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GAZETTE

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Symposium on the Physically Disabled and the Law,
Blackhall Place, Dublin, 24 January 1981.

Pictured at the Symposium were (from left): Group Captain Leonard Cheshire (Founder of the Cheshire Homes), Noel Le Brocquy (Chairman, Cheshire Home, Monkstown), Mr. Jack Kerrigan (Irish Wheelchair Association, Dromahare, Co. Leitrim) and Mrs. Rosemary Kerrican (Cheshire Foundation).

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COMMENT . . .

. . . An Unfortunate Hiatus

The suspension by the Land Registry of all arbitrations under the Landlord and Tenant (Ground Rents) Act, 1978, which must be causing inconvenience to many members of the public, is to be regretted. It is understood that the suspension follows the decision of the Supreme Court in *Gilsenan v. Foundary House Investments and Another*, a case arising out of an arbitration by the Dublin County Registrar who had been asked to determine the purchase price of the fee simple of a chemist's shop, the lease of which had less than fifteen years to run at the date of the arbitration. Under the provisions of Section 17 (2) (b) of the 1978 Act, the Registrar was obliged to have regard to a rent which would be reserved by a Reversionary Lease for a term of ninety-nine years. The Supreme Court held that no willing lessor would grant such a lease so, accordingly, the County Registrar could not determine what the rent reserved by such a lease would be and therefore could not determine the purchase price for the fee simple.

The facts of the case clearly limited the extent of the Court's decision to properties not held under leases with less than fifteen years to run. How then has the effect of the decision become so widespread? It would appear that a sentence in the judgment of the Chief Justice (in which Kenny and Parke, J.J., joined) may provide an explanation. The sentence reads: "This, in my view, means that Section 17 of the 1978 Act cannot be operated." Consideration of the remainder of the judgment and, indeed, the separate but concurring judgments of Henchy, J., and Griffin, J., show that the key provision of the Act under consideration by the Court was Section 17 (2) (b) and nowhere else in the three judgments is there any suggestion that any other part of Section 17 was under attack. Indeed, the sentence itself is in the middle of a paragraph, all the remaining sentences of which are clearly referable only to Section 17 (2) (b). It would appear that the reference to Section 17, *simpliciter*, was a slip of the pen and it is suggested that for the Land Registry to suspend *all* arbitrations and not merely those where there is less than fifteen years of the term of the lease to run, is an excess of caution. It is clear that the judgments of the Court should be read as a whole and, when they are so read, it is plain that only the provision in Section 17 (2) (b) was held to be incapable of operation.

A Case of Dependent Relative Revocation

by

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The statutory provisions governing the revocation of wills are to be found in Section 85 of the Succession Act, Subsection (2) of which provides that "no will, or any part thereof, shall be revoked except by another will or codicil duly executed, or by some writing declaring an intention to revoke it and executed in the manner in which a will is required to be executed, or by the burning, tearing or destruction of it by the testator, or by some person in his presence and by his direction, with the intention of revoking it."[1]

Whilst an act of physical destruction will not, by itself, revoke a will unless accompanied by an *animus revocandi*, a further distinction must be drawn between an act of revocation which is intended by the testotor to be absolute and effective forthwith and an act of revocation which is intended to be conditional upon the efficacy of some other disposition of the testator's property. The latter type of revocation has been described as "dependent relative revocation".[2] The principle of dependent relative revocation has been held to apply where a testator purported to revoke a previous will on the assumption that a new will was valid[3] and where a testator purported to revoke a will on the assumption that the intestacy rules would effect the desired provisions.[4] The principle also applies where a testator purports to revoke a later will on the assumption that an earlier will, which has been revoked, will be revived by the revocation of the subsequent will. This is the precise circumstance which arose in the case of *In the Goods of Eileen Margaret Hogan Deceased* which recently came before Gannon J. in the High Court.[5]

In the goods of Eileen Margaret Hogan Deceased

The deceased, Mrs. Hogan, had executed a will in accordance with the statutory requirements in the office of her solicitor, a Mr. Russell, on 8 August 1977. A photocopy was made of the will and retained by her solicitor, the original being given to Mrs. Hogan. Two years later, on 30 July 1979, Mrs. Hogan revisited her solicitor's office, again in the company of her daughter Patricia who had been with her on the earlier visit, for the purpose of altering her will. Mr. Russell read over to her the terms of her new will and Mrs. Hogan, having expressed her satisfaction with it, executed the will in accordance with the statutory requirements. A photocopy of this new will was retained by her solicitor, the original being taken away by Mrs. Hogan. Mr. Russell had advised Mrs. Hogan that as the 1977 will had been revoked she should destroy it.[6]

A chain of events then occurred from which the Court was obliged to draw certain inferences. On 25 September 1979 Mrs. Hogan opened a deposit account in the Athlone branch of the Bank of Ireland. On the same day, after her son Michael (who lived with her) had finished his evening meal and was reading the evening paper by the fireside, Mrs. Hogan asked him to bring to her a locked steel box which she kept in a wardrobe in her bedroom and in which she kept personal documents. She then went through the documents in the box by the fireside, burning some of them. At some stage during this operation Mrs. Hogan showed Michael a brown envelope saying: "These documents are important; they concern you principally; the others are taken care of." She then returned the envelope to the box without saying what it contained. Michael was not aware that his mother had made a will on 8 August 1977 or that she had made another will on 30 July 1979, but his mother had mentioned to him that there was a will in the office of a Mr. Tormey, a solicitor, which did not count any more.[7]

When Mrs. Hogan died on 6 October 1979 her son opened the steel box and found therein a brown envelope containing the will dated 8 August 1977 and the deposit account book. Extensive searches by Michael and his sister Patricia, the sole executrix of the 1979 will, failed to find the will executed on 30 July 1979. Patricia drew the inference deposed to in her affidavit, that her mother had intentionally destroyed the original of the 1979 will at the time she burnt papers from the steel box.

Patricia applied to the Court, with the consent of her brother Michael and her two sisters, who were beneficiaries under both the 1977 and 1979 wills, to have the photocopy of the will dated 30 July 1979 admitted to probate. This latter will gave the deceased's three daughters larger legacies than had the will of 1977 and also created a charge on the property devised and bequeathed to her son Michael in favour of her daughters in a manner not provided for in the 1977 will.[8]

Gannon J. took the view that the evidence disclosed the following intentions of the deceased:

(1) She did not wish the 1979 will to take effect as a disposition of her property on her death.

(2) She did wish the 1977 will to be the effective disposition of her property.

(3) She did not wish to die intestate.

Gannon J. was satisfied that the revocation of the 1979 will was effected in a manner, by burning, permitted by Section 85 of the Succession Act in relation to which evidence of the circumstances from which her intentions

could be adduced was permitted by the Statute. His Lordship pointed out, however, that the provisions in relation to the revival of a revoked will in Section 87 of the Succession Act are significantly more restrictive than those governing revocation in Section 85, since evidence of an intention to revive must be contained in the document effecting the revival which document must be either the re-executed will or a codicil duly executed in accordance with Section 78.[9] In the instant case there was no such document reviving the 1977 will.

Thus an impasse was reached. The 1979 will had been effectively revoked, the 1977 will had not been revived and the Court accepted that the deceased had not intended that the intestacy rules should govern the disposition of her property on her death. A way out of the impasse was found in the case law, cited by counsel for the applicant, upon Ss. 20 and 22 of the Wills Act, 1837, with which Ss. 85 and 87 of the Succession Act correspond, and the decisions on the interpretation and application of which Gannon J. held to be "a sure guide on the proper course to take on this application".

Counsel for the applicant submitted that the informal, but effective, method of revoking the 1979 will was adopted by the testatrix only in the belief that by so doing the 1977 will would be revived. Since this belief was based on a mistaken assumption on her part of fact and of law, the condition upon which the 1979 will was revoked was not satisfied and it followed that there was no true intention to revoke the 1979 will.

Absolute Revocation or Dependent Relative Revocation

Counsel cited in support of his argument the following observations of Kenny J. in the case *In the Goods of Irvine*:[10] "The question, therefore, that has to be determined is whether in the circumstances the revocation contained in the paper executed by the deceased was an absolute revocation, or merely what is known in our procedure as a dependent relative revocation. If the act of revocation, whether by another will duly executed or by the destruction of the existing will, be without reference to any other act or event, the revocation may be an absolute one; but if the act be so connected with some other act or event that its efficacy is meant to be dependent on that other act or event, it will fail as a revocation. If that other act be efficacious, the revocation will operate; otherwise it will not. It is altogether a question of intention, and if, as part of the act of making a fresh will, there be a revocation of a previous will, that revocation will be absolute provided the fresh will be made. On the other hand, if the fresh will be not made, it would defeat the testator's intention to hold the revocation to be absolute. It had no existence, unless subject to a condition which is not fulfilled. The principle will be found stated in Williams on *Executors* and Theobald on *Wills* and is established by such other cases as *Onions* v *Tyrer*,[11] *Hyde* v *Hyde*,[12] and *Ex Parte the Earl of Ilchester*.[13] Cases in which a testator destroys a will with the intention of setting up a previous disposition introduce the same principle. In *Powell* v *Powell*[14] the testator had destroyed a will with the expressed intention of validating an earlier will and substituting it for the destroyed will. The destruction of the second will did not give effect to that intention, and it was held by Sir J. P. Wilde (afterwards Lord Penzance) that such conditional destruction did not work a revocation, in as much as, the sole condition upon which revocation was intended not being fulfilled, the *animus revocandi* was not present."

Counsel for the applicant also cited the case of *In the Estate of J. R. Southerden, Adams* v *Southerden*[15] in which the English Court of Appeal applied the principle of dependent relative revocation in circumstances where a testator had revoked his will by burning it, under a mistaken belief that in the event of his dying intestate his widow would be entitled to the whole of his property. All three judges in the Court of Appeal (Pollock M.R., Warrington L.J. and Atkin L.J.) endorsed the statement of law by Meredith M.R. in the Irish case *In re Faris*[16] in which case Meredith M.R. had adopted with approval the following proposition contained in Theobald on *Wills*:[17] "It has been said that a revocation grounded on the assumption of a fact which turns out to be false does not take effect 'being, it is considered, conditional and dependent on a contingency which fails'.[18] Probably the proposition is too broadly stated. There is little or no authority directly in point. The true view may be that a revocation grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, or, in other words, unless the revocation is contingent upon the fact being true: see *Thomas* v *Howell*."[19] Meredith M.R. added: "I adopt that statement of the law, merely substituting for the words 'may be' the word 'is'. The true view is, in my opinion, the view so clearly stated by Mr. Theobald."[20]

What Constitutes Effective Revocation

The authorities cited, and particularly *Powell* v *Powell*[21] the facts of which corresponded most closely with the facts in the instant case, led Gannon J. to the conclusion that the point before him was not that a revoked will (the 1977 will) was set up again if a subsequent disposition (the 1979 will) was made ineffectual by the testatrix but that the later disposition was not intended to be revoked unless or until an effectual disposition was made. The Court being satisfied that the 1977 will had been revoked and had not been effectively revived in accordance with the statutory requirements, then had to consider whether the revocation of the 1979 will was an effective revocation. Gannon J. believed that the evidence supported the contention of counsel for the applicant that the purported revocation of the 1979 will was ineffectual being conditional only and contingent on the truth of facts mistakenly believed by the deceased. Accordingly, since there was a photocopy of the 1979 will which was made at the time of execution of the original, Gannon J. admitted the photocopy to probate "in lieu of the original which was ineffectively revoked by destruction by the deceased by burning".

Whilst the doctrine of dependent relative revocation is said to be dependent on the intention of the testator its application in cases such as *In the Goods of Eileen Margaret Hogan Deceased* suggests that it has now acquired an independent self-validating existence of its own which has little to do with the intention of the testator. It is extremely unlikely that Mrs. Hogan gave any thought to the possibility of the 1977 will being invalid and, that being so, the assumption that there was a conditional element in her revocation of the 1979 will was pure fiction. Indeed, in so far as the intention of the testatrix could be ascertained it was clearly to the effect

that she did not wish the 1979 will to be dispositive of her property on death. The other certain intention that could be attributed to her was that she did not wish to die intestate and the Court clearly attached more weight to this latter intention. The present writer would agree with the learned author who has written that the operation of the doctrine of dependent relative revocation "is, in most cases, in accordance with common sense, but it is only achieved by flagrant invention on the part of judges of an element of intention which in most cases was not present".[22]

FOOTNOTES

1. Subsection (1) of Section 85 deals with the revocation of a will by marriage.
2. Sir J. P. Wilde said of the doctrine in *Powell* v *Powell* L.R. 1 P. & D. 209, 212: "This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it is done *animus revocandi* it is no revocation."
3. See e.g. *Onions* v *Tyrer* (1716), 2 Vern. 741; *Re McMullen* [1964] Ir. Jur. Rep. 33.
4. See e.g. *In the Estate of Southerden, Adams* v *Southerden* [1925] p. 177.
5. Unreported High Court judgment of Gannon J. delivered on 18 February 1980.
6. Mrs. Hogan did not follow her solicitor's advice re destruction of the 1977 will.
7. The third earlier will would have been revoked by the revocation clauses in the subsequent wills.
8. Mrs. Hogan had been concerned, in leaving her business to her son, to make special provision in the 1979 will for the possibility of him pre-deceasing his wife.
9. Section 87 provides: "No will or any part thereof, which is in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil duly executed and showing an intention to revive it; and when any will or codicil which is partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shown."
10. [1919] 2 I.R. 485, 489. The deceased Michael J. Irvine had signed a printed form of a will containing blanks, the printed matter including a revocation clause, and his signature was duly witnessed by two witnesses. The blanks were filled in by the deceased subsequent to execution. On a motion by the executor to have the revocative part alone admitted to probate, the Court, in applying the doctrine of dependent relative revocation, held that the attempted revocation was merely the first act towards accomplishing the testator's intention of making a new will and was dependent or conditional on a new will being made.
11. 1 P. Wms. 343.
12. 1 Eq. C. 409.
13. 7 Ves. 380.
14. L.R. 1 P. & D. 209.
15. [1925] p. 177.
16. [1911] 1 I.R. 469.
17. 7th edition at p. 750.
18. 1 Jarm. 147.
19. L.R. 18 Eq. 198.
20. [1911] 1 I.R. 469, 472.
21. L.R. 1 P. & D. 209.
22. Mellows, *The Law of Succession* (3rd ed.) at p. 123.

Capital Acquisitions Tax

Sections 13 and 73 and Disclaimers

Interest and Valuation Date

It is well settled that any beneficiary may disclaim a benefit accruing to him under a will or upon an intestacy. Most people do not look a gift horse in the mouth and are only too glad to accept such benefits. When, however, the acceptance of these benefits gives rise to a claim to Inheritance Tax, one may look to Section 13 of the Capital Acquisitions Tax Act 1976 for a possible way of avoiding or reducing any liability to Inheritance Tax. This Section clearly recognises the principle of Disclaimer with regard both to absolute interests and interests in settled property. Not alone does the Section recognise unconditional Disclaimers, but it also recognises the possibility of a Disclaimer for a consideration. It does, therefore, open considerable possibilities for mitigation of Inheritance Tax in certain cases.

Before exploiting the possibilities of this Section, a lawyer should look very carefully at the possible effects of such a Disclaimer. A Disclaimer must not be confused with an Assignment of a benefit; the person disclaiming a benefit cannot select the person who in turn will benefit from his action and the benefit disclaimed will devolve according to the rules of construction relating to testate or intestate succession.

In the case of testate succession, the disclaimed legacy or benefit will pass under the provisions of any "gift over" in the will or ultimately into residue; a disclaimed share passing into residue will devolve in accordance with the residuary provisions of the testator's will or, if the will is silent, in accordance with the laws of intestate succession. If the person disclaiming is also a residuary beneficiary or one of the next of kin, then he may be brought back into the picture, despite his intention to disclaim.

This brings one to the consideration of the even worse problem which arises if the disclaiming party is himself a member of the class of next of kin taking on an intestacy. Where does the disclaimed share go? To the remaining next of kin, as if the disclaiming party had never existed? Or to the State, under the provisions of Section 73 of the Succession Act 1965? Section 73 reads as follows:

"In default of any person taking the estate of an intestate, whether under this Part or otherwise, the State shall take the estate as ultimate intestate successor."

The Revenue Commissioners have taken the view in at least one case that the disclaimer of a benefit taken on intestacy passes to the State under Section 73. Whether the Revenue will press this view in all cases remains to be seen and may depend upon the circumstances of each case.

The opposing argument is that the effect of a Disclaimer is either to bring in the next interests in title or simply, where the other interests are of equal degree with the disclaiming party, to increase the shares of the remaining beneficiaries.

Unfortunately, it is impossible to give positive advice as to the effect of Disclaimer in the circumstances outlined above. This doubt could be removed very simply, as has been done in several other countries, by introducing a simple statutory provision to the effect that where a beneficiary disclaims any benefit, the estate of the disponer should be distributed as if the disclaiming beneficiary had died immediately before the disponer.

It is understood that a revision of the Succession Act 1965 is pending and this clearly is one of the matters that should be incorporated in any such revision.

In the meantime and pending any change in the law, the practitioner should be careful to examine the circumstances and should warn the client of the possible adverse consequences of Disclaimer.

Interest and Valuation Date

It has been argued by a member that the provisions of Section 41 (2) of the Capital Acquisitions Tax Act 1976 are unfair, inequitable and punitive, having regard to the fact that interest on C.A.T. is chargeable from the Valuation Date, which in certain cases can be the date of death itself.

It has been suggested that, in normal cases, at least two or three months must elapse before an Inland Revenue Affidavit can be filed and an assessment to C.A.T. obtained.

The Valuation Date is defined in Section 21 of the Act.

In response to an approach on the subject, the Revenue Commissioners, Capital Taxes Branch, have replied (28 November 1980) making the following points:

(i) Section 44 of the Act enables the Revenue Commissioners to waive interest in certain circumstances;

(ii) if it happens that "it will be two or three months before an assessment is actually made . . .", neither the parties nor their solicitors are prejudiced by the delay in the matter of interest, since it is the practice not to charge interest in respect of any period during which a case is delayed in the Capital Taxes Branch;

(iii) the Valuation Date is, broadly speaking, the date on which the successor becomes beneficially entitled in possession, not only to the property but to the income and profits therefrom. As a corollary, it would not be unreasonable that the successor should pay interest due on the tax that is due from that date.

○ *Continued on page 16*

Safety in Industry Act, 1980

A Commentary

by

Maurice Cashell
Secretary, Commission on Safety, Health and Welfare at Work

Preface

The Act was passed by both Houses of the Oireachtas on 28 May 1980 and was signed by the President on 9 June 1980. The bulk of it should come into operation on various dates in the near future to be fixed by orders of the Minister for Labour, following on discussions with the Irish Congress of Trade Unions (ICTU) and the Federated Union of Employers (FUE) on the timetable which have taken place over the past several months. The Department of Labour will publish shortly simple introductions to what is involved. It is expected that Part III of the Act (dealing with Safety and comprising Sections 35 to 39) will be brought into operation from 1 April 1981. This article concentrates primarily on Part III of the Act and on those aspects of the Act which are entirely new.

Introduction

The Act does not mark a radical departure in our approach to occupational safety and health: the need and the extent of change in the overall system inside and outside industry will be examined by a Working Party which has recently been set up (see p. 12). About 70% of the provisions are designed to up-date various aspects of the Factories Act, 1955, by changing those parts – mainly technical details – which practical experience has shown to be necessary or desirable. The rest is new: these are the ideas in Sections 9-11, 13, 15, 27, 29, 35-39, 49, 50 and 54-55. In other words, those parts of the Factories Act which are not amended together with the new Act and the hundred or more regulations made under the Factories Act constitute the safety and health code for Irish industry. The Factories Act, 1955, and the new Act will together now (by the new Act, Section 4) be described as the Safety in Industry Acts 1955 and 1980.

Scope

The new Act brings a few additional types of premises within the scope of the safety and health code. Premises at the pre- and post-construction stages, viz. when plant is being installed or dismantled, are now regarded as factories and are subject to the law. Protection under the law also extends to workers in all places where cattle, sheep, poultry and other animals are killed in the course of a business. Also covered for the first time are premises where fruit and vegetables are cleaned, graded or packed. During the debates in the Dáil and Seanad many speakers advocated the extension of protective legislation to all places of work, including agriculture. It is reasonable to expect that this will be one of the most important topics examined by the Working Party. One feature of the Act is that not all the provisions are applicable in every work situation. I will be returning to this later when dealing with safety committees, etc.

Significant new Elements

Particularly significant are the provisions which underwrite "greater co-operation, including acceptance and exercise of appropriate responsibilities by management and by workers". This is a theme which the Minister for Labour has stressed to the National Industrial Safety Organisation (NISO) on a number of occasions. These provisions are in Sections 35-39, dealing with safety representatives, safety committees, safety delegates and safety statements (see Table 1 below). Despite efforts, including a campaign by NISO, the voluntary system of safety committees which were a feature of the Factories Act, 1955, resulted in the establishment of only 274 safety committees by the end of 1978 – a disappointing result.

Table 1
Size and composition of Safety Committee having regard to the number of Workers

Number of Workers	Size of Committee	Worker Nominees	Employer Nominees
2– 60	3	2	1
61– 80	4	3	1
81–100	5	3	2
101–120	6	4	2
121–140	7	5	2
141–160	8	6	2
161–180	9	6	3
181–	10	7	3

The new proposals for safety committees etc. are consistent with the principles on which they are based: they owe their present content to joint proposals from ICTU and FUE.

By comparison with the voluntary system set up by the 1955 Act the system now being introduced is better because:

—the emphasis is on *joint* safety committees;
—a stimulus to their activities is the safety statement which management must draw up and discuss with them;

—safety delegates and safety representatives are involved more closely with the visiting inspector;
—provisions for facilities for meetings and the frequency, duration and times for meetings are spelled out clearly; these can be improved on by agreement with the employer.

Quite clearly there is a major problem of education and training for trade unions and employers in preparing for the new system. It is for that reason that in order to permit trade unions and employers' organisations to prepare themselves this Part III of the Act will not, with the agreement of ICTU and FUE, be brought into effect until 1 April 1981.

Other significant provisions are in Sections 9, 10, 11 and 50. Section 9 imposes a duty on manufacturers, importers and suppliers of plant to ensure that plant is in operation. Section 10 enables the Minister to have plant tested in the event that it was wholly or partly the cause of an accident. Section 11 gives the Minister power to close down immediately activities which in his opinion involve risk of serious bodily injury. Section 50, dealing with industrial medical advisers, opens up a vista of greater efforts in the field of occupational health and foresees the employment of specialist staff and surveys of workers exposed to health risks.

Safety Committee or Safety Representative

In factories where up to twenty persons are employed workers have a choice between a safety representative and a safety committee. They cannot have both. There is no such choice in factories where more than twenty are employed: there must be a safety committee. Quite obviously there is no rule of thumb about which is better – every factory has its own peculiarities and problems and the workers in that factory are in the best position to decide. In the training courses being prepared by the Irish trade union movement, guidelines will be prepared to help them decide. Regulations may vary upwards or downwards the number (twenty) of persons that must be employed in a factory before the workers will be entitled to appoint a safety representative. Such regulations cannot be made, however, before ICTU and FUE are consulted.

Safety Representatives

Where the workers have decided on the safety representative option they can select and appoint him or her from among themselves and, barring resignation or leaving the factory, the safety representative will hold office for three years. If during that period workers decided to create a safety committee this would automatically revoke the appointment of the safety representative. Ideally the safety representative should have experience of the kind of work being done by the people whom he represents. His mandate is wide: to represent the workers in consultations with the employer. When he is appointed the employer must hold consultations with him for the purpose of ensuring co-operation at the workplace in relation to the Acts and Regulations. The employer must consider any representations made on the safety, health and welfare of the workers. The safety representative will be more closely involved with the industrial inspector. When the inspector visits the factory in order to carry out a general tour of inspection, i.e. one that is not specifically to investigate an accident, the employer is obliged to notify the safety representative and, once he requests it, the safety representative is entitled to accompany the inspector.

These functions are obviously seen as minimal. In a provision of a type which features regularly in the new Act the Minister for Labour is given powers to add to the functions of the safety representative by way of Statutory Regulations which would be made only after ICTU and FUE are consulted.

Safety Committees

So long as there are two workers and provided of course that they do not exercise the safety representative option, there can be a joint safety committee. The new Act entitles workers to select from among themselves the worker members of the committee. If any of the members so selected leave the factory, they cease to be members of the committee but otherwise no limit is put on their term of office. In practice it is left up to each enterprise to work out its own rules concerning the life of a committee, provisions for elections, resignations and replacements etc. There are rules (Table 2) about the size and composition of safety committees: the committee cannot be smaller than three or bigger than ten. Safety committees, already in existence with at least three members, set up under the Factories Act 1955 continue in being unaffected by the new Act even if there are more than ten members. Such committees will have all the powers and responsibilities of the new safety committees.

There is general guidance in the new Act about the functions of the safety committee and detailed guidance about its meetings.

The functions of the safety committee are similar to

those of the safety representative; to assist the employer and the workers in relation to the Acts and Regulations and to perform such other functions (if any) relating to the safety and health of workers as may be written into Regulations by the Minister after consultations by the Minister with ICTU and FUE.

There is some guidance on how the safety committee will function. At the request of the committee the employer is obliged to consult with it with a view to reaching agreement on facilities for meetings and on their frequency, duration and times. The law provides that meetings shall take place at times settled by the committee. These meetings may be held during normal working hours and without loss of pay provided:

—there is a quorum;
—except for emergencies, they are held not more frequently than once every two months;
—they do not last longer than two hours;
—the times are compatible with the efficient operation of the enterprise.

The interaction between the workers and the employer does not cease with the appointment of committee members by the employer. The employer is entitled to attend personally or to nominate a person or persons to attend each meeting on his behalf. He or his nominee(s) must attend the first meeting. He must consider any representations made to him by the committee, and vice-versa, or matters affecting the safety, health and welfare of the workers.

Safety Delegate: Safety Statement

To facilitate communication on a day-to-day basis the safety committee is entitled to choose somebody from the worker members to be its delegate. This safety delegate, as he is called, makes representations on behalf of the committee and, like the safety representative described above, is entitled to accompany an industrial inspector on a normal tour of inspection.

Nor will the safety committee discuss safety and health in a vacuum; very early on, the employer will be expected to provide it with a "Safety Statement" which will be the basis for a more structured dialogue between workers and management.

This "Safety Statement" is something entirely new. It is to cope with the fact that the law cannot lay down provisions to counter every hazard which can arise nor can inspectors be present every day in every workplace to enforce them.

The new Act obliges employers in virtually every factory, and certain other premises where ten or more persons are employed, to produce a written statement showing how the safety and health of the workers is going to be achieved. These "Safety Statements" will be vetted by industrial inspectors and if they are not satisfactory the Minister for Labour can order them to be revised in a way in which he directs. As soon as the "Safety Statement" has been prepared – or indeed whenever it

Table 2
Safety Representatives, Safety Committees, and Safety Statements

System	No. of Workers	Type of Premises	Comments
Safety Statement	Ten or over	(i) a factory (ii) electrical stations (iii) institutions (iv) training establishments (v) docks, wharves quays warehouses	The Minister can exempt prescribed premises from this requirement. He can, equally, apply it to premises to which the provisions do not apply but which feature any manufacture, plant or process which could give rise to bodily injury.
Safety Representative	Not more than twenty	(i) a factory (ii) electrical stations (iii) institutions (iv) training establishments	Workers have the option of selecting a Safety Representative or a Safety Committee in premises with not more than twenty workers: if within six months they do not appoint one or the other, the employer must within three months appoint a safety representative if there are less than twenty employees; otherwise he must appoint the safety committee and the delegate. The employer-appointed representative and committee members and delegate will hold office for three years.
Safety Committee	Two or more	(i) a factory (ii) electrical stations (iii) institutions (iv) training establishments	

has been revised – a copy must be given to the safety committee, or safety representative if there is no committee. Where there is neither, a copy must be given to every worker.

Even though the hazards and therefore the arrangements in every workplace are different, the Act requires that certain elements will be common to all statements and specifications of:

—"the arrangements for safeguarding the safety and health of such persons";
—"The co-operation required from such persons as regards safety and health";
—"the duties of safety officers (if any)";
—"any safety training facilities which are available";
—"the measures to be taken in relation to dangers so specified arising in relation to risks of such danger".

The intention behind this new requirement is to stimulate employers into formulating a safety policy which would be suitable for their premises, not as a substitute for the present legal standards but rather to complement them and even to supplement them. Whereas in some cases the "Safety Statement" may do no more than articulate the measures already being taken, in others the requirement to produce such a written statement may stimulate thoughts of newer and better measures.

A New Onus on Employers

The most far-reaching change introduced by the Act on safety committees and representatives stems from our disappointing experiences up to now. If workers do not wish to appoint the worker members of a safety committee or, indeed, a safety representative, within six months of the coming into operation of the relevant provisions, then the employer has a further three months within which to make these appointments. Failure to do so is an offence and the employer can be prosecuted. Hopefully, recourse will not have to be made too often to this Section. Where there are up to twenty workers the employer must appoint a safety representative; where there are over twenty, there must be a safety committee and safety delegates. The persons appointed in this way hold office for three years.

Links with Industrial Inspectorate

The work of the safety committee and the safety representative is tied in with that of the industrial inspector in two ways. One is the entitlement to accompany the inspector on a normal tour of inspection. The other entitlement now being written into the law for the safety representative and the safety committee (safety officer in a construction site) is the power to request an investigation to be carried out by an inspector as regards specified danger or potential danger to the safety, health and welfare of workers. The Minister for Labour may cause such an investigation to be carried out if he considers it appropriate and when it is completed he may, if he thinks fit, communicate the outcome to the representative or committee who requested it.

(This article was first published in "Sciath" (published by the National Industrial Safety Organisation — NISO) in July 1980 and is reprinted here by kind permission.)

COMMISSION ON SAFETY, HEALTH AND WELFARE AT WORK

Mr. Bruce St. John Blake, Solicitor, member of the Council of the Law Society and a Past President, has been nominated as a member of the Commission on Safety, Health and Welfare at Work, established by the Minister for Labour, which Commission under the Chairmanship of Mr. Justice Donal Barrington held its inaugural meeting at the Burlington Hotel, Dublin, on 16 December 1980.

The terms of reference of the Commission are:

To examine the arrangements made for the safety, health and welfare of people in the course of their employment and to consider:

Whether changes are needed in the laws, or in voluntary activities, relating to safety, health and welfare at work,

Whether there are adequate safeguards for the public from hazards, other than general environmental pollution, arising in connection with activities in industrial and commercial premises, construction sites and the transport of dangerous substances,

and to make recommendations.

The full membership of the Commission is as follows:

Chairman

Mr. Justice Donal Barrington.

Employer Members

Mr. Dermot P. Brady, Plant Manager, Olin Chemicals B.V.

Mrs. Clare Carroll, Secretary, Legislation Committee, Federated Union of Employers.

Mr. Joseph Osborne, Managing Director, Camac Cask Company Ltd.

Mr. Allen Wilson, Training Executive, Construction Industry Federation.

Trade Union Members

Mr. Peter Cassells, Secretary, Protective Legislation Committee, Irish Congress of Trade Unions.

Mr. John Hall, National Secretary, Association of Scientific, Technical and Managerial Staffs.

Mr. Peter Keating, Branch Secretary, Federated Workers Union of Ireland.

Mr. Donal O'Sullivan, Industrial Engineering Officer, Irish Transport and General Workers Union.

Members from Central and Local Government

Mr. Brian Campbell, Principal Officer, Department of the Environment.

Mr. Patrick Gleeson, Clare County Engineer.

Mr. Michael McLoughlin, Agricultural Inspector, Department of Agriculture.

Mr. Noel Morrison, Industrial Inspector, Department of Labour.

Miss Margaret O'Callaghan, Industrial Inspector, Department of Labour.

Other Members

Mrs. Carrie Acheson, Mayor of Clonmel.

Mr. Bruce St. John Blake, Solicitor.

Mr. Thomas Kearney, Farmer.

Dr. Daniel Murphy, Medical Officer, E.S.B.

Dr. Breda Scanlon, Area Medical Officer, Midland Health Board.

Mr. Merlin Stanley, Farmer.

Secretary

The Secretary of the Commission is Mr. Maurice Cashell of the Department of Labour who has been seconded to the Commission.

Registration of Births, Deaths and Marriages

In the July/August 1980 issue of the *Gazette* there was published a directive from the General Register Office, Custom House, Dublin 1, suggesting that, due to the considerable waiting period in the issue of certificates from the General Register Office, applications be sent in writing to the Superintendent Registrar of Births, Deaths and Marriages for the County in which the event occurred.

The position in regard to non-Roman Catholic marriage certificates has been clarified in a letter dated 22 December 1980 received from Mr. Brendan Hensey, Ard Chlaraitheoir, in the course of which he states:

"Superintendent Registrars have custody of completed register books of births, deaths and Catholic marriages which take place in their area and have no functions with regard to the issue of certificates of non-Catholic marriages.

"The system of registering non-Catholic marriages varies and is somewhat complicated. The question of where a person might obtain a certificate, other than from the General Register Office, is dependent on the nature of the marriage, e.g. marriage by religious ceremony, marriage in the presence of a Registrar of Marriages or marriage by civil ceremony by a Registrar of Marriages. As a general rule, certificates of non-Catholic marriages can be obtained from the General Register Office after the quarterly returns of marriages have been received, which is usually about six weeks after the expiration of the quarter in which the marriage takes place. In the case of a non-Catholic marriage by religious ceremony, certificates would also be obtainable from the clergy attached to the church or building in which the marriage was celebrated. If the marriage was performed by civil ceremony or in the presence of the Registrar of Marriages, a certificate could be obtained from the Registrar."

Arrears in General Register Office

Mr. Hensey also states in his letter that the situation with regard to arrears of work in the General Register Office has improved considerably since the directive was issued, but there is still a waiting period of a few weeks for certificates. He states that while arrears should be cleared soon, if the attention of the General Register Office is drawn to any applications of special urgency every effort will be made to deal with them quickly.

PRACTICE MEMORANDUM ON THE ISSUING AND SERVICE OF SUBPOENAS

Practice Memorandum from the President of the High Court Concerning the Issuing and Service of Subpoenas and their Period of Effectiveness.

In a practice memorandum recently issued by the President of the High Court, Mr. Justice Finlay, it is provided that a subpoena issued in respect of an action for a particular term need not under any circumstances be re-issued merely because of the adjournment of the action, and the subpoena must be deemed, having regard to the provisions of the Rules of the Superior Courts (O. 39, R. 25 to 34, and Forms 1, 2 and 3 in Appendix D) to be effective for a hearing in the following or later term.

The full text of the President's practice memorandum is as follows:

Having regard to the provisions of Order 39, Rules 25 to 34 inclusive, and to Forms Nos. 1, 2 and 3 in Appendix D of the Rules it does not appear that there is any statutory prohibition against the effectiveness of a subpoena issued for and in respect of the trial of an action in one particular term where that action has been postponed or adjourned to a later term.

Since as a practical matter, although the subpoena requires the attendance of the witness on a particular day and so on from day to day until the cause is tried, solicitors universally inform the witness of the particular day which has been fixed for the hearing of the case, no inconvenience, injustice or abuse could arise from dispensing with the practice which has heretofore been observed in the Central Office of requiring the issue of a new subpoena where the action for which a subpoena was originally issued has been postponed or adjourned to a later term.

I am therefore satisfied that this practice may now be discontinued and that a subpoena issued in respect of an action for a particular term need not under any circumstances be re-issued merely because of the adjournment of the action, and must be deemed having regard to the provisions of the Rules to be effective for a hearing in the following or later term.

A consideration of the Rules would also indicate that there is no statutory prohibition or bar to the issue of a subpoena in one particular term made returnable for an action not to commence until the following term. If, therefore, solicitors seek the issue of a subpoena in any particular term for an action which has been fixed to commence in the succeeding term the Central Office can issue such subpoena, the date of course being the date of the commencement of that term or of the list in which the action is on that term.

This ruling applies to both subpoena *ad testificandum* and to subpoena *duces tecum*.

The Employment Appeals Tribunal

A Review

The Federated Union of Employers (F.U.E.) provides, as part of its service to member companies, representation at the Employment Appeals Tribunal and Rights Commissioners. This service has been developed over the years, and our advice and assistance is now backed by a comprehensive information service and a full-time legal adviser. Over 90% of members appearing at the Tribunal use the services of F.U.E. A characteristic of the involvement of F.U.E. is that of all cases involving F.U.E., 14% were settled without recourse to a full hearing, compared with a 6% settlement rate for solicitors.

In 1979, 40% of Unfair Dismissal claims succeeded, 33% of Minimum Notice claims succeeded, 30% of Redundancy claims succeeded, and 32% of claims were dismissed totally.

In the December 1980 issue of the *Bulletin*, we examined the performance of the Employment Appeals Tribunal in 1979. In this issue, we analyse some of the results of our survey that may be of interest to member companies. The first point is that of the attraction of the Employment Appeals Tribunal to employees seeking compensation.

The Tribunal has awarded some substantial sums to claimants, and appears, therefore, more attractive in the eyes of the employee who feels he has a very good case. Awards in Unfair Dismissal cases in 1979 totalled £146,138 with the average award being £1,228.

Monetary awards are by far the most commonly used of the three remedies allowed by the Unfair Dismissals Act. Of all Unfair Dismissals claims in 1979, 40% were successful – of these 12% involved "re-instatement" (employee re-employed in same position as before dismissal with no break in service, full pay for the period of dismissal and no loss of rights, seniority, etc., as a result of the break).

Only 12% of cases resulted in "re-engagement" (employee to be restored to his former position with no entitlements in relation to the break in service, the employee "starts from scratch" on the day he is re-engaged).

The third category of award is compensation, up to a maximum of two years "remuneration". Some large awards running to five figures have been awarded by the Tribunal. The maximum was awarded in 2.5% of cases in 1979.

The 1979 Annual Report of the Employment Appeals Tribunal was issued recently and considering that the figures referred to in the report were based on a survey of claims actually filed in the calendar year 1979, the percentages approximate closely to those of our own survey. We reproduce two Tables from the Report showing the number and outcome of cases, and a detailed breakdown of the amounts awarded in successful Unfair Dismissal claims where compensation was deemed to be the appropriate remedy.

Summary of the amounts awarded in 117 Unfair Dismissal orders formulated and perfected in 1979 in which the redress determined by the Tribunal was the employee's entitlement to compensation.

Total Awarded £178,214.56
Average Awarded £1,523.20

£1	to	£100	12	£1,000	to	£2,000	22
£100	to	£200	12	£2,000	to	£3,000	6
£200	to	£300	8	£3,000	to	£4,000	2
£300	to	£400	8	£4,000	to	£5,000	2
£400	to	£500	10	£5,000	to	£6,000	2
£500	to	£600	7	£6,000	to	£7,000	3
£600	to	£700	7	£7,000	to	£8,000	1
£700	to	£800	2	£8,000	to	£9,000	2
£800	to	£900	5	£9,000	to	£10,000	2
£900	t0	£1,000	2	£10,000	to	£11,000	1
				£11,000	to	£12,000	1

	No. of Appeals Referred to the Tribunal in 1979	Allowed	Dismissed	Grand Total Decided	Withdrawn Prior to Hearing	Withdrawn During Hearing	Grand Total Withdrawn
Redundancy Payments Act	504	171	107	278	52	32	84
Minimum Notice and Terms of Employment Act	504	246	117	363	68	95	163
Unfair Dismissals Act	402	165	166	331	60	68	128
Grand Total	1,410	582	390	972*	180	195	375*

**Some of these appeals were referred to the Tribunal prior to 1979.*

(Reprinted, by kind permission, from the Bulletin of the Federated Union of Employers, January 1981.)

"Gripe Night"

The Dublin Solicitors' Bar Association, during December, held what it termed a "Gripe Night", at which it was hoped that the Council would hear from colleagues about matters and problems which were creating difficulties. Despite the fact that from time to time the Association is criticised by solicitors for its apparent failure to communicate with them and to look after their interests, the attendance at this meeting was in the main disappointing. However, for those who did attend, they derived great benefit from discussing the problems and the Council of the Association will certainly do its utmost to take up these problems with the appropriate quarters.

Most of the criticism was levelled at the Courts and the failure of judges to issue judgments or, alternatively, as happens in the Lower Courts, to sit on time. This latter complaint relates in particular to Kilmainham District Court and the method of listing cases in that Court was also the subject of severe criticism. It was felt that a system could be evolved whereby certain cases should be listed in the morning and others in the afternoon, thereby avoiding the unnecessary attendance of solicitors.

In relation to the Land Registry and the Companies Office, it was apparent that many members have been finding that files are not available for inspection.

A suggestion was made by one member present, regarding the problem of having to write in every case to the local authority seeking a letter confirming that the roads, footpaths and services are in charge and that there are no outstanding charges thereon. It was suggested that the local authority should issue a letter or circular confirming what roads are in charge at any particular time and that this could be updated from time to time. This would not, of course, overcome the purchaser's solicitor's liability to ascertain that there are no outstanding charges, but it would be helpful if such a circular could be issued. A similar suggestion was made in relation to searches in the Bankruptcy Office and it was suggested that the Law Society might obtain a list of bankrupts from the Bankruptcy Office and have this available for inspection by the profession. This, however, could have certain statutory difficulties which might be impossible to overcome.

The question of legal documentation being drafted by persons other than solicitors was also raised and members expressed disquiet about the practice, which appears to be growing. It was pointed out to the members present that this particular problem is being actively considered by the Company Law Committee of the Law Society.

It is hoped to have a further "Gripe Night" during 1981 and the Council would certainly welcome a larger attendance; those who do not wish to attend could furnish in writing details of any particular problems they may wish to have discussed. The Association is more than willing to assist any colleague in difficulties and the Council would certainly hope that all solicitors feel free to approach any member of the Council for assistance at any time.

Interest and Valuation Date

○ *Continued from page 8*

Section 41 (3) of the Act provides that interest shall not be payable on tax which is paid within three months of the Valuation Date. This provision, coupled with the Revenue practice of not charging interest in respect of any period during which accounts are in their office for assessment, means that even in cases where the Valuation Date is the date of death, the practitioner has only to ensure that the Inheritance Tax Return is lodged with the Revenue within three months of that date.

It should be pointed out, however, that in the majority of cases the Valuation Date will not be the date of death, as provided by Section 21 (2) of the Act. The more usual situation is covered by Section 21 (4), which provides that the Valuation Date of a taxable inheritance, other than a taxable inheritance referred to in Sub-section (2) or (3), shall be the earliest date of the following:

(a) the earliest date on which a personal representative or trustee or the successor or any other person is entitled to retain the subject matter of the inheritance for the benefit of the successor or of any person in right of the successor or on his behalf;
(b) the date on which the subject matter of the inheritance is so retained; or
(c) the date of delivery, payment or other satisfaction or discharge of the subject matter of the inheritance to the successor or for his benefit or to or for the benefit of any person in right of the successor or on his behalf.

MAYO BAR ASSOCIATION DINNER DANCE

Breaffy House Hotel, 12 December 1980.

Standing (left to right): Patrick O'Connor, Patrick J. McEllin, Patrick J. Shanley (President, Mayo Bar Association), Seán Calleary, T.D. (Minister of State, Department of Labour and Department of the Public Service), Michael P. Houlihan.

Seated (left to right): Michael Quinlan, Mrs. Moya Quinlan, President of the Incorporated Law Society of Ireland, and Mrs. Ann McEllin.

Law Society Symposia . . . . ". . . . very worthwhile"

"There's a lot of information coming out of it . . ."

"People are hearing things they didn't know before . . ."

"The sessions were very worthwhile . . ."

"Vox pop" comments from members of the audience during the lunchbreak at the Society's symposium on "The Physically Handicapped and the Future" at Blackhall Place in January.

The symposium was opened by Dr. Michael Woods, Minister for Health and Social Welfare, and attended by over eighty representatives of public bodies and voluntary organisations.

The subjects covered were:

The Early Assessment of Disablement (Dr. Neil O'Doherty, Professor of Paediatrics, Temple Street Hospital, Dublin);

An Overview of the Situation in Ireland relating to Disablement (Pauline Faughnan, Deputy C.E.O., Irish Wheelchair Association);

Education, Employment and Rehabilitation (Dr. T. M. Gregg, Medical Director, National Rehabilitation Board, and Frank Flannery, General Manager, Rehabilitation Institute);

Design for Living (Seán Rothery, B.Arch., who showed a number of slides of good and bad architecture in relation to handicapped persons);

The Law as Perceived by the Consumer (Brian Malone, Chairman, Irish Wheelchair Association);

The Legal Protection of the Handicapped Person's Assets (Patrick O'Connor, Solicitor).

The closing speaker was Group Captain Leonard Cheshire, V.C., D.S.O., D.F.C., founder of the Cheshire Homes, who came to Dublin especially to attend the symposium.

The President of the Society, Mrs. Moya Quinlan, welcomed the Minister and participants and presided at the first sessions. Other sessions were under the chairmanship of the Hon. T. F. O'Higgins, Chief Justice; David Weston, Chairman, Union of Voluntary Organisations for the Handicapped; and Frank O'Donnell, Vice-President of the Law Society.

A further symposium associated with the International Year of Disabled Persons has been organised by the Law Society to examine the problems of the mentally handicapped. This will take place at the Downhill Hotel, Ballina, on June 27th.

Other symposia in the current year will be under the general title of *The Builder and the Law* (May 16th) and *Medicine and the Law* (October 17th), both at Blackhall Place.

Symposia arranged by the Society's Public Relations Committee are intended to provide a forum for the ventilation of the views and interests of the various groups embraced by the titles, accessible to the media, and, at the same time, to gain for the profession some insight into the views and problems of the groups concerned.

Members of the Society are welcome to attend but, by reason of space and catering limitations, must notify their intentions to the Public Relations Committee at least one week before the date of the symposium.

Photographed at the Symposium were (left to right): Mrs. Moya Quinlan, President of the Incorporated Law Society of Ireland, Mr. Patrick O'Connor, Solicitor, and Group Captain Leonard Cheshire, founder of the Cheshire Homes.

At the initiative of the President a Mass for Peace was celebrated in the President's Hall, Blackhall Place, by the Rev. Martin Clarke, C.C., Celbridge, on January 6. The Rev. Canon N. V. Commiskey, Vicar of St. Michan's Church, read the prayers and imparted the blessing. This was the first religious ceremony to be held in the Hall since it ceased to be the Chapel of the King's Hospital School. The President of the Society, Mrs. Moya Quinlan, is seen with Canon Commiskey (left), and Father Clarke (who is a Solicitor) after the Mass.

The Right Honourable Lord Denning, Master of the Rolls, and the Chief Justice of Ireland, the Honourable T. F. O'Higgins (on the left), at Blackhall Place on the occasion of Lord Denning's visit on 6 December 1980.

Pictured at a recent reception to announce sponsorship of the Law United Football Club by Kings, the Law Stationers, are from left: Patrick J. Farry, Team Manager, Fred Haslam, Kings, and Peter Doyle, Treasurer.

Acts of the Oireachtas 1980

Title of Act	Number
Fisheries Act, 1980.	1 of 1980
Ministers and Secretaries (Amendment) Act, 1980.	2 of 1980
Social Welfare Act, 1980.	3 of 1980
Employment Guarantee Fund Act, 1980.	4 of 1980
Land Bond Act, 1980.	5 of 1980
Prisons Act, 1980.	6 of 1980
Arbitration Act, 1980.	7 of 1980
Local Government (Superannuation) Act, 1980.	8 of 1980
Safety in Industry Act, 1980.	9 of 1980
Landlord and Tenant (Amendment) Act, 1980.	10 of 1980
Packaged Goods (Quantity Control) Act, 1980.	11 of 1980
Agriculture (Amendment) Act, 1980.	12 of 1980
Turf Development Act, 1980.	13 of 1980
Finance Act, 1980.	14 of 1980
International Development Association (Amendment) Act, 1980.	15 of 1980
Sale of Goods and Supply of Services Act, 1980.	16 of 1980
Electoral (Amendment) Act, 1980.	17 of 1980
Export Promotion (Amendment) Act, 1980.	18 of 1980
Restrictive Practices (Confirmation of Order) Act, 1980.	19 of 1980
Rates on Agricultural Land (Relief) Act, 1980.	20 of 1980
Army Pensions Act, 1980.	21 of 1980
Fishery Harbour Centres Act, 1980.	22 of 1980
Trading Stamps Act, 1980.	23 of 1980
Plant Varieties (Proprietary Rights) Act, 1980.	24 of 1980
National Institute for Higher Education, Limerick, Act, 1980.	25 of 1980
Ombudsman Act, 1980.	26 of 1980
Pyramid Selling Act, 1980.	27 of 1980
Shannon Free Airport Development Company Limited (Amendment) Act, 1980.	28 of 1980
Social Welfare (Temporary Provisions) Act, 1980.	29 of 1980
National Institute for Higher Education, Dublin, Act, 1980.	30 of 1980
Building Societies (Amendment) Act, 1980.	31 of 1980
Johnstown Castle (Agricultural College (Amendment) Act, 1980.	32 of 1980
Irish Whiskey Act, 1980.	33 of 1980
Thomond College of Education, Limerick, Act, 1980.	34 of 1980
Gas (Amendment) Act, 1980.	35 of 1980
Irish Film Board Act, 1980.	36 of 1980
National Film Studios of Ireland Limited Act, 1980.	37 of 1980
Restrictive Practices (Confirmation of Order) (No. 2) Act, 1980.	38 of 1980
Irish Shipping Limited (Amendment) Act, 1980.	39 of 1980
Electoral (Amendment) (No. 2) Act, 1980.	40 of 1980
Local Loans Fund (Amendment) Act, 1980.	41 of 1980
Industrial Alcohol (Amendment) Act, 1980.	42 of 1980
Casual Trading Act, 1980.	43 of 1980
Appropriation Act, 1980.	44 of 1980

Presentation of Parchments

18 December 1980

1. Caitriona Aird, Nutgrove, Portlaoise, Co. Laoise.
2. Lavinia Anderson, Coolbawn, Blackrock Road, Cork.
3. Thomas Baldwin, 74 Killester Park, Dublin 5.
4. William Boland, 37 Endsleigh, Douglas Road, Cork.
5. Michael Bourke, Greenrath, 2 Bishopscourt Road, Wilton, Cork.
6. Michael P. Bourke, Greenrath, 2 Bishopscourt Road, Wilton, Cork.
7. Michael J. N. Brennan, Cúl na Gréine, Kilkenny.
8. Neil Buckley, 416 Aylesbury, Tallaght, Co. Dublin.
9. John Burns, Monemore House, Emly, Co. Tipperary.
10. John Casey, Mountrivers, Blackrock, Cork.
11. Joan Clarke, Kilmore, Ballina, Co. Mayo.
12. Barry Collins, 12 Iona Drive, Glasnevin, Dublin 9.
13. Anne Condon, 111 Rathfarnham Road, Dublin.
14. Denis V. Connolly, The Elms, Foxrock Park, Foxrock, Dublin.
15. Margaret M. P. Connolly, 72 Howth Road, Raheny, Dublin.
16. Anne Connolly, Barrett Street, Bagenalstown, Co. Carlow.
17. Diarmuid Corrigan, 6 St. Agnes' Road, Crumlin, Dublin.
18. Peter Cranwell, 207 Botanic Avenue, Drumcondra, Dublin 9.
19. Alice Crawford, 91 Ranelagh Road, Ranelagh, Dublin 6.
20. Thomas Dalton, Main Street, Banagher, Offaly.
21. Dermot F. Davis, 44 Wainsfort Road, Terenure, Dublin 6.

Father and son: Michael Bourke and Michael P. Bourke, Wilton, Co. Cork.

22. Anthony Diamond, 119 Brookwood Avenue, Artane, Dublin 5.
23. Finnian G. Doyle, 11 Calderwood Avenue, Griffith Avenue, Dublin.
24. Fiona Duffy, Gaudete, 33 Bellevue Road, Glenageary, Co. Dublin.
25. David Dunne, 14 Wallace's Avenue, Ballinlough, Cork.
26. Carol Fawsitt, 48 Anne Devlin Road, Templeogue, Dublin 14.
27. John Flynn, Rosbercon Hill, New Ross, Co. Wexford.
28. Lucia A. Fielding, 7 Wellington Tce., Dunmore East, Waterford.
29. Dermot Fullam, Ivy Cottage, Johnstown, Naas, Co. Kildare.
30. Joseph Geoghegan, 26 Glenard Crescent, Salthill, Galway.
31. Edward Gleeson, 2 Neville Road, Rathgar, Dublin.
32. Mimi Goodman, Castlebellingham, Dundalk, Louth.
33. Margaret Grealis, Cushlecka, Mulrany, Westport, Mayo.
34. Maurice Griffin, Clondormey House, Tulla, Co. Clare.
35. Thomas B. Halligan, Loughill, Ardagh, Longford.
36. Deirdre Hegarty, 4 Bishopscourt Lawn, Bishopstown, Cork.
37. Noel Houlden, 9 Springhill Park, Blackrock, Dublin.
38. Michael T. Joyce, Ballyhaunis, Co. Mayo.
39. Patrick M. Keane, Templepatrick, Moyvore, Mullingar, Co. Westmeath.
40. Eamonn Keenan, 21 Landscape Crescent, Churchtown, Dublin 14.
41. Nora Kelleher, Dooniskey, Lissarda, Cork.
42. Brian Lynch, 85 Devon Park, Salthill, Galway.
43. William Lyster, 68 South Avenue, Mount Merrion, Dublin.
44. Gabriel Maguire, 152 Griffith Avenue, Drumcondra, Dublin 9.
45. John Mannion, Bridge Street, Clifden, Galway.
46. William Colin Martin, 345 Blarney Street, Cork.
47. Jacinta Morris, 144 South Circular Road, Dublin.
48. Peter Morrissey, 50 Trees Road, Mount Merrion, Co. Dublin.
49. Colm Murphy, 12 St. Canice's Road, Glasnevin, Dublin.
50. Daniel Murphy, Abbey House, North Mall, Cork.
51. Helen Murphy, Glanworth Road, Ballyhooly, Mallow, Cork.
52. Christopher McAuley, 72 Breamor Road, Churchtown, Dublin.
53. Audrey McCarthy, Glenart, Dunmore Lawn, Boreenmanna Road, Cork.
54. Orlaith McCarthy, 4 Canal Bank Cottages, Northumberland Road, Dublin.

55. Timothy McCarthy, Crescentia, Killeigh, Cahir, Co. Tipperary.
56. David McClean, 17 Rushbrook, Blanchardstown, Co. Dublin.
57. Mary V. McCrann, Mayfield, Circular Road, Roscommon.
58. Peter McDonnell, The Square, Castleblaney, Monaghan.
59. Hilary McGartoll, 65 Knocknashee, Goatstown, Dublin.
60. Brendan McManus, 40 Trees Road, Mount Merrion, Dublin.
61. Philomena McRory, Alt, Castlefin, Donegal.
62. Richard O'Brien, 42 Nutley Road, Dublin.
63. Charles O'Connor, Ballycrea, Priest Road, Tramore, Waterford.
64. Geraldine O'Connor, 10 Monivea Road, Galway.
65. Niall O'Connor, 9 Mather Road North, Mount Merrion, Dublin.
66. Claire O'Doherty, Malin Road, Carndonagh, Donegal.
67. Patricia O'Donnell, Dublin Road, Naas, Co. Kildare.
68. Mary O'Shea, Tahilla P.O., Killarney, Co. Kerry.
69. Michael O'Sullivan, Bonavalley, Athlone, Westmeath.
70. Fintan Phelan, Cloongullane, Swinford, Co. Mayo.
71. Michael Gerard Ryan, 25 Foster Street, Galway.
72. Romaine Scally, 57 Shrewsbury Lawn, Cabinteely, Dublin.
73. Maurice Sheehan, 53 Cowper Road, Rathmines, Dublin.
74. Ronan Sheehan, 53 Cowper Road, Rathmines, Dublin.
75. Emer Shields, Cranford Lodge, Stillorgan Road, Donnybrook, Dublin.
76. Charles D. M. Simms, 15 Garville Avenue, Rathgar, Dublin 6.
77. Patrick Smalle, Clonard, Avondale Drive, Greystones, Limerick.
78. Laurence Tierney, Lough, Thurles, Co. Tipperary.
79. Niall Walsh, Kilmurry Lodge, Carrick-on-Suir, Tipperary.
80. Patrick Whelan, Bridge House, Stradbally, Co. Laoise.
81. Gerald Yelverton, Ash Close, Elm Park, Castletroy, Limerick.

Continuing Legal Education

Spring Programme 1981

The main emphasis in the Spring 1981 programme of Continuing Legal Education Courses is on Introductory Courses for recently-qualified solicitors. A series of some six courses on Probate and Administration, Purchase of New Houses, Commercial Law, Advocacy (Road Traffic Offences), Labour Law, and Registration of Title and Drafting of Deeds has been prepared and is being offered to recently-qualified solicitors at a reduced fee of £90 for the package of six courses.

Other courses which are planned for the Spring will include one on the acquisition of the share capital of a private limited company, to be held in Cork, as well as further courses on Capital Gains Tax, with particular reference to the farming community, and on Licensing law.

Other courses which are planned include a course on Administration of Estates, which it is hoped to hold in three provincial venues, together with a course in E.E.C. law and one on office management and organisation, while a seminar on the recent Landlord and Tenant Act is also planned.

For Your Diary

4 March 1981: Irish Association of Law Teachers Council Meeting. Blackhall Place, Dublin.

23 March 1981: Dublin Solicitors Bar Association/Leinster Society of Chartered Accountants: *Solicitors Accounts Regulations*. Blackhall Place, Dublin.

4-5 April 1981: Society of Young Solicitors Seminar: *Bringing a case before the Employment Appeals Tribunal* (Speaker: Donal Hamilton, Solicitor); *A Review of the Law of Pollution* (Speaker: Liam Devally, B.L.); *Injunctions – A Practical Approach* (Speaker: John Quirke, Solicitor); *Criminal Practice for the Non-Specialist* (Speaker: Garret Sheehan, Solicitor). Metropole Hotel, Cork.

28 April 1981: Continuing Legal Education Seminar: *Labour Law* (Lecturers: Brian Gallagher, Solicitor; Ercus Stewart, Barrister-at-Law).

30 April to 5 May 1981: The Law Society's Annual Conference. Waterville Lake Hotel, Waterville, Co. Kerry.

5 May 1981: Continuing Legal Education Seminar: *Registration of Title and Drafting of Deeds* (Lecturers: Maeve Hayes, Solicitor; Colm Price, Solicitor).

16 May 1981: Law Society Symposium: *The Builder and the Law*. Blackhall Place, Dublin.

27 June 1981: Symposium: *The Mentally Handicapped and the Law*. Downhill Hotel, Ballina, Co. Mayo.

Professional Information

Land Registry— Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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 25th day of February, 1981.

W. T. MORAN (Registrar of Titles)

Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

(1) Registered Owner: Kate Parks; Folio No.: 12187; Lands: Fawnlion (Part); Area: 36a. 3r. 9p. County: Leitrim.

(2) Registered Owner: Patrick Conlon; Folio No.: 7642; Lands: Montpelier; Area: 34a. 3r. 9p.; County: Limerick.

(3) Registered Owner: Maryland Trust Company Limited; Folio No.: 48583; Lands: Ardnasillagh; Area: 0a. 2r. 0p.; County: Galway.

(4) Registered Owner: Kieran Egan; Folio No.: 11371 (This Folio is closed and now forms the property No. 1 in Folio 18518); Lands: Castletown; Area: 5a. 2r. 15p.; County: Kings.

(5) Registered Owner: Joseph Ferguson; Folio No.: 1627; Lands: Ballynatone (Parts); Area: 37a. 1r. 15p.; County: Donegal.

(6) Registered Owner: William Browne; Folio No.: 11185 (This Folio is closed and now forms the property No. 1 in Folio 1956F); Lands: Drumnamahaneisland; Area: 21a. 1r. 36p.; County: Tipperary.

(7) Registered Owner: Edmond O'Brien; Folio No.: 11116 (This Folio is closed and now forms the property No. 1 in Folio 2427F); Lands: Coolagarranroe; Area: 37a. 2r. 10p.; County: Tipperary.

(8) Registered Owner: John Hely-Hutchinson and John R. H. Fowler; Folio No.: 2765F; Lands: (1) Nugentstown, (2) Nugentstown; Area: (1) 6a. 3r. 34p., (2) 11a. 2r. 30p.; County: Meath.

(9) Registered Owner: Richard and Mary Graham; Folio No.: 6L; Lands: The leasehold interest in part of the townland of Borris Little in the Barony of Maryborough East; Area: 0a. 2r. 0p.; County: Queens.

(10) Registered Owner: Patrick Barry; Folio No.: 6524F; Lands: (1) Lisnagry, (2) Woodpark, (3) Coolreiry; Area: (1) 24a. 1r. 39p., (2) 16a. 1r. 0p., (3) 0a. 3r. 13p.; County: Limerick.

(11) Registered Owner: Genevieve Lyster; Folio No.: 10723; Lands: Part of the land of Athlone and Bigmeadow in the Barony of Athlone South with the houses thereon situate at Grattan Row in the town of Athlone. Area: ———; County: Westmeath.

(12) Registered Owner: James Reddington; Folio No.: 44963; Lands: Logcurragh; Area: 33a. 2r. 34p.; County: Mayo.

(13) Registered Owner: Margaret Reaney, Gortnasculloge, Cahervlistrane, Co. Galway. Folio No.: 838; Lands: Gortnasculloge. Area: 17a. 0r. 35p. County: Galway.

(14) Registered Owner: Thomas Brien; Folio No.: 2170; Lands: Athgaine Great (Part); Area: 25a. 0r. 37p. County: Meath.

Lost Wills

Catherine Minogue, deceased, late of Church Road, Borrisokane, Co. Tipperary. Will anybody having any knowledge of any will of the abovenamed deceased please contact Messrs J. Brendan Quigley and Co., Solicitors, Borrisokane, Co. Tipperary.

Owen O'Brien, deceased, late of "Alvernor", Meath Road, Bray, Co. Wicklow. The above-named died on the 26th day of December, 1980, at "Alvernor", Meath Road, Bray, Co. Wicklow. Will any solicitor or other person having a will or knowledge of a will of the above-named deceased please contact O'Neill & Curtin, Solicitors, 9 Parnell Square, Dublin 1.

Michael Murphy, late of 7, Windy Arbour, Dublin 6. Will any solicitor or any person holding a will of the above-named deceased, please contact Messrs Kelly, Kennedy & Company, Solicitors, 50, Merrion Square, Dublin 2.

Any person holding a will of **Joseph Salmon,** late of Ballydavid, Loughrea, Co. Galway, who died on the 5th October, 1980, please contact the undersigned solicitor: Florence G. MacCarthy and Associates, Solicitors, Loughrea, Co. Galway. The matter is extremely urgent.

Anna May Murphy, deceased, late of Sancta Marie Nursing Home, Gallows Hill, Cratloe, Co. Clare, and formerly of 109, Lower Rathmines Road, Dublin 6. Will anyone knowing of a will made by the above-named deceased who died on 10 January, 1981, please contact Mary Murphy of Michael Tynan & Co., Solicitors, 16 William Street, Limerick.

Employment

American lawyer, 1980 graduate of Harvard Law School, law clerk to a United States District Court Judge, member of Massachusetts Bar, seeks legal employment for a period of one to two years commencing September, 1981. Replies: Box 010.

Newly-qualified solicitor, graduate, seeks post in Dublin. Excellent references, own car. Experience in conveyancing, probate, and company law. Part-time basis might suit. Replies: Box 011.

The Profession

P. J. O'Driscoll & Sons, Solicitors, of Cork, Bandon, Bantry and Kenmare, have opened an office at 179, Church Street, Dublin 7. Telephone 728144.

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Printed by the Leinster Leader, Naas, Co. Kildare.

INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 2 March 1981

Our Apprentices — Our Investment?

It is – or should be – a truism that the only successful contract is one in which each party feels entirely satisfied that his or her interests are adequately and fairly provided for – and that, if an element of mutual compromise is involved, such compromise is as fair as it can be, from the point of view of each party.

It must be a very inexperienced or unthinking (or, perhaps, cynical) solicitor who can permit a client to enter into an agreement which that solicitor and client know to be weighted against the other party; on the general, if obscure, proposition that worms turn, sooner or later that other party is likely to discover the extent of the disadvantage and to seek redress.

The relationship of master and apprentice is one of contract and, with the emergence in April of another ninety-six apprentices from their first six months of intensive practical training in the Society's Law School, this may be an appropriate time to look again at that contract.

On the part of the apprentice, the essential commitment is "well and faithfully to serve the master" during the term of the apprenticeship. For the master, the commitment is more specific – including "providing the apprentice with such facilities in the master's office as are necessary to enable the apprentice to learn the practice and profession of a solicitor" and, "by the best ways and means he can and to the utmost of his skill and knowledge, to teach and instruct the apprentice . . . in the practice and profession of a solicitor".

In addition, the master will also have executed an Undertaking whereby, *inter alia*, he has agreed to pay the apprentice adequately, to provide sufficient space for the apprentice, and to ensure that the apprentice obtains reasonable exposure in all the areas of the office's practice.

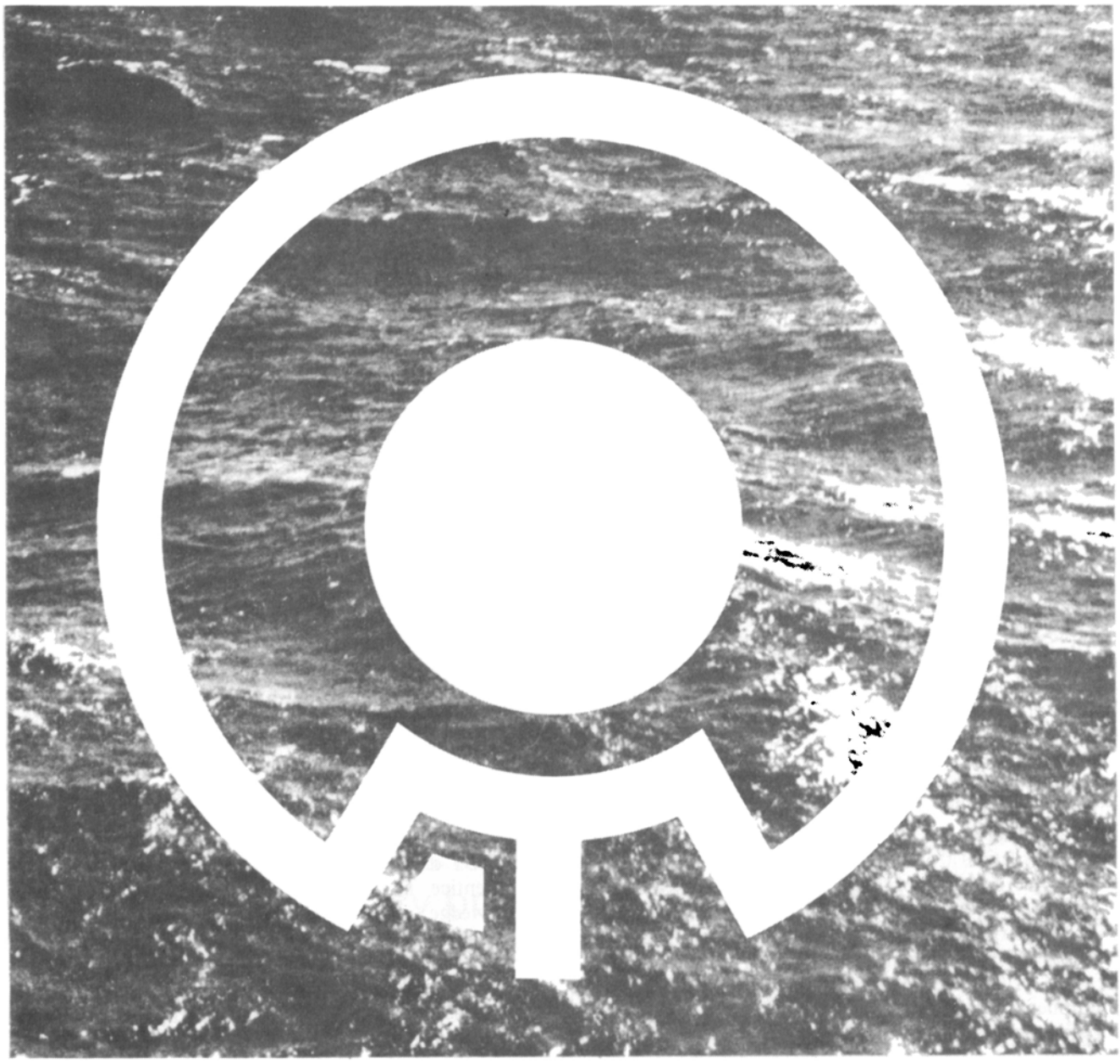
In considering the terms and conditions surrounding the relationship of master and apprentice, it is essential to realise that the apprentice with whom we are now dealing is a very different being from that of yesteryear. The new apprentice is likely to be a *lawyer*, holding a university law degree, before becoming apprenticed. The first six months of apprenticeship will be spent in the Society's Law School learning how to put into practice the legal knowledge the apprentice has gained in college. Thus, the apprentices who will be coming into their master's offices this April should be well able to play a useful and constructive role in the office and, in a comparatively short space of time, to become a "fee-earner". The master's duty to provide the apprentice with the necessary facilities to learn and to teach and instruct the apprentice, must be considered in this context.

Although in general the arrangements work well and to the satisfaction of both parties, it has been found by the Law School administration, through its regular discussions with apprentices and visits to masters' offices, that not all masters are honouring their Undertakings.

To deny the apprentice a room, or a telephone, or even – as has happened – a desk to sit at and a chair to sit on, and to fail to provide the apprentice with sufficient work to justify those years of legal education and training, is as shortsighted and as destructive as it is a breach of the master's contract. For a master to fail an apprentice in this unthinking manner is to put the apprentice into the position of the aggrieved party to the contract; as the apprentice acquires more knowledge and, with that knowledge, more confidence, the apprentice will seek some form of redress. That redress can take many forms, from passive to active but, whatever form it may take, it can only lead to soured relationships between apprentice and master and, worse, between apprentice and the profession.

At the same time, the apprentice must not expect red carpets to appear, miraculously, down every corridor he travels. A great deal of a solicitor's life is spent upon poorly remunerated "donkey work" and the apprentice must expect his fair share. The apprentice must be prepared to pay such menial dues as may be necessary to find his way around the ever-increasing range of bureaucratic offices with which the profession is involved and to discover how such offices may be used to the best advantage of both. Above all, the apprentice – in today's economic climate – is arguably fortunate to have found a master at all and must, to some extent, be prepared to take a little rough with the smooth.

But the fact that demand for apprenticeships, at present, far exceeds the supply is no justification for a master to abrogate his side of the contract. To do so is not alone unfair, unkind and probably harmful to the profession as a whole – it is to turn one's back on what may well be the first opportunity, in the history of the profession, to acquire a properly qualified and properly trained assistant who should be worth his or her weight in the gold which both the apprentice and the profession have invested in his or her education.



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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 2 March 1981

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

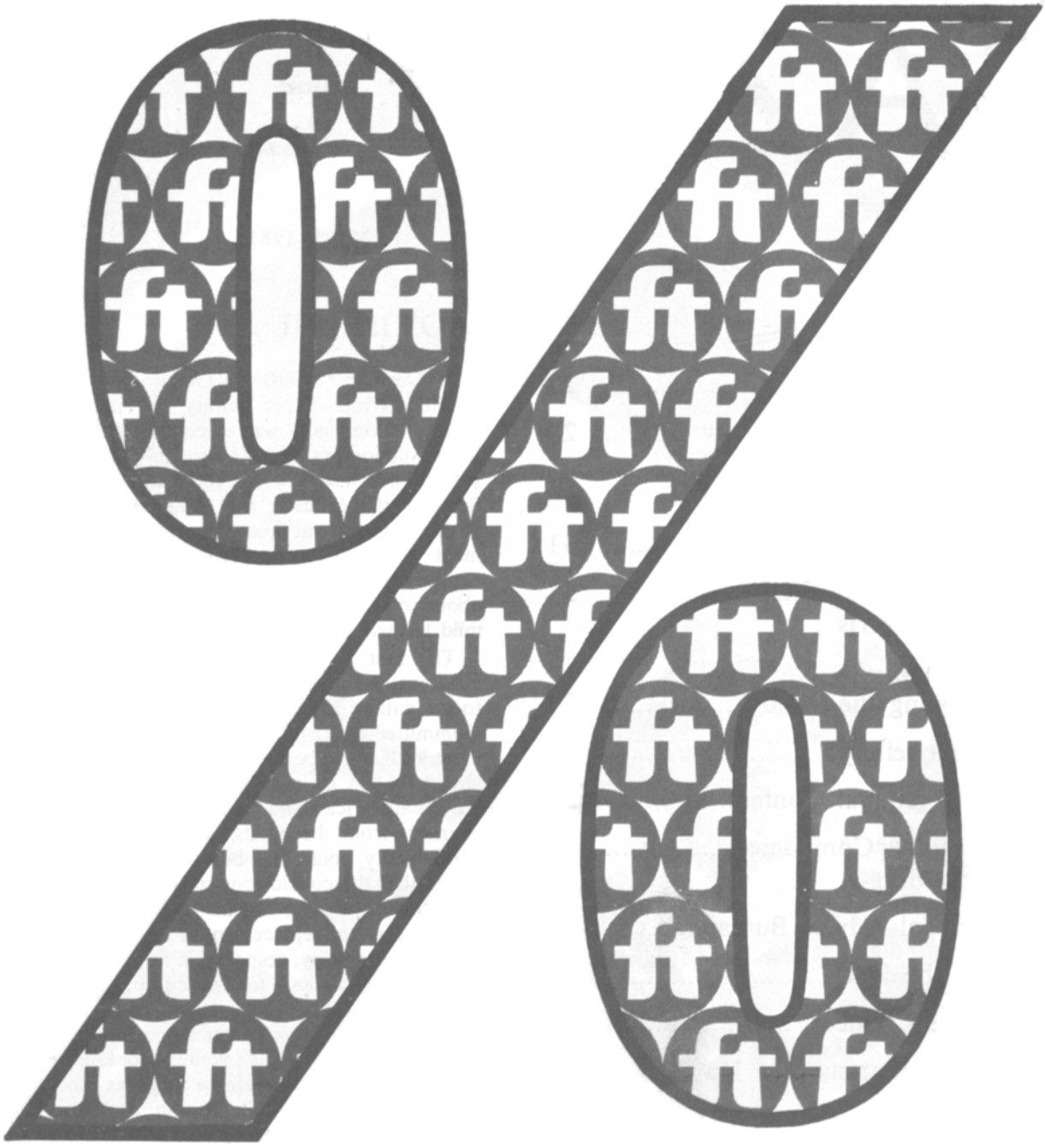
In December 1980 the Government issued its long-awaited White Paper setting out its proposed Land Policy. "Comment" was in course of drafting, when the Irish Auctioneers and Valuers Institute Seminar on the subject was held towards the end of February. At that Seminar the Minister for Fisheries and Forestry, Mr. Paddy Power, was quoted as saying that the Government was "mildly surprised at the almost total lack of reaction, to date, to the White Paper". "Comment" was about to express similar surprise, but in somewhat less mild terms.

The first point that must be emphasised is that a coherent and workable Land Policy is not only essential to the nation, but long overdue. The Inter-Departmental Committee on Land Structure Reform and the Government itself are to be congratulated on the time and trouble already taken in investigating the inherent problems – social, historical and financial – which prevent this country from becoming the agricultural success it undoubtedly could be. But it is plain from the White Paper that the conclusions of the Committee and of the Government by no means coincide. The Committee recommends the replacement of the Land Commission by a new land agency, responsible for the promotion of the efficient use of land for agricultural development; the Government White Paper proposes to retain the Land Commission. The Committee recommends that the use of Land Bonds as a payment medium for lands purchased or acquired for structural reform purposes should be discontinued and payment made in cash; the Government does not regard this as an acceptable alternative to the "Land Bond" system. On these, and many other matters, the thinking of both the Committee and the Government is readily understandable and the difficulties all too plain.

The White Paper is worth studying for its statistics alone. From them, a greater appreciation is possible of the scale of the present problem, of the extent to which traditional Land Commission practice has failed to achieve any significant structural improvement in agriculture, and of the wholly disappointing response by the intended section of the farming community to the Farmers' Retirement Scheme.

Government proposals for future land policy include financial measures intended to restrict the purchase of agricultural land by persons other than "full-time farmers (and . . . farmers' sons and daughters and landless persons working full-time in farming or who have received approved agricultural training) . . ."; the provision of grant or loan assistance towards land purchase by a "progressive farmer-purchaser" with an existing holding

○ *Continued on page 30*



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Education — A Student's View

by

John Fahy

Students' Representative on the Fourth Professional Course

(Written in conjunction with a representative cross-section of Students)

On Tuesday, 14 October 1980, ninety-six apprentices entered upon the Law Society's Fourth Professional Course in Blackhall Place. For each of them this marked a new departure in their careers. The academic side of their training over, they were now to be introduced to the law in practice. However, it was to prove an introduction at a price, the approximate cost of the course being £1,000. For most of the apprentices this involved obtaining a bank loan, which they will have to repay with interest over the next few years.

In April 1981 the apprentices having completed the course will enter their respective master's offices. This is possibly where the most crucial part of their training will begin, for it is here that they should become acquainted with the day to day work of a solicitor. While, for most apprentices this period proves most beneficial, both from their own and their master's point of view, unfortunately this may not be true of all apprenticeships. For some, this period consists of a long series of frustrations, in which the apprentice is continually relegated to the most menial and least educational work in the office. Perhaps if more masters understood the training which apprentices receive prior to entering their offices, such frustration for the apprentice could be avoided.

It is the purpose of this article, therefore, to outline the new training scheme, with particular emphasis on the initial six month course.

The Development of the New Training Scheme

In 1971 the training of lawyers in England was investigated by the Ormrod Committee and suggestions designed to improve training were put forward. The Committee recommended that legal education for the profession be divided into two parts; the academic and the vocational. The former it was recognised could best be provided in the university law schools, the latter in vocational law schools.

In 1974 the Incorporated Law Society announced its decision to revise the system of legal education by which solicitors were trained. To this end, they accepted substantially the recommendations of the Ormrod Report. After consultations with many practitioners, a new system, to accommodate the vocational side of the apprentice's training was designed.

This new system envisaged the apprentice spending an introductory period in the master's office, followed by a six month course in the Law School at Blackhall Place. The objective of this course was stated to be the learning by the apprentice of "the skills needed and procedures followed by solicitors in the initial years of their professional lives". The next stage involved the apprentice returning to his/her master's office for a period of eighteen months, during which period it would be the master's duty to give the apprentice as much experience as possible of the broad spectrum of the solicitor's work. Finally, the apprentice would complete his training by a final course, dealing with more advanced topics than the previous one.

A Practice-Orientated Course

The initial six-month course is a "practice-orientated" one and a list of the subjects covered can be found in the Appendix to this article. Extensive reliance is placed on Professor Gullickson's belief that "skills can only be acquired through performance", and the course is fashioned around this belief. To this end, a learning-by-doing approach is adopted, which puts the emphasis on "doing by the students, with a subsequent appraisal and correction by the course consultants and tutors".

Aspects of legal procedure are demonstrated by the consultants through use of hand-outs, audio-visual aids and practical exercises in which all the students participate. Each student's progress is monitored continually and failure to achieve the required standard in assessments may result in the student having to repeat that particular part of the course. Punctuality and attendance are also taken into account in assessments.

Appraisal

While the theory behind the course appears basically sound, this is not to say that in practice the course works ideally.

For a start, while the students benefit greatly from the experience of the one hundred and fifty practitioners acting as consultants and tutors, it is a fact of life that not all good practitioners possess the ability to communicate their particular subject. Indeed it must be said that, in a small number of cases, students detected a distinct lack of preparation on the part of certain tutors.

There is the additional danger that, in a course as intensive as this, too much information may be thrust upon the student too quickly, leading to a situation where the student merely receives information without analysing it. Under such circumstances, the student may fail to acquire an objective and critical view of how the law works in practice, which must surely be essential for any competent, discerning solicitor.

Finally, the comment may be made that the course "though enlightened in inspiration tends towards the wearisome in the manner of its execution". A routine of compound lectures, tutorials, discussions and exercises eventually takes its toll on the faculties of the students. Perhaps a shorter, less intensive course would be both more acceptable and effective.

Looking ahead to the advanced course, it is suggested that while the apprentices are serving their eighteen months in their offices, their views could profitably be sought on the areas of law which they would most like to see covered on the advanced course.

Conclusion

Notwithstanding these criticisms, the consensus of student opinion seems to favour the course. Possibly the single most important contribution it makes to the apprentices training, is the confidence it gives in their own ability to become a productive unit in the office. Unless this confidence is recognised, appreciated and utilised by masters the apprentice's effort will have been in vain. It is, of course, appreciated that the present courses are still in their infancy and it is hoped that the various weaknesses which must inevitably appear can be identified and cured, to the general good of students and the profession.

APPENDIX I

CONTENT OF THE COURSE

(a) Practice and Procedure:
(1) Civil Litigation in all Courts.
(2) Criminal Litigation in all Courts.
(3) Practical Instructions in the Drawing of Pleadings, Preparation of Cases for Advice.
(4) Advocacy in Criminal Proceedings.
(5) Family Law.

(b) Business Law Course:
(1) Accountancy.
(2) Commercial Law.
(3) Company Law and Partnership Law.
(4) Bankruptcy, Liquidation and Receiverships.

(c) Conveyancing:
(1) Practical Conveyancing, including the drafting of documents.
(2) Land Registry Practice.
(3) Applied Landlord and Tenant Law.

(d) Taxation and Estate Planning:
(1) Taxation.
(2) Probate and Administration of Estates.
(3) Wills and Settlements, including the drafting thereof.

Comment . . .

○ *Continued from page 27*

under a certain R.V.; a prohibition on the acquisition without Land Commission consent of agricultural land exceeding five acres *by any person or body* and the creation of a "Priority List" of qualified farmers who it is considered should be entitled to purchase additional land, with or without financial assistance. It is envisaged that the existing provisions of Section 45 of the Land Act, 1965, will remain with regard to the purchase of land by nationals of countries outside the E.E.C.

At the recent I.A.V.I. Seminar, Mr. Paddy Lane, immediate past-president of the I.F.A., pointed to a number of adverse consequences which he considered must inevitably result from the Government's proposals. Not only would land values fall, but it would become impossible to value land in any part of the country. Mr. Lane offered his own proposals for a land reform policy, which may seem to some to be open to as much objection as those of the Inter-Departmental Committee and of the Government.

One thing is, however, clear; the White Paper cannot be ignored; the I.A.V.I. and Mr. Paddy Lane have uttered the first, strong, public words in a debate upon what is probably the most important single issue in the State. That debate must be made continue at the highest and most informed level and it is a debate in which the solicitors' profession must surely be qualified to play a significant role.

The Solicitor's Apprentice

A cautionary tale

This is the tale of an apprentice whose firm forgot about him. It is perhaps apocryphal, but it might also be seen as an Awful Warning of what could happen . . .

The scene is a partners' meeting, with four partners present.

Staff Partner:
I have another batch of letters here
Inquiring for a vacancy next year;
It seems apprenticeships are hard to find.
I have, however, not made up my mind
On whether one apprentice is too few
Or whether we'd be better off with two.

Sleeping Partner:
Apprentice? What apprentice . . .
Who is this person? I was not aware
We had a young apprentice up the stair.

Junior Partner (to Staff Partner):
He never listens to you, by the way;
He just approves of everything we say.

Senior Partner:
But granted that we have one – all the same
I've never seen him since the day he came –
No doubt he's done some work and done it well,
But whom he works for only he can tell;
Who took it on himself to keep him right?
Who is his master, who his guiding light?

Staff Partner:
Well, I suppose I am, but heaven knows
I never notice when he comes and goes.
I thought the work I gave him would suffice;
He's drafted notes on title once or twice.
A simple will – he may have finished it;
I haven't seen him lately, I admit.

Junior Partner:
Well, gentlemen, today I scaled the heights;
In curiosity, mounted flights
Of stairs up to the attic, where I found
Three feet of dust and papers all around;
Forgotten clients' files and printed forms
Submerged in water from last winter's storms,
Ten years of the *Conveyancing Review*,
Old PH Books and other journals too,
And even Erskine's *Institute* was there
(Been looking for that volume everywhere).
The room was shadowed, though the sun was high,
And in the dimness something caught my eye.
Upon my soul, I thought, now what is this?
Something, I said, has surely gone amiss;
It seems all is not well with our affairs . . .
My friends, we have a skeleton upstairs!
It's been up there some time, I think you'll find,
And only one solution springs to mind:
It must be the apprentice that we had.
I didn't know that business was so bad.
When did he come? A year or two ago?
Or maybe more; it only goes to show
Our staffing situation needs to be reviewed.
Upon your province, sir, I'll not intrude.
(to Staff Partner)

Staff Partner:
Well, what a shame . . . He wasn't very old;
The Law Society should perhaps be told.
I think we could discharge the indenture now,
And, if they ask us, we'll explain somehow.
His indentures nothing more will save;
There's no assigning them beyond the grave.
And as for being admitted! Well, I vow
I hardly think he's going to practice now.
A practising certificate? So what!
A fit and proper person he is not;
So perish all who take the law in vain
He won't serve *bona fide* here again.

With thanks to the Law Society of Scotland, from whose Journal these words of warning have, with kind permission, been culled.

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The Unattainable Heights?

Scholarships and Prizes awarded to Solicitors' Apprentices

by

Jacinta Morris
Education Officer, The Law Society

Responsibility for the education and training of solicitors' apprentices was vested in the Incorporated Law Society of Ireland by the Attorneys and Solicitors Act (Ireland), 1866. Since that date, there has evolved a comprehensive scheme of scholarships and prizes which encourage a high standard of performance by apprentices in their various examinations.

At present ten scholarships and prizes are offered, of which two are endowment scholarships, two are memorial prizes, four are presented by the Society and two are awarded by commercial undertakings.

In its early days, the Society was anxious to ensure that entrants to the profession had attained a good standard of literary education. This concern is reflected in the terms of reference which the Council outlined in 1866, to govern the prizes it would award on the results of the Preliminary and Final Examinations. While the prize for the Final Examination went to the apprentice who attained the highest marks in that examination, the prize for the Preliminary Examination was awarded on the basis of a separate examination, for which successful candidates in the Preliminary Examination could compete. The prizes were: "For the best answerer – a gold medal, together with the sum of £10; for the second best answerer, a silver medal and the sum of £5."

The syllabus for this special Preliminary Examination is worth reproducing in full – it would suggest great classical knowledge on the part of our predecessors in the profession. To quote from the Regulations of the Act of 1866 – Resolutions of the Council as to Prizes to be given annually at Preliminary and Final Examinations:

> "That with a view to encourage an advanced standard of answering in the subjects prescribed for the Preliminary Examinations of apprentices, prizes be given annually, to be competed for by gentlemen who may have exhibited a satisfactory degree of proficiency at such Examination . . . that a Special Examination for these prizes be held in or about Michaelmas Sittings in each year – that in addition to the course prescribed for the Preliminary Examination, candidates for prizes shall be examined in the following:
> Virgil's Aeneid, 4th and 5th Books.
> Horace's Odes and Satires.
> Livy, 1st Three Books.
> Dr. Smith's Grecian History.
> Liddell's Roman History.
> Murray's and Whately's Elements of Logic.
> Also, the French or German Languages, at the option of the Candidates."

With the development of the second-level education system in Ireland, the Society did not need to concern itself so much with the basic standard of education of its apprentices. The old Preliminary Examination declined in importance and the emphasis, in so far as prizes were concerned, shifted to the Final Examination and the standard of performance in law subjects. However, the aim of encouraging excellence remained the same, and the tradition of awarding gold and silver medals at Michaelmas Sittings has remained to the present day.

In 1877 there was a new departure, when Sir William Findlater founded a scholarship, by the grant of £1,000 to the Society. Sir William (1824-1906) was himself an eminent solicitor and was twice elected President of the Society – first, in 1877-8 and again nearly twenty years later in 1896-7. In 1880 he was elected Liberal M.P. for County Monaghan.

The Scholarship is awarded in Michaelmas Sittings in each year on the results of the Second and Third Law Examinations, to the apprentice who has shown the most proficiency in the subjects of such examinations.

The list of Findlater Scholarship winners is lengthy and includes many distinguished names, including:

1914 Valentine W. Miley	1952 Mary C. C. O'Mahony
1927 James J. Hickey	1959 John Temple Lang
1929 John J. Nash	1961 Maurice R. Curran
1936 Mathew Purcell	1970 Ernest B. Farrell

In 1919, another former President of the Society, Mr. Trevor T. L. Overend, by his Will endowed a Scholarship, originally divided between the Preliminary and Final Examinations and latterly awarded on the results of the First Law Examination.

The Overend and Findlater Scholarships between them cover the First, Second and Third Law Examinations and, over the years, a few apprentices have distinguished themselves by winning both these scholarships:

Patrick F. Treacy	1954 (Overend)	1955 (Findlater)
Brian V. Hoey	1957 (Overend)	1957 (Findlater)
Michael G. Cody	1958 (Overend)	1960 (Findlater)
Maurice R. Curran	1959 (Overend)	1961 (Findlater)

These prizes are awarded only if sufficiently high standards can be attained and the amount of the prizes depends on the yield from the invested funds and the frequency with which the prizes have been won.

On the occasion of the Centenary of the Society's Charter of 1852, the Council of the Society established a prize of £10 (later increased in value) for the best candidate, whose age does not exceed twenty-five years, at each First Law Examination, subject to a satisfactory standard of answering. Centenary prizewinners have included:

1958 Dermot F. Bouchier Hayes
1959 Maurice R. Curran
1960 James L. O'Keefe
1961 Michael V. O'Mahony

The Annual Report of the Council for the year 1961-62 announced the establishment of two new prizes. During that year Mr. Val O'Connor of Swinford, Co. Mayo (a later President of the Society in 1972-73), presented the Society with a sum of £100 to found a prize in memory of his late father, Patrick O'Connor, Solicitor, who had a special interest in the principles of equity and devoted much of his practice to Chancery cases. He appeared in some leading cases, e.g. *Kelly v Morrisroe*, 53 I.L.T.R. 145, still the leading case on the degree of capacity necessary to sell or dispose of real property.

The capital sum has been augmented several times by Mr. Val O'Connor and the value of the O'Connor Memorial Prize is now worth £42 annually. The prize is awarded annually for the best marks in the Equity paper in the Second Law Examination. In 1975 the winner was Thomas V. O'Connor (junior), grandson of Patrick O'Connor.

Also in the year 1962, Comhdáil Náisiúnta na Gaeilge expressed a desire to establish a memorial prize in recognition of the interest of the late Seán Ó hUadhaigh, who died in 1959, in the Irish language. He was for many years a member of the Council of the Society and a member of the Irish Legal Terms Advisory Committee.

He had a great love of the Irish language and contributed much to the encouragement of its use in legal practice. This prize is awarded annually on the results of the Society's first examination in the Irish language and special consideration is given to proficiency in the spoken language. The first recipient in 1962 was James F. O'Higgins.

In addition to the prizes already mentioned, the Society itself awards the following prizes:

(1) The Society's Prize. This prize of £150, awarded annually to the apprentice who achieves the best overall results in the Second Law Examination.
(2) The Society's Silver Medal, which is awarded to each apprentice who attains a minimum average mark of 70% in all subjects in the First, Second and Third Law Examinations.
(3) The Society's Gold Medal, which is awarded on the same basis as the Silver Medal save that the minimum average mark must be 80%.

In 1980, Mrs. Rowena Mulcahy achieved the distinction of winning three of the six prizes for which, as a Third Law candidate, she was eligible – The Findlater Scholarship, The Society's Silver Medal, and the Guinness and Mahon Prize.

This latter prize was established by Guinness and Mahon Ltd., in 1970, who award an annual prize of £50 on the combined results of the papers on Tax Law and Commercial Law in the Third Law Examination. The first award was made to John Stephen Hannon in 1970.

In 1973, Allied Irish Banks Ltd. founded an annual prize of £100 for the best paper in Company Law in the Second Law Examination. Recent prizewinners were:

1980 Patrick J. Morrissey
1979 John J. Mannion
1975 John F. Condon

The Scholarships for the new system of training are really bursaries; the Industrial Credit Company Ltd. has generously donated £2,000 in each of the two years that Professional Courses have been run while the Society itself has made £4,000 a year available during the same period. The Dan Chambers Memorial Scholarship – currently in the region of £500 a year – is available to Clare students. It was established by friends and colleagues of Dan Chambers, the distinguished young Ennis solicitor who lost his life in a road accident on 1 September 1977.

As the "old regulations" are gradually phased out, it will be necessary to adapt the scheme of scholarships and prizes so that they may be awarded to apprentices now being trained in the new and more "practice-oriented" Law School.

No longer will it be relevant to award a prize on the basis of the highest marks attained in any examination but, at all events, it is to be hoped that the long tradition of recognising the academic achievements of apprentices in their professional studies continues unbroken.

THE LAW SCHOOL — CONCENTRATING THE MIND

That the prospect of being hanged in the morning concentrates one's mind wonderfully is now part of received wisdom. It is, in fact, good journalism rather than good research; those who have been hanged in the morning have failed, more often than not, to record – in deathless or even deadly prose – the state of their mental concentration on the night before. There is no doubt, however, that the knowledge that you are to *expound* on the morrow – and all the morrow – to some ninety odd apprentices on an area of legal practice in which someone believes you have an expertise, does concentrate your mind wonderfully – hopefully earlier than the night before.

The concentration of the mind is one of the very real, if slightly selfish, advantages of being a contributor to the Professional or Advanced courses in the Society's Law School. Instead of jogging along in a habitual pattern – even being comfortable in the pattern, if one allows for the unpredictabilities of one's clients and the idiosyncrasies of one's colleagues – one has to explain not merely how something is done in practice but why it is done that way and, indeed, why it is done at all. Habits suddenly need explanations. The finding and exposition of the explanations are discovered to be rewarding and refreshing; practitioners have found in every case when they acted as a consultant or tutor in the Law School that their knowledge of the subject in which they are instructors-teachers-counsellors has been deepened and widened. Not to be ignored either are the advantages of meeting and exchanging views and information with colleagues specialising in the same subject.

The Society is very grateful to the two hundred or so solicitors – and a handful of other professionals – who have contributed to the work of the Law School, your Law School, and is proud to record the selflessness of practitioners who have unhesitatingly shared with the students – the solicitors of the future – their knowledge, their experience and the expertise which they have stored and built up – in some cases over many years – without any thought of hugging that knowledge and experience to themselves.

The Law School cannot overly impose on their practitioners-teachers; no one should devote so much time to the Law School that he or she becomes "turned off". The way forward is to have a bank of practitioners ready to contribute as consultants and tutors and to call on them sparingly; in this way contributors will maintain their interest and zest. That is why your Society is now appealing to more practitioners to put forward their names as contributors to the Law School. Tutors are usually solicitors qualified two or three years or more, while consultants tend to be more senior. Solicitor consultants are currently paid £50 a day and solicitor tutors £30 a day for their days "on" and the Society recoups travelling expenses for those practising outside Dublin. The syllabus for the Professional course covers Civil and Criminal Litigation, Labour and Social Welfare Law, Family Law, Conveyancing, Probate and Administration, Wills and Settlements, Landlord and Tenant Law, Insolvency, Commercial Law, Capital and Income Taxation, Company Law and Partnership. Practitioners – and please remember the new training system is a practice-orientated one, where the students learn the skills and procedures of a solicitor in a "learning-by-doing" atmosphere – who have built up expertise in any of these areas are asked to volunteer their services as consultants or tutors in their own specialities by writing to Miss Desiree Flynn or Miss Raphael Mathews, full-time tutors in the Law School, Blackhall Place, Dublin 7.

In some areas contributors are thinner on the ground than in other areas (and therefore more in demand) but in every case volunteers are recorded as potential consultants or tutors.

Practitioners who are already contributing and those who have already volunteered need not write again to the Society.

The Law School, Blackhall Place

REQUIRES

Tutors and Consultants

in the following areas

Conveyancing, Capital Taxation, Landlord and Tenant, Planning Law, Insolvency, Income Tax, Wills and Settlements, Commercial Law, Company Law, Criminal Law, Civil Litigation, Family Law, Labour Law, Probate.

Applications to and further details from either
Miss Desiree Flynn *or* **Miss Raphael Mathews**
(full-time tutors) Tel. 710711 ext. 75

Existing contributors, either as Consultants or Tutors, need not apply in response to this appeal – their continuing service is needed and appreciated.

Travelling Hopefully?

It may, as Robert Louis Stevenson once suggested, be better to travel hopefully than to arrive, but is it better to pay hopefully than to travel?

The collapse of Bray Travel Ltd., a leading tour operator, following rapid departures from the scene of other lesser fry, must throw this question into stark relief and has already led to increasing demands for better protection for the public against the loss of deposits or other sums paid for holidays, which vanish with the demise of the tour operator.

The collapse of any major trading company highlights certain general flaws in our control of trading companies. Apart from the basic weakness that major trading companies are permitted to operate with minimal nominal capital, there is no requirement that any particular amount of paid-up capital should be maintained while a company is trading, nor is there any obligation on a parent company to accept liability for a subsidiary's debts. With this background, the likelihood increases that members of the public will suffer as a result of a failure of a trading company, when that trading company is found to be operating in an area of activity where profit margins are by any normal standards extraordinarily small. It has been authoritatively reported that the profit margins hoped for by tour operators frequently do not exceed 10% and it is clear that the tour operators' business, like modern-day insurance, has become largely a "money" business. Profit comes not only from the activity being carried on, but from the investment income earned from the monies paid by customers, in advance of their holidays.

The tour operator is obliged to make commitments for hotels and for seats on charter airlines anything from six months to a year in advance of the holiday period, which calls for considerable expertise in anticipating likely demand. Any unexpected drop in demand may have a serious affect on the viability of the tour operator.

In such circumstances, the need for protection of the monies paid in advance to the tour operator by the holiday maker is obvious and it is strange that neither the Trade Association nor legislation has, long ago, brought effective measures into operation for the protection of deposits. It is clear that a substantial bonding scheme is required and it is suggested that, in the nature of the particular business, the individual bonding of tour operators for very substantial sums is to be preferred to collective bonding schemes. In addition, there is a strong case for a rapid development of a "compensation fund" which could be operated on a "trade-wide" basis, to cover the immediate effects of the collapse of any tour operator on individual travellers, whose particular holidays are immediately affected by the collapse.

The Travel Reserve Fund Bill recently introduced in the Dáil by Deputy Patrick Hegarty is, apart from its obvious drafting defects, quite unsatisfactory. To confine, as it does, the protection of the fund to customers of the Irish Travel Agents' Association members alone suggests that the aim of the legislation is as much the advancement of the Association as the protection of the public. The Bill, as introduced, confers a status on this Association which ought not to be conferred on any group which is not the subject of statutory control or regulation.

It is suggested that such a "compensation fund" might be also used to compensate travellers who suffer unhappy experiences on their package tour holidays. This second aspect of protection for the travelling public has not as yet been tackled comprehensively in the Republic of Ireland. We have no equivalent of the Codes of Conduct for tour operators and retail agents operated by the Association of British Travel Agents and the arbitration arrangements imposed in the Republic of Ireland on individual travellers by the standard booking form of the I.T.A.A. is unsatisfactory in many respects. Apart from the fact that the arbitration cannot be conducted within the context of a code of conduct, no arrangements were made by the I.T.A.A. for the funding of the arbitration scheme. The A.B.T.A. scheme provides for "a simple and inexpensive method of arbitration whereby the claim may be considered on documents alone". If the customer loses on arbitration, he can only be required to pay twice the deposit which, in the normal case, would be unlikely to exceed £40. The I.T.A.A. have unilaterally provided that an arbitrator is to be appointed by the President of the Incorporated Law Society (without having consulted the Law Society as to whether the President wished to be involved in such an arrangement!) and has made no provision for any contribution, either by the Association or by the tour operator concerned, towards the costs of the arbitration. The arbitration can, therefore, be quite expensive for a customer who is at risk of having the costs of the arbitration awarded against him. The only redeeming factor is that because the arbitration is not limited to documents, the tour operator may be in difficulty in producing witnesses from the hotels or transport authorities concerned to refute the claims of the customer.

It is understood that the Director of Consumer Affairs hopes to persuade the Irish Travel Agents' Association to establish a code of conduct along lines similar to the A.B.T.A. scheme in the near future. It is to be hoped that the establishment of such a code of conduct will include an arrangement whereby the costs of arbitration are substantially funded by the I.T.A.A., so that the customer is only at risk of suffering a relatively modest loss, in the event of the arbitration going against him.

Launch of "Corporation Tax in the Republic of Ireland"
Blackhall Place, Dublin, 3 March 1981.

Pictured at the launch are Mrs. Moya Quinlan, President of the Incorporated Law Society of Ireland; the author, Mr. A. Graham Williams (right), and Mr. Edmond Cummins, President of the Institute of Taxation in Ireland, who launched the book.

The Incorporated Law Society of Ireland

Annual Conference

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EARLY BOOKING IS ADVISABLE

German Trading Companies

A note on their structure

by Nicola K. Barr

German law provides for two main types of company. They are the "Aktiengesellschaft" (AG) and the "Gesellschaft mit beschraenkter Haftung" (GmbH). The AG is comparable to the Public Company and the GmbH to the Private Company as known in Irish law. Unlike the U.K. and Ireland, these two types of company are governed by two separate statutes. Both companies are separate legal entities, apart from their shareholders, and their shareholders are not personally liable for the acts of the company.

In the AG, as opposed to the GmbH, there is little opportunity for a shareholder to exercise much influence on the company and it is therefore a suitable structure for large concerns or undertakings, where shares will be bought as an investment only.

A minimum of five shareholders is necessary to incorporate an AG. It has a minimum share capital of 100,000 DM, 25% of which must be paid up. The shareholders are liable only to the uncalled amount of their shares. To ensure that the capital will not evaporate, there are stringent rules for the maintenance of capital.

The AG has three organs; the General Meeting (Hauptversammlung), the Board of Supervisors (Aufsichtsrat), and the Board of Management (Vorstand).

The General Meeting is the highest organ of the AG. It is composed of all the current shareholders. What is particularly interesting about the AG General Meeting is that its powers and rights are set out in the German Company Law Statute (Aktiengesetz), or in the Articles of Association, which cannot remove any powers or rights conferred by the Company Law Statute. The Irish General Meeting, in contrast, may, if Article 80 of Table 1 of the Companies Act, 1963, is adopted, pass any direction to the Board of Directors on any matter relating to the management of the company.

Perhaps the most important power of the AG General Meeting is the power to appoint the Board of Supervisors. This body, in turn, appoints the Board of Management, which is responsible for the running of the company. The main duty of the Board of Supervisors is to watch over the Board of Management. It performs this duty throughout the course of the year, and is enabled, by statute, to examine all the documents of the company relating to the assets of the company. A natural consequence of this "watchdog" principle is that a member of the Board of Management may not concurrently be a member of the Board of Supervisors. The Board of Supervisors is empowered to approve the proposed calculation of the year's profits. Should it not approve the calculation, as proposed by the Board of Management, the General Meeting is requested to approve the calculation or, if necessary, to recalculate the profits. If the AG has less than 2,000 employees, the Betriebsverfassungsgeset (Statute on Works Organisation) provides that the Board of Supervisors is composed of one-third of employees' representatives and of two-thirds of shareholders' representatives. If there are more than 2,000 employees, the Mitbestimmungsgesetz (Statute on Co-Determination), which provides for the representation of the employees on the Board of Supervisors, provides that the ratio shall be 50:50. The actual number of members of the Board of Supervisors is rather complicated and regulated in the following way.

Where an AG has more than 2,000 employees there is an equal number of shareholders' and employees' representatives on the Board. The Mitbestimmungsgesetz provides that from 2,000 employees to 10,000 employees, there is a minimum number of six members from each side. The six members from the employees' side are again divided into four and two – the four members being actual members of the work force, the other two members being full-time employees of the relevant trade union operative in the industry in question. These members are fully employed by the union, and are not members of the work force of the AG. From 10,000 to 20,000 employees, it is laid down that there shall be eight members from each side. Here the employees' representation is divided into six and two. Where the work force exceeds 20,000 there are ten from each side, the employees' ten being divided into seven and three, on the above lines.

When the work force of the AG is less than 2,000 the number of members of the Board of Supervisors is related to the capital of the company. There must be a minimum of three members. The maximum number in an AG with a share capital of up to 3,000,000 DM is nine. From 3,000,000 to 20,000,000 DM the maximum is fifteen. Over 20,000,000 DM there shall be a maximum of twenty-one members of the Board. The number of members must be divisible by three, as the employee-shareholder ratio in an AG with a work force under 2,000, as mentioned above, is one-third to two-thirds.

The Board of Management, as a body, is capable of acting on the company's behalf. However, the Articles of Association may provide that certain members of the management may represent the company when acting alone or with another member of the Board of Management. This is common as it avoids the necessity of obtaining the signature and consent of each member of the Board of Management each time the company acts. Members of the Board of Management may hold office for a maximum of ten years.

The GmbH

The more frequently used form of company for small undertakings is the GmbH. In contrast to the AG, the

GmbH is regulated less by German statute law and more by its Articles of Association. In the case of a GmbH there is a minimum capital of 50,000 DM. There are similar rules to those of the AG for the maintenance of its capital. The GmbH has at least two organs. These are the Board of Management and the General Meeting. In contrast to the AG, the areas of competence of these bodies are not laid down in statute law, but regulated by the company's Articles of Association. The Board of Management (Geschaeftsfuehrer) may be one person or several. The Board of Management of the GmbH is capable of acting on the company's behalf. As in the case of the AG, the Board of Management must act together as a body, unless the Articles of Association provide that one member or several members, acting alone or together, may represent the company. In contrast to the AG, there is no maximum time limit to their term of office. This is obviously more suitable to small undertakings, where one person may be the sole director and shareholder.

The General Meeting of the members, in contrast to the AG, is more like the Irish General Meeting. The German Statute (GmbHGesetz), Section 45, provides that the GmbH General Meeting has power to make decisions in respect of the company in so far as statute law or the Articles of Association do not otherwise provide.

When a GmbH has more than 500 employees, the company must have a Board of Supervisors, of which one-third are employees' representatives, and two-thirds are shareholders' representatives. As in the case of the AG, when there are more than 2,000 employees, the ratio is 50:50.

Partnerships

In Germany, business is conducted, other than through companies, by the use of partnerships. There are two basic types of partnership used, the Limited Partnership (Kommanditgesellschaft) and the Unlimited Partnership (Offenehandelsgesellschaft). The Unlimited Partnership (OHG) is not, in its own right, a separate legal entity. It is granted by statute (Handelsgesetzbuch) the right to sue and be sued, the capacity to own property, both real and personal, and it is also liable in tort. The fundamental point about the OHG is that vis-à-vis third parties, the partners are all liable personally and there is no limit to their liability. The partners all possess, individually, the capacity to bind the partnership in any contract whatsoever, even though it may have no relevance to the business of the partnership. Despite this very heavy burden on partners, the OHG is a common form used to run businesses. As to the partners' relationship, *inter se*, it is regulated by contract (Gesellschaftsvertrag). This may provide that individually partners may only bind the partnership in certain areas, but any such provision will only affect their liability to each other and will not affect third parties. The Gesellschaftsvertrag gives the partners the right to sue each other should a partner make a foolish mistake in an area in which he is not competent. The partners also owe a duty to each other, which is similar to our common law duty of care (*treu und glauben*).

The Limited Partnership (Kommanditgesellschaft) is a derivative of the Unlimited Partnership. The difference between them is that only one partner in the Limited Partnership has unlimited liability (the general partner). The liability of any other partner is limited to the amount which he has paid or has contracted to pay (the limited partner). Only the general partner has the power of management or representation. The limited partner has no power of management or representation. He has the right to be consulted on all transactions which are outside the normal sphere of business, but the consequence of the general partner omitting to do this is not to make the contract void with respect to a third party, but to make the general partner liable in damages to the limited partner. The limited partner, further, has the right to inspect the balance sheet and, when there are profits, he is entitled to 4% of his original contribution.

Figures show that the number of limited partnerships in Germany has risen and the number of unlimited partnerships has decreased. This is evidence of the general economic development since the second world war; the Unlimited Parnership concedes rights which are considered too great for a businessman, with the result that Limited Partnerships are increasing in number.

[For full statistics of the number of companies in each category see Table 1 below.]

Table 1

	1/1/1970	1/1/1975	1/1/1980
OHG	67,083	47,105	36,204
KG	57,323	103,330	107,203
AG	5,333	6,564	5,455
GmbH	79,446	123,573	211,261

A further development of the Limited Partnership (Kommanditgesellschaft) is the GmbH & Co. KG. This is, in reality, a Limited Partnership, but the general partner is a GmbH, which means in effect that no partner is liable to an unlimited extent, as the GmbH is automatically limited in liability to the amount of its share capital (minimum 50,000 DM). This form of partnership is regarded as a corruption of the Limited Partnership and not to be in the spirit of the concept; it is much criticised and rarely used.

FLAC – Legal Advice Bureau

The Society's Education Committee has agreed to a request from FLAC that apprentices willing to participate in the Bureau should be released from their offices for one morning or one afternoon per week subject to the consent of their masters.

COLLAPSE OF THE LIST

The problems of efficient planning and co-ordination of the list of jury actions has been raised again, at a recent meeting between the Dublin Solicitors' Bar Association and the President of the High Court, Mr. Justice Finlay.

The President and Mr. Justice Hamilton are both very concerned that the management of the list is becoming more and more difficult and more and more frustrating to the practitioner, the judiciary and, last and by no means least, to the witness.

For some time, a practice rule was followed (and reasonably well observed) that if a solicitor realised that a case already listed was not, in fact, ready to go to hearing, an application should be made to the Court on the Thursday prior to the week in which the case was listed, to have the case taken out of the list and re-entered at some later date.

Regrettably, the rule is now being honoured more in its breach than its observance, with the result that lists are collapsing; on a recent Tuesday, only one jury action went to hearing, all the others having either been settled or not ready for hearing.

The President has considered the possible remedy of listing more cases for each day, but appreciates that this must inevitably result in a number of listed cases not being reached on the day of listing. This would entail solicitors and their clients and witnesses hanging about the Four Courts, perhaps for days, waiting for their case to be heard.

Quite apart from the waste of increasingly expensive professional time, our clients and their witnesses deserve more courteous treatment and the image of the legal system can only suffer increasing damage from such apparently haphazard administration. For the time being, in the hope that improvement may be generated from within the profession, the Dublin Solicitors' Bar Association is merely passing on the President's urgent plea that as soon as solicitors become aware that a listed case will not be ready to be heard on the day fixed, they apply at once to have the case withdrawn from the list; this will enable another case to be listed and avoid the all-too-frequent collapses of the list at present taking place.

PUBLIC DANCE LICENCES

The Senior Administrative Officer of the Community-Environment Section of Dublin County Council has suggested that practitioners be informed that notices of application for public dance licences in respect of premises in the administrative area of Dublin County Council should be forwarded to Mr. D. O'Sullivan, Principal Officer, Development-Environment Department, Dublin County Council, 46/49 Upper O'Connell Street, Dublin 1.

It is pointed out that in accordance with the Public Dance Halls Act, 1935, the Local Authority must be given at least one month's notice in writing of the application for the granting of a public dancing licence. This is a mandatory provision.

HIGH COURT SUMMONS — SIX DAY COSTS

The Superior Courts Rules Committee has made orders amending the costs payable in debt and liquidated claim cases either settled within six days after service of the summons or where judgment is obtained in default of appearance. The new rules (S.I. No. 32 of 1981) are:

Order 4, Rule 5 (2) shall be deleted and the following substituted therefor:

The amount claimed for costs shall be:

(a) If the demand does not exceed £250:	Such sum as would be appropriate to a proceeding for a like amount in the District Court.
(b) If the demand exceeds £250 but does not exceed £2,000:	Such sum as would be appropriate to a proceeding for a like amount in the Circuit Court.
(c) If the demand exceeds £2,000:	£18.10 with £1.50 for each additional service after the first, and the costs of any order for issue and service, or service of the summons or notice in lieu thereof out of the jurisdiction, or for substituted or other service or for the substitution of notice for service, or for declaring service effected sufficient, or for notice by advertisement of the issue of the summons, and this amount shall be exclusive of and in addition to all actual and necessary outlay.

Appendix W, Part III, shall be deleted and the following substituted therefor:

(1) District Court Jurisdiction	
If the amount of the judgment does not exceed £250:	Such sum as would be appropriate to a judgment in the District Court for a like amount.
(2) Circuit Court Jurisdiction	
If the amount of the judgment exceeds £250 but does not exceed £2,000:	Such sum as would be appropriate to a judgment for a like amount in the Circuit Court.
(3) High Court Jurisdiction	
If the amount of the judgment exceeds £2,000:	£18.10 and £1.50 for each additional service after the first; and this amount shall in every case be exclusive of and in addition to all actual and necessary outlay.

Bills before the Oireachtas 1980

During the Dáil Session 15 October to 18 December 1980

and the Seanad Session 22 October to 19 December 1980

Title of Bill	Effect	Introduced	Position as at 19 December 1980
National Film Studios of Ireland Limited Bill, 1979.	To authorise the Minister for Finance to take up shares in National Film Studios of Ireland Limited, to provide for the guaranteeing of borrowings by the Company and other related matters.	26/11/79 (Dáil)	Passed by Dáil Éireann 12/11/80. Passed by both Houses of the Oireachtas 10/12/80.
Irish Film Board Bill, 1979.	To provide for the establishment of the Irish Film Board to encourage the development of a film industry in the State.	26/11/79 (Dáil)	Passed by Dáil Éireann 9/12/80. Passed by both Houses of the Oireachtas 10/12/80.
Shannon Free Airport Development Company Limited (Amendment) Bill, 1980.	To amend and extend the Shannon Free Airport Development Company Limited Acts, 1959 to 1978.	20/3/80 (Dáil)	Passed by Dáil Éireann 15/10/80. Passed by both Houses of the Oireachtas 22/10/80.
National Heritage Bill, 1980.	To amend and extend the National Monuments Acts, 1930 to 1954.	14/5/80 (Dáil) Private Member's Bill	Defeated 15/10/80.
Health (Mental Services) Bill, 1980.	To repeal all existing legislation governing the treatment of mental illness and replace it with provisions which will have full regard to modern developments in psychiatry.	23/6/80 (Dáil)	Second Stage (Dáil).
Irish Whiskey Bill, 1980.	To define Irish Whiskey and certain descriptions used in relation to Irish Whiskey and to repeal the Irish Whiskey Act, 1950.	23/6/80 (Dáil)	Passed by Dáil Éireann 12/11/80. Passed by both Houses of the Oireachtas 3/12/80.
Dumping at Sea Bill, 1980.	To control dumping in the sea.	25/6/80 (Dáil)	Passed by Dáil Éireann 19/11/80.
Johnstown Castle Agricultural College (Amendment) Bill, 1980.	To amend the Johnstown Castle Agricultural College (Amendment) Act, 1959, so as to permit the sale or transfer of parts of the estate and to provide for other related matters.	15/10/80 (Dáil)	Passed by Dáil Éireann 26/11/80. Passed by both Houses of the Oireachtas 3/12/80.
Courts Bill, 1980.	Gives effect (with some modifications and extensions) to the recommendations in the 20th Interim Report of the Committee on Court Practice and Procedure for increasing the monetary limits of the civil jurisdictions of the District and Circuit Courts and for conferring new jurisdiction in family law matters on these Courts and provides for other related matters. Amends and extends the Courts of Justice Acts 1924 to 1961 and the Courts (Supplemental Provisions) Acts 1961 to 1979.	15/10/80 (Dáil)	Second Stage passed. Committee Stage to be ordered.
Criminal Law (Rape) Bill, 1980.	To amend the law relating to rape and indecent assault on females.	15/10/80 (Dáil)	At Second Stage.
National Institute for Higher Education, Dublin Bill, 1980.	To establish the National Institute for Higher Education, Dublin, on a statutory basis and to provide for other related matters.	15/10/80 (Dáil)	Passed by Dáil Éireann 29/10/80. Passed by both Houses of the Oireachtas 26/11/80.
Thomond College of Education, Limerick Bill, 1980.	To establish the Thomond College of Education, Limerick, on a statutory basis and to provide for other related matters.	15/10/80 (Dáil)	Passed by Dáil Éireann 19/11/80. Passed by both Houses of the Oireachtas 3/12/80.
Building Societies (Amendment) Bill, 1980.	Amends and extends the law relating to Building Societies. Empowers the Minister to pay a subsidy to a Society in respect of interest on loans made by the Society. Amends S. 23 of the Principal Act -- the Building Societies Act, 1976. Repeals S. 12 of the Housing (Miscellaneous Provisions) Act, 1979.	15/10/80 (Dáil)	Passed by Dáil Éireann 26/11/80. Passed by both Houses of the Oireachtas 3/12/80.

