GAZETTE

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LAW SOCIETY
OF IRELAND

Vol. 83 No. 1 January 1989

Peter Sutherland, S.C., former Irish Commissioner to the EEC.

European Issue

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Index compiled by Julitta Clancy B.A., Dip. Archival Studies, (Registered Indexer of the Society of Indexers)

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Executive Editor:
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Committee:
Geraldine Clarke, Chairman
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Advertising:
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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

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Viewpoints

EURPHORIA

The publication last month of a comprehensive survey of '1992 Readiness' within Irish industry conducted by The Marketing Institute is profoundly disturbing. It provides hard statistical evidence, firstly, that Irish industry is highly aware of 1992, secondly, is extremely optimistic about it and thirdly has no proper basis for this optimism.

The survey, conducted in October 1988, shows 74% of the Chief Executives questioned viewed the likely impact of 1992 as 'favourable', 10% thought it could go 'either way' and only 14% believed it would be 'unfavourable'.

The most revealing responses, however, were those which showed that 77% of companies had made no assessment whatsoever of the impact which 1992 would have on them and indeed 40% went on to state that they did not even plan to do this in the future.

More worrying still was the fact that the replies showed a widespread and deep misunderstanding of what 1992 was all about. The research concluded that there was a situation of "dangerous complacency". There is a high awareness of 1992 but not of what it means. Worse, there is a belief that it means something different from what it really does.

If we were to follow the Government into word play we could say that 'Europen' has led to a dangerous 'Eurphoria'.

There is a strong argument to be made that 1992 will be anything but an unmixed blessing for Irish industry. Whatever the balance of benefits and threats of 1992 may be, however, there can be no questioning the need to address the issue and prepare for it. Every business in the country has solicitors who advise it. The legal profession has not played a sufficient role to date in urging its commercial clients, on whose continued economic health the profession depends, to assess the impact of the internal market programme in the case of each individual company.

The company solicitor, indeed, has an active role to play in that assessment and must fully familiarise himself with the huge changes which Europe is currently causing to the legal climate in which industry must compete.

As Peter Sutherland points out elsewhere in this *Gazette*, the 1992 Program, indeed the whole European integration process, is composed of law and it behoves all lawyers to master it and bring it to the attention of their clients.

If this does not occur soon, then a new word may have to be coined and addressed to both Irish industry and the legal profession – 'Eurlosingout'! □

CHILD ABDUCTION

A number of recent cases which involved the alleged abduction of children either from or to Ireland by estranged parents has highlighted the absence of any proper legal structure governing such cases.

In 1985 the Law Reform Commission recommended that Ireland should adhere to the Hague Convention on the Civil Aspects of International Child Abduction but action does not appear to be imminent. At that time the Department of Justice was also considering Ireland's adherence to a Council of Europe Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of custody of children. Ireland actually signed this convention subject to ratification in 1980. It is notorious that Ireland's record of ratification of International Conventions is deplorable though occasionally this may be justified by the fact that some of the Conventions have found little support elsewhere.

Contd. on page 5

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The Legal Implications of 1992

Address by Mr. Peter D. Sutherland to the Irish Centre for European Law. Mr. Sutherland is the former Irish Member of the Commission of the European Communities responsible for Competition Policy and Relations with the European Parliament.

Over the past few weeks, both here in Ireland and throughout Europe, there has occurred an explosion of analysis and exhortation arising out of the completion of the Single Market by 1992. I have been an active participant in the developing public and political debate in Europe on this issue ever since the decision was taken by the present Commission at a weekend of reflection in Royaumont in November 1984 (two months before it formally took office) to identify the completion of the Single Market by 1992 as the over-riding objective for the Community. Emile Noël, who served as Secretary General of the Commission from 1958 to 1987, has recently said of that meeting in Royaumont: "A strong idea had been launched and you had the impression that it would be irresistible and that it would transform the whole European process in the years to come".

It is a matter of regret that the kind of debate and analysis which we are now having in Ireland did not occur some 12 to 18 months ago when we debated the adoption of the Single European Act. For what we are now experiencing, what we are now becoming conscious of, is simply the unfolding of the approach and the commitment entered into by the Single Act. It is a matter of regret because our level of preparedness would by now be so much higher.

Single Market inevitable

I believe I can also detect a qualitative change in the way in which the Single Market is now being discussed. Firstly there is now widespread acceptance of its inevitability: the phrase used by the Heads of State and Government at Hannover was "irreversibility". 1992 is no longer an aspiration, a proposal, a project; it is a reality which is now built into the plans, preparations and actions of governments and of businesses throughout the Community. Some of the most difficult decisions which will enable us to complete the Single Market have already been taken. In February the Community's financial system was put on a sound basis, the reform of the guidance section of the CAP was completed and the Structural Funds were doubled in an overall package which will not need revision until 1993. Last month there was a series of seminal decisions on the liberalisation of capital movements, the mutual recognition of diplomas and the liberalisation of the road transport market followed by the decision at Hannover to undertake work aimed at preparing for monetary union. While serious renegotiating difficulties lie ahead – notably in relation to the harmonisation of taxes – there is also a much greater readiness in all Member States than in the past to make sure that such difficulties do not become insurmountable. This change in attitude is partly explained by the much clearer picture which is now available of the considerable economic benefits which the Single Market will entail – GDP to increase by up to 7%, prices to fall by 6% and up to five million net new jobs to be created. Finally, and most welcome of all, there is the realisation that these benefits will not flow automatically to any particular region, sector or group of persons but will have to be competed for. 1992 leaves no room for complacency: its impact will be to provide a framework of permanent competitive renewal in previously protected markets; the winners will be those who are ready to put in a good performance.

Legal Implications

In contrast to the economic analysis, relatively little has been said about the legal implications of 1992. Yet they are very far-reaching, affecting the corpus of laws, the Judiciary, the content and mix of judicial proceedings, and indeed the structure, organisation and efficiency of national legal systems. I therefore welcome very much the focus of today's Conference, but even more so the fact that it is the first public manifestation of what I regard to be an absolutely essential part of preparations for 1992 – the establishment of the Irish Centre for European Law. For law lies at the heart of the European Community.

Legal Framework

Firstly, unlike previous efforts to unite Europe, the Community has been created by law. Secondly, the Community is a source of law, both through the founding treaties and through the legal acts promulgated by the institutions set up by the treaties. Thirdly, the Community is

VIEWPOINT *Contd. from page 3*

This is certainly not the case with regard to the Hague Convention on Child Abduction because it has been ratified by a significant number of countries whose ratification would have a significant relevance for Ireland, such as the United Kingdom, the United States, Canada and Australia as well as France, Spain and Portugal. What the Convention does is to provide a system whereby the judicial or administrative authorities of the State where the child, which has been wrongfully removed from the custody of those persons entitled to it, are obliged to order the return of the child if proceedings are brought within one year and even after that period shall order the return unless it is demonstrated that the child is now "settled in its new environment".

"Tug-of-Love" cases are difficult enough to administer when the parties are all within a single jurisdiction, they become immeasurably more difficult and expensive where the child is removed from one jurisdiction to another. Anything that can be done to smooth away the difficulties of these unfortunate cases should surely be a matter of priority for our legislators. □

a legal order – it pursues its objectives purely by means of law. Fourthly, in a democratic political context, only a Community of law can offer all of its participants the prospect that rights and obligations will be equally shared. The smaller and weaker states can be assured that decisions are taken on their objective merits and not merely on an arbitrary basis at the behest of politically more powerful forces; as a result, Community law provides the necessary public confidence in the decision-making process as we move towards European Union.

Community law is directly applicable, it confers rights and imposes obligations directly, not only on the Community institutions and the Member States but also on the Community's citizens. Finally, Community law has primacy over national law, that is sovereign rights in a number of areas have been definitely transferred by the Member States to the Community and cannot be regained by unilateral measures inconsistent with the Community concept. Nor can a Member State call into question the status of Community law as a system uniformly and generally applicable throughout the Community.

Impact of Community Law

It is in order to bring home the importance and potential of Community law to legal practitioners in Ireland that the Irish Centre for European Law has been founded. Let me give an example of the potential of Community law. It is common myth that Articles 85 and 86 of the Treaty, which concern the rules of competition as regards undertakings, can only be enforced by the Commission. In fact, Articles 85 and 86 can be enforced by national courts against private individuals and state bodies. Damages and interim measures are available for breach of Articles 85 and 86 under the legal systems of all Member States. While some Article 85 and 86 cases must, of their nature, involve the fact-finding powers which the Commission has at its disposal, a recent study indicated that about half of the complaints submitted to the Commission could have been dealt with by national courts without any serious problem. It is the deliberate policy of the Commission to favour more frequent application of Community law by national courts.

Given the physical and psychological proximity of national courts, decentralised application would often provide quicker and more efficient solutions. Not only would the effects of anti-competitive behaviour thus be cut down in time, but application by national courts of the relevant block exemption regulations would allow companies to launch constructive forms of cooperation as rapidly as possible, with the necessary legal security. This example shows the complex nature of the relationship between national and Community law with, in this instance, Community law requiring the assistance and substructure of national law.

Legislating for 1992

If considerations such as these have not impinged themselves to the extent that one would imagine they should on the Irish legal community, there is no doubt but that recent developments, especially those linked to 1992, will bring home very forcefully the points I have been trying to make about the importance of Community law. In these circumstances I believe it will be no exaggeration to say that the work of the Irish Centre for European Law will be indispensable to the practice of law in Ireland.

Firstly, there is the immense corpus of law which the completion of the Single Market will entail. Two hundred and eighty-five legislative texts in all, 91 of which have already been adopted. I would estimate that over half of all future, national, economic, fiscal and social legislation throughout the Community will flow from the working out of the Single Market programme. To take a few random examples; think of the legal ramifications of the harmonisation of taxation, the establishment of a European company statute, the opening up of markets for public procurement, the introduction of a model code for building regulations, directives on labelling requirements and price transparency, etc., etc. This is a massive challenge and workload for the legal profession which will be called upon to transform the Single Market programme into living law, i.e. to draft, to adjudicate upon, to take account of in imparting advice to clients etc., in the immediate future for that part of the legislation which has not yet been adopted, lawyers will be called upon to assess draft legislation, advise clients on its impact and to help them with lobbying activities.

Secondly, the nature of the Single Market implies a strengthening of the regulatory and enforcement powers of the Community. The correct application of the agreed rules must be ensured. The greater part of the complaints received each year by the Commission relate to Articles 30-36, i.e. to Quantitative Restrictions on Trade between Member States. The Commission is improving its procedures to correct such violations rapidly and efficiently. These considerations apply also in relation to competition policy. The achievement of the major economic gains from the opening of markets depends upon private sector confidence in the solidity of Community disciplines over state subsidies that sharply affect competitive conditions. New forms of local protectionism would only

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lead to a process of industrial consolidation and regrouping across national boundaries requiring a vigilant Community control over mergers, acquisitions, joint ventures, etc. so as to prevent the emergence of non-competitive situations. There is no need to exemplify the way in which the pace of transfrontier industrial restructuring has quickened with the 1992 deadline and there can be no doubt but that this activity will intensify. Businessmen and their advisers in their day-to-day business activities will become more and more conscious of the relevance of Community competition rules in the months and years ahead.

These developments will require also a strengthening of the Judiciary. The Single Act therefore provided for the establishment of a new Court of First Instance to supplement the work of the Court of Justice. It is proposed that this Court will deal in particular with competition and perhaps trade protection issues. At the same time, the Commission is giving active encouragement to efforts to promote national enforcement of Community law, particularly as concerns competition.

Thirdly, in the words of the Single Act, the Single Market is an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. We have already seen that the emerging business configuration will as a result be increasingly international, whether through expansion, diversification or joint venture. Equally, as regards the consumer, the Single Market will bring him into increasing contact with goods and services from throughout the Community. Thus in the future an Irish citizen may carry out transactions using a bank account anywhere in Europe, to buy goods and services provided by any European firm. The products and services which he buys may have been certified by, say, an Italian agency. Following the *"Cassis de Dijon" case,* the Commission will ensure that if goods are lawfully manufactured and marketed in one Member State, they must be allowed free entry into other Member States. Thus, those once rather seemingly extraordinary situations which used to be described in the Private International Law examination papers – whereby an Irish firm insures itself with a Dutch company against the loss of goods in transport within Italy on the basis of a contract signed in Brussels and paid for in sterling out of the Irish firm's German bank account – will become increasingly familiar. As business transactions become increasingly international so will the law which will regulate them.

Legal Services

And here I come to the nub of my message today. In the provision of legal services and advice, the forces of competition which are being released throughout the European Community will apply with equal strength. I have three reasons for saying so. Firstly, if the type of international situation which I have described above becomes more and more frequent, the component of European and of Private International Law will become increasingly important in legal proceedings. Only lawyers who are versed in these branches of law can carry out such work. But of their very nature, such legal situations can be dealt with by lawyers from any of the countries associated with the situation. Thus there is no automatic reason why an Irish firm in, say, a joint venture with a Belgian company will automatically turn to Irish rather than Belgian lawyers for legal advice and representation. What the Irish firm will be looking for is knowledge of the total legal implications of the situation and advice which is competent and efficient. The internal market will bring the typical Irish firm into contact with non-Irish lawyers and in an increasing number of instances they will be as well placed to act for it as Irish lawyers.

Of course, the inverse will be true; non-Irish firms will come into increasing contact with Irish lawyers and will be able to avail of their services. In legal services as in every other aspect of the Single Market, there will be no protected home market. This will provide the opportunity and the threat which is the double-edged sword of competition.

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Secondly, the legal profession is, of course, covered by the recent Council common position on a general system for the recognition of higher education diplomas awarded on completion of professional education and training. Subject to an additional adaptation test, lawyers whose diplomas are recognised in one Member State will be free to practice in any other Member State. I do not propose to get into more detail on this agreement because it is to be the subject of further consultation by the Parliament before its final, formal adoption at the end of this year. It is envisaged that mutual recognition will be operational from January 1991. The longterm impact of the decision will be to allow lawyers from other Member States to appear in Irish courts and to give legal advice as well as to set up permanently in Ireland. Equally, of course, Irish lawyers will be able to offer their services in other Member States. But remember that most other Member States follow a civil law code. European Community law therefore will be the most transferable branch of law as well as the one where there is likely to be the greater volume increase in legal proceedings.

Forum Shopping

Finally, let me develop a further general consideration. If, as I have argued, the law will become increasingly international, then there will inevitably develop forum shopping. How does the Irish legal system compare, as a system for the provision of rapid, efficient and authoritative judgements with other legal systems? How do Irish legal costs compare? What is to prevent the Irish legal system from becoming a centre of excellence within the European framework? In Ireland we have companies and organisations that are able to gain significant niches or shares of the world market in their fields, be it in packaging or aircraft leasing. The International Financial Services Centre and the Trading Houses also represent institutional efforts to capture markets in international services. There can be no doubt that there is fast developing a comparable European market in legal services. An adequate response, if Ireland is to get a share of this market, cannot occur just at the level of the individual practitioner; a corporate response is required.

There can be no doubt about the need for the Irish Centre for European Law. It is a development which is fully supported by the European Commission and which deserves support from the legal community, national administration, the educational authorities, business and the trade unions. I hope it will become a tangible, permanent structure which will endure after all the words about 1992 have died on the wind. I am fully confident that it will grow into something of immense significance and support to all sectors of the nation as well as making a significant contribution to the practice of European law throughout the Community. □

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Younger Members' News

REVIEW OF MILLENNIUM LEGAL YEAR

(with particular emphasis on activities of the Younger Members)

JANUARY
Saw a delegation of 30 lawyers visit the Institutions of the EEC in Luxemburg, Strasburg and Paris. A working knowledge of the legal system of one country was acquired by some representatives!

The YMC, through the tireless efforts of Justin Condon and Bernadette Owens, held two very successful table quizes in Cork and Tullamore respectively.

FEBRUARY
Brought another successful YMC table quiz organised by Helen Doyle in the Ardree Hotel in Waterford.

MARCH
Saw the students of the fifteenth professional course return to Blackhall Place (and to Bill!) Wedding fever started as Stanley Watson (14th Prof. Course) walked down the aisle.

APRIL
Toasted the final countrywide table quizes organised by the Younger Members. Approximately 350 people attended the quiz at the Royal Marine Hotel in Dun Laoghaire with our own version of the Eurovision Duo, Mrs. Moya Quinlan and Mr. Gerard Griffin acting as Quiz Masters, Auctioneers (without a licence) and comperes. This month also boasted a very successful SYS Seminar in Galway with many of the attendance finishing the weekend in Morans of the Weir. Wedding Bells for Stephanie Power (15th Prof. Course) and Elizabeth Fitzjohn (16th Prof. Course).

MAY
Was the month of the Annual Conference in Cork and also the month in which approx. 55 solicitors were presented with their parchments by President, Mr. Tom Shaw.

JUNE
Brought the 5th successful Co-operation North Maracycle and was the second cycle in which funds were raised for the Benevolent Fund. Some participants are rumoured to have been sighted smoking cigarettes while on the bike!

JULY
Saw the departure of YMC Committee member, Roddy Bourke to London. Earlier in the year another Committee Member, Richard Devereux, also left for London and both were hard-working and dedicated members of the YMC. We understand they are both doing extremely well and wish them continued success.

AUGUST
Witnessed many a legal eagle tie the knot! This month saw the weddings of younger members of the profession such as Marie-Christine Dennis (13th Prof. Course); Andy Muckian (14th Prof. Course); Fiona Daly (14th Prof. Course) and also Brendan Cahill and Barbara Shelly who met and started courting on the 14th Professional Course. And our YMC Committee Member Helen Doyle (Wexford) was also married in August.

SEPTEMBER
Was an active month for the YMC! On the 3rd, the Committee held its annual Soccer Blitz in Blackhall Place and this year was designated .... yes ... you guessed ... "The YMC Millennium Soccer Blitz"! This year's event was won by Messrs. John P. Carroll and Co., captained by John McCarthy. On the 7th of the month the Council of the Law Society unanimously passed the Committee's Motion that the recommended salary scale for newly qualified Solicitors be increased to £10,000 – £11,000. Wedding fever continued as Deirdre Giblin (14th Prof. Course) tied the knot.

OCTOBER
Saw President Shaw in action again for the delivery of approximately 50 parchments. This month also saw the return of approx. 78 students from the 16th Professional Course to Blackhall Place for their final stint on the Advanced Course (without Raphael King, who departed en famille during the summer to the exotic Turk and Caicos Islands). Ms. Cathy O'Brien is the new face for the Advanced Course students.

NOVEMBER
Brought the end of the Law Society's "year" and the end of his term for the poll-topping Mr. Tom Shaw as President of the Law Society. This year's President, Mr. Maurice Curran, was elected. The Council elections brought three newly elected members for the year 1988-89 in the persons of Justin McKenna, Liam O'Brien and Miriam Reynolds.

DECEMBER
is DECEMBER! End-of-year drinks as we wave goodbye to the Millennium Year and look back on our achievements (or otherwise!) for 1988. □

ATTENTION YOUNGER MEMBERS!

The YMC are endeavouring to establish a network system throughout the country. It is envisaged that a YMC officer be elected in each county to communicate with an individual YMC member who in turn meets with the full committee on a monthly basis.

The objective is to improve the YMC by making it more representative of the views and more aware of the issues affecting the younger members of the profession.

If you are interested and would like to represent your local area, please submit your name to Ms. Sandra Fisher, Law Society, Blackhall Place, Dublin 7, *or* Ms. Miriam Reynolds, Hayes & Son, 15 St. Stephen's Green, Dublin 2, before Friday, 24th February, 1989.

From the President . . .

This issue of the Gazette is devoted to European matters and to 1992 in particular.

I am pleased to be able to tell you that the Annual Conference to be held in the Hotel Europe in Killarney between the 4th/7th May will also be devoted to this topic. John Hume, M.E.P., Peter Sutherland, S.C., and Conor McCarthy, Chairman of Coras Trachtala and of Ryans Hotels plc, have accepted invitations to speak. I would like as many of you as possible to attend what should be a most interesting meeting: put the date in your diary now!

One matter which gives me great concern is how we can assist the profession as a whole to deliver to their clients the necessary expertise in the whole developing field of community law. It seems to me that the referral system that has been set up in recent years in the Company law, Conveyancing and Taxation fields has had only limited success and has not been as popular or as heavily used as it should have been. I perceive the main reason for this to be a fear of the Solicitor who should be using the service that he will lose his client to the bigger firm to which the referral is made.

This should not happen as the referral rules are intended to provide protection so that a firm to whom a client is referred is not to act for that client for a period of years after the referral in any other matter without the consent of the referring solicitor. However, it may be that this is not felt to give sufficient protection and that we must find some sanction which will be seen by the profession to protect solicitors who use the referral service. I am not aware that there actually has been any poaching of clients, but if there has been or if it should happen in the future, then the offending firm must be dealt with by the Law Society. Perhaps the publication of a defaulting firm's name in the *Gazette* plus withdrawal of that firm's name from the list of those eligible to receive referrals might be sufficient sanction.

In the United Kingdom and in Australia, national federations of firms are growing up and I believe we will have to develop linkages whereby practices which are operating independently on a local scale will combine either by linking to some of the larger practices or by forming national partnerships to provide, both an information service and a delivery of legal services here and abroad, and in particular in Brussels.

The profession is already familiar with the Town Agent concept which works very effectively and there is a confidence in that system throughout the country. Is there any reason why we cannot arrange something similar in relation to referrals?

John Temple Lang in his Paper on 1992 at the recent Conference in Trinity College suggested that it will be important to have access to legal expertise in all the Member States of the Community and that it will be important for Irish firms to become members of the various Law Clubs that are springing up, whereby firms in different countries are joining together pooling their expertise and making their services available on a cross-border basis. It may be that if we can apply the Town Agency concept to the referral service, it will be easier to establish the necessary continental links.

The English Law Society has recently decided to permit their solicitors to go into partnership with lawyers in other jurisdictions which points another way forward. It seems clear that in the not too distant future there will be large cross-border international legal partnerships following the trail that has been blazed by the accountancy firms for many years past.

Those are just a few thoughts on the way in which I see things developing and I should be most interested to have the views of any of you who would care to write to me on the subject.

We have recently brought into force new regulations permitting the profession to market its services in a manner appropriate to the last few years of the 20th Century. If we develop the confidence to market and to deliver these services to the public, making full use of modern technology so that we deliver such services as efficiently and as cost effectively as possible, then I believe professional skill, integrity and independence will continue to bring rewards in the practice of our fine profession. □

MAURICE R. CURRAN,
President.

CORRECTION — DECEMBER GAZETTE

The following is a reprint of the Profile of the Senior Vice-President of the Society which appeared in the *December* issue of the Gazette. In that issue Mr. Margetson was described as being "current" Chairman of a number of committees of which he was "former" Chairman. The mistake is regretted.

SENIOR VICE PRESIDENT 1988/89

Ernest J. Margetson

Ernest J. Margetson was educated at the High School and Trinity College Dublin and was admitted as a Solicitor in 1951. He is a partner in the firm of Matheson Ormsby & Prentice. He was Honorary Secretary of the Dublin Solicitors Bar Association and also President of that Association. He was elected to the Council in 1974 and has served as Chairman of the Professional Purposes Committee, Compensation Fund Committee, Registrar's Committee, and Finance Committee. He was Junior Vice President of the Society for the year 1982/83.

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Litigating in Luxembourg

The following article is reprinted from the Journal "Counsel" and appears here with the kind permission of the publishers.

A growing, if still small, number of members of the Bar — both silks and juniors now come to Luxembourg so regularly that they are thoroughly familiar with the procedure of the Court and the techniques most likely to be effective there. This article, which the Editorial Board has asked me to write, is not for them. It is for those who do not come often or who may be asked to come for the first time.

Their number is likely to increase, not just because the Court now receives some 400 new cases a year (as opposed to less than 200 seven years ago and far less when the United Kingdom joined the Community) but because of the likelihood of a further increase following the adoption of the 300 measures which it is planned will be in force in time for the market without frontiers in 1992.

What are the essential features of our procedure, are there obvious pitfalls to avoid?

The procedure varies to some extent according to the type of case before the Court — there are (a) staff cases (which in the majority of cases are conducted in French and which normally go straight to a Chamber of three judges and an advocate general, even though sometimes they raise interesting and difficult questions of administrative law); (b) direct actions where the Commission contends that a member State is in breach of the Treaty and where usually only member States take part in the proceedings; (c) direct actions where Community legislation is challenged as being *ultra vires,* in breach of the Treaty, or as having been adopted in violation of some essential procedural requirement — usually brought by member States, except where the instrument adopted is in form or in substance a Decision addressed to, or of direct and individual concern to, an individual or a limited company; (d) references for a preliminary ruling as to the interpretation or validity of a Community instrument, or as to the interpretation of the Treaty, made by national courts to the European Court.

The English barrister is most likely to find himself at Luxembourg on such a reference or in a direct action to challenge decisions of the Commission relating to breaches of the competition or antidumping rules; more rarely in direct actions challenging the validity of other forms of decision, since most Community legislation does not satisfy the test of being of "direct and individual concern" to a particular trader, since it makes rules applying to a sector of industry, agriculture or commerce.

by
Sir Gordon Slynn,
Advocate General of the Court of Justice of the European Communities.

The essential difference between the two types of case is that in direct actions the applicant can put in two pleadings — a claim and a reply, answered by a defence and a rejoinder. In reference by a national court the parties in the main proceedings, like member States and the Community institutions, file only one pleading — a difference which affects the nature of the lawyer's submissions at the oral hearing.

In both types of case, however, it is essential to bear in mind that the procedure is fundamentally written. The judges will receive a preliminary report prepared by the judge reporter, often after discussion with the advocate general assigned to the case, which summarises the arguments and makes proposals for the future conduct of the case (which the lawyers do not see); and a report for the hearing which summarises, though often in some detail, the facts and the arguments of the parties (and which is supplied to the parties).

It is, therefore, crucial that the claim should set out clearly the facts and all grounds relied on and that it should annex the relevant documents. The pleadings are, therefore, normally longer than pleadings in an English action and the content is different. Arguments have to be developed in writing and cannot simply be left for the oral hearing and the Court is strict in not allowing new grounds to be introduced in the reply. This does not necessarily mean that excessive length is to be encouraged — particularly in the reply and in the rejoinder which really are intended to give an opportunity to answer the arguments of the other side.

In my opinion, there is now a tendency for the reply and the rejoinder to be too long — what has already been said in the claim and defence is repeated, often at greater length. This should be discouraged — not least because the pleadings will have to be translated into French as the working language of the Court. There is much to said, partly for clarity, partly because Continental judges are used to it, for setting out, after a statement of the relevant facts, each ground of attack *seriatim,* developing the arguments relevant to that case. Because of the vast amount of paper which is put before Members of the Court, it is important to make sure that the strongest arguments are put emphatically and strikingly so that they cannot be lost in a mass of words. This may sound very elementary but there are not infrequent occasions when the mass of words conceals the critical point.

Indeed there are occasions when it is both possible and desirable to say that no reply or rejoinder will be filed or merely a formal reply can be filed stating that all the arguments in the other side's pleadings have already been dealt with.

When the report for the hearing is received it is no less essential to ensure that the fundamental arguments have been correctly

summarised. If something has not been understood or is not wholly accurate the attention of the Registrar should be drawn to it immediately in writing, even though at the end of the day it is for the judge reporter to decide whether to amend his report. At the least the point should be made at the hearing or in the preliminary interview which takes place just before the hearing.

Although the decision whether or not to refer a question to the Court under Art. 117 of the Treaty is entirely within the discretion of the national judge, counsel can play an important role in assisting the formulation of the questions. The precise formulation is important — not least to ensure that a question of Community law is raised, since the Court will not decide what national legislation means or whether specifically it violates the Treaty or a relevant rule of law. Some references to the Court — I do not suggest they come from the United Kingdom — fail to present the material in the appropriate form. There is everything to be said for following the form common in the English case stated; a section containing, and headed "the facts"; a section explaining how the issues have arisen, defining the question and summarising the arguments each way; it is also valuable to have a preliminary view of the judge as to the answer.

The pleadings of the party who desires to take part in the reference will have to be written without seeing the pleadings of the other side; they should therefore deal with all the major arguments which need to be put forward or answered.

Annexes to pleadings in both types of case are important. There is no discovery or opportunity for interrogatories or to ask for further and better particulars, though if the documents in possession of the other side have not been supplied it is possible to ask the Registrar to tell the judge reporter that the documents are essential for the case. Then, if satisfied that they are needed, the Court will itself ask for them, or put questions to elicit further facts in the knowledge of the other side.

It has not been the practice of the Court to prepare "bundles" of such annexes as a separate working document, In the result, the Members of the Court often have to search around the annexes (exhibited at particular stages as they crop up in the argument) to produce a coherent, connected story. There is much to be said in cases with a lot of documents for a bundle to be agreed either in chronological order, or in particular sections, so that the documentation is more readily usable.

Only infrequently are there interlocutory hearings: they can, however, be valuable in sorting out the really important issues, and deciding, where there are several parties, which advocate deals with which issues, so as to avoid all covering the same ground. Sometimes counsel can discuss these matters between themselves and make suggestions to the Court as to the future conduct of the proceedings.

The fact that the procedure is primarily written does not mean that the oral hearing is not important. The Court, partly because of the heavy case load and partly because the Continental judges are more used to dealing with documents, has, it is true, limited speeches to thirty minutes or two of fifteen minutes when the case is before a chamber of three judges and an advocate general. Where, however, the case needs and justifies longer, then an application should be made to the President for an extension — which if good reasons are given is frequently granted — though English counsel, perhaps to their surprise, discover how much, given the content of the written pleadings, they can say in thirty minutes.

It is rarely necessary to go into the facts in any depth at the oral hearing: they are in the report for the hearing and the best way to lose the attention of the Court is to begin with a long factual recital. Facts which it is desired to emphasis can be stressed as part of the relevant argument. Nor since all the relevant decisions of the Court should have been referred to in the written pleadings, is it necessary to recite long passages from earlier judgments or opinions (which themselves are citable and frequently cited). The punchlines, with the necessary references, are sufficient.

At one stage, counsel regularly read, and sometimes still do read, their speeches. Such a practice is

Submission of Articles for the Gazette

The Editorial Board welcomes the submission of articles for consideration with a view to publication. In general, the most acceptable length of articles for the *Gazette* is 3,000-4,000 words. However, shorter contributions will be welcomed and longer ones may be considered for publication. MSS should be typewritten on one side of the paper only, double spaced with wide margins. Footnotes should be kept to a minimum and numbered consecutively throughout the text with superscript arabic numerals. Cases and statutes should be cited accurately and in the correct format.

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much less likely to be effective than to speak from notes: the lawyer appearing before the European Court is still there as an advocate and a few strong submissions will catch the attention of the Court, attract the waiverers, and maybe shake those who have already formed their preliminary view to the contrary on the basis of the written pleadings. This remains true even if many Members of the Court are listening in translation so that they may only receive what is said seconds or minutes after it has been said by the advocate. The interpretation is of very high quality. Short sentences, clear language and a moderated speed are, however, vital, not for the convenience of the interpreters, but for the communication and understanding of the arguments in the case. English lawyers have the advantage that most Members of the Court understand English — an advantage not enjoyed by the Greek, Danish or Portuguese advocate — and they can risk idioms, even the occasional humorous remark, so long as they bear in mind that idioms and jokes do not always translate easily.

This does not mean that counsel must drop down to the slowest possibly speed of speaking — even if they know that they are being interpreted into other languages. To my mind, what is predominantly important — and few advocates seem to have realised this — is to pause between sentences so that the interpreter can catch up. A sentence at normal court speed with a pause is more effective than a slow drawl without a break. Stick to the time limits, emphasise, develop or amend those arguments which have been set out in the report for the hearing, hammer home any point which may not have appeared fully enough in the report for the hearing.

British counsel have established a high reputation as advocates — not just with those of us who are anglophone, but generally — and their court experience gives them a strong lead over others who lack such experience in other jurisdictions. They can have a major effect on the decision by their presence at the oral hearing — and it must not be forgotten that the judges are human, so that the old saying "the higher the court the better the jury point" has some force so long as the argument does not become over-histrionic or emotional.

Where I think English counsel have really triumphed is in question time. They are used to being interrupted and can cope with questions even during their speeches. This does not happen frequently before the full Court since if one Member begins the others may follow and the hearing becomes disorganised — it does, however increasingly happen before a chamber of three judges.

Questions used to be asked after the speeches in reply; now more commonly they are asked after the first round of speeches so that the second speech can be shorter if indeed it is necessary at all. Answering questions crisply and firmly can do much to win a case — all too often lawyers go back to their text or seem incapable of dealing with the question, largely because they are apparently not used to the process.

For this purpose it is important, and by no means always done, for counsel to have immediately at hand the exhibits for the case and more particularly the relevant legislation. All too often some lawyers do not seem to be able to turn up quickly the relevant document when asked a question, all they have is their typed speech. The English lawyer's training and experience again stand him in good stead in this kind of situation.

Saving time at the moment is regarded as of great importance. It is for example quite enough to begin with "My Lords"; a shorter formula than that adopted and interspersed frequently by many Continental lawyers in their speeches "Monsieur le Président, Messieurs les juges, Monsieur l'avocat général", which seems to me always inordinately time wasting. And when counsel have said what they really have to say it is better to stop, to field questions and, if necessary, to come back in reply. □

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23 February, 1989
Medico-Legal Society of Ireland. *The pros and cons of screening for women.* Speaker: Dr. Peter Skrabanek, Dept. of Community Health, Trinity College, Dublin. 8.30pm. United Service Club, St. Stephen's Green, Dublin 2.

23 February, 1989
Continuing Legal Education Seminar. *The Legal Receptionist.* (for Receptionists). Metropole Hotel, Cork. 9.30am - 1.00pm.

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Continuing Legal Education Seminar. *The Legal Secretary.* (for Secretaries). Metropole Hotel, Cork. 2.30pm - 5.30pm.

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Continuing Legal Education Seminar. *Company Law.* Consultants: Paul J. G. Egan, Solicitor, and Michael G. Irvine, Solicitor. Metropole Hotel, Cork. 9.30am - 5.30pm.

2 March, 1989
Continuing Legal Education Seminar. *Land Registry Practice.* Consultants: Barry Lysaught, Solicitor, and Moling Ryan, B.L., Land Registry.

10 March, 1989
Insolvency Practitioners Association (Irish Branch) / Law Society. Meeting at Milltown Golf Club. Speakers: John Glackin, Solicitor, Frank Sowman, Solicitor, Ray Jackson (IPA) and Tom Grace (IPA). 6.00pm - 10.00pm. Members wishing to attend should contact Eileen McCormac at the Law Society. 710711.

30 March, 1989
Medico-Legal Society of Ireland. *DNA Profiles — the Identikit of the Future.* Speaker: Dr. Maureen Smyth, Ph.D., Forensic Scientist, Department of Justice. 8.30pm. United Services Club, St. Stephen's Green, Dublin 2.

4-7 May, 1989
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Further details on **CLE Seminars** may be had by consulting the CLE Brochure circulated with the November *Gazette,* or by contacting Geraldine Pearse at 710711.

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Practice Notes

Civil Proceedings in the District Court, Dublin.

1. All such proceedings should be headed – **Dublin Metropolitan District.**
2. (a) Civil proceedings for a simple debt, Tort, Breach of Contract should always be listed for Court No. 7, Dolphin House, Essex Street, Dublin 2, at 10.30a.m. on Mondays only.*

   (b) Enforcement proceedings, i.e. Examination Orders and Committal Summonses are issued for Court 9, Dolphin House on Thursdays and Fridays respectively.
3. (a) In cases for a simple debt the following procedure applies: the District Court Civil Office gives the return date and the record number in that proceedings. This record no. is placed on the original civil process, the copy civil process for the Plaintiff's Solicitor and this same number is also put on the notice of intention to defend on the process for service on the defendant. This record no. should always be quoted when bespeaking a decree by way of Summary Judgment.*
4. All District Court proceedings must show jurisdiction on the face of the document, i.e.

   (a) The Contract was made within said District;

   (b) The defendant resides within said District;

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5. The territorial jurisdiction of the Dublin Metropolitan District comprises of Dublin City and County and part of Co. Kildare which formerly was in the Lucan District Court Area. (See District Court Areas Order 1961.) Rathmichael in South Co. Dublin is in Bray D.C.A.
6. The costs in the District Court are set out by reference to S.I. 218/82 and the Fees Order, 1986 (S.I. 377/86).
7. Proceedings may also be brought in Dun Laoghaire and Swords District Courts on the appropriate Civil Days for the transaction of such proceedings. Information can be obtained from the District Court Clerk in Swords and Dun Laoghaire in this regard.

** In Proceedings where notice of intention to defend has been lodged defended dates are given for Court 9 or 10. Undefended actions for 2(a) above are put back for an Undefended hearing.* □

1992 and the Hit and Run Driver

EEC Directive leads to new MIBI Agreement

People who suffer personal injuries in road accidents caused by "hit and run" drivers will have enhanced protection as from 31st December 1988. As the result of the implementation of the Second Directive on Motor Insurance 84/5/EEC victims of such accidents occurring on or after 31st December 1988 will have a *right* to compensation for personal injuries incurred in road accidents involving vehicles whose drivers are unidentified or untraceable or found to be uninsured.

Compensation will be payable by the Motor Insurers Bureau of Ireland (MIBI). Under the terms of the new agreement reached between the Minister for the Environment and the MIBI, injured parties will no longer have to obtain a judgement against the uninsured driver but can apply directly to the MIBI for compensation. Injured parties will also have a right of redress to the Courts where they have been refused compensation or consider the compensation offered to be inadequate.

In addition an uninsured driver who suffers personal injuries in a collision with a vehicle driven by another uninsured driver will in future be entitled to compensation.

A further extension of the liability of the MIBI will come into force in respect of accidents occurring on or after 31st December 1992. As from that date the MIBI will pay compensation for property damage caused by uninsured (including stolen) vehicles. This will not however, include damage caused by unidentified or untraced drivers.

Practitioners should note that claims must be made by registered post to the MIBI within 3 years from the date of the accident giving rise to the death or personal injury. When compensation for property damages becomes payable claims will have to be brought within 1 year of the accident. □

Company Law

Registration of Charges

Practitioners should be aware that there is considerable delay in the Companies Office in the processing of form 47 (the form giving particulars of a charge pursuant to Section 99 of the Companies Act, 1963).

The form 47 and the issuance of the certificate of the charge does not appear on the relevant company's file in the Companies Office for approximately two months from the date of the delivery of particulars of the charge. Anybody therefore examining a company's file in the Companies Office might not have notice of a charge created but not yet filed. This could have serious implications for both a solicitor and his client.

The practice in the Companies Office is to immediately record all forms delivered to it on the computerised print out for each company. The fact that a charge has been created will therefore be shown on this record though *not* on the company's file.

It is therefore essential that when making a Companies Office search an examination be made of the computer print out of the particular company as well as the company file.

This will indicate that a charge has been created, though of course the details thereof will not be available until the filing on the particular company's file has been completed.

The Company Law Committee are in constant communication with the Companies Office about this and other such areas of practical difficulty.

The Committee welcomes practitioners' observations or comments on any aspects of Company law or practice which may be of concern to them.

Michael Irvine,
Chairman,
□ Company Law Committee

PEOPLE AND PLACES

KERRY

KERRY LAW SOCIETY ANNUAL DINNER
Front Row, L. to R.: His Honour Judge John Gleeson, Louise McDonough, Kerry County Registrar, Maurice Curran, President Incorporated Law Society, Mary O'Halloran, Hon. Sec. Kerry Law Society. Back Row, L. to R.: District Justice Humphrey Kelliher, Donal Browne, President Kerry Law Society, James Ivers, Director General Incorporated Law Society, Michael O'Connell, Chairman Kerry Law Society.

MAYO

At the Mayo Bar Association's [illegible]nual Dinner at Breaffy House Hotel. Back: Justice Bernard Brenn[illegible], Michael Keane, Minister Padraig Flynn, Judge Patrick Moran (Mayo Bar), An Tanaiste Mr. Brian Lenehan, Maurice Curran (Pres[illegible]ent, Incorporated Law Society), Colin Haddick, President, Northern [illegible]land Law Society; Bernard Daly and John Keane. Front row: Ma[illegible] McDermott, Mrs. Brian Lenehan, Dorothy Flynn, Mary Keane, [illegible]ean Morton, Mrs. M. Curran, Mrs. Bernard Daly.
Photo: Tom Campbell

LAW SOCIETY

PRESENTATION OF LAW SOCIETY PRIZE FOR BEST RESULT IN LEAVING CERTIFICATE ACHIEVED BY STUDENT OF KINGS HOSPITAL GOING ON TO STUDY LAW.
The President of Law Society, Maurice Curran (2nd left) making the Presentation to Mr. David Gentleman. The photograph also includes on far left and right the students' parents and Mr. Harry Myers, Headmaster, Kings Hospital.

LAW SOCIETY

INAUGURAL COLOURS MATCH BETWEEN LAW SOCIETY STUDENTS AND KINGS INNS STUDENTS
The Law Society team won by 2-1. The Law Society team included: (left to right, standing): David Colbert, Seamus Downs, Mick Twomey, Niall Black, Edward Evans and Niall Cunningham. (left to right, front row): John Burke, Donagh McGuinness, Kieran O'Connor, Terry Doyle, John Davis and Timothy Scanlon.

MEATH and CAVAN

PRESIDENT OF THE LAW SOCIETY MEETS MEATH AND CAVAN BAR ASSOCIATIONS
The President of the Law Society of Ireland Mr. Maurice Curran (second from left) with from left: Joan Smith, President Cavan Bar Association, Dermot Byron, President of Meath Bar Association, Joe Smith, Secretary Cavan Solicitors Association, pictured at a meeting of the Cavan and Meath Bar Associations in Kells.
Photo: Tom Conachy.

DUBLIN

At the launch of a Report on "Press Freedom and Libel", commissioned by the National Newspapers of Ireland, were (from left to right): Professor Kevin Boyle, Co-Author, The Attorney General, Mr. John Murray, S.C., Mr. Louis O'Neill, Chairman, National Newspapers of Ireland, Mrs. Marie McGonagle, Co-Author, The Chief Justice, Mr. Thomas Finlay, S.C.

DUBLIN

At the launch of Henry Murdoch's book "A Dictionary of Irish Law", on 29 November, 1988 were Henry Murdoch (left) and Mr. Gerard Collins, T.D., Minister for Justice. The Dictionary is reviewed elsewhere in this issue of the Gazette.

Sources of European Community Law:

Where to find them

PART I

By Margaret Byrne, Librarian, The Law Society

This article, in two parts, is a guide to the literature of European Community Law. Part I covers the sources of the European Community's legal system –

the primary legislation: the treaties establishing the European Communities;

the secondary legislation: the regulations, directives, decisions and other acts made by the Community institutions as provided for in the treaties;

the international agreements concluded between the European Communities and non-member states or other international organisations;

together with the case law of the European Court of Justice.

Part 2, which will be published in the next issue of the *Gazette*, will deal with the secondary literature including EC and commercial publications.

Primary Legislation

The European Communities comprise three separate Communities each established by a separate treaty:

the European Coal and Steel Community, established by the ECSC Treaty (Treaty of Paris, 1951);
the European Economic Community, established by the EEC Treaty (Treaty of Rome, 1957);
the European Atomic Energy Community, established by the EAEC or Euratom Treaty (Treaty of Rome, 1957).

The principal amending treaties to these three foundation treaties are:

the Convention on Certain Institutions common to the European Communities (Rome, 1957);
the treaty establishing a Single Council and a Single Commission of the European Communities (the Merger Treaty) (Brussels, 1965);
the Treaty of Luxembourg of 22 April, 1970, and the Treaty of Brussels of 22 July, 1975, on budgetary matters;
the Act of the Council concerning direct elections to the European Parliament (1976);
the Single European Act and Final Act, 1986;

and the three accession treaties:

the first Treaty of Accession and its Annexes (1972) (accession of UK, Ireland and Denmark);
the second Treaty of Accession and its Annexes (1979) (accession of Greece);
the third Treaty of Accession and its Annexes (1985) (accession of Spain and Portugal).

The current official edition of the treaties published by the Office for Official Publications of the EC is the 1987 edition in 2 vols.

Vol. 1 – *Treaties establishing the European Communities; treaties amending these treaties; Single European Act.*

Vol. 2 – *Accession documents.*

These volumes contain all the treaties and their annexes in force on 1 July, 1987.

The text of treaties and amendments are published in the *Official Journal* L Series. (See below for details of OJ.)

Publications of the Office for Official Publications of the EC, including Catalogues of EC Publications, can be purchased directly or ordered through the Government Publications Sales Office, Sun Alliance House, Molesworth Street, Dublin 2.

The treaties and amendments thereto have been implemented in all the member states by national legislation following, where necessary, amendments to national Constitutions. In Ireland, following a referendum, a new Article 29.4.3 was inserted in *Bunreacht na hEireann* by the Third Amendment of the Constitution Act, 1972. This was followed by the enactment of the European Communities Act, 1972, which came into effect on 1 January, 1973.

European Communities (Amendment) Acts were enacted to provide for the second and third treaties of accession as well as for other amendments to the treaties, the most recent being the European Communities (Amendment) Act, 1986, and the Tenth Amendment of the Constitution Act, 1987, to incorporate into Irish law the changes effected by the Single European Act. A full list of the EC legislation enacted can be found in the *Index to the Statutes 1922-85* and subsequent annual lists.

In addition to the official texts of the treaties published by the EC there are various commercially published editions with annotations, including Rudden & Wyatt, *Basic Community Laws,* 2nd Ed., 1986, and Sweet and Maxwell's *Encyclopaedia of European Community Law,* B volumes, and Sweet and Maxwell's *EC Treaties,* 4th Ed., 1980.

Secondary Legislation

Secondary legislation comprises the legal acts made by the Council and the Commission of the EC in implementing the powers granted to them in the Community treaties.

They consist of obligatory acts: regulations, directives and decisions under the EEC and Euratom Treaties and decisions and recommendations under the ECSC Treaty and non-obligatory acts: recommendations and opinions under the EEC and Euratom Treaties and opinions under the ECSC Treaty. The names of the legal acts under the EEC and Euratom Treaties differ from those of equivalent effect under the ECSC Treaty. The following tables illustrate the equivalent nature of the acts under the three Treaties:

EEC/Euratom	**ECSC**
Regulations	Decisions (General)
Directives	Recommendations
Decisions	Decisions (Individual)
Recommendations	
Opinions	Opinions

In terms of the acts made under **the EEC Treaty**, regulations are binding in their entirety and are directly applicable in all member states, without the necessity of national implementing legislation. Regulations are published in the *Official Journal* L Series (Acts whose publication is obligatory) and enter into force on the date specified in the text or, in the absence of a commencement date, on the twentieth day following publication. Publication is a necessary condition of the regulations having effect.

Directives are binding as to the result to be achieved upon each member state to which they are addressed. Directives are intended as instruments of approximation or harmonisation and they are normally issued with a set time limit within which member states must implement their requirements by national legislation. Directives are published in the *Official Journal* L Series.

Decisions are binding in their entirety upon those to whom they are addressed – individuals, member states or corporate groups. They are published in the *Official Journal* L Series. The majority of Commission decisions are determinations of specific cases. Many of these cases, largely concerned with restrictive practices, are reported in the *Common Market Law Reports* and are included in the Indexes to EC case law.

The non-obligatory acts, recommendations and opinions – are not binding. They are published in the *Official Journal* L Series.

Official Journal

The *Official Journal* is the official gazette of the European Communities. It carries the text of all EC primary and secondary legislation and official announcements as well as information on the activities of the EC institutions.

The *Official Journal* is published almost daily in two main series, issued separately. It is available in paper copy and microfiche.

1. The L series (legislation) contains the text of enacted legislation divided into two sequences:
   (a) Acts whose publication is obligatory (EEC regulations and ECSC general decisions),
   (b) Acts whose publication is not obligatory (all other legislation referred to above).
2. The C Series (Information and Notices) contains different categories of information from the various Community institutions. Not all categories will be necessarily included in any one issue. The following is covered:
   (a) Commission – the text of proposed legislation which requires an Opinion from the European Parliament, rates of the European Currency Unit.
   (b) Court of Justice – a list of new cases brought before the Court and summaries of the judgments of the Court.
   (c) European Parliament – minutes of the Plenary Sessions and written questions and answers.
   (d) Economic and Social Committee – opinions of the ESC.
   (e) Notices of invitation to tender for commercial and research contracts and staff vacancies.

In addition to the two main series an S Series (Supplement) gives details of public supply contracts and the *Official Journal: Annex* publishes the full text of the debates of the European Parliament.

On the accession of the UK, Ireland and Denmark in 1973 Special Editions of the *Official Journal* were published in English and Danish versions giving official translations of the legislation enacted between 1952-1972 and still in force in January 1973.

Indexes to the Official Journal

The index is issued monthly with an annual cumulation. It is divided into two parts:

(a) Methodological Table,
(b) Alphabetical Index.

The Methodological Table lists the legislative Acts by document number; the Alphabetical Index is a keyword subject Index.

Because of the lack of cumulation of the annual indexes and the previously complicated classification arrangement of the alphabetical Index it is often easier to trace legislative acts through other sources such as Butterworth's *European Communities Legislation: Current Status,* published annually and kept up to date by 3 cumulative supplements published during the year; Sweet and Maxwell's *Encyclopaedia of European Community Law* – C volumes; the EC's *Directory of Community Legislation in Force,* published twice yearly (not as easy to use as Butterworths' *Current Status)*; the tables of EC secondary legislation in *Halsbury's Laws of England,* 4th ed., Vol. 52 and current service to *Halsbury.* The full text of EC legislation is searchable on CELEX, the Commission's computerised information retrieval system.

National implementation of secondary legislation

As stated above, in the category of obligatory acts, EEC regulations are directly applicable in all member states and ECSC decisions are directly applicable to those to whom they are addressed. Directives, being binding as to the result to be achieved in the member states concerned, are intended to be implemented by national legislation within a specific period. In Ireland the implementation of directives is usually by statutory instrument, though where a directive requires a major reform of the law, such as the second and fourth Directives on Company Law, implementation is by statute – in these cases by the Companies (Amendment) Act, 1983 and the Companies (Amendment) Act, 1986, respectively.

To find out if a particular directive has been implemented by legislation, the *Indexes to the Statutory Instruments* (published by the

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LAW AGENCY

Stationery Office up to 1986) and Humphreys' *Index to Irish Statutory Instruments*, up to date to the end of 1986, should be consulted. There is a useful subject Index to the S.I.s in *Humphreys*. A chronological list of Statutory Instruments implementing EC secondary legislation is published in the *Index to the Statutes*. The Annex to the twice yearly Report on EC Developments to the Houses of the Oireachtas also contains a list of implementing Statutory Instruments.

International Agreements

International Agreements between the European Communities and other international organisations are published in the *Official Journal* L Series. *Collected agreements concluded by the European Communities* have been published by the EC in 12 volumes to date, covering the years 1958-1982. An index to volumes 1-11 incl. was published in 1986. A Table of International Agreements is published in vol. 52 of *Halsbury's Laws of England* (plus current service).

Case Law

The decisions of the Court of Justice of the European Communities are published in an official series, *Reports of Cases before the Court,* also entitled *European Court Reports* and cited as ECR. This English language series commenced in 1973. (English translations of the volumes from 1954 to 1972 have been published.) The authentic version of a judgment is that in the procedural language of the case; this version is included in the ECR. The ECR are published in approx. 12 loose parts per year. The most recently published English language issue being 1986 — Part 10. Annual indexes are published.

The main alternative series to the ECR is the *Common Market Law Reports* (CMLR), published weekly by the European Law Centre. While these reports are not the official versions, they are more up-to-date, and, in addition to annual indexes, cumulated Indexes to a number of volumes are produced from time to time. The CMLR include a selection of decisions of the Commission and judgments of national courts having a bearing on EC law in addition to those of the European Court.

Since 1970 the CMLR include the text of the judgment of the European Court in the procedural language. Since 1988 they include an *Antitrust Supplement.*

Other sources of EC case law are the *Proceedings of the Court of Justice, of the European Communities,* a weekly bulletin issued free of charge by the Information Office of the Court giving a summary of the judgments and opinions of the Court during the week in question and listing new cases. It is useful primarily as a current awareness service. The *Times* and *Financial Times* report the significant European Court judgments in their law reports section. Short summaries of recent judgments and details of new cases are published in the C Series of the *Official Journal.* Summaries and articles on recent cases are published in general and specialised journals, such as the *New Law Journal,* the *European Law Review,* the *European Competition Law Review,* the *European Intellectual Property Review.*

Copies of all the Judgments or Orders of the Court and Opinions of Advocates General may be obtained on subscription from the Internal Services Division of the European Court. These are issued in typescript shortly after the judgment is given. It is also possible to order copies of individual judgments from the Court's Internal Services Division for a small fee per document.

The European library file on LEXIS (marketed in Ireland by Itelis Ltd.) contains the European Court Reports 1954-, the Common Market Law Reports 1959-, unreported decisions 1980- and Commission decisions relating to competition 1972-. CELEX, the EC's database covers the judgments and opinions of the European Court 1970–.

Indexes and Digests

As mentioned above the ECR and CMLR produce their own Indexes. These Indexes include tables of Community legislation which list cases arising under particular treaty articles, regulations, directives etc.

The Court of Justice publishes a looseleaf Digest, *Digest of case law relating to the European Communities.* The main series, the A series, covers the years 1977-1982. It was preceded by Eversen & Sperl, *Compendium of the case law relating to the European Communities 1953-1976* (1973-1976 only in English). These Indexes also allow for searching against specific Community legislation.

The fullest Index and Citator to EC case law 1953-1983 is the *Gazetteer of European Law* published by the European Law Centre. Commencing in January 1989 the European Law Centre intend recommencing publication of the *Gazetteer* under the title of *Case Search Monthly* with annual cumulated volumes. The period between 1983 and 1988 will be covered separately.

Case law can also be traced through *Current Law's Case Citator,* vols. 51 and 52 of *Halsbury's Laws of England* (plus cumulative supplement and current service), Sweet & Maxwell's *Encyclopaedia of European Community Law.*

Judgments Convention

The 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters, has been in force in original member states since 1 February, 1973. The text of the 1978 Accession Convention (on the accession of Denmark, Ireland and the UK), together with the text of the 1968 Convention and 1971 Protocol, are published at OJL304, 30.10.78. The Greek Accession Convention is at OJL388, 31.12.82. The Convention was implemented in Ireland by the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988, which came into force on 1 June, 1988 (S.I. No. 91 of 1988).

The following Statutory Instruments have been made and are in force: District Court (Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988) Rules, 1988, S.I. No. 173 of 1988, and Rules of the Superior Courts (No. 1) 1989, S.I. No. 14 of 1989. A *Guide to changes in the Rules of the Superior Courts, 1986, as a consequence of the coming into operation of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988,* is available from the Government Publications Sales Office.

The *Digest of Case Law relating to the European Communities,* D series, indexes and digests cases on the interpretation of the

Contd. on page 31.

Multi Disciplinary Partnerships

In May 1988 the C.C.B.E. examined the issue of multi-disciplinary partnerships. Mr. H. Collot d'Escury from the Netherlands presented a paper from which the following is an extract. Mr. d'Escury looked firstly at developments within his own country and examined some of the more general arguments both for and against such partnerships. He then attempted to list the various professional combinations which might make up such practices. Finally, in the extracts included here, he proceeded to examine the conflict of interest issue and looked specifically at partnerships between Lawyers and Chartered Accountants.

Some examples of the kind of problems that may arise

In order not to create the impression that a mixed partnership is all honey, let me give you some examples of problems that nevertheless may arise.

Conflicting professional rules:

In the case of notaries in the Netherlands, it is professionally acceptable for the notary, should two parties wish to enter into an agreement, to advise and draw up a draft agreement for both parties concerned.

Now let us assume that one party is a client of one of the notaries of your firm and the other of one of the lawyers. The first client (that of the notary) regards it as normal and insists that his notary makes the draft for both sides and does not accept that the lawyer-partner advises the other client, which client has a much longer standing with the firm.

What do you do?

Conflicting interest:

The difference in the type of practice may create difficulties. The notary may have clients who use his services always for conveyancing matters in real estate. Such a notary client – certainly where the mixed partnership is fairly young – not necessarily uses the same MDP firm for lawyer services.

Now it may happen that such a notary client is engaged in a conflict leading up to legal action against a client of one of the lawyer partners. As the notary client himself has instructed another law firm to handle this matter there seems to be no problem. The lawyer partner is acting for the adversary of the notary client.

So far so good. What may happen, however, as we found out, was that suddenly out of the blue the notary client objected to the lawyer partner acting in this matter on the ground that the notary partner has privileged knowledge of certain real estate transactions he intended to complete involving considerable amounts of money. He felt that this was dangerous for him.

It has been argued of course that there was no reason for the notary client to be afraid, because the lawyer partner will never try to have and cannot have access to this privileged knowledge.

Furthermore, we pointed out that he himself had chosen another law firm to assist him in the legal proceedings. All to no avail! We decided in the end to withdraw from the lawsuit, but were not happy.

It created much commotion, also within the law firm and brought us to the conclusion that a "mixed committee" to handle these highly complicated conflicts of interest problems – which in this case we in fact had not foreseen – was absolutely necessary!

This example brings me to another problem. How do you realise as partners of the one discipline that there may be a conflicting interest with a client of one of the partners of the other discipline?

In our case we can ask the administration whether the name of the counterpart of one of our clients appears in the client administration of either the law practice or the notary practice and who is the responsible partner. The client administration is split in two parts but the administration, at least the head of the administration, can do this check.

The question was put to me whether one should not avoid the possibility that the partners of one profession can get to know the names of the clients in the section of the other profession. In our case we do not want to avoid this unless the partner in question in a very special case decides that for reasons such as protection of the client, it should not be known.

One can, however, keep this totally separate and avoid this possibility if there were reasons – for example, again, the protection of the client. This could arise in the case of a mixed partnership with a tax lawyer or accountant, who do not – like the lawyers – enjoy the privilege of professional secrecy in criminal investigations.

One would then have to keep the administration of the law practice totally separated from that of the tax practice or accountant's practice and include only the result in the administration of the mixed partnership.

In our case there remains the question of professional secrecy. We see no reason to avoid the situation where a practitioner on the one side can find out whether a certain person or company is a client of one of the partners of the other side. The knowledge he thus obtains is privileged and thus protected. In case of a mixed partnership with tax lawyers or chartered accountants one would have to arrange a system whereby the tax lawyer and/or accountant would have no access to the names of the clients of the law practice, combined with a warning system for the lawyers.

The mixed partnership with chartered accountants

Let us now look at the question whether (under a ruling such as in force in the Netherlands) a mixed partnership between lawyers and chartered accountants could be allowed.

In my opinion there are certainly grounds to argue that it should not be allowed. Basically, these grounds are to be found in the prime function of the chartered

accountant, which, in essence, is not the advising of his clients, but auditing the annual accounts of his clients. Consequently, the chartered accountant does not primarily have the same relationship of trust with his client as the lawyer has. His client may hesitate to tell him all the facts because by doing so the client may jeopardise the chance of obtaining a clean certificate for his accounts.

It is true of course that in many cases the chartered accountant also is an adviser to his clients, but that does not alter the fact that in the first place he is the person that on the request of his client has to audit/certify the accounts of that client.

This difference in function, in my opinion, is an aspect to be seriously reviewed when deciding, for example, under the existing Ruling in the Netherlands, whether the profession of chartered accountant qualified under that Ruling.

It is not surprising that most law firms have reduced the so-called accountant's letter (the statement about pending litigation) to the bare minimum. These firms – even if they provide the information to the chartered accountant on request of their clients – try to limit this to the bare minimum because they do not wish their clients to hesitate to come to them and consult them about possible litigation out of fear that this may have to be included in the letter to their accountants.

The problem lies in the fact that the chartered accountant has by law a public duty to perform.

Assume a considerable claim against a client of one of the lawyers, which client also uses the services of one of his chartered accountant partners; the lawyer will have to advise his partner, the chartered accounant, at some time about the chances in the legal proceedings. How free will he feel to advise his client?

Considered from this angle the conclusion may have to be that such a combination of professions is undesirable, because it could jeopardise seriously the free and independent exercise of the law profession or in any case make that impression on the outside world.

It is not a question of conflicting interests as may occur in any mixed partnership, also not of how to make sure that privileged knowledge remains with the lawyer handling a certain case. It is a matter of difference in the relationship with the client; a problem that does not arise in the case of a mixed partnership with for example, a tax lawyer or a public relations adviser or consultant, because they all are advisers, who have no public function as the accountants primarily have. It is this difference in function that may well have to lead to the conclusion that a mixed partnership with accountants is not desirable as it may endanger the free and independent exercise of the profession. □

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Solicitors Apprentices Rugby Club

Solicitors Apprentices Rugby Club
-v-
The Bar

At last the Solicitors' Apprentices managed to recapture the **Joseph McGowan Memorial Cup** with an overwhelming comeback in the last ten minutes of the match in Belfield on the 9th December 1988.

The Bar swept in to a commanding lead converting two tries by Dermot Flanagan and a penalty kick by Paul Gardiner with tries from Stephen Walker and Michael Carney in response.

A stern half-time talking to by "coach" Michael V. O'Mahony took time to work. Paul Gardiner kicked another penalty leaving the score at 18–8 to The Bar with 10 minutes to go.

The Apprentices then came alive. After great forward work on the right touch-line, Pat Farrelly scrambled over for a try converted by Paddy Cadell. Following more "pack power" which brought play within five yards of the Barristers' line, John Shaw, with some Margot Fonteyn-like footwork, shimmied over the line to tie the game. The same man then converted.

Three minutes later he repeated this "entrechat" to bring the final score to 26–18.

Our thanks to the Sponsors – Mr. Anthony Ensor and McGowan & Co., Solicitors, of Balbriggan and to Conor Sparks who made the presentation afterwards.

Our thanks to Smithwicks who also sponsored, and to Michael O'Mahony for his presence and support. Special thanks to referee Declan Gardiner, who put up with a lot of abuse from both sides.

The next fixture is on March 3rd, 1989, against the Scottish Law Society by which time we hope to have acquired a set of matching jerseys.

The Team: John Kilroy, Rory Deane, Pat Farrelly, Stephen Walker, Nevin O'Shaughnessy, John Shaw, Michael Carney, Conor O'Callaghan, Kevin O'Meara, Bill Carroll, Harry Fehily, Robert Browne *(Captain),* Paddy Cadell and Paul McKnight. □

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1992 – Completing the Internal Market

1992 has been much discussed in the press of late. What has happened to make the EEC suddenly so important? What momentous event takes place on 1st January 1992 – or is it 31st December 1992? This article outlines what 1992 is all about and discusses a few areas of particular relevance to businessmen and lawyers.

by
Michael Hutchings,
Solicitor,
Lovell White Durant.*

What is the internal market?

One of the principal aims of the EEC Treaty, as amended by the Single European Act, is to create within Europe:

> *"An area without internal frontiers in which the freedom of movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."*

This aim is to be achieved "progressively . . . . over a period expiring on 31st December 1992". As the EC Commissioner in charge of completing the Internal Market, Lord Cockfield has pointed out, the aims are ambitious; it is not merely a question of simplifying frontier controls but of creating an area "*without* internal frontiers". The freedoms to be ensured are not just for the benefit of individuals, but also for "goods, services and capital."

Why is an internal market important?

The creation of the internal market is vital for the success of the Community: it is only by enabling commerce and industry to make full use of the vast single market which the twelve Member States constitute that the Community can continue to compete with its main competitors, particularly from North America and the Far East.

The opportunities of the internal market and the costs of maintaining the present divided status ("non-Europe") are immense: the European Community has over 320 million inhabitants, nearly as many as the population of the USA and Japan combined. More than half of most EEC countries' imports and exports are from or to the rest of the EEC. For example, in the 11 months January – November 1988 74% of Ireland's exports, amounting to £11.2 billion went to other EEC countries (38.5% to the UK and 35.5% to the rest of the EEC). In the same period of Ireland's imports came from the EEC.