Title of Bill	Effect	Introduced	Position as at 19/12/80
Malicious Injuries Bill, 1980.	To amend and consolidate the law relating to compensation for malicious damage to property and to provide for compensation in respect of property unlawfully taken during a riot.	15/10/80 (Dáil)	At Second Stage.
Social Welfare (Consolidation) Bill, 1980.	To consolidate enactments relating to the social welfare services administered by the Department of Social Welfare. Also incorporates provisions relating to the supplementary welfare allowances scheme which is administered by the health boards under the direction and control of the Minister for Social Welfare.	16/10/80 (Dáil)	At Committee Stage.
Casual Trading Bill, 1980.	To provide for the control and regulation of casual trading and to provide for other related matters.	21/10/80 (Dáil)	Passed by Dáil Éireann 16/12/80. Passed by both Houses of the Oireachtas 19/12/80.
Social Welfare (Temporary Provisions) Bill, 1980.	To provide for an increase of pensions, deserted wife's benefit and certain allowances for one week in December 1980.	11/11/80 (Dáil)	Passed by Dáil Éireann 18/11/80. Passed by both Houses of the Oireachtas 19/11/80.
Intoxicating Liquor Bill, 1980.	References to the Dublin Metropolitan District in S. 35 of the Intoxicating Liquor Act, 1962, are references to the district court district styled and known by virtue of the District Court Districts (Dublin) Order, 1945 (S.R.&O., No. 279 of 1945).	11/11/80 (Dáil)	As introduced.
Gas (Amendment) Bill, 1980.	Amends and extends the Gas Act, 1976, to increase the borrowing powers of the Gas Board for capital purposes and to increase the limit of the Ministerial guarantee of borrowings by the Board.	18/11/80 (Dáil)	Passed by Dáil Éireann 2/12/80. Passed by both Houses of the Oireachtas 10/12/80.
Domicile Bill, 1980.	To abolish the dependency of domicile of married women.	19/11/80 (Seanad)	As introduced.
Electoral Amendment (No. 2) Bill, 1980.	To amend the provisions in relation to the unopposed re-election of the Chairman of Dáil Éireann. Amends S. 14 of the Electoral Act, 1963.	26/11/80 (Dáil)	Passed by Dáil Éireann 16/12/80. Passed by both Houses of the Oireachtas 17/12/80.
Agricultural (Emergency Provisions) Bill, 1980.	To make certain financial provisions in order to mitigate the effect on farmers of the decline in agricultural incomes.	27/11/80 (Dáil)	As introduced.
Local Loans Fund (Amendment) Bill, 1980.	To increase the limit on issues from the local loans fund. Amends the Local Loans Funds Acts 1935-78.	28/11/80 (Dáil)	Passed by Dáil Éireann 10/12/80. Passed by both Houses of the Oireachtas 17/12/80.
Irish Shipping Limited (Amendment) Bill, 1980.	To increase the company's capital and to increase the limit of the Ministerial guarantee of moneys borrowed by the company.	2/12/80 (Dáil)	Passed by Dáil Éireann 9/12/80. Passed by both Houses of the Oireachtas 17/12/80.
Industrial Alcohol (Amendment) Bill, 1980.	Provides for an increase in the authorised share capital of Ceimici Teo., and an increase in the value of the shares which the Minister may take up and an increase in the limit of the Ministerial guarantee of borrowing by the company. Amends the Industrial Alcohol Acts 1938 and 1947.	2/12/80 (Dáil)	Passed by Dáil Éireann 9/12/80. Passed by both Houses of the Oireachtas 17/12/80.
Restrictive Practices (Confirmation of Order) (No. 2) Bill, 1980.	To confirm the Restrictive Practices (Motor Spirit) (No. 2) Order, 1980 (S.I. No. 376 of 1980).	12/12/80 (Dáil)	Passed by Dáil Éireann 16/12/80. Passed by both Houses of the Oireachtas 17/12/80.
Appropriation Bill, 1980.	To appropriate the sums granted by the Central Fund (Permanent Provisions) Act, 1965, to the supply services and purposes set out in the schedule annexed to the Bill.	17/12/80 (Dáil)	Passed by Dáil Éireann 17/12/80. Passed by both Houses of the Oireachtas 19/12/80.
Turf Development Bill, 1980.	Provides for the making of development grants by Bord na Móna to develop bogs for the production of turf or turf products for fuel. Amends and extends the Turf Development Acts, 1946-80.	17/12/80 (Dáil)	Order made for Second Stage.
Rates on Agricultural Land (Relief) (No. 2) Bill, 1980.	To give statutory effect to the relief of the second moiety of rates in respect of holdings with land valuations of £40 or more but less than £60 in respect of 1980.	18/12/80 (Dáil)	As introduced.

Correspondence

The Secretary, 2 February 1981
Incorporated Law Society of Ireland

Dear Sir,

Greetings from Trumbull County, Ohio, from myself and my family to all of my colleagues in Ireland.

The purpose of this letter is to enable me to make contact with and subsequently correspond with one or more lawyers of my approximate age group in Ireland so that we may learn more effectively as much about Ireland, Irish society, Irish history, Irish people and the Irish way of life as possible. As you can probably tell by my name, I am descended from Irish people (and nothing but Irish people). I am enclosing a resume to give a little personal background on myself.

If it is possible, I would request that you turn this letter over to one or more of your members who might be in my general age group (I am thirty-six years old) so that I may be able to correspond with one or more of your members and their families. If we are successful in setting up effective correspondence between my family and that of one or more of your members, it could lead to an exchange of visits to our respective countries and homes and other joint activities of mutual interest and benefit.

Also, I am interested in learning about the Irish legal system as it compares to our legal system in the United States and especially in Ohio.

It is also my hope to travel to Ireland within the next two years.

Yours sincerely,

PATRICK J. DONLIN
Attorney at Law
244 Seneca Ave. N.E.
Warren Ohio 44481

The Secretary, 9 February 1981
Incorporated Law Society of Ireland.

Dear Sir,

I am writing to inquire as to whether you can assist me in arranging for a meeting with Irish lawyers on a trip that we are planning to Ireland on or about 28 June 1981.

I am an attorney practising in the state of New Jersey in the United States with a general practice. While the trip to Ireland is primarily a vacation, I anticipate being in Dublin with my wife for a day or two during which time I would look forward to the opportunity of meeting with Irish lawyers who may be specifically involved with the criminal justice system and perhaps even observing one of your Court proceedings.

My practice consists of general practice, including litigation and criminal law, as well as estate and corporate practice.

If you are able to put us in touch with persons who might be of assistance to us, we would appreciate the same.

Thank you for your consideration in this matter.

Very truly yours,

TIMOTHY J. DUNN, II
Attorney at Law
317 Harrington Avenue
Closter, N.J. 07524
U.S.A.

President's Diary of Events

During December 1980 and January 1981 the President represented the Society at the following functions: Mayo Bar Association Dinner, Law Society Staff Dinner, Formal Opening by Lord Mayor of Dublin of Year of Disabled Persons at Mansion House, Law Society Mass for Peace, New Year Lunches for members of the Media, Employment Appeals Tribunal Department Annual Dinner Dance, Symposium on Disabled Persons and the Law, Vin d'Honneur in honour of Australia Day, Dinner of the Benchers in Kings' Inns, Solemn Session of the Bar in Paris.

For Your Diary . . .

4-5 April 1981: Society of Young Solicitors Seminar; *Bringing a case before the Employment Appeals Tribunal* (Speaker: Donal Hamilton, Solicitor); *A Review of the Law of Pollution* (Speaker: Liam Devally, B.L.); *Injunctions — A Practical Approach* (Speaker: John Quirke, B.L.); *Criminal Practice for the Non-Specialist* (Speaker: Garret Sheehan, Solicitor). Metropole Hotel, Cork.

11 April 1981: Continuing Legal Education Seminar: *Wills and Tax Implications* (Lecturers: Robert Johnston, Solicitor; John O'Connor, Solicitor; Colin Chapman, Solicitor). The Old Ground Hotel, Ennis, Co. Clare. 10 a.m. to 5 p.m.

14 April 1981: Dublin Solicitors Bar Association/Leinster Society of Chartered Accountants: *Solicitor's Accounts Regulations.* Blackhall Place, Dublin. 8 p.m. (a revised date for the event noted in last month's "Diary").

28 April 1981: Continuing Legal Education Seminar: *Labour Law* (Lecturers: Brian Gallagher, Solicitor; Ercus Stewart, Barrister-at-Law). Blackhall Place, Dublin. 10 a.m. to 5 p.m.

30 April to 5 May 1981: The Law Society's Annual Conference. Waterville Lake Hotel, Waterville, Co. Kerry (see page 38).

5 May 1981: Continuing Legal Education Seminar: *Registration of Title and Drafting of Deeds* (Lecturers: Maeve Hayes, Solicitor; Colm Price, Solicitor). Blackhall Place, Dublin. 10 a.m. to 5 p.m.

12 May 1981: Dublin Solicitors Bar Association: *Sale of Goods and Supply of Services Act, 1980.* Blackhall Place, Dublin. 8 p.m.

12 May 1981: Continuing Legal Education Seminar: *Family Law* (Lecturers: Alan Shatter, Solicitor; Raymond Downey, Solicitor; Michael V. O'Mahony, Solicitor). Blackhall Place, Dublin. 10 a.m. to 5 p.m.

15 May 1981: Continuing Legal Education Seminar: Landlord and Tenant Legislation (Lecturers: Angela McCann, Solicitor; Michael Roche, Solicitor). Blackhall Place, Dublin. 10 a.m. to 5 p.m.

16 May 1981: Law Society Symposium: *The Builder and the Law.* Blackhall Place, Dublin.

27 June 1981: Symposium: *The Mentally Handicapped and the Law.* Downhill Hotel, Ballina, Co. Mayo.

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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 25th day of March, 1981.

W. T. MORAN (Registrar of Titles)
Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

(1) Registered Owner: John J. McLoughlin; Folio No.: 736; Lands: Carton; Area: 5 acres; County: Longford.

(2) Registered Owner: John and Veronica Finnegan; Folio No.: 4107 F: Lands: Poulawillin; Area: 0.631 acres; County: Clare.

(3) Registered Owner: Liam O'Neill; Folio No.: 6718; Lands: Tawnycorragh; Area: 10a. 1r. 33p.; County: Leitrim.

(4) Registered Owner: Anne Keaveney; Folio No.: 12844; Lands: Corderry (E.D. Belhavel); Area: 6a. 0r. 30p.; County: Leitrim.

(5) Registered Owner: Alice Fitzpatrick; Folio No.: 3368; Lands: Ballinalea; Area: 8a. 2r. 0p.; County: Wicklow.

(6) Registered Owner: William Belder Pratt; Folio No.: 17176; Lands: Drumconnick; Area: 25a. 3r. 24p.; County: Cavan.

(7) Registered Owner: Paul Heanue; Folio No.: 42531; Lands: (1) Ardnagreevagh; (2) Tonadooravaun; (3) Ardnagreevagh (Part); (4) Ardnagreevagh (Part); Area: (1) 9 a. 3r. 29p.; (2) 3a. 0r. 26p.; (3) 6a. 1r. 13p.; (4) 0a. 1r. 15p.; County: Galway.

(8) Registered Owner: Mary Josephine Burke; Folio No.: 20624; Lands: Burrow; Area: 0a. 3r. 2p.; County: Wexford.

(9) Registered Owner: Joseph Gallagher; Folio No.: 13856; Lands: Gortnamucklagh (Part); Area: 0a. 1r. 35½p.; County: Donegal.

(10) Registered Owner: Pope Brothers Ltd.; Folio No.: 2681F; Lands: Longfordpass North; Area: 1 acre; County: Tipperary.

(11) Registered Owner: Christopher Bailey; Folio No.: 26503; Lands: Ballintober; Area: 0a. 0r. 21p.; County: Roscommon.

(12) Registered Owner: Charles Brooks; Folio No.: 2768; Lands: Rathkenny; Area: 3a. 1r. 18p. (8 undivided 9th shares); County: Meath.

(13) Registered Owner: Geoffrey Kenny; Folio No.: 15425; Lands: (1) Cornaveagh (Part); (2) Carrowkeel (Part); (3) Coolraghaun (Part); Area: (1) 2a. 1r. 2p.; (2) 23a. 2r. 26p.; (3) 9a. 2r. 1p.; County: Roscommon.

(14) Registered Owner: John McGarrigle; Folio No.: 43137; Lands: Magheracar (situate on the north side of the road leading East from Bundoran in the Town of Bundoran); Area: 0a. 1r. 7p.; County: Donegal.

(15) Registered Owner: Timothy Mullally; Folio No.: (a) 7322 (Rev.); (b) 20848; Lands: (a) Clooneen; (b) Grange; (c) Grange; (d) Grange; (e) Scart; Area: (a) 4a. 3r. 3p.; (b) 20a. 1r. 0p.; (c) 1a. 2r. 25p.; (d) 2a. 3r. 1p.; (e) 17a. 3r. 20p.; County: Tipperary.

(16) Registered Owner: Bridget Dymphna Fitzgerald; Folio No.: 1810 F; Lands: Killard; Area: 1a. 0r. 13p.; County: Clare.

(17) Registered Owner: Thomas Masterson; Folio No.: 4785; Lands: (1) Rincoolagh; (2) Rinroe; Area: (1) 106a. 2r. 3p.; (2) 2a. 2r. 0p.; County: Longford.

(18) Registered Owner: Ailleen Charlotte Cole; Folio No.: 15S; Lands: (a) Glennaun (Part); (b) Cloghernagnn (Part); (c) Cloghernalanta (Part); (d) Cloghernalanta (Part); (e) Slieveaneena; (f) Knonklough (Part); (g) Finisklin (Part); (h) Laughil; Area: (a) 1183a. 2r. 8p; (b) 2142a. 0r. 4p.; (c) 677a. 2r. 0p.; (d) 677a. 2r. 0p.; (e) 2899a. 0r. 32p.; (f) 1029a. 1r. 8p.; (g) 528a. 2r. 16p.; (h) 0a. 3r. 15p.; County: Galway.

(19) Registered Owner: Aileen Charlotte Cole; Folio No.: 21S; Lands: (a) Knock South; (b) Aille (Part); (c) Laughaun Beg (Part); (d) Cornarona (Part); Area: (a) 616a. 3r. 2p.; (b) 783a. 2r. 4p.; (c) 1758a. 3r. 14p.; (d) 1567a. 0r. 0p.; County: Galway.

(20) Registered Owner: John Sheridan; Folio No.: 14819; Lands: Tooa; Area: 15a. 0r. 35p.; County: Monaghan.

(21) Registered Owner: Peter E. Marron and Mary Patricia Camplisson; Folio No.: 3772; Lands: Kilmurry; Area: 48a. 0r. 9p.; County: Kildare.

(22) Registered Owner: John Joseph Blaney; Folio No.: 12156; Lands: Clowanstown; Area: 0a. 3r. 37p.; County: Meath.

(23) Registered Owner: Andrew O'Sullivan; Folio No.: 20428; Lands: Ballymartin; Area: 42a. 1r. 36p.; County: Cork.

(24) Registered Owner: Moremiles Tyre Services Ltd.; Folio No.: 3109 L; Lands: The Leasehold interest in the property situate at the west of Pouladuff Road in the Parish of St. Finbar's and County Borough of Cork; Area: 0a. 0r. 26p.; County: Cork.

(25) Registered Owner: James Collentine; Folio No.: 1199 F; Lands: Ballinderry; Area: 5a. 3r. 21p.; County: Westmeath.

(26) Registered Owner: Hugh McDaid; Folio No.: 9205; Lands: Aughnish; Area: 56a. 1r. 25p.; County: Donegal.

(27) Registered Owner: John M. Somers; Folio No.: 5020. (This Folio is now closed and the property herein now forms the lands No. 1 in Folio 4759 F Co. Wexford); Lands: Ballyteige; Area: 46.619 acres; County: Wexford.

(28) Registered Owner: The County Council of the County of Louth; Folio No.: 8336; Lands: Callystown; Area: 5a. 3r. 32p.; County: Louth.

(29) Registered Owner: Loyal Goulding, Marian Goulding and John Kevin Coakly; Folio No.: 27228; Lands: Part of Ballinlough in the Barony of Cork; Area: ———; County: Cork.

(30) Registered Owner: John Duffy; Folio No.: 7646; Lands: Tullylougherney; Area: 4a. 0r. 18p.; County: Monaghan.

(31) Registered Owner: Right Reverned Monsignor Patrick O'Neill and Very Reverend Edward Punch; Folio No.: 16632; Lands: Barnakyle; Area: 1a. 0r. 15p. 17¼ sq. yds.; County: Limerick.

(32) Registered Owner: Anna Carey; Folio No.: 2095; Lands: Lackenacreena; Area: 174a. 1r. 10p.; County: Tipperary.

(33) Registered Owner: William Price; Folio No.: 12716; Lands: Part of the lands of Turnings with the cottage thereon situate in the Barony of Naas North; Area: ———; County: Kildare.

(34) Registered Owner: Philip and Gertrude Sweeney; Folio No.: 7488; Lands: Hansfield or Phibblestown; Area: 40a. 2r. 39p.; County: Dublin.

(35) Registered Owner: Ronnie White; Folio No.: 3175; Lands: Curraduff (Parish of Kilrush); Area: 117a. 1r. 22p.; County: Wexford.

(36) Registered Owner: Thomas Coffey; Folio No.: 9985; Lands: Hundredacres; Area: 113a. 1r. 26p.; County: Galway.

(37) Registered Owner: Thomas Meade; Folio No.: 14003; Lands: Cashel; Area: 130a. 3r. 34p.; County: Meath.

(38) Registered Owner: John Lynch; Folio No.: 1022; Lands: Carrignafeela; Area: 44a. 3r. 21p.; County: Kerry.

(39) Registered Owner: Allied Irish Banks Ltd.; Folio No.: 2230F; Lands: A plot of ground situate on the north side of Kenlis Place south of John Street in the town of Kells; Area: ———; County: Meath.

Lost Wills

Thomas S. Mackessey, deceased, late of "Rin Barna", 31 Seafield Avenue, Clontarf, Dublin. Will any person having knowledge of a Will of the above-named deceased, who died on the 20th December 1980 at the Regional Hospital, Limerick, please communicate with Messrs James Binchy & Son, Solicitors, Charleville, Co. Cork.

Thomas Murphy, deceased, late of Booleigh, Athy, Co. Kildare, and formerly of Ballywillian, Enniscorthy, Co. Wexford. Will any person having knowledge of a Will of the above-named who died on the 20th Dec. 1980 please contact Messrs James P. Coghlan & Co., Solicitors, New Ross, Co. Wexford.

Michael O'Brien, deceased, late of 60 Church Road, Celbridge, Co. Kildare. Will any person, having knowledge of the Will of the above-named deceased, who died on the 26th day of December 1980 at 60 Church Road, Celbridge, Co. Kildare, please communicate with Delaney Dawson & Company, Solicitors, Main Street, Celbridge, Co. Kildare.

Employment

U.S. Attorney (Solicitor), presently employed as Attorney-Advisor to the Associate Attorney General to the United States, desires interesting position with Dublin Solicitor's Office. Graduate of the University of Notre Dame School of Law, 1976. Admitted to practice before the Supreme Court of the State of Illinois. Address inquiries to: Jean K. Fitzsimon, 1014 13th St., S.E. Washington, D.C. 20003, U.S.A.

Solicitor required for busy practice in North-West. Experience in Probate, Conveyancing and Litigation essential. Salary negotiable – good prospects for suitable applicant. Apply giving full details of qualifications and experience, which will be treated as strictly confidential. Position will be available shortly. Apply Box No. 0001.

The Profession

Lewis E. Citron & Co. As from 27 February 1981, Lewis E. Citron, M.A., has been practising as Lewis E. Citron & Co., at 4 Waldemar Tce., Dundrum, Dublin 14. Tel. 984624/989064.

Matthews & Co. As from 27 February 1981, Vivian C. Matthews and Brian J. Matthews, B.A., LL.B., have been practising as Matthews & Co. at Shamrock House, Dundrum, Dublin 14. Tel. 985481, 987177, 988309.

Miscellaneous

Typewriting Service. All kinds of typewriting undertaken – legal documentation, etc. Tel. 213761.

Professional Information

Readers will have noticed last month that the section of the *Gazette*, for long entitled "The Register", has been given a new look. Retitled "Professional Information", this page is intended to carry a range of information of relevance to the profession, including information on the profession itself. In future, particulars will be included of new firms, changes of address, the opening or closing of branch offices, new or retiring partners, amalgamations, etc. Members wishing to have information included should send all details to the Executive Editor, at Blackhall Place.

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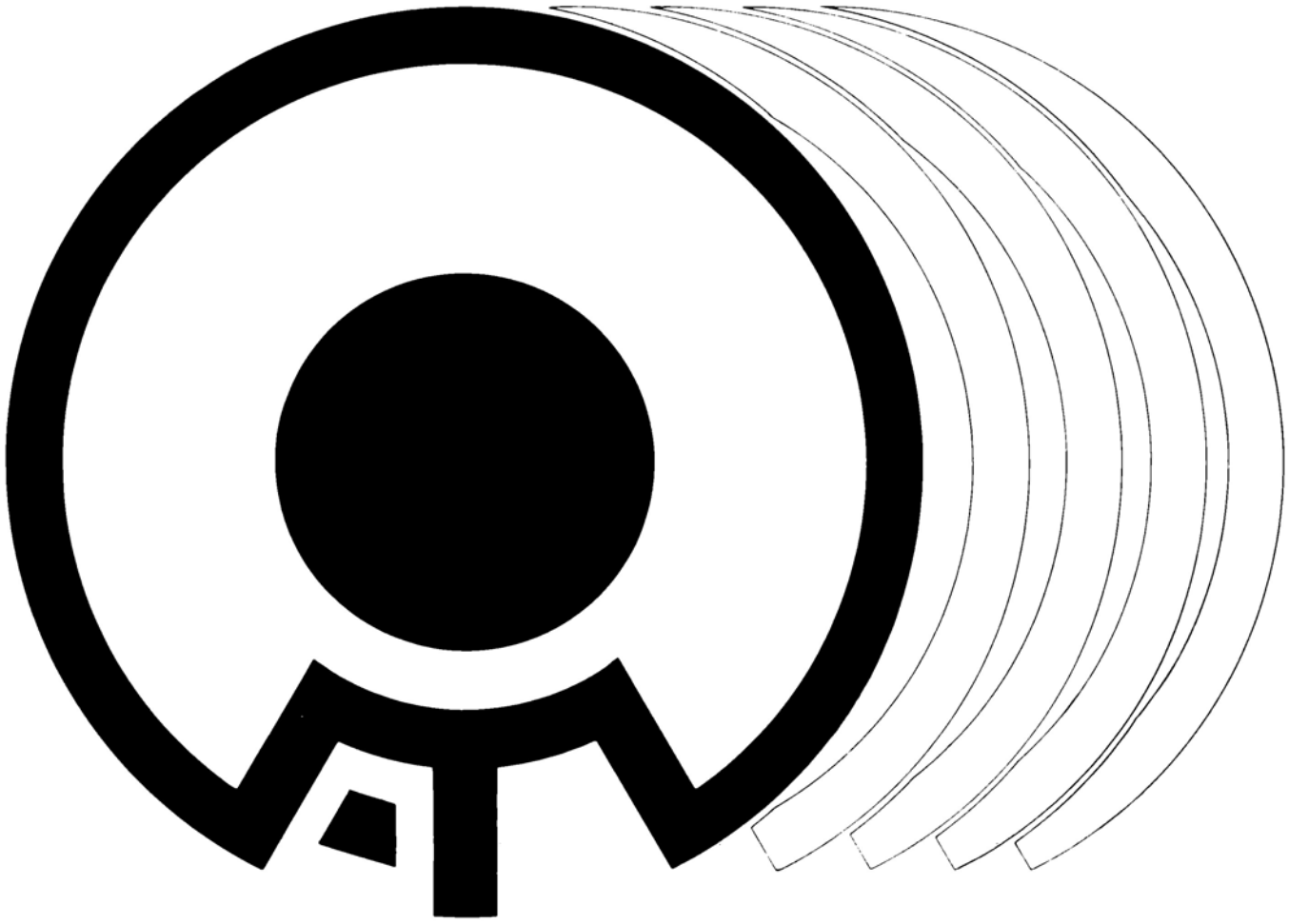
INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 3 April 1981

INCORPORATED LAW SOCIETY OF IRELAND COUNCIL DINNER,
BLACKHALL PLACE, DUBLIN, 26 March, 1981

The President, Mrs. Moya Quinlan pictured with Gerard Collins, T.D., Minister for Justice (centre) and the Hon. Mr. Justice Declan Costello.



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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 3 April 1981

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

THE STARDUST TRIBUNAL

The Stardust holocaust was unarguably so tragic that dispute over the manner of legal representation of the unfortunate victims can only appear to be in the worst possible taste.

The Law Society believes that each victim, or their next of kin, should be entitled to the widest possible choice of legal advice in pursuing any legal claim that might arise out of the disaster. It could not condone any proposals which, however well intentioned, might be seen to limit such choice. The Society is confident that both branches of the legal profession would adhere to their long established traditions of providing legal services, regardless of the financial strength or weakness of the client.

However, so far as representation at the Tribunal of Enquiry is concerned it is clear that there could be no need for each interested party to have separate legal representation. The purpose of the enquiry is primarily to ascertain the *cause* of the disaster and while the transcript of evidence at the Tribunal and the eventual report may well provide information on which civil claims for damages might be founded, it is clearly not necessary that legions of lawyers should participate merely to ensure that the Tribunals' enquiry is comprehensive.

In the aftermath of the Whiddy Tribunal, where criticism has been offered of the large fees earned by leading Counsel (though whether such fees will have seemed large to their multi-national clients must be doubtful) and of the total legal costs involved, it was not unreasonable for the Government to take the view, when establishing the Stardust Tribunal (where unlike the Whiddy Tribunal it was not likely that there would be a preponderance of parties of very substantial financial strength) that efforts should be made to avoid the State being faced with a huge bill for legal fees. In view of the possibility that each victim, or their next of kin, might seek separate representation at the Tribunal and that the State would be asked to pay the bill, some arrangement whereby this might be avoided was clearly sensible. Unfortunately, the method chosen was not the wisest. It smacked too much of paternalism, led to allegations of political favouritism (which, it must be stressed, appear totally unfounded) and led to confrontation with the bereaved. It would have been more appropriate if, instead of offering to the bereaved and injured the services of the Coolock Law Centre and of one firm of solicitors, however competent, the Government had simply indicated it would pay the legal costs of say, two or three

○ *Continued on page 56*

Trust Irish Nationwide to back up everything it says!

THE IRISH PRESS
MONDAY, APRIL 6, 1981

LOANS BODY BACKS LAW MONOPOLY

By JOHN FOLEY

IRISH NATIONWIDE Building Society chief, Michael Fingleton argued today in favour of solicitors retaining their present legal monopoly on conveyancing.

They were the people generally equipped by training and experience to do the work, he told the 12th day of the Restrictive Practices Commission Public Enquiry.

"Solicitors are equipped to do a competent, efficient and accurate job to protect their clients in the complex sale and transfer of property", he told Commission member, Professor Charles McCarthy.

"To allow amateurs to get involved in the business which often involved large sums of money, without the necessary expertese would be dangerous to encourage", Mr. Fingleton added.

And he said he would be very reluctant to see any move to substitute any profession or body for solicitors in carrying out this kind of work.

Mrs. Eithne Flanagan, solicitor for the society, told the Commission that they had no bar against any individual borrower wishing to do his own conveyancing.

WASTE OF TIME

"We will deal with the man in the street if he is capable of doing so but generally we find it a waste of time.

"I can't remembere any case in which an induvidual was capable to do conveyancing himself to the end. It delayed his loan in the long run and eventually he had to get a solicitor's assistance", she said.

She told another Commission member, Mr. Patrick Lyons, that the difficulties arose at the requisition stage because individuals acting for themselves did not understand the words or the terms used in the technical documents.

The inquiry which is also investigating the solicitors' pro-

fessional ban on advertising was ordered in 1977 by the Minister for Industry, Commerce and Tourism, Mr. O'Malley, when he accepted a recommendation from the National Prices Commission that the conveyancing monopoly of solicitors be ended.

Evening Herald
TUESDAY, APRIL 14, 1981

Mortgages extended to cover legal fees

THE Irish Nationwide Building Society has decided to grant up to £1,000 extra loan to all first time house purchasers to cover mortgage and legal fees in addition to the current normal loan requirement, the society announced yesterday. The facility took effect from yesterday.

The Irish Nationwide says that the normal requirements of income will not apply to this additional loan and "neither will any additional security be required." It has stated that it has been conscious of the difficulty experienced by first time purchasers in budgeting for these fees.

To obtain the additional facility it must be applied for at the time of the mortgage application and before the issue of formal loan approval. The present requirement for loans is that the applicant must be an investor of the society for three months and have 10 p.c. of the amount of mortgage invested required with the society for that period. This applies to both new and old houses.

It's one thing to talk about a problem. But it takes a caring company to do something positive about it.

The Irish Nationwide Building Society has led the way in extending mortgages to cover legal fees. Just as it led the way in paying *extra interest* to investors.

Even now the Irish Nationwide Building Society is still the only major society in Ireland to offer up to 9.25% on your investment.

Backed by a full choice of accounts to suit your needs. Plus minimum formalities and the sort of friendly service that has been a watchword of the Society since its formation in 1873.

Contact us today for fullest details of just how much the Irish Nationwide Building Society can do for you and your clients.

And rest assured Irish Nationwide will back up everything it says.

Head Office: No. 1 Lr. O'Connell St., Dublin 1. Tel: (01) 742283 (10 lines)
Branch & District Offices throughout Ireland.
Member of the Irish Building Societies Association
Authorised to accept Trustee Investments.

IRISH NATIONWIDE
BUILDING SOCIETY
Established 1873

The Right of Workers to Choose their Collective Bargaining Agents

by

Gerry Whyte, B.C.L.,
Lecturer in Law, Trinity College, Dublin

One of the most serious problems affecting the Irish trade union movement at present is that of multiplicity of unions. The existence of competition for members among unions can result in inter-union disputes which are both costly in themselves and damaging to the public image of the trade union movement, as, for example, the Ferenka dispute in 1978. Furthermore, many small unions cannot afford to provide those services to their members which one larger union, representing the same workers, would be in a position to provide. And, from the employers' point of view, it is infinitely preferable to be able to agree the terms and conditions of employment of a group of workers with one bargaining agent, than to have to approach a number of different unions in order to attain the same result.

It is not surprising, therefore, that practically all post-Independence legislation dealing with trade union law in Ireland is concerned with the problem of multiplicity of unions.[1]

The Courts have on a number of occasions, been confronted with attempts to tackle this problem and it must be noted that judicial decisions are not a little blameworthy for the present situation.[2] A recent High Court decision, however, gives cause for some hope that a solution to this problem may be available which is acceptable to the Irish judiciary. This is the decision of McWilliam J. in *Abbott and Whelan v ITGWU and the Southern Health Board*.[3]

The central issue in this case was whether Article 40 (6) (1) (iii) of the Constitution, which guarantees freedom for the exercise of the right to form associations, also guarantees workers the right to choose their agents for the purpose of collective bargaining. The significance of this question for the present discussion is clear – if such a right is not protected by the Constitution, then, arguably, the problem of multiplicity of unions could be tackled along the lines adopted in the U.S.A., where a worker is free to associate with a union for political, social or even sentimental reasons, but cannot rely on that union to defend his economic interests if there is another certified or designated union, elected by the majority of the employees in the appropriate collective bargaining unit and respresenting the class of workers to which he belongs, at his workplace.[4] Even if this proposal proves to be unsuited to contemporary Irish industrial relations, it is submitted that a decision refusing to confer on workers a constitutional right to select their own bargaining agent for the purposes of collective bargaining would still alleviate some of the difficulties caused by multiplicity of unions. In the first place, an employer would not be obliged to consult with every union which has members among his workforce, in order to determine the conditions of employment of that workforce. This would greatly simplify the collective bargaining process for that employer. Secondly, conferring sole negotiation rights on specified unions would tend to make such unions more attractive to workers, thereby reducing the number of workers represented by the smaller, less-effective unions.

Prior to the recent decision of McWilliam J. in *Abbot and Whelan v. ITGWU and the Southern Health Board* the legal position in Ireland on this point was not absolutely clear. Part II of the Trade Union Act, 1941, proceeds on the assumption that freedom of association does not include the right to negotiate. Before one can enter into negotiations with employers, a negotiating licence must be obtained – it is the licence, and not Article 40 (6) (1) (iii) therefore, which entitles a union to negotiate on behalf of its members.[5] This approach is also adopted by the Committee of Experts under the European Social Charter. In the second volume of their Conclusions they state that a distinction exists between the right to establish or to join a union, and the right of negotiation and collective action.[6]

In *FIRRW v Great Southern Railway Co. and Others*[7] the plaintiff union sought an order by way of injunction, mandamus, or otherwise, to compel the defendant unions, who represented other workers of the defendant company, to enter into negotiations for a new agreement governing conditions of service of employees, or alternatively, to compel the defendant company to enter into negotiations with the plaintiff union, without the concurrence of the defendant unions. Gavan-Duffy J. granted the plaintiff union a declaration that it was a trade union representative of railway employees within the meaning of S. 55 of the Railways Act, 1924, but held that he was unable to grant it any relief entitling it to enter into negotiations with either the defendant unions or the defendant company.

It would appear from this case, therefore, that unions

do not have a right to enter into negotiations. It must be pointed out, however, that the Constitution was not cited before the learned trial judge and consequently the decision may not be of much weight.[8]

A more recent Supreme Court decision which might appear, *prima facie,* to be relevant in this context is *Becton Dickinson & Co. Ltd. v. Lee.*[9] In that case, the first five defendants had agreed with the plaintiff company that, upon taking up employment with the plaintiff company, they would join either the ITGWU (in the case of the first defendant) or NEETU (in the case of the other four defendants). The sixth defendant was an official of AEF, to which union the first five defendants belonged, and the defendants sought to have AEF represent them in negotiations with the plaintiff company. When the latter refused to negotiate with the AEF the defendants went on strike and picketed the plaintiff's factory. The plaintiff sought an injunction restraining picketing. The injunction was granted by the High Court but the Supreme Court, by a three to two majority,[10] allowed an appeal taken against that decision.

Walsh J., delivering the judgment of the majority, stated that a recognition dispute was a trade dispute within the meaning of S. 5 of the 1906 Act.[11] Here the defendants had agreed to be represented by ITGWU and NEETU. Nevertheless, they were entitled to go on strike, in breach of this clause, because the contract did not contain a "no-strike" clause. For present purposes, however, the most important passage in the judgment deals with the constitutional rights of the defendants.[12] Walsh J. pointed out that the constitutional issues did not fall to be decided, so that his remarks in this area are necessarily *obiter.* Nevertheless they do afford us a valuable guideline as to the nature of freedom of association. The learned judge assumed that the term in the contract with regard to trade union membership was valid and went on to say that it was not necessary to express any opinion upon the question of how far or in what circumstances a person could contract out of a constitutional right. It would appear, however, that the constitutional right in question is not a right to be represented by one's union but rather the right to join the union of one's choice. Walsh J.'s judgment is not clear on this – in fact he does not specify the constitutional right to which he is referring – but Henchy J. does refer to a "worker's constitutionally-guaranteed right to choose whom he shall join in union with,"[13] a right also referred to by counsel for the defendants.[14] It is submitted, therefore, that the Supreme Court recognised in this case that the right of association included the right to join the union of one's choice.[15] That is not authority, however, for the slightly different proposition that the right of association includes a right to be represented by one's chosen association.

Constitutional right to select negotiating unit

This conclusion is supported by the recent High Court decision in *Abbot and Whelan v ITGWU and the Southern Health Board.* The facts of this case were as follows: in October 1979 the plaintiffs, who were employees of the defendant Board, resigned from the ITGWU and joined the ATGWU, being dissatisfied with their former union. The ensuing inter-union dispute was referred to the Disputes Committee of the Irish Congress of Trade Unions, and, on 30 April 1980 this body decided that the ATGWU should not organise or seek to represent members concerned in the dispute and should actively encourage them to resume membership of the ITGWU. Meanwhile a trade dispute had arisen between a member of the ATGWU and the Southern Health Board. The defendant Board refused to negotiate with the ATGWU over this dispute because it feared that the ITGWU would retaliate by taking industrial action. As a result of the Board's refusal to negotiate with the ATGWU, the plaintiffs commenced industrial action and also brought proceedings in the High Court claiming various forms of relief. Chief of these was an order restraining the defendants from interfering with the exercise of the plaintiffs' right to join the trade union of their choice and to be represented by such union in the conduct of negotiations concerning wages and conditions of employment. They also sought declaratory orders to the effect that the defendant union was not entitled to represent the plaintiffs in negotiations with the Southern Health Board concerning wages and conditions of employment and that the Board was not entitled either to negotiate with the defendant union concerning the plaintiffs' terms of employment or to withhold recognition from the ATGWU. They sought a further order restraining the defendant union from negotiating on behalf of the plaintiffs with the Southern Health Board and from interfering with the conduct of negotiations by the ATGWU on behalf of its members. Lastly, they sought damages for conspiracy and infringement of constitutional rights.

The plaintiffs argued that Clause 47 (d) of the Constitution of Congress, which prevents unions from organising workers in a negotiating unit if the majority or a substantial proportion of those workers are already members of another union, was similar to provisions in Part 3 of

the Trade Union Act, 1941, which had been declared to be unconstitutional by the Supreme Court in *NUR v Sullivan*.[16] They further contended that the constitutional right of a citizen under Article 40 (6) (1) (iii) extended to protect the benefits of joining a union and that the principal benefit of so joining was to be able to negotiate with an employer through the expertise and strength of the union.

McWilliam J., expressing a view rejected the view that workers had a constitutional right to select their negotiating unit. In a remark which, on the facts of the case, may be *obiter*, he said, ". . . the suggestion in the pleadings that there is a constitutional right to be represented by a union in the conduct of negotiations with employers has not been pursued and, in my opinion, could not be sustained. There is no duty placed on any employer to negotiate with any particular citizen or body of citizens."[17]

Nor would the citizen's right to dissociate encompass such a right, the learned Judge stating that to hold that the Southern Health Board must agree to negotiate with the ATGWU in order to afford the plaintiffs the full benefits of the exercise of their constitutional right to "join" a union, would be a "great extension of the principle that a citizen must not be coerced into joining an association or union against his will."[18]

The learned judge pointed out that, in the earlier decision of *Murphy v Stewart*,[19] neither the High Court nor the Supreme Court felt it necessary to consider the constitutionality of Clause 47 (d), and under the similar circumstances of the instant case, he did not feel obliged to do so either. He did state, that, ". . . there may be a distinction between placing a statutory embargo upon any person doing or refraining from doing something and a voluntary agreement between parties that they will or will not do something which they are entitled to do or not to do at their discretion."[20]

Freedom of Association under the European Convention

It is respectfully submitted, however, that if a citizen's constitutional rights are infringed the source of infringement is irrelevant; and the Courts will restrain interference with the exercise of such rights in all cases, except where the exercise of one's constitutional rights results in the violation of the constitutional rights of another.[21] McWilliam J. concluded on this point that the refusal of the Board to negotiate with the ATGWU did not amount to coercion on the plaintiffs to forego their constitutional rights.

With regard to the refusal of the ITGWU to consent to the transfer of their former member to the ATGWU, the learned judge held that it followed from the decision in *Murphy v Stewart* that such refusal did not infringe the constitutional rights of the plaintiffs, even where, as in the present case, the transferee union had received the workers into membership. This last factor constituted an essential difference between the instant case and *Murphy v Stewart*, and consequently the learned judge felt constrained to consider the relevance of the absence of the facility to negotiate on the plaintiff's position. He concluded, however, that ATGWU had as little right as the ITGWU to negotiate with the Board and that there was nothing unconstitutional in one union endeavouring to obtain better terms for its members than those obtained by any other union, whether by obtaining special negotiation rights or otherwise. Consequently the plaintiffs' claim failed.[22]

It would appear, therefore, that Article 40 (6) (1) (iii) does not guarantee workers the right to be represented by the union of their choice. Before leaving this point, however, one must bear in mind Ireland's obligations incurred under the European Convention on Human Rights. From the decisions of the Court of Human Rights in *National Belgian Police Union v Belgium*,[23] *Swedish Engine Drivers Union v Sweden*[24] and *Schimdt and Dahlstrom v Sweden*,[25] it is clear that freedom of association under the Convention includes the right to have one's union make representations on one's behalf, though not the right to compel employers to negotiate with that union. Therefore, any provision in Irish law which would entitle a citizen to join a union but then deny that union the right to represent him, would appear to be in violation of the European Convention.

However, the right to represent one's members cannot be regarded as a blanket right to represent them in all situations – it may be that a distinction could be drawn between representing members in relation to individual grievances, which would be protected by Article 11 of the European Convention, and representing them in negotiations on terms and conditions of employment which might not be so protected, but rather be subject to an agreement between employers and unions similar to that found in the case of *Becton Dickinson & Co. Ltd. v Lee*. Such a distinction has been recognised by the Labour Court in a number of recommendations.[26]

In conclusion, it is submitted that there is no authority supporting the proposition that the constitutional right of freedom of association includes the right to select one's negotiating unit. Therefore it would appear to be open to employers and trade unions to agree that the employer would only negotiate with certain designated unions on terms and conditions of employment. Individual workers do have the right to join the union of their choice and may even insist that such union represent them in relation to their own individual grievances but a case can certainly be made for denying workers the right to insist on their chosen union participating in collective agreements with management, if to do so would violate a previous agreement between unions and management designating specific unions as the sole negotiating units for that purpose. This would appear to leave the way open for both sides of industry to compel workers to accept specified unions as their representatives for collective bargaining purposes and, to the extent that this goes some of the way towards dealing with the problem of multiplicity of unions, then the decision in *Aboot and Whelan v ITGWU and the Southern Health Board* is to be welcomed.

FOOTNOTES

1. The exception being the Trade Union Act, 1935, which amends S. 7 of the Trade Unions Act, 1871, in order to permit unions to own property in excess of one acre of land.

2. See "Trade Unions and the Future" by Professor M. P. Fogarty, in *Trade Unions and Change in Irish Society* (1980), where, at p. 143 thereof, the author refers to the Supreme Court decision in *NUR v Sullivan* [1947] I.R. 77, as a "disaster where after effects are only too visible now".

3. Unreported, High Court, 2 December 1980.

4. See S. 9 (a) of the National Labour Relations Act, 1935, as amended by the Labour Management Relations Act, 1947.

5. The distinction between the right to associate and the right to negotiate can be seen quite clearly in S. 34 (5) of the 1941 Act, which provided that workmen were always free to join a trade union which did not carry on negotiations for fixing wages or other conditions of employment. The section is no longer in force because of the Supreme Court decision in *NUR v Sullivan* [1947] I.R. 77, which provided that Part 3 of the 1941 Act was unconstitutional, because it denied workmen their freedom of association. (It was not argued, however, that S. 34 (5) was, *per se*, unconstitutional.)

6. Conclusions II, at p. 22. For a similar view, see the speech of Lord Scarman in *UKAPE v ACAS* [1980] 1 All E.R. 612. at p. 622.

7. [1942] Ir. Jur. Rep. 33, cited recently in *CIE v Darby*, High Court, unreported, 16 January 1980.

8. J. P. Casey, in an article in the 1972 *Irish Jurist* (n.s.) at p. 1, "Reform of Collective Bargaining Law", concludes, at pp. 7-8 thereof, that Article 40 (6) (1) (ii) would not give rise to a right to bargain collectively, because of the practical difficulties involved, though he did consider that the Oireachtas could create a statutory duty to negotiate. It must be pointed out, however, that this article was written prior to the Supreme Court decision in *Becton Dickinson & Co. Ltd. v Lee* [1973] I.R. 1. though cf. Labour Court Recommendations Nos. 381 and 2556, which appear to establish that if a union represents a sizeable proportion of the workforce, then the employer has a moral, if not indeed a legal duty, to negotiate with that union on terms and conditions of employment. Cf. also Labour Court Recommendations Nos. 5070 and 5338, where the Court recommended that the relevant unions be recognised by the employers for negotiating purposes, even though in the latter case the union represented only 7% of the workforce.

9. [1973] I.R. 1. See also de Blaghd, "Trade Union Law – 1973 Style." [1974] 108 ILTSJ 71.

10. Ó Dálaigh C.J. and Butler J. concurred with the judgement of Walsh J.; Henchy and Fitzgerald JJ. dissented.

11. Ibid., at pp. 24-25.

12. Ibid., at pp. 40-41.

13. Ibid., at p. 48. Henchy J. was of opinion that the picketing in this case was intended to hinder the company in carrying out its part of the agreement with NEETU and ITGWU and therefore, because it was not merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working, it lost the protection of the 1906 Act. For some of the legal difficulties with this view, see de Blaghd, op. cit., at pp. 109-109.

14. [1973] I.R. 1 at p. 14.

15. A right also protected under the European Convention on Human Rights. See the Commission Report on *James and Others v U.K.*, adopted on 14 December 1979.

16. [1947] I.R. 77.

17. Unreported judgement, p. 7.

18. Ibid., pp. 10-11.

19. [1973] I.R. 97.

20. Unreported judgement, p. 14.

21. See *Crowley v Ireland*, unreported, High Court, 21 July 1978.

22. Quaere whether the Irish Transport can now represent the plaintiffs in collective bargaining with the Southern Health Board, even though the plaintiffs have terminated any agency relationship between themselves and the ITGWU. Cf. *Singh v BSC* [1974] I.R.L.R. 131.

23. Judgement of the Court delivered on 27 October 1975.

24. Judgement of the Court delibered on 6 February 1976.

25. Judgement of the Court delivered on 6 February 1976.

26. See Recommendations Nos. 381, 5070, 5338, 5962.

Comment . . .

○ *Continued from page 51*

firms whom a majority of the bereaved and injured might choose to appoint. It is the pre-emption of this right to choose which has given rise to some justified criticism.

What is not justified is the criticism offered by at least one public representative that a firm chosen by the Government to represent the bereaved would be influenced in the conduct of the case by the fact that they were being paid by the State. Such an allegation contrasts with the usual criticism that lawyers defending persons on criminal legal aid, strive too hard to defeat the prosecution. We have no doubt that following in the long tradition of independence of the legal profession, any lawyers appearing on behalf of the bereaved and injured, will work to the limits of their ability to assist the Tribunal in its work, regardless of their source of payment.

CONVEYANCING NOTE

Family Home Protection Act

No piece of legislation in recent years has caused as much difficulty for the profession as the Family Home Protection Act, 1976. The difficulties presented by the drafting of the Act for the Conveyancers have been considerable and many practitioners have found themselves in considerable difficulties in adducing the necessary evidence to satisfy their colleagues that a particular transaction may not be void.

The Conveyancing team running the Conveyancing Module in the Professional Course in the Society's Law School commissioned one of their number to prepare a "hand out" for the students which would, in addition to providing an explanation of the various aspects of the Act which impinge on conveyancing transactions, include some precedent declaration which might be considered appropriate.

The "hand out" as prepared by Peter Polden and Rory O'Donnell seems to the Conveyancing Committee to be of such value that it should be circulated to the Profession and a copy of it is enclosed herewith. Practitioners will note that the "hand out" has been prepared so that it may readily be bound in the Law Society's Handbook.

The Conveyancing Committee felt that while the style of the "hand out" was not perhaps as formal as might be expected in a document emanating from the Society and distributed to its members, the content was of such a high quality that any amendments designed to formalise the document would probably only result in a diminution of its value.

E.E.C.

What Constitutes Unfair Competition?

by Gregg Myles, Solicitor

Both North and South, businesses are becoming ever more aware of the provisions of competition law by virtue of recent national legislation.

In the South, the legislation is to be found in the Restrictive Practices Act, 1972, and the Mergers, Take-Overs and Monopolies (Control) Act, 1978.

In the North, the legislation is to be found in the Fair Trading Act, 1973, the Resale Prices Act, 1976, and Restrictive Trade Practices Acts 1976 and 1977 and the Competition Act, 1980.

In addition to this national competition law, EEC law makes substantial provision in relation to unfair competition.

The EEC law is to be applied together with the relevant national legislation above, but where a conflict occurs between EEC and national law, EEC law prevails.

EEC Competition Law

EEC Competition Law is contained in Articles 85 to 94 of the EEC Treaty and in various regulations, decisions and notices and also in cases decided by the EEC's court – the Court of Justice of the European Communities. This falls into three areas of unfair competition – restrictive trade practices (Article 85), fair trading (Article 86) and the regulation of State aid (Articles 92 to 94). This article considers the implications of EEC restrictive trade practice law for the business person.

EEC Restrictive Trade Practice Law

Article 85 outlaws agreements which affect trade between the nine member states of the EEC and which have as their object or effect the restriction of competition within the EEC.

This embraces agreements by sole traders, partnerships, private companies and public companies.

Agreements covered range from legally binding contracts through to informal co-ordination between traders.

Both the supplier/supplier and supplier/person supplied relationships are covered.

Where the agreement is shown to be restrictive there is often little difficulty in establishing that the agreement affects trade between member states.

Thus, an agreement between two Northern or between two Southern suppliers might have the effect of isolating the Northern or Southern market. *Since this would impede the penetration of that market by outside competitors, it could constitute a restrictive trade practice.*

Prohibited Agreements

In a non-exhaustive list, Article 85 (1) sets out five classes of agreements which are prohibited where the above conditions are satisfied – those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts.

Thus an agreement between persons in the North or South restricting imports to or exports from another member state comes within (a).

The most obvious example of an illegal agreement under (b) and (c) is one designed to isolate the Northern or Southern market.

Such agreements as those discriminating against certain customers by giving them, for example, less favourable terms as to prices, discount or credit would come within (d).

Under (e), such agreements are prohibited as those requiring the purchaser to buy all or part of his needs of a second (tied) product from a supplier of a first (tying) product.

Agreements of minor importance escape the prohibition in Article 85 even where they otherwise come squarely within the terms of the Article. An agreement may be said to be of minor importance where the relevant products do not represent more than 5% of the total market for such products and the aggregate annual turnover of the participating undertakings does not exceed a certain figure.

Exemption

The EEC Commission department responsible for competition – Directorate-General IV – can grant or deny exemptions to the application of Article 85 to an agreement.

For exemption to be granted, the benefits from the agreement must outweigh the disadvantages from the restrictions on competition.

Four criteria must be satisfied: (1) the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress; (2) it must allow consumers a fair share of the resulting benefit; (3) it must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (4) it must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Exemption from the application of Article 85 may be either on an individual or block basis.

Where a block exemption situation exists, the undertaking need not apply for exemption from Article 85 but merely obtains this as of right by virtue of an EEC regulation.

To date certain exclusive distributorship agreements and certain specialisation agreements have been given block exemption. Again certain exclusive agency agreements fall outside Article 85.

What can a business person do to ensure that an agreement which he suspects to be illegal, is valid under competition law? He should of course, consult his lawyer. Directorate-General IV can certify that an agreement does not come within Article 85.

This is called negative clearance.

Again, an agreement which does come within Article 85, and which does not have the benefit of a block exemption, may obtain a declaration by the Commission that Article 85 is inapplicable.

This is called individual exemption.

The same procedure applies to negative clearance and to notification to obtain an individual exemption. An application is made to Directorate-General IV on Form A/B which is obtainable either from D-G IV itself or from an EEC Commission information office.

D-G IV has strong investigatory powers to discover whether restrictive agreements exist. Anyone having a legitimate interest may complain to D-G IV about the suspected existence of such an agreement. By virtue of a recent court case, D-G IV has strong powers of interim relief to avoid a situation likely to cause serious and irreparable damage to a complainant.

An oral hearing may be held into a suspected infringement of Article 85.

Where the D-G intends to grant a negative clearance or an exemption, interested third parties may submit observations.

The final decision is published. This may require the termination of an infringement of Article 85.

A periodic penalty payment may be imposed by D-G IV in order to enforce such a termination. In addition, D-G IV can impose fines for intentional or negligent infringement of Article 85. This fine may be anything up to 10% of the turnover in the preceding business year of the participating undertakings.

A recent record fine of UK £4,414,000 was imposed.

A further form of fines – procedural fines – exists.

The Court can review fines or periodic penalty payments.

This article first appeared in 'Trade and Industry in Ireland' and is reprinted here with kind permission of the publishers.

CENTRAL CRIMINAL COURT LISTINGS

Practice memorandum from the President of the High Court on the procedure for the listing of cases before the Central Criminal Court.

In a practice memorandum recently issued by the President of the High Court, Mr. Justice Finlay, there was set out a new system for listing of cases before the Central Criminal Court. The system was put into practice initialiy on an experimental basis until 16th March 1981 but will now continue until further notice. The full text of the President's practice memorandum is as follows:

Central Criminal Court Listing

In an attempt to maintain a balance in the listing of cases for trial by the Central Criminal Court between the absolute necessity that the Court should, if possible, be occupied on each day for the disposal of cases which arises from the state of the arrears and the desirability of reducing the inconvenience to witnesses, practitioners and the accused from multiple listing and the consequent adjournment of cases at the last minute, I am introducing a new method of listing on an experimental basis between now and the week commencing the 16th of March.

The system will be as follows:

1. Not more than one case per Judge will be listed on each day and where predictably lengthy cases are listed before any particular Judge a listing may not occur for some days afterwards.
2. In addition however there will be a stand-by list of shorter cases listed for each week.
3. On Thursday morning of each week at 10.30 there will be a call-over of the succeeding week's work for the Central Criminal Court consisting of the listed cases and the stand-by cases.
4. The Solicitor or Counsel acting on behalf of the Director of Public Prosecutions and the Solicitor or Counsel acting on behalf of the accused in each case, that is to say, both the listed cases and the stand-by cases must be present at the calling-over of that list and be in a position to assure the Court that any case contained in either of those two lists is ready to go on the following week.
5. Any accused person on bail must attend at 10.30 on the Thursday before the week in which his case is either listed or contained in a stand-by list and failure to attend on that occasion will be regarded by the Court as a breach of his bail bond and a bench warrant will be issued unless his failure is explained or excused.
6. It follows from this that it is one of the obligations of the Solicitor retained by an accused person who is on bail specifically to warn his client of the necessity from time to time to attend not only on the date fixed for the trial but at the call-over of the list on a Thursday as well.

INCOME TAX

Duty of Solicitors to account for interest paid to clients

Section 176 of the Income Tax Act 1967 imposes on (inter alia) Solicitors an obligation, whenever required to do so by any general or particular notice, to prepare and deliver within whatever time limit may be stated a list containing particulars of income, profits or gains arising from any of the sources mentioned in the Act, together with the name and address of every person to whom the same shall belong.

Section 500 of the Act prescribes the penalties for failure to deliver returns.

In conjunction with the Revenue Commissioners, the Society agreed upon a simplified procedure for the delivery to the Revenue of the minimum required information and the appropriate forms, known as Form 8.2 (R) Solicitor, were made available, bound into large flat books for ease of use. In a letter to the Society dated 2nd December 1977 the Revenue Commissioners advised the Society that it was their intention to consider the institution of proceedings against solicitors who failed to carry out the agreed procedure. The Revenue Commissioners have again raised this matter and have pointed to the continuing failure of some firms of Solicitors to comply with statutory notices issued to them under Section 176 of the Act.

It is now pointed out that in the Dublin area alone, there are 122 cases in which statutory notices remain uncomplied with for 1975/76 or for any subsequent year.

The Revenue Commissioners have stated that it is proposed to take action in a number of cases to recover the penalties provided by Section 500 of the Act.

CERTIFICATES OF VALUATION

The Society has communicated to the Land Registry complaints received from Bar Associations over the increase in fees charged by local authorities for Certificates of Valuation from 2½p to £2.00.

The Land Registry has informed the Society that, under the Land Registration Fees Order, 1980, fees which were formerly assessed on the valuation of property became flat fees, Certificates of Valuation are no longer required in connection with the assessment of Land Regiatry fees.

The Society has also written to the Revenue Commissioners querying the continued need for Certificates of Valuation and awaits a reply.

Students attending the 1st Advanced Course held in the Society's Law School, Spring 1981

German Public Companies

The Rights of Shareholders

by Nicola K. Barr, B.A. (Mod.)

The shareholder is a necessary and integral part of the German "public company" (Aktiengesellschaft). The Aktiengesellschaft is comparable with the Irish public company. To found an Aktiengesellschaft, a minimum of five shareholders is necessary. When the shareholders come together and form the General Meeting (Hauptversammlung) they form, in theory, the highest organ of the company. Although the shareholder is a necessary part of a company, he possesses only those rights which are expressly given him by law or by the Articles of Association (Satzung). It is interesting to note, in contrast to the Irish General Meeting, the German General Meeting may only decide on those subjects expressly permitted by statute or by the Articles of Association. Otherwise, the Board of Management (Vorstand) is competent to take all decisions affecting the company. This is exactly the reverse of the common law position. At common law, the Board of Directors may only act where expressly allowed by the Articles of Association, otherwise the General Meeting is competent to take decisions. However, in practice, the Board of Directors takes most managerial decisions (Table A, Article 80, Companies Act, 1963). In Germany, questions regarding management may only be discussed and decided when the Board of Management has requested the General Meeting to decide such questions. The Board of Management is bound by this decision. In Ireland, Table A, Article 80, Companies Act 1963, provides that the General Meeting may give the directors directions with regard to management, on any issue, at its own instigation.

The majority of German public companies issue 'bearer shares', which are rarely found in Britain or Ireland. The Irish practice is that shares are registered in a person's name and only that person, or his appointed proxy, may exercise the right attaching to the share.

The rights of a shareholder in a German public company may be divided into administrative and monetary rights. The administrative rights include the right to attend and speak at a General Meeting, the right to information, or the right to contest a decision not in accordance with the procedure laid down either by statute or in the Articles of Association. With regard to individual monetary rights, the members have the right to vote in the dispensing of the year's profits (the amount of which is calculated by the Board of Management and approved by the Board of Supervisors). The General Meeting only acts in determining the profits if the Supervisors and Management cannot agree.

With regard to collective rights, the General Meeting, as a body, elects the shareholders' representatives on the Board of Supervisors (Aufsichtsrat), which in turn elects the Board of Management, which body is the executive organ of the company and is responsible for the company's activities. The General Meeting in Germany, in contrast to Ireland, does not have the power to dismiss a member of the Board of Management. It has the right to approve or disapprove of the way in which the Board of Management or the Board of Supervisors are running the company. This approval does not prejudice the General Meeting, or individual shareholder, should it or he subsequently wish to sue the company or an individual member of the Board of Management or of the Board of Supervisors. The General Meeting, as a body, decides on how the profits, as calculated by the Board of Management, are to be applied, either as reserves or as a dividend. It appoints the auditors of the company and has power to alter the Articles of Association. All the rights conferred on the shareholders acting in the General Meeting are set out in the Aktiengesetz (Company Law Statute) or in the Articles of Association.

Individual Rights of Shareholders

With regard to individual rights, possibly the most important is the right to participate in the General Meeting. This basic right may be regulated by the Articles. Instead of our registration system, a shareholder in Germany must identify himself and effectively become known to the company a certain period before the General Meeting. The basic right may not be taken away by the Articles or by any act of the company. The individual right to participate in the company may not be exercised elsewhere other than in the General Meeting. The shareholder may ask the Board of Management in general, a question, but may not seek out one member alone – nor may he direct a question to the Board of Supervisors. The Board of Management has a duty to answer these questions, unless it would be against the interest of the company to do so. Should there be a dispute as to whether it is in the company's interests, the courts may decide. It is in this way that individual minority shareholders may create difficulties for big concerns. Under German company law a share does not necessarily carry the right to vote; such a right may or may not be attached to a share. A share may only carry one vote. The exercise of this vote, as in Ireland, need not be personal – it may be exercised by proxy. In contrast to the common practice in Ireland, voting is usually by poll. The right to contest a decision of the General Meeting as invalid attaches to each member individually.

When a member of the Board of Management or Supervisors, deliberately, exercises his influence to the detriment of the company or its shareholders, the company is liable in damages to the shareholder in respect of any loss suffered by the company which may have affected him as a shareholder. The member of Management or Supervisors, who was responsible for the action,

is in breach of his duty to the company and is himself liable to the company in damages. A member has a further right of action against the majority of shareholders, who in a General Meeting used their vote for their own benefit or for the benefit of a third party, to the company's detriment or to the detriment of the other shareholders. These actions may, to an extent, be compared with the action under Section 205 of the Companies Act, 1963.

With regard to minority shareholders, a minority, (holding 10% of the capital of the company or 2m. DM in shares), may request that the conduct of an individual member of the Board of Supervisors or Management be voted on separately, as opposed to the Boards being approved of as a body. A similar minority representation may request a vote on the appointment of a new auditor. The same minority may request the Board of Management to call a General Meeting. These last two are similar to Irish minority rights.

Finally, and perhaps most importantly for large concerns in Germany, there is no corresponding provision in German company law to Section 204 of the Companies Act, 1963. Under this Section a company which owns 80% of the shares of another company can force the minority shareholders out of the company, by offering them a reasonable economic value for their shares. This power is also known and extensively used in the U.K. There is no such provision in German law; such a provision would, undoubtedly, be welcomed by large German concerns who control companies, but who would like to be able to remove troublesome minority shareholders.

COPIES WILLS AND GRANTS

It is, perhaps, not sufficiently widely known that copies of Wills and Grants can be bespoken from the Probate Office **at the same time as papers are lodged for the relevant Grant.** If copies are bespoken in this way, they will be available very shortly after the issue of the grant itself, thus enabling the practitioner to proceed at once with the rapid circulation of copies of the Grant for noting, or with an application for a Grant in another country.

It must be noted, however, that this facility is only available if the copies are bespoken **when lodging the papers;** if the requisition is not lodged with the papers, it will not be processed until **after** the Grant has issued.

It should, perhaps, also be noted that the charge for an **official** copy of a Grant, **if bespoken at the time of the application for the Grant,** is only 15 pence and that such a copy is, under Section 43(2) of the Succession Act 1965, sufficient evidence of the Grant for any transaction in Ireland.

The charge for an **official** copy of the Grant, **if bespoken at any other time,** is 25 pence. The charge for an official copy of a Will, whenever bespoken, is 25 pence.

LAW SEARCHERS' PROFESSIONAL INDEMNITY INSURANCE

The inflationary increase during the past few years in the sheer volume of money involved in conveyancing transactions led the Dublin Solicitors' Bar Association to take upon itself an enquiry into the position of the professional Law Searchers upon whom the majority of the solicitors' profession so heavily relies. The Association was concerned to find that, although some Law Searchers had taken out cover up to £100,000 for any one claim, the majority had no cover whatever.

The Association then considered the desirable minimum cover which Law Searchers should maintain and decided, in February 1978, that this should be £250,000 for any one claim.

It is inevitably difficult to introduce a completely new concept into a well-established field of practice and, not unnaturally, the Association encountered some opposition to its proposal. It is only fair to record that all Law Searchers were agreed that professional indemnity cover should be carried and discussion continued merely as to quantum.

The Association is very pleased to be able to report that it believes that all the major Law Searchers practicing in the Dublin area have taken out professional indennity cover for £250,000 and there is set out below a list of Law Searchers who have notified the Association that they are so covered. Some of the information collected by the Association is, by now, more than one year old, so there is always a theoretical possibility that the cover of some one or more Law Searchers may have lapsed or been discontinued. The Association has no reason to doubt the bona fides of any Law Searcher but suggests that from time to time practitioners might, for the record, seek an assurance from their customary Law Searchers that their professional indemnity cover is still in force.

With the passage of time, the value of cover as high as £250,000 will have been eroded by inflation and the Association will in due course take up with the Law Searchers the question of increased cover.

Law Searchers who have notified the Dublin Solicitors' Bar Association that they have arranged Professional Indemnity Cover for not less than £250,000:–

Brady & Company.
Charles Brennan & Son.
Sean Cuddihy (with whom Eamon Quinlan is practising).
Ellis and Ellis.
Gardiner Mooney & Company.
Inter Company Comparisons Ltd.
O'Halloran Menton.
Eamon Quinlan (with Sean Cuddihy).
Mrs. Ethel Roche.
John M. Tighe & Son.

SOLICITORS' BENEVOLENT ASSOCIATION

The Annual General Meeting of the Solicitors' Benevolent Association took place by kind permission at the Law Society, Blackhall Place, on 26th March 1981 and in the course of proposing the adoption of the Report and Receipts and Expenditure Accounts for the year ended 30th November 1980, the Chairman, Mr. Eunan McCarron welcomed solicitors from Northern Ireland who were present. He thanked the Incorporated Law Society for their co-operation in collecting subscriptions for the Association but he pointed out that while some years ago almost all the Bar Associations in Ireland were subscribers, the Report disclosed now that subscriptions had only been received from four Associations namely – The County Tipperary/Offaly Bar Association, the Dublin Solicitors' Bar Association, the Society of Young Solicitors and the Belfast Solicitors Association. He drew attention to the fact that over £2,000.00 had been received as proceeds of a Soiree held in May of last year and he again thanked the ladies committee for their wonderful efforts in organising that function.

The Chairman stated that the financial sub-committee had made quite substantial alterations in the portfolio which would have the effect of increasing dividend income as income was more important than ever when one appreciated that the average annual grant exceeded £500.00.

The adoption of the Report and the Accounts was seconded by Mr. W. Brendan Allen, Senior Vice President of the Law Society.

Receipts and Payments Account for the Year Ended 30th November 1980

		Dr.	Cr.
–	To Cash on Hands (30/11/79)		
8,972	Annual Subscriptions	7,422	
122	Life Subscriptions	160	
1,325	Donations and Legacies	4,656	
–	Rents Received		
2,424	Refund of Income Tax	2,699	
10,010	Dividends	10,610	
–	Proceeds of May Soiree	2,061	
3,171	Bank Overdraft (30/11/80)	1,104	
2,500	By Bank Overdraft (30/11/79)		3,171
19,898	Grants		21,305
2,400	Annuities		2,500
195	Bank Interest and Charges		352
450	Secretary's Salary		800
80	Audit Fee		150
345	Printing, Stationery and Postage		181
124	Income Tax Recovery Fees		171
36	Ground Rent		72
–	Cash on Hands (30/11/80)		10
		£28,712	£28,712

Having examined the books and vouchers of the Solicitors Benevolent Association, I have prepared therefrom the foregoing Receipts and Expenditure Account, which I certify to be correct.

28 South Frederick St.,
Dublin 2.

Joseph A. Taaffe,
Chartered Accountant

BOOK REVIEWS

Cases and Materials on the Irish Constitution: by James O'Reilly and Mary Redmond, the Incorporated Law Society of Ireland, 1980. lv, 712p. (with Index) £27.50 incl. VAT.

It is less than two years since this reviewer, in search of a systematic legal commentary on the Constitution had resort to a series of articles written by Donal Barrington, now Mr. Justice Barrington, in the *Irish Monthly*, and published in 1952. As late as last session, the Law Society's syllabus on constitutional law advised students to consult Kelly's *Fundamental Rights*, the last edition of which was in 1967 and has long been out of print.

The enormity of the gap filled in this last year with the appearance first of Professor John Kelly's *The Irish Constitution* and now of O'Reilly and Redmond *Cases and Materials on the Irish Constitution*, is clear. What better recommendation could publications expect, than, as has occurred with these books, that they are pressed into immediate service in every constitutional law course in the country and can anticipate a lively interest from the practitioner and the general market as well?

Both books are however expensive and it is unlikely that, aside from the specialists, other readers will buy both. The differences between them are therefore important. The texts offer a choice; *Kelly* (reviewed in the *Gazette* vol. 74 no. 5 June 1980) is an encyclopaedic annotation of and commentary on the Constitution through the cases; *O'Reilly and Redmond* consists of a set of selected materials with added comment which seeks to give the reader direct access to the primary sources of constitutional law and practice. In reading *Kelly*, the serious student would need the law library at hand to consult the references; in *O'Reilly and Redmond* the library is built in.

The casebook is an American invention adapted to the emphasis there on students reading primary sources and making up their own minds rather than reproducing the comments of someone else on the law. In Ireland even if the lecture is still the primary vehicle of teaching, this book will prove an excellent one to teach from and to learn from. It will have the added value of relieving pressures on library resources. Students can be asked to read a judgment in the casebook, thus avoiding the familiar nightmare of librarians – when fifty or more of them invade the library in search of the 1965 *Irish Reports*. But there is more to a good casebook – and this is an excellent one, than convenience. It calls for a deep understanding of the subject, considerable skills in selecting, editing and arranging the sources cited and perhaps above all, for a linking commentary which is both economical and unobtrusive yet directs the reader to the significance of the range of materials reproduced.

The Constitution itself is, as might be expected the major document reproduced in the book. That takes up 100 pages. Might it have made the book less expensive if it had been omitted and the user asked to find it in another source? The answer obviously is yes, if we had a good edition to *Bunreacht na hEireann*. The Stationery Office is still selling an edition which does not incorporate any constitutional amendment in the text but merely records them on a page slipped into each volume. At 25p it may be the last book bargain left but it is time for a new edition and the text reproduced in this book with amendments italicised and deletions footnoted could well act as a model. Other sources reproduced in the book include the leading constitutional decisions and relevant provisions from the statutes. There are also extracts from debates in the Oireachtas, from the Report of the Committee on the Constitution, and from various other reports and inquiries down the years. The value of this work becomes clear when it is remembered for all practical purposes most of these sources would be otherwise inaccessible to the majority of readers.

The selection of cases made for this very large book is so comprehensive than one is hard put to find any major decision some part of which is not reproduced from the law reports. As Mr. Justice Walsh points out in an introduction which is predictably thought provoking, the texts of the cases are reproduced in sufficient length to allow serious study of constitutional reasoning. One quarrel I would have with the authors concerns the decision to cut up some of the judgments cited and fit excerpts here and there in the text as it suited their themes. From the experience of using the book over a couple of months, I think it would have been a better decision to reproduce all of the text of a case in one place with references back to it at other portions of the text. On coverage my only quibble would be that the chapter on Art. 29 and International Relations gives too much space to the extradition controversy and too little to other matters. It is for example surprising, to put at its mildest, that the EEC amendment (Art. 29 4(3)) gets no mention. The significance of this amendment might at least have drawn a comment when discussing the constitutional provisions which state that the Oireachtas has exclusive legislative authority in the state, or that the decisions of the Supreme Court are final for all purposes.

The commentary otherwise is uniformally superb. It is most clearly written and never overshadows the material reproduced – a standard pitfall in this type of book. It achieves the purpose of integrating the enormous range of materials used while also conveying numerous interesting suggestions on interpretation and possible reform of the Constitution.

A word about the publishers. The publishers of books are usually taken for granted. They should not be in Ireland. There are several reasons why we have had to wait so long for books of this quality on our Constitution. But at least one of the reasons has been the lack of willingness of commercial publishers to produce, for what they consider, a hopelessly uneconomic market. That picture is changing and the activities of the Law Society in publishing and stimulating young lawyers to write, has largely brought about that change. The preparedness of a professional body to support and to publish a book of this kind, which must largely find its market among law students is as unusual as it is welcome.

Kevin Boyle

Law at Work Series: Sweet and Maxwell, 1980. £1.95p (sterling)

The paucity of Irish literature for those interested in Employment law in this country has forced most practitioners to purchase English books. These are, as may be expected, heavily laden with analysis and comment on English statutes. While our own statutes tend to mirror

similar legislation in England, it is a most arduous business trying to apply otherwise excellent academic and judicial comment to what is, at best, only "similar" legislation. There is, of course, the added difficulty in the U.K. that with every change of Government, there comes a change in this area of the law. It is with this prejudice heavily lying on my mind that I tackled a new series of publications under the generic title "Law at Work." There are to date, fourteen titles in the series, all by different authors but under the general editorial hand of Paul O'Higgins, a well-known and respected author in the field of employment law. Each publication runs to approximately 90 pages, and is written in a simple and concise form. The books are aimed at the wide market of employers, employees, trade unionists, and possibly lawyers. The back cover of each title specifies that the books "assume no previous knowledge of law" and have an "emphasis on everyday situations in the workplace." I could not, however, recommend any of the titles to practitioners in this field, as the subjects are not dealt with in sufficient depth. For those, however, who are not familiar with this area of the law, and wish to become so, I would recommend three of the titles as a useful starting point. These are:

"Trade Disputes" by Patrick Elias:

This book has a most useful and interesting history of the Trade Disputes Act, 1906, and the workings of the Act to date. The text is easily applied to the law in this country with the exception of one chapter dealing with the position from 1974 to date, consequent on the enactment of the Trade Union and Labour Relations Act, 1974 as amended, and the Employment Act, 1980. The main fault as with all the titles in the series is the lack of depth, but for those interested in a potted history and background to existing law, this is as good a publication as any.

"Discipline" by Brian Napier

The book gets off to a good start with the cover illustration showing a smiling employer and a smiling employee shaking hands in front of a time clock showing five minutes to nine. The book itself is a useful guide to a subject, about which most practitioners of the law know little, the workings of discipline on the shop floor.

"Dismissal" by Robert Apex

With an increasing number of Solicitors involving themselves in Unfair Dismissals Act claims, there is a need for these practitioners to acquaint themselves with the industrial relations mechanisms which produce such claims. There are more comprehensive industrial relations publications dealing with this subject on the market, but they tend not to be attractive to the legal practitioner. This book is concise and easily read, and is a most useful primer. The subject of dismissals has become one of great interest to Solicitors, and for those seeking a concise clear introduction to the subject, I would recommend this book. There is the obvious difficulty that the text is dealing at all times, with U.K. legislation, and while our legislation is broadly similar, there are significant differences which should be noted. Chief among these differences are: those who work for less than 16 hours a week are not covered in the U.K., it is 21 hours here; retiring age specifically mentioned in the U.K. Act, is not referred to in our Act; a claim in the U.K. must be made within three months of the alleged dismissal – 6 months here. There are also many differences in Tribunal procedure. These differences have become more significant with the recent publication in the U.K. of new procedural rules which are not referred to in this book. Nor is there any reference to the *British Home Stores v. Burchell* case which is to date the most important case dealing with the criteria to be applied in deciding whether or not an employer's actions were justified. This, I feel is a serious omission in any publication purporting to deal with the law of dismissals. Chapter 8 of this book deals with dismissals related to pregnancy, and is a valuable aid in anticipating the likely impact of our proposed new Maternity Protection Act, which became law on the 6th April, 1981, but here again, care should be taken where references are made to specific statutory provisions such as three weeks notice of intention to take leave whereas it is four weeks here. In all this is a useful guide to the law relating to Dismissals and as with all of these titles is recommended to those seeking an introduction to the subject.

Of the five other titles which I have received **"Job Security"** by Colin Bourn is a useful guide to Redundancy, but not more so than the booklet on the Redundancy Payments Acts issued free by the Department of Labour. **"Health and Safety"** by Peter Rowe is based exclusively on the U.K. Health and Safety at Work Act, 1974, and is a useful indicator of the probable workings of our Safety in Industry Act, 1980, and in particular, part III thereof. **"Sex Discrimination"** by Shelley Adams is not recommended as, in this area, our legislation and U.K. legislation have too many points of difference for comfort, and our legislation is coloured greatly by the Employment Equality Agency and its policies, decisions, and interpretations. The same can be said of the remaining two titles **"Social Security"** by Julian Fulbrook, and **"Occupational Pensions"** by Ian Smith. This latter publication deals with the U.K. State pension scheme, and may be of use when the Government here produce the proposed State pension scheme, but it appears that we are still a long way from the introduction of such a scheme. There are six titles which I did not have the benefit of reading, these are: **"Employment Contracts," "Going to Law," "Safety Representatives," "Trade Unions," "Union Members," and "Wages and Salaries,"**

Gary V. Byrne

Incorporated Law Society of Ireland

STARDUST ENQUIRY, BLACKHALL PLACE

During the currency of the Enquiry, it is regretted that because of the demands on the available space, overnight accommodation cannot be provided for members. This facility will be reintroduced as soon as possible.

WHAT'S NEW?

A Miscellany of Recent Legal References

by

Andrew Dillon, Solicitor

Did you know

—that the British High Court has held that in assessing the amount of financial provision from a husband to wife on divorce it may be proper to consider periods spent in unmarried cohabitation prior to marriage. In *K. v. K.* the parties had lived together for 24 years prior to marriage and for four months thereafter (*Times*, 4.12.1979, p. 15).

—that the U.S. Supreme Court has ruled that a person who engages in criminal conduct does not automatically become a "public figure", unable to complain of defamation, unless he can show actual malice by the Defendant. *(Wolston v. Readers Digest, New Law Journal*, 3.1.1980, p. 20).

—that the British Court of Appeal has rules that the Court has no jurisdiction, either statutory or inherent, to grant a declaration of paternity (see in re *JS, Times*, 23.1.1980, p. 10).

—that in Britain a new form of Writ is to be introduced by the Rules of the Superior Courts, which will replace the 'Entry of an Appearance in response to the Writ' by an 'Acknowledgement of Service'. *(Solicitors' Journal*, 25.1.1980).

—that Afghanistan has, not surprisingly, acquired a new Constitution. Unlike Chile, whose government has decided to hold a referendum on the matter, the central committee of the Democratic Peoples Party has simply adopted one. This presumably saves the much harrassed Afghanis the trouble of voting. (Neue Zurischer Zeitung, 16.4.1980, p. 4).

—that the State Government of Queensland is to restrict abortion to women who are at risk of death or serious physical injury, or likely to commit suicide should the pregnancy continue *(Times*, 18.4.1980, p. 10).

—that slavery has at last been abolished in Mauritania? The military committee of national salvation announced this on 5th July 1980 to the great relief, one is sure, of the Irish Anti-Slavery Movement. Apparently the country's Islamic judicial experts advised this move, but did propose that former slave masters should receive full compensation. *(West Africa Report*, 14.7.1980, p. 1312).

—that the English Bar has agreed on the principle of compulsory insurance for negligence liability *(Times*, 27.7.1980, p. 2). This subject might be discussed more generally in Ireland as, as yet, there is no legislation compelling solicitors to take out insurance in this country. In New Zealand, the Legal Practitioners' Amendment Act 1980 has recently introduced a scheme of compulsory professional indemnity insurance.

—that in California's Supreme Court, a claim has been allowed for damages for emotional and mental distress when no physical injury was suffered. Plaintiff sued a hospital for reporting that his wife had syphilis, which was untrue and led to the collapse of Plaintiff's marriage. *(Milien v. Kaiser Foundations Hospitals, Nat. Law Journal*, 3.9.1980, p. 3).

—that the Liberian Government has, in its wisdom decided that should one be caught importing marijuana, the culprit should be held in port until such time as the entire consignment has been smoked – by the culprit. (West Africa, 6.10.1980, p. 1992).

—that we may all expect to hold and EEC driving licence as and from the beginning of 1983, which will be issued and recognised by all member states, except Britain ('Euroforum', No. 12, 1980 p. 7).

COUNTY OF TIPPERARY AND OFFALY (Birr Division) SESSIONAL BAR ASSOCIATION ANNUAL DINNER DANCE, 27 March, 1981

Seated (left to right): Mrs. Joan Binchy, Mrs. Shirley Carrigan, Donald G. Binchy, President, Mrs. Moya Quinlan, President Incorporated Law Society of Ireland, Mr. Michael Quinlan, Mrs. Frances Murphy.
Standing (left to right): David Hodgins, Vice President, Mr. Francis Murphy, Mrs. Gretta Hodgins and John Carrigan, Honorary Secretary.

BAR ASSOCIATION NEWS

DUBLIN SOLICITORS' BAR ASSOCIATION

Officers and Council of the Association for the year 1980/81:

Andrew F. Smyth ..... President
Rory O'Donnell ..... Vice-President
Clare Cusack ..... Hon. Treasurer
Herbert Mulligan ..... Hon. Secretary

The remaining Council members of the Association comprise:

Terence E. Dixon, Michael Farrell, Elma Lynch, Stephen Maher, Vivian Matthews, Charles Meredith, Barry O'Reilly, Colm Price and Laurence K. Shields.

The Association works through its various Sub-Committees which, for 1981, have been appointed as follows:

Conveyancing Committee – Convener, Elma Lynch.
Rory O'Donnell, Charles Meredith, Colm Price, Vivian Matthews and Herbert Mulligan.

Courts Committee/Litigation – Convener, Herbert Mulligan.
Barry O'Reilly, Michael Farrell and Stephen Maher.
Co-opted Members: Kieran O'Brien and Declan Sherlock.

Activities Committee – Convener, Stephen Maher.
Terence Dixon, Laurence Shields, Clare Cusack, Herbert Mulligan and John Buckley.

Costs Committee – Convener, Barry O'Reilly.
Stephen Maher, Elma Lynch, Rory O'Donnell, John Buckley, Rory O'Connor and Herbert Mulligan.

Publicity Officer – Charles Meredith.

KERRY LAW SOCIETY

Kerry Law Society Officers for 1981 are –
Donal Browne ..... President
John J. O'Donnell ..... Vice-President
M. L. O'Connell ..... Chairman
Thomas J. O'Halloran ..... Hon. Secretary

The remaining Committee members are – William Crowley, J. S. O'Reilly, Michael O'Connell, Timothy Murphy, Michael Larkin, Donal Kelliher, Mary Twomey, Michael O'Donnell and John Baily.

COUNTY AND CITY OF LIMERICK BAR ASSOCIATION

The Officers of the Association for 1981 are –
Patrick Glynn ..... President
Gordon A. Holmes ..... Vice-President
Joseph Murphy ..... Treasurer
Michael D. Murray ..... Secretary
Gerry Yelverton ..... Asst. Secretary

The Committee comprises – Miss Kathy Carey, Messrs. James G. Lyons, T. E. O'Donnell, J. R. Sweeney, Michael J. O'Malley, Bobby Cussen and Robin Lee.
It is reported by the Association that, due to local expansion at a more youthful level of the profession, Soccer in Limerick has become a substantially more hazardous occupation. In the past few years, a Legal Team has been much in evidence, local stars including Eugene Cash, Joe Murphy and Stephen Nicholas, ably assisted by such veterans (locally described as geriatrics) as Paddy Geraghty and Niall Sheehy.

SOUTHERN LAW ASSOCIATION

The Officers of the above Association elected for 1981 are:
Nicholas Comyn ..... President
Michael Enright ..... Vice-President
Grattan Roberts ..... Treasurer
Ms. Pauline Horgan ..... Hon. Secretary
The remaining Council members are – Brian Russell, Frank Daly, Martin Sheehan, Basil Hegarty, G. John Moloney, John L. Jermyn, John O'Meara, Raymond O'Neill, Ms. Joan Nagle, Robert Flynn and Pat McNally.
Recent activities of the Association included an attempt to amend its Rules, in order to empower the imposition of penalties but, for various reasons, the proposed amendment was defeated.

The Association made representations on the Courts Bill, and had its representation published in the Cork Examiner, followed up by an interview on South Side, R.T.E., Radio I.

The Association has also made representations to the President of the High Court concerning the Jury List in Cork, to the effect that no more than 12 or 15 cases might be listed each day during the three-week Jury Sessions in Cork, which was kindly put into effect by Mr. Justice Finlay.

Further representation was made to Mr. Justice Finlay concerning the "Cork Subpoena," which achieved, with the utmost possible grace, a Cork Solution to a Cork problem! If there is nothing legally preventing Subpoenas from being served in the term before trials came on for hearing, then Subpoenas should be so issued and served!

During the Jury Sessions in January 1981, the

Association entertained two of the learned High Court Judges and took the opportunity of making a number of points to them concerning the profession in the Southern area.

WATERFORD LAW SOCIETY

Waterford Law Society Officers elected for the 1981 session are:

Austin V. Maher, State Solicitor ..... President
Brian F. Swift ..... Vice-President
Donal J. O'Connell ..... Hon. Secretary
John Purcell ..... Hon. Treasurer

The Committee elected for the year comprises – Fergus J. Power, John P. C. Goff, Emmet Halley, Morette Kinsella, Gerard O'Connor, Therese M. Clarke, and Iain R. Farrell.

"YOUNG CITIZEN" SUPPLEMENT

One of the aims of the Society's Public Relations Committee is the spread of information about the Society, the profession and the law generally. One recent example of the Society's activities in pursuit of this aim was the compilation of a supplement for "Young Citizen" Magazine.

"Young Citizen" is a publication of the Institute of Public Administration and is distributed to students in second level schools with a circulation of 8,000.

The Public Relations Committee, believing that members would be interested in this aspect of the Society's activities, has arranged for the distribution of off-prints of the supplement with this issue of the Gazette.

For Your Diary . . .

5 May 1981: Continuing Legal Education Seminar: *Registration of Title and Drafting of Deeds* (Lecturers: Maeve Hayes, Solicitor; Colm Price, Solicitor). Blackhall Place, Dublin. 10 a.m. to 5 p.m.

7 May 1981: Continuing Legal Education Seminar: *Capital Gains Tax* (Lecturers: Anthony Osborne, Solicitor; Rory McEntee, Solicitor), Blackhall Place, Dublin. 10 a.m. to 5 p.m.

12 May 1981: Dublin Solicitors Bar Association: *Sale of Goods and Supply of Services Act, 1980.* Blackhall Place, Dublin. 8 p.m.

12 May 1981: Continuing Legal Education Seminar: *Family Law* (Lecturers: Alan Shatter, Solicitor; Raymond Downey, Solicitor; Michael V. O'Mahony, Solicitor). Blackhall Place, Dublin. 10 a.m. to 5 p.m.

15 May 1981: Continuing Legal Education Seminar: Landlord and Tenant Legislation (Lecturers: Angela McCann, Solicitor; Michael Roche, Solicitor). Blackhall Place, Dublin. 10 a.m. to 5 p.m.

16 May 1981: Law Society Symposium: *The Builder and the Law.* Blackhall Place, Dublin.

19 May 1981: Continuing Legal Education Seminar: *Licensing Law* (Lecturers: Carol O'Kennedy, Barrister-at-law, Barry O'Reilly, Solicitor), Blackhall Place, Dublin. 10 a.m. to 5 p.m.

27 June 1981: Symposium: *The Mentally Handicapped and the Law.* Downhill Hotel, Ballina, Co. Mayo.

24-28 August 1981: *Young Lawyers International Association* XIX Congress, Dublin. Full programme now available from Secretariat, XIX Congress of AIJA, 44 Northumberland Rd., Ballsbridge, Dublin 4. Tel. 688244.

1-4 September, 1981: *Law and Society in Ireland:* An International Conference, Trinity College, Dublin. Full programme and details available later.

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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 8th day of May, 1981.

W. T. MORAN (Registrar of Titles)

Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

(1) Registered Owner: Margaret Hickey; Folio No.: 5133; Lands: Rush; Area: 23 perches; County: Dublin.

(2) Registered Owner: Industrial Development Authority; Folio No.: 16733F; Lands: Willsborough; Area: 2.957 hectacres; County: Dublin.

(3) Registered Owner: James Stone & Nora Stone; Folio No.: 21728; Lands: (1) The Sheehys; (2) The Sheehys; Area: (1) 5a. 1r. 36p.; (2) 17a. 1r. 14p.; County: Tipperary.

(4) Registered Owner: Michael Canning; Folio No.: 1517F; Lands: Grange Lower; Area: 0a. 3r. 22p.; County: Kilkenny.

(5) Registered Owner: James McManus; Folio No.: 10996; Lands: Drumbeagh; Area: 32a. 1r. 27p.; County: Cavan.

(6) Registered Owner; Helen White; Folio No.: 2536(R); Lands: Derry; Area: 1a. 0r. 20p.; County: Cork.

(7) Registered Owners: Patrick O'Keeffe & Noreen O'Keeffe; Folio No.: 28925; Lands: Ballincrossig; Area: 0a. 1r. 33p.; County: Cork.

(8) Registered Owner: Mary Neenan; Folio No.: 31315; Lands: (1) Boleylaan, (2) Levally West; Area: (1) 40a. 3r. 29p. (2) 1a. 1r. 22p; County: Galway.

(9) Registered Owner: Michael Leahy; Folio No.: 5646F; Lands: Part of the Townland of Ballyvoloon in the Barony of Barrymore; Area:———; County: Cork.

(10) Registered Owner: John Lally; Folio No.: 607F; Lands: (1) Teltown; (2) Gibstown; Area: (1) 22a. 1r. 12p.; (2) 23a. 1r. 17p.; County: Meath.

(11) Registered Owner: James Doherty; Folio No.: 8895F; Lands: Part of the townland of Collboy Big in the Barony of Kilmacrenan; Area: ——; County: Donegal.

(12) Registered Owner: Michael and Bernadette Confrey; Folio No.: 39752L; Lands: Templeogue; Area: 0a. 0r. 13p.; County: Dublin.

(13) Registered Owner: Richard Russell; Folio No.: 1013; Lands: Seafield; Area: 0a. 2r. 4p.; County: Waterford.

(14) Registered Owner: Cornelius C. O'Leary; Folio No.: 16915; Lands: Knockeenawaddra; Area: 9a. 0r. 10p.; County: Kerry.

(15) Registered Owner: John Keppel, Mary Elizabeth Keppel and Charles Keppel; Folio No.: 2889; Lands: Ballanagh; Area: 88a. 3r. 15p.; County: Wicklow.

(16) Registered Owner: John James Carrabine; Folio No.: 20604; Lands: (1) Knockbrack; (2) Knockbrack; (3) Carraun, (4) Carraun; (5) Carraun; Area: (1) 19a. 0r. 35p.; (2) 17a. 2r. 30p.; (3) 0a. 0r. 8p.; (4) 5a. 2r. 5p.; (5) 6a. 0r. 15p. County: Sligo.

(17) Registered Owner: Francis Levins; Folio No.: 1283; Lands: Funshog; Area: 17.269 acres; County: Louth.

(18) Registered Owner: Patrick Joseph McKiernan; Folio No.: 19125; Lands: Part of the lands of Claraghy with the cottage thereon in the barony of Dartree; Area: ———; County: Monaghan.

(19) Registered Owner: Carlow Urban District of Carlow; Folio No.: 8684F; Lands: A plot of ground situate in the Parish and Urban District of Carlow; Area: ———; County: Carlow.

(20) Registered Owner: Valentine O'Regan (A) and (B); Folio No.: (a) 37068, (b) 32578; Lands: (a) Shanbally, (b) Shanbally; Area: (a) 1a. 1r. 16p. (b) 3a. 2r. 10p; Couty: Cork.

(21) Registered Owner: O'Connor Construction Company Ltd.; Folio No.: 4715F; Lands: Drumcaran More; Area: 15.747 acres; County: Clare.

(22) Registered Owner: Margaret Hennessy; Folio No.: 1578L; Lands: No. 16 Marine Drive, Sandymount, City of Dublin; Area: ———; County: Dublin.

(23) Registered Owner: Joseph Bradley; Folio No.: 631F; Lands: Crocknamurleog; Area: 0a. 3r. 15p.; County: Donegal.

(24) Registered Owner: Cornelius McSweeney; Folio No.: 36366; Lands: Aherla; Area: 0a. 2r. 13p.; County: Cork.

(25) Registered Owner: Edmond Walshe; Folio No.: (1) 19077; (2) 39937; Lands: (1) Belmullet (Upper Floor); (2) Belmullet; Area: (1) 0a. 0r. 1p.; (2) 0a. 0r. 1p.; County: Mayo.

(26) Registered Owner: Margaret Foley; Folio No.: 262 (Rev) (This folio is now revised to read folio no. 3622F Co. Limerick); Lands: Croagh; Area: 52a. 3r. 13p.; County Limerick.

(27) Registered Owner: John Quinn; Folio No.: 12414; Lands: Ballybofey; Area: 9.425; County: Donegal.

Lost Wills

Honor (Nora) Martin, late of Ballynacourty, Oranmore, Co. Galway. Will anybody having any knowledge of any Will of the above named deceased who died on the 8th day of May, 1953 please contact Colman Sherry, Solicitor, Church Street, Gort, Co. Galway.

Employment

Solicitor, T.C.D. Legal Science Degree, qualified in Northern Ireland. 2 years experience in litigation, seeks apprenticeship or legal assistant's position. Box 013.

Miscellaneous

Wanted – Bound volumes of the Acts of the Oireachtas for years 1960/1973. Reply Box No. 012.

Obituaries

Mr. Timothy O'Neill Kiely died on 13 January 1981. Mr. Kiely was admitted in Hilary Term 1933 and practised in the town of Kilkenny, and was subsequently senior partner of the firm of Messrs. Poe, Kiely and Hogan at 21 Patrick Street, Kilkenny. He was the author of "The Principles of Equity" (1936), which was a most useful compendium of Irish Cases on Equity.

Mr. James Michael Farrell, B.A. died 27 December 1980. Mr. Farrelly was admitted in Trinity Term 1946 and practised first at 9-11 Nassau Street, then at 1 College Street; 16 Herbert Street and at 2 Eglington Square, Dublin.

Mr. Maurice E. Veale died on 9th January, 1981, Mr. Veale was admitted in Hilary Term 1939, and was senior partner of the firm of Messrs. Maurice E. Veale, & Co., 6 Lower Baggot Street, Dublin 2.

Mr. Raymond A. French died on 31st December 1980. Mr. French was admitted in Michaelmas Term 1934 and was subsequently a partner in the firm of Messrs. Fred Sutton & Co., first at 52 Dame Street, and subsequently at 65 Fitzwilliam Square, Dublin.

Mr. Fintan M. O'Connor died on 12 January 1979. Mr. O'Connor was admitted in Hilary Term 1923, and practised under the style of Messrs. M. J. O'Connor & Co., Georges St., Wexford. Mr. O'Connor was a founder member of the Wexford Festival, and a brother of the late Mr. James J. O'Connor of Ormond Quay, Dublin.

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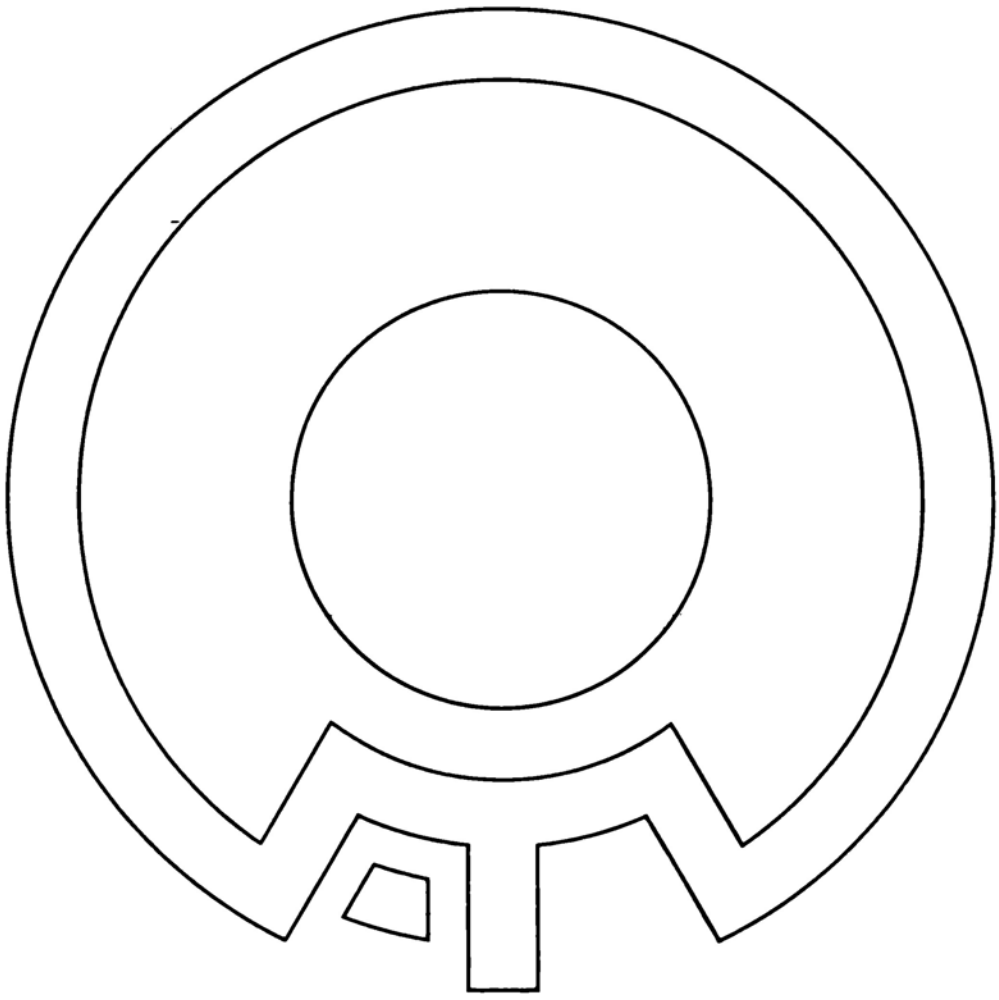
INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 4 May 1981

The President, Mrs. Moya Quinlan with Mrs. Mirette Corboy, President of the Construction Industry Federation at the Law Society's Symposium on "The Builder and the Law."



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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 4 May 1981

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

IT is with a feeling of envy that we observe the attempt of the Law Society of England and Wales to achieve an amendment to the Supreme Court Bill, the effect of which would be to entitle certain solicitors to be appointed to the High Court Bench in England and Wales. Envy because, for ten years now, solicitors of ten years standing have been entitled to be appointed Recorders in England and Wales and, after three years service as Recorders, have been entitled to be appointed Circuit Judges. The amendment which the Law Society of England and Wales is advocating would provide that only Barristers of ten years standing or Circuit Judges would be entitled to appointment to the High Court Bench. The present provision only entitles Barristers of ten years standing to be so appointed.

It is ironical that while solicitors in England and Wales do not have the same comprehensive rights of audience in all the Courts, which since 1971 have been conferred on solicitors in the Republic of Ireland, the entitlement of appointment as Circuit Judges has been more readily conferred there than here.

From time to time it is said that one reason for the reluctance of the members of the solicitors' profession here to exercise their rights of audience in the higher Courts has been an apprehension that the exercise of such rights would be viewed with disfavour by certain judges. The view has been expressed that, until such time as solicitors, or solicitors who have been District Justices for a number of years, are seen to be entitled to be and are in fact appointed to the Circuit Court bench, the fear of indications of disfavour by some members of the bench will persist, even if the fear is an unreasonable one.

The solicitors' profession has made great strides in recent years, not least in its education and training programmes, both prior to and after qualification and its members hold many positions of responsibility in the public, political and business fields. Many solicitors have served with distinction, in the most adverse circumstances, as Justices of the District Court, since the foundation of the State. Approaches to the Minister for Justice requesting an amendment to the present Courts Bill to permit the appointment of solicitors as Judges of at least the Circuit Court have not apparently been successful.

It is time that the solicitors' profession took more active steps to pursue this aim so that it may more clearly be seen that solicitors are not in the "second-class" in the practice of the law. □

Insurers at Bay — Repercussions of *Gammell v. Wilson*

by

John P. M. White, B.C.L., LL.B., LL.M. (Harvard)

Barrister-at-Law

ALARM bells are ringing in the insurance industry, as a bombshell of Hiroshima proportions threatens to strike the Irish law of wrongful death in the wake of the recent decision of the House of Lords in *Gammell v. Wilson*.[1] The decision in *Gammell* is the result of the confluence of the law relating to personal injury actions, dependants' fatal injury actions and personal representatives' actions on behalf of the estates of persons wrongfully killed. This article confines itself, however, to the simple objective of alerting plaintiffs' solicitors to impending developments of some importance.

The Fatal Accidents Act, 1846[2] gave the dependants of one wrongfully killed by another a statutory cause of action in respect of the economic loss occasioned them as a result of the decedent's wrongful death. Recovery was confined by the early decisions on the Act to the financial benefits which the preferred relatives under the Act could reasonably have anticipated from the continued existence of the decedent. Accordingly, recovery by the parents of young unmarried men and women wrongfully killed would normally be confined to a small sum, as the parents could only expect financial contributions while their children remained unmarried and, perhaps, some contribution in their old age, depending on the parents' own financial resources. As a result of the decision in *Gammell v. Wilson*, however, the parents of such persons can now look forward to a substantial windfall. A handsome "profit" may be made by their suing, not in their own right, as dependants of the decedent under the Fatal Accidents Act, but by suing on behalf of the decedent's estate in respect of the wrong done to the decedent himself. This result follows from the combined operation of two rules, the first judge-made and the second, the creature of statute.

In *Pickett v. British Rail Engineering, Ltd.*[3] the House of Lords held that when a man is injured by the tort of another and his working-life has been shortened as a result, he may recover in his personal injury action damages for loss of the earnings which he would have made during the years of life which he has lost as a result of the accident, i.e., during the years when he will now be dead but would have been alive and working, were it not for the accident. The measure of such damages is the amount of his anticipated earnings, less what he would have spent on maintaining himself during those "lost years."

At common law, a cause of action in tort vested in a person before his death did not survive his death. The English Law Reform (Miscellaneous Provisions) Act, 1934, provided that on the death of a person (subject to certain exceptions) all causes of action vested in him should survive for the benefit of his estate. When a man is killed – even instantaneously – as a result of the tort of another, there is deemed to have been vested in him at the moment before his death a cause of action in respect of that tort. By virtue of the Law Reform Act, this right is transmitted to his estate and the personal representatives may prosecute the action on the estate's behalf.

The Decision in Gammell

In *Gammell v. Wilson* it was argued that since a living plaintiff in his personal injury action is entitled to recover damages in respect of the lost earnings of the "lost years," i.e., the years by which his working-life has been cut short by the accident, it follows that where the potential plaintiff has been killed outright by the tort, his right to sue for the lost earnings of the "lost years" is transmitted to his estate and may be prosecuted on its behalf by the personal representatives, by virtue of the Law Reform Act. The House agreed and held that where a person is wrongfully killed and his working-life thereby cut short, his estate may recover in respect of the earnings which he would have made during the working-years lost as a result of the accident, less what he would have spent on maintaining himself during those "lost years."

In *Gammell's* case, a 15-year-old itinerant boy had been killed in an accident for which the defendant was responsible. The plaintiff father sued in two capacities. First, he claimed damages for himself and his wife, as being dependants of their dead son and thus entitled to damages under the Fatal Accidents Act. Secondly, he claimed damages as administrator of his son's estate, by virtue of the Law Reform Act. The damages recoverable by the estate in respect of the latter claim would be divided equally between the plaintiff and his wife, as being the persons beneficially entitled on their son's death intestate. The trial judge in the administrator's action held that, after making allowance for his living expenses, the decedent would have had £416 p.a. remaining from his income. This figure, when multiplied by the number of

years working-life lost to the decedent and discounted to present value, gave the sum of £6,656. He held and the House of Lords affirmed, that the decedent's estate was entitled to recover this sum in respect of the decedent's loss of earnings during the "lost years." On the Fatal Accidents Act claim, the judge held that the father's dependency was £250 and the mother's dependency was £1,750. In the result, then, the total of the dependencies (i.e., the economic loss) of the boy's parents was only £2,000, i.e., less than one-third of the assessed loss of income in the "lost years" recoverable in the administrator's action under the Law Reform Act.

In *Furness v. B. & S. Massey, Ltd.*, the appeal in which was heard with that in *Gammell*, a young unmarried man of twenty-two and in steady employment had been wrongfully killed. His parents' dependencies under the traditional Fatal Accidents Act claim were assessed at a mere £2,028. In the Law Reform Act action, however, the parents, as administrators of his estate, recovered £17,275 on behalf of the estate in respect of the decedent's lost earnings of the "lost years."

The claim under the Law Reform Act on behalf of the estate is completely unaffected by any Fatal Accidents Act claims brought by the dependants of the decedent. The converse, however, is not the case. If certain dependants of the decedent succeed to his estate as swelled by the amount recovered in the personal representatives' action, their economic loss resulting from the decedent's death is necessarily diminished and the amount recoverable under the Fatal Accidents Act will be correspondingly reduced or eliminated entirely. Thus, in both *Gammell* and *Furness*, the effect of the award made in the personal representatives' action was to eliminate the entitlement of the parents to recover anything under the Fatal Accidents Act, because each of them would be receiving more, by reason of their son's death intestate, than was the amount of their respective dependencies. The parents were, nevertheless, left with a net "profit" of some £4,600 in *Gammell's* case and of £15,000 in the *Furness* case. Liability has thus been created for defendants were none existed before. Moreover, had the decedent in *Gammell* or *Furness* made a will before his death leaving his estate away from his dependant parents, the result would have been that they would not have benefited from the amount awarded in the Law Reform Act action. Their economic loss resulting from their son's death would, therefore, be unaffected and their Fatal Accidents Act claim would succeed. In such circumstances, the defendant would suffer double recovery. The beneficiary under the will would recover in respect of the lost earnings of the "lost years" awarded in the Law Reform Act action and the dependant parents would recover the value of their dependencies under the Fatal Accidents Act.

Repercussions on Irish Law

The Republic of Ireland law of wrongful death appears to be poised on the slippery slope to a *Gammell* ruling by our courts. Section 7 of the Civil Liability Act, 1961, contains provisions for the survival of causes of action for the benefit of the estates of deceased persons and is similar in material respects to the corresponding provisions of the English Law Reform Act. Indeed,s.7 is of such a nature as to lend even greater force than does its English counterpart to the proposition that a cause of action in respect of the lost earnings of the "lost years" survives, by virtue of the section, for the benefit of the decedent's estate. The Irish courts appear, moreover, to have already accepted the proposition that a living plaintiff may recover in a personal injury action in respect of the lost earning of the "lost years": *Doherty v. Bowaters Irish Wallboard Mills, Ltd.*[4] The twin rules which compelled the House of Lords to rule as it did in *Gammell* appear established in Irish law and appear to render inevitable a *Gammell*-type ruling by the Irish courts.

A comprehensive discussion of *Gammell* and its likely repercussions on the Irish law of wrongful death must await a further article. In concluding, however, reference may be made to what is, perhaps, the most tantalising prospect in likely post-*Gammell* developments. The dependants' Fatal Injuries claim under Part IV of the Civil Liability Act, 1961, and the estate's action under s.7 are juridically distinct entities. Therefore, compromise of, or judgment in, a dependant's Fatal Injuries action does not bar a subsequent claim on behalf of the decedent's estate under section 7. This principle, when combined with the proposition that recovery by the estate in a s.7 action is in no way affected by recovery by the dependants in their Fatal Injuries action, may be productive of startling results. If the principle of *Gammell* is accepted by the Irish courts, it ought, in logic, follow that one may – provided the limitation period has not expired – "resurrect" settled Fatal Injuries claims in the glory of a s.7 action on behalf of the estate.

It appears that plaintiffs' solicitors have their quarry at bay and it may well be that nothing short of swift legislative intervention can save it from a proper bloodying!!

FOOTNOTES

1. [1981] 1 All E.R. 578, H.L.
2. Now replaced in England by the Fatal Accidents Act, 1976, and in Ireland by the Fatal Injuries provisions of Part IV of the Civil Liability Act, 1961, s.49 of which confers an additional entitlement to an award in the nature of solatium not to exceed £1,000.
3. [1979] 1 All E.R. 774, [1980] A.C. 136, H.L.
4. [1968] I.R. 277, S.C.

FAMILY HOME PROTECTION ACT, 1976

Evidencing Spouse Consent

The decision of the High Court (McWilliam J.) in the case of *Kyne v. Tiernan* (1978 No. 6857 P. Judgment 15th July 1980) reported in the November issue of the Law Society's Gazette, confirming that once a spouse had consented in writing to a contract for the sale of a Family Home no further consent for the purpose of the Family Home Protection Act to the assurance was required, was of considerable assistance in clarifying this doubtful point.

It is now being argued that a corollary to the decision is that a written consent to the assurance need not be sought once the appropriate prior consent to the contract had been obtained. While this is a logical extension of the decision in *Kyne v. Tiernan*, it is the view of the Conveyancing Committee that the practice of seeking the spouse's consent in writing to the assurance, which has operated since 1976, should not be abandoned. To do so, would be to breach a much older conveyancing practice that contracts for sale are not normally regarded as "title documents" and that their production on any subsequent sale should not be required. It might also be regarded as an inroad on the legal doctrine that on the completion of a purchase the "contract merges in the conveyance."

Accordingly, while recognizing that, if any difficulty arises about getting later consent to the assurance, the solicitor for a vendor and purchaser may safely rely on a spouse's prior written consent to a contract for the sale of a Family Home, the Committee strongly urges the retention of the practice of arranging for the endorsement of a prior written consent by the spouse on the assurance itself.

In making this recommendation, the Committee is taking cognisance of the very likely risk of relevant contracts not being retained with Title Deeds and thus giving rise to serious problems in proving the granting of the relevant spouse's consent, in the event of future sales of the property.

Consent of Minor Spouse

The Conveyancing Committee has also been concerned with the problem of whether a minor spouse could consent to a sale or mortgage under the Act, without the approval of the Court. Mortgagees' Solicitors have been insisting upon Court approval being obtained to consents, lest their mortgages be void.

Most of the families involved in these situations have been young married couples and the extra cost of an application to the High Court for approval for the sale, is a considerable burden on a class of people who can least afford it.

Representations were made to the Department of Justice, which indicated that it had the matter under consideration and would provide for a statutory amendment, if it were found necessary.

Doubts as to the law on this matter have now been resolved by the decision of McWilliam, J. in the High Court case of *Lloyd v. Sullivan*, the learned Judge holding that a minor spouse could not give a valid consent without the approval of the Court.

The Department of Justice has introduced a section in the Family Law Bill, 1981, which, when passed, will entitle a minor spouse to give a consent without needing the authority of the Court. The relevant section is Section 10 and its provisions are intended to be retrospective.

For Your Diary . . .

6 June 1981: Continuing Legal Education Programme: *Landlord & Tenant Legislation* (Lecturers: Angela McCann, Solicitor; Michael Roche, Solicitor). Metropole Hotel, Cork, 10 a.m. to 5 p.m.

16 June 1981: European Law Centre Ltd: *Legal Information: The Next 5 Years*. Application forms and particulars from Conference Organiser, ELC, 4 Bloomsbury Sq., London WCIA 2RL. Tel. 031-404 4300.

27 June 1981: Symposium: *The Mentally Handicapped and the Law*. Downhill Hotel, Ballina, Co. Mayo.

2 July 1981: Solicitors' Golfing Society: *President's Prize Golf Outing*. Milltown Golf Club.

10-11 July 1981: Law Society Seminar: *Computers for Solicitors*. Blackhall Place, Dublin 7.

14 July 1981: Law Society *Presentation of Parchments*, Blackhall Place, Dublin 7.

24-28 August 1981: *Young Lawyers International Association* XIX Congress, Dublin. Full programme now available from Secretariat, XIX Congress of AIJA, 44 Northumberland Rd., Ballsbridge, Dublin 4. Tel. 688244.

1-4 September, 1981: *Law and Society in Ireland:* An International Conference, Trinity College, Dublin. Full programme and details available later.

12 October 1981: Law Society *Commencement of Sixth Professional Course.*

28 October 1981: Law Society *Presentation of Parchments*, Blackhall Place, Dublin 7.

Quote . . .

"The Law Commission in 1975 recommended that a term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is reasonable; and there is a Bill now before Parliament which gives effect to the test of reasonableness. This is a gratifying piece of law reform: but I do not think we need wait for that Bill to be passed into law. You never know what may happen to a Bill:"

Per Lord Denning, M.R. in *Levison v. Patent Steam Carpet Cleaning Co.* [1977] 3 All. E.R. 498 at p. 503.

The Tachograph — "The Spy in the Cab"

by

Gary V. Byrne, Solicitor

LITTLE, if any, new legislation receives unanimous approval from those affected by it, but one area of legislation enacted in recent times has drawn almost total disapproval in this country; that is the EEC legislation relating to the fitting and use of Tachographs in vehicles. The Department of Labour acknowledged the reaction of interested parties in this country and obtained various agreements from Brussels on the deferment of the legislation. The fateful day, however, could not be put off forever and, from the 1st December of this year, the use of Tachographs will be mandatory. The purpose of this article is to explain the background to, and details of, this legislation.

EEC Regulation 1463/70 (the "Tachograph Regulation") became law in this country on the enactment of the "European Communities (Road Transport) (Recording Equipment) Regulations 1979," under Statutory Instrument Number 214 of 1979. The Regulation came into being as part of the EEC policy on Social Legislation in Road Transport and specifically to enable practical enforcement of EEC Regulation 543/69 (as amended) on the harmonisation of certain social legislation in road transport within the community, relating chiefly to drivers' hours. The principal limits imposed by Regulation 543/69 include a maximum continuous driving period of 4 hours (minimum break: ½ hour); a maximum daily driving time of 8 hours; and a minimum daily rest period of 11 hours, although provision exists for a certain amount of flexibility.[1] In Ireland, Statutory Instruments Nos. 260 of 1975 and 16 of 1979 give effect to these EEC requirements. The Tachograph Regulation was introduced by the EEC to facilitate the enforcement of the drivers' hours requirements, replacing the log book originally specified in Regulation 543/69.

Irish Legislation

The Irish Legislation giving effect to the Tachograph provides, *inter alia*, that:

1. Vehicles used for the carriage of goods and having an unladen weight in excess of 1½ tons must be fitted with recording equipment (tachographs) complying with the detailed requirements of the Council Regulation.

2. Vehicles which in construction and equipment are suitable for carrying more than nine persons (fifteen, in the case of national journeys) including the driver and are intended for that purpose must also be fitted with tachographs.

3. The obligation to install the tachograph rests on the owner of the vehicle. Use of the tachograph is a joint owner/driver responsibility.

4. Enforcement of the Legislation is vested in "authorised officers," viz. Gardai, Customs and Excise Officers, and inspectors appointed by the Minister for Labour.

5. An "authorised officer" may:

(a) at all reasonable times enter a premises if he has reasonable grounds for believing that it is used for transport operations either within the State, or between member States of the EEC;
(b) inspect a vehicle and any documents, records, or recording equipment believed by him to be used for those purposes whether pursuant to the Council Regulations or otherwise at any time;
(c) make copies of, and take extracts from any document or record referred to in (b) above;
(d) if the officer is a member of the Gardai or an officer of the Customs and Excise in uniform, he may halt a vehicle for inspection as aforesaid;

6. The penalty for obstruction or interference with the exercise of powers conferred on authorised officers is a fine on summary conviction not exceeding £200. The penalty for breach of the regulations is a fine not exceeding £200, or a term of imprisonment not exceeding 6 months, or both.

7. Offenders may be proseducted by the Minister for Labour or the Garda Siochana.

8. Drivers must retain discs for 7 days and owners must retain them for 1 year. Discs must be kept clean.

Note that ownership of Tachographs and Tachograph discs is vested in the vehicle owner.

Excluded Vehicles

A number of vehicle categories are expressly excluded from the scope of both EEC Regulations. These include vehicles used by the security forces, public utilities, ambulance and rescue vehicles, and short-distance scheduled bus services. In addition, The European Communities (Road Transport) (Exemptions) Regulations

1980 (S.I. No. 390 of 1980) exempt additional vehicle categories and uses insofar as transport operations within the state are concerned. Among the vehicles excluded by the Instrument are:

(a) vehicles constructed and equipped to carry not more than 15 persons including the driver,
(b) vehicles undergoing local road tests for repair or maintenance,
(c) transport of live animals to or from local markets and transport of animals' carcases or waste not intended for human consumption,
(d) use of specialised vehicles (not defined) at local markets, for door to door selling (not defined), for mobile banking, for worship, lending of books, records, or cassettes, for cultural or mobile exhibition. exhibition,.