But the costs of doing business with eleven other Member States, each of which still maintain restrictive national laws and practices, are immense. The Commission has carried out a detailed study of the costs of "non-Europe". These include:

- *administrative costs* incurred in dealing with different national bureaucratic requirements:
- *higher transport costs* due to border formalities;
- increased costs as a result of having to apply *different national standards;*
- duplication of costs in *separate research and development;*
- the high costs of *heavily regulated public supply policies;*
- *failure to capitalise on the market potential* of a much larger "home" market.

Aside from direct additional costs, it is estimated that the cost to industry of being denied the economies of scale of a unified internal market is as much as 20-30% of unit costs. Furthermore, the creation of the internal market could, it is estimated, lead to the creation of 1.8 million further jobs and an increase in economic activity throughout the Community.

How complete is the Internal Market already?

Even before the publication of the Commission's White Paper proposing the target of 1992 for completion of the Internal Market, considerable progress has been made in removing barriers to trade:

The *common customers regime* applies throughout the EEC for trade with non-EEC countries (subject to a few remaining derogations for Spain and Portugal). No duties are payable on trade within the EEC. The simplified customs form ("single administrative document") introduced on 1st January and replacing hundreds of documents previously used in different countries has further helped to ease the flow of goods.

The *Sixth VAT Directive* has gone some way towards harmonising internal taxation.

Harmonising directives have ironed out distortions in trade created by differing technical, composition, purity and other regulations.

The *"Cassis de Dijon"* case confirmed a basic tenet of EEC law: once a product is lawfully marketed in one country, its sale must not be restricted in other countries. Only very narrow health and safety exceptions are allowed. This principle was recently confirmed by the European Court in a case where German laws which effectively kept out all imported beer were condemned.

The Commission's 1985 White Paper

But despite these achievements, progress towards the completion of the Internal Market was slowing down. The 1985 White Paper set out the Commission's proposals for completing the Internal Market by 1992. It lists detailed proposals for the removal of physical, technical and fiscal barriers faced by goods, persons, services and capital. Fourteen European 1992 Information Leaflets have been issued by the European Bureau outlining the Commissions proposals set out in the 1985 White Paper. Subjects covered include Insurance, Company Law, Consumer Protection, Social Dimension of the Single Market, Public Procurement, etc. They may be obtained from the Bureau. Tel. 01-601992.

Goods – Physical Barriers

Internal border controls will largely become unnecessary by 1992.

First, Member States will no longer need to monitor internal policies which themselves conflict with EEC rules.

Secondly, it is anticipated that by 1992 intra-Community road transport will no longer be subject to quotas thus obviating the need for Member States to check movements of goods vehicles across frontiers.

The other main justifications for maintaining border posts, such as monitoring the movement of goods and people for statistical purposes, health reasons and prevention of crime will be dealt with by removing the control of those activities wherever possible from border areas.

Goods – Technical Barriers

Removing border controls is not sufficient to guarantee a genuine Common Market. Technical barriers must also go to achieve the aim that if a product is lawfully manufactured and marketed in one Member State, there is no reason why it should not be sold freely throughout the Community.

The Commission has largely abandoned the aim of setting harmonised standards for each and every product. In future, the Commission will press Member States to recognise other countries' standards and allow goods to circulate freely on the basis of this mutual recognition of national regulations and standards. Where the Commission does proceed to harmonise standards, it will restrict itself to laying down essential health and safety requirements: this approach will apply to veterinary controls, food products, chemicals and pharmaceuticals, electrical items, construction products and motor vehicles.

The proposals are still extensive and too numerous to spell out in this article. But, by way of example, in the food law area, directives will cover:

- *labelling,* to ensure customers are given the necessary information and so are not misled:
- *additives, flavourings,* etc. covering all items not already dealt with in EEC directives:
- *containers* coming into contact with food;
- *quick frozen foods;*
- controlling the use of the *irradiation* process.

New European standards for many products (measuring instruments, pressure vessels, toys, to name but a few) will be worked out by European standards bodies, such as CEN and CENELEC. The National Standards Authority of Ireland encourages representation by Irish manufacturing and other interests on the relevant CEN and CENELEC technical committees. Since in many cases Irish manufacturers will have to adapt to standards already familiar to their competitors it is essential that early familiarity with these standards is obtained by participation.

Public Purchasing

EEC rules adopted in 1971 already require government departments and local authorities to allow suppliers or contractors from any Member State to bid for contracts over a certain size – 200,000 ECU (about £140,000) for supply contracts and 1 million ECU (about £700,000) for works contracts.

Measures proposed would:

- remove or reduce the excluded sectors, such as water, transport, energy and telecommunications;
- extend publicity requirements so that potential suppliers and contractors from throughout the Community have an opportunity to bid for contracts:
- give "losing" bidders a means of complaining and taking action against non-complying authorities.

Financial Services

There are more barriers to free trade in financial services than in most other areas of economic activity. Examples of restrictions include bans on individuals taking *mortgage loans* from foreign lenders, requiring *property insurance* to be obtained from national insurers, and marketing of *unit trusts.*

The Commissions proposals are far reaching and will enable financial services companies based in any part of the EC to market their services throughout the EC. It is at least partly in this context that the proposed financial services centre is being established in the Custom House Docks area in Dublin.

The fields to be covered by the liberalisation process are numerous, but include:

Banking:

The remaining barriers faced by banks wishing to establish in other countries will be removed. Thus a single banking licence obtained in one country will enable a bank to market its services throughout the twelve member states.

Mortgage Credit

Equally some loan institutes will, subject to compliance with the EEC standards, be able to offer loans to house purchasers in other countries.

Securities

Common standards will be established for disclosure for investors by means of prospectuses: issuers will be able to use standard documents in each country rather than satisfying a number of different stock exchange requirements.

Unit Trusts

The 1985 directive allowing unit trusts to be marketed freely in the Community will take effect in 1989.

Insurance

Many harmonising directives in the insurance field have already been adopted. Insurers in the non-life area will eventually be able to cover risks in any Member State (although widely differing rules at present may delay this aim beyond the magic date of 31st December 1992).

Transport Services

The Commission is proposing to phase out the quota system for road transport leading to substantial reductions in costs. Measures to promote greater freedom in air and maritime transport, road passenger transport and railways between Member States will also be adopted. Traditional national monopolies in all areas of transport will be opened up to competition from the private sector and from other countries.

Information Technology

The Commission has already submitted proposals to the Council for the establishment of *common standards* for IT equipment which will be developed by the International Standards Organisation (of which Eolas which incorporates the National Standards Authority of

Ireland is a member). Member States will no longer be allowed to favour suppliers in IT (or other) public procurement programmes. Testing and certification of equipment will follow common procedures.

The removal of fiscal barriers

The Commission regards the harmonisation of indirect taxation as an essential and integral part of achieving the Internal Market. The first step to achieving such harmonisation will be the approximation throughout the EEC of turnover tax (VAT) rates. Contrary to reports in the press, the Commission's aim is not to impose uniform rates throughout the EEC, but rather to restrict variations between rates for particular classes of goods. This is analogous to the American practice which suggests that variations of indirect tax rates of more than 5% lead to distortions of trade. The Commission is therefore proposing to set standard rates for indirect taxes on classes of goods which Member States will be permitted to exceed or undercut by margins of 2.5%. For example, if the standard rate for particular goods were to be set at 16.5% actual rates adopted by Member States could be in the range of 14% to 19%.

Merger Control

At present the Commission can control mergers only through the application of the competition rules contained in the Treaty (Articles 85 and 86). The completion of the internal market necessitates a specific merger control instrument especially adapted to deal with an increasing number of cross-frontier mergers. The proposed merger regulation is based on the following principles:

- The Regulation will apply only to mergers "having a Community dimension", related to geographical scope and turnover.
- Qualifying mergers must be notified in advance and not implemented until the Commission has considered them.
- Mergers which create or strengthen a dominant position in the Community, will not be compatible with the single market. Where the combined market share of the companies concerned does not exceed 20%, it is presumed that a dominant position does not exist. Above this threshold, a merger will only be permitted if it would contribute to improving the production or distribution of goods or would promote technical or economic progress.
- The Commission will have only two months following notification to initiate proceedings and a final decision would normally have to be taken within the following four months.

Conclusion

By the end of 1988 the Commission had tabled 243 of the approximately 300 directives covering the proposals contained in the 1985 White Paper for the completion of the Internal Market.

The adoption in the Single European Act of Article 100A permits the Council to adopt legislation relating to the completion of the Internal Market on the basis of a "qualified majority" rather than an absolute majority. Although inevitable political objections persist in many fields, this procedure will ensure that measures cannot be blocked by one or two recalcitrant Member States. Despite widely held views that 1992 is still a pipe dream, the momentum is inevitable: the goal of a single European market is going to be achieved.

The DTI campaign to promote 1992, spearheaded by Sir John Harvey-Jones and Sir John Egan, is designed to remedy the level of ignorance as to the implications of 1992 for British business. Solicitors have an important role to play; they should inform themselves of the issues and be prepared to advise on the implications for their clients of a range of new laws and business opportunities.

MICHAEL HUTCHINGS
Lovell White Durrant
London

Michael Hutchings practises in the field of EEC law, and spent four years in his firm's office in Brussels. He is currently Vice-Chairman of the English Law Society's Solicitors European Group, and wrote this article for publication in its Journal. It is reprinted here with permission of the author and some minor changes have been made to suit the Irish context. □

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Book Review

A Dictionary of Irish Law
by Henry Murdoch. Published by Topaz Publications, 1988.
£25.00 PB, £38.00 HB.

It must be at least thirty years ago that your reviewer discovered, during a rare office clear-out, three large, dusty, coverless and dilapidated legal tomes. Being naturally reluctant to throw out anything of potential usefulness or value, he consulted the Society's then librarian, Colum Gavan Duffy. That mine of bookish information was enthusiastic! The three volumes were the complete set of Stroud's Judicial Dictionary, 2nd Edition. Valuable? Not very – there was a later edition. Useful? *Extremely.* Get the set re-bound and see. He was absolutely correct. Stroud remained a consistently useful provider of answers to many random problems. In fact, before turning to Halsbury, a quick look at this Judicial Dictionary often saved lengthier research.

More recently, other legal dictionaries have come on the market, together with a relatively new edition of Stroud – well worth having, but expensive. All these are based on UK law and the need has increasingly been apparent for a publication taking note of the ever enlarging body of Irish statute and case law, in which words and phrases have received judicial definition or consideration.

This, literally, mind-bending task has now been undertaken by Henry Murdoch B.E. C.Eng., FIEI, MBA, Barrister, whose *Dictionary of Irish Law* was published by Topaz Publications of Dun Laoghaire on 29 November, 1988.

The book is excellently produced, in both hardback and paperback, at £38.00 and £25.00 respectively. Sadly, the publishers have sent only the paperback for review! Nevertheless, even the paperback edition made light work of a pre-Christmas boat trip from Dun Laoghaire to Holyhead, as this is a book every bit as enjoyable to browse through as to call upon for solving instant problems.

One can but marvel at Mr. Murdoch's industry. How much easier it would have been merely to have up-dated a previously existing work. But Mr. Murdoch has started from scratch and has produced a 570 page work – in what must be the truest sense of the word – which is in fact more than a mere 'dictionary'; while a great many words or phrases are given simple and straightforward definitions or explanations, many are dealt with discursively, to which extent the book may be regarded as a mini-Halsbury and very much less expensive!

In addition to words which have been defined statutorily or judicially, Mr. Murdoch has included a very fine selection of those Latin Tags, so much beloved by our legal forefathers. These are not without their usefulness even today. On receiving an enquiry from a friend as to the quality of the pint in a certain hostelry, one would arguable be negligent if one failed to qualify a recommendation with the observation *Simplex commendatio non obligat,* especially if, *non cepit modo et forma.* Although a defence could perhaps be raised on the principle of *nemo contra factum suum proporiem venire potest.*

Arguably, the time-worn expression ''this is a book no practitioner should be without'' has tended, over years of repetition, to have lost its impact. For once, however, the words are wholly appropriate. Despite a few typographical errors – apparently impossible to avoid through late-twentieth century technology – this excellently produced book really is a ''must'' Buy the hardback edition – it will receive constant handling – and accept a further piece of advice: don't just put the book on your shelf and forget it – browse through it at length, as I have done; enjoy it for what it is and, at the same time, discover just how much is in it and how it works. There is much more in it than you would ever imagine. Mr. Murdoch deserves our heartiest congratulations. But of course, *simplex commendatio non obligat!*

Charles R.M. Meredith

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Contd. from page 23.

Convention referred to the European Court by national courts. These cases are reported in the *European Court Reports* and the *Common Market Law Reports.* The *Digest* also includes extracts of selected decisions of national courts – in the language of the court – on the Convention. The D series of the *Digest* is up-to-date to 1984. □

Correspondence

The Editor,
Law Society Gazette,
Blackhall Place,
Dublin 7.

21st November, 1988

Re: Building Societies and Tiered Rates

Dear Sir,

As Conveyancers will be aware, the Building Societies' (Amendment) Act 1986 prohibits tiered interest rates with effect from the 1st April, 1987. Tiered rates are defined as meaning the rate of interest on a loan where such rate is determined by reference to the amount of the loan made and is greater than the lowest rate of interest applicable to borrowers generally.

On a couple of occasions recently I have acted for clients borrowing from the EBS, where loan approval has been sanctioned "subject to interest rate being one quarter of a percent above home loan base rate". Being concerned as to whether such a condition could be construed as amounting to a tiered rate in contravention of the Act I made enquiries with the EBS, who justify such a condition on the grounds that this levy is charged to borrowers not having any savings record with them. I understand that the Irish Nationwide adopted a similar policy.

In raising the matter with the Department of the Environment they advise me that they were aware of such conditions but they do not take the view that such a condition amounts to the re-imposition of a tiered rate couched in different terms.

I have noted also that the EBS in their standard loan approval letter stipulates that approval is subject to insurance being effected with their nominated Insurers. Again, this is in clear contravention of the Act which gives the Borrower a choice in relation to Insurers. Again from enquiries that I have made with the EBS, they advise me that as long as an appropriate indemnity and transfer is obtained from the borrower he could insure with whomsoever he wished. If this is the case why do the Societies not stipulate such choice in their standard conditions.

Members may wish to note therefore that by imposing levies on borrowers the Building Societies appear to be side-stepping the provisions of the Act in disregard of its well-intentioned provisions.

Yours faithfully,
KEVIN O'HIGGINS
Solicitor,
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Younger Members Quiz Nights

7 March, 1989: Welcome Inn Hotel, Castlebar. 8.00 p.m. Contact Eva Tobin. Tel. (094) 21854.

14 March, 1989: Old Ground Hotel, Ennis. 8.00 p.m. Contact David Casey. Tel. (065) 28159.

29 March, 1989: Ardree Hotel, Waterford. 8.00 p.m. Contact Gabrielle Dalton. Tel. (051) 72934.

5 April, 1989: Royal Marine Hotel, Dun Laoghaire. 7.30 for 8.00 p.m. Contact John Larkin. Tel. (01) 613311.

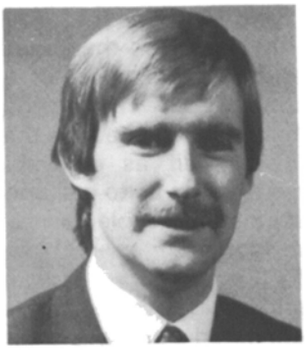
21-23 April, 1989: Sys Weekend Conference. Limerick Inn Hotel. Speakers: Prof. Bryan McMahon and Robert Pierse.

PEOPLE . . .

Ms. Laetitia Baker, Solicitor, of Skibbereen, Co. Cork, has been elected National President of Junior Chamber Ireland.

Robert W. R. Johnston, Solicitor, has been elected President of the Confédération Fiscale Europeéne for a two year period commencing 1 January, 1989.

Laurence Cullen, Solicitor, has been elected to the 1988/89 American Judicature Society Board of Directors.



Ken Murphy recently moved to Brussels to open a new branch office there for his firm A. & L. Goodbody. He is confident, however, that he will be able to fully maintain his contribution as a member of the Council of the Law Society and he is now ideally placed to fulfil his role as Chairman of the E.C. (1992) and International Affairs Committee.

Ken Murphy.

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 as 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.
25th day of January, 1988.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Dermot O'Leary of Ballindoney, Grange, Clonmel, Co. Tipperary. Folio No.: 9113; Lands: Ballindoney West; Area: 142a.1r.15p; County: **TIPPERARY.**

Harry Lloyd of Drish, Thurles, Co. Tipperary. Folio No.: 177F; Lands: Loughbeg; Area: 0a.2r.20p. County; **TIPPERARY.**

John Dolan of Gortagown, Banagher, Co. Offaly. Folio No.: 14684; Lands: Guernal and Balliver; Area: 11a.0r.0p. (Guernal), 31a.3r.30p. (Balliver). County; **OFFALY.**

Sean Guirke and Carolyn Murphy, Folio No.: 61318F: Lands: 74 Mount Drinan Avenue (formerly Road 13), Kinsealy Downs, Kinsealy, Co. Dublin; County: **DUBLIN.**

Bernard Cummins and Thomas Joseph Cummins, both of 69/70 Patrick St., Dun Laoghaire, Co. Dublin. Folio No.: 6505; Lands: The property situated in the townland of Johnstown and Barony of Rathdown: County: **DUBLIN.**

Desmond Duffy, Lake View, Co. Galway. Folio No: 6747; Lands: Knockauncoura; Area: 9a.2r.10p.: County: **GALWAY.**

Patrick Delaney of Carrigatoher, Nenagh, Co. Tipperary. Folio No.: 6729: Lands: Carrigatogher; Area: 36a.0r.39p. County: **TIPPERARY.**

Richard Leslie Smyth of Ballywilliamroe, Bagnelstown, Co. Carlow. Folio No.: 126 closed to Folio 2608F: Lands: Ballywilliamroe and Ballymoon; Area. 104a.0r.15p. (Ballywilliamroe), 56a.2r.24p. (Ballymoon); County: **CARLOW.**

Christopher Cullen of Carrigroe, Ballinglen, Co. Wicklow. Folio No.; 1364: Lands: Carrigroe; Area: 40a.1r.35p.; County: **WICKLOW.**

James Lavelle, Aughavale, Westport, Co. Mayo. Folio No.: 43745: Lands: (1) Clerhaun, (2) Clerhaun (1 undivided 4th part), (3) Cloghan; Area: (1) 15a.1r.15p.; (2) 22a.3r.16p.; (3) 4a.1r.32p.: County: **MAYO.**

Patrick Malone of 253 Glenwood Estate, Dublin Road, Dundalk, Co. Louth. Folio No.: 990L; Lands: Castlebellingham; Area: 0a.0r.8p. County: **LOUTH.**

James O'Brien of Ballylanigan, Mullinahone, Co. Tipperary. Folio No.: 7663; Lands: Kilvernon; Area: 7a.0r.20p. County: **TIPPERARY.**

Robert Dillon of Larrha, Nenagh, Co. Tipperary. Folio No.: 34516; Lands: (1) Redwood, (2) Annagh, (3) Annagh; Area: 4a.3r.0p., 26a.0r.10p., 9a.1r.0p. County: **TIPPERARY.**

Alfred E. Lowe of Bonavalley, Athlone, Co. Westmeath. Folio No.: 18433; Lands: Loughandonning; Area: 0.125 acres. County: **WESTMEATH.**

William Anthony O'Sullivan of 23 Riverview Estate, Waterford. Folio No.: 1637L; Lands: Knockboy; Area: 0a.0r.11p. County: **WATERFORD.**

William Barry of Cloonlusk, Doon, Co. Limerick. Folio No.: 8445; Lands: Cloonlusk; Area: 12a.3r.4p. County: **LIMERICK.**

Lost Wills

FLAHERTY, Peter, deceased, late of Cloonagh/ Cloonaghgarve, Milltown, in the county of Galway. Will anyone having knowledge of the whereabouts of a will and more particularly of the will dated the 22.6.1961, of the above named deceased who died on the 18 November, 1969, please contact George Bruen, Solicitor, Castle St., Dunmore, Co. Galway. Tel: (093) 38178.

CUFFE, Mary (otherwise Maisie), deceased, late of No. 2 Saint Patrick's Close, Monkstown, Dun Laoghaire, and formerly of 21 Poplar House, Mountown, Dun Laoghaire. Will anyone having knowledge of the wherabouts of a will of the above-named deceased who died on 13 October, 1988, please contact Leonard Silke & Co., Solicitors, 4 Chancery Place, Dublin 7. Tel: 779408.

HEASLIP, Thomas P., deceased, late of 3 Sydenham Road, Ballsbridge, Dublin (formerly of Nenagh, Co. Tipperary). o.b. 10 October, 1988. Would any person having knowledge of the wherabouts of a will of the above named deceased, please contact Messrs. John N. Duff & Co., Solicitors, Buncrana, Co. Donegal.

WALSH, Michael, deceased, late of The Bridge House Flats, Enfield, Co. Meath, who returned from England about 1982/83. Will anybody having knowledge of the wherabouts of the will of the above-named deceased who died on 29 October, 1988, please contact Messrs. Malone & Martin, Solicitors, Market St., Trim, Co. Meath.

McGEER, Mary, deceased, late of 23 St. James Gardens, Killorglin, in the county of Kerry. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased, who died on 19 July, 1985, please contact Messrs. John B. Healy & Co., Solicitors, O'Connell St., Caherciveen, Co. Kerry.

Death Notices

CREED, Michael B., Solicitor, of C. W. Ashe & Co., Macroom, Co. Cork, died on 1 January, 1989. Mr. Creed qualified in Michaelmas Term, 1961.

WALSH, John, Solicitor, of 11 Hume St., Dublin 2, died on 13 December, 1988. Mr. Walsh qualified in 1947.

Miscellaneous

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INCORPORATED LAW SOCIETY OF IRELAND

Vol. 83 No. 2 February 1989

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INCORPORATED LAW SOCIETY OF IRELAND
Vol. 83 No. 2 February 1989

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Cover Photo: Alderman Alice Glenn, Deputy Lord Mayor, with Gerard Griffin, Solicitor President of the Dublin Solicitors Bar Association, and Daire Murphy, Secretary, D.S.B.A., at the D.S.B.A. Meeting of 2 December, 1988, which was held in the Dining Room of the Mansion House, in honour of the Dublin Millennium.

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Viewpoint

The sudden announcement of the immediate withdrawal by the Revenue Commissioners of the facilities for stamping documents by post exemplifies the typical failures of our public service, creating despair in those who had hoped for real improvement. A major revenue area has been allowed to become so under-staffed that a back-log of cases (extending to 8 weeks by the Revenue's own admission) has built up. At the very least this must lead to a significant loss of interest on the stamp duty payable to the State.

No attempt was made to consult with the Law Society or any other professional group whose members are presumably responsible for the vast majority of documents presented for stamping. It is not inconceiveable that some less drastic solution to the problem might have emerged from such consultation, other minds might possibly have been able to suggest a solution which had escaped the Revenue.

The Revenue, like other Departments apparently oblivious to the fact that people would have made arrangements based on existing practices, introduced the change virtually without notice. Would 9 weeks back-log have been much more disasterous than 8? A week's delay could have allowed alternative arrangements to be made for urgent cases.

In its advertisement drawing attention to the difficulties caused by the withdrawal of the postal facilities for stamping documents, the Law Society drew attention to another department of the public service, tne Land Registry, where the service available to the public has become quite unacceptable. Again it appears that the public service embargo is the principal culprit. While it is appreciated that a policy of reducing the numbers of public servants must be applied rigorously, if exceptions are not to become the norm, there is a strong argument for treating quasi commercial areas of activity, such as the Land Registry, differently.

Reductions in staff numbers should only take place where an institution, which should be self financing, can be seen to perform efficiently with a smaller staff. It would seem that the increase in the back-log of cases — transfers of part (and probably the majority of these sales of house sites) now take over a year to complete — has built up not only at a time of the operation of the embargo but also as the Land Registry's surplus on its activities declines.

This is quite simply crazy. People are prepared to pay for a service from the Land Registry. The Registry itself has done its best to modernise its operations under severe financial restrictions. It should be permitted to engage sufficient staff to provide a decent service.

Some 25 years ago the Registration of Title Act was part of a package of law reform measures introduced under the aegis of the present Taoiseach when Minister for Justice. One of its aims was the extension of the Land Registration system to the entire country. Twenty-five years later the original three counties in which compulsory registration was introduced remain the only counties in which compulsory registration can be achieved. Perhaps the Taoiseach should take some steps to ensure that the expansion which he desired is capable of achievement.

The Law Society recently proposed to the Government that the Land Registry should be converted into a public corporation on the lines of An Bord Telecom, with a view to giving it independence and enabling it to operate on a more commercial basis. Much has been spoken of the need to improve our physical infra-structure to enable us to compete in the Europe of the 1990s. It is equally important that our administrative infra-structure is able to perform efficiently. □

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Defective Building Work: Who should pay?

Part I

Over the past decade or so, we have witnessed the British courts lurching between conservative and liberal positions in relation to the duty of care in negligence. In contrast to the Supreme Court's gradual and consistent extension of the scope of that duty, the House of Lords has moved a couple of steps forward, only to take flight when the implications of that progress have become clear.

The most recent decision of the House of Lords in *D. & F. Estates Ltd. -v- Church Commissioners for England,*[1] is of very great importance for Irish practitioners, in view of the issues at stake, as well as its effective repudiation of the liberal approach favoured by the House of Lords in *Anns -v- Merton London Borough Council,*[2] and *Junior Books Ltd. -v- Veitchi Ltd.*[3] The central question to be resolved concerned the extent of liability in tort for negligence in respect of a product where expenses have necessarily been incurred in averting danger to persons, property, or the defective product itself.

The outcome of the case may be attributed in part to the incoherence of early judicial efforts in the general area of builder's liability and liability in negligence for pure economic loss. It is easy to sympathise with Lord Bridge's decision not to engage on the "daunting task" of reviewing most of these cases when addressing the issue raised on appeal.

Builders' Immunity Crumbles

A complicating element in the development of the caselaw arose from the fact that for several decades after *Donoghue -v- Stevenson,*[4] the old immunity from a duty of care in negligence continued to apply to builders, vendors and lessors of real property.[5] As the courts began to dismantle this immunity, they recognised a distinction between "dangerous" and "non-dangerous" defects. The former involved physical damage to the person or to property as, for example, where a house was in such a state that it collapsed. The latter involved no such danger; they included cases where, for example, doors would not close properly or the walls or ceilings, while creating no danger of physical injury to persons or of collapse of the building, were out of synchrony with the plans.

By
William Binchy, B.L.,
Research Counsellor,
Law Reform Commission.

The Eclipse of Junior Books

In *Junior Books Ltd. -v- Veitchi Co. Ltd.,*[6] the House of Lords, by a majority, accepted for the first time that liability in negligence in *tort* (as well, of course, as liability in contract) could attach in respect of a product with a non-dangerous defect. That case was initially regarded as a watershed decision, since it opened up a potentially vast new area of potential liability on the part of manufacturers and others not in a direct contractual relationship with the plaintiff. However, within a short time the House of Lords showed signs of running scared, and sought to interpret *Junior Books* narrowly. In *D. & F. Estates*, this process of retrenchment has gone about as far as is possible short of actually reversing *Junior Books* in express terms. Lord Bridge stated:

> "The consensus of judical opinion, with which I concur, seems to be that the decision of the majority is so far dependent upon the unique, albeit non-contractual, relationship between the pursuer and the defender in that case and the unique scope of the duty of care owed by the defender to the pursuer arising from that relationship that the decision cannot be regarded as laying down any principle of general application in the law of tort or delict."

He pointedly praised Lord Brandon's dissenting speech in *Junior Books* for its "cogency and clarity". Similarly Lord Oliver did not consider *Junior Books* to be "of any help in the present context". He agreed with Lord Bridge that it depended on so close and unique a relationship with the plaintiff that it was "really no use as an authority on the general duty of care", adding that "it rests, in any event, upon the *Hedley Byrne* doctrine of reliance". So far as the general limits of the general duty of care in negligence were concerned, he adopted what had been said in Lord Brandon's dissenting speech.

There is something quite unsatisfactory about this manner of dealing with *Junior Books*. It betrays a timidity and unprincipled subtlety unworthy of an ultimate appellate court. It is not true (as asserted by Lord Oliver) that *Junior Books* rested on the *Hedley Byrne* doctrine of reliance. *Junior Books* is not a species of the *Hedley Byrne* genus. Of course, the reliance element played a most important role in establishing a sufficient degree of proximity, on the particular facts, between the pursuer and the defender; but nothing in *Junior Books* incorporated the *Hedley Byrne* "doctrine of reliance" as an essential ingredient of liability in every case involving a defective, non-dangerous product. It is, moreover, disingenuous to interpret the majority speeches as involving the application of no general

principles relating to the duty of care in negligence, while enthusiastically endorsing Lord Brandon's dissenting analysis. In fact the majority speeches are replete with a consideration of general principles; moreover, Lord Roskill's speech took issue with Lord Brandon's dissenting analysis and went some way to answer his concerns; yet neither Lord Bridge nor Lord Oliver mentioned this attempted rebuttal.

The Cost of Avoiding Threatened Injury

As has been already mentioned, the central issue in *D. & F. Estates* related to the extent of liability in tort for negligence in relation to a product (or structure) resulting in expenses necessarily incurred in averting danger to persons, property or the product (or structure) itself. That question had arisen in 1973 in the Canadian case of *Rivtow Marine Ltd. -v- Washington Iron Works,*[7] where the plaintiffs, who had hired a crane manufactured by the defendent, were obliged to take it out of service for repair when they learned that cranes of this type had been so negligently manufactured as to consitute a danger to the lives of employees. The Supreme Court of Canada was agreed that the plaintiffs should be entitled to loss of profits (in the logging business) resulting from the withdrawal of the crane but there was no similar unanimity on the question whether they should also be compensated for the cost of repairing the defect in the crane. The majority thought not, but Laskin, J., dissenting, thought that they should.

Laskin, J.'s approach received support from the House of Lords in *Anns -v- Merton London Borough Council.*[8] Lord Wilberforce (with whose speech Lords Diplock, Simon and Russell agreed) said that he had derived "much assistance" from the judgment which, though dissenting on this point, was "of strong persuasive force". *Anns* did not involve any issue relating to remedial action; Lord Wilberforce, J. left for some future decision resolution of this issue, which he admitted could "possibly [be] very difficult in some cases . . .". .

Addressing the question of when the cause of action arises, Lord Wilberforce considered that it can do so only when the state of the building is "such that there is present or imminent danger to the health or safety of persons occupying it". This starting-point was conceived as an alternative to the time of conveyance of the defective house, which would of course leave many injured plaintiffs uncompensated. Nevertheless, as we shall see, it gives rise to a good deal of difficulty.

In *Batty -v- Metropolitan Property Realisations Ltd.,*[9] the English Court of Appeal invoked Lord Wilberforce's statement in *Anns* regarding the time of commencement of the cause of action as authority for the imposition of liability on builders for breach of a duty of care to the plaintiffs who had been subjected to imminent danger of their health or safety by purchasing from a development company a house that was liable to collapse at any time owing to defective support from adjoining land, this defect being discoverable before the house was built. Megaw, L.J. (Bridge and Waller, L.JJ. concurring) said:

> "Why should this not be treated as being a case of imminent danger to the safety and health of people occupying the house? No one knows, or can say with certainty, not even the greatest expert, whether the foundations of the house will move and the house perhaps suddenly tumble tomorrow, or in a year's time, or in ten years' time. The law, in my judgement, is not so foolish as to say that a cause of action against the builder does not arise in those circumstances because there is no *imminent* danger".

There is, of course, nothing logically inexorable in the path followed by Megaw, L.J. The reference in *Anns* to the imminence of the danger to the safety and health of occupants of a house related only to the *time of commencement* of a cause of action in negligence; Lord Wilberforce was not deciding the issue of the scope of duty of the type that arose later in *Batty.*

D. & F. Estates: The Facts

In *D. & F. Estates,* the issue arose as follows. Sub-contractors employed by one of the defendants carried out plaster-work on a flat in 1965 in which the plaintiffs later acquired interests. In 1980 it was discovered that some of the plaster was loose, and parts of it fell down. Remedial work was carried out, involving the stripping off of the defective plastering followed by replastering. The plaintiffs sued that defendant for (*inter alia*) damages for negligence, claiming the cost of the remedial work, the cost of cleaning carpets and other possessions damaged or dirtied by falling plaster, loss of rental income and damages for inconvenience and distress. The trial judge found that the plaster was defective because it has been incorrectly applied. He awarded damages against that defendant for lack of proper supervision of the plastering work. The Court of Appeal reversed, and the House of Lords unanimously dismissed the plaintiffs' appeal.

The Question of Supervision

On the question of supervision, the House of Lords held that a main contractor did not in general assume a duty of care to any person who might be injured by a dangerous defect caused by the negligence of an apparently competent sub-contractor, and that thus the defendant contractor was not in breach of any duty to supervise the sub-contractor's work. To impose such a general duty "would obviously lead to absurd results", said Lord Bridge. If, however, the main contractor, in the course of such supervision as he chose to give to the sub-contractor's work, discovered that it was being carried out in a defective and foreseeably dangerous way, and condoned that negligence, he would "no doubt make himself potentially liable for the consequences as a tortfeasor". Of course, this approach by the House of Lords gives the main contractor a strong incentive to neglect to monitor the sub-contractor's work in progress.

The Curious Influence of United States Admiralty Law

As we have seen, it is the broader subject of recovery for economic loss which makes *D. & F. Estates* such an important decision. On this matter, Lord Bridge presented the most detailed analysis. Having sought to isolate the majority approach in *Junior Books* he derived what he considered to be "powerful support" for Lord Brandon's dissent from the United States Supreme

Court decision in *East River Steamship Corporation -v- Transamerica Delaval Inc.*[10] This was an admiralty case in which the Court, having considered products liability precedents in several jurisdictions, held that, "whether stated in negligence or strict liability, no products liability claim lies in admiralty when a commercial party alleges injury only to the product itself resulting in purely economic loss".

Blackmun, J., delivering the judgment of the Court, had said that the Court did not:

> "find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous . . . But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain – traditionally the concern of contract law . . .".

In Lord Bridge's view, Blackmun, J.'s statement of law appeared "to undermine" the earlier American authorities referred to by Richmond, P., in the New Zealand case of *Bowen -v- Paramount Builders (Hamilton) Ltd.*[11] He considered that Lord Brandon's approach and that of the United States Supreme Court were "entirely in line" with the majority decision of the Supreme Court of Canada in *Rivtow Marine* that the damages recoverable by the hirers of the crane from the manufacturer did not include the cost of repairing the defect.

Lord Bridge's reliance on *East River Steamship* is questionable on two counts. First, Lord Bridge appears to misunderstand the force of the case as a precedent within the American system of law. Unlike a decision of the United States Supreme Court on a constitutional issue, which would of course take precedence over the decisions of state courts, a decision of that Court in the exercise of its appellate admiralty jurisdiction does not have the same effect in relation to the products liability issue raised in *East River Steamship.* Secondly, Lord Brandon was dealing with the issue of compensation for *prevention* of damage. This was certainly not at the centre of Blackmun, J.'s analysis.

Lord Bridge's Central Analysis

In the key passage in his speech, Lord Bridge stated:

> "These principles are easy enough to comprehend and probably not difficult to apply when the defect complained of is in a chattel supplied complete by a single manufacturer. If the hidden defect in the chattel is the cause of personal injury or of damage to property other than the chattel itself, the manufacturer is liable. But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the *Donoghue -v- Stevenson* principle. The chattel is

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now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.

If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic. Thus, if I acquire a property with a dangerously defective garden wall which is attributable to the bad workmanship of the original builder, it is difficult to see any basis in principle on which I can sustain an action in tort against the builder for the cost of either repairing or demolishing the wall. No physical damage has been caused. All that has happened is that the defect in the wall has been discovered in time to prevent damage occurring. I do not find it necessarily for the purpose of deciding the present appeal to express any concluded view as to how far, if at all, the ratio decidendi of *Anns -v- Merton London Borough Council* involves a departure from this principle establishing a new cause of action in negligence against a builder when the only damage alleged to have been suffered by the plaintiff is the discovery of a defect in the very structure which the builder erected.

My example of the garden wall, however, is that of a very simple structure. I can see that more difficult questions may arise in relation to a more complex structure like a dwelling-house. One view would be that such a structure should be treated in law as a single indivisible unit. On this basis, if the unit becomes a potential source of danger when a hitherto hidden defect in construction manifests itself, the builder, as in the case of the garden wall, should not in principle be liable for the cost of remedying the defect. It is for this reason that I now question the result, as against the builder, of the decision in *Batty -v- Metropolitan Property Realisations Ltd.*

However, I can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to "other property", and whether the argument should prevail may depend on the circumstances of the case. It would be unwise and it is unnecessary for the purpose of deciding the present appeal to attempt to offer authoritative solutions to these difficult problems in the abstract. I should wish to hear fuller argument before reaching any conclusion as to how far the decision of the New Zealand Court of Appeal in *Bowen -v- Paramount Builders (Hamilton) Ltd.* should be followed as a matter of English law. I do not regard *Anns -v- Merton London Borough Council* as resolving the issue."

Applying these principles to the facts of the case, Lord Bridge held that no liability should attach, since any danger of personal injury or of further injury to other property could have been simply avoided by the timely removal of the defective plaster, once it appeared to be loose. Whatever case there might be for treating a defect in some part of a building as causing damage to "other property" when some other part of the building was injuriously affected, as for example cracking in walls caused by defective foundations, it seemed to Lord Bridge "entirely artificial" to treat the plaster as being distinct from the decorative surface placed upon it. Liability in negligence under the principle of *Donoghue -v- Stevenson* "or any legitimate development of that principle" could not possibly be imposed. To make the contractor so liable "would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose". Lord Bridge was glad to reach this conclusion since imposition of liability would have meant that the courts, in developing the common law, would have gone much further' than the legislature had been prepared to go in enacting the *Defective Premises Act 1972,* after comprehensive examination of the subject by the English Law Commission.

This article is written in a personal capacity.

[*Part 2 of this article will be published in the next* Gazette.]

Footnotes

1. [1988] 2 W.L.R. 368.
2. [1978] A.C. 728.
3. [1983] 1 A.C. 520.
4. [1932] A.C. 562.
5. See B. McMahon & W. Binchy, *Irish Law of Torts,* ch. 14 (1981).
6. [1983] 1 A.C. 520.
7. 40 D.L.R. (3d) 530.
8. [1978] A.C. 728.
9. [1978] Q.B. 554.
10. 106 S.Ct. 2295 (1986).
11. [1977] 1 N.Z.L.R. 394, at 410.

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From the President . . .

As I write this, I have just returned from the European Presidents' Conference which is held each year in Vienna. Almost 30 European nations both Eastern and Western and including almost every country in the Soviet Block were represented, as were all the Scandinavian countries. There were simultaneous translations in English, German and French. Peter Shanley,. S.C., represented the Chairman of the Bar Council and Colin Haddick, President of the Northern Ireland Law Society was also there.

There were short Submissions from a number of countries setting out recent developments in their jurisdictions and, of course, the contribution by Richard Gaskell, President of the Law Society of England and Wales was received with particular interest in the light of the three Green Papers which the Lord Chancellor has issued dealing with contingency fees, the work and organisation of the Legal Profession (which appears to point to a de facto merger of the two branches of the Legal Profession) and the authorisation of Building Societies to carry out conveyancing. The impression I obtained from listening to Mr. Gaskell and in subsequent conversations with him is that whilst the views of the Lord Chancellor are described as the provisional views of the Government, he does not believe there will be many changes and that legislation will be actually introduced in Parliament by the Autumn. No proposals have yet been issued for Scotland or Northern Ireland.

Whether any of these proposals (other than the Building Societies being permitted to offer conveyancing services, which is already provided for in the Buildings Societies Bill) will eventually percolate to this jurisdiction only time can tell, but it is a very interesting situation and one that the Law Society is watching very closely as no doubt are our colleagues at the Bar. My information is that whilst the English Bar is in a state of shock they will be vigorously opposing the proposals.

On the conveyancing front there was an interesting submission from the Danish President relating to a Financial Institution (similar I gather to a Building Society) which had set up a conveyancing service in Denmark. Apparently conveyancing was not restricted to lawyers in that jurisdiction, as it has been here, but in practice nobody else carried out the work which is responsible for one-third of the fees of the Profession. When this happened the Danish Lawyers Association commenced an advertising campaign attacking this Financial Institution, stating that such an offer of conveyancing services was unethical and lacking in independence. It emphased the independence of the legal profession and how important it was that anyone buying a house (for most people the most important capital transaction of their lives) should have independent disinterested advice. It seems that this campaign has been so successful that any other Financial Institution proposing to get more involved in the property sector has specifically stated that they will not offer conveyancing services.

If we are not successful in objecting to Building Societies being permitted to offer conveyancing services under the Building Societies Bill then it may be that some such campaign advising the public of the dangers of dealing with a Building Society, which cannot, by its nature, offer an independent disinterested service, may become necessary in the public interest and also to give some reasonable protection to the profession.

The International Bar Association took the opportunity of this meeting to hold a meeting of its general Professional Programme Committee which dealt with first, Inter Professional or Multi Disciplinary Partnerships and secondly the problem of disciplinary control of lawyers practising outside their home territory. For the moment the only countries that permit Multi Disciplinary Partnerships are the Netherlands and Germany. There are not many so far and it is not clear what the problems are. It must be remembered that amongst the Lord Chancellor's proposals will be provision for International Legal Partnerships and Multi Disciplinary Partnerships.

The position in the Netherlands is that full partnerships with "similar" professions such as Tax Advisers and Notaries are allowed. Partherships with Accountants are also permitted but as yet none have been formed. The basic requirement is that the members must be subject to disciplinary rules comparable to those applicable to lawyers and provide that as a result thereof no obligation is imposed that could jeopardise the free and independent exercise of the profession.

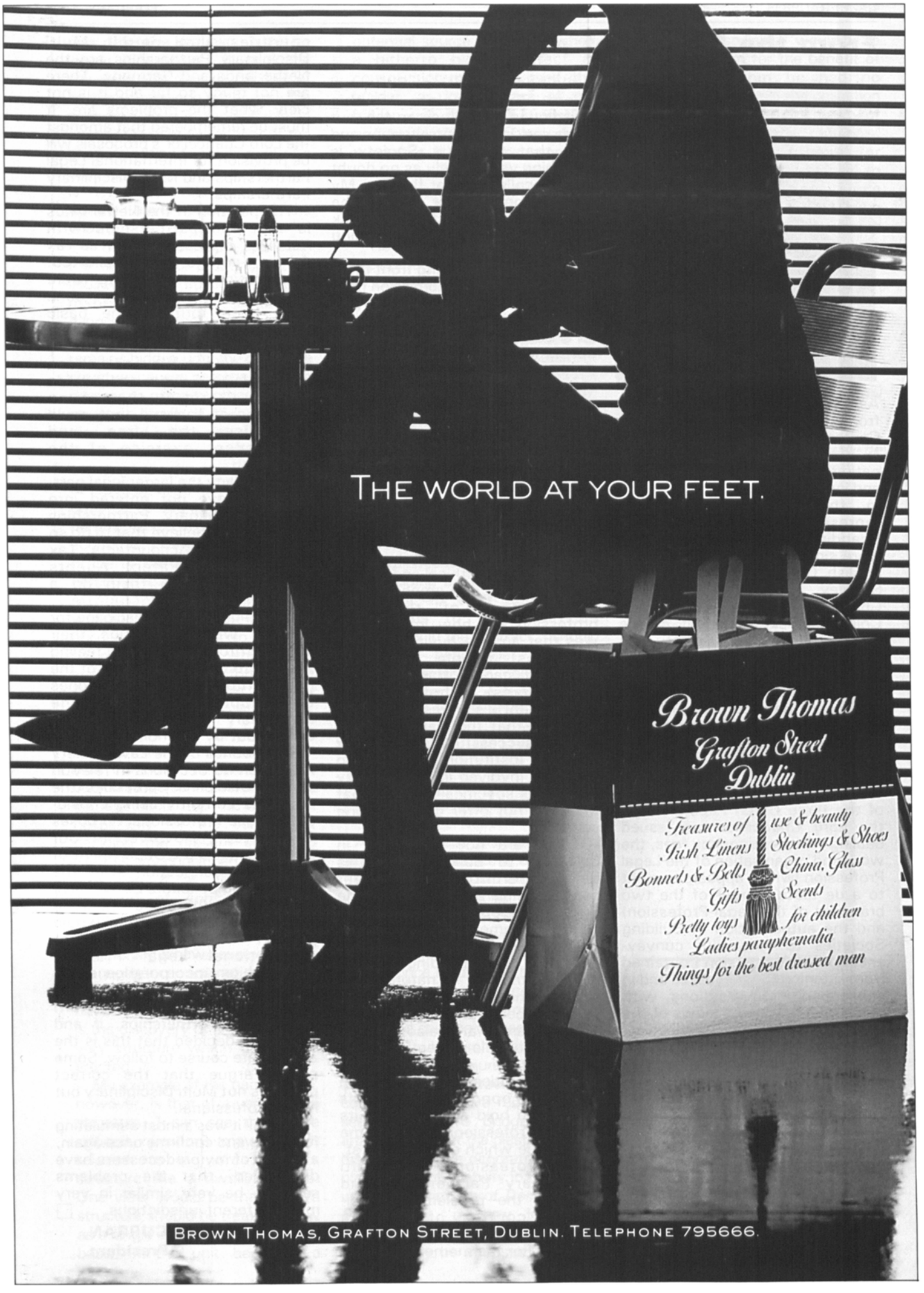
In Germany the larger legal partnerships have not entered into Multi Disciplinary Partnerships because they believe that to do so would prevent Accountants, Tax Advisers and Patent Agents referring work to them on a reciprocal basis.

On the question of discipline for lawyers working outside their home territory, the general feeling seemed to be that the rules of the host territory should be the ones that applied but that the disciplinary process should be carried out by the home Society.

The Council of the Law Society has taken no decisions in relation to Multi Disciplinary practices (the matter is currently being considered by the Professional Purposes Committee). However in our submissions to the Department of Justice in connection with the forthcoming Solicitors Bill we have asked that there be included enabling sections which would permit Multi National or International Legal Practice Partnerships, incorporation either with limited or unlimited liability of legal practices and Multi Disciplinary Partnerships, if and when it is decided that this is the appropriate course to follow. Some people argue that the correct phrase is not Multi Disciplinary but Multi Professional.

All in all it was a most stimulating few days and confirms once again, as many of my predecessors have discovered, that the problems seem to be very similar in very many different jurisdictions. □

MAURICE R. CURRAN,
President.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Practice Notes

Planning Permissions – Exempted Developments

Recently some Local Authorities have adopted a procedure of including in Planning Permissions for high density housing developments, a Condition prohibiting the carrying out of *Exempted Development* without obtaining Planning Permission, for example some high density town house developments.

The attention of Practitioners is drawn to Article 11 (1)(a)(i) of the Exempted Development Regulations S.I. 65/1977 which provides that a development as described in the Schedule to the Regulations shall not be an exempted development if it would contravene a Condition attached to a Planning Permission. Accordingly, before a particular development can be certified as being an exempted development regard should be had to any existing Planning Permission relating to the property. □

Conveyancing Committee

Evidence that roads and services are in charge of the Local Authority

The Conveyancing Committee consider that it is quite acceptable for a Solicitor to certify either from his own personal knowledge or from an inspection of the Local Authority records that Roads and Services are in charge of the Local Authority. Such a Certificate where forthcoming, should be accepted by a Purchaser in lieu of a letter from the Local Authority itself. □

Conveyancing Committee

Company Names

The system for checking company names has been changed from 12 January 1989.

The provisional name clearance service will no longer be available. Company names will be checked prior to incorporation only.

While names will continue to be registered at the discretion of the Minister, generally speaking a new company name or a change of name for an existing company will not be registered if:

(a) it is identical to a name already on the register of companies;
(b) in the opinion of the Minister it is offensive;
(c) it would suggest State sponsorship.

In accordance with Section 23 of the Companies Act, 1963 the Minister can direct a company to change its name within six months of its being registered, if in his opinion it is too like the name of a company already registered.

The onus for checking the name of a company will reside with the applicant. Therefore when choosing a name the applicant should satisfy himself/herself in advance on the acceptability of the proposed name bearing in mind that an objection might be received which would result in the company being asked to change its name.

Enquiries in relation to the new processing system should be directed to Companies Registration Office (Tel. No. 614222, Ext. 3206).

Companies Registration Office

WARNING

Retention of tax from rent and proceeds of sales on behalf of non-resident clients

The attention of Practitioners is drawn to the provisions of Sections 200 and 433 of the Income Tax Act 1967.

Section 433 imposes on a person, collecting rents on behalf of non-resident landlords, a statutory obligation to deduct tax at the standard rate and forward same to the Revenue. Such person is deemed to be an agent of the non-resident Landlord and as such is personally liable for tax on said rental income at the standard rate.

The non-resident Landlord's agent must deduct the tax from the rental income received and forward the monies, so deducted, to Revenue. The agent must then furnish to the non-resident landlord a form RI85 showing the total rental collected and the amount deducted in accordance with the provisions of the Section. The non-resident Landlord must lodge the form RI85 together with any claim for refund to the Claims Section, in Dublin.

Practitioners are therefore strongly urged that when they receive instructions to prepare letting agreements on behalf of non-resident clients, they should notify the client in writing of these statutory provisions and should seek a written acknowledgement of receipt of such letter.

Failure on the part of Practitioners to advise their

(a) tenant clients; or
(b) non-resident Landlord clients; or
(c) rent-collection clients (e.g. estate agents)

of this provision could result in that client having a cause of action against the practitioner under Section 200 of the Income Tax Act, 1967. A Solicitor or other party, who receives money on behalf of a non-resident client by way of proceeds of a sale or other source to which the client is entitled, may be deemed to be the agent of such non-resident client and may be accordingly personally liable for any tax liability due in respect of said monies and possibly for other tax liabilities of the principal. Practitioners are therefore strongly urged not to release such monies without first obtaining a letter of clearance from the inspector of Taxes. □

Taxation Committee

Handwriting & Subject Document Analysis

Michael Rasmussen,
Mayanncor Ltd.,
19, Woodside, Rathnew,
Co. Wicklow.

Telephone: 0404-69474

Younger Members News

Committee Members 1988-89
Miriam Reynolds, *Chairman* (1988)*;
John Larkin, *Vice Chairman* (1984);
Brian O'Connor (1987);
Eva Tobin (1982);
Frances Twomey (1988);
Peter Power *(Apprentice);*
Eugene O'Connor (1984);
Justin McKenna (1979);
Richard Cooke (1983);
Patricia Boyd (1988);
Gabrielle Dalton (1986).
*Indicates year admitted.

PROFILE
The Younger Members Committee (YMC), a Committee of the Council, is probably best described as a Special Interest Group for Younger Members of the profession. Historically it was viewed as a Committee primarily concerned with social activities but it is now anxious, while maintaining this role, to promote itself as a Committee representative of the views and needs of Younger Members.

Over the last few years, for example, the YMC has concerned itself with payment conditions and in September of 1988 was successful in having its motion to increase the recommended salary scale for Assistant Solicitors, to the £10,000 – £11,000 bracket, passed unanimously by the Council of the Law Society – a development which is most encouraging from the YMC's point of view.

In 1987, the YMC hopes to increase the participation of Younger Members countrywide in the Committee, consequently making it more representative of Younger Members. The YMC hopes to achieve this through the establishment of a countrywide network system whereby each of the Committee members mentioned above has regional responsibility for a number of counties. To complete the network, the YMC is aiming to select a YMC officer in each county who will communicate with his/her "Regional" YMC member on a monthly basis in relation to any issues affecting the Younger Members in the area in question and/or to communicate any views of the local Younger Members.

Reverting to the social aspect of the Committee, the YMC is organising a series of table quizzes around the country during the course of the next few months (a full list of which is published in this month's *Gazette*), and would welcome the support of all members of the profession (and others) in the locations listed. □

AND THEN THERE WAS . . .
And then there was the apprentice who went into the Adjudications Office to inquire as to what stamp duty was payable on an oral agreement!

And then there was the apprentice who was sent down to the Law Library by his Master. Not knowing how to call a Barrister, he consulted his pals who informed him that the correct procedure was to stand at the entrance and shout out the Barrister's name clearly. This he duly did and the Barrister ran the other way!

AND THEN THERE WAS . . .

The YMC would like to hear from members with similar items before Friday, 17th March 1989.

The best anecdote will be published and a prize of £10 sent to the winner.

YOUNGER MEMBERS COMMITTEE YMC DIARY

Tuesday, 7 March 1989
YMC Quiz Night, Welcome Inn, Galway at 8p.m.
(Organiser: Eva Tobin, Garvey Smith & Flanagan)

Tuesday, 14 March 1989
YMC Quiz Night, Old Ground Hotel, Ennis
(Organisers: Frances Twomey, Leahy & O'Sullivan and David Casey, John Casey & Co.)

Wednesday, 29 March 1989
YMC Quiz Night, Ardree Hotel, Waterford at 8p.m.
(Organiser: Gabrielle Dalton, Nolan Farrell & Goff)

Wednesday, 5 April 1989
YMC Quiz Night – Grand Final – Royal Marine Hotel, Dun Laoghaire
(Organiser: John Larkin, A. & L. Goodbody)

Thursday, 13 April 1989
YMC Bowling Night – Stillorgan Bowling Centre – 7.30 for 8p.m.
(Organiser: Justin McKenna, Sheridan & Kenny)

Saturday, 27 May 1989
YMC Soccer Blitz – The Law Society, Blackhall Place, Dublin 7.
(Organisers: John Larkin, Justin McKenna, Patricia Boyd and Peter Power)

FORTHCOMING EVENT, YMC QUIZ NIGHT, CORK
(Organiser: Simon Murphy, Barry M. O'Meara & Son)

Sources of European Community Law

Where to find them

PART 2

By Margaret Byrne, Librarian, The Law Society

Part 2 of this article is a guide to the secondary literature on European Community Law. It covers publications of the European Community itself and those of commercial publishers. Part 1 (published in the January, 1989, *Gazette* at page 20) dealt with the sources of the European Community's legal system – the primary and secondary legislation and international agreements – and the case law of the European Court of Justice.

EC Publications

The publication of EC documents is largely done by the institutions of the Community:

The European Parliament
The Council of the European Communities
The Commission of the European Communities
The Court of Justice of the European Communities
The Economics and Social Committee
The European Investment Bank
The Court of Auditors of the European Communities

and the research agencies established by the Commission such as **the European Centre for the Development of Vocational Training (Cedefop), the European Foundation for the Improvement of Living and Working Conditions**, and **the European University Institute.**

EC Publications and Catalogues are available from the Office for Official Publications of the European Communities in Luxembourg or through the official sales agent in each country which in Ireland is the Government Publications Sales Office, Sun Alliance House, Molesworth Street, Dublin 2, or, for mail orders, the Stationery Office, 6th Floor, Bishop Street, Dublin 8. Tel. (01) 781666.

The catalogue of publications of the EC, issued quarterly and annually, lists publications by subject in a classified index arrangement. The catalogue is issued in two separate parts – *Part A: Publications of the EC* lists monographs, series titles, periodicals, and *Part B: Documents* gives bibliographical details of the COM Documents (the Commission's legislative proposals and policy documents), the ESC Opinions (Opinions, studies, reports of the Economic and Social Committee) and the EP Reports (European Parliament amendments to draft legislation and other reports).

The EC Commission's Central Document Service (SCAD) publishes current awareness and bibliographical guides to Commission documents – the *SCAD Bulletin* (weekly), *SCAD Bibliographies* on various subjects (irregular) and *SCAD News* (monthly).

The Commission Library publishes *Recent Publications on the European Communities received by the Library* (11 issues per year plus supplements).

The following is a selection of EC publications which provide introductions, overviews and summaries of legal activities in particular areas:

Periodicals

The General Report on the Activities of the European Communities. Issued annually by the Commission, it indicates legislative developments in all areas and the chapter on Community Law is also published as a separate pamphlet.

The Bulletin of the European Communities. Issued by the Commission 11 times a year with an annual index, it covers developments on a monthly basis. *Supplements* to the Bulletin are published at irregular intervals. They contain official Commission material (e.g. communications to the Council, programmes, reports and proposals). The *Programme of the Commission* for the year ahead is published as a *Supplement.*

The *Report on Competition Policy* and the *Report on Social Developments* are published as supplements to the *General Report.* The former is a source of information on EC competition policy and on the enforcement of competition law. The latter covers labour law developments.

The Review of the Council's work is published annually by the Council.

The Court of Justice issues *Information on the Court of Justice of the EC* (quarterly) and a *Synopsis of the work of the Court of Justice* which covers a two year period.

Social Europe is published three times a year (with Supplements) by the EC Commission Directorate-General for Employment, Social Affairs and Education. It covers the Commission's principal measures and policies on employment, social affairs, education, health and safety, professional training, as well as the main events taking

place in the field of employment in the member states. A special issue of *Social Europe* was published in 1988 entitled *The social dimension of the internal market.*

Energy in Europe is published three times a year by the Directorate-General for energy and deals with the Community's energy policies.

European Economy (quarterly) is published by the Directorate-General for Economic and Financial Affairs. *European Economy* has published a Report entitled *The Economics of 1992* which evaluates the potential economic impact of completing the internal market by 1992.

JUSletter is a weekly newsletter which has just commenced publication, with the support of the EC Commission Directorate-General for Information, Communication and Culture. *JUSletter* records and summarizes each week EC legislation and judicial decisions, with emphasis on citizens' rights. It may be received by post, fax or on a terminal via electronic mail. *JUSletter Bulletin*, published monthly, analyses one Community law issue each month, reviews European law journals and lists recent publications.

Books/Booklets

The EC publishes a number of monographs under various series titles, such as *European Perspectives, European Documentation, European File* and *Documents.*

European Perspectives consists of a series of substantial academic monographs on various subjects including, for example, *Thirty Years of European Law* (1983); *The Community Legal Order* (1980); *Lawyers in the European Community* (1988); *The European Monetary System* (1986); *The Customs Union of the EEC* (1988); *The Professions in the European Community* (1986).

The *European Documentation* series comprises short booklets covering the main areas of community policy – of legal interest are the *European Community Legal System* (1981); *The Court of Justice of the European Communities,* 4th ed. (1986); *The A.B.C. of Community Law,* 2nd ed. (1986); *Europe without frontiers: completing the internal market* (1988), *The ECU* (1988).

The *European File* series consists of short 8-12 page reviews of current Community topics.

The *Documents* are reports and studies on the completion of European integration. Included in the *Documents* collection is *Completing the internal market; White Paper from the Commission to the European Council* (1985). The *White Paper* sets out the programme for completing the Internal Market and lists approximately 300 directives requiring implementation by the end of 1992. (The Commission has to-date published three Reports on the implementation of the White Paper, in the form of COM Documents.) Another *Document*, the research study entitled *The Cost of non-Europe,* edited by Cecchini, is a set of 16 volumes published in 1988, which cover different aspects of the internal market. Included in the series are volumes on border-related controls and administration formalities, public sector procurement, technical barriers in the EC, obstacles to transborder business activity, business services, financial services, telecommunications equipment and services, the EC 92 automobile sector, the foodstuffs industry, the textile clothing industry, the pharmaceutical industry.

Other *documents* are Nicholas, *Common Standards for enterprise,* 1988, which explains the need for standardisation in the new internal market and *The Panorama of EC Industry* which gives information on industry and service sectors.

Publications of publishers other than the EC. (A selection of the main works is given in all the following categories.)

Encyclopaedic works

The final two volumes of *Halsbury's Laws of England*, 4th ed., – vols. 51 and 52 – are entitled "European Communities" and discuss the institutions, the law-making functions, and all aspects of Community Law. They are up-dated by the *Cumulative Supplement* and loose leaf *Current Service* to Halsbury. These volumes have also been published separately as Vaughan (ed.), *Law of the European Communities,* 1986, Butterworths.

Sweet and Maxwell's *Encyclopaedia of European Community Law,* 1973 – to date (loose -leaf with service issues) is divided into three volumes, A, B and C, each volume containing several loose-leaf binders. Volume A entitled "United Kingdom Sources" contains the UK national legislation implementing EC primary and secondary legislation. Volume B, "European Communities Treaties", contains the text of the treaties and international agreements. Volume C, "Community Secondary Legislation", contains the text of current EC secondary legislation arranged by subject.

EEC Brief by Greg Myles, (in three loose-leaf volumes) is a handbook of EC law, practice and policy. The text covers the EC institutions and the substantive law and it includes a section on funding which details the sources of grants, loans, research contracts etc. The Update '88 service issue is entitled "Countdown 1992". Up to date to mid-1988, it catalogues all EC acts and proposals relating to the completion of the internal market. *EEC Brief* is published by Locksley Press, Belfast, and is available from the Irish Centre for European Law, Trinity College, Dublin 2.

Smit and Herzog, *The Law of the European Economic Community,* 1976 - to date (in six loose-leaf binders), published by Matthew Bender, is arranged as an article by article commentary on the Treaty of Rome.

General

Lasok, K.
Law of the Economy in the EEC, 1980. Butterworths.

Lasok & Bridge
Introduction to the Law and Institutions of the European Communities, 4th ed., 1987. Butterworths.

Continued on page 53.

Selection of textbooks on specific areas of EC Law

Agriculture

Churchill, R. R.,
EEC Fisheries Law, 1987. Martinus Nijhoff/Kluwer.

Snyder, F. G.,
Law of the Common Agricultural Policy, 1986. Sweet & Maxwell.

Usher, J.
Legal aspects of agriculture in the EEC, 1988. Oxford University Press.

Wood, D. *et al,*
Milk Quotas: law and practice, 1986. Farmgate Communications Ltd.

Antitrust Law

Common Market Law Reports – Antitrust Supplement (monthly), European Law Centre.

Kerse, C. S.
EEC Antitrust Procedure, 2nd ed., 1987. European Law Centre.

Matthews, R.
EEC Antitrust Compliance, 1986. European Business Publications.

Banking Law

Dassesse & Isaacs
EEC Banking Law, 1985. Lloyds of London Press.

Sunt & Dierckx
Legal Aspects of the ECU, 1989. Butterworths.

Company Law

Deloitte, Haskins & Sells
EEC Law for Companies, 1986. DHS.

Meinhardt, P.
Company Law in Europe, 3rd ed., 1988. Gower.

Pennington & Wooldridge
Company Law in the European Communities, 3rd ed., 1982. Longman.

Competition

Allan & Hogan
Competition Laws of the United Kingdom and Republic of Ireland, 1988. Matthew Bender.

Bellamy & Child
Common Market Law of Competition, 3rd ed., 1987. Sweet & Maxwell.

Butterworths
Competition Law Handbook, 1987.

Gijlstra & Murphy
Leading cases and materials on the competition law of the European Economic Community, 3rd ed., 1984. Kluwer.

Green, N.
Commercial Agreements & Competition Law, 1986. Graham & Trotman.

Korah, V.,
An Introductory Guide to EEC Competition Law and Practice, 3rd ed., 1986. ESC Publishing Ltd.

Korah, V.
Patent Licensing and EEC Competition Rules: Regulation 2349/84, 1985. ESC Publishing Ltd.

Korah, V.
R & D and the EEC Competition Rules: Regulation 418/85, 1986. ESC Publishing Ltd.

Sweet & Maxwell
Encyclopaedia of Competition Law (1 loose-leaf vol.), 1987.

Van Bael & Bellis
Competition Law of the EEC, 1987. CCH Editions.

Court of Justice of the EC

Brown & Jacobs
Court of Justice of the European Communities, 2nd ed., 1983. Sweet & Maxwell.

Lasok, K.
European Court of Justice: practice & procedure, 1984. Butterworths.

Rasmussen, H.
Law & Policy in the European Court of Justice, 1986. Kluwer.

Usher, J.
European Court Practice, 1983. Sweet & Maxwell.

Distribution Agreements

Korah, V.
Exclusive Dealing Agreements in the EEC, 1984. European Law Centre.

Employment Law

EEC Employment Cases (2 vols.), 1988. European Law Centre.

McMullen, J.
Business Transfers and Employee Rights, 1987. Butterworths.

Environmental Law

E.C. Commission, *Legislation on Dangerous Substances.* (2 vols.), 1987. Graham & Trotman.

The Law and Practice relating to Pollution Control in the Member States of the EC: a comparative survey. (In 11 volumes; volume 6 on Ireland by Y. Scannell, 2nd edition, 1982). Graham & Trotman for the EC Commission.

Intellectual Property

Cawthra, B.
Patent Licensing in Europe, 2nd ed., 1986. Butterworths.

Guy & Leigh
The EEC & Intellectual Property, 1981. Sweet & Maxwell.

Industrial Property Law in the Common Market: a case collection from the Common Market Law Reports. (5 vols.). European Law Centre.

Sweet & Maxwell
Encyclopaedia of UK and European Patent Law (1 loose-leaf vol.), 1988.

Judgments Convention

Collins, L.
Civil Jurisdiction and Judgments Act, 1982, 1983. Butterworths.

Dashwood, *et al.*
Civil Jurisdiction & Judgments Convention, 1987. Kluwer.

Hartley, T.
Civil Jurisdiction & Judgments, 1984. Sweet & Maxwell.

Kaye, P.
Civil Jurisdiction and Enforcement of Judgments, 1987. Professional Books/Butterworths.

O'Malley & Layton
European Court Practice, 1989. Sweet & Maxwell.

Professions & Services

Lasok, D.
Professions & Services in the EEC, 1986. Kluwer.

Trade

Beseler & Williams
EEC Anti-Dumping & Anti-Subsidy Law, 1986. Sweet & Maxwell.

Kelley & Onkelinx, *EEC Customs Law* (1 loose-leaf vol.), 1986. ESC Publishing.

Lasok & Cairns
Customs Law of the EEC, 1983. Kluwer.

Oliver, P.
Free Movement of Goods in the EEC, 2nd ed., 1988. European Law Centre.

Van Bael & Bellis
International Trade Law and Practice of the European Community – EEC Anti-Dumping and other trade protection laws, 1985. CCH Editions.

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Those days have gone! The legal profession which is already trying to cope with a fast changing climate now faces further changes which will affect radically the way we practise law. This is a time for re-evaluation – to look again at our objectives – the way we practice – why we practice.

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Rachel Ford, Lawyers' Planning Services, 18-20 High Street, Cardiff CF1 2BZ, South Wales.
Telephone 0222 398161 Fax: 0222 373275

Hartley, T.
Foundations of European Community Law. 2nd ed., 1988. Oxford University Press.

McMahon & Binchy
European Community Law in Ireland, due in March, 1989. Butterworths.
Includes chapters on the Community Institutions, sources of Community law, judicial control, Community law and national law, the reception of Community law in Ireland and the substantive rules of the EEC.

Mathijsen, P,
Guide to European Community Law, 4th ed., 1985. Sweet & Maxwell.

Parry & Hardy
EEC Law. 2nd ed., 1981. Sweet & Maxwell.

Wyatt & Dashwood
The Substantive Law of the EEC, 1987. Sweet & Maxwell.

1992 Single European Market

In July, 1988, the Government launched EUROPEN, the national campaign to prepare for the completion of the single European market. A series of EUROPEN Information Leaflets have been published on various topics e.g. the basic facts on 1992, consumer protection, recognition of higher education qualification (diplomas), the social dimension of the Single Market, public procurement, company law, mergers and competition, intellectual and industrial property. The leaflets may be obtained from the EUROPEN Bureau, Tel: 01-601992.

The Irish Centre for European Law, which was established in May 1988, has published the proceedings of three of its Conferences: *The Legal Implications of 1992;* Whyte (ed.), *Sex Equality, Community Rights and Irish Social Welfare Law – the impact of the Third Equality Directive; The Single European Market and Financial Services in Ireland.* A fourth publication is due shortly – *Acquired Rights of Employees.* ICEL publications are available from the ICEL at Trinity College, Dublin 2.

The Confederation of Irish Industry's weekly Newsletter is a source of information on 1992. Each month it includes a "Euroreview", prepared by the Irish Business Bureau in Brussels, which gives an up-date on developments for the completion of the internal market. The CII has published the proceedings of seminars which it held in 1988 in the form of a book entitled *CII overview of the 1992 Single European Market.* The seminars dealt with individual and direct taxation, company law, financial services, trade, transport, public procurement etc. Copies of the Newsletter and the book are available from the CII.

Irish Business Manuals Ltd. publish a series of loose-leaf *Small Business Manuals,* with up-dates, including a volume, *1992 Matters.*

Ireland to 1992 by Jim Fitzpatrick and Associates, was published in 1988 by the Economist Intelligence Unit.

1992 What's that? Deloitte's 1992 Guide, was published in 1988 by Butterworths. □

Selection of major periodicals on EC Law

European Law Review. 6 issues a year. Sweet & Maxwell.

Common Market Law Review. Quarterly. Martinus Nijhoff/ Kluwer. Includes an annual survey of literature on EC law prepared by the Europa Institute of the University of Leyden.

Legal Issues of European Integration: the law review of the Europa Institute, University of Amsterdam, Half-yearly. Kluwer.

European Competition Law Review. Quarterly. ESC Publishing.

European Intellectual Property Review. Monthly. ESC Publishing.

European Law Digest. Monthly. European Law Centre. Summaries of treaties, legislation, case law of European countries and of the European Community.

Commercial Laws of Europe. Monthly. European Law Centre. Covers national legislation, with text in both English and the original foreign language, as well as treaties, conventions, EC regulations and directives. Major enactments are reported in full text.

European Commercial Cases. Quarterly. European Law Centre. Reports major decisions of European national courts in selected areas of commercial law and in relation to the enforcement of judgments under the EC Judgments Convention.

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INTERNATIONAL BAR ASSOCIATION BIENNIAL CONFERENCE 1988

— BUENOS AIRES —

(Left to right): Mr. Jack Kirwan, Mrs. Betty Kirwan, Mrs. Addie Plunkett, Mr. Jack Plunkett.

Mahla Pearlman, Vice President of the Law Council of Australia with James McFarland, President of the Law Society of Northern Ireland.

Reception at International Bar Association Conference

In accordance with its usual practice, the Society's delegation to the International Bar Association's Biennial Conference at Buenos Aires hosted a reception for the Officers of the International Bar Association and the leaders of other delegations to the Conference. On this occasion the opportunity was availed of to invite prominent members of the significant Irish Argentine community in Buenos Aires. The reception was held in the magnificent Club House of the Newman Club formed by the past pupils of the Cardinal Newman College which is managed by the Irish Christian Brothers. The Society are particularly grateful to the then Irish Ambassador in the Argentine, Mr. Patrick Walshe, for his assistance in organising this function.

In the captions to the photographs delegates are identified by the positions which they held at the time of the Conference.

Maurice R. Curran, Senior Vice President, Law Society; Mr. Kumar Shankardass, President, International Bar Association; Mrs. Kumar Shankardass; Thomas D. Shaw, President, Law Society.

Anthony Smith (Australia), Secretary of the General Practice Section of the IBA, with Madeleine May, Executive Director of the IBA, and Maurice Curran, Senior Vice President of the Law Society.

Colin Haddick, Vice President of Law Society of Northern Ireland with Mr. and Mrs. Julio O'Farrell, Buenos Aires.

Thomas D. Shaw, President, Law Society, with His Excellency Patrick Walshe, Irish Ambassador to the Argentine and Mrs. Yvonne Shaw.

Mrs. Dorinda Hickey, Dr. John M. Richards, Mrs. Beatrice Donnelly Richards, Kathleen Rhatigan Donnelly.

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Advice on Investments

There is no simple, all embracing answer to that most popular of questions "where should I put this money". Indeed before attempting to answer any financial advisor worth his salt will need to spend some time asking a lot of questions in return. Does the investor need an income: does he or she need ready access to the funds: what is his or her tax situation: what is the attitude to risk: and even, is there any worry about the tax-man asking where the money came from?

by Colm Rapple

There are no black and white answers to most of these questions. There are degrees of risk aversion. There may be no need for ready access to the money – except an emergency arising. A good financial advisor needs to know his client and his or her circumstances – one reason indeed why solicitors can have an advantage in this area. The advisor, of course, also needs to have a broad notion of the type of outlets available. It is then a matter of fitting the client to the investment outlet.

There is a growing range of investment possibilities – new products being developed by the increasingly competitive financial services sector and the new found option of investing abroad with the easing of exchange controls. It would take a book – even a few books – to cover them all adequately. For the purposes of this article let us look at three make-believe clients and some of the investment options which might suit them.

Client 1 – Mr X is self-employed with a good income. He pays heavy tax but has some spare funds which are not needed in the business. He does not need to supplement his income and can leave the money untouched for the foreseeable future – certainly some years. As a businessman he is not adverse to risk.

The range of options here are immense. But let us suppose that Mr X wants something more exciting than putting his money on deposit with a bank, building society or the Post Office and that direct stock exchange investment does not appeal to him. But he would like the idea of something "tax effective". Let us have a look at some of the options.

Pension Scheme: if he has not already set up a personal pension scheme, then he should do so without delay. He will get full tax relief on annual contributions of up to 15 pc of his income and will also benefit from the fact that the money in the pension fund builds up free of tax. It can, in fact, be worth while to put in even more than 15 pc of income for that reason.

If Mr X is an employee of his own company, the tax relief possibilities are far greater since the company can claim tax relief on all its contributions provided the scheme does not promise more than the maximum benefits approved by the Revenue Commissioners. And they are very generous.

Business Expansion Scheme: An earlier article in this series looked at the opportunities for setting up businesses in the tourism sector under this scheme. Any individual can get tax relief on up to £25,000 a year invested in such a project. Of course, the scheme also applies to manufacturing ventures and stock-brokers often have entrepreneurs on their books looking for funds. There are also funds which seek investment from time to time and spread the funds over a range of ventures.

But be careful, the tax advantage can often be largely offset by profit sharing and share option schemes which the promoters build-in for their benefit. And there may be no clear means of realising the investment in the future.

Section 23 Apartment or House: For someone with cash to invest for at least ten years the purchase of a new apartment or house for renting can be a very attractive proposition. Provided it falls into the Section 23 guidelines, the rental income can be collected tax free until the purchaser recoups the cost of the building in full. The cost of the building can be reckoned to be about 70 to 80 pc of the price paid. The letting has to be to a non-connected tenant for at least ten years. Good conversions also comply with the rules. Better still the tax relief can be immediately set against other rental income if the client has any.

Unit Linked Funds: Since Mr X does not want to invest directly in company shares either at home or abroad, a unit linked fund may be an alternative. The entry cost is higher than buying shares directly but there is the benefit of professional management of the fund and the knowledge that the investment is a spread of shares or properties or whatever.

A unit linked fund is basically a co-op of investors who pool their money under the aegis of some insurance company which provides the professional management. About 8 pc of the investment goes in buying in. There is a 3 pc stamp duty and there is usually a 5 pc spread between the price at which the units are bought and the price at which they are sold. So someone who cashed in their investment immediately after making it would lose 8 pc of their money.

Those funds which do not have a 5 pc price spread usually impose heavier annual management costs and early encashment penalties.

Unit values – like shares – can go up and down. Some perform better than others. Some carry less risk than others. The choice is wide. Quarterly surveys of fund performances are published in some of the daily papers and can provide a guide to future prospects. Past performance is not always a

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reliable guide to the future but the surveys also normally show where each fund has its money invested – so much in shares, so much in property, so much in Government funds, so much in Ireland, so much abroad etc. That type of information has to be combined with a view of future prospects on the various markets to make the best choice – and "best" can vary with the attitude to risk of the client.

Just recently two companies, Irish Life and Hibernian Life have issued new funds which guaranteed that at least the investor will get his money back at the end of three or five years. Also new are a wider range of units linked to overseas markets.

There is no tax on the returns from unit linked investments. They can be cashed in at any time, but because of the heavy set-up cost it is usually advisable to be thinking of them as a medium to long-term investment. It is usually possible to switch from one fund to another within an insurance company at least once a year without additional cost. So it is important to reassess past decisions from time to time and see if a change is needed.

Mr X may also want to consider the options mentioned below for Messrs Y and Z.

Client 2 – Mr Y has a reasonably good job. He is set somewhere in the middle of the middle classes. His income is adequate to keep him going. He has a mortgage on his house, a few pounds put aside for emergencies, and just about gets by. He has come into an inheritance of £25,000 and wants to put it aside for the future. He sees it as a security for his family and as a nest egg which may be needed when his children go on to third level in five to seven years time. He is not too keen on taking any risk.

If he were willing to take a risk, then any of the options mentioned above might suit. But let us assume that he would really lose sleep if there was much risk involved. He could still consider the new guaranteed unit linked funds from Irish Life and Hibernian Life. Irish Life offers the alternative of three or five year guarantees. The Hibernian Life plan carries a three year guarantee. During the three or five years the units can go down in value. The guarantee is that at the end of the period they will at least be worth what was put in.

That means that a large proportion of the funds will be put in fairly safe investments so these funds are not likely to provide the extraordinarily good returns yielded by some funds in recent years. But that is the cost of safety.

There are other funds – money and gilts funds – which carry little or no risk of a downturn either. But their growth rates have never been exciting.

Long term deposits are another option. It is a question of shopping around for the best rate. Lists of deposit rates are carried in the daily papers but they should only be taken as a guide. Better rates can sometimes be negotiated while other times the rates published are not really on offer. So you have to shop around. But DIRT tax will be stopped on all resident accounts and Mr Y will certainly not be able to claim it back.

Post Office Saving Certificates still offer a better tax free return than is obtainable after tax on deposits but the gap is narrowing.

Client 3 – Mr. Z is in his mid-fifties and has just been made redundant. He has a lumpsum of £20,000 to invest. He has a deferred pension which he will start drawing at age 60 or later and in the meanwhile hopes to get some work. But jobs are hard to find. He still owes about £2,000 on his house mortgage but no other debts.

The uncertainties in Mr Z's situation makes it extra difficult to give one-handed advice. On the one-hand he might get a job but on the other hand he may not. Social welfare considerations add yet another dimension to the problem. If Mr Z does not get a job he will be able to draw unemployment benefit for fifteen months. There is no means test on that. But at the end of the fifteen months, any further social welfare will be means tested and the lump sum, if declared, will be taken into account.

It is crazy but true that the man who spends his redundancy lump sum has no problem about getting the means tested dole while the man who tries to husband it will have his dole payments reduced – perhaps to nil. Mr Z will certainly be asked what he did with his £20,000 and may be asked to produce letters from local banks declaring how much, if anything, he has on deposit.

So long as he is out of work he is unlikely to be liable for income tax. Short-term social welfare payments are still exempt from tax although some change had been expected in this year's budget. Unfortunately only those over 65 years of age or incapacitated can claim back the DIRT tax stopped on deposit interest. So if Mr Z simply puts his money on deposit he would end up paying DIRT tax although not really liable for tax because of his low income.

Post Office Saving Certificates are one option. They can provide a six monthly income if a proportion of the Certs are cashed in every six months – just after the interest is added in. But cash in a day too soon and you do not get that six months interest or any part of it. So care is needed.

A return of about 6½ pc tax free is available in this way while leaving the capital untouched.

Another tax free alternative are Government stocks. The dividends are liable for tax but there is not tax stopped at source. So a non-tax payer can avoid the tax. Stock values can move up and down, so there is a risk for someone who may want to cash them in at short-notice. But someone who can hold them until they mature knows exactly what he is going to get back and exactly what income he can expect, so there need be no risk. □

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...at a Glance

LEXI - TIME '89 is a Wall Chart containing legal time limits and miscellaneous legal information **FREE** in the next issue of the **GAZETTE.**

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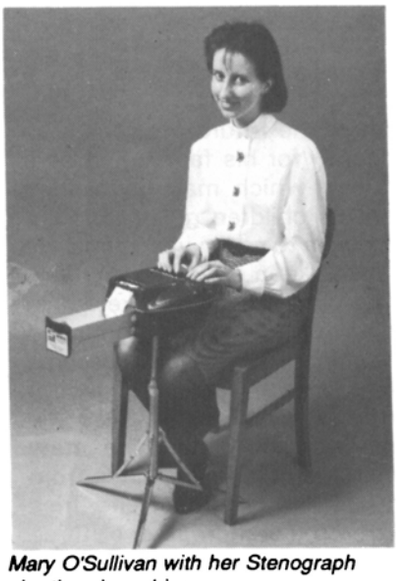

Mary O'Sullivan with her Stenograph shorthand machine

For your Diary

10 March, 1989
Insolvency Practitioners Association (Irish Branch)/Law Society. Meeting at Milltown Golf Club. Speakers: John Glackin, Solicitor, Frank Sowman, Solicitor, Ray Jackson (IPA) and Tom Grace (IPA). 6.00pm - 10.00pm. Members wishing to attend should contact Eileen McCormac at the Law Society. Tel: 710711.

13 March, 1989
Continuing Legal Education Seminar. *Company Law,* Consultants: Paul J. G. Egan, Solicitor and Michael G. Irvine, Solicitor. Jury's Hotel, Limerick. 9.30am - 5.30pm.

14 March, 1989
Continuing Legal Education Seminar. *Company Law.* Consultants: Paul J. G. Egan, Solicitor, and Michael G. Irvine, Solicitor. Great Southern Hotel, Limerick. 9.30am - 5.30pm.

20 March, 1989
Continuing Legal Education Seminar. *Bankruptcy Act, 1988.* Consultant: Barry O'Neill, Solicitor. Blackhall Place. 7.30pm - 9.30pm.

30 March, 1989
Medico-Legal Society of Ireland. *DNA Profiles – the Identikit of the Future.* Speaker: Dr. Maureen Smyth, Ph.D., Forensic Scientist, Department of Justice. 8.30pm. United Services Club, St. Stephen's Green, Dublin 2.

19 April, 1989
Family Lawyers Association Seminar. *Family Law – the taxation implications.* Buswell's Hotel, Molesworth St., Dublin. 7.00p.m. All are welcome to attend. For further information contact Brian Sheridan, Solicitor, at 724133, or Cormac Corrigan, B.L. at 720622.

4-7 May, 1989
Law Society Annual Conference. Hotel Europe, Killarney, Kerry.

14 June, 1989
Family Lawyers Association Seminar. *Support Services in Family Cases.* Buswell's Hotel, Dublin. 7.00pm. All are welcome to attend.

Further details on **CLE Seminars** may be had by consulting the CLE Brochure circulated with December *Gazette*, or by contacting Geraldine Pearse at 710711.

STATISTICS

1988 CENSUS OF SERVICES

We urge our members who have not already done so to return their Census of Services form to the Central Statistics Office immediately.

This Census is being conducted for economic planning purposes. The data provided will be treated as strictly confidential and will be used for statistical purposes only. Outstanding forms should be returned immediately as they are now more than six months overdue and delaying the finalisation of results.

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FORENSIC FABLES *by* O

THE KINDLY JUDGE AND LITTLE EFFIE

A KINDLY Judge (of the Chancery Division) Found himself Confronted by a Difficult Problem. Was Little Effie (a Ward of Court) to go to School, or Not?

Counsel Representing Little Effie's Grandmother Contended that Little Effie, by Reason of her Nervous Temperament, was not Fitted for Contact with the Rough Companions whom she would Doubtless Encounter at the Proposed Educational Establishment.

The Advocate Voicing the Opinions of the Maiden Aunt Took the Line that Little Effie was a Perfectly Normal and Healthy Child who would Derive Immense Benefit from the Discipline and Gaiety of School Life.

The Kindly Judge Wisely Suggested that before Reading the Affidavits he should Interview Little Effie in his Private Room.

When Little Effie Presented herself the Kindly Judge (who was a Family Man) Found himself Attracted by her Cropped Head and her large Blue Eyes. To Put Little Effie Completely at her Ease the Kindly Judge Invited her to Try on his Wig and to Observe the Effect in his Looking-Glass. After a Pleasant Little Chat the Kindly Judge Resumed his Wig and Returned to Court. Counsel Thereupon Set to Work.

THE KINDLY JUDGE AND LITTLE EFFIE

"A Month Ago," ran Paragraph One of the Grandmother's Affidavit, "Effie Suffered from a Bad Attack of Ring-Worm and her Head had to be Shaved." The Kindly Judge forthwith Adjourned the Proceedings *Sine Die*, and Sent his Clerk Out for a Bottle (Large Size) of Condy's Fluid.

Moral.—*Read the Affidavits First.*

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Computerised Accounting for Solicitors – Do you need it?

Several months ago I discussed the question of Account Systems with the Principal of a "two-man" practice. He informed me that with two hours work, one Friday afternoon per month, he could extract a satisfactory management report accurately advising him of his Profit & Loss position for the month and year to date.

He knows whether or not there is oil in the well, and he did not need a computer to tell him. Whether you are a big, medium or small office, that is the first and most critical test for your accounts.

Let us disregard the size of the firm for the present, then, and keep the analysis of our respective accounting systems as basic as possible by asking ourselves three questions:-

1. Is the firm in profit or loss? Without diverting too much staff time, or our own time, can we establish the profitability of our practice?
2. Are the Client Accounts entirely up to date? (Can we pick up any one client account ledger any day and find that it accurately reflects the state of the financial transactions for the client?)
3. Are the P.A.Y.E. and VAT returns completely up to date?

If all the above questions cannot be answered affirmatively, (or if any one is achieved at the expense of the other), then the accounting system is not fullfilling its role in the practice, irrespective of whether it is a computer or manual system.

The argument "For":

Frequently, as a firm expands, or the requirements imposed on its accounts increase (the introduction of VAT, or Witholding Tax), the above targets may not be realised. Sometimes they are still achieved but with increasing difficulty, with extra staff engaged in book-keeping, time delays in delivery, or increased auditing costs. It is time then to consider if a computer accounting system will serve better.

The efficiency of the computerised accounting system is very much analagous to the efficiency achieved by the Kalamazoo and/or Safeguard systems when they arrived on the market. At that stage many Solicitors had three-part books and, with the arrival of the more efficient manual Kalamazoo or Safeguard Accounting system, the necessity to write up the third part of the books was removed by accurately overlaying account ledgers onto the third set of records and carbonising the third entry. With the arrival of computerised accounting records the work of book-keeping has again been very significantly reduced. The book-keeper only makes the financial entry once through the Client's Ledger Account and all other relevant accounts are automatically written up to date, whether it be the fee account, the VAT records, the bank record or the Client Control account, and so on.

by
Frederic J. Binchy
Solicitor

The best example, and the one dearest to the solicitor's heart, is when he comes to bill the Client! Where the manual book-keeper will have subsequently to write up the fee account and VAT record, etc., the computerised book-keeper has the entry done once the bill is posted to the Client Ledger Account. The Client is billed for a Conveyancing fee – the fee is posted to his account by the Bookkeeper, the fee element is automatically recorded on the conveyancing Nominal Account and the VAT element is automatically posted to the VAT Account.

When you have agreed the transfer from the current Account to pay this bill, the computerised book-keeper posts the debit once to the Clients Account, and automatically the credit for payment of the bill is posted to the office section of the Client record, and this system goes on to post a separate record of the Bank Transfer to the Control Account for transfers, to the Client Account recording the debit, to the Office Bank Account recording the credit. All this is done with one entry.

Subsequently, when preparing the VAT report, the computerised book-keeper will simply ask for the VAT Return for the period and a full report will be compiled showing all the input VAT liabilities against fees earned, and the output VAT credits against the Firm's bills paid or received and, most importantly, the system produces the net figure to be recorded on the VAT return.

The argument becomes progressively more important as you move into the realms of the bigger practice. Frequently, as a practice evolves, its accounting section creaks under the strain of increasing demand and the partners come to realise that the prime targets mentioned are not being achieved. All too often the Management Accounting Reports, the Profit & Loss statement, etc., or the VAT or PAYE returns suffer at the expense of keeping the information in the Client Ledger Accounts totally up to date. If, therefore, the posting to the relevant account ledgers for these areas is automated as outlined above, then a considerable part of the battle has been won in getting these targets back within daily reach.

This practice, then, has one of two choices; either employ more accounting staff using a manual system, or upgrade to a computerised accounting system and see if you can achieve your three targets with the one book-keeper as before. In practical terms, one computerised book-keeper should be able to service satisfactorily three to five fee earners (varying) and achieve the above three targets.

Doing it:
The conversion to a computerised accounting system or transfer of any records from one system to another is fraught with dangers and difficulties.

The transfer of information has to be recorded in a meticulously accurate and reliable fashion and the only safe advice that can be given is:-

(a) ensure that your existing accounting records are completely written up to date (and cleared of as many dormant Accounts as possible);

(b) the transfer of information has to be made from a set of audited balances for each Client and, accordingly, it is very advisable to tie in the transfer of the financial data to the year end, or any other date, when a set of audited balances can be made available. If a set of audited balances cannot be made available quickly, then a balance has to be struck for each account at a given date and posted to the computer;

(c) in advance of (b), accounts can be opened for each Client on the system, furnishing all the particulars you require to identify the Client, leaving the open account ledger ready to receive the financial data when the audited balances are available;

(d) when the balances are ready, they should be transferred immediately. This should be done promply and thoroughly, verifying the balance input against the audited balances being worked from. Speed and meticulousness are the keywords here: speed because every single case ledger entry from the data of that balance will have to be subsequently posted to the computer and every day or week's delay carrying out the postings will have to be caught up later: meticulousness, because any misposted balance will subsequently throw out the balancing of that clients account until corrected;

(e) subsequent to loading the financial information, it is advisable to carry the two accounting systems side by side (what they call the "parallel run") for a short period, say three to six months, until you (and your auditor) are satisfied that your Computer accounting records are thoroughly satisfactory.

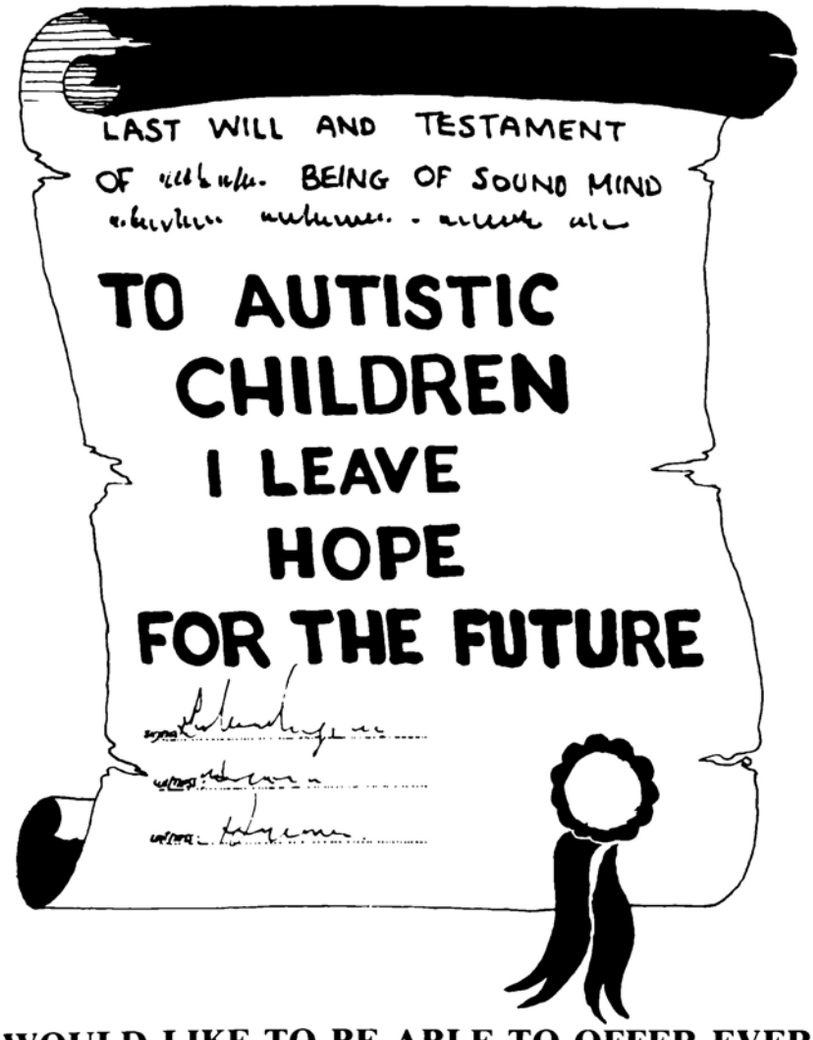
The Contract:
Experience has shown that the transfer from one system to another is a sufficiently important job to consider contracting it out to an independent accountant. Think about retaining an accountant who is not from your own auditor's firm. His or her job will be to:-

1. tidy up the existing accounts before the audit so that the transfer of moribund balances will be avoided, making the transfer operation more efficient. Every dead balance transferred means the entry of unneccessary client information to the computer;
2. liaise with your Auditors re. the audited or extracted balances to be transferred to your system;
3. organise the first entry of information to the system, the opening of accounts etc., the layout and set-up of the system, so that it will accurately reflect and present the accounting system that you will be looking for when the trial period is over;
4. organise the posting of Client and Office Account balances, (and all other financial data), ensuring that there is no undue delay, and verifying the balances transferred;
5. update each Client record as quickly as possible, vouching to the practice that your ledgers now reflect the exact position in relation to each financial transaction for each Client;
6. liaise again with the Auditors and get their confirmation that the system has been successfully installed and commissioned and is now working satisfactorily;
7. check periodically during the parallel run to ensure that all is going smoothly;
8. set up and implement the new controls and disciplines that are advisable in using your new accounts system.

Fear and Loathing:
Consider this course rather than "make do" with your own bookkeeper or accountant, who will already be struggling to acquaint himself or herself with a new system and at the same time keeping the existing account system up to date. He or she will already be in fear of the machine, and loathing the boss who put it there. So do you think it is a good idea to burden him or her with all the extra work outlined under the previous heading?

Backup:
This is one of those "mysteries" of the computer world which will quickly become a hum-drum reality if you proceed. If it does not, you are in trouble already! Your computer simply keeps an electronic record of your accounts. Like any machine, it is capable of failing you and in that situation you must have a copy of your accounts records available off the system. Backing up is the process of making a copy of your records, which is stored off the computer. In practice, you have to do it every day and you should have several up-to-date copies of your accounts to hand. You will obtain the additional advantage of being able to store a spare copy of your accounts off the firm's premises as a further precaution against fire.

Conclusion:
Most of this article concerned itself with advancing the case for computerised accounts on a cautionary basis but, in conclusion, I would like to revert to its opening proposition so that it is not lost sight of. A computerised accounting system is not necessary where the manual system is meeting the required "targets". The computer accountancy system is not necessary for a firm which is meeting these targets without difficulty. For that firm, it is purely a matter of choice. However, for the larger firm, or the firm dealing with a large volume of accounts, computerised accounting represents a more compelling option (but not, indeed, the only one) to recover any lost efficiency in their manual system. If you choose the computer then, hopefully, this article will help your firm steer clear of some of the pitfalls! □



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BOOK REVIEWS

NEW DIRECTIONS IN JUDICIAL REVIEW.

Current Legal problems.

By J. L. Jowell and D. Oliver (Editors) [London: Stevens & Sons, 1988. £15 Sterling].

Irish Administrative law has developed significantly in the last decade. The supervisory jurisdiction of the courts is often exercised over administrative and government processes through the procedure known as judicial review. *The Rules of the Superior Courts* (S.I. No. 15 of 1986) introduced a comprehensive procedure regulating applications for judical review whilst retaining the individual remedies including *certiorari, mandamus* and prohibition.

Jeffrey Jowell, Professor of Public Law, University College, London and Dawn Oliver, Senior Lecturer in Law, University College, London, present five essays relating to issues which pose challenges to administrative law and which deserve critical evaluation in both jurisdictions. These five issues relate to the public/private law distinction, the extension of the scope of authorities that are subject to judicial review, the developing doctrine about the protection of legitimate expectation, the principle of proportionality as a ground for review and the increasing supervision by the courts of the policy-making process.

Michael J. Beloff, Q.C., discusses the issue of the boundary walls of procedural exclusivity which have been built within the framework of Order 53 of the UK Rules of the Supreme Court – the distinction between private law and public law. Order 53 is similar to this jurisdiction's Order 84. It is noteworthy, however, that the changes effected by Order 53 were given statutory backing in sections 29 and 31 of the UK Supreme Court Act, 1981. Order 84 in this jurisdiction did not receive similar statutory endorsement. The ambit of the House of Lords decision in *O'Reilly -v- Mackman* [1983] 2 A.C. 237 and its subsequent refinement in *Wandsworth -v- Winder* [1985] A.C. 461 and other cases is discussed in some detail. In *O'Reilly -v- Mackman* the House of Lords laid it down that there exists a distinction between public law and private law which goes to the essence of the civil jurisdiction of the English courts; accordingly, Order 53, subject to such exceptions as may be determined on a case by case basis, provided an exclusive procedure by which the validity of a decision of a public authority could be challenged. It remains to be determined whether the Irish courts will follow the rationale propounded in *O'Reilly -v- Mackman.* Beloff rightly argues that the developing willingness of the courts to act as watchdogs on the executive will be undermined if litigants find themselves enmeshed in a new web of procedural technicalities.

In his paper on "What is a public authority for the purpose of judical review?" David Pannick, Fellow of All Souls College, Oxford, examines the case law on this important issue and states that there remains considerable uncertainty about the directions in which judicial review will travel. Patrick Elias, Barrister, in his essay on "Legitimate expectation and judicial review" examines the cases in which the courts have defended the "legitimate expectations" of applicants for judicial review. Irish courts have adopted the doctrine of "legitimate expectation" which has been considered by Murphy J. in *Goldrick and Coleman -v- Dublin Corporation,* High Court, November 10, 1986 and by the Supreme Court in *Webb -v- Ireland* [1988] ILRM 565.

Jeffrey Jowell, one of the co-editors and Anthony Lester, Q.C. editors, Master of the Bench of Lincoln's Inn, in their paper on "Proportionality: neither novel nor dangerous" trace the origin of this concept in German, French and European Community Law and in the jurisprudence of the European Convention on Human Rights. Proportionality – the principle that requires a reasonable relation between a decision, its objective and the circumstances of a given case – has long been accepted in Irish Law under the guise of other names but the concept has potential for further development.

The courts are increasingly scrutinising the policy making process. Dawn Oliver, one of the co-editors in *"The Courts and the Policy Making Process"* argues that the courts have extended the frontiers of judicial review beyond decision-making and into the policy-making process.

This book is confined to English law. However, many of the issues considered in this book apply to this jurisdiction. Practitioners interested in extending the frontiers of our judge-made law will find many interesting concepts within these pages.

Eamonn G. Hall

THE LARCENY ACT 1916

By J. Paul McCutcheon.

Published by Round Hall Press, 1988.

Price £25.00 h.b. £17.50 p.b.

When I was a Law Student I had difficulty reconciling the concept that every man is presumed to know the law with reality as I saw it. Actual practice in law has served to accentuate rather than alleviate my problem. Statutes, Statutory Instruments, reported decisions of different Courts in both this and other jurisdictions, unreported decisions, European Regulations, Directives – it is obviously impossible for any one person to know the law. The inherent difficulty is compounded when the Statutes setting out the law are not available to the public. That is the position with the vast

majority of pre- 1922 Statutes – these cannot be obtained in the Government Stationery Office. Due to the inactivity of successive Governments many of the main Statutes governing criminal law fall into that category. The Vagrancy Act 1824, The Offences against the Person Act 1861, The Dublin Police Act 1842, The Childrens Act 1908 and the Larceny Act 1916 are cases in point. On several occasions I have witnessed legal argument in Court in relation to these Acts falter and end as the Act in question was not readily available even in the Court offices.

The Round Hall Press have commenced a series of books called Irish Statutes Annotated which may rectify the problem to some extent. The first book in the series, ''The Larceny Act, 1916'', contains the full text of that Act together with all subsequent amendments. Also included is an introduction to the Act, a full case index, a commentary on the various Sections of the Act and finally some thoughts on reform. This introduction deals with the whole concept of larceny as a crime against possession as opposed to ownership and the difficulties the law has had in reconciling that concept with various dishonest actions which deprive persons of their goods but which do not amount to the crime of larceny. Indeed some of the illogical and peculiar English decisions are judicial attempts to criminalise obviously dishonest behaviour which does not come within the framework of the Act. It also discusses at length the difficult problem of ''Possession'' in law which has also given rise to irreconcilable judicial judgements.

The commentary on the Act itself is informative and easily readable though uneven in places. Because the Act is so old many of the Sections now are otiose and in some cases almost certainly unconstitutional. I would have liked a greater discussion of the unconstitutional aspects of the Act though the Author does point out several sub-sections such as s.43 (1) – (Prosecution empowered to put previous convictions of accused in evidence (and s.42 (2) (Chief Officer authorising searches) which are almost certainly unconstitutional. However, no comment is made in relation to s.37 (6) which authorises the sentence of whipping (maximum sentence 50 strokes).

The final part of the Book is a readable discussion of possible reforms to the larceny code. The Theft Act was introduced in 1968 in England but many problems have remained unsolved. One difficulty is that the very structure of the State is partly built on dishonesty and unfairness. A Statute that attacked all forms of dishonesty would therefore be an attack on the State itself as it now exists. Abuse of monopoly power, insider trading, misuse of the protection given to corporate entities can all be said to be dishonest but not criminal and yet can cause more harm to the public than petty theft. Whatever one feels about this there can be no doubt that the Act is in need of reform. Many of its Sections are outdated, unconstitutional and even morally objectionable.

The Irish Statutes Annotated series is to be welcomed as a necessary innovation in legal publishing. I am delighted that the series commenced with this Act. The second book in the series will deal with the Civil Liability Act 1961. For the reasons outlined earlier I would ask the Editor to annotate as many pre-1922 Statutes as possible. I would also hope that the subsequent books would keep up the same standard as this one. Despite the fact that the Book deals with a technical subject it is readable and interesting and contains very few errors. I would recommend it to any lawyer who appears regularly before our Criminal Courts. In fact those lawyers who do not appear before our Courts should read it also – every man is presumed to know the law after all.

Michael Staines

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Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

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Tower Service Station (Arklow) Limited, Wexford Road, Arklow, Co. Wicklow. Folio No.: 10244; Lands: Knockanrahan Lower; Area: 0a.3r.10p.; County: **WICKLOW.**

Walter McFarland, Ballybofey, Co. Donegal. Folio No.: 39355; Lands: Crocknamurleog; Area: 0a.0r.22p.; County: **DONEGAL.**

Richard & Margaret Lyons. Folio No.: 23067; Lands: Bunowen; Area: 1a.2r.0p.; County: **MAYO.**

Patrick Howard, Newtown, Clonlara, Co. Clare. Folio No.: 24586; Lands: Ardataggle; County: **CLARE.**

Marie Spellacy, Ballycar, Oatfield, Sixmilebridge, Co. Clare. Folio No.: 3924; Lands: (1) Ballycar North; (2) Ballycar South; Area: (1) 49a.0r.2p.; (2) 15a.3r.19p.; County: **CLARE.**

Eileen O'Neill, of Clonard, Dundrum, Co. Tipperary. Folio No.: 22652; Lands: Clonkelly; Area: 32a.1r.23p.; County: **TIPPERARY.**

Lost Deeds

In the estate of Bridget (orse Bea) Mullin, Deceased, late of "Mount Coleman", Meath Road, Bray, County Wicklow, owner of property known as 2 Meath Villas, Meath Road, Bray, standing on the Northern portion of the property described as:—

"ALL THAT AND THOSE that piece or plot of building ground situate on Meath Road, Novara Avenue, containing in the front to Meath Road aforesaid 87 feet in the rere 87 feet and in depth from front to rere 175 on the North side and in depth from front to rere on the south side 175½ feet or any of them more or less bounded on the North by other building ground the property of the said Peter Warburton Jackson on the south by the road to Bray through Novara Avenue, on the East by Meath Road aforesaid and on the West by an intended laneway . . ."

Any person having knowledge of the whereabouts of title deeds to the said 2 Meath Villas is requested to contact T. Dillon-Leetch & Sons, Solicitors, Ballyhaunis, County Mayo.

Lost Wills

WALSH, Ellen, late of Strand Street, Kanturk, Co. Cork or 9 Grattan Hill, Cork, Spinster – anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 6th October, 1988 please contact James Lucey & Sons, Solicitors, Kanturk, Co. Cork, ref. JML/W1277.

McDONAGH, Bridget Gertrude, late of Sancta Maria Nursing Home, Kinnegad, Co. Westmeath, and formerly of Clonmellon, Navan, Co. Meath. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 18th day of January, 1989 please contact Keavney Walsh & Co., Solicitors of Headfort Place, Kells, Co. Meath.

URBACH, Rafael, deceased, formerly of 9 Crannagh Court, Crannagh Road, Rathfarnham, Dublin 14 and originally of 27 Ballytore Road, Rathfarnham, Dublin 14. Will any person who made a Will for the above named deceased who died on the 27th March 1988 or who has knowledge of the whereabouts or the existence of a Will of the above named deceased please contact Lewis E. Citron & Co., Solicitors, 4 Waldemar Terrace, Dundrum, Dublin 14. Telephone 989624/989064, Fax 988309.

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 83 No. 3 March 1989

The President of the Law Society, Maurice Curran, presenting a picture to Eamonn Greene, President of the Institute of Chartered Accountants in Ireland, to mark the Institute's Centenary, which it celebrated in 1988.

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GAZETTE
INCORPORATED LAW SOCIETY OF IRELAND
Vol. 83 No. 3 March 1989

Viewpoint

The sight of the serried ranks of the judicial and bar establishment in England and Wales ranging themselves to oppose the Lord Chancellor's proposals for radical alterations to the organisation of the profession of advocate is fascinating. The piquancy of the situation is enhanced by the fact that Lord Mackay's political master is herself a member of the Bar.

Two of the principal changes proposed in the Green Papers, the abolition of the Bar's exclusive right of existence in the Higher Courts and the entitlement of Lawyers to take cases on a "no foal no fee basis", are not novel in this jurisdiction. Solicitors have of course had the full right of audience in the High Courts here since 1971. While the UK is not noted for looking beyond its own shores for examples when it is preparing legislation, it may be that the limited effect of the extension of the right of audience to solicitors in this jurisdiction has persuaded the Lord Chancellor to propose a more radical and complicated system for England and Wales.

The creation of a new profession of advocate, open to barristers, solicitors and indeed non lawyers who meet the educational criteria seems certain to create further unnecessary bureaucracy. Developments in other Common Law jurisdictions, in Australia and Canada, seem to have brought about a change in the advocacy profession by evolution rather than by the imposition of complex new structures. In some of these jurisdictions the normal progress to the status of specialist advocate is by way of what we would call the solicitors' profession. Having spent a number of years as "solicitors" some elect to become specialist advocates in the Barristers' profession.

Another proposal to permit lawyers to enter into multi disciplinary practices has brought forth one of the more bizarre comments. Sir Gordon Borrie, the Director of Fair Trading in the UK who has been a vociferous advocate of breaking down restrictive practices in the professions has strenuously objected to barristers being permitted to enter into partnership with solicitors. It might have been thought that this type of partnership would have been the most obvious development if the intention is to provide more ready access to legal services for the lay man.

It would be amusing to watch these events from the safety of a neighbouring jurisdiction were it not for the usual danger of "spill over". It may be no bad time for us to consider how effective the provision of legal services is in Ireland and whether any structural changes need to be made particularly in relation to the provision of advocacy services.

It has been suggested that actual or anticipated disapproval by judges has discouraged solicitors from exercising their rights of advocacy to any great extent in the higher Courts. It is difficult to quantify the extent of the basis for this suggestion. Another explanation may be that there are in fact only a small number of solicitors who would regard themselves as sufficiently skilled in advocacy to warrant their conducting cases, particularly in the High Court. In addition there is the cost factor. Only the most modest firm of solicitors will have such low operational costs as members of the Bar. While the level of fees charged by some barristers does not always reflect their low operating costs, nonetheless it is a factor which enables them to compete on a price basis, certainly at the Circuit Court level.

Much has been made of the need to preserve the independence of the Bar but is it not time that the Bar looked again at whether its services could be more sensibly provided by partnerships or associations of Barristers rather than by the exclusively independent practitioner. □

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Defective Building Work: Who should pay?

Part 2

The Policy Implications

Lord Bridge's analysis provokes several observations. First, and most fundamentally, its policy preference should be identified and assessed. Lord Bridge commits himself to the principle that a person who has been put to expense in protecting himself, his family, his business and his employees, or his property, from the danger of injury or damage brought about by the defendant's negligence should have no right of action in tort against the defendant on account of that negligence. This is surely a principle that contradicts conventional norms of justice and that, if it is to be accepted, should be supported by a clear and compelling argument. Yet what Lord Bridge offers fails both these tests. Few people would be impressed by the suggestion that, because the loss (on Lord Bridge's analysis) was purely economic, the plaintiff should on that account be defeated without further consideration of the issue. Of course it is true that, in every common law jurisdiction, courts have been wary about recognising broad principles of liability in negligence for pure economic loss, but prior to *D. & F. Estates* it seemed that there were at least some circumstances in which recovery for this type of loss should be allowed. *Hedley Byrne* was an obvious instance; *Junior Books* another (before it was distinguished into oblivion by *D. & F. Estates*). The attempt to obliterate *Junior Books* should not prevent us recalling how that decision, in reaching its conclusion, relied strongly on the premise that there is (and should be) liability for negligently causing a person to go to expense to prevent injury to the person or property. Lord Roskill observed that Laskin, J.'s dissenting judgment in *Rivtow Marine* was "powerful".

Accepting that the costs incurred in preventing injury to oneself or one's property should be characterised as "pure economic loss", this is nonetheless an odd and distinctive species of such loss. That it should merit compensation would in no way compromise the courts in their general strategy of treating claims for pure economic loss gingerly.

The idea that economic costs incurred in preventing injury to others from a dangerous defect should not be recoverable in a tort action offends common sense. As Andrew Grubb[12] observes, "it would be unfair to require the plaintiff, knowing the defect, . . . to sit back and wait for an accident to occur for which he would be liable, to discontinue use of his property or else to do the repairs at his own expense because he had no cause of action". This comment makes it plain that separate policy considerations apply in regard to the different types of cases of prevention of injury: preventing injury to others (whether or not one is under a prior legal duty to do so) raises separate questions from preventing injury to oneself; and certainly the notions of "endangering" and "injuring" property, in contrast to causing a "non-dangerous" defect, need closer examination than the British decisions have yet given them. Yet *D. & F. Estates Ltd.* offers no significant insights on any of these questions. Nor does the case address the legal position of a person who acquires a product which he later discovers is dangerous. If he uses it and it injures him, is he to be regarded as having been guilty of contributory negligence?[13] (The proviso in that paragraph as to "unjust enrichment" *might* save the day for the plaintiff, however; moreover, bringing the defect to the attention of the vendor or manufacturer could help his case.[14] If the product injures another person, should the doctrine of *novus actus interveniens* apply?[15]

By
William Binchy, B.L.,
Research Counsellor,
Law Reform Commission.

A Glance Towards Europe

Lord Bridge's notion of "atomising", as it were, the constituent elements of complex structures or chattels is not new. Article 2 of the European Products Liability Directive defines "product" as including movables incorporated into other movables or into immovables.[16] Article 9 of the Convention excludes from compensation damage to, or destruction of, *the defective product itself.*[17] The effect of *D. & F. Estates* is to go a long way towards incorporating into the common law actions in negligence the limitations inherent in the Directive. This is likely to be good news, by and large, for British manufacturers but emphatically bad news for British consumers.

Prevention Costs or Damages for Self-Destructing Product?

Lord Bridge's analysis suffers from a confusion of thought in its intermeshing of two quite separate principles. The first is that the cost of preventing threatened injury (whether to the product itself, to a person or to other property) is a pure economic loss which as such should not be the subject of compensation in tort. The second is that there should be no compensation in tort for the destruction of a product, resulting from the defendant's negligence, where no other damage has been caused. An adherent to the latter principle could comfortably decline to compensate a plaintiff whose claim was based on the prevention of damage to the product: if no liability should accrue for causing

actual damage, *a fortiori* liability should not attach for merely causing the risk of such damage.

Lord Bridge's analysis leans both ways. On the facts of *D. & F. Estates,* the plaintiff would have to lose under either approach. But what would be the outcome of a case with somewhat different facts – where, for example, a plaintiff was put to expense in preventing physical injury to himself or his family resulting from a defendant's negligence in plastering a ceiling? If Lord Bridge were to deny this plaintiff compensation on the basis that the case was one of pure economic loss he could derive no support from *East River Steamship Corporation,* which limits immunity to cases where a product self-destructs (or, it may be presumed, *threatens* to self-destruct) rather than causing (or risking) injury to a person or other property.

"Complex" and "Simple" Structures

Another example reveals the practical importance of the question as to when a product or a structure is of sufficient "complexity" to fall within Lord Bridge's scheme of liability. A man buys a caravan manufactured by the defendant. On account of negligence in the design, the caravan bursts into flames and is consumed by fire. If the caravan is a "simple" structure, the plaintiff will have no claim in tort against the manufacturer. If it is a "complex" one, he will be entitled to succeed to the extent, it seems, that the court isolates the separate parts of the structure, the claim being limited to the damage to the totality of the structure minus the element of damage attributable to the part with the hidden defect, unless (according to Lord Oliver, at p. 393) the repair of that part is "necessary to remedy damage caused to other parts".

Lord Bridge gives tantalising hints as to the nature of "complexity" of products and structures. A garden wall is "a very simple structure"; however, it "may well be arguable that in the case of complex chattels", one element of the structure should be regarded as distinct from another. He does not therefore, commit himself unreservedly to the existence of such complex chattels. Conversely he does not commit himself finally on the question whether a residential structure attached to the ground is sufficiently complex to be regarded as having separate elements. As we have seen, he goes no further than to admit that, in comparison with the garden wall, "more difficult questions" may arise in relation to a "more complex structure" like a dwelling house. "One view", he notes, "would be that such a structure should be treated in law as a single indivisible unit". On this approach the decision in *Batty -v- Metropolitan Property Realisations Ltd.* would be different – an outcome Lord Bridge favoured. Nonetheless, he stressed the argument against this characterisation, and made it clear that he was coming to no final view on the question.

Lord Oliver's Speech

Lord Oliver's concurring speech is also worthy of close attention. Much of it is concerned with a critical analysis, and narrow interpretation of the scope, of the holdings, in earlier decisions. He is surely correct in finding in *Anns* a statement of common law duty which in fact reflected the statutory context in which the question of the liability of the builder and local authority was debated. Lord Oliver had great doubt as to whether *Batty* had been correctly decided, at least as far as the builder was concerned. He considered that the decision in *Batty* might possibly have been justified on the *Hedley Byrne* principle of reliance had it been argued on this ground.

Reverting to *Anns,* Lord Oliver said:

> "This much at least seems clear: that in so far as the case is authority for the proposition that a builder responsible for the construction of the building is liable in tort at common law for damage occurring through his negligence to the very thing which he has constructed, such liability is limited directly to cases where the defect is one which threatens the health or safety of occupants or of third parties and (possibly) other property. In such a case, how-

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ever, the damages recoverable are limited to expenses necessarily incurred in averting that danger. The case cannot, in my opinion, properly be adapted to support the recovery of damages for pure economic loss going beyond that, and for the reasons given by [Lord Bridge], with whose analysis I respectfully agree, such loss is not in principle recoverable in tort unless the case can be brought within the principle of reliance established by the *Hedley Byrne* case."

Lord Oliver's hesitancy as to whether costs incurred in preventing threatened damage to other property fall within the range of recovery is worth noting.

Implications for Ireland

It is difficult to assess the likely attitude of the Irish courts to *D. & F. Estates*. Certainly in recent years, the Supreme Court has generally been more willing than the House of Lords to embrace the practical implications of the "neighbour" and "proximity" tasks espoused in *Donoghue -v- Stevenson* and *Anns*. In *Ward -v- McMaster,*[18] McCarthy, J.'s judgment in particular shows a strong disposition to steer Irish law away from the retrenched position prevailing in England, where it has been said that "the picture has, in some respects, become more blurred with each new pronouncement" of the House of Lords or the Privy Council: Markensinis, 104 L.Q. Rev., at 9 (1988). In *Siney -v- Dublin Corporation,*[19] Henchy, J. referred with apparent approval to *Anns* and *Batty*, though he did acknowledge that the "precise conditions or limitations" of the liability established in these and other decisions did not need to be considered in *Siney*.

In *Colgan -v- Connolly Construction Company (Ireland) Ltd.,*[20] McMahon, J. had already invoked *Anns* and *Barry* when endorsing the principle of allowing compensation in tort for expenses in preventing threatened injury or damage, now challenged in *D. & F. Estates*. It is, however, worth noting that McMahon, J. was not disposed to extend compensation to cover "defects in the quality of the product itself", where there was no question of injury or damage to persons affected by the product.[21] To that very limited extent, McMahon, J.'s judgment found an echo in *D. & F. Estates*.

In *Sunderland -v- McGreavy,*[22] Lardner, J., having discussed *Colgan,* noted that the defects with which he was concerned were "likely to affect health and safety". In view of the fact that the plaintiffs' garden had already been seriously flooded, resulting in the escape of sewage from a septic tank, the case can scarcely be interpreted as raising the issue confronting the House of Lords in *D. & F. Estates*.

It is to be hoped that the Irish courts resist the argument that compensation should be denied for expenses in preventing threatened damage to the person or property. Apart from the clear injustice and arbitrariness of such a denial, it scarcely makes good sense, as a social policy, for the law in effect to discourage people from removing such dangers.

If our courts continue to recognise the right of recovery for these expenses, they will eventually have to confront subsidiary issues, such as the circumstances, if any, in which the prevention of threatened damage to one's product (where there is no danger of damage to other property or of personal injury) should give rise to a claim. In answering this question, the courts will be obliged to analyse the notion of "danger" to a product. This notion rests largely on a metaphor, and it may be that the courts will be disposed to treat this type of "danger" differently from cases where there is a real danger of personal injury or of the product causing damage to other property. In this regard, the analysis in *D. & F. Estates* regarding simple and complex structures may prove helpful.

As regards the Statute of Limitations,[23] the Irish courts will be required to consider whether the clock should not start until the threat to health and safety is "imminent", as Lord Wilberforce proposed in *Anns*, and, if so, whether it should be supplemented by a further requirement that such imminent threat be reasonably discoverable by the plaintiff. High Court decisions on the general subject are difficult to harmonise: cf. the Law Reform Commission's *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries,*[24] and R. Byrne & W. Binchy, *Annual Review of Irish Law 1987*, 246-255 (1988). In *Hegarty -v- O'Loughran,*[25] although Barron, J. noted that reference had been made in the course of argument before him to submissions in other cases on the constitutional issue (highlighted by Carroll, J., in *Morgan -v- Park Developments Ltd.,*[26] the constitutional issues had not in fact been raised during argument. Subsequent to *Hegarty -v- O'Loughran,* Costello, J., in *Brady -v- Donegal County Council,*[27] held that an automatic two-month limitation period in relation to challenging planning decisions offended against the Constitution. On 17 October 1988, the Supreme Court remitted the entire action for retrial by the High Court. It remains to be seen how the general issue will finally be determined at Supreme Court level. The decision of the Supreme Court in *Toal -v- Duignan,*[28] suggests that the Court will not look with favour on an unqualified discovery rule.*

**This article is written in a personal capacity.*

References

12. [1988] Camb. L.J., at 114.
13. Cf. Hampton, *The Liability Crisis, U.K.-Style,* Financial Times, 12 October 1988, *Civil Liability Act 1961,* section 34(2)(d).
14. Cf. *Deegan -v- Langan,* [1966] I.R. 373 (Sup.Ct.).)
15. Cf. *Conole -v- Redbank Oyster Co.,* [1976] I.R. 191 (Sup. Ct.), *Crowley -v- Allied Irish Banks,* [1988] I.L.R.M. 225 (Sup. Ct.).
16. See Binchy, 80 Incorp. L. Society of Ireland Gazette, at p. 38 (1986).
17. See further the Explanatory Memorandum to the Draft Directive, para. 20 (85/374/EEC, published in the Official Journal of the European Communities, No. L210/29) Owles, Damage to Property, 138 New L.J. 77 (1988).
18. 10 May 1988.
19. [1980] I.R. 400.
20. [1988] I.L.R.M. 33.
21. Cf. Kerr & Clark, 15 Ir. Jur. (n.s.), at 59 (1980).
22. [1987] I.R. 372, at 384.
23. as to which cf. Stapleton, 104 L.Q.Rev. 213, at 221ff (1988).
24. 2-6 (LRC 21 – 1987).
25. [1987] I.L.R.M. 604.
26. [1983] I.L.R.M. 156).
27. On 6 November 1987.
28. On 27 November 1987.

Local Government (Multi Storey) Buildings Act 1988

The Society has organised an Evening Seminar on the above Act which came into force on the 14th November 1988. This Act has major implications for anyone involved in the sale or purchase of a five storey building (including basement) or part thereof built since 1st January 1950. Many apartment blocks are affected by the Act.

The Seminar will be held at 7.30p.m. on Wednesday 26th April next at Blackhall Place and the guest speakers will include a conveyancing solicitor and an engineer. Attendance will be limited to 200 and anyone interested should contact Audrey Geraghty at the Law Society, Blackhall Place, Phone No. 01-710711 (Fax 01-710704). A charge of £10.00 will be made to cover the cost of reproduction of information material.

It is expected that there will be great interest in this Seminar and accordingly the date should be entered in your diary straight away and a booking made without delay.

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From the President . . .

Building Societies Bill

Dear Colleagues,

The Law Society called an Extraordinary Meeting of the Presidents and Secretaries of the Local Solicitors' Associations throughout the country in February, to consider sections of the Building Societies Bill which permit Building Societies to provide conveyancing services and on the following day the Council of the Law Society also considered this matter.

The Law Society on behalf of the solicitors' profession objects strongly to this proposed legislation for which there has been no public demand and which is not in the public interest.

If, as stated by the Minister, the reason for the proposal (which is a direct copy of the provisions in English legislation) is to increase competition we would point out that there is more than sufficient competition in the profession at this time where the number of solicitors has grown from 1,500 in 1976 to over 3,500 at the present time. In addition, as from 1st January, 1989, solicitors are permitted to advertise and on request to give quotations of fees.

From the viewpoint of the public, buying a house is one of the most important capital transactions that most families ever enter into and we would be concerned that independent advice should be available to a purchaser who should not be left to rely on the advice of employees of Building Societies, whose first interest will be to the Society that employs them. A solicitor gives independent advice and he is not selling any particular financial service.

Building Societies are powerful, financial organisations and the Law Society is concerned that the independence of the profession could be fundamentally undermined if serious inroads are made into conveyancing practice by Building Societies, as such work represents for most solicitors in private practice over 40% of their business. Without conveyancing, small practices, both in rural and in surburban areas, may not be able to offer at a reasonable price other legal services which are a necessity to the community, resulting in the withdrawal of legal services from large sections of the population. The legal profession has had good relationships with Building Societies over the years and would hope that these relationships can be maintained. The proposals in the Bill to expand financial services which they provide to members is to be welcomed. However, the proposals to permit societies to provide legal services is a fundamental change, not only in the traditional business of the Societies but also in the structure and operation of a particular aspect of Irish society. We do not believe that the Government has given sufficient consideration to the arguments we have made to them about the serious consequences for the solicitors' profession.

As we have said to the Government, we believe the time of the Oireachtas would be much better spent in reforming the law relating to property transactions, as there has not been a major Conveyancing Act for over 100 years. In addition Compulsory Registration should be extended beyond the paltry few counties in which it is operative.

We accept that the solicitors' profession must see itself as the provider of professional services efficiently and economically to the public; such services must be delivered to a high standard and competitively.

An important element of the Building Societies' proposals is that Regulations will have to be made by the Department of Justice in consultation with the Department of the Environment and the Central Bank. If we are not successful in our objections to the proposed legislation, we have assurances from the Department of Justice that we will be fully consulted before such Regulations are made.

In our ongoing discussions with the Department of the Environment and in our monitoring of the progress of the Bill through the Oireachtas, we will seek to ensure that this is achieved.

I believe that our well educated and mainly youthful profession will be able to compete successfully so long as the competition is fair and the playing field level. □

MAURICE R. CURRAN
President

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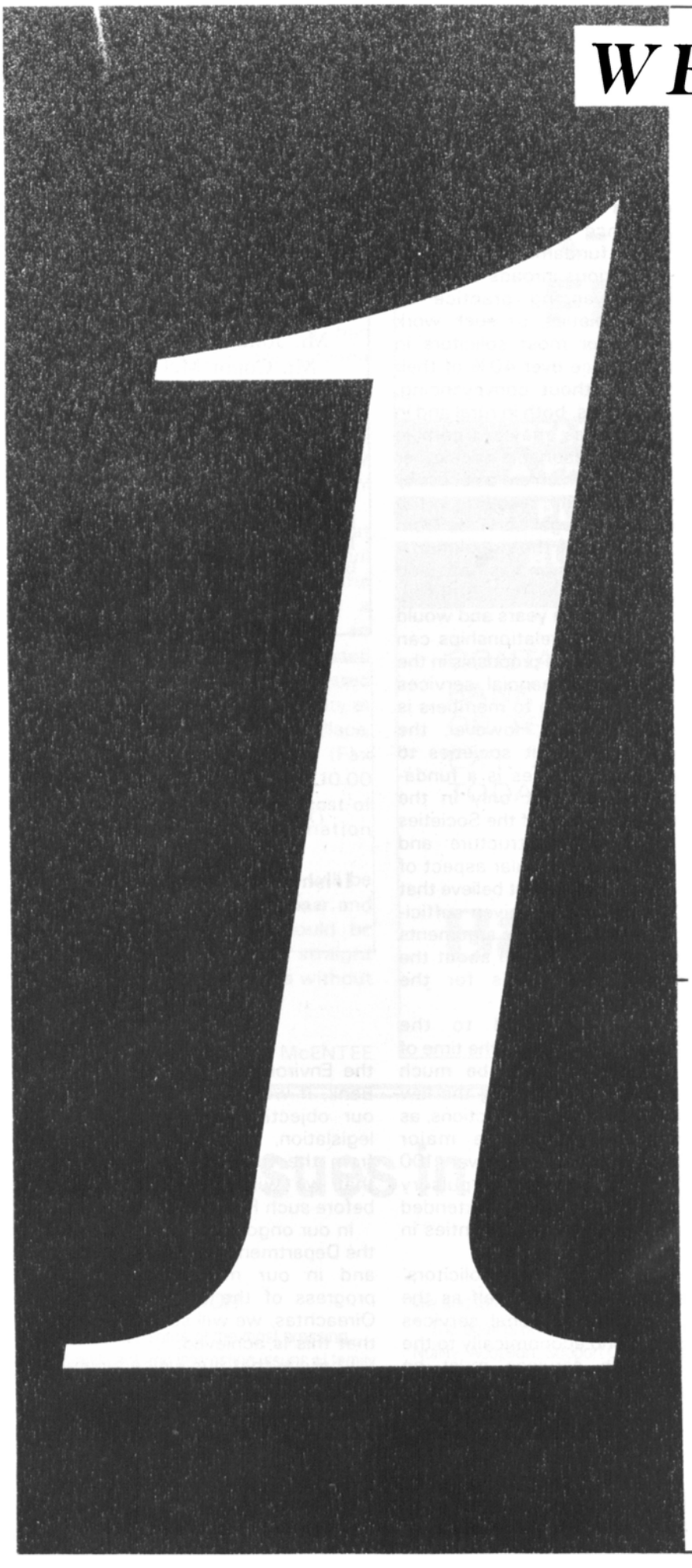

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Younger Members' News

"If it's Tuesday it must be Luxembourg"

Some of the Younger Members have just returned from a most informative and enlightening tour of the EC institutions where they saw the machinery of the EC in action. The visit included a trip to Brussels and the European Commission, where Mr. Ray McSharry put in a brief appearance. The tour also covered the European Court and the Court of Auditors, both of which are situated in Luxembourg and then proceeded to the European Parliament in Strasbourg.

Travel was by bus and proved quite tiring. However, the time was spent ingesting some of the reams (or Reims?) of informative documentation obtained at each stop. All rose to the rigorous demands of the trip with great enthusiasm. □

And then there was . . .