Vehicles operating regular services come within the scope of the EEC drivers' hours requirements, but do not have to install or use tachographs. Service time-tables and duty rosters covering a three-tweek period may be carried instead. In general, where vehicles are exempt from the EEC hours limitations, section 114 of the Road Traffic Act applies.

The Tachograph

The Tachograph itself is an instrument something like a speedometer or rev. counter incorporating a clock mechanism, which is mounted on the dashboard of the vehicle and connected directly to the gearbox. The Tachograph records driving time, speeds and distance driven. The actual recording equipment in the Tachograph consists of three styli which trace patterns on a recording disc. The disc or chart consists of a special coated paper which, when compressed by the action of the styli, becomes visible on the backing paper, leaving a legible pattern similar to that found on a Barometer. Before inserting the disc/chart, details of driver's name, place of departure, place of arrival, mileage reading at start (and finish), vehicle's registration number and date are entered manually. Details of the information provided by the disc/chart can easily be read from the chart, but for expert and detailed analysis, there is a process of microscopic analysis carried out by experts, which has shown to be extremely accurate. It can be seen, therefore, that the chart will provide a highly reliable record of any journey undertaken.

The availability of such a record in legal proceedings would, of course, have far-reaching effects. Courts on the Continent have proved themselves very amenable to such evidence and, in a ruling, the German Federal Court has stated that "the Tachograph recorder is a piece of equipment designed specifically for the purpose of eliminating the serious unreliability of human observations. Precedence is to be given to the recordings of the Tachograph before other forms of evidence. If contradictions exist between human observations and the recordings of the Tachograph recorder, proof of the malfunctioning of the Tachograph recorder is required." (BGH VIZR 118/62 VZR 24, 171).

It can be seen, therefore, that Solicitors must be fully informed of the scope and details of these regulations when involved in defence of prosecutions under the Regulations, Civil actions where one or more vehicles involved were fitted with Tachographs, and, in certain circumstances, criminal cases. One such case is the celebrated German case where a stolen lorry fitted with a Tachograph was used to steal a large safe. The lorry was later found abandoned and, from the information on the Tachograph disc, the police reconstructed the journey the lorry had taken, and were able then to pinpoint the place where the safe had been taken to be cut open; ultimately, this information led to the arrest of the guilty parties. One cannot, of course, accurately assess the impact of Tachographs in Irish Courts, but there can be no doubt that in certain areas, such as Orders of Discovery, the Tachograph will loom large. Many problems of definition will also arise, e.g. "regular service" as referred to above is not defined, nor is "door to door selling." Before attempting to tackle such problems, Solicitors would be well advised to arm themselves with copies of the Statutory Instruments and the Council Regulations, particularly Council Regulations, No. 543/69 which is a most comprehensive and detailed document, containing many useful definitions and obligations not dealt with by the domestic legislation.

FOOTNOTE

1. Further details on the Drivers' hours and Tachographs regulations are available from the Department of Labour at: Dublin 765861 Extension 258.

Bills before the Oireachtas 1981

During the Dáil Session 27 January to 9 April 1981 and the Seanad Session 18 February to 15 April 1981

Title of Bill	Effect	Introduced	Position at 15 April 1981
Health (Mental Services) Bill, 1980.	To repeal all existing legislation governing the treatment of mental illness and replace it with provisions which will have full regard to modern developments in psychiatry.	26/6/80 (Dáil)	Report Stage (Dáil).
Dumping at Sea Bill, 1980.	To control dumping in the sea.	25/6/80 (Dáil)	Passed by Dáil Éireann 19/11/80. Passed by Seanad Éireann 8/4/81. Passed by both Houses of the Oireachtas 9/4/81.
Courts Bill, 1980.	Gives effect (with some modifications and extensions) to the recommendations in the 20th Interim Report of the Committee on Court Practice and Procedure for increasing the monetary limits of the civil jurisdictions of the District and Circuit Courts and for conferring new jurisdiction in family law matters on these Courts and provides for other related matters. Amends and extends the Courts of Justice Acts 1924 to 1961 and the Courts (Supplemental Provisions) Acts 1961 to 1979.	15/10/80 (Dáil)	Passed by Dáil Éireann 2/4/81. Passed by Seanad Éireann 15/4/81.
Criminal Law (Rape) Bill, 1980.	To amend the law relating to rape and indecent assault on females.	15/10/80 (Dáil)	Passed by Dáil Éireann 18/3/81. Committee Stage (Seanad).
Malicious Injuries Bill, 1980.	To amend and consolidate the law relating to compensation for malicious damage to property and to provide for compensation in respect of property unlawfully taken during a riot.	15/10/80 (Dáil)	Passed by Dáil Éireann 2/4/81.
Social Welfare (Consolidation) Bill, 1980.	To consolidate enactments relating to the social welfare services administered by the Department of Social Welfare. Also incorporates provisions relating to the supplementary welfare allowances scheme which is administered by the health boards under the direction and control of the Minister for Social Welfare.	16/10/80 (Dáil)	Passed by both Houses of the Oireachtas 18/2/81.
Intoxicating Liquor Bill, 1980.	References to the Dublin Metropolitan District in S. 35 of the Intoxicating Liquor Act, 1962, are references to the district court district styled and known by virtue of the District Court Districts (Dublin) Order, 1945 (S.R.&O., No. 279 of 1945).	11/11/80 (Dáil)	Passed by Dáil Éireann 2/4/81. Passed by both Houses of the Oireachtas 8/4/81.
Turf Development Bill, 1980.	Provides for the making of development grants by Bord na Móna to develop bogs for the production of turf or turf products for fuel. Amends and extends the Turf Development Acts, 1946-80.	17/12/80 (Dáil)	Committee Stage.
Rates on Agricultural Land (Relief) (No. 2) Bill, 1980.	To give statutory effect to the relief of the second moiety of rates in respect of holdings with land valuations of £40 or more but less than £60 in respect of 1980.	18/12/80 (Dáil)	Second Stage (Dáil).
Maternity Protection of Employees Bill, 1981	To introduce a statutory scheme of paid maternity leave from April 1981.	12/2/81 (Dáil)	Passed by Dáil Éireann 24/2/81. Passed by both Houses of the Oireachtas 18/3/81.
Travel Reserve Fund Bill, 1981.	To establish a fund from which payments may be made in certain cases in respect of losses or liabilities incurred by customers of travel organisers and to establish an agency to hold, manage and apply the fund and to provide for other related matters.	12/2/81 (Dáil) (Private Member's Bill)	Defeated 18/3/81.
Family Law Bill, 1981.	To abolish actions for criminal conversation, enticement and harbouring of a spouse and breach of promise of marriage, to make provision in relation to the property of, and gifts to and between, persons who have been engaged to be married and in relation to the validity of consent of a minor spouse for the purposes of the Family Home Protection Act, 1976, and to provide for related matters.	20/2/81 (Dáil)	Second Stage (Dáil).

Title of Bill	Effect	Introduced	Position at 15 April 1981
Social Welfare (Amendment) Bill, 1981.	To amend and extend the Social Welfare (Consolidation) Act, 1981, by giving effect to the proposals, announced in the Budget statement, 28/1/81, for increased rates of payment in the schemes of social insurance, social assistance, children's allowances, occupational injuries benefits and other related matters.	25/2/81 (Dáil)	Passed by Dáil Éireann 8/3/81. Passed by both Houses of the Oireachtas 25/3/81.
Night Work (Bakeries) (Amendment) Bill, 1981.	To provide for the amendment of the Night Work (Bakeries) Act, 1936, to enable the Minister for Labour to license night baking on application, following consultation with representatives of employers and workers. Also provides for enforcement of the legislation by inspectors of the Department of Labour instead of the Garda Siochana and for increased penalties.	3/3/81 (Seanad)	Passed by Seanad Éireann 11/3/81. Passed by Dáil Éireann 2/4/81. Passed by both Houses of the Oireachtas 8/4/81.
Litter Bill, 1981.	To enable more effective arrangements to be made for the control of litter in order to improve the quality of the physical environment in towns and in the countryside.	9/3/81 (Dáil)	Second Stage (Dáil).
Finance Bill, 1981.	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.	12/3/81 (Dáil)	Second Stage (Dáil).
Restrictive Practices (Confirmation of Order) Bill, 1981.	To confirm the Restrictive Practices (Groceries) Order, 1981, S.I. No. 69 of 1981.	10/3/81 (Dáil)	Passed by Dáil Éireann 24/3/81. Passed by both Houses of the Oireachtas 1/4/81.
Retail Grocery Trade (Special Provisions) Bill, 1981.	To make special provisions in connection with the retail grocery trade, and to amend the Restrictive Practices Act, 1972.	18/3/81 (Dáil) (Private Member's Bill)	Defeated 8/4/81.
Restrictive Practices (Confirmation of Order) (No. 2) Bill, 1981.	To confirm the Restrictive Practices (Motor Spirit and Motor Vehicle Lubricating Oil) Order, 1981, S.I. No. 70 of 1981.	20/3/81 (Dáil)	Passed by Dáil Éireann 31/3/81. Passed by both Houses of the Oireachtas 8/4/81.
Family Law (Protection of Spouses and Children) Bill, 1981.	To make further provision for the protection of a spouse and any children whose safety or welfare requires it because of the conduct of the other spouse, and to provide for other connected matters.	1/4/81 (Dáil)	Second Stage (Dáil).
Patents Bill, 1981.	To make new provisions in respect of patents and related matters in substitution for the provisions of the Patents Act, 1964; to enable effect to be given to certain international conventions on patents and to provide for other related matters.	1/4/81 (Dáil)	Second Stage (Dáil).
Merchant Shipping Bill, 1981.	To enable effect to be given to an International Convention for the Safety of Life at Sea signed in London on 1 November, 1974, to amend and extend the Merchant Shipping Acts, 1894 to 1979, and to provide for other related matters.	7/4/81 (Dáil)	Order for Second Stage (Dáil).
Fire Services Bill, 1981.	To update and strengthen the law in relation to the fire service, including the organisation of the service fire fighting arrangements, fire prevention measures and the protection and rescue of persons and property. Repeals the Fire Brigade Act, 1940; re-enacting its main provisions subject to amendments and additions. Takes account of the recommendations of the Report on the Fire Service (Prl. 4593), July, 1975.	7/4/81 (Dáil)	Order for Second Stage (Dáil).

COMPLETION BEFORE ASSURANCE

An extract from the Special Conditions of a Contract for the purchase of new house built under the Dublin County Council 'Small Builders' Scheme was submitted by a firm of solicitors to the Conveyancing Committee for consideration, the extract reads as follows:

> Delays may occur in obtaining the Transfer and other documents of title from the County Council, but notwithstanding the employer shall complete this transaction by way of bridging finance within seven days of being notified by the Contractor or by his solicitor that the premises have been so completed and shall accept an undertaking from the contractor's solicitor that they will furnish the transfer duly sealed by the County Council together with the other relevant documents when received by them from the County Council.

The Conveyancing Committee considered that this clause is unfair and improper and should not appear in the Special Conditions of any contract; it is further recommended that no solicitor should give or ask another solicitor to accept an undertaking to furnish a transfer duly sealed by any County Council.

The clause creates an impossible position for purchasers' solicitors who, in giving the normal form of undertaking for bridging finance, would be in breach of the terms of that undertaking in that bridging finance would be used to close the transaction and on closing no documents of title would be furnished by the Vendor's solicitor to be held by the Purchaser's solicitor for the Bank.

FEES PAYABLE TO COMMISSIONERS FOR OATHS

Superior Court Rule (No. 3) 1981, which came into operation on 31 March, 1981 provides for increase in the fees payable to Commissioners for Oaths. The Minister for Industry, Commerce and Tourism has, under Section 2 (2) (a) of the Prices (Amendment) Act, 1972, consented to the exercise by the rule-making authority (Superior Court Rules Committee) of their statutory powers to prescribe the fees in question, with which the Minister for Justice has concurred.

The rule reads as follows:–

THE RULES OF THE SUPERIOR COURTS (No. 3), 1981

In Appendix W, Part VII shall be deleted and the following substituted therefor:

PART VII
FEES PAYABLE TO COMMISSIONERS FOR OATHS

1. On taking an affidavit, affirmation or declaration £1.00
2. On marking exhibits therein referred to and required to be marked – for each exhibit £0.25
   but not exceeding for all exhibits £3.75
3. On attesting the execution of a bond £1.00

These Rules shall be construed together with the Rules of the Superior Courts and may be cited as the Rules of the Superior Courts (No. 3), 1981.

COURT AND EXCISE STAMPS

Arising out of representations made by the County of Tipperary and Offaly (Birr Division) Sessional Bar Association, the Department of Posts and Telegrpahs has now informed the Society that stamps may be purchased by cheque at a named Post Office, provided the cheques are guaranteed by the drawer's Bankers. A form of guarantee, which can be obtained from the Department, should be completed and signed by the Banker and returned to the Accountant's Branch, Ledger Section, Department of Posts and Telegraphs, Findlater House, O'Connell Street, Dublin 1. Arrangements will then be made to have cheques accepted at the Post Office at which the service is required.

Supplies of the form of guarantee should be obtained from the above section, whenever they are required.

Incorporated Law Society of Ireland

STARDUST ENQUIRY, BLACKHALL PLACE

During the currency of the Enquiry, it is regretted that because of the demands on the available space, overnight accommodation cannot be provided for members. This facility will be reintroduced as soon as possible.

Solicitors' Apprentices Debating Society of Ireland

Inaugural Meeting – Family Law

The Inaugural Meeting of the Solicitors Apprentices Debating Society of Ireland took place at Blackhall Place on Friday, 13th February, 1981. The Auditor, Richard Grogan, delivered his inaugural address on "Marriage in Ireland."

Speakers to the auditor's paper were Inge Clissman, B.L., James O'Reilly, B.L. and Rev. Fr. Liam Ryan, Doctor of Sociology, St. Patrick's College, Maynooth.

In his paper the auditor, Mr. Grogan, gave a synopsis of the present Law in Ireland relating to what constitutes a valid marriage, the constitutional prohibition on divorce and the present distinction between the Civil Law and the Canon Law on Nullity. The Auditor then continued:–

"While nullity and church annullments may seem similar they are distinct in many ways, firstly by a decree of nullity in the Courts the marriage is taken as having never been in existence and all acts done during that time when the parties were living together are taken as having occurred outside of marriage. One striking result of this is that any children that are born are automatically bastardised, something which the Church does not agree with, whereas with a Church annullment the decree is not backdated to the date of the marriage but only to the date of the decree. The Attorney-General's paper on nullity in 1976 proposed a total re-appraisal of the law of nullity by extending the grounds for such a decree. However, the paper envisages introducing elements which arise after the solemnisation of the marriage while the historical perspective is that the grounds on which a decree of nullity is granted should exist at the time of the marriage.

"With a divorce jurisdiction a child of the marriage would remain legitimate and a spouse would be entitled to maintenance and the children to their succession rights. Such rights and privileges automatically cease with a decree of nullity. To extend dramatically the law of nullity is to allow divorce by the back door. As a nation we must now decide if we want divorce or not. To introduce it by a back door method will neither be effective nor will it be honest for it will merely be divorce under a different name. Such an approach would not be in keeping with the Constitution nor with our Christian beliefs of honesty and sincerity. It is obvious that the present is a time of exceptional activity in family law reform. There have, of course, been similar upsurges in the past. These have been associated with the transition from ecclesiastical to secular administration of family law and the reduction of the husband's legal dominion over his wife. The present activity centres around the question of divorce. This movement has gained momentum particularly as the purpose for legal marriage has changed. Marriage has served human society well. On one hand it has institutionalised the care and protection a mother needs during child bearing and maternal care. On the other hand it has provided a method of creating alliances by which human groups have been reconciled, united and expanded. But, in Western society marriage no longer carries these implications. Political allegiances and economic wealth are differently allocated. Even the maternal function is diminished because the proportion of a woman's married life spent in maternal care has been dramatically reduced. The result is that, for the larger part of their existence, the only social purpose for maintaining marital relationships lies in the value they have for the parties themselves. The 1937 Constitution in Article 43 introduced the ban on divorces. No such ban was incorporated in the 1922 constitution. The Irish Free State Parliament took over the jurisdiction of the British Parliament in that a petitioner could obtain a divorce *a vinculo matrimonii* by having a Bill of Divorce passed. By 1925 three bills for divorce had been lodged and in February of that year the Irish Free State Parliament introduced additional standing orders to prevent the introduction of Bills of Divorce. Mr. W. T. Cosgrove said "I have no doubt that I am right in saying the majority of people in this country regard the bond of marriage as a sacramental bond which is incapable of being dissolved." During the debate on the draft constitution Mr. de Valera said "with regard to the question of divorce in general there is no doubt that sometimes there are unhappy marriages, but from the social point of view, without considering any other point of view, the obvious evil would be so great, and it has been proved to be so great in other countries that I do not think any person would have any difficulties – at least I would not – in making a choice on this matter." His choice was to ban divorce. However, I would argue that the State's overriding goal is not to preserve 'marriages' which are marriages in name only but rather to foster viable family relationships and in the event of divorce to minimise damage to residual and re-organised family relationships.

"Mr. de Valera felt that divorce facilities would be detrimental to the stability of marriages and cause marital breakdown. However, it is the factual breakdown of a marriage and not the availability of divorce which constitutes a social evil. The role played by divorce proceedings are not very different than that played by separation proceedings. They are merely alternative ways of dealing with marital breakdown when it occurs. The only difference is that the former permits the parties to remarry while the latter does not. We, as a society, must now decide whether we want or need a divorce jurisdiction. However, I think we would all accept that any divorce statute must leave the decision to divorce or remain married to the adults involved. A divorce procedure must acknowledge the inability of the law to order highly personal human relationships and to recognise as

Mr. Alexander in the Follies of Divorce said that "the Law doesn't really divorce husbands and wives. It seems to think it does, but in fact they divorce themselves." A divorce statute must protect the parties from coerced decisions. It must safeguard the interest of the children, and provide the adult parties with an opportunity to avoid rash decisions. A divorce statute must neither discourage co-operation and good faith efforts to resolve issues of finance or custody, nor aggravate the tensions and hostile emotions that accompany the break-up of marriage. It must also facilitate, or at least not undermine, the development of sound re-organised family relationships. It must also recognise the law's limits in what is basically a highly personal situation where the law is not always the best equipped instrument in the particular circumstances of the case. However, any statute even if it fully covers all these matters will be of little use if it does not make divorce equally available to people who because of financial inability are unable to pay counsel and court costs and other expenses.

"The question of the introduction of divorce raises questions of religious beliefs, the requirements of society and the needs of individual couples who find themselves in intolerable positions. Those who both advocate for and against divorce must recognise that the question of the introduction or not of divorce in this country is not an end in itself. A total re-appraisal of our family law, which is in many areas archaic and unsuited to present day requirements, is necessary.

"The time has been reached when legislators and the general public must seriously consider the deletion of Article 41.3.2° from the Constitution and the enactment of legislation to correspond with the social reality of marriage. A whole new codification and re-appraisal of our family is now required.

"Let us hope that those who are in a position to introduce change have for the sake of society the political will to do so.

BOOK NOTE

The Society's Library has received an **Index to Legal Citations and Abbreviations** by Donald Raistrick published by Professional Books at £15 Sterling.

Identifying abbreviations has long been a problem for the legal profession, as there has been no standardisation and many abbreviations have more than one meaning. This is the first near-definite work of its kind to have been compiled in English and the first to have attempted to include all the known variants of the citations listed.

The geographical coverage is broadly the United Kingdom, Commonwealth and the U.S.A., but frequently encountered abbreviations of Common Market countries are also included.

While the book must be of principle use to libraries and universities, the Index, with over 20,000 entries, should find its place as an invaluable bibliographical tool in the hands of all who have need to consult law books.

Mr. Raistrick is the Librarian at the United Kingdom Law Commission.

INTERNATIONAL BAR ASSOCIATION

John F. Buckley has been appointed Chairman of the International Bar Association's Committee on Legal Education and Continuing Legal Education, which is a Committee of the General Practice Section of the I.B.A.

APPRENTICESHIPS

Professor Woulfe of the Society's Law School has drawn our attention to the fact, that while the demand for apprenticeships is great, the Society is satisfied that it has succeeded in ensuring that no candidate who was qualified to enter the Society's Professional Course under the new system has failed to find a Master.

DEED OF APPRENTICESHIP — ADDENDUM

Conditional Indentures

The Education Committee draws to the attention of any practitioner about to take on an apprentice that, where the Indentures are executed before the student has passed the Final Examination – First Part, the following specimen clause may be added to the deed of apprenticeship:

> "These Indentures are conditional upon the Apprentice's passing the Final Examination – First Part* (at the next sitting). In the event of the Apprentice's failing to satisfy this condition then these Indentures of Apprenticeship shall be deemed to be cancelled by mutual consent."
>
> *may be deleted if not required

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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 25th day of May, 1981.

W. T. MORAN (Registrar of Titles)
Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

(1) Registered Owner: Bernard McDermott; Folio No.: 17560 (This folio is closed and now forms the property No. 2 in Folio 19874 Co. Leitrim; Lands: Ballynacleigh; Area: 12a. 3r. 22p.; County: **Leitrim.**

(2) Registered Owner: Patrick Deeney; Folio No.: 301; Lands: Culinee; Area: 15a. 3r. 37p.; County: **Donegal.**

(3) Registered Owner: Thomas Dillon; Folio No.: 24522; Lands: (1) Brownstown; (2) Rathbran; Area: (1) 28a. 2r. 0p.; (2) 58a. 0r. 11p.; County: **Meath.**

(4) Registered Owner: Patrick McEvoy; Folio No.: 5723; Lands: Ballyspellan; Area: 33a. 2r. 11p.; County: **Kilkenny.**

(5) Registered Owner: John Brendan O'Donoghue; Folio No.: 623F; Lands: Rathdown Lower; Area: 0a. 0r. 10p.; County: **Wicklow.**

(6) Registered Owner: John C. Quinn; Folio No.: 12026; Lands: Deerpark (part); Area: 6a. 1r. 0p.; County: **Roscommon.**

(7) Registered Owner: Pearl McCarthy; Folio No.: 17043; Lands: Donaghmore (part); Area: 0a. 3r. 34p.; County: **Tipperary.**

(8) Registered Owner: Roadstone Ltd.; Folio No.: 6385; Lands: (1) Dunbyrne; (2) Dunbyrne; (3) Dunbyrne (one undivided tenth part); (4) Barrettstown; (5) Tankardsgarden; Area: (1) 63.350 acres; (2) 2.038 acres; (3) 5.113 acres; (4) 2.750 acres; (5) 2.43 acres; County: **Kildare.**

(9) Registered Owner: Samuel Francis Brownrigg; Folio No.: 4014; Lands: Ballyrocbuck; Area: 50a. 2r. 34p.; County: **Wexford.**

(10) Registered Owner: Patrick Dargan; Folio No.: 21F; Lands: Chapelstown; Area: 0a. 0r. 15p.; County: **Carlow.**

11. Registered Owner: Cornelius Ahern; Folio No.: 23183; Lands: (1) Meenyline North; (2) Meenyline South; (3) Meenyline North; (4) Meenyline North; (5) Meenyline South; Area: (1) 39a. 3r. 11p; (2) 23a. 1r. 39p; (3) 5a. 3r. 12p; (4) 4a. 2r. 16p; (5) 18a. 2r. 22p.; County: **Limerick.**

(12) Registered Owner: Colum Hume; Folio No.: 43726; Lands: Churchland Quarters (Carrowtemple, Moneyshandoney and Carrick); Area: 0a. 1r. 0p.; County: **Donegal.**

(13) Registered Owner: Kathleen Barnicle; Folio No.: 2429 (Rev); Lands: (1) Kilkeeran (2) Lough Carra; Area: (1) 38a. 3r. 22p (2) 28a. 1r. 37p; County: **Mayo.**

(14) Registered Owner: Hilda M. Flanagan; Folio No.: 20261; Lands: Balreask Old; Area: 1a. 1r. 8p.; County: **Meath.**

(15) Registered Owner: Belturbet Urban District Council; Folio No.: 16498; Lands: No. 1. Corporation Lands, No. 2 Corporation No.: 16498; Lands: No. 1. Corporation Lands, No. 2. Corporation, Lands; Area: No. 1. 1a. 1r. 23p, No. 2. 0a. 0r. 21p.; County: **Cavan.** Lands: Newpark; Area: 30a. 2r. 27p; County: **Mayo.**

(17) Registered Owner: Sean Norton, as tenant in common of an undivied moiety of the property; Folio No.: 29232; Lands: (1) Mohober, (2) Cragaugh, (3) Cragaugh; Area: (1) 8a. 1r. 34p, (2) 10a, 2r. 32p, (3) 18a. 2r. 30p; County: **Tipperary.**

(18) Registered Owner: William G. Keane; Folio: 26753; Lands: (1) Perssepark, (2) Perssepark, (3) Perssepark, (4) Killeen, (5) Ballynamockagh; Area: (1) 23.063 acres, (2) 1a. 1r. 4p., (3) 3a. 0r. 0p., (4) 1a, 1r. 39p., (5) 46a. 0r. 36p.

(19) Registered Owner: Thomas Larkin and Joan Larkin; Folio No.: 1441F; Lands: Part of the Townland of Curragh situate in the Barony of Brawny; Area: —; County: **Weatmeath.**

(20) Registered Owner: Martin Lavan; Folio No.: 2639F; Lands: 234 Woodfarm Acres, Palmerstown, Dublin 20 (Otherwise known as 22 The Orchard, Woodfarm Acres, Dublin 20); Area: ——; County: **Dublin.**

(21) Registered Owner: Mathew P. Minch; Folio No.: 1019; Lands: Coolroe; Area: 15a. 1r. 11p.; County: **Kildare.**

Lost Wills

John Ballantine, deceased, late of Brickeen, Castlebaldwin, via Boyle, County Sligo, Farmer. Will any person having knowledge of a Will of the aforesaid deceased who died on the 28th March, 1981 please contact Johnson & Tighe, Solicitors, Ballymote, County Sligo.

Julia Cahill, deceased, late of Ballinasare, Annascaul, Co. Kerry, Widow. Will any person having any knowledge of the Will of the above-named Deceased, please contact Messrs. O'Donnell, Liston & Co., Solicitors, 4 Denny Street, Tralee, Co. Kerry.

Robert O'Donoghue, deceased, late of Kew Gardens, Lucan, Co. Dublin. Will any person having any knowledge of the Will of the above-named deceased, who died on 17 April, 1981 please contact Trant, McCarthy & Co., Solicitors, 35 Charles St., West, Dublin 7.

John Quigley, deceased, late of Baurnadomeeny, Rear Cross, Newport, County Tipperary, Farmer. Will any person having any knowledge of any Will made by the above named Deceased who died on or about the 1st day of January, 1955, please contact Messrs. Michael Tynan & Company, Solicitors, 16 William Street, Limerick."

Employment

Assistant Solicitor required by County Cork Firm for general practice. A minimum of 1 year post-enrolment experience essential. Good salary and conditions. Application will be treated in strictest confidence. Apply with full particulars to Box No. 014.

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Obituaries

Mr. Richard Knight died in July, 1980. Mr. Knight was admitted in Michaelmas Term, 1955 and was a partner in the firm of Messrs. W. G. Bradley & Sons at 11 Lower Ormond Quay, Dublin.

Mr. Ralph T. Walker died on 11 November 1980. Mr. Walker was admitted in Hilary Term 1937 and practised as a partner with Messrs. Hayes & Sons, 15 St. Stephen's Green, Dublin. Mr. Walker was President of the Society in 1960-61.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 5 June 1981

"Justice delayed . . ."

WE welcome the proposal of the President of the High Court for additional sittings of the Central Criminal Court at the end of the long vacation to clear the back log in that Court caused by the foolish statutory provision (now removed by the Courts Act 1981) enabling a defendant to secure the automatic transfer of a case from the Circuit Court to the Central Criminal Court.

Unfortunately, the position with regard to Jury Trials set down for hearing in Dublin, Cork and Galway is unlikely to improve in the foreseeable future. It is understood that there are now over 3,300 cases set down for hearing, which means that any litigant now setting down his case cannot hope to obtain a hearing before November, 1982. Since, in the majority of personal injury cases, it must be likely that the case will not have been set down until the medical prognosis of the Plaintiff's condition has been decided, probably at least a year to eighteen months after the injury, there can be no likelihood of the case being heard in Court until three years after the events giving rise to the injury. By this time, witnesses' memories will have dimmed, some may have died or gone abroad, thus limiting the prospects of a proper trial.

To say that a high percentage of cases is settled is to beg the question. If the proportion of cases settled fell, the waiting time for hearing would lengthen.

Another area where the level of service to the public has fallen far below acceptable levels is that of default judgments. It is accepted officially that a period of up to eight weeks elapses between lodgment of papers and signing of the judgment. Such a delay could clearly be fatal to a creditor's chances of collecting the debt. The figures for Summary Summons issued show a doubling within four years and staffing has not kept pace with that increase.

Criticisms have again surfaced of delays in the furnishing of reserved judgments in the High Court. Such criticisms must be tempered by the fact that the facilities provided for judges in our legal system are of a kind which practitioners would not tolerate for long in their own practices. To require judges in long and complicated cases to rely on the notes which they have been able to write down during the course of the cases is bad enough, but to add to this the obligation to carry out all the legal research into the authorities which may have been quoted (or, as may happen, not quoted) to the Court during the hearing of the case imposes an intolerable burden on our judges. This is not to say that it might not be a useful discipline if each High Court Judge were to adopt the practice of some members of that Court of indicating the date on which a reserved judgment will be delivered. Deadlines concentrate the mind wonderfully and judges are no exception to this rule.

The fundamental question which arises on any consideration of the efficiency of our Courts is whether the administration of the Courts is in the hands of an appropriate body. At present, the control and administration of our Court system seems to depend on an uneasy co-operation between the judiciary and the Department of Justice. The training and experience of a practising Barrister is not one which confers any great expertise in the skills of administration, nor is it likely to bring much familiarity with up-to-date office systems and technology. The Department of Justice has a remarkably wide range of activities under its control and it would be surprising if there were not direct relationship between the attention given to certain of those activities and the level of public interest in or comment on them. Clearly, the Courts do not fall into a category of high continuing public interest and the Department's performance in the provision of Courthouses and of adequate facilities for the administration of justice has been less than adequate. An ill-housed system of justice, operating with a creaking administration, will not do much to encourage respect for the law and our system of justice in the average citizen.

Other countries have established their Court administration on a basis independent from their equivalent of our Department of Justice, with the apparent result of greater flexibility in the system and a general improvement in the administration.

As light appears to be dawning in Government circles that direct control and operation of public services need not be in the hands of individual departments (even if the reasons for such views are more linked to the oboloquy which attached to the appropriate Minister through the criticism of the performance of his department), it may well be appropriate now to take similar steps with the administration of our Court system and put it on an independent basis. □

INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 5 June 1981

In this issue . . .

Comment . . .

THIS issue coincides with the Society's first Seminar on (and trade show of) computers for Solicitors. There is considerable interest in the profession in computer-based developments in office technology. Interest, but caution – for, in many cases, there is a wide gap between the comprehension of the practitioner and the persuasiveness of the sales man and the glossiness of the brochures, to say nothing of the flood of technical or pseudo-technical jargon.

In an effort to bridge that gap the Society has arranged for a panel of distinguished visiting speakers, including Irish Practitioners who are already users of the new technology, to speak at the Seminar. The trade show will enable participants to see, in the one place, the majority of the products available on the Irish Market. In addition, this issue contains some special articles which are intended to assist members in evaluating the new technology and its application to their own practices.

* * *

THE recent decision of Osler, J. of the Ontario High Court of Justice in *Re British United Automobiles and Volvo Canada Ltd.* (1981) 114 DLR (3d) 488 should interest practitioners here. The parties had entered into an agreement of purchase and sale respecting certain premises. A schedule was attached to the agreement and included a declaration that the purchaser was aware of a prior agreement, made between a predecessor in title and representatives of a Residents' Association, respecting the use to which the premises would be put. The main question for the Court was whether the prior agreement amounted to a restrictive covenant running with the land and, if so, whether it was to be treated as fraudulent and void by reason of certain statutory provisions. However, Osler, J. also had to deal with the question of actual notice by the purchaser. The purchaser's solicitor was in partnership with other solicitors and one of the partners had actual knowledge of the agreement. Osler, J. accepted Counsel's submission that the solicitor/client privilege was a bar to any finding that knowledge acquired by a solicitor when acting for a client could be attributed to a second and unrelated client, holding that knowledge acquired by one legal partner could not be attributed to another and hence to the client of that other. Indeed support for this submission can be found in the judgment of Lord Hardwicke LC in *Worsley v. Earl of Scarborough* (1746) 3 Atk. 392 where it was said that "Notice to an agent or counsel who was employed on the thing by another person, or on another business, and at another time, is no notice to his client, who employes him afterwards; and it would be very mischievous if it was so, for the man of most practice and greatest eminence would then be the most dangerous to employ." □

The Word Processor in Practice

by

Michael G. Hayes, Solicitor

ADVERTISEMENTS and demonstrations of Word Processing Machines are designed to convince you that every Solicitor's office should have one. You will be led to believe that your secretaries will be so free from typing that they will be able to devote their skills to real secretarial work and that your professional staff will be able to draft excellent documents so quickly that they will be able to devote most of their time and energy to dealing with the important legal aspects of any case. This is true, but it is not as simple as getting the equipment. If you buy a Word Processing Machine, expecting it to take over and do the work for you, you will find after a few months that you and your staff are using the Word Processor as if it were a more sophisticated and convenient version of the now old-fashioned Magnetic Card Memory typewriters. You will not reap the benefits of Word Processing unless you start out with realistic expectations and are prepared to devote a considerable amount of time and hard work to setting up a suitable office system around your Word Processor.

Realistic Expectations

Most Solicitors deal with such a variety of cases at the same time that they tend to draft documents on a once-off basis. No doubt we all have bundles of precedents, indexed to a greater or lesser extent, but each time you use a precedent for a particular client you tend to feel that you have corrected and improved upon the original draft. Therefore, there is always a temptation to use the version of the document which you used in the previous case. The result is that you end up with many documents from which to chose, none of which could be said to contain a cross-section of the most important points which you may need. You therefore have to work your way each time through what occurs to you as being the important points, resulting in omissions, mistakes, bad draftmanship and repetitive dictating of standard or semi-standard clauses.

It is realistic and proper to expect that Word Processing would enable the professional staff to organise their precedents and whatever other standard information they require in such a way that any of it can be obtained at any time and quickly assembled and put on paper. However, you would be wrong and disappointed if you thought that such a result would be achieved simply by having all your office precedents typed up and recorded on your Word Processor system. You will have to index them properly and prepare standard paragraph files and check-lists to match your precedents.

Secretaries can rightly expect that they will save themselves an enormous amount of time and drudgery typing and re-typing fresh drafts and engrossments of long documents and the same long boring covenants, trusts, indemnities, exceptions and reservations which are contained in much the same form in so many different documents. However, if you expect the Word Processor to do the work for you, you will find that your Secretaries will waste the time they save hunting around for the precedents they are supposed to be using or, worse still, reconstructing the urgent document which needs to be engrossed because the final draft has got lost through incorrect machine operation, or the only floppy disc containing the final draft became damaged and the information corrupted.

The expense of Word Processing is not limited to the purchase price of the machine. You will have to be prepared to consider buying many extras. Not all the extras are essential and whether you will require them will depend on your particular needs. Printers can produce a very irritating and tiresome noise. If girls are expected to do secretarial work and take telephone calls in the same room as the printer, you will have to be prepared to buy an acoustic hood. Depending on what you buy and the physical characteristics of your office, you may have to consider buying additional furniture to hold the equipment. You may have to buy folders for holding the precedent documents which you create and you will need a safe to hold the discs. Although these and many other extras are only a small part of the total cost of Word Processing, they are mentioned in order to stress that the purchase of the basic equipment is, in many ways, the beginning rather than the end of your new system.

Preparatory Work

Before making any orders you will to assess the needs of your office by looking at the number of people involved, the kind and amount of work, the amount of money available and the attitude of your staff. It is difficult to make generalizations because every office is a mixture of its particular individuals. However, even if you were getting the smallest stand-alone system (i.e. 1 screen/keyboard and 1 printer), I think it is important that there should be at least two or three professional staff and perhaps at least two secretaries who are sufficiently interested in word processing and prepared and able to work together in setting up a system suitable for their office. Every person thinking of investing in word processing must investigate

the market thoroughly, take such advice as he can get, and use his common sense.

The Machine Is Now In Your Office

When you take delivery of the Word Processing machine you may first have to get over some psychological barriers. If you have a large number of Solicitors in your office, you will probably find that some of them will feel that the equipment will not be of much use to them and they will not want to use it. Some of the secretaries may feel that the machine will be too complicated to use and may hesitate. However, as you will by now have bought the machine, you will have worked out who on your staff is interested in trying to use it.

In our office, we started off by making some understandable mistakes:

1. Many of the precedents which we had on the magnetic cards were typed manually on to the word processing machine and recorded on floppy discs. A somewhat casual and not properly thought out indexing system was put into operation and the machine was used only as a sophisticated typing and editing machine with a high speed print-out, but many of its most useful functions were either totally ignored or only partially or incorrectly used.
   This may have been because the three secretaries who attended a two-day training course to learn how to work the machine found it difficult to remember exactly what they had learnt when the word processor was delivered about two or three weeks later.
2. The handbook was not very easy to follow, unless you already had some idea how to use the machine and I have found it necessary from time to time to prepare memos supplementing the handbook.
3. For the first few months, no one person took overall responsibility for using the equipment properly.
4. One person having ultimately been put in charge of the system, it was not properly appreciated how time-consuming it is to organise people to work in a particular way and to draft (and then check) documents in a form which suits the word processing machine. On this last point, I would mention that I have found that, although everything can be done much more quickly and conveniently on a word processing machine than on a magnetic card memory typewriter, it seems that the slightly increased typing speed, coupled with the appearance of the text on the screen, produces more typing errors.
   A page of text which requires just a few small insertions of new text or alterations here and there frequently arrives with more typing errors than would have been produced if the job had been done on a memory typewriter, or even a manual typewriter. This seems to be because the keyboard is quicker to the touch and because what may seem an obvious and glaring error on a printed page will not be noticed so easily in a mass of single-space green text on black, or blue text on a grey screen.
   This does not mean that the word processing machine is more trouble than it is worth because of the increased proof-reading which must be done. On the contrary, a word processor is versatile enough considerably to reduce typing. This can be achieved only if your secretaries understand fully how to use the machine, so that they can alter text by using the memory of the machine with the minimum of copy-typing. It is indeed possible to make a considerable number of errors in using the machine but usually, instead of carrying out a wrong instruction, the machine simply stops and throws up an "error" signal on the screen.

On receipt of the machine, therefore, you must

(a) put some one person in charge of organisation, and
(b) see that your secretarial staff are adequately and properly trained.

General Organisation

Most firms sending out a draft document which is likely to be negotiated upon and re-drafted many times will number and date their drafts. However, drafts which are fairly standard, such as draft conveyances, family home declarations, and other such documents peculiar to particular cases, are often sent out with either no particular date or reference on them or, perhaps, at most, the initials of the solicitor and secretary dealing with the case. You may have noticed that for some time certain (usually the larger) firms have complicated-looking references either on the top of the front page or at the bottom of the back sheet of their draft documents, consisting of a series of numbers and/or letters. These will be the firms that have organised themselves around some form of automatic typing and/or computer. If your firm does not already pay attention to proper referencing of draft documents, correspondence, files etc. you will now find that you will have to accustom everybody involved in your word processing system to the idea that every document (whether a general precedent or a draft relating to a particular case) must be properly referenced and dated. In other words, every document must be properly and clearly identified. There is nothing difficult about this, but it should be appreciated that until you tackle any problems of disorganisations and lack of discipline in your office, new machinery will highlight your problems rather than solve them; you will use the time which you should be saving in clearing up the mess.

Bottle-Necks

At first you may find a certain reluctance on the part of both your professional and secretarial staff to use the machine. However, as time goes on, you will find that bottle-necks will build up because several people will want to use the machine at the same time. Traditionally, solicitors have worked on a one secretary to one solicitor basis. This is satisfactory in most respects, in that solicitors deal with a large variety of cases at the same time, in many of which a certain amount of "personal touch" is important. Therefore, it has been felt that a case can be dealt with properly only if the same solicitor and (though to a slightly lesser extent) the same secretary deal with every aspect of a case from start to finish. In practice, you will probably find that your Word Processing system will work better either if some of your secretarial staff do nothing else but work on the Word Processing machine of, if you starting only in a small way, if you have a small number of secretaries pool the work of a small number of solicitors so that documents can be drafted and printed out with a minimum of effort and delays. The latter will enable you to retain the one secretary to one solicitor ratio for secretarial (as opposed to typing) work.

Speed
If you have not actually used a word processing machine, the technical specifications for printers are at once unbelievable and unreal. Our printer is a standard Qume printer. The following is a rough idea of the time it takes to produce certain documents. These times are only an approximation, because they allow for telephone interruptions, the fact that some of the secretaries are not as familiar as others with using the machine and the fact that we are not as organised as we ought to be to get the full benefit from our equipment:

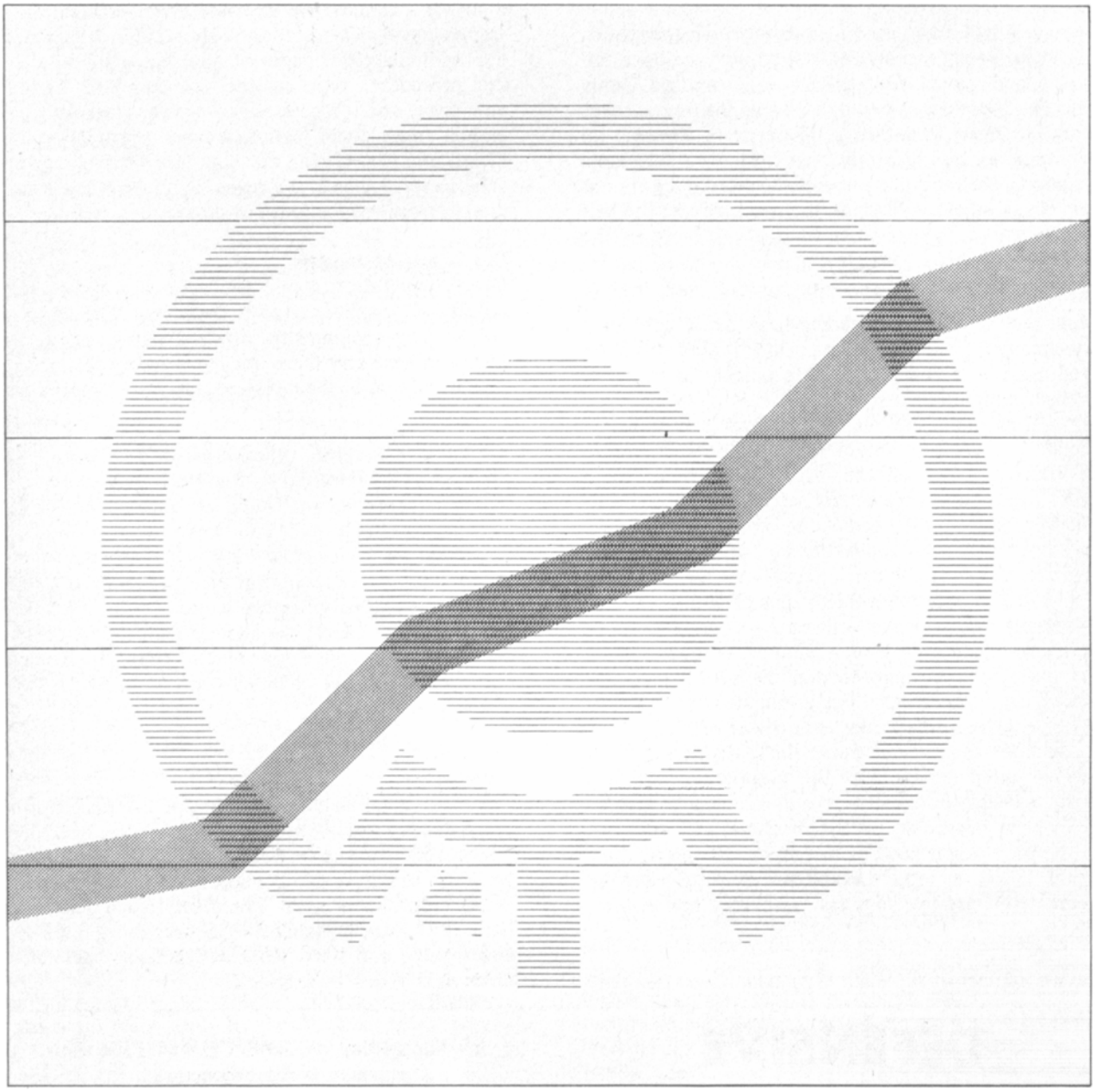
Leases
Our first recording of a precedent long Lease contained approximately 150 typing errors. Once it was corrected and redrafted, it was possible quite quickly to make up other basic standard drafts. With a standard draft in front of him and assuming he has taken proper and complete instructions, a solicitor ought to be able to dictate in about fifteen minutes all the instructions needed by a secretary to produce a lease. His secretary then ought to be able to produce on the screen (before she prints it out) a newly drafted lease in approximately forty-five minutes, which time allows for some interruptions for telephone calls. The draft Lease (about 28 pages of double-spacing on A4 paper) can be printed out on A4 continuous draft paper in approximately eighteen minutes. While it is being printed out it can be ignored and the screen used for something else, if necessary. For a long time we were not doing our engrossments in the easiest way and they took from one hour to an hour and a half, depending on a number of interruptions and the number of mistakes made; it was easy to repeat a page by accident or give an incorrect print instruction to the machine, as a result of which the page might need to be redone. However, done efficiently, such a long Lease can be engrossed in approximately forty-five minutes, with very few errors.

Wills
We have a number of standard Wills and, unless there are a lot of changes, we produce them straight away as engrossments. Our standard short Will is equivalent to approximately four pages of double spaced A4. To copy the precedent, type in the non-standard names and addresses and then produce the engrossment with a carbon takes, from start to finish, approximately ten or fifteen minutes. Giving our standard Discretionary Trust Wills (approximately 10 pages only) the same treatment, it takes from start to finish approximately twenty minutes.

Deeds and Memorials
Deeds, when drafted and approved, can be engrossed as quickly as it takes to print them out. The Memorial is prepared by making the standard alterations and a few additions here and there and by deleting everything else. The Memorial is then printed out on Memorial paper.

Affidavits, Contracts, Endorsements of Claim
These can all be drafted on the Word Processing machine and, when checked and found satisfactory, can be printed out very quickly. If you have a specially drafted document for a particular case, which document may be required several times in that case (for example a standard letter, or a specially drafted service contract for the staff of a particular client) the basic document would need to be done only once. It would then be copied the appropriate number of times and the variables would be added in.

Conclusion
This article has dealt with some of the problems which you can have when you buy a Word Processing Machine. It is not intended to be pessimistic or off-putting. On the contrary, its purpose is to suggest to you that not only is a Word Processor of great advantage to a solicitor's office, but it is well worth taking the considerable amount of time and trouble and hard work necessary to get full value from your Word Processor.□



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Legal Information Retrieval

Advertisements for Legal Information Retrieval Systems abound – We are already urged to subscribe to Lexis or Eurolex, while we are aware of proposals to establish a National Law Library in the U.K.

But what is it all about? Do we really need to join? What about Irish Law? Should we be doing something about it?

The answers to some of the questions are easily given; others are still awaited, but should not be too far off. The functioning of a Legal Information Retrieval System depends on the establishment of a legal data base, ideally including all statute law and case law in that jurisdiction and, most important perhaps from the Solicitors' point of view, including what are known as "secondary materials," such as textbooks, articles from legal journals and sets of precedents. The present trend is to include every word of the case law in the data base – projects which have restricted themselves to headnotes appear to be less favoured.

Establishing a legal data base by putting all this material into the memory of a computer is a massive task, even for a small jurisdiction, and it is interesting to note that the world's most substantial data base, Lexis, was established, not by a legal publishing house, but by a computer firm Mead Data Systems. Their Lexis System started by establishing a data base of U.S. Federal Law and was targeted to include all U.S. State Case Law by 1981. To this has now been added U.K. Statute Law, the All England Reports and the Weekly Law Reports. Its principal competitor, Eurolex, a subsidiary of the Thompson Publishing Group, has concentrated on material originating in the E.E.C., but has expanded to include some U.K. Reports, including the Weekly Law Reports and, more interestingly, some secondary materials. From the consumer's point of view, the significant difference between the two systems, apart from their different data bases, is that Lexis is a "dedicated" system – which means that the computer terminal used to access the information can only be used for that particular purpose. Eurolex is an "integrated" system – which means that the same computer terminal may be used for accessing a firm's accounts, records or word processing, as well as for accessing the Eurolex Data Base.

The problem of establishing an Irish legal data base is an unusual one. It is apparently not possible to separate either Irish Statute Law or Irish Case Law from U.K. Statute Law and Case Law; for this reason, the establishment of a complete Irish legal data base would involve the inclusion of a substantial amount of U.K. material. It seems clear that duplication of this nature would be foolish and studies are now in progress with a view to ascertaining how best an Irish legal data base can be established. The study is being carried out by the Department of Library and Information Services and the Computer Department of University College, Dublin.

While the subscription charges and charges for using either Lexis or Eurolex are not unreasonable, it must be doubtful if many Irish legal firms would consider taking out subscriptions. A development which could be of considerable interest is one which has commenced on an experimental basis in Belfast, under the aegis of the U.K. National Law Library, known as a "mid-user" scheme. In essence, a number of subscribers would share a single subscription and have access to a centrally located computer terminal and would pay for their individual use of the terminal. If, as appears to be a likely outcome of the present enquiries, it appears that the most economical way to establish an Irish Legal Data Base would be as an appendage to a U.K. Data Base, a "mid-user" system might well have considerable attractions.

There is one step which should be taken urgently, in order to ensure that the cost of establishing an Irish legal data base does not continue to increase unnecessarily and that is that the drafting and printing of our legislation, from its inception, should be prepared in a computer -- compatible form, so that it may ultimately be fed directly into a computer and not have to be laboriously retyped. The necessary technology has been in existence for some time, but the Stationery Office does not as yet appear to have taken the necessary decision to utilise this technology.

The Software Dilemma – A Solution Ahead?

The increasing complexity of the office technology is in inverse proportion to the ability of the consumer to evaluate it. Independent consultants are few and far between. The speed of development of the technology renders the printed commentary obsolete soon after its publication.

These are some of the factors which render the choice of the new technology so difficult. Unlike most of our major purchases, it is not just the physical equipment (the hardware) that has to be carefully assessed. Indeed, apart from the usual concern about service, the choice of hardware is unlikely to give rise to many problems.

It is the software which gives most cause for concern. For most consumers, the cost of having a special programme written to meet their needs would be prohibitive. The hardware manufacturers will have programmes to suit the hardware, but not necessarily to suit each customer's specific needs. Programmes designed for use in Britain may not be appropriate for Irish use. If the programme is not suitable, it may be very expensive to alter it.

A special Law Society sub-committee is exploring two possibilities

1. the commissioning of a special software programme for Solicitors accounts which would meet the needs of all but the largest offices and would be usable on all but the cheapest machines on the Irish market, and
2. the adaptation of a programme now used by British Solicitors to Irish requirements.

It is hoped that the Committee's recommendations will be available in time for the computer seminar. □

IN WHAT AREAS CAN A COMPUTER HELP —

Now?

Accounts: Provide a superior accounting system (maintaining ledger cards, if required).

Time Recording: Process your time records and assist you in calculating charges (processing time records manually can be a herculean task).

Management Information: Provide information, not only on the comparative profitability of various areas and individual cases, but also on cases which are unbilled or have been overlooked.

Debt Collecting: Ensure that the various steps in the process are taken at the correct time and keep track of all the monies involved.

In the Near Future?

In house retrieval: Keep track of the nature of the information contained in your files, both current and non-current.

Diary and Reminder Systems: Keep you from missing that date of the hearing, or the last day for issuing Proceedings.

What Can't a Computer Do For You?

1. Turn an unsystematic office into a systematic one; intelligent use of a computer requires a disciplined office.
2. Sort out the problems of an overworked or undermanned Accounts Department; a manual accounting system has to be in apple-pie order before it can be transferred to the computer. Remember the maxim "garbage in – garbage out."
3. Work without an appropriate programme; programmes are usually not interchangeable, many being designed for one make of computer only.
4. Work beyond its capacity; a bottom-of-the-market computer will have limited storage capacity and won't handle the accounts of the average office.

A Glossary of Computer Terms

Computer: A processor of information stored electronically, either in an in-built or attached memory store.

Word Processor: Usually a machine which will store, retrieve and process text. The processing usually involves editing and amending the stored material.

Word Processing: Has no special technical meaning. Includes, at its broadest, dictating equipment, and typewriters but is now used primarily where words are stored by an electronic process on tape, card or disc, from which they can be automatically retrieved.

Bit: One character of information.

Byte: A collection, usually of eight, bits – a "word".

K: A thousand bytes.

Floppy Discs: Very similar to forty-five R.P.M. records, used for the storage of information which is picked up from any part of the disc by a moving arm.

Hard Discs: (Winchester Discs) The equivalent of long-playing records, on which information is similarly stored and from which it is similarly extracted.

Hardware: The actual equipment. In the context of word processing or computerised accounting in a Solicitors office, hardware will comprise a V.D.U./Keyboard, a Central Processing Unit and a highspeed printer. Two or more of these peripherals may be included in a composite piece of equipment.

Software: The programmes which control the operations of the computer; they may be "built-in" or "wired-in" to the equipment in some cases.

Memory: As in the human being, where the information is stored. Not necessarily in the computer itself – can be on tape or on disc.

Modem: A device attached to a computer or V.D.U. in the nature of a socket for a telephone handset, which converts the computer's signals into telephone-compatible signals.

Stand alone Systems: Only designed for one process, e.g. word processing, with the software built in. Incapable of linking with other systems.

Shared Resource System: Involves a common memory, and common set of system programmes with terminals dedicated (i.e. only capable of one function) one to word processing one to data processing (e.g. accounts) one to information retrieval.

Shared Logic System: Usually a larger operation, with shared memory store and shared processor, each terminal being capable of being used simultaneously or different tasks.

Programme: A linked series of commands that causes the computer to take certain action – carry out calculations or re-order stored material.

Occupiers' Rights: A New Hazard for Irish Conveyancers?

by

J. M. G. Sweeney

Professor of Common Law, University College, Galway

OCCUPATION, as a result of recent English decisions, is rapidly assuming more importance in conveyancing than it has enjoyed since the middle ages. As the relevant common law and statutory provisions are almost identical on both sides of the Irish Sea, these cross-channel cases are of absorbing interest to lawyers here. The unreported Irish case of *Northern Bank Ltd. v. Henry* (1975 No. 3130 P. 175/78) is, in a sense, of a piece with these decisions, although it may formally be classified as an example of constructive notice arising, not from occupation, but from not investigating title (as to which see Cheshire's *Modern Law of Real Property*, 12th ed., particularly p. 66). In this instance, the readiness with which the Irish courts accepted the claim of somebody who was in fact an occupying wife with rights under an undisclosed trust may suggest that our judges would not be unreceptive to the conclusions of the two recent English cases we are about to examine.

The Rule in *Hunt v. Luck*

It has always been required of the purchaser to inspect the land. The Conveyancing Act, 1882, effected little more than a restatement of the common law position when by s.3(1) (i), it laid down that, to avoid being affected by notice, a purchaser must have made "such inquiries and inspections . . . as ought reasonably to have been made by him." Wylie, *Irish Land Law* para. 3.072, p. 104, commenting on this subsection, emphasises the need actually to visit the land: "The proper steps in most cases involve two matters of substance, inspection of the property concerned and an investigation of the title to it." More than 100 years ago, an Irish judge, Christian, L.J., in *Carroll v. Keayes* (1873) I.R. 8 Eq. 97, at 134, had strikingly illustrated the conveyancer's primary concern with the question: who is in occupation, when he laid down that when a purchaser

> "sees someone other than the vendor in possession . . . and makes no inquiry, he purchases under the legal presumption that that person has the fee, and when it afterwards turns out that he has some lesser interest than that, why so much the better for the purchaser – he is getting more than he presumably bargained for."

This occupational aspect of the doctrine of constructive notice is known as the rule in *Hunt v. Luck*.

The limits of this rule were of scarcely more than vocational interest until it was sought to use it to solve that most topical of social problems, the protection of the deserted wife. One common situation is that of the "bare" wife who not only has no legal interest in the property, but has not even an equitable interest by virtue of, say, having made a financial contribution to the purchase of the house. If the property is registered, then the husband's registration as owner is subject to what in Ireland are called "burdens which without registration affect registered land" but, in England, more concisely, "overriding interests." Although the absence of litigation about these burdens in this country may tend to make us regard the task as a mere formality, Irish solicitors, closing sales of registered land, invariably obtain from the vendors statutory declarations to the effect that the lands are not subject to such burdens. S.72(1) (*j*) of the Registration of Title Act, 1964, includes among these burdens the following:–

> "the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where, upon enquiry made of such person, the rights are not disclosed;"

This follows, almost verbatim, the wording of s.70 (1) (**g**) of the Land Registration Act, 1925, which still applies in England and Wales, and for convenience this paragraph will be referred to as "paragraph (g)." Except for the inclusion of the rights of a person "in receipt of the rents and profits," paragraph (**g**) is a statutory application to registered land of the rule in *Hunt v. Luck*. *National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175, decided that the right of a wife – *qua* wife – to reside in the matrimonial home was not a burden protected by paragraph (**g**).

Where the wife has an equitable interest

In another typical situation, whilst the husband may be the legal owner, his wife may have an equitable interest. Supposing the property to be unregistered, does the rule in *Hunt v. Luck* protect the wife from a sale or mortgage

by her husband? This situation was considered in *Caunce v. Caunce* [1969] 1 All E.R. 722. On 3 November 1959 there was a conveyance on sale of a house to the husband in fee simple, and on the same day he mortgaged the house to a building society for the purpose of meeting the purchase price of the property. The wife provided £479 out of her own money in respect of the purchase price. This house, which was bought as a proposed matrimonial home, was acquired on terms between husband and wife that the purchase price, so far as not obtained from the building society, should be provided by the wife and that the property was to be vested in the spouses as joint tenants at law. The husband, in breach of these terms, had the property conveyed to him alone, and although the wife knew this, she took no step to assert her rights. From the date of the conveyance down to the date of his bankruptcy, 7th July, 1966, the husband paid the instalments due on the mortgage, and thereafter they were paid by the wife. Unknown to her, the husband created three further mortgages in favour of Lloyds Bank Ltd. to secure money advanced to him. After a receiving order in July 1966, the husband left the house and thereafter the wife lived there without him.

The wife issued a writ *inter alia* claiming against the bank a declaration that her beneficial interest in the property had priority over the three legal charges. The wife urged that then when so many matrimonial homes were purchased out of monies provided in part by the wife, a purchaser (including a mortgagee) who finds the matrimonial home vested in one of the spouses is put on inquiry whether the other spouse has an equitable interest in the property and that, if he does not inquire of the other spouse whether such an interest is claimed, he takes subject to that interest. In this case, as distinct from *Ains worth's* case, the wife was living in the house with the husband at the time of each of the bank's advances. The wife contended *inter alia* that an inquiry ought to have been made on the property and that, if such an inquiry had been made, the wife would have asserted her equitable interest. Therefore, so the wife's argument ran, the bank had constructive notice of that interest. On this point, Stamp, J. (at p. 728) ruled that

> "where the vendor or mortgagor is himself in possession and occupation of the property, the purchaser or the mortgagee is not affected with notice of the equitable interests of any other person who may be resident there, and whose presence is wholly consistent with the title offered. If one buys with vacant possession on completion and one knows or finds out that the vendor is himself in possession and occupation of the property, one is, in my judgment, by reason of one's failure to make further enquiries on the premises, no more fixed with notice of the equitable interest of the vendor's wife who is living there with him than one would be affected with notice of the equitable interest of any other person who might also be resident on the premises, e.g., the vendor's father, his Uncle Harry or his Aunt Matilda any of whom, be it observed, might have contributed money towards the purchase of the property."

This decision has been both applauded (as by McWilliam J. in the *Northern Bank* case) and condemned, the latter somewhat savagely, by John Eekelaar in *Family Security and Family Breakdown*, at p. 87:–

> "The reasoning in *Caunce v. Caunce* illustrates with the utmost clarity how alien it is to English legal thinking to conceive of the possibility that the wife might have an interest in the property of her husband simply because she is his wife. Ineed, had Mrs. Caunce been a stranger (a mistress, or a male friend of her husband's), she would have been in a stronger position because the mortgagee would have been on his guard as to whether the stranger was in possession under some interest in the property. It is difficult to find enthusiasm for a law according to which the holding of the marriage status, not only fails to achieve security of occupation in relation to dealings with it by the other spouse, but is a positive disadvantage to the person concerned."

The pendulum swings

There was another judicial oscillation towards a more liberal interpretation of the statutory protection of the occupier's rights in *Hodgson v. Marks* [1971] Ch. 892. When the effect of paragraph (g) had been considered in *National Provincial Bank Ltd. v. Ainsworth* supra, by Lord Denning he had interpreted the paragraph literally and thereby had reached a liberal result. Russell, L.J., on the other hand, had construed the words of this paragraph in the general context of the law of property and, on appeal, the House of Lords had preferred his restrictive construction. In *Hodgson* this Lord Justice pronounced the leading judgment in the Court of Appeal which, if it cast no doubts on the *Ainsworth* case, at least

produced a decision very much at variance with the conservative trend of that epochal decision. What makes *Hodgson* of particular interest to the Irish practitioner is that it dealt with an occupant who was not the vendor's wife and therefore its scope has not been largely pre-empted by the Family Home Protection Act, 1976.

In 1959, Mrs. Hodgson, a widow and old age pensioner, then aged 72, took as a lodger a Mr. Evans

> "a very ingratiating person, tall, smart, pleasant, self-assured, 50 years of age, apparently dignified by greying hair and giving the impression . . . of a retired colonel."

Mrs. Hodgson's nephew was in the Foreign Service and returned on six months' leave from time to time. Evans succeeded in persuading her that her nephew would turn him out unless the land was transferred to him. He brought her land certificate to solicitors who were strangers both to him and Mrs. Hodgson and who entrusted the matter to a managing clerk, Mr. Goodland. Mrs. Hodgson executed a transfer of the property on 30 June 1960 on what appeared to be her only visit to the solicitors' office. Evans was registered as proprietor on 1 September, 1960, but the transfer of legal ownership did not result in any change in the relationship between Mrs. Hodgson and her lodger. Evans however, unknown to Mrs. Hodgson, on 28 July 1964 contracted to sell the property, with vacant possession on completion, to Marks for £6,000. The transfer was executed on 12 August and Marks was registered as proprietor with title absolute on 1 September 1964. The purchase was effected with the aid of a loan from a building society (who were to become the second defendants) and Marks executed a charge in their favour on the same day on which he executed the transfer. Their charge was registered simultaneously with Mark's registration as proprietor.

Marks had visited the house before the contract. He had seen Mrs. Hodgson coming up the path but did not ascertain who she was, much less make of her the enquiry prescribed by paragraph (g). The evidence did not directly establish that, before registration of the transfer to him and the charge in favour of the building society, "he knew or had reason to know that she had any interest in the house." Nor, apart from his knowing that a separate bedroom was occupied by a woman, "did he know or have reason to know" that anybody other than Evans was in occupation. The latter had told Marks that he was married and there may have been an assumption that the lady seen on the premises was his wife. It was not until May 1965 that Mrs. Hodgson discovered that the house had been sold, and that Marks realised that she claimed to be its owner.

The trial judge, Ungoed-Thomas, J., dismissed Mrs. Hodgson's action for declarations that Marks was bound to transfer the property to her free from the building society's charge and that she was entitled to be registered as proprietor free from his charge.

The Court of Appeal allowed Mrs. Hodgson's appeal. Russell, L.J. was not responsive to the argument that paragraph (g) did not apply to a vendor who was also in occupation and that any other view would lead to an impossible burden of inquiry on the purchaser, and more particularly on a mortgagee. Although he does not seem to have required that the purchaser must have notice of the actual occupation protected by the paragraph, Russell L.J. held that Marks the purchaser did in fact have notice of Mrs. Hodgson's occupation. She was in actual occupation of the property and he held that there was a resulting trust of the beneficial interest to her.

The influence of *Caunce,* rather than of *Hodgson* is, however, to be seen in *Bird v. Syme Thomson* [1978] 3 All E.R. 1027. This decided that, where a husband and wife were in occupation and the legal title was held by one of them and actual occupation for purposes of paragraph (g) belonged to the spouse with the legal title, the other spouse was only there as a shadow of the owner's occupation. This case could also be regarded as an extension of *Ainsworth* and it applied the doctrine of that case to the occupancy of somebody who was not a "bare" wife but one who had an equitable interest.

A more progressive trend

The reformist tendency of *Hodgson* has, however, now returned with a decision of the Court of Appeal and of the House of Lords in two cases reported under *Williams & Glyn's Bank v. Boland* [1979] Ch. 312 and [1980] 3 W.L.R. 138 respectively. Both husbands were registered as sole proprietors of the matrimonial home where they lived with their respective wives. In both cases the wife had made a substantial contribution to the purchase of the house but had not registered any form of caution, restriction or notice. In each case the husband, in order to secure business indebtedness, charged the house to the plaintiff bank without his wife's knowledge. In neither case did the bank make any inquiry as to any interest which might be held by the wife. When the debts were not paid, the bank sought possession of the matrimonial homes.

Although the conveyance was taken in the husband's name alone, it was common ground in both of these cases that the wife, owing to her contribution to the purchase, was entitled, in equity, to a share in the house. Thus, her right to occupy was, of course, something more than the right of the "bare" wife with which *Ainsworth* dealt. The only question was whether she was herself a person "in actual occupation." In *Bird v. Syme Thomson,* Templeman J.'s view (at p. 1030) was that "when a mortgagor is in actual occupation of the matrimonial home, it cannot be said that his wife also is in actual occupation." Lord Denning held that this view could not stand with *Hodgson* nor with the standing of women in our society today:—

> "Most wives now are joint owners of the matrimonial home – in law or in equity – with their husbands. They go out to work just as their husbands do. Their earnings go to build up the home just as much as their husband's earnings. Visit the home and you will find that she is in personal occupation of it just as much as he is. She eats there and sleeps there just as he does. She is in control of all that goes on there – just as much as he. In no respect whatever does the nature of her occupation differ from his. If he is a sailor away for months at a time, she is in actual occupation. If he deserts her, she is in actual occupation. These instances all show that "actual occupation" is matter of fact, not matter of law. It need not be single. Two partners in a business can

> be in actual occupation. It does not depend on title. A squatter is often in actual occupation. Taking it simply as matter of fact, I would conclude that in the cases before us the wife is in actual occupation just as the old lady Mrs. Hodgson was in *Hodgson v. Marks*."

Ormrod, L.J. commented that these appeals, at first sight, looked like a renewed attempt by married women to assert their rights in the matrimonial home, following their defeat in the House of Lords in the *Ainsworth* case:–

> "And so in a sense they are; but with the important difference that these appellant wives are relying not upon their position as married women, but upon their property rights as ordinary citizens. It is conceded by the respondents ("the bank") that in each case the wives have made a substantial, in one case a very substantial, contribution to the purchase price of the property in dispute. They are seeking to protect their investments as well as to resist the attempt to dispossess them of their respective homes. The fact that in both cases the wives are married to the persons in whom the legal estate in the property is vested is therefore incidental; their contentions would be exactly the same if they were not married or were of the same sex as the legal proprietors."

The wives were co-owners in equity with the persons holding the legal estate and they were physically at least, occupying the house. The social changes which had taken place since the property legislation of 1925 was passed had made this problem increasingly acute. The great increase in the number of married women who earned their living before marriage, or continued to be employed after marriage, and so contributed financially to the purchase of their homes, many of which continued to be conveyed into the name of the husband alone, had enlarged the class of equitable tenants in common to an extent which could not have been contemplated in 1925. The only comparable case to which the Court of Apeal (though since it was concerned with unregistered land, it was not directly in point) had been referred was *Caunce v. Caunce*. In that case Stamp J. [1969] 1 W.L.R. 286, 293 had held that the purchaser was not affected with notice of the wife's rights because:–

> "the plaintiff, unlike the deserted wife was not in apparent occupation or possession. She was there, ostensibly, because she was the wife, and her presence was wholly consistent with the title offered by the husband to the bank."

This part of the judgment was being referred to by Russell L.J. in *Hodgson* when he had said that he did not consider it necessary to pronounce on the decision in *Caunce v. Caunce*

> "In that case the occupation of the wife may have been rightly taken to be not her occupation but that of the husband. In so far, however, as some phrases in the judgment might appear to lay down a general proposition that inquiry need not be made of any person on the premises if the proposed vendor himself appears to be in occupation, I would not accept them."

In *Hodgson* it had been been held by the Court of Appeal that the words "actual occupation" in paragraph (g) were to be given their ordinary meaning, without the gloss suggested by Ungoed-Thomas J. in his judgment in the court below (he had suggested that "in actual occupation" should be treated as "in actual *and apparent* occupation"). Ormrod L.J. therefore held that the wives were in actual occupation of the land in each case, as did Browne L.J. who added:–

> "If a wife living with her husband is incapable of being in "actual occupation" she is in a worse position than a deserted wife or a mistress or anyone else who is sharing the occupation of a house and has "rights." Whether in any particular case other people living in a house (for example, children living in the family home) are in "actual occupation" must depend on the facts of each case. It seems to me that today it is unrealistic and anachronistic to talk about a wife's occupation being only a "shadow" of her husband's occupation. In many, perhaps most, cases, the wife has a proprietory interest in the matrimonial home because of her contribution."

The House of Lords

The bank appealed unsuccessfully to the House of Lords, where Lord Wilberforce [1980] 3 W.L.R. 138 at 141 made the point that:–

> "the appeals do not, in my understanding, involve any question of matrimonial law, or of the rights of married women or of women as such. Exactly the same issue could arise if the roles of husband and wife were reversed, or if the persons interested in the house were not married to each other."

The first question to be decided was whether the wife was a "person in actual occupation" and if so, whether her right as tenant in common in equity was a right protected by paragraph (g). His lordship (at p. 142) recalled that the system of land registration was designed to simplify and to cheapen conveyancing:–

> "In place of the lengthy and often technical investigation of title to which a purchaser was committed, all he has to do is to consult the register; from any burden not entered in the register, with one exception, he takes free. Above all, the system is designed to free the purchaser from the hazards of notice – real or constructive – which, in the case of unregistered land, involved him in enquiries, often quite elaborate, failing which he might be bound by equities . . .
>
> The exception just mentioned consists of "overriding interests" listed in section 70. As to these, all registered land is stated to be deemed to be subject to such of them as may be subsisting in reference to the land, unless the contrary is expressed in the register. The land is so subject regardless of notice actual or constructive."

It had been said that the purpose and effect of paragraph (g) was to make applicable to registered land the same rule as previously had been held to apply to unregistered land: see *per* Lord Denning in the *Ainsworth* case. Lord Wilberforce adhered to this, but did not accept the submission that, in applying paragraph (g), the House of Lords should limit the application of the paragraph in the light of the doctrine of notice, since this would run counter to the whole purpose of the Land Registration Act, 1925. In the case of unregistered land, the purchaser's obligation depended on what he had notice of – notice actual or constructive. In the case of registered land, it was the fact of occupation that mattered. If there was actual occupation, and the occupier had rights, the purchaser took subject to them.

Whilst Lord Wilberforce considered that the words "actual occupation" were ordinary words of plain English, and should in his opinion, be interpreted as such, he traced their emergence, in this context, to the judgment of Lord Loughborough L.C. in *Taylor v. Stibbert* (1794) 2 Ves. Jun. 437 (in a passage at 439-440 where the words in fact used were "actual possession"). Actual occupation required presence on the land, physical presence, not some entitlement in law. In these cases there was physical presence by the wives and it would require some special doctrine of law to avoid the result that each wife was in occupation. Three arguments had been used for a contrary conclusion:–

(1) If the vendor (or mortgagor) were in occupation, that was enough to prevent the application of the paragraph, and this was so whether the vendor was the spouse of the occupier or not. Lord Wilberforce, however, agreed with the disapproval by Russell L.J. in *Hodgson v. Marks* Ch. 892, 934 of the observations supporting this argument in *Caunce v. Caunce*.

(2) The suggestion that the wife's "occupation was nothing but a shadow of the husband's," a version of the doctrine of unity of husband and wife. Lord Wilberforce found the argument flowing from this expression, which was used by Templeman J., in *Bird v. Syme-Thomson* (at p. 1030), to be "heavily obsolete.";

(3) The appellant's main and final position was that to come within the paragraph, the occupation in question must be apparently inconsistent with the title of the vendor. This, it was suggested, would exclude the wife of a husband-vendor, because her apparent occupation would be satisfactorily accounted for by his. But, apart from the rewriting of the paragraph which this would involve, the suggestion was unacceptable:–

> "Consistency, or inconsistency, involves the absence or presence, of an independent right to occupy, though I must observe that "inconsistency" in this context is an inappropriate word. But how can either quality be predicated of a wife, simply *qua* wife? A wife may, and everyone knows this, have rights of her own; particularly, many wives have a share in a matrimonial home. How can it be said that the presence of a wife in the house, as occupier, is consistent or inconsistent with the husband's rights until one knows that rights she has? And if she has rights, why, just because she is a wife (or in the converse case just because an occupier is the husband) should these rights be denied protection under the paragraph? If one looks beyond the case of husband and wife, the difficulty of all these arguments stands out if one considers the case of a man living with a mistress, or of a man and a woman – of for that matter two persons of the same sex – living in a house in separate or partially shared rooms. Are these cases of apparently consistent occupation, so that the rights of the other person (other than the vendor) can be disregarded? The only solution which is consistent with the Act (s. 70(1) (g)) and with commonsense is to read the paragraph for what it says. Occupation, existing as a fact, may protect rights if the person in occupation has rights . . . I have no difficulty in concluding that a spouse, living in a house has an actual occupation capable of conferring protection, as an overriding interest, upon rights of that spouse."

A breach of the curtain principle?

Finally, there was the argument that if the overriding interest sought to be protected was, under the general law, only binding on a purchaser by virtue of notice, then, under s.74 of the Land Registration Act, 1925, it could not be binding on a purchaser of registered land. Section 74 (in terms which differ rather widely from the otherwise equivalent s.92 of our Registration of Title Act, 1964) provides:–

> Subject to the provisions of this Act as to settled land, neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express, implied or constructive, and reference to trusts shall, so far as possible, be excluded from the register.

If this argument were correct, then, according to Lord Wilberforce, *Hodgson v. Marks* must have been wrongly decided (but it is submitted that this is not necessarily so, since it is clear that for Russell L.J.'s decision notice by Marks of Mrs. Hodgson's occupation was not essential?). Lord Wilberforce, however, held (at p. 146) that the purpose of s.74 was to make clear, as he had already explained

> "that the doctrine of notice has no application to registered conveyancing, and accordingly to establish, as an administration measure, that entries may not be made in the register which would only be appropriate if that doctrine were applicable. It cannot have the effect of cutting down the general application of section 70(1)."

Lord Scarman (at p. 149) also agreed that overriding interests took effect under s.70(1) whether or not a purchaser had notice of them:–

> "I do not, therefore, read the Act of 1925 as requiring the courts to give the words "actual occupation" in section 70(1) (g) the special meaning for which the appellants contend, namely an occupation, which by its nature necessarily puts a

(Continued on p. 109)

(Continued from p. 107)

> would-be purchaser (or mortgagee) upon notice of a claim adverse to the registered owner. On the contrary, I expect to find . . . as I do find . . . that the statute has substituted a plain factual situation for the uncertainties of notice, actual or constructive, as the determinant of an overriding interest."

The implications for this country?

It is a tribute to the adaptability and resourcefulness of the English bench that, in *Williams & Glyn*, it has, by judicial means, secured for wives almost that degree of protection obtained for them in this country by our Family Home Protection Act. Of course, the decision falls short by being unable to protect that class of married women, dwindling but perhaps most deserving of protection – the "bare" wives whose contributions are invaluable in everything but economic terms.

It would, however, be rash of the Irish practitioner to assume that, since the Oireachtas has, to say the least of it, forestalled the House of Lords by its statutory protection of the family home against unilateral alienation, these English decisions are of little more than academic interest here. This developing jurispurdence does more than defend occupying spouses, particularly wives. Mrs. Hodgson, it will be recalled, was not related at all to the lodger who gulled her into transferring her house to him. Furthermore, one aspect of the decisions which seems so far to have escaped the attention of commentators is the possible application of the principle underlying the decisions to property other than dwelling-houses and family homes. There must be thousands of small businesses and farms in this country and no doubt in England which are legally owned by one spouse but to the purchase of which the other spouse has contributed. In many such cases the latter is as clearly "in actual occupation" as the former. Moreover, where the husband (supposing him to be the legal owner) is an invalid, or an idler or drunkard, or has another job, the work of looking after such enterprises will devolve upon her, and she may indeed be the only one of the two "in actual occupation." Whilst the prospect that such an occupying spouse may have an "overriding interest" in such non-residential property is not touched on in any of the judgments or speeches, this result would seem to follow, in principle, from the decision. It would not be a distortion, it is submitted, to suggest that the previously quoted remarks of Lord Wilberforce, to the effect that the appeals did not involve any question of matrimonial law, could be invoked to support the submission that *Williams & Glyn* is not limited territorially to the matrimonial home (prescinding for the moment from the fact that *Hodgson* was not a matrimonial case at all). Except for the fact that wives are known to contribute more frequently to the acquisition of the home, there is no difference in legal principle between a home and a business or farm. The decision represents a further step in the acquisition by wives of a legal personality independent from that of their husbands and could not have intended to give the character of a sanctuary to homes, matrimonial or otherwise.

Disadvantages

Perhaps the chief drawback of the decisions is a disadvantage associated with all judicial lawmaking: its retrospective operation. When lenders in future seek possession in respect of property mortgaged before the Family Home Protection Act, 1976, came into force on July 12, 1976, equitable claims from borrowers' wives are sure to be made. Purchasers, as distinct from lenders, may be thought to be in an enviable position, since they, and not vendors subject to equitable claims, will be in occupation once a sale is closed, as it should be, with vacant possession. However, it has already been held, in *London and Cheshire Insurance Co. Ltd. v. Laplagrene Property Co. Ltd.* [1971] Ch. 499, that claimants in actual occupation at the relevant time (that of registration) do not lose their claims if they go out of occupation subsequently.

A further pitfall has become more clearly established since *Williams & Glyn*. In *Hodgson*, Russell, L.J., under reservation of his position that occupiers could enforce their rights independently of notice, was at pains to show that Marks, the purchaser, had notice of Mrs. Hodgson's occupation. Now, however, it is clear that occupiers' rights are not outside the registration system, even in the sense of being dependant for their effectiveness on notice. Whilst observance of the precaution of obtaining clear possession before completion will obviate claims in most cases, it is bound to occur that an occasional purchaser will be ousted in circumstances of great hardship. For instance an occupier with an equitable claim will not cease to be "in actual occupation" because of a temporary, though extended, absence from the premises.

Finally, spouses, chiefly wives, are not, it is submitted, the only members of the family to benefit from the more recent of the decisions. In *Caunce v. Caunce* [1969] 1 All E.R. 722, at 728, the legal position of occupying wives vis-a-vis purchasers was equated by Stamp J. to that of other persons resident, consistently with the vendor's title, on the premises, such as

> "the vendor's father, his uncle Harry, or his aunt Matilda, any of whom, be it observed, might have contributed money towards the purchase of the property."

Not the least worrying feature of the decision is, not that uncles and aunts have (with the reversal of *Caunce v. Caunce*) joined the vendor's wife to make up a new class of overriding occupiers, but that there seems to be no reason why the *children* in residence should not be included in that class. If, for example, the property had been purchased with funds belonging to a minor, the purchaser's position would be immeasurably more difficult than if he had to contend with a claim by any other member of that class. After all, a considerable point in favour of the decision is that paragraph (g), in words that were to be copied almost verbatim by its Irish equivalent, provides that the rights it confers are not to apply "Where enquiry is made . . . and the rights are not disclosed." The difficulties posed by the occasional need to obtain the consent of an under-age spouse under the unamended Family Home Protection Act pale into insignificance compared with the possible consequences of any extension of the *Williams & Glyn* principle to minors in actual occupation.

The Law School: The End of the Beginning

On 20 February, 1979 the Law School in the Blackhall Place headquarters of the Society opened its doors to the first group of seventy-three students under the new education and training scheme for solicitors' apprentices.

On 17 February, 1981 those seventy-three apprentices (less one of their number who was ill) returned to commence their Advanced Course. This was the top layer of their sandwich course. Having completed (or is it having munched through?) the bottom layer in the five-and-a-half month Professional Course – the apprentices spent eighteen months in the offices of their masters, welding together the knowledge of substantive law which they learned in the university law faculties and the lawyering skills which they acquired in the Society's Law School. In an office where the apprentice is given meaningful work, carried out under the interested and concerned eye of the master, or master manque, their unbroken eighteen month in-office training is the meat in the sandwich. Apprentices really want to work and, in most cases, their zest for work was rewarded by plenty to do. In some few cases, the apprentice was given insufficient work or work of lesser quality than his capabilities justified: this was dispiriting to the apprentice and bad value to the master, who was paying the apprentice £40 a week as well as providing office space, equipment and some secretarial services.

And so the apprentices arrived at the first Advanced Course. The very title is slightly misleading in that to some extent it was a refresher and up-dating exercise as much as a breaking-of-new-ground course.

The course maintained the twin characteristics of the Professional Course – objectives identified in behavioural terms (what will the apprentice be able to do in the office or in court or in another legal situation that he was unable to do at the start) and "learning-by-doing" – but the maturity and experience of the apprentices allowed somewhat "thinner" teaching teams to cover practical subjects more widely and with more speed. It was found right to set the tone and pace by jumping off with four days on the administration of estates; after some initial breath-catching the apprentices took to the taxation aspects of administration of estates and the framing of wills and settlements to minimise capital tax; they understood too the need for systematising and speeding up the administration and winding-up of estates. Conveyancing followed – with refreshers in mortgages and searches and in investigation of title, and covering sale of flats, commercial leases, acting for a builder, Land Registry and Land Commission practice, stamp duty and CGT. A whole week was devoted to office administration and financial control, because solicitors must run an efficient business in order to give an effective professional service.

Licensing and negotiation of settlements in civil litigation were both popular days, while the two optional subjects – Family Law and Business Law – were both well supported. Landlord and Tenant Law was up-dated with an exposition of the 1980 Act. Cost drawing, ethics and professional conduct were covered and – after days of moot courts, with advocacy and evidence much to the fore – the course ended with the apprentices giving their views of the course and of the other elements of the sandwich.

The students have now to await the results of the assessments made of their performance and attendance during the course and, subject to a satisfactory outcome in that area, to wait for the rest of their three year minimum apprenticeship to run out.

In view of the fact that these apprentices have completed their course and are waiting only for time to elapse in order to obtain their parchments, the Education Advisory Committee have expressed the view that they differ from qualified solicitors only in being unable to plead in court and that their salary scales should be reviewed to recognise this reality.

The Society is proud of its culinary effort! The completion of its first sandwich course is a notable "first" in the field of practical training courses. The Law School administration – which records its thanks to the planning committees and the consultants and tutors who took time from their practices and work to make it all possible – will share the experience of the Advanced Course with colleagues from New South Wales and other jurisdictions who are on the same road.

Education Timetable 1981

July 7: First Irish Examination.

July 8: Second Irish Examination.

July 14: Presentation of Parchments.

July 14-15: Preliminary Examination.

August 12-24: First, Second and Third Law Examinations (this is the last time the First Law Examination will be offered).

October 1: Book-keeping Examination.

Oct. 12-Nov. 20, Nov. 25-Dec. 23: Sixth Professional Course.

Oct. 13-Nov. 27: Second Advanced Course (dates to be finalised)

October 28: Presentation of Parchments.

December 2: First Irish Examination.

December 3: Second Irish Examination.

Dec. 4-16: Final Examination – First Part.

The Intestate Testator?

by Charles R. M. Meredith, Solicitor

A commentary on the Judgment of Miss Justice Carroll in the Case of *R.G. v. P.S.G. and J.R.G.*, delivered on 20th November 1980.

NEW law is always of interest; when that new law is brought about by the judicial interpretation of a statutory provision of relatively long standing, in circumstances that must have occurred many times in the past without serious question, the interest is greatly enhanced.

In the case of *R.G. v. P.S.G. and J.R.G.*, it fell to Miss Justice Carroll to examine the intriguing question of whether a person can execute a valid will, die without having taken any action which could revoke that will and yet die intestate. The case is the more interesting by reason of the fact that Counsel for the three parties were apparently unable to find any case law to argue before the learned Judge, who was left to come to her conclusions upon the basis of her own interpretation of the relevant statutory provisions in the circumstances of the case.

Those circumstances were as follows. The Plaintiff was the eldest son of a deceased testator, who died in 1976. The defendants were the two younger brothers of the Plaintiff. The three of them also happened to be the sole next of kin of the deceased and, in the events which had happened, the only persons entitled to share in his estate.

The deceased, by his will dated 16th September 1960 appointed his wife to be sole executrix and universal legatee and devisee. His wife predeceased him by eight years and he did not make any other will. The deceased's will was therefore wholly inoperative and, as far as the disposal of his estate was concerned, that estate would devolve as on intestacy.

The case arose through the particular and individual circumstances of the deceased's three sons. The Plaintiff had at all times resided with the deceased and the deceased's wife (Plaintiff's mother) on the family farm. When the Plaintiff married in 1965, his wife had moved into the family home. The deceased and the Plaintiff had, in effect, farmed the family farm together. The farming activities had comprised a dairy herd, store cattle, a bull, sheep, and some tillage principally to provide food for the cattle but with some of the crop being sold to cover the cost of seed.

Household expenses came from the creamery cheque and from mart cheques, whenever stock was sold. The Plaintiff received no wages from his father and if he or his wife required any money they asked for it. On occasion, the deceased told Plaintiff to take some money for himself out of the mart cheque, when lodging it in the Bank.

Being a dairy farm, the requirements of dairying and looking after young stock necessitated the Plaintiff working on the farm seven days a week for 365 days of the year. The Plaintiff's wife also played her full part in the running of the farm and, after 1969, only casual labour was employed.

Over the years, the Plaintiff gradually acquired stock on his own account, which he maintained on the family farm and the Court accepted his evidence that at the date of his father's death, about 75% of the stock on the farm belonged to the Plaintiff.

It was at all times represented to the Plaintiff by his father, the latest occasion being less than a week before his father died, that the Plaintiff would inherit the family farm and it was the Plaintiff's belief in this that gave rise to the proceedings.

After his father's death, the Plaintiff and his wife stayed on in the family home and farm, to the exclusion of the two defendants. Both defendants had left home many years before and, in their respective ways, had made their own lives, with partial assistance from their parents.

In 1978, the defendants proved the Will and obtained a grant of Letters of Administration with Will annexed.

The action now described was brought by the Plaintiff under the terms of Section 117 of the Succession Act 1965, the Plaintiff arguing that the one-third share of his father's estate which he would receive as one of three next of kin would, in his special circumstances, represent less than proper provision by his father for him in accordance with his means and that the Court should award him a greater share of his father's estate. The defendants argued that the deceased could not be said to have died wholly or partly testate and that accordingly Section 117 could not apply.

Subsections (1) and (2) of Section 117 of the Succession Act 1965 read as follows:

(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

(2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.

These Subsections must be read in the general context of Section 109(1) of the Act, which provides:–

> Where, after the commencement of this Act, a person dies wholly or partly testate leaving a spouse or children or both spouse and children, the provisions of this Part shall have effect.

The Act contains no definition of "testator," although Section 3 defines "an intestate" as:–

> a person who leaves no will or leaves a will but leaves undisposed of some beneficial interest in his estate

and provides that "intestate" shall be construed accordingly.

In considering the arguments before her, the learned Judge first asked herself the question when is a testator not a testator? She pointed out that under Section 117 of the Act, an application must be made by or on behalf of a child of "a testator." The Section does not apply in the case of a pure intestacy and she considered that the legislature had clearly not intended that a child of an intestate should be able to come into Court and make the case that, in his particular circumstances, his share should be greater than those of his brothers and sisters. As the deceased's will, in the present case, was clearly inoperative and as, in the absence of some special factor, his estate would pass under the rules of intestacy to his three sons in equal shares, it was essential to the plaintiff, in order to attain the necessary status to apply under Section 117, to establish that notwithstanding the inoperation of his will the deceased had, in fact, died testate.

Having considered the terms of the various Sections and of the definition quoted above, the learned Judge reached the interesting conclusion that a person can simultaneously be a "testator" and "intestate," within the meaning of the Act. In further support of this conclusion, she cited Section 115(2) of the Act, relating to a spouse's legal right, which Section specifically contemplates that a person may die partly testate and partly intestate.

The Judge also considered the ordinary meaning of "testator," being a person who has made a will in accordance with the appropriate statutory provisions and she pointed to the fact that, in consequence, regardless of whether a testator has effectively disposed of all or any part of his estate, a grant of Probate will issue to the executor or executors named in the will; alternatively, if there is no executor named, or if that executor has renounced, a grant of Letters of Administration with Will annexed will issue. Letters of Administration Intestate would not issue, notwithstanding that the Will was wholly inoperative to pass any part of the testator's estate.

The Judge posed the questions (a) whether Section 109(1), which refers to a person dying "partly testate," requires that a special meaning should be given to the word "testator," as used in Section 117 and (b) whether a person who has made a valid will, but has failed to dispose of any part of his estate, can be said to have died "partly testate"? Answering her own questions, the learned Judge argued that to depart from the ordinary meaning of the word "testator" would be to introduce an arbitrary element. If the test was to be ineffectiveness as to disposition of the testator's property, it would have to be borne in mind that the testator's will may validly have appointed a guardian of his infant children, executed a power of appointment, given directions as to burial or appointed an executor, yet it could have failed to dispose of any part of his own property. It would accordingly be stretching the meaning of language to hold that he did not die partly testate.

If the test was to be whether the will was inoperative in every respect, the conclusion could, again, be purely arbitrary. The learned Judge posed the example of an executor, validly appointed, surviving the testator but renouncing probate. In such a case, a will which otherwise ould have been partially operative (as to the appointment of the executor) would then become totally inoperative and, if the argument as to the meaning of "partly testate" were accepted, the right of a child to apply under Section 117 would depend upon whether the nominated executor could be persuaded to take out probate.

The Judge considered that in order to decide if a person has died wholly or partly testate, it is necessary first to decide whether he had died testate. The state of testacy, she pointed out, does not depend on the *effectiveness* of the will; it depends upon the effectiveness of the *execution* of the will. If testacy is established, then, in her opinion, it follows that the person must die wholly or partly testate. There is, the learned Judge commented, no third state of testacy – that is, a state of testacy which neither whole nor partial.

Accordingly, it was the view of the learned Judge that a person who has made a will in accordance with the statutory provisions (and, although she did not mention the point, takes no effective steps to revoke that will) dies testate. If that person has disposed of his entire estate, he dies wholly testate. In every other case he dies partly testate.

The Judge then considered the various p-resumptions which must arise upon the making of a will. She stated that a testator must be presumed to know that if any bequests or devises lapse, they will fall into residue. Similarly, he must be presumed to know that if the residuary legatee or devisee or (as in the present case) the universal legatee and devisee, predeceases him, his residuary estate or entire estate, as the case may be, will devolve as on intestacy. Therefore, a testator should be presumed to make a will knowing that it will be supplemented, if necessary, by the statutory provisions relating to distribution on intestacy.

But because his estate is said to devolve *as on intestacy*, does not mean that he has not died testate. The only way in which a testator, having made a valid will, can cease to be a "testator" is by revoking the will by one of the means described in Section 85 of the Act, other than by making a new will.

The learned Judge therefore held that because the deceased died a "testator," Section 117 of the Act applied and she then turned to consider the merits of the Plaintiff's application concerning the share of his father's estate to which he felt he should be entitled.

As the essential legal interest underlying the Judgement of Carroll, J., concerns the interpretation of Sections 109(1) and 117 of the Act, it is not proposed to comment in detail on the application by the learned Judge of the principles of equity. Having examined carefully the circumstances of all three sons of the testator, she concluded that this was not a case where "equality is equity." In the Judge's opinion, the testator had failed in his moral duty

to make proper provision for the Plaintiff in accordance to receive a one-third share of the testator's estate would not constitute proper provision.

In her view

> "Farming is the only occupation known to the plaintiff since the age of 14. He was always encouraged to believe that the farm would be his. He was discouraged from leaving home when he married. Therefore the testator owed a moral duty to the plaintiff to make proper provision for him and provide him with a means of livelihood from farming reasonably comparable with what he enjoyed before the death of the testator. The life style which they enjoyed was not one of luxury. It was one of hard unremitting work. It would not have discharged the testator's moral duty to leave the minimum amount of land from which a living might or might not be wrested. Adequacy is not the test. There must be proper provision in accordance with the testator's means. The living which the plaintiff could make from the land should in this case be reasonably comparable with what he enjoyed prior to his father's death."

Having regard to the circumstances of the plaintiff and of the two defendants and of the manner in which the testator's lands were laid out, the learned Judge made an allocation of the testator's lands and other assets which gave the Plaintiff, first, the house and all its contents, all personal effects of the deceased, all farm machinery, the car and all the stock on the farm and, second, the major part of the lands. The remaining land, which the Judge considered would cause least damage to the farm by its loss, she directed should be transferred to the defendants, free from incumbrances, as tenants in common. This, she considered, would leave the defendants with a reasonably saleable unit and she further allocated to the defendants all the mones to credit of the deceased's bank accounts.

Having considered whether further distinction should be made between the two defendants, the learned Judge concluded that it should not.

Finally, the learned and humane Judge directed that the various parties should bear their own costs. □

DISTRICT COURT LICENSING APPLICATIONS

Requirements in Relation to Special Exemptions

The Dublin Solicitors' Bar Association has been liaising with the President of the District Court as to his requirement concerning certain information in all Applications for Special Exemptions.

The President has indicated that in relation to any premises in respect of which a Special Examption is sought, he will wish to know what particular room or area of the premises is intended to be the subject of the Special Exemption, e.g. the main restaurant, the first floor functions room, the "Georgian Boudoir," etc.

For Your Diary . . .

2 July 1981: Solicitors' Golfing Society: *President's Prize Golf Outing*. Milltown Golf Club.

10-11 July 1981: Law Society Seminar: *Computers for Solicitors*. Blackhall Place, Dublin 7.

14 July 1981: Law Society *Presentation of Parchments*, Blackhall Place, Dublin 7.

24-28 August 1981: *Young Lawyers International Association* XIX Congress, Dublin. Full programme now available from Secretariat, XIX Congress of AIJA, 44 Northumberland Rd., Ballsbridge, Dublin 4. Tel. 688244.

1-4 September, 1981: *Law and Society in Ireland:* An International Conference, Trinity College, Dublin. *Speakers:* Professor William J. Chambliss on law and process, Professor Albert K. Cohen on law and crime, Dr. Masud Hoghughi on juvenile justice and social control, Professor Nils Christie on diversification of penal control, Chief Probation Officer Graham Smith on community corrections. Application forms are available from the Conference Organisers, School of Law, Trinity College, Dublin 2.

12 October 1981: Law Society *Commencement of Sixth Professional Course.*

28 October 1981: Law Society *Presentation of Parchments*, Blackhall Place, Dublin 7.

FAMILY HOME PROTECTION ACT

Absence of Supporting Evidence to Spouses Consent

The Conveyancing Committee has been asked for guidance by a number of practitioners as to the proper approach to be made by purchaser's solicitor where, on investigation of the title of an unregistered property, an assurance of a family home made after the 12th July, 1976 appears on the title and, although the assurance bears a consent completed by the vendor's spouse, there is no supporting evidence identifying the consenting party as the spouse of the vendor.

The Committee is satisfied that the present practice of seeking a statutory declaration from the vendor and the consenting spouse exhibiting a copy of their marriage certificate to evidence the identity of the consenting party was not adopted immediately after the introduction of the Act and takes the view that, in the ordinary way, a purchaser's solicitor should not, where there is a spouse's consent endorsed on an assurance of the family home executed prior to the 1st January 1978, and no supporting evidence of the identity of the consenting spouse is available, requisition any further evidence.

Minutes of the Half-Yearly General Meeting

The Half-Yearly General meeting of the Society was held in the Lake Hotel, Waterville, Co. Kerry, on Friday, 1st May, 1981, at 10.00 a.m. Having called the meeting to order, the President called on **Mr. Donal Browne**, President of the Kerry Law Society to address the meeting. Mr. Browne said that it gave him great pleasure on behalf of the Kerry Law Society to welcome the members, especially on such an auspisious occasion when for the first time, a General Meeting was presided over by a Lady member of the Society. Apart from her charm and ability, the President, Mrs. Quinlan, had played a leading part in the acquisition and furnishing of the Society's Headquarters at Blackhall Place, for which the members were deeply grateful. He referred to the importance of the Kerry Law Society having a member on the Council of the Society and was sure that the member in question, Mr. O'Connell, with the support of his colleagues in the county, had been of assistance to the Council. Concluding, he wished the meeting every success.

The **President** then extended a welcome to Mr. M. Parke, President and Mr. K. Pritchard, Secretary, Law Society of Scotland, who were in attendance at the meeting. She also welcomed Mr. Jonathan Clarke, President and Mr. John Bowran, Secretary General, Law Society, London, and Mr. Roderick Campbell, Acting President and Mr. Sydney Lomas, Secretary of the Incorporated Law Society of Northern Ireland, who would be arriving later in the day.

Notice

The **Director General** read the notice convening the meeting. The attendance at the meeting was recorded in the Attendance Book. 59 members attended.

Minutes

The minutes of the Annual General Meeting held in Blackhall Place, Dublin 7, on 21st November, 1980, were taken as read and signed by the President.

President's Address

The **President** then addressed the meeting and a copy of her address is filed with the minutes.

Pension Scheme

Mr. Curran presented a report on the Society's Pension Scheme and Income Continuance Plan, details of which are filed with the minutes. Commenting on the Report, **Mr. M. Curran** expressed appreciation of the work done by the Society's Investment Managers, the Investment Bank of Ireland, which had produced a growth of 26% over the preceding 12 months. He also expressed the hope that more of the members of the Society would take an interest in the scheme.

Resolutions:

The Resolutions circulated for the meeting were taken as follows:—

1. **To Insert a New Bye Law 29B so that it reads:**
Notwithstanding the provisions of any other Bye Law and in particular Bye Laws 29, 29a, 30 and 31 the member who shall at the date of the receipt of nomination be serving as Senior Vice-President of the Society shall not be required to be nominated for election to the Council but shall be deemed to be elected to the Council for the year commencing on the date of the November General Meeting (unless he shall, prior to the date of the receipt of nominations, notify the Secretary of his intention of resigning from the Council or of his intention not to serve as President of the Society in the said year).

Proposed by Mr. Andrew Dillon
Seconded by Mr. Rory O'Connor

Mr. G. Doyle spoke against the Resolution on the grounds that the existing election system had worked well over the years and that the proposed change was an interference with the democratic process. He was supported by **Mr. J. Carrigan. Mr. J. F. Buckley** made the point that the demands on the Presidency now made it imperative that the person who was facing the Office and particularly, the person who would be expected to succeed as Senior Vice-President should have some degree of certainty in regard to their assignments. Even in a large office, arrangements had to be made by the individual concerned for the period in which he held Office in the Society. **Mr. P. O'Connor** supported the Resolution, on the grounds that, from the point of view of a country practitioner, it was absolutely essential to have the opportunity of making one's arrangements. On a poll, the Resolution was carried by 36 votes to 19.

2. **To Amend Bye Law 33 so that it reads:**
The Secretary shall cause voting papers to be printed in the form in Schedule 'C' containing the names and addresses of all candidates who shall have been duly qualified and nominated in accordance with Bye Law 30 for election as ordinary members of the Council, arranged in alphabetical order, with the names of the respective nominators and giving the number of attendances during the year at Council Meetings of any candidate who was a member of the outgoing Council and shall at least one week before the date of the poll or election in each year send one of such voting papers to each member of the Society, who shall have paid his subscription for the current year, at his address on the roll book together with an envelope marked 'Voting Paper.' A copy of such voting paper shall at the same time be posted in the Hall of the Society.

Proposed by Mr. Andrew Dillon
Seconded by Mr. Rory O'Connor.

On being put to the meeting, the Resolution was carried unanimously.

To Amend Bye Law 34 to that it reads:

The Secretary shall also cause voting papers to be printed in the Form 'D' for each province containing the names and addresses of all candidates who shall be duly qualified and nominated in accordance with Bye Law 30 for election as the provincial delegate for such province arranged in alphabetical order with the names of their respective nominators, and giving the number of attendances during the year at Council meetings of any candidate who was a member of the outgoing Council, and shall at least one week before the date of the poll or election in each year send papers to each member of the Society whose principal place of practice is in such province elsewhere than in the County and City of Dublin as regards the province of Leinster, who shall have paid his subscription for the current year, together with an envelope addressed to the Secretary, having the name of the province printed on the outside together with an envelope marked 'Voting Paper.' Where only one candidate is validly nominated in respect of each province, the scrutineers of the ballot shall be empowered to return such candiate for election without the necessity or printing or issuing voting papers in respect thereof.

Proposed by Mr. Andrew Dillon
Seconded by Mr. Rory O'Connor

On being put to the meeting, the Resolution was carried unanimously.

4. **To Amend Bye Law 35 so that it reads:**

In voting each member shall make a mark (thus X) with ink or pencil on his voting paper opposite to the name of the candidate for whom he intends to vote.

Proposed by Mr. Andrew Dillon
Seconded by Mr. Rory O'Donnell

On being put to the meeting, the Resolution was carried unanimously.

5. **To Amend Bye Law 36 so that it reads:**

The poll or election shall take place each year on the date appointed by the Council under Bye Law 29A.

The Secretary shall provide 6 Ballot boxes – one for the election of the ordinary members of the Council and one for the election of each provincial delegate; and the scrutineers of the ballots shall attend in such place as the Council shall appoint, from 11 a.m. to 1.00 p.m. and each member of the Society present and desiring to vote for any election shall hand his voting paper for such election to the scrutineers of the ballots or one of them, and any member not finding it convenient to attend, and desiring to vote for any election, shall be at liberty to place his voting paper in the envelope marked 'Voting Paper' which should then be sealed and enclosed in the envelope addressed to the Secretary, forwarded to him for that election, on the outside of which the member so voting shall have written his name and either deliver the same to the Secretary or transmit it so that same may reach him not later than 1.00 p.m. on the said date; and in such cases the Secretary shall during the election hand such envelope addressed to him to the scrutineers of the ballots by whom they shall be opened and the envelopes marked "Voting Paper" shall be placed on one side until after the scrutineers of the ballot shall have ascertained that the member submitting such envelope is entitled to vote, and the envelope is addressed to the Secretary shall be preserved until after the declaration of the poll; when all the envelopes addressed to the Secretary shall have been opened and the scrutineers of the ballot shall have ascertained the total of such envelopes which have been submitted by members entitled to vote, the envelopes containing the voting paper placed in the proper ballot box. Of the admissibility of each voting paper, the scrutineers of the ballot shall be the sole judges.

Proposed by Mr. Andrew Dillon
Seconded by Mr. Rory O'Connor

On being put to the meeting, the Resolution was carried unanimously.

Appointment of Scrutineers:

On the proposition of the President, the following were appointed as Scrutineers of the Ballot for Council for the year 1981/82:

Messrs. L. Branigan, E. McCarron, A. J. McDonald, R. T. Tierney, P. D. M. Prentice, J. R. C. Greene, P. C. Moore and G. Doyle.

Their appointments were agreed. The President expressed the Society's appreciation to the Scrutineers and in particular, to Mr. B. P. McCormack who had served as a Scrutineer for many years, for their help to the Society. This terminated the business of the meeting and the President declared the meeting closed.

The Chairman of First National Building Society, Mr. T. G. Nolan (second from right) presents a cheque to the President of the Incorporated Law Society, Mrs. M. Quinlan. The cheque is to help defray the cost of the Society's new headquarters. Also present were left to right: Mr. J. Ivers, Director General of Incorporated Law Society and Mr. J. M. Treacy, Managing Director of First National Building Society.

High Court Order Restoring Solicitor to Roll

BEFORE The President
In the Matter of The Solicitors' Acts 1954 to 1960
And in the Matter of James G. Orange Applicant

Upon Motion pursuant to Notice dated 30th day of March 1981 made to this Court this 25th day of May 1981 by Mr. Aidan Browne S.C. with him Mr. Barry White of Counsel for the Applicant for an Order restoring the Applicant to the Roll of Solicitors pursuant to Section 10 of the Solicitors (Amendment) Act 1960

Whereupon and on reading the said Notice the affidavit of James J. Ivers filed the 14th day of May 1981 and the documents and exhibits therein referred to and the written evidence adduced on behalf of the Applicant and on hearing Joseph Gilsenan the prospective Employer of the Applicant and on hearing said Counsel for the Applicant and Mr. McDonald S.C. with him Mr. Humphries of Counsel for the Incorporated Law Society of Ireland

And the Applicant James G. Orange undertaking in open Court

(1) that he will seek and obtain employment with the aforesaid Joseph Gilsenan and if for any reason he wishes to change that employment that he will inform the Incorporated Law Society;
(2) that he will not in any event practise as a Solicitor on his own account pending further Order;
(3) that he will practise in the area of Criminal defence and litigation and specifically will not practise in the area of conveyancing and administration of Estates;
(4) that he will not give to any Bank or other financial institution any undertaking with regard to retention application or disposal of monies;

It is Ordered that the name of James G. Orange be restored to the Roll of Solicitors in accordance with Section 10 (3) of the Solicitors (Amendment) Act 1960 limited by the foregoing conditions

And It is Ordered that the Applicant be permitted to hold a bank account in his own name in his personal capacity simpliciter

And It is Ordered that this Application do stand adjourned generally with liberty to the Applicant or the Society to apply to re-enter this Motion

The Court Doth Make no Order as to Costs

Mary P. O'Donoghue
Registrar

Tipperary Bar Association

In his report for the year 1980/81 the Hon. Secretary noted that there were now 82 members of the Association. He paid tribute to the late John Shee, who had been State solicitor of the South Riding of the county for over 30 years and who had recently died.

The Association had submitted reports on the state of the Court Houses in its area to the Law Society.

The Association's Annual Dinner had attracted the largest attendance ever.

The Hon. Secretary had given notice of his retirement, after some 41 years, being concerned at becoming "set in one's ways, narrow minded, conservative, intolerant and not very adventurous."

It will be noted from the list of officers, that the Association being presumably unable to diagnose all or any of these symptoms in the incumbent, duly re-elected him!

Officers for the year 1981/82:

President	David Hodgins
Vice President	Kieran T. Flynn
Hon. Secretary	John Carrigan

Irish Association of Lawyers for the Defence of the Unborn

The Gazette has received a Press release from the newly founded Irish Association of Lawyers for the Defence of the Unborn. Part of the release was as follows:

"At a meeting held in Dublin on Thursday 28th May 1981 the Irish Association of Lawyers for the Defence of the Unborn was established. The Chairman is Dermot Kinlen S.C.

The Association was founded by a group of lawyers, is completely independent of all other organisations and is non-sectarian.

Membership is open to members of the Bar, to Solicitors, to academic and non-practising lawyers, to articled clerks, to law students, to legal executives and to all persons with a legal qualification. There is no subscription and there are no specific obligations, except to support the aims of the Association.

Members accept the undisputed findings of modern embryology that human life begins at conception. They therefore hold that natural justice requires that the unborn child, no matter how young, should enjoy the same full protection of the criminal law as is enjoyed by any other human being.

The Association plans to arrange conferences for members on various aspects of the legal situation of the unborn child and is also pleased to provide speakers for meetings of other organisations on request."

The release was given to the Gazette by one of the Honorary organisers, Paul Byrne, c/o 69 Merrion Road, Dublin 4.

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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 25th day of June, 1981.

W. T. MORAN (Registrar of Titles)
Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

(1) Registered Owner: Samuel John Patterson; Folio No.: 1259; Lands: Carrigans Upper; Area: 63a. 2r. 30p.; County: **Sligo.**

(2) Registered Owner: Martin Thomas McManus; Folio No.: 44046; Lands: (1) Carrowmore, (2) Toorard, (3) Carrowmore (E. D. Callow), (4) Toorard; Area: (1) 9a. 1r. 7p., (2) 3a. 2r. 30p., (3) 4a. 1r. 0p., (4) 7a. 1r. 29p.; County: **Mayo.**

(3) Registered Owner: Annie Maria Coburn; Folio No.: 10458; Lands: (1) Marsh South, (2) Marsh South (one undivided 4th part), (3) Point, (4) Marshes Lower, (5) Marsh South, (6) Marsh South, (7) Marsh South (one undivided 4th part); Area: (1) 7a. 1r. 22p., (2) 6a. 1r. 20p., (3) 0a. 1r. 26p., (4) 7.450 acres, (5) 34a. 1r. 30p., (6) 6a. 2r. 9p., (7) 6a. 1r. 20p. County: **Louth.**

(4) Registered Owner: Johanna Sweeney & Donal Sweeney; Folio No.: 28144; Lands: Killeagh Gardens; Area: 0a. 0r. 32p.; County: **Cork.**

(5) Registered Owner: Mary Byrne; Folio No.:2715F; Lands: Bealalaw; Area:0a. 1r. 19p.; County: **Carlow.**

(6) Registered Owner: Michael Carroll; Folio No.: 9048; Lands: Kilcloony; Area: 12a. 1r. 21p.; County: **Galway.**

(7) Registered Owner: Aiden Smith; Folio No.: 1864F; Lands: Kilconny; Area: .475 Acres; County: **Cavan.**

(8) Registered Owner: Thomas Ryan; Folio No.: 4771; Lands:Ballyknavin; Area:14a. 0r. 9p.; County: **Clare.**

(9) Registered Owner: Patrick Corbett; Folio No.: 11905; Lands: Quingardens (Part); Area: 4a. 0r. 28p.; County: **Clare.**

(10) Registered Owner: Murtha Fleming; Folio No.: 3072; Lands: Ballynagall; Area: 57a. 3r. 13p.; County: **Queens.**

(11) Registered Owner: Ann Loughrey; Folio No.: 34598L; Lands: 94 Broadford Crescent, Ballinteer; Area: –; County: **Dublin.**

(12) Registered Owner: The Mayor Aldermen and Burgesses of Waterford; Folio No.: 12988; Lands: Newtown; Area: 1a. 1r. 22p.; County: **Wexford.**

(13) Registered Owner: Thomas Henry Blennerhassett; Folio No.: 870; Lands: Gortatlea; Area: 74a. 2r. 25p.; County: **Kerry.**

(14) Registered Owner: Patrick (or Patrick Anthony) Finnegan; Folio No.: 41999L; Lands: Loughlinstown and Barony of Rathdown; Area: 0a. 0r. 33p.; County: **Dublin.**

(15) Registered Owner: John Guckian; Folio No.: 2858F; Lands: (1) Drumboylan, (2) Drumboylan (5 undivided 1/12 parts), (3) Drumore, (4) Drumatybonniff, (5) Derreen, (6) Moyoran, (7) Drumlahard, (8) Drumlahard, (9) Derreen, (10) Lurga, (11) Drumboylan (2 undivided 1/12 parts), (12) Drumboylan (3 undivided 1/12 parts), (13) Drumboylan; Area: (1) 6.507 acres, (2) 1.275 acres, (3) 1.031 acres, (4) 15.000 acres, (5) 0.906 acres, (6) 9.706 acres, (7) 0.906 acres, (8) 18.175 acres, (9) 2.938 acres, (10) 8.138 acres, (11) 1.275 acres, (12) 1.275 acres, (13) 0.375 acres; County: **Roscommon.**

(16) Registered Owner: T. Carey Limited; Folio No.: 10711F; Lands: Kilnamanagh in the Barony of Upper Cross in the County of Dublin; Area: 30.938 acres; County: **Dublin.**

(17) Registered Owner: James McGrath; Folio No.: 15155 (Rev.); Lands: Newpark; Area: 30a. 2r. 27p.; County: **Mayo.**

(18) Registered Owner: Gallagher Group Ltd.; Folio No.: 1613F; Lands: Townland of Newtown (Parish of Kilmurry); Area: –; County: **Limerick.**

(19) Registered Owner: Sean Norton; Folio Nos. (A) 29232, (B) 29233; Lands: (A) 1. Mohomber, 2. Graguagh, 3. Graguagh (B) 1. Graguagh, 2. Graguagh, 3. Graguagh, 4. Graguagh; Area: (A) (1) 8a. 1r. 34p. (2) 10a. 2r. 32p. (3) 18a. 2r. 30p (B) (1) 9a. 0r. 33p. (2) 12a. 3r. 34p. (3) 12a. 1r. 11p. (4) 3a. 0r. 22p.; County: **Tipperary.**

(20) Registered Owner: Carole Haugh; Folio No.: 2271L; Lands: Leasehold interest in the property situate in part of the Townland of Ballynacarrig and Barony of Arklow. Area: –; County: **Wicklow.**

Lost Title Documents

Daniel Doyle – Deceased late of Berryhill, Cobh, County Cork. Date of Death – 17th July, 1980. Will any person who has any knowledge of the whereabouts of the original Title Documents of Premises Berryhill, Cobh, County Cork, please contact Timothy J. Hegarty and Son, Solicitors, 58 South Mall, Cork.

Lost Wills

Brigid Behan deceased, late of 2 Pembroke Row, Baggot St., Dublin 2. Will any person having knowledge of a Will of the above-named deceased who died on the 10 May, 1981 at the Royal Hospital, Donnybrook, Dublin 4, please communicate with Bruce St. John Blake & Co., Solicitors, 93 Lr. Baggot St., Dublin 2.

Vincent P. Hyland late of "Mavin," 15 La Touche Park, Greystones, County Wicklow, Retired Bank Manager. Will any solicitor having a Will of the above named deceased who died on 25th March, 1981, please contact Patrick J. Creagh, Solicitor, 8 Eglinton Road, Bray, County Wicklow.

Stephen Julien Savage deceased, late of 6 Alma Road, Monkstown, Co. Dublin, Medical Doctor. Will any person having knowledge of a Will of the aforesaid deceased who died on the 2 May, 1981, please contact McCann Fitzgerald, Roche & Dudley, Solicitors, 28/32 Upper Pembroke St., Dublin 2.

Miscellaneous

For Sale – Seven Day Licence. Apply: P. J. O'Driscoll & Sons, Solicitors, 41 South Main Street, Bandon, Co. Cork.

Secretary 5 years experience (Audio/Dictaphone typing) with Spanish Lawyers in Spain seeks temporary employment. Tel. 867833.

Would a person interested in exchanging house and/or car, with Scottish Solicitor for first two weeks in August, please communicate with the Editor.

Obituaries

Mr. Gerald Baily died on 17 July, 1980. Mr. Baily was admitted in Michaelmas Term, 1931 and practised in Tralee, Co. Kerry.

Mr. Cornelius Sheehan died in July 1980. Mr. Sheehan was admitted in Trinity term, 1945 and practised at 30 Lr. Ormond Quay, Dublin.

Trust Irish Nationwide to back up everything it says!

Evening Herald

MONDAY, FEBRUARY 9, 1981

LOANS BODY BACKS LAW MONOPOLY

By JOHN FOLEY

IRISH NATIONWIDE Building Society chief, Michael Fingleton argued today in favour of solicitors retaining their present legal monopoly on conveyancing.

They were the people generally equipped by training and experience to do the work, he told the 12th day of the Restrictive Practices Commission Public Enquiry.