And then there was the clerk typist's first Estate Administration. She consistently referred to the late Mrs. Bloggs as "the diseased" and when reciting the Title of the only daughter of the "diseased" stated on the Oath "And I am the lonely and awful daughter"!

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INTERNATIONAL BAR ASSOCIATION
Section on Business Law Scholarships

The Section on Business Law of the International Bar Association will hold its biennial conference in Strasburg, France, from 2-6 October 1989.

The Section on Business Law has 8,700 members and consists of 26 committees. Those committees will meet during the Conference and discuss matters of substantive law (e.g. arbitration, business organisations, sale of goods, environmental law, labour law, aeronautical and maritime law) and many other subjects.

The Section has established a fund from which scholarships may be given to young lawyers who may wish to participate in this conference, but who are prevented from doing so owing to financial constraints. The Section invites interested persons to apply for the scholarships.

The candidates should be solicitors aged not more than 35 and employed or engaged in private practice.

Those who are interested are asked to write to the International Bar Association, attention: **Rachel Youngman, 2 Harewood Place, Hanover Square, London WIR 9HB, England before 20 April 1989.** After receipt of your letter showing interest, a questionnaire will be sent in return. Candidates, if selected, may be asked to write a report on their experience at the Conference.

LAW SOCIETY OF IRELAND

REVENUE COMMISSIONERS - STAMP DUTY LAND REGISTRY & REGISTRY OF DEEDS

The President and Council of the Law Society have noted with extreme concern the notice by the Office of the Revenue Commissioners in the daily papers of 16th February, 1989, to the effect that the Stamps Office will not deal with postal applications until further notice. The Society understands that it will be quite some time before the postal service is resumed.

This public admission by the Revenue Commissioners of their inability to adequately staff a major revenue raising service will impose severe hardship, delay and additional costs on solicitors practising outside Dublin and on their clients.

The Society seeks the understanding of Solicitors' Clients in the present difficulty.

The inability of the Revenue Commissioners to deal with the increasing flow of business consequent on recent improvements in the economy, will be a serious blow to business confidence and to the expeditious handling of business in the rising property market.

At the same time the Society urges the Minister for Finance to take immediate steps to eliminate these difficulties.

The Society avails of this opportunity to draw the public's attention to an almost equally disastrous situation in the Land Registry and Registry of Deeds, where despite the Society's constant pressure and the strongest representations to the Department of Justice and public representatives of all political parties, delays in many types of application, due to inadequate staffing are running at **12 months and more**. Again, this is having a seriously detrimental effect on property transactions and building developments.

Despite the high and ever increasing level of charges, the service is deteriorating by the day.

How long must the public suffer from inadequate, essential Government services for which they pay dearly?

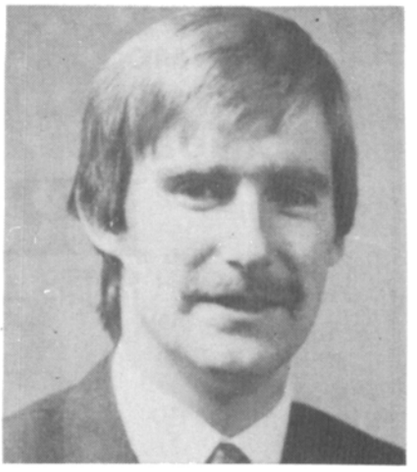
Text of notice placed in the national newspapers on 17 February, 1989, by the Society's Public Relations Committee.

Eurlegal

(or why we put Peter Sutherland in Pink)

by

Ken Murphy, Solicitor*



*Ken Murphy is a solicitor in the Brussels office of A&L Goodbody. He is a member of the Council of the Law Society and Chairman of the E.C. (1992) and International Affairs Committee.

Not everybody loved the pink colour of our January cover. It wasn't chosen for its attractiveness, but for its significance. This particular shade is the official colour which denotes that a European Community publication is in English rather than any of the other eight working languages each of which has a different colour. And so for our first "European" issue we thought it an appropriate colour to choose.

Because there are rather a lot of other, more important things which not many Irish solicitors seem to know in the areas of European law in general and the 1992 programme in particular, the Law Society sees a need to encourage the profession to take a new interest in these areas.

To co-ordinate this the President, Maurice Curran, has set up the EC (1992) and International Affairs Committee. In spite of its rather inelegant title, this Committee has set to work with a will. The special European law issue of the Gazette in January was the first tangible result of its efforts.

The need to increase solicitors' awareness and knowledge of European Community law and developments was very firmly impressed on all who attended the inaugural meeting of the Irish Centre for European Law last year. Peter Sutherland spoke of "the opportunity and the threat which is the double-edged sword of competition".

The opportunity is that the Irish legal system could become a centre of excellence within the European framework. The threat is that failure to prepare to meet the competition will result in the gradual melting away of commercial clients to other professional advisers, both lawyers and non-lawyers, in Ireland and abroad.

In the tradition of word-play which gave us "EUROPEN", we have devised the word "EURLEGAL" to give cohesion to the Law Society campaign which, we anticipate, will run right up to 1992. More details of the campaign will be announced by the President at the Law Society Annual Conference in Killarney. This will be held between the 4th/7th May next and will be devoted to the topic of 1992 with John Hume, MEP, Peter Sutherland, and Conor McCarthy as guest speakers.

We can tell you at this stage, however, that one of the features of the campaign will be a greater emphasis on European law topics and 1992 developments in the Gazette.

Although the following examples relate largely to the area of intellectual property, the Gazette's net in the future will be cast widely and deeply into the shoal of new laws which will create the Single Market and transform all economic activity in Ireland and in Europe.

There will be more pink Gazettes!

First EC Regulation on Franchising

(OJL 359/46 of 28.12.88)

With effect from 1st February 1988 the European Commission has adopted a block exemption regulation on franchising agreements. Agreements which fall within the scope of these regulations will benefit automatically from exemption under article 85 (3) of the EEC Treaty. There will no longer be a need to notify such agreements to the Commission for individual exemption.

In the recent years the number of franchise contracts in the EC has grown considerably. At the present time there are 2,000 franchisors and 80,000 franchisees, found mainly in the Northern member states, which account for 10% of the EC retail trade. Yet, there are no national laws on franchises.

The European Commission had already taken individual decisions in the *Pronuptia* case (which was also the subject of a European Court of Justice decision) and in the cases of *Computerland, Yves Rocher,* and *Servicemaster.* These decisions made it possible for the Commission to gain the experience necessary to draw up these general regulations which provide a framework of legal certainty and a favourable approach to distribution and service franchise contracts.

Commission issues new Regulation governing Transfer of "Know-how"

This Regulation is due to come into effect on 1st April 1989. The regulation results from a Commission desire to encourage the dissemination of new technology in European industry. The intention is to promote co-operation between different operators in matters of research and development.

The economic importance of technological information not protected by patents (called "know-how") is illustrated by the large number of such agreements at present concluded by industry. Among the many features of this new block exemption are the definitions of know-how together with the regulation of the field and length of application of legal restrictions in such agreements.

Contd. on page 87.

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(We will very shortly be opening a new office in Dublin.)

Contd. from page 85.

Trade Marks Directive Adopted
(OJL 40/1 of 11.2.89)

The Council has adopted the directive co-ordinating the laws of the member states on trade marks. Its aim is to harmonise the principal points of the member states, trade mark laws.

Member states' laws on trade marks vary considerably and this directive will not by any means make them identical. What it does do, however, is to lay down a common definition of the signs capable of constituting a trade mark. It also gives a definitive list of reasons for refusing a trade mark application and for nullity of a mark. Procedural matters are left to the member states. The rights conferred by a trade mark are also defined.

The member states will have until December 1991 to implement the directive in their national laws. Agreement has not been reached as yet regarding the site and language of the proposed Community Trade Mark Office.

Commission Adopts Directive on Takeover Bids

In the course of its meeting of 22nd December 1988 the European Commission adopted a proposal for a Directive on takeover bids (13th Company Law Directive). The proposal is designed to establish an equilibrium between the interest of the offerer, on the one hand, and those of the target company, including its shareholders and employees, on the other hand.

The offerer will be obliged to supply specific information about its intentions in the offer document, make a bid once one third of the shares have been acquired and explain any use of the financial resources of the target company to finance the bid. The directive also proposes to regulate the conditions under which defence measures can be adopted once the offer is announced.

The Commission would have power to forbid or suspend any takeover bid which did not comply with the directive.

The intention of the proposal is to put an end to speculative raids by requiring anyone making a bid to bid for the whole Company, not just part of it. It will also be necessary to launch a formal take over bid once control of one third of the voting rights of the target company has been acquired.

By creating an obligation for bidders to issue an offer prospectus detailing their intentions as regards the company's future activity, management, employees and debts, the proposal seeks to put an end to leveraged buy-outs where speculators borrow heavily to acquire a company and then repay the debts and cream off a handsome profit for themselves by asset stripping the acquired company.

There will certainly be opposition from some member states, notably the United Kingdom, to this proposed directive on the grounds that adequate regulation of takeover bids already exists at national level. The Commission believes strongly that takeovers need to be regulated uniformly throughout the Community as part of the 1992 programme, however, so that the necessary consolidation can take place in the European economy. □

The **Criminal Justice Section of the American Bar Association** will hold its annual meeting in Dublin between April 23rd and April 29th, 1989.

Members are invited to attend the working sessions which include:

Monday 24th April:
'Political Offence Exception in Contemporary International Extradition"
Panelists include
Prof. Christine Van den Wijngaert, Professor of Criminal Law, University of Antwerp, Belgium.

Thursday 27th April
"International Enforcement against Securities Fraud"
Panelists include
Marvin Picholz, Strook, Strook & Lavan, Washington, D.C.

Further information for confirmed times and venues can be obtained from Audrey Geraghty, Law Society, Blackhall Place, Tel. 710711.

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BRADSTOCK to set up in Dublin

Bradstock Insurance Broking Group, one of Lloyd's largest and most profitable broking houses, is to establish a company in Dublin. Bradstock director, Nick Bryce-Smith says he expects the company to commence trading in Dublin on May 1st next in Upper Fitzwilliam Street.

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The Data Protection Act 1988
– Must you Register?

The Act aims to give effect to the Council of Europe Data Protection Convention and so to protect the privacy of individuals about whom automated personal data are kept. It applies whether or not the personal data are kept on mainframes, minicomputers, microcomputers or word processors.

The Convention contains basic principles of data protection and rules for the transborder flow of personal data. The Act obliges all persons who control the contents and use of personal data ("data controllers") or who process personal data on their behalf ("data processors") to comply with these basic principles and it confers new rights on individuals ("data subjects").

All data controllers must ensure that data are collected fairly; are accurate and up-to-date; are kept only for specified and lawful purposes; are adequate and not excessive, and are not kept longer than is necessary in relation to those purposes. The test to be applied when determining whether a person is a data controller is "Does the person control the contents and use of personal data?" A data controller can be an individual, a firm or a corporate or an unincorporated body.

Both data controllers and data processors must take appropriate security measures against unauthorised access to, or alteration, disclosure or destruction of the data and against their accidental loss or destruction.

In accordance with the Convention, every individual, regardless of nationality or residence, must enjoy the rights it confers. The first major one is the right to establish the existence of personal data. An individual may exercise it free of charge by writing to any person he believes keeps personal data and he must be told within twenty-one days whether any such data are kept and, if so, the nature of the data and the purposes for which they are kept.

The second major right entitles an individual to have access to any personal data kept in relation to him. He must be given a copy of the data within forty days of requesting it on payment of an access fee, which is optional but cannot exceed £5. In certain cases the fee is refundable, for example, if the access request gives rise to a need to materially modify the data.

The right of access is not absolute. It is subject to a number of restrictions in the interest of the rights and freedoms of others, for example, where exercise of the right would prejudice the matters in respect of which the personal data are kept. However, in these cases a data subject may appeal to the Data Protection Commissioner if he feels that the exemption claimed is not justified. The Commissioner must investigate every complaint unless it is frivolous or vexatious.

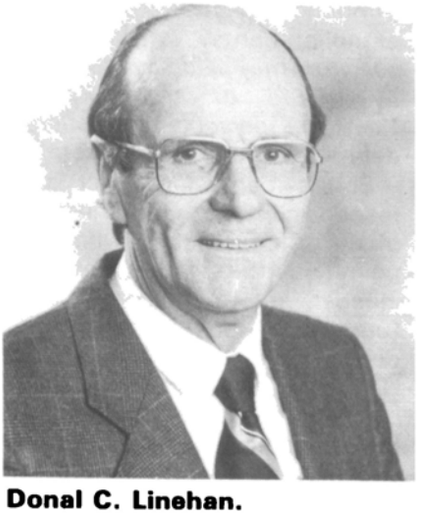
By
Donal C. Linehan,
Data Protection Commissioner

Section 4 of the Act, which gives the right to access, contains an important provision for those involved in the areas of health and social work. It enables the Minister for Justice, if he considers it desirable in the interests of data subjects (after consultation with the Minister for Health and other Ministers concerned) to make regulations modifying the right of access to personal data relating to physical or mental health or to social work. These regulations are in course of preparation and will be made before the right of access becomes exercisable (19 April, 1989).

The third major right given to an individual enables him to have personal data rectified or erased if such data are kept in contravention of any of the data protection provisions. The data controller must comply with such a request within forty days. However, a data controller can refuse to accede to such a request and will still be regarded as having complied with the Act if he supplements the data with a statement agreed between the data subject and the data controller involved.

An innovative right contained in the Act is that which allows an individual to have his or her name removed from a direct marketing or direct mailing list.

Only certain categories of data controllers are required to register in the register established and maintained by the Commissioner, who is responsible for supervising the application of the Act. The data controllers required to register include virtually all those in the public sector; financial institutions, insurance companies and persons or firms whose business consists



Donal C. Linehan.

wholly or mainly in direct marketing or direct mailing, providing credit references or collecting debts, as well as any other data controllers who keep "sensitive" personal data, that is, data relating to racial origin, political opinions, religious or other beliefs, physical or mental health, sexual life or criminal convictions.

If the only kind of sensitive personal health data kept by a data controller is health data kept in the ordinary course of personnel administration and not used for any other purpose, then he does not have to register – unless of course he comes under one of the other categories that have to do so. This exemption from registration, therefore, will not apply if, for example, a data controller has to register by virtue of being a public sector body required to do so.

Data processors whose business consists wholly or partly in processing personal data on behalf of data controllers also have to register.

Registration began on 9 January and will continue up to 19 April 1989, when the remaining provisions of the Act, with one or two exceptions, will come into force. Thereafter, any registrable person who has not registered will commit an offence while those who have registered will commit an offence if they knowingly deal with data otherwise than as indicated in their registered entry. Registration is subject to an annual fee of £100.

Data controllers most likely to keep personal data relating to physical or mental health will include hospitals, nursing homes, clinics, doctors, dentists, pharmacists and insurance companies. Schools, colleges, educational establishments, *barristers and solicitors may also have to register by virtue of their keeping "sensitive" personal information,* as defined above, on computer.

Enforcement of the Act is the responsibility, in the first instance, of the Commissioner, who is appointed by the Government and is independent in the exercise of his functions. Appeals against his decisions lie to the Circuit Court. He is required to investigate complaints that the data protection provisions have been contravened and may do so also on his own initiative. If he is satisfied that a breach has occurred he can issue an "enforcement notice" on the data controller or data processor concerned indicating what must be done to comply with the Act. A refusal or failure to comply with such a notice, without reasonable excuse, is an offence.

The Commissioner can prohibit the transfer of personal data outside the jurisdiction in certain cases. He does this through the issue of a "prohibition notice". The provisions in the Act relating to the transfer of data correspond to those in Article 12 of the Convention. When applying them, the Commissioner must balance the interest of privacy against the desirability of facilitating international transfers of data. Failure to comply with a prohibition notice without reasonable excuse is also an offence.

The Data Protection Act creates a new branch of the law having its own particular concepts and terms. As stated, it will come into operation on 19 April 1989. To assist those affected by it a Guide to the Act, registration forms and guidance notes on how to complete them are available, on request, from the Office of the Commissioner, 74 St. Stephen's Green, Dublin 2. Tel. 01-789304.

It is to be hoped that all those immediately involved with implementing the Act and its requirements will co-operate to make it a success. It is the first privacy legislation to have been enacted by the Oireachtas and the advantages that can stem from it for data subjects, data controllers and data processors are considerable, both on the domestic and on the international plane. On the domestic plane, it establishes new individual rights and introduces new standards of data protection that will make for increased efficiency and cost saving in the management of computer systems, while on the international plane it has placed this country in the forefront of modern data protection legislation, a factor that can only benefit our international trade and business life, particularly in the information market. □

FORENSIC FABLES

by

O

THE GREAT LAWYER WHO TOLD HIS AUDIENCE HOW TO DO IT

A GREAT Lawyer Once Attended a Banquet. He was the Principal Guest. The Great Lawyer's Hosts were Budding Members of the Bar who had Formed a Debating Society. They Desired to Pay Honour where Honour was Due and to Learn from One who had Arrived at the Top how the Trick was to be Done. The Great Lawyer, when Responding to the Toast of the Evening, Told them All About It. Individual Effort and Concentration, said the Great Lawyer, were the Only Things that Counted. There were Some, he Believed, who Thought that Luck was an Important Factor in Life. They were Wrong. He who Wished to Succeed must Work—Work—Work. He must Rise Early and Map Out his Day. He must be an Athlete in Strict Training. He must be a Sentry at his Post, Morning, Noon and Night. He must Serve One Master, and One Master Only—his Profession. The Great Lawyer Reminded them of the Emperor Napoleon's Observations on the Subject of Knapsacks and Bâtons, and Assured them that, if Only they would Fight the Good Fight, Each One of them might be a Marshal in the Army of the Law. And in a Moving Peroration the Great Lawyer Attributed his Own Success in Life to a Strict Adherence to the Maxims he was Expounding. In Point of Fact, the Great

THE GREAT LAWYER WHO TOLD HIS AUDIENCE HOW TO DO IT

Lawyer had been Spoon-Fed by a Near Relative from the Day of his Call; he had Always Taken Things Easily and Done himself Well; he had made a Matrimonial Alliance which Furnished him with Abundant Cash; a Series of Unexpected Political Events had Floated him into a Government; and the Sudden Demise of an Important Personage on the Eve of his Party's Defeat at the Polls had Provided him with the Fat Job which he now Enjoyed. When the Great Lawyer Resumed his seat after Speaking for Forty-Five Minutes, his Innocent Hosts Cheered him to the Echo, and Went Home Grimly Determined to Follow in the Great Lawyer's Footsteps.

Moral.—*Say the Right Thing.*

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Practice Notes

Correction

The following is a corrected version of this practice note, which was first published in the January, 1989 Gazette, with an error in the third paragraph.

1992 and the Hit and Run Driver

EEC Directive leads to new MIBI Agreement

People who suffer personal injuries in road accidents caused by "hit and run" drivers will have enhanced protection as from 31st December 1988. As the result of the implementation of the Second Directive on Motor Insurance 84/5/EEC victims of such accidents occurring on or after 31st December 1988 will have a *right* to compensation for personal injuries incurred in road accidents involving vehicles whose drivers are unidentified or untraceable or found to be uninsured.

Compensation will be payable by the Motor Insurers Bureau of Ireland (MIBI). Under the terms of the new agreement reached between the Minister for the Environment and the MIBI, injured parties *will no longer* have to obtain a judgement against the uninsured driver but can apply directly to the MIBI for compensation. Injured parties will also have a right of redress to the Courts where they have been refused compensation or consider the compensation offered to be inadequate.

In addition an uninsured driver who suffers personal injuries in a collision with a vehicle driven by another uninsured driver *will no longer* be entitled to compensation.

A further extension of the liabilty for the MIBI will come into force in respect of accidents occurring on or after 31st December 1992. As from that date the MIBI will pay compensation for property damage caused by uninsured (including stolen) vehicles. This will not however, include damage caused by unidentified or untraced drivers.

Practitioners should note that claims must be made by registered post to the MIBI within three years from the date of the accident giving rise to the death or personal injury. When compensation for property damages becomes payable claims will have to be brought within 1 year of the accident. □

References on letters

Solicitors are reminded of the desirability of including references on all letters. Such references are an aid to persons doing the "screening of post" when received. □

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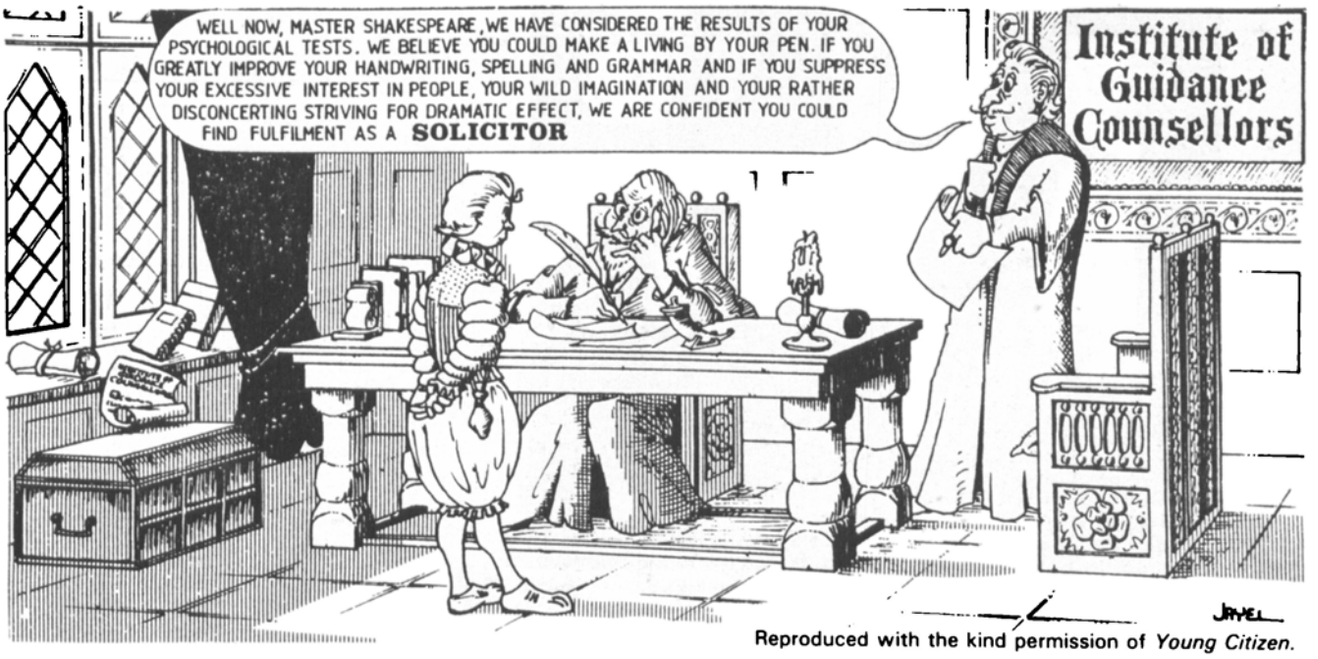

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PEOPLE AND PLACES

Mr. Peter Jones, Solicitor, has recently been appointed State Solicitor for Westmeath. A native of Dublin, Mr. Jones qualified as a solicitor in 1980 and has worked in Mullingar since 1982 with the firm of J. A. Shaw & Co. In 1988 he established a new practice with David Walsh, Solicitor.

Mr. Maurice Curran, President of the Incorporated Law Society who attended the Clare Law Society Ball at Dromoland Castle, photographed with Judge Kevin O'Higgins (left) and Desmond Houlihan, President of the Co. Clare Law Association.

Jimmy Scally, Solicitor, is now working with the Irish Red Cross Society in Ethiopia on a project based on Lake Tana, near Condar, Northern Ethiopia. Prior to this he worked with GOAL, co-ordinating relief supplies with Sudan. He is photographed here with (left) Dr. Mary Henry, Chairman Irish Red Cross Society Overseas Committee and (right) Ms. Anne Callaghan, Irish Red Cross Society.

Contributions Welcome

Please send photographs of legal interest to:-

The Editor, Gazette,
Law Society, Blackhall Place, Dublin 7.

Brenda Power, who won the Law Society's prize for best article on a law-related topic while studying journalism at Rathmines in 1982, has since gone on to establish herself as a successful journalist, now feature writer with the *Sunday Press*. She recently won the AT Cross Award for her work with the *Sunday Press*.

Mr. Robert Johnston has recently been elected President of the Confederation Fiscale Europeenne, which is the umbrella body for all taxation institutes in the EEC. Mr. Johnston is a member of The Law Society and he is a Past President of the Institute of Taxation.

An Introduction to the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988

The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on the 27th day of September, 1968, was drawn up by the Member States of the European Community in order to simplify the formalities governing the reciprocal recognition and enforcement of judgments in accordance with Article 220 of the Treaty of Rome. In addition to the original 1968 Convention, there is a Protocol of 1971 on its Interpretation by the European Court of Justice. There are also the Accession Conventions of 1978 and 1982 making the necessary adjustments to cater for the accession of Denmark, Ireland, the United Kingdom and Greece. Ireland recently ratified the Convention and it came into force here on the 1st day of June, 1988 by virtue of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 (no. 3 of 1988) and Statutory Instrument No. 91 of 1988, which is the commencement order for the Act.

The purpose of the Convention is to provide rules for the determination of the jurisdiction of the Courts of the Contracting States and for the recognition and enforcement of judgments between these States, in civil and commercial matters. The Convention has been incorporated directly into Irish law and its text is set out in the First Schedule to the 1988 Act. Section 1 of the Act defines Contracting State as:-

> "(a) one of the original parties to the 1968 Convention (Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands), or (b) one of the parties acceding to the 1968 Convention under the 1978 Accession Convention or the 1982 Accession Convention (the State, Denmark, the United Kingdom and the Hellenic Republic)."

Section 3 provides that the 1968 Convention together with the 1971 Protocol and the 1978 and 1982 Accession Conventions shall have the force of law in the State. The provisions of the Convention apply only to legal proceedings instituted after the entry into force of the Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed. (Article 34 of the 1978 Accession Convention – Third Schedule to the 1988 Act).

THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The main effect of the Convention in relation to the enforcement of foreign judgments is procedural. Prior to the 1st day of June, 1988, apart from maintenance orders enforceable under the Maintenance Orders Act, 1974, foreign judgments for a liquidated sum of money only could be enforced in Ireland. This was done by bringing fresh proceedings on foot of the foreign judgment in an Irish Court involving unnecessary delay and expense. In contrast to this, the Convention provides for almost automatic recognition of judgments granted in the courts of other Contracting States together with a quick and simple enforcement procedure.

by
Eileen McAuley, B.C.L.
Barrister-at-Law

Certain classes of judgment are excluded from the scope of the Convention. Article 1 of the Convention reads:-

> "This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The Convention shall not apply to:-
> 1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
> 2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
> 3) social security;
> 4) arbitration."

Article 1 of the Convention gives rise to two questions: What are civil and commercial matters? and what is a court or tribunal? "Civil and Commercial matters" are ordinary private law matters. They do not include criminal matters or public law matters, so revenue, customs and administrative matters are therefore excluded. Any questions that may arise as to whether or not a particular case falls within the scope of the Convention are to be decided on the basis of Community law.

Eileen McAuley.

The term "court or tribunal" is wide and vague and includes any institution of a judicial nature.

Article 25 of the Convention defines a "judgment" as: "Any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court". It is significant that the Convention does not limit enforcement to judgments which are final and conclusive. This is in contrast to the common law which requires a foreign judgment to be final and conclusive before it can constitute a valid cause of action in this jurisdiction. Accordingly, provisional and protective judgments or orders for periodical payments which may be varied are capable of being recognised and enforced under the Convention. In case 125/79 [1980] E.C.R. 1553 *Denilauler -v- S.n.c. Couchet Freres,* the European Court held that a judgment delivered in a case where the application had been made ex parte did not come within the scope of the Convention. The basis of this ruling is not the lack of finality of such a judgment, but rather the fact that it is contrary to the policy of the Convention to allow automatic recognition and enforcement of a judgment given in a case where the defendant has not been given an adequate opportunity to put in his defence. The European Court gave the following interpretative ruling on this point:

"Judicial decisions authorising provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by Title III of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters."

Articles 50 and 51 require authentic instruments (made by notaries and certain other public officers) and court settlements which are enforceable in the Contracting State where they are made, to be enforceable under the Convention.

The Convention provides an enforcement procedure which is as quick, easy and effective as possible. It also ensures that all judgments coming within its scope will be recognised in all Contracting States. In the case of Community judgments that come within the scope of the Convention, the Convention procedure is the only permissible method of enforcement in Contracting States. The common law allowed the plaintiff to sue again on the same cause of action in another jurisdiction provided the foreign judgment had not been satisfied. In case 42/76 *De Wolf -v- Cox* [1976] E.C.R. 1759 the European Court ruled that, if a judgment which is entitled to recognition under the Convention is given by a court in a Contracting State, the person in whose favour the judgment was given may not sue the defendant again on the same cause of action in another Contracting State. If the plaintiff in such a case does bring fresh proceedings in another Contracting State, the defendant may plead *res judicata* on the ground that the foreign court has already determined the issue.

JURISDICTION

One of the aims of the Convention is to have the rules on recognition and enforcement applied uniformly throughout the Contracting States. In order to achieve this, the Convention sets out rules on jurisdiction which are to be applied by the court in which the original proceedings are brought and which must be observed even where enforcement of the eventual judgment in another Contracting State will not arise. A court of a Contracting State which is requested to recognise and enforce a judgment obtained in another Contracting State must assume that the judgment granting court had jurisdiction under the rules in the Convention and it may not apply any further jurisdictional tests. This system is in complete contrast to the former common law procedure, whereby the court in which a foreign judgment was sued upon would first check if the original court had jurisdiction in the matter by reference to the Irish rules on Private International Law.

The Irish law on jurisdiction prior to the coming into force of the 1988 Act was that, except where a defendant voluntarily submitted to the jurisdiction of an Irish Court, that court would only have jurisdiction if the defendant had been duly served in the State with the summons which instituted the proceedings in question. If the defendant was even only temporarily within the State he could be validly served with the summons under Irish law and the court would accordingly assume jurisdiction. However, if the defendant was outside the jurisdiction he could only be served with the permission of the Court, which would be granted only if the case complied with the conditions set out in Order 11 of the Rules of the Superior Courts. Article 3 of the Convention provides that "persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out" in the Convention. It specifically states that the rule of the Irish courts whereby jurisdiction may be assumed on the basis of a defendant's temporary presence within the jurisdiction shall not be applicable to persons domiciled in a Contracting State.

The basic jurisdictional provision of the Convention is that the courts of the defendant's domicile have jurisdiction (Article 2). Otherwise, the court may only assume jurisdiction where the Convention makes provsion to that effect. Such provision is made in Title 2:- Section 2 (Articles 5 to 6a on special jurisdiction), Section 3 (Articles 7 to 12a relating to insurance), Section 4 (Articles 13 to 15 relating to consumer contracts) and Section 5 (Articles 16 and 17 providing for exclusive jurisdiction). In addition, Article 18 allows a court before which a defendant enters on appearance to assume jurisdiction except where an appearance is entered solely to contest the jurisdiction of that court or where another court has exclusive jurisdiction under Article 16. The general rules on special jurisdiction as set out in Articles 5 to 6a of the Convention do not substantially change the present Irish rules on jurisdiction contained in Order 11 of the Rules of the Superior Courts. In proceedings to which the rules relating to special jurisdiction apply, the plaintiff has

a choice of jurisdiction. He may sue the defendant either in the courts of the Contracting State where the defendant is domiciled (Article 2), or in the courts of the Contracting State which is entitled to assume jurisdiction under the rules relating to special jurisdiction. However, where the subject matter of the proceedings is one to which the rules relating to exclusive jurisdiction apply, e.g. a dispute relating to rights in immovable property, the courts which are given exclusive jurisdiction under the Convention shall have exclusive jurisdiction regardless of domicile (Article 16).

Order 11 of the Rules of the Superior Courts was used in a wide range of cases, but it was most commonly used in cases of contract or tort. Article 5(3) of the Convention provides that jurisdiction in tortious matters may be assumed by the courts for the place where the harmful event occurred. This accords with the present Irish law. However, Article 5(1) of the Convention provides that, in cases involving contract, the courts of the place of performance of the obligation may assume jurisdiction. This makes a change in the present Irish law. The mere fact that a contract was made within the jurisdiction or that it was to be governed by Irish law is no longer sufficient to entitle the Irish courts to assume jurisdiction against a person domiciled in another Contracting State. However, where the parties to a contract agree in writing (or by other formality as specified in the Convention) that the Irish courts are to have jurisdiction to settle disputes under it, then an Irish court will have exclusive jurisdiction unless the agreement relates to an insurance or consumer contract in which case such an agreement will have no legal force (Article 17).

Maintenance is another important area of special jurisdiction which the Convention specifically provides for in Article 5(2). The maintenance debtor may, as an alternative to the courts of his State of domicile, be sued in the courts for the place where the maintenance creditor is domiciled or habitually resident. The object of this provision is the protection of the maintenance creditor who may not have the financial resources to pursue the defendant abroad. The explanatory report on the 1978 Accession Convention (by Professor P. Schlosser: O.J. No. C59 of 5.3 1979, p. 71) states that the mere fact that an order is for a lump sum does not prevent it from being regarded as maintenance. The essence of maintenance is that it is intended to provide for the support of a dependant spouse or child and is based (at least in part) on need. Any lump sum payment awarded to a child is regarded prima facie as a maintenance order. There is a special procedure for the enforcement of Community maintenance orders which is set out in S.I. No. 173 of 1988 entitled: 'District Court [Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988] Rules, 1988'. This amends the District Court Rules to provide that, in cases where the Master of the High Court has made an order for the enforcement of an ''enforceable maintenance order'', the District Court Clerk shall make the necessary arrangements for payments on foot of the said order and he shall also transmit the payments to the maintenance creditor. This procedure is similar to that used when enforcing in this jurisdiction, under the terms of the Maintenance Orders Act, 1974, a maintenance order made by the Courts of the United Kingdom.

Insurance matters and consumer contracts (as defined in Article 13) have special jurisdictional rules attached to them by Articles 7 to 15 of the Convention largely because of the inequality of bargaining power which frequently exists between the parties to such contracts. These rules give effect to a social policy of protecting the weaker party. The insurer or supplier will usually be the stronger party which might use its position to impose unfair terms on the weaker party. In these Articles the Convention grants certain rights to the weaker party to such transactions and those rights cannot be nullified by contract. A party to a contract is regarded as a consumer when he concludes the contract for a purpose outside his trade or profession (Article 13). In order to protect the consumer or policy-holder from the imposition of unfair terms the jurisdictional rules are tilted in his favour. In cases where the insurer or supplier sues the policy-holder (or the insured or a beneficiary) or consumer, Articles 11 and 14 of the Convention provide that the only courts with jurisdiction are those of the Contracting State in which the defendant is domiciled. In actions brought against the insurer or supplier a choice of jurisdiction is given. In such cases the policy-holder or consumer may choose to sue either in the Contracting State where he is domiciled or in that in which the insurer or supplier is domiciled (Articles 8 and 14).

Articles 12 and 15 respectively allow the jurisdictional rules in respect of insurance and consumer contracts to be departed from only by an agreement entered into in the following circumstances:

1) if the choice of jurisdiction agreement is entered into after the dispute has arisen;

2) where the agreement allows the policy-holder, the insured, a beneficiary or the consumer, as the case may be, to bring proceedings in courts other than those already indicated;

3) where the agreement is concluded in a Contracting State where both parties are at that time domiciled or habitually resident and it confers jurisdiction on the courts of that State. Some additional exceptions apply in relation to insurance under Article 12(4) and (5).

A court must voluntarily declare that it has no jurisdiction to hear a case if it is a case which is principally concerned with a matter within the exclusive jurisdiction of the courts of another Contracting State (Article 19).

Where proceedings between the same parties and involving the same cause of action are brought before the courts of different

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Contracting States, both of whom *prima facie* have jurisdiction under the Convention, the court in which the proceedings were first instituted is competent and the other court must decline jurisdiction (Article 21).

AMENDMENTS TO THE RULES OF THE SUPERIOR COURTS

The Rules of the Superior Courts have been amended to provide the procedures required for the implementation of the 1988 Act. The new rules are entitled "Rules of the Superior Courts (no. 1) 1989" (S.I. No. 14 of 1989) and they came into operation on the 1st day of February, 1989. They may be purchased from the Government Publications Sale Office, together with a Guide to the changes made as a result of the 1988 Act prepared by Mr. Gerard Hogan B.L. and Mr. James O'Reilly B.L. for the assistance of the legal profession.

Procedural Changes Relating to Jurisdiction

A summons initiating proceedings coming within the scope of the Convention may be issued and served out of the jurisdiction without an order of the Court. In order to provide for the issue of such a summons a new rule 1A has been inserted after Order 4, Rule 1. It provides that:-

"Where an endorsement of claim on an originating summons concerns a claim which by virtue of the 1988 Act, the Court has power to hear and determine, the following provisions shall apply:-

1) The originating summons shall be endorsed before it is issued with a statement that the Court has power under the 1988 Act to hear and determine the claim, and shall specify the particular provision or provisions of the 1968 Convention under which the Court shall assume jurisdiction, and

2) The originating summons shall be indorsed before its issue with a statement that no proceedings between the parties concerning the same cause of action is pending between the parties in another Contracting State."

In practice it may be necessary to allow solicitors to qualify the endorsement required by Rule 1A(2) above. In civil law jurisdictions proceedings are only "issued" when they are served. This is in contrast to common law jurisdictions where proceedings may be issued first and then served on the defendant up to one year later. A defendant in a common law jurisdiction such as Ireland or England usually first becomes aware of proceedings against him when the summons is served on him. Accordingly, a party who intends to institute proceedings in the Irish High Court against an English defendant, may himself already be a defendant in proceedings concerning the same issue and between the same parties which have been instituted in the English Courts by the issue of a writ, but of which he is not aware as the writ has not yet been served.

A new Rule 3A has been inserted after Order 19, Rule 3 which requires that the same endorsement shall be put on the Statement of Claim in such cases.

Order 11A has been created to make provision for service out of the jurisdiction without an order of the Court of sumonses in proceedings in which the claim comes within the scope of the Convention. Order 11 now only covers cases which do not come within the scope of the Convention. A Court order is still required for liberty to serve a summons or notice thereof out of the jurisdiction on a defendant who is domiciled in a non-contracting State or if the claim belongs to a class which does not come within the scope of Convention e.g. bankruptcy or arbitration matters. A minor amendment has been made to Order 11, Rule 1 by the insertion immediately before the words:- "Service out of the jurisdiction of an originating summons" of the following:- "Provided that an originating summons is not a summons to which Order 11A applies".

Order 11A, Rule 2 allows service of an originating summons or notice of an originating summons out of the jurisdiction without the leave of the Court if it complies with the conditions set out therein. These are:-

"(1) The claim made by the summons is one which by virtue of the 1988 Act the Court has power to hear and determine; and

(2) No proceedings between the parties concerning the same cause of action is pending between the parties in another Contracting State and

(3) Either

(a) the defendant is domiciled in any Contracting State, or

(b) the proceedings commenced by the originating summons are proceedings to which the provisions of Article 16 of the 1968 Convention concerning exclusive jurisdiction apply, or

(c) the defendant is a party to an agreement conferring jurisdiction to which the provisions of Article 17 of the 1968 Convention concerning prorogation of jurisdiction apply."

There is no change in the common law rule whereby notice of the summons rather than the summons itself is served in cases where the defendant is not a citizen of Ireland. Order 11A, Rule 6 provides:- "Where the defendant is not, or is not known or believed to be a citizen of Ireland, notice of the summons, and not the summons itself, shall be served upon him."

Order 12, Rule 2 has been deleted and a new Rule 2 substituted to make special provision regarding the entry of an appearance to an orginating summons in proceedings served out of the jurisdiction under Order 11A, Rule 2. These provisions also apply to an appearance entered solely to contest jurisdiction. A distinction is made between a sumons which is to be served in the European territory of another Contracting State and a summons which is to be served in a non-European territory of a Contracting State. Where an originating summons is served in the European territory of another Contracting State the defendant has five weeks from the date of service of the summons within which to enter an appearance. A defendant who is served in any non-European territory of a Contracting State must enter an appearance within six weeks of the date of service of the summons on him.

Procedure for Enforcement

Section 5 of the 1988 Act provides:- "An application under Article 31 for the recognition or enforcement in the State of a judgment shall be made to the

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Master of the High Court and shall be determined by him by order (including an order for the recognition or enforcement of a judgment in part only) in accordance with the Conventions''. Article 31 of the Convention provides that such an application may be made by any interested party.

The new Order 42(a) which has been inserted after Order 42, provides the procedure for enforcement. The applicant should make an ex-parte application to the Master of the High Court for an order that the judgment be enforced in the State (Order 42(a), Rule 4). The fact that the application is to be made ex parte gives it an element of ''surprise'', which is designed to protect the interests of the applicant by depriving the party against whom enforcement is sought of the opportunity of disposing of his assets prior to the making of the enforcement order. The application is grounded on an affidavit in which the following documents set out in Rule 5 should be exhibited:-

''(1) The judgment which is sought to be enforced or a certified or otherwise duly authenticated copy thereof;

(2) In the case of a judgment given in default, the original or a certified copy of the document which establishes that the party in default was served with the document or documents instituting the proceedings or with an equivalent document or documents in sufficient time to enable him to arrange for his defence.

(3) Documents which establish that, according to the law of the state in which it has been given, the judgment is enforceable and has been served;

(4) Where appropriate, a document showing that the applicant is in receipt of legal aid in the state in which the judgment was given;''

The affidavit should be drafted in accordance with Rule 6 which requires that the affidavit should state whether the judgment provides for the payment of a sum or sums of money and, if so, whether or not there is interest due and whether any part of the debt has been satisfied. It also requires that the affidavit should give an address within the State for service of proceedings on the party making the application together with the name and usual or last known address or place of business of the person against whom judgment was given and it should state the grounds on which the right to enforce the judgment is vested in the party making the application.

If the judgment which the applicant seeks to enforce or any other document required for its enforcement is not in one of the official languages of the State Order 42(a), Rule 17 provides that:- ''a translation thereof into the Irish or English language certified by a person competent and qualified for the purpose in one of the Contracting States, shall be admissible as evidence of same. The competence and qualifications of the translator shall be verified by affidavit''.

If enforcement is ordered by the Master, notice of the enforcement order should be served on the defendant. Order 42(a), Rule 10 sets out the requirements for such notice. The notice should inform the party against whom enforcement has been ordered of the particulars of the judgment, the name and address of the applicant, the protective measures (if any) which have been granted, and of his right to appeal together with the time limit within which he must appeal if he wishes to do so.

The procedure for appeal against an enforcement order, as provided for by Article 36 of the Convention is set out in Order 42(a), Rules 11 to 14. Rule 11 provides that the person against whom an order for enforcement is made may appeal to the High Court within one month of service of the enforcement order. Rule 12 provides that in the case of a refusal by the Master of an order for enforcement the applicant may appeal to the High Court within five weeks from the date of perfection of the Master's Order. Rule 14 provides for an appeal to the Supreme Court from a decision of the High Court either granting or refusing an order for enforcement, on a point of law only.

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A judgment in respect of which an order for enforcement has been made may not be executed until the time for appeal has expired (Order 42(a), Rule 13), but Article 39 of the Convention allows protective measures to be taken during the time specified for an appeal and provides that:- ''The decision authorising enforcement shall carry with it the power to proceed to any such protective measures''. Section 11 (3) of the 1988 Act confirms that the Master of the High Court shall grant the protective measures mentioned in Article 39 when requested, as soon as the enforcement order is made. These protective measures are designed to ensure the continued protection of the applicant's interests by preventing the party against whom enforcement is sought from disposing of his assets as soon as he gets notice of the enforcement order. When the party seeking enforcement is also seeking protective measures, such application should be included in the application for enforcement. (Order 42(a), Rule 5). The Master of the High Court has no discretion in relation to the granting of protective measures. Once he has made an enforcement order and is satisfied that the High Court has power to grant the protective measures sought he is obliged to grant the protective measures which are requested by the applicant in his affidavit. This was confirmed by Miss Justice Carroll in an unreported High Court judgment delivered on the 2nd of February, 1989 in the case of *Elwyn (Cottons) Ltd. -v- Pearle Designs Ltd.*

Once any appeal has been decided or the time for appealing has expired, Section 6 of the Act provides that the judgment will have the same force and effect and be enforceable in the same way as if it were a judgment of the High Court.

Order 42(a), Rule 16 provides that an application for the enforcement of an authentic instrument or court settlement should be made, in the first instance, ex parte to a Judge of the High Court and not to the Master.

Article 29 of the Convention provides that under no circumstances may a foreign judgment be re-examined as to its substance. The proper procedure for a party who alleges that a foreign judgment, sought to be enforced in the State under the Convention is wrong in fact or in law is to appeal against the judgment in the Contracting State where the judgment was granted. An Irish Court cannot act as an appellate court in relation to a matter which has already been decided by a court of competent jurisdiction in another Contracting State.

Under Article 30, if an "ordinary appeal" has been lodged against the judgment in the Contracting State of origin, the judgment-recognising court may stay the proceedings. In case No. 43/77 *Industrial Diamond Supplies -v- Riva* (1977) E.C.R. 2175, it was held that an appeal should be regarded as "ordinary" if it could result in the annulment or amendment of the judgment and the time within which it must be lodged must run from the date of the judgment.

GROUNDS FOR NON-RECOGNITION OF A FOREIGN JUDGMENT

A judgment will not be recognised or enforced if it is outside the scope of the Convention. However a judgment will not fall outside the scope of the Convention merely because one of the matters excluded by Article 1 was considered by the judgment-granting court as an incidental issue. There are also certain specific grounds on which a court may refuse to recognise or enforce a judgment of a court in another Contracting State. These are set out in Articles 27 and 28 of the Convention. The more important of these grounds are:- 1. public policy (Article 27(i)); 2. that it would be contrary to natural justice (Article 27(2)) and 3. *Res Judicata* (Article 27(3)). The public policy exception allows some discretion in relation to matters which may be contrary to public policy in certain Contracting States but not in others. Such problems would only arise in exceptional cases.

Article 27(2) allows non-recognition in cases where the judgment-granting court did not observe the rules of natural justice, in that the judgement was given in default of appearance and it can be shown that the defendant was not duly served with the document which instituted the proceedings in sufficient time prior to the marking of judgment to enable him to arrange for his defence.

Article 27(3) provides that a judgment will not be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the Contracting State in which recognition is sought. This is the case irrespective of which judgment was given first.

Article 29 does not allow a foreign judgment to be re-examined as to its substance. If a defendant alleges fraud in proceedings the recognising court may grant him a stay on the enforcement proceedings to enable him to apply in the judgment-granting State to have judgment set aside. It may be also that enforcement of a judgment obtained by fraud could be refused on the grounds of public policy.

PROVISIONAL/PROTECTIVE MEASURES

The Convention provides a very useful device which could become important in relation to debt collection. Article 24 of the Convention confirms the usual power of the Court to grant provisional or protective measures such as a Mareva-type or other form of injunction, but it also extends this power by allowing an application for such provisional or protective measures to be made to the courts of one Contracting State in cases where the courts of another Contractng State are seised of the main action. The court could thus make an order freezing the assets of the defendant in the former State pending the outcome of the proceedings in the latter. If the plaintiff succeeded in his action, there would then be funds available to meet the judgment debt when enforcement proceedings are brought in the the former State. Section 11(1) of the Act gives the High Court power to grant "provisional, including protective, measures of any kind that the Court has power to grant in proceedings that apart from this Act, are within its jurisdiction. "An application for such provisional or protective measures should be made ex parte to the High Court grounded on an affidavit (Order 42(a), Rules 1 and 2).

ENFORCEMENT OF IRISH JUDGMENTS IN OTHER CONTRACTING STATES

Section 12 of the Act requires the Courts in the State to provide to an interested party an authenticated copy of a judgment together with a certificate signed by the registrar or clerk of the court setting out the relevant particulars of the proceedings in question. Order 42(a), Rules 18 and 19 set out the procedure to be followed in relation to judgments of the High Court and Supreme Court which an interested party is seeking to have recognised or enforced in another Contracting State. In any case where an interested party is seeking to enforce a judgment of the High Court or Supreme Court in another Contracting State he should obtain an authenticated copy of the judgment or order from the Registrar of the High Court or Supreme Court (as the case may be) (Rule 18), together with a certificate pursuant to Rule 19 setting out the particulars of the proceedings required by that rule. The form of certificate is set out in Form No. 1 of Appendix F, Part 111 of the amended Rules of the Superior Courts. The authenticated copy order together with the certificate should then be forwarded to a firm of lawyers in the Contracting State in which judgment is sought to be enforced, so that it may be enforced in accordance with the procedures laid down in that State.

CONCLUSION

The ratification by Ireland of the Convention means that it now operates between nine Member States of the Euopean Community — the original six (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) and the three States which joined the Community in 1973 (Denmark, Ireland and the United Kingdom). Greece signed the 1982 Accession Convention and deposited its instrument of ratification with the Secretary-General of the Council of the European Communities in January 1989. The Convention will therefore enter into force for Greece on the 1st day of April, 1989 in accordance with Article 15 of the Fourth Schedule to the Convention. Negotiations for accession are proceeding with the latest two Member States to join the Community (Spain and Portugal).

EILEEN McAULEY

Notes on the 1968 European Communities (Judgments) Convention, the Act of the Oireachtas which enabled Ireland to ratify it, and the District Court Rules made thereunder. (September 1988)

The Conventions, the Act, the Rules

- The 1968 European Communities (Judgments) Convention – herein called "the 1968 Convention" – is the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (including the Protocol annexed to that Convention) signed at Brussels on 27th September 1968.
- The Protocol was signed on 3rd June 1971 and deals with the interpretation of the 1968 Convention by the Court of Justice of the European Communities. It aims to ensure a uniformity of interpretation throughout the Community.
- The 1978 Accession Convention was signed on 9th October 1978 at Luxembourg and provided for the accession of Ireland, Denmark and the United Kingdom to the 1968 Convention and the Protocol (as amended). By virtue of Article 220 of the Treaty of Rome and Article 3 of the Act of Accession 1972 accession to the 1968 Convention and the Protocol was a condition of our membership of the European Communities.
- The 1982 Accession Convention was signed on 25th October 1982 at Luxembourg and provided for the accession of Greece to the 1968 Convention and the Protocol (as amended).
- The Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 (No. 3 of 1988) – herein called "the Act" – which, other than section 3 in so far as it relates to the 1982 Greek Accession Convention, came into operation on 1st June 1988, gave the force of Law in Ireland to the Conventions and the Protocol. S.I. No. 37 of 1989 fixed 1 April, 1989, as the date on which section 3 of the Act in so far as it relates to the 1982 Greek Accession Convention comes into operation.
- The District Court [Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988] Rules, 1988 (S.I. No. 173 of 1988) – herein called "the Rules" – regulate practice and procedure in the District Court under the Act. The Rules came into operation on 18th July, 1988.

THE 1968 CONVENTION

Where in force

The 1968 Convention has been in force between the original six

By
Seamus Casey,
Secretary, District Court Rules Committee.

Member States since 1973. It came into force for Denmark on 1st of November 1986, for the United Kingdom on 1st January 1987, and for Ireland on 1st June 1988. Therefore, since 1st June 1988 that Convention is in force between Ireland and Belgium, Denmark, France, Germany, Italy, Luxembourg, the Netherlands and the United Kingdom. On 1 April, 1989, the Convention will be in force for Greece. It should be noted that it is not yet in force for Portugal or Spain.

Texts

The texts of the 1968 Convention and the 1971 Protocol are set out in the 1st and 2nd Schedules to the Act. Certain provisions of the 1978 and 1982 Accession Conventions are set out in the 3rd and 4th Schedules to the Act. For easy reference there is a list of the headings of the 1968 Convention appended to these notes which the reader may find useful.

Scope

The 1968 Convention deals with civil and commercial matters (including maintenance) but does not apply to revenue, customs or administrative matters, status, matrimonial property, wills, succession, bankruptcy, social security, or arbitration (see Article 1).

Title II of that Convention sets out the rules which determine jurisdiction. It provides uniform rules of civil jurisdiction for courts throughout the Community, where the defendant is domiciled in a Contracting State. Title III provides for the recognition (subject to specified exceptions) and enforcement of civil judgments given in any Contracting State.

Jurisdiction – Domicile

In general, domicile determines jurisdiction under the 1968 Convention. Title II (Article 2) provides that persons domiciled in a Contracting State shall (subject to the provisions of that Convention) be sued in the courts of that State. Alternatively, (Article 3) they may be sued in the courts of another Contracting State only by virtue of the rules set out in sections 2 to 6 of that Title, which establish special jurisdiction and exclusive jurisdiction in various matters. In regard to individuals "domiciled" may, for the purposes of the Conventions, generally be equated with "ordinarily resident"; the term "domicile" is not defined in the Conventions – under Article 52 it must be determined in accordance with national law. Section 13 and the 5th Schedule of the Act provide definitions of the domicile of an individual, a corporation, an association (an unincorporated body of persons), and a trust.

Service out of the jurisdiction

In cases coming within the scope of the 1968 Convention courts will no longer have discretion to decide whether or not to allow service out of the jurisdiction of originating documents or notices thereof. Rules 7 and 8 of the Rules prescribe the procedures to be

followed in the District Court in such proceedings. However, the existing provisions (in the 1962 Rules) will continue to apply in "non-Convention" cases.

RECOGNITION AND ENFORCEMENT

Recognition

Title III of the 1968 Convention deals with the recognition and enforcement of judgments. An application for the recognition or enforcement of a Community judgment in Ireland should be made to the Master of the High Court. It shall be determined by him by order (which may be for recognition and enforcement of a judgment in part only) – see section 5 of the Act. Articles 27 and 28 of the 1968 Convention provide the only grounds on which recognition (and enforcement) of such a judgment may be refused. Article 29 provides that under no circumstances may a foreign judgment be reviewed as to its substance.

Enforcement

An application for the enforcement in Ireland of an authentic instrument or a settlement (Title IV – Articles 50 and 51) should be made by *ex parte* application to a judge of the High Court. Under Article 31 a judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there. When an enforcement order has been issued in Ireland in respect of a Community judgment other than a maintenance order that judgment shall, subject to Article 39 (re. appeal), be enforced as if it were a judgment of the High Court. If the enforcement order is made in respect of a maintenance order the District Court shall (under section 7(2) of the Act) have jurisdiction to enforce such enforceable maintenance order, and for the purposes of enforcement, variation or revocation of such order it shall, from the date on which it was made, be deemed to be an order made by the District Court under section 5 of the Family Law (Maintenance of Spouses and Children) Act, 1976. It should be noted that, although reference is made in section 7 of the Act to the Illegitimate Children (Affiliation Orders) Act, 1930, the latter Act has since been repealed by Part IV of the Status of Children Act, 1987 and section 5 of the 1976 Act has been expanded to provide for the making of maintenance orders in lieu of the former affiliation orders. On the application of the maintenance creditor, the Master of the High Court may declare arrears of maintenance which accrued prior to the date of the enforcement order to be enforceable as if they were payable under a judgment of the High Court (section 6 of the Act). Lump sum maintenance judgments will be enforced in like manner (see definition of "maintenance order" in section 1 of the Act).

Enforcement by the District Court

Notwithstanding the 1968 Convention, the 1974 Agreement between Ireland and the United Kingdom on the Reciprocal Recognition and Enforcement of Maintenance Orders (given effect to here by the Maintenance Orders Act, 1974) continues in force as a separate arrangement between the two countries.

The recognition and enforcement of maintenance orders as between Ireland and the other Contracting States is governed by the provisions of the 1968 Convention, the relevant provisions of which are similar though not identical to those of the 1974 Agreement. It is worth remembering the following important points –

- The Maintenance Orders Act, 1974 had effect in relation to maintenance orders whether made before or after the commencement of that Act (section 4), whereas by virtue of Article 34 of the 1978 Accession Convention (see the 3rd Schedule to the Act) the 1968 Convention applies only to legal proceedings instituted after its entry into effect (i.e. for Ireland after 1st June 1988).
- A maintenance creditor seeking to recover arrears of maintenance under the 1974 Act is, by virtue of section 8(7) of the Enforcement of Court Orders Act, 1940, restricted to recovering only those arrears which accrued within the previous six months. There is no such restriction under the 1968 Convention (see section 7(8) of the Act).
- Section 14(3) of the 1974 Act prohibits courts in Ireland from varying or revoking maintenance orders made in reciprocating jurisdictions. However, under the 1968 Convention a maintenance order made in one Contracting State may, subject to the provisions of that Convention, be varied or revoked on application in another Contracting State.
- Under the 1968 Convention a maintenance creditor has a choice of jurisdiction when suing the maintenance debtor. Proceedings may be brought in the courts of her domicile – i.e. the place where she is habitually resident (Art. 5.2), or in the courts of the State where the maintenance debtor is domiciled (Art. 2). However, the maintenance debtor has no such option when suing the maintenance creditor (e.g. variation or revocation proceedings). Article 5.2 requires that such proceedings be brought in the courts for the place where the maintenance creditor is domiciled or habitually resident.

ENFORCING IRISH JUDGMENTS ABROAD

Enforcement abroad – Provision of documents

In order to apply for recognition and enforcement in another Contracting State of a judgment given in the District Court in Ireland it will first be necessary to prepare and lodge with the District Court clerk certain documents (see section 12 of the Act and Rules 10 and 11 of the Rules). He will return duly certified or authenticated copies in due course. The copy judgment must then be served on the defendant. The statutory declaration as to service, certificate of posting and advice of delivery should be lodged with the court clerk, who will issue certified copies thereof if required for the purposes of Article 47.1 of the 1968 Convention. It should be noted that duly certified translations of the documents must be produced if the court (abroad) so requires (Article 48).

THE RULES

Rules 1, 2 and 3 provide for citation, commencement and interpretation.

Rules 4 and 5 contain the necessary venue provisions in consequence of Articles 8.2 and 14 of the 1968 Convention.

Rule 6 *EXCLUDES* Convention cases from the provisions of the 1962 Rules relating to service out of the jurisdiction.

Rules 7 and 8 set out the procedures to be followed where proceedings, other than proceedings under the Maintenance Orders Act, 1974, are being instituted in the District Court by virtue of the Conventions against a person domiciled in a Contracting State other than the State.

Service of documents

Under these Rules documents may be served by registered post or insured post. They must be served on the defendant AT LEAST ONE MONTH before the date of hearing. A registered-post service is available in most E.C. countries, but in France, Greece and the Netherlands there is an insured-post service. Instructions may be placed on the top left-hand corner of letters so that they may be delivered to the addressees in person (in all E.C. countries except the United Kingdom). To ensure delivery in this manner, the letter should be registered or insured and must be accompanied by an advice of delivery form. The envelope must be marked in the top left-hand corner –

A remettre en main propre - *for French post;*
Eigenhandig *for German post;*
a entregar en proprio mano *for Spanish post*
(i.e. for delivery to the addressee in person);
or the equivalent in a language known in the country of destination. The present cost of sending a standard letter of under 20 grammes in weight by *registered post* is £1.50 and by *insured post* is £1.65. The British Post Office does not undertake to deliver registered mail (even if accompanied by an advice of delivery form) to the addressee in person.

Judgment in office not to apply

Rule 9 makes the necessary amendments to the Summary Judgment Rules of 1963. It should be noted that in Summary Judgment matters, where the defendant is domiciled in a Contracting State other than the State, and no Notice of Intention to Defend is received from the defendant, the case will be listed for court.

Rules 10 and 11 deal with the provision of documents to interested parties in connection with applications for recognition and enforcement of District Court judgments abroad and provide for the service of judgments in such cases.

Rule 12 excludes the enforcement of United Kingdom maintenance orders from the provisions of the Rules.

Rules 13 and 14 prescribe procedures in relation to the enforcement of Community maintenance orders in the District Court.

Rule 15 which is similar to section 9(1) of the Act, regulates the currency of payments under an enforceable maintenance order and fixes the appropriate rate of exchange for currency conversions.

Rule 16 requires the District Court clerk to send a receipt for each payment received, to transmit the amount of the payment to the person entitled to receive it, and in doing so to comply with any Exchange Control regulations in force governing such payments.

Rule 17 provides a procedure for the case where a maintenance debtor changes address from one court area to another.

Rule 18 Applications to the court clerk in relation to arrears of maintenance are dealt with in this Rule. The clerk may proceed under

Contd. on page 107

1968 EUROPEAN COMMUNITIES (JUDGMENTS) CONVENTION

List of Headings

TITLE	SUBJECT	CONTENTS	SECTION	ARTICLES
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II	Jurisdiction	General Provisions	1	2 to 4
		Special	2	5 to 6a
		Insurance	3	7 to 12a
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the Enforcement of Court Orders Act, 1940, or may apply for an Attachment of Earnings Order. The Rule also provides that, where arrears of maintenance have accrued and the court clerk has received no request in respect of them, he may in his discretion notify the maintenance creditor of the means of enforcement available to her.

Rule 19 sets out necessary venue provisions.

Rule 20 prescribes the procedure to be followed when proceedings are brought in the District Court by virtue of the Convention, as follows:

under Art. 5.2 by a maintenance creditor domiciled in Ireland against a maintenance debtor domiciled abroad;

under Art. 2 by a maintenance creditor domiciled abroad against a maintenance debtor domiciled in Ireland, or

under Art. 2 by a maintenance debtor domiciled abroad against a maintenance creditor domiciled in Ireland.

SEAMUS CASEY,
Secretary to The District Court Rules Committee, Dolphin House, Essex Street East, Dublin 2.
September 1988.

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STATISTICS

1988 CENSUS OF SERVICES

We urge our members who have not already done so to return their Census of Services form to the Central Statistics Office immediately.

This Census is being conducted for economic planning purposes. The data provided will be treated as strictly confidential and will be used for statistical purposes only. Outstanding forms should be returned immediately as they are now more than six months overdue and delaying the finalisation of results.

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- Mr. Robert Pierse
  "Bad Driving Offences"
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  "The future of the Circuit Court"
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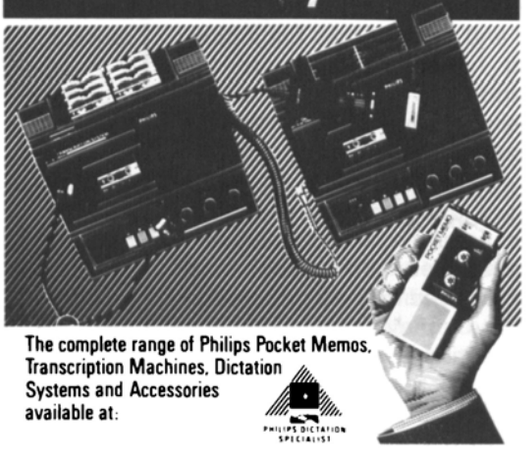

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John J. Nash

An Appreciation

His many friends and colleagues were deeply shocked by the news of John Nash's tragic death two weeks ago in a road accident in Gran Canaria. John, who practised as a solicitor in Thurles and Templemore for over 50 years, had become a legend in his lifetime.

Educated at Rockwell College and UCD he secured first place in his degree and solicitors' finals, winning the coveted Findlater Gold Medal and a First Class Exhibition. Further honours came with the M.A. and LL.B. Degrees. He aimed at excellence in all he did. A leading advocate, his knowledge of law was legendary. Fearless in the pursuit of justice he acted in many *causes celebres* and established legal principles which now form part of decided case law here and in Britain.

He was a member of the Incorporated Law Society for over 40 years and was President in 1959. Elected to the Senate in 1961 he served with distinction for twelve years, making notable contributions both in committee and in the chamber. A versatile public speaker he excelled in impromptu debate.

Always loyal to his alma mater, he was President of Rockwell College Union in the 1960s.

John was no dry academic or "book in breeches." His subtle sense of humour often surfaced to break a deadlock in serious negotiations. An amusing raconteur, he had an endless fund of anecdotes, garnered from his wide experience.

In addition to his busy practice John found time to advance industrial and community development in Templemore. He played a leading part in introducing the Lancegaye Safety Glass firm to the town and successfully directed Tipperary Glass Company up to a short time ago. As town clerk of Templemore in the thirties he piloted a major building scheme to rehouse the occupants of substandard dwellings in the town. All aspects of his career were infused by a deep Christian faith. Many worthy causes benefited from his unobstrusive charity.