"Solicitors are equipped to do a competent, efficient and accurate job to protect their clients in the complex sale and transfer of property", he told Commission member, Professor Charles McCarthy.

"To allow amateurs to get involved in the business which often involved large sums of money, without the necessary expertese would be dangerous to encourage", Mr. Fingleton added.

And he said he would be very reluctant to see any move to substitute any profession or body for solicitors in carrying out this kind of work.

Mrs. Eithne Flanagan, solicitor for the society, told the Commission that they had no bar against any individual borrower wishing to do his own conveyancing.

WASTE OF TIME

"We will deal with the man in the street if he is capable of doing so but generally we find it a waste of time.

"I can't remembere any case in which an induvidual was capable to do conveyancing himself to the end. It delayed his loan in the long run and eventually he had to get a solicitor's assistance", she said.

She told another Commission member, Mr. Patrick Lyons, that the difficulties arose at the requisition stage because individuals acting for themselves did not understand the words or the terms used in the technical documents.

The inquiry which is also investigating the solicitors' profession ban on advertising was ordered in 1977 by the Minister for Industry, Commerce and Tourism, Mr. O'Malley, when he accepted a recommendation from the National Prices Commission that the conveyancing monopoly of solicitors be ended.

THE IRISH PRESS

WEDNESDAY, MARCH 4, 1981

Mortgages extended to cover legal fees

THE Irish Nationwide Building Society has decided to grant up to £1,000 extra loan to all first time house purchasers to cover mortgage and legal fees in addition to the current normal loan requirement, the society announced yesterday. The facility took effect from yesterday.

The Irish Nationwide says that the normal requirements of income will not apply to this additional loan and "neither will any additional security be required." It has stated that it has been conscious of the difficulty experienced by first time purchasers in budgeting for these fees.

To obtain the additional facility it must be applied for at the time of the mortgage application and before the issue of formal loan approval. The present requirement for loans is that the applicant must be an investor of the society for three months and have 10 p.c. of the amount of required mortgage invested with the society for that period. This applies to both new and old houses.

It's one thing to talk about a problem. But it takes a caring company to do something positive about it.

The Irish Nationwide Building Society has led the way in extending mortgages to cover legal fees. Just as it led the way in paying *extra interest* to investors.

Even now the Irish Nationwide Building Society is still the only major society in Ireland to offer up to 10.25% on your investment.

Backed by a full choice of accounts to suit your needs. Plus minimum formalities and the sort of friendly service that has been a watchword of the Society since its formation in 1873.

Contact us today for fullest details of just how much the Irish Nationwide Building Society can do for you and your clients.

And rest assured Irish Nationwide will back up everything it says.

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Bank of Ireland Finance have branches in Dublin at Blackrock (888511), Fairview (331816), Merrion Square (689555) and Tallaght (522333) and throughout Ireland at Athlone (75100), Belfast (27521), Cork (507044), L'Derry (61424), Dundalk (31131), Galway (65231), Kilkenny (22270), Limerick (47766), Sligo (5371), Tralee (22377), Waterford (3591), Omagh (44694), Newry (66013) and Ballymena (47227).

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 6 July/August 1981

Rent Control—What Now?

MUCH print has been spilt in the aftermath of the Supreme Court decision holding unconstitutional the two principal parts of the Rent Restrictions Act. A Bill, effectively restoring for a six month period, the previous system of rent control has been hustled through a new Dail and a curiously "lame-duck" Senate.

It is disappointing that all that the Department of the Environment has been able to produce by way of a solution to the problem is this "stalling" legislation. It might have been expected that, once the High Court had, in April 1980 pronounced that major parts of the legislation were unconstitutional, steps might have been taken to draft legislation which could cope with the situation, if and when the Supreme Court upheld the High Court's decision. It is unlikely that anything has happened in the intervening period which would have made the drafting of such replacement legislation any easier.

Rent control clearly affected only a modest part of the private letting market. Since it applied principally to premises built or converted prior to 7th May 1941, the widest category of excluded premises comprised virtually all of "flatland" in our major urban areas. Market forces have been seen to operate in these areas for many years, so the results of freeing premises from rent control can clearly be seen.

There have been calls for the extension of rent control or the provision of security of tenure to all residential accommodation. There are examples from other jurisdictions to show that such measures are not entirely beneficial. Ignoring the position in the U.K., where rent control has become a political shuttlecock, examples are to be found in France and the United States where rent control has led to a decline of the housing stock, if not in quantity, certainly in quality. This, of course, has been a feature of our own rent restrictions legislation, where numbers of landlords either could not or would not expend the appropriate sums on repair and maintenance because of the poor return.

If there is to be rent control and security of tenure given to tenants, it must not be at the expense of the housing stock. Too much attention has been given in Ireland to the provision of new and expensive owner-occupied housing and too little to the preservation of existing habitable rented accommodation. One of the most unsatisfactory aspects of the excessive length of, operation of, and strict control imposed by our Rent Restrictions legislation was that in many cases the landlord and the tenant were in an equally unhappy economic plight; some landlords relying on static rents from controlled premises in periods of high inflation were little better than their tenants.

The argument for allowing rents to reach market levels is a strong one; even stronger is the argument that, if some members of the community need financial aid to enable them to meet such rents, it is the business of the State to provide such subvention. A pensioner has as much right to state assistance in maintaining his rented home as first-time buyers have of substantial grants for new houses.

If there is a need for a tribunal to monitor rents, its jurisdiction, supported hopefully by amending legislation, should enable it to ensure that the landlords are not tempted to indulge in extra-legal bullying activities to obtain possession of rented property, nor to avoid registering their property with such local authorities as have introduced byelaws governing rented accommodation. Equally, landlords deserve some protection against the minority of tenants who cause serious damage to the rented property or its contents.

It is to be hoped that any new legislation will not become a mere political football and that the broader concern of the community in the maintenance of a substantial market in rented accommodation will take precedence over narrower sectional interests.□

INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 6 July/August 1981

In this issue . . .

Comment . . .

STATUTORY Instrument Number 237 of 1981, dated 30th June 1981, in a few brief words, has eliminated a legal institution of more than 100 years — the statutory Town Agent.

Twenty or thirty years ago, a number of Dublin practices acted as Town Agent for their more distant colleagues. Over the years since then, Dublin representation has narrowed itself down until, today, one firm enjoys almost a complete monopoly of agency practice.

The legal requirement that all Solicitors should maintain an office within convenient walking distance of the seat of justice dates from more spacious days, before the invention of the internal combustion engine and the telephone and of the other even more sophisticated electronic communication devices which are becoming increasingly widespread. In those days, the only practical means of affecting service of court documents was to deliver them in person. While this was practicable for Dublin City Solicitors, whose offices would in any event be situated within, at most, a mile or two of each other, it was clearly impossible for, say, a Cork Solicitor to effect personal service on a Solicitor in Sligo. So arose the requirement that all practitioners should maintain a town office, originally within the municipal boundary of Dublin City and later within two miles of the Four Courts, between whom could be passed all formal documentation from and between the further flung reaches of the profession.

While the system undoubtedly had its uses, it was arguably unreasonable that two Solicitors, practising next door to each other in Tralee, should be required to effect service of documents upon each other through a token Dublin office within walking distance of Inns Quay. It has been obvious for some years that the anachronism could not remain for much longer but, to the older practitioner, the removal of the legal obligation to maintain a registered address in Dublin, although welcome, cannot but represent the end of an era. (The text of the Statutory Instrument is published on p. 133).□

Judicial Attitudes to the Construction of Written Contracts

or

. . .for the want of a nail the ship was lost

by

Robert A. Pearse and David Tomkin
Lecturers in Law, University College, Cork

THE gradual divagation of English from Irish contract law is of considerable importance to practitioners in Ireland, who deal commonly not only with contracts subject to Irish law, but also with contracts which are subject to English law and which may be interpreted by English courts.

The interpretation of written contracts in England has recently been the subject of judicial attention. The purpose of this article is to discuss and to elucidate the differing judicial approaches which have become apparent and to consider what application they might have in Ireland.

1. Commercial Contracts

The tendency in construing commercial contracts in England may be inferred from the attitude of the House of Lords' recent decision in *A.S. Awilco v. Fulvia Spa di Navigazione (The Chikuma)*[1] in which articulation was given to the ideal at which courts should aim, in construing common form contractual clauses. It is, Lord Bridge said:

> to produce such a result that in any given situation both parties seeking legal advice as to their rights and obligations can expect the same clear and confident answer from their advisers and neither will be tempted to embark on long and expensive litigation in the belief that victory depends on winning the sympathy of the court.[2]

The general approach which appears from both this case, and *Photo Production Ltd. v. Securicor Transport Ltd.*,[3] again a recent decision of the House of Lords, is that the words of a written contract should be given their ordinary and natural meaning.

In the *Photo Production* case the appellant company owned a factory, and in 1968 entered into a contract with the respondent company for the provision of security services there. During the course of the provision of these services an employee of Securicor lit a small fire, which got out of control, and resulted in a conflagration which caused the respondents monetary loss to the amount of £615,000. The respondents sought to avoid liability relying on a widely drafted exclusion clause.

The House of Lords, in allowing the appeal from the decision of the Court of Appeal, and upholding the decision of MacKenna J., indicated that the exemption clause was clear and unambiguous. It protected the respondent company from liability.

The court rejected any "artificial" approach to the interpretation of the contract. It indicated that there was no justification for interfering with the terms freely reached by the parties. Referring to the Unfair Contract Terms Act 1977, Lord Wilberforce said:

> It is significant that Parliament refrained from legislating over the whole field of contract. After this act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit, and for respecting their decisions.[4]

It will be noted that this proposition is made subject to qualifications, and further qualifications were expressed in the speech of Lord Diplock, who, while stating that "parties are free to agree to whatever exclusion or modification of . . . obligations they please,"[5] laid down the following exceptions:–

(1) The agreement must retain the legal characteristics of a contract.
(2) It must not offend against the equitable rule against penalties.
(3) Exclusion clauses are to be construed strictly and the appropriate degree of strictness to be applied to the construction of exclusion clauses may properly depend on the "extent to which they involve departure from the implied obligations."[5]
(4) The reasonableness of exemption clauses is a relevant

> consideration in deciding what meaning the parties intended the words to bear in the case of alternative possible meanings. However, where the words are unambiguous, the Court is not entitled to reject the exclusion clause, "however unreasonable the court itself may think it is."[6]

The general rule of construction, however, as Lord Wilberforce stated in relation to commercial contracts is that:

> there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made."[7]

This was confirmed by *The Chikuma*.[8] In this case payment on foot of a time charterparty arrived on the due date, but by an irrelevant complexity of Italian banking practice, if drawn out from the owners' bank within four days, the owners would have been potentially liable for the subtraction of a small interest charge. Had the payment been withdrawn by the owners on or before the fourth day, the interest would have amounted to approximately $70-100 out of the $68,863 due. The charterparty was a Time Charterparty in the New York Produce exchange form; and clause 5 provided that the payment of the hire was:

> to be made in . . . cash in United States currency . . . monthly in advance . . . otherwise failing the punctual and regular payment of the hire . . . the Owners shall be at liberty to withdraw the vessel from the service of the Charterers . . .

The financial loss suffered by the owners could be reasonably said to be inconsiderable, involving, as it did, a shortfall of under 0.07 per cent. of the monthly hire for four days. However, the shipowners claimed to exercise their right under the term of the contract to withdraw the vessel from the service of the hirers. The hirers claimed that the withdrawal was in breach of contract and sought $3,000,000 compensation for the breach.

The House of Lords unanimously concurred with Lord Bridge's speech in which he held that the hirers had not paid the instalment due in full and on time.[9] According to the strict interpretation of the charterparty, the owners were within their rights in withdrawing the vessel. Their Lordships declined to be deflected by the previous cases expressing, as Lord Bridge put it:

> earlier exercises of judicial ingenuity to mitigate the rigours of clauses in charterparties giving to shipowners a right to withdraw their ships on failure or default in payment of hire or freight which he said 'had not had a happy history.'[9a]

Two principles are of importance in noting the route which led to his decision. First, he pointed out that shipowners and charterers bargain at arms length. Neither class has such a preponderance of bargaining power as to be in a position to oppress the other. Secondly, he stressed that where common form contractual clauses are used, it is of "overriding importance that their meaning should be certain and well understood".[10] Clear and consistent principles must be followed – in a phrase, that contractual terms must be given strict interpretation.

Such strict interpretation of the contract appears to give rise to not inconsiderable hardship, and contrasts with the principles of assessment of commercial agreements evident in cases like *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki*.[11] There, a time charter contained clauses stating that the vessel was in every way fitted for ordinary cargo service and that it would be maintained by the owners in a thoroughly efficient state in hull and machinery during service. The vessel was kept out of service for repairs for over four months. The charterers wrote twice to the owners repudiating the charterparty. The Court of Appeal held, however, that the charterers were not entitled to repudiate: the delay involved in ameliorating the condition of the vessel was not so great as to frustrate the commercial venture of the charter. The Court of Appeal declined to interpret the contractual term "seaworthy" as a condition *stricto sensu*, because this would entitle the hirer of a wooden vessel to repudiate, if even one nail was absent.

Similarly, in *Schuler A.G. v. Wickman Machine Tool Sales Ltd.*[12] a clause in a contract stating it to be a "condition" that certain visits should be made by sales representatives was held not to give a right to terminate the contract for any breach. This would be too unreasonable a result. The word "condition" was, the House of Lords held, to mean no more than "contractual term". To adopt the primary meaning of the term would result in Schuler being able to determine the contract for a failure to make one in over a thousand visits; "this is so unreasonable," said Lord Reid, "that it must make me search for some other possible meaning of the contract. If one can be found, then Wickman must suffer the consequences. *But only if that is the only possible interpreation.*"[13]

On the face of it, there appears to be a distinction between the approach in the *Photo Production* and *The Chikuma* cases on the one hand, and the *Schuler A.G.* case on the other. They could be reconciled on the bases that there was, according to the Court in *Schuler A.G. v. Wickman*, an ambiguity, but as is often pointed out, most words have an "open texture" and are capable of meaning more than one thing. Moreover, Lord Wilberforce (dissenting) considered the word to be free from ambiguity, so it is artificial to reconcile the cases on this basis. They do indeed evince a difference of approach.

The force of the *Hong Kong Fir* and *Schuler A.G.* cases is that the court seeks to give a reasonable interpretation to the contract and, to this end, places a construction on words and phrases which facilitates this.

However, in the two more recent decisions, the procedure is different. The Court is to look primarily at the "ordinary" meaning of the words used. Only if the words used are unclear or ambiguous is the court entitled to turn to consider the reasonableness of the interpretation. The words used by the parties govern, rather than any actual or imputed intention. As Lord Diplock put it in the *Photo Production* case, the court is not entitled to reject an exclusion clause "however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only."[14] As reinforcement for this view of the attitude shown by the House of Lords, it should be remembered that the Court of Appeal had decided the case – at least in part – on the basis of the

construction they considered fair and reasonable, Lord Denning M.R. in particular remarking that:

> in order to decide whether the exemption or limitation clause applies, you must construe the contract, not in the grammatical or literal sense, or even in the natural and ordinary meaning of the words, but in the wider context of the 'presumed intention' of the parties, so as to see whether or not, in the situation that has arisen, the parties can reasonably be supposed to have intended that the party in breach should be able to avail himself of the exemption or limitation clause.[15]

This whole approach was rejected by the House of Lords.

2. Consumer Contracts

There are grounds for believing that the attitude of the courts to the interpretation of consumer contracts differs – or at least used to differ – from that to the interpretation of commercial contracts. As Lord Diplock said in *Photo Production:*

> the reports are full of cases in which what would appear to be very strained constructions have been placed on exclusion clauses, mainly in what today would be called consumer contracts and contracts of adhesion.[16]

The reason for a distinction between commercial and consumer contracts is not hard to find.

> Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and, if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could take it or leave it. If he then went to another supplier, the result would be the same. Freedom to contract must surely imply some choice or room for bargaining. At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason.[17]

It is difficult to say how far this difference in judicial attitude applies only to exemption clauses and how far it can be considered to apply more generally to contract terms, since most of the cases have involved exemption clauses. The operation of the *contra proferentem* rule, under which ambiguities are resolved against the person who drew up the contract, is capable of application to terms other than exemption clauses. For example, terms under which an estate agent claims commission on (or before) the sale of a house are interpreted on the presumption that commission is payable only on a concluded sale achieved through the agent's own endeavours, any flexibility in interpretation thus being resolved in favour of the consumer.[18] Cases of this kind can, however, be seen as akin to exemption clause cases, in that a purported departure is being made from what would be the position under an open contract and, as has been said in relation to contracts for the sale of land:

> If a vendor means to exclude a purchaser from that which is a matter of common right, he is bound to express himself in terms the most clear and unambiguous, and if there be any chance of reasonable doubt, or reasonable misapprehension of his meaning, I think that the construction must be that which is rather favourable to the purchaser than to the vendor.[19]

But even in relation to consumer contracts, there are indications of a change in judicial attitude. The Unfair Contract Terms Act 1977 is the cause. This Act contains very wide provisions restricting the effect of exemption

clauses in consumer contracts and in written standard form contracts. According to the House of Lords in *Photo Production*, in view of these provisions, the need for judicial distortion of the English language in these kinds of contracts has been banished. The straightforward route of statutory invalidity will certainly be preferred over the more difficult route of strained interpretation.

How far the logic of this dictum would apply in Ireland is debatable. The nearest equivalent in Ireland of the Unfair Contract Terms Act 1977 is the Sale of Goods and Supply of Services Act 1980. Far-reaching as this Act is, it is not as wide as the English Act. There is, for instance, no provision equivalent to s.3(2) of the English Act striking down (except so far as they are shown to be reasonable) contract terms under which a party may claim to be entitled either to render no performance at all, or "to render a contractual performance substantially different from that which was reasonably expected of him." To this extent the English Act restricts both clauses which limit liability by narrowly defining the obligation of the parties as well as more traditional exemption clauses.

3. Fundamental Breach

The evolution and demise of the fundamental breach rule reflects the shift in attitudes to interpretation outlined above. The earlier cases went no further than to suggest that, as a principle of construction, exception clauses are, where possible, to be construed as not exempting a party from liability for fundamental breaches or breaches of fundamental terms in a contract.

Later cases, however, elevated this principle to a rule of law. In *Karsales (Harrow) Ltd. v. Wallis*,[20] where there was a contract for the sale of a car by hire-purchase, it was held that, despite a very wide exemption clause, the hirer could reject the car, which had been in good condition when he first inspected it, but was a complete wreck when delivered. Denning L.J. put forward as a rule of law that:

> It it now settled that exemption clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract.[21]

In what appears to be the only reserved Irish decision on fundamental breach, *Clayton Love v. B. and I.*,[22] the Supreme Court appeared to adopt the view that the doctrine of fundamental breach operated as a rule of law and to accept the submission that a defendant in breach of a fundamental obligation cannot avail of any exempting clause whatever. This conclusion was reached with only very brief reference to authority, and there was no examination in the reported judgments of the view of Davitt P., the trial judge, that the doctrine of fundamental breach rested on interpretation and that "there is nothing to prevent parties who wish to do so from entering into a contract containing exception clauses which will exempt one or the other or both from liability even in the case of a breach of a fundamental term. If that is done clearly and unequivocally I see no reason why such a provision should not be effective."[23]

The Supreme Court decision in the *Clayton Love* case was delivered within a day of the decision of the House of Lords in the *Suisse Atlantique* case[24] and in ignorance of the view, unanimously reached by the House of Lords, that the rule-of-law doctrine of fundamental breach was unsound. Attempts by Lord Denning to re-establish the doctrine of fundamental breach in *Harbutts Plasticine Ltd. v. Wayne Tank & Pump Co. Ltd.*[25] and *Photo Production Ltd. v. Securicor*[26] were emphatically rejected by the House of Lords in the latter case.[27] It can scarcely be doubted that, if the facts of the *Clayton Love* case were to arise again, the Irish Supreme Court would not reach the same conclusion, but would prefer the view expressed in the English decisions. If the operation of the doctrine of fundamental breach as a rule of law is rejected, in the end, everything depends on the true construction of the clause in dispute.

4. Implications

There can be no doubt that the application of a "literal interpretation" rule can produce harsh results – and results not always intended by the parties. Just as, on questions of statutory interpretation, the Courts will not insist on a literal interpretation where this would lead to manifest absurdity, so also is there a case for saying that even apparently clear words must yield, where this gives rise to a result which cannot have been intended. For instance, in *The Chikuma*, payment of the hire was to be "in cash," but the court did not consider that this required payment in dollar bills or other legal tender. That would be absurd.[28]

Other arguments can be marshalled against an unyielding literal interpretation. It is clearly desirable that the interpretation of written contracts should be a matter on which a legal adviser should be able to give a clear and confident answer. But even insisting that words should bear their "natural and ordinary" meaning will not always lead to this result, for the rule does not (and cannot) apply except where the words are clear and unambiguous; and as has already been said, few words are used consistently with only a single meaning. Moreover, even if the interpretation of written terms is certain, there can often be considerable difficulty in establishing if any, and if so, which, written terms are incorporated into a contract,[29] or whether their interpretation is affected by oral representations.[30]

Again, an omission from a contract can be as significant as an inclusion. Some applications of an express term may be just as unforeseen and unintended as cases in which the contract makes no express provision, yet in the latter event the court will often imply a term to give the contract reasonable business efficacy or to give effect to the putative intention of the parties.

Despite these reservations, it is right and desirable that, within limits, parties should be able to agree their own obligations. But it is difficult to put forward, far more to adhere to, a single principle of interpretation. In so far as the recent English cases suggest this approach, the Irish courts should be slow to follow. Undue reliance should not be placed on the use of particular words or phrases. It is the intention of the parties which should be sought through the words they have used in the context of the

whole document. Certainty should not be the only concern.

The change in judicial attitude to the interpretation of contracts has undoubtedly been strongly influenced by the existence of statutory protection aimed mainly towards shielding consumers from all-embracing exclusion clauses. However, there are many cases where the question of interpretation may not involve an exclusion clause at all. Here, particularly where there is an inequality of bargaining power, or where independent legal advice may not have been obtained, there remains scope for further legislative intervention, or for an extension of the equitable jurisdiction to give relief against the unconscionable exercise of legal rights. This equitable jurisdiction already exists in relation to penalty clauses and relief against forfeiture for non-payment of rent on leases. Could it not apply to cases where for instance a car had been let on a long-term hiring contract to an individual, but the hiring company sought repossession under a term insisting on punctual payment of the hire, and payment had been received a day late through a bank error?□

FOOTNOTES

1. [1981] 1 All E.R. 652.
2. Ibid. at p. 658-9.
3. [1980] 1 All E.R. 556.
4. Ibid. at p. 561.
5. Ibid. at p. 567.
6. Ibid. at p. 568.
7. Ibid. at p. 561.
8. [1981] 1 All E.R. 652.
9. If the reasoning of Lord Bridge were ruthlessly applied, then even if $100 were added to the payment to cover the potential interest charge, the contract would still have been broken, although the owners would in no way have been prejudiced.
9a. [1981] 1 All E.R. 652 at p. 658.
10. For an earlier decision similar to *The Chikuma* see *Tenax Steamship Co. Ltd. v. The Brimnes (Owners)* [1974] 3 All E.R. 88.
11. *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kishen Kaisha Ltd.* [1962] 1 All E.R. 474.
12. [1973] 2 All E.R. 39.
13. Ibid. at p. 45 (Our italics).
14. *Photo Production Ltd. v. Securicor* [1980] 1 All E.R. 556 at p. 568.
15. [1978] 3 All E.R. 146 at pp. 152-153.
16. [1980] 1 All E.R. 556 at p. 568.
17. *Suisse Atlantique Société D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1966] 2 All E.R. 61 at p. 76 (per Lord Reid).
18. See J. C. W. Wylie, *Irish Conveyancing Law* pp. 107-109.
19. Per Knight-Bruce V-C in *Symons v. James* (1842) 1 Y. & C. Ch. cas. 487 at p. 490.
20. [1956] 2 All E.R. 866.
21. Ibid. at p. 868.
22. (1968) 104 I.L.T.R. 157.
23. Ibid., at p. 163.
24. [1966] 2 All E.R. 61 (Supra, note 17).
25. [1970] 1 All E.R. 225.
26. [1978] 3 All E.R. 146.
27. [1980] 1 All E.R. 556.
28. [1981] 1 All E.R. 652 at p. 657 and see *The Brimnes* [1974] 3 All E.R. 88 at p. 114.
29. For a discussion of the cases on incorporation of written terms into a contract see Treitel: *The Law of Contract* (5th ed.) 152-157.
30. As in *Curtis v. Chemical Cleaning and Dyeing Co. Ltd.* [1951] 1 K.B. 805.

For Your Diary . . .

24-28 August 1981: *Young Lawyers International Association* XIX Congress, Dublin. Full programme now available from Secretariat, XIX Congress of AIJA, 44 Northumberland Rd., Ballsbridge, Dublin 4. Tel. 688244.

1-4 September, 1981: *Law and Society in Ireland:* An International Conference, Trinity College, Dublin. *Speakers:* Professor William J. Chambliss on law and process, Professor Albert K. Cohen on law and crime, Dr. Masud Hoghughi on juvenile justice and social control, Professor Nils Christie on diversification of penal control, Chief Probation Officer Graham Smith on community corrections. Application forms are available from the Conference Organisers, School of Law, Trinity College, Dublin 2.

26-27 September, 1981: Mayo Bar Association/Northern Ireland Law Society: Seminar on "Office Management and Technology in the Eighties". Open to Solicitors in Ulster and in the Counties of Donegal, Sligo, Leitrim, Rosrommon, Mayo and Galway. Further details from Patrick O'Connor, Solicitor, Swinford, Co. Mayo.

12 October 1981: Law Society *Commencement of Sixth Professional Course.*

28 October 1981: Law Society *Presentation of Parchments,* Blackhall Place, Dublin 7.

11 December, 1981: Mayo Bar Association Annual Dinner Dance. Breaffys House Hotel, Co. Mayo. Tickets available from Patrick O'Connor, Solicitor, Swinford, or Anne Nolan, Solicitor, Castlebar.

The Rules of the Superior Courts (No. 4), 1981

1. In Order 4, rule 15 shall be deleted and the following substituted therefor:-
   "15.A plaintiff suing in person shall indorse upon the summons and notice in lieu of service of a summons his occupation or description and an address for service within the jurisdiction, where summonses, notices, pleadings, petitions, orders, warrants, and other documents may be left for him".
2. In Order 12, rule 7 shall be deleted and the following substituted therefor:-
   "7. A defendant appearing in person shall state in the memorandum of appearances an address for service within the jurisdiction where summonses, notices, pleadings, petitions, orders, warrants, and other documents may be left for him".

(Continued on p. 143)

Adventure into Advertising

The English Experience

MODERN advertising practitioners may deny the famous dictum of one of the founders of their profession — "One half of all advertising is wasted, but nobody knows which half". They will point to penetration studies, in-depth surveys, sampling and the other techniques which are used to determine the effectiveness of advertising campaigns but, after two major campaigns of corporate advertising by the Law Society in England, it was considered doubtful whether or not the improvement in the overall reaction of the public to the profession justified continuation of the programme.

The Law Society's National Information Campaign began in 1977/78 in the Press and on TV, and continued in the Press in 1979/80. Funding was provided through the collection of £10 per head from members of the profession (paid with the practising certificate fee) in 1977, and £20 per head in 1978 and 1979.

The monitored results indicated that, broadly speaking, there was an overall improvement but not enough to justify continuation. The subsequent approach has been to inform the public of specific aspects of the profession's services through the establishment of information objectives, in fact differing little from those originally established:

1. Increasing public awareness of the work of the profession and the social need for solicitors;
2. Informing the public of the services available from the profession;
3. Involvement of the profession in the achievement of these objectives.

The attempt to achieve the first objective through a national advertising campaign was abandoned, largely – as already indicated – as the result of the experiences of 1977-1980, and the high cost of such campaigns. The employment of public relations consultants for general purposes would, it was thought, cost a substantial amount and achieve little. The view was taken that much of the work of such consultants was already covered by the Law Society's Professional and Public Relations Department and that local law societies should become more involved in public relations. To assist the local bodies, it was considered that material should be provided to assist them in media and public communications.

Future advertising on a national scale will be limited to promoting special services. Local advertising campaigns have been found not to be cost-effective, except for very narrowly-defined purposes.

Part of the fund (currently £874,000) which the Law Society raised for its National Information Campaign will now be used for the production of a film concerning the solicitors' profession, and also for the making of video and audio-visual programmes which can be used in education and in projecting the profession to the public.

Mr. H. B. Matthissen, Chairman of the Law Society's Professional and Public Relations Committee, commented in that Society's *Gazette* (29 April 1981):

> "Good public relations cannot be achieved without first establishing sound professional relations. The Committee is determined that a strong campaign should be mounted to remind members of the profession of their responsibility for the efficient conduct of their work and for good client relations, emphasising that this is in their own self-interest."

—a view which would be endorsed by the Public Relations Committee of the Incorporated Law Society of Ireland.□

Central Office Delays in High Court Default Judgments

The Society has been in correspondence with Mr. J. K. Waldron, Registrar, as to delays in issuing default Judgments in the Central Office.

The Registrar concedes that the position is, at present, very unsatisfactory. He accepts that it is taking up to eight weeks from the lodgment of Judgment sets until the signing of Judgment, but explains that the present huge backlog of work in this area is due to the steep rise in the issue of Summary Summonses and the fact that staff members have not kept pace with that increase.

The Registrar has supplied the Society with a table of figures indicating the growth in the issue of Summary Summonses since 1976, which is set out at foot of this note.

A survey of staff needs in the Central Office was carried out some months ago and it is hoped that, arising out of that survey, an extra court clerk will be assigned to the Judgments Office in the very near future. With this assistance, and with occasional overtime, it is hoped that the backlog will soon be seen to be reducing.

Period Year ending 31st July	Summary Summonses issued
1976	2,792
1977	3,307
1978	3,584
1979 (Postal Strike)	3,229
1980	5,561
Eight Months period to end of March 1981	5,287*

*About 45% increase over the same period in previous year.

Professional Fees for Road Traffic Acts

A new schedule of solicitors' fees for proceedings arising out of road accidents has been agreed with the Accident Claims Standing Committee of the Federation of Insurers in Ireland to apply for 12 months with effect from 1 July 1981.

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 51(A) of the Road Traffic Act 1961 (as incorporated by Section 49 of the Road Traffic Act 1968) and under Section 52 or 53 of the Road Traffic Act 1961 (as amended by Sections 50 and 51 of the Road Traffic Act 1968) £32.50

(b) Attending a Court of Summary Jurisdiction to defend any proceedings under Section 51(A) of the Road Traffic Act 1961 (as incorporated by Section 49 of the Road Traffic Act 1968) and under Section 52 of the said Act (as amended) £42.50

(c) Attending a Court of Summary Jurisdiction to defend any proceedings under Section 53 of the Act (as amended) £52.50

(d) Attending to observe such proceedings £32.50

(e) Attending at a Coroner's Inquest £30.00

2. Where a report of the proceedings is required, a minimum fee for the report should be £30.00. 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 principle 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. All proper outlays are payable in addition to the minimum fee.

The Builder and the Law

THE Law Society organised a most successful Symposium on "The Builder and the Law" at Blackhall Place on the 16th May last. Representatives of all the professions and trades concerned with the topic, as well as members of the Public Service concerned with the area, were present. The Symposium was officially opened by the Minister for the Environment, Mr. Ray Burke T.D.

In his introductory remarks to the Symposium, the Minister said that in Ireland we were fortunate that, in general, the many outstanding features of our physical environment are still available to us in good condition. The pressures on our environmental resources were increasing due to the expanding population, the rapid growth of industry, the changing patterns of agriculture and consequential overall growth and development which is in line with the demand for improved living standards. Vigilance and care had to be taken to ensure that the environment did not suffer and unnecessary controversy and conflicts arise which would only impede development. This could best be achieved through a national environmental policy, which sets out objectives and means of their achievement. He had received a report from the Environment Council with recommendations on this matter. The report was at present being considered and he hoped to put proposals to the Government on environment policy in the near future.

Expenses in Buying a New House or Flat

In a paper entitled "Expenses in Buying a New House or Flat" Mr. John Gore Grimes, Solicitor drew attention to the fact that the present system of adjudicating the stamp duty on non CRV type houses and flats was cumbersome and the cause of additional delay and therefore expense in connection with the house purchase. The Law Society had on previous occasions appealed to the Minister to rationalise the situation in relation to stamp duty on new houses and flats and to apply a fair and equal system without the necessity of contentious fictions which in the experience of the Stamp Office seems to do a little more than encourage perjury. The system causes difficulty both for solicitors, purchasers and for the stamp office. The documentation required was substantial and somebody in the stamps office had to read carefully through each building contract and each agreement for site purchase to make quite certain that they were not linked and this is a costly and time consuming process in an office which is already over-burdened with work. This time consuming and wasteful exercise is based on the fiction that there is no link between the sale of the site and the building of the house and in most cases there is of course a very practical link. The Law Society would continue to press for reform and repeats its call for rationalisation in the form of fixed duty on new houses. Once the Revenue Commissioners are satisfied that the instrument presented is an instrument transferring or conveying newly built premises then a flat race of duty should apply whether the premises are a house or a flat.

Builder/Client Relationship

In the course of her paper on the Builder/Client relationship the President of the Law Society, Mrs. Moya Quinlan suggested that solicitors should explain more fully to the client, the various stages the building of a house will go through and advise the client that he is quite entitled, once the contract has been signed, to visit the site on a regular basis for the purpose of satisfying himself that the work is being carried out in accordance with the specification which he will have had an opportunity of seeing at the moment of signing the contract. In saying this the President commented that she was well aware that this was a practice which builders might not wish to encourage but nevertheless she felt at many times if a more positive interest in the construction of the house was taken by the client in the early stages, fewer problems would arise later on and many of the difficulties which solicitors are subsequently asked to unravel would be avoided.

She also suggested that a solicitor should explain in detail the duties and obligations which a purchaser undertakes entering into a contract with a builder. If there were any piece of advice that could be offered to both the client and the builder it was that before proceeding with the contract the effect of the contract should be explained in great detail and its duties and obligations clarified at all levels.

On the question of the time limits for construction of houses and payment of instalments she noted that all too often the small builder or developer for one reason or another is unable to meet the time commitment and so frustration begins to build up and a certain amount of distrust on the part of the client becomes inevitable if deadlines are not met. She suggested that from the builders point of view it would seem that if the progress of the work was carefully monitored and the client was aware of the likelihood of the due date being reached punctually, the client would realise that it was necessary to have the various instalments ready for immediate payment and so the builder would at least be in a position to meet his own financial obligations.

Draft Building Regulations

In her paper on the Builder/Client relationship Mrs. Mirette Corboy, President of the Construction Industry Federation, in dealing with the proposed draft Building Regulations urged that such regulations should of their nature only be concerned with public health, safety and energy conservation. They should not embrace aspects of building that are more appropriately dealt with by way of consumer protection legislation, or by the public's rights at Common Law and should not interfere with the processes that already exist within the Construction Industry to deal with the contractual relationship between all parties in the Industry.

If the objective of the Regulations is to protect public health and the safety of the community then this provision

should be included. If not included the Regulations could be a charter for the unnecessary legal proceedings, unnecessary waste of time of senior professional and administrative staff in the Public Authorities and a charter for the whole industry to cater for the protestors and the third party objectors. She suggested that the Regulations were far too complex and would present major difficulties to the controllers and the controlled. The Construction Industry Federation believe that there should be a simple set of Regulations to deal with domestic buildings, and that more complex buildings should be dealt with by broadly expressed functional regulations and the use of supporting approved contract documents. The CIF had always felt that the philosophy of self regulation as a means of regulating an industry is the right way and the best way. Legislation is not always the panacea it may seem and is not always a solution to the problem. CIF felt that they had achieved much by self regulation – the National House Building Guarantee Scheme, and the Standard Form of Contract among others. They have no doubt that more had been achieved in three years than could have been achieved by a State Agency.

Planning Permission and the Economic Environment

In his paper on Planning Permission and the Economic Environment Mr. Sean McKone, the Hon. Secretary of the Construction Industry Federation drew attention to the fact that a study in 1976 of the decisions reached on planning applications made to Dublin County Council during the previous year showed that in 75%-80% of the cases permissions were granted. However about half the applications were for extensions to dwellings and for changes of use and for the erection of advertising signs and other relatively small projects. In a more detailed analysis of the Dublin County decisions the surprising result emerged that one-third of all group residential projects – housing estates and flats – were refused permission and nearly half the applications for factories, offices, shops, pubs, garages and warehouses were refused permission. The annual reports of An Bord Pleanala indicated that nearly half the appeals lodged with them came from the Eastern Planning region (Dublin, Kildare, Meath and Wicklow). If the Dublin County Council figures are representative of the Eastern planning region and perhaps the whole country it would be found that nearly half the important work for the Construction Industry, work generating large employment and the use of vast quantities of Irish made materials was either refused permission at local level or was the subject of a third party appeal. He believed that the situation if anything had got worse since 1975 and that it was an intolerable burden on the Construction Industry. A survey of Architects in 1976 indicated that costs were inflated by about 5% as a result of the planning control procedures.

He suggested that there were a number of changes that could be made immediately to the planning process without the necessity of having amending legislation. The most dramatic change would be if An Bord Pleanala worked to a time limit and Section 20 (1) of the 1976 Act gave the Minister for the Environment power to make a regulation requiring them so to do. He believed that recent Court decisions would necessitate changes in the planning regulations and this would be an ideal opportunity to make this most important change. He believed that the length of time that the Board should take should be a maximum of six months from the date of the decision of the Planning Authority though this time could be extended by agreement with the applicant or by permission of the Minister.

Dealing with the question of planning appeals generally he said that there was no doubt that the right of third parties to object is overbalanced in their favour. It is quite clear that the total elimination of third parties rights to object would not be acceptable to the Oireachtas – reflecting the public opinion. Third party rights would be adequately protected if such objections were allowed only at one stage of the planning process. What would suffice would be to elevate the status of the outline planning permission by the submission of essential data such as use, height, point of access, distances from crucial boundaries. Third parties would have the right to object at this stage. Once outline permission had been granted by the Planning Authority or granted on appeal by An Bord Pleanala the more detailed planning could only be the subject of an appeal by one of the parties to the application. Once the planning use of the site had been approved then the detailed submission or detailed changes could not be the subject of a merry-go-round at an immense cost to the developer and immense loss of jobs to the Construction Industry.

Price Control System on Houses

In a paper on the present Price Control System on Houses, Michael Greene a Director of the Construction Industry Federation in a historical review of the CRV system stated that very soon after its introduction it became evident that there were certain problems with the CRV system which the Industry found difficult if not impossible in some cases to cope with. There was secrecy on the part of the Department in its discussions with applicants for certificates and there were the delays in dealing with applicants. There was no mechanism for an appeal against refusal to issue a certificate. If a builder was refused a certificate no reasons were given for that refusal. The system did not take account of some of the fundamentals of a market economy such as taking into consideration a company's previous experience. How then had industry responded to the situation? To a degree the response was to build non-grant aided houses. It is clear from statistics that there was from the mid-1970s a clear shift in the structure of the private housing market away from smaller houses towards bigger houses, and one of the contributing factors was the unwillingness of the industry to continue to operate a CRV system which they felt was inequitable.

In looking to the future he commented that the CRV system was introduced into a different world from that which exists today. The builder who is building for the first time buyer can no longer operate on the principle of "I will charge whatever I can get" but rather must operate on the principle of "What can I build which will enable me to sell to the first time buyer given the limitations on his ability to repay his loan and raise a deposit?" It was necessary to encourage builders into the first-time buyer market. The CRV system acts in the reverse. The private sector was in his view the most

efficient way of providing homes for young people. It is the most cost effective way. Our tax and subsidy system is geared towards encouraging home ownership and that is a policy to be commended. It was not however enough. Policies would also have to be devised to encourage the industry to become involved in the first-time buyer market which, after all, has a much higher risk factor than upmarket housing. If that argument were accepted then it must follow that changes in the CRV system were necessary.

Mr. John Prendergast's Paper

Of particular value to practitioners was the paper read by Mr. John Prendergast, (Assistant City and County Manager of Dublin), entitled "Planning Permission and the Environment", in which Mr. Prendergast did much to assist a balanced appreciation of the underlying aims of planning bodies and the inherent difficulties facing them.

Having reminded his audience of the obligation imposed on planning authorities to prepare and review Development Plans for their functional areas, Mr. Prendergast went on to say:-

"Development Plans for Dublin City and Dublin County contain land use provisions for their respective areas, identify the areas for development and conservation, indicate obsolete areas for which the planning authorities are committed to secure redevelopment, objectives on roads and the relief of traffic congestion and areas of non-development consisting mainly of agricultural land and amenity lands in the mountains, river valleys and adjoining the sea shore. The Plans also contain objectives and advice in relation to development control for the benefit of intending applicants. There are two strands to implementation of objectives — one which can be implemented by the planning authority and one which aims at controlling the activities of the private sector. Both derive from policies set out in the Development Plan and aim at implementing them. The intention behind development control is positive and should not be regarded in a negative way.

The Development Plan

"In considering the proper planning and development of an area in relation to a planning application regard must be had, *inter alia* to the provisions of the Plan. Development Plans, therefore, contain many provisions relating to control of development such as density, site coverage, plot ratio, car parking, tree planting and provision of open space, all of which will have a beneficial effect on the quality of the environment.

"The two planning authorities for which I have been delegated the planning functions are Dublin Corporation and Dublin County Council and the planning problems for each area are quite different. The City is built up and the County is developing. The present population of the Dublin area is estimated at just over 1 million and is projected at between 1.2 and 1.3 million by 1991. Virtually all the increased population will be housed in the County area and the planning priority in that area is to ensure that they are housed in a satisfactory environment. Simultaneously it is necessary to provide for employment opportunities and other necessary community services and for an increasing demand for better amenities in both City and County.

"Of course, environmental improvement in the centre city areas, particularly in the Inner City, has other aspects. The biggest problems result from traffic congestion and rundown areas. The provision of an adequate roads system, development of public transport and limitation of parking, particularly long-term parking, are all prime objectives of the planning authority. Planning studies are going on in the Inner City to determine planning priorities in the area and already, on publicly owned property, considerable improvements in public housing and amenities are being effected.

Amenities

The provision of better amenities in built up areas is easier said than done. Such undeveloped property as exists is predominantly in the ownership of religious bodies and private sports clubs. While the lands are not generally available for recreation to the general public, they do provide a welcome lung in a developed area and the planning authorities are reluctant to see them developed. Development Plan objectives usually zone these areas either for institutional or amenity use, but financial considerations often frustrate the objectives. Assuming no non-compensatable impediments to development, preserving these open areas would require either the payment of substantial compensation at development land values or the purchase of the lands by the planning authority, if that option were available. In practice, the planning authorities seek to obtain a larger element of open space than the normal minimum 10% of the site and this approach has met with reasonable success. Its effect is to protect, to some extent, the amenity enjoyed by adjoining residents. However, both Dublin Corporation and Dublin County Council consider that it should be open to the planning authority to purchase such land for amenity purposes at a price related to its existing use (thus broadly supporting Kenny) and have made representations to the Minister for the Environment in this regard.

"It is in the developing areas that the planning authority has the greatest opportunity of adopting policies that will favourably affect the environment. The concept of community development in neighbourhoods, protected from heavy through traffic and catering for about 5,000 people, is surely the correct approach. Neighbourhood Action Plans provide for:-

1. Adequate road systems to cater for diverting non essential traffic away from residential areas.
2. Sufficient land at an appropriate density to facilitate a suitable housing layout and variety of design.
3. Land uses within the neighbourhood to ensure that enjoyment of residential amenity is not impaired by intrusive non compatible uses.
4. Properly located and sufficient open space, both active and recreational, to enable all sections of the community to enjoy the facility.
5. Central location of neighbourhood shopping and other community facilities to ensure ready access.

A neighbourhood will normally support a church, primary school, district shopping centre and community hall. It will also normally have about 20 acres of local amenity open space at suitable locations within the

neighbourhood. Two neighbourhoods, will, in turn, support a post primary school.

The Planning Act requires that proposals to develop land must have permission of the planning authority, with or without conditions, except in minor cases which are exempted from planning control and further lays down, in Section 26 of the Act, restrictions on the planning authority in considering the proper planning and development of its area.

The effect of policy

"Obviously, main policy statements infringe in varying degrees on different development proposals. Major projects are affected in a significant way and minor ones in a more general way. The intermediate link between the policy and the site standards are the zoning objectives for each area. Thus, extensions to houses, etc. in an area the objective for which is to protect and/or improve residential amenity will be judged mainly on whether or not it fulfills this zoning objective and meets minimum site standards. The conversion of houses to flats, aside from being measured against these two criteria, may also have to comply with declared policy for flat development in different parts of the planning authority area. The area to be considered, as well as main policy implications, also varies tremendously. A major factory or residential proposal on the fringe of an urban area may accord with general residential and industrial policy, may comply with the zoning objective, but may also overburden the roads or Sanitary Services network in the larger area and thus be unacceptable. Works of a minor nature usually involve only the immediate area but, if in a sensitive area of outstanding civic design or natural beauty, must be reported within policy contexts.

"What, in fact, happens when a planning application is made and against what environmental and other factors is it measured? The criteria may be summarised as follows:-

1. Does it comply with regulations on planning submissions?
2. Is the site in an area of high amenity, or are there other special environmental factors? Should any or all of the following bodies be notified, the Arts Council, Bord Failte, An Taisce, The National Monuments Advisory Council, other Local Authorities?
3. What other technical inputs are required from Roads, Sanitary Services, Community and Environment, Fire Officers, Development, etc., Housing Act?
4. Has the proposal any policy implications — does it conflict with planning policies — if so, is this conflict important?
5. Is the proposal acceptable in the context of the zoning objectives of its location?
6. Does it affect the amenities of a more sensitive use adjoining it, i.e. factory, major offices or shopping alongside residential use?
7. Is it in a conservation area, or does it affect buildings listed for preservation in the Development Plan?
8. What effect will the massing, scale, height of the proposal have on adjoining areas — what is the physical condition of the area in question?
9. Can it comply with Roads, Fire Chiefs, Sanitary Services etc. requirements?
10. Can it meet site development standards on plot ratio, site coverage, space around buildings, parking provision, residential density? Are deviations important?
11. Does it provide for sufficient amenity open space (where relevant) and for planting of trees and shrubs?
12. Does it constitute proper planning and development of the area — could it be made to do so by conditions?

From left: Mr. Michael Greene, Director, Construction Industry Federation, Mr. John Gore-Grimes, Solicitor, Mr. Sean McKone, Hon. Secretary, Construction Industry Federation, and Mr. John Prendergast, Assistant City and County Manager, Dublin.

"Each planning application must be considered in relation to its immediate environs and to a wider area. The administration is organised to facilitate this approach.

Conditions

When planning permission issues, development must be carried out in accordance with its terms. The responsibility for ensuring this lies with the developer, but the Planning Acts give enforcement powers to Planning Authorities and third parties. The cumbersome procedures of the 1963 Act have been considerably strengthened by Section 27 of the 1976 Act, which gives quick access to the High Court for a prohibition order where unauthorised development or use of land is concerned; this section is invoked where the circumstances warrant it. It is policy to try to achieve satisfactory development by co-operation and agreement with developers and legal proceedings are only instituted where other approaches fail.

It is not alone the planning authority that can influence the environment by means of planning permissions. Indeed, it can be argued that in the field of development control the role of the planning authority is a passive one, in that its function is either to grant permission, with or without conditions, or to refuse permission to what is placed before it. Unquestionably, the role of the private sector through the building developer and his architect, can have a much greater effect on the environment and criticism of the planning authority in this field is often misdirected. The builder might well say that he has to build what he knows he can sell, but is this a sufficient reason for not encouraging flair in design and layout? It has been claimed that the planning authority imposes too many conditions on permission. Insofar as there may be room for some criticism in this regard, it is a measure of the limitations of the submissions made to it. It is not always realised that the alternative to such conditions would be refusal of permission. Invariably, the objective of the planning authority in attaching conditions is to improve what has been submitted to it, to make it conform to the requirements of the Development Plan or to ensure that development is satisfactorily carried out. The planning authorities try to give permission where it is at all possible to do so.

In view of all the control built into the Development Plan, why is it that there is criticism, particularly in the developing areas, of the development that eventually takes place? In my opinion, there are a number of serious drawbacks in implementing development proposals. These include:-

(a) shortage of funds made available to the local authorities for infrastructural purposes in the Dublin area. This has resulted in an inadequate road system and a shortage of serviced land to serve the areas zoned for development;
(b) the patchwork nature of land ownership which, in practice, determines the sequence in which development takes place and makes orderly progressive development impossible;
(c) despite commendable efforts made by planning staff to co-ordinate the work of Government agencies and public utilities, the time-lag that exists between houses being occupied and the provision of schools, churches, shops and other amenities;
(d) the standard of development of a substantial part of the building industry who take an inordinate time and, frequently, only on foot of enforcement proceedings by the planning authority, to complete roads and other services and open spaces to a satisfactory standard for handing over.

Delays

The problem of getting estates completed in accordance with the permission and to a satisfactory standard is serious. It is not just a question of a few hard-pressed developers, unable to meet their obligations. The problem is widespread throughout the industry. Some of the bigger developers are the worst offenders. At the moment there are some 61 estates in County Dublin at some stage of proceedings with the planning authority, either through Court action or negotiated agreement, on completion of works. This is a serious matter to which the industry should address itself. In saying this, I am conscious of the efforts which have been made by the Construction Industry Federation to encourage builders' participation on their guarantee arrangements to complete estates and I would like to acknowledge the valuable assistance which the Federation has given in this regard.

These, of course, are transient problems and in the course of time as finance becomes available the necessary infrastructure will be provided, infill development will complete the present jig-saws and estates will be taken over. The important thing is that the planning authorities lay the proper planning foundations based on sound environmental concepts that will stand the test of time.□

Land Registry Dealing Numbers

The Conveyancing Committee, in conjunction with the Land Registry, have reached agreement on a procedure whereby a note of the Dealing Number will be furnished to the Applicant's solicitor at the earliest possible date.

The Land Registry Rules provide that every Application to the Registry should be accompanied by a Statement in Form 17. Where a Dealing has been lodged by post the Form 17 should be furnished in duplicate and, subject to the Dealing being in order, the Registry will on the allocation of a Dealing Number put a note of same on the Copy of the Form 17 and return this to the lodging Solicitor. In the case of Dealings lodged by hand, the Form 17 should be furnished in *triplicate*. The Registry, on the lodgment of the Dealing, will receipt one copy and furnish it to the solicitor making the lodgement. When a Dealing Number has been allocated, the extra copy of the Form 17 will be returned to the lodging solicitor with a note of the Dealing Number therein.

It is considered that this procedure will greatly assist solicitors who may have subsequent queries concerning the progress of their Applications. In all subsequent communications with the Registry, the Dealing Number should be quoted.

Unattested Copies of Affidavits

Mr. J. K. Waldron, Registrar of the Supreme Court, has issued the Society the text of a notice he intends publishing in the Legal Diary as to the acceptance in Court of unattested copies of affidavits. The notice reads as follows:-

> Practitioners are reminded that under the provisions of the Rules of the Superior Courts (No. 1) 1978 (S.I. No. 295 of 1978) an unattested copy of an original affidavit which has been filed may be used in Court provided that
>
> (1) it is a photostatic copy, and
>
> (2) the solicitor who has filed the original certifies
>
> (a) that it is a true copy thereof, and
>
> (b) that the original has been filed.

The following is a suggested form of certification:-

> I Certify that this photocopy is a true copy of the original affidavit filed on the day of 19
>
> Solicitor .....
>
> J. K. Waldron
> *Registrar*

Solicitors' Accounts Regulations

Approved Authorised Depositories for Clients Funds

Agricultural Credit Corporation Limited
Algemene Bank Nederland (Ireland) Limited
Allied Irish Banks Limited
Allied Irish Finance Company Limited
Allied Irish Investment Bank Limited
Ansbacher & Company Limited
Bank of America
Bank of Ireland
Bank of Ireland Finance Limited
Bank of Nova Scotia
Banque Nationale De Paris (Ireland) Limited
Bowmaker (Ireland) Limited
Citibank N.A.
Chase & Bank of Ireland (International) Limited
City of Dublin Bank Limited
First National Bank of Chicago
Forward Trust (Ireland) Limited
Guinness & Mahon Limited
Hill Samuel & Company (Ireland) Limited
Industrial Credit Company Limited
Investment Bank of Ireland Limited
Irish Bank of Commerce Limited
Irish Intercontinental Bank Limited
Lombard & Ulster Banking (Ireland) Limited
Mercantile Credit Company of Ireland Limited
Northern Bank Limited
Northern Bank Finance Corporation Limited
Post Office Savings Bank
Royal Trust Bank (Ireland) Limited
Trinity Bank Limited
Trustee Savings Banks
Ulster Bank Limited
Ulster Investment Bank Limited
United Dominions Trust (Ireland) Limited.

The Rules of the Superior Courts (No. 4), 1981

(continued from p. 133)

3. In Order 111, the definition "registered place of business" shall be deleted and the following substituted therefor:- "registered place of business means a place of business duly registered under the Solicitors Acts 1954 and 1960".
4. This rule shall be construed together with the Rules of the Superior Courts and may be cited as the Rules of the Superior Courts (No. 4), 1981.□

Earlier Contract?

An extract from the 1981 Frances E. Moran Memorial Lecture on "Irish Law in the Next Century"

by John Wylie, LL.M., LL.D.

IF one were to conduct a survey amongst those who have recently completed a major conveyancing transaction, such as the sale of one's home and the purchase of a new one, and were to ask them, and indeed, their conveyancers, which aspect of the transaction disturbed them most, I suspect that one item in particular would be specified by most people. This is that period of time stretching between the preliminary negotiations and the signing of the contract for sale or purchase, when neither party is really sure whether the transaction is 'on' or 'off'. In other words, in most conveyancing transactions there is a wretched period when both parties are in a state of 'limbo.' It is sometimes said that which of them is the more uncomfortable depends on the state of the market. If there is a property boom, it is more likely to be the purchaser, because he is then subject to the risk of 'gazumping' by the vendor who may be tempted to accept subsequent, but more attractive offers for his property. In times of a slump, or even a static market, it is more likely to be the vendor, for he is then subject to the risk that, having apparently made a bargain with one purchaser and thereafter turned away later offers, the original will withdraw and the ones who made later offers will have gone elsewhere. In truth, however, both parties are often equally uncomfortable because in many situations they each have a dual capacity, that is, they are each a vendor and a purchaser, selling one property, and therefore subject to one risk, and buying another property, and therefore subject to the other risk. And as most conveyancers will testify, all too often it is the law of the jungle which prevails in this situation. If only we could remove, or at least reduce drastically, this period of 'limbo.'

Of course, several different approaches to resolution of this problem have been suggested from time to time. One is to tackle what may be described as the strictly legal source of the trouble, which is of course, the provision in the Statute of Frauds whereby the contract for sale does not become enforceable until written evidence of its existence is created. It is this which deprives the parties' preliminary oral agreement of any binding quality and facilitates the moral abomination of gazumping. Thus the Statute, as it is often said, encourages the perpetration of more frauds than it discourages. And, if I may hark back to a subject I was discussing earlier, is this not a fine example of a statute failing to achieve its purpose? Repeal of the Statute so as to remove the need for written evidence has been mooted from time to time and has a superficial attraction for other reasons. One is that it must be a very strong favourite for the prize going to the most litigated statutory provision; every year brings yet more cases involving section 2 of the Irish Statute. However, I must confess that I have my doubts about whether its repeal will affect the solution desired. If written evidence of the agreement were no longer required, the matter would be thrown back for determination according to the intention of the parties and it will always be argued in conveyancing situations that one or other of the parties cannot reasonably be taken to have intended to commit himself at such an early stage because of the dangers of this from his own point of view.

Another approach, which has become increasingly popular in the North, is to use what are called 'conditional' contracts, but I have doubts as to whether these are entirely satisfactory. One reason is that there are doubts as to their precise legal effect. Most of the authorities, which are English and Commonwealth cases, are far from clear or consistent with each other. The other is that such contracts, even if their effect is clear, will work only if both parties are prepared to enter into one. The trouble is that one or other of the parties may feel that it is not in his own, albeit selfish, interests to commit himself to an arrangement whereby the other party may withdraw if things do not turn out to his liking. And, of course, the pressure which the other party can bring upon him to persuade him to enter into such a contract may vary again according to the state of the market. So I come back to the proposition that what is needed is a change in procedures. In particular, what we must try to do is to tackle the root of much of the trouble, namely that under the present system it is not in the interests of the purchaser to commit himself to a binding contract at an early stage. To understand the solution you must analyse why this is so.

There are, of course, many reasons, but three in particular stand out. The first is that basic principle drummed into all conveyancing students – 'caveat emptor' – which in substance means that the purchaser must take precautions against the risk of physical defects in the property he is contemplating buying. The really only effective protection is to have it surveyed by a competent person, but the galling thing at the moment is that this may result, to use an apt metaphor, in him throwing money down the drain. The survey, for which, of course, the prospective purchaser has to pay, may reveal serious defects and force him to call the deal off and to look elsewhere. And he may be unlucky enough to have to repeat the exercise several times before he feels able to commit himself to a purchase of a particular property. What a daft system! Little wonder so many purchasers are prepared to run the risk or rely instead on the survey carried out by their lending institutions, for which, of course, they also pay, though this too may prove to be abortive. Surely the time has come to question the whole

principle of 'caveat emptor', if only because it is inconsistent with the recent movement in other fields towards consumer protection. I question whether it would shake the foundations of our conveyancing system if a vendor were required to have at least a basic structural survey made of his property before he puts it on the market, so that a certificate of a qualified surveyor would be available for inspection by any prospective purchaser. Legislation may have a role to play here in laying down the precise scope of such a survey and the nature of the certificate, so as to ensure that it would be accepted by lending institutions as sufficient for their purposes. The cost could, of course, be added by the vendor to the purchase price and, if the certificate were acceptable to lending institutions, purchasers should not object to this extra price since it would save them having to pay later for their mortgagee's survey, and, of course, an additional one of their own. Indeed, in many cases they would save money in the long run, while at the same time being able to avoid some of the uncertainties and delays necessarily involved under the present system.

The second reason for delays relates to the numerous charges and interests which may affect land nowadays, but which will not be disclosed by the title documents and therefore cannot be left to the traditional investigation of title. It is this which has given rise to that modern conveyancing phenomenon, enquiries and searches to be made of the vendor and public bodies or authorities. Increasingly, these are being made at the pre-contractual stage, even in the Republic, where, for example, planning enquiries are often made at this stage. But again one is prompted to ask why these matters should not be treated in the same way as physical defects. Why should not the vendor be expected to make many of these enquiries and searches in preparation for putting his property on the market and to have appropriate certificates showing the results available for inspection by prospective purchasers? In Northern Ireland, such a system would seem to be especially applicable to things like the Department of the Environment 'property certificate' and Statutory Charges Register search certificate. Again the cost can be added to the purchase price, but purchasers expect to pay for these items anyway. I recognise that there may be more of a problem here in that there is a danger that the certificates may become out-of-date. This is clearly a matter for discussion and, as I shall mention later, one crucial aspect of this is the role of public authorities and the sort of service they provide for enquirers and searchers. However, for the moment I will say that I am convinced that a system could be worked out whereby most prospective purchasers could again be provided with sufficient information to persuade them and their legal advisers not to delay entering into a binding contract for the purchase of the property in question.

The third reason for delay relates to the question of finance. Most purchasers nowadays have to borrow a substantial portion of the purchase price, but all too often the final arrangement of this is left until after the preliminary negotiations with the vendor are completed. There is often a very practical reason for this, because lending institutions may be reluctant to entertain an application for a loan until the purchase of a specific property is settled, and the details of this are known. They may also be reluctant to give any 'letters of intent' which might be construed as firm promises to lend a specified amount in a given, albeit hypothetical, situation. But unless the purchaser knows where he stands financially, he cannot be expected to enter into any commitment with the vendor, and his conveyancer must guard against this so often under the present system. What is clearly needed is for some new system to be worked out by conveyancers and lending institutions whereby purchasers can be given some sort of basic guarantee as to a loan being forthcoming, which will enable them to enter into a commitment for the purchase at a much earlier stage. I refuse to believe that the practical difficulties, and no doubt there are some, are such as to be incapable of resolution if those primarily involved in arranging purchasers' finance got together to discuss the matter in a positive spirit. For the lending institutions there is surely the attraction of enhancing the public relations which seem to be their constant concern nowadays. For conveyancers there is the prospect of removing one of the greatest practical headaches they have at the moment.□

MAYO SOLICITORS BAR ASSOCIATION

At its recent Annual General Meeting the Association appointed the following Officers and Committee for 1981/82.

President: Liam McHale; Vice-President: Michael Browne; Secretary: Eanya Egan; Treasurer: Ward McEllin; Ex-Officio Members: Paddy Shanley, Paddy McEllin, Pat O'Connor and Adrian Bourke; Ordinary Committee Members: Michael J. Egan, Kevin Loftus, William O'Keeffe, Anthony O'Malley, Marian Chambers, James Cahill, Michael Keane and John O'Dwyer.

GALWAY SOLICITORS BAR ASSOCIATION

The following are the Officers for 1981 — President: Kieran Murphy; Vice-President: Francis O'Callanan; Honorary Secretary, Ciaran Keys; Honorary Treasurer: Bryan C. Brophy.

The remaining Committee Members are — Fionnuala Murphy, Colman Sherry, Geoffrey Browne, Vincent Shields, Paul Horan and Peter Crowley.

Exclusion Clauses in Contracts for the Sale of Goods

Comment by the Director of Consumer Affairs

A SPECIAL meeting of the Dublin Solicitors' Bar Association was held at Blackhall Place on Tuesday 12 May, 1981, on the topic of the Sale of Goods and Supply of Services Act, 1980 ("the 1980 Act"). The speakers were Patrick Kilroy, Solicitor, William Earley, Solicitor, and Frank O'Riordan, Solicitor.

Among those who attended the meeting was James Murray, Director of Consumer Affairs, who spoke from the floor. Mr. Murray made some very pertinent remarks regarding exclusion clauses in standard contracts for the supply of goods, in relation to the 1980 Act.

Mr. Murray has subsequently kindly prepared a note of his remarks, which is set out below:

> "I am grateful for the opportunity to comment on a problem that has been referred to me by as many as ten different solicitors in the Dublin area who have been engaged in drafting standard terms of supply for business clients.
>
> "As you know, standard terms of supply commonly contain clauses excluding or restricting the seller's liability or the buyer's rights under the implied terms of the Sale of Goods Acts.
>
> "Where the buyer deals as consumer it is clear that the seller's liability or the buyer's rights under Sections 12,13, 14 and 15 of the Sale of Goods Act, 1893 cannot be excluded and indeed it may be an offence to imply in a contract that such rights and liabilities are excluded or restricted (where the buyer deals as consumer). Where the buyer does not deal as consumer (i.e. in a contract between two persons in business) Section 55 of the 1893 Act (as amended by the 1980 Act) does in effect provide that certain implied terms may be excluded if such exclusions can be shown to be fair and reasonable. In other words, to the extent that it is fair and reasonable to do so, standard terms of supply may exclude or restrict the seller's liability to a degree when seller and buyer are both in business.
>
> The problem is that Section 11 (4) of the 1980 Act seems to make it an offence, in effect, to include in a contract, or other document, terms excluding or restricting the seller's liability under Sections 13, 14 and 15 of the 1893 Act, as amended.

(Section 30 (4) of the 1980 Act seems to have the same effect for hire purchase transactions). How then can a solicitor draft standard terms purporting to restrict, say, a manufacturer's liability to his (business) buyers in such a way as to ensure that the manufacturer will not be prosecuted under Section 11 (4) of the 1980 Act? Since it would be my task to prosecute under Section 11 (4), a number of solicitors have, not unnaturally, sought my views on this question.

There is not an easy answer, at least in theory, to this question, but there may in effect be a solution in practice – along the following lines.

1. Make it absolutely clear that the rights of a buyer *who deals as consumer* are in no way prejudiced by the relevant term – include a clear and conspicuous declaration to that effect.
2. For buyers who do not deal as consumer make it clear that the exclusion or restriction of the rights conferred by Sections 13, 14 and 15 of the 1983 Act, as amended, are subject to Section 55 of the 1893 Act, as amended.
3. Do not purport to exclude in any way the application of the test of fairness and reasonableness under Section 55 of the 1893 Act, as amended.

It would be improper of me to say that no prosecutions will ever be taken in respect of contract terms which observe these guidelines – I cannot re-write the 1980 Act. However, in particular cases, any wise prosecutor would have to consider the possible attitude a court might take to the proposition that the subsection prohibits the exclusion of certain terms while other sections of the 1980 Act specifically provide that such terms may be excluded in business dealings (subject to the proviso that such exclusions are fair and reasonable). If it was also clear that the consumer's rights were not prejudiced by the exclusion clauses and there was no indication that any business buyers had been misled as to their rights, the prosecution's task would be even more difficult.

(In passing it should be noted that the above considerations apply only to attempts to exclude the operation of Sections 13, 14 and 15 of the 1893 Act, as amended. Any provision purporting to exclude the operation of Section 12 is of course always void.□

Training Course for Law Clerks

The Society has for some time been concerned that no facility was available to Law Clerks already working as such to improve their knowledge of Legal Practice. The beginning of an attack on the problem is happily to hand, with the launching in September 1981 of an in-service course specially designed for Law Clerks in the key areas of Conveyancing, Litigation and Probate/Administration of Estates. This is a joint venture by the Society and the College of Commerce in Rathmines, Dublin, and it involves the Law Clerk's attendance at the College of Commerce for six hours each week (2-5 p.m. on Wednesdays and 7-10 p.m. on Thursdays) for three terms each of ten weeks. Each subject area will be covered in one term involving sixty hours of attendance at lectures, demonstrations and exercises, apart from the time candidates will devote to study.

The course will commence towards the end of September with the Conveyancing module. an interesting optional alternative is planned to the module on Probate and Administration of Estates, in the form of a course on Local Government Law and Practice; this should be particularly valuable to the staffs of the Dublin Corporation Law Department, of Dublin County Council and of the Local authorities in the Dublin area.

Instruction will be given mainly by practising solicitors recruited and briefed by the Society. This will ensure that what is taught is relevant to the working situation. Substantive Law — where it is applicabe — will largely be covered by the lecturers from the College of Commerce.

It is the Society's hope that both solicitors and clerks will perceive the benefits that will flow to the office and to the Law Clerk from the latter's attendance at the course: further information about it can be had from the College of Commerce, Rathmines, Dublin 6. Telephone 970666.

Launch of "The Consumer and the Law"
Blackhall Place, Dublin, 25 June, 1981
From left: Edward Donelan B.L. and Thelma King, Solicitor, Co-Authors of the book, with Mrs. Moya Quinlan, President of the Incorporated Law Society of Ireland and Mr. Jim Murray, Director of Consumer Affairs.

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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 25th day of August, 1981

W. T. MORAN (Registrar of Titles)
Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

1. Registered Owner: Patrick Carragher. Folio: 1427. Lands: Lackagh. Area: 14a. 2r. 8p. County: **Monaghan.**

2. Registered Owner: John Hurley. Folio: 3384. Lands: Farranthomas. Area: 86a. 3r. 31p. County: **Cork.**

3. Registered Owner: Kathleen Barry. Folio: 28150. Lands: (1) Lahardane; (2) Lahardane; (3) Kilteen. Area: (1) 4a. 1r. 36p.; (2) 2a. 0r. 0p.; (3) 1a. 1r. 8p. County: **Kerry.**

4. Registered Owner: John Hayes. Folio: 7088F. Lands: Ballycasey. Area: 64a. 1r. 18p. County: **Limerick.**

5. Registered Owner: James Shakespeare. Folio: 1473F. Lands: Jobstown. Area: —. County: **Dublin.**

6. Registered Owner: John McKernan. Folio: 19148, 19149. Lands: Santry and Coolock. Area: 0a. 0r. 22p. County: **Dublin.**

7. Registered Owner: Michael Flynn. Folio: 9591. Lands: Magherarny. Area: 57a. 1r. 30p. County: **Monaghan.**

8. Registered Owner: Brian Joseph Robinson. Folio: 16757. Lands: (a) Agher, (b) Agher, (c) Agher. Area: (a) 42a. 1r. 28p.; (b) 5a. 0r. 10p.; (c) 4a. 0r. 25p. County: **Meath.**

9. Registered Owner: John Cotter. Folio: 56979. Lands: (1) Arlinstown, (2) Arlinstown. Area: (1) 49a. 3r. 35p. (2) 4a. 0r. 10p. County: **Cork.**

10. Registered Owner: Donal J. Laverty. Folio: 12200. Lands: (1) Kildermot, (2) Tarahill. Area: (1) 12a. 3r. 31p. (2) 2a. 3r. 17p. County: **Wexford.**

11. Registered Owner: Thomas Gerard Farrell. Folio: 29893. Lands: (1) Gardenstown, (2) Anrittabeg, (3) Anrittabeg. Area: (1) 45a. 1r. 36p., (2) 8a. 1r. 16p., (3) 2a. 2r. 30p. County: **Roscommon.**

12. Registered Owner: Margaret Mary McBride. Folio: 157LSD Lands: Cabra Park, Phibsborough. Area: —. County: **City of Dublin.**

13. Registered Owner: John O'Carroll. Folio: 4582. Lands: Gortnaskeha. Area: 54a. 3r. 20p. County: **Kerry.**

14. Registered Owner: Timothy O'Connor. Folio: 15059. Lands: Kilbeg East. Area: 2a. 2r. 30p. County: **Kerry.**

15. Registered Owner: Richard McMahon. Folio: 7867. Lands: Clonmacken. Area: 38a. 2r. 8p. County: **Limerick.**

16. Registered Owner: Julia Maher. Folio: 67R. Lands: Gorteen. Area: 10a. 2r. 2p. County: **Offaly.**

17. Registered Owner: Sean Byrne. Folio: 14693. Lands: (1) Cloghvalley, (2) Cloghvalley Upper. Area: (1) 10.956; (2) 3.994. County: **Monaghan.**

18. Registered Owner: Raymond C. Preston. Folio: 26604 and 17700. Lands: (a) Fanore More; (b) Ballyconry; (c) Ballyconry; (d) Islands off Ballyconry. Area: (a) 0a. 1r. 19p.; (b) 68a. 3r. 32p.; (c) 0a. 3r. 12p.; (d) 7a. 0r. 28p. County: **Clare.**

19. Registered Owner: Margot Boyle. Folio: 39006. Lands: Letterkenny. Area: 2a. 0r. 9p. County: **Donegal.**

20. Registered Owner: John Waters. Folio: 5565. Lands: Glencolumbkille South. Area: 26a. 3r. 4p. County: **Clare.**

21. Registered Owner: Thomas P. O'Neill. Folio: 5682. Lands: Carnickateane. Area: 20a. 1r. 9p. County: **Longford.**

22. Registered Owner: Samuel Henry Cope. Folio: 5190. Lands: Woodlands West (Part). Area: 96a. 0r. 17p. County: **Kildare.**

23. Registered Owner: Charles Byrne. Folio: 18420. Lands: Corlea (Part). Area: 83a. 0r. 0p. County: **Donegal.**

24. Registered Owner: Donal Hurley. Folio: 9485. Lands: Caher. Area: 58a. 2r. 30p. County: **Cork.**

25. Registered Owner: Michael Furlong and Joan Furlong. Folio: 1240F. Lands: Clonard Great. Area: 0a. 1r. 28p. County: **Wexford.**

26. Registered Owner: Martin Fitzpatrick and Anne Fitzpatrick. Folio: 11764. Lands: Derrycon. Area: 31a. 1r. 6p. County: **Queens.**

27. Registered Owner: Robert H. Chambers. Folio: 18031 (This folio is closed and now forms property No. 1 in Folio 754F). Lands: (a) Mullaghboy, (E.D. Ballymachugh); (b) Mullaghboy. Area: 7a. 3r. 30p.; (b) 32a. 0r. 16p. County: **Cavan.**

28. Registered Owner: Hugh Flinn. Folio: 1878(P), 26911; 57696. Lands: (a) Curraghbinny; (b) Curraghbinny; (c) Curraghbinny. Area: (a) —; (b) 2a. 0r. 28p.; (c) 1a. 2r. 37p. County: **Cork.**

29. Registered Owner: Edward Miley. Folio: 7383. Lands: Lisdaulan. Area: 47a. 3r. 23p. County: **Roscommon.**

30. Registered Owner: James Kelly and Mary Teresa Kelly. Folio: 1761F. Lands: Tomgarrow. Area: 0a. 1r. 33p. County: **Wexford.**

31. Registered Owner: John Hayes. Folio: 15603. Lands: (a) Clonnahaha (Part); (b) Laghtyshaughnessy (Part). Area: (a) 51a. 3r. 39p.; (b) 0a. 1r. 10p. County: **Galway.**

32. Registered Owner: Patrick O'Brien. Folio: 3062 and 3065. Lands: (a) Ballygeale; (b) Ballygeale. Area: (a) 33a. 0r. 25p.; (b) 22a. 0r. 20p. County: **Limerick.**

33. Registered Owner: Tube Rollers Ltd. Folio: (a) 1377F; (b) 1020F. Lands: (a) (1) Bolton, (2) Bolton; (b) (1) Bolton. Area: (a) (1) 2a. 3r. 36p., (2) 2a. 3r. 8p.; (b) (1) 3a. 2r. 26p. County: **Kilkenny.**

34. Registered Owner: Christopher Dunne. Folio: 25147. Lands: Slane. Area: 0a. 2r. 31p. County: **Meath.**

35. Registered Owner: (a, b) Cornelius Duggan, (c) Noel C. Duggan, (d, e) Noel C. Duggan Ltd., (f) Noel C. Duggan Ltd. Folio: (a) 42129, (b) 42130, (c) 23259, (d) 24192, (e) 58769, (f) 54935. Lands: (a) Coomlogane, (b) Coomlogane, (c) Coomlogane, (d) Coolroe, (e) Coomlogane, (f) Liscahane. Area: (a) 0a. 5p., (b) 0a. 1r. 1p., (c) 0a. 0r. 33p., (d) 82a. 2r. 18p., (e) 1a. 10p., (f) 1a. 1r. 30p. County: **Cork.**

36. Registered Owner: James Michael William McCosh. Folio: 12522. Lands: Deeps. Area: 3a. 0r. 37p. County: **Wexford.**

37. Registered Owner: Thomas Nolan. Folio: 5651 (this folio is closed and now forms property No. 1 in Folio 2028F). Lands: Ballon. Area: 7a. 2r. 23p. County: **Carlow.**

38. Registered Owner: George Wheelock. Folio: 699R. Lands: Moneyhore. Area: 45a. 2r. 9p. County: **Wexford.**

39. Registered Owner: Gerald Leddy. Folio: 25734. Lands: (1) Drumlane; (2) Drumlane; (3) Drumlane. Area: (1) 10a. 2r. 7p.; (2) 3a. 1r. 20p.; (3) 3a. 1r. 7p. County: **Cavan.**

40. Registered Owner: Rev. Peter McGivney. Folio: 3570. Lands: Cloonfide. Area: 0a. 1r. 0p. County: **Longford.**

41. Registered Owner: John Bennett. Folio: 547. Lands: Fourcuil. Area: 63a. 3r. 33p. County: **Cork.**

42. Registered Owner: Denis John O'Sullivan. Folio: 98L. Lands: Craiglea. 120 Newpark Road, Bray, Co. Wicklow. Area: —. County: **Wicklow.**

43. Registered Owner: Francis Edmond Rossney & Mary Gerard Rossney. Folio: 9106F. Lands: Part of the townland of Dooradoyle in the barony of Pubblebrien. Area: —. County: **Limerick.**

44. Registered Owner: Hannah Coll. Folio: 34658. Lands: Dunglow. Area: 0a. 1r. 0p. County: **Donegal.**

45. Registered Owner: Clondalkin Concrete Limited. Folio: 19431. Lands: 13a. 2r. 18p. Area: **Dublin.**

46. Registered Owner: Margaret Carney. Folio: 1622. Lands: Tawnaghaknaff. Area: 22a. 2r. 33p. County: **Mayo.**

47. Registered Owner: Michael & Mary Dunne. Folio: 2616. Lands: Tomhaggard. Area: 0a. 2r. 10p. County: **Wexford.**

48. Registered Owner: Edward P. Heffernan. Folio: 19453L. Lands: East of Ballinclea Rd., Parish of Kill. Area: 0a. 0r. 20p. County: **Dublin.**

49. Registered Owner: Bernard Kilbride; Michael West & Thomas Bagnall. Folio: 7599. Lands: Bohernabreena. Area: 5a. 0r. 0p. County: **Dublin.**

50. Registered Owner: John Martin Lee. Folio: 27644. Lands: Kilkenny (Part). Area: (a) 7p. 20 sq. yds., (b) 4p. 12 sq. yds. County: **Mayo.**

51. Registered Owner: Kieran Kenny. Folio: 8654. Lands: Curraghavarna. Area: 4a. 2r. 4p. County: **Offaly.**
52. Registered Owner: William Dalton. Folio: 8654. Lands: Curraghavarna. Area: 4a. 2r. 4p. County: **Offaly.**

Lost Wills

Annie Cadden late of Aughnaskea, Mountnugent, Co. Cavan. Widow Deceased. Will any person who knows the whereabouts of the Original Will dated 21st October 1960 and Codicil dated 25th October 1960 of the above named deceased who died on 13th October 1961 please contact Eileen A. Brennan, Solicitor, Oldcastle, Co. Meath.

Catherine (Kathleen) Dilworth, late of Stoneview, Blarney, Co. Cork. Will any person having any knowledge of any Will of the above named deceased, who died on the 18th March, 1981 please contact Philip Wm. Bass & Co., Solicitors, 9 South Mall, Cork.

John (Jack) Gavin, late of Arderaugh, Aughagower, Westport, Mayo. Will any person having any knowledge of any Will of the above named deceased who died on or about June/July 1970 please contact Donal Kelliher, Solicitor, Main St., Castleisland, County Kerry.

Patrick McNamee, deceased, late of 23B Elgan Park Redland, Bristol, England, also of Altadush, Breenagh, Co. Donegal. Will any person having knowledge of the Will of the above named deceased who died in Bristol on 21st May, 1981 and is believed to have made a Will in Dublin within the past three years please communicate with W. Kelly & Co., Solicitors, Letterkenny, County Donegal.

Augustine John Mehigan, F.R.C.S.I. deceased. Will any person having knowledge of any will made by the above named deceased who died on or about the 14th day of June, 1981, please contact Messrs. James M. Magee & Co., Solicitors, 1 Eglinton Road, Bray, Co. Wicklow.

Amelia Elizabeth Robinson late of 14 Butterfield Crescent, Rathfarnham, Dublin 14. Will anyperson having any knowledge of any Will of the above named deceased who died on the 24th day of May 1981, please contact Joynt & Crawford, Solicitors, 8/9 Anglesea Street, Dublin 2.

Patrick Stuart Thunder, deceased, late of 30 Duncairn Avenue, Bray, Co. Wicklow. Will anyperson who knows of a Will made by the above named deceased who died on the 12th March, 1981, please communicate with J. Costello, Solicitor, McCann Fitzgerald Roche & Dudley, 31 Pembroke Street, Dublin 2.

The Profession

R. Moylan & Co. Please note as and from Monday the 29th June, 1981 R. Moylan & Co., Solicitors, formerly of 17 West End, Mallow, Co. Cork are now in practice at Shortcastle, Mallow, Co. Cork. Telephone numbers remain unchanged.

Employment

Solicitor retiring soon from Public service seeks position in firm specialising in Family Law and Criminal Law. Box No. 017.

Young Solicitor (Female) seeks position in general practice in Dublin immediately. Please ring (01) 393321.

Miscellaneous

For Sale – Ordinary Six Day Licence. Enquiries to R. Neville & Co., Solicitors, Bandon, Co. Cork. Telephone No's. 023/41308 and 023/41040.

For Sale – Seven Day Ordinary Licence. Enquiries to R. Neville & Co., Solicitors, Bandon, Co. Cork. Telephone No's. 023/41308 and 023/41040.

For Sale – 2 Seven Day Public House Licences. No endorsements. Offers to R. Neville & Co., Solicitors, Bandon.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 7 September 1981

Companies: Lifting the Veil?

IT is not surprising that in a time of recession with Company failures and personal bankruptcies at a high level that calls for added protection of the public are on the increase both in Ireland and in the U.K.

What is interesting is that among those calling most firmly for reform are many leading academics. Within recent months, Professors R. M. Goode and L. G. Sealy together with Mr. Michael Whincup have offered criticism in legal journals of various unsatisfactory aspects of the Company Law system which the U.K. and the Republic of Ireland share. Two of those aspects are inter-linked, the protection against personal liabilities in a "one-man" company and the unhappy position of creditors of an unsolvent company, particularly one that is in receivership.

The privilege of Incorporation is too lightly given in Ireland. For an outlay of some £200.00 to £300.00 in duties and fees of one kind or another, and without investing more than £2.00 of capital, a person can establish a Company with an apparent share capital of £10,000,000 and conduct a business through the medium of that Company, successfully avoiding ordinary trade creditors in the event of the failure of the venture. Only if there is blatant fraud, particularly on the Revenue, is a Court likely to "lift the veil" of Incorporation and nail the principal.

The theory that the public can be sufficiently informed about the present status of a Limited Company, because of the obligation imposed on Companies to file various documents on the Company's file in the Registry of Companies, is one which does not stand up to serious examination. Even if this system worked, which it does not, there being a current delay of over a week between the lodgment of a document in the Companies Office for registration and the appearance of that document on the file, which files are frequently unavailable for considerable periods and there being no satisfactory up to date monitoring of the obligation to file documents, the range of information required to be disclosed on the file is quite inadequate. The deficiencies of the Companies Office have received sufficient attention elsewhere recently. If further finance is required to make it efficient can this not be raised by imposing annual charges for maintaining a Company on the Register?

To suggest that before giving credit to a Company a trader will check the Company's file, and note the existence of a Debenture or other encumbrance and will realise that he is taking a risk in dealing with that Company on anything other than a cash basis is impracticable. Apart from the commercial reality that anything from 30 to 90 days credit will be the norm in that particular business, a trader is likely to find that all his prospective customers are Companies with such encumbrances. Either he trades with them on a credit basis or he does not trade at all.

The position of the unscrupulous individual who acquires the cloak of Incorporation is parallelled by that of the established Company which sets up a subsidiary to operate in a particular geographical area or to deal in particular products. Such a subsidiary will frequently be described as a "Company within the X Group" leaving the unknowing layman under the not unreasonable impression that the financial strength of the established parent Company — of indeed all the Companies in the Group — is available to the creditors. Nothing of course could be further from the truth. It is over twenty years since the Jenkins Committee in the United Kingdom recommended that parent Companies should be made liable for their subsidiaries' debts and although there have been a number of notorious cases where substantial Companies have abandoned their subsidiaries, and their creditors, without a backward glance, no legislation to remedy this defect has been introduced either in the United Kingdom or in Ireland. The "Group" is treated as a unit for most, if not all taxation categories and usually to the benefit of the Companies within the Group. Surely the obverse of this favourable treatment should be the acceptance of the concept of Group Liability for each Companys debts.

The whole area of floating charges or Debentures gives rise to further criticism. The floating charge itself is a concept unknown to most of the great European trading nations (and indeed was to Scotland until 1972). Following on the four fold increase in receivers in 1980 over 1979 the anomalous position of the receiver appointed under such floating charges or Debentures is attracting mounting criticism.

There is increasing evidence that the powers conferred on the Debenture Holder, usually a Financial Institution, over a Company by the Debenture, lessens the attention which the Debenture Holder pays to the day to day financial position of the Company. Secure in the

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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In this issue . . .

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Comment . . .

THERE was general public and professional approval for the introduction of An Bord Pleanala as the Tribunal for determining appeals from decisions of Planning Authorities. It was generally believed to be preferable that the ultimate power of decision in planning matters should be removed from the political arena. Before the introduction of the new appeal system there was a widespread belief, the evidence for which may well have been virtually non-existent, that while the decision on appeals rested with the Minister, as long as the appropriate political strings could be pulled, a favourable decision could be expected.

Until recently, there seemed to be broad approval for the decisions of An Bord Pleanala, if not always from the Planning Authorities whose decisions had been reversed. A recent development which appears to be increasing in size as well as in geographical spread is the use by members of certain Local Authorities of the provisions of Section 4 of the City and County Management Act, 1955, to order the County or City Manager to grant a permission for a development where a refusal would be recommended by the Planning Officer and any such refusal would be likely to be upheld by the Board.

Formerly, the Section 4 procedure was used where an Applicant knew that his application would contravene the development plan, and thus necessarily attract a recommendation for refusal from the Planning Officer. A more recent development is that where a previous application, sufficiently altered to avoid it being rejected as a duplicate of the previous application, is submitted to the Authority. The wheels are then set in motion for a Section 4 Order. Where such an Order is made, only a Third Party Appeal can bring the permission before the Board for review.

The main purpose of the 1955 Act was to extend the powers of the elected representatives on Local Authorities. Section 4 of that Act conferred a decision making power on the elected members of a Local Authority, subject to certain exclusions. It can hardly have been intended by the draughtsman or the legislators, when the 1955 Act was being introduced, that its provisions could be used to nullify a decision of an administrative tribunal operating under another statute. It is significant that Local Authorities were restricted from using the Section 4 procedure when exercising their jurisdiction as Health Boards.

What is particularly unattractive about the use of the Section 4 procedure is the encouragement of that peculiarly Irish form of corruption, "return of the favour". Party divisions mean little on such occasions: "you vote for my Section 4 notice tonight and I will vote for yours next time" ensures success for the motion.

(Continued on page 162)

Constitutional and Other Remedies for Remand and Convicted Prisoners

by

Raymond Byrne LL.M.,
Tutor in Constitutional Law, University College, Dublin

THE prosecutor in *The State (Comerford) v. Governor of Mountjoy Prison*[1] was awaiting trial as a remand prisoner in Mountjoy Prison. He complained by affidavit to the High Court that the manner of his detention was in breach of the requirement in Rule 192 of the Rules for the Government of Prisons, 1947[2] that "[p]risoners awaiting trial . . . be kept apart from convicted prisoners . . ." Barrington J. treated the application as one for an enquiry under Article 40.4.2° of the Constitution into the legality of the prosecutor's detention.

Internal Transfer: Administration.

During the initial ten days of his remand, Comerford had been given a cell in the area of Mountjoy Prison reserved for remand prisoners. However, he was then transferred to another area in the prison, the ground floor of B wing, because the Deputy Governor had received information from a confidential source that the prosecutor was engaged in a conspiracy with three other prisoners to kidnap a warder and escape from the prison.[3] The Governor stated in evidence that the decision to transfer the prosecutor was taken in the interests of security and good order in the prison only, and that the ground floor of B wing was not, as the prosecutor had alleged, solely a punishment area.[4] Barrington J. held that:

> . . . the steps [taken] were not designed to punish the prosecutor but were designed to ensure that [he] would turn up at his trial. I am satisfied therefore that the Governor's decisions were motivated by administrative and security reasons only."[5]

It would seem, therefore, that such an internal transfer is not reviewable in the courts, but rather is a matter to be left to the prison authorities. The same conclusion had previously been reached by Keane J. in a case also relating to the ground floor of B wing, *The State (Littlejohn and Ors.) v. Governor of Mountjoy Prison*,[6] in which convicted prisoners unsuccessfully challenged their separation from the general prison population, the justification given by the Governor, as in *Comerford*, being security considerations.

Internal Transfer: Breach of Prison Rules

However, unlike *Littlejohn*, *Comerford* raised the additional point that the transfer involved contact between remand and convicted prisoners. This was the nub of the prosecutor's complaint, and hence his invocation of Rule 192 of the Prison Rules, quoted above. Thus, while Barrington J. accepted and reiterated that there had been no intention to punish the prosecutor, he was nonetheless:

> . . . placed in a position where he had necessarily to associate with convicted prisoners and therefore there was, in my opinion, a clear breach of Rule 192 . . .[7]

Having established this, it remained to consider what remedies were available to the prosecutor, and, secondly, whether he was entitled to claim any of them in the circumstances of the case.

Habeas Corpus and Remand Prisoners

In view of the breach of Rule 192, Barrington J. stated:

> I am therefore satisfied that the manner of the prosecutor's detention was irregular but I do not think that the irregularity was such as to make the prosecutor's detention unlawful or to entitle him to an absolute order of Habeas Corpus. We are here dealing with the case of a remand prisoner and not of a convicted prisoner but nevertheless the principles laid down by the Supreme Court in . . . *The State (McDonagh) v. Frawley*[8] would appear to apply.[9]

At first sight, it is arguable, however, that the *McDonagh* principles ought *not* apply to remand prisoners. In laying down its test for convicted persons (that only fundamental defects in conditions of confinement could justify making an absolute order of *habeas corpus*), the Supreme Court in *McDonagh* emphasises that since such prisoners had been convicted of a criminal offence in due course of law under Article 38.1 of the Constitution, they were suffering a punishment as a result and therefore technical defects in the conditions of detention could not justify release.[10] Clearly, that rationale cannot be applied to remand prisoners, since they are detained solely to ensure they will stand trial, and punishment may *only* begin after

they have been tried and duly found guilty of an offence under Article 38.1: the basis for this being the operation of the presumption of innocence.[11] Indeed, there are two passages in *Comerford* where Barrington J. adverted to this distinction in treatment. He quoted the recital in section 13 of the Prisons (Ireland) Act, 1877,[12] that the Prison Rules should contain "special rules" so that a clear difference is made between the treatment of persons "unconvicted of crime and in law presumably innocent" since they are in prison "for safe custody only," and the treatment of convicted persons who are being detained "for the purpose of punishment." These special rules are to ensure that the remand prisoner's detention be as minimally oppressive as possible having due regard to the necessary maintenance of order and good government in the prison.[13] Secondly, Barrington J. seems to have taken the view that if the conditions under which the prosecutor had been detained were intended by the authorities to punish him, that would have been inconsistent with his status as a remand prisoner,[14] and some remedy would appear to be appropriate in such a case. Therefore, the difference in treatment between remand and convicted prisoners is important.

The United States Supreme Court also adopted the test that remand prisoners may not be subjected to punishment, in *Bell v. Wolfish*.[15] However, the case is interesting for the further reason that even in applying the punishment test, the first justification for a common approach to remand and convicted prisoners is to be found. That justification is primarily a separation of powers argument. In *Bell*, the Supreme Court recognised that in carrying out its duty to hold prisoners on remand under a judicial order, the executive prison authorities are entitled to some deference in areas such as the maintenance of order and discipline within prisons. That is their area of expertise, into which the judiciary will not delve unless the authorities' actions involve, for example, an intentional decision to punish the remand prisoner. Thus, the courts will defer to the executive branch if some legitimate objective, for example the maintenance of discipline within the prison, may rationally be assigned to the deprivation being imposed on the remand prisoner.[16] A similar deferential approach had been adopted by Barrington J. in relation to the Prison Rules in general. In *The State (Richardson) v. Governor of Mountjoy Prison*,[17] he stated that the Rules should be viewed as reconciling the need for security and good order in prison with a prisoner's subsisting constitutional rights, and that "the prison authorities must be allowed a *wide area of discretion* in the administration of the prisons in the interests of security and good order."[18]

A second justification for applying *McDonagh* to remand prisoners is the fact that the prison authorities receive their jurisdiction to detain under Article 40.4.1° by virtue of a warrant from the judicial branch, as they do for convicted prisoners.[19] This is in contrast to the Gardai who also detain presumptively innocent persons, but without prior judicial intervention. The Gardai also are engaged in the active investigation of crime: the prison authorities play a neutral role.

An attempt has been made above to justify similar *habeas corpus* review both for remand and convicted prisoners on the basis of similar operational difficulties encountered by the prison authorities. Nonetheless, the convicted/unconvicted distinction arguably should result in the judiciary providing increased remedial relief for remand prisoners. Since convicted prisoners may be subjected to "punishment", it follows that the prison authorities may be allowed greater latitude in imposing restraints than they would be in similar circumstances regarding remand prisoners.[20] Therefore, *mandamus* might issue against the prison authorities in favour of a remand prisoner, but the principal point remains that *habeas corpus* would not lie.[21] This may be contrasted with the position of a person in Garda custody who was deprived of a similar facility: *habeas corpus* would probably lie.[22]

The State of Alternative Remedies for Prisoners

Notwithstanding the fact that *habeas corpus* did not lie for the prosecutor in *Comerford*, Barrington J. went on to consider whether he could issue *mandamus* as an alternative in view of the breach of Rule 192.[23] However, he did not think it appropriate in the circumstances.

In his previous decision in *Richardson*,[24] Barrington J. had decided to issue an order of *mandamus* against the prison governor but he allowed him an adjournment to correct the deficiencies which his lordship had found in the sanitation facilities in the prison.[25] He adopted this course even though the proceedings had been primarily dealt with as an enquiry under Article 40.4.2° of the Constitution. However, he explained in *Comerford* that this course was exceptional, because counsel for the governor in *Richardson* had consented to forego a *mandamus* hearing which would have involved the same evidence as had been proved in the Article 40.4.2° enquiry. It is in the context of this concession, therefore, and the adjournment upon which counsel agreed to that concession, that the course adopted in *Richardson* is to be considered. In *Comerford*, counsel for the governor objected to *mandamus* being granted after an Article 40.4.2° enquiry, pleading that if the proceedings had been for *mandamus* from the outset, the governor would have known the precise claim and might not have even shown cause. Although Barrington J. stated he was

> . . . not totally convinced by this as it must have been quite clear from the beginning that the prosecutor was complaining about the conditions of his detention",[26]

he did not think it appropriate to grant an absolute order of *mandamus* in the case. He was influenced in this conclusion by the statement of Finlay P. in *The State (Cahill) v. Governor of the Military Detention Barracks*[27] that the procedure for an enquiry under Article 40.4.2° is *primarily* a remedy to secure release from unlawful custody, and is therefore not to be debased by using it as an informal or expeditious method of obtaining other relief such as *mandamus*.[28] Barrington J. noted two distinguishing features of *Cahill:* the prosecutor had no genuine complaint, and since the Military Detention Barracks is not an established civilian prison it should be allowed some time to set up the facilities contemplated by the Prison Regulations for the Detention Barracks.[29] He continued:

> The present case appears to me to be a different one. The prosecutor appears to have a genuine complaint. His situation has been adversely affec

> ted by a breach of the prison rules. Mountjoy is an established civilian prison and, even though it has had to face peculiar difficulties in recent times, I am not satisfied that this breach of the regulations was occasioned by the exigencies of the present situation. I think it more probable that it arose from inadvertence.[30]

In view of the sentiments of Finlay P. in *Cahill*, however, Barrington J. accepted that no order of *mandamus* should issue after an Article 40.4.2° enquiry.[31]

The courts would appear to have reached the position that Article 40.4.2° may not be used as a general remedy, but is to be confined primarily as a traditional *habeas corpus* remedy.[32] To some extent, this leaves the judiciary with a remedies lacuna. In both *Cahill* and *Comerford*, the courts granted no relief to prisoners who had proved breaches of the Prison Rules; and in *Comerford*, it was admitted that the prosecutor had a "genuine complaint" and was "adversely affected" by the breach. It is unfortunate that in the one case in which the judiciary did intervene, *Richardson*, this seemed to depend on a voluntary concession made by counsel and not on a broader principle. In *Richardson*, Barrington J. stated:

> There is no Iron Curtain between the Constitution and the prisons in this Republic . . . The right of access to the Courts has been accepted as one of the unspecified rights guaranteed by Article 40, section 3 of the Constitution and this right is available to prisoners as well as to other citizens.[33]

As this constitutional right of access to the courts is based on the premise that a prisoner, even if convicted of a crime, and more especially if he is a remand prisoner, retains some rights which are admittedly limited by the exigencies of the institutional environment in prison,[34] it can hardly be doubted that it amounts to more than an ability to make a complaint to the High Court. It must surely also be capable of producing the result that matters complained of and found to be deviations either from the conditions of confinement demanded by the Constitution (as in *Richardson*), or from the Prison Rules (as in *Cahill* and *Comerford*) which to a degree reflect constitutional requirements[35] and, in any event, are statutory enactments to which prisoners must submit and are entitled to the protection afforded by them,[36] are remediable.

It has been said on numerous occasions in Irish courts that where the Constitution establishes a right and a person has established the breach of that right, he may enforce, and demand that the State vindicate it even where no rules of procedure or method of enforcement was at hand to present an easy solution.[37] If a prisoner's right of access to the courts is to be effective, it is arguable that the courts should adopt an informal approach to personal (*pro se*) applications directly from prisoners, treating them as applications in which the courts can grant appropriate relief in cases where a genuine injustice has been suffered by the applicants and, more particularly, where their constitutional rights have been infringed by the conditions of their confinement.[38]

It must not be overlooked that ever since *McDonagh*, the courts have made it clear that unless conditions of confinement are fundamentally defective, *habeas corpus* (that is, an application for an Article 40.4.2° enquiry) will not be appropriate. However, as the case-law since then has shown, even experienced lawyers have found difficulty in applying that test to particular situations. A realistic conclusion to reach is that in all probability deviations from either constitutional requirements or the Prison Rules would hardly ever result in an absolute order of *habeas corpus*. Even if this is correct, and the recent discouragements to Article 40.4.2° applications seem to confirm it, judges have tended not to raise a barrier to relief to people who have not had the benefit of legal advice even though in normal circumstances their conduct would preclude them from relief;[39] how more relevant is this approach to *pro se* applications from prisoners, unless the effect of the present state of law can be conveyed directly to prisoners?[40] Of course, if that did occur, and prisoners made *bona fide* but informal applications for remedial relief, that is, excluding *habeas corpus*, then the status of their right of access to the courts would require reconsideration.

Conclusion: The Alternative Remedies

It remains to attempt to summarise the circumstances in which the forms of relief discussed above apply and the interaction between these reliefs.

1. For fundamental defects in conditions of confinement, *habeas corpus* is the appropriate remedy: *The State (C.) v. Frawley*;[41] *The State (McDonagh) v. Frawley*.[42]

2. If conditions fall short, though not "fundamentally", of constitutional requirements, the courts could

issue *mandamus* to order remedial action: *The State (Richardson) v. Governor of Mountjoy Prison*,[43] and, while the authorities are obeying the order, a court *might* be able to order by way of *mandamus* that a prisoner be detained in accordance with specific conditions, thus perhaps necessitating his transfer from one prison to another: *The State (Cahill) v. Governor of the Military Detention Barracks*.[44]

3. If, for some reason, the authorities are either unable or unwilling to remedy unconstitutional conditions, after the courts issue *mandamus, habeas corpus* might then *become* the appropriate remedy though originally it would not have been: *Richardson*.[45]*

*I wish to thank Thomas A. M. Cooney, University College, Dublin, for his many helpful comments on an earlier draft.□

FOOTNOTES

1. Unreported, High Court (Barrington J.), 19 November 1980.
2. S.R. & O. No. 320 of 1947.
3. Barrington J. accepted that the Deputy Governor "could not responsibly disclose the source of his information to the prosecutor": at p. 6 of his judgment. It is unclear if the same privilege could have been claimed in court if the prosecutor had challenged the validity of the source's statement, given that the judge would hear the information in private and thus could present no threat to prison security: see *Murphy v. Dublin Corporation* [1972] I.R. 215; 107 I.L.T.R. 65.
4. The ground floor of B wing *was* used to closely supervise prisoners who were undergoing punishment, for example loss of privileges, for breaches of prison discipline, but it was also used to house security-risk prisoners to maintain overall discipline within the prison. It was to the second class of prisoners that the Governor felt the prosecutor belonged. It may be that, as a response to the observations by Finlay P. in *The State (Cahill) v. Governor of the Military Detention Barracks*, unreported, High Court, 31 July 1980, the separation of prisoners from the general prison population to effectuate loss of privileges is lawful: see pp. 20-22 of the President's judgment. However, this matter was not at issue in *Comerford*.
5. At p. 6 of the judgment.
6. *The Irish Times*, 11 November 1980 (no written judgment available).
7. At p. 8 of the judgment.
8. [1978] I.R. 131.
9. At pp. 8-9 of the judgment.
10. For a discussion of the case, see (1979) 14 *Irish Jurist* 109.
11. Per Ó Dálaigh C.J. in *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501, at 509; 102 I.L.T.R. 45, at 49.
12. 40 & 41 Vict., c.49.
13. The full recital is quoted by Barrington J. at pp. 6-7 of the judgment.
14. See quote accompanying note 5, *supra*.
15. 441 U.S. 520 (1979).
16. *Ibid.*, at 537-538, citing and quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, at 168-169 (1963).
17. Unreported, High Court, 28 March 1980.
18. At p. 24 of the judgment (italics added). See also Hamilton J. in *The State (Greene) v. Governor of Portlaoise Prison*, unreported, High Court, 20 May 1977, at p. 16 of the judgment (all steps necessary for the maintenance of prison order and discipline must be taken, provided there is no deliberate and conscious violation of a citizen's constitutional rights); and McMahon J. in *The State (Fagan) v. Governor of Mountjoy Prison*, unreported, High Court, 6 March 1978, at p. 18 of the judgment (since a judge is not qualified to decide on the proper management of prisoners after a riot, he should defer to the good faith of the authorities and the necessity of the steps taken).
19. In *The State (Wilson) v. Governor of Portlaoise Prison (No. 1)*, unreported, Supreme Court, 11 July 1968, Walsh J. applied the same jurisdictional test to *habeas corpus* applications relating to court procedures by prisoners "detained *by order of a court*, whether under sentence following conviction *or otherwise*": at p. 3 of the judgment of the Court (italics added). See *The State (Royle) v. Kelly* [1974] I.R. 259, at 267.
20. It was on this point that the majority and minority in *Bell v. Wolfish, supra* note 15, disagreed. The minority imposed a higher standard for remand prisoners; the majority did not. The majority were unwilling to give weight in this context to the presumption of innocence: see 441 U.S. at 533. This approach does not seem consistent with either the views of Ó Dálaigh C.J. in *The People (Attorney General) v. O'Callaghan, supra* note 11, or of Walsh J. in that case: "The presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect only at the trial.": [1966] I.R. at 513; 102 I.L.T.R. at 51.
21. In *The State (Walsh and McGowan) v. Governor of Mountjoy Prison*, unreported, Supreme Court, 12 December 1975, the Court granted *mandamus* so that the consultations between the prosecutors (who were remand prisoners) and their solicitor would comply with Rule 210(1) of the Prison Rules. Note also the majority held that remand rules have a superior status to general rules: at p. 8 of the judgment of O'Higgins C.J. (Walsh and Kenny JJ. agreeing).
22. In *The State (Harrington) v. Garda Commissioner*, unreported, High Court, 14 December 1976, Finlay P. held that despite the administrative inconvenience that might be involved in Garda stations, access to a solicitor must be out of the hearing of a Garda, because of "the extreme importance of this right, and . . . the major inroad on the liberty of the individual which its denial or restriction would involve": at p. 17 of the judgment. The constitutional dimension invoked in the President's judgment (though the result he achieved was, as he acknowledged, similar to that in Rule 210(1) of the Prison Rules) may be contrasted with the statutory approach of the Supreme Court in *Walsh and McGowan, supra* note 21 (O'Higgins C.J. expressly stating the case was to be considered in the light of the Prison Rules and not the Constitution: at p. 6 of the majority judgment).
23. This was, apparently, motivated by a desire to comply with the statement of the Supreme Court in *McDonagh* that those defects falling short of the "fundamental defects" test "fall to be investigated, where necessary, under other forms of proceedings": [1978] I.R. at 137. It is probable that these other proceedings should be initiated separately in view of recent cases.
24. *Supra* note 17.
25. When the matter was re-entered, the required changes were progressing, and Barrington J. therefore made no further order in the case: *The Irish Times*, 7 May 1980.
26. At p. 12 of the judgment.
27. Unreported, High Court, 31 July 1980.
28. At p. 26 of the judgment of Finlay P.
29. Prisons Act, 1972 (Military Custody) Regulations, 1972 (S.I. No. 138 of 1972). Section 2(9) of the Prisons Act, 1972 requires that the Regulations be in substance the same as the 1947 Rules.
30. At pp. 9-10 of the judgment.
31. In *Richardson*, Barrington J. distinguished the complaint made in *McDonagh* (back-ache) from that in *Richardson* itself (health and sanitation facilities) to justify in part his willingness to grant relief to the prosecutrix: at pp. 23-24 of the judgment. Clearly, despite the difference in fact between *Cahill* and *Comerford*, he did not consider this sufficient to justify a different outcome in both cases.
32. The present writer asserted the "general relief" approach previously: see (1979) 14 *Irish Jurist* 109, at 113. I still support that position, though with some "refinements" to take account of the undoubted relevance of Article 40.3 as a second procedure of access to the courts for a prisoner: see text following and "Conclusion" below.
33. At p. 21 of the judgment, approving a similar statement by White J. (delivering the opinion of the United States Supreme Court) in *Wolff v. McDonnell*, 418 U.S. 539, at 555-556 (1974). He also cited *Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345 for the general proposition of a right of access to the courts.
34. See *Wolff, supra*, and McMahon J. in *The State (Fagan) v. Governor of Mountjoy Prison, supra* note 18, at pp. 17-18 of the judgment.
35. *Richardson, supra* note 17, at p. 24 of the judgment.
36. *The State (Gallagher) v. Governor of Portlaoise Prison*, unreported, High Court (Finlay P.), 18 May 1977, at p. 8 of the judgment; *Richardson, supra* note 17, at p. 19 of the judgment.
37. See Walsh J. in *East Donegal Co-op. Ltd. v. Attorney General* [1970] I.R. 317, at 349 and Finlay J. in *The State (Hunt) v. O'Donovan* [1975] I.R. 39, at 45-47.
38. For a suggestion that an alternative might be that adopted by the United States Supreme Court, the provision of legal research facilities for prisoners, see Byrne, Hogan, McDermott, *Prisoners' Rights: A Study in Irish Prison Law* (forthcoming 1981), Chapter 2.

39. See McWilliam J. in *The State (Sheehan) v. Deputy Garda Commissioner*, unreported, High Court, 1 March 1976, at p. 6 of the judgment (a person who had no legal advice was granted relief, despite his acquiescence in a faulty hearing, because he did not fully realise the consequences of his acquiescence); the decision was reversed by the Supreme Court on other grounds, *sub nom. The State (Sheehan) v. McMahon*, unreported, 25 October 1977.
40. See Henchy J. in *The State (Byrne) v. Frawley* [1978] I.R. 326, at 349 350 (because a decision had been widely reported and its requirements common knowledge, but no prisoner had challenged his detention on the basis of its holding, such acquiescence in his detention would bar him from claiming relief). For a general discussion of the acquiescence rule, see *Corrigan v. Irish Land Commission* [1977] I.R. 317.
41. [1976] I.R. 365. Finlay P. held that judicial review did not extend to ordering the Executive to provide particular facilities to accommodate prisoners for whom ordinary detentional conditions are unsuitable. This decision indicates the limitations on the judiciary's power to resolve difficult medico-penological problems.
42. [1978] I.R. 131.
43. *Supra*, note 17.
44. *Supra*, note 27, at p. 28 of the judgment. In certain circumstances, of course, an internal transfer might be sufficient.
45. *Supra*, note 17, at p. 23 of the judgment.

For Your Diary . . .

26-27 September, 1981: Mayo Bar Association/Northern Ireland Law Society: Seminar on "Office Management and Technology in the Eighties". Open to Solicitors in Ulster and in the Counties of Donegal, Sligo, Leitrim, Rosrommon, Mayo and Galway. Further details from Patrick O'Connor, Solicitor, Swinford, Co. Mayo.

12 October 1981: Law Society *Commencement of Sixth Professional Course.*

28 October 1981: Law Society *Presentation of Parchments*, Blackhall Place, Dublin 7.

11 December, 1981: Mayo Bar Association Annual Dinner Dance. Breaffys House Hotel, Co. Mayo. Tickets available from Patrick O'Connor, Solicitor, Swinford, or Anne Nolan, Solicitor, Castlebar.

Birth, Marriage and Death Certificates

By reason of recent difficulties in procuring Certificates in relation to Births, Marriages and Deaths, the Dublin Solicitors' Bar Association has been in correspondence with the General Register Office.

In correspondence with Mr. Andrew F. Smyth, President of the Bar Association, it has been confirmed that there has recently been a build-up of work due to the large volume of correspondence and applications for Certificates being handled by the office. The present average waiting time appears to be approximately five weeks.

The Registrar is taking steps in an endeavour to reduce the waiting period and is confident that the situation is gradually improving. It appears that applicants for Certificates are informed of the likely delay and, if they require their Certificates more quickly, are advised to apply to the Superintendent Registrar's Offices for the counties in which the events took place. These offices, because they cater for events in their own counties only, are not subject to the same pressures as the Dublin offices. It is pointed out, however, that local Superintendent Registrars do not normally have custody of non-Catholic Marriage records and, in such cases, special arrangements are made for the issue of such Certificates as quickly as possible from the General Register Office.

The Superintendent Registrar's Office at Pearse Street, Dublin has been endeavouring to provide Certificates over the counter to all personal callers, but has been having serious difficulty in coping with demand and in accommodating the public in the office, while waiting. Applicants are now being encouraged to leave their applications and have Certificates sent on to them through the post. By this means, the need for people to wait for lengthy periods at the office has been reduced and, because the office now closes earlier and the staff are working overtime, all Certificates are now being issued within a few days of the receipt of applications, whether through the post or otherwise.

If an applicant to the General Register Office in Dublin has a really pressing need for a Marriage Certificate as, for example, in the completion of the sale of a house, then, upon this fact being explained to the General Register Office, every effort will be made to issue the Certificate in the minimum possible time. □

Land Registry —

Solicitors Certificate as to Title

The Land Registry Rules 1972 (Rules 19 and 35) provide for First Registration of property and Discharge of Equities on foot of a Solicitors Certificate as to Title when on a sale (or an acquisition by a Statutory Authority) the purchase money (or compensation) does not exceed £25,000. The Land Registration Rules, 1981 have extended this limit to £50,000 as and from the 4th day of August 1981.

Conveyancing Note

10% Deposit on Execution of Contract

In recent years the practice has developed that Vendors accept deposits of 10% on the execution of Contracts for the sale of property by private treaty.

As most Purchasers are dependent on 90% loans to enable them to complete their purchases, the Conveyancing Committee of the Law Society recommend that this should become standard practice, except in exceptional circumstances, such as where there is a long closing date or a Purchase in trust for an undisclosed principal or the purchase price is small.

Comment (Continued from p. 155)

Section 4 has its proper place in our local government structure to ensure that their certain decision-making powers are retained by the elected members, in order to provide some alternative to bureaucratic decision-making. An Bord Pleanala already provides this alternative in the case of planning decisions. There is a clear case for the introduction of legislation to remove planning decisions from the scope of Section 4 of the City and County Management Act, 1955.□

Matrimonial Problems

Counselling — Another Option?

A Solicitor's Comment

(by a practising Solicitor who is also a mariage counsellor)

ALL practitioners are conscious of an astronomical increase in the number of marital problems where legal advice is sought. This is shown by the great increase in matrimonial cases coming before the courts. As lawyers, we are faced with a dilemma when dealing with such cases because the pressure of work and time precludes the care and attention needed to promote the welfare of the whole family. In the interests of our own practices, we cannot afford to spend a disproportionate amount of time on cases which are often financially unrewarding because of the particular social circumstances.

I think it is the experience of most lawyers dealing with this type of work that frequently a client who requests a legal separation is in reality pleading for help to sort out a problem which has evolved in the marriage. If a solicitor's letter issues, a process is started which makes it more difficult for the parties concerned to reconsider their positions and to work towards a reconciliation. For this reason, it is important for the solicitors acting for each of the parties not to start the legal process or to permit the legal process to continue, unless the circumstances of the case clearly leave no option and each solicitor is satisfied that his client truly wants to bring about the consequences of such legal process.

It is remarkable how many people will reconsider the breaking up of their marriages if they are made aware of the consequences, particularly if they are the party who may lose custody of the children or who may be barred from the family home. On the other hand, it is obvious that there are cases where it is vital that the legal remedies available be obtained as quickly as possible, for example, to save the parties inflicting injury on each other or where there is little, if any, prospect of reconciliation.

At the heart of the dilemma is the time-consuming nature of the work. As a profession, there is one danger which we must guard against — the danger that through our actions a family may be broken up unnecessarily. Separation may not be the consequence if more time could be given to the underlying reasons for the problem which has arisen.

A marriage counsellor can and does give the time which the busy legal practitioner cannot give without damaging the interests of other clients and of his or her own practice. Marriage counsellors are trained to assist people in viewing their situations objectively, so that any decisions are made with more confidence that they will be acceptable in the longer term. A counsellor can also support a client through a difficult period in his or her life, as for example, during the time it takes to obtain relief from the Courts. Therefore, the plea is that solicitors should be at all times conscious of the role that a marriage counsellor might play in a possible family breakdown case, and be aware of the location of the nearest available marriage counselling service.

A Marriage Counsellor's Comment

(by a Counsellor with the Catholic Marriage Advisory Council)

Two conditions seem to be common to most people when they are under strain, particularly emotional stress of a personal nature. One is that they fail to see the wood for the trees and they lose their sense of perspective; the other is that they tend to seek a one-shot solution, one single act or event that will cut the Gordian knot of personal tension. I imagine many solicitors are familiar with the client who persists in reciting the copious details of a recent incident, which does very little to illuminate the necessary background upon which a professional judgment must be based. There may be also an unreal belief in the existence of legislation, tailormade to fit a particular situation, which will enable the practitioner to respond immediately and effectively, to wave a metaphorical magic wand.

The role of the marriage counsellor is to help people regain their sense of proportion and to help them consider options before making a decision. Through reflective discussion, the counsellor encourages the client to approach the same situation from different aspects, the better to understand the contributions made to its development by the client himself or herself and by other significant members of the family. Comparison with previous and subsequent experience often results in the emergence of tentative patterns, which can be used later in thinking about options to predict possible reactions.

This process may take place at a number of levels, and the counsellor is striving all the time to work at the level of feelings. Sometimes unconscious resistance by the client means that other modes of expression have to be worked through before a useful discussion of feelings can be achieved. The aim is to secure aceptance without striving for understanding — identification and acceptance by the client of his or her own feelings as well as acceptance that others may legitimately experience contrasting emotions. The counsellor participates as a real live person and has opportunities to model calm acceptance of reactions that are not readily understandable. If the client appreciates indirectly that feelings are human responses for which we are not always responsible, that feelings are influenced by many factors, both innate and learned, he or she is in a

stronger position to think about the area in which responsibility can be exercised, namely action that is taken as a consequence of feeling.

So far a number of interviews between counsellor and client may have taken place, or if the client is especially receptive, this stage may be reached by the end of the first interview. In either case, the scene is now set and the means are available for an examination of options. The counsellor helps the client to think about possible courses of personal action in the immediate future, perhaps including some that are not so obvious and even unattractive initially. The recognition of patterns, and the acceptance of "differences" in others, facilitates a more realistic assessment of possible developments, and the separation of feeling and responsible action begins to inspire confidence in the client that the destructive course of events can be altered.

It is a basic principle that the client must make the decision and take responsibility for the consequences, because every individual has a right to his or her God given integrity. It is the counsellor's job to help the client discover and affirm that integrity, whatever course of action is chosen. The counsellor may not approve if the client eventually decides to pursue a legal separation, with or without Church annulment, but that decision must be respected and the client helped, within the counsellor's competence, to put it into effect.

Even after the decision has been taken, the counsellor may have a valuable supportive role to play, as already mentioned by the solicitor above, when the unfolding succession of events gives rise to conflicting feelings. Marriage counsellors have no part to play in the legal process as they work solely at the level of personal feeling, with the material brought into counselling by the clients. In fact, if counselling is to be effective, and continue to be so, it is very important that it not only be separated, but be seen to be separated, from remedies available under the law. For that reason, marriage counsellors are reluctant to get involved in legal proceedings.

Marriage counsellors are all married people themselves, who were invited personally to participate in selection conferences staffed by psychiatrists, psychologists and experienced counsellors. Commonly 50% to 60% of those who attend such a conference are offered places, on the basis of personal openness and absence of perceived threat in relationships with others, on an initial training course of approximately nine months.

Experience enriches theory in subsequent in-service training, which is continuously monitored by a tutor group. In this way, fresh ideas and new techniques are fed into the system, influenced by practice. Also group support arises from the fact that counsellors work in centres, where clients are met in comfortable, relaxed surroundings on neutral territory. In order to ensure that time is available for each client, it is necessary to make an appointment in advance, but no other rules exist. Simply, if meeting a marriage counsellor is thought to be beneficial, the telephone directory gives details of the nearest centre and the method of making appointments. Every interview is completely confidential.

From the same centres, pre-marriage courses are organised to help engaged couples to take a more realistic view of their present relationship and to make responsible decisions for the future. A counselling service is also provided in awareness and control of fertility, supported by a comprehensive education programme in the natural methods of family planning. Each centre is always interested to receive comments and suggestions on the service it offers from the user's point of view.□

Catholic Marriage Advisory Council

The Catholic Marriage Advisory Council works for the well-being of marriage and family life.

Centres organise courses to help couples prepare for marriage.

Each Centre provides a confidential Counselling Service for people with problems in relation to Marriage or other personal relationships.

The C.M.A.C. also provides a confidential service for people who wish to discuss the planning of their families and to learn the natural methods of Family Planning.

Enquiries and appointments: Phone Catholic Marriage Advisory Council of Ireland, Central Office, All Hallows College, Drumcondra 9: Office Hours, 375649.

List of Centres see below:

Dalymount 15, Dalymount 7, Mon.-Fri. 10 a.m.-2 p.m. and 8 p.m.-9.30 p.m. — 301028

Dunlaoghaire, 7 Eblana Avenue, Mon.-Fri., 10 a.m.-4 p.m. and 8 p.m.-9.30 p.m. — 801682

35 Harcourt St. 2, Mon.-Fri., 9 a.m.-5.30 p.m. and 7.30 p.m.-9.30 p.m. — 780866.

Marino, 71 Griffith Avenue 3, Mon.-Fri., 10 a.m.-4 p.m. and 8 p.m.-10 p.m. — 338631.

Templeogue 265, Templeogue Road, Mon.-Fri. 9.30 a.m.-4 p.m. and 7.30 p.m.-10 p.m. — 908739

Athlone: Dr. Dobbs Memorial Home, Northgate St. Office Hours: (0902) 2174

Ballina: Parish Centre, Teeling St. — (096) 21478

Ballinasloe: St. Joseph's College, Garbally Park, Mon. 1 p.m-2 p.m. — (0905) 2504

Carlow: St. Catherine's Community Services Centre, St. Joseph's Road, Mon.-Fri. 10 a.m.-5 p.m. and Mon. 8.30-10 p.m. — (0503) 31063

Castlebar: Social Service Centre — (094) 22214

Cavan: Cana House, Farnham St., Mon. 8-10 p.m. — (049) 31378

Charlestown: St. Nathy's College, Mon. 7-9 p.m. — Ballaghaderreen 74.

Cloyne: Cobh (after 6 p.m. daily) — (021) 811727

Cork: 34 Paul St., Mon.-Fr. 8-10 p.m. — (021) 25678.

Drogheda: Drogheda Community Services Centre, Fair St., Mon.-Fr. 10 a.m.-12 noon — (041) 36084

Dundalk: St. Patrick's, Roden Place — (042) 31731

Ennis: Social Service Centre, Office Hours — (065) 21178

Galway: Ozanam House, Middle St., Mon.-Fri. 8 p.m. 9.30 p.m. — (091) 62331 and Appointments Social Service Centre, Mon.-Fri. (office hours) — (091) 63581

Inishowen: Pastoral Centre, Derry Road, Movilla (anytime) — Movilla 60

Kerry: Cana House, Killarney, Fri. 8 p.m.-10 p.m. — (064) 31748

Letterkenny: Raphoe Pastoral Centre, Monastery Avenue, Tues. 8-10 p.m. — (074) 22218. Donegal — Donegal 25. Bunbeg — Bunbeg 51
Limerick: 68 O'Connell St., Office hours and 8-9.30 p.m. Mon.-Thurs. — (061) 43287. Also — (061) 49620
Longford: St. Mel's Road, Tues. 8-10 p.m. — (043) 6827
Monaghan: Cathedral Rooms, Mon. 7-9 p.m. or by appointment — (047) 81220
Mullingar: Cathedral Social Service Centre, Bishopsgate St., Mon. & Wed. 8-10 p.m. — (044) 8707
Navan: CYMS Hall, Wed. 8-10 p.m. — (046) 21346
Nenagh: Social Service Centre, Loreto Hall, Kenyon St., Office hours — (057) 31800
Newbridge: St. Anne's, Station Road, Mon. 8-10 p.m. — (045) 31695
Portlaoise: Main St., Mon. & Wed., 8-9 p.m. — (0502) 21905
Roscommon: St. Coman's Club, Abbey St., Mon.-Fri. 8-9 p.m. — (0903) 6619
Sligo: The Retreat House, Charles St., Mon.-Fri. 8-9 p.m. — (071) 5641
Thurles: C.M.A.C. House, Cathedral St., Office Hours — (0504) 22279
Tipperary: Social Service Centre, St. Michael's St., 10 a.m.-12.30 p.m. daily — (062) 51622
Tuam: Social Service Centre, Dublin Road, Office hours — (093) 24577
Tullamore: St. Brigid's Place, Office hours — (0506) 21587
Waterford: 4 George's St., Mon. 8 p.m.-10 p.m. — (051) 73559
West Cork: 8 Market St., Bandon, Mon. 8.30-9.30 p.m. — (023) 41665; Bantry, Mon. 8-9.30 p.m. — Bantry 272; Skibbereen, Mon. 8.30-9.30 p.m. — (028) 21220
Wexford: St. Brigid's Centre, Roches Road, Tues.-Fri. 9.30-11.30 a.m. and 2.30-5 p.m. — (053) 23086

Marriage Counselling Service

What on earth is the Marriage Counselling Service? Sounds self-explanatory and yet there is much more to it.

The Service bases its work on the belief that happy stable marriages are desirable for the well-being of the family and society. It aims to increase public understanding of the complex nature of personal relationships and it seeks to help individuals to develop mature relationships.

The Service provides a confidential service for counselling marital and personal relationships, sexual therapy and individual counselling in other areas of distress, e.g. bereavement. It also provides an educational service for pre-marital couples, engaged couples and young parents.

What causes relationships to breakdown? Many, many things, but perhaps the most significant factor in relationship difficulties is faulty communication. The Marriage Counselling Service has trained counsellors who will work with individuals and couples to enable them to improve their communication at all levels. Everyone goes to the doctor and people will seek medical help to prevent the onset of illness. How different when it comes to seeking help with marital and relationship difficulties.

If you feel your relationship needs enrichment, or if you feel you would like help with any emotional, sexual or relationship difficulty, the Marriage Counselling Service provides a completely confidential and understanding service.

Marriage counsellors are trained to a high professional standard and are skilled at working with personal relationships.

Please seek help early; it is so important. Ring Dublin 720341 for an appointment with a counsellor.

Access to Justice and Legal Aid

The State of Play

by

Ann Fitzgerald, Solicitor.

IN RECENT times there has been a strong movement in many countries to provide effective access to justice. Some critics have been concerned to eliminate the cost barrier only while others have realised that financial considerations do not consititute the sole deterrent to the full use of the legal system by the poor and underprivileged. Frequently, the law is seen by the poor as an evil to be avoided at all costs, not as a weapon to enforce and protect basic rights. in view of the lack of involvement in the law-making process by the less powerful sections of our society, the poor themselves tend to recognise only traditional legal problems as worthy of attention.

One American commentator put it simply thus: "Poor people are not just like rich people without money."[1] It could be said that a legal aid movement must therefore involve some missionary effort. It must aim to reach those who have never had access to the legal system. These people must be taught to use the law and the law must be revised and simplified for them. Lawyers must move into more convenient offices – where are most solicitors' offices found in Cork? – and learn about the problems of poverty while working to expand the legal system outwards.

In a seminal study of three London boroughs, it was found that as many as 11% of those queried replied that they never go to a lawyer, while 45% preferred a lawyer who normally acted for "people like themselves."[2] Lawyers are generally ill-equipped to advise on job rights, social welfare and housing problems; in fact, any lawyer who qualified in this country before 1970 will have had no formal training in a vital subject like family law. Although law courses are improving, the emphasis remains on property and commercial matters. Ralph Nader, the U.S. Pioneer of 'Bringing Law to the People' has said that lawyers are educated "... in a highly sophisticated form of mind control that trades breadth of vision for the freedom to roam in an intellectual cage."[3]

The first attempt in this country to provide a free legal service to those unable to afford a lawyer came from the law students themselves. In 1969, a voluntary advice-giving organisation backed up by qualified professionals, was set up in both Cork and Dublin. (For reasons that are not relevant here, the Cork and Dublin groups have remained separate and the latter, due no doubt to its larger size, has been more vocal over the years). In Dublin, responding to pressure from local groups and demand for the service, F.L.A.C. (The Free Legal Advice Centres Limited) expanded rapidly to a total of 16 centres in the city by 1979. Each centre opened on one evening per week, yet despite the limited service, F.L.A.C. had handled some 32,000 cases by August 1979 (with 24,000 of these from 1975-79). It became clear that the Government was content to see law students carry the legal aid burden and so, in 1973 F.L.A.C. threatened to withdraw. This produced a £5,000 grant, from the Department of Justice. In the following year, F.L.A.C. continued the bluff and once again the Government capitulated – in July, 1974, the Pringle Committee was set up '... to advise on the introduction, at an early date, of a comprehensive scheme for legal aid and advice in civil matters...."

F.L.A.C. then decided, in 1975, to open Ireland's first community law centre, to afford a model for the Pringle Committee's findings. The selection of Coolock, on Dublin's northside, as the location was no accident. It is a poor urban area comprising predominantly Local Authority housing built since the early '60s. Successful and influential prototypes were provided by the U.S. Legal Services Programme set up in conjunction with the 'War on Poverty' in 1965 and by the U.K. 'Neighbourhood Law Centres,' the first of which was set up in North Kensington, a working-class area of West London, in the summer of 1970, operating from a converted butcher's shop. As originally conceived, a "Law Centre" should be found in the heart (if there is one of a poor area – the Coolock centre is in the Northside Shopping Centre – concerning itself not only with individual clients but with recurring problems in the neighbourhood. There is small point tackling the same landlord on behalf of, say, three separate clients when a lawyer could equally act on behalf of the inhabitants of a whole street to the same end. The centre should open outside normal business hours providing a relaxed and open atmosphere. Local people would have a say in the running of the centre via a Management Committee – a law centre cannot otherwise offer a community service. The lawyer should be freed from concern about his or her own income; rather, funding should come from central government or a charitable trust – hence the term 'salaried lawyer.'

Owing to the lack of private solicitors' offices in the area and the absence, until recently, of any free legal aid scheme, the Coolock Community Law Centre has carried a heavy caseload. Thus the one solicitor employed has dealt with over 3,500 cases during the period 1975-79. Nonetheless, to achieve some balance a "law officer" (a

qualified lawyer who does not take individual cases) was employed by F.L.A.C. to lisaise with local groups and pinpoint problems requiring attention. Thus, a campaign was undertaken on the following issues: firstly, Deserted Wives Allowances and the issue of split payments; secondly, a survey on the operation of Barring Orders in family disputes, particularly with regard to their enforcement; thirdly, the divorce issue was discussed by the Management Committee which, in December 1978, decided to organise a public meeting to press for the introduction of divorce legislation. The campaign is now carried on through the medium of the Divorce Action Group.

It is precisely this aspect of the Centre's work which both the Minister for Justice and his Department have refused to accept, let alone encourage. It would appear that such people desire to see only a steady increase in the number of cases dealt with, so that those running the Centre become so totally preoccupied with running from Court to appointment and back again, that there should be no time to research the Centre's effectiveness nor to consider potential test cases. Due to this clash with the Department of Justice, the Centre has had major financial difficulties. The day of reckoning arrived with the introduction of the Government's Legal Aid Scheme in August, 1980. Politically, the Coolock Community Law Centre was well located in the constituency of the then Taoiseach and, with the tragedy at the Stardust Club in February 1981, the Centre's existence seems assured for the foreseeable future, given that the Centre's Solicitor has been appointed by the Government to represent relatives of the disaster victims. Yet, the Minister's lack of flexibility and imagination does not augur well for the chances of setting up further Community Law Centres in other parts of the country. For example, a suggestion in 1979 that a Law Centre should be set up in the borough of Dun Laoghaire was rejected out of hand by the Minister, despite widespread support locally for the idea.

The Pringle Report

When the Pringle Committee made its Report to the Minister for Justice in December 1977, it also lent its voice to the demand for the setting up of further Community Law Centres to be staffed on a full-time basis and which, in addition to casework, would "participate in any appropriate activities in the Community which would be likely to enhance the status of the centre and would be consistent with the provision of a comprehensive legal aid and advice service for the Community."[4] The Committee also suggested a parallel panel system calling on the skills of private practitioners who would take cases after a means test, to be re-imbursed thereafter by a Legal Aid Fund – such a scheme has operated successfully in the U.K. for many years. In addition, such lawyers should be permitted to give £15 worth of legal advice without first carrying out the means test. No readily available explanation can be offered for the Government's decision to ignore completely the findings of an expert committee which, after 3½ years deliberation, produced a worthy 289-page report (which even included a Draft Legal Aid bill, begging introduction). And yet now the Pringle Report is merely of historical interest.

The story might well have ended here but for the courage and tenacity of one Cork woman, Mrs. Johanna Airey who in 1973 decided to bring a case against Ireland in the European Court of Human Rights in Strasbourg. Using the individual petition procedure, Mrs. Airey claimed that she had no "effective and practical" access to a court, while realising that the right to free legal aid in civil proceedings was not as such, guaranteed by Article 6 of the Convention. Since 1972, Mrs. Airey had attempted to obtain a decree of judicial separation in the High Court against her allegedly violent husband. She could not afford to pay the legal costs (estimated at between £500-£1,000, depending on whether the action was contested) and by the same token was unable to find a solicitor prepared to handle her case without the guarantee of costs being forthcoming. The Court finally gave its judgment in October 1979, finding Ireland in breach of the Human Rights Convention. The following day the Government issued a statement that there was "a definite Government commitment as far as the availability of civil legal aid is concerned". In fact Counsel gave the Court an assurance at the hearing that a Legal Aid Scheme would be introduced. Most critics would agree that such a commitment appeared singularly lacking when F.L.A.C. sought support and this was so even with Mrs. Airey's case pending in Strasbourg; acute embarrassment was covered with rhetoric.

Scheme for Civil Legal Aid and Advice

To get off the European hook, the Government was now forced to introduce a cheap, quick remedy. Thus in December 1979, the Minister for Justice laid before the Dáil a Scheme for Civil Legal Aid and Advice, a short 89-page booklet which makes dry reading after the liberal Pringle Report. In it, the Minister recommended a Scheme bearing no resemblance to the recommendations of the earlier expert Committee. Instead of dealing in "rights" and "needs," it is couched in the language of the dispensary system. Whereas the medical service has now progressed at last to the 'Choice of Doctor Scheme,' the Minister for Justice in his own wisdom and without public debate sought to and succeeded in institutionalising a 'Poor Law' system of delivering legal services. The scheme was not introduced as a Bill in Dáil Éireann, rather on an administrative basis, so bypassing the democratic process. The Scheme has overlooked the private profession – the country's greatest legal resource – preferring to set up so-called "Law Centres" working parallel to private practitioners, staffed by full-time lawyers, who will deal exclusively with poor people's problems. As the lawyers only have a mandate to engage in orthodox casework, the use of the word "Law Centre" is confusing, perhaps deliberately so.

The seven centres which opened their doors to the public in August 1980 are located in Cork, Limerick, Waterford, Galway, Sligo and two in Dublin. To date, the Cork Centre has dealt with some 400 cases while the Dublin centres are inundated with clients and, despite taking on extra staff, have had to refuse further work for a time. At last the worst cases are being handled by qualified lawyers — the battered wives have a refuge; indeed some 65% of all cases handled in the Cork centre concern marital problems. F.L.A.C. has, incidentally, ceased to take further casework and thus the load has been transferred to the new Law Centres. A team of dedicated young lawyers have been employed and good work is being done. What causes concerr nevertheless, is

the Scheme's narrow base and application, It is worrying that it has succeeded in splitting the ranks of those pressing for a comprehensive legal aid scheme, while in its very make up it does not allow room for expansion. No doubt the Minister for Justice is careful not to waste taxpayers' money, yet the Scheme has necessitated the Legal Aid Board occupying a premises at a reported rent of £25,000 per annum.

The most serious drawback in the present Scheme is one which cannot readily be cured by further expansion. It will require a radical restructuring. The Law Centres are located in major cities and towns with no concessions for those living in outlying areas; for instance, twenty counties have no Law Centre; the midlands have no Law Centre; somebody living in West Cork may have to travel eighty miles to the nearest Law Centre. There are apparently plans to open weekly or fortnightly "clinics", as soon as premises become available in the larger towns; but is it realistic, even on a broad reading, to claim that will offer an "effective" and practical right of access" as set out in the Johanna Airey case? There is no travel allowance made for clients who must be inspired to hear of the Scheme, which has received spartan publicity from the Department of Justice in a few scattered press and T.V. ads – a far cry from the vigorous T.V. licence spongers campaign. They make the journey without even certain knowledge that the case will be handled. Yet the opening of an ever-increasing number of Law Centres could not be cost-effective from the taxpayers' point of view, nor would a full-time centre be necessary in many cases. What is required is the assistance of the private legal profession, as suggested in the Pringle Report, but which remains wholly outside the scope of the present Scheme.

In practice, in an emergency, one gathers there is no problem; indeed, a Court case may be heard and completed before the applicant's means have been assessed and the requisite Legal Aid Certificate issued. In all other cases, however, there is a strict means test, which, despite relaxation by a Ministerial Order effective as of February 1st 1981, would still exclude many who could not be described as comfortably-off. There is a built-in bias favouring people with property whereby a £2,000 per annum allowance is made for mortgage instalments, whereas a person living in Local Authority housing will only receive an allowance in respect of rent paid. It is ironic to note that in view of her means, Mrs. Johanna Airey who attended the Cork Law Centre during its first week of operation has, in lieu of legal aid under the Scheme, received an offer from the Government to cover the reasonable legal costs for her High Court separation petition. While the offer, made to comply with the requirement for "just satisfaction," under Article 50 of the European Convention, will afford Mrs. Airey the result she has sought for so long, it is questionable whether the means to that end are wholly to her pleasing – not every distraught wife will receive such special treatment.

The Scheme also operates a system of excluded cases which is both imprecise and arbitrary: one such exclusion is, according to the Department of Justice, "civil bills for sums below £150." In the first place, the correct terminology is "civil process" and not "civil bill," in the second place, are all such causes, irrespective of their nature, excluded? For example, landlord-tenant cases are covered by the Scheme, yet where a landlord withholds a deposit of £100, will the tenant not be eligible for legal aid to sue for its return? Another strange anomaly is that whereas legal advice (as opposed to aid) is available for unfair dismissal cases, representation before an Employment Appeals Tribunal is disallowed. One must therefore go ahead alone, await the Tribunal's decision before lodging an appeal in the Circuit Court and only then will a legal aid application be entertained. Small wonder therefore that test cases are also specifically excluded.

In the end, if one has successfully weathered the form-filling requirements of the means test, one may for some reason find the solicitor unsuitable for, or not amenable to one's particular problem – a fairly common occurrence in legal practice. If such be the case, one has the happy option of travelling from, say, Cork to Limerick or Waterford to see another Law Centre Solicitor (the extra cost of so doing will not, of course, be underwritten by the scheme). Indeed, in a family case, a husband and wife cannot in any circumstances be represented by the same Law Centre. Thus, for example, a wife from Clonmel goes to the Cork centre while the husband must therefore attend the Limerick Centre, and for any District Court proceedings in Clonmel the solicitors from both the Cork and Limerick Centres must travel to defend their respective clients. (How the solicitors also find time to deal with callers at the Centre is amazing). Can this be seen as effective use of the taxpayers' money and, more importantly, does it afford a "Choice of Lawyer" in any real sense?

To extemporise further on the other shortcomings of the Scheme might render the writer liable to a charge of unadulterated bias. The Scheme is undoubtedly a step in the right direction, even if it will have to be brought down a side street to get it back on the main road. A small beginning is being made in the Churchfield area of Cork city, where a service being offered, though quite unconnected with the Law Centre, has some of the essential ingredients for a Community Law Centre, in the sense used in the Pringle Report.

Cork Education Rights Centre

The Cork Education-Rights Centre originally set up as part of the now defunct Combat Poverty Group's Resource Projects has provided a weekly advice session for the past eighteen months, having evolved from a series of public education courses, manned by young lawyers on a voluntary basis. To date there has been a steady flow of enquiries and, such is the good relationship with the solicitors in the Cork Law Centre, that any urgent cases, which obviously come within the terms of the State Scheme, are referred there. It should be stressed that, in terms of individual casework the Cork Law Centre offers a far superior service. However, what the Churchfield experiment lacks in this regard is compensated for by the emphasis on public education, self-help and self-reliance. Most of the personnel working in the Education-Rights Centre are local people and since December 1980, due to a total Government cut in the Project's funding, all concerned – even the full-time staff – are working without payment. The lawyers (solicitors, barristers and academics), as with their local co-workers, are referred to as "resource workers" and, with the client's consent,

advise in the presence of a local person, who is anxious to develop interviewing skills. The service has a single-tier structure with no demarcation between the lawyers, locals and clients. In an effort to further its aims to educate the public, the Centre will run a further course on 20 varied legal topics in the near future, dealing with such elementary matters as how to respond if a summons is served on you. It clearly prevents hardship and legal turmoil if every citizen is au-fait with these requirements – a good argument for the extension of the Law Centres' work to include legal education.

A Political Solution?

In the end, like most issues, access to the law comes down to politics. For example, if groups such as the Divorce Action Group, which, as we have seen, arose from a meeting of the Management Committee in the Coolock Community Law Centre, started springing up left, right and centre, the Government might find itself forced into taking action on certain issues which have been either overlooked or simply ignored for years. Examples that occur are single parents and illegitimacy, itinerants and juvenile delinquents (so-called), all of whom enjoy a less than privileged status in our society. Furthermore, there is a deep-rooted tradition in Ireland whereby local T.D.s exercise a near-monopoly on advice-giving and problem-solving through the vehicle of their clinics – an area of concern which a Community Law Centre might infringe upon. Here we are talking about Medical Cards, housing allocation and welfare benefits generally. Indeed, T.D.s often like to credit themselves with gaining a benefit for a constituent which, if properly received, is something to which he or she is entitled as of right. Toe-stepping in this sensitive area will be resented by any average politician.

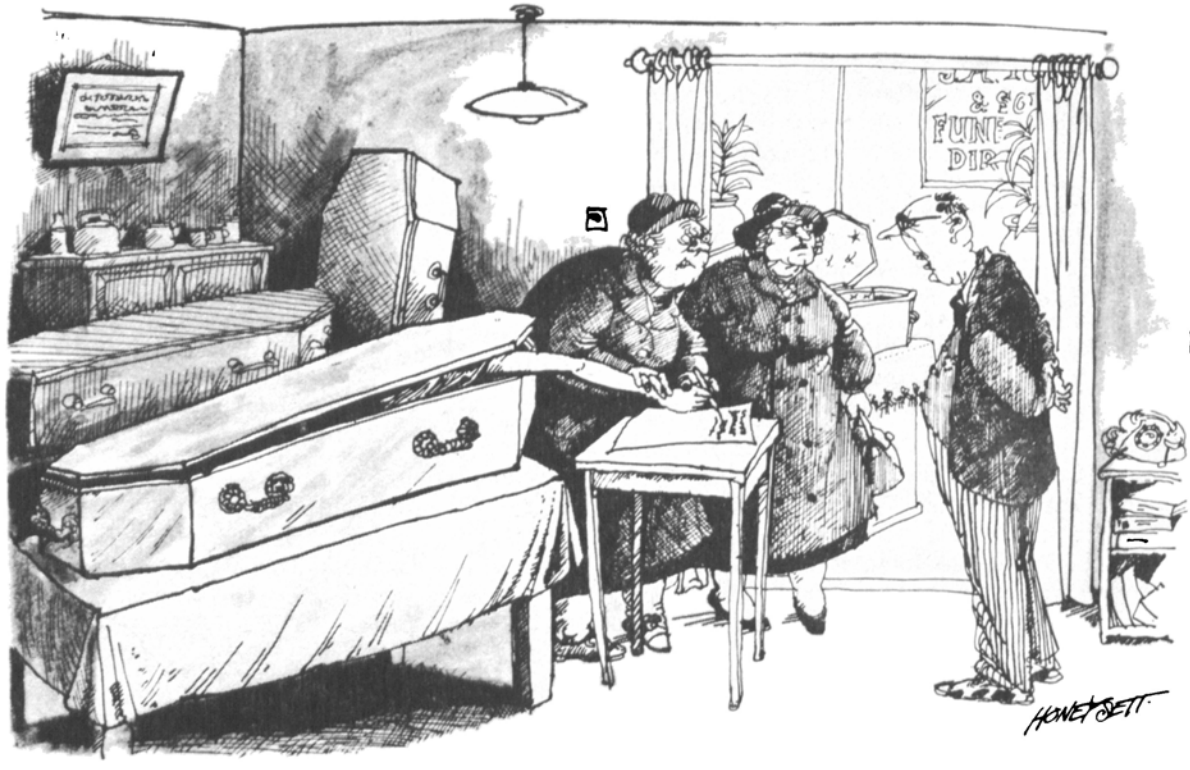
To avoid this conflict many useful reforms could still be put through to make legal procedures more simple and comprehensible. In England, since 1973, the option of arbitration instead of a Court case has existed for small claims; in Poland, there are "Social Conciliatory Committees," in Sweden, a Public Complaints Board has been set up, along with a simplified procedure in the regular courts; while, in Germany, there is a 'Public Legal Consultation and Mediation Agency' which has operated successfully for over fifty years in Hamburg and other major centres. To date, the only offering in this country's jurisdiction is the Courts Act, 1980, Suffice it to say that there has been severe criticism of some sections of this Act which provides for custody actions to be tried in the District Court.

The problem of access to the law is primarily a matter for the legal profession. Like the medical profession, which lobbied for the Choice of Doctors Scheme, the onus must rest on the law-merchants who, after all, in terms of prestige and public image, stand to gain substantially from increased access to the law by the citizenry.□

FOOTNOTES

1. Wexler: *Practising Law for Poor People,"* (1970) Yale Law Journal.
2. *"Legal Problems and the Citizen"* (1973) Abel-Smith, Zander and Brooke.
3. Quoted in *"Unequal Justice"* (1976), J.S. Auerbach.
4. *The Pringle Report, page 100.*

(This article first appeared in The Cork Review, June 1981 and is reprinted here with kind permission of the publishers).



"Just because it's in his own hand, Mrs Figmarsh, doesn't automatically make it a legal will."

(Reprinted with kind permission from Punch, 22 April, 1981)

District Court (Family Law (Protection of Spouses and Children) Act, 1981) Rules, 1981

THE new Family Law (Protection of Spouses and Children) Act 1981 became law on the 23rd July 1981 providing, inter alia, for a new system of Barring Orders and Protection Orders and for swifter and direct enforcement of same by the Gardai.

New District Court Rules entitled as above (S.I. Number 246 of 1981) lay down the practice of procedure and the appropriate Court Forms to operate the Act in the District Court.

The general lay out of the Rules and the Forms thereunder are similar to the previous 1976 rules and do not call for detailed individual comments. In general, they provide for the making of applications for Barring Orders and Protection Orders and for discharging and varying the same, and for the proper notification to be given to the Gardai as provided by the Act, with all the requisite Court Forms set out in the Schedule.

However, there are a number of important features in the Rules — particularly relating to service of documents — which deserve mention and which, from the Practitioners' point of view, will be of some practicable assistance.

In particular, Rule 11 provides that henceforth service of Summonses issued under the Rules will be effected by the District Court Clerk. Thus, the responsibility for effecting service has been removed from the applicant or his or her Solicitors.

Also, Rule 11 provides for service to be effected by means of ordinary pre-paid post, instead of pre-paid registered post which had hitherto become the principal mode of service. Clearly this is a very substantial change in practice which, it might be argued, is readily capable of working serious injustice on Respondent Spouses, particularly in the context of the type of proceedings involved. However, it will no doubt be equally argued that this provision will make for more effective protection for applicants spouses by substantially reducing the possibility of a respondent spouse avoiding service.

Rules 13 and 14 provide for the District Court Clerk posting a copy of the Barring Order, Protection Order or Order varying or discharging the same by ordinary post and for posting a copy thereof to the Local Garda Siochana by pre-paid registered post.

With regard to the question of which particular District Court shall have jurisdiction to entertain applicants under the Act, the Rules would appear to present an applicant spouse with a wider choice of jurisdiction than was hitherto the case. Under Rule 5 of the 1976 Rules (S.I. Number 96 of 1976) jurisdiction was determined by wherever "either party to the proceedings *ordinarily* resides or carries on any profession, business or occupation, "whereas under Rule 6 of the 1981 Rules jurisdiction is determined by wherever "the applicant spouse resides or where there is situate the place in relation to which the Barring Order is sought". Thus it would appear that, for instance, a wife taking refuge in a Women's Aid Centre would be entitled to issue a Summons for a Barring Order for hearing in the District Court Area District in which the Centre is situate, whereas under the 1976 rules she would not have been so entitled, this not being a place where she "ordinarily resides". This interpretation is, it is submitted, consistent with the word "ordinarily" being deleted from the new Rules, but clearly the question is arguable and may ultimately have to be decided by Court.

Finally, again in connection with jurisdiction, there is a possibility of confusion arising under Rule 7 in relation to applications for Protection Orders in the Dublin Metropolitan District. Rule 7 provides that where a Barring Order has been issued the Spouse may also apply ex parte for a Protection Order "at any sitting of the Court in the district court district within which the Summons was issued". Because the Family Law Office in Ormond House operates as the Court Office in family law matters for both the Dublin Metropolitan District and the District Courts in the County of Dublin it might be thought that a Spouse having issued a Summons for a Barring Order for hearing at, say Kilmainham District Court (District No. 11) might at the same time be entitled to apply ex parte to the District Court in Ormond House for a Protection Order. This, however, is not the case, and the application for a Protection Order would in fact have to be made at the Courthouse in Kilmainham or any other Court sitting in District No. 11.□

Table of Fees in Circuit Court Matters

The following Table of Counsel's Fees in the Circuit Court has been approved by the Bar Council to operate from the 1st October, 1981

Contract and Tort:
Fee on Brief (i) Plaintiff's Counsel where the amount or value of specific chattels recovered; or (ii) Defendant's Counsel where the amount or value of chattels sued for:

(a) exceeds £250 but does not exceed £500 — £38.95
(b) exceeds £500 but does not exceed £1,000 — £51.45
(c) exceeds £1,000 but does not exceed £1,500 — £68.25
(d) exceeds £1,500 but does not exceed £2,000 — £80.35

Fee on Settling Civil Bill or Defence, on Advising Proofs and on Consultation:-

Where the amount referred to above does not exceed £1,000 — £16.80
exceeds £1,000 — £21.00

Fee on Settling Counterclaim: — £5.25
Fee on Settling Notice for Particular of Reply thereto: — £11.55

Ejectments:
Fee on Brief (the appropriate scale is that applicable to the higher of two categories based on the Rateable Valuation or the Annual Rent).

R.V. does not exceed £25; Annual Rent does not exceed £1,500 — £42.00
R.V. exceeds £25 but does not exceed £50; Annual Rent exceeds £1,500 but does not exceed £3,000 — £52.50
R.V. exceeds £50 but does not exceed £75; Annual Rent exceeds £3,000 but does not exceed £5,000 — £88.20
R.V. exceeds £75 but does not exceed £100; Annual Rent exceeds £5,000 — £105.00
Fee on Settling Civil Bill or Defence, on Advising Proofs and on Consultation where the Brief Fee comes within either of the first two categories above — £16.80
Otherwise — £21.00

Fee on Settling Counterclaim, Notice for Particulars or Reply thereto as per Contract scale.

Equity Suits (1) Personalty Only
Fee on Brief where the value of the subject matter:-
does not exceed £1,500 — £38.95
exceeds £1,500 but does not exceed £2,500 — £51.45
exceeds £2,500 but does not exceed £3,500 — £68.25
exceeds £3,500 — £80.33
Fee on Settling Civil Bill or Defence, on Advising Proofs and on Consultation where the Brief Fee comes within either of the first two categories above — £16.80
Otherwise — £21.00

Fee on Settling Counterclaim, Notice for Particulars or Reply thereto as per Contract scale.

(2) Realty, but excluding Specific Performance
Note: Where the subject matter of an Equity Suit consists of both Personalty and Realty the fee appropriate shall be the fee applicable to whichever be the higher of the fee applicable to the Realty or Personalty respectively.

Brief Fee: Where the rateable Valuation:-

does not exceed £25 — £52.50
exceeds £25 but does not exceed £50 — £69.35
exceeds £50 but does not exceed £75 — £105.00
exceeds £75 but does not exceed £100 — £149.65

Fee on Settling Civil Bill or Defence, on Advising Proofs or on Consultation where the rateable Valuation does not exceed £50 — £16.80
Otherwise — £21.00

Fee on Settling Counterclaim, Notice for Particulars or Reply thereto as per Contract Scale.

(3) Specific Perfomance
Where the value of the subject matter mentioned in the alleged Contract does not exceed £10,000 — £52.50

exceeds £10,000 but does not exceed £20,000 — £69.35
exceeds £20,000 but does not exceed £30,000 — £105.00
exceeds £30,000 but does not exceed £40,000 — £149.65
suitable increases where the amount exceeds £40,000

Fee on Settling Civil Bill or Defence, on Advising Proofs or Consultation where the amount above does not exceed £20,000 — £16.80
Otherwise — £24.15

Fee on Settling Counterclaim, Notice for Particulars or Reply thereto as per Contract Scale.

Note
Where a Contract relates to development land Counsel may take into account the development value of the lands.

Probate
The fees appropriate to Probate Actions shall be the equivalent to the appropriate Equity Scale fee.

Malicious Injuries
Fee on Brief where the amount recovered in the case of an Applicant or the amount claimed in the case of a Respondent:-

does not exceed £250 — £26.25
exceeds £250 but does not exceed £1,000 — £44.00
exceeds £1,000 but does not exceed £3,000 — £63.00
exceeds £3,000 but does not exceed £5,000 — £84.00
exceeds £5,000 but does not exceed £10,000 — £105.00.

Fee on Advising Proofs or Consultation:
Where the amount above does not exceed £1,000 — £10.50
for each £2,000 or part thereof extra £3.15 but not, in any case to exceed £26.25

Landlord and Tenant Applications
Fee on Brief where the rent agreed or fixed, or compensation agreed or awarded:-

does not exceed £250 — £26.25
exceeds £250 but does not exceed £500 — £42.00
exceeds £500 but does not exceed £1,000 — £68.25
exceeds £1,000 but does not exceed £2,000 — £84.00
exceeds £2,000 but does not exceed £3,000 — £105.00
exceeds £3,000 but does not exceed £5,000 — £141.75
exceeds £5,000 pro rata

Fee on Settling Notice of Application or Notice or Intention to Claim Relief — £12.60
Fee on Advising Proofs or Consultation — £18.90

Note: Where an Application is rejected the amount shall be 150 times the Rateable Valuation of the premises.

Hire Purchase
Where the amount recovered, or in the case of the recovery of a specific chattle the balance outstanding under the agreement or, in the case of a Defendant the amount claimed:-

does not exceed £250 — £25.20
exceeds £250 but does not exceed £500 — £42.00
exceeds £500 but does not exceed £1,500 — £68.25
exceeds £1,500 — £94.50.

Fee on Civil Bill, Defence, Advising Proofs or Consultation where the case comes within either of the first two categories above — £16.80
Otherwise — £21.00

Fee on Counterclaim, Notice for Particulars or Reply thereto as per Contract Scale.

Motions
Motion ex parte — £16.80
Motion on Consent — £16.80

Motions for Judgment, Motions for Interlocutory Relief where the case comes within the first two categories in respect of any type of action — £19.95
Otherwise — £29.40
All other Motions — £16.80

District Court Appeals
Where the amount recovered or, in the case of a Defendant the amount claimed:-
exceeds £100 but does not exceed £175 — £29.40
exceeds £175 — £34.65
In Ejectments — £31.50
Consultations — £12.60

Miscellaneous
Preliminary Opinions — £15.75
Advices on Settlement — £15.75
Notice of Motion — £10.50
Principal Affidavits — £21.00
Supplemental Affidavits — £12.60
Third Party Notices or Indemnity Notices — £15.75

Solicitors and the Bar

A precis of the address given

by

Niall McCarthy, Senior Counsel

Chairman of the General Council of the Bar of Ireland, to the Society's Annual Conference at Waterville, County Kerry, on 7th May, 1981

A Bifurcated Profession

A common stem or root requires or, at least, makes desirable the provision of a common educational policy in at least the elements and rudiments of law and legal practice.

The acquisition of legal knowledge in, say, tort, contracts, land registry, conveyancing, crime, equity and the like are, surely, capable of joint learning. It was so, in my student days at University College, Dublin, and, I believe, elsewhere. It is so in the obtaining of a degree in Law in the National University and in Dublin University. Whilst the systems of education and qualification for both branches of our profession now require third-level education, this is not to say that the teaching of law beyond the third level cannot usefully be combined between both branches. One must recognise that a stage will be reached where the two prongs of the legal implement must go their separate ways — the degree of separation not being free from certain grey areas — but, generally speaking, there is on the part of the apprentice solicitor a concentration on the administration of an office and dealing with various other offices, both those of fellow solicitors and the public and court offices, while on the part of the student barrister, the emphasis is on the presentation of court work and in time, the study, research and experience that will tend to give him or her a more specialised knowledge in particular fields.

If the stem remains sound there is no reason why the profession, in its two aspects, cannot remain equally sound and true to itself, as well as to the public. It demands, however, that each branch should recognise problems of the other; should try to avoid petty criticisms; should seek, together, to remedy defects; should abandon any form of siege mentality vis-a-vis the other branch of the profession or such other bodies or persons as may tend to mount attack. It is not uncommon for newspapers to publish criticisms of the law and lawyers — ranging from comments on the delay to comments on the charges. Many of these comments come from the convenient recipe of arrogance and ignorance. The profession, as a whole, I suggest is not helped when such comments are made by members of the profession itself, on matters of particular kind about which they know little or nothing.

Fusion

The common argument in favour of fusion in our profession is that of reduced cost. There is, however, nothing to show that the cost of litigation in jurisdictions where the profession is unified is any less than it is here. Would it be more efficient? The common experience is that, in fact, whether or not the profession is unified, the individual members tend to do the work either of a Solicitor or a Barrister. Where two minds or two sets of minds are brought separately to bear upon the presentation, analysis and resolution of a problem, it is likely although, I hasten to say, not invariably, to be the case that the resolution will be the better of it.

It is not my purpose to enter into an analysis of the various arguments against fusion — suffice it to say that they are not limited to the well-worn ones of the problems for country Solicitors, the independence of the Bar, the influence of corporate bodies or the State, but extend also to such considerations as the continuity of trial; the presumption of ignorance on the part of the judiciary — this is no idle or joking matter — it seems to me to underly the duty that lies upon Counsel to inform the Court of all relevant law, including precedent and Statute, irrespective of whether or not that law favours his particular client's case — this seems to be based upon an assumption that the Judge knows no law; the exact converse is the case in Continental Europe where, indeed, cases have been decided upon legal issues which were not even the subject of argument, much less pleading — what appears to me to be a most unsatisfactory method of administering justice, if it can be called justice at all; it appears to infringe the first principle of natural justice — *audi alteram partem,* if not also the second — not to be a Judge in their own cause. What is one being other than a Judge in one's own cause, if the case is decided by the Judge upon a point that was not taken by the other side and which the losing party never had the opportunity of answering?

Continuity of trial depends, in part, on the availability of Counsel. In a fused profession, it would seem to me that great difficulties would be met in achieving this. I do not know exactly what the situation is in the United States, but the simplest of trials there seem to take an unacceptably long time in Court. Let me and, indeed, you, discard fusion, attractive though it is for those of my years to contemplate entering into a partnership in a law firm with consequent pension and insurance advantages!

Future Law

Let us, in both branches of the profession, play our part; let us not merely use the law and the legal system as we know it, but let us seek to influence it in a particular way, to guide it along developing lines, to appreciate that we should not merely react to proposed changes in the law, but actively seek to improve it for the good of the community as a whole and the good of our profession in particular.

During the next decade, the rate of technological

achievements will speed up to a frightening degree. It is not long since a computer filled a room; now there are computers that would barely fill one's hand.

Data Processing, Word Processing, all manner of computer sciences, are expanding at a hectic rate. We cannot allow ourselves to fall behind in matching the achievements of commerce in meeting the demands that these achievements create. Justice delayed is justice denied, but a rush to Judgment is not the solution for weighty problems. The ready reference programme from the computer cannot supplant analysis by intellect — no sausage machine can reproduce refinements of flavour; and the need for dialectic in debate — profundity in argument and in submission will remain.

A more frightening aspect of our age, not for the legal profession alone, but for the public at large, is the growth of computerisation, the end result of which, within a relatively short time must be, in the absence of controlling and enforced legislation, the laying of the foundation of a Police State — a computerised filing system covering every citizen. This vision of 1984 is far from unreal. Many financial institutions — Banks, Insurance Companies, Hire Purchase Companies, are computerised. In effect, this means that every one of us with a Bank Account, an Insurance Policy, a Mortgage from a Building Society, an arrangement with a Hire Purchase Company, the recipient of Social Welfare benefits, the holder of Credit Cards, the user of Credit Accounts, is a computerised individual.

The day must come when all of these several sources of information, at present in relatively private hands, can become the subject of one great computer and the life of every citizen will, by throwing a switch, become an open print-out, available at the behest of whoever has control. The consequences are obvious — control of this information in anyone's hands is a terrifying prospect, in which bugging devices and concealed microphones would become irrelevant.

The Omniscient State

One cannot legitimately prevent the State from acquiring a modicum of knowledge about every citizen — the danger lies in the transfer of information from a variety of sources to one central area — the correlation of all of these sources together — and the consequent removal of all privacy from the private citizen. We must seek to provide legal safeguards in a computerised society with consequent control of access to information.

There is, in Ireland, no statutory restriction on the passing of information. To call the Constitution in aid would be a most complex and uncertain procedure it requires legislation and is a field in which our profession could and, I believe, should take a stand and make representation to the Law Reform Commission, to which body the contribution of this branch of our profession has not been overwhelming! This would be but one step in promoting the very laudable objective propounded by the Secretary of the Tipperary Sessional Bar Association, as cited in the Report of the late Sir Thomas Lund to the International Bar Association Conference in Dublin, in 1968:-

> "In my opinion, the lack of communication between the profession and the public is extremely serious. An enlightened communication service — or Public Relations service — to prevent the profession being constantly misrepresented to the general public, is a fundamental necessity for every Bar Association".

These observations by Mr. John Carrigan, some-time President of this Society, have even more force to-day than they had in 1968. If our profession were to promote legislation of the kind that I have suggested, it would be one step in the direction of securing a better image for the profession in the eyes of the public. So also, in very many other fields, I ask has our profession no view on such matters as abortion, euthanasia, access to the Courts, the legal education of the non-lawyer? The field is great; the time is running out. Rather than analysing the many petty disputes that arise between members of our Profession — Solicitors and Barristers — let us combine looking at the future of our profession with looking at the future of our country.

The Law may be an ever-inadequate human endeavour to divide justice, which is divine, into compartments, but let us not fail in contributing to the effort that should be made to afford a reasonable degree of justice for all.□

Presentation of Parchments

July 1981

1. Beattie, David H., 15 Silchester Park, Glenageary, Co. Dublin.
2. Binchy, David G., Glenview, Clonmel, Co. Tipperary.
3. Breen, Michael J., Main Street, Roscrea, Co. Tipperary.
4. Cogan, Catherine, Shannon Park, Carrigaline, Co. Cork.
5. Doyle, Isolde M., "Tantallon", 49 Newcastle, Galway.
6. Dunn, Edwina M., "Monte Coelio", Ard Mhuire, Park, Dalkey, Co. Dublin.
7. Egan, Ronald J., 41 Dun Emer Drive, Dundrum, Dublin.
8. English, Enda, "Hyleglass", South Circular Road, Limerick.
9. Farrelly, Donal, "Karneleigh", Charleville Road, Tullamore, Co. Offaly.
10. Flynn, Michael J., 85 The Cloisters, Mount Tallant Avenue, Dublin.
11. Gallagher, Joseph D., Ballymacool Upper, Letterkenny, Co. Donegal.
12. Gormally, Mary, 3 Richview Park, Rathmines, Dublin 6.
13. Griffin, Catherine M., Kilfoylan, Lower Glenageary Road, Dun Laoire, Co. Dublin.
14. Guerin, Denis, Muckross Road, Killarney, Co. Kerry.
15. Hanley, Aideen, "Rossbrin", 5 Eden Park Drive, Goatstown, Dublin 14.
16. Harris, Anthony S., 328 Harold's Cross Road, Dublin 6.
17. Hayes, Jan, "Crakaig", Killiney Hill Road, Killiney, Dublin.
18. Heffernan, Carolyn A., "Argard", 29 Kincora Road, Clontarf, Dublin 3.

Kevin O'Higgins with his father the Hon. T. F. O'Higgins, Chief Justice.

19. Hegarty, Michael J., 47 Roselawn Road, Castleknock, Dublin.
20. Hewetson, Ann, 2 Coolowen, Magazine Road, Cork.
21. Hughes, Catherine J., Allua House, Grange, Togher, Tuam, Co. Galway.
22. Ireton, Caitriona, "Cluain Meala", Castletroy, Co. Limerick.
23. Kelly, David, Curragh, Castlebar, Co. Mayo.
24. King, Niall P. T., Abbeyside, Dungarvan, Co. Waterford.
25. Lynch, William F., "Hisswood", Woodleigh Park, Model Farn Road, Cork.
26. Monahan, Michael B., "Ashleigh", Rosses Point Road, Sligo.
27. Morrissey, Patrick J., 11 Wellington Place, Dublin.
28. Murphy, John G., Ard Ordha, Circular Road, Dangan, Galway.
29. Murphy, Sarah, T., "St. Endas", Upton, Cork.
30. Murtagh, Noel F., Cavan, Co. Cavan.
31. McNeilis, Neil, 11 Maretimo Gardens East, Blackrock, Co. Dublin.
32. McSparran, Patricia, 5 Mellifont Avenue, Dunlaoghaire, Co. Dublin.
33. Nugent, Clodagh, 34 Park Drive, Rathmines, Dublin 6.
34. O'Brien, Ann M., Owvaun House, Ballyhahill, Co. Limerick.
35. O'Carroll, Martin D., Mount Danville, Kilkenny.
36. O'Cathain, Diarmaid, 20 Beaumont Crescent, Ballintemple, Co. Cork.
37. O'Connor, Laurence, Gurthreeva, Oughterard, Co. Galway.
38. O'Connor, Michael, Mabestown House, Malahide, Co. Dublin.
39. O'Connor, Peter, 33 Eglinton Road, Donnybrook, Dublin 4.
40. O'Donovan, Carole, "Rossa", Hettyfield Park, Douglas Road, Cork.
41. O'Higgins, Kevin, "Jerpoint", Elton Park, Sandygrove, Dublin.
42. O'Reilly, Ronan V., "Oriel Villa", Clogherhead, Louth.
43. O'Sullivan, Anna M., Weir View, Islandbridge, Dublin.
44. O'Sullivan, Donal, 20 Terenure Road East, Rathgar, Dublin.
45. O'Sullivan, Oliver, Canal House, Ardrostig, Waterfall.
46. O'Sullivan, Philip, Barna, Co. Galway.
47. Prentice, William P., Nendrum, Knocksinna, Dublin.
48. Quinlan, Michael, 1 Sloperton, Dun Laoghaire, Dublin.
49. Shanahan, Thomas, Oriel Court, Ballincollig, Cork.
50. Shaw, Jennifer V., Brownstown, Monasterboice, Co. Louth.
51. Shields, Vivienne, 4 Victoria Road, Clontarf, Dublin.

52. Spelman, Brian, P., Roselawn Avenue, Castleknock, Dublin.
53. Timmons-Kiely, Mary, 27 Tara Court, Letterkenny, Co. Donegal.
54. Torsney, Gerard F., 27 Coulson Avenue, Rathgar, Dublin.
55. Walsh, Elizabeth C., Carriglea, Bandon, Co. Cork.

Companies: Lifting the Veil?

(continued from p. 153)

knowledge that it is, under its fixed charge, going to have a first claim on the most saleable assets of the Company in the event of a collapse, it is not uncommon for such lending institutions to display a cavalier attitude to the financial position of the Company until the crisis arises. In contrast in European Countries where the doctrine of the floating charge does not exist Lending Institutions on advancing credit to trading companies frequently seek a share in the Company's equity and demand the right to appoint a Director to the Board. In this way the Lender is privy to the Company's trading position at all times and is in a position to suggest or require remedial action at a time when such action can usefully be taken.

The situation arising subsequent to the appointment of a receiver has attracted further criticism. Such a receiver holds an anomalous position in that he is primarily answerable only to his Appointer. His presence on the Company's premises and his taking control of the assets and affairs of the Company usually results in the directors of the Company finding themselves wholly at the mercy of the Receiver as far as access to the companys premises and records is concerned even though their obligations in respect of the Company under the Companies Acts are not diminished to any great extent by the appointment of the Receiver. The position of the ordinary trade creditors in a receivership is a most unhappy one. The Debenture Holder will normally have a fixed charge over the Company's property giving it first priority on any sale of the companies assets and it is common to find substantial "Super-preferred" and "Preferred Creditors" P.R.S.I. V.A.T. and other Revenue Claims and wages in for substantial amounts while receivers fees are not noted for their modesty. In such situations the position of the ordinary creditor is usually disastrous.

So great is the benefit conferred by incorporating a trader that it would not be at all unreasonable for much more stringent requirements to be imposed. There ought to be an obligation on the promotor of a new company to subscribe a fixed capital sum of not less than £10,000. Ideally some provision ought to be made for the maintenance of such capital during the life of the Company, but it has to be admitted that the realisation of such a name presents considerable practical difficulties.

There is an obvious need to improve the system for inquiring into the manner in which the affairs of failed companies have been carried on by their directors. At present, if the failed Company's assets are too small to fund a liquidator's expenses, any inquiry must be financed by the unfortunate creditors. Consideration should be given to the establishment of an Official Receiver on the U.K. model, who would be available to act as a liquidator of wholly and solvent Companies and thus enable enquiries into the conduct of their affairs to be made.□

Election of Young Solicitors to Council?

There are many problems facing young solicitors to-day not least of which are

(a) Low Salaries, after several years of study and in many cases working apprenticeships, and
(b) frustrating working conditions.

Many people have complained that the Council of the Incorporated Law Society of Ireland is removed from the problems facing young solicitors. Some have suggested that the Society of Young Solicitors ought to tackle the problems of young solicitors.

However, the Law Society cannot do this as it does not claim to represent the views of young solicitors, nor does it have any mandate from them. Notwithstanding that the Law Society has the best interests of young solicitors at heart and shows this by providing lectures and a forum for discussions on recent developments in the law, the Society's role has been in the field of legal education only, and the Society has not for a long while been involved in promoting other matters of concern to young solicitors, in particular, the areas of remuneration and conditions of work.

The Law Society on the other hand may be said to represent the voice of the profession as a whole. It does claim to have the interests of the whole profession at heart. However, it may be said that the Council, being the democratically elected body of the Society does not, as presently elected, adequately represent the views of young solicitors but this may very well be because young solicitors themselves do not seek election.

The Council elections take place in November and it is the view of the Committee of the Society of Young Solicitors that the Council should be made to reflect adequately the interests and concerns of the young solicitors. However, it it up to you, the young members of the profession, to seek adequate representation for your interests on the Council by supporting candidates who will be your spokesmen or spokeswomen on the Council.

Officers and Committee

Officers and Committee of The Society of Young Solicitors for the year 1981/82: Chairman: Tom O'Connor; Treasurer: John Lynch; Secretary: Petria McDonnell. Committee: Marcus Beresford, John Bourke, Claire Callanan, Paul Clune, Carol Fawsitt, Michael G. Hayes, Phil McCarthy, Peter Morrissey, Owen O'Connell, Donal O'Hagan, Norman Spendlove, William White.

Continuing Legal Education

NOTICES:

1. Autumn 1981 Programmes for Solicitors qualified 2 years or less is now available.
2. The 1982 Programme: Details in Next Issue.
3. Wills and Taxation Planning (Messrs. Robert Johnstone, Solicitor, John O'Connor, Solicitor and Colin Chapman, Solicitor.) Tralee, 28 Nov. 1981 with Kerry Law Society. Fee £25.00. Apply to Prof. L. G. Sweeney, Inc. Law Society, Blackhall Place, Dublin 7. Telephone 710711.

Golf

On Friday, 26th June last, at the instigation of Andrew F. Smyth, President of the Dublin Solicitors' Bar Association, the first blows were struck in what promises to be yet another facet of practice designed to help polarise the separate branches of the legal profession! On that date, teams representing the Bar and the Dublin Solicitors' Bar Association battled at Portmarnock Golf Club for a perpetual challenge cup to be known as the "Sol-Bar Trophy".

The Dublin Solicitors' Bar Association team comprised: Pat Treacy (Captain of the Solicitors Golf Society), Andrew F. Smyth, Andrew Curneen, Gerard Walsh, Ernest Margetson, Noel T. Smith, Enda Marren, Column McKeown, Colm Price, Paul McLoughlin and John Maher.

The Bar was represented by: Patrick Geraghty, S.C. (Captain of the Bar Golfing Society), Kevin Lynch, S.C., Seamus Egan, S.C., Henry Hickey, S.C., Vincent Landy, S.C., Eoghan Fitzsimons, S.C., Hugh O'Flaherty, S.C., Liam Devalley, B.L., Ian Brennan, B.L., Ray Fullam, B.L., and The Honourable Mr. Justice Rory O'Hanlon, S.C.

The overall result was a win by the Solicitors by four matches to two.

Later, at a delightfully informal gathering at the Law Society, the formal presentation of the Cup was made by Andrew F. Smyth, President of the Dublin Solicitors' Bar Association, to Mrs. Moya Quinlan, President of the Incorporated Law Society of Ireland. The attendance included Mr. Justice O'Higgins, Chief Justice, and Mr. Raymond O'Neill, S.C. The presentation was followed by a meal and some refreshments, both light and heavy and a most enjoyable evening was highlighted with entertainment by those present.

A return match is contemplated for 1982, with the Bar vowing vengeance. □

Correspondence

"Occupiers' Rights: A New Hazard for Irish Conveyancers?"
(June Gazette, 1981. Vol. 75, No. 5).

Dear Sir,

Since the above article was published, I have read the unreported case of *K. v. K.* in which not only the *Northern Bank* case but the *Williams & Glyn's* case was relied on by the wife who was plaintiff. In his judgment delivered on the 17th October 1980, Mr. Justice Barrington declined to apply the principles in these cases when dealing with a commercial property and with the wife in her capacity as a trader. When the wife enters into the market place trading with property which is not the matrimonial home, then, it appeared to his Lordship that the social considerations stressed in these cases have not application.

Whilst this case will be greeted with some relief by conveyancers, other commentators are likely to have different views.

Yours faithfully,
J. M. G. Sweeney

Photograph includes Mrs. Moya Quinlan, President of The Incorporated Law Society of Ireland, the Hon. T. F. O'Higgins, Chief Justice, Mr. Raymond O'Neill, S.C.; Solicitors team: Pat Treacy (Captain), Andrew F. Smyth, Andrew Curneen, Gerard Walsh, Ernest Margetson, Noel T. Smith, Enda Marren, Colum McKeown, Colm Price, Paul McLaughlin, John Maher. Bar team: Patrick Geraghty (Captain), Kevin Lynch, Seamus Egan, Henry Hickey, Vincent Landy, Eoghan Fitzsinons, Hugh O'Flaherty, Liam Devalley, Ian Brennan, Ray Fullam, and the Hon. Mr. Justice Rory O'Hanlon, S.C.

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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 25th day of September, 1981.

W. T. MORAN (Registrar of Titles)
Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

1. Registered Owner: Annie McGarry. Folio No: 2489. Lands: Aghoos. Area: 15a. 2r. 30. County: **Mayo**

2. Registered Owner: Michael Kearns (Junior). Folio No: 1368F. Lands: Part of the Townland of Threecastle situate in the Barony of Talbotstown Lower. Area: —. County: **Wicklow.**

3. Registered Owner: Kathleen O'Malley. Folio No: 14427. Lands: (1) Ballynageeha (Part), (2) Bushfield (Part). Area: (1) 19a. 2r. 7p., (2) 27a. 3r. 38p. County: **Galway.**

4. Registered Owner: Vincent Hanelly. Folio No: 3154. Lands: Cloonconra (Part). Area: 42a. 3r. 10p. County: **Roscommon.**

5. Registered Owner: David Dahill. Folio No: 2983. Lands: Kilmurry. Area: 51a. 0r. 36p. County: **Tipperary.**

6. Registered Owner: Charles J. O'Doherty. Folio No.: 3032. Lands: Lorrha. Area: 28a. 0r. 13p. County: **Tipperary.**

7. Registered Owner: James Quinn. Folio No: 4048R. Lands: (1) Cashelard; (2) Cashelard (three undivided thirty sixth parts); (3) Cashelard (three undivided twelfth parts); (4) Corlea (three undivided twelfth parts). Area: (1) 12a. 3r. 5p.; (2) 460a. 1r. 38p.; (3) 6a. 1r. 4p.; (4) 3a. 2r. 36p. County: **Donegal.**

8. Registered Owner: Thomas F. Crammond. Folio No: 382. Lands: Ballycooleen. Area: 1a. 2r. 24p. County: **Wicklow.**

9. Registered Owner: James Francis Quinn. Folio No: 9488. Lands: Dromore (Parts). Area: 35a. 0r. 4p. County: **Leitrim.**

10. Registered Owner: Patrick McCann. Folio No: 1914. Lands: Monksland. Area: 1a. 0r. 8p. County: **Westmeath.**

11. Registered Owner: Mary A. Curran and Michael Curran. Folio No.: 148L. Lands: Commons North. Area: 0a. 1r. 0p. County: **Longford.**

12. Registered Owner: John McCauley. Folio No.: 4052. Lands: (1) Cashelard, (2) Cashelard (12 undivided 36th part), (3) Corlea. Area: (1) 28a. 2r. 39p.; (2) 460a. 1 r. 38p.; (3) 1a. 3r. 34p. County: **Donegal.**

13. Registered Owner: Thomas Martin. Folio No.: 14717; Lands: Mullantlavan; Area: 20a. 2r. 35p. County: **Monaghan.**

14. Registered Owner: Catherine F. Clarke. Folio No.: 12374. Lands: Bawnacarrigaun. Area: 1r. 6p. County: **Waterford.**

15. Registered Owner: The Dublin General Warehousing Company Ltd. Folio No.: 244. Lands: North Wall. Area: ——. County: **City of Dublin.**

16. Registered Owner: Ivan S. Barrett. Folio No.: 9971. Lands: Kilbride. Area: 1a. 1r. 1p. County: **Wicklow**

17. Registered Owner: Peter Scanlon. Folio No.: 4265. Lands: Cloonfadda (Barony of Tulla Lower). Area: 19a. 3r. 33p. County: **Clare**

Lost Wills

Sir Ernest William Davis Goff, deceased, late of Inishannon Hotel, Inishannon, Co. Cork, Baronet. Will any person having knowledge of the will of the above named deceased who died on the 26th March, 1980 please contact Messrs. Kenny Stephenson & Chapman, Solicitors, Newtown, Waterford.

Thomas Kenaney deceased late of Corner House, Patrick Street, Tullamore, County Offaly. Will any person having knowledge of a Will of the above named deceased who died on the 18th day of March 1981, please contact Brian P. Adams, Solicitor, Tullamore, Co. Offaly.

Annie Watts, deceased, late of 4 Loretto Road, Maryland, Dublin 8. Will any person having knowledge of a Will of the above named deceased who died on the 11th day of August, 1967, at her home, please communicate with Ronald J. Egan & Co., Solicitors, 41 Dun Emer Drive, Dundrum, Dublin 14.

Miscellaneous

Experienced Legal Secretary wishes to undertake typing from own home. Reasonable rates. Work collected and delivered if required. Box No. 018.

Squadron Leader (later Acting Wing Commander) Peter Tom Argyll Elliott Cairnes; Nancy Joyce Cairnes (his wife); Robert David Page. Will anybody having knowledge of the present or recent whereabouts of any of the above originally of "Fourwinds", Church Road, Holywood, Belfast, Northern Ireland (1942) but later (1949) of Stameen, Drogheda, Eire, please contact Messrs. Ellison & Co., Headgate Court, Colchester, Essex, CO1 1NP quoting reference DS/JK, as soon as possible.

The Profession

Neil Corbett & Co. As from the 4th of August, 1981, Neil Corbett has been practising as Neil Corbett & Co., Solicitors, 62 Main Street, Mallow, Co. Cork, Telephone Number (022) 22862.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 8. October 1981

ASSOCIATION INTERNATIONALE DES JEUNES AVOCATS (YOUNG LAWYERS INTERNATIONAL ASSOCIATION) XIX CONGRESS, DUBLIN, 24-28 AUGUST, 1981.

From left: Christian Dieryck (Past President, AIJA); Rolf Meurs-Gerken (First Vice-President, AIJA); Klaus Günther (Secretary General, AIJA); Marie-Anne Bastin (Treasurer, AIJA); Dick Spring, T.D., Minister for State; Eduardo Ruis de Luna Y Bruges (President, AIJA); Hon. T. F. O'Higgins, Chief Justice; Peter Sutherland, Attorney General and Michael Carrigan, Solicitor.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 8. October 1981

In this issue .....

Published at Blackhall Place, Dublin 7.

Comment .....

Tinkering with The Constitution

CONCERN must be expressed at what appears to be a well orchestrated campaign for the review of our entire Constitution. There may be a case for examining the provisions of a very small number of articles of a particularly political nature whose application may no longer seem entirely satisfactory. Many lawyers, for instance, would favour a review of the provision in Article 41.3.3 that governs the refusal of our State to recognise certain divorce decrees granted by Courts in other jurisdictions. This has led to a most unhappy situation in which many Irish people, frequently the non-moving party in a foreign divorce, are not aware or are unable to obtain confident advice as to what their present marital status is. Such an alteration would, of course, leave unaffected the principal provision of Article 41.3.2 that "no law shall be enacted providing for the grant of a dissolution of marriage."

If a Constitution is to be of lasting value to a State, it must be capable of being interpreted and re-interpreted in the light of contemporary mores and social situation. Our Constitution, like many others in the Common Law world, has as its fount the United States' Constitution. It is important to appreciate that this document, prepared, with its succeeding Bill of Rights, almost 200 years ago, has acquired only 16 amendments in the following 200 years, one of which was, of course, the repeal of the disastrous 18th Amendment, which introduced Prohibition. Whether the qualities of the United States' Constitution are to be attributed to the great legal skills of Madison and Hamilton or to the common sense of the farmers and merchants who made up the majority of the Constitutional Convention is of less significance than the fact that their product has proved a sufficiently flexible instrument as to require such little amendment.

Our Courts have interpreted our present Constitution in ways which might not necessarily have pleased its begetters and, on occasion, have restrained our legislators from excesses by invoking the Constitution as a shield against the supremacy of Parliament. Thus our Constitution has served us well.

There should be no question of altering those provisions of the Constitution which have already been the subject of profound judicial consideration and interpretation over the past forty years.

A Constitution is neither a toy for politicans to play with nor a scapegoat for political failure. Our people have twice rejected an attempt to deprive them of what they rightly believed to be as fair an electoral system as exists in the world.

It is to be hoped that they would similarly reject unnecessary tinkering with our present workable document. There are more urgent tasks facing our political leaders. □

The Entitlement of the Mentally Disabled

(Paper to the Incorporated Law Society Symposium, "The Mentally Handicapped and the Law", 27th June 1981)

by

Dr. Jim Behan
Consultant Psychiatrist, Eastern Health Board

"No man is an island . . .
for each man's death diminishes me"
John Donne

THESE well known lines provide a useful introduction to this paper for they remind us that any discussion on the rights of the individual mentally disabled person and his position in society today is, at the same time, a diagnostic enquiry into the present state of society itself. It is generally unrecognised but nonetheless a fact that the treatment of its vulnerable minority groups, such as the mentally ill, the mentally handicapped and the elderly, is in itself an index to the degree of development and civilisation of that society. If we consign such minorities to private islands of isolation, loneliness and alienation, where they are beyond our interest, awareness or concern, then not only is the rest of society diminished by their psychological death but it rests on an insecure, false foundation.

As a starting point, it is fair to say that the mentally ill person should, as far as his illness or incapacity permits, be entitled to the full range of basic civil and human rights enjoyed by others. That these rights are subject to modification by virtue of his condition is evident but, when any basic rights are temporarily lost or suspended, such as the right to freedom, it is important to note that the mentally disabled person acquires other rights as a result. In addition to the basic rights enjoyed by others, as a member of a vulnerable minority by virtue of his illness or handicap, it is my belief that the mentally disabled person is particularly entitled to certain other rights.

Generally these may be described as an entitlement to an adequate and minimum level of care, treatment and rehabilitation to a degree that is appropriate to his condition and which, in the light of present day knowledge of psychiatry, is calculated to enable him to function to the best of his potential and capacity. The mentally disabled person is entitled to expect that this process of care, treatment and rehabilitation will take place in an appropriate range of facilities, provided to the best extent possible by the informed and balanced utilization of the maximum amount of available resources.

The implications of such a tentative definition are that the mentally disabled person is also entitled, both in his living situation and throughout the treatment process, to the retention and enhancement of his human dignity, privacy and of his need for support, shelter and, as appropriate, progression through a range of treatment and rehabilitation facilities. He is entitled to participate, or to refuse to participate, in the treatment process on the basis of informed consent and, even before entering the treatment process, where his entry is not by his own volition, he is entitled to judicial protection to ensure the appropriateness and correctness of the committal procedure. Finally, where he is deprived of his freedom on the basis that he requires treatment, it is increasingly clear that the institution in which he is confined must provide for his treatment actively and not merely operate as a place of passive custodial care.

What is required to meet these requirements?

As a corollary to the statement that the mentally disabled have the rights defined above, in a well ordered and developed society there would exist a reciprocal obligation and duty upon the State to provide for these rights. In my opinion, that extends to the clear obligation to utilise its resources in an informed and balanced manner so as to provide an adequate and minimum level of care and treatment services and facilities, based on modern advances in psychiatry and, to the widest extent possible, by the equitable distribution of available resources.

Assuming that there had existed in this country the social and political will to meet the entitlements of the disabled, the institutionally oriented mental hospital system which yet prevails here would long since have given way to the development of a comprehensive community-based approach.

The concept of a community-based psychiatric service is no longer new or progressive in enlightened societies. Developments in psychiatric treatment and techniques of intervention over the last 25 years have transformed the outlook for the mentally ill, enabling a community-based psychiatric service to become standard practice. Basically, such a service consists of the decentralisation of the various treatment functions from the traditional large mental hospital and its reorganisation on a more local geographical basis to provide for a more efficient, humanitarian and ultimately more economical delivery of mental health care. In the modern alternative community-

based approach, the range of treatment functions which previously were practised in the restricted setting of a mental hospital are reorganised around population sectors of 100,000 people. Each such area is served by a multi-disciplinary psychiatric team operating from a comprehensive range of facilities in their area which, in their totality, provide a more effective range of treatment services. These include small in-patient units to cater for acute, medium and longer-stay patients, together with a full range of residential and day-care facilities such as day-hospital, day-treatment centres, group homes, sheltered workshops and rehabilitation services.

And here perhaps the truth of Donne's insight is relevant. The kind of society that it would have taken voluntarily, by political and social will, to meet the entitlements and rights of the mentally disabled would, by definition, have been a more open minded and truly liberal society which, whilst pursuing economic prosperity, would at the same time have promoted and fostered the development of other humanitarian values to enhance personal worth, happiness and fulfilment.

It will be evident that all I have described up to now is the ideal that ought to exist where the rights of the mentally disabled are met by a State which is willing to recognise and undertake its responsibilities on behalf of a society whose value systems encourage it to do so. As such, it constitutes an ultimate objective to be obtained in the development of a psychiatric service, in the promotion of the rights of the mentally disabled and in the development of a better society. It also constitutes a yardstick against which to measure the existing position for the mentally disabled; to realise the inadequacy of the treatment services currently available to them; to appreciate the refusal by the State either to recognise or honour its obligations to the mentally disabled and to appreciate the apparent indifference with which society excludes them from its conscious awareness. The reality of the position in which the mentally disabled find themselves is quite at variance with their rights; it is disturbing and damaging, not just to them, but to the very structures of society itself.

The Mental Hospital Scandal

There are between thirteen and fourteen thousand people who are inmates of our mental hospitals. The magnitude of this can be understood better when it is realised that this is the population equivalent of a good-sized Irish town and comprises several times the total prison population in the country. By international standards, it represents an exceptionally high proportion of people hospitalised for mental illness. Usually taken to indicate a high national rate of mental illness, in fact this figure represents the result of a total reliance on, and overuse of, mental hospital beds because of the lack of alternative community-based residential and treatment facilities outside the mental hospital.

The thirty six mental hospitals scattered throughout the country are, for the most part, grim, forbidding institutions which have a profoundly depressing effect on the casual visitor. It is in such prison-like institutions that we, as a society, have locked away and forgotten people whole sole transgression is that they suffer from an illness which is better dealt with in alternative facilities. Many are mentally handicapped. Many more are infirm, elderly persons, guilty of little more than reaching old age in a social order in which, because there are not adequate support services available and because their families lack the resources to help them endure a natural condition with dignity, they are incarcerated in the only space available and in conditions never designed for them. With such a policy of disposal and containment in operation, the radical criticism both within and without psychiatry that society in this country is using the mental hospital as a "human garbage pail" has an inescapable ring of truth.

To make matters worse and in rebuttal of any claim that this policy is at least humanitarian, the institutions which are incorrectly used to contain these people are, with few exceptions, grossly substandard. The physical conditions of the hospitals in which we treat our mentally ill are largely those of neglect, deterioration, overcrowding and squalor. Consequently they induce widespread secondary demoralisation and apathy, despite the best endeavours of a caring staff. The very existence of such appalling conditions is a major public scandal. Their quiet acceptance by society and their perpetuation for years by the institutions of central government represents a damning indictment of our failure, in sixty years of national independence, to use our available resources of wealth and manpower to create an equitable social order.

The alternative to this, the development of a community-based approach, has already been identified. The reorganisation of treatment services on such a community basis has considerable practical advantages over the institutional approach. It enables earlier and more therapeutically effective diagnosis of mental illness and related disorders to take place, producing better rehabilitation and reintegration into family, work and community life. It can deal just as effectively with the serious psychiatric disorders which formerly had to be dealt with in the traditional mental hospitals. By its integration and interaction with the community, it is better equipped to respond to the problems generated by the stresses and strains of modern life. These produce a wide range of conditions, such as personal and family stress or breakdown, which show themselves in various indices of social pathology, including high rates of alcoholism and absenteeism, at considerable cost to industry and the exchequer.

Ten years ago the estimated cost of implementing a community psychiatric service in the Eastern Region, covering about one third of the national population, was in the region of £2 million. The plan was turned down and, in the meantime, little has been done other than to spend the cost of the alternative community service many times over in trying, unsuccessfully, to maintain antiquated and decaying institutions whilst the cost and need for the alternative service continues to grow. Nevertheless, the development of a modern community psychiatric service is not particularly expensive in the context of present day health services. A once-off capital investment of some £30 million, spread over three years, would provide such a comprehensive service in the Eastern Region. This compares favourably with an estimated expenditure in the same Region over a like period of some £150 million for four new general hospitals and a third new medical school. In other words, the cost of providing a total comprehensive psychiatric

service for one third of the national population is the financial equivalent of just one of these new general hospitals.

There is international evidence available to show that countries that had a similar long-stay psychiatric problem in their mental hospitals and in which the alternative community-based psychiatric service was subsequently implemented, the long-stay population has been cut by over 80%, falling to a few hundred long-stay in-patients. Applying such knowledge to our national long-stay mental hospital population of some thirteen to fourteen thousand people, we can see just one measure of the unnecessary human and financial cost of an outmoded institutional approach to the care and treatment of the mentally disabled. *In simple financial terms, at today's prices the cost of keeping one long-stay patient in a mental hospital throughout his life is approximately £¾ million.* A community-based psychiatric service, underpinned by adequate facilities, will not only minimise the unproductive cost to the exchequer inherent in our existing institutional system, but is highly likely to reintegrate people into a community and working life with personally fulfiling and economically viable attributes, such as the growth of personal autonomy and responsibility.

As well as the financial cost of perpetuating an out-dated institutional approach to psychiatric care, in human terms alone it has been internationally recognised for many years that prolonged and unnecessary confinement in a mental hospital actually destroys the benefits in treatment brought about by modern developments in psychiatric therapy. These can bring the treatment of patients to a certain level, but when it is necessary to progress the patient to a range of community-based rehabilitation facilities and when these are not available, resulting in the long-stay detention of a patient in hospital, then that patient's therapeutic progress is reversed. Such patients deteriorate into the pathological condition of being "institutionalised". This chronic state of demoralisation, apathy and total dependency on the institution and its staff destroys any sense of personal identity, self confidence or self-respect. It produces and continually reinforces a sense of failure in the patient, creating feelings of rejection and alienation from family and society. Paradoxically, this very condition, maintained and perpetuated by the current policies of the Department of Health, provides justification in the minds of the hidden decision makers that the right place for people with such a "hopeless" prognosis is, indeed, as an inmate of a 19th century mental hospital.

Given the clear knowledge that 19th century institutions cannot provide for modern treatment, that prolonged stay in such institutions is damaging and that comparatively inexpensive modern community alternatives are available, one must ask why have repeated plans for the implementation of these modern facilities been ignored and delayed by the Department of Health? Why do successive Ministers for Health and the Secretaries of their Departments persist in a 19th century policy of containment of the mentally ill, even though such a policy clearly infringes on basic civil rights, offends human dignity and negates the very purposes of treatment for which the person has been admitted and detained?

Responsibility — Why and how has this happened?

The genesis of the problem lies in the existence and perpetuation of a two-tiered health service in Ireland. Despite the common denominator that they are both run on tax payers' money, there is little co-ordination or integration between the services provided; these services cater for different sectors of the population and, up to now, have operated in very contrasting styles. The upper tier or "private sector" is largely comprised of those voluntary bodies and general hospitals which are under proprietary or private ownership. That they are the prestigious, fashionable and elitist section of the health services is not so much a criticism as a statement of fact which has to be recognised. This is a position which they have secured for themselves on the strength and efficiency of their organisation and the independence and autonomy with which they operate. These in turn are derived from the degree of local control and management over their own affairs which such voluntary bodies and institutions have acquired and jealously guard in their relations and negotiations with the Department of Health.

The lower tier "public sector" of the health service, run by the various Health Boards, is the direct successor of the Poor Law system in its administration, image, funding and clientele. Seriously and chronically under-resourced, it has to cope with the lower socio-economic groups and the poor of Irish society, amongst whom the mentally ill and infirm figure prominently. It is a fact that 90% of the thirteen to fourteen thousand long-stay inmates of Irish mental hospitals are catered for in the public sector. The public sector health service is statutorily obligated to provide, from increasingly inadequate resources, what progressively becomes an inadequate service for patients relegated to second-class citizenship in second-class Poor

MEDICO-LEGAL SOCIETY

The **October Meeting** will be held at **The United Services Club, St. Stephen's Green, Dublin 2** on **29th October, 1981,** at 8.15 p.m.

Topic: "Irish Coroner System — has it outlived its use-fulness?"

Speaker: Dr. Jack Harbison, State Pathologist.

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The **November Meeting** will be held at **The U.S.C.** on **26th November, 1981.**

Topic: "Keening for Forensic Science".

Speaker: Professor James E. Starrs, Professor of Law and Forensic Science, George Washington University, Washington D.C.

Law institutions. Despite that, it is important at this point to indicate that the answer to the problem is not to be found in reducing the role and operation of the private sector, for voluntary effort and local control over management of the service are essential ingredients of a good service. If anything, the answer lies in an upgrading of the public sector health service by the restoration to it of local control.

The explanation for the origin of our two-tiered health service and the apparently high rate of mental illness in this country both lie in the period of our colonial history. Since the dark ages, the nature of mental illness has always evoked fear and mystery. The requirements of a colonial administration inspired the building of enormous mental hospital institutions throughout the country. It is an interesting fact that the social stigma of mental illness is particularly strong in Ireland, just as the number of people we have locked away in our mental hospitals since those times is particularly high. I suspect that the explanation of these facts lies as much in particular aspects of the Irish character and personality which have been moulded and fashioned by the later centuries of colonial domination as in any innate propensities of the Celtic gene. Oppression, poverty, dispossession and depopulation by death and emigration resulted in an increase in such reactions as escape through alcohol, melancholic depression and schizophrenia — the psychosis of isolation and withdrawal. These, and other coping styles, such as learned helplessness and dependency evolved in response to this period of domination, were understandable in their day but are maladaptive in present times in an independent nation with a growing economy.

As a consequence, through the 19th century, a colonial administration responded to the social pathology and problems it had itself created by erecting the greatest per capita number of mental hospitals anywhere in the world to deal with an artificially produced "high" rate of mental illness. The Poor Law system which it had introduced to deal with widespread poverty eventually fused with the administration and image of the mental hospital system dealing, as they both did, with related aspects of the same colonially induced social pathology in Ireland. Because of the basic fear of mental illness and the Poor Law image, with its connotations of poverty and personal failure which have subsequently become attached to it, the sense of social stigma and self-protective withdrawal from contact with the mentally ill is particularly strong in this country.

Thus there can be no doubt that society as a whole has acquiesced in the continuation of these Poor Law attitudes to the mentally ill. It is necessary to create and maintain an increased level of public awareness and an informed social conscience if we are ever to be successful in dismantling the barriers of ignorance, prejudice and fear which unnecessarily typify society's attitude to the mentally ill.

It is a regrettable fact that because they, too, are members of society at large and share society's ignorance and fear of mental illness, our legislators and Health Department policy makers have likewise acquiesced in the perpetuation of Poor Law attitudes to the mentally ill. As such, they constitute a key group who have to be persuaded that their policy of institutional containment of the mentally disabled is an inefficient, costly and damaging policy. Until the psychiatric profession and other concerned groups succeed in persuading central government that this is so, the lot of the mentally ill looks bleak.

The cumulative effect of the lack of informed awareness of the lot of the mentally disabled at Department of Health level is clearly evident in the administrative structures which they have established and, in turn, in the distribution and utilisation of resources through these administrative structures. The Health Boards established 10 years ago were a noble concept and intended as a vehicle for local control over local health services. Unfortunately, they constitute a failed experiment, as the Department of Health has effectively centralised policy-making through total control of the allocation of resources in accordance with the Department's perception of policy and priorities.

As a consequence, there has been an imbalanced distribution of resources, reflecting the selective developments of the health service according to Departmental policy, with little regard for the requirements indicated locally by the Health Boards. Regardless of White Papers or other expressions of intent, policy is where the money is spent. Analysis of 10-year trends of expenditure in the health service, both Revenue and Capital, demonstrates clearly that there is a policy to develop the general hospital sector, on which expenditure is growing exponentially. Certainly general hospitals are necessary and required. But one has to ask upon what moral, upon what social, and upon what professional values are they apparently being built, to the exclusion of any development in the care of the mentally disabled. Indeed, corrected for inflation, it is quite apparent that the lot of the mentally disabled is growing considerably worse, rather than better.

The administrative structures within the Department of Health by which needs are identified and through which policy is formulated, are in urgent need of review. They do not reflect the needs of the weaker sectors of the community such as the mentally ill, the mentally handicapped and the elderly. Responsibility for this must ultimately rest with successive Ministers for health. It is a regrettable fact that there are few votes to be obtained behind the walls of mental institutions. The patients of the psychiatric and geriatric services, lacking a political voice or pressure group active on their behalf, constitute a disenfranchised and forgettable minority, who can be electorally ignored.

Instead of using the available resources for the development of a balanced health service, based on an informed and equitable social policy, our politicians and successive governments have been content to lead safely from behind, by responding to the sources of pressure which, naturally, translate into votes. As a result and particularly for those sectors of the health service which are not politically rewarding to politicians, too much hidden policy-making power has fallen on the shoulders of a civil service which was never structured for it and which is not publically accountable for it.

Turning to the role of professional staff in psychiatric service, it has become increasingly clear that the doctors and nurses who run the psychiatric service operate within a Civil Service structure. In this, by becoming officer-employees in a hierarchical administrative system, rather than by remaining separate contractors of their service,

they have abandoned their professional independence for a system which is not conducive to speaking their minds on the obvious inadequacies within it. Those who have raised questions of public importance in relation to their work and the care of their patients have, until quite recently, been censured for "bringing the service into disrepute". Usually failing to achieve the improvements they have sought for their patients, such staff have, on humanitarian grounds, felt compelled to continue treating them, even though in inadequate conditions. Whilst, until quite recently, this has produced a sense of defensive apathy on the part of staff, it is becoming increasingly clear that today's more professionally confident and independently-minded staff are no longer prepared to tolerate these restrictions at the expense of the better welfare and treatment of their patients.

The Solution

The single most important first step is a commitment by Central Government to a policy for the development and vigorous implementation of an alternative comprehensive community-based psychiatric and geriatric service which, in the best interests of a humanitarian and effective approach to patient care, will phase out unnecessary and excessive institutional containment of mentally disabled people.

Implicit in this policy is the requirement that Central Government have the courage to make an entirely fresh approach to the whole question of funding chronically under-resourced but socially important public sector facilities, such as the services for the mentally ill, the mentally handicapped and the elderly. By co-operation between Central Government, the Health Boards and the various voluntary organisations, it would be possible to arrange an investment programme financed along the lines of the public sector investment plan for the purpose of developing these services. Such an innovative approach is necessary to fund these Poor Law public sector services which have traditionally fared worse in the allocation of capital resources by the Government.

There is a need for considerable reform at administrative, political and legal level. The administrative and policy-making structures in the Department of Health must be revised so that the requirements of the mentally disabled are not ignored in the competition with stronger voices for available resources. At local level, greater autonomy for policy-making and effective control over resources and services must be returned to the Health Boards. Indeed, rather than see the present unsatisfactory system continue, it would be preferable to explore the possibility of extending the concept of "privatisation" of the public sector health service in a different way. Rather than seeing the public sector continuing at the bottom of a two-tier health service, it might be preferable to modify the role of the public sector so that it, too, can evolve into a number of different semi-statutory or voluntary-type bodies, with a responsibility for a defined area of service and control over management of the budget and service occurring at local level, under the supervision of local boards of management.

At a political level, the development of an egalitarian social order requires, in a spirit of pragmatic altruism, that politicians will give positive leadership in areas in which, up to now, there has been no apparent immediate political reward.

In conclusion, it is perhaps appropriate to turn to the potential role waiting to be played by the legal profession and the judicial process in securing and developing the rights and entitlements of the mentally disabled. As a member of a Health Board which has invested a considerable amount of time and energy of its members in planning the development of better services for the mentally ill, the mentally handicapped and the elderly, I have become progressively more frustrated and angry at the lack of response and, indeed, at the sustained resistance and opposition to change and improvements in the Mental Health Service demonstrated by the Department of Health. Convinced that the mentally disabled possessed the rights and entitlements which I have earlier articulated and confident that these rights were enshrined explicitly or implicitly in statutory law or in the Constitution, I decided to read the Health Acts and the Constitution.

The Health Acts, cumulatively, amount to a simple Catch 22 in which the Health Board is compelled to provide services, but in which its responsibilities do not extend beyond providing them to the level of resources provided by the Minister and his department. Conversely, the Minister and his department do not have the statutory responsibility to provide the services, only the resources, and therefore they do not seem to be liable for the deficiency in the service provided. It seemed a simple matter therefore to identify that article of the Constitution, which every schoolboy and schoolgirl knows is the keystone of fair play handed down to us by Pearse and his colleagues, in which the State "undertakes to cherish all the children of the nation equally". There turned out to be but one problem — to an amateur, and at first reading, there seemed to be no such article in our Constitution. To my amazement, somewhere between Padraig Pearse and the drafting of the first and second Constitutions of this country, such a fundamental concept was edited out of the Constitution — no doubt by a keen-eyed civil servant who anticipated well the trouble in which such frank idealism would land him and future Ministers in the decades ahead.

I believe that the series of Constitutional cases which have been heard in America in the past 7 years or so will prove to have a very significant bearing on the development of our mental health services. The landmark cases of *Wyatt v. Stickney, Donaldson v. O'Connor, Dickson v. Weinberger* and *Halderman v. Pennhurst* provide, at the most, case authorities for the guidance of Irish courts and, at the least, considerable encouragement that it is worth testing our Constitution in the courts to seek, if necessary, to vindicate the rights and entitlements of the mentally disabled.

These cases successively established that it was a "violation of the very fundamentals of due process" to deprive any citizen of their liberty for the purposes of treatment and then to fail to provide adequate levels of treatment; that a court could order a Government to finance the establishment of alternative care and treatment facilities; that a court could order a State to make plans to provide for the development of community services for residents in inhumane institutions; and that a court would uphold an action against professional staff in an institution in which a patient has been detained without

adequate levels of rehabilitation and treatment being provided.

It seems to me that if there should prove to be an absence of positive leadership which will give political recognition and expression to the rights and entitlements of the mentally disabled by enacting an amendment to the Health Act which will provide a "right to treatment charter", then the only safeguard that members of vulnerable minorities possess against the abuse of power will lie in recourse to the courts. Whilst I hope it will not be necessary for this to happen, if it does, I hope that our Constitution will prove to be sound and that the rights of the mentally disabled and other vulnerable minorities will be vindicated in an Irish courtroom, by an Irish Lord Denning and not in a European courtroom, by a European Lord Denning. □

INCORPORATED LAW SOCIETY SYMPOSIUM - "THE MENTALLY HANDICAPPED & THE LAW", 27 JUNE, 1981.

From left: John Gordon, Solicitor; Dr. Jim Behan, Consultant Psychiatrist (Eastern Health Board); Patrick O'Connor, Solicitor; Patrick McEllin, Solicitor.

(Photo: Western People, Ballina).

The Legal Problems of Ageing

(Paper to the Incorporated Law Society Symposium "The Mentally Handicapped and the Law", 27 June, 1981).

by

Charles R. M. Meredith, Solicitor

SO far as the application and operation of our law is concerned, it matters little whether the mental incapacity arises as a result of the passing of the years or through any other reason. The only area of mental incapacity which is separately recognised by our legal system is that of extreme youth — persons under a certain age being regarded as being incapable of managing their own affairs.

Until about thirty years or so ago, our law so recognised the distinction between the two principal categories of mental disability that those under the age of 21 years were dealt with and described as "Minors", whereas those suffering from mental disability arising otherwise than simply through tender years were described as "Persons of Unsound Mind". This description was considered to be kinder than "Lunatics", but increased social awareness, led, ultimately, to all categories being described as "Wards of Court".

It may be of interest to record that the jurisdiciton of the Courts over the affairs of persons incapable of looking after themselves is of vast and authentic antiquity. The roots of guardianship are embedded in both Roman and English law. In the ancient Rome of Cicero's time, we are told, extensive provisions existed under Roman law for the protection of the property of mentally disabled people, although no such provision was made for their persons.

Under English law, from which our own law derives, the intervention of the Courts in the affairs of mentally disabled people stems from the duty, long recognised, of the monarch to look after the property of lunatics and idiots, which duty rested upon feudal lords long before the passing of the Statute "De Praerogativa Regis" in the reign of Edward II.

The monarch customarily delegated his functions to his Lord Chancellor and, gradually, to other Judges and thus the term "Court" came into the picture. More recently, the management of the legal and property affairs of mentally disabled people and of those under the age of 21 years, has been regulated by a series of Statutes, the principal of which now are the Guardianship of Infants Act, 1964, which — as its name implies, deals only with people under the age of 21 years, and the Lunacy Regulation (Ireland) Act, 1871, — a piece of legislation which may have been enlightened 110 years ago, but which is by now limited in its scope, cumbersome, time consuming and expensive to operate.

The Irish Position Contrasted

Under what, for want of a better expression, we must now call "Irish" law — England and Wales, Northern Ireland and Scotland having gone their separate and to a greater or lesser extent, differing, ways — the concerns of property and the person are considered separately; responsibility for the property and for the person of someone of unsound mind can be vested in separate individuals although, in fact, the custom is for the one individual to be appointed by the Court to care for the property and the person of the Ward.

The name given to the individual in whom this responsibility is vested is "Committee" — a misleading name as, in ordinary usage, it implies a group of people acting in concert, which is the exact opposite of what the person actually is. The word "Guardian" is already current in the case of minors and a valid argument could be made that the same word should apply in the case of people who are so mentally incapacitated that they need somebody else to manage their affairs. In some jurisdictions, the word "Conservator" is also used.

"Guardianship" is a legal relationship which authorises one individual to become a substitute decision-maker for another; what should concern us and our legislature is the ordering of the conduct of that substitute decision-maker so that, with the greatest ease and flexibility and with the least expense, all necessary decisions can be taken and all consequent actions carried out on behalf of the Ward.

Here we come to a very real difficulty which we, with the benefit of 110 years hindsight, can see was inadequately appreciated during the reign of the good Queen Victoria. In her day, things seemed substantially more black and white than they do today and, then, the mentally disabled person was almost automatically regarded as being so lunatic as to be incapable of doing anything for himself. We have, over the years, come to realise that there are extensive gradations of mental incapacity. Many legal jurisdictions have applied themselves to the difficult but socially necessary task of differentiating between those gradations and of providing a legal framework capable, first, of recognising what gradation of incapacity is present in any case and, second, of imposing only as much "substitute decision-making" as that case requires.

In England and Wales, the Mental Health Act of 1959 has revolutionised their law, while Scotland had its own enactment a year later.

In the United States of America, all 50 States have their own Statutes and a recent statutory survey of the whole body of legislation disclosed that while all American jurisdictions provide statutorily for some form of guardianship of adult persons and conservatorship of their property, if they are not able to care for themselves without assistance, the nature and extent of that provision is by no means uniform.

For example, fourteen states specifically include

individuals with mental retardation as appropriate subjects for guardianship or conservatorship. Five states also list individuals with developmental disabilities, or with autism, cerebral palsy or epilepsy. In most other states, inclusion of persons with developmental disabilities depends on the interpretation of such terms as "mental or physical disability", "mental or physical weakness", or "mentally deficient".

It is worth mentioning, in passing, that in America the subject is taken so seriously that the President maintains a Panel or Committee on Mental Retardation and the American Bar Association has established a Commission on the Mentally Disabled which has initiated what is described as the "Developmental Disabilities State Legislative Project", with the objective of safe-guarding the rights of developmentally disabled citizens and of assuring them equal access to quality services, consistent with the philosophy and programme of certain national and federal enactments, through the identification, development and dissemination of model state legislation and reports that review existing state legislation in this area.

In the Republic of Ireland, the latest figures available indicate that we have approximately 1,500 adult Wards of Court. This is, in relation to the known extent of mental disability, a very small figure. While the small size of the figure may, to an extent, reflect the socially desirable fact that not all persons suffering from some mental disability actually require to be made Wards of Court, it is, I would suggest, more likely to be a reflection, partly, of the fact that a considerable number of mentally disabled persons do not happen to have sufficient — or any — assets requiring that they be made Wards of Court but, mainly, of the fact that it is widely known throughout the community that existing Wards of Court procedures are so expensive and cumbersome that almost any alternative is to be preferred.

I have little doubt that the affairs of a great many mentally disabled people are handled informally by their close families, without anyone being any the wiser. While, pragmatically, this may, in many cases, be no bad thing, the potential abuses are obvious.

Looking after the Mentally Disabled

Just what do we do to safeguard as efficiently and as humanely as possible the property and person of the individual who, through age, either has become or seems likely to become incapable of handling his or her affairs?

The short and perhaps facetious answer to that question may seem to be to avoid, at all costs, the procedures available under the 1871 Act and in certain circumstances this may, indeed, be both sensible and possible.

If the onset of senility or other mental collapse can be foreseen, it may well be possible to induce the person concerned to set up a trust to hold his assets and to administer his affairs, thus transferring this own property into safe and independent hands while he is still able. If the mental deterioration continues, it will ultimately be necessary only to care for the person himself.

An even less formal, though less satisfactory alternative, may be to procure a Power of Attorney from the person concerned. This, however, has a distinct disadvantage; strictly speaking, Powers of Attorney are revoked by operation of law if the person who appointed the Attorney becomes of unsound mind. It is, of course, a very frequent practice for elderly people to execute Powers of Attorney, appointing a member of the family or, perhaps, their solicitor to be their Attorney, but this procedure is primarily intended to deal with the person who becomes incapable of managing his affairs by reason of physical, rather than mental, disability. In very many cases, the Attorney continues to function perfectly satisfactorily, notwithstanding that the donor of the Power of Attorney has become senile and, in the majority of cases, nothing ever turns on it. It is not unusual, however, for circumstances to arise in which the Attorney feels that matters have become sufficiently serious, or sufficiently large, that he can no longer act as Attorney, in which case the only course is to apply to have the patient made a Ward of Court — which brings us back to the 1871 Act.

Procedures under the 1871 Act

The 1871 Act creates two main procedures under which Orders may be made to take people into Wardship.

The first, and the more lengthy, arises through the operation of Sections 14 and 15 of the Act; the simple procedure is laid down by Section 68.

To describe the simpler procedure first, it should be mentioned at the outset that this procedure has only a limited financial jurisdiction. The section, as enacted in 1871, provided that where it was established to the satisfaction of the Lord Chancellor (now the President of the High Court) that any person is of unsound mind and incapable of managing his affairs and that his property does not exceed £2,000 in value, or that the income thereof does not exceed £100 per annum, the Lord Chancellor may, without directing any enquiry, make such order as he may consider expedient for the purpose of rendering the property of such person, or the income thereof, available for his maintenance or benefit. The figures of £2,000 assets and £100 per annum income were increased by the operation of the Courts Act, 1971, to the princely sums of £5,000 worth of capital assets and to £300 annual income. These figures still apply.

If the prospective Ward of Court has assets in excess of £5,000, or income in excess of £300 per annum, then Sections 14 and 15 of the Act come into play. These Sections create a two-tiered system, highly complex and expensive, in which the first stage is an enquiry in open Court as to the sanity of the prospective Ward — which may actually have to take place before a Jury — the second stage being a further enquiry as to the property involved.

In this context, it is worth remarking that in every case in which the prospective Ward happens, for any reason, to reside outside the physical jurisdiction of our Courts, the enquiry as to sanity *must* be conducted before a Jury. To put this into context, I need only offer the example of a patient, who may perhaps have been the certified inmate of a mental hospital abroad, owning or inheriting property in this country — a not infrequent occurrence!

In Northern Ireland, where the same Act of 1871 still applies, the financial jurisdiction of Section 68 has progressively been increased. Their most recent increase was effected by a Patients' Affairs Order which became operative on the 23rd March this year and which increased the figures within which the simplified Section 68 procedure may be availed of to £60,000 assets and

£6,000 per annum income. When one considers that a substantial number of wardship cases now arise as a result of mental damage through road or other accidents, in which huge awards of damages are very common, it will be appreciated that even these figures may not be sufficiently realistic.

The Section 68 admission procedure is so simple that it is possible to procure an Order making a person a Ward of Court within 4 weeks of the initial filing of the Petition in the Wards of Court Office of the High Court. With the substantial sums of money now in issue, the potential saving of time through the availability of the Section 68 procedure could be of the utmost value.

In England and Wales and Scotland, the procedure in **all** cases has been simplified, with the bonus of an even simpler procedure in the case of assets under £2,000. Section 4 of the English Act of 1959 provides that such cases can be handled without even the formality of appointing a Receiver.

Some Difficulties

The title laid down for this paper was "The Legal Problems of Ageing", but it might have been better expressed as the problems of the people looking after the legal affairs of those who are ageing. Medical science is keeping us alive for longer and it is increasingly the case that those who are unlucky enough to suffer in their advancing years from diminished mental capacity can live on in such a state for very many years. If they have sufficient assets to merit their being made Wards of Court, then those assets must be managed and applied in the most effective way possible, having regard to the circumstances of the Ward and to the circumstances of the economy — almost certainly inflationary.

Under existing legislation, the assets of a Ward of Court can only be invested either in "Trustee Securities" — those prescribed by the Trustee (Authorised Investments) Act 1958 — or in investments permitted by the Trustee Act 1893.

Authorised Trustee Securities comprise, basically, Government Stocks and the Stocks of the Bank of Ireland and Allied Irish Banks. The 1893 Act confers a limited power of investment in land or building or in the taking of mortgages on land or buildings.

To make matters worse, it would seem to be the case that the Ward's assets cannot even be sold unless such sale is necessary to provide cash for the Ward's benefit. This effectively inhibits any investment policy, as there is no power, for example, to sell Stocks which are likely, or even certain, to depreciate in value.

It may happen that the Ward has a family, for whom he is primarily responsible. He may even have the particular concern and responsibility of a physically or mentally impaired child of his own, for whom he would, but for his own failed condition, have continued to make provision. Our existing law does not specifically empower the President of the High Court to apply the assets of a Ward of Court for the benefit of the Ward's family, not even if a member of that family is in dire need of assistance and the Ward has adequate means to assist. In practice, the Court has, over the years, found certain ways of alleviating this problem, but the position remains far from clear and the Court's activities in this regard very limited.

Another area of potential difficulty which, in fairness, the Victorian draftsmen could hardly have forseen, has been created by the Succession Act of 1965. To suggest just one problem under this heading, Section 117 of the Succession Act empowers a child of a deceased testator to apply to the Court where it may be the case that the deceased has made inadequate testamentary provision for that child. What, however, of the child who is under a mental disability, who is unaware of his rights and who fails to make the necessary application within the time limit laid down by the Succession Act? While the Succession Act provides for the service of notices informing spouses of their rights, there is no similar provision for children of a deceased testator. A child with mental disability, particularly in those sad and all-too-frequent cases where the person concerned has been abandoned by family, swept under some institutional carpet, could well be disadvantaged. And because I refer to a "child" in this example, I am not necessarily discussing a person of tender years; the child of the testator may be quite elderly and very much in need of whatever extra benefit from his deceased parent's estate which might have been gained by a Section 117 application.

New legislation — When?

In summarising, as I have, the legal problems of ageing, I have only touched on the difficulties inherent in managing the affairs of those who can no longer manage their own. Clearly, much could be done to alleviate these and other problems by enlightened legislation. Equally clearly, the President of the High Court and the Registrar of Wards of Court are as well aware of the difficulties and inadequacies as are the legal practitioners and others who have to do the best they can in the circumstances. Indeed, it is only right to record that, considering the difficulties that face them, the President and the Registrar of Wards of Court, in their desire to do what is best for Ward and family, achieve near miracles of adaptation and compromise, but there are definite limits to how far they can go.

It is no secret that new legislation has been under discussion for a number of years, but there are, as yet, no rustlings to be heard from the grapevine as to when such legislation may see the light of day. I am by no means the first person to remark that there are, regrettably, no votes in such legislation, but I take this opportunity of suggesting to our legislature that, in terms of simple cost-effectiveness, quite apart from the better ordering of the affairs of those who are sufficiently unlucky as to be unable to order their own, it could well make considerable sense to put some parliamentary time and public effort into this vast national problem. □

International Bar Association

Section on General Practice develops

This Section was set up in 1974 to provide a forum for the exchange of information and views between lawyers in general practice throughout the world and on all matters affecting the legal profession, its development and the improvement of legal services to the public. Its seventeen committees cover all fields of general practice, such as wills and administration of foreign estates, town planning, family law, civil procedures, estate and tax planning, defamation and media law and criminal law. The section now has more than 1300 members from 68 countries and its current Chairman is John Kennedy, Q.C., of Canada, Vice-Chairman Giselher Hochstrasser, Switzerland and Secretary Monty Knoll of South Africa.

In May 1981, the Section held its first Conference in Lisbon, attended by over 10% of the section membership. Thirteen of the section's committees met. Topics discussed included Trusts in no-Trust Jurisdictions, the International Recognition and Enforcement of Judgments and Orders, Current Problems in Criminal Law — Legal and Human Rights and Narcotic Offences, the Involvement of Practitioners in Practical Training Courses for Law Students, Lawyer Advertising, the Development of Press Laws in Northern and Southern Europe and Comparisons between the defamation laws in Eastern Block Countries and the Western World, and Legal Aid in the 80's, what priorities? In addition, there were a Section general meeting, council meetings and a full social programme of excursions and receptions.

The Section's committees will next meet in New Delhi, 18-23 October, 1982 during the IBA's 19th Biennial Conference, when the Section will have responsibility, with the IBA's Professional Ethics Committee, for one of the major conference topics on Standards of Professional Conduct of Lawyers, the Responsibility for the Control of such Standards and minimum Standards of Judicial Independence. Plans for a 1983 Section conference are already being made.

Two of the Section's committees have already held successful seminars — the Committee on Law Office Management and Technology in Munich in 1979 and, in May 1981, in Lisbon on *How to Maintain Profits and Improve Communications in the 80's*, and the Committee on Immigration Law in London in 1979 on *Comparative Immigration Laws*, with a second planned on the same topic for Washington DC, 8-10th November, 1981. A seminar on *Continuing Legal Education* is planned for 1983.

Members of the Section are entitled to receive its journal "The International Legal Practitioner" which is published three times each year. The Section's publications include papers prepared for the Committee on Real Property's Meeting on the Impact of Planning Restrictions, Building Controls, Environmental Considerations and Private Rights of Adjoining owners on the Development of Real Property; the Proceedings of the Law Office Management and Technology Seminars in 1979 and 1981 and their 1978 Meeting on Computers in the Law Office and the Proceedings of the Comparative Immigration Law Seminar.

Any member of the IBA can join the Section, entitling him to attend section conferences, reduced fees for Section seminars and publications, receipt of its journal and to participate in the work of the committees. Details of how to join the IBA and the Section are available from the IBA, Byron House, 7/9 St. James's Street, London SW1A 1EE.

Section on Business Law —
Environmental Law Committee

The Environment Law Committee of the IBA's Section on Business Law, was established approximately ten years ago to act as a forum for the exchange of views and information among practising lawyers, interested in environmental laws, to promote the discussion, practice and teaching of environmental law both internationally and nationally and to keep under review material developments in such laws world-wide.

The Committee works in liaison with the UN environmental programme and has participated in UN non-governmental organisation's conference in Geneva and New York. From 29 March - 2nd April, 1981 the Committee organised its first residential Seminar in Cambridge, England choosing for its topic Planning Law for Industry. The Seminar was designed to benefit lawyers having industrial clients, working in Legal Departments in Industry, or advising governmental authorities on planning matters. Topics included EEC directives and law, Proving the need, Environmental impact analysis, Conservation and restoration, the "Developer pays" Principle, Effects on infra-structure, Health and Safety, Waste disposal, Control of new industry and State aids and taxation. The proceedings, comprising 32 papers and a summary of the discussions, have been published in two volumes and are available from the IBA office, 7-9 St. James's Street, London, SW1A 1EE.

Such was the success of this Seminar that a second is being organised to be held at the National 4-H Centre in Washington D.C. from the 4th to the 8th April 1982.

During the course of the Seminar, questions arose concerning disclosure of documents held on a "Confidential Basis". Accordingly, two small working parties have been set up, one under the Chairmanship of John Spens of Maclay, Murray and Spens in Glasgow, dealing with the laws of Scotland and one under the Chairmanship of John Salter of Denton Hall & Burgin, London, dealing with the laws of England and Wales. The *AM & S* case now before the European Court of Justice will be examined in some detail, as will the production of confidential documents by "in-house" legal advisers in the context, for example, of the exercise of powers by EEC inspectors and by planning Inspectors (or Reporters in Scotland) during the course of monitoring industrial plant performance or of an Inquiry into an industrial planning application.

The Committee has also published a book of the papers presented at its 1976 Meetings in Stockholm on 'The Rights of an Individual against Acts of Pollution'. A second (extended) edition is in preparation.

The Committee will meet at the IBA Conference to be held in New Delhi, 17-23 October, 1982, where the main topic will be Environmental Impacts of Alternative Energy Sources. □

Conveyancing Notes

Houses held under Transfer Orders — Consent to Extensions

Difficulties have arisen in cases where extensions were carried out to houses held under a Local Authority Transfer Order where Planning Permission and Building Bye-Law Approval were not obtained for the extension.

While permission could be obtained for retention of the structure under the Planning Act it is not possible for the Local Authority to grant Building Bye-Law Approval retrospectively. The form of Transfer Order prohibits the person holding the property from the Local Authority from carrying out any extension or alteration to the structure without consent and the Local Authorities were reluctant to give a letter of consent in case it could be argued that this was a waiver of the breach of the Building Bye-Laws.

Following a meeting between Law Society Representatives and Officials of Dublin Corporation and Dublin County Council it has been agreed that the following will be included in any letter of consent issued in such circumstances:—

> "This letter of consent is given by the Corporation in its capacity as the Housing Authority under Transfer Order dated the day of 19 . The extension the subject of this consent was erected in breach of the requirement to obtain Building Bye-Laws Approval under the Public Health Acts. It is not possible for the Corporation to give Building Bye-Laws Approval retrospectively under the Health Acts. This consent must not therefore be construed as a waiver of the breach of Building Bye-Laws."

Requisitions on Title — 1981 Edition

Requisitions 20 and 21 of the 1979 Edition of the Requisitions became obsolete on the expiry of the 6-year period commencing on 1st April 1975. Having taken expert advice, the Conveyancing Committee has prepared a new requisition No. 20 which replaces the previous requisitions 20 and 21. A consequent renumbering of all the succeeding requisitions has been made but, apart from some minor changes in wording, they otherwise remain unaltered. The new requisition is as follows:—

> Please state whether on the death of any person on the title prior to the 1/4/1975 any reversionary interest passed.
>
> If so, was payment of Estate Duty arising on such passing deferred.
>
> If, so a certificate of the subsequent discharge of such duty must be furnished, in any case where the reversionary interest fell into possession within six years of the date of this sale.

A number of Solicitors have written to the Committee requesting the inclusion of the special requisition relating to Licensed premises, Hotels or Restaurants which were omitted from the 1979 Edition. The omission of the Licensing Requisitions was a result of a deliberate policy decision that the requisition that only appeared in a very small minority of cases should not be included in the standard forms of requisitions. In view of the interest in the matter however, the Committee has commissioned an expert to prepare an updated version of the Licensing Requisitions which will be published shortly and circulated to the profession for insertion in the Handbook. □

Computerisation of the Land Registry

A feature of the Society's recent Seminar on Computers and Office Technology, which is of interest to all practitioners, was a paper read by Mr. James Doyle of the Land Registry on the progress of the Registry's computerisation programme.

Mr. Doyle informed his audience that the Land Registry intended to commence early in 1981 on the computerisation of its Folio record (plus related indices) and its method of recording details of dealings lodged. The soft-ware programme the Registry will use is called PROMIS, which was developed by Inslaw Inc., of Washington U.S.A. It has an unique tailoring facility, which allows the adaptation of the system to a particular application and the Land Registry has accordingly adapted PROMIS to its own requirements.

At present the Registry has approximately one million folios and each year an average of 40,000 new Folios are opened. The task of entering the existing folio record will take an estimated eight years. Since, however, the records are to be entered on a regional basis, the effect and expected benefits should become apparent almost immediately in some regions. After an initial trial period, it is hoped to enter all new folios into the system. The present intention is that the computer system will supplement the existing filing and retrieval methods. It is intended also to enter into the computer details of dealings lodged and this, it is hoped, will assist in the tracking of dealings and facilitate the production of management information for the Registry.

The Registry's approach to the computerisation of the records is intended to cause the minimum disruption to its operation, while at the same time reaping the expected benefit as soon as possible. Ease of storage, retrieval and analysis are the principal benefits the Registry expects to derive from computerisation. For the public at large and the legal profession in particular, computerisation should lead to improvement in the services provided by the Registry, especially in the copy folio and inspection areas.

This major step forward brings us substantially nearer the day when it will be theoretically possible for each Solicitor's office to have its own computer terminal linked to the Registry's computer to enable searches to be made, folios inspected (and printed) within a matter of minutes. Although there is already precedent for such a service elsewhere, it remains to be seen whether such easy access to public data will be permitted in this country. □

Time Limits in Rent Review Clauses in Leases

by

David Tomkin and Robert Pearce
Faculty of Law, University College, Cork

OWING to high and endemic inflation in both England and Ireland in recent years, most commercial leases now provide for periodic reviews of rent. The tenant has the advantage of a long term, which a lessor would not be prepared to grant at a fixed rent in a period of high inflation, and the lessor has the advantage of the increases which would normally be expected from periodic reviews. There can, however, be problems.

Time is not normally of the essence

One of the problems concerns the observance of any time limits which may be laid down in the lease. This problem was dealt with in a number of English cases. After some vacillation in the earlier cases, the House of Lords in *United Scientific Holdings Ltd.* v. *Burnley B.C.*[1] in 1977, concluded that, whatever the form of a rent review clause, time was not normally of the essence. This decision, and the earlier cases, are comprehensively reviewed in an article in the November 1978 issue of this Gazette by Michael W. Tyrell.[2]

The question has now — for the first time — received the attention of the Irish Supreme Court in *Hynes Ltd.* v. *Independent Newspapers Ltd.*[3]

In that case, the plaintiff held commercial premises in Galway City from the defendant for a term of 99 years from January 1st 1972, at the yearly rent of £42,000. The lease provided that in every seventh year of the term the lessor would be entitled to serve a notice to initiate the prescribed process for fixing rent. This notice had to be served before 1st October in the seventh year. In 1978, the seventh year of the lease, the defendants served notice upon the plaintiffs. The notice, however, was not delivered until 17th November. This was more than six weeks after the time appointed. The net question was — did the delay in serving notice render it invalid? Was time of the essence?

McWilliam J., whose decision was upheld by the Supreme Court, held that the delay did not render the notice invalid and that time was not of the essence. He was content to follow the decision of the House of Lords in the *Burnley* case, without further examination of the law. He adopted and applied a passage from Halsbury's *Laws of England*:[4]

> "The modern law in the case of contracts of all types may be summarised as follows. Time will not be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject-matter of the contract or the surrounding circumstances show that time should be of the essence; or (3) a party who has been subject to unreasonable delay gives notice to the party in default making time of the essence."

In the Supreme Court, O'Higgins C.J. and Kenny J. (with both of whose judgments Parke J. concurred) undertook more extensive analyses of the law and policy involved, but came to the same conclusion. O'Higgins C.J. considered the English cases on rent review clauses and then analysed the reasoning behind the decision of the Law Lords in *Burnley*.

This was that:

> ". . . with one reservation, they were prepared to regard the inclusion in a lease of a rent review clause as, in reality, an acceptance by the tenant of an obligation to pay to the landlord a rent so determined and, further, that this acceptance was an inseverable part of the whole consideration for the landlord's grant of the term of years for the length agreed. The majority view was to this effect even when the right to initiate or to "trigger" the rent review was exclusively that of the landlord. It was recognised that there could be exceptions as where a break clause was included in the lease entitling the tenant to surrender if the rent were increased."

The Chief Justice went on to suggest that the timetable for the review or determination of the new rent was regarded by the Court as subsidiary to an obligation already accepted by the tenant and as mere machinery for effecting the parties' intention that there should be periodic reviews of rent. No new contract or relationship was created and, in this respect, it differed from an option. Accordingly, he said, the House of Lords ruled "that a presumption existed stemming from the application of equitable principles, that in all rent review clauses, even if the right of review was unilateral, the presumption was that time should not be regarded as essential to the initiation or operation of the rent review".

O'Higgins C.J. found this reasoning compelling. Without enforceable rent reviews a landlord would refuse to grant long leases. In the absence of special circumstances, it would be unfair and inequitable for a tenant to escape a rent review because time was not observed.

Kenny J. adopted a different approach. He was of the opinion that the cases in which it had been held that time was of the essence in relation to rent review clauses had "ignored or overlooked the principles developed in the Court of Chancery two hundred years ago". At common law, time limits had always to be strictly observed, but in equity "relief would be given against failure to comply with a stipulation as to time in a contract unless time was of the essence of the

contract". Since the *Supreme Court of Judicature Act (Ire.) 1877* the rules of equity prevail. Time could not normally be considered to be of the essence in rent review clauses. They were not options, but merely varied a term in the contract of tenancy. No hardship would be caused by a failure to initiate promptly a rent review.

When Time is of the Essence

(a) Principles

The Supreme Court accepted in *Hynes* v. *Independent Newspapers Ltd.* that time could be of the essence in rent review clauses, although it was not normally so. O'Higgins C.J. implicitly adopted the rule of law set out in the passage from *Halsbury's* laws cited above, and Kenny J. accepted a passage to similar effect from *Fry on Specific Performance*:[5]

> "Time is originally of the essence of the contract in the view of a Court of Equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. As this intention may either be separately expressed or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to any one or more of its terms either by virtue of an express condition in the contract itself making it so or by reason of its being implied."

(b) Application of Principles

Express terms in the contract may make it clear whether time is (or is not) of the essence. Where they do not, then it may be implied from the subject matter of the contract[6] or from the surrounding circumstances that time is of the essence. The fact that the lease is of a commercial character will not be sufficient, but it could make a difference if the rent review is associated with other provisions. Both in the *Burnley* case and in *Hynes* v. *Independent Newspapers*, it was suggested, for instance, that the presence of a "break" clause would be relevant. Under a clause of this kind, the tenant is given the right to elect to determine prematurely by surrender his interest in his property under the lease. This has the converse characteristics of an option and, like an option, there are practical business reasons for treating time as of the essence. If a break clause and a rent review clause are closely linked as, for instance, with the intention to give the tenant a choice either to remain in possession at the higher rent, or to determine the lease then, by necessary implication, time would have to be of the essence in relation to the rent review in order to allow the tenant to make this choice.

In a recent case in England, *Al Saloom* v. *Shirley James Travel Service Ltd.*[7] the Court of Appeal reached a similar decision, as a matter of interpretation, where the two provisions were found in a single continuous integrated clause, even though the intention may not have been to enable the tenant to break upon news of a rent increase, since the periods specified were identical. Waller L.J. indicated that

> "The phrase must mean the same in each case, that time was of the essence in both or in neither. The phrase would not change its meaning in the course of 10 lines unless there was some qualifying phrase to make a change clear."

From what date is the new rent payable?

There are three possible dates from which the revised rent could be payable. The first is the date on which the rent is agreed or fixed; the second, the date on which the review procedure was initiated; and the third, the date fixed by the contract. Arguments in favour of the first two are, respectively, that rent must in its nature be certain and that a tenant ought to know in advance his maximum liability for rent. The contractual date, however, was that upheld in both the *Burnley* and *Hynes* cases. Rent, it was said, is what is payable under the terms of the contract of tenancy. It need not be certain in advance. Moreover, the tenant would have a fair idea of his likely liability for rent, even where this had not been fixed, since this could be estimated for him by an experienced surveyor.

Where the tenant is prejudiced

Both in *Burnley* and *Hynes* it was emphasised that a tenant would not normally be prejudiced by a delay in fixing a new rent and this was a factor in their respective decisions. Prejudice to the tenant would, however, be possible, particularly if a delay were long. A number of resolutions to this problem are possible.