In his college days he was a useful athlete and boxer. He continued to swim and to take long walks up to the day of his death. Truly a case of *mens sana in corpore sano.* His intellect undiminished and his physique still strong, John Nash never grew old. Such a towering personality must find a place among Tipperary's outstanding sons. To his heartbroken wife, Thérese, who was ever by his side and to his sorrowing brothers and sisters goes our deepest sympathy.

P.P.R.

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KWS

Dr Keith W Snape

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EMPLOYMENT FORUM

The next Employment Forum will be held in the Lecture Hall, Blackhall Place, Dublin 7, at 6.00p.m. on Thursday 20th April, 1989.

The employment situation in Ireland will be reviewed. There will be speakers from a leading legal Employment Agency with offices in London and Dublin and from an Irish solicitor familiar with the legal employment scene in New York.

Admission is free and all interested solicitors and solicitors' apprentices are welcome.

Teresa Hughes

An Appreciation

When I first heard the news of Teresa Hughes' final illness, my response was one of resigned despair that here once more was one of life's angels being loaded with life's misery. However, the dignity and grace with which she bore her burden was an inspiration to all who had the good forturne to know her.

It is indicative of her character that she continued in her position in the battlefront we call the Law Society Rooms at the Four Courts almost to the very end and despite all her problems she remained courteous, smiling, efficient and helpful to all.

I count myself lucky, as I know do many of my colleagues, to have known her. Our sympathy must go in full measure to her family on their sad loss.

J.O.

Book Reviews

CASES AND COMMENT ON IRISH COMMERCIAL LAW AND LEGAL TECHNIQUE

By Raymond Byrne,
Round Hall Press, (2nd. ed.)
Dublin 1988,
218 pages including preface, tables of cases, constitutional provisions, Irish Statutes, Bills, and EC laws, and index.
Price IR£12.95 pb, IR£20.00 hb.

Oscar Wilde (not notoriously possessed of reason to be grateful for the labours of Irish lawyers) said, in a different context, that it is "imagination that imitates, and that it is the critical spirit that creates". In the second edition of this work, Mr. Byrne has deployed his critical spirit, his clear mind, and vigorous style in commenting on some of the most important cases in Irish commercial law. A layman can painlessly learn to appreciate something of the judicial approach to commercial problems. A lawyer can refine his understanding of many of the finer points in this complex area. Judges themselves will be able, should they so choose, to see their own decisions within a linear intellectual progression.

The approach is refreshing, eschewing the drab, familiar style of many introductory texts to law, and the dull and perfunctory comments favoured by some anthologists, who burden the captive student market with compendiums of Irish cases, fondly believed to be otherwise inaccessible, but selected for obscure reasons, illustrating incomprehensible and peripheral points, and proving that extracts from judgments can provide the most boring and frustrating reading possible for students.

The book's introduction takes a series of common experiences familiar to everyone, e.g. broken washing machines, difficulties with neighbours, taping music from a radio broadcast etc., and explains the legal implications inherent in such situations. Gradually, the difference emerges between criminal and civil law, EC and Municipal law, the process of statutory enactment and judicial determination is explained, the role of the Constitution is discussed, and the framework of Irish law revealed.

The scene is thus laid for a critical examination of cases on precedent and legal reasoning (chapter 2), interpretation of statutes, (chapter 3), the Constitution and constitutional rights (chapter 4), remedies (chapter 5), commercial orgainisation (chapter 6), negligence and tort law (chapter 7), contracts (chapter 8), Agency (chapter 9), sales, credit and financial services (chapter 10), restrictions on unfair competition (chapter 11), and insurance (chapter 12). In a short compass, the reader learns to appreciate some of the important problems in each substantive area, and thus to follow the method of judicial determination of them.

It may be that chapters 1-6 could be criticised as covering the same material as that contained in Byrne and McCutcheon's *The Irish Legal System: Cases and Materials,* Professional Books, Abingdon, 1986. As against this, the material is different, abridged, presented colloquially: thus facilitating the commerce, accounting or E.S.S. student, to whom law is just one element in a variety of disparate courses.

The good student will therefore be drawn beyond the first chapters to further reading; the less conscientious student can confine his attentions to one text: no bad option, pedagogically. As an example, in elucidating *Madigan -v- AG* [1986] ILRM 136, Byrne explains the decision, points out the obvious difficulty in distinguishing between unconstitutional and otherwise undesirable legislation, and goes on to explain how judges purport to give appropriate weight to the counterbalancing constitutional provisions of Arts 40 and 43, referring the reader to further judicial discussion of the same issues pitched at a more recondite level.

My main gripe about this excellent book is that some of the chapters (particularly chapters eight and ten) cover very large areas in the commentary, but the cases used as illustrations deal with points which, judged by the commentary, are of minor but specific importance. This is the inevitable penalty of short case-books. However, there is no mystery in this book why a case is selected, and what it illustrates.

An alternative approach might have been to select fewer cases, and insert, as footnotes, extracts from other decisions exemplifying contrasting approaches to the same question, thus giving greater weight to the commentary. But since this criticism involves a request for more of the author and less of the judges, it must be deemed to be an implied compliment.

The book's undoubted value to students and other rests, not only on the fluency of the commentary and the generally felicitous choice of cases, (one which should not have been included without reference to the Copyright (Amendment) Act 1987) but on the author's hard scholarship and breadth of reading and knowledge. This will be a popular book with students, but it is written by a genuine scholar with a knowledge of the practice of law, who makes no inappropriate intellectual concessions to his audience, and whose critical approach clarifies and instructs.

David Tomkin

DEBT COLLECTION: (1) THE LAW RELATING TO SHERIFFS.

LAW REFORM COMMISSION REPORT. LRC 27/88. Price £5.00

The most recent text-books on the law relating to Sheriffs in Ireland were published towards the end of the last century and the most recent legislation relating to Sheriffs is now more than 60 years old.

A hundred years ago people did not usually have in their possession goods which they did not own and it was unusual for businesses to be carried on by limited companies. In that relatively uncomplicated society it was a great deal easier for a Sheriff to make a successful seizure than it is to-day.

Today, goods which are in the possession of an individual may well be subject to retention of title; they may be on "sale or return"; on hire purchase, or be leased or otherwise owned by somebody else. Businesses are carried on frequently not just by one company

but by a group of companies so that it is very difficult to know which of the companies owns the goods which are on the premises which the companies occupy.

In this report the Law Reform Commission sets out to deal with the problems presented by these changes in our habits and commercial practices.

The recommendations centre around the giving of greater protection for the Sheriff when he seizes goods and the limiting of the time during which a third party can claim against goods which have been seized.

It suggests also a right for the Sheriff to endorse and negotiate instruments and to surrender and collect the proceeds of life policies, which have been taken in execution.

It is recommended that Sheriffs be protected where they seize in good faith property in the joint or sole possession of the judgement debtor but that if he seizes goods in the possession of a third party he does so at his own risk. This is alright as far as it goes but would need to be expanded to cover the position where goods are seized at a premises from which several companies, which are associated, all carry on business. This is a very common situation and it is almost impossible to know who owns the goods.

The much vexed question of goods held subject to "retention of title" has been left over for a later report.

Useful recommendations are made to simplify the procedures relating to the obtaining of execution orders and that they also should all have the same legal life. Interpleader procedure is also to be simplified and it will be possible to interplead in the original proceedings without commencing a new action.

Sheriffs will welcome the recommendation that their fees be increased and index-linked. Fees for lodgement of execution orders for example were fixed in 1926, the usual fee being around 35p, which in todays money would be around £10.00.

It is recommended that the Sheriff should report to the Plaintiff and the Court in every case within a specified time. One wonders what the Court would do with the large flow of reports that would arrive. The Commission appear to be under the impression that reporting to the Court would in some way hurry up the execution of orders. The reality is that, as the law stands at the moment, orders are delayed because of the extreme difficulty in making seizures, which forces Sheriffs to tread warily and collect as much money as possible by instalments. If the making of seizures were less hazardous there would be less delays and plaintiffs and solicitors would have greater confidence in the system.

This short report – 58 pages – deals very clearly and concisely with both the law and practice relating to Sheriffs with appropriate references to authorities throughout.

It is in its own right an excellent work of reference. □

Michael Hayes

DEPT. OF JUSTICE

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CORRESPONDENCE

The Editor,
Law Society Gazette,
Blackhall Place,
Dublin 2.
14th February, 1989.

Re: Shopping Centre Leases

Dear Sir,

While the relevant law may be the same for Shopping Centres, High Street Shops and Office Blocks, Shopping Centres involve, as your Members will readily appreciate, a melange of inter-relationships which require careful consideration by potential tenants.

The National Federation of Shopping Centres was established to study the problems and make recommendations and representations as appropriate. It is recognised that many of the problems are of a **commercial** nature and not of a **legal** nature.

A typical example of this is the 'device' whereby a landlord will admit a new tenant at a high rent but free of premium in advance of the general rent review date for the Centre, in order to establish a higher market rental value. Service charges provide another example as there is a trusteeship situation here with landlords effectively spending the money of tenants without in many instances giving the tenants any say in how the money is spent. This is particularly worrying in relation to the advertising of Shopping Centres which benefits landlords indirectly and has benefits for the tenants which are difficult to measure.

The Federation does not deal directly with individual Shopping Centre tenants but, recognising that 'the damage is done' when the lease is signed, has agreed to assist potential lessees referred by practising Solicitors.

The telephone number of the Federation is (01) 611911.

Yours faithfully,

GEORGE EATON, FCA,
Secretary General,
National Federation of Shopping Centres,
2 Fitzwilliam Place,
Dublin 2.

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 as 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.
31st day of March, 1989.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

John J. Nunan, Folio No.: 15913. County: **CORK.**

Paul T. and Anne Gerety, 5 Firhouse Grove, Knocklyon, Templeogue, Co. Dublin. Folio No.: 32858L; Lands: the property situate in the Townland of Knocklyon and Barony of Uppercross. County: **DUBLIN.**

Martin Francis Flannery, 114 Tyrconnell Park, Inchicore, Dublin 18. Folio No.: 1982L; Lands: 114 Tyrconnell Park. County: **DUBLIN.**

Mary McCormack, Ballymacallen, Moyvore, Mullingar, Co. Westmeath. Folio No.: 4120; Lands: Ballymacallen; Area: 15a.2r.13p. County: **WESTMEATH.**

Nellie Sullivan, Ardgroom Village, Ardgroom, Castletownbere, Co. Cork. Folio No.: 28475; Lands: Ardgroom; Area: 0a.0r.4p. County: **CORK.**

Michael Grogan, Tullagower, Cooraclare, Co. Clare. Folio No.: 7686; Lands: Tullagower (Part); Area: 44a.0r.31p. County: **CLARE.**

Mary Veronica Webb, c/o F. F. Cullinan & Co., Solicitors, Bindon Street, Ennis, Co. Clare. Folio No.: 22162; Lands: Killadysert; Area: 0a.0r.3p. County: **CLARE.**

James Bissett and Andrew Bissett, Fermain, Sandyhills, Rush, Co. Dublin. Folio No.: 17958; Lands: The property number one situate in the Townland of Rush and Barony of Balrothery East. The property number two situate in the Townland of Rush Demesne and Barony of Balrothery East. County: **DUBLIN.**

James Corcoran, Folio No.: 7198; Lands: (1) Rinn; (2) Shanbeg; (3) Nutgrove; Area: (1) 34a.1r.16p; (2) 5a.0r.34p; (3) 0a.1r.15p. County: **LAOIS (QUEENS).**

Rev. Pat J. Kenny, Rev. Patrick Doyle and Rev. Martin Gillespie - Mill Hill Fathers. Folio No.: 145F; Lands: Boherkyle; Area: 2.587 acres. County: **KILKENNY.**

Martin King (Jnr.), Tonroe, Kingsland, Co. Roscommon. Folio No.: (1) 13656; (2) 4993; (3) 14489; Lands: (1) Killaraght; (2) Tonroe or Creen; (3) Cornaveagh; Area: (1) 17a.3r.16p; (2) 9a.3r.; (3) 3a.1r.10p. County: **SLIGO & ROSCOMMON.**

Martha Howard, Kilnahue, Gorey, Co. Wexford. Folio No.: 3041; Lands: Kilnahue; Area: 5a.3r.27p. County: **WEXFORD.**

Dorothy T. M. Gaisford St. Lawrence (¼), Cyril H. Gaisford St. Lawrence (¼), Margaret T. M. Gaisford St. Lawrence (¼) and Clare E. M. Gaisford St. Lawrence (¼), Howth Castle, Howth, Co. Dublin. Folio No.: 11356; Lands: Ballina; Area: 42a.3r.10p. County: **WESTMEATH.**

Joseph Francis McGrath, Dalkinstown, Kilcullen, Co. Kildare. Folio No.: 2831; Lands: Ballyshannon; Area: 6a.1r.14p. County: **KILDARE.**

Walter & Katherine Burke, Mayfield, Claremorris, Co. Mayo. Folio No.: 43794; Lands: (1) Mayfield; (2) Mayfield; (3) Mayfield; (4) Mayfield; (5) Mayfield; Area: (1) 1a.0r.12p.; (2) 3a.0r.14p.; (3) 0a.2r.30p.; (4) 1a.2r.22p.; (5) 0a.2r.26p. County: **MAYO.**

Edward Alan Wetherall, Rowan Hill, Glencullen, Co. Dublin. Folio No.: 7586; Lands: The property situated in the Townland of Ballybrack and Barony of Rathdown. County: **DUBLIN.**

Joseph Ryan, Ballydavid, Littleton, Thurles, Co. Tipperary. Folio No.: (1) 16203; (2) 21253; Lands: Ballybeg; Area: (1) 55.388 acres; (2) 7.875 acres. County: **TIPPERARY.**

Richard Leslie Smyth, Ballywilliamroe, Bagnelstown, Co. Carlow. Folio No.: 126 closed to Folio 2408F; Lands: Ballywilliamroe and Ballymoon. Area: 104a.0r.15p. (Ballywilliamroe), 56a.2r.24p. (Ballymoon). County: **CARLOW.**

Patrick Moyles, Formoyle, Dooleague, Ballina, Co. Mayo. Folio No.: 31093; Lands: (1) Formoyle; (2) Formoyle (an undivided moiety); (3) Gortnahurra Lower; Area: (1) 8a.0r.30p.; (2) 7a.2r.10p.; (3) 12a.2r.5p. County: **MAYO.**

Noreen Chance, Kingswood House, Clondalkin, Co. Dublin. Folio No.: 7314; Lands: The Property situate in the Townland of Brownsbarn and Barony of Newcastle. County: **DUBLIN.**

John Collins of Kilmacabea, Leap, Co. Cork. Folio No.: 22256F; Lands: Kilmacabea; Area: 0.825 acres; County: **CORK.**

Thomas Murtagh, 55 Dangan Park, Terenure, Dublin. Folio No.: 2737L; Lands: Townland of Common, Barony of Connell; Area: 0a.0r.15p; County: **KILDARE.**

Lost Title Deeds

In the matter of the Registration of Titles Act, 1964 and of the application of Ursula Mary Connolly as Personal Representative of Margaret Mary Connolly,
7 Annaville Park, Dundrum.
TAKE NOTICE that the above named has lodged an Application for her registration on the freehold Register with absolute title free from encumbrances in respect of the above mentioned property.
The original documents of title set out in the Schedule hereto are not forthcoming. The application may be inspected at this Registry.
The application will be proceeded with without production of the said documents unless notification is received in the Registry within one calendar month from the date of publication of this Notice that the original documents of title are in existence. Any such notification should state the grounds on which the documents are held quote reference No. 85DN13413.
DATED this 9th day of February 1989.

Pat O'Brien
Chief Examiner of Titles

SCHEDULE
1. Fee Farm Grant dated 24th May 1860 made between Thomas Bell and Reverend John Beatty of the one part and Francis Purcell of the other part.
2. Conveyance dated 16th April 1932 made between Sir Ernest Cecil Cochrane and James Robertson Coade of the first part, Sarah Elizabeth Grahame Day of the second part, James Robertson Coade and Robert Nesbitt Keller of the third part and Margaret Frances Connolly of the fourth part.

***Re:* PIKE ESTATE, ACHILL, CO. MAYO.**
Would anyone having information concerning the title deeds of the above estate please contact Anthony J. O'Malley & Co., Solicitors, Market Square, Castlebar, Co. Mayo. Telephone (094) 22790.

In the matter of the Registration of Titles Act, 1964 and of the application of James Dooley in respect of property 100 Donore Avenue, Dublin.
TAKE NOTICE that James Dooley of 3 Sarah Curran Avenue, Rathfarnham, Dublin 14, has lodged an Application for registration on the Leasehold Register free from encumbrances in respect of the above mentioned property.
The original documents of title specified in the Schedule hereto are stated to have been lost or mislaid.
The Application may be inspected at this Registry.
The Application will be proceeded with unless notification is received in the Registry within one calendar month from the date of publication of this Notice that the original documents of Title are in existence. Any such notification should state the grounds on which the documents of title are held and quote Reference No. 88DN12986. The missing documents are detailed in the schedule hereto.
DATED this 15th day of March 1989.

M. O'Neill
Examiner of Titles

SCHEDULE
Lease dated 27th November 1894. Edward Watson and others to Thomas Stringer.
Assignment dated 29th December 1965. Francis Walter Flower to James Dooley.

Lost Wills

McMAHON, Patrick Joseph (P. J.), late of Main Street, Tulla, County Clare and Carrigoran Nursing Home, Newmarket-on-Fergus, County Clare. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 19th of August, 1988 please contact Messrs. William M. Cahir & Co., Solicitors, 36 Abbey Street, Ennis, Co. Clare, telephone (065) 28383.

SHAIKH, Constance Doreen, deceased, late of 7 Forde Park, Newton Abbot, Devon, England, and formerly of 1 Myrtle Grove, Merville Road, Stillorgan, County Dublin. Will anyone having knowledge of the whereabouts of a Will, and more particularly of the Will executed in Dublin on the 14th May, 1968 of the above named deceased who died on the 24th December 1982, please contact T. G. McVeagh & Co., Solicitors, 32 Kildare Street, Dublin 2. Telephone 789122.

LACY, Ellen, late of Castle Square, Castleblayney, Co. Monaghan, widow, deceased. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 3rd day of November, 1980 please contact Corrigan Coyle & Kennedy, Solicitors, Castleblayney, Co. Monaghan. Tel. (042) 40010.

SHOTT, Harriet Elizabeth, late of 32 Ulverton Road, Dalkey, Co. Dublin, who died on the 7th January, 1989. Will anyone having knowledge of the whereabouts of a Will of the above named deceased please contact Mason Hayes & Curran, Solicitors, 6 Fitzwilliam Square, Dublin 2.

BRADY, Elizabeth, late of Aille, Barna, Co. Galway, retired nurse. Will anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 14th day of October, 1988, please contact K. J. Rooney & Co., Solicitors, 6A Eglinton Street, Galway.

NILAND, Nora, deceased, late of Ballinastack, Ballyglunin, Tuam, Co. Galway (formerly Stephen Street, Sligo). Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 29th December, 1988, please contact Concanon & Meagher, Solicitors, Tuam, Co. Galway. Telephone No. 093-24115.

WALSH, Kathleen (née Curran), late of 63 Patrick Street, Dun Laoghaire, Co. Dublin. If any Solicitor or person has knowledge regarding the administration in the Estate of the above named deceased will they please communicate with Masters & Co., Solicitors, 89 Regent Street, Cambridge CB2 1AW (Telephone No. 0223-311141; reference: EMS).

DOODY, Martin, deceased, late of 1 Tuskar View, Wexford, retired ESB Supervisor, and also with previous addresses at 1223 Goulding Street, Rosslare Harbour, Co. Wexford; 4 Michael Street, Wexford; and Brookhill, Claremorris, Co. Mayo. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 21st December, 1988 contact Messrs. M. J. O'Connor & CO., Solicitors, 2 Georges Street, Wexford. Telephone (053) 22555.

FLEMING, Patrick, late of 59 Watson Drive, Killiney, County Dublin, caretaker. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 26th June, 1988 please contact Hooper and Company, Solicitors. 97 Upper George's Street, Dun Laoghaire, County Dublin.

COTTER, Jas. J., deceased, otherwise James Joseph Cotter, late of Derryishal, Colomane, Bantry, Co. Cork. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 24th day of November, 1988 contact Marcus A. Lynch & Son, Solicitors, 12 Lower Ormond Quay, Dublin 1. Tel. 01-732134.

Miscellaneous

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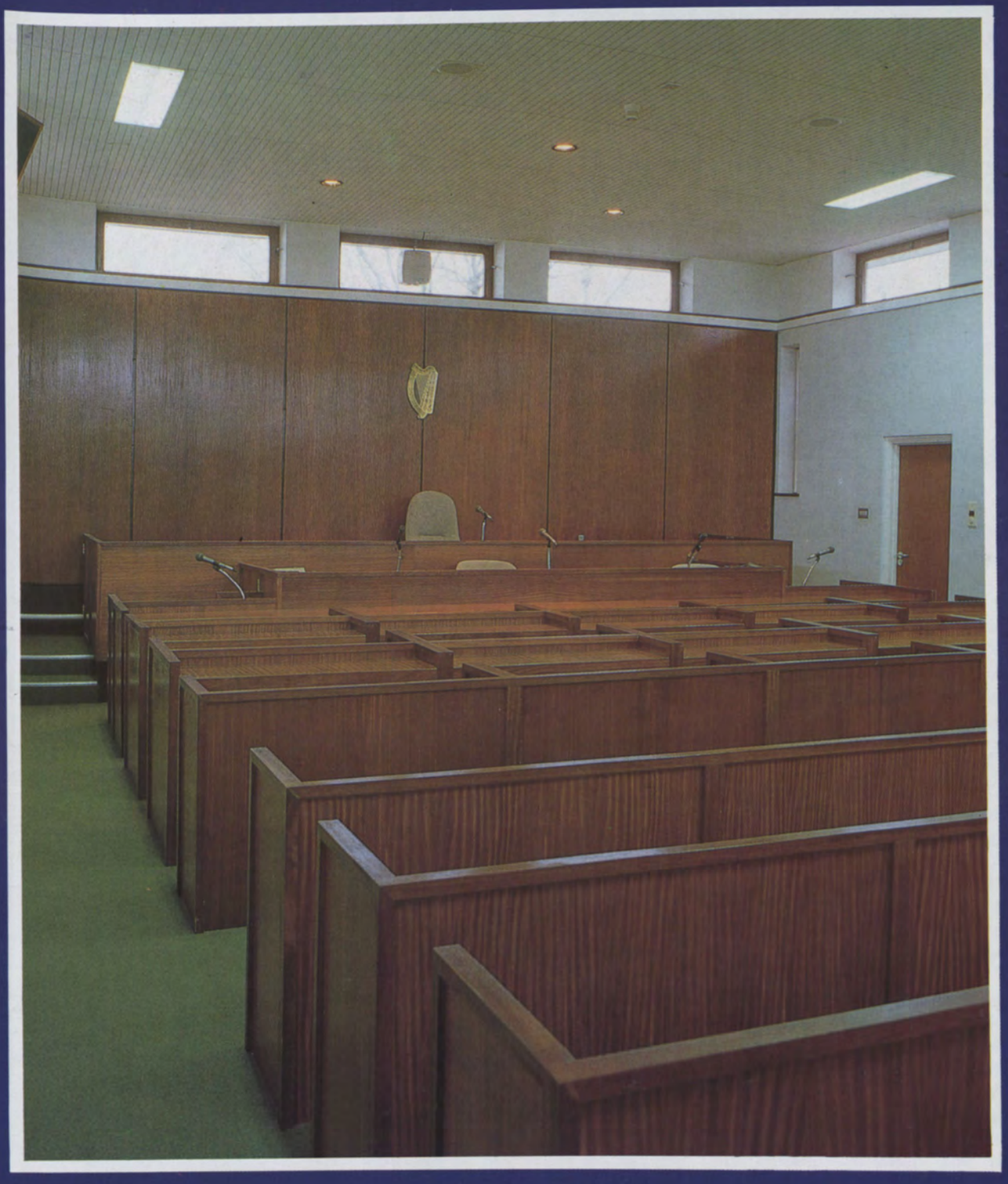

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Geraldine Clarke, Chairman
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GAZETTE INCORPORATED LAW SOCIETY OF IRELAND

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Viewpoint

The recent survey of Courthouses, conducted by the Law Society, has produced several startling, if not altogether surprising, statistics. It is quite clear that of the 103 Courthouses surveyed, the majority fell far short of the very minimum standards that might be expected. The practitioners and members of the public who have had occasion to attend courts have long been familiar with the difficulty in actually hearing what is going on. It is not unusual for a client to leave court and then proceed to ask his solicitor to tell him what has happened. Sometimes, the client won't even know if he has won or lost. Where amplifying facilities have been provided, they have often been inadequate or are ill-maintained.

In addition, practitioners have long been familiar with the dilapidated decorative conditions of Courthouses and probably most practitioners have felt that their local Courthouse is merely an exceptionally bad case rather than the rule. The Law Society's Survey, covering as it does such a large number of Courthouses throughout the country, shows clearly that the standard right across the board and in all regions is abysmal. Added to the long-standing and well-known problems mentioned above the survey shows most Courthouses to be inadequately heated, the majority to have no consultation rooms, to be in a dilapidated state of repair and in very many instances to have inadequate toilet facilities or none at all. It would appear that little or no money or attention is being given to the provision of these facilities, fundamental as they are to the provision of justice in the State and the maintenance of the democratic process.

The Courts worst affected, although by no means exclusively so, are the District Courts which deal with the largest number of cases both in the criminal, matrimonial and civil fields. Dissatisfaction with judical systems, and a feeling of alienation are the inevitable result for the parties, witnesses, family and friends attending a case where they cannot hear what is going on. Add to this the difficulty of people who have waited for some hours for their case to be called without the most basic of facilities including easily accessible toilets. People subjected to such treatment can hardly be expected to form a reasonable opinion as to whether justice has been done.

The root of the problem appears to lie with the division of responsibility between central government and its various departments and local authorities. It is clear that neither government nor local authority is prepared to contribute any significant resources to the maintenance of Courthouses unless forced to do so. The cynic might attribute this to a lack of votes in the issue.

High Court proceedings were commenced before improvements were introduced to one local Courthouse while, in several instances well documented by the Press, District Justices have had to refuse to proceed with the court's business before such problems as rat infestation and leaking roofs have been tackled. In some cases the state of the local Courthouse has been so embarrassing to the solicitors practising in the area that they have had to ''whip around'' and have contributed money out of their own pockets to have basic facilities provided.

The duty to provide ''Justice'' is sometimes seen as purely the preserve of the lawyer. However, Justice is a much wider issue, fundamental to the running of our State and our system of Government based as it is on the interrelationship between the three arms of the executive, administration and Courts. Lawyers, be they Solicitors, Barristers or

Contd. on page 121

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An Outline of Extradition Law

Part I

"Where the liberty of any person, be he citizen of this State or otherwise, is concerned, where valid arrest is fundamental to the validity of the proceedings, where sweeping powers are given to the Police Forces of two adjoining jurisdictions, I am not prepared to overlook the careless approach and lack of attention to detail . . . " per McCarthy J. in McMahon -v- Leahy [1984] IR 525; [1985] ILRM 422.

Introduction

Extradition[1] is not a matter of discretion. The State has entered into a series of international arrangements and treaties,[2] which obliges it, on request, to hand over fugitives within its borders. Under the Extradition Acts,[3] the State has no option between extradition to a requesting State and trial and punishment for an extra terratorial offence[4] within the jurisdiction. Extradition proceedings concern themselves not with the merits of returning a person to the place where he allegedly committed an offence,[5] nor with the strength of the case against him,[6] but simply with whether or not the proofs laid down in the Act have been complied with. Because of the difficulties of proving documents and ensuring the attendance of foreign witnesses, considerable assistance is given to the State by presuming documents to be valid in certain circumstances and allowing their contents to be an exception to the hearsay rule.[7] The task of the State is to ensure their documents comply with the Act and prove adequately what it requires. The defence lawyer is concerned to spot and exploit gaps in the State's proofs or challenge the documents as having been invalidly issued in a foreign jurisdiction or as being bad on their face. The writer's task is to concisely set out and consider those proofs and in so doing expose areas of possible weakness for future consideration.

Extradition is most often requested to the United Kingdom (governed by Part III of the Act). It is considered in most dertail and is followed by a discussion of our arrangements with other countries (governed by Part II of the Act). A considertaion of some of the more important defences, including the political exemption, concludes the article.[8]

UNITED KINGDOM (PART II)

Persons may be tried in the State for a wide range of terrorist-type offences committed in Northern Ireland, under the Criminal Law (Jurisdiction) Act 1976. This act does not extend to the remainder of the UK. The act therefore treats Northern Ireland and the remainder of the United Kingdom separately.

by
Peter Charleton,
B.A.(Mod),
Barrister-at-Law

In some circumstances, the State has extra-terratorial jurisdiction for crimes committed outside Ireland (see footnote 4 in the previous section). Section 4 of the Criminal Law (Jurisdiction) Act, in addition gave jurisdiction to try any Irish citizen, who, outside the State, causes an explosion, possesses an explosive or conspires to cause an explosion. This section runs against the general scheme of the act, which is to treat Ireland and Northern Ireland as one juristic entity for the purpose of terrorist crime and extends that principle, in the case of explosives, to the rest of the United Kingdom and the world. At the time of writing it is proposed to try Fr. Patrick Ryan under this section for conspiring to cause explosions in England. Clearly persons may also be extradited to Northern Ireland and the UK. There is no option given in any of the enactments between trial in the State and extradition. As to whether trial or extradition is requested in respect of Northern Ireland cases is a matter of politics, not law.

Extradition to the United Kingdom is governed by Part III of the 1965 Extradition Act, as amended. It is brought into operation by a Garda Commissioner[1] endorsing a UK warrant for execution here (the "backing of warrants" system). If the warrant is for arrest following a conviction or following committal proceedings, the Attorney-General has no function.[2] But if it is otherwise, the Attorney-General must be satisfied that the UK authorities intend to prosecute or continue the prosecution of the alleged offence and that their intention is "founded on the existence of sufficient evidence".[3] If he is not so satisfied then he must direct that the warrant should not be endorsed. A feature of extradition law in the UK is that before extradition is granted, a requesting state is usually required to make out a *prima facie* case of guilt. Extradition arrangements between Ireland and the UK were made in 1965,[5] following the collapse of the previous arrangement,[6] with the passing of the Extradition Act 1965 (hereinafter referred to as "the Act"). At that time, Ireland intended to ratify the 1957 European Extradition Convention[7] which does not have the requirement of a *prima facie* case.[8] If such a requirement had been imposed on the UK it would have been an anomalous feature of the

Peter Charleton.

legal system requiring evidence of guilt from our nearest neighbour, but not from any other European country. This possible absurdity,[9] coupled with a desire to retain the convenience of a backing of warrants system, albeit securing the prisoner's right of access to the Court to test the validity of his detention, resulted in a system whereby Ireland and the UK had merely to issue and prove a valid warrant[10] to secure a fugitive from the jurisdiction of the other. This was perceived as somewhat unsatisfactory. In 1985, two acquittals resulted in Northern Ireland following extradition from the State. In September, Dominic McGlinchey was acquitted of the murder of a Post Mistress and later the same month Séamus Shannon was acquitted on charges relating to the murder of Sir Norman Strong and his son. This prompted the SDLP to call for the introduction of a *prima facie* case requirement into Ireland's extradition arrangements with the UK. In 1987, the perceived emasculation of the political offence exemption to extradition[11] by the Extradition (European Convention on the Suppression of Terrorism) Act and the concern evoked by the appeal to the UK Court of Appeal by the "Birmingham Six", prompted further similar calls. The result was the Extradition (Amendment) Act 1987 passing the effective duty of deciding whether there is or is not a case based on "sufficient evidence" to the Attorney-General. Whatever of its expediency in political terms, the Act makes little sense legally.

The Attorney-General may consider "such information as he deems appropriate". It is difficult to see how he can consider anything other than evidence admissible in a UK prosecution because any other information could not be introduced at the requested person's trial and so help the prosecution to establish a "sufficient" case.[12] Such information will, one presumes, consist of written statements. There is nothing in the Act to stop the Attorney-General interviewing a witness, apart from the principal of constitutional construction which would, one would think, prohibit him from acting as a kind of examining magistrate in the absence of the parties. A case made on paper is very different to a case presented in Court. No analysis of the "Birmingham Six" case could conclude that there was insufficient evidence to bring the case to trial. Its disturbing features involved objectively strong forensic evidence rendered weak by cross-examination, a case otherwise almost entirely dependent upon confession statements by the accused and an allegation by the defence that these were obtained by oppression and maintained by a conspiracy among the police. No examination of prosecution documents would hint at that situation. The accused's side of the case will not be presented because it is unlikely that he will be asked for his opinion! Nonetheless, provision is made in the Act for the communication of "relevant information".[13]

In addition, these functions, involving as they do the consideration of potential evidence, a finding of fact that such evidence is admissible and sufficient, the receiving of "relevant information" and "appropriate" information, have the odour of a judicial function. Under section 22 of the 1965 Act, where a treaty contains a *prima facia* requirement, the Court is obliged to decide that "sufficient evidence" exists. Very arguably the Attorney-General is being asked to fulfil the same judicial function.[14]

Apart from that a proper case for judicial review might be made. For example, a person arrested on a warrant alleging he committed an offence in the UK, might say that at the time of the alleged offence he was in Iran and that therefore the Attorney-General's decision was not factually sustainable.[15]

Under Article 30 of the Constitution the Attorney-General is the advisor to the Government "in matters of law and legal opinion". The State has sole responsibility for prosecuting extradition requests through the Courts and those proceedings are initiated on the advice of and taken by the Attorney. Under Article 40.3 the State has an absolute obligation to respect the constitutional rights of the citizen and a qualified duty to protect and defend those rights. The meaning of the word "State" is unclear. There is authority for a wide construction. In *People (DPP) -v- Madden*[16] the Court of Criminal Appeal held that when a Garda failed to inform a prisoner, who was making a written confession, that his 48 hour detention had elapsed, this failure to accord "the Defendant his right to liberty, should he, the Defendant, desire to exercise his rights" amounted to a deliberate and conscious violation of his rights. The confession was excluded and the Defendant acquitted. On December 14th, 1988 the Attorney-General refused to initiate extradition proceedings against Fr. Patrick Ryan. No specific power is given by legislation to the Attorney to refuse to prosecute a request for extradition through the Courts. In a statement issued that day[17] the Attorney referred to the references to Ryan in British newspapers "often expressed in intemperate language and extravagently-worded headlines, and also assertions of his guilt of the offences comprised in the warrants" and to inferences of his guilt made in the House of Commons. Those factors would influence future jurors in Ryan's case and as "it would not be possible for a jury to approach the issue of his guilt or innocence free from bias" the Attorney refused to aid the violation of Ryan's right to a fair trial.

Once the warrant is executed the accused must be brought before the District Court[18] as soon as is reasonably possible.[19] Although the hearing before the District Court under Part III had been judicially categorised as "largely

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formal'',[20] there are, it is submitted, four substantial points it can consider: arrest, the documents supporting the request, correspondence of offences and identity.

Arrest

A person is brought before the District Court, under Part III, pursuant to an endorsed warrant.[1] The Court, under this Part, is not entitled to consider any defence under section 50 and ''the substantial hearing on the merits (if there is to be one) takes place for the first time in the High Court''.[2] The proofs are:

1. The validity of the warrant and associated documentation.
2. That the person who has been arrested is, in fact, the person named or described in the warrant.
3. That the offence described in the warrant corresponds with any offence under the law of the State which is an indictable offence or if punishable, on summary conviction, by imprisonment for a maximum period of at least six months.[3]

It was possibly never intended that the District Justice should consider the validity of the accused's detantion. The accused was to be informed of his right to challenge the legality of his detention in the High Court either by *Habeas Corpus* proceedings or by raising defences under section 50.[4] In 1965 a challenge to the legality of his detention would have been a less complex and fruitful matter than today, as the duty to ensure that the Executive did not obtain the planned results of a deliberate and conscious violation of a citizen's constitutional rights received its first mention in the Irish Reports of that year[6] and the full effect of that principle was realised only in 1977.[Thus in 1985 when Robert Trimbole was arrested under section 30 of the Offences Against the State Act 1939, on a pretence of the possession of a firearm[7] and, on being discharged by the High Court, was rearrested for extradition under Part II, it was hardly foreseeable from a 1965 perspective that the entire procedure, as a product of the initial illegal arrest, would be struck down by the High and Supreme Court as a violation of his right to personal liberty. Indeed the entire legal climate has changed and *Habeas Corpus* is now regarded ''as a remedy for unfair procedures and not as a substitute for fair procedures''.[8]

Dunne -v- Clinton[9] imposes on Justices a duty to discharge a prisoner arrested improperly in the ordinary course of events, for example without reasonable suspicion or for questioning. It surely follows that a District Justice in an extradition case can enquire, if the defence raise the point and establish evidence to ground it, into a deliberate and conscious violation of the accused's constitutional right to liberty. As a matter of practice, this does happen in the District Court. On 22 March 1986, for example, Evelyne *Glenholmes* was released by District Justice Conellan because the documents supporting the warrant for her arrest were defective. A telephone call was

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then made to Dublin, possibly by pre-arrangement, from London to a Garda Inspector stating that a further arrest warrant had been issued in the UK and requesting her urgent arrest thereon in Ireland. District Justice Conellan then issued an emergency warrant under section 49 of the Act. This was executed some short time after her release and she was brought before the Court. Notwithstanding that the section requires the person to be remanded for up to three days to await the arrival of the warrant from the UK, District Justice Plunkett embarked on an issue as to whether the original release of Ms Glenholmes was illusory because of a pre-arranged plan to immediately apply for an emergency warrant while keeping the released prisoner under tight surveillance. The District Justice decided the issue in favour of the defence, ruling that the second arrest was deliberately unlawful because "the release meant nothing in the events that followed".[10]

The *Glenholmes* case would not be decided the same way today. In *Kane -v- The Governor of Mountjoy*[11] the Supreme Court held that the Gardaí were justified in keeping the applicant under close surveillance in the expectation of the arrival of an Extradition Warrant. Finlay, C. J. further stated that "the essential feature of detention in this legal context is that the detainee is effectively prevented from going or being where he wants to go or be and instead is forced to remain or go where his jailer wishes him to remain or go".

A warrant may be executed anywhere in the State by any Garda[12] who should read the warrant to the prisoner and give him a copy of it. The prisoner should be asked, on being taken before a District Justice, if he needs an adjournment to seek legal representation.[13] For the purpose of executing the warrant a Garda may enter private property and may, on being refused entry break an entry using reasonable force.[14] A Garda may also validly arrest someone already under arrest.[15]

The Validity of the Warrant and Associated Documentation

There are three basic documents which must be produced before the District Court to ground an application for extradition to the UK. They are:

(a) A warrant issued by a judicial authority in the UK.[1]
(b) An Affidavit verifying the signature on the warrant.[2]
(c) A certificate that the offence charged is indictable and if also summary carries a maximum sentence of at least six months.[3]

In serious extradition cases the offences will usually be indictable only but if an offence is being proceeded with summarily then either service of the summons or breach of a recognisance or bail bond must also be proved.[4]

There are two possible points that can arise from these documents (A) that they are invalid under UK law and (B) that they are bad on their face. The first is easily disposed of since Irish Courts have no competence, in the absence of expert evidence, in construing foreign law.[5] Once the defence wish to challenge the validity of the issue of the warrants by calling expert evidence then it must be received.[6] In its absence, however, the Court cannot entertain a point as to whether the warrant was properly issued or if an immunity existed in respect of the prosecution of the person sought. Thus, in *McMahon -v- McDonald*[7] the respondent had been discharged by the President of the District Court on warrants relating to the sale of Irish passports in London because there was no proof of proper consent to the institution of proceedings against him and no evidence that his diplomatic immunity from prosecution had been waived. It was held that both points could only be ruled on where expert evidence was produced. This is so even though the statutes and treaties grounding the submissions were common to both.[8] Since such evidence of invalidity under UK law may be given by the defence it is prudent for the prosecution to have their own expert on that law available to challenge any evidence that may be given.[9]

The documents are proved by their production to the Court. They are presumed valid unless the Court sees good reason to the contrary. The word that is used in section 54 and section 55 of the Act is "appearing". There is no technical question of UK law involved and nor is there a requirement for the verifying affidavit to be sworn as a foreign affidavit, or for the certificate to be otherwise authenticated. But any of these documents may be bad on its face. Because the only way something can "appear" from a document, is that the document should exhibit the characteristics and give the information that the Act requires. The Act seems to require that it appear:

(a) That the warrant is a warrant for arrest.[10]
(b) That the warrant was issued by a judicial authority.[11]
(c) The judicial authority operates in a place specified under section 41 of the Act.[12]
(d) That the warrant was duly signed.[13]
(e) Probably it should contain the particulars to be expected of a warrant; date and place of commission, short particulars of the offence[14] and of the enactment infringed and a statement that the judicial authority is competent and has power to issue the warrant in the place where it was issued.
(f) It should be endorsed for execution under section 43 of the Act and if the warrant is to arrest a convicted person, should probably specify the particulars in section 43(3), i.e. the length of the unexpired position of the sentence.
(g) The verifying affidavit need simply verify the signature, usually be exhibiting the warrant, identifying it and stating that on the specified date it was signed by the judicial authority, the deponent being present and witnessing the signature appearing on the warrant.
(h) The affidavit should be sworn before a person who states who and what he is and that he is authorised to take affidavits by the law of the place where the judicial authority signing the warrant operates.[15]
(i) The affidavit should have the basic characteristics of an affidavit; a proper title, a date, a swearing and identifying clause, an averment of knowledge of the facts and a signature by the deponent

and a signature, description and swearing clause by the authority before whom it is sworn, which authority should state that it knows the deponent.

(j) The certificate should refer to the offence in the warrant and specify that it is an indictable offence only and if it is also a summary offence specify the maximum period of imprisonment. If the offence is being prosecuted summarily it should give the further particulars required in section 51 and section 54(3) of the Act.[16]

(k) The certificate should state that it is given by the authority or the clerk or other officer of the authority by which the warrant was issued.[17]

(l) It is also wise for the dates, names, offences and persons named on the documents and signing the documents to correlate with each other.[18]

The fundamental point is that the State must show documents which appear to comply with the Act and the defence have the burden of showing "good reason to the contrary".[19] That is that the documents do not have the appearance of those the Act demands or that, by proving UK law, that they have been invalidly issued. While the points above have been taken from the Act and checked against samples of the appropriate documents they may not be exhaustive.

Correspondence

The offence specified in the warrant must correspond with an offence under the law of Ireland which is an indictable offence or is punishable on summary conviction for a maximum period of at least six months,[1] and the District Justice should specify on the fact of his order what he considers to be the corresponding offences.[2] He may accept that only some of the offences on the warrant are corresponding and his rejection of others does not destroy the validity of the entire warrant.[3] The names of offences are unimportant as the same offence may be similarly named in each jurisdiction but have a different meaning. This necessitates the warrant or an affidavit from the prosecuting authority accompanying it to give "sufficient particulars of a factual nature setting out the ingredients of the offence . . . somewhat as the particulars of offences appear in a Court in an indictment under our law".[4] What is required therefore is the nature of the charge[5] and words in a warrant will be given their ordinary or popular meaning, unless the context suggests a special significance.[6] In 1971 the Supreme Court seemed to say that correspondence exists where the elements of an offence are precisely the same in Irish law as they are in UK Law.[7] The ratio of Ó Dálaigh C. J.'s judgment in Furlong's case being that if an offence under Irish law had an additional element to the offence under English law, or if the elements were the same in number but not in character there should be no correspondence. The idea, it seems, was that no-one should be convicted in the UK on easier or lesser proofs than in Ireland. In 1974, the Supreme Court confined their analysis to the facts alleged against the accused in the particulars of offence and, because of the absence of expert evidence to the contrary, decided that if the accused had done in Ireland what he was alleged to have done in the United Kingdom he would have offended against our criminal law.[8] Again, in 1979, in the absence of expert evidence, the Court decided that the word "rob", as an ordinary English word, must correspond with the offence of "robbery" in Irish law.[9] Finally, in a unanimous judgement in 1981 the Court held the relaxation of the *mens rea* requirement in English law for the offence of receiving stolen goods, from "knowing" to "believing", where "knowing" was the *mens rea* requirement for the offence under Irish law, did not destroy the correspondence between the two offences; English law was said to have "an additional alternative ingredient"![10] The point is that English law does not correspond. Obviously the receipt of a video recorder there, in the belief that it was stolen, would not secure a conviction for the same offence in

VIEWPOINT *Contd. from page 115*

Judges, can only work within and provide a level of service commensurate with the facilities available to them. These facilities come under the control of the other arms of Government and are receiving only the most meagre of attention and little or no resources.

With the facts now clearly available to them on a countrywide basis, it is the immediate and urgent duty of central government to respond with a positive and adequately resourced programme to repair, renovate and rebuild. The state of our Courthouses shows neglect over a long number of years and is not the result of neglect by one party or by any particular political grouping. It is a national disgrace which shows scant regard for the fundamental institutions to our State and a total disregard for the welfare of those who must have recourse to it. □

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Ireland, unless in addition the receiver knew the goods were stolen or otherwise feloniously obtained.[11] The recent relaxation by the House of Lords of the definition of recklessness to an approximation of negligence[12] and the unique position in the common law world of some of our defences to murder[13] as well as the obvious reforms of English law assisting the prosecution,[14] leads the writer to the view that the correspondence between Irish and English criminal law is now minimal. However, the challenges mounted in the cases noted above have been ineffective due to the absence of an expert for the defence to give evidence as to what are the precise elements of the offence for which the fugitive is sought and as to how those elements differ from their UK counterpart. It remains to be seen what the High Court or Supreme Court would do in the event of the gulf between Irish and English law being clearly enunciated to them.[15]

Identity

Identity is a proof common to Part II and Part III of the Act. Under Part III the District Court can only make an order for delivery into the custody of a member of the UK police force "where a person named or described in a warrant is before" the Court.[1] Extradition under Part II is a formal order by the Minister[2] made after committal by the District Court,[3] the Justice being satisfied that the arrest warrant issued by him under section 26 or section 27 of the Act has been executed against a person before the Court whose extradition "has been duly requested".[4] Following the pattern of the Act, Part III places less formal emphasis on establishing identity than does Part II.

The documents supporting a non United Kingdom request must include "as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality",[5] whereas no such requirement is made under Part III. Instead the endorsed warrant, being the document upon which the District Court acts under section 47 of the Act allows only for a name or description. In practice a name and current address (e.g. Mountjoy Prison) is usually given together with former addresses. There is no reason why a date of birth should not be included. A Part II description is made Evidence by section 37 of the Act. Since the warrant under Part III will include a name or description then that name or description is evidence of identity admitted by section 55(1)(a). In both cases the task of the State is to match whatever name and description is given with the name and description of the accused. A photograph or fingerprint can be properly admitted under Part II if signed and certified under section 37, but formal proof is required for anything other than a name or description in a warrant under Part III. Probably this descrepancy is due to geographical proximity making it easier to produce a UK policeman to identify the accused or his fingerprints, or for a Garda to match up his name and address with those on the warrant. Nonetheless, the anomaly can cause confusion.

In the case of *Patrick McVeigh*[6] the respondent was named and his current former addresses were given in the warrants. His current address and his name were proved by the Deputy Governor of Portlaoise Prison who stated that he was the only person of that name in the Institution, and his name and former address were proved by several Garda witnesses, to whom the prisoner had given them.[7] This evidence was unchallenged on behalf of the respondent who did not give evidence to contradict it or deny that identity. District Justice Ruane dismissed the application because there was no member of the requesting police authority in Court to identify the prisoner. This has never been a requirement under the Act, the express provisions of which dispense with such formalism and allow foreign documents and their content to be admitted in proof of all that is required for an order to be made.[8] Nor has the calling of a member of a foreign police force been the practice in extradition cases[9] and in *Saurin -v- Ó hUadhaigh*[10] Finlay P. was satisfied that there was evidence of identity before the District Court when a Detective Superintendent referred to a photograph of the accused in the English Police Gazette. In England evidence that the person arrested never protested that he was not the person accused was held to be acceptable evidence as to identity[11].

The Burden of Proof and the Burden of Adducing Evidence

There is no recorded decision as to whether the State must prove all these matters as a probability or beyond reasonable doubt.[1] A person extradited will have to face criminal proceedings but the extradition itself merely determines if the person named in the warrant should stand trial elsewhere. Even a *prima facia* case requirement would not impose a beyond reasonable doubt standard on a requesting State with regard to the evidence against the accused and there seems no reason why the elements imposed by the Act should have a higher standard of proof than the balance of probability. The state must prove all the elements of its own case, but matters of defence, for example, whether the defendants fundamental constitutional rights would be imperilled in the requesting State or whether the political exception applies, must be proved by the defence as a probability.[2] There are two aspects of the burden of proof; the burden of adducing evidence and the latter burden of proving one's case according the standard set, whether probability or beyond reasonable doubt. The latter is the final question of fact for the District Justice "is there sufficient evidence here for me to be satisfied that the man in the dock is the man described in the warrant, that the defence have not shown good reason for me to act on the documents before me and that the offences are corresponding?" The burden of adducing evidence falls on a party challenging a case to lead some evidence supporting that challenge upon which the District Justice might see fit to displace the State's case.[3] The challenge may come from cross examination, from a prosecution witness stating the opposite to the State case or by the accused giving evidence, but the challenge must be there and it is not legally there unless based on some evidence.[4] For all the evidence to point one way and for

the accused to remain mute leaves only one finding open.[5]

Point of Departure

If the District Justice is satisfied with the evidence offered on behalf of the State, and no defence evidence has been offered to rebut it on the balance of probabilities, he should, before making an order, hear the accused on how he wishes to travel from the State[1].

The Justice should specify a particular place as that point of departure; merely to specify "Dublin" is insufficient.[2] The accused should be informed of his right to apply to the High Court under sectin 50 or to seek an order of *Habeas Corpus.*[3]

Part 2 of this article will be published in the May Gazette.

FOOTNOTES

Two sections of this article were originally prepared for the Criminal Law Journal (U.K.), and first published there in 1989.

Introduction

1. In this Article the 1965 Extradition Act is referred to as "the Act" and the reference to a section is, unless otherwise stated, to a section of that Act. The Extradition (European Convention on the Suppression of Terrorism) Act 1987 is referred to as the 1987 Act. The Extradition (Amendment) Act 1987 is given its proper title.
2. Pursuant to section 8 of the Act, a full list is given in Humphries – An Index to the Irish Statutory Instruments, at 846-848.
3. The 1965 Act, the 1987 Act and the Extradition (Amendment) Act 1987.
4. The list of offences where the State has extra-terratorial jurisdiction is now quite vast; see Ryan and Magee – the Irish Criminal Process, p. 25-29, the Criminal Law (Jurisdiction) Act 1976, the Air Navigation and Transport Acts 1973 and 1975 and the Extradition Act 1987, section 5.
5. Section 9, section 47.
6. The State can require a *prima facie* case under treaty; section 22.
7. The main provisions are – Part II: section 26, section 37; Part III; section 51, section 54, section 55 (as amended by section 2 of the Extradition (Amendment) Act 1987).
8. Considerable assistance can be had with these cases from Forde – Extradition Law in Ireland, Dublin 1988.

United Kingdom

1. Or Deputy, or Assistant Commissioner, who must apply his mind to the conditions for endorsing it under section 43. The emergency warrant procedures contained in section 49.
2. Section 44A(1) and section 44D, as inserted by section 2 of the Extradition (Amendment) Act 1987.
3. Section 44B as inserted by section 2 of the Extradition (Amendment) Act 1987.
4. In any proceedings under Part III, it is presumed by section 44C, that the Attorney-General did not so direct; see further section 55(3) as inserted by section 2(1)(c) of the Extradition (Amendment) Act 1987.
5. The 1965 Act commenced by SI 161 of 1965 and the Backing of Warrants (Republic of Ireland) Act 1965, as commenced by SI 1965 No. 1850.
6. Found to be unconstitutional because they allowed the immediate execution of warrants and excluded the possibility of a *Habeas Corpus* application: *State (Quinn) -v- Ryan* [1965] IR 70.
7. And did so on May 2nd, 1966.
8. Unless the treaty requires a *prima facie* case, the Act does not require one to be made out; section 22.
9. Paul O'Higgins, 15 ICLQ (1966) 369, 391.
10. Section 55, and see section 7 of the United Kingdom Act; *Keane -v- Governor of Brixton Prison*[1972] AC 204.
11. Section 44, as amended by section 8 of the 1987 Act and section 50 (Part III) and section 11 (Part II) as limited by section 3 and section 4 of the 1987 Act. Note the Act applies automatically to the UK but requires an order to apply as to any other country.
12. It may be that the Act is attempting to distinguish between sufficient evidence to found an intention to prosecute and sufficient evidence to prosecute. Were that to be so the word "information" should have replaced the word "evidence".
13. Section 4 of the Extradition (Amendment) Act 1987. I find it impossible to say what this section means.
14. Article 37 of the Constitution expressly forbids the exercise, in criminal matters, of limited powers and functions of a judicial nature, by persons who are not judges; *the State (Clarke) -v- Roche* [1986] IR 635; [1987] ILRM 309 and the 1987 Supplement to Kelly – The Irish Constitution, p. 51-54.
15. On this point see Hogan's commentary on the Act in ICLSA 87/25-01.
16. [1977] IR 336.
17. See the full text of the statement as published in the *Irish Times* of December 14th, 1988.
18. The powers of Peace Commissioners under the Act are constitutionally suspect having regard to Article 37; see *State (Lynch) -v- Ballagh*[1986] IR 203; [1987] ILMR 65.
19. *Dunne -v- Clinton* [1930] IR 336 and unreported.
20. Barrington J. in *State (Gilliland) -v- Governor of Mountjoy Prison* [1986] ILRM 381 at 384.

Arrest

1. Section 43.
2. Per Barrington J. in *The State (Gilliland) -v- Governor of Mountjoy Prison* [1986] ILRM 381 at 348.
3. Per Barrington J. in *The State (McFadden) -v- Governor of Mountjoy Prison* [1981] ILRM 133 at 116; see also Walsh J. in *State (Holmes) -v- Furlong* [1967] IR at 210.
4. Section 48.
5. *The People (AG) -v- O'Brien* [1965] IR 142.
6. *The People (DPP) -v- Madden* [1977] IR 336.
7. As Egan J. found; *State (Trimbole) -v- Governor of Mountjoy Prison* [1985] ILRM 465.
8. Per Barrington J. in *The State (McFadden) -v- Governor of Mountjoy Prison* [1981] ILRM 113 at 118.
9. [1930] IR 336.
10. *The Irish Times,* March 24, 1986. Under the 1987 Act, section 6(3)(c), the DPP may commence a prosecution because of a likelihood that an extradition application will be refused.
11. Supreme Court, unreported, 11 May 1988.
12. Section 45(1).
13. *State (McFadden) -v- Governor of Mountjoy Prison* [1981] ILRM 113.
14. *McMahon -v- McDonald,* Barrington J. unreported 3 May 1988, p. 28 and *DPP -v- Corrigan* [1986] IR 290.
15. *The People (DPP) -v- Nicholas Kehoe* [1985] IR 444. A point as to an invalid arrest should be taken at the first opportunity.

The Validity of the Warrant and Associated Documentation

1. Section 54(1).
2. Section 54(1).
3. Section 54(2).
4. Section 51, Section 54(3), Section 55(1)(b).
5. Per Walsh J. in *The State (Furlong) -v- Kelly* [1971] IR 132 at 143.
6. Henchy J. in *Gillespie -v- Attorney General* [1976] IR 233 at 236.
7. High Court unreported, Barrington J., 3 May 1988, Supreme Court unreported, 27 July 1988 (impromptu judgment).
8. By section 55 as amended by section 2 of the Extradition (Amendment) Act 1987.
9. Otherwise the presumptions under section 55(1) will be simply rebuted.
10. Section 43.
11. Section 43, section 54(1), section 55(1). A judicial authority can be a Justice of the Peace; *Russell -v- Fanning* [1988] ILRM 333.
12. Section 55(1)(a).
13. Section 55(1)(a).
14. *State (Furlong) -v- Kelly* [1971] IR 132, see particularly Walsh J. at 143; this is necessary for the purpose of testing correspondence though an affidavit can fulfill the same function.
15. Section 54(1), section 55 (1)(a).
16. Section 54(2) and (3), section 55(1)(c).
17. Section 54(2).
18. This apparently was the problem before District Justice Conellan in the Glenholmes case, see *The Irish Times* March 24 and 25, 1986.
19. Section 55(1).

Correspondence

1. Section 47(2).
2. *State (Furlong) -v- Kelly* [1971] IR 132, per Walsh J. at 142, as a result of which Form 15 was introduced by SI 275 of 1971. This requirement is not to be read into Part II; *State (Gilliland) -v- Governor of Mountjoy Prison* [1986] ILRM 381 387. See also *Wyatt -v- McLoughlin* [1974] IR 378 (failure to state the corresponding offence does not invalidate the order).
3. *Mulloy -v- Sheehan* [1978] IR 438.
4. *State (Furlong) -v- Kelly* [1971] IR 132 at 143; the affidavit method is rarely used as it is not a document the validity of which is presumed under the Act.

5. *Duff -v- Sheehan*, unreported Supreme Court July 5, 1976.
6. *Wilson -v- Sheehan* [1979] IR 23.
7. *State (Furlong) -v- Kelly* [1971] IR 132, Ó Dálaigh C. J. at 141.
8. *Wyatt -v- McLoughlin* [1974] IR 378, Walsh J. at 401, Henchy J. at 403, Griffin J. at 404.
9. This effectively reverses Walsh J.'s judgment in Furlong's case, with which Budd J. agreed, requiring a proper factual description of the ingredients of the offence
10. *Hanlon -v- Fleming* [1981] IR 489 at 499, *R. -v- Neiser* [1958] 3 All E R 622.
11. This last point was not argued in the Supreme Court, nor was there any expert evidence to support it.
12. *R. -v- Caldwell* [1982] AC 341.
13. *People (A-G) -v- Dwyer* [1972] IR 416, all other common law countries reject this defence as to the positon on provocation, see *People (DPP) -v- MacEoin* [1978] IR 360 which postulates a subjective test.
14. These are partially set out in the Law Reform Commission Reports on Receiving (Chapter 2) and Malicious Damage (Chapter 3 and Chapter 7).
15. A clear warning is given by Henchy J. at page 499 of the Report in *Hanlon -v- Fleming* that the system of correspondence has almost broken down and a new Act is needed simply listing offences for which extradition will be granted thereby dispensing with the correspondence doctrine.

Identity

1. Section 47.
2. Section 53. .
3. Section 29.
4. Section 26(1)(a).
5. Section 25(a).
6. District Court unreported June 13, 1988 and see *The Irish Times*, June 14, 1988.
7. An admission is, of course, an exception to the rule against hearsay; *Sullivan -v- Robinson* [1954] IR 161.
8. Section 55 as amended by section 2 of the Extradition (Amendment) Act 1987 (Part III), and section 26 and 27 (Part II).
9. As submitted by the defence in McVeigh.
10. High Court unreported May 27, 1976.
11. Re Parisot (1889) 5 TLR, 344, D.C.; and see *R. -v- Finkelstein and Trusovich* [1886] 16 Cox. C.C. 107.

The Burden of Proof and the Burden of Adducing Evidence

1. In the UK the standard is the balance of probabilities.
2. *Russell -v- Fanning* [1988] ILRM 333.
3. On this generally see Cross Jones and Card – Criminal Law, Butterworths, 1988, 7.9.
4. *Hill -v- Baxter* [1958] 1 QB 277 at 284.
5. *People (A-G) -v- Quinn* [1965] IR 366 at 382/383.

Points of Departure

1. *State (McFadden) -v- Governor of Mountjoy* [1981] ILRM 113.
2. *State (Holmes) -v- Furlong* [1967] IR 210.
3. Section 48(3). □

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From the President . . .

When speaking to groups of solicitors at Bar Association meetings around the country, one of the points that I make in relation to the profession's fears of competition from Building Societies and other Lending Institutions in the Conveyancing area, is that we are a well educated and mainly youthful and energetic profession, which if it cannot compete on a level playing field, that is on fair terms as to competition, then we have no one to blame but ourselves.

One of the elements which will be important in ensuring that we can face such competition, if and when it comes, is how we manage our offices. There is a growing belief that in addition to technical excellence, management skills will be crucial to our firms' long term effectiveness.

Law Office Management courses started about 20 years ago. I was a great attender at them and I believe that I learned a lot. Finally when asked by Bob Weil, the joint author of Altman and Weil, *How to Manage a Legal Office*, after a Law Society Annual Conference in Killarney at which he spoke, whether I was going to his next meeting somewhere on the continent, I replied, "No, I now know all the theory, my problem is putting it into practice". On the shelves of our office, there are in addition to Altman and Weil, Soars – *The Solicitors Practice* and David Andrews – *Organisation and Management of a Legal Practice*, each of which is a two volume loose leaf work. I have to confess that I have not got beyond the introductions in either. However, I have read and would recommend to you a paperback book of 111 pages (excluding index) written by Michael Simons, a London Solicitor, entitled *Anatomy of Professional Practice* which is published by the Law Society's Gazette, 113 Chancery Lane, London at £14.95 stg.

In this book he recommends that anyone interested in Management and Practice Development should join the Law Office Economics and Management Section of the American Bar Association. It publishes a quarterly magazine entitled *Legal Economics* which contains many interesting articles. Maybe what appealed to me about Mr. Simons's book is that I agree with so much of what he says, particularly that our business is about people and that you should do as he says and not, as he confesses, he sometimes does himself.

Some of the comments can be quite amusing. For example on the question of Mergers he asks, is a Merger of equals ever possible, to which he replies, no there needs to be a predator and a victim for each successful amalgamation. Again he can be quite analytical; writing on the same subject he says "Merger is not an easy route to follow. It requires self-appraisal, discipline and a willingness to subordinate one's ego for the general good. None of those are characteristics which are of necessity prevalent in our profession".

Branch offices are not something that has caught on to any great extent in this jurisdiction and I have often wondered why; does it have to do with an inability or a believed inability to enforce restrictive convenants against solicitors or against Assistants or Partners who operate branch offices and then decide to go out on their own? Or does it – as Michael Simons believes – relate to the lack of strong managment of finance and personnel which he feels is a pre-requisite?

Obviously, as well as spending considerable sums of money on law books we will all have to spend great sums in future on installing computerised legal information retrieval systems which will also enable us to obtain financial service advice and additionally give access to Land Registry, Companies Office and other such Organisations.

Shortly after I qualified I thought the copying machine was the greatest invention; then decided that the word processor was as good if not better until finally (so far) along came the fax machine which to my mind really enables the profession to deliver a modern and efficient service. I have been very pleased at the rate at which fax machines have been acquired by solicitors practices and I believe in a very short time most of the profession will be linked in this manner and very shortly thereafter linked on area network by computer.

Another writer on legal practice, asks "what is the real asset of a law firm?" – to which he replies – "the customer or the client is the real asset of the business". The purpose of the solicitors business is to get and keep a client, as without clients in sufficient and steady numbers, there is no business and no profits. If our legal services do not meet the needs of our clients, what good are they? Do lawyers who believe themselves more important than the people they serve deserve to fail? In America I read that today's clients increasingly turn their backs on arrogant and pompous lawyers and look for a new breed of lawyer who offers courtesy, promptness and value.

There are all sorts of simple rules which will help you in this direction, for example, return calls promptly, give practical advice, stay on top of your work, anticipate your clients needs. There are many others which will be found regularly repeated in articles in Journals such as *Legal Economics*. In opening this comment, I mentioned meeting with Solicitors at Bar Associations. Last November, those Bar Associations at their Half-Yearly Meeting asked that I endeavour to put Solicitors in a position to compete in the area of housing finance and general investment. Acting on that suggestion, the Society in association with Sedgwick Dineen Personal and Financial Management is now launching a financial and property service for Solicitors. I hope that the service will receive a wide acceptance and be used to good effect in advising clients.