(a) *Initiation of review by tenant*

The lease may contain express provision permitting the tenant to initiate a rent review, but even where it does not, he can remind the landlord of the right to make a review. A significant delay on the part of the landlord might then give rise to an estoppel.[8]

(b) *Service of notice by tenant*

In a case where time is not of the essence, the tenant can make it of the essence by serving a notice giving the landlord a time limit within which to initiate a review (or take any other steps necessary on his part). Provided that this period is reasonable, he can thus make time of the essence. Lord Diplock and Lord Fraser, in the *Burnley* case, both suggested that such a notice could be served immediately the date stipulated by the contract had passed.[9] Presumably, even where there is no time limit in the contract, this method could be adopted.

(c) *Damages*

Where a tenant suffers loss (or other damage) by a failure to review on time, then, if the landlord is in breach of contract, he could be held liable in damages.[10] The fact that time is not of the essence does not make it any the less a breach of contract to fail to observe time in the contract, nor does there necessarily have to be an obligation to review on the part of the landlord.

(d) *Estoppel*

On equitable principles, where a person so conducts himself as to lead another to act to his detriment, then he may be prevented from acting inconsistently with the belief he has induced. A long delay in instituting a rent review could be seen as an implied representation that no increase would be sought, so that the landlord would be estopped from claiming a review of the rent. As Lord Salmon said in the *Burnley* case,[11] "any unreasonable delay caused by the landlords and which is to the tenants' prejudice would prevent the rent being revised after the review date". O'Higgins C.J. in *Hynes* accepted "That there may be circumstances in which delay has been extreme or where, because of it, other factors have arisen which alter the equities". Clearly, a short delay would not entitle the tenant

to refuse to pay a higher rent: as the Supreme Court pointed out, the tenant benefits from a delay in fixing a new rent in that even though payment must be backdated, he has the use of the money until such time as the amount is fixed (and perhaps even until the next following gale day) without any obligation to pay interest.[12] □

1. [1977] 2 All E.R. 62.
2. Tyrrell, "Rent Review Clauses — When Time Means Money" (1978) 72 I.L.S.I. Gazette 179.
3. (Unrep.) (S.C.) Record Nos. H.C. 1979/1354 P.; S.C. 1980/33 (19/11/1980).
4. 4th ed., Vol. 9, Para. 481.
5. 6th ed., (1921) at 502.
6. For instance, in *Bunge Corpn.* v. *Tradax S.A.* [1981] 2 All E.R. 513 it was held by the House of Lords that stipulations as to time in mercantile contracts should generally be treated as conditions, breach of which (no matter how minor) entitle the innocent party to treat the contract as at an end. This reflects the tendency towards the strict interpretation of commercial contracts evinced in *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] 1 All E.R. 556 and *A/S Awilco* v. *Fulvia SpA di Navigazione* [1981] 1 All E.R. 652 (discussed in Pearce and Tomkin: "Judicial Attitudes to the Construction of Written Contracts" (1981) 75 I.L.S.I. Gazette (July-August, 1981).
7. *The Times* Law Report 18th May 1981.
8. See below p. 198.
9. [1977] 2 All E.R. 62 at 75 and 97-98 respectively.
10. See the *Burnley* case [1977] 2 All E.R. 62 at 84 per Lord Simon, and the judgment of O'Higgins C.J., in *Hynes Ltd.* v. *Independent Newspapers Ltd.*
11. [1977] 2 All E.R. 62 at 89.
12. Express provision could be made for the payment of interest.

Mr. Justice Gerald Harris — Kenya

Messrs. Mason, Hayes & Curran, Solicitors, have asked that the following notice be published:—

A syndicated news item was printed in several Irish newspapers last January to the effect that Mr. Justice Gerald Harris had been dismissed by President Moi of Kenya as the result of having acquitted a man on a murder charge. This information was totally incorrect being due to a wrong interpretation of the gazetting of the revocation of his appointment as an acting Judge by the President of Kenya.

Mr. Justice Harris, who was called to the Irish Bar in 1927, and subsequently to the English Bar (Middle Temple) was for a number of years a contributor to the Irish Law Times and Solicitors' Journal. He went to Kenya in 1952 where he practised as an advocate, becoming President of the Kenya Law Society in 1963, and was appointed a Judge of the Supreme Court in Kenya in April 1965 being the first person appointed after Kenya achieved its independence. In May 1974 he attained the then statutory retiring age and, having agreed to continue as an Acting Judge, was so appointed.

In October 1980 being then in his 75th year, he notified the Chief Justice of his desire to retire from the Bench and this request was granted by a formal revocation of his appointment gazetted on 2 January, 1981. In accordance with the provisions of the Constitution of Kenya, Mr. Justice Harris continued in office until the end of March, 1981, in order to dispose of a number of part-heard cases. He has now retired and continues to live in Nairobi. □

For Your Diary . . .

7 November, 1981: Law Society Symposium. *"The Doctor and Society"*, Blackhall Place, Dublin 7.

10 November, 1981: Continuing Legal Education Seminar. *"The Financial Control of a Solicitor's Practice."* Blackhall Place, Dublin 7. 10.00 a.m. - 5.00 p.m. Fee: £30.00.

13 November, 1981: Law Society Symposium. *"Farm/Family Partnerships"*, Blackhall Place, Dublin 7.

20 November, 1981: Incorporated Law Society of Ireland. **Dinner Dance,** Blackhall Place, Dublin 7. Dinner: 8.30 p.m. Dancing: 10.00 p.m.-2.00 a.m. Subscription: £15.00.

26th November 1981: Medico-Legal Society *"Keening for Forensic Science"* (Speaker: Professor James E. Starrs, Professor of Law and Forensic Science, George Washington University, Washington DC). United Services Club. 8.15 p.m.

28 November, 1981: Kerry Law Society. *"Wills and Taxation Planning"*, Earl of Desmond Hotel, Tralee, Co. Kerry.

11th December, 1981: Mayo Bar Association Annual Dinner Dance. Breaffy House Hotel, Co. Mayo. Tickets available from Patrick O'Connor, Solicitor, Swinford, or Anne Nolan, Solicitor, Castlebar.

Companies Registration Office

The Society has been discussing with the Registrar of Companies problems which have arisen in practice and which could, with the co-operation of the profession, be substantially reduced or eliminated, to the general good of all concerned.

The Registrar has been good enough to submit to the Society some observations on present difficulties, attention to which would certainly avoid a great many unnecessary delays and frustrations.

The more important of the Registrar's comments are as follows:—

1. Memoranda and Articles of Proposed New Companies:

These documents, on incorporation of the Company, become permanent records and, by law, are required to be held by the Registrar for examination by the public. They are subject to extensive handling and photocopying. In the circumstances, the paper used should be of good quality and the characters should be clear and durable in accordance with the definition of "printed" in Section 2(1) of the Companies Act, 1963. In practice, Memoranda and Articles very often fall short of these requirements.

(a) Paper too flimsy — typing post (normally used for carbon copies of letters) and even printers' proofs have been submitted.

(b) Photostat Memoranda and Articles are received in which words, and, indeed, occasionally entire paragraphs are smudged or illegible, for one reason or another.

(c) It would appear that the characters produced by, at least some, electric typewriters are not durable — certainly they are easily erased.

(d) Although there is no objection to a reasonable amount of amendment or smplification of a paragraph in manuscript, some Memoranda and Articles are received with entire paragraphs written in manuscript: indeed, in a recent example, an entire paragraph was written on the top margin of the paper, with a footnote to indicate its sequence in relation to the other paragraphs of the document.

(e) The Companies Act, 1977, provides that that Act and the 1963 Act may be cited together as the Companies Acts, 1963 to 1977. Although the 1977 Act came into operation on 1st April 1978, Memoranda and Articles are still being received with the legislation stated simply as Companies Act, 1963. In some cases the omission persists, notwithstanding that the attention of the practitioners concerned has been drawn to it on several occasions. Amplification in manuscript is acceptable in this regard.

(f) It is not unusual for the Office to receive the Articles prescribed by the Companies Act, 1963, for a limited company, whereas an unlimited company is what is proposed and vice versa. Recently such a case took four weeks of correspondence and phone calls to clear.

(g) Sometimes the Articles received are taken from the U.K. Companies Act, 1948, or, indeed the Companies Act, 1908.

(h) The recital at the end of the Memorandum frequently is faulty in the subscribers' area. Either the names of the subscribers and/or witness are omitted or the number of shares taken by each subscriber is not stated, or is stated in figures instead of words. A delicate situation in this regard arises where the number of shares taken by each subscriber is written in the same hand. This generally happens where the Companies Registration Office has previously returned the document because the information originally was omitted and some difficulty is experienced in convincing practitioners that amendment is essential.

2. Form 41 — Statutory Declaration of Compliance

The Declaration is to the effect that all requirements of the Companies Act, 1963, in matters precedent and incidental to the incorporation of a company have been met: it may be made either by a Solicitor engaged in the formation of the company or by a person named in the articles as a director or secretary. Where a person other than the Solicitor makes the Declaration — say where the Solicitor has handed over the case before the Declaration is executed — the Companies Registration Office is often left with the task of helping with the procedure — amendment of Regulation 75 of Part I of Table A of the Companies Act, 1963, for instance.

3. Post-Incorporation Requirements

When issuing the Certificate of Incorporation of a company, the Registrar includes, with the Certificate, information leaflets about the legal responsibilities of a company after incorporation, with particular regard to the various returns to be made to the Registrar. It is most important, from the Registrar's viewpoint, that the leaflets are passed on to the company, as companies often plead, as an excuse for failing to make statutory returns, that they were never notified that any returns were required. Another point in this connection is that Solicitors who have acted in the incorporation of a company are subsequently unable to assist the Companies Registration Office in efforts to obtain notification of the location of the registered office of the company or the names of its directors. Practitioners could greatly assist by encouraging their clients to furnish the information without delay. In many cases, indeed, the solicitor's office is notified to the Companies Registration Office as the registered office of the company. Later, however, efforts of the Companies Registration Office to obtain the names of the directors are to no avail. In cases where threats of prosecution are forwarded to such registered addresses, it is found that practitioners allowed the registration simply to facilitate their clients and are unable to assist in having the returns furnished.

4. Delays in Incorporation

(a) The Companies Registration Office is still receiving enquiries from members of the public as to delay in incorporating companies. Often it is claimed that the Office had the case for five or six weeks. In some of these cases it is found that, in fact, no papers

whatever have been lodged or that lodgement has taken place only a few days earlier.

(b) Many requests are received from practitioners for incorporation of companies as a matter of urgency. In some of these cases, it is found that the documents were executed some considerable time previously but, for some reason, they were not presented at the Registry at the time of or shortly after the date of their preparation.

5. **Availability of Names**

In the matter of availability of names problems abound. Many practitioners are quite co-operative about this very sensitive and subjective area. Some, however, add terms like Irish, Ireland, National or Euro to names already rejected and expect the amendment to be acceptable. Another example is where a practitioner applies for approval of a list of names as follows: Milford Construction, Milford Properties, Milford Developers, Milford Homes and Milford Estates. Experience shows that such names, almost invariably, are used for building concerns, but many practitioners are reluctant to accept that such lists cannot be accepted in their entirety. Sometimes approval of the name of a company is contingent on production of a letter confirming that the proposed company is associated with a company already registered and having a similar name. Very often the incorporation documents arrive without any letter of association, and the letter of association is produced only when the incorporation documents are returned because of unsuitability of the name. □

Correspondence

The Editor,
The Law Society Gazette,
Blackhall Place,
Dublin 7.

Re: Comment (July/August, 1981 Gazette)

Dear Sir,

Under the heading "Comment" in the July/August issue of the Gazette you make reference to the effects of Statutory Instrument No. 237 of 1981 which removes the necessity for a Statutory Dublin Agent.

As the firm which will be identified by many who read your "Comment" as that which "enjoys almost a complete monopoly of Agency Practice", there are important aspects which we would like to clarify.

Firstly: The word "almost" does not sufficiently remove the implication that a monopoly situation exists and the other firms who do this work and have done so for many years, should not be "written off". There is no monopoly here and a monopoly would, in our view, be highly undesirable.

Secondly: We may be unduly sensitive in reading the "Comment", but we see in it a suggestion that Dublin Agents are now only an interesting fact of History and have no further use. Nothing could be further from the truth. Solicitors throughout the country will understand what we say and we would hasten to reassure them that we do not see the new provision as having more than a minimum technical effect and, certainly, there will be no change in our approach to the work we do.

Finally: Those concerned should give some thought to the complications regarding delivery of pleadings which could result from the abandonment of a Registered Dublin Address if there is not a provision speedily made for posting such deliveries. It is not at all clear that provisions for certain types of service by post which were introduced by the Court Act 1971 covers the delivery of pleadings.

Let the change that has not been made not be allowed to cause more trouble than it is worth although there is no shortage of precedent for such a result!

Yours faithfully,

DENIS R. PEART,
Solicitor,
27 Upper Ormond Quay,
Dublin 7.

Incorporated Law Society of Ireland

IMPORTANT NOTICE

The attention of solicitors with full Practising Certificates i.e. all practising solicitors (other than those solicitors who certify in any year that they are employed as Assistant Solicitors or those in the full-time service of the State) is drawn to their legal obligation to file Accountants' Certificates with the Law Society within six months after the end of their accounting year. Any such solicitor, who is in arrear in filing his Accountants' Certificate as of 6th February, 1982, will not be issued with a Practising Certificate for the practising year commencing 6th January, 1982.

The current status of individual solicitors will be furnished to members of the Society on request.

JAMES. J. IVERS.
Director General.

Book Review

Introduction to Law in the Republic of Ireland by Richard H. Grimes, LL.B., M.A. and Patrick T. Horgan, LLB., LLM., Dublin: Wolfhound Press. 368pp. Paperback, £9.90 (inc. VAT); Hardback, £16.50 (inc. VAT).

The Authors are Solicitors. Mr. Grimes formerly a Law Lecturer at University College, Cork is now at Keele University. Mr. Horgan is currently a Statutory Law Lecturer at U.C.C.

It requires great skill and knowledge to write a good elementary Law Book. It involves making accurate general statements about the law, and if you think this is easy, try doing it yourself. As one cannot assume that readers have any prior knowledge, it is necessary to explain everything and this makes the book tiresome to anyone who has a slight familiarity with the subject. Such books can be dull and this one is dull in places, although dullness is not its greatest fault.

Effective writing for students calls for clear exposition of the subject, systematic arrangement, and a degree of grace and elegance. A student's book should have some visual impact and appeal. The information should be clearly and attractively presented on the page with appropriate headings, sub-headings, side-notes and footnotes. If this is done, the work is easier to read, easier to understand, easier to remember. The notes and references in this book which are absolutely essential to its educational purpose are not presented as footnotes, but are gathered together, grouped into chapters, at the end of the book. This method is guaranteed to exasperate, expecially in a rather long book. The notes themselves are useful and deserve better treatment.

In favour of this work it can be said that it is fairly comprehensive, up to date, and specifically related to the law of the Irish Republic. Some chapters are better than others. There is a good short summary of the law and institutions of the E.E.C. The treatment of case law and precedent and legislation in Chapter 2 is well done and the Chapters on Tort, Welfare Law, and Company Law are good. The book would be useful as a handbook and introductory guide to a number of areas of Irish Law. In general, however, this is not an impressive work — there is much weak and confused writing and one suspects that the proof reading was carried out in great haste or altogether omitted.

There are numerous (mostly verbal) howlers — "Borough Eagles" — "The Gambling Act 1845" — "Deasy's Act of 1869" — "Descent was traced from the Land Purchaser" — "famous contemporary legal positivists Austin, Kelsen and Hart".

Lest it should be thought that I have been unduly severe, here is a quotation, not entirely untypical, from the summary at the conclusion of the Chapter on Constitutional Law —

> "That most of the Constitution has not been the subject of litigation is indicative of its largely descriptive nature and also of the traditional perception of law untouched by a documentary yardstick".

All in all a disappointment — a missed opportunity, a great deal of work went into this book and it should have been much better.

William Dundon.

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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 25th day of October, 1981.

W. T. MORAN (Registrar of Titles)
Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

1. Registered Owner: Daniel Kelly; Folio No.: 11986; Lands: Drumatumpher (Part); Area: 5a. 1r. 10p.; County: **Donegal.**

2. Registered Owner: Peter Finnegan; Folio No.: 11693; Lands: Lisdoony (Part); Area: 5a. 0r. 0p.; County: **Monaghan.**

3 Registered Owner: John Kennedy; Folio No: 5349F; Lands: Kilderry; Area: 119a. 2r. 5p.; County: **Limerick.**

4. Registered Owner: Michael Murphy; Folio No: 17082; Lands: Robinstown; Area: (1) 7a. 3r. 30p.; County: **Kilkenny.**

5. Registered Owner: Michael Murphy; Folio No: 11687; Lands: Inistigoe; Area: (1) 7a. 3r. 30p.; (2) 8a. 0r. 4p.; **Kilkenny.**

6. Registered Owner: John Melvin (Junior); Folio No: 18193; Lands: Lackan; Area: 17a. 1r. 23p.; County: **Sligo**

7. Registered Owner: Governor & Co. of the Bank of Ireland; Folio No: 1062F; Lands: Potato Market; Area: 0a. 1r. 16p.; County: **Carlow.**

8. Registered Owner: James Hampson & Mary Hampson; Folio No: 6102; Lands: Rathdown Lower; Area: 0a. 0r. 5p.; County: **Wicklow.**

9. Registered Owner: Thomas Mullen (Junior); Folio No: 44769; Lands: (1) Corimla South, (2) Corimla South, (3) Cormila South. Area: (1) 6a. 0r. 30p., (2) 5a. 0r. 12p., (3) 18a. 3r. 30p. County: **Mayo.**

10. Registered Owner: Vincent F. Owens; Folio No: 2508F; Lands: Plot of ground situate to the west side of Elphin Street, in the town of Boyle; Area: ——; County: **Roscommon.**

11. Registered Owner: Patrick Joseph McCabe; Folio No.: 11358; Lands: (1) Lumcloon, (2) Gallen, (3) Gallen, (4) Gallen, (5) Gallen, (6) Lumcloon. Area: (1) 29a. 1r. 22p., (2) 2a. 0r. 20p., (3) 2a. 0r. 27p., (4) 1a. 3r. 19p., (5) 2a. 1r. 30p., (6) 10a. 0r. 25p.; County: **Kings.**

12. Registered Owner: Charles O'Donnell; Folio No: 21721; Lands: Dromore (E.D. Magheraboy); Area: 0a. 2r. 4p.; County: **Donegal.**

13. Registered Owner: Margaret Quigley and Kate Quigley; Folio No: 6903; Lands: Edenagrena; Area: 35a. 0r. 19p.; County: **Louth.**

14. Registered Owner: Patrick McMahon; Folio No: 18457; Lands: Kilbannivane; Area: 56a. 1r. 35p.; County: **Kerry.**

15. Registered Owner: Mary Flanagan; Folio No: 8696; Lands: Coologmartin; Area: 1a. 0r. 32p.; County: **Kildare.**

16. Registered Owner: Patrick Gallagher; Folio No: 128R; Lands: Roughan; Area: 24a. 3r. 10p.; County: **Donegal.**

17. Registered Owner: Martin Fogarty and Margaret Fogarty; Folio No: 7216; Lands: Milltown; Area: 9a. 2r. 27p.; County: **Limerick.**

18. Registered Owner: James Baldwin; Folio No: 52215; Lands: Part of the land of Donickmore with the cottage thereon situate in the Barony of Imokilly; Area: ——; County: **Cork.**

19. Registered Owner: Ellen O'Brien and Michael O'Brien; Folio No: 19891; Lands: (1) Park, (2) Park (one undivided eight part); Area: (1) 6a. 2r. 13p., (2) 1a. 2r. 29p.; County: **Tipperary.**

20. Registered Owner: Maureen Cullinane; Folio No: 1572; Lands: Leperstown; Area: 30a. 0r. 23p.; County: **Waterford.**

21. Registered Owner: Michael and Mary Collender; Folio No: 24893; Lands: Clonroad More; Area: 0a. 1r. 2p.; County: **Clare.**

22. Registered Owner: Marie Frances McKeone (otherwise Marie Frances Tyer); Folio No: 3383L; Lands: "St. Catherine", Crofton Avenue, Dun Laoghaire; Area: ——; County: **Dublin.**

23. Registered Owner: William Minihan (Junior); Folio No: 4849; Lands: Ardvarna (Part); Area: 9a. 3r. 24p.; County: **Limerick**

24. Registered Owner: Kenneth Smyth; Folio No: 112; Lands: Granaghan More; Area: 338a. 2r. 22p.; County: **Clare.**

25. Registered Owner: Joseph Connolly; Folio No: 702L; Lands: 3 Great Western Avenue, Grangegorman; Area: ——; County: **Dublin.**

26. Registered Owner: Thomas Nugent; Folio No: 917F; Lands: Castlebarnagh Big; Area: 5a. 0r. 33p.; County: **Kings.**

27. Registered Owner: Daniel O'Donovan and Eileen O'Donovan; Folio No: 12668; Lands: Kilmoney; Area: 73a. 3r. 39p.; County: **Cork.**

28. Registered Owner: Thomas Carroll; Folio No: 11377; Lands: Meeshal; Area: 24a. 1r. 32p.; County: **Cork.**

29. Registered Owner: Michael Cashman; Folio No: 1509F; Lands: (1) Gortnalahee, (2) Gortnalahee, (3) Dromboy North; Area: (1) 31a. 3r. 32p., (2) 31a. 2r. 34p., (3) 38a. 0r. 21p.; County: **Cork.**

30. Registered Owner: Patrick Mary Pearse O'Grady and Una Teresa O'Grady; Folio No: 9230L; Lands: Leasehold interest in the property situate in the part of the townland of Grange (E.D. Rehenagh) and Barony of Cork; Area: ——; County: **Cork.**

Lost Wills

Reverend Francis Hassard Burkitt, deceased, late of Myrtle Lodge, Stradbally, Co. Waterford. Will any person having knowledge of the Will of the above-named deceased who died on the 2nd day of May, 1980, please contact Messrs. Kenny Stephenson & Chapman, Solicitors, Newtown, Waterford.

Terence O'Sullivan, late of 3 Limekiln Park, Manor Estate, Dublin 12 (deceased). Would any person having any knowledge of any Will of the above-named deceased who died on the 6th day of March, 1981, please contact Damien J. Kelly, Solicitor, 77 Terenure Road North, Dublin 6.

Thomas Bernard Kenaney, deceased, late of Corner House, Patrick Street, Tullamore, Co. Offaly. Would any solicitor having knowledge of any Will of the above-named deceased who died on or about the 18th March, 1981, please communicate with Matheson Ormsby & Prentice, Solicitors, 20 Upper Merrion Street, Dublin 2.

Michael John Egan (deceased), otherwise Michael Egan, late of Lattoon, Caltra, Ballinasloe, Co. Galway. Will any person having knowledge of a Will of the above-named deceased who died on the 6th September, 1981, please communicate with Patrick J. Noonan, Solicitor, Ballinasloe, Co. Galway.

Anthony John Magan, deceased, late of Kilmore, Kilcock, Co. Meath and 45 Lower Dodder Road, Rathfarnham. Will anybody having any knowledge of any Will of the above-named deceased who died on the 4th day of July, 1981, please contact Kearns, Price & Company, Solicitors, Ulster Bank Chambers, 2/4 Lower O'Connell Street, Dublin 1.

Thomas Hardiman, deceased. Will any Solicitor having knowledge of a Will or Codicil made by the above-named deceased, who died on 27th September 1981 and who was a farmer at Buckhill, Fairymount, County Roscommon, please communicate with Messrs. David Sacker & Co., of St. David's House, 16 New Cavendish Street, London, W1M 7LJ.

Employment

YOUNG SOLICITOR, 4-5 years experience, seeks to buy practice in Munster or South Leinster area. An arrangement with retiring principal might suit. Box No. O19.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 9. November 1981

LAUNCH OF "IRISH LAW OF TORTS"

Co-authors of the "Irish Law of Torts" William Binchy and Bryan McMahon with the Hon. Mr. Justice Brian Walsh, President, The Law Reform Commission (right) who introduced the book at the launch, and Michael V. O'Mahony, (left), Solicitor, Chairman of Law Society's Publications Committee. The book is published by Professional Books Ltd.

INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 75, No. 9. November 1981

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . . . .

A Welcome Arrival

THE appearance of the new Irish Law Reports Monthly is most welcome. Law Reporting has in recent years become noticeably and regrettably inadequate, despite the best efforts of the Editor of the Irish Reports; the increase in the number (and length!) of written judgments, combined with the decline of the Irish Law Times Reports whose survival, to reverse Mark Twain's comment, has been much exaggerated, has led to an increase in the number of significant cases which remain unreported.

The Digests published as "Pink Pages" in this Journal and compiled, at the suggestion of the President of the High Court by the Editor of the Irish Reports, are no more than useful signposts to the unreported judgments, which themselves have become more widely available in Law Libraries. The increasing availability of such judgments has, ironically, created further problems because of the difficulty experienced by Libraries in storing and indexing the bulky documentation. This difficulty alone makes it imperative that a higher proportion of these cases be formally reported. The decline of the Irish Law Times Report had led to informal discussions between the Law Society and the Bar Council about a possible joint venture in publishing Law Reports. A collective sigh of relief almost certainly went up when the announcement that Irish Academic Press, under its imprint The Round Hall Press Limited, were to undertake the publication of the new series.

On the evidence of the first three issues, the standard of the Reports in the new work is satisfactory, though the notes of cases have in some instances been either inadequate or unhelpful. It is to be hoped on the one hand that the publishers will receive sufficient support for the venture from the profession to enable them to maintain publication regularly and on the long term basis and, on the other, that the publishers will ensure that the level and scope of the Reports is acceptable to the profession. It would be a pity if the duplication which occasionally arose in the past between the Irish Reports and the Irish Law Times Reports were to be repeated. There are sufficient cases of significance for both to fill all their available space and, hopefully, some *modus vivendi* can be worked out to ensure that the two publications are complementary.

The Editorial Board of the Gazette believes that the summaries of cases which it publishes in the "Green Pages" serve a need of the solicitors' profession in a way which neither the full case reports nor the "Pink Pages" do and proposes to continue to publish such summaries for the foreseeable future. If it should turn out that the "Green Pages" become redundant, the Board will be delighted to divert the skills and labour of its Note Editor and contributors to other areas of the Law which remain untilled. □

Conditions of Sale and the Sale of Goods and Supply of Services Act, 1980

by

Mark de Blacam, Barrister-at-Law

THE drafting of conditions of sale for use in commercial contracts has become increasingly complex in recent years. For instance, the so-called "Romalpa clause" is now often regarded as an essential element of well-drafted conditions. But, for a variety of reasons, the wording of this clause has failed to become standardised. An additional burden on the draftsman of conditions of sale has been imposed by the new Sale of Goods and Supply of Services Act, 1980. This Act has given rise to a number of new problems which this article attempts to analyse. The article does not purport to be a comprehensive consideration of the 1980 Act; it is concerned solely with its effects on commercial contracts of sale.

Protection by implied terms.

A purchaser of goods continues to be protected by the implication of certain terms into the contract of sale. To this end, section 10 of the 1980 Act replaces sections 11, 12, 13, 14 and 15 of the Sale of Goods Act, 1893 with new provisions which are set out in the Table. These new provisions, as did the old ones, provide that certain implied terms are to be incorporated into a contract of sale. These terms can be summarised as follows. There is, generally, an implied condition that the seller has a right to sell the goods and an implied warranty that the goods are free from any undisclosed charge or encumbrance and that the buyer will enjoy quiet possession of them.[1] In the case of a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description.[2] The 1980 Act restates the *caveat emptor* rule by enacting that, subject to the provisions of the Act and of any statute in that behalf, there is no implied condition or warranty as to the quality of fitness for any particular purpose of the goods supplied under a contract of sale.[3] But where a seller sells goods in the course of a business there are, generally, implied conditions that the goods supplied are of merchantable quality and, where the buyer makes known to the seller any particular purpose for which the goods are being bought, reasonably fit for that purpose.[4] In the case of a contract for the sale of goods by sample, there are implied conditions that the bulk will correspond with the sample in quality; that the buyer will have a reasonable opportunity of comparing the bulk with the sample; and that the goods will be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.[5] The Act defines expressly for the first time the phrase "merchantable quality" and includes in that definition the concept of durability.

As will be noted, the terms implied by the 1980 Act are virtually identical to those implied by the Sale of Goods Act, 1893. The major innovation of the 1980 Act is contained in section 22, which replaces section 55 of the 1893 Act, which allowed the unrestricted contracting out of the statutory implied terms. Section 22 substitutes a new section for section 55. This new section reasserts a contracting party's right to contract out of the statutory implied terms,[6] but it renders void any term of a contract for the sale of goods which exempts all or any of the provisions of section 12.[7] It provides further that any term of such a contract which exempts all or any of the provisions of section 13, 14 or 15 is to be void where the buyer deals as consumer and, in any other case, is to be unenforceable unless it is shown that it is fair and reasonable.[8] This last provision raises a number of questions for the draftsman of conditions of sale. Among them: when can a purchaser be said to deal as consumer? And what is a term which exempts all or any of the provisions of section 13, 14 or 15?

The two questions considered

The phrase "dealing as consumer" is defined in section 3 of the 1980 Act.[9] There it is said that a party to a contract deals as consumer where "(a) he neither makes the contract in the course of a business nor holds himself out as doing so, and (b) the other party does make the contract in the course of a business, and (c) the goods or services supplied under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption." The definition is not without difficulty. What constitutes, for example, goods "of a type ordinarily supplied for private use or consumption?" If somebody buys an item of goods which is to be used both by the purchaser and others, when does private use become non-private use? Perhaps even more difficult is the requirement that the purchaser must not make the contract in the course of a business nor hold himself out as doing so. Does the doctor buying a typewriter for his office make the contract in the course of a business? It would seem that he does. *Benjamin's Sale of Goods*,[10] considering an equivalent provision in the English Supply of Goods (Implied Terms) Act, 1973, says that:

> "It should be noted that by virtue of this provision various sales where the buyer does not in his business deal in the goods concerned, and therefore may be no better able to judge the goods than a private purchaser, will not be consumer sales. Thus a farmer buying a tractor, or a doctor buying a car or a typewriter for professional use or wallpaper for his surgery ... could be regarded as effectively private purchasers. It seems probable, however, that they are not to be treated as such, at any rate where the article is bought solely for use in connection with business or professional activities ..."

The second problem that arises is to determine when, exactly, a term exempts all or any of the provisions of sections 13, 14 or 15. In this regard, one must look to section 55 (6) of the Table inserted by section 22. This sub-section says that:

> "Any reference ... to a term exempting from all or any of the provisions of any section of this Act is a reference to a term which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of that section, or the exercise of a right conferred by any provision of that section, or any liability of the seller for breach of a condition or warranty implied by any provision of that section."

This sub-section deserves careful scrutiny. It will be noted that a term of a contract exempts the implied terms if it "has the effect of excluding or restricting" any liability of the seller for their breach. This is particularly significant in relation to clauses in condistions of sale which purport to limit the seller's liability for a breach of contract to a fixed sum. If such a clause limits to a fixed amount the liability of the seller for breach of the implied condition as to, say, the quality of the goods, then it seems that such a clause would be void where the buyer deals as consumer and would be unenforceable in any other case unless shown to be fair and reasonable.

When is an exclusion clause fair and reasonable?

If, as is often the case, conditions of sale are being drafted to deal with non-consumer transactions, then obviously it is important to be able to advise a client as to when clauses in the conditions excluding the statutory implied terms will be considered fair and reasonable and therefore enforceable. The criteria for determining whether terms are fair and reasonable are set out in the Schedule to the 1980 Act. It is provided there that the test to be applied is whether the term is "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in contemplation of the parties when the contract was made." The Schedule requires that consideration be had for the following matters where they appear relevant:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
(e) whether any goods involved were manufactured, processed or adapted to the special order of the customer.

It is clearly impossible to lay down any one, all-embracing rule for determining the fairness and reasonableness of a term; each case is going to have to be considered on its own facts. Before the draftsman of conditions of sale can fully advise a client in this regard, careful consideration is going to have to be given to the client's business, the terms on which he deals with customers, the terms on which his competitors deal, whether a particular transaction has any special features, the state of the market for the goods being sold and, perhaps most important of all, the relative bargaining strengths of the parties. On the whole, though, it seems fair to say that where the client sells goods in an open market situation to non-consumer customers who are free to pick and choose, then it ought to be fair and reasonable to exclude the statutory implied terms.

The problems caused by section 11(4)

A major difficulty for the draftsman of conditions of sale is presented by section 11(4) of the 1980 Act. This sub-section provides that it is an offence for a person in the course of a business to furnish to a buyer (interalia) any document including a statement, irrespective of its legal effect, which sets out, limits or describes rights conferred on the buyer or liabilities to the buyer in relation to the goods acquired by him. Such a statement will be permissible, however, if it is accompanied by a clear and conspicious declaration that the contractual rights which the buyer enjoys by virtue of sections 12, 13, 14 and 15 of the 1893 Act (as amended) are in no way prejudiced by it. This provision seems to raise a serious contradiction within the Act itself. On the one hand, section 55(4) of the 1893 Act (as amended) provides that, in the case of a non-consumer sale, the seller can contract out of certain implied terms where it is fair and reasonable. On the other hand, section 11(4) says that it is an offence to furnish a statement in the course of a business to a buyer which describes his rights or liabilities, unless that statement declares that it in no way prejudices the statutory implied terms. This is some conundrum. It may have been that the intention of the legislature in enacting section 11(4) was to proscribe statements which derogate from the buyer's contractual rights under the Act where the buyer is an ordinary consumer. Such a conclusion would appear to be in accordance with the policy of the Act. Yet the draftsman of conditions of sale is faced with the difficulty that section 11(4) prohibits the furnishing of the objectionable statement to a "buyer" and not simply to a "buyer dealing as consumer." But if it is argued that the section 11(4) offence applies to both consumer and non-

consumer sales (as, indeed, its wording suggests), how does one account for the express provision in sections 55(4) allowing for the exclusion of implied terms in non-consumer transactions? Moreover, if the section 11(4) offence applies to non-consumer sales, its effect is to outlaw conditions of sale in such cases, in so far as they exclude the statutory implied terms from the contract. Such a drastic change could not, one hopes, be effected by the legislature in such an oblique way.

Section 11(4) makes for two distinct difficulties where conditions of sale are being prepared for non-consumer transactions. First, the draftsman must point out the terms of the sub-section to a client and explain that, on a literal interpretation of it, the conditions of sale, assuming they contain the usual exclusion clauses without the redeeming "clear and conspicuous declaration," may give rise to prosecution for an offence. (The conditions would not, of course, leave open this danger if they fail to exclude the provisions of sections 12 and 15 of the 1893 Act and contain a clear and conspicuous declaration to that effect). This advice can, doubtless, be qualified by the comment that, since it was apparently the intention of the legislature that section 11(4) should only apply to consumer transactions, the likelihood of any such prosecution must be very small indeed.

But there is a second danger brought about by section 11(4). Suppose goods are sold to a purchaser, who does not deal as consumer, subject to conditions of sale containing the usual exclusion clauses and omitting the section 11(4) "Clear and conspicuous declaration". And suppose this purchaser refuses to pay for the goods and is sued for the price. Can he not argue, in defence, that the contract is unenforceable due to illegality in that conditions of sale were furnished to him descriptive of his rights but failing to contain the prescribed "clear and conspicuous declaration" in breach of section 11(4)? The authorities suggest that the answer to this question requires an investigation of the intention of the legislature. The purchaser's point would seem to have validity if the legislature intended that the entire contract should be nullified where it is performed in the manner made illegal by statute.[11] But if the intention of the legislature was that the performance of the prohibited act should only result in the imposition of a charge or penalty, then the enforceability of the contract is not affected.[12] There is little evidence to support a contention that the legislature intended that an entire contract of sale should be invalidated owing to a failure to comply with section 11(4). But this does not completely dispose of the difficulty. For a court might still take the view that, while the contract remains enforceable, the provisions set out in the conditions of sale cannot be relied upon. This is a real danger and, pending a decision of the Irish courts on the point, the legal adviser can do little more than make his client aware of the danger.

The guarantee provisions

Another problem for the draftsman of conditions of sale is brought about by the guarantee provisions of the 1980 Act.[13] A "guarantee" is defined in section 15 as any "document, notice or other written statement, howsoever described, supplied by a manufacturer or other supplier, other than a retailer, in connection with the supply of any goods and indicating that the manufacturer or other supplier will service, repair or otherwise deal with the goods following purchase." It is, probably, a fair assumption that the legislature intended to refer here to the guarantee cards or warranty cards which are often furnished with manufactured goods. But the careful draftsman of conditions of sale will note that the definition is a very broad one: it extends to any document furnished with goods which indicates that the manufacturer or other supplier, provided he is not also the retailer, will "service, repair or otherwise deal" with the goods after purchase. Many conditions of sale provided that, in the event of a complaint being made by the buyer that the goods are defective, they must be returned to the seller who, if satisfied as to the validity of the complaint, will repair or replace them. It seems that such a provision now comes within the definition of a guarantee under section 15. Again, this is a result which the legislature may not have intended. Nevertheless, if the point were to be judicially considered, then it is not unreasonable to conjecture that a court might well conclude that such a provision in conditions of sale constitutes a guarantee. Pedantic as it may seem, the cautious draftsman must assume, for the time being at any rate, that conditions of sale which are prepared for a manufacturer or supplier other than a retailer and contain an undertaking to "repair or otherwise deal with the goods following purchase" constitute a guarantee for the purposes of the 1980 Act. Therefore, the conditions of sale must comply with the terms prescribed for a guarantee.[14] In summary, the Act requires that a guarantee: (1) be legible and refer only to specific goods or to one category of goods; (2) state clearly the name and address of the person supplying the guarantee; (3) state clearly the duration of the guarantee from the date of purchase; (4) state clearly the procedure for presenting a claim under the guarantee which must not be more difficult than ordinary or normal commercial procedure; and (5) state clearly the undertakings given in relation to the goods and what charges, including the cost of carriage, the buyer must meet. Failure to comply with the requirements for the terms of a guarantee is an offence.[15]

A client must also be advised as to the effect of the conditions of sale being rendered a guarantee by virtue of the undertaking to repair or replace the goods sold. In particular, he must be advised with regard to the effect of section 19(1). This sub-section breaches the doctrine of privity of contract by providing that a right of action is to be conferred on the buyer of goods either to enforce the guarantee or for damages against a manufacturer or other supplier who fails to observe its terms; and this right is expressly provided to exist "as if that manufacturer or supplier had sold the goods to the buyer." Assuming that an undertaking in conditions of sale to repair or replace goods does render the conditions a guarantee for the purposes of the Act, section 19(1) means, in effect, that the ultimate purchaser may have an action against the manufacturer or supplier furnishing the conditions to enforce the terms of the guarantee or for damages.

Conditions of sale that also provide for the rendering of a service

Conditions of sale often provide not only for the sale of goods but also for the supply of some service by the seller to the buyer. For example, where highly technical equipment is being sold, the seller may undertake to

install it. If conditions of sale include an undertaking by the seller to perform any service for the buyer, then the provisions of sections 39 and 40 must be noted. Section 39 provides that certain terms are to be implied in every contract for the supply of a service where the supplier is acting in the course of a business. Briefly, these terms are:

(1) that the supplier has the necessary skill to render the service;
(2) that he will supply the service with due skill, care and diligence;
(3) that, where materials are used, they will be sound and reasonably fit for the purpose for which they are required; and
(4) that, where goods are supplied under the contract, they will be of merchantable quality.[16]

These terms may be negatived or varied, but they will not be negatived by an express term unless it is inconsistent with them.[17] Section 40(3) provides that a term negatives or varies a term implied under section 39 if it "purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any provision of that section, or the exercise of a right conferred by any provision of that section, or any liability of the supplier for breach of a term implied by any provision of that section." Thus a term in conditions of sale which limits liability to a fixed amount will be a term negativing or varying the section 39 implied terms. Section 40(1) places an important limitation on the right to negative or vary the terms implied under section 39. It provides that an express term negativing or varying the section 39 implied term must, where the recipient of the service deals as consumer, be shown to be fair and reasonable and to have been specifically brought to his attention.

Problems similar to those raised by section 11(4) arise in relation to section 41(4) which deals with statements restricting the rights of a recipient of a service. This subsection provides that it is an offence for a person in the course of a business to furnish to the recipient of a service (inter alia) any document including a statement, irrespective of its legal effect, which sets out, limits or describes rights conferred on him or liabilities to him in relation to goods acquired by him, unless the statement is accompanied by a clear and conspicious declaration that the contractual rights which the recipient enjoys by virtue of section 39 are in no way prejudiced by it. In other words, all conditions of sale which cover not only the provision of a service, but also deal with the recipient's rights of liabilities in relation to goods acquired, must contain the prescribed clear and conspicuous declaration vouchsafing the recipient's rights under section 39. Once again the Act is difficult to understand, in that it expressly authorises the exclusion of the section 39 implied terms, subject to the sole limitation that, where the recipient deals as consumer, the exclusion must have been specifically brought to his attention and be fair and reasonable. So what is the draftsman to do? The straightforward solution is to delete any reference to the recipient's rights or liabilities in relation to goods acquired by him under the contract. This means, in effect, that the supplier of a service cannot protect himself in relation to any goods supplied by him. The more daring draftsman may venture to rely on the provisions of section 40(1) allowing the exclusion of the section 39 implied terms and ignore section 41(4). Such a course of action, however, raises the same dangers as have already been outlined in relation to section 11(4).

Future developments

The draftsman should be aware that certain important provisions of the Act may in the future be brought into force by ministerial order so as to affect conditions of sale.[18] For example, under section 53, the minister is empowered to prohibit the use in the course of a business of a printed contract, guarantee or other specified class of document unless printed in type of a prescribed size. He is also empowered, under section 52, to order that a person using a standard form of contract in the course of a business give notice to the public as to whether or not he is willing to contract on any other terms.

Conclusion

Clearly the 1980 Act is fraught with problems for the draftsman of commercial conditions of sale. It is perhaps worth mentioning that many of those problems were brought to the attention of the author within a matter of weeks of the Act coming into force. Of course one should expect that common sense will prevail and that the Act will be applied in a sensible way, but it seems a pity that an Act so important to the commerce of the country should already give rise to such difficulty and controversy. □

Footnotes

1. Section 12 of the Table inserted by section 10 of the Sale of Goods and Supply of Services Act, 1980.
2. Section 13 of the Table inserted by section 10.
3. Section 14(1) of the Table inserted by section 10.
4. Section 14(2) and (4) of the Table inserted by section 10. The term "merchantable quality" now has the meaning given to it in section 14(3) of the Table inserted by section 10.
5. Section 15 of the Table inserted by section 10.
6. Section 55(1) of the Table inserted by section 22. But if a draftsman wishes to exclude or vary a statutory implied term, he must do so with precision. It is not sufficient to provide an express condition or warranty in the conditions of sale: section 55(2) of the Table inserted by section 22.
7. Section 55(3) of the Table inserted by section 22.
8. Section 55(4) of the Table inserted by section 22. It should be noted that in the case of what the Act terms a "contract for the international sale of goods" all the statutory implied terms (including section 12) can be excluded from the contract: section 61(6)(a) inserted by section 24. A "contract for the international sale of goods" has the meaning attached to it in section 61(6)(b) inserted by section 24.
9. It should be noted that under section 3 (3) the onus will rest on the party alleging that another did not deal as consumer to show that he did not.
10. First edition (1974) at pages 450-451.
11. As in *Anderson, Ltd. v. Daniel* [1924] 1 K. B. 138 where a seller of fertilisers lost his action against the buyer for the price of the goods sold because he had failed to furnish the buyer with an invoice required by statute setting out the percentages of certain chemical substances in the goods.
12. *St. John Shipping Corporation v. Joseph Rank Ltd.* [1957] 1 Q. B. 267; *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.* [1961] 1 Q. B. 374; and *Shaw v. Groom* [1970] 2 Q. B. 504.
13. Sections 15-19.
14. Section 16.
15. Section 16(6).
16. For the definition of "merchantable quality" see the meaning now assigned to it in section 14(3) of the Table inserted by section 10.
17. Section 40(1) and (2).
18. Sections 50-54.

Law Reporting and Statute Law

The first venture of the Irish Association of Law Teachers outside its own ranks was a very successful Summer meeting on Law Reporting and the Publication of Statute Law held at University College, Dublin.

The paper on Law Reporting prepared by Professor Kevin Boyle of University College, Galway included a brief history of Law Reporting in Ireland and went on to review the present unsatisfactory position — unsatisfactory not because of any lack of effort on the part of the official body charged with Law Reporting, whose Editor has made great strides in what is a most difficult task, namely to catch up arrears in a periodical publication, but for other reasons. The increase in the number (and, dare it be said, of some Judges, the length) of written judgments in the High and Supreme Court is one reason; the disappearance of the old Irish Jurist Reports and the decline in the Irish Law Times Reports is another, while the small number of subscribers (the solicitors' profession in Ireland is notably at fault here) to the Irish Reports is yet a further reason.

During the discussion on the paper, the need to improve Circuit Court reporting following the introduction of the new jurisdiction under the Courts Act, 1981, was noted and the Association was asked to set up a Sub-Committee to suggest ways of improving law reporting. Mr. Bart Daly of Irish Academic Press drew the attention of the meeting to his company's projected Irish Law Monthly Reports which were scheduled to commence publication in October 1981.

Professor Desmond Greer of Queens University presented a paper on Statute Law and began by reminding his audience of the difficulty, for historical reasons, of ascertaining precisely what Statutes still apply in Ireland; he then commented on the delay in publishing the bound annual volumes of the Acts of the Oireachtas due, it was understood, largely to delays in translating the English version into Irish. The production of an annual volume of English language only texts from 1980 onwards was to be welcomed.

Unfortunately, the Republic has never had an equivalent of the Northern Ireland "Statutes Revised" — the complete text of all Statutes affecting Northern Ireland, from whatever legislature. This was first published in 1956 and a new edition is in course of preparation but, for reasons of cost, will exclude United Kingdom Acts. It appeared that tables of Statutes were printed triennially in Northern Ireland (and are only 15 months in arrears!).

The particular difficulties attaching to the problem of Statutory Instruments was also noted in Professor Greer's paper.

During the discussion, considerable attention was paid to the problem of the piece-meal coming into force of certain parts of recent legislation and some suggested guidelines were mentioned. The Law Society representative indicated that the Society proposed to reprint the Acts of the Oireachtas in a monolingual edition to cover the volumes from 1922 to 1973.

The Association must have been gratified by the large attendance of non-members of the Association and it is to be hoped that this will encourage the Association in further ventures not wholly directed at its own membership. □

Incorporated Law Society of Ireland

IMPORTANT NOTICE

Practising Certificates will not be issued in 1982 or future years unless the Solicitors' Accountants' Certificates is in order, i.e., a clear Certificate has been lodged within 6 months of the solicitors' accounting date.

Where, on application for a Practising Certificate, an Accounting Certificate is not in order, the Solicitor will be notified in writing that the Practising Certificate cannot issue until the Accountants' Certificate is lodged and that should be done within one month. He will be informed that pending receipt of the Accontants Certificate his remittance is being held in suspense account and that in the meantime, it is an offence to practice without a Practising Certificate.

After a lapse of one month, the solicitor will be informed that unless the Accountants' Certificate is received within a further month, disciplinary proceedings will be commenced without further notice and that, at the same time, the Bar Association and County Registrar will be notified that the solicitor is practising without a current Practising Certificate.

The situation regarding outstanding Accountants' Certificates is reviewed at each Council meeting.

JAMES J. IVERS,
Director General

INCORPORATED LAW SOCIETY OF IRELAND

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DIRECTOR OF EDUCATION,
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Mergers, Take-overs and Monopolies (Control) Act, 1978

by

Anthony E. Collins, Solicitor

THIS Act came into effect on 3rd day of July 1978. The purpose of this Article is merely to point out some of the salient features of the Act and to indicate some of the possible pitfalls.

The Act has two applications —

(a) Its application to proposed Mergers or Take-Overs which is new legislation; and
(b) provisions relating to Monopolies which are grafted on to the Restrictive Practices Act, 1972.

1. **Mergers:**

The most alarming fact, from the point of view of the practising Solicitor, is that if there is a take-over or merger which comes into the criteria of the Act and in respect of which the Minister's consent has not been obtained, then, the Act states (Section 3(1)) that title to the shares or assets involved does not pass. It could therefore happen that six months after the acquisition has apparently been completed the parties would discover that in fact no title to the shares or assets had passed. The implications of this for both client and Solicitor are to say the least alarming and in certain circumstances, the conveyancing implications are also considerable. The fundamentals of the Act insofar as it relates to mergers, are as follows:—

(i) The Act applies to a proposed take-over or merger if in the most recent financial year the value of the gross assets of each of the two or more enterprises to be involved in the proposal is not less than one and a quarter million pounds (£1,250,000) or the turnover of each of those two or more enterprises is not less than two and a half million pounds (£2,500,000). (Section 2(1)(a)). Turnover in this instance means real turnover and does not include payments in respect of V.A.T. or in respect of Excise Duty.

(ii) "Enterprise" effectively means a Company, partnership or individual engaging in business for profit and it also includes a Society registered under the Industrial and Providend Societies Act 1893 to 1897, a Friendly Society, a Building Society or a holding Company.

The main exclusions from these definitions are Banks including Trustee Savings Banks, C.I.E., Local Authorities, any holders of Licence under the Road Transport Act, any Body Supplying Electricity and any Air Service.

(iii) Section 1(2) of the Act states that a merger or take-over shall be deemed to be proposed when an offer capable of acceptance is made.

The Act further goes on to say (Section 1(2)(a)) that a merger or take-over shall be taken to exist when two or more enterprises, at least one of which carries on business in the State, come under common control. Shortly common control means where one of the enterprises has the right to appoint or remove a majority of the Board or Committee of Management in a second enterprise or has more than 30% of the voting rights in the shares provided that the first enterprise does not already hold more than 50% of the total of such voting rights before the acquisition.

Sub-Section (e) of Sub-Section 1(3) covers the situation where what is acquired is not the shares in the Company itself but all, or a substantial part of its assets. Provided the criteria for the acquisition of these assets are within the limits of the criteria which would being the acquisition of a Company within the terms of the Act, then the Act will similarly apply where the acquisition is a specific asset.

Specifically excluded from the Act are the following situations:—

(a) Where the enterprises come under common control because of the appointment of a Receiver or a Liquidator and,
(b) Where the two enterprises involved are both wholly owned subsidiaries of the same Body Corporate.
(c) Where the enterprises coming under common control do so solely as the result of a testamentary disposition or intestacy.

(iv) The Minister has power to increase the financial criteria and also has power to apply the Act to any proposed merger or take-over notwithstanding that it does not fulfil the criteria. So far the Minister has only made such an Order in relation to newspapers.

(v) Where there is a proposed merger or take-over, both parties are obliged to give written notice of the existence of the proposal to the Minister.

(vi) The Minister has the right (Section 6) to seek further information after he first receives notification of a merger or take-over.

After the Minister receives notification of a proposed merger or take-over Section 7 obliges him to do one of two things as soon as practicable:— either

(a) inform the enterprises that he has decided not to make an Order under Section 9 prohibiting the proposed merger or take-over or prohibiting it except on conditions specified in that Order

or

(b) to refer the notification to the Examiner of restrictive practices for a Report. The Examiner has an obligation to investigate the proposed merger or take-over in relation to the scheduled criteria which are as follows:—

(a) the extent to which the proposed merger or take-over would be likely to prevent or restrict competition or to restrain trade or the provision of any service.

(b) The extent to which the proposed merger or take-over would be likely to endanger the continuity of supplies or services.

(c) The extent to which the proposed merger or take-over would be likely to affect employment and would be compatible with national policy in relation to employment.

(d) The extent to which the proposed merger or take-over is in accordance with national policy for regional development.

(e) The extent to which the proposed merger or take-over is in harmony with the policy of the Government relating to the rationalisation, in the interests of greater efficiency, of operations in the industry or business concerned.

(f) Any benefits likely to be derived from the proposed take-over or merger and relating to research and development, technical efficiency, increased production, efficient distribution of products and access to markets.

(g) The interests of the shareholders and partners in the enterprises involved.

(h) The interests of employees in the enterprises involved.

(i) The interests of the consumer.

(vii) The Examiner must make such investigations as quickly as possible and, if the Minister specifies a particular time in which he must make it, he must furnish a report within that time. Included in that report will be a statement by the Examiner as to whether or not the proposed merger or take-over would operate against the common good in respect of the scheduled criteria. For the purposes of his investigation the Examiner has full rights to inspect the premises and records of the Companies involved under the powers given by Section 15 of the Restrictive Practies Act, 1972.

(viii) Once the parties have notified the Minister, then title to any shares or assets concerned shall not pass until either:—

(a) The Minister has stated that he has decided not to make an Order under Section 9 in relation to the proposal or,

(b) The Minister has stated in writing that he has made a Conditional Order in relation to the proposal or,

(c) Three months have passed either since the Minister first received notification of the proposal or alternatively three months have passed since the Minister requested further information.

(ix) Certain anomalies result as a result of the wording of the Act for example:—

(a) If a newly-formed subsidiary of a very large Company makes a take-over bid for say two million pounds in cash for another Company — which cash is received from its parent Company — then the transaction would appear to be outside the scope of the Act, as one of the two enterprises concerned does not have (at the time the proposal is notified) a turnover of 1.25 million pounds or gross assets of over 2.5 million pounds.

(b) If two large non-Irish Companies both operating through small branches in Ireland, decide that one Company should take over the branch of the other, then it would appear to be necessary to obtain the consent of the Minister because of the size of the two enterprises involved in the acquisition even though the value of the actual assets being acquired might only be, say £100,000. The Minister has, through his Department, unofficially expressed the view that he considers the Act to apply only where two enterprises each with either turnover or gross assets in excess of the threshold figure come under common control within the meaning of Section 1. For the avoidance of doubt, however, application should be made in each case.

(c) The Minister has indicated in one case that he will decide whether or not the Company comes within the required criteria by looking at the last set of certified accounts which were available at the time of notification of the proposal. Accordingly the size of the Companies at the time when the proposal is actually made may be over the criteria but under the above ruling they will be considered to be outside the criteria of the Act if their last accounts show a weaker position. Ironically, a delay in producing the certified Accounts of the Company could actually result in that Company being saved the necessity of receiving a clearance from the Minister.

(x) As mentioned in the beginning it is absolutely vital for a Solicitor to make sure, in a proposed acquisition or take-over, that either the proposal comes outside the criteria of the Act or alternatively that the consent of the Minister is obtained. Because of the wording of the Act, it can be seen that on some occasions proposals would be within the Act which on the face of it looks to be completely

outside and in other cases the contrary.

(xi) An Appeal to the High Court against the Minister's decision can only be made on a point of law.

2. **Monopolies:—**

While the Sections in the above Act dealing with the monopolies are mixed in with Sections dealing with mergers and acquisitions, the actual position regarding monopolies, as set out in the Act, is quite different to the situation regarding mergers.

The relevant part of a definition of a monopoly in the Act is as follows:

> "An enterprise or two or more enterprises under common control, which supply or provide or to which is supplied or provided, not less than one half of the goods or services of a particular kind supplied or provided in the State in a particular year, according to the most recent information available on an annual basis."

Sub-Section 2(2) states that the Act shall apply to a monopoly where in the most recent financial year the monopoly's sales or purchase of the goods or services concerned exceed 1.5 million pounds.

If the joint turnover does not exceed that figure then the Minister may at any time, if he is of the opinion that an enquiry should be made into an apparent monopoly, request the Restrictive Prices Commission to hold an enquiry. The Commission, in effect, works largely through the Examiner.

It is important to note that no specific event necessarily triggers off an enquiry. A number of Companies may well have a turnover of more than 1.5 million pounds and may supply more than 50% of goods of a particular kind in the State. The Minister has no obligation to hold an enquiry into the workings of any such Company, but is entitled to do so at any time. Likewise a Company may be below one or other of the criteria but because of expansion gradually exceed the criteria in both cases. Again the fact that such a Company exceeds both criteria does not mean that there will be an enquiry but at any time thereafter the Minister may request the Commission to hold an enquiry.

Where the Examiner is of the opinion that a monopoly exists or where the Commission has held and enquiry, the Commission then states whether in its opinion:—

(a) A monopoly exists.

(b) If it does, if it prevents or restricts competition or endangers continuity of supplies or services or restrains traders or the provision of any service, or is likely to do any of these things.

(2) If it causes any interference or likely interference with competition, the provision of services or the continuity of supplies or services or any restraint of trade or of it would be unfair or operates or would operate against the common good.

An enquiry held by the Commission under this Act would be deemed to be an enquiry under Section 5 of the Restrictive Practices Act 1972. After the Commission has reported, the Minister may, if he thinks that the exigencies of the common good so warrant, after consultation with any other Minister of the Government appearing to him to be concerned, he may be either:—

(a) Prohibit the continuance of the monopoly except on conditions specified in the Order, or,
(b) Require the division, in a manner and within a period specified in the Order, of the monopoly by the sale of assets or otherwise so specified.

If the Minister makes an Order of this kind, he shall state his reasons for doing so.

Further the Minister does make an Order under this Section, it will not have effect until it is confirmed by an Act of the Oireachtas and after that it will have the force of Law.

One difficult question is what "goods or services of a particular kind" means. For example a whiskey producing Company might have 60% of the whiskey market but this might only represent 3% of the total sale of alcoholic drinks. Is such a manufacturer therefore to be considered as having monopoly (of sales of whiskey) or merely have a very small share of a large market (i.e. the drinks market). There is no immediate answer as to which argument is right.

Even if the Minister holds an enquiry and finds there is a monopoly as such, he may well take the view that it is the kind of monopoly that does not restrict competition and therefore may not make any Order. □

Farm partnerships — a joint project

THE work of a tripartite body representing the Law Society, Macra na Feirme and the Agricultural Credit Corporation culminated in November with a symposium on Farm Family Partnerships, and the launching of a book of the same title.

Wide practical experience — agricultural and legal — was represented on the Committee, of which the chairman was William D. McEvoy, solicitor, Enniscorthy. Other solicitors who served on the committee were Jeremiah Healy, Fermoy; Denis Hipwell, Wicklow; Dermot Jones, Agricultural Credit Corporation; Rory McEntee, Trim, Co. Meath; and William A. Osborne, Naas, Co. Kildare, a Past President of the Society.

James Cleary, Farm Partnerships Advisor, edited the publication which is reviewed elsewhere in this edition of the *Gazette*.

By launching the book at a symposium in the Society's premises, a forum for discussion was provided for members of the farming community, reinforcing the relationship established by the previous symposium held at Blackhall Place, on "The Farmer and the Law". This was the subject of comment by Dermot Jones, solicitor, ACC, the organisation funding the project, who emphasised the role played by the Law Society and the ACC in the publication of the book as representing a further development of the close liaison between these bodies, particularly in relation to matters involving the furtherance and deeper understanding of agricultural law.

The comments of the majority of the 230 attendees as they left the hall, can be summed up in the remark: "It was interesting and worthwhile."

Witnessing and Attestation

by Charles R. M. Meredith, Solicitor

THERE can hardly be a day in the working life of the average solicitor without at least one document requiring to be signed by a party to it, in the presence of a witness. Equally, there can hardly be a day in the working life of the average solicitor when he (or she) actually questions what is involved in such witnessing, or why! The witnessing of documents is something which is so much taken for granted that the profession has largely ceased to concern itself with anything beyond the immediate and obvious practicalities. That the presence of a witness and the addition of that witness's signature to the document concerned are intended as some better proof of the execution of the document is self-evident, but the fact that relatively few documents ever require to have their due execution proved has resulted in the atrophy of our general knowledge at just about the primary level of awareness.

Wills are, of course, a special case. The Succession Act, 1965, as successor to the Wills Act, 1837, is quite specific as to the manner of execution and attestation of wills and such execution and attestation must be "proved" as part of the probate procedure. Similarly must documents requiring registration in the Registry of Deeds be properly attested, in accordance with the Statute 6 Anne, c.2. Other documents, too, are statutorily controlled as to execution and attestation. But what of the great mass of documentation with which the practitioner is daily concerned — leases and letting agreements; simply contracts in a variety of fields; waivers under the Succession Act and a host of other common examples? Which of them actually *requires* to be witnessed or attested and, of those that do so require, how should such witnessing or attestation be effected? This raises the further interesting question, can a party to a document witness the signature of another party to that document? The answer to which is, as one might expect, yes and no!

To appreciate the underlying principles, it is necessary to appreciate the distinction between mere witnessing, on the one hand, and attestation, on the other. This distinction has been the subject of a long and venerable line of cases, stretching back to at least 1842. In that year, the leading case of *Freshfield & Ors v. Reed & Ors*,[1] laid down the broad guidelines of what was required by way of execution where such execution was specifically required to be *attested*. In that case, the Court considered the execution of a document by Elizabeth Susanna Watson, whose consent and approbation in writing, duly attested, was required to certain demises of property effected by one Thomas Watson. In the events which happened, Elizabeth Susanna Watson was a party to such a demise, but it was argued that the fact that she was a party to the deed in question was not sufficient to sustain an allegation that she gave her consent in writing and that that was duly attested. Against this, it was argued that the wording of the power in question did not require that the consent should be *attested by witnesses*, but that any attestation in writing was sufficient; that the word "attested" had the same meaning as "testified"; and that the parties to the Lease might be considered as so many witnesses to her consent.

The Court clearly took the view that *attestation* was something very different from mere witnessing and held that the term "attest" manifestly implied that a witness should be present, to attest that the party who was to execute the deed had done the act required by the power — the object of which (in the present case) was that some person should verify that Elizabeth Susanna Watson had *voluntarily* given her consent and approbation to the demise in question.

Almost forty years and probably as many cases later, Lord Selvorne, L.C., handed down what has become the leading judgment on the subject, in the 1881 case of *Seal v. Claridge*.[2] The case concerned the execution of a Bill of Sale which, like a Will, is a document whose execution is regulated by statute and which is required, for its validity, *inter alia* to be "attested by a Solicitor of the Supreme Court".

At the initial hearing in the lower Court, Huddleston, B., held that the attestation of the Bill of Sale was insufficient. The underlying circumstances were that the Plaintiff, a solicitor, was the grantee of a Bill of Sale granted by one Johnson. The Bill of Sale was attested by the Plaintiff.

The Court of Appeal confined argument to the matter of execution of the Bill. It was argued for the appellant Plaintiff that the fact that the Bill had been attested by a solicitor was sufficient to give it validity; that a Bill of Sale may be valid without any attestation (*Davis v. Goodman*[3]); and that the mere omission by the solicitor properly to perform his duty would not annul the transaction (*Ex parte National Mercantile Bank; in re Haynes*,[4]). It was argued, contra, *inter alia*, that the party to a deed could not be a witness to it and Counsel for the defendant cited *Coles v. Trecothick*,[5] and *Freshfield v. Reed*.

Lord Selborne, L.C., dealt summarily and dismissively with an aspect of the appellant's argument, upon certain facts not here described. The question of attestation, however, he found to be "of more general interest. I was at first surprised that no authority could be found directly in point; but no doubt the common sense of mankind has always rejected the notion that a party to a deed could also attest it."

The Lord Chancellor added that he did not pay much attention to the old rule of evidence whereby interested persons were rendered incompetent as witnesses; the rule had been done away with by statute; instead he concentrated on the meaning of the word "attestation", apart from the Bills of Sale Act 1878. The word, he considered, must imply the presence of some person who stands by *but is not a party to the transaction.* The Lord Chancellor felt that his view was confirmed by the fact that *attestation,* as such, is unnecessary, unless it is specifically required by an instrument creating a power or by some statute. He also examined an aspect of the case pleaded by Counsel for the appellant Plaintiff, that the attestation required by the Bills of Sale Act 1878 would be satisfied by the mere repetition of the signature of a party to the deed. "Can this", the Lord Chancellor asked, rhetorically, one feels, "be regarded as a a useful provision?" He added that he did not place much reliance on what had been said by Lord Eldon, L.C., in *Coles v. Trecothick* but he did rely on *Freshfield v. Reed:*

> *"It follows from that case that the party to an instrument cannot attest* it. When I pass to the Bills of Sale Act, 1878, I find that it is necessary that the execution of a Bill of Sale shall be attested by a solicitor. This means that a solicitor shall be an independent witness. It has been admitted that if the grantor were a solicitor he could not attest his own signature; but it is contended that it is different in the present case, where the grantee is a solicitor".

The Lord Chancellor then applied his own common sense to the value of attestation by a grantee who, although a solicitor, would have in fact the greatest possible interest to deceive the grantor, were he inclined to be fraudulent or guilty of malpractice.

> "He is not to attest an instrument which is to operate chiefly for his own benefit".

In the instant case, he found that the attestation was insufficient and that the appeal must be dismissed.

As the concurring words of Lord Justice Bagallay may provoke a smile, they are here set out in full:

> "I am of the same opinion. I only wish to mention two cases which have been cited, and in which I was a party to the decision. Neither of them bears upon the case before us. In *Davis v. Goodman*[6] the question arose simply between grantor and grantee; and it was there held that as between them no attestation or registration was requisite. In *Ex parte National Mercantile Bank, in re Haynes* it was held that, if the attestation states that a proper explanation has been given, it is immaterial that in point of fact the solicitor has failed to discharge the duty imposed upon him".

Clearly, in the best regulated circles, it is still possible for execution to be imperfectly witnessed or attested. Quite apart from the fate of the unfortunate Mr. Seal, it is not very many years since the Registry of Deeds finally made up its mind as to the proper execution and attestation of deeds by corporate bodies. (For the unwary, it is now established that the signatories to the seal of a corporate body are not attesting witnesses; to satisfy the requirements of the statute 6 Anne, c.2, two further attesting witnesses are required, ine of whom must swear the affidavit of due execution endorsed on the Memorial.)

It behoves the practitioner, pace the luckless Mr. Seal, to establish to his own satisfaction whether any particular paper writing requires its execution to be *attested* rather than simply witnessed, and to ensure that such attestation is properly achieved. History does not relate the amount of Mr. Seal's loss through his failure to procure the proper attestation of the Bill of Sale drawn in his own favour, but at today's money values the cost could be dear indeed. □

FOOTNOTES

1. 11 L.J. Ex. 193; 9 M. & W. 404.
2. 50 L.J.Q.B. 316.
3. 5 C.P.D. 128.
4. 15 Ch.D. 42.
5. 9 Ves. 234 at p. 251.
6. 5 C.P.D. 128.

Apprenticeship — Some Changes

The Council of the Society, at its meeting on October 15th, increased from £40 to £50 the recommended minimum weekly wage for apprentices attending the offices of their Master during the eighteen month period from the end of their Professional Course in the Society's Law School to the beginning of their Advanced Course.

The Society now requires — it is no longer a recommendation — that every apprentice, before commencing the Professional Course, should spend at least one month in the office of the master (or other agreed office) becoming familiar with office procedures and the work of a solicitor. Apprentices have found this familiarisation period beneficial when taking the Professional Course. Conversely, the absence of such a period of familiarisation proves to be a distinct drawback and those without the benefit of it are immediately so identified in tutorial work. There is no recommendation as to payment of a wage to the apprentice during this period; this would be a matter for the individual Master and apprentice. This requirement will be of immediate interest to the students who will be entering the 7th Professional Course at the end of next March.

Practitioners are reminded that in the Professional Course, an apprentice will have obtaining a grounding in the following areas of practice: Civil Litigation; Criminal Litigation; Family Law; Wills & Settlements; Conveyancing; Landlord & Tenant; Planning Law; Probate & Administration of Estates; Company Law; Commercial Law; Insolvency; Labour & Social Welfare Law; Taxation (both of Capital & Income).

The apprentice should quickly be able to contribute to the work of the office and it is of benefit to both Master and apprentice that the latter be given a busy (and, hopefully varied) work load. □

For Your Diary . . .

28 November, 1981: Kerry Law Society. *"Wills and Taxation Planning"*, Earl of Desmond Hotel, Tralee, Co. Kerry.

4-6th December, 1981: Irish Association of Law Teachers. *Annual Meeting*, Queen's University, Belfast. Full details from Professor D. S. Greer, Faculty of Law, Queen's University, Belfast.

11th December, 1981: Mayo Bar Association Annual Dinner Dance. Breaffy House Hotel, Co. Mayo. Tickets available from Patrick O'Connor, Solicitor, Swinford, or Anne Nolan, Solicitor, Castlebar.

Water Pollution — Strict Proof Required

Anglers, potential water polluters and lawyers will, alike, be interested in the recent decision of the Honourable Judge Timothy N. Desmond in a Circuit Appeal concerning the alleged pollution of the River Feale by creamery effluent.

The case was that of *John Costello,* Complainant/Appellant *v. North Kerry Milk Products Limited,* Defendant/Respondent and the following summary of the proceedings and of the decision has been prepared by Counsel for the Complainant.

The Complainant in his capacity as Chief Inspector of the Shannon Regional Fisheries Board (formerly The Limerick Board of Fishery Conservators), caused a Summons to be issued against the Defendant on the 1st day of November 1980, alleging that on the 2nd day of May 1980, at Islandganniv North, Listowel, within the District Court area of Listowel, District No. 13, the Defendant permitted to fall into the waters of the River Feale, deleterious matter, contrary to Section 171(1) of the Fisheries (Consolidation) Act, 1959; that on the same date the Defendant emptied into the waters of the River Feale, deleterious matter contrary to the said Section of the said Act; and that on the same date, the Defendant caused to fall into the waters of the said river, deleterious matter contrary to the said Section of the said Act. The matter came before the District Court in Listowel, when the learned District Justice dismissed the Summons, from which decision the Complainant appealed. The Appeal came before the Honourable Judge Timothy N. Desmond, Judge of the Circuit Court, at Listowel in the South Western Circuit, County of Kerry, on the 9th day of July 1981.

At the close of the case for the Complainant, Counsel for the Defendant sought a Direction on the grounds, inter alia, that in order to secure a conviction against the Defendant, it was necessary for the Complainant to show that deleterious matter had been permitted to fall into and/or had been emptied into and/or had been caused to fall into the *entire* of the River Feale, and that evidence that such matter was emptied into a portion of the River, was not sufficient to secure a conviction under the Section, having regard to the definition of "deleterious matter" and "waters" in Section 2(1) of the Act. The expression "deleterious matter" is defined in the Act as "any substance (including an explosive) which, on entry or discharge into any waters, is liable to render the waters poisonous or injurious to fish, spawning grounds or the food of any fish". The word "waters" is defined in the said Section of the Act as "any river, lake, watercourse, estuary or any part of the sea".

The evidence of the Complainant was that deleterious matter had fallen or been emptied into the river in question through a certain pipe, but the evidence did not show that the deleterious matter had either fallen or been emptied into the entire of the waters of the river or that, if deleterious matter had fallen or been emptied into the river, it was liable to render the entire of the river poisonous or injurious to fish, spawning grounds or the food of any fish. It was submitted by Counsel for the Defendant that to secure a conviction within the Section, it was incumbent on the Complainant to prove that deleterious matter had fallen into or been emptied into the entire of the river, or that the entry or discharge of deleterious matter into any part of the river was liable to render the entire of the river poisonous or injurious to fish, spawning grounds or the food of any fish. It was on this point that the District Justice had dismissed the original summons, while accepting that the Complainant had proved that deleterious matter had entered the river at a certain point.

It was submitted by Counsel for the Complainant that such a submission and construction of the relevant provisions of the Act would render a relevant portion of the Act unworkable and that the greater must include the lesser and that, accordingly, if deleterious matter within the definition was shown to have fallen into or been emptied into any portion of the river, an offence had been committed.

It was further submitted by Counsel for the Defendant, that any or any adequate proof that the pipes out of or from which the alleged deleterious matter was alleged to have fallen or been emptied into the river, was the property of the Defendant, or came from their premises, had not been adduced. Counsel for the Complainant submitted that it was not necessary in order to secure a conviction within the Section to show that the entire of the river had been rendered liable to injure or poison or endanger fish, or that deleterious matter had fallen or been permitted to enter the entire of the river.

It was held by the learned Circuit Court Judge that it was not necessary under the Section to show that deleterious matter had fallen into the entire of the river, or that the entire of the river had been rendered liable to poison or endanger fish or fish life and that it was sufficient to secure a conviction under the Section to show that deleterious matter within the meaning of the Act, had fallen or been permitted to enter into any part of the river at all and that any part of the river had been rendered liable to injure or poison fish and that the phrases "waters" and "deleterious matter" in the Act of 1959, should be construed accordingly. He held, further, that no or no adequate or sufficient evidence had been adduced by the Complainant to show that the deleterious matter in question had come from the Defendant's premises, and that accordingly, the Summons should be dismissed.

The Judge made no Order as to costs. □

Presentation of Parchments

October 1981

1. Allen. Sean, 93 Marlborough Road, Donnybrook, Dublin.
2. Baker, Laetitia, Carhukeal, Bantry, Cork.
3. Barrett, Mary, 183 Howth Road, Dublin.
4. Bohan, Brian, 99 Grange Park Road, Raheny, Dublin.
5. Boyle, Owen, "Inis Ealga", Derrybeg, Letterkenny, Co. Donegal.
6. Campbell, James, 11 Main Street, Dungloe, Co. Donegal.
7. Carr, John, M. 23 Newcastle Park, Galway.
8. Casey, Mary, 19 The Rise, Mount Merrion, Dublin.
9. Cody, Peter, G. The Parade, Bagenalstown, Carlow.
10. Cogan, Edmond, Trabeg, Ballinlough Road, Cork.
11. Colley, Henry, P., 10 Palmerstown Gardens, Rathmines, Dublin.
12. Collins, Catherine, 3 Firhouse Grove, Templeogue, Dublin.
13. Connellan, Paul, 487 Howth Road, Raheny, Dublin.
14. Courtney, Breda, 1 Belgard Road, Clondalkin, Dublin.
15. Cunniffe, Geraldine, "Fortfield House", Kiltoom, Athlone, Westmeath.
16. Curran, Joseph, Carns, Tulsk, Roscommon.
17. Dennehy, Marie, "Riverside", Currow, Killarney, Kerry.
18. Doherty, Brian, 10 Castle Park, Duncrana, Co. Donegal.
19. Duncan, Sean, Realt-na-Mara, Baltimore Lawn, Douglas Road, Cork.
20. Egan, Frank, 10 Callary Road, Mount Merrion, Dublin.
21. Egan, Paul, 61 The Rise, Mount Merrion, Dublin.
22. Fitzgerald, Pamela, 55 O'Connell Street, Limerick.
23. Fitzpatrick, Hilary, 1 Erne Hill, Belturbet, Cavan.
24. Fitzpatrick, Michael, Bawnmore, Claregalway, Co. Galway.
25. Folan, Mary, M., Lettercamus, Cashel, Connemara, Co. Galway.
26. Foley, Jennifer, 59 Lansdowne Park, Ballsbridge, Dublin.
27. Foley, Oliver, Donoughboy, Kilkee, Co. Clare.
28. Forde, Aidan, 55 Cherbury Court, Booterstown Avenue, Dublin.
29. Gallagher, Noel, Hollybank House, Hollybank Avenue, Ranelagh, Dublin.
30. Gallogly, Errol, 2 Lavarna Road, Terenure, Dublin.
31. Grogan, John G. Derryvicneill, Attymass, Ballina, Co. Mayo.
32. Hally, James, The Burgery, Dungarvan, Waterford.
33. Harrington, Patricia, Glencarne House, Ardcarne, Carrick-on-Shannon, Co. Roscommon.
34. Harris, Olivia, M.P., Oughterard, Galway.
35. Harris, Patrick, T., Oughterard, Co. Galway.
36. Heffernan, Jacqueline, 37 North Great Georges Street, Dublin.
37. Heffernan, Jacqueline, Puddingfield, Tipperary, Co. Tipperary.
38. Hogan, Edmund, "Sentosa", College Road, Cork.
39. Hughes, Noel, 73 North Strand Road, Dublin.
40. Jones, Eamon J., 26 Dalkey Park, Dalkey, Dublin.
41. Jones, Gerard, Greaghwillian, Carrickmacross, Co. Monaghan.
42. Joyce, John F. 53 Threadneedle Road, Salthill, Galway.
43. Keaveney, Mary, 41 Sycamore Drive, Highfield Park, Galway.
44. Kelly, Eugene, Bromehill House, Kilrush, Co. Clare.
45. Killalea, Katherine, Lisheenabrone, Swinford, Co. Mayo.
46. Martin, Catherine, 19 Monread Heights, Sallins Road, Naas, Co. Kildare.
47. Meehan, Gerard J., 14 Monaleen Park, Castletroy, Co. Limerick.
48. Millar, Hugh, 24 Brooke Vale, Rathfarnham, Dublin.
49. Moloney, Gerald, "Ballymore Lodge", Ballymore, Cobh, Co. Cork.
50. Mooney, Michael, P., Strand Road, Bunbeg, Co. Donegal.
51. Moore, Michael Keylod, Moyvane, Co. Kerry.
52. Moran, William, T., 14 River Valley Road, Swords, Dublin.
53. Moynihan, Brid, 26 Ard Carman, Co. Wexford.
54. Mulcahy (Nee Martin), Rowena, 13 Seafort Parade, Blackrock, Co. Dublin.
55. McCourt, James, Williamsville, Finglas, Dublin.
56. McDarby, Michael, 101 Castlelawn Heights, Galway.
57. Mac Dermot, Ruth, Landscape, Castlerea, Co. Roscommon.
58. Nelson, John P., 9 Washington Park, Rathfarnham, Dublin.
59. Ni Leighin, Mairead, A. B., 'Derrynane", 24 Glenageary Park, Glenageary, Co. Dublin.
60. Nolan, Bernadette M., 482 Collins Avenue, Whitehall, Dublin.
61. O'Beirne, Anthony, 56 Cowper Road, Rathmines, Dublin.
62. O'Brien, Owen, 6 Hannaville Park, Terenure, Dublin.
63. O'Brien, Patricia, "Bathurst", Taylor's Hill, Galway.
64. O'Cearbhaill, Sean, Ard Alainn, Glin, Co. Limerick.
65. O'Connor, Bernard M. J., 75 The Rise, Mount Merrion, Dublin.
66. O'Donnell, John G. M., Shanaclough, Oola, Co. Limerick.
67. O'Donovan, Sheila M., Castletownshend, Skibbereen, Co. Cork.
68. O'Flynn, Gerald A. J., "Rock Lawn", Rochestown Road, Cork.
69. O'Keeffe, Charles T., 15 Leopardstown Park, Stillorgan, Co. Dublin.
70. O'Leary, Edward S., Leim-an-Tsagairt, Newtown, Bantry, Cork.

71. O'Shea, Michael, 18 Anne Devlin Road, Templeogue, Dublin.
72. Riordan, Mary T., 40 Central Avenue, Bishopstown, Cork.
73. Scully, Geraldine, 26 Aberdeen Street, Dublin.
74. Smyth, Sean, 36 Elton Park, Sandycove, Dublin.
75. Sweeney, Elizabeth, Athenry, Co. Galway.
76. Sweeney, Kathy, "Maryfield", Kilmaine Road, Ballinrobe, Co. Mayo.
77. Walsh, Michael P., 124 Moyville, Rathfarnham, Dublin.
78. Watters, Paul, 76 Grattan Park, Galway.

New IBA Award for Best Article

First Award to be made at New Delhi Conference

The IBA Council have decided to award a Prize in order to stimulate the writing and publishing of articles which, on an international level, treat topics of special interest to the legal profession and the practising lawyer.

The first award will be made at the IBA's Nineteenth Conference to be held in New Delhi from 18-23 October, 1982 and will consist of £750 and an engraved medal. Second and third prizes may also be awarded consisting of £200 and £100 respectively together with a diploma.

The Topic chosen for the 1982 Award is:

The role of legal mechanisms in regulating acts performed outside the domestic jurisdiction with particular reference to the activities of multi-national companies in less developed countries.

Treatment of the Topic may cover one or more aspects. Examples of matters that could be considered are, trade in harmful substances, Arab boycott clauses in commercial contracts, violations of exchange control laws, possibly Swiss confidentiality laws, taxation of companies operating outside the domestic jurisdiction, and difficulties in securing international treaties. This list is in no way exclusive.

Articles on the topic must not exceed 10,000 words and must be submitted in English. The prize-winning article or articles will be published in the Association's Journals.

The contest is open to any lawyer under the age of 40. He or she does not have to be an IBA member.

Entries must be sent to the IBA headquarters by **June 1, 1982.** Judging will be by a Committee of three with a Chairman appointed by the British Institute of International and Comparative Law. The Committee shall, in its complete discretion, be free to recommend that no awards be given if none of the articles submitted are of sufficient quality. □

Correction

Election of Young Solicitors to Council?

(September 1981 Gazette, p. 177)

In paragraph 2, line 1 of the above note reference was made to the "Law Society". This in fact should have read "The Society of Young Solicitors".

We apologise for any misunderstanding which may have been caused by this error.

Adjudication of Stamp Duties

ADJUDICATION is a very important constituent of the stamp duty code. It is essential for the proper stamping of certain instruments; it is a necessary prerequisite for an appeal against an assessment of the duty and, finally, it authenticates the correctness of the stamp. The fact that in recent years over fifty thousand instruments are adjudicated upon annually reflects that importance. The necessity for and the volume of adjudication demand that, as far as possible, there is no avoidable delay in the processing, assessing and stamping of instruments lodged for that purpose. This article is intended as an aid to the attainment of that objective.

The Stamp Act, 1891, contains two sections only relating to adjudication, dealing respectively with the assessment of duty (Section 12) and with appeals (Section 13). For our present purpose we are concerned solely with the first two subsections of section 12 which indicate the purposes of and the mechanics of adjudication.

The Revenue Commissioners may, under subsection (1) "be required by any person to express their opinion with reference to any executed instrument upon the following questions:—

(a) whether it is chargeable with any duty;
(b) with what amount of duty it is chargeable".

To that end "the Commissioners may require to be furnished with an abstract of the instrument, and also with such evidence as they may deem necessary, in order to show their satisfaction whether all the facts and circumstances affecting the liability of the instrument of duty, or the amount of duty chargeable thereon, are fully and truly set forth therein". (Subsection (2)).

The following are the requirements necessary to enable the Revenue Commissioners to carry out their functions under that section —

(i) the delivery of a copy deed with the original;
(ii) the completion of a "Warrant for Adjudication" which is at once an application for adjudication and an information sheet; and
(iii) certain information.

The delivery of the copy deed and the completion of the warrant present no difficulties. Experience has shown that the problems arise under the third head, that relating to information. Cases cannot be finalised where insufficient information is available to enable decisions to be made. The effects of the necessary querying and the resulting delays are cumulative and affect both the case in question and others. Arrears which inhibit and delay the practitioner, his client and the Commissioners occur.

Those delays can be reduced considerably if certain steps are taken. Amongst the most important is the necessary relevant documentation such as a valuation, rate demand note, contract for sale, Certificate of Reasonable Value, statutory declaration etc., as the case may be. Next comes information that may not be apparent on the face of the documents and that should be set out in a covering letter, such as, the necessity for adjudication if it is a case where the need for adjudication is not readily apparent; the date of marriage in the case of a marriage settlement; the stage of building of a dwellinghouse; whether chattels or other property were also included in a sale. The amount of documentation and information necessary will depend upon the nature of the property the subject of the transaction and upon the facts of the case.

The Revenue Commissioners and the Society's Conveyancing Committee have been considering a number of practical problems which, over the years, have become apparent and, for the assistance of practitioners, have prepared particulars of the documentation and information that might be furnished in each of six different transactions. Not all would be required in all cases; on the other hand, there may be unusual circumstances in which further correspondence would be necessary in a minority of cases. However, it can be taken that if the steps outlined therein are reasonably adhered to, the question of raising queries will not arise in the vast majority of instruments that are lodged for adjudication.

1. Conveyancing or Transfer operating as voluntary disposition inter vivos

Where the property is land

Furnish a statement of the market value of the property at the date of the instrument and describe the property.

State the rateable valuation, area of the property and the name of the rated occupier (a Rate Demand Note may be furnished giving this information).

State whether the lands were subject to any changes and, if so, the amount thereof.

If only a fractional share of the property is passing, show how the share arose.

If only a limited interest or reversion in the property is passing, a statement as to how the interest arose (or a copy of the instrument which created it) should be furnished. The date of birth of the life tenant should be stated.

If applicable, the appropriate transaction certificate or relationship certificate should be included in the instrument.

Where the property is quoted stocks, shares or marketable securities

Furnish a statement showing the market value of each item of property.

Where the property is unquoted stocks or shares

Furnish a detailed valuation of the property transferred.

Furnish copies of the balance sheets, trading and profit and loss accounts for the three years prior to the date of the transfer, together with a statement of the market value of the fixed assets of the company.

Where the conveyance or transfer is made in consideration of marriage

Where the date of the marriage does not appear in the instrument, state its date.

Where the instrument was executed after the marriage furnish a copy of the pre-nuptial contract.

Where relief is claimed under the Family Home Protection Act, 1976

Furnish a description of the property.

Certify that the property is a family home within the meaning of section 2 of the Act.

2. **Conveyance, Transfer or lease of a New House of Flat**

Where exemption is claimed under section 49 Finance Act, 1969 (as amended by section 48 Finance Act, 1976 and section 48 Finance Act, 1981)

Furnish a copy of the Certificate of Reasonable Value, form H.P. 3 for a house or form F.P. 3 for a flat (forms H.P. 4 and F.P. 4 do *not* confer exemption).

Certify that the instrument gives effect to the purchase of a house upon the erection thereof.

Certify that the property passing in the instrument is that referred to in the Certificate of Reasonable Value.

In the case of a flat, state, in addition to the above, whether it has been let or sold prior to the present transaction.

Where it is claimed that duty should be assessed on a site fine and not on the value of a covenant to build

Furnish the Agreement for sale or lease, the Building Contract and any other agreement in connection with the transaction.

State the amount of the site fine (if any).

Furnish a statutory declaration from —

(a) the solicitor for the builder, or

(b) the solicitor for the purchaser, or

(c) an architect

giving precise details of the stage of development of the site as at the date of the Agreement for Sale or Lease.

3. **Conveyance or Transfer on Sale**

Where the property is land

Furnish the contract for sale.

Confirm that the consideration represents the full market value of the property passing.

State the amount owing in respect of any mortgage or charge where the purchaser undertakes payment thereof.

Furnish a statement as to whether there was an agreement between the parties for the sale of any other property such as chattels etc.

If applicable, the appropriate transaction certificate or relationship certificate should be included in the instrument.

Where the property is stocks, shares or marketable securities

Confirm that the consideration represents the full market value of the property passing.

4. **Conveyance or Transfer between Associated Bodies Corporate**

Where relief is claimed under section 19 Finance Act, 1952 (section 85 Finance Act, 1980 substituted a new section 19).

Furnish a statutory declaration in pursuance of section 19(5) Finance Act, 1952 as amended. The declaration should set out in full the grounds on which the claim is based stating:—

That the claim is made in respect of the instrument(s), which should be summarised briefly, and that the effect of the instruments is that laid down by section 19(2).

types and particulars of the bodies corporate concerned (date of incoropration, registered number, share capital both nominated and issued).

that the transferor was entitled to the beneficial interest in the relevant property.

That the beneficial interest in the relevant property became vested in the transferee.

how the relationship between the bodies corporate complies with section 19(2). If any shares are held by a nominee, the instrument evidencing the beneficial ownership of those shares should be produced.

whether it is intended that the relationship between the bodies corporate satisfying the provisions of section 19(2) shall be maintained.

whether the consideration for the transfer is shares. If so, share certificates should be furnished.

the manner in which the consideration (if other than shares) has been or is to be found and satisfied.

that the instrument(s) was/were not executed in pursuance of or in connection with such an arrangement as is described in section (19(3).

5. **Reconstruction or Amalgamation of Companies**

Where relief is claimed under section 31 Finance Act, 1965

Furnish a statutory declaration from a solicitor setting out fully the circumstances of the transaction and the grounds on which it is considered that the relief should apply and stating how much, if any of the consideration consists of cash.

Furnish copies of all documents pertaining to the transaction such as returns of allotment forms, agreement, company minutes and resolutions.

Furnish share certificates relating to new shares issued which form all or part of the consideration paid by the transferee company.

6. **Agreement for Sale chargeable under Section 59, Stamp Act, 1981.**

Where it is claimed that items of property to which the Agreement relates are within the exemptions contained in the section

The consideration should be apportioned between items of property which are exempt and items which are not exempt. For this purpose a form St. 22 may be obtained from the Adjudication Office for completion.

If there is a balance sheet available which supports the values stated, this should also be furnished. □

Incorporated Law Society Symposium *"The Doctor and Society"*
Blackhall Place, Dublin 7. 7 November, 1981.
From left: Professor Patrick Meenan, Mrs. Moya Quinlan (President, Inc. Law Society), Dr. John Wall and Michael V. O'Mahony, Solicitor.

Pictured at a recent visit of American Criminal Lawyers to the Incorporated Law Society were Judge Nath C. Doughtie and Mrs. Moya Quinlan, President, Incorporated Law Society.

BOOK REVIEWS

Benjamin's Sale of Goods, 2nd Edition. General Editor, A. C. Guest. Published by Sweet and Maxwell 1981, cxl, 1401pp. £65.00 (sterling).

In a previous issue of the Gazette a short book on the Sale of Goods was recommended for the "busy practitioner who wants to keep up with developments in this area of the law and who does not have a new Benjamin at his elbow." In that extract, the reviewer rightly paid tribute to the usefulness and authority of Benjamin's Sale of Goods, the second edition of which has just been published. The second edition, like the first, is the successor in title, so to speak, to a volume first published in 1868 and then entitled "Benjamin's Treatise on the Law of Sale of Personal Property with References to the French Code and Civil Law."

The new edition of course relates to U.K. Law (as at 1st June, 1980) but, for the Irish practitioner, its publication is timely because of the enactment of the Sale of Goods and Supply of Services Act, 1980. The present edition therefore should be particularly useful in considering the implications of the 1980 Act although, at the risk of stating the obvious, it must always be remembered that the Irish Act does not necessarily follow its U.K. counterparts in every detail and, furthermore, that an English authority can at best be persuasive rather than binding in Irish courts.

That said, the volume under review contains much useful material for considering the concept of "dealing as consumer", the test of what is "fair and reasonable" in relation to certain contractual terms, misrepresentation, and the general terms implied by the 1980 Act in contracts for the sale of goods. The volume is less useful in considering the provisions of the 1980 Act in relation to services (and perhaps hire-purchase), partly because the Irish provisions on these subjects tend to differ from their English counterparts.

The commercial lawyer will derive considerable enlightenment, but perhaps little certainty, from the extended treatment of retention of title clauses. The full implications of such clauses will only become clearer over time.

The same may be said of such a familiar concept as "merchantable quality". It is no criticism of the learned authors to say that their treatment of the subject reflects the general uncertainty as to the precise meaning of the concept, even following its definition by Statute. The Irish Act of 1980 follows the English definition, but with the important addition of the concept of durability. I believe the Irish addition is useful, particularly for the consumer, but it carries with it the difficulty that any breach of the "condition" as to durability is something that, of its nature, may often be discovered only after a considerable period has elapsed following purchase.

The previous edition of Benjamin was published in 1974 and the editor sets out in the Preface an account of the more significant developments since then which have led to the new edition. These include the Sale of Goods Act, 1979, the Consumer Credit Act, 1974, and the Unfair Contract Terms Act, 1977, (all of course U.K. Acts) as well as the relevant case law of recent years. (In relation to overseas sales, in particular, the editor refers to over a hundred cases, which have necessitated many changes since the previous edition). Much of the volume relates primarily to commercial transactions (as does much of the case law on the sale of goods) but a chapter on Consumer Protection has been extensively re-written although the authors do not claim to provide anything more than an introduction to this particular area.

As might be expected from a volume in the Common Law Library series, the text, layout and annotations of the present edition are excellent. With over 1,500 pages, including index and table of cases, Benjamin's Sale of Goods is not something to be purchased on impulse but for the practitioner in this area of law, it would seem to be indispensible.

James M. Murray

Principles of Irish Law, Brian Doolan, (Gill & Macmillan), 300 pp, 1981. Price: £7.24 (inc. VAT).

The publishers of this book make a number of claims which caused this reviewer to approach his task with some misgivings. It did not seem possible to produce a small book of less than 300 pages of text which would fill the perceived need for "a comprehensive statement of Irish legal principles in clear and positive language". It is true that the work is also described as an introduction to the most important areas of Irish Law, so that the intending reader is put on notice that it is merely an introduction and that it does not purport to cover all areas, even in an introductory fashion.

The areas selected are the Irish Legal System (in which the author deals with the history of Irish Law and the constitutional and legislative framework of the legal system) and in the eight parts following, the major areas of substantive law (Contract, Criminal Law, Torts, Equity and Trusts, Land Law, Family Law and Succession, Commercial Law and Employment Law). Few would dispute that these are the most important areas, or, indeed, that they encompass practically the whole of Irish Law.

An attempt to give a *comprehensive* statement of the legal principles of all of these branches of Irish Law in less than 300 pages would appear to be faredoomed to failure, and this book indeed fails in this respect.

Mr. Doolan has not failed to achieve what one assumes was his real objective. This book *is* a statement, in clear and positive language, of many of the substantive rules of Irish Law in various areas. It presents a simple and useful account of the machinery of the legal system and the major divisions of the substantive law. It is a model of clarity — both language and organisation.

The publishers are also to be congratulated on the attractive lay-out and general quality of the work. It is, for example, rare nowadays to find any published work which is as relatively free of misprints as this is and, in one of the few lapses, (O'Laigheis, p. 27), the error is at least consistently maintained both in the text and in the Table of Cases. The authorities cited throughout are not supported by footnotes, but full citations are given in the Tables of Cases and Statutes.

As the book is not intended for practitioners or more advanced scholars, its lack of comprehensiveness and discussion of controversial issues is understandable. It is

intended for students of law, business, accountancy, banking etc., and will be found useful by these, and others, who wish to acquire a broad picture of modern Irish Law. It should be emphasised however, especially to those who may not intend to pursue legal studies beyond a superficial level, that it is not possible to state even the so-called "principles" of law with quite the degree of accuracy, simplicity and clarity suggested by this work. The laudable aim of explaining the more important principles in easy terms has been achieved here at the expense of a considerable distortion of the reality of "Irish Law". This distortion arises not only from the misleading positive statement of the principles but also from the author's equally laudable aim to concentrate almost exclusively on cases decided in Ireland.

It is obviously right that a book on Irish Law should not pay too much consideration to cases decided outside this country at the expense of Irish cases. But in some areas it is not possible to give an *adequate* statement of "Irish" law by excluding English cases entirely. For example, in the section on Contract, important for the main intended readers studying law in the business context, the total exclusion of reference to English cases is very questionable. Irish and English Courts and practitioners do not deprive themselves of the benefits to be gained from reference to Contract cases decided elsewhere in the common law world. The House of Lords, e.g., in *Scuttons Ltd. v. Midland Silicones Ltd.*, quite happily relied on decisions in the U.S. Supreme Court and the High Court of Australia. If readers consult the cases cited in the section on Contract, they will discover that, in many cases, the Irish judges refer simply to an English case in which the relevant principle is fully discussed.

Mr. Doolan could not reasonably have been expected in this book to provide the full synthesis of Irish and English cases which would be required for a comprehensive statement of the Anglo-Irish law of contract, but, while still emphasising Irish cases, he might in this, and other sections, have alerted his readers to the continuing importance of English cases in contemporary Irish law.

J. F. O'Connor

Solicitors' Golfing Society

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St. Patrick's Plate: Winner, Paul Malone (10) 39 points; Runner-up, Brian Rigney (11) 35 points, on 2nd nine.

Veterans Cup: Winner, Pat O'Gorman (11), 36 points; Runner-up, Ernest Margetson (19), 32 points.

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Over 30, miles: Garry McMahon (10) 35 points.

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Professional Information

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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 25th day of November, 1981.

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Obituaries

Mr. Thomas T. Kenny died in St. Michael's Hospital, Dun Laoghaire on April 21, 1981. Mr. Kenny who was admitted in Hilary Term 1937, had been a partner in the firm of Messrs. Sheridan & Kenny, 26 Eustace Street, Dublin 2, together with his father Mr. Edward Kenny, and his brother Raymond.

Mr. John Baldwin Murphy died on 31 October, 1981 in Clones, Co. Monaghan. Mr. Murphy having admitted in Trinity Term 1921, was entitled to practise in any part of Ireland, North or South. He became a partner to his father, Mr. Henry Murphy in Clones where he continued to practise.

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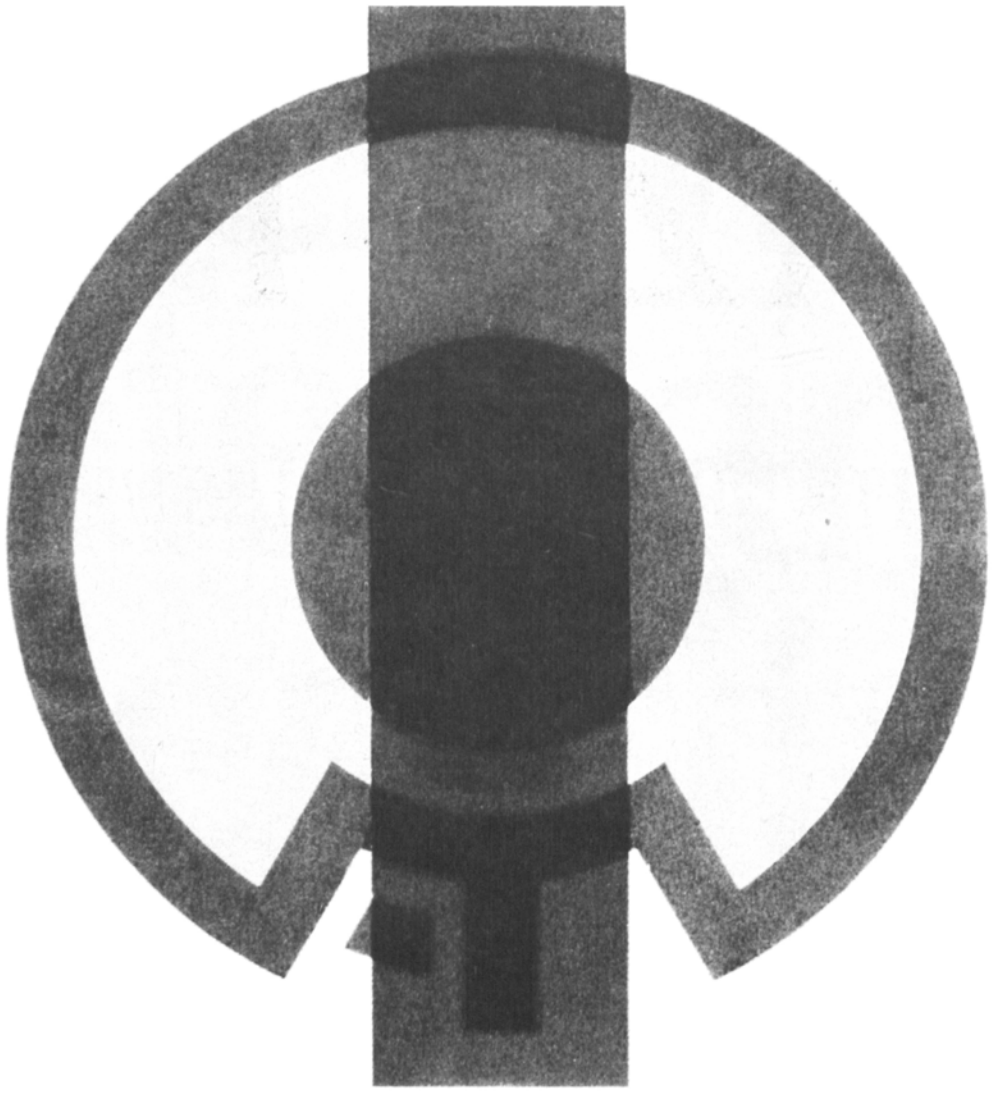
THE PRESIDENT 1981/82

Mr. W. Brendan Allen has been elected President of the Society for the year 1981/82. Mr. Allen was educated in Galway at St. Ignatius College and St. Joseph's College. He was admitted in Michaelmas, 1945 and was first elected to the Council in 1970. Mr. Allen is the senior partner of MacDermott & Allen, Solicitors, Galway.



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INCORPORATED LAW SOCIETY OF IRELAND

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In this issue

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Comment . . .

. . . Watch your language

AS the International Year of Disabled Persons draws to a close, differing views are being expressed as to its success. It is true that none could claim that there has been a revolutionary improvement in the position of disabled persons in Irish society, but no such improvement could realistically be expected in such a short time.

If, on the other hand, the year has led to a change in attitudes among hitherto unaffected and uncaring sections of our community, it will have achieved much. One positive example of such change would be a reduction in the use of those ugly phrases which are in such common use either to describe disabled people or to compare them with "normal" persons.

What is most depressing is that our legislators, to whom the community is entitled to look for a lead in such matters, and our Department of Health have so recently combined in the perpetuation of a misdescription so fundamental as to put in doubt their depth of understanding of the position. The Mental Health Act of 1980 still makes no distinction between those who are mentally handicapped and those who are mentally disturbed. Many people who are mentally handicapped are not mentally disturbed.

The Royal Society for Mentally Handicapped Children and Adults in Britain has been pressing for many years for the removal of mental handicap from the comparable English legislation, the Mental Health Act, and there are signs that in a proposed Bill the British Government is to recognise the distinction between the two groups. It is highly unsatisfactory, to say the least, that in the Republic of Ireland, in order to obtain benefits or hospitalisation, a mentally handicapped person must be treated as a mentally disturbed person. There are worrying suggestions that, as a result of the classification of mentally handicapped persons as mentally ill for the purposes of the Mental Health Act, such persons may be detained or subjected to treatment which is not appropriate to mere mental handicap.

The least our legislators should do in 1982, to show that the year of disabled persons has had a lasting impact, would be to pass legislation dealing sensibly with the position of the mentally disabled as a category of persons different and distinct from those who are mentally disturbed. □

The European Convention on Human Rights and the 'Closed Shop'

by

Gerry Whyte, LL.M.,

Lecturer at Law, Trinity College, Dublin

TRADE union legislation in Ireland can be divided neatly into two parts, (a) the Trade Union Acts, 1871 1935, which are largely concerned with the consequences flowing from the legal recognition of trade unions, and (b) the Trade Union Acts, 1941-1975, which attempt to tackle the problems created by the multiplicity of unions in Ireland.

A radical attempt to resolve these latter problems was thwarted by the Supreme Court when it held that Part III of the Trade Union Act, 1941, was unconstitutional, in *N.U.R. v. Sullivan*.[1] In the aftermath of this decision, the Oireachtas resorted to a more "softly, softly" approach to the problem of multiplicity of unions. The Trade Union Act, 1971, sought to make it more difficult to create new unions, while the Trade Union Act, 1975, facilitated the amalgamation of existing ones.

A legal concept which is very relevant to the resolution of the problem of multiplicity of unions is what is known as the "negative freedom of association" — the right to dissociate. The existence of this concept precludes the legal enforcement of post-entry closed shops, i.e. where the worker is offered employment on condition that he become and remain a member of a specified trade union — *Meskell v. C.I.E.*[2] Industrial relations personnel are therefore obliged to rely on practices such as pre-entry closed shops, where applicants for new jobs are confined to members of specified unions, or sole negotiation agreements, which confer sole negotiation rights on a specified union or unions, in order to minimise the difficulties created by the multiplicity of unions.

The recent decisions (in June and August 1981, respectively) of the European Court of Human Rights in the case of *Le Compte, Van Leuven and De Meyere*,[3] and in the case of *Young, James and Webster*[4] have great significance for this aspect of Irish industrial relations insofar as they outline the circumstances under which Article 11 (eleven) of the Convention on Human Rights protects the "negative freedom of association." Article 11 provides that:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police or the administration of the State.

The applicants in both of the cases under consideration argued, *inter alia*, that Article 11 implied protected freedom not to associate and that legal provisions which either directly obliged the applicants to join a specific association or which permitted others to compel the applicants to join a specific association, infringed this negative freedom. But despite the similarity of the arguments used, the results arrived at by the Court in both cases were diametrically opposed to each other.

The Case of Le Compte, Van Leuven and De Meyere (June 1981)

This case arose out of various disciplinary proceedings taken by the Belgian Medical Association against the applicants who were all medical practitioners. As a result of these proceedings, the applicants were prevented from practising medicine for periods ranging from one to three months. Having failed in their respective appeals against these decisions in the Belgian civil courts, the applicants referred their cases to the European Commission of Human Rights, alleging, *inter alia*, that their rights under Article 11 of the Convention were infringed by the requirement of Belgian law that they be members of the Medical Association ("Ordre"). Their respective applications, which had been joined in March 1977, eventually came on for hearing before the Court of Human Rights in November 1980 and it delivered its judgment on 23 June 1981.

The Court held, by a majority of 16-4 that the applicants' rights under Article 6 of the Convention, which guarantees fairness of procedures, had been infringed. But for the purposes of the present article, we are more concerned with the unanimous decision of the Court on the submissions based on Article 11.

The Court held that Article 11 did not apply to "public law institutions." The Belgian Medical Association was such an institution because

> "(I)t was founded not by individuals but the legislature; it remains integrated within the structures of the State and judges are appointed to most of its organs by the Crown. It pursues an aim which is in the general interest, namely the protection of health, by exercising under the practice of medicine. Within the context of this latter function, the Ordre is required in particular to keep the register of medical practitioners. For the performance of the tasks conferred on it by the Belgian State, it is legally invested with administrative as well as rule-making and disciplinary prerogatives out of the orbit of the ordinary law . . . and, in this capacity, employs processes of a public authority".[5]

Although the concept of "public law institution" is here described rather than defined, it is arguable that it encompasses such professional bodies in Ireland as the Irish Medical Council, the Incorporated Law Society of Ireland and the Honourable Society of King's Inns. The Court did enjoin on such institutions one requirement if they are not to infringe Article 11 — viz. their members must not be prevented from forming or joining other professional associations. As the applicants in the instant case were free to join several associations which existed to protect the professional interests of medical practitioners, the Court concluded that there had been no violation of Article 11.

The case of Young, James and Webster (August 1981)
The applicants in this case were former employees of British Rail who had been dismissed because they refused to join specified trade unions pursuant to an agreement negotiated between British Rail and the National Union of Railwaymen (N.U.R.), the Transport Salaried Staff's Association (T.S.S.A.) and the Associated Society of Locomotive Engineers and Firemen (A.S.L.E.F.). They alleged, *inter alia*, that the enforcement of the Trade Union and Labour Relations Act 1974 (T.U.L.R.A.) and the Trade Union and Labour Relations (Amendment) Act 1976, which permitted their dismissal from employment when they objected on reasonable grounds to joining a trade union, violated their rights under Article 11.[6]

A preliminary issue which arose concerned the responsibility of the United Kingdom Government in the instant case. The Court ruled that:

> "If a violation of one of those rights and freedoms [guaranteed by the Convention] is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged".[7]

Thus, in the context of industrial relations, the State may be held responsible for the violation of an employee's rights even where that employee is not employed by the State. It is not clear, however, whether a failure on the part of the State to enact legislation protecting the rights of its citizens can result in the State being held responsible for an infringement of those rights by a third party — the U.K. Government had conceded, in the instant case, that its responsibility would be engaged by virtue of the enactment of T.U.L.R.A. and the amending Act of 1976. It is submitted that failure to act should give rise to liability as Article 1 of the Convention places a positive obligation on all the Contracting Parties to

> "secure to everyone within (their) jurisdiction the rights and freedoms defined in . . . (the) Convention".

The significance of the Court's ruling as to the basis of the State's liability in this case is that the subsequent remarks of the Court as to a violation of Article II must be taken as referring to those legislative provisions which permitted dismissal for a breach of a closed shop agreement, rather than to the closed shop agreement itself. Thus it would still appear to be lawful for unions to conclude closed shop agreements with employers, though of course they cannot have such agreements legally enforced and it is unlikely that they can compel employers to dismiss those employees who refuse to be bound by the agreement. They may, however, be entitled to take action short of this in order to encourage employees to abide by such agreements.

Having established the responsibility of the U.K. Government, the Court then proceeded to consider the effect of Article 11. One of the principal issues before the Court was whether the Article protected, by implication, the "negative" freedom of association. The respondent Government contended that such a right had been deliberately excluded from the Convention, citing in support of this contention the following passage in the travaux preparatoires:

> "On account of the difficulties raised by the 'closed-shop' system in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which 'no-one may be compelled to belong to an association' which features in (Article 20(2) of) the United Nations' Universal Declaration".[8]

The Court did not think that it was necessary to decide this question in the instant case, but observed that the

> "notion of a freedom implies some measure of freedom of choice as to its exercise".[9]

In the present case, this apparently meant that the negative right of association did not fall completely outside the scope of Article 11 and that Article 11 could be used to restrain certain types of compulsion to join a trade union.[10] The Court stressed, however, that it was obliged to consider only the issues raised by the concrete case before it and therefore it did not intend to examine the general legal position of the closed shop system but rather the effects of that system on the applicants. Those effects were that existing employees were threatened with dismissal for refusing to comply with the closed shop agreement. In the opinion of the Court, this was a very serious form of compulsion and one which

> "strikes at the very substance of the freedom guaranteed by Article 11".[11]

Accordingly there had been a violation of the applicants' rights.

Furthermore, by specifying the unions which the applicants were obliged to join, the closed shop agreement unlawfully restricted the applicants' freedom of choice.

> "An individual does not enjoy the right to freedom

> of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value".[12]

In the light of this statement the question may properly be asked whether the Trade Union Act, 1971, which makes it very difficult, in reality, to form a new trade union in Ireland, infringes Article II of the Convention. A positive answer to this question would have very serious consequences for the legislative policy of tackling the problem of multiplicity of unions by discouraging the creation of new unions.

The Court then observed that, read in the light of Articles 9 and 10 of the Convention, one of the purposes of freedom of association is the protection of personal opinion, viz. freedom of thought, conscience, religion. Consequently any attempts to compel someone to join an association contrary to his convictions violate Article 11.

Finally the Court turned to consider whether the legislation in this case was protected by Article 11, para. 2 of the Convention. (It may be noted that this is the first occasion on which this paragraph has been considered in detail by the Court). Under the terms of paragraph 2, an interference with freedom of association would be justified if

(a) it was "prescribed by law",
(b) it had an aim or aims that is or are legitimate under that paragraph, and
(c) it is "necessary in a democratic society" for the aforesaid aim or aims.

The Court did not find it necessary to consider the first two of these three conditions but instead focussed on whether the interference with freedom of association, contained in T.U.L.R.A. 1974 as amended by the 1976 Act, was "necessary in a democratic society" in order to attain the advantages inherent in the closed shop system, for example, the fostering of good industrial relations, avoiding inter-union disputes, counter-acting the inequality of bargaining power, etc. The Court re-stated a number of principles relevant to the assessment of the "necessity" of a given measure which it had first enunciated in the *Handyside* case.[13] First, "necessary" cannot be construed as broadly as "useful" or "desirable", and so the fact that the closed shop agreement might have produced certain advantages is not conclusive of the issue. Secondly, because pluralism, tolerance and broadmindness are characteristics of a democratic society, a balance has to be struck between the dominant position of a majority, and the position of minorities. Consequently the fact that the applicants were in a minority was again not conclusive of the question. Lastly, any restrictions imposed on a Convention right have to be "proportionate to the legitimate aim pursued".[14] Applying these principles to the facts of this particular case, the Court concluded that the provisions of T.U.L.R.A. 1974 as amended by the 1976 Act, relating to the closed shop, were not necessary for the protection of the interests of union members and that the detriment suffered by the applicants was not proportionate to the aims pursued.

The Implications of these Decisions:

The decisions of the Court of Human Rights in the *Le Compte, Van Leuven and De Meyere* case, and in the *Young, James and Webster* (i.e. "British Rail") case, have added greatly to our knowledge of the effect of Article 11 of the Convention. In particular they afford us a better insight into the protection afforded to the "negative freedom of association" by the Convention.

A number of important points emerge from these cases:

(a) Article 11 does not protect the right of the individual not to have to join a "public law institution." Therefore members of the Professions can lawfully be compelled to register with, and be subject to the discipline of, professional bodies established by statute. However they cannot be prevented from forming or joining other professional associations, in addition to the appropriate public law institution. Trade unionists may, no doubt, find it difficult to understand why the negative freedom of association should apply to trade unions but not to public law institutions. In this respect, it is interesting to note that the United States Supreme Court has refused to distinguish between public law institutions and trade unions. In the case of *Railway Employees' Dept., A.F.L. v. Hanson*,[15] which concerned the constitutionality of a legislative provision authorising the conclusion of union shop agreements, Douglas J., delivering the judgment of the Court, stated that in such a case

> "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar".[16]

(b) It would appear that Article 11 does afford limited protection to the "negative freedom of association", though the remarks of the Court in the *British Rail* case were very cautious on this point. The decision in that case

means that existing employees cannot be dismissed for refusing to join a trade union pursuant to closed shop agreements. A similar decision had already been reached by the Irish Supreme Court in *Meskell v. C.I.E.*[2] It is arguable, from a reading of the decision in the *British Rail* case, that action short of dismissal taken to compel workers to join a trade union might not violate the Convention.[17] A similar view may be found in the judgment of Kingsmill Moore J. in *Education Co. of Ireland v. Fitzpatrick*[18] in the context of the guarantee of freedom of association under the Irish Constitution.

(c) The prospective employee also benefits from the protection of Article 11. The Irish Supreme Court, in *Becton-Dickinson & Co. Ltd. v. Lee*[19] was prepared to assume, though without deciding the point, that a term in a contract of employment requiring a new employee to join a specified trade union or unions was not unconstitutional on the basis that this would amount to a waiver of his constitutional rights.[20] The European Court, however, stated, in the *British Rail* case, that restricting an individual's choice of unions so that it becomes either non-existent or is so reduced as to be of no practical value amounts to an infringement of his right to freedom of association. This would seem to sound the death-knell for a term such as that in question in the *Becton-Dickinson & Co. Ltd.* case, though it is arguable that it merely anticipates a similar decision by the Irish courts, given the exacting standards required for a valid waiver of constitutional rights, outlined by the Supreme Court in *G. v. An Bord Uchtala*.[21] The statement of the European Court also calls into question the validity of the pre-entry closed shop, where workers are required to be members of a certain union or unions before they can apply for a particular job.

(d) In the light of the *British Rail* case, it is arguable that a major part of the legislative policy underlying the Trade Union Acts 1941-1975 infringes Article 11. As was pointed out at the outset in the aftermath of the *N.U.R. v. Sullivan* case, the legislature resorted to a policy of hindering the creation of new unions and facilitating the amalgamation of existing ones, in an attempt to resolve the problem of multiplicity of unions. The first aspect of that policy, as exemplified by the Trade Union Act, 1971, makes it extremely difficult for workers to form a new trade union — a deposit of at least £5,000 must be lodged with the High Court for a period of eighteen months and the proposed trade union must have a membership of at least five hundred during the same period before it can apply for a negotiation licence. This obviously restricts the individual's freedom to form a new union and may therefore be in violation of Article 11.

(e) It is now clear that before any interference with freedom of association can be protected by Article 11, paragraph 2, it must:

(i) be prescribed by law;
(ii) have an aim or aims that is or are legitimate under that paragraph, and
(iii) be "necessary in a democratic society" for the aforesaid aims.

Given the rigorous interpretation of these conditions by the Court in the *British Rail* case, it is arguable that these parts of the Trade Union Acts 1941-1975 which relate to the granting of negotiation licences may not be entitled to the protection of Article 11, paragraph 2.

(f) One ray of hope remaining for the Government and industrial relations personnel is that the Court had nothing to say about sole negotiation agreements. It would appear therefore that it is still open for an employer to agree with one or more specified unions that they, and they alone, will be entitled to represent his workforce in any collective bargaining which may take place, a decision which is in line with the pronouncements of McWilliam J. in the recent High Court decision of *Abbott v. Whelan*[22] and which is treated of in more detail by the present author elsewhere.[23]

Conclusion

The European Convention on Human Rights is, of its very nature, concerned with the rights of the individual. Legislative policy in Ireland with regard to trade unions, however, attempts to promote the collective interests of the Irish trade union movement. Of the two European cases under consideration in the present article, the *British Rail* case in particular emphasises the rights of the individual worker *vis a vis* his employer and the trade unions. More specifically, it confirms that Article 11 of the Convention confers some protection on the individual's "negative freedom of association." In so doing, however, it brings one step closer the inevitable conflict between our domestic legislative policy on trade unions and our international obligations under the Convention of Human Rights. □

Footnotes

1. [1947] I.R. 77.
2. [1973] I.R. 121.
3. Judgment delivered on 23 June 1981.
4. Judgment delivered on 13 August 1981.
5. Paragraph 64 of the judgment of 23 June 1981.
6. The legal position in the U.K. is now governed by the Employment Act 1980, which protects, inter alia, employees who object on grounds of conscience or other deeply-held personal conviction to being a member of a trade union.
7. Paragraph 49 of the judgment of 13 August 1981.
8. Report of 19 June 1950 of the Conference of Senior Officials, Collected Edition of the "Travaux Preparatoires", vol. IV, p. 262.
9. Paragraph 52 of the judgment of 13 August 1981.
10. Cf. the strong dissenting opinion of Judge Sorenson (13 August 1981), joined by Judges Vilhjalmsson and Lagergren, where he attacks the view that the positive and negative freedom of association are logically connected.
11. Paragraph 55 of the judgment of 13 August 1981.
12. Paragraph 56 of the judgment of 13 August 1981.
13. Judgment delivered on 7 December 1976.
14. Paragraph 63 of the judgment of 13 August 1981.
15. (1955) 351 U.S. 225. See also *Lathrop v. Donohue* (1961) 367 U.S. 820.
16. *Ibid.* at p. 238.
17. See paragraph 55 of the judgment of 13 August 1981.
18. [1961] I.R. 323, at p. 396.
19. [1973] I.R. 1.
20. See the judgment of Walsh J. at p. 40; the judgment of Henchy J. at p. 48.
21. [1980] I.R. 32.
22. High Court, 2 December 1980, unreported.
23. See "The right of workers to choose their collective bargaining agents", Gazette of the Incorporated Law Society of Ireland, April 1981, p. 53.

PRACTICE NOTE

Use of Vendor and Purchaser Act Summons Procedure

In a recent case, *Mulligan v. Dillon*, judgment delivered on 7th November 1980 (unreported) brought under the Vendor and Purchaser Act, 1874, Mr. Justice McWilliam indicated that he was of the opinion that both parties were under a misapprehension as to the functions of the Court in such Applications. In this case the Vendor's Solicitors had to reply to the standard form of Requisition, number 52 in the Law Society's printed form of Requisition, dealing with the Family Home Protection Act replied as follows:

52(a). Is there on the property any "Family Home" as defined in the Act, answer: No.

52(c). If the answer to (a) is in the negative please state the grounds relied upon and furnish now draft Statutory Declaration for Approval verifying these grounds. Answer: "The Vendor's spouse has never resided on the property, herewith draft Statutory Declaration for approval". In fact four draft Declarations were furnished, a full one by the Vendor with the following relevant provisions. "(2). I say I am the sole owner of the property which I have purchased by way of Lease dated the 28th day of September 1973 and which purchase I effected entirely with my own money and I further say that I have resided in the property continuously since the month of August 1973. (3). I say I have been separated from and lived apart from my husband Malachy since the 26th March 1967 and I further say that since I acquired the property in 1973 my husband has neither resided in, visited, occupied nor has been accommodated in the property".

The draft declarations of the children were in the following terms subject to variance as to the period of residence: "I say that I resided in the property continually during the period between August 1973 and 30th December 1977 and I further say that my said father Malachy Mulligan neither resided in, visited, occupied nor was ever accommodated in the property during the period aforesaid".

The Defendant's Rejoinder was as follows: "Purchaser notes contents of draft Statutory Declarations. However it is now clearly established that either a corroborative Statutory Declaration of the Vendor confirming the facts averred to in the Statutory Declaration of the Vendor must be furnished or a Court Order obtained declaring that the premises are not a "Family Home". Please advise which procedure the Vendor will follow."

The Vendors reply to this dated 9th October was "the Vendor issuing a High Court Special Summons seeking a Declaration that premises are not a "family home". You might please advise whether you have authority to accept service of the Summons".

A Special Summons was issued on the 20th October 1980 and claimed an Order pursuant to Section 7 of the Act of 1874 for (a) A determination as to whether or not the said flat is a family home within the meaning of Section 2 of the Family Home Protection Act 1976; (b) A determination as to whether or not the Defendant is a bona fide purchaser for value within the meaning of Section 3 of the Family Home Protection Act 1976.

(c) Further or other Relief.

(d) Costs.

Mr. Justice McWilliam said that he was of opinion that both parties were under a misapprehension both as to the appropriate steps to be taken under an investigation of title on a sale and as to the function of the Court. It was not the function of the Courts to take over the duties of Conveyancing Counsel or Solicitors on an investigation of title. Once the facts have been established or the Vendors fail to make disclosure or the parties have joined issue as to the legal effect of the facts or of the failure of the Vendor to furnish information it is then for the Court to decide what is the legal position "whether good title has been shown or whether the Vendor was bound to furnish further or better evidence of title." In the instant case he indicated that it was for the Defendant to consider the particulars furnished in the Affidavit of the Plaintiff, make such further enquiries as she may be advised and then decide whether or not she would accept or refuse the title.

Mr. Justice McWilliam indicated that as no argument had been addressed to him under Law applicable to the contention made in the Defendants Rejoinder he would not make any further pronouncement on it.

Section 9 of the Vendor and Purchaser Act 1974 provides that a Vendor or Purchaser of Real or Leasehold Estates in Ireland or their representatives may apply to a Judge of the High Court in Ireland "in respect of any Requisition or Objections, or any claim for compensation, or any other question arising out of or connected with a Contract, (not being a question effecting the existence or validity of the Contract) and the Judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of an incident to the application shall be borne and paid. □

Incorporated Law Society of Ireland

IMPORTANT NOTICE

Practising Certificates will not be issued in 1982 or future years unless the Solicitors' Accountants' Certificates is in order, i.e., a clear Certificate has been lodged within 6 months of the solicitors' accounting date.

Where, on application for a Practising Certificate, an Accounting Certificate is not in order, the Solicitor will be notified in writing that the Practising Certificate cannot issue until the Accountants' Certificate is lodged and that should be done within one month. He will be informed that pending receipt of the Accontants Certificate his remittance is being held in suspense account and that in the meantime, it is an offence to practice without a Practising Certificate.

After a lapse of one month, the solicitor will be informed that unless the Accountants' Certificate is received within a further month, disciplinary proceedings will be commenced without further notice and that, at the same time, the Bar Association and County Registrar will be notified that the solicitor is practising without a current Practising Certificate.

The situation regarding outstanding Accountants' Certificates is reviewed at each Council meeting.

JAMES J. IVERS,
Director General

DUBLIN SOLICITOR'S BAR ASSOCIATION

Annual Dinner 1982

The Association will hold its Annual Dinner
ON FRIDAY, 19th FEBRUARY, 1982
at the Law Society,
Blackhall Place, 8 p.m.

Application for tickets (£14.00 per person) together with remittance to:

MRS. CLARE CONNELLAN, Hon Treasurer,
Industrial Credit Corporation,
25-27 Adelaide Road, Dublin 2.

ANNUAL GENERAL MEETING OF THE SOCIETY

Blackhall Place, Dublin 7
Friday, 20 November, 1981.

The President, Mrs. Moya Quinlan, took the Chair and the notice convening the Annual General Meeting was read by the Director General, Mr. James J. Ivers.

The minutes of the previous meeting were taken as read, were approved unanimously by the meeting and signed.

ACCOUNTS AND BALANCE SHEET:

The Chairman of the Finance Committee, Mr. Maurice Curran, proposed that the accounts as circulated should be formally adopted by the Society. To Mr. Gerry Doyle, Mr. Curran said that the Society paid the Auditors the sum of £4,500 in respect of Audit fees for the year just expired. Mr. P. C. Moore seconded the adoption of the accounts as circulated to the members.

Mr. Curran then proposed the following motion:—

That Bye Law 14 be amended to read as follows:—

The financial year of the Society shall terminate on the 31st day of December in each year. The accounts shall be made up annually, (except for the first period of the changeover when accounts will be made up for a period commencing May 1st, 1982, and ending on December 31st, 1982) and a copy thereof laid on the Table in the Hall at least 14 days before the November General Meeting.

In support of the motion, he said that the view of the Finance Committee was that an accounting date of April 30th gave a distorted picture of the financial situation as the Accounting Year and Practising Certificate Year were not coterminous. In order to reduce the time gap between the expiry of the Financial Year and the date of the General Meeting, he indicated that the Accounts would be circulated to members as soon as they were audited. Mr. Beatty formally seconded the Resolution. When put to the meeting, the Resolution was passed unanimously.

ELECTION OF AUDITORS

Mr. Curran proposed the re-appointment of the Society's existing Auditors, Messrs. Coopers & Lybrand. Mr. Margetson seconded the proposal. The Resolution was passed unanimously by the meeting.

SCRUTINEERS' REPORT:

The Scrutineers' Report was read to the meeting by the Director General. The results of the Council Election were as follows:—

Candidates - Elected		Total Votes
1.	Quinlan, Moya	942
2.	Buckley, John F.	864
3.	Binchy, Donal F.	746
4.	O'Donnell, Rory	724
5.	Shaw, Thomas G.	709
6.	Houlihan, Michael P.	673
7.	Bourke, Adrian Patrick	671
8.	Beatty, Walter	666
9.	O'Connor, Patrick	662
10.	Collins, Anthony Eugene	655
11.	O'Mahony, Michael V.	650
12.	Daly, Francis D.	649
13.	Smyth, Andrew F.	638
14.	McEvoy, William D.	635
15.	Shields, Laurence K.	618
16.	Blake, Bruce St. John	608
17.	Curran, Maurice R.	608
18.	Monahan, Raymond T.	602
19.	Margetson, Ernest J.	584
20.	Cullen, Laurence	570
21.	Connellan, Clare	568
22.	Hickey, Gerald	567
23.	O'Donnell, Patrick F.	564
24.	Glynn, Patrick	561
25.	Pigot, David R.	546
26.	Killeen, Carmel	540
28.	Kelliher, Donal	534
29.	Donnelly, Andrew J. O.	501
30.	Reidy, John C.	481

The following members received the number of votes placed after their names:—

1.	Collins, Aidan D.	477
2.	Lynch, John R.	476
3.	Malone, Paul L.	470
4.	Enright, Michael	444
5.	Murphy, Joseph	406
6.	Sexton, Harry	396
7.	Mangan, Joseph	372
8.	Madigan, Patrick J.	321
9.	Bennett, Richard	205
10.	Garvan, Brendan	190
11.	Egan Ronald J.	115

Provincial Delegates Returned Unopposed:
Connaught: Patrick J. McEllin, Claremorris, Co. Mayo.

Leinster: Michael J. Hogan, 21 Patrick Street, Kilkenny.
Munster: Joseph Dundon, 101 O'Connell Street, Limerick.
Ulster: Peter F. R. Murphy, Ballybofey, Co. Donegal.

The report was unanimously adopted on the proposal of John Maher, seconded by Mr. Moran.

COUNCIL REPORT FOR THE YEAR 1980/81:

The President referred to the Council Report as circulated to the members and indicated that she would deal with it under its various sections and paragraphs.

Par. 2.5 Council — Legal Costs

Mr. T. C. G. O'Mahony expressed disappointment that no great progress seemed to have been achieved by the Council. He stated that solicitors should be charging on the basis of time or quantum meruit. He posed the question as to whether the Council of the Society had considered bypassing the Solicitors' Remuneration Act.

Mr. Crivon stated that Par. 2.5 only merited about six or seven lines in the Council Report for the year. He expressed the view that while the public was complaining about conveyancing fees the public was not aware that solicitors were generally spending ten hours a day in the office. He referred to the amount of time wasted in the Courts. He expressed the view that the solicitors must now take unilateral action and by-pass the Government. He stated that as there were increases in Stamp Duties etc. without corresponding increases in solicitors' fees, it was not the answer that conveyancing is taken care of by inflation as property prices have not kept pace recently with movements in the inflation indices. Mr. Crivon suggested that the incoming Council must take stronger action in line with other professions. Mr. Moran pointed out that the solicitor had the option of agreeing fees with his client. The President of the Society replied that the brevity of the Paragraph under discussion did not reflect the amount of effort put into the matter by the outgoing Council.

Par. 2.9 — Clients' Funds

The Director General stated that the Revenue Commissioners were now prosecuting where solicitors had not returned forms 8 - 2 (Solicitor). Since the agreement with the Revenue Commissioners on the return of interest payments was made by the Council of the Society and not by the general body of solicitors, Mr. Crivon asked whether the Society would assist any solicitor in difficulties in the matter. On this point, the Director General, stated that agreement had been made with the Revenue Commissioners at the end of 1974. The understanding was that the agreement would operate from a current date and the profession had been so notified. In these circumstances, the Society would not back a solicitor who did not comply with the Revenue Commissioners' requirements.

Mr. Des McEvoy suggested that a reference to the agreement with the Revenue Commissioners regarding the return of inter payments should be published again in the Society's *Gazette*. This suggestion was accepted.

Par. 2.11 — Premises

Mr. T. C. G. O'Mahony queried the proposed capital expenditure in the amount of £150,000. He questioned the need for this expenditure and the need for increasing the facilities at Blackhall Place in view of the increase in the cost of operating the Society. The President mentioned that the Council was not engaged in expending money unnecessarily. The current year was the Year of the Disabled Persons and as there were no toilet facilities suitable for the disabled persons in the premises, the Council decided to provide these facilities as part of the Society's contribution to the Year of the Disabled Persons. In addition, the toilet facilities in the Law School were inadequate. The opportunity afforded by the building work was availed of to extend the Members' Lounge. In time, this would bring increased revenue to the Society.

Par. 3.7 — Registrar's — Computerisation

In reply to Mr. T. C. G. O'Mahony, the Director General said that the computer was currently being used primarily in monitoring the Accountants' and Practising Certificates. It was also being used for other accounting functions. Mr. Colm Price, queried Accountants' Certificates in arrears. He wanted to know the number of Practising Certificates issued by the Society to solicitors in arrears with Accountants' Certificates. In reply, the Director General stated that over the past two years, the Society had tightened up gradually on Accountants' Certificates. As of now, the Society would not accept delay on the part of the Auditor as an excuse for the non furnishing of the Accountants' Certificates. While up to recently the Society had allowed a further six months period of grace for the lodgement of Accountants' Certificates, it was now insisting that solicitors must lodge Accountants' Certificates within six months after the expiry of their Accounting Year in accordance with the requirement of the Solicitors' Accounts Regulations. Over the past two years, the Society has initiated investigations. This procedure would be intensified. In the longer run, it was hoped to inspect all practices over say a 5 year period. Arising out of the investigations, a number of Accountants had been referred to their Professional Bodies for failure to qualify Accountants' Certificates where this should have been done. It was not possible without notice to give a reply to Mr. Price's particular question. Mr. Reilly suggested that as soon as possible, the Society should publish a list of solicitors who have not been issued with Practising Certificates for the current Practice Year. In reply, Mr. Margetson stated that in the coming year, the Society hoped to inform Bar Associations of the solicitors with Practising Certificates in their areas. This information would be furnished to the County Registrars and District Court Clerks. Mr. Crivon submitted that Accountants were not carrying out audits within a reasonable time. In his experience, a long time elapsed between instructing an Accountant to carry out the Audit and the actual delivery of the Accountants' Certificate. He had found that by availing of the good offices of the Society's Accountant, the response time improved.

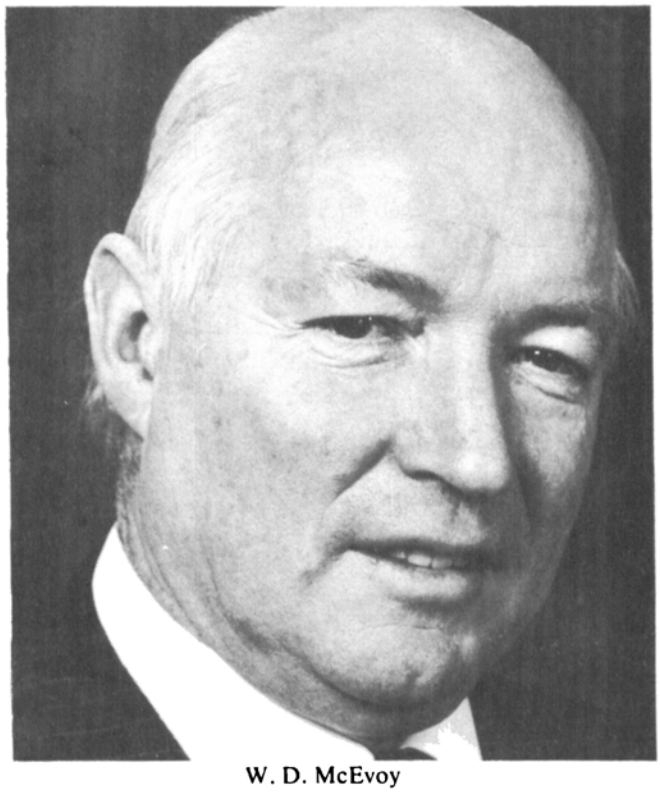
Par. 7.6 Finance — Retirement Fund

Mr. Michael Murphy suggested that the Trustees of the Fund might consider making an investment in the car parking facilities for solicitors in the Four Courts.

Par. 10.9 — Public Relations — GAZETTE

Mr. T. C. G. O'Mahony commended the *Gazette* Committee for doing a good job. However, he felt that more letters should be contained in the *Gazette*.

Michael Houlihan



W. D. McEvoy

The Vice-Presidents 1981/82

Mr. Michael P. Houlihan has been elected Senior Vice President for the year 1981/82. 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. W. D. McEvoy has been elected Junior Vice-President for the year 1981/82. Educated at University College, Galway, Mr. McEvoy was admitted in 1948 and has been a member of the Council since 1974. He is a former Chairman of the Society's Public Relations Committee. Mr. McEvoy is Senior Partner of John A. Sinnott & Co., Rafter Street, Enniscorthy, Co. Wexford.

Unfortunately, in his experience, the Committee denied members the right to put letters in the *Gazette*. In reply, the President said that the Editorial Committee enjoyed editorial privilege on the contents.

Par 11.2 — Education

In reply to comments that the supply of solicitors was outstripping solicitors' demand and that too many solicitors were graduating each year, Mr. Frank Daly said that a statistical survey which was conducted by the Education Committee some two years ago predicted that six hundred solicitors would be unemployed in 1985. The Committee had been in touch with the Civil Service and other employments since it was clear that solicitors would have to find an outlet in Commerce, Industry and the Public Service. Mr. Crivon said that it was irresponsible for the profession to turn out 160 solicitors per annum and that the Society would have to cut-back on the intake of students. Other professions controlled the output of members. He also outlined the undesirable situation where solicitors were setting up on their own account just because they were unable to obtain a position. The President said that with the new Law School, the intake of students was restricted to about 150 per annum. Currently there was a peak situation insofar as solicitors are graduating from the 'Old' and the 'New' systems which are running parallel. This situation would be cleared in a year or two. The Matter of unemployed solicitors was of great concern to the Council and was kept under constant review by the Council.

Mr. Curran commented that the public attitude to the Profession must be taken into account. The Profession had been accused of being a closed shop which enjoyed certain monopolies. In his view, market forces must be

allowed to prevail as otherwise, it could happen that the Society would lose control of the Profession at the behest of public opinion. Mr. Daly said that all students entering the profession are interviewed and are clearly advised on the overcrowding of the Profession and the lack of jobs in the market place.

Par. 13 — E.E.C. & International Affairs

Mr. T. C. G. O'Mahony referred to the number of Directives and Regulations emanating from the E.E.C. He said that he had tremendous difficulty in keeping abreast of the situation which was very serious in that it affected every Irish Citizen.

Mr. Ray Monahan said that Directives emanating from the E.E.C. were being closely monitored. He suggested that any solicitor having a specific query should raise the matter with the Society's Librarian. The Library was well equipped and any query would be researched fully. He accepted that it is not possible to oversee all legislation emanating from the E.E.C.

Par. 14 — Premises

Mr. Murphy queried the relationship between the Law Club and the Society. Mr. Curran said that the Law Club was a seperate entity whose accounts were being audited. They would be circulated to the members in due course.

On the Four Courts, Mr. T. C. G. O'Mahony said that there was lack of facilities for solicitors in the way of a Writing Room. What had been available had been turned into a Consultation Room for letting at a charge. He expressed disappointment at the lack of parking facilities. On Blackhall Place, he queried the number of floors which the Stardust Tribunal was occupying and asked as to the charge being made for the use of the Society's premises. The President said that the charge was a matter for the Finance Committee which dealt with it within its own discretion.

Mr. T. C. G. O'Mahony felt that as a member he was being penalised through the non-availability of the facilities. He suggested that the fields at the back of the Society's premises, since they were not required might be sold off to pay for the Society's indebtedness. Mr. Gerard Doyle took the view that the question on the Stardust was not adequately answered by stating that the matter was dealt with by the Finance Committee.

The Director General, said that the Writing Room in the Four Courts had been withdrawn in view of the demand by members for Consultation Rooms. It might be possible to provide a Writing Room facility in the Library area in the Four Courts and this would be looked into. However, in view of the demand for Consultation Rooms, he was not in a position to allocate a room specially as a Writing Room.

Par. 15 — Company Law

Mr. Shields clarified the situation regarding opinion letters.

Par. 16 — Conveyancing

Mr. Crivon queried whether an Undertaking given by a solicitor can be statute barred. Mr. Shields gave it as his opinion, that an Undertaking can be statute barred as a matter of contract but that as a disciplinary matter, it is enforceable. Mr. Crivon suggested that the Profession should have a definite situation in the matter of time limits for Undertakings and the Society's attitude thereto. It was agreed to refer the matter to the Professional Purposes Committee. This concluded the discussion on the Council Report.

On the proposal of Mr. Sexton, seconded by Mr. Curran, the Report was unanimously accepted.

7. Prize Bond Draw:

Mrs. Clare Connellan supervised the draw and the following bonds were drawn:—

4 Prizes of £1,000 each

Bond 1197
Bond 1579 (Thomas Mitchell)
Bond 1106
Bond 1423 (Colm Murphy)

6 Prizes of £500 each

Bond 1123
Bond 1692 (William Fallon)
Bond 1209 (P. McEntee)
Bond 2123 (Thomas A. Morrow)
Bond 1576 (Thomas Mitchell)
Bond 1540 (Charles Kingston)

5 prizes of £250 each

Bond 1802
Bond 1515
Bond 1560(Patrick O'Reilly)
Bond 1367 (Donal Gallagher)
Bond 1282 (Gerald Hickey)

5 prizes of £100 each

Bond 1219
Bond 1510
Bond 1769 (Michael Cusack)
Bond 1020 (John Casey)
Bond 1982

8. Council Business

The Council did not put forward any business for discussion.

9. Date of Next Annual General Meeting

Friday, 12th November, 1982, at 11.30 a.m.

10. Other Business

Under this heading, Mr. T. C. G. O'Mahony queried criteria used by the *Gazette* Committee to decide whether letters should be published in the Society's *Gazette*. In reply, Mr. M. V. O'Mahony, for the Editorial Board, outlined the criteria which covered the size of letters, the degree of interest therein and the relevance to the Profession. As his letter was refused Mr. T. C. G. O'Mahony wished to know what rights had he as a member to get the refusal reviewed. The President said that discretion lay with the Editorial Board. To a further query from Mr. T. C. G. O'Mahony regarding the use of the playing fields, the President explained that while equal consideration was given to all charities who applied to use this facility, particular consideration was given to a neighbouring school for handicapped children.

At this point, the Senior Vice-President, Mr. Allen, took the Chair and called on Mr. Gerry Doyle to propose a vote of thanks to the President, Mrs. Moya Quinlan. Mr. Doyle stated that the profession held the President in highest esteem. He paid tribute to her on her very active year of office which was now coming to an end. He commented that the President had distinguished herself not only at home but in many foreign countries. Mr. McLoughlin seconding the motion said that whereas he was resident in the same municipality as the President, she was conspicuous by her absence from the area during her year of office, an indication of how hard she worked for the Law Society. The President replied to the vote of thanks and stated that she was honoured to follow in the steps of the many great Presidents of the past and thanked the Profession for its support during her term of office. She wished her successor well. The President's comments were received with acclamation.

The Senior Vice-President declared the meeting closed. □

Commission Consultative des Barreaux de la Communauté Européenne

The Incorporated Law Society has, for some years, been a member of the CCBE.

The CCBE is the officially recognised liaison committee in the European Community for the professions of Avocat/Advocaat (Belgium), Advokat (Denmark), Avocat (France), Rechtsanwalt (Germany), Dikigoros (Greece), Barrister and Solicitor (Ireland), Avvocato (Italy), Avocat-Avoué (Luxembourg), Advocaat en Procureur (Netherlands), Advocate, Barrister and Solicitor (U.K.).

The CCBE consists of ten delegations, whose members are nominated by the Bars and Law Societies (the controlling professional bodies) of the ten member states of the Community. The Bars of Austria, Norway, Portugal, Spain, Sweden and Switzerland are represented by observer delegations.

The CCBE's stated object is to study all questions affecting the legal profession in the member states of the Community and to formulate solutions designed to coordinate and harmonise professional practice.

The CCBE acts as liaison both between the Bars and Law Societies themselves and between them and the Community institutions, to whom it conveys the views of legal practitioners on proposed Community legislation and other matters.

There is a Permanent Delegation to the European Court of Justice. This Court in 1980 granted the CCBE the right to intervene in a case concerning confidentiality of communications between Lawyer and client.

A Council for Advice and Arbitration exists to settle disputes between Bars or between lawyers on matters of professional conduct.

The Lawyers' Professional Identity Card published in 1978 by the CCBE and issued by the national Bars and Law Societies is officially recognised by the European Court of Justice and by national authorities. It is widely used by an increasing number of lawyers.

The CCBE's 1977 Declaration of Perugia lays down the principles of professional conduct applicable throughout the Community, and has formed a basis for much useful discussion and voluntary harmonisation between Bars.

Specialist sub-committees exist to study company law; competition and intellectual property; and rights of defence and Community sanctions. The first committee includes representatives of the notaries' profession.

Subjects of study affecting professional practice include the implementation of the first Community Directive affecting lawyers and relating to free provision of services; preparation of a further Directive on freedom of establishment; advertising and specialisation; the protection of the consumer of legal services; fees; legal aid; legal costs insurance; the training of young lawyers and legal professional privilege.

Access to Justice — VAT

Recognising that access to justice for the resolution of disputes and grievances is a fundamental human right of all citizens of the European Communities, the CCBE meeting in plenary sessions in Bologna on 24 October 1981 reaffirmed its previous resolutions on this issue, and reasserted its view that:

1. the taxation of any fundamental right is wrong in principle;
2. the imposition of VAT (Value added tax) on legal services discriminates in the administration of justice against those of limited means because only those who cannot pass it on in the course of trade are obliged to bear its full burden from their personal resources.

The CCBE resolved to call upon the Council and the Commission of the European Communities to ensure that in any future directive relating to this tax in the Member States no requirement is imposed for the extension of the tax to the provision of legal services in those Member States where there is no present liability and that every step should be taken to extend the exoneration of legal services from VAT to all Member States.

The resolution was unanimous, subject only to the abstention of the UK delegation. □

Section 84 Loans

The attention of members acting in connection with loans under Section 84 of the Corporation Tax Act, 1976, is drawn to the provisions of Section 3 of the Partnership Act, 1980, which may affect the security of such loans.

Instant Dismissal Without Observing Natural Justice Unconstitutional

by

Colum Gavan Duffy, M.A., LL.B.
Lecturer in Law, University College, Galway

GARVEY v. Ireland, The Attorney General, An Taoiseach and the Minister for Justice. (Full Supreme Court, 9 March 1979, unreported) demonstrates irretrievably that the Government cannot dismiss a high official, such as the Commissioner of the Garda Siochana, without first observing fairly the principles of Natural Justice, particularly *"Nemo judex in causa sua"* and *"Audi alteram partem"*.

The Plaintiff, Edmund Garvey, was appointed by the Government as Commissioner of the Garda on 2 September 1975. On 15 December 1977 the Plaintiff was required to attend a meeting with the Minister for Justice. At that meeting, the Minister read out to the Plaintiff a number of complaints relating to him. The Plaintiff said that he would have to have these complaints in writing, so that he could answer them. This was followed by a written complaint. The Plaintiff was soon notified that the Minister required immediate replies to these allegations. On 21 December, the Plaintiff sent a written reply and, on 22 December, the Plaintiff gave full oral replies, in the Department, to all the charges. The Minister, having heard him, said he would make a report to the Government and that they would probably order an inquiry. Notice of his removal was finally given to the Plaintiff by letter, delivered by hand at his home at 6.35 p.m. on 19 January 1978, without any previous notice or warning, but he was given an opportunity of resigning from office within two hours of receiving this letter. When he declined to resign, he received a notice, issued under S. 6 (2) of the Police Forces (Amalgamation) Act 1925, removing him from his office as from that day. Subsequently, the Plaintiff brought declarations against Ireland, the Government and the Attorney-General requesting the Court to answer the following questions:-

1. Does the Police Forces (Amalgamation) Act 1925 empower the Government to terminate the post of Garda Commissioner at any time —
   (a) without prior notice;
   (b) without giving reasons;
   (c) without giving the holder of the office an opportunity of making representations?
2. Is S. 6 (2) of the Police Forces (Amalgamation) Act 1925, which, briefly, provides that "every Commissioner appointed by the Executive Council . . . may at any time be removed by the Executive Council", inconsistent with the Constitution?

McWilliam J., in the High Court, construed the dismissal as the normal consequence of a contract of employment for an indefinite term but held that, under S. 6 (2) of the Police Forces (Amalgamation) Act 1925, senior officers can only have their contract terminated without cause on being given reasonable notice.

Having quoted Article 40 (1) of the Constitution ("All citizens shall as human persons be held equal before the law"), he found it difficult to identify any constitutional right which had been infringed. McWilliam J., however, endeavoured to apply the same principles to Article 40 (3), which seems to this writer to be the lynch-pin of the whole Constitution. It will be recalled that in Article 40 (3), "the State guarantees in its laws to respect, and so far as practicable to defend and vindicate the personal rights of the citizen". Furthermore, "the State shall in particular by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property right of every citizen". The fact that McWilliam J.'s views on this point were unacceptable on appeal was emphasised by Henchy J., when he stated that "the guarantees contained in Article 40 (3) cast a duty on Judges, who are required by the Constitution to expand and interpret the common law in terms which will not deny the citizen a shield against injustice". It follows that Article 40 (3) is the guarantor of the observance of Natural Justice.

In stating that in applying the operation of S. 6 (2) of the 1925 Act the Government must apply the concept of Justice, be it called Natural Justice or Constitutional Justice, McWilliam J. concurred forcibly with the majority view of the Supreme Court. McWilliam J. admitted that reasonable notice should have been given to the Plaintiff and that he should have been given adequate opportunity to defend himself. He then, surprisingly, reached the conclusion that S. 6 (2) itself was not repugnant to the Constitution, which appears to contradict the principle expressed by O'Dalaigh, C.J. *In Re Haughey* – [1972] I.R. at p. 264:-

> "The Constitution guarantees to the citizen basic fairness of procedures. It is the duty of the Court to underline that the words of Article 40, Section 3 are not political shibboleths but provide a positive protection for the citizen and his fair name".

Griffin J. had stated that Article 40 (3) had been held in

that case to be a guarantee of fair procedures. As Griffin J. said: "The rules of Natural Justice are only the rules of fair play and fair procedure put into practice".

Henchy J. expressed himself even more forcibly thus: "Neither the Government nor the Courts can ignore the solemn guarantees contained in Article 40 (3) (2) of the Constitution that the State shall, by its laws, protect as best it may from unjust attack. That guarantee would be abandoned and abrogated if, in every case of dismissal from an office such as this, the possibility of error, unfairness and injustice were to be compounded by silence and then rendered immune by the concept of executive authority.

I conceive the law to be that, when a person holds a whole time pensionable office, . . . from which he may be removed at any time, the power of removal may not be exercised without first according him Natural Justice, by giving him the reason for the proposed dismissal and by providing him with an adequate opportunity of dealing with the reason and making a reply to it".

In view of the narrow construction of the non constitutionality of S. 6 (2) of the 1925 Act in the High Court, the majority of the Supreme Court, Kenny J. dissenting, was thus compelled to consider whether S. 6 (2) of the 1925 Act providing for the removal of every Commissioner appointed by the Executive Council at any time was in fact against the rules of Natural Justice and consequently repugnant to Article 40 (3) of the Constitution. O'Higgins C.J., with whom Parke J. concurred, gave a useful brief historical summary of the legal power of dismissal. The original distinction between office-holders and servants, upon which the Irish Queen's Bench Division in *R. (Jacob) v. Blaney* – [1901] 2 I.R. 93 at p. 112 had heavily relied, gradually became blurred. He stated that, generally, Natural Justice is the only protector for office-holders. Undoubtedly, if the office-holders held office at the will and pleasure of the Crown, since the King could do no wrong, as it was the King's pleasure to appoint, so it was his to remove; there was thus no question of Natural Justice. Although still applicable in England, this view is increasingly regarded as out of date in Commonwealth countries. In Ireland, it had already received the *coup de grace* in *Byrne v. Ireland* - [1972] I.R. 24), see in particular the judgments of Walsh J. and Budd J. As regards the royal prerogative, Henchy J. stated that the older authorities, on whom Kenny J. relied so heavily, exemplify the concept in British constitutional theory that the King can do no wrong and that offices held at royal pleasure are outside the reach of Natural Justice. This is a theory of immunity and of executive absolutism that has been steadily crumbling in modern times and which he did not propose to follow.

As Lord Wilberforce had stated in *Malloch v. Aberdeen Corporation* – [1971] 2. All E.R., 1278, at p. 1295 - "a difficulty arises, in the cases of offices held at pleasure, where there are other incidents of the employment laid down by statute or regulation. The rigour of the principle of not hearing an office-holder is in modern practice mitigated, for it has come to be perceived that the very possibility of dismissal without reason being given - an action which may vitally affect a man's career or his person -- makes it all the more important for him to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void".

It was important to stress that S. 6 (2) of the 1925 Act did not at any time create a contractual relationship of master and servant between the Government and the Commissioner, but created a statutory office and the Commissioner, on appointment, became the holder of the office. While the District Justices (Temporary Provisions) Act 1923, stated that District Justice could be dismissed or removed at the pleasure of the Governor-General on the advice of the Executive Council and that Civil Service Commissioners could be removed in the same way by the Civil Service (Regulation) Act, 1924, there was no corresponding provision in S. 6 (2) of the Police Forces (Amalgamation) Act, 1925.

The Chief Justice then referred to Article 40 (3) of the Constitution which, he stated, necessarily incorporated into our laws and their administration the requirements of Natural Justice. The Chief Justice also pointed out that a statute of the Irish Free State enacted in 1925, continued in force only to the extent to which it was not inconsistent with our present Constitution. Powers exercised under Article 40 (3) cannot be exercised unjustly or unfairly.

The Government must act fairly and must tell the Commissioner of the reasons of the proposed action and must also give him an opportunity of being heard; as this was not done in this case, the purported dismissal of the Commissioner was null and void. In the result, until the dismissal of Garvey as Commissioner had been properly rectified, there were theoretically two Commissioners of the Garda holding an identical position.

Henchy J. first stressed that the Government were

entitled to dismiss the Plaintiff when they purported to do so. The Government's submission, however, that the Government's right to remove the Plaintiff from office at any time is, in fact, an executive discretion is unacceptable. If, by maintaining an obscuring silence, the Government could render their act of dismissal impenetrable as to its reasons and irreconcilable as to its methods, an office holder such as the Plaintiff could have his livelihood snatched from him, his chosen career snuffed out, his pension prospects dashed and his reputation irretrievably tarnished, without any hope of redress, no matter how unjustified or unfair his dismissal might be.

In stating that, if the rules of Natural Justice had been observed, the dismissal would have been justified, Henchy J. then limited the reasons for dismissal to general ones. He stated that, in the absence from Section 6 (2) of express restriction of the Government's power to remove a Commissioner from office at any time, a discretion so wide is connoted that it is limited only by what the law to be interpreted now by the Constitution deems indispensable. It must consequently be deemed to be a tacit assumption of the law that it will not require the discretion to be exercised in a manner that is inimical to the common good. Thus, even if Natural Justice is applied, the reason for the dismissal need not always be specific.

Griffin J. emphasised the Government's argument that if they had not full confidence in the Commissioner, it was not only their right but their duty, however distasteful, to remove him from office. The Government contended that to disclose the reasons for the removal would be contrary to public policy and executive necessity. Griffin J. stated that he found it difficult to see how, in modern times, public policy and executive necessity required that the tenure of an office held at pleasure should be capable of being determined without giving to the office-holder the right to be heard on his own behalf. If, however, the dismissal is on procedural as opposed to substantive grounds . . . a second dismissal is valid, provided that the correct procedure is followed.

It is submitted by the author, with great respect, that one can only consider the sentiments expressed in his dissenting judgment by Kenny J. as surprising. The theories of Natural Justice are completely ignored as if they did not exist, save in the case of the holder of an office who may be removed in certain events only. The fact that the holder of an office has not the right to hold it for any period of time, nor that there are any safeguards to protect him in S. 6 (2) of the 1925 Act, is unduly stressed. Kenny J. then stated that on principle and on the construction of Section 6 (2) of the 1925 Act, he considered that the Government were fully entitled to remove the Plaintiff without prior notice, without giving reasons and without giving him an opportunity of making representations with regard to his removal. He added that the conclusion was supported by five Irish authorities, extending from 1846 to 1918, which he deemed coercive on the question at issue. As the five cases referred to do not, even remotely, contemplate the position existing today, after the passing of our Constitution, their relevance can be questioned.

Most of these cases are based on the old procedure of an information in the nature of a *"quo Warranto"*, directed to the new holder of the office to show cause how he held it. The five decisions are alleged to establish conclusively that the holder of an office held at the will or pleasure of a body was not entitled to the remedy of an information in the nature of a *"quo warranto"*. This may be interesting from the point of view of legal history, but it is highly significant that this remedy of an information in the nature of a *"quo warranto"* was abolished in England by Section 9 of the Administration of Justice Act, 1938 and proceedings for an injunction were substituted.

One cannot but commend the views of Henchy J. on this subject, who states that judicial precedents resting on the theory of community and of executive absolutism are of little value to-day, particularly in a State such as this, where constitutional guarantees compel the recognition of personal fundamental rights, which this dissenting judgment ignores.

The five *Pre-Treaty Irish* cases which Kenny J. considers to be coercive on the question at issue are, chronologically:-

(1) *Darley v. R.* (1846) 12 Clark and Finelly.
In this case, which related to the position of Corporation Treasurers of the City of Dublin, it was held this was a public office of an independent character. The House of Lords held that an information in the nature of a *"quo warranto"* would lie, whether the office had been created by Charter or by Act of Parliament.

(2) *R. (Fitzmaurice) v. Neligan:* (1884) 14 I.R. Ireland 141.
The Queen's Bench Division in this case decided a minor procedural issue.
On 5 June 1883, the then surgeon of the infirmary, Mr. Lawlor, sent a letter to the secretary of the Governors, resigning his office on the ground of ill-health. Although there were special regulations as to annual subscription of three guineas, the Plaintiffs, after receipt of this letter, claimed to be entitled to vote for the vacancy on 6th June 1883, as they had paid an annual subscription first on 23 June 1881 and again on 6 June 1883. The Court held that the vacancy existed from the receipt of the letter on 5 June 1883, and that consequently the three plaintiffs were not entitled to vote on 6 June 1883, despite the payment of their annual subscriptions.

(3) *R. (Ryall) v. Bailey* – [1898] 2 I.R. 335. The Court of Appeal affirmed the Court of Queen's Bench and held, briefly, that an information in the nature of *quo warranto* does not lie in respect of the office of secretary of a Grand Jury in Ireland, such a secretary nolding office merely at the will and pleasure of the Grand Jury. The Plaintiff had claimed that the defendant had no authority to act as Secretary of the Grand Jury of the County of Tipperary, as he was then High Constable for the North Riding of that County and had not resigned from that office in accordance with regulations.

(4) *R. (Jacob) v. Blaney* [1901] 2 I.R. 93.
The Court of Queen's Bench held that the office of surgeon in the Queen's County Infirmary is one held at pleasure and is thus not subject to an information in the nature of a *quo warranto*. At a special meeting on 25 October 1899 the majority of the Committee passed a resolution as to the desirability of determining Dr. Jacob's services as County Surgeon. At a special meeting on 22 November 1899, Dr.

Jacob was dismissed and, at a special meeting on 10 January 1900, Dr. Blaney was appointed to this post. Dr. Jacob contended unsuccessfully that the resolutions passed at these meetings were null and void and that Dr. Blaney's appointment was irregular.

Dr. Jacob also contended unsuccessfully that he could only be dismissed for cause, otherwise he would be entitled to reinstatement. It was held that the surgeon of an infirmary is merely the paid servant of the Governors; the Governors may dismiss him arbitrarily.

(5) *R. (McMorrow) v. Fitzpatrick* [1918] 2 I.R. 103. This case dealt with the construction of S. 29 of the Petty Sessions Clerk (Ireland) Act, 1858, which gave the Lord Lieutenant full power to prescribe conditions of age for candidates for the post of Petty Sessions Clerk; this office was to be held at the pleasure of the local Justices and of the Lord Lieutenant. This was a motion by the plaintiff to make absolute a conditional order of *Mandamus* directed to the Justices of the Peace for a Petty Sessions District in Leitrim, commanding them to elect a clerk of Petty Sessions for that district in the manner required by law. The limits of age were set out in the regulations. The plaintiff was appointed Clerk by the local Justices, although he was under the prescribed age; the Lord Lieutenant would not accept the appointment and ordered a fresh election. This was ultimately held on 31 August 1917. The plaintiff went forward again as a candidate and secured a majority of votes from the Justices, but Captain Fitzpatrick, R.M., declared the next candidate elected, as he was within the prescribed age limit. The Court then discharged the conditional order of *mandamus* as the order of the Lord Lieutenant was final.

Having summarised the five cases, this writer fails to see how one of the most important posts in the State from the point of view of security, that of Commissioner of the Garda, can be compared to the positions of County Surgeon, Corporation Treasurer, or Clerk of a Petty Sessions District – particularly when the majority judgments of the Supreme Court had emphasised that, if the correct procedure had been adopted, the dismissal of the Commissioner would have been valid.

As regards the modern case law, Henchy J. emphasised that the decided cases on the point of Natural Justice were few, not of recent origin and are all of one opinion. Only three cases decided in the last half century were referred to – namely, *Ridge v. Baldwin* [1964] A.C. 40 and *Glover v. B.L.M. Ltd.* [1973] I.R. 388 – which contained an *obiter* judicial observation that a person who holds office at will and pleasure is not entitled to *Natural Justice*, but neither case was concerned with a person holding such an office. *Malloch v. Aberdeen Corporation* [1971] 2 All. E.R. 1278 dealt with a schoolmaster who held office at will or pleasure but, since the body with powers of removal (the British Education Board) was required by statute to give each of its members three weeks notice of the consideration of the office-holder's dismissal at a meeting, it was held that the requirement of Natural Justice was thereby imputed and applied.

Kenny J. emphasised that, in *Ridge v. Baldwin* [1964] A.C. 40, Section 191 (4) of the Municipal Corporations Act, 1882, had there a safeguarding provision for the Chief Constable of Brighton, but that there was no (statutory) safeguarding provision of any kind for the holder of the office of Commissioner; this leads inevitably to the conclusion that Kenny J. considers that the combined principles of Natural Justice and of Article 40 (3) of the Constitution are to be ignored.

The majority decision of our Supreme Court in Garvey's case is of primary importance, inasmuch as it has specifically related the principles of Natural Justice, as principles of fair procedure and fair play, to Article 40 (3) of the Constitution. By doing so, it has reinforced the dictum of Gavan Duffy J. in *The State (Burke) v. Lennon* [1940] I.R. at p. 154:-

> "The Constitution is the Charter of the Irish people, and I will not whittle it away".

In a separate action on 19th December 1979 McWilliam J. awarded Mr. Garvey a sum for damages and for compensation for loss of office. It was established that Mr. Garvey had been paid his full salary as Commissioner up to 7th May 1979. □

Land Registry — Folio Numbers

The practice of the Land Registry of using the suffix the letter "F" to the Folio number of freehold folios seems to be causing confusion to the profession. The Land Registry use the suffix for all new freehold folios. No change is made to the numbers of the existing Folios, so the existence of an "F" folio does not preclude the existence of another folio with the same number, minus the "F". For example, there can exist simultaneously a Folio 1234 County Dublin and a Folio 1234F County Dublin (and of course 1234L County Dublin). Particular care should be taken to check the Folio number, as errors seem to arise frequently particularly on searches.

Checking Folio Numbers in Transfers

It is well established that many typists (except perhaps those working for firms of accountants) are particularly weak in typing figures. Presumably this is because of lack of frequency in doing so. It is very easy for a typist to transpose any two keys while working at speed, but it seems to be particularly easy to do so while working with figures. The result of this is that errors are found more often than might be expected in the numbers typed in documents including unfortunately Land Registry Transfers. The folio number is typed both in the heading and in the body. Getting the number right in the heading will be of no avail if it is incorrectly stated in the body of the deed. The Registry act only on the number in the body of the deed. If the number is wrong in the body of the deed, the Land Registry are obliged to seek re-execution of the Transfer, with consequent inconvenience for all parties. It is suggested that Solicitors should check Transfers carefully after they have been typed, paying particular attention to the Folio numbers. It might be a wise precaution for those who dictate Transfers to give the typist a copy of the folio to check the number.

Declaration of Solvency

Recommendation of Joint Committee of Building Societies/Law Society

Where either a voluntary assurance appears on the title or the current transaction involves a voluntary assurance, it is unreasonable for a purchaser's/mortgagees Solicitor to insist on a Declaration of Solvency made by the Grantor's Accountant. The Committee felt that there was no reason to depart from the long-standing practice of accepting a Declaration from the Grantor.

This is not to suggest that a Declaration by an Accountant should not be accepted in lieu of a Declaration by the Grantor.

For Your Diary . . .

19 February, 1982 — Dublin Solicitors' Bar Association. Annual Dinner. Law Society, Blackhall Place, Dublin 7.30 for 8.00 p.m.

LAND REGISTRY

TELEX FACILITIES are now available at the SETANTA CENTRE OFFICE OF THE LAND REGISTRY, which caters for Counties Dublin, Roscommon, Sligo, Mayo, Galway, Clare. The number is 90495 LReg. EI.

Correspondence

The Editor,
The Gazette,
Blackhall Place,
Dublin 7.

Re: "Comment", Tinkering with the Constitution, October, 1981, Edition.

Dear Sir,

Tinkering, inter alia, is defined as, "to work ineffectively, to meddle with," which is hardly consonant with your suggested "review of our entire Constitution," as per your opening gambit in the above.

Your comments on Divorce are somewhat chaplinesque with your suggestion of 'No divorce here please, we're Irish!'

While our Constitution may very well have that of the U.S. as its fount, there the resemblance ends notwithstanding your empty rhetoric.

If you are anti-change in the Constitution or even the consideration of same, why not come straight out and say so? Leave the hyperbole to the politicians or save some of it for the courtroom, a somewhat more fitting stage.

Your sincerely,

Jack Norton,
37 Thomas Street,
Dublin 8.

BOOK REVIEWS

Farm Family Partnerships, produced and published by Macra na Feirme and The Incorporated Law Society of Ireland. Production and publication sponsored by The Agricultural Credit Corporation. Price £2.00 including VAT – Paperback only.

For years, by reason of ever-increasing (until lately) land values and the consequent impact of gift and inheritance taxes, the legal practitioner has been worried almost as much as his client by the problem of how the family farm can best be organised in order to minimise whatever form of fiscal impost will necessarily attend the passing of the family farm from one generation to the next.

The all-too-obvious fact that a combination of current recession and the logical culmination of the great EEC bonanza have, between them, resulted in a near disastrous decline in farm and, in consequence, land values, has made the present time particularly propitious for the handing over of farming land, in terms of Capital Acquisitions Tax and Capital Gains Tax.

Given a farmer prepared to relinquish the reins in favour of his offspring or, in certain circumstances, his nephews, a great deal of land can be passed on at today's values without giving rise to any charge of Acquisitions or Gains taxes. The avowed intent of the present Government to abolish the tapering rates of Capital Gains Tax could well have a significant impact on this position but, hopefully, indexation relief would still remove much of the chargeable gain from agricultural land.

But matters are not always as simple as this. A great many farming proprietors, for a great many reasons — mostly bound up with their own personal security — feel unable or unwilling to pass on their land — and, with it, their personal security and, indeed, standing in the community. This reservation has, demonstrably, resulted in the next generation acquiring land too late to realise its best potential and, in many cases, too late to make matrimony economically viable — the old adage that two can live as cheaply as one is as untrue in farming circles as anywhere else!

In recent years an acceptable "halfway house" has been gaining favour in certain agricultural communities; in France and New Zealand and, nearer home, in Northern Ireland, forms of Farm Partnership are being evolved which retain for the senior generation a valuable (and interest-preserving) stake in the family farm, while admitting the younger generation to a proprietory slice of the action.

How a farm family partnership should be tailored is a matter for the circumstances of each case, tempered by the prevailing social mores of the community but, in the Republic of Ireland, the concept has been given a hefty shove forward by the publication by Macra na Feirme and the Incorporated Law Society of a pioneering work under the title "Farm Family Partnerships". On the very excellent principle of putting one's money where one's mouth is, it should be added, with all possible praise and no disrespect, that the production and publication has been sponsored by the Agricultural Credit Corporation. Let more such institutions take note and follow suit.

It would be invidious to mention only some of the names involved in the truly vast endeavour that has gone into this book from both Macra na Feirme and the Law Society. Certain credits are given in the book itself but, clearly, more industrious souls have given of their labours than could ever be listed. Suffice it to say that their *turas* has not been *in aisce* and that they have pioneered a work which we can only hope will see many later editions, incorporating the many practical and legal developments and refinements that will inevitably flow from this first endeavour.

The book is presented as much as a guide to the farmer and his family as for Lawyers and Accountants and, by reason of its "middle of the road" approach, must serve more as a stimulus to social reform than as a practical textbook. Nevertheless, a great deal of thought has gone into the fiscal and legal implications of the use of the partnership agreement and a precedent is offered which, at one and the same time, brings about a true working partnership from day one and, in addition, leads to a gradual increasing proprietorial stake for the young participant, culminating in total ownership for the son (or daughter) after an appropriate period.

The book considers all the necessary elements of a farming partnership — management, property, banking, accounts, income tax and periodic drawings and contains useful case-histories of some typical family farming situations illustrating how partnerships have successfully been utilised to create a stake in the land for the younger generation without consigning the older generation to the County Home.

It should be emphasised that this is not merely an exercise for ranchers or bloodstock breeders. The examples contained in the book, as well as those offered at the recent Law Society/Macra Symposium at which the book was launched, are those of the smaller farmer, faced with the all-too-real problem of accommodating the child lately graduated from agricultural college, in the context of a number of other children for whom the one modest family farm cannot hope to provide a living. Indeed, it was made encouragingly clear at the Symposium that a family farm partnership could actually increase profitability making it possible for two — or even three — families to live reasonably well off the one farm or group of farms.

Arguably the technical sections of the book must go beyond the ordinary capability of the average farmer and are intended as a guide to his advisers. Those advisers must be warned, however, that the techincal comments and the precedents offered are no more than that — a mere guide. Under no circumstances should the precedent Partnership Agreement set out in Chapter 9 be used without the closest possible scrutiny, nor without the closest possible consideration of the individual family circumstances.

By way of example only, mention should be made of the precedent provision for Spouse Consent under the Family Home Protection Act, at pages 83 and 84. It must be doubtful whether such Consent could amount to a waiver of a Spouse's legal right share under the Succession Act 1965 and the legal adviser should be careful to consider, in the circumstances of each case, whether such a waiver should also be procured.

Also by way of example, the drafters of the precedent Partnership Agreement have not — indeed, they arguably could not — make any special provision for the

possibility of claims by a child or children of a deceased partner, under Sec. 117 of the Succession Act 1965, that the parent had failed to make proper provision for such child or children. Nothing is offered beyond a note on page 95 as to a partner's responsibility, when making a will to make "adequate provision" for the spouse and children.

The precedent Eight Schedule to the Agreement is particularly complex. Apart from the fact that it is not clear that the "joint ownership" and the "tenancy in common" referred to as at the commencement of Sub Clause (A) of Clause (I) must refer to a common ownership with some person other than a party to the Partnership Agreement, Sub-Clause (B) of Clause (I) must be worthy of a place in the Guinness Book of Records on the strength of sheer complexity! Practitioners are implored to make sure that they understand this Clause fully before adopting it in any case.

The provision for the gradually increasing share of the "junior" partner is contained in an elaborate Appendix A, set out in tabular form. This is ingenious but, again, calls for careful consideration in the context of gift and inheritance taxes. In the Appendix, as drafted, no proprietory interest passes to the "junior" partner until the "senior" of them has attained 55 years of age. This is to avail of the relief offered by Section 27 of the Capital Gains Tax Act 1975. For the purpose of gift and inheritance taxes, hopefully, the "junior" partner would have earned by his labours his ever-increasing stake in the partnership assets, but a paragraph on the author's reasoning on this matter would be a useful addition to the text.

In view of the sheer hard work that has gone into the production of this book, it seems almost trivial to mention that the general layout and choice of type-face leaves a certain amount to be desired; this is something which will no doubt be tidied up in later editions.

At IR£2.00, "Farm Family Partnerships" should be on the shelves of every practitioner. The *idea* alone is worth every penny of IR£2.00, which means one gets the book for nothing!

What is more, the book should not remain on the shelf; use it, and pass on the benefit of your experience — your trials and your tribulations — to the publishers. On such experience will subsequent editions be based.

Charles R. M. Meredith.

Youth and Justice — Young Offenders in Ireland, edited by Helen Burke, Claire Carney and Geoffrey Cook, published by Turoe Press, 1981. Paperback. £7.25.

Having grown out of the controversy surrounding the government's decision to set up a closed detention centre for boys in Loughran House, Co. Cavan, this book covers much more ground than its origins might imply. Far from dealing exclusively with the pros. and cons. of high security residential care for young offenders, this wide ranging work treats the subject in its social context, which entails tracing the present system for the treatment of young offenders through its historical development; comparing and contrasting our system with those of neighbouring jurisdictions; looking at the various stages a juvenile offender may go through under the present system; and, perhaps most importantly, seeking to analyse the nature and extent of juvenile crime, both in terms of the backgrounds and formative influences of young offenders, and in relation to assessing the most effective methods of tackling the problem.

Central themes in the book are: the necessity of achieving a balance between the requirements of society and the interests of the young people who offend against its rules, and the prime importance of moving from an 'offence' to a 'needs' orientation with regard to young offenders. Indeed, the authors go further, and suggest that if "need" is to be the relevant criterion, then those charged with responsibility in this area should not wait for an offence to be committed before intervening in a situation where a young person is 'at risk'.

Emphasis is placed on the desirability of rehabilitating young people in their own environment. Recommendations are also made with regard to residential care where this is necessary. Existing structures and practices are critically analysed, but all due credit is given to what enlightened developments there have been, in areas such as the Juvenile Liaison Scheme operated by the Gardai, Youth Encounter Projects and the intensive supervision scheme of the Department of Justice's Probation and Welfare Service. Expansion of these projects is urged, as is greater use of them by the courts.

Clearly, socio-economic factors are seen as fundamental to the solution of the problems of young offenders (and others), but the authors stress that much improvement is possible even within the existing framework. They do however strongly recommend some administrative change; the present situation in which several government departments have overlapping areas of responsibility should be altered, and a reconstituted Department of Health and Social Services have overall control; under its auspices, regional Health and Social Services Boards should have responsibility for the development of community-based projects designed to help the greatest possible number of young people in their own environment. These Boards would also be responsible for the welfare of those who needed residential care. An informal panel system is suggested to replace the present court structure; it would have cases referred to it when other agencies proved inadequate, by a Juvenile Referral Officer, and would decide on the most suitable method of treatment in consultation with parents and guardians.

Other specific recommendations refer to the dangers to young people of over-secure and alien custodial care, and to the ultimate folly of spending huge sums of money on methods which it is believed can be of little or no benefit either to the young person or to the community. Particularly, it is recommended that institutions such as adult prisons, St. Patrick's and Loughran House should never be used for young offenders.

This work is not, and does not pretend to be, a comprehensive analysis of the legislative reforms necessary to achieve its objectives. Nor is it free from defects of style and presentation. However, in bringing together so much diverse information and in putting forward their recommendations for change, the authors have succeeded in their declared objective of providing us with material for informed debate and have produced a book worth reading.

Karen Banks.

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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 25th day of December, 1981.

W. T. MORAN (Registrar of Titles)
Central Office, Land Registry, Chancery Street, Dublin 7.

1. Registered Owner: Nora O'Driscoll; *Folio No: 781;* Lands: Ballybrack; Area: 185a. 2r. 0p.; County: **Cork.**

2. Registered Owner: Margaret Horgan; *Folio No: 18838;* Lands: Ballyorban, Raheenering; Area: 33.413 acres; 22.550 acres; County: **Cork.**

3. Registered Owner: Michael Lillis and Patrick Joseph Lillis; *Folio No: 12353;* Lands: (1) Ballinloughane (parts) (E. D. Rooskagh), (2) Ballinlougane (an undivided moiety of other part); Area: (1) 96a. 0r. 10p.; (2) 1a. 0r. 10p.; County: **Limerick.**

4. Registered Owner: William Moffitt, Charlestown, Co. Mayo; *Folio No: 5230;* Lands: (1) Ballyglass East; (2) Lowpark; (3) Lavy Beg; Area: (1) 1a. 0r. 8p; (2) 0a. 0r. 23½p; (3) 4a. 2r. 22p.; County: **Mayo.**

5. Registered Owner: Thomas Doyle, 31 Aiden Park, Shannon, Co. Clare; *Folio No: 1911L;* Lands: Smithstown (Part); Area: —; County: **Clare.**

6. Registered Owner: James Walsh; *Folio No: 7142;* Lands: Aughrim; Area: 33a. 1r. 16p.; County: **Kerry.**

7. Registered Owner: Denis Coughlan; *Folio No: 26R;* Lands: Lag; Area: 76a. 1r. 36p.; County: **Cork.**

8. Registered Owner: Cavan Livestock Sales Ltd.; *Folio No: 983F;* Lands: (1) Keadew; (2) Keadew (situate to the north of the Railway Station in the town of Cavan); Area: (1) 1a. 0r. 16p.; (2) 0a. 2r. 0p.; County: **Cavan.**

9. Registered Owner: Thomas Brady & Sons (Cootehill) Ltd.; *Folio No: (1) 7343, (2) 17944, (3) 17945, (4) 17946;* Lands: (1) Coravoggy, (2) Munnilly, (3) Munnilly, (4) Munnilly; Area: (1) 51a. 1r. 18p., (2) 3a. 0r. 16p., (3) 6a. 0r. 0p., (4) 81. 0r. 32p.; County: **Cavan.**

10. Registered Owner: Patrick Curley, Cloonillan, Thomastown, Athlone, Co. Westmeath; *Folio No: 1174;* Lands: Cloonillan (Part); Area: 24a. 1r. 32p.; County: **Roscommon.**

11. Registered Owner: Bernadette and Bernard Fitzsimons as joint tenants of an undivided moiety of the property which they hold under a tenancy in common with the owners at entry No. 4 on the Folio; *Folio No: 18104;* Lands: Crumlin; Area: 0a. 0r. 20p.; County: City of **Dublin.**

12. Registered Owner: Michael McCarthy; *Folio No: 477;* Lands: Corbally, Barony of Uppercross; Area: 56a. 1r. 7p.; County: **Dublin.**

13. Registered Owner: Daniel Egan; *Folio No: (1) 7452; (2) 14072;* Lands: (1) Ballinvulla; (2) Lissatotan; Area: (1) 73a. 1r. 38p.; (2) 52a. 2r. 24p.; County: **Limerick.**

14. Registered Owner: Murray Kitchens Ltd.; *Folio No: 2393F;* Lands: Kilballygorman; Area: 5a. 2r. 38.4p; County: **Tipperary.**

15. Registered Owner: John M. Reidy; Folio No: 6838F; Lands: 13, Laurel Court, Tralee, Co. Kerry; Area: —; County: **Kerry.**

16. Registered Owner: Andrew Nugent; *Folio No: 9045;* Lands: Clonkeiffy; Area: 46a. 1r. 35p.; County: **Cavan.**

17. Registered Owner: Mrs. Kathleen Moran, Cornmarket, Ballinrobe, Co. Mayo; *Folio No: 11854;* Lands: Cornaroya; Area: 0a. 0r. 19p.; County: **Mayo.**

18. Registered Owner: Mary Burke, c/o Concannon & Co., Solicitors, Sea Road, Galway; *Folio No: 6321F;* Lands: Rahoon; Area: —; County: **Galway.**

19. Registered Owner: Mary Quinn; *Folio No: 19829;* Lands: Curragh; Area: 0a. 0r. 20p.; County: **Tipperary.**

20. Registered Owner: Christopher Corrigan, c/o John Hegarty, Gortnadeve, Creggs, Co. Roscommon; *Folio No: 11515F;* Lands: Culleen; Area: 0.438 acres; County: **Galway.**

21. Registered Owner: Marion O'Toole; Folio No.: 9140; Lands: Corballis; Area: 0a. 1r. 13p.; County: **Dublin.**

Lost Wills

Kathleen Bartley, deceased, late of Dardistown, Cloghran, County Dublin. Will any person having knowledge of any Will of the above named deceased who died on the 11th September, 1981, please contact Thomas G. Baldwin, Solicitor, 74 Killester Park, Killester, Dublin 5.

Teresa Brennan, deceased, late of 96 Tyrconnell Road, Inchicore, Dublin. Will any person knowing of the whereabouts of a Will of the deceased who died on the 8 November, 1981, please communicate with Geraldine Gillece, Solicitor, Poplar Square, Naas, Co. Kildare.

Kate Devane, deceased, late of Woodstock, Ballindine in the County of Mayo. Will any person having knowledge of the whereabouts of the original Will dated 4 November, 1974, of the above-named deceased who died on 5 November, 1974, please contact Crean O'Cleirigh & O'Dwyer, Solicitors, Ballyhaunis, Co. Mayo. Ref. D47.

Charles Fleming, deceased, late of 13 Shanboley Road, Santry, in the city of Dublin. Will any person having knowledge of the Will of the above named deceased who died on 14 January, 1981, please contact Michael B. O'Maoileoin & Co., Solicitors, 4 Lower Fitzwilliam Street, Dublin 2.

Mary Garvey, deceased, late of Rinn, Kilkelly, Co. Mayo. Will any person knowing of the whereabouts of the original Will dated 7 March, 1959 of the above-named deceased who died on 15 June, 1979, please contact T. Dillon-Leetch & Sons, Solicitors, Ballyhaunis, Co. Mayo.

Lucinda MacDermott, deceased, late of 8 Emorville Avenue, South Circular Road, Dublin 8. Will any person having knowledge of the Will of the above-named deceased who died on 26 October, 1981 please contact Michael Owens & Co., Solicitors, 5 Lr. Main Street, Dundrum, Dublin 14.

Mary Cissie McGinn, deceased, late of 20 Slate Quarry Road, Cullyhanna, Newry, Co. Down. Will any person having knowledge of the whereabouts of the Will of the above-named deceased who died on 8th October, 1981, please contact Peter J. Cusack & Co., Solicitors, Orchard Road, Clondalkin, Co. Dublin. Telephone 517864.

Elizabeth O'Donnell, deceased, late of Church Street, Cootehill, Co. Cavan. Will any person having any knowledge of the Will of the above named deceased who died on 19 February, 1967, please communicate with Aodhagan B. O'Reilly, Solicitor, Cootehill, Co. Cavan.

Employment

Young Solicitor with general practice experience, especially Conveyancing, Probate and District Court Advocacy seeks position. Replies to Howley & Armstrong, Solicitors, Teeling Street, Sligo.

Solicitor's Practice Wanted. Expanding firm of Young Solicitors wish to take over small practice. Practitioner to retire or remain as consultant. Dublin area. Confidentiality assured. Box No. 023.

Solicitor seeks position. One year's experience in High Court Litigation, Conveyancing and Probate. Phone Anne at 692336 (7.00-10 p.m.).

The Profession

Ann FitzGerald, Solicitor, is pleased to announce that she has commenced practice under the style of Ann FitzGerald & Co., Solicitors, 70 Shandon Street, Northgate Bridge, Cork. Telephone (021) 509323, shortly to be (021) 501307.

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FAMILY HOME PROTECTION ACT, 1976

Guide for Students of Law Society

Professional Course

prepared by

Peter Polden, Solicitor

Rory O'Donnell, Solicitor

(Issued as a supplement to the Gazette of the Incorporated Law Society of Ireland, April 1981, Vol. 75, No. 3)

INDEX

Family Home Protection Act, 1976.

The Family Home Protection Act, 1976, became law the 12th day of July 1976. The purpose of the Act was to prevent one spouse in whose sole name the family home is vested from dealing with the family home over the head of the other spouse in such a way as to deprive that spouse of her home. The Act was principally aimed at the errant husband who would be trying to sell or otherwise deal with the family home over his wife's head, but, of course, the converse would also be the case. The Act has a number of conveyancing consequences which are of vital importance to property Lawyers in that any "Conveyance" within the meaning of the Act which is in breach of the provisions of the Act since 12th July, 1976 is void.

The Act is a short one and it is essential that the main clauses of the Act should be carefully read. In particular, for Conveyancing pruposes, the following definitions should be noted:

(1) Conveyance is defined in Section 1 as "a mortgage, lease, assent, transfer, disclaimer, release, and any other disposition of property otherwise than by a Will or a *donatio mortis causa* and also includes an enforceable agreement (whether conditional or unconditional) to make any such conveyance and 'convey' shall be construed accordingly". Where all or any of these documents relate to a family home it is necessary to obtain the prior consent in writing of the spouse as otherwise the proposed document is void.

(2) A family home is defined in Section 2 of the Act as:

(i) "family home" means, primarily, a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided before so leaving.

(ii) In subsection (i) "dwelling" means: (a) any building, or (b) any structure, vehicle or vessel (whether mobile or not) "or part thereof, occupied as a separate dwelling and includes any garden or portion of ground attached to and usually occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling".

Section 3 contains the provisions which make a Conveyance in contravention of the Act void. It goes on to provide that no Conveyance will be void by reason of Section 3 if it is made to a Purchaser for full value who, in good faith, acquires an interest in the property. The Conveyancing consequences which are now becoming standard requirements flow from this provision because a Purchaser for full value will not be deemed to be a Purchaser in good faith unless certain reasonable enquiries are made. The rest of this Memorandum attempts to set out shortly what these enquiries are in conveyancing transactions and how the results of these enquiries should be verified.

The Act does not just apply to private houses. For example, a residential public house, a residential shop and a farmhouse can all come within the definition.

If the Act does apply to a transaction there are two essential ingredients. The first is whether the house is or was a family home **for some period of time** and the second is whether there is a spouse whose consent is necessary. For example, a residence owned by a limited company may be a family home but a limited company cannot have a spouse and the question of consent or verification should not arise. Again, the property may have been the family home of a married couple but the Vendor may now be a widow or widower and there may be no person whose consent is needed. There is a mistaken impression that because a couple may now have a family home elsewhere, that the Act does not apply to the sale by a spouse of a former family home. Consent is needed in any such case.

In investigating a title you are unlikely to overlook the necessity of checking each Deed since the Act to verify compliance with the Act. However, care must be taken to see that there are no outstanding claims by the spouse of a tenant or lessee under a letting or sublease of a family home. The Courts have taken the view that consent cannot be given retrospectively. This seems reasonable in view of the word "prior" before the word consent.

There have been many interesting cases already heard arising out of the Act. There are however other points which have not yet been clarified and are still the subject of some confusion. One of these is the question of whether a minor spouse can validly execute a consent. It is surprising to us how often this arises. The better opinions seem to be that a minor spouse can consent but the price of being wrong is so severe that many solicitors feel that they cannot take the risk and insist on an Order of the High Court being obtained to authorise the consent. This usually arises in the case of young couples buying their first house and of course they are usually the people who can least afford the extra expense of a Court Order. The Law Society have asked the Department of Justice to amend the Act to clarify this and the proposal seems to have been sympathetically received.

Another question is whether consent arises in a sale by a personal representative in due course of administration. For example, if a married couple go to live with the wife's widowed mother. They share the expenses of the house or pay her rent. The widow dies and appoints the daughter executrix and universal legatee. If the daughter assents and sells as beneficial owner consent of her spouse will be needed. What happens if she sells as legal personal representative in due course of administration? The better opinions are that consent cannot arise on a sale by a personal representative *qua* personal representative. However, again the price of being wrong is such that many solicitors feel obliged to get a consent in such cases or a Statutory Declaration to verify that none is necessary. Some raise Requisitions as to whether the property is the family home of the beneficiaries under a Will or intestacy. On a sale by a personal representative this is nonsense.

Another question is whether P. C. Moore's maxim "once a family home always a family home" is correct. For example, a man buys a residence in Dublin in 1960 and marries a few years later. The house is the couple's family home. They buy a new house in joint names in 1977 but the husband retains the former house as an investment, obtains planning permission and converts it into flats. Is consent needed if the husband wants to sell it now? It was hardly the type of case that the Act was intended to deal with. However, it has the two essential ingredients and most people take the view that consent is

needed. A Court might take the view however, that in such circumstances the former home becomes "de-controlled" so to speak. Another question is whether a house can be the family home of more than one couple at the same time. We feel that it can.

The one thing that we can be sure of is that there will continue to be a great deal of litigation over this Act in the future. Hopefully many of the problems will be resolved in the near future.

The Act also contains certain other ancillary provisions which are quite important. For example, it provides that a person who is the sole owner of a property which is a family home may transfer that property into the joint names of that person and their spouse free of Stamp Duty and registration fees provided that they take the property as joint owners, not tenants in common. Some Solicitors take the view that since the Act applies to pubs or farms which are family homes, that it should be possible to transfer say a 300 acre farm into joint names without liability for Stamp Duty. This view is not shared by the Revenue Commissioners, who say that only the portion that comprises the family home and the portion reasonably ancillary thereto is covered by the Section.

Premises which are a Family Home

When premises being sold are a family home what extra matters must arise in the course of the transaction:

(1) If the Vendors of the property are joint owners and are husband and wife no consent is needed on either the Contract or Deed. In all other cases, the Contract will be void unless the prior written consent is given by the Vendor's spouse. This is usually endorsed on the Contract in some form of words, like the following:

> "I being the spouse of the within named Vendor HEREBY CONSENT to the proposed sale of the property described in the within Contract at the price of £ and hereby irrevocably agree to endorse a consent in writing on any assurance of the said property by the Vendor in furtherance of the within Contract for the purposes of Section 3 of the Family Home Protection Act 1976".

The undertaking to execute a Consent on the Deed is, of course, not essential but is clearly advisable, in the case of a spouse having consented to the Contract but refusing to consent ot the Deed. Neither is it essential that the consent be endorsed on the Contract. If the consent is a separate document, however, it would have to be more explicit.

In the case of a sale by auction (as a *prior* consent is necessary) the Vendor's Solicitors should arrange to have the spouse present at the auction to endorse consent on the Conditions of Sale or, failing that, have a separate consent to a sale at not less than a stated price signed by the spouse prior to the auction. The Solicitors for a prospective Purchaser should enquire, prior to the auction, that the appropriate consent is, or will be, available.

(2) If one spouse is the owner, the prior written consent of the other spouse must be given to the Deed. This is usually endorsed on the deed in some form of words, like the following:

> "I being the spouse of the within named Vendor HEREBY CONSENT for the purposes of Section 3 of the Family Home Protection Act, 1976, to the sale by the Vendor of the within premises for the sum of £ ".

Some Solicitors, particularly in the country, have adopted a practice of including the consenting spouse as a party to the Deed and including the form of consent as an extra Certificate in the Deed. If this is done, the Certificate should specify that the consenting party has executed prior to any of the other parties to the Deed and care should be taken to see that this is actually done. This seems to be a very good practice which should be adopted more generally because, particularly in unregistered land, the Certificates will be an important document of title for at least 12 years and if they are on a separate piece of paper, they may get lost. In addition, the consent can be recited in the Memorial of the Deed and if, by any chance, a Deed incorporating the consent was lost, there would be some strong evidence to verify that a consent was included in the Deed.

(3) Because of the awful implications of a Deed being void, it has become normal practice for a Purchaser's Solicitor to ask for a Statutory Declaration to be furnished to verify that no consent is necessary because the Vendors are joint owners and are married to one another or that the person who executed the Consent is the correct person to do so. Some Solicitors disapprove of this practice and point out that it is not normal practice to ask for verification that the signification that the signature of the Vendor to the Deed is the signature of the correct person. However, there have been very few examples of persons who succeeded in selling a house they did not own. With the increasing number of cases involving matrimonial problems, there are plenty of people who would attempt to sell the family home without their spouses's consent if they could. We feel that a Solicitor should ask for verification by way of Statutory Declaration to protect themselves and their clients. It is normal for such a Declaration to exhibit a Marriage Certificate. Again, some Solicitors argue that this Certificate should be a State Marriage Certificate and if one wants to be able to satisfy any Purchaser's Solicitor, it is safest to get a State Certificate. The Law Society Conveyancing Committee is investigating the validity of this particular point and a practice note will be published as soon as possible. Precedents of the type of Declarations generally acceptable in both of these instances are attached, numbered Precedents One and Two.

Land Registry

If the property is registered in the Land Registry the Registrar of Titles is concerned with the question of the Family Home Protection Act because there is a general obligation on him to register only valid Transfers. If the Transfer is by two joint registered owners who are married to one another, the Registrar of Titles will require to be furnished with a Declaration such as that at Precedent Number Three to be satisfied that there is no other person whose consent should have been obtained. He will not think it reasonable to be expected to draw

conclusions from the fact that the owners are described as, for example, John Smith and Mary Smith and they live at the same address. It is not unusual for a brother and sister to own property jointly and one of these could have a spouse living in the property whose consent would be required under the Act. If the Deed is by a Vendor with a consent endorsed on it, the Registrar of Titles will not require verification that the consent is by the correct party.

Unregistered Property

If the property for sale is unregistered land, the only matter of importance is that the consent is forthcoming for every appropriate transaction since 12th July, 1976 and that any Declarations to vouch the position should be retained with the Deeds as important documents of title for at least 12 years.

Where The Premises are not a Family Home

(1) At Contract stage, a Solicitor acting for a Purchaser should enquire as to whether the sale is one in respect of which a consent will arise so that, if necessary, it can be endorsed on the Contract. It is good practice for a Solicitor acting for a Purchaser to ask his clients and take a note as to whether the property appears to be a family home from any information which the Purchaser has gleaned from seeing around the house.

(2) On the completion of the purchase, the Purchaser will require verification as to the circumstances in which the property is not a family home. Generally, what is required is a Statutory Declaration stating that the premises are not a family home and setting out in full the reasons why they are not a family home. The reasons can be manifold. The Vendor's family home may have been elsewhere. The Vendor may never have married. He may have been divorced and remarried and his first wife may never have resided in this house. Great care must be taken by the Purchaser's Solicitor where the premises are not a family home to make sure that all reasonable enquiries have been made. Mr. Justice McWilliam in his judgment in the case of *Hegarty v. Morgan* commented that he hoped it was not becoming conveyancing practice to furnish in such cases a Declaration which says simply that the property is not a family home. In his opinion, a Declaration should go on to state the basis on which it was stated not to be a family home. The Solicitor acting for a Purchaser should try and insist on getting the best evidence available as to the position. If the Vendor is married, the best evidence would be a Statutory Declaration by his spouse. The logic behind this is that the only person who could attack the validity of a Deed later is the spouse and, if at all possible, the Declatation verifying the position should be obtained from him or her. If the Vendor is not married, a Declaration as to the position by the Vendor should be sufficient. When buying a property which is not a family home a crucial point will be the date of execution of the declaration. This must be dated on or after the date of the deed. For example, if a vendor is selling a property which is not a family home; the Vendor is unmarried he will hand over on closing the executed purchase deed together with a declaration verifying that he or she is unmarried. If the deed is undated (as they usually are) and the declaration was executed say two weeks before completion (which is not unusual) the purchaser could have a problem if he is reselling within twelve years. A Purchaser from him could rightly point out that the Vendor could have married and ordinarily resided in the property with his wife between the date of the declaration and the date of the deed., By then the person who executed the deed may be difficult to find. This problem has been exaggerated in a few cases. We came across a case in which the Purchasers Solicitors had held the deed for a few months waiting for the client to pay the stamp duty and then up-dated the deed which was still undated to avoid a penalty. This was surely a case of "out of the frying pan" . . . The solution to this is simple. Deeds should be dated the date of first execution which is the strictly correct practice anyway. A Certificate of Escrow can be given on closing if there is any appreciable period between execution and the actual closing of the sale. Annexed are certain precedent Statutory Declarations which are generally acceptable in the following circumstances:

Precedent Number Three
Where the Vendor has never married.

Precedent Number Four
Where the Vendor is a Widow or Widower.

Precedent Number Five
Where the Vendor is divorced or living apart from a spouse who has never lived in the property the subject of the transaction.

Precedent Number Six
Where there is no building on the property and it is not part of the garden or land used in conjunction with or for the convenience of the family home.

Land Registry

Where the property is registered in the Land Registry, the Registrar of Titles is also entitled to the best evidence available as to the position. On the basis of the comments of Mr. Justice McWilliam in the case mentioned, he will not accept a Certificate in the Deed stating that the property is not a family home.

He will accept a Statutory Declaration by the Vendor or the Vendor's spouse setting out the basis on which the property is not a family home. As a concession to the Solicitors' profession, he will accept a Certificate from a Solicitor that the property is not a family home. The Law Society do not advise Solicitors to give such a Certificate because it can be very difficult to be sure in some cases as to whether a property was a family home or not and there is absolutely no reason why a Solicitor should take responsibility in a matter where there is no need to. We advise Solicitors to give their own Certificates only in cases of the clearest possible personal knowledge and certainly not on the basis only of information given to him or her by the client. When a Solicitor is acting for the Purchaser of registered land, he clearly must look into the position in so far as the Vendor and the Family Home Protection Act are concerned. Many conveyancers had serious doubts as to whether they should also investigate the position under the Family Home Protection Act in

relation to any transaction since the date of the Act. These doubts have now been resolved as a result of a decision of the High Court. In the case of *Guckian and Another v Brennan and Another*, Mr. Justice Gannon held that in purchasing registered land every prudent Solicitor for a Purchaser should make enquiries as to the position regarding the Family Home Protection Act in so far as the Vendor was concerned, both in relation to the Contract for Sale and the Deed of Transfer. He said in his judgment that Solicitors need not and should not go behind the Folio because to do otherwise would defeat the purpose of the Registration of Title Act. The duty was on the Registrar of Titles to register only valid Transfers.

Unregistered Property

(3) The only thing to remember again, is to retain all Statutory Declarations of Verification in respect of all transactions since the Family Home Protection Act carefully with the Title Deeds.

1.

(Family Home – Vendors married)

We A.B. and C.D. of both aged twenty-one years and upwards DO SOLEMNLY AND SINCERELY DECLARE AND SAY as follows:—

(1) By an Agreement for Sale dated the day of we agreed to sell the premises known as to X.Y. and Z.Q.

(2) The said premises are our family home being the dwellinghouse in which we ordinarily reside.

(3) We were married to each other on the day of and we refer to a copy Certificate of said Marriage upon which marked with the letter "A" we have signed our names prior to the completion hereof. We are now the lawful spouses of each other and neither of us has been married to any other person.

(4) We make this Solemn Declaration for the satisfaction of X.Y. and Z.Q. conscientiously believing the same to be true for the purposes of the Family Home Protection Act 1976 and by virtue of the Statutory Declarations Act 1938.

DECLARED before me by the said A.B. and C.D. who are personally known to me (or who are identified to me by who is personally known to me) at in the City of this day of 19 and I know the Declarants.

COMMISSIONER FOR OATHS

2.

(Family Home in Single name)

We A.B. (wife) and C.D. (husband) both of aged twenty-one years and upwards DO SOLEMNLY AND SINCERELY DECLARE as follows:—

(1) By an Agreement for Sale dated the day of 19 C.D. agreed to sell the premises known as to X.Y. and A.B. and endorsed her consent to the sale on the Agreement.

(2) The said premises are our family home being the dwellinghouse in which we ordinarily reside.

(3) We were married on the day of 19 and we refer to a copy Certificate of said Marriage marked with the letter "A" upon which we have signed our names prior to the completion hereof. We are now the lawful spouses of each other and neither of us has been married to any other person.

(4) We make this Solemn Declaration for the satisfaction of the said X.Y. conscientiously believing the same to be true for the purposes of the Family Home Protection Act 1976 and by virtue of the Statutory Declarations Act 1938.

DECLARED before me by the said A.B. and C.D. who are personally known to me (or who are identified to me by who is personally known to me) at in the City of this day of 19 and I know the Declarants.

COMMISSIONER FOR OATHS

3.

(Not Married)

I A.B. of aged twenty-one years and upwards DO SOLEMNLY AND SINCERELY DECLARE AND SAY as follows:

(1) By an Agreement for Sale dated the day of , I agree to sell the premises known as to X.Y.

(2) At the date of the said Agreement and at the date hereof I was and am not married and I have never been married to any person so that the said premises are not and have not been during the period of my ownership thereof a dwelling in which a married couple ordinarily reside.

(3) I make this Solemn Declaration for the satisfaction of the said X.Y. conscientiously believing the same to be true for the purposes of the Family Home Protection Act 1976 and by virtue of the Statutory Declarations Act 1938.

DECLARED before me by the said A.B. who is personally known to me (or who is identified to me by who is personally known to me) at in the City of this day of 19 and I know the Deponent.

COMMISSIONER FOR OATHS

4.

(Widow)

I A.B. of aged twenty-one years and upwards DO SOLEMNLY AND SINCERELY DECLARE AND SAY as follows:—

(1) By an Agreement for Sale dated the day of 19 I agreed to sell the premises known as to X.Y.

(2) I was married to C.D. on the day of 19 and I refer to a copy Certificate of said Marriage marked with the letter "A" upon which I have signed my name prior to the completion hereof. The said C.D. died on the day of 19 and I refer to a copy Death Certificate upon which marked with the letter "B" I have signed my name prior to the completion hereof.

(3) I have not been married to any person other than C.D. and I have not remarried since the date of his death.

(4) I make this Solemn Declaration for the satisfaction of the said X.Y. conscientiously believing the same to be true for the purposes of the Family Home Protection Act 1976 and by virtue of the Statutory Declaration Act 1938.

DECLARED before me by the said A.B. who is personally known to me (or who is identified to me by who is personally known to me) at in the City of this day of 19 and I know the Declarent.

COMMISSIONER FOR OATHS

5.

(Divorced)

I A.B. of aged twenty-one years and upwards DO SOLEMNLY AND SINCERELY DECLARE AND SAY as follows:

(1) By an Agreement for Sale dated the day of I agree to purchase the premises known as from X.Y. and by Deed by dated the day of 19 the premises were to me.

(2) At the date of the said Agreement I was and at the date hereof I remain a single person. By virtue of an Order of the Court of made the day of 19 a copy upon which marked with the letter "A" I have signed my name prior to the completion hereof whereby the marriage between myself and C.D. was dissolved and since the said date I have not been remarried to any person.

(3) My said spouse C.D. at no time lived either as my wife or otherwise at the said premises which were only bought by me subsequent to the date of the said Court Order aforesaid.

(4) I make this Solemn Declaration for the satisfaction of the Building Society from whom I am obtaining a loan on the security of the said premises conscientiously believing the same to be true for the purposes of the Family Home Protection Act 1976 and by virtue of the Statutory Declarations Act 1938.

DECLARED before me by the said A.B. who is personally known to me (or who is identified by who is personally known to me) at in the City of this day of 19 and I know Deponent.

COMMISSIONER FOR OATHS

6.

(Not a House)

I A.B. of aged twenty-one years and upwards DO SOLEMNLY AND SINCERELY DECLARE AND SAY as follows:—

(1) By an Agreement for Sale dated the day of 19 my spouse C.D. agreed to sell the plot or site of ground known as to X.Y.

(2) The plot aforesaid has been owned by my spouse since prior to the 12th July 1976 (or whatever later date may be applicable).

(3) I was married to the said C.D. on the day of 19 and I refer to a copy Certificate of said Marriage upon which marked with the letter "A" I have signed my name prior to the completion hereof. I am now the lawful spouse of C.D. and I have not been married to any other person than C.D. since that date.

(4) The said plot has never during the period of my spouse's ownership had a dwellinghouse erected on it and there has not during that period been a married couple ordinarily residing thereon nor has the plot been attached to or usually occupied with such a dwelling or otherwise required for the amenity or convenience of same.

(5) I make this Solemn Declaration for the satisfaction of the said X.Y. conscientiously believing the same to be true for the purposes of the Family Home Protection Act 1976 and by virtue of the Statutory Declarations Act 1938.

DECLARED before me by the said A.B. who is personally known to me (or who is identified by who is personally known to me) at in the City of this day of 19 , and I know the Deponent.

COMMISSIONER FOR OATHS

Recent Irish Cases

LANDLORD AND TENANT
Landlord and Tenant (Ground Rents) (No. 2) Act 1978, Section 17 – Acquisition of Fee Simple of premises. Determination of purchase price where lease will expire in less than fifteen years, "having regard to" (inter alia) a hypothetical rent which would, in the opinion of an arbitrator, be reserved by a reversionary lease of such premises for ninety-nine years from the expiry date. Impossibility of ascertainment of such a rent that a "willing lessor" would accept, having regard to inflation and other unknown factors and in absence of any provision for periodic rent reviews.

The Applicant held a chemist shop at Rathmines Road, Dublin, from the Respondents for a term of 147 years expiring in 1982 at the yearly rent of £16. He sought to acquire the fee simple and on arbitration pursuant to Section 17 of the Landlord and Tenant (Ground Rents) Act 1967 ("the Act of 1967"), the County Registrar determined the purchase price to be £10,000. The factors to be taken into account when the price was to be determined by arbitration were provided for in Section 18 of the Act of 1967, but that Section was repealed by the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 ("the Act of 1978") and was replaced by Section 17 of the Act of 1978. Section 17 of the Act of 1978 provided that where the purchase price was to be determined by arbitration it should be the sum which, in the opinion of the arbitrator, a willing purchaser would give and a willing vendor would accept for the fee simple *having regard to* [italics added] certain factors specified in the Section which included (in Subsection 2).

"(b) Where the land was held by the person acquiring the fee simple under a lease which has expired or is held by him under a lease which will expire less than fifteen years after the date of the service of the Notice under Section 4 of the Act of 1967 or of the application of Part III of this Act, the rent which, in the opinion of the arbitrator, would be reserved by reversionary lease under the Act of 1958 of the land granted for a term commencing on the expiration of the first-mentioned lease."

Section 18 of the Landlord and Tenant (Reversionary Leases) Act 1958 ("the Act of 1958) provides for the determination of the rent of a reversionary lease on the basis that such lease should be for a term expiring ninety-nine years after the expiration of the lease to which it is reversionary (Subsection (2)). Section 18 (4) of the Act of 1958 provides as follows:

"(4) Subject to Subsection (3) of this Section the rent to be reserved by the reversionary lease shall be one-eighth of the gross rent as defined by Subsection (5) of this Section."

Section 18 (5) (a) of the Act of 1958 provides as follows:

"(5) (a) The gross rent shall be the rent which, in the opinion of the Court, a willing lessee not already in occupation would give and a willing lessor would take for the land comprised in the reversionary lease in such circumstances that the supply of similar lands is sufficient to meet the demand:
(i) On the basis that vacant possession is given and that the lessee pays rates and taxes in respect of the land (other than the lessor's proportion of income tax) and is liable to insure against fire and to keep the premises in repair:
(ii) Having regard to the other terms of the reversionary lease and to the letting values of land of a similar character to and situate in the vicinity of the land comprised in the reversionary lease but without having regard to any goodwill which may exist in respect of the land comprised in the reversionary lease."

By reason of the fact that the Applicants' lease was due to expire in 1982 (i.e. less than fifteen years) the provisions first quoted of the Act of 1958 applied and had to be had regard to in the determination of the purchase price of the fee simple under Section 17 (2) (b) of the Act of 1978 (also quoted above).

From the determination of the County Registrar of a purchase price of £10,000, the Respondents appealed to the Circuit Court and the President of the Circuit Court (Neylon J.) stated a case to the Supreme Court in which he submitted two questions for determination:

(1) Whether – in view of the evidence that the Respondents would not willingly make a lease for ninety-nine years for the premises without inserting a clause for periodic reviews of rent during the continuance of the term – I, for the purpose of assisting me to decide upon the appropriate purchase price of the fee simple of the said premises pursuant to Section 17 of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 can now determine the rent which would be reserved by a reversionary lease of the said premises granted pursuant to the Landlord and Tenant (Reversionary Leases) Act 1958 for a term commencing on the expiration of the lease in 1982.
(2) Whether, when determining the rent which would be reserved by a reversionary lease of the said premises granted pursuant to the Landlord and Tenant (Reversionary Leases) Act 1958, I am legally entitled to endeavour in so far as possible to provide for inflation in view of the evidence that freely negotiated ninety-nine year

leases in respect of premises of the type the subject matter of the application are unknown in the property world and in view of the evidence that it would be pure speculation to try and endeavour to determine the inflationary trends (if any) over a ninety-nine year period.

The President of the Circuit Court had accepted the following matters as being established by the evidence:

(a) The sum of £10,000 determined by the County Registrar as the purchase price was so determined without regard to inflation.
(b) If inflation was to be ignored this sum of £10,000 was reasonable.
(c) Over the past ten years inflation had shown an average (annual) increase of 12.2%.
(d) The Respondents would not be willing to grant a ninety-nine year lease of the premises without a provision for rent reviews.
(e) A ninety-nine year lease of premises similar to the subject matter of the application was something which would now be unknown in the property world.
(f) It would be impossible to predict the rate of inflation for a ninety-nine year period.

The supreme Court was referred to its decision in *Byrne v. Loftus* [1978] I.R. 211, in which it had held that if there was evidence to support such a course, a Court could (in granting a twenty-one year lease approval) fix a rent which would provide an aggregate amount of rent over twenty-one years equal to the total of the rents a willing landlord would obtain by granting a lease for twenty-one years with a clause providing for rent reviews. The Court stated that it found it difficult, if not impossible, to imagine credible evidence being adduced which would indicate a likely or possible rent to be determined now which would on aggregation over more than ninety-nine years equate to what an imaginary lessor would be willing to take and an equally imaginary lessee would be willing to give for a ninety-nine year lease subject to rent reviews. The Court could therefore not apply the principle laid down in *Byrne v. Loftus*.

HELD (per O'Higgins C.J. with Kenny and Parke J.J. concurring, and with separate concurring judgments from Henchy and Griffin J.J.).

That on the facts as found by the President of the Circuit Court it was simply not possible to have regard to a rent which would be reserved (with no provision for periodic rent reviews) by a reversionary lease for ninety-nine years of the premises the subject matter of the application as such a rent was not capable of being ascertained. Accordingly the Court answered the first question "no" and also held that the determination of the County Registrar was governed by the statutory requirements contained in Section 17 (2) (b) of the Act of 1978 and accordingly answered the second question "no" also.

In his concurring judgment Henchy J. stated:

"If computation by reference to the gross rent were merely directory, the position would be different. But it is a prerequisite to the exercise of jurisdiction to fix the purchase price. The rule to be applied, therefore, is that stated as follows in Maxwell on *The Interpretation of Statutes*, 12th edition, p. 328:

> 'Where an act or thing required by the statute is a condition precedent to the jurisdiction of a tribunal, compliance cannot be dispensed with and, if it be impossible, the jurisdiction fails. It would not be competent to a Court to dispense with what the legislature has made the indispensible foundation of its jurisdiction.'"

In concluding his concurring judgment Henchy J. stated:

"The way out of the unfortunate impasse disclosed by this case stated is for Parliament to enact, in place of the existing method of ascertaining the purchase price of a ground rent, a method which will not depend on an unworkable element. It is unfortunate that, pending such a statutory change, a ground rent can be bought out by a tenant only when the parties agree to the amount of the purchase price."

Seán Gilsenan v. Foundary House Investments Ltd. and Rathmines Properties Ltd. Supreme Court (per O'Higgins C.J.) with concurring judgments of Henchy and Griffin J.J.) - 14 November 1980 unreported.

LOCAL GOVERNMENT— SANITARY SERVICES ACT 1964

Section 3 (8) (a) of Sanitary Services Act 1964 – prohibiting the repair or letting of premises ("structure") or the carrying out of works on the site until payment to the sanitary authority of sums expended by the authority on carrying out of specified works in default of owner doing so pursuant to District Court Order – applied to the premises and site in question and not only to the then owner of the site; and a person subsequently purchasing the premises or site took subject to and affected by the District Court Order. Who was "owner" at the time of the Order also considered on the facts.

The Prosecutor (F. & C. Limited) bought the fee simple in the four premises numbers 1-4 Roby Place, Dun Laoghaire, by indenture of conveyance dated 9 June 1978 from Rochford Holdings Limited ("Rochford"). Rochford had owned the property from prior to 31 May 1976.

In 1974 and 1975 applications for planning permission in respect of the premises had been made by architects on behalf of T. & J. Nolan Builders Limited ("T. & J. Nolan") stating that T. & J. Nolan were the owners of the fee simple. There was an identity of directors in both Rochford and T. & J. Nolan.

On 31 May 1976 Dun Laoghaire Corporation ("the Corporation") served Notice on T. & J. Nolan pursuant to Section 3 of the Local Government (Sanitary Services) Act 1964 ("the 1964 Act") of the fact that the Corporation were of the opinion that the floors and ceiling of the four premises was a "dangerous structure" within the meaning of Section 1 of the 1964 Act and requiring T. & J. Nolan to carry out certain works specified in the Notice. On 29 June 1976 further Notice was given by the Corporation to T. & J. Nolan of an application to the District Court in accordance with Section 3 (5) of the 1964 Act for an Order requiring T. & J. Nolan to carry out the work specified in the Notice and in default for an Order

authorising the Corporation to carry out the works. On 15 July 1976 the District Justice of Dun Laoghaire made an Order directing T. & J. Nolan to carry out the specified works within seven days and authorising the Corporation to carry out the works in default.

On 1 December 1977 notice of application for an Order under Section 3 (8) (a) of the 1964 Act was sent to T. & J. Nolan. A further application to the same effect was sent to T. & J. Nolan on 13 January 1978. On 26 January 1978 the District Justice made an Order pursuant to Section 3 (8) (a) of the 1964 Act prohibiting the repair or letting of the premises (i.e. "structure") in question or the carrying out of any works on the site until payment to the Corporation of the sum of £1,289. Although that Order was apparently made on 26 January 1978 it was not signed by the District Justice until 8 May 1978 and it was directed to T. & J. Nolan. The particulars of the Order were entered in the Register maintained by the Corporation (pursuant to Section 8 (3) (c) of the 1964 Act) on 31 January 1978 and on 15 May 1978 a copy of the Order was served on the registered office of T. & J. Nolan.

The Prosecutors had a full planning permission for certain works on the premises and in August 1978 they commenced the construction of foundations for those works. On or about 25 August 1978 the Corporation engineer produced to the Prosecutors a copy of the Order of the District Justice dated 8 May 1978 (but apparently made on 26 January 1978) and intimated that if work continued the persons responsible would be liable to imprisonment. It was established to the Court that Rochford, from whom the Prosecutors purchased the premises, had the same registered office and had identity of directors with T. & J. Nolan but no evidence was forthcoming that T. & J. Nolan had at any time any interest in the premises.

The Prosecutors contended that the Order of the District Justice made on 26 January 1978 was bad, firstly because it was made in the absence of the Prosecutors and without their having an opportunity to be heard and, secondly, because the Corporation had at the time of obtaining of the Order failed to serve the then owner of the premises, Rochford.

The Corporation contended that on the information available to them the apparent owners were T. & J. Nolan and that the identity of address of T. & J. Nolan and Rochford raised a presumption that Rochford were aware of the making of the Order of 26 January 1978 and that the Prosecutors could either by inspecting the Register (maintained under Section 8 (3) (c) of the 1964 Act) or by raising ordinary requisitions on title, have obtained information in regard to the making of the Order and that they could not now challenge the Order because at a time when they had no interest in the lands they were not served with the notice of application to have it made.

HELD (per Finlay P.)

(1) That the prohibition provided for in Section 3 (8) (a) of the 1964 Act applied to the premises and site and not only to the then owner of the premises and site, even if it was the default of the owner which gave rise to the prohibition. The provision for a Register of such orders to be kept open for public inspection was inconsistent with any other interpretation.

(2) That the mere fact that the person who at a particular time owned premises ("structure") was not represented at the District Court hearing on which an application for an Order pursuant to Section 3 (8) of the 1964 Act was made would not be a ground for invalidating the Order. A person subsequently purchasing the premises or site in respect of which an Order under Section 3 (8) (a) of the 1964 Act had been made took the premises or site subject to and affected by the Order.

The Court had not before it any information as to what evidence had been adduced before the District Justice at the hearing of 26 January 1978. If the facts deposed by the Corporation were as adduced to the District Justice they appeared to the Court to provide ample *prima facie* evidence of proof of ownership by T. & J. Nolan. The Court considered that there was an almost inevitable presumption from the facts proved that the directors of the true owners, Rochford, who were also the directors of T. & J. Nolan, must have been aware of the District Court proceedings and of the Orders made and that by failing or refusing to assert the true position on behalf of T. & J. Nolan (that T. & J. Nolan were not the true owners of the premises) the said directors were misleading the Corporation, and, to a certain extent, the Court, into the belief that the true owner was before the Court. Notwithstanding that the service of the Notice of disrepair on the owner was a clear condition precedent to the exercise by the Sanitary Authority of its powers under the 1964 Act the Court refused to set aside the Order.

(3) That the Order was an Order good upon its fact and that all that was really asserted before the Court and to a certain extent proved was that the District Justice probably came to an incorrect conclusion as to who had then been the owner of the premises in question. The incorrect conclusion of fact by an inferior Court was not subject to review by way of *certiorari*.

Conditional Order of *certiorari* discharged.

F. & C. Limited v. District Justice Hubert Wine – High Court (per Finlay P.) – 23 July 1979 – unreported.

CUSTOMS DUTY—SALE OF GOODS BY RECEIVER

Whether customs duty was payable by a receiver of a company on certain goods sold by him on the home market which had been imported by the company without payment of duty with the authority of the Revenue Commissioners, because the goods had been imported merely for processing in Ireland before exporting them, when processed, for sale abroad.

The Plaintiff was appointed by the Northern Bank Limited on 2 February 1976 to be receiver of the property of Vecta International Limited. Vecta had imported certain goods without payment of customs duty, with the authority of the Revenue Commissioners pursuant to Section 38 of the Finance Act, 1932, as amended by Regulation No. 11 of the European Communities (Customs) Regulations, 1972, subject to conditions contained in Notice No. 1181 and an appendix thereto, as it had imported the goods merely for processing in Ireland before exporting them, when processed, for sale abroad. The Plaintiff realised such of those goods as came into his possession by selling them on the home market.

Under Clause 9 (2) of the said

Notice No. 1181 diversion to the home market could be allowed with the prior consent of the Revenue Commissioners on payment of the appropriate duty chargeable and subject to such conditions as the Revenue might see fit to impose. Under Clause 14 of the Appendix to the said Notice an application for permission to divert goods to the home market had to be made in writing to the Revenue. The Plaintiff did not make any such application and did not pay the customs duties before selling on the home market. It was argued on behalf of the Plaintiff that none of those provisions created a charge on the goods.

On behalf of the Defendant (the Revenue) reference was made to *A.G. v. Thornton* (1824) 13 Price 805, in which an auctioneer who, after an ambassador's term of office had expired, sold on behalf of the ambassador dutiable goods which had been imported during the ambassador's term of office free of duty on diplomatic exemption, was held to be liable for the duty which became payable when the goods ceased to have the benefit of the diplomatic exemption by reason of the sale.

HELD (per McWilliam J.)

(1) That the Revenue were entitled to be paid the duties out of the proceeds of sale of the goods in priority to everyone else.

(2) That the goods became liable to duty as soon as they were put up for sale in Ireland and, under Clause 14 of the Appendix to Notice 1181, they could not lawfully be put up for sale in Ireland without the consent of the Revenue and on payment of the appropriate duties.

(3) That it was the duty of the Plaintiff to ascertain the position before he sold the goods as it had been the duty of the auctioneer in *A.G. v. Thornton* (supra), and that if the proper steps had been taken the duties should have been paid before the goods were sold. The Plaintiff, or the Bank, could not be permitted to benefit from an irregular dealing with the goods for which dealing the Plaintiff was responsible.

Alex Spain v. The Revenue Commissioners – High Court (per McWilliam J.) – 12 February 1980 – unreported.

Summaries of judgments prepared by John F. Buckley and Hugh M. Fitzpatrick. Edited by Michael V. O'Mahony

Recent Irish Cases

FAMILY LAW — CUSTODY

Mother seeking custody of her seven year old daughter who had been living for some years with her maternal grandparents and had only been visited occasionally by the mother during that period. Mother granted custody and grandparents ordered to have access to the infant for lengthy periods.

This was an action brought by the Plaintiff seeking custody of her 7½ year old daughter. The proceedings were originally instituted naming as Defendants the Plaintiff's mother and father with whom the daughter in question was residing but on the direction of the High Court at a preliminary hearing the father of the infant child (hereinafter referred to as "M") was added as a third Defendant.

The Plaintiff was aged 31 years and the first two Defendants were aged 70 and 71 years respectively. After completing third level education the Plaintiff returned home to live on the family farm in Cork. She became friendly with a young man, "M", of her own age who was working as a labourer on the family farm. Her parents disapproved of this relationship. She and "M" in effect ran away from home and came to Dublin where they lived for some period in 1971.

By the commencement of 1972 the Plaintiff had become pregnant and she then married "M" in January 1972. The child was born in June 1972. The Plaintiff and "M" lived in various flats in Dublin and suffered considerable poverty. "M" was an alcoholic and there were problems from the very start of the marriage.

There was no contact between the Plaintiff and her parents or other members of the family from the time she went to Dublin in 1971 until the Summer of 1973 when she returned for a short period to her home for the funeral of her grandmother.

Towards the end of 1973 the Plaintiff and "M" brought the child for the first time to her home in Cork. The Plaintiff and her husband separated in 1974 and did not have any significant contact with one another after that time. In the Summer of 1974 contact between the Plaintiff and her parents had been resumed and they visited her in Dublin from time to time.

The Plaintiff then asked her mother to look after the child and she brought the child down to Cork. This arrangement was intended to be of a temporary nature. The Plaintiff then obtained employment and lived on her own in various flats in Dublin.

By the commencement of 1975 the Plaintiff was beginning to suffer from depression and in the Spring of 1976 there was superimposed on this a physical ailment necessitating an operation and a period of convalescence. Contact was maintained between the Plaintiff and her parents during all this period, and from time to time she visited her parents in Cork and saw the child although frequency of these visits was disputed.

By the year 1977 the Plaintiff's condition of depression had worsened and after a major break-down involving an attempted suicide she was admitted as a patient to a psychiatric day centre. She attended there on a daily basis between October 1977 until the end of February 1978. During this period she developed a friendship with another patient, "P." In March 1978 the Plaintiff took an overdose of drugs and was admitted to a psychiatric hospital. After being discharged she stayed with one of her brothers in Cork and later returned to Dublin.

Having obtained an annulment from the Catholic Church of her Canonical marriage with "M" the Plaintiff married "P" in July 1979 according to the Rites of the Catholic Church. Her parents strongly disapproved of this marriage and all significant contact ceased between the Plaintiff and her parents.

The matter first came before the High Court on an interlocutory application in July 1979 and the President (Finlay P.) made an Order that the Plaintiff should have access to see the child in Cork on stated occasions. Significant disputes arose relating to access and the matter came before the President on two other occasions before the full hearing.

At the time of the full hearing the Plaintiff had been employed for 18 months as an assistant in a pre-play-school run by nuns in Dublin.

"P" was 21 years of age and came from a broken home. He had been working at various different jobs and at the time of the hearing was earning £55 net per week as a store assistant. He had been treated for depression in a psychiatric day centre and, as stated, above it was there where he met the Plaintiff.

The Plaintiff was earning £35 per week and both of them were residing in a two-room flat but at the time of the Court hearing they secured a lease of a furnished three bedroomed house which they expected to occupy within three weeks.

The Plaintiff sought custody of the child and proposed altering her working days in order to bring the child to and from school. She proposed that the child should have frequent staying access with her grandparents.

The grandparents (i.e. first and second Defendants) on the other hand contended that it was in the interests of the welfare of the child that the child should continue residing with them and continue attending school in Cork. They proposed that the Plaintiff should have frequent access.

Both the Plaintiff and the grandparents agreed that "M" (the father of the child) should have access to the child in Cork, but, both agreed that "M" should not be given staying access.

"M" did not seek custody but supported the grandparents contention that the child's welfare would be better served by the child living with the grandparents in Cork.

The grandparents contended that the Plaintiff had not shown a true maternal affection or care for the child and they contended that the Plaintiff was not interested in the child. The Court rejected this contention. The Plaintiff contended that she had been consistently seeking the return of the child whereas the child's grandparents contended that the

Plaintiff never sought her return. The Court was satisfied that some mention or requests for the return of the child were made by the Plaintiff and that they were refused or avoided.

Evidence was heard from two child psychiatrists as to the wishes of the child. Doctor O'D, concluded that the true wishes of the child were to be living in Dublin with the Plaintiff whereas Dr. C, concluded that the child would prefer to live with the grandparents in Cork. The Court attached more weight to Dr. O'D's evidence and opinioned that Dr. C had earlier reached a series of conclusions that were unwarranted on the information then available to him.

In relation to the stability of the Plaintiff and her canonical husband "P", Dr. C expressed the view that both persons were unstable and expressed a gloomy view with regard to the possibility of the continuance of this marriage.

Dr. McC, a third doctor, on the other hand, was of the opinion that the Plaintiff and "P" had reached a measure of stability and that their marriage had as good a chance as any other marriage of being successful. The Court attached more weight to Dr. McC's evidence.

The Court was impressed with evidence of the child's school teachers and was very impressed with the grandmother and with the grandmother's son who took a very keen interest in the child.

Held (per Finlay P.):

1. That the material welfare of the child would be better served if the child remained in Cork with her grandparents.
2. That to place the child in the custody of the mother (i.e. the Plaintiff) had got in it an element of risk due to the possibility of the mother suffering a recurrence of a mental disorder and due to the possibility of her (canonical) "marriage" breaking down.
3. That to place the child in the custody of the mother was bound to cause the child to have problems relating to its identity because of the situation arising from the canonical annulment.
4. That to place the child with the grandparents also carried with it an element of risk due to the fact that the grandparents could die before the child had become independent and also due to the fact that the child might have problems in its development when the child realised that it had a mother who was not looking after it.
5. That notwithstanding the loving care of the grandmother she could not be a substitute mother figure for the care of a mother.
6. That notwithstanding the real risks attached to the Plaintiff's relationship with "P" and notwithstanding that material affairs might deteriorate very rapidly, that the welfare of the child would best be served by being brought up within the ambit of that relationship because there was a reasonable chance of that relationship succeeding even though it was not a full chance.
7. That the balance of the welfare of the child would be that it should on a probationary basis and subject to significant precautions and checks be returned to the custody of her mother and that the grandparents should have access to her for lengthy periods.

O'N v. O'B and Others High Court (per Finlay P.) - 22 Jan. 1980 – unreported.

FAMILY LAW — WIFE'S RIGHT TO MAINTENANCE

If a wife had not "just cause" for leaving the family home, she was not entitled to maintenance under the Family Law (Maintenance of Spouses and Chidren) Act 1976, and husband could not be barred from family home.

The Plaintiff and the Defendant were a young married couple whose family home was vested jointly in them. The property had been purchased for £8,100 of which £6,000 was raised by a mortgage and the balance was largely contributed by the parties prior to their marriage. It was decided by the Court as a matter of fact that the family home was owned legally and beneficially by the parties in equal shares. Difficulties arose in the marriage and ultimately the wife, who claimed that she was frightened by her husband's conduct, left the family home, shortly thereafter discovering that she was pregnant. The husband, who claimed that he was shattered by her leaving, had been of the opinion that after initial difficulties the parties to the marriage had been reconciled, and that it was a matter of surprise to him that in November 1978 the wife had left the matrimonial home.

In May 1979, the wife gave birth to a child and the Court found again as a matter of fact that the wife deliberately embarked on a course of excluding her husband from all contact with the child. Both parties having accepted that the marriage had irretrievably broken down at the time the case was heard, the husband did concede that the wife should have the custody of the child, but the wife was insisting that the access to the child should take place in her presence. The Court could see no justification for this and ruled that appropriate arrangements must be made to grant the husband reasonable access.

In the course of his judgment, Barrington J., considered in detail the conflicting evidence surrounding the circumstances of the wife's departure from the family home. In the course of this consideration, Barrington J. stated:

"When parties marry they marry for better or for worse. This, as I understand it, includes accepting quirks and difficulties in the character of the other marriage partner.

To establish "just cause" for leaving the matrimonial home the partner who has left must establish some form of serious misconduct on the part of the other partner. Such conduct must, as Lord Asquith said:

"... exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other "for better or worse." The ordinary wear and tear of conjugal life does not in itself suffice." (Buchler v. Buchler 1947 1 A.E.R. P319 at 326).

After weighing up the respective conflicting testimonies of the witnesses, Barrington J. concluded that the husband was not a violent and vicious man, although he might have been excitable and difficult, and he also concluded that the husband did not suffer from any psychiatric disorder. In the circumstances he decided that the wife did not have 'just cause' for leaving the matrimonial home. Having decided this, he ruled that the wife had been guilty of desertion and that the Court was de-

barred by Section 5 (2) of the Family Law (Maintenance of Spouses and Children) Act 1976 from making a maintenance order for her separate support. He also ruled that it would not be appropriate to make an order pursuant to Section 22 of the said Act of 1976 debarring the husband from the family home. However, as both parties agreed that the wife was the proper person to have custody of the child, and that the wife could not therefore work for some years to come, the maintenance of the child should be provided by the husband and should include a sufficient sum to enable the mother to look after the child, and the Court fixed maintenance for the child pending further Order at the sum of £30 per week.

As far as the family home was concerned, it appeared that the husband had expressed a desire to buy out the wife's interest at a fair valuation and it was decided that the parties should be given an opportunity to negotiate on this proposition but failing agreement the family home would have to be sold and the net proceeds divided equally between the parties.

In summary, therefore, it was –

Held (per Barrington J.):

(i) That the husband must have reasonable access to the child;
(ii) That the wife did not have 'just cause' for leaving the family home and was not therefore entitled to maintenance under the Family Law (Maintenance of Spouses and Children) Act 1976, although the maintenance of the child should be provided by the husband;
(iii) That the husband should not be debarred from the family home under Section 22 of the said Act of 1976; and
(iv) That, failing agreement between the parties, the family home was to be sold and the proceeds divided

P.V.P. – High Court (per Barrington J.) – 12 March 1980 – unreported.

INJUNCTION — LACHES

Suspension of members of committee of Hurling and Football Club — no notification to committee of charges being preferred against them personally — natural justice — delay in taking proceedings.

The plaintiffs were the President and Chairman of Nemo Rangers Hurling and Football Club, and as such were members of the G.A.A., and the Defendants comprised officers of the Cork County Board of the G.A.A. and the Munster Council of the G.A.A. Nemo Rangers won the Cork Senior Football Championship on 17 August 1978. The captain of the team was instructed not to accept the cup, because of differences between Nemo Rangers and the County Board, which placed the prize awarding official in an embarrassing position in public. Certain Nemo Rangers' supporters engaged in an unsportsmanlike demonstration.

The Cork County Board wrote to the secretary of Nemo Rangers to ask them to show cause why the Club should not be suspended for the conduct which had taken place, but the Board did not refer to the possibility of action being taken against the Plaintiffs personally. At a meeting on 31 October 1978, in the absence of the Plaintiffs, the County Board decided to suspend and disqualify the Plaintiffs. The Plaintiffs appealed to the Munster Council and on 16 December 1978 the decision of the County Board was upheld.

The Plaintiffs alleged that they did not breach any rule and they claim the County Board acted 'ultra vires,' contrary to the principles of natural justice and in breach of the constitutional rights of the Plaintiffs and in breach of the G.A.A.'s Rules. The complaints against the Munster Council were similar, with the addition that on appeal the Council should have investigated the conduct of the County Board and directed the County Board to reconsider the matter *'ab initio.'* The Plaintiffs also claimed that two members of the County Board on the Munster Council had no discretion at the appeal, as under the Rules of the County Board they were obliged to uphold the County Board's decision and that hence this invalidated the appeal.

Proceedings were issued (more than one year later) on 7 January 1980 for an injunction to reinstate the Plaintiffs. The statement of claim and the motion in the application were dated 31 January 1980.

Held (per McWilliam J.): that there was a case to be argued in the proceedings but in view of the delay in bringing the proceedings and the considerable doubt that an injunction would serve any useful purpose for the Plaintiffs the application was refused.

The Court, however, commented on the inadvisability of imposing a penalty on a person without giving that person notice of the likelihood of a penalty being imposed and also commented that it was unsatisfactory for any person hearing an appeal with his discretion fettered.

Cotter and another v. O'Sullivan & Others – High Court (per McWilliam J.) – 23 April 1980 – unreported.

LEASE OR LICENCE

An agreement in respect of land for seasonal use as a playing field was terminated for breach of various covenants. Agreement found to be a licence validly revoked, but equitable relief against forfeiture was granted.

Under the agreement of 14 July 1956, the trustees at that time of the Defendants (a cricket club) for the consideration of £1,000 and an annual payment of £60 agreed "to lease" to the then trustees of the Plaintiffs (a rugby club), **"ALL THAT** the field and the pavilion thereon known as the Merrion Cricket Club grounds situate at Anglesea Road, in the City of Dublin from the 1st day of October 1956 to the following 1st day of March (which period from the 1st day of October to the 1st day of March is therein and hereinafter referred to as "the season") and for the same period on a further 89 consecutive occasions subject to the said annual rent and the conditions and covenants in the said Lease."

It was alleged by the Plaintiffs that on two occasions goal posts on the field had been dismantled by the Defendants and that in late 1975 the Defendants had caused the goal posts to be destroyed so that the Plaintiffs were unable to use the field for the purpose of playing rugby football and then obstructed the Plaintiffs in their efforts to erect new goal posts.

The Plaintiffs claimed:

(a) An injunction to prevent the Defendants from using the field and pavilion;
(b) A declaration that the Plaintiffs were entitled to use the field and the pavilion for the purposes of

playing rugby football on the terms of the agreement of 14 July 1956;
(c) Damages for trespass;
(d) Further and other relief.

The Defendants alleged that:
(a) The agreement of 14 July 1956 was not a lease but only a licence;
(b) That the Plaintiffs did not at all times comply with the covenants and conditions contained in the agreement;
(c) That the Plaintiffs did not at all times pay the annual rent provided for;
(d) Further and other relief.
serious and continual breach of the covenants and other terms of the agreement; and
(e) That the Plaintiffs had used the field for periods in excess of those envisaged by the agreement and had failed to maintain the playing pitch and its surrounds and to keep them properly cut and maintained and that notices of these breaches had been repeatedly given to the Plaintiffs and that undertakings had been received to the effect that there would be no repetition of these breaches.