I end by recommending you to read Michael Simons book and become a Subscriber to the Journal.

Maurice Curran
President

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Life Assurance

Life assurance nowadays is too often seen as a tax effective way of saving for the future or of paying off a loan. And, of course, life assurance schemes can be used profitably for both of those purposes. But the basic purpose of life assurance should not be forgotten – that is to provide protection for dependants in the event of premature death.

Life assurance has certainly a role to play in most families' savings plans. Because of the tax relief allowed on premiums it can provide a tax effective way of saving for the future. It is only useful, of course, for medium to long term saving – perhaps taking ten years as a minimum. While a savings plan may be showing a profit before that time, the heavy initial set-up costs dictate that the initial objective should be to save for at least ten years.

Because of their perceived attractiveness, savings type policies are most easily sold and they also provide good commission rates, but any tax adviser worth his salt should initially determine that other insurance needs are adequately catered for. Savings type policies do provide a lump sum on the death of the insured person but it is possible to get that type of death cover far cheaper if you dispense with the savings element in the policy. That leaves you with what is known as "Term" insurance.

by Colm Rapple

Term Insurance

Term insurance is simple protection with no saving element attached. If the person insured dies within a set term of years, a lump sum is payable to his family or dependants. It is the cheapest way of providing protection and it is the first type of policy a young family man on slender means should consider. Within this general category there are a number of different possibilitiies.

Level Term: In this case the sum assured remains fixed for the term of the policy. If the person insured survives the term no payment is made by the insurance company. For example, for an annual premium of about £14.40 (before tax relief) a man of 25 years can be insured for £10,000 for a period of ten years. If he dies any time during that ten years the £10,000 is payable to his family. If he survives the ten years the policy terminates and no payment is made. For the same cover, a man 35 years of age would pay annual premiums of about £20.50 and a man of 45, about £56.50.

Convertible Term: This provides the same basic insurance cover as level term assurance, but there is an option to convert the policy into another type. Usually the assurance company allows conversion at any time during the life of the policy and agrees not to require any further medical test or proof of good health. The policy into which you convert will operate from the date of conversion and will be at the normal premium rates applied to such policies given the insured person's age at the time of conversion.

A convertible term assurance policy need not cost much more than a long term policy and it is generally worth paying the extra.

Decreasing Term: This type of policy is often referred to as a mortgage protection policy since they are often taken out for this purpose. The life cover gradually decreases over the term of the policy as the amount outstanding on the loan decreases. On new house mortgages from building societies it is now compulsory to take out a mortgage protection policy. These are organised by the societies themselves and the premiums are collected as part of the repayments.

Family Income Benefits: This is another type of term insurance which provides, instead of a lump sum, a regular income for the family or dependants. For example, for a premium of about £1.15 a month, a man of 25 can provide that his wife receives an annual income of £1,000 a year each year between his death and the end of the term. In this case the term is twenty years starting from the date the policy was taken out. The payment made by the insurance company would not be liable to income tax.

Whole of Life Assurance

Term assurance is pure protection. There is no element of saving since no payments are made if the insured person survives the term. With whole of life assurance there is an element of saving, although it is saving for your dependants after your death. The insurance company undertakes to pay the agreed sum – plus bonuses if you go for a with-profits policy – whenever you die. So unlike term assurance. the payment is made at some time.

Obviously the premiums payable for a given life cover are higher in this case than a similar term assurance. You can opt to pay premiums up to death or else elect to stop paying premiums at a certain age. For most people, whose incomes fall after retirement at 65, it is a good idea to have premium payment stopping then.

Endowment Assurance

This is the most common form of insurance policy sold, where the saving element is uppermost. The range is immense, from strict "endowment" to "unit-linked" policies. In all cases the main emphasis is on saving with the actual sum payable on death relatively small per premium pound compared with term or whole life assurance. They are a topic to themselves and will be considered in a future article but they are best considered as ways of saving or investing rather than as ways of providing insurance cover for dependants.

What is best?

No family should be without some form of life assurance. The early death of a husband or wife can impose severe financial burdens on the surviving spouse. And for a relatively small sum life assurance can provide some protection and a certain amount of peace of mind. Remember, that even if someone who lives to pay all the premiums on a term assurance, and therefore

gets no monetary gain, will still have got a return by way of many years of peace of mind. So it is important for any financial adviser to ascertain what the client needs before offering any advise.

Protection is obviously the first consideration. And the newly married couple on a tight budget can get this through term assurance. Unless the budget is extremely tight, convertible term assurance offers the best bet providing, as it does the flexibility to convert into other types of assurance as the family circumstances, and possibly budget, improve.

So the first policy should be a convertible term assurance either providing a lump sum on the death of the husband or else the guarantee of a regular income over a set number of years. It may be that the husband is in a pension scheme at work which provides adequate protection. So, first check if there is adequate cover through an occupational pension scheme. If not, then term assurance is the cheapest way to get protection. A 25-year-old might take a policy over a 30 year term – the cover ceasing at age 55, by which time other policies will have been taken out.

If a house is being purchased on a mortgage, it makes sense to take out a special kind of term assurance, called a mortgage protection policy. For a very low premium this will provide enough funds to pay off the mortgage should the breadwinner die within the set term. Basically it is a declining balance term assurance i.e. the amount paid out on death goes down each year in line with the reduced indebtedness to the provider of the mortgage. It is also possible to get a term assurance to cover the full value of the house without any decline in the amount payable on death, but this is more expensive.

The next thing to consider is possibly a policy on the wife's life. Few people think of the costs imposed on a family by the death of a wife and mother, even if she is not wage-earning. The husband who wishes to keep his family together might need to employ a housekeeper and will certainly be involved in some expense in looking after the children. Such cover might take the form of an endowment policy say over ten or fifteen years. By the end of such a period the children will be older and the costs of keeping a family together a good deal less than with younger children.

If the wife survives the ten or fifteen years, as hopefully she will, then the policy will pay out a useful lump sum which can be put towards the children's education.

When these protection needs have been taken care of it is time enough to start looking at the attractions of endowment assurance as a method of saving. Those will be considered in a future article. □

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Practice Notes

Deposits in sale generally

The Incorporated Law Society of Ireland General Conditions of Sale provide that in a sale by Auction and a sale by Private Treaty, the deposit monies are to be paid to the Vendors' Solicitor as stakeholder.

It is the practice, in some instances, for the Vendors' Auctioneer or Estate Agent to hold the whole or part of the deposit monies pending the completion of the transaction. In these instances, the Vendors' Solicitor and the Purchasers' Solicitor must advise their respective clients of the provisions of the Contract for Sale relating to deposits and take instructions on whether or not the Auctioneer/Estate Agent is to hold any part of the deposit monies, pending the completion of the transaction.

The Vendors' and Purchasers' Solicitor must also advise their clients of the risk to the deposit monies in the event of the Auctioneer/Estate Agent becoming insolvent; in this regard it should be noted that Auctioneers and Valuers who are members of the IAVI attract the protection of the IAVI Compensation Fund. Clients should also be advised that further protection may be afforded by having the Auctioneer/Estate Agent hold the monies in his possession as stakeholder.

It must be emphasised that if the instructions received vary the General Conditions of Sale relating to deposits, the contract should be altered to reflect those instructions.

The Professional Purposes Committee feels that it would be good and prudent for a Solicitor to obtain an irrevocable authority and instruction from a client prior to discharging any outlays from the proceeds of sale whether they had been fees of an Auctioneer/Estate Agent, Engineer or otherwise. □

Professional Purposes Committee

Sale by Private Treaty

Issue of Contracts to Auctioneers

The Professional Purposes Committee has been considering the prevalent practice of Solicitors sending out to Auctioneers copies of contracts for sale where premises are for sale by private treaty and not by auction. It appears that Auctioneers frequently seek contracts from the Vendors' Solicitors in order to be in a position to have them completed by purchasers once a sale has been agreed.

The Committee considers that the best interests of the public and Solicitors duty are not served by the existence of this practice which does not allow a Purchaser's Solicitor a reasonable opportunity or considering the pre-contract title which is being offered before advising his client as to whether he should proceed to complete the contract.

There must also be some doubt as to whether a purchaser who executes a contract presented to him by an Auctioneer, without having had the opportunity either personally or through a solicitor of inspecting the title documents referred to in the first schedule of the standard form of contract, would be bound thereby.

The committee considers that a party to a sale should have an opportunity of having the Contract vetted by a Solicitor before executing same and recommends that in Private Treaty Sales the practice (where it exists) of sending out copies of contracts to Auctioneers be discontinued. □

Professional Purposes Committee

Medical Negligence Panel (Ophthalmologists)

Members are referred to a Practice Note which was issued in the November 1987 issue of the Society's Newsletter indicating that the Society considered the scheme offered by the Faculty of Ophthalmology to be unsatisfactory and that the Society no longer recommended the scheme to its members. The scheme required the instruction of three Ophthalmologists before a report would issue in a case of alleged medical negligence. The Society has since entered into correspondence with the Irish Ophthalmological Society and that Society has agreed to operate a panel of Expert Witnesses in medical negligence cases on the basis that a single expert witness would be nominated. However, in exceptional cases an expert witness would have recourse to further opinions if he required them.

The basis on which the panel will operate is that Professor L. Collum will act as a liaison for the panel within the Royal College of Surgeons.

The College has now furnished the panel to the Society.

If members require the name of an expert witness in this field they are recommended to contact Miss Anna Hegarty, Secretary of the Litigation Committee. □

Litigation Committee

Practice Direction

The attention of practitioners is directed to the changes effected by Rules of the Superior Courts (No. 2) 1989 [S.I. No 20 of 1989] with effect from 13th February 1989.

1. [0.36 r. 2(b)]	**Setting down – Country Venues** Personal Injuries and Fatal Injuries actions may be set down for trial by a judge only at 7 country venues – Waterford is now added.
2. [0.61 r. 3(a)]	**Circuit Appeals** (i) Notice of Appeal (for Dublin sittings) is to be lodged directly in the Central Office (Notice Office) indorsed with particulars of service (Court fees £17). The time for appeal is 10 days from the date of the Circuit Court Order, a certified copy of which may be lodged later.
[0.61 r. 4]	(ii) Two books of appeal with a

sufficient index should be lodged without delay in the Central Office (Notice Office): Appellant should have previously served Respondent with a copy of the index. The appeal will then be listed for hearing in the next succeeding sessions.

[0.61 r. 7] (iii) Notice of withdrawal of appeal (from Dublin List) should be filed in the Central Office (Notice Office).

J. C. Delahunty
Chief Registrar

Court List Numbers

Under the existing arrangement a plaintiff's solicitor must set down an action for trial within fourteen days after the service of the notice of trial.

The Litigation Committee recommends that within seven days of the setting down of an action the plaintiff's solicitor should inform the defendant's solicitor of the list number. □

Litigation Committee

Lloyd's Underwriters

This note is supplemental to the Note published in the December 1988 issue.

In cases where a Plaintiff is unaware of a policy number or when a policy has not been issued, enquiries should be made in writing to Raymond P. McGovern, Lloyd's Underwriters' Sole General Representative in Ireland, of W. G. Bradley & Sons, 52 Fitzwilliam Square, Dublin 2. □

Medical Negligence — Orthopaedics

Ms. Anna Hegarty,
Secretary of the Litigation Committee of Law Society,
Blackhall Place,
Dublin 7.

20th February, 1989

Dear Miss Hegarty,

I would like to inform the Law Society that procedures have been laid down by the Irish Institute of Orthopaedic Surgeons with regard to cases of alleged medical negligence. Those procedures were formulated at the Annual General Meeting in 1985 and have remained unchanged since. (The vast majority of Orthopaedic Surgeons in the Republic of Ireland are members of the Irish Institute of Orthopaedic Surgeons).

There is general agreement among the Institute Members that they should take on those cases when requested to do so. A Solicitor may approach any member of the Institute asking him to act on behalf of his client. The Orthopaedic Surgeon in accepting the case will nominate a colleague who will examine the patient with him and both Surgeons will then issue a joint report. A fee for this examination and report will be agreed between the Solicitor and the first Surgeon to be contacted.

If the Litigation Committee requires any further information or if that Committee wishes to meet members of the Institute, appropriate arrangements can be made.

Kind regards.

Yours sincerely,
Mr. Joseph P. McGrath, M.Ch., M.CH.Orth., F.R.C.S.E., F.R.C.S.I.,
Chairman,
Irish Institute of Orthopaedic Surgeons.

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Professional Purposes

I think it is safe to say that the Professional Purposes Committee is the practitioners' committee. In other words it is the committee to which the practitioner can bring his problems, whether they be generated within his own practice or caused by a breakdown of the proper levels of co-operation which should exist between all solicitors offices. The committee which is responsible for the preparation and publication of the Guide to Professional Conduct of Solicitors in Ireland, has the unenviable task of creating guidelines for the profession in the area of good conduct or the application of good common sense to everyday problems. Very often of course, there are precedents for the problems which come before the committee but increasingly the committee is getting into consideration of those areas of practice which are brought about by the continuing development of a dynamic profession, which finds itself operating in an ever more competitive environment.

Members of the profession will be familiar with the involvement of the committee in conduct and practice matters, in the friendly resolution of problems between colleagues, and in advice to individual practitioners on a variety of day-to-day problems.

However, the committee does try to keep an eye on the future and in this regard has recently been looking at the matter of Multidisciplinary Partnerships. The idea of the Multidisciplinary Partnership has been aired in England and Scotland for some time now and indeed is being actively encouraged by the present Lord Chancellor, who has covered the subject in his very controversial review of the Legal Profession in England and Scotland. The committee is conscious of the Restrictive Practices Commission enquiry into the professions in this Country, and is equally conscious of the impending Solicitors' Bill.

It was with this in view that I, as Chairman of the Professional Purposes Committee, attended a meeting at the English Law Society on the 9th December, 1988. A large number of bodies were represented at this meeting and it may interest the profession to know just exactly who has their finger in this particular pie.

The Institute of Chartered Accountants in England & Wales;
The Chartered Institute of Patent Agents;
Royal Institute of British Architects;
The Chartered Institute of Management Accountants;
The National Association of Estate Agents;
Association of Consulting Engineers;
Insurance Brokers Registration Council;
Institute of Actuaries;
The Incorporated Society of Valuers and Auctioneers;
The Chartered Association of Certified Accountants;
The Institute of Trade Mark Agents;
The Royal Institution of Chartered Surveyors;
The Chartered Association of Loss Adjusters;
The Corporation of Estate Agents;
The Society of Pension Consultants.

These various organisations were joined by representatives from our Society, The Law Society of Scotland, The Council of the Bar and of course, representatives of the Law Society of England & Wales.

Not everybody was in favour of this new development, notably the Law Society of Scotland and the National Association of Estate Agents. But there were a number of people in favour, some of them making strange bed-fellows such as Accountants, Actuaries, Estate Agents, Chartered Surveyors, Valuers and Auctioneers, Construction Engineers, Architects and Trade Mark Agents. Much was made of the distinction that should be drawn between Multidisciplinary Practices involving major institutions and small partnerships covering more than one discipline. Differences in professional standards were highlighted and it was felt that the higher standard, wherever that prevalied, should be adopted by everyone else in a Multidisciplinary Practice. Clearly, such a vast subject could not be dealt with in one meeting and it was decided that a working group would be established at staff level in the Law Society in London and their deliberations were to be considered in conjunction with the green paper which has recently been issued by the Lord Chancellor.

There are clear problems for the profession in contemplating Multidisciplinary Partnerships. What about the Compensation Fund for instance? What if some members of the Multidisciplinary Partnership (MDP) were from professions which are not covered by a Compensation Fund? Clear distinctions would have to be made here obviously. There are problems of jurisdictions where every decision in relation to discipline must be taken by a High Court Judge. There are difficulties in relation to arrangements for Professional Indemnity Insurance. Clearly there would have to be arrangements made for situations where certain work was reserved to particular elements in the MDP, solicitors as officers of the court, or Chartered Accountants as Auditors. What about Privilege for instance, and Confidentiality?

Different professions have different relationships with their clients and in the pursuit of these different relationships may have different views on how particular client problems should be handled. Who is to have the final say? Will the majority rule? And if that majority is from one particular profession will not tension develop within the MDP itself? Ultimately, it is the client that is served by the Multidisciplinary Partnership and the client must receive the best possible advice and feel confident that he is dealing with professionals. It would be very easy to lose sight of the client in the possible wrangles that might ensue!

The Professional Purposes Committee are considering the Green Paper and liaising with the Law Society of England & Wales in relation to this interesting and difficult development. It is hoped that at some stage this year it may be possible to circularise the profession with a better distillation of views about the subject so that they may make their own minds up about whether this revolution is likely to catch on. For the moment there are more questions than there are answers. □

James Donegan,
Chairman,
Professional Purposes Committee

PEOPLE AND PLACES

DUBLIN SOLICITORS BAR ASSOCIATION IN SCOTLAND
Harry Cassidy (centre) of Investment Bank of Ireland, presenting a cheque to Ms. Rosemary Kearon of the DSBA and Mr. Gerry Griffin, President of the DSBA. The Investment Bank of Ireland sponsored a reception for the DSBA and the Law Society of Scotland during their recent visit to Edinburgh.

Contributions Welcome

Please send photographs of legal interest to:-

The Editor, Gazette,
Law Society, Blackhall Place, Dublin 7.

SOUTHERN LAW ASSOCIATION ANNUAL DINNER
Mr. James T. Ivers, Director General of the Law Society, with District Justice J. Brendan Wallace (right), and Mrs Deirdre O'Mahony, County Registrar, Courthouse, Cork.

GUILD OF AGRICULTURAL JOURNALISTS SEMINAR
Attending a recent seminar at the Law Society were (l. to r.) Michael Miley, Information Officer, Teagasc, Chairman of the Guild of Agricultural Journalists, Michael O'Mahony, Solicitor, and Larry Sheedy, Sheedy Communications, President of the Guild of Agricultural Journalists.

GUILD OF AGRICULTURAL JOURNALISTS SEMINAR
(l. to r.): Michael O'Neill, Dove PR; Des Maguire, Deputy Editor, Irish Farmers Journal and Niall O'Muilleoir, Public Relations Officer, Irish Farmers Association.

LAWYERS VISIT EUROPEAN COURT, BRUSSELS
Mr. Paul Spring, Solicitor (Northern Ireland) making a presentation to His Honour Judge Thomas F. O'Higgins, on the occasion of the visit to Brussels by a group of lawyers in January of this year.

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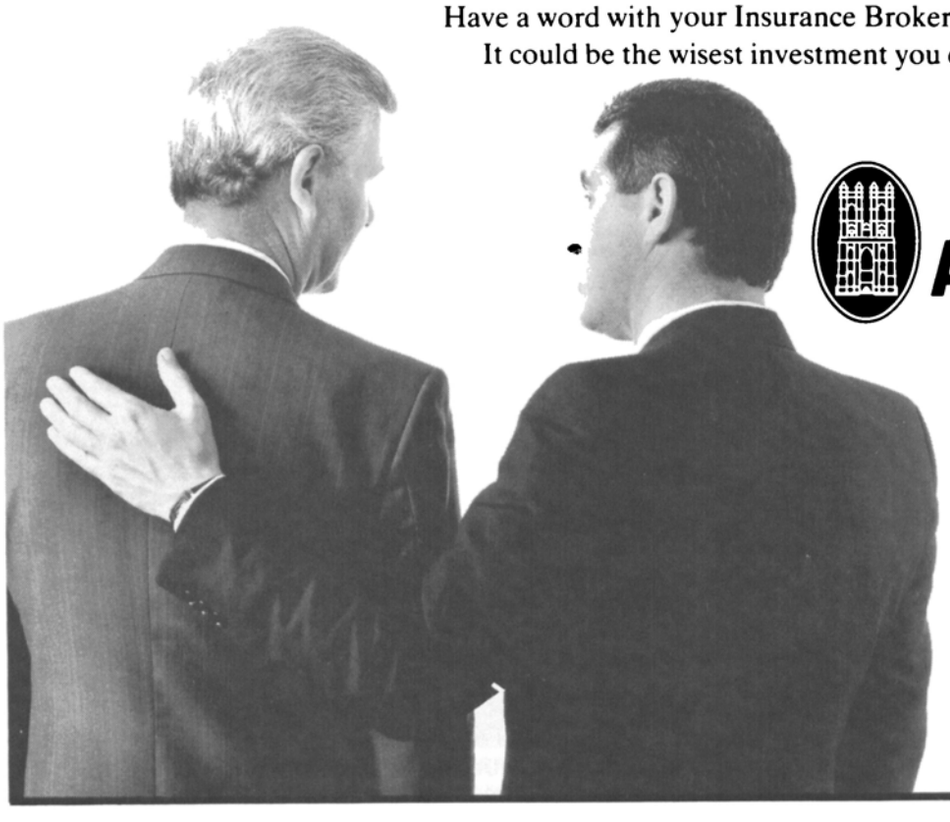

Abbey Life

NGMASTER

The Civil Legal Aid Scheme
– Scope and Operation

In its latest Annual Report, the Legal Aid Board has drawn attention to what is described as . . . "an increasing tendency . . ." on the part of private practitioners to refer clients of modest means to the Civil Legal Aid service; it is not surprising that this would tend to occur in complex family law cases where . . . "costs seem likely to go beyond the clients' resources . . .".

The Board, therefore, considers it desirable that practitioners should have information on the scope and operation of the Scheme; the purpose of this article is to outline some of its essential features.

Background to the Scheme
Background information on the Scheme will be kept to a minimum. The emphasis is on practical matters – how does the Scheme work, who is entitled, what do clients pay for the service, how available is it etc.?

The Scheme was introduced on a non-Statutory basis by the Minister for Justice in 1980. It is governed by a detailed set of Government-approved rules contained in a document entitled "Scheme of Civil Legal Aid and Advice"; this document is available from the Government Publications Sales Office (price 90p). (PL. 1532 – May 1983)

Many of the rules in the Scheme are – contrary to general belief – in line with recomendations contained in the Pringle Report published in 1979. That is not to say that all of the recommendations contained in the Pringle Report were followed – there are some quite significant differences. The Pringle Report, for example, recommended that services be provided by salaried lawyers working in Law Centres and by private practitioners, but the Scheme excludes the latter.

The Legal Aid Board – Progress to Date.
The legal aid service is administered by a Board, appointed by the Minister for Justice. The Board, according to the Scheme, . . . "will consist of a Chairman, and twelve ordinary members of whom two will be practising barristers and two will be practising solicitors . . . ". At the time of writing, there are twelve members in all – three barristers (two Seniors, one Junior, one of the Seniors being Chairman), three solicitors, three civil servants and three persons representing other interests.

To date, the Board has opened twelve Law Centres. These are

By
Timothy Dalton
Solicitor*

located in Dublin City (three centres), Tallaght, Cork City (two centres), Limerick, Waterford, Galway, Sligo, Tralee and Athlone.

The Law Centres are staffed by solicitors who are full-time employees of the Board. Twenty-nine solicitors are now employed, most of whom had been engaged in private practice prior to joining the Legal Aid service. The support staff in Law Centres (clerical and typing) are on secondment to the Board from various Government Departments.

Legal aid and advice is also provided by the Board's staff on a part-time basis in areas other than those just mentioned. Under this arrangment, services are provided at nineteen venues – fifteen of them being in counties which do not have a full-time Law Centre. These part-time centres or "clinics" are visited by the Board's solicitors once or twice a month.

The total financial provision for the Board's operation is now in the region of £1.9m per annum.

Who Qualifies?
An applicant will qualify for legal aid if the Board is satisfied that certain requirements are met. There are two basic eligibility tests.
(a) a "merits" test, and
(b) a means test.
Each of these is discussed briefly below.

Two further matters having to do with means are also discussed – for convenience, however, and in order to avoid confusion, they are treated separately i.e.
(c) assessment of an applicant's capital resources, and
(d) the payment of contributions.

(A) **"Merits" test.** The essential question for the purpose of assessing the "merits" of any application for legal services is whether . . . .

"a reasonably prudent person whose means were outside (those specified in the Scheme) *would be likely to seek such service at his own expense, if his means were such that the cost involved, while representing a financial obstacle to him, would not be such as to impose undue financial hardship . . . " and*

"a competent lawyer would be likely to advise him to obtain such services."

The purpose of the Scheme, in other words, is not to put the person of limited means in the position of a person for whom "money is no object" but in the position of the person whose means, while not over-abundant, are sufficient to cover essential legal services.

This general test of merit is supported by various other provisions in the Scheme which are to the same general effect. There is provision, for example, that the applicant must have . . . "as a matter of law, reasonable grounds for taking, defending, or being a

**Timothy Dalton, Solicitor, was former Deputy Chief Executive of the Legal Aid Board. He is now Assistant Secretary in the Department of Justice.*

party to proceedings . . . ", that it must be . . . "reasonable having regard to all the circumstances of the case . . ." to provide legal services and so on.

The relevance of the "merits" test will be apparent to practitioners; there is very little point in referring an indigent client to the Legal Aid service where the practitioner concerned already considers that, from a legal point of view, the client's case is totally lacking in merit, and that legal services (no matter who provides them) are unlikely to provide him with any worthwhile benefit. If the practitioner considers, however, that the matter is "borderline", or perhaps that a process of negotiation might produce some worthwhile benefit, it would be a different matter.

(B) **Means Test** – An applicant is eligible on financial grounds if his "disposable income" and diaposable capital" are within certain limits specified in the Scheme. (As mentioned earlier, the treatment of *capital* resources is dealt with separately in this article – in the vast majority of cases applicants do not have significant capital resources which means that, by and large, eligibility is determined by reference to *income* alone).

"Disposable income" is the income which remains when various deductions are made from gross income – "gross income" being defined as total income received from all sources. The deductions to be made from gross income – referred to as "allowances" – include, for example, income tax, mortgage repayments, rent, social insurance, V.H.I. contributions, expenses in travelling to and from work together with various allowances in respect of the applicant's spouse and dependent children.

A person will qualify for services under the Scheme if his annual *disposable* income does not exceed £5,500 per annum. Obviously, with the various allowances that can be made, an individual with the usual family commitments could qualify for legal services on a gross annual income considerably in excess of £5,500. The Board's Annual Report for 1985 contained various examples, one of which showed that a married man with three children and fairly typical commitments would still qualify for legal aid on a gross income of almost £14,000 per annum.

There would be no advantage in going into further details, here, on the subject of disposable income. Guidance will be provided in individual cases at any of the Board's Law Centres – phone numbers and addresses are given below.

There is, however, one further point worth mentioning on means assessement and that is that while the income of husband and wife are normally aggregated, they are treated separately when the parties are in conflict with each other or where they are living separately and apart. The effect of this rule is that in a very high proportion of matrimonial cases a wife will qualify for legal services even if her husband is financially secure.

(C) **Capital Resources** – As mentioned above, an applicant's *capital* resources are treated separately from his *income.* "Capital" includes, for example, money in a bank or post office account, house property or land. The assessment of the value of such resources can be a rather complex matter. The aim is to find the value of the applicant's *disposable* capital which is its gross value less, for example, the cost of realising assets, outstanding loans, etc.

Again, there would be no real advantage in discussing the details of capital assessments here; the Board's staff will be able to help in individual cases.

As in the case of income assessments, however, certain features are worthy of special note:-

(i) the value of the applicant's family home is excluded, except where its unencumbered value exceeds £45,000,
and
(ii) farm land is treated much more favourably than other types of capital for assessment purposes.

(D) **Contributions** – All applicants for legal services are liable to pay certain contributions. The minimum contribution is £1 for legal advice plus a further £14 where the applicant needs to take or defend court proceedings; minimum contributions are payable by people whose disposable income does not exceed £3,500 per annum.

Where the applicant's disposable income is between £3,500 and £5,500 per annum (the latter being the upper eligibility limit), higher contributions become payable both for legal advice and for legal representation. The maximum income-related contribution (i.e. leaving aside the question of capital resources) for legal advice is £50 and for legal representation in Court £515. An analysis of contributions for legal representation, which is contained in the Board's Annual Report, 1986 shows that less than 6% of all applicants were liable for a contribution in excess of £15 and only ten applicants (under 1% of the total) were liable for a contribution in excess of £100. No applicant, is of course, required to pay a contribution in excess of the cost to the Board of providing him with legal services.

An important feature of the contributions system is that, generally speaking, the individual applicant knows, from the outset, what the maximum cost of legal services will be, even if he loses the action. In some cases (in practice, a very small minority of cases) the contributions originally determined may be increased – for example, where the applicant's financial circumstances improve while he is in receipt of legal services, or (more commonly) where his financial circumstances change for the better as a result of obtaining such services.

Additional contributions may be payable also in the case of a person with assessible capital resources. This does not arise in the vast majority of cases; if there are queries in individual cases, the Board's staff will be in a position to assist.

There are three final points concerning contributions which are worthy of special mention;

(i) All persons depending solely on Social Welfare payments qualify for legal services on payment of the standard "minimum" contributions referred to earlier i.e. £1 for advice plus a further £14 for representation in court.
(ii) A person who is liable to pay the minimum contributions

may have the payments waived either in whole or in part in cases of severe hardship.

(iii) Contributions may, in certain circumstances, be paid by instalments.

Excluded Proceedings

Certain matters are excluded from the scope of the Legal Aid Scheme, though the exclusions have been considerably modified over the years.

From the outset, representation for proceedings could be provided only where the proceedings were before a court (District, Circuit, High or Supreme). Representation before tribunals is excluded. Law Centre Solicitors can (and regularly do) provide advice in connection with cases coming before tribunals (for example, the Employment Appeals Tribunal), but cannot provide representation at the actual tribunal hearing. If, however, the decision of the tribunal is appealed to the Courts, both legal advice and representation may be provided.

One of the Schedules to the Scheme lists various matters in respect of which services will not be granted e.g. defamation and debt collection (where the applicant is the creditor). Some of these exclusions have been the subject of criticism; it is not the purpose of this article to deal with the criticisms, however, but simply to outline the facts.

Two particular exclusions which had been considerably modified i.e.

(i) "disputes concerning rights and interests in or over land" and

(ii) "conveyancing".

By virtue of *Ministerial Policy Directives,* provision for which is contained in the Scheme, disputes concerning interests in land are now regularly dealt with where they form part of a wider family law dispute (e.g. where the parties seek to have their respective interests in the family home determined by a Court). Conveyaning will also be dealt with in certain limited circumstances, for example, where a Separation Agreement is concluded and it becomes necessary to transfer the family home from one spouse to the other. Conveyancing is dealt with under the Scheme, however, only where, the conveyance is an essential step in the settling of a matrimonial dispute and, in the opinion of the Board, it is reasonable to have it dealt with by a Law Centre Solicitor.

Apart from land disputes that arise in matrimonial cases, the Board is also authorised to deal with such matters where the applicant appears to have been the victim of fraud or undue influence, provided that the property which is the subject of the dispute is the applicant's home and the applicant suffers from . . . "an infirmity of mind or body due to old age or to other circumstances . . .". This change (again introduced by a Ministerial Policy Directive) enables the Board to deal, for example, with the elderly person who has transferred his/her home to a close relative on the basis of promises which are subsequently unfulfilled.

Criminal cases involving the defence of accused persons are excluded from the scope of the Scheme – they are dealt with under the Criminal Legal Aid Scheme.

How does the Service Operate?

The first step, usually, is to call to one of the Board's Law Centres or one of the "clinics". As with all services – and this is true particularly in the case of Dublin and Cork where there are considerable pressures – it is advisable to 'phone a Law Centre, in advance, for an appointment. In very exceptional circumstances – for example, in the case of a disabled person or a prisoner – special arrangements can be made.

At the Centre, the clerical staff, once satisfied that the applicant's spouse is not already a client, will ask the applicant to complete application forms. (If the applicant's spouse happens to be a client, however, and the parties are in conflict with each other, the applicant is immediately referred to another centre).

The application forms deal mainly with the applicant's means; the staff will, if necessary, assist in having them completed. Preliminary assessment as to eligibility is usually made there and then.

Despite the apparent complexities of the means test, this part of the procedure is completed, in most cases, in about 10-15 minutes. The odd case, not surprisingly, presents difficulties – it may, for example, be necessary to ask the applicant to produce evid-

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The person appointed must have excellent inter-personal and communication skills with the personality to work easily and effectively at all levels. The nature of the position is such that this individual must possess a good deal of initiative and business sense combined with sound, yet practical, legal views. While the job is based in Dublin, travel to the United States and Europe is envisaged.

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Wilton Place,
Dublin 2.

Price Waterhouse

An AMCO member

ence of earnings where eligibility appears to be "borderline", or it may be necessary to ask the Department of Social Welfare for a report in certain circumstances.

Once eligibility has been determined, an appointment is made for the applicant to see one of the solicitors in the centre. He or she takes instructions in the usual way and decides whether the matter can be dealt with by way of advice (which includes writing letters, perhaps drawing up a Separation Agreement, etc.), or whether a court appearance may be necessary.

Where the client requires advice only, the solicitor proceeds to deal with the case without any reference to the Board. In the vast majority of court cases handled by the Board (i.e. District Court family law cases), the decision to proceed is made by the solicitor-in-charge of the Law Centre – again without any reference to the Board.

Where the proceedings are in the Circuit, High or Supreme Court, however, the solicitor prepares a brief summary of the facts and submits them to the Board for a decision as to whether, in all the circumstances, legal aid is to be granted.

Under the Scheme, Board decisions on individual cases are made by "Certifying" Committees, each consisting of three Board members of whom at least one must be a practising solicitor or barrister. These Committees have, over the years, delegated much of their decision-making to the Chief Executive and other staff members so that, in practice, only a small proportion of cases are now referred to Committees. Any application refused by staff are open to review by Certifying Committees.

If the Committee itself decides that legal aid should be refused, there is a further appeal to an Appeals Committee consisting of five members of the Board of whom at least three are practising solicitors or barristers, *the Chairman of the Appeals Committee being always the Chairman of the Board.* Decisions of the Appeals Committee are final.

One result of the foregoing arrangements is that before anybody can be refused legal aid, *finally,* the case for granting it will have been considered by at least ten people – the solicitor who advised him, the Chief Executive or his nominee, and eight members of the Board of whom at least four are practising lawyers. In practice, the bulk of applicants who are refused legal aid accept the decision without going through the appeal process.

If legal aid is granted (whether by a Law Centre or otherwise), a legal aid certificate issues to cover whatever proceedings are contemplated. It also covers attendance of witnesses, engagement of counsel etc. With regard to the engagement of counsel, the position is that prior to the introduction of the Scheme, an Agreement was reached between the Bar Council and the Minister for Justice under which barristers may be engaged by the Board to deal with legal aid cases; this Agreement provides for the setting up of a panel, the question of fees, etc.

Costs and Damages

Any costs or damages recovered by a legally aided party on foot of proceedings are payable into the Legal Aid Fund. If the costs are sufficient to meet the Board's outlay, the client's contribution is refunded.

Costs awarded against the legally aided party, in favour of a party who has not been granted legal aid, are not, generally speaking, payable from the Legal Aid Fund. In exceptional cases, however, the Board is authorised to make an *ex-gratia* contribution towards such costs.

With regard to damages, the position, again, is that any sums recovered are, under the terms of the Scheme, paid to the Legal Aid Fund and the Board may with the prior consent of the applicant, retain portion of the damages where its outlay exceeds the amount otherwise paid into the Fund; the amount retained (if any) in individual cases depends very much on the type of action ivolved, the total amount recovered and the client's financial circumstances.

In the event of money that may become payable to a legally aided party arising out of partition and sale of a family home, the general rule is that if there is evidence that all the proceeds may be needed for the purchase of another home for the applicant and his/her children, no deduction will be made. A deduction may, however, be made where the indications are that the money will not be required immediately for the purchase of another home (for example, where the legally aided party is residing elsewhere with a co-habitee).

Availability, Referrals and Achievements.

There is a general awareness that the main difficulty faced by the Civil Legal Aid Scheme is the lack of resources necessary to provide a nationwide service. The Board has been delivering this message in its Annual Reports over the years and the matter has also been the subject of comment in the media and elsewhere.

Limited funds for public services are of course nothing new at the present time – it is part of the process of putting public finances generally in shape and the Board fully recognises this. The Board has also recognised that, despite the restrictions generally on Exchequer funding in recent years, it was fortunate to be in the position of actually expanding the service during 1985 and 1986. This came about because additional funding was provided under the Funds of Suitors Act, 1984; it enabled the Board to establish centres in Cork (South Mall), Tallaght, Tralee and Athlone.

Despite this very welcome expansion, however, the service, nationwide, is still thinly spread. One of the effects of this is that, in certain areas – mainly Dublin and Cork – there are queues for legal services with Law Centres being obliged to restrict access to the service for new clients from time to time. The Board, while acknowledging that this is an unsatisfactory situation, is concerned that it is sometimes portrayed in a way which gives the impression that there is effectively no service at all available. That would be very far from the truth. Thousands of clients are in fact provided with services each year. According to the Board's most recent Annual Report, the number of people provided with legal advice, only, was 5,274 and the number provided with both advice and representation was 1,317. The bulk of cases going to court were family law cases, as the table overleaf indicates:-

Type of Case	District Court	Circuit Court	High Court	Supreme Court	Total
Family Law	873 (854)*	289 (349)	66 (65)	3 (3)	1,231 (1,271)
Other	29 (10)	35 (31)	20 (18)	2 (1)	86 (60)
					1,317 (1,331)

(Previous year's figures in brackets).

It is worth making the point, also, that in periods which see services temporarily restricted, arrangements are made whereby what are described as "emergency" cases continue to be taken on. The latter include, for example, cases of severe matrimonial violence or abuse of children, or cases where there is a threat to remove a child from the jurisdiction – assuming, in all cases, that the services of a solicitor are actually necessary. The Centres also continue to handle existing clients during these periods – temporary restrictions, in other words, apply to new clients.

Referral of Case by Private Practitioners.

With regard to the referral of cases to the Legal Aid service by practitioners, it would be of great benefit if the following arrangements were applied:-

(a) Practitioners should try to avoid referring cases at the last minute, e.g. where proceedings are already set to take place within a few weeks (sometimes within days) of the referral.

(b) The Law Centre should be contacted, in the first instance, by 'phone, to find out whether they can take on the case (for example, is it the type of case that is covered by the Scheme?) and how soon they can give the applicant an appointment.

(c) A properly organised file, ideally with a brief summary of the facts, should be forwarded to the centre. The solicitor referring the case – especially if it is a complicated case which has been with his firm for some time – should make himself available to the Law Centre solicitor to discuss points of difficulty.

Obviously the above is in the nature of a "wish list"; it will not be possibly, in all cases, to meet all of these desiderata. The Board, naturally, is conscious that when the "traffic" if flowing the other way (i.e. when Law Centre clients are referred to private practitoners), it is equally important that properly organised files etc. be presented to the firm concerned.

Concluding Comments

The legal aid service is part of the justice system. Its primary aim is to provide persons of limited means with effective access to justice. Because of the severe budgetary situation experienced in recent years, the service is not by any means as extensive as would be warranted by reference to the size of the problem it attempts to address.

This article will have demontrated that there are complexities associated with the provision of a civil legal aid service, most of them having to do with the maintenance of proper controls. The same is true of corresponding services in other jurisdictions – the Legal Aid Schemes in neighbouring jurisdictions are, in many ways, more complex in their operation than ours.

It goes without saying that complexity is never a virtue. No doubt, one of the aims of any review which will take place in the context of introducing a Statutory measure will be to simplify the Scheme. The degree to which simplicity can be achieved, however, is limited. One of the main reasons for this is that civil legal aid is not just a matter of providing persons of limited means with access to justice – though, this is its principal aim – it also means that a very powerful weapon is put in the hands of individuals, who happen to qualify, whereby they can, with the backing of State resources, take others, who do not qualify, literally to any Court in the land. The potential for abuse, in that situation, is clear and the need for effective control mechanisms is equally clear.

In their day-to-day operations, Law Centres are in constant contact with private practitioners. The more the private profession understands the strengths and limitations of the service, the more effectively it is likely to operate. One hopes that this article will have contributed to this understanding.

Relevant Addresses etc.

Law Centres:

45 Lower Gardiner Street, Dublin 1. (01-787295)
Aston House, Aston Place, Dublin 2. (01-712177)
9, Lower Ormond Quay, Dublin 1. (01-724133)
517 Main Street, Tallaght, Dublin 24. (01-511519)
24 North Mall, Cork. (021-300365)
96 South Mall, Cork. (021-275998)
5 Mary Street, Galway. (091-61650)
Lower Mallow Street, Limerick. (061-314599)
5 Catherine Street, Waterford. (051-55814)
1 Teeling Street, Sligo. (071-61670)
6 High Street, Tralee, Co. Kerry. (066-26900)
Northgate Street, Athlone, Co. Westmeath. (0902-74694)

Head Office

47 Upper Mount Street, Dublin 2. (01-615811)

Association of Criminal Lawyers

The Association of Criminal Lawyers is in the process of preparing a comprehensive report on the shortcomings in the present system of legal aid payments and proposals will be submitted to the Law Society and the Department of Justice. Any members of the Association who wish to make submissions are invited to do so in writing within the next three weeks to Padraig Ferry, Solicitor, 4 Chancery Place, Dublin 7. Please note that all membership subscriptions for 1989 are now due. A cheque for £15 can be sent to Elizabeth Ferris, Solicitor, Arran Chambers, 6 Arran Quay, Dublin 7.

CLASS OF 1956 — WHERE ARE THEY NOW?

Newly admitted Solicitors photographed with the President of the Incorporated Law Society at the Four Courts, Dublin. Seated (left to right): D. J. Devine, B.A., Athlone; J. V. Phillips, Millstreet, Cork; M. A. Regan, Enfield; Miss I. C. Kennedy, Dublin; Mr. Dermot P. Shaw, President; Miss C. O'Connell, B.A., Dublin; Miss M. Bourke, B.A., Dublin; M. C. Halpenny, Dun Laoghaire; D. J. Moloney, Middleton; T. M. Williams, B.A., Dublin. Standing: J. J. Kelly, B.A., Templemore; A. C. O'Dwyer, Cashel; K. S. Kenny, B.A., Adare; H. P. Kelleher, Cork; N. O'Keefe, Cobh; W. A. Irwin, B.A., Cork; N. M. Gleeson, Limerick; P. R. O'Gorman, Hacketstown; A. F. McCormack, Strokestown; T. B. McEniry, Mitchelstown; M. A. O'Carroll, Ballinasloe; P. C. Coyle, Castleblayney; W. J. Fallon, Wicklow; J. J. Kiernan, Dublin; and E. A. Lane, Dublin.

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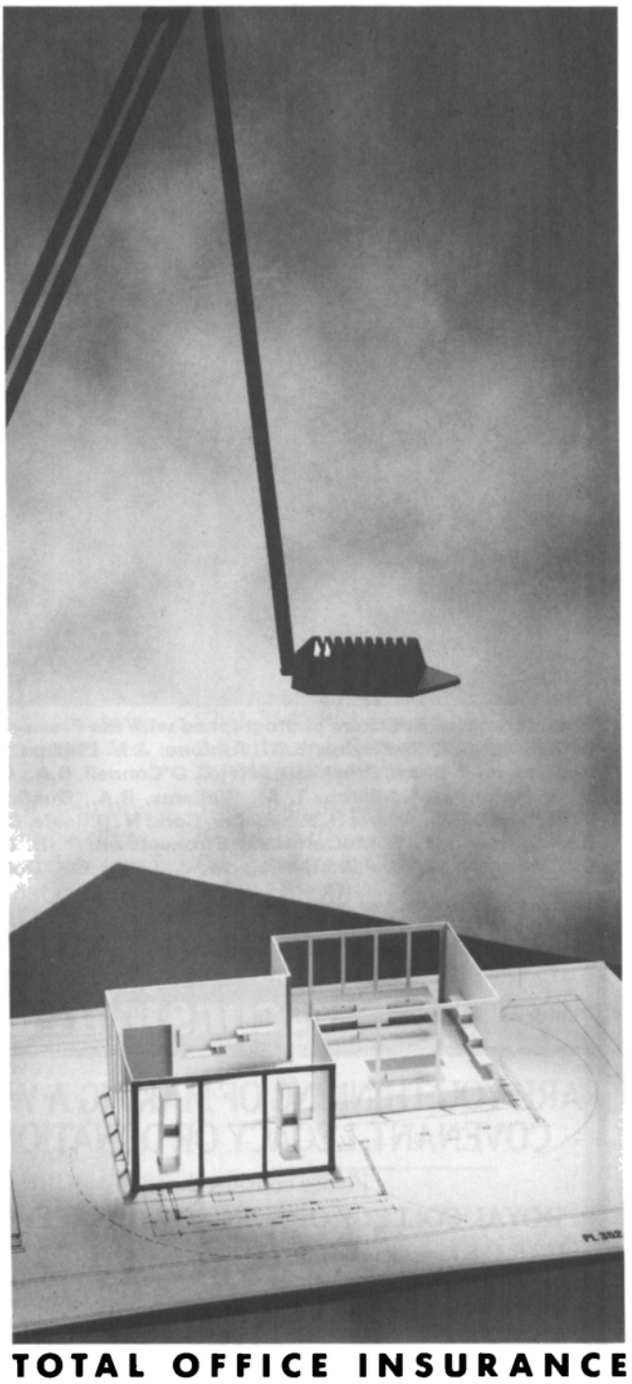

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EC COMPANY LAW DIRECTIVES AND REGULATIONS PROGRESS REPORT as at 3rd MARCH 1989

EC Ref. No.	Subject matter	Status
Dir. 68/151 (1st)	Safeguards for Members & Creditors of Companies	Implemented SI 163 of 1973
Dir. 77/91 (2nd)	Formation & Capital of Public Limited Companies	Implemented Companies (Amendment) Act, 1983.
Dir. 78/855 (3rd)	Mergers of Public Limited Companies	Implemented SI 137 of 1987
Dir. 78/660 (4th)	Company Accounts	Implemented Companies (Amendment) Act, 1986
Dir. 82/891 (6th)	Divisions of Public Limited Companies	Implemented SI 137 of 1987
Dir. 79/279	Admissions to Stock Exchange Listing	Implemented SI 282 of 1984
Dir. 80/390	Listing Particulars	Implemented SI 282 of 1984
Dir. 82/121	Interim Reports of Listed Companies	Implemented SI 282 of 1984
Dir. 83/349 (7th)	Consolidated Accounts	Adopted by EEC. Must be implemented by 1/1/1990
Dir. 84/253 (8th)	Auditors	Adopted by EEC. Must be implemented by 1/1/1990
Reg. 2137/85	European Economic Interest Grouping	Adopted by EEC. Comes into force 1/7/1989. (Domestic Legislation required).
Dir. 87/345	Mutual Recognition of Listing Particulars	Adopted by EC. Must be implemented by 1/1/1990
Dir. 85/611 (Amended 1988)	Control of Unit Trusts	Adopted by EC. Must be implemented by 1/10/1989.
EC Draft (5th)	Structure & Management of Public Limited Companies	Not yet adopted.
EC Draft (9th)	Relationships between companies in a group.	Not yet adopted.
EC Draft (10th)	International Mergers.	Not yet adopted.
EC Draft (11th)	Accounts of Company Branches	Not yet adopted.
EC Draft (12th)	One man companies.	Not yet adopted.
EC Draft	Amendments to the Fourth & Seventh Directives on Accounts.	Not yet adopted.
EC Draft	Winding-up and Liquidation of Companies.	Not yet adopted.
EC Draft Regulation	European Companies Statute.	Not yet adopted.
EC Draft	Takeover Bids.	Not yet adopted.
EC Draft	Information to be published on acquisition or disposal of shares in a public limited company.	Not yet adopted.
EC Draft	Contents of Prospectuses.	Not yet adopted.
EC Draft	Insider Trading.	Not yet adopted.
EC Draft	Regulation of the Provision of Investment Services to the Public.	Not yet adopted.

Company Law Committee

The High Court

Judicial Review No. 199/1987

between

Frank MacGabhann, applicant
and
The Incorporated Law Society and others, respondent

Judgment of Mr. Justice Blayney delivered the 10th day of February 1989.

The Applicant is a Solicitor's Apprentice. The first named Respondent is the Incorporated Law Society of Ireland to which I shall refer as the Society. The second named Respondents are the members of the Council of the Society, and I shall refer to them as the Council. The third named Respondents are the members of the Education Committee of the Society and I shall refer to them as the Committee.

The Applicant seeks a number of reliefs by way of Judicial Review. I will specify them at a later stage. Essentially he is challenging the examination system as it existed in 1986 for Apprentices seeking entry to the Society's Law School.

The Applicant was born in New York but all four of his grandparents were born in Ireland. In 1970 he obtained a Bachelor of Arts Degree from Manhattan University in Liberal Arts. Between then and 1984 he taught in New York, Ireland, Spain and France. In 1984 he decided to take steps to qualify as a Solicitor. He took a course in Irish and passed the Society's Irish examination in July 1985. By reason of having a University Degree he was exempted from the Society's preliminary examination, and also in July 1985, having become apprenticed, his name was duly entered in the Society's Register of Apprentices.

In November 1985 he sat for the Society's final examination – first part. He failed the examination but passed in Criminal Law. In November 1986 he sat the examination again and, having passed Criminal Law in the previous year, he did not have to repeat that subject. The five subjects for the examination were Tort, Contract, Property, Company Law and Constitutional Law. By letter from the Society dated the 30th January 1987 he was informed that he had not been successful in the examination, his marks having been: Tort 50, Contract 50, Property 50, Company Law 51 and Constitutional Law 46.

With this letter the Society enclosed the rules governing re-checks of papers and the compensation rules. The Applicant sought a re-check of his results in Constitutional Law and by letter of the 10th March 1987 from the Society he was informed that following completion of the re-check procedure there had been no change in his position in the examination. He was also informed that all his scripts had been seen by the extern examiner. Some further correspondence followed which it is not necessary to refer to in detail. It terminated with a letter from the Applicant's Solicitors to the Society on the 27th May 1987 stating that, if the decision to refuse admission to the Applicant to the Law School was not reversed, application would be made to this Court to seek liberty to have Judicial Review of that decision. The Society did not alter its decision and on the 13th July 1987 the Applicant applied for and was granted by Johnson, J. liberty to apply for certain reliefs by way of Judicial Review. Some of these reliefs the Applicant is not now pursuing and two additional items were added later by amendment so that the reliefs actually sought in the course of the hearing before me were as follows:

1. An Order quashing the decision of the Society to refuse the Applicant entry to the Society's Law School at Blackhall Place in the current academic year.
2. A Declaration that the compensation rules applied by the Committee and adopted by the Society in respect of the final examination – first part which part took place in or about the month of November 1986 insofar as they operate to restrict the number of places in the Society's Law School below a figure of 150 for the current academic year are unlawful, void and of no effect.
3. A Declaration that there is no power express or implied in the Solicitors Act, 1954 to limit or otherwise regulate the number of candidates reaching a satisfactory standard in the prescribed subjects from being admitted to the Law School of the Society.
4. A Declaration that it is *ultra vires* the powers conferred on the Society to impose a limiting quota of in or about 150 on candidates seeking admission to the Law School.
5. Further or in the alternative if a power to limit and regulate numbers is to be implied in the Solicitors Act, 1954, a Declaration that it is *ultra vires* the powers conferred on the Society under the Act of 1954 to impose any restriction on numbers without having made a regulation empowering the Society to do so.
6. In the further alternative, if a power or authority to restrict numbers can be implied (which is denied) a Declaration that the said limitation and restriction of 150 is unreasonable in the circumstances.
7. A Declaration that it is *ultra vires* the powers conferred on the Society under Statutory Instrument Number 66 of 1975 to hold a competitive examination for entry into the Law School of the Society.
8. Further or in the alternative, if a power or authority to hold a competitive examination can be held to exist (which is denied) a Declaration that the administration of the final examination – first part by the Committee is unreasonable in the circumstances.
9. A Declaration that the

Applicant passed the final examination – first part.

10. A Declaration that the Applicant is entitled to admission to the Law School for the next course.

The grounds on which the Applicant relied as entitling him to this relief were detailed in his original and amended Statement. Grounds of opposition were filed by the Society on the 7th September 1987 and amended grounds on the 4th December 1987. It is unnecessary to set out any of the grounds in full as by Order of the President of the High Court made by Consent on the 2nd March 1988 the issues to be tried were settled and the case was adjourned for plenary hearing on oral evidence. These issues were originally eight in number but when the matter came before me it was agreed by the parties that five only had to be determined. These were:

1. Did the Respondents limit to 150 the number of places to be awarded to candidates who sat the final examination – first part in or about the month of November 1986?
2. If so, is it *ultra vires* the powers of the Respondents to so limit the number of places available at its Law School?
3. Is it lawful for the Respondents to require as a standard to be attained in the final examination – first part held in November 1986 a pass mark of 50% in each of the five subjects, Law of Contract, Law of Tort, Law of Real Property, Constitutional Law and Company Law, and in the case of a candidate failing to achieve that standard in not more than two subjects, an aggregate pass mark of 250 marks in these five subjects?
4. Did the Applicant as a matter of fact know that 50% was the pass standard set for the said examination in 1986 before he sat the said examination?
5. Are the Respondents compellable in law to consider the Applicant as having achieved a satisfactory standard on the marks actually received by him in the said examination?

Most of these issues are concerned with the system of entry to the Society's Law School, so before embarking on their determination it is necessary to set out first how that system came into being and how it operated between its inception and 1986.

The Society's Law School was set up in 1978. Prior to that there had been discussions about it between the Society and the Law Schools of the National University and of Trinity College. It had been envisaged that an Apprentice with a Degree in Law from any of these Universities would be exempt from the final examination – first part which an Apprentice would otherwise have to pass in order to gain entrance to the Law School. This is reflected in paragraph 12(1) of the explanatory note to the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment No. 1) Regulations, 1974 (Statutory Instrument Number 138 of 1974) which is as follows:

> *"Applicant with Law Degree*
> Subject to passing the Statutory First Irish Examination and obtaining a master, the applicant will be allowed to commence the three year apprenticeship and will be given an exemption from the Society's First Law Examination (new form)".

And Regulation No. 17 of the Solicitors Acts, 1954 and 1960 (Apprenticeship and Education) Regulations 1975 (Statutory Instrument No. 66 of 1975) to which I shall refer as "the 1975 Regulations" expressly gives the Committee a discretion to exempt in whole or in part from the final examination – first part "an apprentice who holds or is entitled to hold a degree in law of a recognised university in Ireland".

During the course of 1976 it emerged that the numbers attending the new Law School each year would have to be limited to 150. Blackhall Place could not handle more than 75 students at a time, and with two professional courses being held every year, this meant that the yearly intake of students could not exceed 150. The question which then had to be considered was that raised by Mr. Maurice Curran, the Chairman of the Committee at the time, in a Memorandum prepared for the Council dated the 24th February 1977:

> "How are we to decide who obtains entrance to the limited number of places in the new Law School?"

A variety of suggestions was considered and that ultimately adopted, notwithstanding strong opposition from the Universities, was that it should be decided by examination. Accordingly, starting in 1978, an examination known as the final examination – first part has been held in November of each year.

No problem arose initially as the numbers seeking entrance to the Law School were small. But between 1981 and 1984 the numbers sitting the examination rose from 172 in 1981 to 391 in 1984. One of the consequences of this was that the examination became a competitive examination. And this appears to have been acknowledged by the Society. In its booklet "How to become a Solicitor" (June 1985 edition), it is stated on page 5 in regard to the final examination – first part "candidates compete for 150 places". And in the syllabus for the 1986 examination, paragraph 2 of the notes on the examination states that "150 places in the Society's Law School are awarded annually on the basis of overall performance in the five subjects other than Criminal Law, although a satisfactory standard must be achieved in each subject including Criminal Law before any candidate will be awarded a place". Finally, the following statements appear in the Minutes of a meeting held on the 10th April 1978 between members of the Committee and representatives of the four University Law Schools:

> "The Society was firm that the annual quota would not exceed 150.
>
> The final examination – First Part. The Society stated that it had taken decisions on the following points: (iv) That the competitive examination would therefore be based on five subjects i.e. Torts, Contract, Real Property, Constitutional Law and Company Law".

The pass standard adopted by the Society was 50%. This appears from the Minutes of a meeting of the Committee held on the 1st March 1976 when the following standards were agreed:

> Pass 50%
> First Class Honours 70% with a minimum of 60 in each subject.

Second Class Honours 65% with a minimum of 55 in each subject. (Grade 1).

Grade 2 60% with a minimum of 50 in each subject.

Intern and extern examiners are appointed by the Society to conduct the examination. The interns are normally practising Solicitors with a specialised knowledge of their subject and the externs are distinguished academics from the Law Schools of the Universities or of other third level institutes. The main differences between the manner in which the examination is conducted and that in which a University examination is conducted is that the decision as to whether a student has passed is not made by an examining body consisting of all the intern and extern examiners, but is made by the Committee on the basis of marks awarded by the examiners, the Committee having met them and received a report from each of the chief intern examiners. In deciding who has passed the examination the Committee applies what it terms "compensation rules". And up to and including the 1986 examination the details of these rules were not decided until the meeting held to consider the marks awarded by the examiners. The rules varied from year to year. In 1984 a student who had fallen below 50% in two subjects required an aggregate of 265 marks to pass; in 1985, the same student would have required only 260 marks, and in 1986, before the decision of the President in the case of *Gilmer -v- The Society* (unreported 31st August, 1987) he would have required 255 marks, and after that decision, 250 marks.

Notwithstanding the big increase in the number sitting the examination, the numbers passing have not varied significantly as appears from the following table showing the number who sat the examination and the number who passed in the years from 1981 to 1986 inclusive.

Year	Number Sat	Number Passed
1981	172	134
1982	226	146
1983	312	159
1984	391	155
1985	371	159
1986	325	147

The percentage pass rate went down from approximately 72% in 1981 to 40% in 1984.

The Applicant's principal challenge to the examination for entrance to the Law School in 1986 is that the Society imposed a quota of 150 and that the imposition of such a quota was *ultra vires*. In support of his contention that there was a quota, his Counsel relied on references to a limit of 150 in the Minutes of the Committee, in the syllabus and in the booklet "How to become a Solicitor". He relied also on the evidence of Dr. Anthony Unwin, a senior lecturer in the Statistical Department of Trinity College who has an M.Sc. in statistics from London University and a doctorate in the same discipline from Trinity College. Dr. Unwin said in evidence that there were two possible reasons why the pass rate had gone down from slightly below 80% in 1981 to 40% in 1984: either the quality of the students had changed or the examination standard had changed. Having carefully selected comparable sub-groups of students and still found declines in pass rates he had to conclude that the standard had changed.

As to the quota being *ultra vires*, Counsel for the Applicant submitted that for it to be permissible, it would have been necessary that it should be expressly spelled out in the Solicitors Act 1954 and he relied on the decision of the Supreme Court in the case of *East Donegal Livestock Mart Limited -v- The Attorney General* [1970] I.R. page 317.

Counsel for the Respondents submitted that no quota was imposed. He did not deny that the Society had always contemplated that the number which could be accommodated in the Law Society was 150, but he submitted that the examination results were such that the Society had not had to impose a quota. The standard of 50% had been set as far back as 1976 so it would be impossible to conclude that it had been set with a view to keeping the numbers down to 150.

The first of the issues that I have to determine is:

"Did the Respondents limit to 150 the number of places to be awarded to candidates who sat the final examination – first part in or about the month of November 1986?"

The issue is concerned with the 1986 examination only. What happened in previous years is not relevant except insofar as it may assist in ascertaining the circumstances of the 1986 examination and it is only in that context that I may refer to previous examinations.

The 1986 examination has already been considered by the President in the *Gilmer* case. The Plaintiff there had been notified that she had been unsuccessful in the examination as she had got less than 50 marks in two subjects and her overall aggregate (initially 251 marks, and on a re-check raised to 254 marks) was less than 255 marks which was the number of marks the Committee had decided that a candidate in her position would require to have in order to pass by compensation. The President held that the pass mark of 50% fixed by the Committee in 1976 should be construed as requiring an average of 50%, and as the Plaintiff had achieved such average she was entitled to a pass. Before his decision the Committee had declared that 135 candidates had passed, 63 having obtained over 50% in each subject, and 72 having passed by compensation. After his decision a further 12 students were declared to have passed by compensation, bringing the total up to 147. The question to be considered is whether the remaining candidates who failed to pass did so because a quota of 150 was imposed by the Committee, or because they had not attained the standard laid down by the Committee, and to decide this it is necessary to examine the standard in question.

Counsel for the Respondents submitted that the standard is 50% in each subject. But if that were correct, only those who obtained that number of marks in each subject could pass. However, this is not the case, as was pointed out by the President in the *Gilmer* case. He said at page 21 of his judgment:

"It is, however, clear from Mr. Binchy's Affidavit that candidates who have not achieved 50% in each subject but who have achieved 50% overall have been allowed to compensate in circumstances determined from time to time by the Education Committee.

The Education Committee, which is a body constituted by

a statutory instrument made pursuant to the provisions of the Solicitors Act 1954 would have no jurisdiction to allow a pass by compensation if the standard as laid down meant that a candidate must obtain 50% in each subject".

In every year a substantial number of students who have not obtained 50% in all five subjects pass by compensation. Counsel for the Applicant submitted, and it seems to me correctly, that the rules governing compensation are part of the standard. If a student comes within the rules, he passes. In other words, if he obtains the standard required by the compensation rules, he passes.

The compensation rules formulated by the Committee in 1986 were held by the President to be *ultra vires* in requiring an aggregate of 255 marks for a pass where a student had dropped below 50% in two subjects. He held that the aggregate in such a case should be 250 marks and not 255. This modification of the compensation rules, and accordingly of the standard, permitted a further 12 students to pass. But the application of the compensation rules was then exhausted. No other students could bring themselves within them, that is to say, could show that they had achieved the standard implicit in the compensation rules. In view of this it seems to me that the students who failed to obtain a pass in 1986 did so not by reason of any quota imposed by the Committee but because they had not attained the required standard, being the minimum standard laid down by the compensation rules. It was the failure to attain that standard rather than the imposition of a quota which resulted in the number gaining entrance to the Law School being limited to 147.

It follows that the Society did not impose a limit of 150 in 1986, the reason being that it was not necessary to do so. But if it had been necessary, it seems to me that they would have had to impose one since Blackhall Place cannot accommodate more than 150 students in any year. Furthermore the Society had clearly decided upon a limit of 150 and had indicated to the students in its literature that in the examination they would be competing for 150 places. The only inference that can be drawn from this is that if more than 150 were to succeed in obtaining a pass, it is only the first 150 who would be admitted to the Law School. In view of this, even though the quota was not imposed in 1986, because the numbers of those who passed did not exceed the limit, it seems to me that the next issue is still relevant: whether it is *ultra vires* the powers of the Respondents to limit to 150 the number of places available in its Law School.

In my opinion the answer to this is reasonably clear. It is to be found in Regulation 18(2) of the 1975 Regulations which provides that

> "an apprentice who has passed or has been exempted from the Final Examination – First Part shall be entitled to admission to the Law School".

As long as that regulation is in existence, the Society cannot in my opinion impose any limit on numbers. The regulation says plainly that any apprentice who passes the examination shall be entitled to admission. That is the position irrespective of the numbers who pass. So whether it is 150, 200 or 250, they are all entitled to entrance to the Law School. The plain terms of the regulation prevent the Society from imposing any limit on the number. Once an apprentice has passed the examination, he cannot be refused entrance.

Were it not for Regulation 18 (2) the position might be different. It would depend on how Section 40 (1)(b), which gives the Society power to hold examinations, should be construed; whether it should be construed as giving the Society the power to hold a competitive examination. Counsel for the Applicant submitted that it could not. As the question does not arise at present, I do not propose to express any opinion on it.

The third issue to be decided is whether "it is lawful for the Respondents to require as a standard to be attained in the final examination – first part held in November 1986 a pass mark of 50% in each of the five subjects, Law of Contract, Law of Tort, Law of Real Property, Constitutional Law and Company Law, and in the case of a candidate failing to achieve that standard in not more than two subjects, an aggregate pass mark of 250 in these five subjects?"

It was not submitted on behalf of the Applicant that there was no power to lay down a standard. It was submitted that the standard was unreasonable and accordingly unlawful. It was pointed out that one student with a mark of 41 in a subject, and another with a mark of 43, had both passed, and it was argued that if they were considered to have reached the appropriate standard, the Applicant, who had dropped below 50 in one subject only, and whose mark in that subject was 46, should be considered to have reached the standard also. If not, it was submitted that the standard was unreasonable.

The test to be applied is in my opinion that enunciated by Diplock L. J. in *Mixnam's Properties Limited -v- Chertsey Urban District Council* [1964] 1 QB 214 at 237, which test was cited and adopted by Henchy J. in his Judgment in *Cassidy -v- The Minister for Industry and Commerce* [1978] I.R. 297 at page 311:

> "Thus, the kind of unreasonableness which invalidates a by-law (or, I would add, any other form of subordinate legislation) is not the antonym of 'reasonableness' in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*'"

Could it be said that the Committee, in laying down this standard, was guilty of manifest arbitrariness, injustice or partiality? In my opinion it could not. There was no arbitrariness or partiality about it because it was a fixed standard which applied equally to all the candidates taking the examination. Nor could it be said to be unjust. An absolute standard of 50% in each subject would have been very rigid. To permit a candidate to pass who had fallen below 50% in not more than two subjects was a reasonable modification to introduce and in order to ensure a certain overall standard there had to be some minimum aggregate specified. And for this

aggregate to be unjust, it seems to me it would have to be shown that it was fixed excessively high. But such is not the case. The figure of 250 simply requires an average equal to the pass mark. I am satisfied therefore that the standard was not unreasonable and so was lawful.

The fourth issue is whether the Applicant as a matter of fact knew that 50% was the pass standard set for the examination in 1986 before he sat the examination? I cannot see that this issue is relevant to any of the reliefs claimed by the Applicant and I deal with it solely because it is one of the issues directed to be tried by the Order of the President.

The Applicant's evidence was that he knew for the 1985 examination that the pass mark was 50%; that he did not know if the Society set a different pass mark every year; that he did not know what the pass mark for 1986 would be and he did not make any enquiries about it. My conclusion from this evidence is that while the Applicant may not have known for certain that the pass mark for 1986 was 50%, if he had been asked before the examination what he thought the pass mark was, he probably would have replied that he believed it was 50%, but he was not sure. The fact that he made no enquiries about it shows either that he felt he knew sufficiently what it was or that he was not concerned with what it was. Between knowing and not knowing there is an intermediate area where there is knowledge but also doubt as to the accuracy of that knowledge. It seems to me that this is probably the Applicant's position and I do not think that it in any way prejudiced his performance in the examination. He was working to achieve the best possible result irrespective of what the pass mark was.

The final issue is whether the Respondents are compellable in law to consider the Applicant as having achieved a satisfactory standard on the marks actually received by him in the examination. In my opinion they are not. It is only when the Committee is satisfied as to the proficiency of a candidate at an examination that they must declare him to have passed (Regulation 28 (1) 1975 Regulations) so the Committee would require to have been satisfied as to the proficiency of the Applicant before he could claim as of right the declaration he is seeking. But they could have been so satisfied only if the Applicant had reached the minimum standard which they had laid down, namely, an overall average of 50%. Having set that as a standard of proficiency to be attained, they could not have been satisfied with any candidate who failed to attain it. And that is the Applicant's position. He did not succeed in obtaining an overall average of 50%. And even though he was only three marks short of the standard, that margin, though small, left him in the position of not having attained the standard and deprived him of the right to claim that he ought to have been passed.

Counsel for the Applicant submitted that as the Applicant is standing on 247 marks, the only reasonable and just decision is to declare that he has reached the appropriate standard. But if the Court were to do that, it would be substituting its view of what the standard should be for that of the Committee, and that is something it is not entitled to do. I have already held that the standard laid down by the Committee cannot be challenged. If I were to declare that the Applicant had reached that standard I would be being inconsistent as I would in effect be substituting a different standard for the Committee's standard which I have already held to be lawful.

Counsel for the Applicant also referred to the evidence of Professor Ellis who had said in regard to the Applicant's marks that most examination boards would have brought him up to a pass, but some would not have. He submitted that on the basis of this evidence the Court should declare that the Applicant had reached the appropriate standard. But such

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evidence is not in my opinion sufficient. It does not necessarily follow from it that if the Applicant's position had been considered by a board consisting of all the extern and chief intern examiners, he would have passed. The furthest it goes is to indicate that he might have passed. And that is not enough to entitle him to a declaration that he did.

The foregoing are my findings on the issues submitted to the Court for its determination. It follows from them that the Applicant's principal claims for relief must be refused. He is not entitled to have quashed the decision of the Committee refusing him entry to the Law School nor is he entitled to a declaration that he has passed the final examination – first part. But in my opinion he is entitled to the following two declarations:

(1) A declaration that it is *ultra vires* the present powers of the Society to impose a limiting quota of in or about 150 on candidates seeking admission to the Law School, and

(2) A declaration that it is *ultra vires* the powers conferred on the Society under the 1975 Regulations to hold a competitive examination for entry into the Law School of the Society.

In considering the relief claimed by the Applicant I was limited to the issues which had been agreed between the parties. Having now fully considered the system adopted by the Society for the examination with which this case is concerned, it seems to me that there is a further issue which could be relevant. As it was not raised or argued before me, I do not propose to express any view on it, but as it is an issue which could arise in the future, I consider that I should refer to it.

It might be formulated as follows: in the light of the provisions of the 1954 Act and the 1975 Regulations, who should decide if a student has passed the final examination – first part? Is it the examiners or is it the Committee? It is clear that it is for the Committee to lay down the standard of proficiency to be obtained and on being satisfied as to the proficiency of a candidate to declare him to have passed (Regulation 28 (1) of the 1975 Regulations), but how are they to be so satisfied? Is it by applying themselves the standard they have laid down, or by permitting the examiners to apply it and relying on their conclusions? The regulations are not very clear on this. Regulation 7 says that "the Committee shall also consider and adjudicate upon the reports of the examiners". The use of the word "adjudicate" would suggest that the final decision as to whether a student has passed is to be made by the Committee but, if this is corect, the question might still arise as to whether the Committee, having appointed examiners, as it is given power to do under the regulations, can reserve to itself what may necessarily be a function of the examiners, namely, the decision as to whether a candidate has passed or not. It could be argued that two separate functions are involved, that of laying down the standard of proficiency to be obtained, and that of applying the standard, and that the former is to be carried out by the Committee and the latter by the examiners. Under the present system it would appear that both are carried out by the Committee. The issue is whether under the Act and the regulations this is permissible. It is an issue which it seems to me may need to be considered by the Society.

This judgment has been appealed to the Supreme Court.

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25th day of April, 1989.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Eamonn O'Rourke, Castle Street, Roscommon. Folio No.: 42L; Lands: Cloonbrackna; County: **ROSCOMMON.**

Louis & Bridget Doyle, Derrynalicka, Kilmurray, McMahon, Co. Clare. Folio No.: 5109; Lands: Derrynalecka; Area: 54a.3r.14p.; County: **CLARE.**

Joseph P. McGinnity, Blackrock, Dundalk, Co. Louth. Folio No. 3316F; Lands: Haggardstown; Area: 25.454 acres, 0.687 acres, 6.138 acres, 4.831 acres, 11.056 acres, 0.531 acres, 13.406 acres, 9.688 acres and 0.075 acres; County: **LOUTH.**

Laurence Baxter & Geraldine Bannon, 13 Deerpark, Ashbourne, Co. Meath. Folio No. 11694F; Lands: Milltown in the Barony of Rathoath; County: **MEATH.**

Helena McKenna, 216 Lr. Kimmage Road, Dublin. Folio No. 738L; Lands: The property known as 216 Lower Kimmage Road situate on the East side of Lower Kimmage Road in the Parish of Saint Peter, District of Rathmines; County: **DUBLIN.**

Aidan Nangle, Jamestown, Carrick-on-Shannon, Co. Leitrim. Folio No.: 3142F; Lands: Jamestown; Area: 0.314 Hectares; County: **LEITRIM.**

Paul White, Pillmore, Youghal, Co. Cork. Folio No. 41003; Lands: Pillmore; Area: 0a.1r.30p.; County: **CORK.**

Brigid O'Brien, Ballyvannon House, Tuamgraney, Co. Clare. Folio No. 5227; Lands: Islandcosgry; Area: 32a.2r.26p.; County: **CLARE.**

Thomas Farrell & Elizabeth Farrell, 101 Shelmartin Avenue, Fairview, Dublin 3. Folio No. 55082F; Lands: 101 Shelmartin Avenue, Parish of Clonturk and District of Clontarf; County: **DUBLIN.**

Andrew Kavanagh, Thomastown, Skerries, Co. Dublin. Folio No.: 7492; Lands: Carnhill & Thomastown in the Barony of Balrothery East; County: **DUBLIN.**

Mary Margaret Oliver Schubert, c/o James Oliver, Kilkenny Road, Carlow. Folio No. 5195F; Lands: (1) Killadoon; (2) Killadoon; Area: (1) 0.488 acres; (2) 1.500 acres; County: **MAYO.**

Henry Warnecke, Cloonslaner, Strokestown, Co. Roscommon. Folio No. 19525; Lands: Pollaghanumera; Area: 7a.2r.28p.; County: **CLARE.**

Alice McArdle, Dunkellin Street, Loughrea, Co. Galway. Folio No.: 33744; Lands: Cosmona; Area: 34p.24 sq.yds.; County: **GALWAY.**

Clare Rahaman, Folio No. 25755L County Dublin; Lands: 30 Mount Drummond Square, Parish of St. Peter, District of Rathmines; Area: 30 Mount Drummond Square; County: **DUBLIN.**

Brendan & Monica Smith, 7 Oaklands, Church Lane, Greystones, Co. Wicklow. Folio No. 2765F County Wicklow; Land: The property situate in the townland of Rathdown Lower; County: **WICKLOW.**

Gerard Cosgrave and Kathleen Cosgrave, 21 Willie Nolan Road, Baldoyle, Co. Dublin; Folio No.: 5304; Lands: Townland of Baldoyle and Barony of Coolock; County: **DUBLIN.**

Thomas O'Connell, Ower East, Moycullen, Co. Galway. Folio No.: 2505; Lands: Ower; Area: 12a.3r.15p. County: **GALWAY.**

Una Flanagan, 37 Annamoe Road, Dublin. Folio No.: 1741L; Lands: The property known as "Ard Mhuire" situate on the south side of Annamoe Rd., in the parish of Grangegorman, North Central District; County: **DUBLIN.**

Peter McGowan, Cloonislaun, Ballina, Co. Mayo. Folio No.: 52818; Lands: (1) Carrowkeribly, (2) Cloonislaun, (3) Cloonislaun; Area: (1) 0.633h, (2) 7.406h, (3) 7.406h; County: **MAYO.**

In the matter of the Landlord and Tenant Acts 1967 to 1987

NOTICE OF APPLICATION

TAKE NOTICE that on the 17th day of May 1989 an Application will be made by John Joy and Patrick Joy to the County Registrar of the County of Tipperary sitting at the Courthouse, Clonmel at 3.30 o'clock p.m. or at the next opportunity thereafter:—

1. For an Order determining that the Applicants are entitled under the Acts to purchase the Fee Simple in the premises known as 38 O'Connell Street, Clonmel.
2. For an Order determining the purchase price of the Fee Simple in the said premises.
3. For such further and other Order as the Country Registrar shall seem fit.

WHICH APPLICATION will be grounded upon the documents of Title to said premises, the facts of the case and the reasons to be offered.

Dated this 4th day of April, 1989.

Joy, Brennan & Co.,
Solicitors,
1 New Quay,
Clonmel,
Co. Tipperary.

Lost Wills

BRADY, Elizabeth, late of Aille, Barna, Co. Galway, Retired Nurse. Will anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 14th day of October, 1988, please contact K. J. Rooney & Co., Solicitors, 6A Eglinton Street, Galway.

McLENNEN (née Calvert), Edith Grace, deceased, late of 17 Fortfield Terrace, Upper Rathmines, Dublin 6, died on the 19th December, 1956, having made a Will on the 30th August, 1948. Will anyone knowing of the whereabouts of this or any other Will of the deceased please contact Philip J. Russell, Solicitor, 9 Prince of Wales Terrace, Bray, Co. Wicklow. Tel. (01) 861799.

KELLY, John, late of 58 Elizabeth Street, Drumcondra, Dublin 9. Would anyone having knowledge of a Will or a testament of a disposition executed by the above named deceased who died on the 19th of December, 1988, please contact Maurice Leahy & Co., Solicitors, 12 Upper Drumcondra Road, Dublin 9. Tel. 379595/370502.

CULLEN, Charles, late of 25 Sandyhill Gardens, Dublin 11 and 23 Phibsboro Road, Dublin 7 and 94A Shangan Road, Dublin 9. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on 13th January, 1989, please contact F. P. Byrne & Co., Solicitors, Edenderry, Co. Offaly.

WALL, Thomas, deceased, late of Ballyvalla, Ferrybank, Waterford otherwise Co. Kilkenny. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 7th April, 1989 please contact Henry D. Keane and Co., Solicitors, 21 O'Connell Street, Waterford. Telephone 051-74857.

LEAHY, Daniel Francis, late of St. Brigid's Hospital, Ballinasloe, Co. Galway and formerly of Fairy Bridge Cottage, Oughterard, Co. Galway. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on 16th January, 1989, please contact Messrs. John S. O'Connor & Co. Solicitors, 4 Upper Ormond Quay, Dublin 7.

STOKES, Patrick Pearse, deceased, late of 10 Landscape Avenue, Dublin 14. Will anyone having knowledge of the above named deceased, please contact Ronald J. Egan & Company, Solicitors, 58 Fitzwilliam Square, Dublin 2.

Lost Title Deeds

PHILLIPS, Mary Eveleen, late of 72 North Circular Road, in the city of Dublin, Spinster deceased. Will anyone having knowledge of the whereabouts of the Title Deeds to the dwellinghouse and premises situate at No. 72 North Circular Road in the City of Dublin held under Lease dated the 2nd January, 1948 and made between Linda Alyward Mervyn Reigh, Gertie New, Alice M. Burns and Frank Ossian of the first part, Linda Alyward Mervyn Reigh and Gertie New of the second part and Joseph Geraghty of the third part for term of 100 years from 29th September, 1945 at rent of £10.00 per annum, please contact P. J. Connellan & Co., Solicitors, Church Street, Longford. (Ref. MC/P175).

Miscellaneous

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 83 No. 5 May 1989

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- Extradition Law — Part 2
- Taxing the Voluntary Disposition Inter Vivos

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GAZETTE
INCORPORATED LAW SOCIETY OF IRELAND
Vol. 83 No. 5 May 1989

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Cover Photo: The President of the Law Society, Maurice Curran (centre) with (left) His Honour Judge Michael A. Moriarty of the Circuit Court, and Ernest J. Margetson, Senior Vice President of the Law Society.

★

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Viewpoint

The concentration of insurance services, auctioneers' practices and, in the not too distant future, conveyancing services in the same hands as providers of mortgage finance has led the English Law Society to protest loudly at the absence of any independent advice being available to house purchasers.

While the situation in Ireland is not as unsatisfactory as that in the UK, it is surely a step in the right direction that our Law Society has made arrangements to enable all practising solicitors to obtain independent financial and investment advice for their clients.

There is already evidence here that mortgage consultants are advising house purchasers to take out forms of assurance policies which are not necessarily the most suitable or economic for them. In passing, it may be commented that the high commission payable on the introduction of the insured to the insurer presents a great temptation to the consultant to sell the policy with the highest commission, rather than the most effective policy for the client.

The services to solicitors which Solicitors Financial and Property Services Ireland Ltd., can offer through their agents, Sedgwick Dineen Personal Financial Management Ltd., are wide ranging. Apart from the provision of advice to would-be house purchasers and, perhaps more significantly, to house owners wishing to remortgage their property, the range of facilities offered includes personal pension plans, retirement planning, key man insurance and investment.

This latter idea may be of considerable interest to practitioners engaged in litigation rather than in the provision of property services.

The wise investment of substantial amounts obtained by plaintiffs on awards is a matter which requires expert assistance; the leeches will gather as soon as the award is made and it is important that the plaintiff's solicitor be in a position to offer expert and unbiased advice to his client.

Now that these services are available to practitioners it is up to the profession to use their newly granted power to advise clients or, indeed, prospective clients of the services which the profession can now offer. It is important that the solicitor regains his position as being the client's first port of call, which certainly in the area of house purchase is no longer the norm. Each firm in the Professional Services area should take immediate steps to make their clients aware of these services which are unlikely to be matched by any other professionals operating in the area. □

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An Outline of Extradition Law

Part 2

EXTRADITION TO COUNTRIES OTHER THAN THE UNITED KINGDOM (Part III)

Extradition to the UK is directly dependent on statutory provisions. Outside the UK, Part II of the Act is only brought into force by the State entering into an agreement, or reciprocal arrangement, with a foreign state for extradition. Under section 8 of the Act, the Government, by statutory instrument, then applies the provision of Part II to that country[1] and recites the terms of the agreement in its order. The treaty then becomes part of the domestic law of the State.[2] Cases are brought before the District Court. As distinct from Part III, under Part II, the case before that Court is not largely formal but is a full hearing of the proofs and, unlike UK cases, the District Justice must consider any defence[3] to extradition which the prisoner raises. The proofs were succinctly put by Barrington J. in *State (Gilliland) -v- Governor of Mountjoy Prison.*[4]

> "Under Part II the substantial hearing on the merits of whether to extradite or not to extradite takes place in the District Court in accordance with the provisions of section 29 of the Act. In the course of his deliberations, the learned District Justice will have to be satisfied that Part II of the Act applies in relation to the requesting country and that the extradition of the person before the Court has been duly requested. In the course of doing this he will have to consider the original or an authentic copy of the conviction or warrant of arrest; a statement of each offence in respect of which extradition is sought; the relevant enactments of the requesting country; the description furnished of the person claimed and any other document or evidence required under the relevant Extradition Treaty. For instance, Article 8 of the Treaty between Ireland and the United States requires that a request for extradition shall contain, *inter alia*, 'a statement of the pertinent facts of the case indicating as accurately as possible the time and place of commission of the offence' and, indeed, it is difficult to see how the learned District Justice could satisfy himself as to what, if any, is the corresponding offence in Irish law in the absence of such a statement."

We will now shortly consider these proofs.

by Peter Charleton, B.A.(Mod), Barrister-at-Law

That Part II Applies

The proof of this is the making of an order pursuant to section 8 of the Act. The order will either recite that the Government is satisfied that reciprocal facilities for extradition will be granted[1] or will recite the terms of the agreement.[2] The Statutory Instrument is handed into Court.

The Request

The request for extradition can only be made in respect of an offence which is punishable, both in Ireland and in the requesting State, by a maximum of at least one year's imprisonment.[1] When the Minister receives a request for extradition[2] he signifies this fact by order, and the District Justice will issue a warrant of arrest for the requested person.[3] The writer presumes that such an order is construed as proof of the request as, other than that, no presumption that a request has been made is contained in the Act and no exception to the rule against hearsay is made in respect of it.[4] The warrant is executed in the same way as under Part III.[5] Its validity depends on Irish law. An invalid arrest will have the same consequences under Part II as under Part III.

Identity

Identity is as central a proof to Part II as it is to Part III and has already been considered.

Documents Supporting the Request

For admission under Part II, documents need merely "purport" to be signed or certified by a judge or magistrate of the requesting state and to be authenticated by the oath of some witness or by being sealed with the official seal of a Minister of State.[1] For the purpose of the Act, judicial notice is taken of all such official seals. The following documents are required:

1. Proof of the request by production of the Minister's order to the District Court to issue a warrant for arrest.[2]
2. An original or authenticated copy order, in the case of conviction, sentence or detention, or an original or authenticated warrant of arrest or its equivalent.[3]
3. A statement of the offence alleged giving its time and place of commission, its legal description and referring to relevant legal enactments in

Peter Charleton.

the requesting state.[4] This should also state the maximum penalty or the unexpired time of a sentence.[5]

4. A statement of the relevant law or a copy of the relevant enactments.[6]
5. A description of the person wanted and such other information (e.g. fingerprints or photographs) as will help establish his identity and nationality.[7]
6. Any further documents required by treaty, e.g. under the Washington Treaty, a statement of the facts of the case is required.[8]
7. A copy of the Order applying Part II to the relevant country and where there is a treaty, incorporating its terms.[9]

Defences

The Defences which the District Court must consider under Part II of the Act are succinctly set out by Barrington J. in *State (Gilliland) -v- Governor of Mountjoy Prison:*[1]

"It may not make an extradition order if the offence alleged is a political offence or an offence connected with a political offence, or if there are substantial grounds for believing that the request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion. Extradition may not be granted for offences under military law which are not offences under ordinary criminal law or for revenue offences. Extradition may not be granted where the person claimed is a citizen of Ireland unless the relevant Extradition Treaty otherwise provides, extradition may not be granted if the offence for which it is requested is regarded under the law of the state as having been committed in the state; or where a prosecution is pending in the state against the person clamed for the offence named; or if final judgement has been passed in the state or in a third country upon the person claimed in respect of the offence; or if the prosecution is statute-barred in the requesting or the requested country; or, in certain circumstances and in the absence of certain assurances, if the offence charged carries the death penalty in the requesting country. Again extradition is not to be granted unless provision is made by the law of the requesting country or by the extradition agreement to observe the rule of specialty. Finally, if the relevant extradition provisions require the production by the requesting country of evidence as to the commission by the person claimed of the offence for which extradition is requested, extradition shall not be granted unless sufficient evidence is produced to satisfy this requirement."

Most of these defences are self-explanatory. The defence sections under Part II are contained in sections 11–22 of the Act and in Part III they are contained in section 44[2] and in section 50 of the Act. In addition by section 3 of the Extradition (Amendment) Act 1987, the Minister may apply the rule of specialty to the UK. We shall now consider the more important defences common to both parts.

Political Exemption

Under Part II of the District Court cannot make an order for extradition[1] and under Part III the Minister must order a warrant not to be endorsed[2] or on appeal from the District Court, the High Court must[3] quash an order in respect of a person sought for "a political offence or an offence connected with a political offence". Similarly if extradition for an overtly non political offence is sought for the purpose of prosecuting or punishing the prisoner on account of his race, religion, nationality or political opinion, or prejudice will result to him from any of these reasons, he may not be extradited.[4]

This separate aspect of the political exemption remains untarnished by what follows, but in contrast to the other aspects of the defence it has never been accepted by any Court.

The burden of proving these defences is on the accused.[5] Three propositions may be tentatively stated:

1. The political offence exemption does not apply to certain offences. Even up to 1987 the killing, or attempted killing, of a Head of State or a member of his family were excluded from the defence.[6] With the coming into force of the Extradition (European Convention on the Prevention of Terrorism) Act 1987, which automatically applies to requests from the UK and can be applied, by Ministerial Order, to other countries, whether they are party to the Convention or not,[7] most serious offences of a terrorist type are excluded[8] or can be excluded.[9] Thus hijacking type offences relating to aircraft, serious attacks on or attempts to kidnap internationally protected persons, serious false imprisonment and an offence involving the use of an explosive or an automatic firearm where persons are endangered, are no longer subject to the political offence exemption.[10] Their accomplices are similarly excluded and and attempts to commit those offences are encompassed in their definition.[11] In addition a unique discretionary element is introduced by section 4 of the 1987 Act where the Court or the Minister is considering a serious offence involving an act of violence against the life, physical integrity or liberty of a person, or an act against property which created a collective danger for persons, can regard those acts as being outside the defence on considering the danger the acts created, their effect on persons foreign from its motives and whether any cruel or vicious means were used in its commission.[12] Under section 6 of the 1987 Act where an application for extradition in respect of any of those offences is refused, the DPP has the option of trying the accused in the State and may commence those proceedings before such a refusal if it appears likely.

It was once thought that Article 29.3 of the Constitution prohibited the extradition of political offenders,[13] but this view has not been litigated. In any event the definition of a political offence will now almost inevitably coincide with the principles set out in section 3 and section 4 of the 1987 Act.[14]

2. Because all acts of the Oireachtas are subject to the Constitution and, if possible, must be given a Constitutional interpretation,[15] the political exemption will not be construed "as having the intention to grant immunity from extradition to a person charged with an offence the admitted purpose of which is to further or facilitate the overthrow

by violence of the Constitution and the organs of the State established thereby.''[16] The Supreme Court, in 1985, adopted this principle in *Quinn -v- Wren* where they were faced with an affidavit alleging that £600 had been obtained by false pretences in London, by the defendant, in order to further the aims of the INLA to violently establish a 32-county workers republic. This amounted to a request to the Court to extend legal shelter to those who would, by force of arms, destroy the Constitution. Not surprisingly that request was refused. In the High Court an applicant called Robert Russell convicted of the attempted murder of an RUC officer, who had escaped from the Maze Prison, then entered a qualifying affidavit to his section 50 application stating that the IRA, to which he belonged, did not intend to overthrow the Constitution but to use force in Northern Ireland to end British rule there.[17] O'Hanlon J. and the Supreme Court by a 3 to 2 majority interpreted the principle in Quinn's case as extending to any usurpation of the functions of Government; since the Government's policy was to reintegrate the National Territory peacefully, the Court would not constitutionally offer protection to members of an organisation differing from that policy.[18] The fierce dissent of Hederman and McCarthy JJ. would not have occurred if the IRA were proved to have similar motives to the INLA.[19] The analysis of the political motivations of both organisations may await consideration in a future case.

3. The Courts have not defined what a political offence or an offence connected with a political offence is, but have stated that the political exemption cannot apply unless ''the person charged was at the relevant time engaged either directly or indirectly in what reasonable civilised people would regard as political activity''.[20] Each case must be judged on its own facts.[21]

Constitutional Protection and Bad Faith

The extradition procedure exists in order to secure the capture of a convicted person due to serve a sentence or to proceed against a person accused of a criminal offence.[1] Just as, at common law, it is illegal to arrest for the purpose of questioning, so under Irish law persons are not surrendered for the purpose of interrogation. In *Russell -v- Fanning*[2] the Supreme Court held that if the RUC were operating a policy of diverting extradited persons from their Court appearances in order to interrogate them, extradition should not be ordered. The closest our law comes to the requirement of a *prima facie* case is the principle enunciated in Russell's case that extradition is granted only for the purpose of meeting a case; foreign police forces are not entitled to seek the extradition of prisoners in the expectation that upon their surrender they may interrogate them and thereby build such a case.[3]

The duty of the Courts pursuant to Article 40.3 to defend and vindicate the personal rights of the citizen can clearly only be exercised within the jurisdiction of the Courts. But the Courts will not countenance any procedure, including extradition, the effect of which is to set those rights at nought. Thus, extradition will not be granted to a requesting jurisdiction which will probably subject the prisoner to unfair procedures,[4] assault, torture or inhuman treatment.[5] Six affidavits by prisoners in Northern Ireland were filed in the case of Robert Russell alleging that after escaping from the Maze Prison on 25th September 1983 and on being recaptured they were beaten by prison officers and subjected to various forms of inhuman treatment including deprivation of clothing. In reply, an affidavit from a Deputy Governor of that prison assured Russell safe conduct and went on to depose that the prisoners in question were pursuing civil remedies against prison officers in respect of those alleged assaults. Because of the absence of a policy to subvert constitutional rights on the part of the authorities in the Maze Prison, and because a remedy at civil law was available to the prisoners, it was held that the defence had not made out their case as a probability.

The Fr. Ryan decision by the Attorney-General[6] is the only occasion when it has been accepted in Ireland that an extradition to England or Northern Ireland would have the effect of violating the accused's constitutional rights. As noted above, that was an instance where the Attorney-General refused to initiate extradition proceedings, thus relieving the accused of the normal burden of proving, as a probability, that his constitutional rights would be infringed in the requesting jurisdiction. It has been the writer's experience that cases of possible jury prejudice, as a result of unfavourable media comment on the accused, have been dealt with here by a suitable adjournment in order to allow memories to fade. Perhaps that course was not suitable in this instance.

James Nash F.S.S. Dip.

Forensic Document Examiner and Handwriting Consultant

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Delay and Discrimination

It is a defence to extradition pursuant to Part II of the Act that under Irish law, or under the law of the requesting state, the time for taking a prosecution has elapsed.[1]

Extradition, under both Parts, will be refused if it would be unfair, invidious or oppressive because of the efflux of time.[2] An example of an invidious situation occurred in *McMahon -v- Leahy,*[3] where following an escape from the Maze Prison in 1975, several escapees had sought refuge in Ireland. McMahon was one of these. Several of his colleagues were sought in extradition proceedings but all raised the political exception. Because the Supreme Court only redefined the nature of a political offence in 1982[4] they succeeded. The proceedings against McMahon commenced over a year later. The Supreme Court held that to

differentiate him from other escapees where the State did not seek to challenge the validity of the political exception, would amount to an unconstitutional act of discrimination.

Specialty

The defence of specialty applies only to cases of extradition under Part II of the Act.[1] The Minister now has the power to apply the rule of specialty and the rule against re-extradition to Part III of the Act, but has not yet done so.[2] The practitioner in raising the defence should seek in the documents provision for the rule against specialty made binding either in the clause of a treaty or in the statement of law of the requesting country.[3] Thereafter it is a matter for the Courts of the requesting state to apply the rule of specialty and the District Court here will have fulfilled its function under the Act by specifying in its orders the foreign offences for which it is granting extradition.[4]

Conclusion

Extradition is an absolute necessity in fostering good international relations between neighbouring states. The alternative is the dishonest turning of a blind eye to the distress caused to citizens of other countries by fugitives within our borders. In cases to which the 1987 Act applies, the State can respond by prosecuting the alleged offender, but only where an extradition application has failed or is likely to fail.[1]

Independence and the development of constitutional law have caused a huge rift to develop between the Irish and the British legal systems. A country which has fought so hard for its independence is likely to have done so because of a fundamental divergence in approach on many major problems from its former rulers. Anyone who has practised in the Criminal Courts is aware of the difficulties inherent in convincing an Irish jury of proof beyond a reasonable doubt. The writer's limited experience with the Courts of the UK leads him to the view that the difficulty is not so severe in that jurisdiction. Perhaps citizens of the UK have a greater respect for the institutions of government and have more trust in their public servants. The greater ease with which guilty verdicts are obtained in that jurisdiction does not apply only in cases where Irish people are charged with terrorist type offences. In the writer's view it applies all the way across the spectrum of criminal offences, irrespective of the nationality or race of the defendant. It would be foolish, however, to ignore the very real danger of prejudice or, perhaps, the more likely instinct of a people under attack to rally behind their leaders and institutions. That instinct is not specifically British in character. The Irish people share this fundamental human quality, albeit tinged with native scepticism.

The Criminal Law (Jurisdiction) Act 1976 gives the authorities an option of prosecuting in respect of offences in Northern Ireland. Similar provisions might usefully be extended to the United Kingdom. As stated at the outset of this article, extradition is not a matter of discretion and the writer can see no legal sense in giving a Court a decision between extradition to a foreign state and trial within the jurisdiction. It is impossible to imagine the Court exercising its discretion on grounds other than those already contained in the Act relating to possible prejudice as a result of race, nationality or political opinion. The Courts are, however, involved only in extradition cases to ensure the principles of legality and constitutional justice. While their powers are statute given they need not be invoked. At all stages of the procedure the Minister for Justice retains a power to act. He may quash a warrant or an order of extradition but he is, of course, obliged to act legally and within the framework of the Act. Furthermore, whether the extradition of a fugitive is sought depends on a political decision made in the UK.

Trial within the jurisdiction for extra terratorial offences is a real alternative to extradition. It may, however, be seen in the extraditing state as a slight to their system of justice. Political consent would make such an alternative possible, but it is dependent to such a degree on the realisation by Irish politicians of the harm that failure to extradite fugitives may cause to the fabric of our society as well as that of the requesting state, and upon a realisation by the British authorities that even the best system of justice is subject to human prejudices, that it seems to be improbable. Practicality is a greater incentive. Since 1982 up to 70% of extradition requests by the UK in major terrorist-type offences have failed due to technical shortcomings in proofs.[2] The Criminal Law (Jurisdiction) Act 1976 has, in the cases taken under it, resulted in a guilty verdict in 14 of 15 cases.[3] The argument for politicians to make greater use of the Act and to extend its operation to Great Britain is compelling.[4]

Footnotes

Extradition to Countries other than the United Kingdom

1. All the orders made under this section are to be found in Humphries – An

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Index to the Irish Statutory Instruments, 846 to 848.
2. Section 8(5), *The State (Gilliland) -v- Governor of Mountjoy Prison* [1987] ILRM 278.
3. Section 29.
4. [1986] ILRM 381 at 384 and 385.

That Part II Applies
1. As, for example, in the case of Australia, SI 271 of 1984.
2. As, for example, in the case of the US, SI 33 of 1987.

The Request
1. Section 10.
2. Section 23.
3. Section 26; the emergency procedure is contained in section 27.
4. Section 37 refers to "a document supporting a request for extradition" and allows hearsay proof of this document but not apparently of the request itself.
5. See the section "Arrest" above.

Documents Supporting the Request
1. Section 37.
2. Section 26.
3. Section 25(a).
4. Section 25(b).
5. Section 25(c).
6. Section 10(1).
7. Section 25.
8. Article 8, SI 33 of 1987.
9. Section 8(3).

Defences
1. [1986] ILRM 381, at 385.
2. As amended by section 8 of the 1987 Act and as amended by section 2 of the Extradition (Amendment) Act 1987.

Political Offence
1. Section 11, section 29(1)(c).
2. Section 44.
3. Section 50.
4. Section 11(2), section 44(2) as inserted by section 8 of the 1987 Act. Those new acts apply equally to revenue and military offences; *McMahon -v- McDonald, No. 2,* High Court, unreported, Lardner J, 13 January 1989.
5. *Russell -v- Fanning* [1988] ILRM 333.
6. Section 3.
7. Section 3(2)(a), section 10 of the 1987 Act.
8. Section 3 of the 1987 Act.
9. Section 4 of the 1987 Act.
10. Section 3 of the 1987 Act. For an analysis of the relationship of the Act to the Convention on which it is based see Connelly ICLSA 87/1-01.
11. Section 3(3)(b) and section 3(3)(a)(IV) of the 1987 Act respectively.
12. Section 4 of the 1987 Act.
13. The Law Enforcement Commission Report, Prl 3832 (1974) paragraphs 41–46.
14. *McGlinchey -v- Wren* [1982] IR 154.
15. *McDonald -v- Bord na gCon* [1965] IR 217.
16. Per Finlay C. J. in *Quinn -v- Wren* [1985] IR 322 at 337.
17. *Russell -v- Fanning* [1986] ILRM 401 and 409.
18. *Russell -v- Fanning* [1988] ILRM 333.
19. Both judges agreed with the *Quinn* judgment.
20. Per O'Higgins C. J., in *McGlinchey -v- Wren* [1982] IR 154 at 160; [1983] ILRM 169 at 172.
21. A useful statement of the relevant principles is to be found in Gannon J.'s judgment in *Quinn -v- Wren* [1985] IR 322 at 330–332 and in Finlay C. J.'s judgment in the same case at 336/337.

Constitutional Protection and Bad Faith
1. Section 9, section 43.
2. [1988] ILRM 333 at 343.
3. *Russell -v- Fanning* [1988] ILRM 333 at 343.
4. *Shannon -v- Ireland* [1984] IR 548; [1985] ILRM 449.
5. *Russell -v- Fanning* [1988] ILRM 333 at 340 and [1986] ILRM 401 at 411.
6. See the *Irish Times*, December 14th 1988.

Delay and Discrimination
1. Section 18. An example in Irish law is the twelve month time limit for prosecutions for sexual intercourse with a mentally defective woman; section 4 Criminal Law (Amendment) Act 1935.
2. Section 50(2)(bbb) as inserted by section 2(1)(b) of the Extradition (Amendment) Act 1987.
3. [1984] IR 525; [1985] ILRM 422.
4. *McGlinchey -v- Wren* [1982] IR 54; [1983] ILRM 169.

Specialty
1. *State (Summers Jennings) -v- Furlong* [1966] IR 183.
2. Extradition Amendment Act 1987 section 3.
3. For example, Article 9 of the Washington Treaty, SI 33 of 1987.
4. *State (Gilliland) -v- Governor of Mountjoy Prison* [1986] ILRM 381 at 388.

Conclusion
1. Section 6 of the 1987 Act which automatically applies to the UK and can be extended by Ministerial Order to any other country; sections 2(1), 6(3)(b) and 10.
2. This figure was compiled by Séan Flynn, Security Correspondent of *The Irish Times*; see *The Irish Times* 3 November, 1988.
3. Ibid.
4. *I would like to thank Fiona Daly BCL, Solicitor, for her helpful comments on an earlier draft of this article.*

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From the President . . .

Extract from Address to the Annual Conference of the Incorporated Law Society of Ireland at Killarney by the President Maurice R. Curran on the 5th May 1989.

Distinguished Guests, Ladies and Gentlemen,

CHANGING TIMES

The times in which we live and the pace of change and development in the world all around us fascinate me. I have been twenty-eight years in practice as a Solicitor and in that time legal offices have been transformed both in the equipment they use and the services that they deliver.

Indeed one of the joys of 1989 is the speed at which business can be carried out with the assistance of modern technology.

GOVERNMENT RESPONSE

Legal offices and solicitors in general have moved with the times, adapted to new technology, increased their productivity and, with the assistance of C.L.E. Courses provided by the Society, have kept their knowledge and skills up to date.

In comparison what we have got from the Government in the same period?

A Land Registry, where it takes over 12 months, on the Government's own admission, to complete a dealing.

A Land Law and Conveyancing system in which there has not been a major reforming Act in this Century.

The Society has proposed to the Government that the Land Registry should be converted into a self financing corporation run on commercial lines with the necessary staff and other resources to install and develop the requisite technology to comply with the demands of the profession and the public for speedy registration of property transactions.

I can see no reason why the Companies Office should not be treated similarly. The Government is committed to a National Development Plan which will commit greater resources to the development of physical infrastructure in terms of regional development. I am not aware that any of these funds have been allocated to the bringing up to standard of the infrastructure of the legal system, be it the Land Registry, the Companies Office or the Courts.

However I am pleased to say the Department of Justice with the Department of Finance and the Land Registry are at present having a study made of the staffing needs of the Land Registry. This I might say is in reaction to considerable pressure from us.

We have also been informed recently that feasibility studies have shown that computerisation of the Central Office of the High Court is viable and should commence next year.

PERSONAL INJURY — NO FAULT COMPENSATION FOR MEDICAL NEGLIGENCE

Can I turn now to a current problem to which we must find a solution — professional medical negligence claims such as the *Dunne* case which is currently heading back to the High Court after a 15 day hearing there and 3 days in the Supreme Court.

Leaving aside the costs which of course are enormous, the stress involved in this kind of action for the parents of the child for the Gynaecologist and for the management and staff of the hospital are extreme.

The Chief Justice, in his Judgment said and I quote, "I am neither aware of nor insensitive to the massive burden both emotional and practical which these proceedings have imposed upon the parties for both the parents of the infant and the Medical Practitioners whose conduct has been impugned".

There has to be a better way of handling this type of case. Surely in this sophisticated age compensation for personal injury in medical negligence cases should not depend on proving fault or error. Can we not come up with an annuity insurance system underwritten by the Government of no fault compensation as has been managed in some other countries?

I also think that in medical negligence cases the system of awarding capital sums should be replaced with an annuity payable at so much per year for the duration of the life of the injured party. This would reduce the cost of this type of claim for the future.

SUPREME COURT APPEALS — WRITTEN SUBMISSIONS

As a separate point, there is something wrong with our judicial system when it takes thirteen days to hear an appeal from a fifteen day trial.

Can we not move towards the American system where on appeal a great body of the submissions are in writing and there is very limited oral presentation. This is also the practice in the European Court with which some of our Advocates should by now have become familiar.

I believe in its own interest the Supreme Court, which is building up a heavy backlog of cases, should apply a new regime to those that appear before it and limit the time for oral debate.

COMPETITION AND FREE MOVEMENT

Not only here but very much so in a host of countries including the U.K. the profession is being subjected to critical review in the name of the Great God of the 1980's — free market competition. Let me quote to you from the Scottish Consultation Paper on the Legal Profession: —

> "The government has encouraged a preference for the market mechanism as a means of allocating resources. Any restriction on the free supply of services is a distortion of a competitive market

in that it restricts choice and may inhibit cost effectiveness. Restriction should only be allowed to remain in place if the public interest requires it and should extend no further than the public interest calls for. The onus is on those who support restrictions to justify them. Customers for legal services should be able to exercise choice according to their perception of value for money whether in terms of particular quality or of price. Suppliers ought to compete as they each choose on price alone or in terms of other marketing strategies. They must be able to advertise in order to market their services effectively".

To many in this room, that would sound completely alien and contrary to our understanding of what constitutes a profession and the delivery of professional services.

Let me quote to you from the Restrictive Practices Commission Report on the Accountancy Profession in Ireland:—

"The Commission is strongly of the view that competition between suppliers of professional services as with suppliers of goods and services is desirable as being in the public interest. Competition in charges is likely to foster changes in the methods and costs of providing the service, resulting in the achievement of greater efficiency without reducing the quality of the service. Established professionals may become less complacent, the inefficient and the incompetent may be forced to improve or cease practice, and new entrants are likely to be encouraged to become established".

WHAT IS A PROFESSION?

George Bernard Shaw asserted that all professionals are a conspiracy against the laity and it may be that Governments are now tending to agree with him. It certainly seems to me that the heyday of the liberal professions which probably stems back to the middle of the last Century, may be coming to a close.

There have been many definitions of what constitutes a profession but I like to think that one of the distinguishing factors is that the *primary objective* is not just to earn a living but also to take pride in the standard of skills and knowledge and to have a sense of responsibility to the general public, so that professional bodies such as the Law Society concentrate on ensuring that members are properly educated, before being admitted to practice, and that education is continued during professional life by appropriate Courses; that proper standards of conduct are maintained and that disciplinary procedures are available to ensure this.

SELF REGULATION

What seems to be a developing view is that restrictions imposed by a self regulating profession interfere with the market mechanism and that the predominant requirement is that Government *set minimum standards* in any area of service in the interests of achieving the cheapest price for the delivery of such services leaving it to the customer/client to decide whether he wishes to pay more for a higher quality or standard.

Are the limits of self regulation to be redefined? The argument has been made, and by me where I have thought it appropriate, that if areas that were reserved to our profession are to be open to others, then why should we subject ourselves to a strict system of self regulation; why not abandon our standards, why not liquidate the Law Society and accept the minimum of standards of conduct and quality imposed by the Government?

We hope we do not have to proceed on that route. What we have done over the years is to seek to improve not just the performance but the image of the profession. Not being consumer orientated, many of our members have not appreciated that in many ways our public face is our complaints handling procedure, and also our ability to provide Solicitors who will take actions against their colleagues for negligence in appropriate cases.

In recent years, I believe we have greatly improved the human face of our complaints procedures by not any longer insisting on a written complaint but being prepared to give interviews and let people make their case across a table. In my view this putting of a human face on our procedures has improved this aspect of our image greatly.

1992

The theme of this Annual Conference is 1992, the Single Market, and all its implications.

The Society will shortly be subscribing to JUSTIS which is an on-line European law database service. Access will be via a terminal in our Library and the searches will be made by our library staff.

On this will be available EC legislation and case law and also the up-to-date position on the progress of measures contained in the Commission's 1985 White Paper on the completion of the Internal Market which should be a great advantage to the profession.

In the light of the EC Directive on the mutual recognition of Higher Education Diplomas, and in the light of the anticipated recommendations of the Fair Trade Commission Report on the Legal Profession which is expected shortly, I think we will have to look at the state of the profession and the education of those members joining it and practising within it.

MERGER OF PROFESSIONAL LAW SCHOOLS

I have no doubt in my own mind, but I must express this as a personal opinion, that the Law Schools of the Law Society and the King's Inn should be brought together and a common training course developed. I like the idea of all graduates of this School spending a period of at least a year in a Solicitors office and thereafter those who wish to practice exclusively in the Courts doing so by an appropriate period of devilling.

A logical consequence of this and one much needed in the context of the European Reciprocity legislation will be a much easier transfer process between the two branches of the Profession. In Scotland, a Solicitor who has been actively practising for three years will be automatically admitted to the Faculty and an Advocate can transfer similarly.

TRANSFER BETWEEN BRANCHES OF THE PROFESSION

Under the EC Directive on the mutual recognition of Diplomas, it is likely that the Law Society will offer an adaptation period of three years whereby a lawyer from

(Contd. on page 172)

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Practice Notes

Probate Officer Directions

1. Practitioners should note that pursuant to Order 79 Rule 3 of the Rules of the Superior Courts applications for Grants must be made personally or through Town Agents, but cannot be made by post.
2. All notices of application lodged must be typed. This requirement is necessary to ensure that the correct details of every application are accurately recorded on the computer of this office.
3. **New Technology - Wills**
   The following guidelines are suggested for the preparation of Wills by Word Processors, I.B.M. Personal Computers, Laser Printers and so forth. These guidelines have already been agreed in principle with the Law Society Technology Committee.
   Wills prepared on single sheets with writing on one side only, should be bound in the traditional methods. These include:-
   (a) Ribbon or Tape;
   (b) Staples covered over by heavy adhesive material;
   (c) Brass Eyelets.
   Each page containing written material should be numbered in the following manner:
   in the case of a Will consisting of 10 separate sheets with writing on one side of each sheet, each written page should be numbered Page 1 of 10, Page 2 of 10, and so forth.
   The suggested attestation clause would read as follows:
   "Signed and acknowledged by the above-named Testator as and for his last Will and Testament in the presence of us both present at the same time who in his presence at his request and in the presence of each other have hereunto subscribed our names as witnesses this Will having been printed on the front side only of the foregoing 10 sheets of A4 paper."
   The shortened form of attestation clause may, of course, be used i.e. "Signed by the Testator in the presence of us and signed by us in the presence of the Testator". The statement regarding the content of the Will must, of course, be added.

W. G. Kenna
Probate Officer

RELEASE OF BANK MORTGAGES

House loan mortgage deeds often now secure for the lender not only the house loan but also any other monies that may be owing by the borrower to the lender, such as monies owing by a borrower on a current account with a bank lender.

A bank, on being asked for mortgage redemption figures, may simply advise the amount due on the house loan. The Bank may later decline to furnish a release of the mortgage/mortgages following receipt of the house loan liabilities on the grounds that there are other liabilities secured by the mortgage deed/deeds. By the time the vendor's solicitor realises that payment of the home loan liabilities does not discharge all liabilities secured by the mortgage deed/deeds, the purchase monies are likely to have been paid out and the vendor's solicitor may be in a position of having to honour an undertaking to furnish a release or vacate of the mortgage or mortgages which the purchaser's solicitor would perhaps have sought and accepted on the closing of the sale.

Where the vendor's property is subject to mortgage, the vendor's solicitor should obtain from the mortgagee a statement of what monies the mortgagee states are required to redeem the mortgage or mortgages *and* an undertaking from the mortgagee that on payment of the amount stated the mortgagee will furnish a release or vacate of the mortgage or mortgages.

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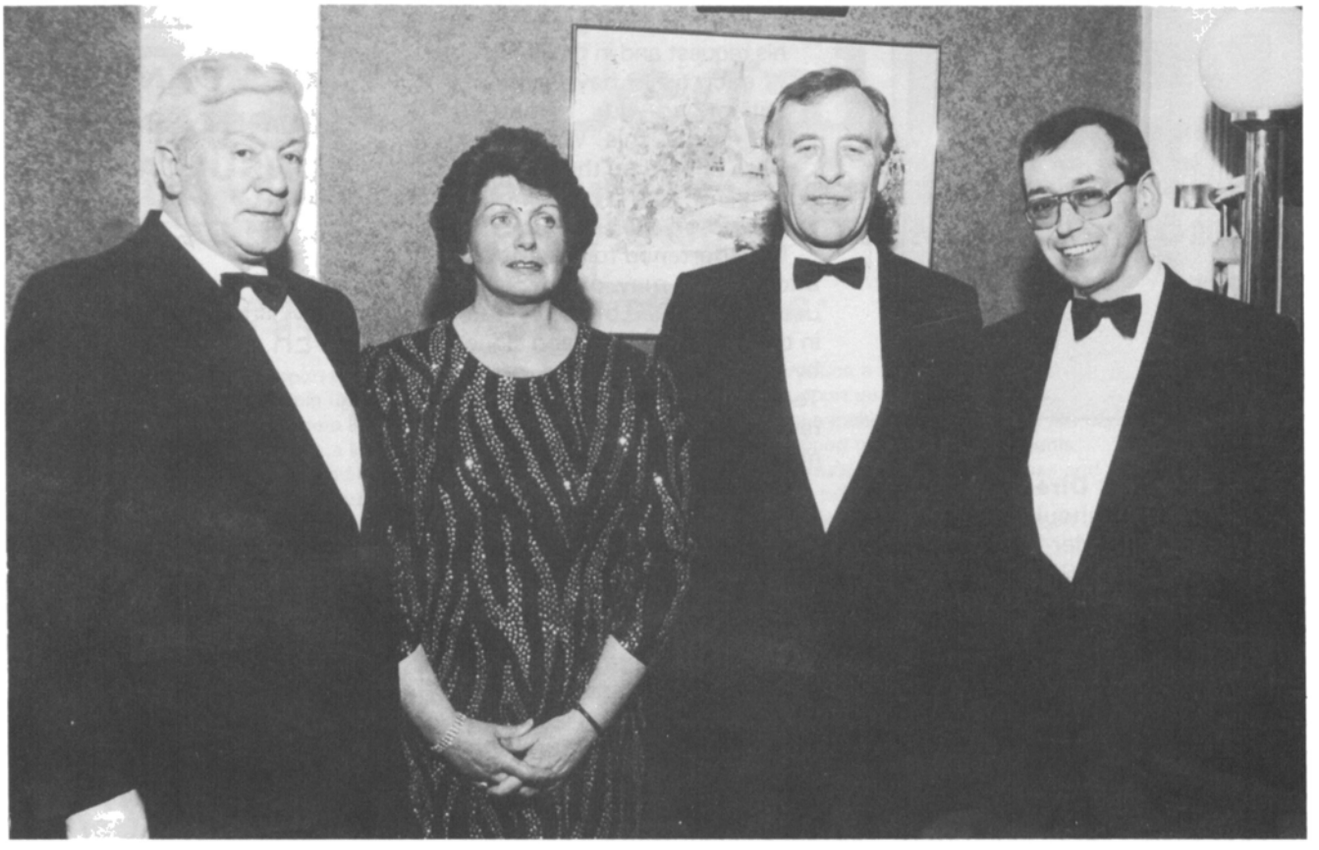
APRIL 1989 GAZETTE
COVER PHOTO

The photograph featured on the cover of the April Gazette was of **Bray Courthouse.** The caption was inadvertently omitted.



Tipperary and Offaly (Birr division) Sessional Bar Association Annual Dinner, at Anner Hotel, Thurles. (left to right) District Justice William O'Connell, Mrs. Pauline Barry, Henry Barry, (President of the Bar Association), and Michael V. O'Mahony, Junior Vice President of the Law Society.

INCORPORATED LAW SOCIETY OF IRELAND

The Society is pleased to announce that the Bank of Ireland – Area West – has offered to sponsor a solicitor based within the area West so that he or she may attend a two-year programme at University College Galway leading to the MBA Degree. The sponsorship is to the extent of £2,000 per annum for the two years of the MBA Degree programme. While the programme does not commence until the academic year beginning October 1990, arrangements will need to be in place by the end of 1989.

The Society wishes to record its appreciation of the Bank's generosity in making available this endowment, details of which will appear in the September 1989 issue of the *Gazette*. The timetable for classes leading to the MBA Degree is arranged so as to permit candidates to attend the course with the minimum interruption to their work responsibilities during the 25 weeks of each academic year in which lectures take place. Classes are normally held each week from 10.00am on Friday and on Saturday up to 1.00pm – a total of about 10 lecture hours per week.

The Society is particularly anxious to promote among solicitors expertise in business methods. This advance notice is given to those solicitors – and those apprentices who will qualify as solicitors within the next year or so – based within the Bank's area West namely the counties of Donegal, Galway, Laois, Leitrim, Longford, Mayo, Offaly, Roscommon, Sligo, Westmeath.

Any potential candidate for the MBA Degree programme in U.C.G. who would like at this time to have further information is welcome to communicate with:

Professor Richard Woulfe,
Director of Education,
The Law Society,
Blackhall Place,
Dublin 7.

SYS Spring Seminar

LIMERICK

21st To 23rd APRIL 1989

A large number of solicitors from all over the country attended the Spring Seminar of the Society of Young Solicitors at Limerick.

Two of the speakers at the Seminar were solicitors who have recently published text books. Professor Bryan McMahon spoke on *Relevant Legal Aspects of 1992* and he, along with Finbarr Murphy, recently wrote the book *European Community Law in Ireland.*

Mr. Robert Pierse gave his lecture on *Bad Drinking Offences* and his book *The Law of Road Traffic in the Republic of Ireland* was officially launched at the Seminar by the Honourable Mr. Justice Johnson. The book launch was attended by a large number of Mr. Pierse's family and many friends from County Kerry.

Terence McCrann, Chairman of the SYS, welcomed the very first launch of a book at an SYS Seminar. Also in attendance was Peter R. Robinson of Butterworths, the publishers of both text books, and Michael V. O'Mahony the Junior Vice-President representing the Incorporated Law Society.

The President of the Circuit Court, the Honourable Mr. Justice Roe, spoke on Sunday morning on the future of the Circuit Court and gave his views on a wide range of issues concerning the Circuit Court.

Terence McCrann welcomed the representatives from other jurisdictions namely Brian Speers, Northern Ireland, Brian McBride, Scotland, and Colin Roe, England and Wales. He also announced that the Young Solicitors Groups from all of these jurisdictions would be having a joint Seminar with the SYS at Cork in March 1990.

The major sponsor of the weekend was the Investment Bank of Ireland Limited. Other sponsors included Butterworth (Ireland) Limited and Law Placements.

THE INCORPORATED LAW SOCIETY OF IRELAND

FINAL EXAMINATION – FIRST PART

Until further notice, there will be no limit to the number of attempts at this Examination and Criminal Law may now be sat independent of the five other subjects.

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The President of the Dublin Solicitors Bar Association, Gerard Griffin presenting a cheque for the proceeds of the Dublin Solicitors Bar Association Summer Party to Clare Leonard, Secretary of the Solicitors Benevolent Association photographed with (left) Harry Cassidy of The Investment Bank of Ireland who sponsored the party, Rosemary Kearon, Treasurer of the Dublin Solicitors Bar Association and Director of the Solicitors Benevolent Association.

From the President . . .

(Contd. from page 167)

another EC country who works with a Solicitor for three years will then be entitled to admission as a full member of the profession without examination. If we are offering such access to lawyers from abroad, should it be more difficult to transfer from one branch to another of the profession here?

I would urge that appropriate representatives of the King's Inn and the Law Society sit down quickly to work out revised agreements which, it seems to me, would be in the interests both of the profession as a whole and of the public.

ONE PROFESSION?

If one accepts the principle that the only restrictive rules should be those that are necessary to ensure the proper maintenance of professional standards in the public interest and in the interests of due administration of justice, what other restrictions should go?

Speaking personally, I believe first, that the barriers should go down between the two branches of the legal profession, secondly, that multi-national partnerships with the lawyers of other countries should be permitted and thirdly, that the barriers should go down between members of the legal profession and other professions.

To an outsider the formal division of the profession into Barristers and Solicitors may look strange.

Why should there be two separate professions: what is the essential difference that justifies this? Is it education? No, as it is shared in university and, as I have already said, could very easily to be combined at the level of post-graduate training.

Is it in the right of audience in the Courts? — No — as both Barrister and Solicitor have unlimited rights of audience.

Is it in the type of law that can be practised? — certainly not.

Then what constitutes the essential difference?

To my mind it comes down to three things, first the Bar does not in general deal directly with the lay client nor handle clients money. Secondly, speaking generally, Solicitors do not act as advocates in the Superior Courts; and thirdly only Barristers are eligible for appointment as Judges of the Circuit and Superior Courts.

If the Bar decided to permit general access to lay clients, then it would appear the configuration of the two branches of the profession would be virtually identical. And that is an interesting thought!

As I see it, you can have three types of lawyer, one who wishes to practise solely as a solicitor, one who wishes to practise both as a solicitor and advocate, and one who wishes to practise solely as an advocate taking instructions from a fellow lawyer.

I believe it should be left to each individual practitioner to make this decision for himself, that the restrictive rules of the Bar relating to partnership between Barristers should be revoked, and not only should partnership with each other be allowed but they should be permitted to be in partnership with Solicitors.

It is also imperative that the present restrictive rules of the Bar requiring a Junior Counsel to be briefed with a Senior and to be paid two-thirds of his fee must go as they are certainly restrictive and anti-competitive.

I am aware that any suggestions of this nature will be greeted with horror in the Law Library and the King's Inns. I am familiar with all the arguments about the independence of the Bar and their accessibility to individual Solicitors around the country.

In common law countries such as Australia and Canada, never mind the United States, a single profession has managed to practice in just the way I have described, some wholly in offices, some both in offices and in Court, and others solely as Court practitioners taking referral work from other firms.

I believe there always will be a need for *independent* lawyers *including advocates* but it is a different question as to whether such advocates should constitute a separate profession.

Incidentally I do not accept that a solicitor is in any way less independent than a barrister.

I have a report on a recent meeting of the C.C.B.E. with D.G. 111 of the Commission, prepared by an Irish Barrister, which states that the Commission simply regard lawyers as one small part of the service sector to be regualted like every one else in the context of achieving the goals of 1992. It was also clear that they regard all the lawyers of Europe as essentially one profession.

As a Latin Notary put it to me recently, the Commission is interested in regulating activities not professions.

Is there any logic in this competitive age in a formal division of the profession? Can the separate profession of barrister survive in the Single Market?

Is there not considerable force in the view that as a small country we must make the best use possible of the available pool of talent both barristers and solicitors. Can the forces of the past be permitted to paralyse the future?

I have tilted at enough windmills for one day.

It is my belief that change just for the sake of change is not necessarily good, but change for survival is essential.

CONCLUSION

To conclude, and since I am an optimist, to conclude on a high note, there are tremendous opportunities available to a profession, one third under 30 and half under 35, well educated and well trained in professional skills.

Provided we shake off entrenched restrictive attitudes, provided we develop the intention to strive to deliver high class, high standard professional services to as many people as possible, then the future of our excellent profession is more than assured. □

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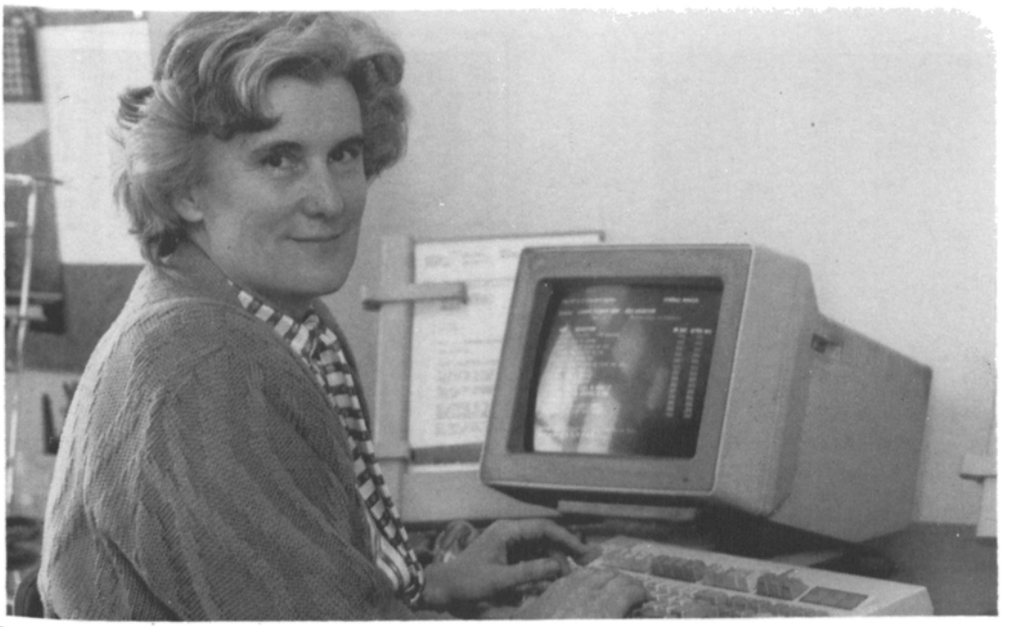

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Gerry Griffin, President of the Dublin Solicitors Bar Association with (left) the Hon. Mr. Justice T.F. Roe, President of the Circuit Court, and District Justice Oliver A. Macklin, President of the District Court.

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Taxing the voluntary disposition *inter vivos*

In the halcyon days of Estate Duty a voluntary disposition by a healthy disponer, who looked a good prospect to survive five years from the date of the disposition, presented few fiscal problems for either the practitioner or his client. Stamp Duty at 1% on the market value of the property transferred was the norm, with the occasional 'belt and braces' approach by some practitioners of insuring against the contingent Estate Duty liability should the disponer die within the five year period.

by
JOHN F. QUINLAN
B.L., Dip.E.L., A.I.T.I.,
Tax Consultant

Nowadays, as we know, the game has changed dramatically and the fiscal exposure is much greater. Furthermore, the practitioner is in general acting for a more exacting client, who wants to know precisely what tax liability will follow his act of bounty. This article attempts to outline the scope of the problem facing the practitioner in these circumstances.

1. Chronologically, *Stamp Duty* is the first fiscal charge.

   The relevant legislation is Section 74 Finance (1909-10) Act, 1910.

   Sub Section 1 states that any conveyance or transfer which operates as a voluntary disposition *inter vivos* is charged to Stamp Duty as if it was a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale.

   Sub Section 5 states that any conveyance or transfer shall, for the purposes of the section, be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*, where the Revenue Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration, the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred.

   The words 'voluntary disposition' have been defined judicially. In *Att. Gen. -v- Smyth* [1905] 2 I.R. Palles C. B. said "the meaning of 'voluntary disposition' is definitely and conclusively settled by the decision of the Court of Appeal in England in *Att. Gen. -v- Jacobs-Smith* [1895] 2 Q.B. This decision involves this, that 'voluntary disposition' means a disposition which operates by way of gift."

   Lord Blanesburgh in *A. G. for Ontario -v- Perry* [1934] A. C. 477 states "a gift does not cease to be a gift although there is some consideration for it received by the donor: a gift, it has been said, may be something which is not 'a pure and simple gift'."

   It appears therefore that if a disposition can be shown to contain some element of bounty it is a voluntary disposition and can be said to operate by way of gift. In other words, any disposition of property which is *not* a disposition for *full* consideration in money or money's worth is a voluntary disposition.

   Stamp Duty is charged on the market value of the property the subject of such voluntary disposition at the rates applicable to the "conveyance or transfer on sale" head of charge. This head of charge is divided in two parts; the first part deals with the transfer of stocks or marketable securities and the second part deals with a transfer of any other property. This second part concerns in the main the transfer of immovable property. It also covers the transfer of movable property (apart from stocks or marketable securities dealt with in the first part) in any case where such movable property is transferred by way of an instrument, that is, any written document.

   Stamp Duty is not the only fiscal consequence of the voluntary disposition or, to use the colloquial expression, 'the gift'. The gift may give rise to both Capital Acquisitions Tax and Capital Gains Tax concurrently. These tax liabilities are quite likely to be much greater than the initial Stamp Duty charge and concern both Transferor and Transferee.