The Defendants counterclaimed that they had also terminated the agreement by re-entering in or about the month of February 1975 and that by notice dated 25 February 1975, they required the Plaintiffs not to re-enter the lands and counterclaimed:

(a) For a declaration that they had lawfully terminated the licence and were entitled to exclude the Plaintiffs from the lands;
(b) Arrears of rent to the date of termination;
(c) £1,000 damages for the Plaintiffs' breaches of covenants and other terms and conditions of the agreement.

At the hearing of the action, counsel for the Plaintiffs had applied for and was granted leave to amend the Plaintiffs' reply and defence to counterclaim by including a claim for relief against forfeiture.

Held (per Hamilton J.): that the agreement in writing of 14 July 1956 was not a lease but merely a licence which had been determined by forfeiture but that the principles with regard to the granting or withholding of equitable relief applied to the facts of the case, such that:
(i) Regard must be had to the conduct of the licencee (i.e. the Plaintiffs); and
(ii) Generally speaking, where the forfeiture was only for securing payment or where there was no injury from the delay in payment or only such injury that the payment of a sum for interest, and, if needs be, costs, would be full compensation for it, relief would not be refused.

The excessive use of the premises and certain damage done to the grass by the use of a corrosive substance in the laying of lines of demarcation of the pitch could in the circumstances be so compensated. Equitable relief against forfeiture was granted on terms for the payment of arrears of rent and an undertaking by the Plaintiffs to comply in future with the terms and conditions contained in agreement of 14 July 1956.

Judd and others, as trustees of Bective Rugby Football Club v. McAlinden and others, as trustees of Merrion Cricket Club. High Court (per Hamilton J.) – 28 March 1980 – unreported.

Summaries of judgments prepared by Frank Daly, Eugene Davy, Peter Polden and Michael Roche and edited by Michael V. O'Mahony.

Recent Irish Cases

Constitutional Law — Statute — Validity — Personal Rights. Application to Minister for Justice for Certificate of Naturalisation; Claim that certain provisions of the Irish Nationality and Citizenship Act, 1956, are invalid.

The first-named Plaintiff, a native of Pakistan, came to this country in March 1977 and has resided here since then. He married the second-named Plaintiff, an Irish citizen, on 15 April 1978.

On the 21 August 1978 the first named Plaintiff applied to the Minister for Justice for a certificate of naturalisation as an Irish citizen.

Section 15 of the Irish Nationality and Citizenship Act, 1956, provided that an alien man might — at the Minister's absolute discretion — acquire Irish citizenship if the Minister was satisfied that the applicant complied with certain conditions, including one year's notice to be given of the intention to make the application and the applicant to have resided in this country for five years in all. These conditions might be dispensed with by the Minister in certain cases.

Section 16 of the 1956 Act provided that the Minister might dispense with any of those conditions (inter alia) "(d) where the applicant is a woman who is married to a naturalised Irish citizen; (e) where the applicant is married to a woman who is an Irish citizen (otherwise then by naturalisation)."

Those two Sections contrast with Section 8 of the 1956 Act which provided that an alien woman who married an Irish citizen (other than a naturalised citizen) might automatically acquire citizenship on her marriage by lodging a declaration in the prescribed manner with the Minister.

The Minister, by letter dated 24 August 1978, stated that in the case of the first-named Plaintiff the residential qualification would be reduced to two years and the requirements as to advance notice would be waived. The Minister refused to waive the residence qualification in its entirety and proceedings were instituted claiming a declaration that Sections 8, 15 and 16 of the 1956 Act were unconstitutional and contrary to natural justice and seeking an order directing the Minister for Justice to grant a certificate of naturalisation to the first named Plaintiff.

It was argued on behalf of the second named plaintiff that the fact that she was deprived of the right to confer an automatic entitlement to Irish citizenship on her spouse was a violation of the guarantee contained in Article 40.1 of the Constitution (equality before the law).

It was submitted on behalf of the first named Plaintiff that the differentiation between alien men and alien women in the Sections already referred to was a breach of the guarantee of equality before the law contained in Article 40 and a breach of Article 9.1.3 which stated:

> "No person may be excluded from Irish nationality and citizenship by reason of the sex of such person".

It was argued for the defendants that the impugned provisions simply provided for a diversity of arrangements which did not amount to discrimination between citizens in their legal rights, that the first-named Plaintiff, not being a citizen, could not claim the protection of the Articles of the Constitution which guaranteed the fundamental rights of citizens and that the second named Plaintiff was not capable in law of asserting any constitutional rights on his behalf.

The High Court (per Keane, J.), accepted that there were certain legal propositions that were clearly established and not disputed.

1. The enactment under attack, being an Act of the Oireachtas which became law subsequent to the enactment of the Constitution was entitled to the presumption of constitutionality operating in favour of all such statutes. *(McDonald v. Bord na gCon* [1965] IR 217; and, *East Donegal Co-Operative Livestock Mart Limited v. The Attorney-General* [1970] IR 317).
2. The guarantee of equality before the law contained in Article 40 of the Constitution was not infringed because of an existence of a diversity of arrangements *(State (Nicholau) v. An Bord Uchtala* [1966] IR 567; and, *O'Brien v. Keogh* [1972] IR 144).

Held: (per Keane J.) dismissing the Plaintiff's claim;

1. That the provisions of the Sections in question (i.e. that female aliens were upon marriage automatically entitled at their option to Irish citizenship, while male aliens were not) do no more than provide a diversity of arrangements which was not prohibited by Article 40.1 of the Constitution.
2. That, accordingly, the sections in question did not infringe the constitutional guarantee and undertaking of equality before the law, nor did they infringe the provisions of Article 9.1.2. of the Constitution providing that no person might be excluded from Irish nationality and citizenship by reason of his or her sex.
3. That no benefit would be conferred on the Plaintiff if the relevant sections were held to be invalid. The Court had no jurisdiction to substitute for the impugned enactment a form of enactment which it considered desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment.

Mohammed Ali Somjee and Margaret Somjee v. The Minister for Justice and The Attorney General — High Court (per Keane J.) – 20 December 1979 – unreported.

ROAD TRAFFIC ACTS

In a prosecution for driving while having excess alcohol in the body, where a certificate of analysis is produced by the Bureau of Road Safety, the onus is on the Defendant to show that the analysis was not carried out "as soon as practicable" and that the certificate of analysis and copy certificate were not forwarded by the Bureau "as soon as practicable". Sections 22 and 23 of the Road Traffic (Amendment) Act 1978 considered.

This was a case stated to the High Court by a District Justice pursuant to Section 2 of the Summary Jurisdiction Act 1857 as extended by Section 51 of the Courts Supplemental Provisions Act 1961 on the application of the Complainant (i.e. the Director of Public Prosecutions) by way of appeal. It concerned a charge against the Defendant of having in his body an excessive quantity of alcohol contrary to Section 49 (2) (4) (a) of the Road Traffic Act 1961 as inserted by Section 10 of the Road Traffic (Amendment) Act 1978.

The Defendant was arrested on 24 October 1979 under the Road Traffic Acts 1961/1978 and he gave a sample of his blood as prescribed and on that date the sample was sent to the Bureau of Road Safety. The Bureau issued its certificate of analysis dated 13 November 1979, on which the seal of the Bureau was affixed on 15 November 1979. The prosecuting garda could not give evidence as to when he received the certificate from the Bureau except to say that it was before 18 December 1979 and the Defendant gave no evidence as to when he received the copy certificate. The case was dismissed in the District Court on the basis that the analysis had not been done "as soon as practicable" nor had the certificate been forwarded to the prosecuting garda "as soon as practicable".

The question raised on the case stated was as to whether the District Justice was right in law in dismissing the complainant. The statutory provisions applicable to the question of law submitted to the High Court were as contained in Sections 22 and 23 respectively of the Road Traffic (Amendment) Act 1989.

Section 22 (1) provided as follows:—

"As soon as practicable after it has received a specimen forwarded to it under Section 21, the Bureau shall analyse the specimen and determine the concentration of alcohol or (as may be appropriate) the presence of a drug or drugs in the specimen".

Section 22 (3) provides —

"as soon as practicable after compliance with sub-Section (1), the Bureau shall forward to the Garda Station from which the specimen analysed was forwarded a completed certificate in the form prescribed for the purpose of this section and shall forward a copy of the completed certificate to the person who is named on the relevant form under Section 21 as the person from whom the specimen was taken or who provided it".

Section 23 (2) provides —

"A certificate expressed to have been issued under Section 22 shall, until the contrary is shown, be sufficient evidence of the facts certified to in it, without proof of any signature on it or that the signatory was the proper person to sign it, and shall, until the contrary is shown, be sufficient evidence of compliance by the Bureau with all the requirements which the Bureau is obliged to comply with by or under this Part or under Part III of the Act of 1968".

The High Court (per Finaly P.) indicated that the effect of these two sections might be summarised as indicating that the Bureau had two obligations with regard to time; the first was to analyse the specimen as soon as practicable after it received it and the second was to send to the Garda Station and to the Defendant the certificate as soon as practicable after analysing the specimen.

The second feature was that there was a rebuttable presumption arising from the production of the certificate itself that these two obligations *inter alia* had been complied with by the Bureau and that therefore the onus of establishing that they had not was upon the Defendant.

The Director of Public Prs-secutions had a case stated to test the propriety of the District Justice's decision and in the High Court the appropriate Section 22 of the Road Traffic (Amendment) Act 1978 was analysed, and Finlay P. considered that this section imposed an obligation on the Bureau to perform the analysis of the sample as soon as practicable after it has received it and to sent the certificate and copy certificate to the appropriate people as soon as practicable after the analysis. The next section of the Act i.e. Section 23, creates a rebuttable presumption on the production of the certificate, that these two obligations have been carried out by the Bureau.

The Court referred to *Hobbs v. Hurley* (Unreported judgment of 10 June, 1980 of Costello J.) where the words "as soon as practicable" were examined, and where it was held (1) that those words were not the same as "as soon as possible' which would impose a more severe obligation; and (2) that those words had to be strictly construed because they were in a penal statute; and, (3) difficulties attendant on effecting the obligation expressed by those words had to be considered in evidence and in particular the nature and purpose of the obligation had to be borne in mind. With regard to the obligation on the Bureau to send the certificate to the prosecuting garda, the purpose of this was to enable that garda to decide under which sub-Section (if any) the arrested person **should be** prosecuted and the purpose behind the obligation to send a copy certificate to the Defendant was to give the Defendant notice of the evidence against him. Because of the rebuttable presumption created by Section 23 of the 1978 Act the Defendant had to produce evidence as to the difficulties and surrounding circumstances affecting the Bureau in performing its obligations and also as to the effects caused by any delay, before a court could properly reach the conclusion that a specimen was either not analysed or a certificate was not sent "as soon as practicable".

Held (per Finlay P.) that in the absence of evidence such as was required as stated above the District Justice was not entitled to reach a conclusion as he apparently did that either the specimen had not been analysed "as soon as practicable" or that the certificate had not been sent "as soon as practicable" and in doing so to the presumption contained in Section 23 of the 1978 Act.

Director of Public Prosecutions v. Leonard Corrigan — High Court (per Finlay P.) — 21 July 1980 — unreported.

TRADE MARKS

It does not follow that because a feature of the trade mark is of a non-descriptive character that a disclaimer under section 22 of the Trade Mark Act 1963 should be required as a matter of course.

The Plaintiffs (Phillip Morris Incorporated) applied to register a mark containing the words "Virginia Slims" in January 1975. The Controller of Patents, Designs and Trade Marks said that he would only proceed with the application if the Plaintiffs agreed to disclaim the exclusive use of the words "Virginia Slims". The Plaintiffs while prepared to disclaim the two words separately, were not prepared to accept the disclaimer of the combination of the two words and the Controller refused their application. The Controller fixed a hearing. No statutory declaration was filed but submissions were made by the Plaintiffs' agent. The Controller refused the application but before he gave his written decision the Plaintiffs filed a declaration. The Plaintiffs appealed to the High Court against the refusal and sought to introduce the statutory declaration as evidence.

Held (per Costello J):

(1) that, under section 25(7) of the 1963 Act the Court has no jurisdiction to allow any further materials to be introduced by the applicant after the Controller has stated his decision.

(2) that if the Court or the Controller concludes that a feature of the mark is not "adapted to distinguish" or "capable of distinguishing" the applicants' goods within the meaning of sections 17 and 18 then a jurisdiction to order a disclaimer arises under section 22.

(3) that it does not follow as a matter of course that because a feature of the mark is of non-distinctive character a disclaimer under the section should be required. In exercising its discretion the Court or the Controller should consider *inter alia:*

(a) the object for which a disclaimer should be required.

(b) the disadvantage which the applicant will suffer if the disclaimer is required.

(c) the danger that the absence of a disclaimer could give rise to unjustifiable claims to a monopoly in a non-distinctive feature of the mark.

(d) That the words "Virginia Slims" constitute matter of a non-distinctive character within the meaning of section 22 and that this is a case in which it was proper to have required the Plaintiffs to agree to disclaim the exclusive use of the words "Virginia Slims" since these words are by far the most prominent and striking feature in the mark and if no disclaimer was required a registered proprietor of the mark might claim statutory monopoly rights in these words even though they could not have been independently registered.

(e) That, in summary, the Controller was right in requesting the plaintiffs to agree to the disclaimer he sought and in refusing the application when the Plaintiffs did not do so. Appeal of the Plaintiffs dismissed.

Note: At the end of his judgment Costello J., said:

> "The appeal to the Court from a discretionary order made by the Controller is, it is clear, by way of a re-hearing, and the Court therefore is not limited to considering whether the Controller had misdirected himself in some way or proceeded on wrong principles ... the Court is perfectly free to exercise its own discretion in the light of the evidence before it."

In the matter of the Trade Mark Act 1963. Phillip Morris Incorporated v. The Controller of Patents, Designs and Trade Marks — High Court (per Costello J.) — 7 October 1980 — Unreported.

PROCEDURE

Lis Pendens — jurisdiction of the Court to vacate in the absence of consent — applicability of Lis Pendens Act 1867 to this jurisdiction confirmed.

The Plaintiff commenced proceedings for specific performance of a contract for the sale of supermarket premises in Mullingar by Plenary Summons issued on 22 September 1978 and on the same date registered the proceedings as a lis pendens against the Defendants' interests in the premises. The statement of claim was served on 15 October 1979. By notice of motion served for 5 November 1979 the Defendants applied to the High Court for an order vacating the lis pendens and dismissing or staying the proceedings. The grounding affidavit of the Defendants deposed to the rescission of the contract by agreement between the parties prior to the action. The Plaintiff's legal advisers did not file a replying affidavit because they believed that the High Court had no jurisdiction to vacate the lis pendens without the consent of the registering party i.e. the Plaintiff.

The Defendants relied on Section 2 of the Lis Pendens Act 1867 which (inter alia) authorised the Court before whom the property sought was in litigation upon the determination of the litigation or during the pendency thereof, where the Court was satisfied that the litigation was not prosecuted bona fide, to make an order, if it sees fit, for the vacating of the lis pendens without the consent of the party who registered it.

In *Giles v. Brady* [1974] IR 462, Kenny J. held in the High Court that the Lis Pendens Act 1867 did not apply to Ireland, the Court being influenced by the fact that Section 1 (since repealed) referred to a section of the Companies Act 1862, which Act of 1862 did not apply to Ireland by the reference in Section 2 to "the Senior Master of the Common Pleas" an office which did not exist in Ireland.

In *Culhane & Hewson* (High Court – 20 October 1978 – unreported) McWilliam J. did not follow the Giles decision relying instead on *Glencourt Investments Ltd., and Companies Act* (Supreme Court – 28 July 1975 – unreported) and also relying on the fact that in the Official Index to the Statutes for 1867 the Lis Pendens Act appeared with the letters "G.B. and I." opposite to it and held that the Act of 1867 did apply to this jurisdiction. In *Dunville Investments Ltd., v. Kelly* (High Court – 17 April 1979 – unreported) Costello J. followed the view of McWilliam J.

This was an Appeal to the Supreme Court from a decision of the High Court (also per McWilliam J.) which had concluded that in view of the fact that the affidavits filed by the Defendants had not been controverted by the Plaintiff that the proceedings were not being bona fide prosecuted because prior to auction bought the Plaintiff had agreed to a rescission of the contract and the High Court had made an order

vacating the lis pendens but had not dismissed the Plaintiff's claim.

The Supreme Court, (per O'Higgins C.J.) stated that the general rule with regard to the operation of a British Statute was that the operation of such a statute extended to the whole of the then United Kingdom and that, if the intention was to limit the operation to a part only, an express limitation was necessary; and, that, in addition, in the absence of an express limitation, an intention to limit the application could be gathered by necessary implication from the construction of the Statute; and that the Lis Pendens Act 1867 was not limited in its application by express terms nor could it be said, because of the forms and terms used in the Act, that by necessary implication an intention not to apply to Ireland could be gathered. The fact that the Act referred to a section of the Companies Act 1862 (which Act expressly did not apply to Ireland) did not of itself indicate that the Act of 1867 was intended not to apply to Ireland.

Also, the absence of a proper officer or proper machinery for registering a vacate of a lis pendens could not be said, by necessary implication, to indicate an intention not to apply to this country. Such absence undoubtedly indicated a defect in the Statute and a defect which required remedying; but it was noted that four years later, Section 21 of the Judgment (Ireland) Act 1871, reciting the absence of sufficient provision for registering a vacate of a lis pendens, made good the deficiency.

Held (per O'Higgins C.J.) that

(1) The Lis Pendens Act 1867 was intended to apply to Ireland.
(2) On the evidence before it on the motion the High Court was not entitled to conclude that the Plaintiff's claim was not being prosecuted bona fide. Registration of Lis Pendens reinstated.

Brendan Flynn v. Oliver Buckley and Anor. – Supreme Court – (per O'Higgins C.J.) – 24 April, 1980 – Unreported.

MANDAMUS

Mandamus — Urban District Council bye-laws — Mandamus refused to compel a local authority to enforce its bye-laws under the Road Traffic Acts 1961/1968.

The Respondent Urban District Council made bye-laws in December 1979 under the Road Traffic Acts 1961/1968 for the regulation of their car parks. The bye-laws included a prohibition of the sale of goods and trading in the car parks. Some unauthorised persons nevertheless used one of the car parks for trading in breach of the bye-laws. They were prosecuted by the D.P.P. (per the local Gardai) but the prosecutions did not stop illegal trading. The Applicants were ratepaying traders resident in the town of Navan and sought an order of Mandamus to compel the Respondents to enforce their own bye-laws, and, by further prosecutions and permanent or temporary fencing of the Car Parks and other measures of control, to prevent such illegal trading. On an application to make absolute a conditional order of Mandamus, the Respondents having shown cause,

Held (per Hamilton, J.) that:

(i) The Applicants had sufficient interest in the matter to support their application.
(ii) There was no legal obligation on the Respondents to take any of the suggested steps by way of fencing and the like, to enforce compliance with the car park bye-laws.
(iii) Failure to comply with the bye-laws constituted a criminal offence and prosecution in respect of them was a matter for the Director of Public Prosecutions, (since the Prosecution of Offences Act, 1974) and not for the Respondents.

Refused the Application for an Order of Mandamus accordingly

State (at the Prosecution of A.C.C. and others) v. Navan Urban District Council. High Court (per Hamilton J.) 22 February 1980 – unreported.

Summaries of judgments prepared by Eamonn G. Hall, Brendan Garvan, Daire Hogan, John F. Buckley and William Dundon. Edited by Michael V. O'Mahoney.

Recent Irish Cases

FAMILY LAW

Custody of infant— Maintenance of infant and wife — Determination of wife's claim to a beneficial interest in the matrimonial home — Married Women's Status Act, 1957, Section 12.

The wife (Plaintiff) and the husband (Defendant) were married in June 1977. They purchased a house in Co. Wicklow for £11,250 with the aid of a County Council mortgage of £4,500, the balance being raised by the husband from his own resources or from his family. The house was put in the husband's name. The husband was employed by his father at a weekly wage of £35 later raised to £50. Later he became self-employed and earned approx £65 per week. The wife was employed in the Civil Service at a wage of £43 which was later reduced to £32 to meet income tax liabilities on the joint income. Unhappy differences arose between the parties and the wife eventually left the family home with the child in July 1979. The proceedings were issued by the wife seeking:

(a) Custody of the infant female child;
(b) Maintenance for herself and the child;
(c) An Order pursuant to Section 12, Married Women's Status Act, 1957, determining her interest in the family home;
(d) An Order under the same Section determining her interest in certain chattels.

As there was a conflict of evidence before the Court, Barrington J. accepted the wife as the more reliable witness. The evidence was that the husband's drinking habits interfered with the marriage. When the wife discovered in Spring 1978 that she was pregnant, the husband's behaviour deteriorated and continued so, even after the child was born in November 1978. The wife left the matrimonial home for the first time after Christmas 1978 but returned in April 1979 after a reconciliation with the husband. After a temporary improvement, matters reverted to their previous unhappy state and eventually on 29 July 1979 the wife left with the child for the final time and went to live with her mother.

Held (per Barrington J.):

1. On the issue of custody of the child, that the child was well cared for by the wife at the wife's parents' home and it was right and appropriate that she should remain there, subject to suitable access to the child by the husband; and that the husband should also pay an appropriate sum to the wife for the maintenance of the child.
2. On the issue of maintenance of the wife, that although the husband maintained that as his wife had deserted him he should not be obliged to maintain her, this issue depended on whether or not she had just cause for leaving him; and that the Court was satisfied that she had just cause and that therefore the husband should pay her appropriate maintenance.
3. On the issue of the claim relating to the family home, that such rights (if any) of the wife under the Family Home Protection Act, 1976, were unaffected by this action; that the wife had conceded that she had no claim to an interest in the home represented by the cash raised by her husband which was three-fifths and that her claim was confined to the beneficial interest in an undivided two-fifths of the home, the purchase of which was financed by the County Council mortgage.

The Court in reviewing the basis of the decision on this issue stated that the claim was brought under Section 12 of the Married Women's Status Act, 1957, which provided the machinery for determining any question arising between husband and wife as to title to or possession of any property. It did not confer on the Court any jurisdiction to divide property between husband and wife in a way considered equitable by the Court, but it merely had jurisdiction to determine in whom the title to the property resided.

The Court cited the case of *C. v. C.* [1976] I.R. 254 (per Kenny J.) where it was held (*inter alia*) that the most useful and correct approach was to apply a concept of trust to the legal relationship which arose when a wife made payments toward the purchase of a house or the repayment of a mortgage instalment when the house was in the sole name of the husband; and that when this was done he became a trustee for her of a share in the house and the size of the share depended on the contribution which she had made towards the purchase or repayment of the mortgage.

The Court also cited *R. v. R.* (High Court, per McMahon J.; 12 January 1979, unreported) where, in developing the principle in *C. v. C.* it was held that there should be no distinction between money paid by the wife on providing food and other requisites for the home and money paid by the wife for necessaries for herself; and that both kinds of expense came within the principles set out in *C. v. C.* , namely that the wife's contribution which would give her a claim to a beneficial interest in the family home might take the form of paying expenses so that the husband had money which made it possible for him to pay the mortgage instalments; as in either case there was a saving to the husband and if it enabled him *pro tanto* to meet the mortgage repayments then the wife should be regarded as contributing to the repayments.

In the instant case Barrington J. stated that the present case was not quite on all fours with *C. v. C.* and *R. v. R.* He was satisfied that the wife had made a substantial contribution to the setting-up of the family home but no direct contribution towards the repayment of the mortgage; and that the effect of the indirect contribution on reducing the capital sum outstanding must have been minimal. He was satisfied on the evidence produced that the wife had borne the main financial burden in running the house and that with her own money she had purchased a stated list of items for the house. He stated that certain items purchased by a marriage partner might remain personal to

that partner but when the property was "bought for the house" then it could logically be inferred that it was to be the joint property of both partners. Counsel for the wife had put her claim to the furniture in the alternative. The purchase of furniture could not in itself affect the wife's claim to an interest in the house, but the subsequent behaviour of the parties cast light on the kind of agreement between them to buy and furnish a home through their joint efforts.

Barrington J. cited with approval Lord Denning in *Hazell v. Hazell* [1972] A.E.R. at p. 923, as follows:

> "It is sufficient if the contributions made by the wife are such as to relieve the husband from expenditure which he would otherwise have had to bear. By so doing the wife helps him indirectly with the mortgage instalments because he has more money in his pocket with which to pay them. It may be that he strictly does not need her help – he may have enough money of his own without it – but *if he accepts it* (and thus is enabled to save more of his own money) she became entitled to a share."

The Court in the instant case concluded that as the husband had paid immediately for a three-fifths interest in the home, the wife's claim was only in respect of the remaining two-fifths, and that the wife was entitled to one-half of that namely an undivided one-fifth share in the beneficial interest of the equity of redemption, together with an undivided one-half share in the household goods and furniture other than such items as were personal to one or other of the parties.

M.B. v. E.B. – High Court (per Barrington J.) – 19 February 1980 – unreported.

MISTAKE

Money paid under a mistake of law — Miscalculation of sum needed to redeem annuity — Overpayment — Recovery of overpayment where parties not "in pari delicto".

J.M. was owner in fee simple of a cottage vested under the Labourers Acts, subject to a redeemable annuity. Being desirous of redeeming, he applied to the Defendant Housing Authority who quoted a redemption price of £1,163. Subsequently the Plaintiff, as personal representative of J.M. deceased, paid that sum to the Defendants to redeem the annuity. The £1,163 was calculated and paid before July 1974 when the Supreme Court gave judgment in the case of *Meade v. Cork Co. Council* (Supreme Court, 31 July 1974, unreported). According to the law as laid down in that case, the redemption price quoted and paid was £953.53 too much. The Plaintiff sued for the return of the overpayment. On a case stated to the Supreme Court by the Circuit Court Judge:

Held (per Griffin J. and per Kenny J. with O'Higgins C.J. concurring) that:

1. The Defendants were not entitled to require the Plaintiff to pay the said sum of £1,163 to redeem the annuity.
2. The said sum was paid under a mistake of law.
3. The Plaintiff was not *in pari delicto* with the Defendants in relation to the said mistake and the overpayment was recoverable from the Defendants by action.

The cases of *Dolan v. Neligan* [1967] I.R. 247, and *Kiriri Cotton Co. Ltd. v. Dewani* [1960] 2 W.L.R. 127, were followed.

Elizabeth Rogers v. Louth Co. Council – Supreme Court (per Griffin J. and per Kenny J. with O'Higgins C.J. concurring) – 11 March 1981 – unreported.

CRIMINAL LAW

Vagrancy Act, 1824, Section 4 (as applied to Ireland and amended by Section 15 of the Prevention of Crimes Act, 1871, and Section 7 of the Penal Servitude Act, 1891) — creating and providing for the offence commonly known as "loitering with intent" — inconsistent with the Constitution.

The Plaintiff was convicted in the District Court on 13 November 1975 on two charges: (1) that being a suspected person he was found on 11 November 1975 loitering with intent to commit a felony, to wit, housebreaking, contrary to Section 4 of the Vagrancy Act, 1824; and, (2) that on the same date he had in his possession certain housebreaking implements with intent to commit some felonious act, to wit, to steal, contrary to Section 4 of the Vagrancy Act, 1824. He was convicted and sentenced to three months imprisonment on each of these charges.

On appeal to the Circuit Court against sentence on 9 December 1975 the term of imprisonment was suspended on terms.

On 2 July 1976 the Plaintiff was convicted in the District Court on a charge that being a suspected person, he was found on 17 June 1976 in a public place loitering with intent to commit a felony, to wit, steal contrary to Section 4 of the Vagrancy Act, 1824, as amended by the Acts of 1871 and 1891.

He was sentenced to three months imprisonment, but suspended on condition that he be of good behaviour and keep the peace for twelve months. No appeal was taken in respect of that conviction or suspended sentence.

Section 4 of the Vagrancy Act, 1824, as amended by the Acts of 1871 and 1891, created a large number of separate and distinct offences. The Plaintiff, as stated, had been charged with two separate such offences.

The Plaintiff sought declaration in the High Court:

(i) that Section 4 of the Vagrancy Act, 1824, as amended and applied to Ireland by the Acts of 1871 and 1891, was not carried forward as a valid law by Article 50.1 of the Constitution, and,
(ii) that certain convictions in the District Court were invalid.

The High Court held (per McWilliam J.) that only the specified part of Section 4 of the Vagrancy Act, 1824, as applied to Ireland and amended by the Acts of 1871 and 1891 creating and providing for the offence commonly known as "loitering with intent" was inconsistent with the Constitution. Orders of *certiorari* quashing the convictions in the District and Circuit Court granted.

The Defendants appealed to the Supreme Court.

Held (per Henchy J., with Griffin, Kenny and Parke JJ., concurring, O'Higgins C.J. dissenting in part):

1. That the specified parts of Section 4 of the Vagrancy Act, 1824, as applied to Ireland and amended by the Acts of 1871

and 1891, creating and providing for the offence commonly known as "loitering with intent" were inconsistent with Articles 38.1, 40.1.4 and 40.3 of the Constitution and, by virtue of Article 50.1 of the Constitution, ceased to have any force or effect in this State upon the coming into operation of the Constitution.

2. That the conviction of the Plaintiff in the District Court on 13 November 1975 of having in his possession specified housebreaking implements with intent to commit some felonious act, to wit, to steal, contrary to Section 4 of the Vagrancy Act, 1824, was invalid as there was no reference to the extension and amendment of Section 4 of the 1824 Act by the Acts of 1871 and 1891; and that accordingly, the recorded conviction failed to show jurisdiction on its face and therefore lacked validity.
3. That in lieu of the orders of *certiorari* granted in the order of the High Court, the two convictions of the Plaintiff in the District Court on 13 November 1975 (as affirmed, but varied as to sentence, in the Circuit Court on 9 December 1975) and the further conviction of the Plaintiff in the District Court on 2 July 1976, should be declared invalid.

In a part dissenting judgment O'Higgins C.J. expressed the view that the specified parts of Section 4 of the Vagrancy Act, 1824, as applied to Ireland and amended by the Acts of 1871 and 1891 creating and providing for the offence commonly known as "loitering with intent" should survive and remain in force with only the words "suspected" and "reputed thief" excluded as being inconsistent with the Constitution. He was also of the view that the conviction of the Plaintiff in the District Court on 2 July 1976 be quashed because at the hearing of the charge prior to conviction evidence was received of a previous conviction of the Plaintiff.

Neville Francis King v. Director of Public Prosecutions and the Attorney General – Supreme Court (per Henchy J. with Griffin, Kenny and Parke J.J. concurring, O'Higgins C.J., dissenting in part) – 31 July 1980 – unreported.

SUCCESSION

Succession Act 1965 — Section 117 — provision for child — settlement of property 'inter vivos' discharged testarix's moral duty to make proper provision for her son.

This was an application by the Plaintiff under Section 117 of the Succession Act 1965, that his mother had failed in her moral duty to make proper provision for him by her will or otherwise. The Plaintiff was aged 58.

It was given in evidence and was not contested that the Plaintiff, the seventh of eleven children of the testatrix, was highly strung, with very little capacity for business, had a poor relationship with most of his brothers and sisters, did not wish to get himself involved in the management of property, had no knowledge of property and had personal problems, including a drink problem.

The testatrix had, during her life, sought to make provision for her children by buying properties for them or by vesting in them properties which had been acquired for the purpose of the (former) family business. As a result, the testatrix had disposed of most of her assets during her lifetime and, on her death, the net value of her estate, for probate purposes, was merely £2093.40.

The testatrix's provision for her son, the Plaintiff, had been to set aside in 1968 her leasehold interest in an investment property in Grosvenor Road, Dublin, The terms of the arrangement, apparently agreed between the parties (although, in evidence, the Plaintiff alleged such terms were forced upon him), were that the testatrix assigned by deed the property to the Plaintiff's brother, C.E., with whom it appeared the Plaintiff had a genuine bond of affection. C.E. was, in essence, to hold and manage the property in trust for the Plaintiff and to pay the Plaintiff thereout a net weekly sum of £15.00. This C.E. had done over the years and had, in fact, increased the income to the weekly sum of £20.00.

The testatrix died on 17 July 1976 and the Plaintiff entered a caveat to her Will made 30 May 1975 whereunder she appointed the three Defendants, A.J., a daughter, I.E., a son and R.D., a Solicitor, and left the residue of her property equally between A.J. and I.E. It was thus necessary for the testatrix's executors to prove the Will in solemn form.

The Plaintiff alleged that he had executed the deed giving rise to the trust arrangement between himself and his brother C.E. under pressure and that the testatrix had failed in her moral duty to make proper provision for him by her will or otherwise.

Held (per Barrington J.) that:

1. The Plaintiff was not placed under any form of improper pressure in executing the said deed and that the Testatrix's primary concern had been to do the right thing for her son, the Plaintiff, and that the transaction had been entered into only because the Plaintiff did not wish or did not feel able to undertake the management of the property himself;
2. The testatrix had not failed in her moral duty towards the Plaintiff by neglecting to make further provision for him in her will.

Obiter (per Barrington J.) that in view of the probable value of the Grosvenor Road property in question it ought to be possible, by the revised management or by sale of it and investment of the proceeds, to substantially increase the Plaintiff's income.

R.E. v. A.J., I.E., and R.D. – High Court (per Barrington, J.) – 11 January 1980 – unreported.

PERIOD OF LIMITATION

Section 126 of the Succession Act 1965, which amended and re-enacted Section 45 of the Statute of Limitations 1957, did not come into force until the date of commencement of the former Act, that is, 1 January 1967 — Section 45 of the Statute of Limitations 1957 (limitation period 6 years) only relates to a claim by an unpaid beneficiary, and has no application to a claim by a personal representative to recover the assets of the deceased from a person holding adversely to the estate. The Statutory provision appropriate to a claim by a personal representative is Section 13 (2) of the Statute of Limitations 1957 (limitation period 12 years).

J.D., the registered owner of lands in Co. Waterford died intestate on 1 February 1966 leaving a widow

and three children, Thomas, John (the Plaintiff) and Brigid. His widow died on 14 January 1970. Thomas remained in possession of the lands after his father's death, to the exclusion of the Plaintiff and Brigid. Thomas died intestate on 11 March 1975 leaving his widow, Mary, the Defendant, and three children in possession of the lands.

On 4th August 1976 letters of administration intestate to J.D., the said registered owner, were issued to the Plaintiff, who then brought an action in the Circuit Court in his capacity as personal representative, to recover the lands from the Defendant.

The net issue in the Circuit Court proceedings was whether the Plaintiff, in his capacity as personal representative, was statute-barred pursuant to section 45 of the Statute of Limitations 1957, as amended by substitution by section 126 of the Succession Act 1965. If the period of limitation was that provided originally in the 1957 Act i.e. 12 years – the plaintiff's claim was not statute-barred; it would be statute-barred, however, if the relevant period were that provided in section 45 of the 1957 Act, as inserted by section 126 of the 1965 Act, i.e. 6 years.

It was contended for the defendant that, although the 1965 Act did not come into force until 1 January 1967 (that is, after the death of J.D.), section 126 of the 1965 Act came into operation on the date of the passing of the Act on 22 December 1965, arguing that Section 9 (3) of the 1965 Act, which Section 9 (3) provided that the provisions of the 1965 Act should not apply to the estate of any person dying before the commencement of the Act, "except to the extent to which any provision of the Act expressly provided to the contrary."

On appeal to the High Court,

Held, (per McMahon, J.):

1. Affirming the Circuit Court (per Judge Sheridan), that this contention failed since, to constitute an express provision to the contrary within Section 9 (3), it had to be clearly and not merely impliedly stated that a provision was to apply to the estates of persons dying before the commencement of the 1965 Act; and, that there was nothing in Section 126 of the 1965 Act which clearly and explicitly so provided; and that therefore, Section 45 of the 1957 Act, as inserted by Section 126 of the 1965 Act, did not come into operation until the date of commencement of the 1965 Act on 1 January 1967.
2. That Section 45 of the 1957 Act did not contain the relevant period of limitation applicable to the Plaintiff's claim in this action. The corresponding English provision was the almost identical Section 20 of the Limitation Act 1939, the application of which was discussed by Lord Green M.R. in *In Re Diplock, Diplock v. Windle* [1948] Ch. 465; and, that Section 20 had been held to apply to claims by an unpaid beneficiary against the executor or administrator as well as those by an unpaid beneficiary against one overpaid or wrongly paid. Following such reasoning, Section 45 of the 1957 Act, as inserted by Section 126 of the 1965 Act had no application to a claim by a personal representative to recover assets of the deceased from a person, whether a beneficiary or a stranger, holding adversely to the estate; and, the period of limitation in such a case was that provided for claims for the recovery of lands by section 13 (2) of the 1957 Act i.e. a period of 12 years. Section 23 of the 1957 Act applied, so that the administrator was deemed to claim as if no interval had occurred between the death and the administration; and applying the period of limitation of 12 years from the date when the cause of action accrued, the Plaintiff's claim was clearly not statute-barred, and he was entitled to recover the lands.

Judgment of Circuit Court affirmed.

J.D. v. M.D. – High Court (per McMahon J.) – 31 July 1980 – unreported.

Summaries of judgments prepared by Sarah Cox, William Dundon, Eamonn Hall, Charles R. M. Meredith and Joan O'Mahony and edited by Michael V. O'Mahony.

Recent Irish Cases

CONSTITUTIONAL LAW

Constitution-*Locus Standi* of Plaintiff and whether a Plaintiff had to have a personal or direct interest in the constitutional issue being raised — Statute of Limitations 1957, Section 11 (2) (b). Interest necessary for Plaintiff.

The Plaintiff sued the Defendant doctor for negligence and breach of contract. She alleged that in 1968 she was negligently supplied with wrong pills which caused her injury and disability. Her action for personal injuries was commenced four years later in 1972, and was based on breach of contract as well as tort. In a preliminary case tried in the High Court it was held that the action was barred by Section 11 (2) (b) of the Statute of Limitations 1957, which provided as follows:—

> "An action claiming damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision), where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, shall not be brought after the expiration of three years from the date on which the cause of action accrued."

The High Court decision was appealed to the Supreme Court, where the issue of the constitutionality of the Section was raised and after leave to amend was allowed, the case was remitted to the High Court. The High Court (per Finlay P.) held that Section 11 (2) (b) of the Act of 1957 did not contravene the Constitution and specifically Article 40.3.1 and 3.2. The Plaintiff appealed this constitutional issue to the Supreme Court. During the appeal the question of the *locus standi* of the Plaintiff was raised by the Defendant. The main argument of the Plaintiff was that there was no protection in Section 11 (2) (b) for the person who was during the three year period ignorant of his claim (similar to the protection introduced by Section 1 (1) of the U.K. Limitation Act 1963).

Held (per Henchy J. with concurring judgment of O'Higgins C.J.):

That as in fact the Plaintiff knew of her claim that she had no legal standing to put forward that argument: and that the Plaintiff could not act as the champion for the putative constitutional right of a hypothetical third party; and that such an indirect or hypothetical assertion of constitutional rights could not give a Plaintiff the standing necessary.

Per Henchy J.:

> "If a citizen comes forward in court with a claim that a particular law has been enacted in disregard of a constitutional requirement, he has little reason to complain if in the normal course of things he is required, as a condition of invoking the court's jurisdiction to strike down the law for having been unconstitutionally made, with all the dire consequences that may on occasion result from the vacuum created by such a decision, to show that the impact of the impugned law on his personal situation discloses an injury or prejudice which he has either actually suffered or is in imminent danger of suffering.
>
> This rule, however, being but a rule of practice must, like all such rules, be subject to expansion, exception, or qualification, when the justice of the case so requires. Since the paramount consideration in the exercise of the jurisdiction of the courts to review legislation in the light of the Constitution is to ensure that persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it, there will be cases where the want of the normal *locus standi* on the part of the person questioning the constitutionality of the statute may be overlooked if in the circumstances of the case there is a transcendant need to assert against the statute the constitutional provision that has been invoked."

Per O'Higgins C.J.:

> "Where the person who questions the validity of a law can point to no right of his which has, by reason of the alleged invalidity, been broken, endangered or threatened, then, if nothing more can be advanced, the Courts should not entertain a question so raised. To do so would be to make of the Courts the happy hunting grounds of the busy-body and the crank. Worse still, it would result in a jurisdiction, which ought to be prized as the citizen's shield and protection, becoming debased and devalued. This is not to say, however, that if those whose rights are affected cannot act or speak for themselves the Courts should refuse to hear one who seeks to speak or act for them, even if his own rights are not affected. Such exceptional cases, hopefully rare, must, of course, be entertained."

Cahill v. Sutton – Supreme Court – (per Henchy J. with concurring judgment of O'Higgins C.J. and with Griffin, Kenny, Parke JJ.) – 9 July 1980 – unreported.

GAMING

Gaming on Licensed Premises is unlawful, unless exempted by Section 9 (2) or Section 9 (3) of the Gaming and Lotteries Act, 1956.

The Defendant had been convicted in the District Court for having permitted gaming on his premises on 10 March, 1979, contrary to Section 9 (1) of the Gaming and Lotteries Act 1956 ("the Act"). An appeal to the High Court by the Defendant by way of case stated was decided before D'Arcy J. who dismissed the Defendant's appeal. The Defendant further appealed to the Supreme Court.

The facts were that the Defendant permitted to be operated in his bar, a fruit machine slot machine. The playing of that machine was clearly "gaming" as defined by Section 2 of the Act i.e. "playing a game (whether of skill or chance or partly of skill and

partly of chance) for stakes hazarded by the players." However, it was not "unlawful gaming" as defined by Section 4 (1) of the Act, because at the time of the offence, unlawful gaming by means of slot machines was confined to slot machines not prohibited by Section 10; and it was agreed that the machine the subject of this case did not fall into that category. Counsel for the Defendant argued that when Section 9 (1) prohibited a licencee from permitting "gaming" on licensed premises the prohibition applied only to "unlawful gaming." It was contended that in these Sections and elsewhere in the Act where the word "gaming" was used, that it should be read as "unlawful gaming."

Held (per Henchy J.):

(1) That in the Act "gaming" did not equate to "unlawful gaming";
(2) Gaming prohibited on licensed premises was not confined to "unlawful gaming." Accordingly the appeal was dismissed.

As to the specific questions put by the District Justice, the Supreme Court replied:

(1) For the purpose of Section 9 (1) there was no distinction to be drawn between "unlawful gaming" and "gaming."
(2) (a) The slot machine in this case constituted a gaming instrument for the purpose of Section 2.
    (b) The operation of this slot machine by a player constituted "gaming" as defined by Section 2.

The Court noted that as the law now stands, following the passing of the amending Act of 1979, that if a licencee of licensed premises (which expression included more than public houses) permitted gaming as defined, and whether unlawful or not, in licensed premises, he committed an offence, unless he was exempted by Section 9 (2) or Section 9 (3); and the conviction might be recorded on the Licence.

D.P.P. (Hurlihy) v. Hannon – Supreme Court (per Henchy J. with Griffin and Kenny JJ.) – 4 March 1981 – unreported.

INSURANCE CONTRACTS

Necessity to complete insurance proposal forms accurately – there must be full disclosure of all matters material to the risk against which the Insured is seeking Indemnity.

In 1976 the Plaintiffs ("Chariot"), whose directors were Mr. and Mrs. W., bought the "Chariot Inn" in Ranelagh, Dublin. Due to certain renovations which had to be carried out there, the directors decided to store some furnishings temporarily in other premises in Lower Leeson Street, Dublin, owned by Consolidated Investment Holdings Limited, whose shares had been purchased by Mr. W. and his business partner, although registered in the respective maiden names of their wives. The Insurance Brokers acting for Mr. W. were the second-named Defendants and more specifically their employee Mr. H. The Leeson Street premises were insured with the Sun Alliance Insurance Company Limited, and when the additional furnishings were stored there additional insurance cover was arranged with the Sun Alliance, valuing the furnishings at £15,000. Subsequently malicious damage was caused to the premises and the furnishings by squatters and a claim was lodged with the local authority. The claim was eventually settled and Chariot were paid a sum of £8,000 directly by the Sun Alliance in respect of the damage to their furnishing.

Originally Chariot had been insured with the General Accident but when extended cover on the premises was requested the premium sought was increased by 50%. Chariot were dissatisfied with this and requested its then Brokers to ask for tenders for the insurance. The first-named defendants sent in the lowest tender. Mr. H. of the second-named Defendants, who had remained on good terms with the Plaintiffs, obtained the proposal forms and called to the Plaintiffs' premises with them in order to have same completed. One of these proposal forms related to material damage. Mr. H asked the questions and filled in the answers and disclosed that the negotiating brokers were the second-named Defendants. He advised that it was totally unnecessary to disclose the facts about the fire in the Leeson Street premises as they were dealing with a different company and only had to show what was relevant to the Chariot Inn. Policies were subsequently issued to Chariot in respect of the various forms of liability for which cover had been sought.

On 14 May 1978 a serious fire occurred causing extensive damage to the Chariot premises. In June 1978, the first-named Defendants repudiated the policy on the grounds of non-disclosure of the fire in Leeson Street. The Plaintiffs then commenced this action, claiming a declaration that the policy issued by the first-named Defendant insurance company giving indemnity against material loss was valid and, as against the second-named Defendant brokers for damages for breach of contract and negligence.

In the High Court the trial judge decided that the non-disclosure of the fire in Leeson Street was not a material fact and therefore the policy issued by the first-named defendants was valid and he dismissed the claim against the brokers. The first-named Defendants appealed.

On appeal Kenny, J. emphasised that a contract of insurance required the highest standard of accuracy, good faith, candour and disclosure by the insured when making a proposal for insurance to an insurance company. Any mis-statement in the answers given when they related to a material fact affecting the insurance entitled the insurance company to avoid the policy. What was material was a matter or circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk and, if so, in determing the premium he would demand. The generally accepted test of materiality was that stated in Section 18 (2) of the Marine Insurance Act 1906 i.e. "every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk." This test was followed by L. J. McKinnon in *Zurich General Accident and Liability Insurance Co. Ltd. v. Morrison* [1942] 1 All E.R. 529 where McKinnon L.J. went on to state:

> "Under the general law of insurance an insurer can avoid a policy if he proves that there has been misrepresentation or concealment of a material fact by the insured. What is material is that which would influence the mind of a prudent

insurer in deciding whether to accept the risk or fix the premium. If this be proved, it is not necessary further to prove that the mind of the actual insurer was so affected. In other words the insured could not rebut the claim to avoid the policy because of a material misrepresentation by a plea that the particular insurer concerned was so stupid, ignorant or reckless that he could not exercise the judgment of a prudent insurer and was in fact unaffected by anything the insured had represented or concealed."

Held Per Kenny J.):

1. That it was material to the insurance effected by Chariot that goods belonging to Chariot had been destroyed by fire in the Leeson Street premises owned by Consolidated; and that the circumstances of the fire and the fact that Chariot ultimately got payment direct from the insurance company concerned for the damaged goods were matters which could reasonably have affected the judgment of a prudent insurer in taking the risk or in fixing the premium.
2. That in relation to the proposition by Counsel for the second-named Defendant brokers that the onus of establishing that the matter not disclosed was material to the risk lay on the first named Defendants and that to discharge the onus they had to establish that the matter not disclosed did affect, and not might have affected, their judgment, *that* the Court rejected the second part of that proposition and stated that it was necessary only to establish that the fact not disclosed would have reasonably affected the judgment of a prudent insurer.
3. That the appeal of the first-named defendants should be allowed.
4. That the second-named Defendant insurance brokers owed a contractual duty to their client to possess the skill and knowledge which they held themselves out to the public and to their client as having and to exercise this in doing their clients' business; and that they were also liable in tort if they failed to exercise that skill and knowledge; and that in fact the brokers were liable to Chariot in contract and in tort and Chariot therefore was entitled to such damages Chariot had sustained as a result of the broker's breach of contract and negligence.

Chariot Inns Ltd. v. Assicurazioni Generali S.P.A. and Coyle Hamilton Hamilton Philips Ltd., Supreme Court (per Kenny J.) with Henchy and Griffin J.J. concurring) – 23 January 1981 – unreported.

RESTRAINT OF TRADE

A resolution of the Equestrian Federation of Ireland to the effect that horses representing Ireland at international equestrian events could only be Irish bred horses was *intra vires* the powers of the Federation, which had sole jurisdiction in respect of national equestrian affairs; neither was such a resolution in restraint of trade as it was reasonable and fair in the context of the Irish horse industry.

The Plaintiff was a professional show jumper and had achieved world statute as a horseman. The proceedings against the Defendants who were members of and constituted the Equestrian Federation in January 1978. The effect of this resolution was to reiterate and repeat the consistent policy of the Federation which was not to permit Irish competitiors at International events to be mounted on other than Irish horses, but to make a special exception in favour of the Plaintiff, who was then resident in Germany, in respect of those international events at which competitiors from the different countries could compete as individuals. The Plaintiff, then resident in Ireland, complained that the decision incorporated in this resolution interfered with his freedom to earn a livelihood and was a restraint of trade which could not be justified as being reasonable. The resolution was also attacked on the ground that it was *'Ultra vires'* the powers of the Defendants as the Equestrian Federation of Ireland.

Under its constitution, the Federation was declared to be "the body responsible for both the national and international aspects of all equestrian sports in Ireland." It had the power "at its discretion" to authorise members of teams and individuals, who had been selected or approved, to compete in international and friendly events. Its regulations, incorporated under the constitution and powers of the Federation, provided for a scheme under which competitors from each country at international events had to be entered by the country's own federation and thereupon each competitor competed at the international event in question as a representative of his country.

In the High Court, Hamilton J. held that the Resolution was not *ultra vires* the power of the Federation but that it was a restraint of trade which could not be justified. Against the judgment and order of the High Court, the Defendants appealed to the Supreme Court.

Held (per O'Higgins C.J.):
Allowing the appeal, that the resolution was *intra vires* the powers of the Federation and even though in restraint of trade, it was reasonable and justified in the Irish context.

Per O'Higgins C.J.:

"The need for the rule in the first instance and the object of maintaining it was and is to build up the Irish half-bred horse industry in the interests of equestrian sport generally in the country. It is the view of the Federation, fairly and reasonably held, that in doing so it is serving the interests of the generality of young riders of limited means and thereby serving the general interests of the public."

Macken v. O'Reilly and Others, Supreme Court, (per O'Higgins C.J. with Griffin and Park J.J. concurring; and Henchy and Kenny J.J. dissenting) — 31 May, 1979 — unreported.

STATUTORY INTERPRETATION

Coroner's Act 1962 — Section 25 (1) — Coroner does not have jurisdiction to adjourn an inquest 'sine die' but only to adjourn it for a fixed or definite period.

Seamus Costello was shot dead in Dublin on 5 October 1977. The City Coroner pursuant to his obligation under Section 17 of the Coroner's Act 1962 proceeded to hold an inquest. The inquest was commenced on 18 October 1978. After evidence of identity and cause of death had been given, a Garda Superintendent requested the Coroner to adjourn the inquest on the grounds that criminal proceedings in relation to the death were being considered. Section 25 (1) of the Act of 1962 required that when an application for an adjournment on those grounds was made by a member of the Garda Siochana not below the rank of inspector, the Coroner had to grant the adjournment. The Coroner did so in this case and made it an adjournment 'sine die.'

The Prosecutrix, (who was the deceased's widow) contending that the Coroner had no jurisdiction to grant an adjournment in this form, applied to the High Court for and was granted a conditional order of Certiorari to quash the Coroner's Order of adjournment. At the hearing of the application to have the conditional order made absolute the conditional order was discharged and cause shown by the Coroner allowed. The prosecutrix then appealed.

The Supreme Court in its judgment (per Henchy J. with concurring judgment of Griffin J.) stated that the main issue was the scope of power vested in the Coroner by Section 25 (1) of the Act. The purpose of the adjournment allowed or required by the Section was to avoid the risk that the inquest might prejudice, pre-judge or otherwise improperly overlap criminal proceedings which were under consideration. Where the criminal proceedings were only at the stage of being considered, Section 25 (1) provided that the Coroner should adjourn the inquest for such period as he thought proper and should further adjourn the inquest for similar periods as often as a member of the Garda Siochana not below the rank of inspector requested him, on the ground aforesaid, to do so. The Coroner should grant such adjournment as he though proper having regard to the submissions or evidence before him. If it turned out that the adjournment granted was inadequate further adjournments might be granted for similar periods.

Held (per Henchy J.):
That the Coroner erred in short-circuiting the statutory scheme of successive adjournments each to be for a period related to the then existing situation and instead granting an adjournment 'sine die' i.e. for a term without a terminal day. The Coroner did not have the power to adjourn the inquest for an indefinite period reserving to himself the power to re-open the inquest on the basis of representations received other than in his court. Albeit that the Coroner was accustomed to granting adjournments 'sine die,' the Act could not be construed as giving him this power: his only power and duty under Section 25 was to adjourn for an ascertainable spell of time.

Per Griffin J.:

> "It was submitted on behalf of the coroner that the requirement that the coroner shall adjourn the inquest for such period as he thinks proper gives to him an unlimited jurisdiction to adjourn, and that accordingly he may adjourn an inquest indefinitely. In my opinion, this submission is not well founded, and those words do not give to the coroner an unlimited jurisdiction to adjourn. He will be limited by the nature of the application made by the member of the Garda Siochana, and the adjournment must be for a reasonable period having regard to the evidence and the length of time that the investigations of the Garda Siochana are likely to take. The purpose of the adjournment, and the use of the words "such period," clearly indicate that a fixed or definite period of time is intended. That this is so is reinforced by the provision for further adjournments for similar periods so often as the Gardai make similar requests. This latter requirement would be unnecessary if the coroner had unlimited jurisdiction to adjourn the inquest 'sine die' in the first instance.
>
> In my opinion, therefore, the coroner does not have jurisdiction under Section 25 (1) of the Act to adjourn the inquest 'sine die,' but must adjourn it for a certain or definite period."

The case of *Reg. v. the Coroner of Margate* (1865) 11 L.T. 707, considered **Maelissa Costello v. Patrick Bofin** — Supreme Court (per Henchy J. with concurring judgment of Griffin J. and with Kenny J.) — 21 November 1980 — unreported.

Summaries of judgments prepared by Robert Pierse, Barry O'Reilly, Joan O'Mahony, Joseph Mannix and edited by Michael V. O'Mahony.

Recent Irish Cases

BREACH OF CONTRACT

Claim for Damages arising out of delay in completion of Sale — whether "time of the essence".

The Defendant agreed by contract in writing dated 17 December 1974 to sell certain lands in Co. Meath to the Plaintiff for £325,000. Special Conditions 3 and 4 of the contract provided as follows:

> "(3) The Vendor reserves the right to hold an auction of all the stock, farm machinery, equipment and utensils on the properties which items are specifically excluded from the sale.
>
> (4) Prior to the completion of the sale the Purchaser shall purchase the silage stored on the lands the subject matter of this contract and in the event of default of agreement on the price then at a price to be fixed by an auctioneer to be nominated by the vendor which said auctioneer shall act as an expert; the purchase monies for such silage to be paid with the balance of the purchase monies on closing".

The date fixed for completion was 7 January 1975. Time was not made of the essence of the contract.

During the negotiations prior to the signing of the contract the Defendant had said he would sell the cattle on the lands to the Plaintiff at market value. There was no reference to the cattle in the contract sent by the Defendant's solicitors to the Plaintiff's solicitors on 6 December 1974 and the Plaintiff tried to telephone the Defendant in England to discuss the sale of the cattle but failed to contact him. The Plaintiff wrote to the Defendant on 16 December 1974 as follows:-

> "My purpose in phoning you was to see how you would meet me with the cattle and machinedry. However I will depend on the reputation I have got of you to meet me on this. As one West of Ireland man to another I know you will get me off to a good start".

By letter of the same date (16 December 1974) the Plaintiff's solicitors returned the contract executed by the Plaintiff (purchaser) with the deposit to the Defendant's solicitors. When sending requisitions on title to the Defendant's solicitors on 20 December 1974 the Plaintiff's solicitors said:-

> "Our client wishes to have the sale closed on or before the 5th day of January as we understand that your Mr. Marren will be departing for Geneva on the 5th day of January".

A meeting between the Plaintiff and the Defendant arranged for 3 January 1975 was cancelled when the Defendant's manager telephoned the Plaintiff to inform him that the Defendant had changed his mind about selling the cattle to the Plaintiff as the Defendant proposed to take the cattle to England. On 3 January 1975 the Defendant's solicitor told the Plaintiff's solicitors that he (the Defendant's solicitor) could not close the sale on 7 January 1975 (the contract closing date) because he was going away on 5 January 1975 and the Defendant's solicitor suggested it be closed on 5 January 1975, but this was not feasible because the question of the cattle and the silage had not been resolved. By letter of 7 January 1975 the Plaintiffs solicitors told the Defendant's solicitors that the purchase money was available and suggested closing the sale on 11 January 1975.

In mid-January 1975 arrangements were made to have the cattle valued by an independent valuer but his valuation was not acceptable to the Plaintiff. The sale was subsequently closed on the 21 January 1975 with the Plaintiff purchaser purchasing cattle elsewhere to stock the lands being purchased.

The Plaintiff claimed that the Plaintiff had expressly made it known to the Defendant before the agreement was executed that the Plaintiff urgently required vacant possession for the purpose of stocking the lands and that in these circumstances it was an implied term of the agreement that time was to be deemed of the essence. Alternatively, the Plaintiff claimed that it was an implied term of the agreement that the same would be completed without any undue delay. The Plaintiff claimed that the price of cattle increased between 7 January 1975 (contract closing date) and 21 January 1975 (actual closing date) and that he suffered the loss of £19,400 being the extra amount paid by him in stocking the lands.

The Court considered that although the Plaintiff's claim was at common law for damages it must approach the case as if it were a claim for equitable relief. The Court, referring to the equitable maxim that the time fixed for the completion of a contract was not of the essence of a contract noted the dictum of Lord Parker in *Stickney v. Keeble* [1915] A.C. at page 416 as follows:

> "This maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non essential term of the contract".

Held (per Hamilton J.) that there was nothing in the nature of the property in the sale which would make it inequitable in the particular case for the Court to treat the time fixed for completion of the contract for sale as a non-essential term of the contract. In so holding, the Court noted that the contract provided only three weeks between the date of execution of the contract and the date fixed for completion and that the Defendant had reserved the right to hold an auction and had provided for the purchase by the Plaintiff of silage at an agreed price and for the price to be fixed in default of agreement by an auctioneer and for that silage purchase price to be paid with the balance of the purchase money for the property on closing. The Court also noted that Christmas and New Year had intervened. The Plaintiff's claim for damages for delay was therefore dismissed.

Patrick Joseph Maye v. Patrick Merriman – High Court (per Hamilton J.) – 13 February 1980 – unreported.

LANDLORD AND TENANT

Whether forfeiture of Lease on Liquidation could take place — effect of Conveyancing Act 1892 — relief against forfeiture.

An Foras Tionscal, the predecessor in functions and title to the Defendants, developed an industrial estate in Galway on which it had erected factory premises. It leased one of these factories to the Plaintiffs for a term of 25 years from 1969. The aim of the Defendants was to attract suitable industrial activity for the creation of employment in an under-developed area and the rents reserved by such leases (including the lease in issue) were below market rents. The lease to the Plaintiffs contained a covenant restricting the use of the premises to the manufacture of copper cylinders and calorifiers.

The lease contained the following provision:-

> "33.1 If the lessee being a company shall go into liquidation (other than a voluntary liquidation for the purpose of amalgamation or reconstruction) or being an individual shall be adjudicated a bankrupt or take the benefit of any Act for the relief of debtors or if an order is made or an effective resolution passed for the winding-up of the lessee's business or if a receiver is appointed over the property of the lessee, then and in any of the cases it shall be lawful for An Foras Tionscal to terminate this lease by serving a notice of termination on the lessee. On the service of such notice this lease shall absolutely cease and determine without prejudice to any claim of An Foras Tionscal against the lessee arising out of any antecedent breach or of any condition of this lease".

The Plaintiff went into liquidation pursuant to a resolution of 8 November 1977. By letter of 15 November 1977 the Defendants purported to terminate the lease by serving a notice under clause 33.1.

The Plaintiffs claimed that by virtue of Section 2 of the Conveyancing Act 1892 the Defendants were not entitled to rely on the provisions of the clause.

Section 14 of the Conveyancing Act 1881 which gave relief against re-entry or forfeiture did not apply to "a condition for forfeiture on the bankruptcy of the lessee"; "bankruptcy" under the provisions of Section 2 of the 1881 Act including "liquidation by arrangement". However, the combined effect of Sections 2 (2) and (3) (e) of the Conveyancing Act 1892 was to provide that the exclusion of the relief given by Section 14 of the 1881 Act in the event of bankruptcy was only to apply "after the expiration of one year from the date of the bankruptcy" except in the case of the lease of:-

> "any property with respect to which the personal qualifications of the tenant are of importance, for the preservation of the property or on the ground of neighbourhood, to the lessor, or to any person holding under him".

Held (per O'Higgins C.J. with Kenny J. concurring):

> (1) That it was difficult to associate the words "personal qualifications" with a company. It was necessary that the Plaintiff company have power to accept the lease and to engage in the industrial activity envisaged but it was straining language to suggest that the possession of such powers related to "personal qualifications".
>
> (2) That the lease in issue, and others granted by An Foras Tionscal and the Defendants, were made solely for commercial purposes; that the character of the property was that of a factory and the lease provided that it could only be used as such; that the neighbourhood was an industrial estate; and that in relation to neither the value nor the character of the premises nor the neighbourhood could the personal qualifications of the selected tenant be regarded as of importance; and that if the Defendants' contention was correct that the relief provided by the 1892 Act would never apply to leases made by the Defendants or An Foras Tionscal; and that if that were to be so it would require very express words in a statute to bring about such a result. The Plaintiffs were therefore entitled to relief against forfeiture.

Griffin J. while concurring in the result expressly reserved for decision in an appropriate case the question as to whether the words "personal qualifications of the tenant" in Section 2 (3) (e) of the 1892 Act were capable of applying where the tenant is a limited company.

MCB (Galway) Limited (In liquidation) v. Industrial Development Authority – Supreme Court (per O'Higgins C.J. with Griffin and Kenny JJ.) – 21 May 1981 unreported.

SALE OF LAND

Liability of Purchaser to pay interest when delay in closing — closing postponed as a result of adverse act on search.

The Plaintiffs agreed on 30 March 1979 to sell premises in Dublin for £130,000 to the Defendant. The parties used the Law Society Standard Conditions of Sale (1978 Edition). The closing date was fixed for 18 May 1979 with provision for the payment of interest on the balance of the purchase price in the event of the sale not being closed on that day, in certain circumstances.

The Plaintiff's solicitors sent copy title documents to vouch the title contracted for to the Defendant's solicitors on 19 April. There was a postal strike in progress and both firms of solicitors had made arrangements for delivery of letters by hand. The documents were to reach the Defendant's solicitors on 20 April. The conditions provided that requisitions on title were to be delivered within ten days, time being of the essence. It was not until 3 May, because of the complexity of the title, that the Defendant's solicitors were in a position to send their requisitions. A letter enclosing the requisitions was written and signed on 3 May but for some unexplained reason did not reach the Plaintiffs' solicitors' office until 16 May.

The Plaintiffs' solicitors replied to the requisitions on 17 May and on 22 May informed the Defendant's

solicitors that a claim for interest was being made. The Defendant's solicitors raised further objections on 28 May and these were replied to on 30 May. On the same day the Plaintiffs' solicitors wrote directly to the Defendant requiring completion within 28 days and making time of the essence of the contract. On 6 June the Defendant's solicitors wrote accepting the replies to requisitions and requiring the furnishing of a statutory declaration and enclosing a draft deed of assignment which was immediately approved and sent back. On 11 June the Defendant's solicitors wrote requesting an appointment to close but on 19 June made it clear that the Defendant was denying liability to pay interest. Subsequently an appointment was made to close the sale on 10 July. There was disagreement as to whether the closing had been arranged on the basis that the Defendant had agreed to pay interest up to 10 July without qualification or without prejudice to the Defendant's right to claim it back.

At the closing meeting on 10 July a search in the Registry of Deeds which only became available on that day, revealed a judgment mortgage against the interest of the Plaintiff vendors. The Plaintiffs' solicitor gave his personal undertaking that he would discharge the mortgage out of the purchase price. The Defendant solicitors were prepared to accept this undertaking but maintained that the existence of the judgment mortgage removed the liability on the Defendant to pay interest. The Defendant's solicitors offered to close the sale on the basis of the Plaintiffs' solicitors' undertaking, on the understanding that the obligation to pay interest would be determined by a Vendor and Purchaser summons. This was not accepted by the Plaintiffs' solicitors.

The parties continued in dispute for some time and eventually on 9 August the Plaintiffs' solicitors suggested that the sale be closed without prejudice to the interest question and that the interest be put on joint account and an application be made to the Court to determine the Defendant purchaser's liability. The sale was actually closed on that basis on 23 August. Condition 4 of the Conditions of Sale provided as follows:

"The purchase shall be completed and the balance of the purchase money paid by the purchaser on or before the closing date which shall be the date specified in the Memorandum ... Completion shall take place at the office of the vendors solicitor. If by reason of any default on the part of the purchaser the purchase shall not be completed on or before the closing date, the purchaser shall pay interest to the vendor at the rate specified in the Memorandum on the balance of the purchase money remaining unpaid from the closing date up to the date of actual completion, or the vendor may elect ... to take the rents and profits less the outgoings of the property for such periods in lieu of interest ..."

The Court having referred to the case of **Bayley-Worthington & Cohen's Contract** [1909] 1 Ch. 648 firstly concluded that there was "default" on the Defendant's part within the meaning of Condition 4 by reason of the hold up in the delivery of requisitions and the Court secondly concluded that there was no "default" on the Defendant purchaser's behalf in relation to the delay in closing the sale between 18 May (when the Defendant's solicitors received the replies to requisitions on title) and 7 June (when the Plaintiffs' solicitors received intimation that the title was satisfactory). The Court thirdly concluded that the delay in closing after 7 June was occasioned by the Defendant's unjustified insistence that interest was not payable.

Held (per Costello J.):

1. That although some of the delay between 18 May and 10 July (the date of the abortive closing) was attributable to the ordinary problems which could occur in the investigation of a complex title it did not mitigate the liability of the Defendant purchaser under Condition 4; and the Court could not apply a term into that condition that the amount of interest was to be limited to the period between the specified closing date and the date of actual completion which equalled the period prior to the specified closing date during which the Defendant purchaser was in actual default.
2. In considering the effect of the events of 10 July on the Defendant purchaser's liability to pay interest on that date, that as a purchaser owed a duty to his vendor in the course of the implementation of a contract for same so too did a vendor owe a duty to the purchaser; that the sale could well have been closed on 10 July and that the reason for its not being closed was a failure by the Plaintiff vendors to agree to close on the terms suggested by the Defendant purchaser's solicitors; and that those terms so proposed by the Defendant purchaser were reasonable ones and were the basis on which the sale was actually closed on 23 August.
3. That Condition 4 should be construed as meaning that if added to the default of the purchaser which results in his liability to pay interest under the Contract there was "wilful default" on the part of the vendor after the specified completion date which resulted in further delay in actual completion, that interest should not be payable for that period attributable to the vendor's "wilful default", and that by failing to close on 10 July the Plaintiff vendors were in "wilful default" as that term was understood in the law of vendor and purchaser; and that the Plaintiff vendors were disentitled to interest for the period from 10 July to 23 August; and that they were entitled to interest only from 18 May to 10 July at the Contract date. *Menton v. Mannion* [1948] I.R. 324 and *Sheridan v. Higgins* [1971] I.R. 291, and *In Re Young and Harston's Contract* 31 Ch.D. 168 at 174, considered and applied.

Northern Bank Limited & Ors. v. John B. Duffy – High Court (per Costello J.) – 16 March 1981 – unreported.

Summaries of judgments prepared by John F. Buckley and edited by Michael V. O'Mahony.

Recent Irish Cases

CRIMINAL LAW

Conviction for murder quashed because statements made by Appellant should not have been admitted by the Trial Judge. Jury should be asked to decide whether Appellant's evidence that he had been held against his wishes, as he described, was or was not true.

The Appellant was tried in the Central Criminal Court before a Judge and Jury on the charge of having murdered Miss V.C. He was convicted and sentenced to penal servitude for life. He appealed directly to the Supreme Court in exercise of his right so to do by Article 34.4.3 of the Constitution which expressly provided that the Supreme Court, as the court of final appeal, should, with such exceptions and subject to such regulations as might be prescribed by law, have appellate jurisdiction from all decisions of the High Court; and that the Central Criminal Court was the name applied to the High Court when exercising its criminal jurisdiction in relation to the trial of offences, and a verdict, arrived at in that Court by a Jury on the trial of an indictable offence was a decision of that Court.

The following were the relevant facts: The body of V.C., it had been stated, was found in her flat by the Appellant, and another man, who entered by means of a door key which was lawfully in the Appellant's possession. A knife was embedded in her chest and a scarf was tightly bound around her neck.

On making the discovery, the Appellant phoned 999 and subsequently the Gardai and an ambulance arrived. It was stated that the Appellant lived in a block of flats which was owned by a Mr. M, a brother-in-law of V.C. Mr. M. employed the Appellant for odd jobs in connection with the upkeep of the flats and, at the time of the murder, the Appellant had been engaged by Mr. M. to paint and decorate, in his spare time, the house in which V.C. resided. The Appellant had stated that he went to the house where V.C. resided on a Sunday, to finish the work he had commenced and Mr. D. who accompanied him was to have assisted him in finishing the work. Following the arrival of the Gardai, the Appellant was asked to go to Irishtown Garda Station to make a statement which he duly did, giving a full and detailed account which was reduced to writing and signed.

In his statement the Appellant said he had gone to the house the previous day, a Saturday, to do a small job in connection with the electric wiring. He said he later met Mr. D. and arranged for his help in finishing the work the following day. His statement then outlined how when they arrived at the house they discovered the dead body of V.C.

At the trial the evidence was to the effect that when the Appellant made his statement and for a considerable time after, no one entertained the slightest suspicion that the Appellant had been in any way involved in the murder of V.C.

The Appellant remained on in Irishtown Garda Station throughout Sunday night and right into the following (Monday) morning, being subjected, throughout, to successive bouts of questioning by different groups of gardai, and at no time being afforded an opportunity of sleeping or resting.

Seven telephonic inquiries, from his wife, friends and family were made while he was there, and they were never communicated to him and those inquiring for him did not receive any reliable information as to what was happening to him.

In the early hours of the Monday morning, he was again interviewed and questioned. At 10 a.m. he was transferred to the Donnybrook Garda Station where the questioning was resumed by other gardai. At 2 p.m. on the Monday afternoon a Garda entered the room where he was, the Appellant enquired whether he was the garda who had taken his fingerprints, and suddenly said: "I killed V.C. I did it with a bit of cable. I stabbed her with a knife from the kitchen table".

The Appellant was then seen by an Inspector and agreed to make a written statement. The Inspector suggested he should have some sleep. At about 6 p.m. on the Monday evening he was awakened, cautioned and he made a statment in which he confessed to the killing of V.C. on the previous Saturday.

Another statement was relied upon by the prosecution. The Appellant said to his brother in answer to a question as to why he was not coming home, "Because I did it". This was in the presence of Gardai. There was some conflict of evidence as to whether he added "because I killed her".

The Trial Judge stated that in his view no question of unlawful custody arose and having found that the statements were voluntary, he decided to admit them in evidence.

In the Supreme Court, O'Higgins, C.J., and Walsh, J., considered the principles laid down in *The People v. O'Brien* [1965] I.R. 142, in relation to evidence, irregularly obtained. The first of these principles was that evidence obtained as a result of a deliberate and conscious violation of the Constitution should be excluded unless there was some "extraordinary excusing circumstance" which warranted its admission.

The second principle was that in relation to evidence obtained by illegal means, short of a violation of Constitutional rights, the presiding Judge has a discretion to exclude same where it appeared to him that public policy, based on a balancing of public interest, required such exclusion.

Held (per O'Higgins, C.J., with a concurring separate judgment by Walsh J., and a separate concurring judgment from Kenny J., with reservations) in allowing the appeal and quashing the conviction that:—

(1) The fact that the Appellant was subjected for almost 22 hours to sustained questioning, never had an opportunity of communicating with his family or friends, and had never been permitted to rest or sleep until he made an admission of guilt, all amounted to such circumstances of harassment and oppression as to make it unjust and unfair to admit in evidence anything he said.

(2) The Trial Judge, in exercising his discretion to admit the

statements, did so on a wrong basis and the statements should not have been admitted.

(3) The Jury, either by a specific question, or by an appropriate direction, ought to have been asked to decide, as a question of fact material to the defence, whether the Appellant's evidence that he had been held against his wishes, as he described, was, or was not true.

(4) (per Kenny J.), assuming that the Supreme Court had jurisdiction to hear an appeal directly from the Central Criminal Court, he was in agreement with the conclusions enunciated above; but that the assumption that such an appeal lay directly was one which he was not then prepared to assent to, or dissent from, without having full argument on the point.

DPP v. Christopher Anthony Lynch — Supreme Court (per O'Higgins, C.J., and Walsh and Kenny J.J.) — 19 February, 1981 — unreported.

ROAD TRAFFIC ACT

Regulations made under an Act which has been passed but which has not yet come into operation are not invalid merely because the Act is not yet in operation provided the making of the regulations was "necessary or expedient" to give the Act force and effect immediately upon its coming into operation — Section 10(1) of Interpretation Act 1937 considered.

A motorist was charged under Section 49(2) of the Road Traffic Act 1961, as inserted by Section 10 of the Road Traffic (Amendment) Act 1978, with driving while having a concentration of alcohol in his blood which was in excess of the permitted level. In order to sustain a conviction a certain defined procedure had to be followed as to the taking of a sample of blood or urine and its subsequent examination and this procedure was laid down in the regulations contained in S.I. No. 193 of 1978. These regulations were made on 11 July 1978 under the Road Traffic (Amendment) Act 1978 which Act was passed on 5 July 1978 but which Act did not come into operation until 20 July of that year.

The motorist was convicted in the District Court and the matter came before the High and subsequently the Supreme Court by way of Conditional Order of Certiorari seeking to quash the conviction. It was contended by the motorist that the conviction was bad because the regulations made by S.I. 193 of 1978 were invalid since the Act under which they were made had not then come into force. Against this argument, Section 10(1) of the Interpretation Act 1937 was relied on, which Section (Section 10(1)(b)) provided that, "If (an) Act confers a power to make or do, for the purpose of such Act .... to have full force and effect immediately upon its coming into operation, such power may, subject to any restrictions imposed by any such Act, be exercised at any time after the passing of such Act".

Held (per Henchy J.) that the regulations made under S.I. 193 of 1978 were valid, as the parent Act had been passed; and that it was a matter of judicial notice that the operation of breathalyser tests, and tests for the analysis of the concentration of alcohol in the blood or urine of a motorist, had broken down by 1978; and that statistics as to the part played by excessive drinking on the part of drivers in road accidents were so notorious that the 1978 Act had become a matter of urgent legislative priority; and that therefore the making of the regulations by the Minister in advance of the coming into operation of the Act was "necessary or expedient" and that therefore the regulations were valid by reason of Section 10(1) of the Interpretation Act 1937.

The State (McColgan) v. Director of Public Prosecutions and District Justice Clifford. Supreme Court, (per Henchy J. with O'Higgins, C.J., and Griffin J.) 25 March 1980. — unreported.

LICENSING

A publican's licence cannot be regarded as property capable of separation from the licensed premises.

The bankrupt was the owner of a public house and the relevant publican's licence attaching to the premises. The bankrupt was adjudicated bankrupt on 6 December, 1976.

During 1974 and 1975, four mortgages were created over the property, and, after the premises were sold in the course of the bankruptcy, the Official Assignee contended that the mortgages were ineffective in attempting to capture the licence as part of the security, principally because none of the documents creating the mortgages referred specifically to the licence.

Held (per Hamilton J.), that the licence could not be regarded as property capable of separation from the licensed premises, and, therefore, the licence was subject to the same charges and incumbrances as the property, and was incapable of passing to the Official Assignee in priority to the charges registered against the property to which it was attached.

In re B.J.S-B., a bankrupt. — High Court, (per Hamilton J.) — 15 August 1979 — unreported.

LAW OF PROPERTY

Failure of Purchaser or Mortgagee to make necessary enquiries or requisitions on purchase or mortgage. Mortgage deemed to have constructive notice of the third party claim of the wife of the Mortgagor which defeated the rights of the Mortgagor.

A married couple, Mr. and Mrs. H. (the first and second named Defendants) in 1964 purchased a house with monies provided by Mrs. H. from the proceeds of the sale of a previous matrimonial home which had been bought in Mrs. H's name by Mrs. H's father and from a mortgage from the F.N.B.S. (the third named Defendants). The title to the house was vested solely in Mr. H's name although Mrs. H. vaguely understood that it was to have been put in her name. Mr. H. got a further mortgage from the F.N.B.S. in 1969 and the mortgage of 1964 was redeemed. Again Mrs. H. was not mentioned. Mr. H. then incurred a substantial overdraft over a period of years and in July 1973 agreed to give the Plaintiff Bank a second mortgage over "his" house having just previously in May 1973 asked the Plaintiff to send all bank letters to him to his business address. Mr. H's Solicitors failed to deal with the granting of the second mortgage to the Plaintiffs informing the Plaintiffs

by letter in November 1973 that it was due to "pressure of work" and that they (Mr. H's Solicitors) were returning the deeds of the house to the F.N.B.S., the first mortgagees. The Plaintiffs then obtained the deeds directly from the F.N.B.S. in December 1973 and sent them to their legal department in Belfast with instructions to prepare immediately a second mortgage. The Plaintiffs' legal department relied on the original requisitions raised in 1964 by the F.N.B.S. solicitors and merely carried out a Registry of Deeds search against Mr. H., which did not disclose any acts.

The Plaintiffs were not aware of the fact that in May 1973 Mr. and Mrs. H had separated and that Mrs. H had consulted a firm of Solicitors who advised her to take proceedings against Mr. H. for a declaration that she was the beneficial owner of the house where she was continuing to reside. The Plaintiff failed to make any enquiries or requisitions and on 22 January 1974 the Mortgage was executed and subsequently registered. On that same day (22 January 1974) Mrs. H began proceedings against Mr. H for a declaration that she was the beneficial owner of the house and for an order for the transfer of the house to her, to which proceedings Mr. H never appeared.

The Plaintiffs first became aware in July 1974 of Mrs. H's claim when Mrs. H's Solicitors wrote to them. On 24 February 1975 the High Court made an order declaring that Mr. H. held the house in trust for Mrs. H. and an order that it be assigned to her subject only to the first mortgage in favour of the F.N.B.S. On the making of these orders the then High Court Judge (Kenny J.) was unaware at the time of the Plaintiffs' second mortgage.

The Plaintiffs then commenced High Court proceedings seeking a declaration that their second mortgage was well-charged on the premises and a declaration that their mortgage ranked before the claim of Mrs. H. The High Court Judge (McWilliam J.) in the course of his judgment held that, as two of the inquiries which would normally and therefore ought reasonably to have been made were not made by the Plaintiffs, then the Plaintiffs were deemed to have notice of the interest of Mrs. H. The inquiries were, (i) "Is there any litigation pending or threatened in respect of the property?" The Plaintiffs appealed to Supreme Court.

Held (per Kenny J.), after quoting passages from Wylie's Irish Land Law (1975 edition p.p. 103/104 and 643/644) and Cheshire's, Modern Law of Real Property (12th edition p. 64) under the heading of Constructive Notice, both of which passages were in accordance with the remarks of Lindley M.R. and the judgment of the Court of appeal in England in *Bailey v. Barnes* [1894] 1 Ch. 25, (where it was held that regard must be had to the usual course of business and a purchaser who wilfully departed from it in order to avoid acquiring a knowledge of his vendor's title was not entitled to derive any advantage from his wilful ignorance which would have come to his knowledge if he had transacted his business in an ordinary way), *That*, as the Plaintiffs made no inquiries whatsoever about the title or other interests in the house when they took the second mortgage; and as they relied on answers to requisitions given to the first mortgagee's solicitors in 1964; and as there was no evidence that they carried out any investigation but were prepared to take whatever interest Mr. H had ("warts and all"); and as they had failed even to raise the two requisitions referred to by McWilliam J. (supra), the Plaintiffs did not act as reasonable mortgages normally do and were therefore fixed with constructive notice of Mrs. H's estate when they took their second mortgage.

Henchy J., in a concurring judgment stated that the Plaintiffs had failed to make such inquiries and inspections as ought reasonably to have been made and he applied an objective test to the extent that he questioned what a purchaser (mortgagee) or a particular property ought reasonably to have done in order to acquire title to it, and he found that the Plaintiffs had made no inquiry as to who was in actual occupation of the house at the time of the second mortgage and that they had not made any inquiry as to whether any litigation was threatened or pending in respect of the property, nor even an inquiry as to the existence of any proceedings or claims arising from statutory notices under such statutes as the Housing Acts or the Planning Acts, which might fatally flaw the title; and, further that despite the fact that the premises were obviously a family home (although the mortgage of January 1974 took place before the Family Home Protection Act 1976) the Plaintiffs as "purchaser" (mortgagee) ought reasonably to have adverted to the fact that there were judicial decisions showing that a wife who had made payments towards the acquisition or payment of instalments of the mortgage of the family home acquired a corresponding share in its beneficial ownership; and that the Plaintiffs did not therefore show the care that was expected from a reasonable purchaser (mortgagee).

Parke J. in a further concurring judgment went further and gave consideration to what should be the duty of a Conveyancer who was investigating title on behalf of a purchaser or mortgagee, and noted that the facts of this case provided a striking illustration of the necessity of assessing the extent of this duty by applying an objective test of the needs of a particular purchaser engaged in a particular transaction. Parke J. stated that a conveyancer could not properly discharge that duty unless he could obtain for his client title which would not be subsequently defeated by a third party whose rights ought to have been discovered on proper investigation and stated that a requisition requiring confirmation of vacant possession (on a sale) or evidence that there was no person in possession with any claim of right (on a mortgage) might have sufficed in the present case, as also even would the standard requisition as to threatened litigation because Mrs. H. had already threatened proceedings.

Plaintiffs appeal dismissed.

Northern Bank Limited v. T.H., H.D.H. and First National Building Society — Supreme Court (per Kenny J. with concurring judgments from Henchy J. and Parke J.) — 17 April, 1980 — unreported.

Summaries of Judgments prepared by E. G. Hall, Brendan Garvan, Joseph Sweeney and Barry O'Neill and edited by Michael V. O'Mahony.

Recent Irish Cases

CONSTITUTIONAL LAW

Constitution of Ireland — Constitutionality of Part II and Park IV of the Rent Restrictions Acts 1960-1967 questioned.

The Plaintiffs sought and obtained Declarations in the High Court that Parts II and IV of the Rent Restrictions Act, 1960, were invalid having regard to the provisions of the Constitution. Appeals were brought by the Attorney General to the Supreme Court. In relation to Part II, the basic rent of the majority of controlled premises was the net rent at which the premises were let on the 8 June 1966, which necessarily had as its base the rent paid in 1914, or the rent paid in 1941 depending on the date of erection of the premises. There was evidence in relation to the Plaintiff's premises that the market rent would be between 9 and 19 times the controlled rent. There were now no provisions to enable the basic rent to be reviewed. The imposition of full responsibility for all repairs (save those which are the tenant's obligations under his agreement or Deasy's Act) further accentuated the hardship caused to landlords of controlled dwellings.

The Plaintiffs contended that Articles 40 and 43 of the Constitution read in the light of its Preamble had been contravened. As to the Preamble the Plaintiffs relied on the following paragraph:—

> "And seeking to promote the common good, with due observance of Prudence, Justice and Charity so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored and concord established with other nations".

As to Article 40 they relied on the following:—

> "1. All citizens shall, as human persons, be held equal before the law.
>
> 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 functions".
>
> 3.1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of an injustice done, vindicate the life, person, good name and property rights of every citizen".

And they relied on the entire of Article 43 which is in the following terms:—

> "1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
>
> 2° The State accordingly guarantees to pass no law attempting to abolish the right to private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
>
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good".

The Plaintiffs' arguments were summarised as follows:—

> For the Plaintiffs, it has been submitted that they have been denied the requirements of justice and have been treated unequally vis-a-vis other citizens who have let uncontrolled property; that the arbitrary and unfair restriction of their letting rights constitute an unjust attack on their property rights; that the State has failed to vindicate those rights; that the restrictions imposed on their property rights are not regulated by any principle of social justice; that the delimination of those rights is unrelated to the exigencies of the common good; that if an emergency or other temporary basis for the impugned restrictions existed at any stage, it has long since passed; that the imposition of those restrictions on houses and flats merely because they happened to be built before 1941 and to have rateable valuations below specified amounts, is arbitrary, unjustifiably discriminatory and not required by the common good, that such control, regardless as it is of the means of the tenant or the hardship it may cause to the landlord, is unjust and unfair, particularly because, since December 1972, the impugned legislation has left no means of reviewing basic rents once they have been determined by the courts; and that the State's failure since 1971 to amend this legislation and to redress the Plaintiffs' grievances amounts to a dereliction by the State of its duty under Article 40, Section 3 to protect them from unjust attack and to vindicate their property rights having regard to the injustice that has been done to them.

On behalf of the Attorney General the case was made:—

> That this legislation falls to be examined for invalidity under Article 43 of the Constitution; that Section 2 of that Article provides for the regulation and delimitation of property rights according to the principles of social justice and the exigencies of the common good; that what this impugned legislation has done is justified by Section 2 of that Article and that, accordingly, no question of non-compliance with Article 40, Section 3 arises; that the power of regulating or delimiting the rights of private property is vested in the Oireachtas by Article 6 and that it is to be presumed that in exercising that power in relation to Article 43, it acted *inter vires* and with due regard to the directive principles of social justice set out in Article 45 which are not cognisable in any court; that the Court's power to condemn this legislation under either Article 40 Section 3, or under Article 43, cannot arise unless it is shown that

what was done was not permitted by Article 43 Section 2; that, if what the Oireachtas has done is permitted by Article 43, Section 2, no question of injustice requiring State action under Article 40, Section 3, Sub-section 2, can arise; that Part II of the Act must be tested for constitutional validity as at the time of its enactment and that it cannot be held to have lost that validity by mere passage of time or changes in economic circumstances; that even if the State had any duty to review rent control periodically, it had in fact done so.

The Court noted that the Acts enjoyed a presumption of validity until the contrary was clearly established and if authority for the legislation could be found under the provisions of Article 43, that Article could be relied on when the legislation was challenged. There existed a double protection for the property rights of a citizen (under Article 43). The State cannot abolish or attempt to abolish the right of private ownership as an institution or the general right to transfer, bequeath and inherit property. In addition a citizen had the further protection under Article 40 as to the exercise by him of his own property rights in particular items of property.

The Court declined to accept the view expressed by the Court in *Attorney General v. Southern Industrial Trust Limited and Simons* (1960) 94 I L T R 161, as follows:—

"In any event, in the opinion of the Court, the property rights guaranteed are to be found in Article 43 and not elsewhere, and the rights guaranteed by Article 40 are those stated in Article 43"

and held that:—

"Article 43 did not state what the rights of property are. It recognises private property as an institution and forbids its abolition. The rights in respect of particular items of property are protected by Article 40 Section 3, Sub-section 2, by which the State undertakes by its laws to protect from unjust attack and in the case of injustice done, to vindicate the property rights of ever citizen",

and approved the contrary view expressed by Davitt P. in the High Court in the same case.

The Court held that the legislation could not be regarded as regulating or delimiting the property rights comprehended by Article 43 and must be examined for its validity in relation to the provision of Article 40.3.2 only.

The question to be decided was whether the impugned provisions constituted an unjust attack on the property rights of the Plaintiffs.

The Court noted that the legislation which contained the statutory provisions by means of which rents were determined and increases restricted was not limited in duration, that its terms were mandatory and generally did not permit any person affected by its provisions to contract out of their application. To the extent that these statutory provisions interfered and rendered ineffective the exercise by the owners of the houses and dwellings affected of their property rights in relation thereto they constituted in the opinion of the Court an attack on such rights.

The Court noted that Rent Control was applied only to some houses and dwellings and not to others, that the basis for the selection was not related to the needs of the tenants, or to the financial or economic resources of the landlords or to any established social necessity and since the legislation was not now limited in duration it was not associated with any particular temporary or emergency situation.

Held (per O'Higgins C.J.):

(1) That such legislation to escape the description of being unfair and unjust would require some adequate compensatory factor for those whose rights were so arbitrarily and detrimentally affected and that no such compensatory factor was to be found.

The Court noted that the vast majority of rents were determined under Section 7 of the Act and that once basic rents were determined under Section 7 and Section 9 no review was now permitted. The absence of any power to review such rents, irrespective of changes in conditions was in itself a circumstance of inherent injustice which could not be ignored. When this was coupled with the absence of any provision for compensating the owners whose rental incomes were thus permanently frozen regardless of the significant diminuition in the value of money, the conclusion that injustice had been done was inevitable.

(2) That the provisions of Part II of the Act of 1960 (as amended) constituted an unjust attack on the property rights of the landlords of controlled dwellings and were therefore contrary to the provisions of Article 40 section 3 sub-section 2 of the Constitution.

(3) With regard to Part IV, that a restriction to the extent of causing in some cases an almost permanent alienation from the landlord of the right to get possession of premises was constitutionally invalid because it was an integral part of the arbitrary and statutory scheme whereby tenants of controlled dwellings were singled out for specially favourable treatment regardless of whether they had any social or financial need for such preferential treatment and regardless of whether the landlords had the ability to bear the burden of providing such preferential treatment.

(4) Having referred to *Maher v. Attorney General* [1973] I.R. 140, 147 *The State (Attorney General) v. Shaw* [1979] I.R. 136 and *King v. Director of Public Prosecutions*, Supreme Court—31 July 1980—unreorted, that even if it could be held that the restrictions on the right to recover possession contained in Part IV did not suffer from the same fatal invalidity as those controlling rent, they could not be given a life of their own as representing duly enacted provisions, and, accordingly Part IV must fall as part of an unconstitutionally unjust attack on the property rights of the landlords affected.

Dorothy Blake & Ors. and The Attorney General and Patrick Madigan v. The Attorney General—Supreme Court (per O'Higgins, C.J.), 29 June 1981; [1981] ILRM 34 (the new Irish Law Reports monthly published by Irish Academic Press).

SUCCESSION ACT 1965

The state of testacy depends on the effectiveness of the execution of the Will, not on the effectiveness of the operation of the Will. A person who has made a Will in accordance with the statutory provisions and has disposed of his entire estate dies testate and in every other case dies partly testate.

The Plaintiff was the eldest son of the deceased, who was a farmer with a dairy farm of 150 acres. The Defendants were the two brothers of the Plaintiff, these three being the only children.

The Plaintiff at all times resided with his father and mother on the family farm, leaving school at 14, and working the land with the deceased. After his marriage in 1965, he was persuaded to stay with his wife in the family home and not move to another farm, being encouraged by his parents to believe that the family farm would one day be his. This was repeated to him by the deceased less than a week before he died.

The Plaintiff worked hard on the farm every day of the year, and his wife also played her full part in the running of the farm. After 1969, only casual labour was employed. The Plaintiff did not receive wages, but household expenses were met from farm income and the deceased sometimes gave him money for himself, as well as for special purposes when he asked for it.

After his father's death in 1976, the Plaintiff and his wife stayed on in the family home to the exclusion of the Defendants, who had left home many years before and made their own lives, with partial assistance from their parents.

The deceased's Will, made in 1960, appointed his wife sole executrix and universal legatee and devisee. His wife having predeceased him by eight years, the Will, although validly made, was totally inoperative, and his entire estate devolved as on intestacy. In 1978, the Defendants proved the Will, and obtained a Grant of Letters of Administration with the Will annexed.

In this action, the Plaintiff made a claim under Section 117 of the Succession Act 1965, arguing that the one-third share of his father's estate, which he would receive as one of the three next-of-kin would, in his special circumstances, represent less than proper provision for him by his father in accordance with his means and that the Court should award him a greater share of his father's estate.

The Defendants argued that the deceased could not be said to have died wholly or partly testate, in accordance with the requirement laid down by Section 109(1) of the Act and that therefore Section 117 could not apply.

Held (per Carroll, J.) that the state of testacy depends on the effectiveness of the execution of the Will and not on the effectiveness of the operation of the Will so that if a person has made a Will in accordance with the statutory provisions, testacy is established. A testator who has disposed of his entire estate dies wholly testate and in every other case dies partly testate. The only way a testator, having made a valid will, can cease to be a 'testator' is by revoking the Will in accordance with S.85 of the Act by one of the means mentioned in that Section other than by making a new Will.

Therefore the deceased died a testator and accordingly Section 117 could be invoked. On the merits, the testator had failed in his moral duty to make proper provision for the Plaintiff in accordance with his means, since in the circumstances one-third of the deceased's estate would not constitute proper provision. Adequacy is not the test to be employed — there must be proper provision in accordance with the testator's means, which meant in this case, providing a means of livelihood from farming reasonably comparable with that which the Plaintiff enjoyed prior to his father's death and a larger share than one-third of the father's estate was awarded to the Plaintiff.

R.G. v. P.S.G. and J.R.G. — High Court — (per Carroll, J.) — 20 November 1980 — unreported.

SALE OF LAND

Sale of land — contract "subject to loan approval" — implied term that conditions of loan approval will be reasonable. Forfeiture of Deposit.

By a contract for sale dated the 17 December 1979 the Plaintiffs agreed to buy premises at North Circular Road, Dublin for £35,000 from the Defendant. Clause 4 of the Special Conditions of the Contract read:—

> "The obligations of both parties under this contract are subject to the purchasers being approved for a loan by the Irish Permanent Building Society on the security of the premises in the amount of £25,000 on or before the 2 January next. Should the said loan approval be not forthcoming on or before that date then this contract shall be at an end, and all amounts furnished by the purchasers will be refunded without any interest or compensation. This clause is to be specifically for the benefit of the vendor who alone shall have the right of waiver".

The Plaintiff had applied to the I.P.B.S. on 25 October 1979 for a loan. The I.P.B.S. had the building surveyed by their architect and he furnished a written report. On 28 December 1979 the IPBS issued a written loan approval subject to special conditions including the following:—

"5. That the property be converted into a single dwelling for owner occupation only before cheque issue.

6. The following repairs be carried out to the Society's valuers satisfaction before the advance is made — rewire; replace defective windows, doors, skirtings and floors; repair defective internal plaster work to ceilings and walls as necessary; provide proper fitted kitchen; replumb as necessary; replace defective external timbers; make good to roof or porch, brickwork to front entrance, gutters and waste pipes.

7. Your particular attention is drawn to General Condition A on the back of the approval letter."

This general condition provided as follows:—

"(a) The applicant must personally within 7 days indicate in writing his willingness to take up this advance and the deeds giving a good marketable title to the property must be sent to the Societys solicitors within a further 10 days and the mortgage loan completed within 40 days from the date of this approval. Failure to comply with any of the foregoing, or the rejection of the property for comprehensive insurance at the standard rate without any special conditions by the company nominated by the Society cancels this approval."

The Plaintiffs did not fulfil or carry out these special conditions of the loan approval at Nos. 5 and 6 because they contended that such conditions were unusual, abnormal and therefore

unreasonable and also that the requirements of general condition (a) were impossible to fulfil and incapable of performance within the stated period of 40 days. For these reasons they refused to accept the terms on which the I.P.B.S. loan was granted and relied on Clause 4 in their refusal to complete the sale with the Vendor.

The Plaintiff claimed that it was an implied term of Clause 4 of the Special Conditions that the loan approval should have been granted on reasonable terms but it was not, for the above reasons. The Defendants claimed that the terms of Clause 4 of the contract were fully, reasonably and adequately satisfied by the issue of the loan approval by the I.P.B.S. and that the Plaintiffs should have accepted the loan offered, and should have completed the sale. The Defendant's solicitor, having served a completioin notice on the Plaintiffs, subsequently notified the Plaintiff's solicitor in writing that the Plaintiff's deposit of £4000 was then absolutely forfeited to the Defendant. The Plaintiffs then issued proceedings for the return of the deposit.

Held (per Ellis J.), having considered *Rooney v. Byrne* [1933] I.R. 609 and *Lee Parker v. Izzet* (No. 2) [1979] 1 W.L.R. 775 and *Richard West & Partners (Inverness) Limited and Anor. v. Dick [1969] 1 All E.R. 943*, and following *Rooney v. Byrne:*

(1) That Clause 4 was subject to the implied terms that the conditions of the loan approval mentioned therein were and are subject to the implied term that they should be reasonable, and that these conditions should reasonably have been within the contemplation of the parties when the contract was made; and

(2) That Clause 4 should be subject to the further implied term that the Plaintiffs were under the obligation at all times to act reasonably and to take and make all reasonable steps and efforts to fulfil and carry out the conditions of the loan approval; and that onus of proof was on the Plaintiff purchaser to show that the conditions of the loan approval were unreasonable, and that the Plaintiffs had acted reasonably and had made reasonable efforts to fulfil and carry out the conditions of the loan approval.

Having heard the evidence on the facts the Court concluded that it indicated an unreasonable lack of effort and desire by the Plaintiffs to implement the conditions of the loan approval, to avail of the opportunity which became available to them for this purpose, and thereby to seek or obtain approval for the loan according to the obligations under Clause 4 of the Special Conditions. The Court found that the conditions of the loan approval were not unreasonable and that they were as should have been in the contemplation of the Plaintiffs acting reasonably. Plaintiffs claim failed and order made declaring that the Defendant had validly forfeited the £4000 deposit.

Brian Draisey and Another v. Fitzpatrick High Court (per Ellis J.) 10 December 1980 unreported.

MISREPRESENTATION

Principles necessary to establish liability for negligent or non-fraudulent misrepresentation laid down — dismissal of claim on the grounds that the Plaintiff was not the person to whom representations were made.

The Plaintiff claimed that in March 1973 he sought the services of the Defendants, as auctioneers, to advise him on the purchase of a property suitable as a residence which would be a sound investment available for immediate re-sale at a profit. He alleged that the Defendants introduced him to a property at Celbridge, County Kildare which he was induced to purchase for the price of £70,000 on the Defendants representation that it was a first-class investment suitable for his purpose and that it could be re-sold at a substantial profit. The property was eventually sold by the Plaintiff in November 1975 for £50,000.

The Defendants denied that they were retained by the Plaintiff as his auctioneers at the time and alleged that they were, in fact, instructed by the Plaintiff's brother. They alleged that they did not give any particulars or advice or make any representations to the Plaintiff who did not come into the picture until December 1973 when his name was substituted for that of his brother in the contract on the execution thereof. The Plaintiff's brother did not give evidence and no note or memorandum of any agreement between the Plaintiff and his brother was produced in evidence.

The Court referred to the cases of *Hedley Byrne & Company v. Heller* [1963] 2 All E.R. 575 and [1964] A.C. 465, *Esso Petroleum Company v. Mardon* [1976] 2 W.L.R., 583, *Derry v. Peak* (14 App. Cas. 337) and *Securities Trust Limited v. Hugh Moore and Alesander Limited* [1964] I.R. 417. In the course of his judgment Doyle J. adopted the principles laid down by Davitt P. in the last mentioned case that in order to establish liability for negligent or non fraudulent misrepresentation giving rise to action:—

1. There must first of all be a person conveying the information or the misrepresentation relied upon.
2. There must be a person to whom that information is intended to be conveyed or to whom it might reasonably be expected that the information would be conveyed, and
3. That person must act upon such information or representation to his detriment so as to show that he is entitled to damages.

Held (per Doyle J.) dismissing the Plaintiff's claim, that on the evidence furnished to the Court the Plaintiff had personally received no representations from the Defendants upon which he acted to his detriment or suffered damage and that any liability on the part of the Defendants would not extend to the Plaintiff, even if the Plaintiff was aware of the nature of his brother's transactions with the Defendants in relation to the property.

P.J.D. Stafford v. Denis Mahony & Others — High Court (per Doyle J.) — 21 March 1980 unreported.

Summaries of Judgments prepared by:
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Recent Irish Cases

COMPANY

Power to Guarantee Borrowing of a Third Party — Doctrine of "Ultra Vires".

The Plaintiffs agreed in November 1973 to lend money to the first named Defendant partly in consideration of the second named Defendants ("The Company") guaranteeing the loan, interest and repayment arrangements supported by a legal mortgage over the company's lands. The necessary resolution empowering the Company to execute the guarantee and the mortgage was passed and the Guarantee and Mortgage were executed by the Company.

The first named Defendant defaulted in the payment of certain instalments and the Plaintiffs instituted proceedings claiming payment of £50,829 by the first named Defendant and sought an Order against the Company declaring the lands well charged with the said sum. Judgment was given against the first named Defendant for the sum claimed. The Company claimed that the execution of the Guarantee was ultra vires the Company. The Plaintiffs submitted that the Guarantee was ultra vires but that even if it were not the bank were protected by Section 8 of the Companies Act, 1963, and further that since the Company had altered its Memorandum of Association on the 18 May 1974 so as to put the Company's power to give Guarantees beyond doubt the Guarantee was retrospectively validated and finally that the Company was stopped from relying on the lack of vires.

The first Objects Clause of the Memorandum of Association in truncated form read "to acquire and hold . . . shares and stocks of any class or description, Debentures, Debenture Stock, Bonds, Bills, Mortgages, obligations, investments and securities of all descriptions and of any kind issued or guaranteed by any Company, Corporation or Undertaking . . . and investments, securities and property of all descriptions and of anykind . . .". Clause 2 (f) empowered the Company "incidentally to the objects aforesaid, but not as a primary object, to sell, exchange, mortgage, (with or without power of sale), assign, turn to account or otherwise dispose of and generally deal with the whole or any part of the property, shares, stocks, securities, estates, rights or undertakings of the Company . . ." Clause 2 (k) empowered the Company "to raise or borrow or secure the payment of money in such manner and on such terms as the Directors may deem expedient and in particular by the issue of Bonds, Debentures or Debenture Stock, perpetual or redeemable, or by any Mortgage, Charge, Lien or Pledge upon the whole or any part of the Undertaking, property assets and rights of the Company, present or future, including its uncalled capital and generally in any other manner as the Director shall from time to time determine and to guarantee the liabilities of the Company in any Debentures, Debenture Stock or other securities may be issued at a discount, premium or otherwise, and with any special privileges as to redemption, surrender, transfer drawings, allotments of shares, attending and voting at General Meetings of the Company, appointment of Directors and otherwise".

The Court held that it was clear that sub paragraph (k) did not authorise the execution of the Guarantee because it could be done only incidentally to objects set out in sub paragraphs (a) to (e), it held that sub paragraph (k) was essentially intended to confer a power of borrowing and the words "secure the payment of money", could not reasonably be read as conferring a power to execute Guarantees. The Court could not accept that the words "to guarantee the liabilities of the Company" which literally construed were meaningless, should be construed as though in place of the words "the Company" there appeared the words "other person" or similar words. The Court held that the execution of a guarantee could not reasonably be regarded as "indidental or conducive to the attainment of "any of the objects set out in the sub paragraphs preceding sub paragraph (t); the sole object of executing the Guarantee was to facilitate the borrowing by the first named defendant.

In holding that the exemption of the guarantee was ultra vires the Court found it unnecessary to decide whether if the Memorandum had conferred an express power to execute the Guarantee the transaction would none the less be ultra vires, since no conceivable benefit could result to the Company from it and indicated that the decision in *Lee Behrens and Co.*, [1932] 2 Ch. 46 would require reconsideration in the light of the decision in *Charterbridge Corporation Limited v. Lloyds Bank* [1970] Ch. 2.

The Court rejected the submission that the Plaintiff was protected by Section 8(1) of the Companies Act 1963. Accepting that actual, as distinguished from constructive, notice of the lack of vires as essential if a third party was to lose the protection of Section 8(1) the Court held that the Plaintiff through its Solicitor, to whom the Memorandum and Articles of the Company had been supplied prior to the execution of the Guarantee, was aware of the contents of the Memorandum and could not rely on Section 8(1).

The Court further held that Section 10(1) of the Companies Act which reads "subject to sub-section (2) a Company may, by Special Resolution, alter the provisions of its Memorandum by abandoning, restricting or amending any existing object or by adopting a new object and any alterations so made shall be as valid as if originally contained therein and be subject to alterations and like manner" did not operate so as to retrospectively validate a transaction entered into prior to the passing of the resolution.

Finally the Court held that the Company was not estopped from contesting the validity of the

Guarantee. The Plaintiffs relied on a letter dated the 31 December 1976 from the Company to the Plaintiff which read in part

> "as you are aware this Company has guaranteed the borrowings from the Corporation of Mr. Fursey Quinn. Please let us have details in confidence, of the guaranteed borrowings in relation to the amount outstanding including interest, the amount and timing of repayments made and interest paid to date"

The Court held that the Plaintiff had not acted on the representation contained in the letter, if representation it were, and thereby altered their position to their prejudice and further held that the mere fact that the Company had sent its Memorandum and Articles to the Plaintiff could not be said to constitute a representation by the Company.

Northern Bank Finance Corporation Limited v. Bernard Fursey Quinn and Achates Investment Company – High Court (Keane J.) – Unreported – November 1979.

FAMILY LAW

Application under Married Women's Status Act 1957 and Family Law (Maintenance of Spouses & Children) Act, 1976.

The Plaintiff and the Defendant were married in 1971 and had no children. They lived firstly in rented accommodation for two years then they purchased a house in the husband's (Defendant's) name by raising a mortgage and obtaining a bank loan guaranteed by the Plaintiff's father.

The Plaintiff worked until 1976 and thereafter the Defendant discharged the mortgage repayments but not the bank loan; in 1977 the Defendant had little income but in 1978 had lucrative employment, but in 1979 his income dropped again. A second mortgage was raised with the consent of the Plaintiff which was used to pay the first mortgage repayments from 1976 to 1978 but thereafter no mortgage repayments were made and at the time of the hearing the Building Society intimated that proceedings would be taken for recovery of possession.

The Court rejected the submission that the Plaintiff's contribution from the date of her marriage to the purchase of the house should be taken into account as both parties income was spent on their lifestyle rather than invested in property or saved.

Held per Finlay P.:

The home consists of an equity of redemption after the discharge of the two mortgage sums. The parties are entitled in law to beneficial ownership of the equity of redemption in the premises in proportion to the contributions made from the time of the purchase to when the parties ceased to repay the mortgage themselves i.e. the date when the second mortgage was used to pay the first mortgage repayments. To do this one has to ascertain (a) the gross earnings of the Plaintiff and the Defendant and (b) what percentage of gross earnings were contributed to the joint family fund out of which the mortgage repayments were met? Having made adjustments between what was earned and what was contributed to the joint fund by the parties Finlay P. found that the Plaintiff contributed 35% and made a Declaration accordingly.

Maintenance: Evidence was given of adulterous relationships by both parties. The Plaintiff is not maintained by the person with whom she has a relationship. She works as a secretary earning £55 per week while the Defendant on a short-term contract earns £600 per month and £300 allowances per month from which he receives no profit. The Defendant pleaded adultery by the Plaintiff.

Held per Finlay P.: Section 5 Sub-Section 3 of the Family Law (Maintenance of Spouses and Children) Act 1976 applicable.

If the Court is satisfied that the Spouse against whom maintenance is claimed has condoned or connived at or by wilful neglect or misconduct conduced to the adultery then it has no discretion and must order maintenance provided the other conditions in the Act of 1976 with regards to maintenance are fulfilled. If the Court is not so satisfied it has a discretion which it may exercise having regard to all the circumstances including the financial circumstances of the applicant.

Condoning of adultery held to mean a co-habiting subsequent to the discovery of the adultery. No condonation in this case.

Connived at held to mean conduct on the part of the other Spouse consisting of a knowledge of the adultery and failure to make any remonstrance concerning it or to take any steps to try and persuade his partner from continuing with it. No evidence that the Defendant connived at the adultery of the Plaintiff.

Wilful neglect or misconduct conduced to the adultery — the President had considerable doubt whether the facts suggested that there was a wilful neglect of the Plaintiff by the Defendant conducing to the adultery but he was satisfied as a matter of probability that wilful misconduct on the part of the Defendant had so done. The Defendant had commenced an adulterous relationship with the person with whom he is presently living in what could be described as a flagrant and public fashion circulating amongst what had been mutual friends of the parties.

An Order was made for £20 per week maintenance to the Plaintiff having regard (a) to the earning capacity of the Defendant, (b) to the wants of the Plaintiff including the anticipated necessity to rent accommodation, (c) to the earning capacity of the Plaintiff and (d) to the interest to which the Plaintiff is entitled in the Family Home.

L. v. L. – High Court per Finlay P. 21 December 1979 — unreported.

PLANNING ACTS

Local Government (Planning & Development) Act 1976 — Order sought to prohibit the continuance of unauthorised use of premises zoned as residential for office purposes — No guarantee of protection for successor in title.

The Respondent and his wife purchased a two storey over basement terraced house on Rathgar Road Dublin in 1972. The area was zoned exclusively for residential purposes. Immediately after purchasing the premises the respondent commenced to practice in the basement of the premises as a

solicitor. At that time the Respondent lived with his wife in the upper floors of the house. Following a visit by an official of the Dublin Corporation, (the planning authority) in May of 1978 a warning notice was served under Section 29 of the Local Government (Planning and Development) Act 1976 on the Respondent in relation to the unauthorised use of the basement for the purpose of carrying on an office business in it.

and his wife vacated the upper floors and extended the solicitors practice to the entire of the premises. The Planning Authority served a notice of motion under Section 27 of the 1976 Act seeking an order for the discontinuance of the unlawful use. The respondent did not contest the application in respect of the upper floors.

In respect of the basement the Respondent first submitted that since the unauthorised use had continued for a period in excess of 5 years at the time of the making of the application, having regard in particular to the provisions of Section 31 of the Local Government (Planning and Development) Act 1963 and the general construction of the Acts of 1963 and 1976 the Court had no jurisdiction now to make an order under Section 27 in respect of the unauthorised use.

The Respondents second submission was that even if there were a discretion to make an Order under Section 27, having regard to that lapse of time and to the other facts of the case the Court should not exercise its discretion in favour of granting an order.

The Court held, referring to its decision in the case of *Dublin County Council v. Matra Investments Ltd.*, (no written judgement given) that there were no grounds for implying into Section 27 of the 1976 Act the time limit created by Section 31 of the 1963 Act. Section 27 of the 1976 Act is an entirely new section in the Planning Code and gives the Court an entirely new power. There is nothing in Section 27 nor in any other section of the Act of 1976 in anyway restricting the time during which the planning authority or any other interested party may apply to the Court for an order under that section.

The Respondent also submitted on this issue that Section 31 should be interpreted as making in this case an unauthorised change of use which had occurred more than 5 years before the institution of proceedings into an authorised change of use, losing its unlawful and unauthorised character. The Court held that it could find no warrant for so construing Section 31.

On the second submission the Court held that the lapse of time between the commencement of an unauthorised use or the making of an unlawful development and the time when application is made to the Court must remain one of but not the only material factor in regard to the exercise by the Court of its discretion as to whether to make an order under Section 27.

In the instant case the Court was not satisfied that the applicant was guilty of laches and delay. The Court held that there was another aspect of the relevance and importance of the lapse of time, namely the position in which the Respondent finds himself, if after a very considerable number of years following the breach of the Acts without any attempt to enforce the Acts he suddenly faces an order under Section 27. The Court construed Section 31 of the 1963 Act and Section 30 of the 1976 Act as an acceptance by the legislature that with regard to those forms of enforcement it would be unjust that a person, after the lapse of 5 years, should face the relevant court proceedings.

The Court noting that there was no question of the respondent concealing the fact that he was using the premises as a solicitors office, and that the public first drew this matter to the attention of the applicants in Spring 1978, came to the conclusion that the use by the Respondent for a period of 5 years although undoubtedly in breach of the Planning Acts was not such a breach causing real damage to the amenity and convenience of the area as instigated complaints by persons or residents near by to the Planning Authority.

The Court held that by reason of the lapse of time since the commencement of the change of use before the institution of proceedings it should refuse an order in respect of the basement. Such decision should not be construed as being equivalent to a decision that this user had now become lawful or authorised or to the effect that any successor in title would be immune from the making of an order under Section 27 were he to use the basement premises for office use.

Dublin Corporation v. Mulligan – The High Court (Finlay P.) – 6 May 1980 – unreported.

SALE OF LAND

Statute of Frauds — Suffiency of Memorandum.

The Dublin Auctioneer, Mr. Corry Buckley, was a customer of his local licensed premises, known as "The Silver Tassie" which was being run by the first named defendant Michael O'Neill and had from time to time discussed with Mr. O'Neill the possibly of the premises being sold. He telephoned Mr. O'Neill on Friday the 13 January 1978 to say that he had a purchaser who would pay £190,000 for the premises. Mr. O'Neill responded by saying that he would telephone his solicitor Mr. Black. Mr. Black had three telephone conversations on the following day with Mr. Buckley who told Mr. Black the Plaintiff was the purchaser, that £190,000 was the maximum that he was prepared to pay and that "everything was subject to contract". After some telephone conversations between Mr. O'Neill and Mr. Black, Mr. O'Neill agreed to the sale at £190,000 saying that "it was subject to the usual documentation attached to the sale of property".

The auctioneer, who was due to go to America that week-end, dictated three letters on a tape recorder intending that they would be typed and sent out by his secretary while he was away. All three were posted on the 17 January and presumably did not reach their addresses before the 18 January. The first letter was to the plaintiff confirming that his offer was being accepted and that Mr. Black would forward a contract to the Plaintiffs solicitor "for his perusal and approval". The second letter was to Mr. O'Neill marked "Subject to Contract" confirming that he had been authorised to accept the plaintiffs offer of £190,000 and suggesting that Mr. Black should send a draft contract to the plaintiffs solicitor. The third letter to Mr. Black

merely enclosed a copy of the letter to Mr. O'Neill.

In the interval, on the 17 January, Mr. O'Neill executed a formal contract prepared by Mr. Black for the sale of the Silver Tassie to another purchaser for £200,000, Mr. Black having advised Mr. O'Neill that there was no note or memorandum of the contract with the Plaintiff.

When the three letters of the 17 January came to light the Plaintiff was advised that they did constitute a sufficient note or memorandum under the Statute of Frauds and he instituted proceedings for specific performance of the contract.

In the High Court the Judge would have granted specific performance had it not transpired that Mr. O'Neill was a joint tenant in fee simple of the premises with his wife. The Judge awarded damages against Mr. O'Neill in lieu of specific performance and made an order declaring Mr. O'Neill to be a trustee for the Plaintiff of such beneficial interest as he was entitled to convey. Before making that order he directed that Mrs. O'Neill be added as a defendant. This having been done without prior notice to Mrs. O'Neill and without giving her an opportunity to plead or to be heard was held by the Supreme Court to be both a breach of the Rules of Court and a denial of natural justice and was plainly a part of the Order that could not stand.

The Plaintiff appealed against the refusal to grant specific performance and the Defendant served a cross appeal contending that the Plaintiff was not entitled to either specific performance or damages on the grounds that the note or memorandum relied on was inadequate.

The Court held that the Defendants contention was unanswerable for two reasons: the first being that the three letters far from reciting or evidencing a concluded oral contract made it clear that essential parts of what was expected to become a contract remained to be negotiated and the words "subject to contract" was no empty formula as was the case in *Kelly v. Park Hall School Limited* (1979) 113 I.L.T.R. 9. The three letters made it clear that essential parts of what was expected to become a contract remained to be negotiated. No date for completion had been fixed, the title on offer had to be submitted for approval and no agreement had been come to as to the price to be paid for the stock, and the other provisions requiring to be negotiated in the contract for sale of a licensed premises as a going concern had to be agreed.

Secondly the letters, while they purported to record who the parties to the contract were, failed to do so or at least failed to do so fully or accurately. The letters were defective as a memorandum because they mistakenly gave Mr. O'Neill as the vendor of the fee simple when in fact he only had an undivided moiety.

Gerald A. Carthy v. Michael O'Neill and Eileen O'Neill — Supreme Court (Henchy J.) — 30 January 1981 — unreported.

Summaries of judgments prepared by John F. Buckley, Barbara Hussey, and edited by Gary V. Byrne.