2. **Capital Acquisitions Tax:** Under Section 5 Capital Acquisitions Tax Act 1976, a gift

John F. Quinlan.

is deemed to be taken when a person (the Transferee or Donee) takes property under a disposition otherwise than for full consideration in money or money's worth paid by him. In arriving at the taxable value of the gift, Section 18 (2) of the Act allows a deduction for any *bona fide* consideration in money or money's worth paid by the Donee. Stamp Duty may also be a good deduction if in fact it was paid by the Donee. In such a case the Stamp Duty would be regarded as a liability properly payable out of the gift (Section 18 (1) of the Act). Payment of the Stamp Duty by the Donee would not be regarded as partial consideration under Section 18 (2)(a) of the Act because the Transferor is not liable for the Stamp Duty and therefore the Donee is not taking over a liability of the Transferor. The provisions of the latter sub section would apply to Capital Gains Tax paid by the Donee, as this would be a liability of the Transferor taken over by the Donee. The Donee is primarily accountable for the Gift Tax. The Transferor (Disponer) is also accountable.

3. **Capital Gains Tax:**
The transfer of an asset by way of a gift is a disposal for Capital Gains Tax purposes. Section 9 Capital Gains Tax Act 1975, states that a person's disposal of an asset shall, for the purposes of the Act, be deemed to be for a consideration equal to the market value of the asset when he disposes of the asset otherwise than by way of a bargain made at arm's length (including in particular where he disposes of it by way of gift).

Under Paragraph 3 Schedule 1 Capital Gains Tax Act 1975, sums allowable as a deduction from the consideration in computing Capital Gains Tax include the incidental costs to the transferor of the disposal of the asset. These incidental costs are stated specifically to include Stamp Duty. If however the Stamp Duty was already deducted for Capital Acquisition purposes, on the basis that it was paid by the Donee, then it would not be a deduction for Capital Gains Tax purposes as it would not have been paid by the Transferor.

It appears therefore that Stamp Duty is a good deduction for either Capital Gains Tax purposes or for Gift Tax purposes, but not for both taxes.

The Transferor is accountable for the Capital Gains Tax (Section 4 Capital Gains Tax Act 1975). The tax is also recoverable from the Donee if the Transferor has not paid it within twelve months from the date when the tax became payable. The Donee, however, has a right to recover the tax from the Transferor as a simple contract debt (Paragraph 18 Schedule 4 Capital Gains Tax Act 1975).

Section 63 Finance Act 1985, as amended by Section 66 Finance Act 1988, allows Capital Gains Tax to be credited against Capital Acquisitions Tax. Where Gift Tax is charged in respect of property on an event happening on or after 30th January 1985 and the same event constitutes a disposal of that property for Capital Gains Tax purposes, Capital Gains Tax payable is not deducted in ascertaining the taxable value of the property for Gift Tax purposes but, insofar as it has been paid, it shall be deducted from the net Gift Tax as a credit against the same; for example Mr. X makes a gift of his farm to his cousin and the Gift Tax payable amounts to £10,000. Capital Gains Tax of £4,000 is also chargeable on the disposal. The Gift Tax liability is reduced by £4,000 to £6,000 so that the total tax payable on the disposition is £10,000, that is Gift Tax £6,000 and Capital Gains Tax £4,000.

In advising in a gift situation the relevant legislation regarding Stamp Duty, Capital Acquisitions Tax and Capital Gains Tax must be considered. To enable a practitioner to assess the fiscal liability of his client in these areas much more information is required than would be necessary if the Stamp Duty liability alone was being considered.

The following check list may be of assistance in enabling a practitioner to obtain all the essential information.

For example, in the case of A purporting to transfer immovable property to B, the following data would be essential in order to advise on the tax consequences of the transaction.

(A) **Regarding the Property to be Transferred:**
(i) It is essential to ascertain the market value of the property at the date of the transfer for all three taxes.

While it is generally accepted that the same market value should apply for all cases, in practice it does not always work out that way. Market value is essentially a matter for agreement between the parties involved and a third party ought not to be bound by such agreement. Accordingly, if the Revenue Commissioners agree a market value for Gift Tax purposes with the Donee, this should not bind the Transferor, who is accountable for the Capital Gains Tax, however much it may inhibit the Revenue Commissioners in arguing another value later for Capital Gains Tax purposes.

In practice, at the initial stage, the Revenue Commissioners value property for Stamp Duty purposes only, unless requested otherwise by the taxpayer and notify the taxpayer accordingly. Neither side is therefore bound by that valuation for the purposes of Gift Tax or Capital Gains Tax. This practice speeds up the adjudication process and is acceptable in general. However, if a practitioner wishes to agree a market value for all three taxes, he should inform the Revenue Commissioners and they will act accordingly. It is understandable that the Revenue Commis-

sioners are more likely to agree a market value in respect of a tax liability chargeable maybe at 3% for Stamp Duty purposes than in respect of a Gift Tax or a Capital Gains Tax liability, which may be charged at a rate of maybe 30%. No problem should arise if a practitioner makes it quite clear to the Revenue Commissioners that he requires a market value agreed for all tax purposes.

It should be noted that we are speaking here of the open market value of immovable property. Different considerations would apply in the case of a transfer of private company shares where differing legislative provisions might apply for valuation purposes.

(ii) The market value of the property when it was acquired by A is necessary for Capital Gains Tax purposes. If the property was acquired prior to 6th April, 1974 the market value at that latter date is also necessary.

(iii) The question of whether the property has development value can be important. This is particularly so for Capital Gains Tax purposes, where the rate of tax and indexation may be affected. It should be noted that development value has no relevance for Capital Acquisitions Tax purposes in the sense that lands that have development value are still agricultural property and, as such, are entitled to agricultural relief if applicable in the circumstances of the particular case.

(iv) If the property to be transferred includes a dwelling house it may be exempt from Capital Gains Tax under Section 25 Capital Gains Tax Act 1975 if it is A's main residence. In such a case an apportionment of market value would be necessary for Capital Gains Tax.

(B) **Regarding the Transferor (Disponer):**

(i) The consanguinity between the Transferor and the Transferee is very relevant;

(a) The amount of Stamp Duty chargeable may be reduced by one-half if the appropriate consanguinity certificate is included in the transfer. (See Paragraph 4 of the Head of Charge 'conveyance or transfer on sale' in the First Schedule as amended to the Stamp Act 1891).

In this connection a common problem must be high-lighted. Where, for example, the Transferor transfers property to his son and to the son's wife, the provisions of Paragraph 4 do not apply, as the son's wife has no consanguinity to the Transferor. This problem cannot be overcome by two transfers, that is, one from the Transferor to his son of the entire property followed by a transfer by the son of that property into the joint names of himself and his wife because, in that case, the overall duty payable would be the same. However, if the family home is involved, the second transfer would be exempt to that extent and therefore a Stamp Duty saving might be obtained. If two transfers are used, the anti-avoidance provisions of Section 8 Capital Acquisitions Tax Act 1976 should be kept in mind.

(b) For Capital Acquisitions Tax purposes the class thresholds and the "favourite nephew" relief are based on consanguinity.

(c) For Capital Gains Tax purposes the relief afforded by Section 27 Capital Gains Tax Act 1975, as amended by Section 8 Capital Gains (Amendment) Act 1978 is confined to children, including favourite nephews and nieces of the Transferor.

(d) The provisions of the Status of Children Act 1987 may be relevant (see Sections 3 and 27 of that Act).

(ii) **The Age of the Transferor:** This is relevant for Capital Gains Tax purposes. The reliefs provided by Section 26 Capital Gains Tax Act 1975 and also Section 27 as already mentioned apply only where the Transferor is over 55 years of age at the date of the transfer.

(iii) **How long has the Transferor owned the Property?** This is relevant for Capital Gains Tax purposes as the rate of tax and indexation may be affected. Furthermore, the reliefs under Section 26 and 27 of the Capital Gains Tax Act already mentioned are not available unless the qualifying assets have been owned by the Transferor for the period of not less than 10 years ending with the date of the disposal.

(iv) **Does the Transferor wish to reserve rights to himself or to others?** Such a provision would affect Stamp Duty and Gift Tax. A deduction could be claimed for Stamp Duty purposes

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on any rights reserved to the Transferor. Rights reserved to persons other than the Transferor would not be a good deduction for Stamp Duty purposes. For Gift Tax purposes rights reserved by the Transferor for himself would be a valid deduction in taxing the Donee, as also would rights reserved to persons other than the Transferor. Such rights given to persons other than the Transferor would constitute benefits taken by them from the Transferor for Gift Tax purposes.

In relation to Capital Gains Tax, the position is not as clear cut regarding allowing rights reserved by the Transferor for himself or for others in arriving at the chargeable gain. Section 33 Capital Gains Tax Act 1975 deals with transfers where the person disposing and the person acquiring are connected persons as defined. Sub Section 5 of that section allows a deduction from the market value of the property in respect of any right or restriction enforceable by the Transferor or by any person connected with him. However, a proviso to the sub section states that certain types of rights are not deductible. As regards rights reserved by the Transferor for himself, regard must be had to the provisions of Section 8 (1)(b) Capital Gains Tax Act 1975, which deals with part disposal. There is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of. In the case of a gift therefore, with some interest reserved to the Transferor, the gain will only be related to the interest given away. However, if the gift results in a gift in settlement, as referred to in Section 15 (2) of the Act, any gain will be related to the whole asset settled.

(v) **Does the Transferor wish to reserve a Power of Revocation to himself?** The Transferor may have very good social reasons for retaining such a power. The fiscal implications should be explained fully to him. Reference should be made:

(a) As regards Stamp Duty, to Section 34 (5) Finance Act 1978.

(b) As regards Capital Acquisitions Tax, to Sections 30 and 31 Capital Acquisitions Tax Act 1976.

(c) As regards Capital Gains Tax, to Section 33 (5) and Section 45 (4) Capital Gains Tax Act 1975.

(vi) **Has the Transferor received any gifts from any Disponer within three years of the present gift?** This is very relevant in the light of the anti-avoidance provisions of Section 8 Capital Acquisitions Tax Act 1976.

(vii) Keeping in mind that Capital Gains Tax is referrable to a particular tax year, it will be necessary to ascertain if the Transferor had disposed or intends to dispose of any other property during that particular tax year. The question of allowable losses will also need to be looked at.

(C) **Regarding the Transferee (Donee)**

(i) The consanguinity between the Transferee and the Transferor has already been dealt with at B(i).

(ii) The age of the Transferee may be relevant for Gift Tax purposes, for example, the minor child of a deceased child of the Transferor would be entitled to a class threshold of £150,000 and not £20,000.

(iii) For Gift Tax purposes it is essential that full particulars of any other benefits taken by the Transferee from any persons since 2nd June, 1982 should be ascertained. The presence of such benefits can have a profound effect on the tax liability of the current benefit.

(iv) In the case of agricultural property it will be necessary, in order to ascertain whether the Transferee is a "farmer" within the meaning of Section 19 Capital Acquisitions Tax 1976, to obtain particulars, including the value, of all the assets held by the Transferee at the date of the transfer.

(v) **Is any consideration moving from the Transferee?** For Stamp Duty purposes, inadequate consideration is ignored and Duty is charged on the market value of the property being transferred (Section 74 (5) Finance (1909/10) Act, 1910). Where the property being transferred is subject to a mortgage which is being taken over by the Transferee, the practice of the Revenue Commissioners, it is understood, is to charge Stamp Duty on the equity of redemption only. This practice is probably based on the fact that the equity of redemption was all that the Transferor had to give away. The Revenue Commissioners may also charge Stamp Duty on the basis of a sale made in consideration of the amount of the mortgage if this resulted in more duty (Section 57 Stamp Act 1891).

For Gift Tax purposes, partial consideration, as already stated, is allowable as a deduction in arriving at the taxable value of the gift (Section 18 (2) Capital Acquisitions Tax Act 1976). The consideration must move from the Transferee but not necessarily to the Transferor.

In Capital Gains Tax, the legislation appears to make a distinction between the word "gift" and a transaction which is not a bargain made at arm's length. The word "gift" appears to mean a transfer of an asset where the Transferor receives no consideration, while a transfer which is not a bargain made at

arm's length represents a transfer at an under-value. In each case, however, the market value is applicable under Section 9 Capital Gains Tax Act 1975 and no allowance is made for partial consideration.

While this check list does not purport to be exhaustive, it is hoped that it will enable the practitioner to obtain all the information necessary in order to quantify, with reasonable accuracy, the fiscal cost to his client of the proposed voluntary disposition *inter vivos*. □

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Younger Members' News

AND THEN THERE WAS . . .

This month's Prize Winner is Alex Gibbons, P. J. O'Driscoll & Sons, Solicitors, Bandon, Co. Cork.

And then there was the newly qualified solicitor whose client was pleading guilty to a charge of drunken driving. He appealed to the District Justice not to be too harsh in the circumstances as "my client was returning from his sister's wedding, which would explain why he was as drunk as a justice". The D.J. did not take too kindly to his remark and barked "I think if you check it you will find the saying is 'as drunk as a lord'." To which our fledgling colleague replied "Yes, my Lord".

And then there was the man accused of drunken driving whose excuse was that he was watching the snooker on the T.V. The T.V. went on the blink so he went to his local to see the result and had two pints of Guinness.

The Justice in summing up stated that this was a case where the defendant sunk the black and got snookered on the way home. (Eva Tobin)

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Frank Moore, Manager of the Irish Permanent Building Society, Ennis, Co. Clare, presenting the I.P.B.S. cheque for prizes to David Casey of John Casey & Co., for the Law Society Ennis Table Quiz organised by the Younger Members Committee of the Law Society. Also in the picture is Geraldine Thornton, I.P.B.S., Solicitor, Houlihan & Co., Solr. for the I.P.B.S. in Ennis (far left) and Frances Twomey of the Younger Members Committee (right).

Correspondence

The Editor,
Law Society Gazette,
Blackhall Place,
Dublin 7.

Re: Lawyers Fishing Club of Ireland

Dear Sir,
I refer to a letter from Mr. Frank Wickham-Smith, Solicitor, of Southgate, England which was published in the Law Society *Gazette* in the Republic of Ireland in August 1988 advising of the existence of the Lawyers Fishing Club in England, Scotland and Wales which comprises Solicitors, Barristers, Apprentices and Bar Students. Mr. Wickham-Smith wished to enquire if the professions in Ireland would form such a Society here with a view to arranging sporting contacts between the professions in these islands.

There has been a solid indication of interest in the intervening period and I am confident that there will be even more.

Therefore, it is my pleasure to propose that the Lawyers Fishing Club of Ireland be formed by ladies and gentlemen of the Solicitors and Barristers professions (including apprentices and bar students) in the Republic of Ireland and in Northern Ireland for the purposes of promoting fellowship within these islands through a shared interest in fishing. The emphasis would be on game fishing and I would be appreciative if anyone interested would write to me.

One of the main tasks of the Club would be to promote Annual Matches alternating between venues in Ireland and Britain. Mr. Wickham-Smith has kindly asked if a group of lawyers from Ireland would go to England for a friendly match this year, probably in September. Please also indicate if you would wish to participate in this event.

I await responses and I hope to be able to arrange an inaugural meeting in due course.

Yours faithfully,
ADRIAN P. O'GORMAN
Avoca House,
8 Marine Road,
Dun Laoghaire,
Co. Dublin.
Tel. 806961 Ext. 299.

A.I.J.A.

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Book Review

Inheritance Tax – Barry McCutcheon, *British Tax Library. Publishers: Sweet & Maxwell. Stg£110.00*

This work is of a very substantial nature and has to be considered both from a subjective and objective point of view. Subjective in as much as, if familiar with the UK system of Inheritance Tax, whether it would enhance the information or knowledge in that area. It also has to be considered from an objective point of view as to whether it would enhance the capability and ability of the Irish Tax Practitioner in relation to Capital Acquisitions Tax. On both these counts, it is a success.

Subjectively, it is an erudite and easily understood (with a few exceptions) work on the new UK Inheritance Tax system which was introduced under the Inheritance Tax Act, 1984. Basically, although called Inheritance Tax, it is a *mutations* tax (i.e. one which taxes what passes), similar in form to Estate Duty but with many new complications and difficulties introduced which makes tax planning quite difficult and indeed speculative.

It breaks this difficult tax down into easily understood sections which lead step by step to an overall knowledge of the system which will stand a practitioner in very good stead. It begins with an overview of the system setting out in short form the more complicated concepts which the reader will be required to investigate in the remainder of the book. This, in itself, is a most useful guide as the reader will already have an idea as to the complexities.

We are then led through the specific complications starting with transfers of value and breaking this down into actual transfers and notional transfers. This explanation as to the difference between them and the reliefs etc. which flow from them and where they are different is most useful. It is interesting to note that "death" is a notional transfer of value. In the area of notional transfers it covers, in exceptional detail, the use of close companies, for example, a reduction in the value of an Estate or Shares using a close company can be a notional transfer of value. It also covers excluded property and other reliefs insofar as they effect transfers.

From there it leads us into exempt transfers and to what type of transfers these exemptions apply. Like C.A.T. it has a small gifts exemptions (annual) and for those of us familiar with Estate duty, the terms "normal" and "reasonable" in relation to expenditure form an exemption. The list from this particular chapter is very similar to the exemptions from C.A.T. with a few noteable exceptions.

In Chapter 4, the Author leads us through the most complicated provision of the legislation namely, Potentially Exempt Transfers called in short, PETs. The advantage of making PETs, the complications they cause for chargeable transfers and ultimately on death, if the death should occur within seven years of the making of the PET, are all explained in detail and the section is liberally laced with examples. It also deals with anti-avoidance situations relating to gifts into settlements.

Once the concept and complications of PETS are understood, the rest of the compution provisions of IHT become relatively simple.

The next step is to deal with chargeable lifetime transfers viz: gifts, and settlements which are not of the favoured kind and again, dealing with the complications arising from those in relation to death and PETS.

The chapter also contains and explains the compution of tax and the concept of "grossing up". There are only two bands of Inheritance Tax in the U.K. namely nil and 40%. The first £110,000.00 to be increased to £118,000.00 in the recent budget is charged at nil and the balance at 40%. Understanding this particular aspect of IHT will help the Irish Practitioner in the area of double taxation relief and tax planning in that area.

Within that chapter, tax planning, taking into account reduced rates, chargeable transfers, PETs and their effect, is explained together with the benefit of Life Assurance in IHT Tax Planning.

Again, for those of us familiar with Estate Duty, Chapter 6 relates to "reservation of benefit" which is again, basically, drawn from the Estate Duty legislation with all the old cases familiar to the older practitioners such as Monro, D'Avigdor-Goldsmid etc.

Logically, therefore, we are led to the charge on death and the differences between our respective taxes are highlighted in this particular area for those familiar with CAT. However, IHT is a tax with which practitioners must be familiar because of of the proximity of the UK and the likelihood that some clients will have money or property invested in the UK. It is in the area of the charge arising on death that the similarities between Estate Duty and IHT are brought out but IHT has its own reliefs such as business relief, relief for woodlands etc. There are also reliefs for persons on active service and quick succession relief which, unfortunately, do not apply to C.A.T.

It is possible to see where property could be charged twice under IHT rules, for example, when a father makes a potentially exempt transfer to the son and the son dies intestate and unmarried prior to the father. This would mean that the PET or portion thereof made by the father would end again in the father's estate thereby being doubly charged. There is relief for this type of situation as well.

This particular chapter is laced with examples explaining the convolutions of the tax as to whether PETs are chargeable or ignored, the consequences on the tax rate at the date of death, tapering relief relating to early PETs which become chargeable and so on. Again, the Chapter points out the complexities of the tax and emphasises for Irish practitioners the difference between the Irish C.A.T. and the UK IHT.

This chapter also deals with posthumous variations, whether testacy, intestacy, whether by agreement among the parties or by the use of disclaimers etc. These variations also receive favourable treatment for CGT purposes although under the recent budget the use of variations has been severely restricted in the UK.

Part 2 of the book is concerned with the special charging provisions of the IHT code. Again it starts with a general introduction and review giving an idea of the problems in short, how they are overcome or otherwise met. Cir-

cumstances in which these charges arise are set out and then each one is covered in detail. The main areas concerned are discretionary trusts with a periodic charge and the treatment of retained and accumulated income. This part is also concerned with discretionary trusts which would be subject to the exit charges, and here are met very many of the concepts which are familiar to the C.A.T. practitioner such as, omission to exercise a right, transfers within or through companies etc. Again, however, the philosophy of the tax is different and must always be borne in mind.

The chapter also covers the fiscal domicile rules of the UK code whereby a person having resided in the UK for 17 years out of the previous 20 years is regarded as having a fiscal domicile there. Similarly, if a person having been domiciled there leaves the UK, he retains that domicile for three years.

There is also a chapter devoted to favoured trusts such as accumulation and maintenance trusts, protective trusts, charitable trusts, employee trusts and the form of relief given to them.

It is in Part 3 that we find the areas that are most relevant to C.A.T. as it deals with items which are effective in both taxes. Again, it starts with an overview leaving the plan of campaign for the rest of the part and it in fact forms over half the publication.

The valuation provisions of IHT in Section 52 of the IHT Act 1984 are very similar to the C.A.T. provisions and although there are special reliefs in the UK which do not apply here, many of the cases and observations in this chapter would be relevant to C.A.T.

In the end, Chapter 15 is very relevant in the area of C.A.T. as it covers such items as domicile both legal and fiscal and can be very important from the returned emigrants' point of view.

It also covers the "foreign" element of IHT, what property would be "excluded property".

The following two chapters are concerned with settled property generally and the favoured settlements in the UK. It incorporates extensive discretionary trusts cases including the *Pearson* case and is very relevant to C.A.T. It also discusses the effect of *Furniss -v- Dawson* on UK transactions and although this is not relevant here, marriage consideration.

There is again a further chapter devoted to dispositions by associated operations and the same type of disposition is included in the Capital Acquisitions Tax Act, 1976. The Irish position is not defined but the IHT provision is very similar to the Estate Duty position and within that concept the chapter considers the concept in the light of the *Ramsay* and *Furniss* decisions. Again, familiar Estate Duty cases appear, such as *Bambridge -v- IRC,* and *IRC -v- Herdman* in this area.

In particular, the Convention between Ireland and the UK is discussed in great detail and is perhaps the first discussion I have seen on the Irish/UK Taxation treaty for Capital Tax although it merely repeats the main provisions of the Convention with certain problems within the context of those provisions being discussed.

This is an extremely handsome publication and would grace any practitioner's bookshelf with authority. As a reference work, it fulfils all the functions required with easily accessible information and, although tends to be wordy in certain areas, it is essential for all those concerned with IHT and, to a lesser extent, C.A.T.

Objectively, most use of this publication will be made by practitioners who concern themselves with tax as their main function and for those, I would heartily recommend the publication.

Brian A. Bohan

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Professional Information

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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 as 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.
25th day of May, 1989.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Thomas McHugh, Folio No.: 932; Lands: Ummeryroe; Area: 49a.0r.28p.; County: **SLIGO.**

Michael and Ann Costello, Folio No.: 22727F; Lands: (1) Oranhill; (2) Oranhill; Area: (1) 0.263 acres; (2) 0.044 acres; County: **GALWAY.**

Patrick McGuill, Bennekerry, Co. Carlow; Folio No.: 5815F; Lands: Bennekerry; County: **CARLOW.**

Patrick Joseph Finnerty, Cloonkeenkerrill, Colemanstown, Ballinasloe, Co. Galway; Folio No.: 22450F; Lands: Cloonkeenkerrill; Area: .500 acres; County: **GALWAY.**

Thomas Neville, Coolrainey, Curracloe, Co. Wexford; Folio No.: 15153: Lands: Coolrainey, Barnahask and Curracloe; Area: 4.869 acres; 17.138 acres; 5.094 acres; 0.806 acres; 1.456 acres and 9.625 acres; County: **WEXFORD.**

John B. Ryan, 62 Kincora Road, Clontarf, Dublin 3; and **John F. Morris,** 10 Clare Street, Dublin 2; Folio No.: 74467L formerly 307LSD; Lands: the property situate at 35 Mount Shannon Road, situate in the Parish of St. Jude, district of Kilmainham, Kilmainham, Dublin 8; County: **DUBLIN.**

Timothy O'Shaughnessy and Marie O'Shaughnessy, Ivy Cottage, Leghanamore, Togher, Co. Cork; Folio No.: 29608F; Lands: Lehenagh More; Area: 0.238 acres; County: **CORK.**

Charles Matthews, Cullenmore, Dring, Granard, Co. Longford; Folio No.: 2766; Lands: Culleenmore; Area: 23a.3r.17p.; County: **LONGFORD.**

Patrick Walsh, Elizabeth Walsh and John Walsh, 13 Whitethorn, Douglas Road, Cork; Folio No.: 10132F; Lands: Whitethorn (south side of Douglas Road); County: **CORK.**

James Martin Cullen, Cartron, Caltra, Ballinasloe, Co. Galway; Folio No.: 2505; Lands: Cartron; Area: 55a.1r.26p.; County: **GALWAY.**

Thomas J. Gibbons, Kingshill, Salthill, Galway; Folio No.: 46107; Lands: (1) Lenaboy; (2) Lenaboy; Area: (1) 5p.20 sq. yds.; (2) 0p.8 sq.yds.; County: **GALWAY.**

James Robert Dunne, "Hill Crest", New Road, Roscrea, Co. Tipperary; Folio No.: 21647; Lands: Parkmore; County: **TIPPERARY.**

Mary Doran, Ballybanogue, Edermine, Enniscorthy, Co. Wexford; Folio No.: 14312; Lands: (1) Edermine; (2) Edermine; Area: (1) 6a.1r.3p.; (2) 0a.2r.11p.; County: **WEXFORD.**

Oakpark Developments Limited, Stephen Court, 18/21 St. Stephen's Green, Dublin 2; Folio No.: 11298F; Lands: The property situate in the Townland of Broadmeadow and Barony of Nethercross; County: **DUBLIN.**

Eamonn Flanagan, Claremount, Foxford, Co. Mayo; Folio No.: 51194; Lands: Foxford; Area: 0.550 acres; County: **MAYO.**

Crossan Transport Group Ltd., Dublin Road, Dundalk, Co. Louth; Folio No.: 7391; Lands: Yellowbatter; Area: 2.213 acres; County: **LOUTH.**

Patrick Farrell, Kilrooskey, Roscommon; Folio No.: 17541: Lands: (1) Carrowbaun; (2) Corbo; Area: (1) 21a.3r.28p.; (2) 1a.3r.30p.; County: **ROSCOMMON.**

Thomas O'Connell, Ower East, Moycullen, Co. Galway; Folio No.: 1679; Lands: Ower; Area: 12a.3r.15p.; County: **GALWAY.**

Brendan Scallan and Eugene Scallan, Folio No.: 3824; Lands: Lands situate in the townland of Cloghran, Barony of Castleknock, Co. Dublin; Area: 1.507 hectares; County: **DUBLIN.**

John G. Manahan, formerly of 9 Westmoreland St., Dublin 2, now of "Shaundar", Newtownpark Avenue, Blackrock, Co. Dublin. Folio No.: 3651; Lands: Townland of Drummartin, Barony of Rathdown. County: **DUBLIN.**

Lost Wills

McGILLICUDDY, Con, late of Lower Stores, Waterville and Glengall Road, Kilburn, London NW6. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 6th March, 1989, please contact Messrs. J. B. Healy & Co., Solicitors, O'Connell Street, Cahirciveen, Co. Kerry.

SHANKY, Thomas, deceased, late of Blackfort, Ardnagh Breague, Kilmainham Wood, Kells, Co. Meath. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on 3rd October, 1984 at Our Lady's Hospital, Navan please contact C. Comiskey & Company, Solicitors, Brighton House, 29 Fairview Strand, Dublin 3. Telephone 01-338489/ 336391.

O'CONNELL, Donal, deceased, late of 34 Canon Sheehan Place, Mallow, Co. Cork. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on 18th April, 1989 please contact Patricia Harney & Co., Solicitors, ACC House, Bank Place, Mallow, Co. Cork. Telephone (022) 20140.

Notices of Application

In the matter of the Landlord and Tenant Acts 1967 to 1987
NOTICE OF APPLICATION
TAKE NOTICE that on the 19th day of July 1989 an Application will be made by Martin Vincent Morris to the County Registrar of the County of Tipperary sitting at The Courthouse, Clonmel at 11.30a.m. or at the next opportunity thereafter:
1. For an Order determining that the Applicant is entitled under the Acts to purchase the fee-simple in the premises known as Cashel Street, Clonmel, County Tipperary.
2. For an Order determining the purchase price of the fee-simple in the said premises.
3. For such further and other Order as the County Registrar shall deem fit which Application will be grounded upon the documents of title to the said premises, the facts of the case and the reasons to be offered.

Dated this 12th day of May, 1989.
J. G. Skinner & Co.,
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2. For an Order determining the purchase price of the fee-simple in the said premises.
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Dated this 12th day of May, 1989.
J. G. Skinner & Co.,
Solicitors,
3 New Quay,
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Vol. 83 No. 6 June 1989

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INCORPORATED LAW SOCIETY OF IRELAND
Vol. 83 No. 6 June 1989

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★

Cover Photo: Ernest J. Margetson, Senior Vice President of the Law Society (left) with Mr. Peter Prost, Managing Director of Sedgwick Dineen Personal Financial Management.

★

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Viewpoint

The Legal profession are constantly being made aware of the difficulties caused by clients who do not make Wills. An even greater problem can occur where a Will is made but then lost. If Wills had to be registered then the exact location of the Will would never be in doubt. The creation of a Wills Register is a reform which is long overdue in Irish Law. A requirement that all Wills be lodged in a Wills Registry within a certain given time after being made would help address the difficulties which can arise.

One of the main objections to a Wills Registry is that the privacy of the individual may be infringed. This need not be the case. It would be possible to ensure that Wills could only be inspected by the Testator during his lifetime or produced to his Executor on the evidence of a death certificate.

Under such a scheme Solicitors would still, of course, keep a copy of the Will so they would be in a position to advise the client on its contents and the necessity for updating it. The Registry would simply eliminate the difficulties which can arise when the location of a Will is in doubt or there is a query as to whether any Will was actually made.

It is interesting to note that the Registry of Deeds was originally conceived as a Registry of Deeds and Wills. However, registering of Wills never took off, perhaps due to fears over confidentiality.

Another practical problem which can arise when someone dies is locating their assets. This is particularly so when money might have been discreetly put away as security against a "rainy day". Frequently the spouse or children will have been too polite to ask the deceased what he actually did with his savings.

Deposit books, prize bond receipts and insurance policies are frequently found in an old brown envelope in the bottom drawer. But if the deceased was more creative and imaginative, these valuable documents may be lost forever and the funds remain unclaimed.

The Law Society has tried to deal with this problem by providing solicitors with a form of Asset Register for their clients. This form is completed by the person making the Will and then left in a safe place with the original Will so that the Executor will have a list of his possessions. The only problem with the Asset Register is that, to be of any value, it does have to be updated frequently.

These two practical problems of lost Wills and lost Assets could be overcome with a correct procedure being set up as part of a nationwide Wills Registry System but this can only come about when the public overcome their fear of Wills in general. It is surprising in this day and age that still 50% of those people who need to make Wills fail to do so. □

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Summary judgment on foot of an architect's certificate — a conflict resolved?

A decision of Costello J. handed down on the 19th January, 1989, on the issue of Summary Judgment on foot of an Architect's Interim Certificate, is of considerable importance. At one time, it was thought that an Architect's Interim Certificate was almost the equivalent to a Bill of Exchange and had to be honoured on presentation. An employer could not seek to set off against a claim on foot of an Architect's Interim Certificate, a proposed counterclaim in respect of defective workmanship. The situation was similar to claims in respect of freight in Admiralty Law.

by
PAUL SREENAN, B.L.

The landmark English decision on this matter was that of *Dawnays Limited -v- F. G. Minter Limited* [1971] 2 All E.R. 1389. That was the case where Denning M. R. held that the provisions of the Contract which required Interim Certificates to be paid within 14 days were inconsistent with the right of set off. He pointed out that the matters which could be deducted from an Interim Certificate were clearly set out e.g. retention monies, monies previously paid etc., and did not include counterclaims for unliquidated damages for defective workmanship or delay. That reasoning was followed in a number of English cases. However, in more recent times, that principle was effectively reversed by two House of Lords' decisions and one decision of the Irish High Court. The principal English case was that of *Gilbert-Ash (Northern) Limited -v- Modern Engineering (Bristol) Limited* [1973] 3 All E.R. 195. In that case a clause permitting a contractor to withhold sums from a sub-contractor was in the following terms:- "If the sub-contractor fails to comply with any of the conditions of the sub-contract, the contractor reserves the right to suspend or withhold payment . . . the contractor also reserves the right to deduct from any payment certified as due . . . the amount of any bona fide contra accounts and/or other claims which he . . . may have against the sub-contractor or contractor with this or any other contract." It was held that this entitled the main contractor to deduct unliquidated damages for breach of warranty. (Clearly, the wording of this clause is very different to the wording of the 19777 R.I.A.I. Form of Agreement.) However, three of the Lords Justices took the opportunity to disapprove of the earlier decision in *Dawnays* case. They held that a counterclaim in respect of defective workmanship could be the subject matter of a set off against a claim on foot of an Architect's Interim Certificate. The second English case was a case of *Aries Tanker Corporation -v- Total Transport Limited* [1971] 1 All E.R. 398. This was a shipping case which affirms the rule of Common Law that a claim in respect of cargo cannot be deducted from freight. The House of Lords stated *obiter* in that case, that counterclaims in respect of defective workmanship could be set off against a claim on foot of an Architect's Interim Certificate and again, disapproved of the *Dawnays* decision. On the basis of these decisions, the editors of Emden's Building Contract and Practice, 8th Edition (1980) page 98 conclude:- "Accordingly, it is submitted that the Law at present is that set offs may be raised in actions on Certificates in the same way as in other actions for work and materials, and that the contrary view is not now sustainable."

Irish case law

There is only one reported Irish case and that is the case of *P. J. Hegarty -v- Royal Liver Friendly Society* [1985] I.R. 524. There had been an earlier unreported decision on the topic *John Sisk & Son Ltd. -v- Lawter Products B.V.* (Finlay P. 15th November, 1976). In the earlier decision, Finlay P. had considered a claim for summary judgment on foot of an Architect's Certificate for the sum of £168,537. In that case, Finlay P. considered a contract which was in the standard form of the R.I.A.I. (1966 edition). He reviewed the relevant clauses and in considering the issue of whether or not a counterclaim could be raised by way of set off against an Architect's Certificate, stated the relevant principle of law as follows:- "I believe the true test to be not whether the common law right of set off has, by the terms of the Building Contract been unequivocally excluded, but rather as to whether all the relevant terms of the Building Contract are in any particular event inconsistent with the exercise in that event of such a right of set off." Finlay P. concluded that the relevant terms of the 1966 edition were inconsistent with the exercise of a right of set off and granted summary judgment for the amount claimed. In the *P. J. Hegarty -v- Royal Liver Friendly Society* case, Murphy J. refused to grant judgment in summary summons proceedings on foot of an Architect's Certificate, pending the hearing of a counterclaim, since he held that the

decree on the counterclaim could be set off against the claim on foot of an Architect's Certificate.

This decision appears to be diametrically opposed to the decision of Finlay P. in *Sisk -v- Lawter.* Murphy J. (who was considering a contract in the form of the 1977 edition of the R.I.A.I. Standard Form) chose not to follow that case. He accepted that the principles were correctly set out by Finlay P. in the passage quoted above, and said that he would have been extremely slow to differ from the conclusion reached by the President of the High Court were it not for what he regarded as "an important distinction" namely, that the latter half of clause 38 (the arbitration clause) of the 1977 edition of the R.I.A.I. form provides that "such reference, except . . . on the question of certificates, shall not be opened . . ." This it is submitted, was not an important distinction at all for two reasons. Firstly, it is submitted that if one reads the clause in its entirety, the clause appears to contemplate that the principal "question of certificates" about which there will be a dispute or difference is the withholding of one (the clause begins . . . "in case any dispute or difference shall arise between the employer and the architect on his behalf and the contractor . . . as to the construction of the contract or as to any matter or thing arising thereunder or as to the withholding by the architect of any certificate . . ."). It is possible to imagine a dispute arising during the course of the contract as to the interpretation of a certificate. Apart from that however, it is submitted that the mere use of the words "question of certificates" in the context of the arbitration clause does not justify an inference that the liability to pay an interim certificate on presentation, is anything other than an absolute one. Secondly, apart from one or two minor differences, there is no distinction between the wording of the arbitration clause in the 1966 and 1977 editions of the R.I.A.I. standard form. Murphy J. concluded his judgment in the *P. J. Hegarty* case saying that even if he had decided it differently, he would nevertheless have granted a stay of execution on the judgment on foot of the certificate to enable the counterclaim to be prosecuted. As can be seen, the law in relation to this area was left in a most unsatisfactory situation as a result of the conflict between these two Irish decisions.

Rohan Construction Ltd. -v- Antigen

This is the importance of the recent decision of Costello J. The claim by Rohan Construction Limited was for summary judgment on foot of an Architect's Interim Certificate in the sum of £191,116 and interest accruing thereon. The Defendants brought a Motion seeking to stay the proceedings pending arbitration of a claim by them for a sum of approximately £400,000 damages in respect of alleged defective workmanship and materials. It had been agreed between the parties that this proposed claim against the contractors should be referred to arbitration and final decision of an agreed arbitrator. However, the Plaintiffs disputed the Defendants entitlement to stay their claim on foot of the Architect's Interim Certificate pending the outcome of the arbitration or to seek ultimately to set off the Defendants' award in the arbitration (if any) against the claim on foot of the certificate. Costello J. held that just like the 1966 edition of the R.I.A.I. Standard Form, the relevant terms of the 1977 edition were inconsistent with the exercise of a right of set off against a claim on foot of an Architect's Certificate. He expressly followed the decision of Finlay P. in *Sisk -v- Lawter* and declined to follow the decision of Murphy J. in *P. J. Hegarty -v- Royal Liver.* Accordingly, he refused to stay the claim for summary judgment pending arbitration. However, the Defendants also raised the additional point of a stay of execution pending the determination of the arbitration. This application was made under Order 42 Rule 17 of the Rules of the Superior Courts. Referring to the unreported decision of Barrington J. in *Agra Trading -v- The Minister for Agriculture* (19th May, 1988) Costello J. refused a stay of execution on the basis that the agreement of the parties as reflected by the terms of the 1977 edition of the R.I.A.I. Standard Form was that there should be no set off and accordingly, to grant a stay of execution would be inconsistent with the intention of the parties and in normal circumstances it would not be proper to grant a stay of execution. He pointed out that the Court still had discretion in cases such as this to grant a stay of execution but there must be "special reasons" for overriding the intention of the parties and in this case, not only were there no special reasons for doing so, but there were reasons of some substance against granting a stay namely, that a considerable portion of the Architect's Certificate was earmarked for sub-contractors and the principal contractors were effectively trustees of this money and the sub-contractors ought not to be prejudiced in this way simply because the employers raise a counterclaim against the principal contractors.

In the light of the decision of Costello J. in *Rohan Construction -v- Antigen,* it seems clear that *P. J. Hegarty -v- Royal Liver Friendly Society* no longer represents good law in this jurisdiction and Architect's Interim Certificates issued under the 1977 edition of the R.I.A.I. Standard Form cannot be subject to a set off in respect of claims for unliquidated damages nor, in the absence of special circumstances, can judgments for sums owing on foot of Architect's Interim Certificates be subject to a stay of execution so as to enable employers to prosecute claims in respect of defective workmanship or materials. □

James Nash F.S.S. Dip.

Forensic Document Examiner and Handwriting Consultant

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From the President . . .

"Dancing with the Dinosaurs" was embossed on the invitation to the Summer Charity Ball for the benefit of the Irish Youth Foundation in London run by the Irish Solicitors in London Bar Association on Saturday, 3rd June in the Natural History Museum, South Kensington, London. Noelle Anne and I were delighted to be invited. Other guests included Niall McCarthy of the Supreme Court and his wife Barbara.

The Irish Solicitors in London Bar Association was founded about a year ago to enable Irish Solicitors to lobby on a collective basis for progress on the subject of their re-qualification in the U.K. At present there are over 150 Solicitors in London who are members of this organisation and we were delighted to represent the "home" profession at their function.

Whilst the E.C. Directive on the mutual recognition of higher education diplomas will come into force on the 4th January 1991, over the last few years multi-lateral negotiations have been going on between England and Wales, Scotland, Northern Ireland and ourselves to seek an agreed form of reciprocity of qualification. The U.K. Societies have now agreed the basic terms which should come into force early next year. We will be entitled to the same terms as soon as we enact the necessary legislation to abolish the two examinations in the Irish language that are at present a bar to Northern Ireland and overseas lawyers becoming members of our profession in this jurisdiction. In addition the Law Society needs the power to exempt Northern Irish and overseas solicitors from having to serve an apprenticeship.

It is hoped that thereafter an Irish Solicitor going to England will (on passing an examination in conveyancing and "general awareness" of the English legal system) be admitted as an English Solicitor limited to restricted practice for a period of three years, that is practising in a firm, either as assistant or in partnership. We, for our part, anticipate offering three years restricted practice as the sole entrance requirement without examination.

If you consider that there are at least 150 Irish Solicitors in London, you will appreciate that in the context of the Law Society, this is a Bar Association of considerable size.

This brings me to reflect that last year, for the first time in many years, the number of practising Certificates issued by the Society decreased, the reason being that a considerable number of newly qualified and not long qualified Solicitors are taking advantage of the opportunities to practise abroad that are now available. Whilst this may cause recruitment problems, particularly in the areas of our country outside Dublin, it must be on the other hand a matter of satisfaction and gratification that our Solicitors are now so highly regarded abroad that they can freely travel to gain experience and hopefully in many cases, to return and give us the fruits of that experience in the future.

This leads me to suggest that we may have a rethink in a radical manner our recruitment and training policies in this jurisdiction. Whilst it is not the objective of the Law Society to train Solicitors for foreign employment, in the context of 1992 we must appreciate that we are now part of a legal profession (not unified but perhaps heading that way) which serves a market of 320 million people. It may be that we will have to expand our facilities or rationalise them (such as by combining the Law Schools of the King's Inns and the Law Society as already proposed by me). Indeed, we may have to involve the universities further than we have in some form of post-graduate pre-professional training to circumvent the physical limitations of our accommodation in Blackhall Place and that of the Barristers in the King's Inns, and to counter our difficulties in finding enough practitioners able and willing to teach in the Society's Law School.

It is a constant complaint of the universities that their law graduates should have to face another law exam to gain entrance to our training system.

I have been travelling with the Director-General and Professors Woulfe and Sweeney to meet the different universities to seek to persuade them to offer greater language and business options in the Law Degrees provided by their faculties. I believe that at present too much "black letter" law is being taught inside the university degrees and there should be a much greater openness to the teachings and skills of other faculties. In the context of the Single Market who can contest that an increased knowledge of languages and broader commercial awareness are not essential?

These I believe are topics that will continue to be on the agenda for some years to come. □

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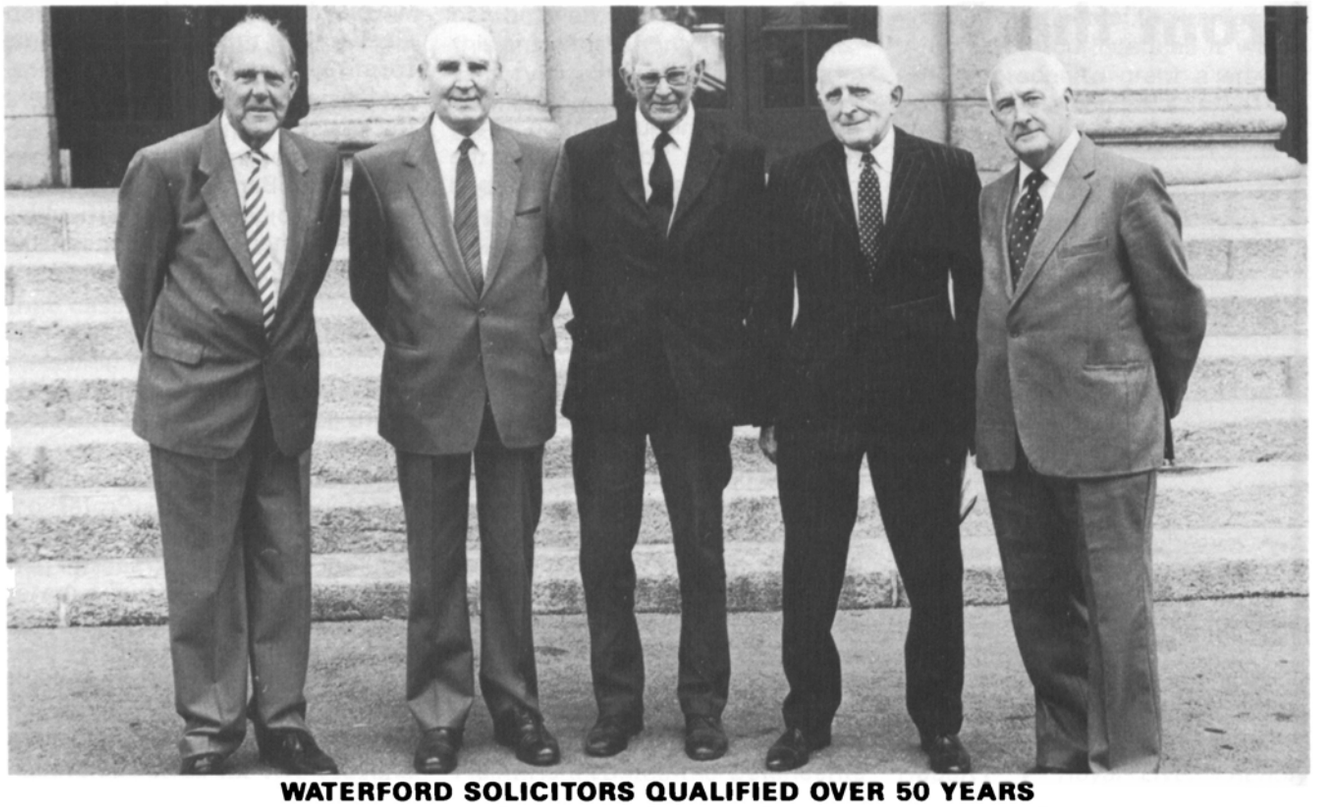

WATERFORD SOLICITORS QUALIFIED OVER 50 YEARS

This photograph, taken outside Waterford Courthouse, Catherine St., Waterford, includes five solicitors practising in Waterford who are qualified over 50 years. The group were honoured at a Dinner hosted by their local colleagues in Waterford Castle, The Island, Waterford. They are (left to right) Maurice Keller (Trinity 1937), Frank Hutchinson (Easter 1938), Fergus Power (Michaelmas 1931), Martin Halley (Hilary 1932) and Tom Kiersey (Trinity 1933).

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The College is an independent and private institution which is financed largely through gifts, donations, and endowments. Your assistance would be very much appreciated, and would help to keep the College and Ireland in the forefront of Medical Research and Education.

For tax purposes, the R.C.S.I. is regarded by the Revenue Commissioners as a Charity. Therefore, gifts and donations may qualify the donors for tax relief.

For further information about the College's activities, please contact:

The Registrar, Royal College of Surgeons in Ireland,
St. Stephen's Green, Dublin 2.

Practice Notes

Civil Proceedings in the District Court, Dublin

1. All such proceedings should be headed –
   Dublin Metropolitan District
2. (a) Civil proceedings for a simple debt, Tort, Breach of Contract should always be listed for Court No. 7, Dolphin House, Essex St., Dublin 2, at 10.30 a.m. on Mondays only.
   (b) Ejectment proceedings are listed by the office for Court 10, Thursdays – 2.15 p.m.
3. (a) In cases for a simple debt the following procedure applies:- The District Court Civil Office gives the return date and the record number in that proceedings. This record No. is placed on the original civil process, the copy civil process for the Plaintiffs Solicitor and this same number is also put on the notice of intention to defend on the process for service on the defendant. This record No. should always be quoted when bespeaking a decree by way of Summary Judgement.
   (b) Enforcement proceedings (1926-1940 Acts) may be brought in Swords, Dun Laoghaire or Dolphin House, depending on address of debtor.
4. All District Court proceedings must show jurisdiction on the face of the document, i.e.
   (a) The Contract was made within said District.
   (b) The defendant resides within said District.
5. The territorial jurisdiction of the Dublin Metropolitan District comprises of Dublin City and County and part of Co. Kildare which formerly was in the Lucan District Court Area. (See District Court Areas Order 1961). **Rathmichael** in **South Co. Dublin is in Bray D.C.A.**
6. The costs in the District Court are set out by reference to S.I. 218/82 and the Fees Order, 1986. (S.I. No. 377/86).

Signed: A. Donnelly (D.C.C.)
District Court Clerk,
24th May, 1989.
Metropolitan District Court,
Civil Office,
Dolphin House,
East Essex St.,
Dublin 2.
Phone 725555, Ext. 604

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c) Attending Court (Section 53 defence) £89.50
d) Attending to observe proceedings – to be negotiated.
e) Attending Coroner's inquest – to be negotiated.
f) Report on proceedings £52.00

Fax Transmissions

The Technology Committee would like to draw the attention of practitioners to the following aspects of fax transmissions which should be borne in mind:

1. It is possible for a sender to falsify both the time and date that a fax transmission was sent and it is also possible for the sender of such a transmission to falsify the origin of the fax transmission. This can only be done if the sender has a knowledge of the workings of a fax machine and deliberately interferes with same, however, it is important that practitioners should be aware of the possibility. The Committee has noted that the time of sending of many fax messages between solicitors is inaccurate in that solicitors have not asked their suppliers to alter the setting of the machine to take account of the change from winter time to summer time.
2. Fax transmissions once received can fade in the following circumstances:
   (a) if left in conditions of dampness;
   (b) if left in strong sunlight;
   (c) if left near a heater; and
   (d) as a result of efflux of time. Accordingly, important fax messages should be photocopied immediately on receipt to avoid their loss.
3. The Litigation Committee of the Society wishes to remind members that letters transmitted by fax should also be posted.

Technology Committee and Litigation Committee

Promulgation of the new Bye-laws of the Law Society

The new Bye-laws of the Incorporated Law Society of Ireland were ordained and made (without dissent) at the Half-Yearly General Meeting of the Society (held at the Hotel Europe, Killarney, Co. Kerry) on Friday, 5th May, 1989, and thereupon became effective. The previously existing bye-laws of the Society are now rescinded and have no further effect, without prejudice to the validity of any act or thing previously carried out, done, made or suffered pursuant to such rescinded bye-laws.

Each member of the Society will receive a punched loose-leaf copy of these new Bye-laws. If any member of the Society wishes to have a bound (unpunched) copy of the new Bye-laws, please apply to Chris Mahon, Director, Professional Services, Law Society, Blackhall Place, Dublin 7. □

PRACTICE NOTES — Contd.

Undertakings

The Law Society through the Conveyancing Committee has now agreed standard forms of Undertakings with the Irish Banks Standing Committee which were designed for use in all the normal circumstances in which Undertakings are usually given to a Bank. The wording of the forms has been agreed with the Banks after lengthy discussions and are considered to be reasonable and fair to both parties. It has been agreed that the wording of the forms shall not be subject to alteration and this should serve to eliminate the difficulties which have often occurred in the past with regard to acceptable wording for such undertakings.

These forms may be put on a Word Processor. However, where title documents are being obtained from the Bank the Solicitor would not be in a position to complete the Schedule to the appropriate Undertaking. It is accordingly envisaged that in those circumstances the Solictor would apply to the Bank for the document and the Bank would issue the Undertaking with the Schedule of Documents duly completed. The documents would be released to the Solicitor on the return of the signed Undertaking.

If it is proposed to put the forms on a Word Processor the following paragraph should be added to the end of each Under-taking:

> "I/WE certify that this form of Undertaking is in the form agreed between the Irish Banks Standing Committee and the Incorporated Law Society of Ireland. If any discrepancy occurs between this form and the agreed form the text of the agreed form shall prevail".

The Undertaking shall be signed by the Principal of the Firm or a Partner or by an Agent authorised in writing to do so by the Principal of the Firm. Attention is drawn to the words of caution at the bottom of the undertaking. □

Clawback on Leased Milk Quota

Since the 1st April 1989, the Minister for Agriculture has introduced a significant change in the rules governing Clawback on Milk Quotas. The current position is as follows:

Sales

The 5% Clawback on sales has been abolished altogether.

Lease

Up to 50,000 gallons – no Clawback.
Up to 75,000 gallons – 10% Clawback.
Up to 100,000 gallons – 15% Clawback.
Over 100,000 gallons – 25% Clawback.

The Clawback is calculated on the total gallonage of the Lessee *after* the Lease is taken and the percentage clawback relates only to the number of gallons by which the minimum threshold (50,000) has been exceeded. For example, a farmer with a 75,000 gallon quota who takes a lease of land with a further 35,000 gallons attaching to it will suffer the following clawback:

Own quota	75,000 gallons
Leased quota	35,000 gallons
Total.....	110,000 gallons
Threshold	50,000 gallons
Balance	60,000 gallons
Clawback 15%	9,000 gallons

The Clawback operates to transfer the appropriate gallonage to the National Reserve and is a *permanent* Clawback and not just for the duration of the Lease. Thus, in the example above, on the termination of the Lease, the land will revert back to the Lessor with 26,000 gallons of a Quota (35,000 minus 9,000).

Conveyancing Committee

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Correction

April Gazette – page 135. "People and Places"

The caption appearing under a photograph of a presentation to His Honour Judge Thomas F. O'Higgins by a group of lawyers paying a visit to the European Court incorrectly referred to the European Court as being located in Brussels. The European Court of Justice is in **Luxembourg** and the mistake is regretted.

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Social Welfare Appeals System

Law Society's Submission to Minister for Social Welfare on the Social Welfare Appeals System

The Law Society has noted that in the Programme for National Recovery in Section 4 under the heading of Greater Social Equality that the Government are examining what changes if any are required in the Social Welfare Appeals System with particular regard to ensuring that the system is perceived to be fair.

Having consulted extensively with its members the Law Society considers that the system could be considerably improved and is unsatisfactory in the following respects.

1. An Appeals Officer is a Civil Servant in the Department of Social Welfare and is employed by the Minister and it is unsatisfactory that he should have to decide on an issue in an appeal between the Minister who is his employer and an insured person who is the appellant and a member of the public. The principal of "justice not only being done but being seen to be done" is of direct relevance and very important here to insured persons.
2. The insured person should be advised of their right to appeal against the decision of a deciding officer.
3. An insured person should also be advised of their right to appeal to the High Court on a point of law against the decision of an appeals officer.
4. There should be an automatic right to an oral hearing of an appeal before an appeals officer.
5. There should be an automatic right for claimants as insured persons to be represented and legally represented if they so require at all appeals.
6. The Law Society recommends that the system of the hearing of Social Welfare appeals by appeals officers should be replaced by a system on similar lines to the Employment Appeals Tribunal with a legally qualified chairman as being the most effective way in which the total integrity and independence of the system could be guaranteed in the interests of justice, fair play and proper due process. □

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- 1988/89 -

The Presentation of Certificates Ceremony in respect of the above course will take place on **Thursday, 20 July, 1989 at 4.15 p.m.**

Land Registry Practice

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5, College Green, Dublin 2.
Telephone: 793888
Fax: 793868

Unit Linked Funds

Unit linked funds have proved attractive for many investors in recent years. Some have suffered losses, but the vast majority have secured returns well above those available from any type of deposit account. The range between the best and the worst performers has been sizeable, however, and it is not always easy to predict the high fliers in advance. If the return is to be maximised and losses avoided, the investor, and/or his adviser, needs to be well informed, not only as to what, and when to buy, but also on when best to sell.

The general good performance should not blind anyone to the risks involved either. There are now a few "guaranteed" funds but, those apart, unit values can move down as well as up. That said, however, there is now such a range of funds to choose from that most investors can find one to suit their own particular degree of risk aversion.

It should not be forgotten that there is a heavy initial cost to the investor in Government tax and set-up charges. So unit funds are best viewed as a medium to long term investment. But just what are they?

Unit linked funds are a kind of co-operative investment venture, managed by life insurance companies,

By Colm Rapple

with a large group of investors putting their money into a central fund. They each get so many shares in that fund – so many units as they are called – depending on the sum they invest. And the fund of money is managed for them by the insurance company. In Britain most such funds are set up under unit trust legislation. In Ireland it was easier to set them up under life insurance legislation so that there is always a small element of life insurance involved. The funds are usually open to both lump sum investors and those who take out savings type life insurance policies with monthly or annual premiums. Here we are considering only lump sum investment. The life insurance element is relatively small. It is just an extra bonus although in some cases it can give the investor a small tax relief as the investment is considered a life insurance premium. But tax relief is only given on up to £1,000 in premiums each year – £2,000 in the case of a married couple.

The lump sum investor has a wide range of unit linked funds to choose between. There are equity funds, property funds, gilt funds, cash funds, and managed funds. The last of those generally contain elements of all the others. The degree of risk varies with the type of fund and, indeed, within the investment policies of the various fund managers.

In almost all cases, however, there is some risk – something which became very obvious with the crash in share values in October 1987. That resulted in the introduction of some funds – from Irish Life and Hibernian Life – which guaranteed that, at the very least, the investor could be assured of getting his money back at the end of three or five years. During the three or five years, the value of the units can move up or down but there is a guarantee of at least getting the capital back at the end of the period.

Those apart, however, the value of the investment can move down as well as up and there is always the chance of loss. Indeed just getting your money back at the end of five years would represent a loss too since you could have been getting interest somewhere else. But, of course, the hope is that the funds will perform better than that. And, indeed, over the longer term – and despite the crash – most funds have risen at least in line with inflation – many have far exceeded that.

Unit Linked Funds

Units have a "bid" and an "offer" price and there is usually a gap of eight per cent between the two. The higher of the two – the offer price – is the price at which the insurance company is offering the units to investors. The lower price – the bid price – is the price at which it will buy the units back. So immediately an investor pays over his money, he has lost eight per cent of its value. If he cashed in his units right away he would only get back £92 for every £100 he invested. That covers commission and Government stamp duty. A large investor may get some concession which reduces this initial cost. It can be by way of some extra units given to him initially or after a couple of years.

Some of the funds have reduced the spread between bid and offer prices but they all impose additional annual management charges so that the overall cost of the investment to the investor is not appreciably changed. The relatively high cost of making an investment means that the investor should be thinking of leaving his money for a reasonably lengthy period, and he should not switch investments too often or too readily unless he can do so at no cost. Most insurance companies do allow investors to switch from one fund to another within their own stable at no cost – usually at least once a year. But switching from one company's funds to another always entails a significant cost – the full eight per cent again. And that is something to watch. Some financial advisers have been known to encourage such switching, more in the interest of maximising their commission than in the interest of the investor.

Normally, any income earned on the fund is reinvested to the benefit of the investors – although there are provisions in some plans for the investor to get a regular income. This is arranged, however, by the sale of units and there is no guarantee that the remaining units will continue to be worth as much as the initial investment. In other words, the income could, in some cases, be paid out of capital.

Units can normally be cashed in in full at any time, although there is often a small expense deduction made on the amount of any partial withdrawal of funds. The perform-

ance of each fund may be subject to short-term fluctuations so it is best judged over a period of a few years. But past performance may not be a good guide to future prospects. The sophisticated investor will also want to look at the mix of investments within each fund. This can vary greatly from one fund to another. The best performing property funds in recent times have been those which kept a large proportion of their money in cash. Performance in the future will depend, of course, on how well they time the investment of that money into property.

Unit Trusts

In addition to the unit linked insurance funds there are a number of unit trusts proper in Ireland. These operate in much the same way except that there is no element of insurance involved. The Bank of Ireland got into this area very early on following the passing of legislation in 1973. The other difference is that in some cases the capital gain – if any – is liable for tax at half the standard rate. This need not be a great worry since the tax only applies to real gains i.e. only that portion of your gain which has exceeded inflation. And even then the first £2,000 of such gain each year is tax free per individual. □

Bradstock Blunt and Thompson Ltd., consultants to the Law Society's Mutual Defence Fund Ltd., launched in March 1987, have now established a company, **Professional Indemnity Insurance Brokers Ltd.** at 38 Upr. Fitzwilliam Street, Dublin 2. Merle Dowling, A.C.I.I. has been appointed as Executive Director. Merle has spent nineteen years dealing with all classes of Professional Indemnity Insurance, but with particular emphasis on insurance for Members of the legal profession having been Managing Director of Irish Underwriting Agencies Ltd., who launched the first scheme for Members in the early '70s.

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That will really be the position when the Society's new EC Information Service comes on stream next month. Using a PC and the Justis on-line European law database, the Society's Library will now have the facility to provide members with up-to-date information on all EC legislation as published in the Official Journal. The system provides a search facility through the Regulations, Directives and Decisions appearing in the O. J. Printouts of the retrieved material will be available to enquirers.

At present Margaret Byrne and Mary Gaynor of the Library are engaged in a familiarization course and it is anticipated that the system will be fully operational and available to members by late July. Full details of the operation of the system, including the charging rates, will be published in the next issue of the Gazette.

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New Bye-Laws Approved: Progress of Retirement Fund

The considerable appreciation of the Retirement Fund, established by the Incorporated Law Society of Ireland 14 years ago, was reported to the Society's half-yearly general meeting by Mr. Ernest J. Margetson.

The meeting, held in the Hotel Europe, Killarney, on May 5th 1989, learned that the Fund now stands at £12.25 million. Mr. Margetson said that the value of the fund has increased by 25% in the year ended 1 March 1989 and the unit value now stood at £244.355. The investment performance over the year was satisfactory and Irish Equities did particularly well. Overall, the return was substantially ahead of inflation.

Changes in the future operation of the fund will provide for the accounting year end to be 31 December with reports to members at the end of January/early February in each year. A cash fund for consolidation of gains for members who request this facility has been established.

Membership increase

There was a satisfactory increase in the membership of the fund during the year with the age profile being primarily in the 40/60 year bracket. The level of individual contributions was increasing. To develop participation further, the Investment Bank of Ireland had been appointed to undertake a marketing role amongst the members of the Society. In this context, the tax saving obtained through participation in the fund was highlighted.

For the future, the Income Continuance and Life Assurance aspects of the fund will be handled by Sedgwick Dineen.

The report and the accounts of the Fund were adopted.

New Bye-Laws

The meeting unanimously adopted the following motion which was proposed by Mr. Michael V. O'Mahony and seconded by Mr. Francis D. Daly:

> "That the Society's existing bye-laws be rescinded and that the draft Bye-Laws, approved by the Council of the Society at its meeting on 7th April, 1989, and circulated to members, be hereby ordained and made with immediate effect."

Accounts show surplus

Mr. Ernest J. Margetson reported that the Accounts showed a slight surplus which was satisfactory, bearing in mind that significant legal costs had been incurred arising out of actions in respect of admission to the Law School. The audited accounts will be debated at the Annual General Meeting.

Scrutineers appointed

The following were appointed Scrutineers of the Ballot for the Council for 1989-90:

1. Walter Beatty
2. Laurence F. Branigan
3. Terence Dixon
4. Andrew Donnelly
5. Eamonn Hall
6. Clare Leonard
7. John Maher
8. Donal O'Hagan
9. Peter Prentice
10. John Reidy
11. Roderick Tierney
12. Liam Young

Benevolent Association

The work of the Solicitors' Benevolent Association was detailed by the chairman of that body, Mr. John O'Connor, who stressed its continued need for funds. He paid a tribute to all the members who had made special efforts to raise funds, and particularly Mr. Frank O'Donnell through his involvement in the Mara-Cycle event, which had raised a significant amount for the Association.

Mr. O'Connor urged members to maintain and increase their support as the needs of claimants on the Association continued to rise.

The Presidential Address of Mr. Maurice R. Curran was received with acclamation. A copy of the address has been filed with the Minutes and a summary was published in the May issue of the *Gazette*.

At the formal opening of the meeting the Minutes of the Annual General Meeting of the Society, held in Blackhall Place on November 17, 1988, which were published in the Society's *Gazette*, were taken as read and signed by the President.

The members of the Society and members of Law Societies from Northern Ireland and six overseas jurisdictions – England and Wales, Scotland, Belgium, Canada, USA and Australia were welcomed by Mr. Donal E. Browne, President, Kerry Law Society. □

Data Protection Act, 1988

The Council of the Law Society wishes to advise members that they should not register unless they hold on computer data relating to:-

(a) Political opinions.

(b) Religious and other beliefs.

(c) Physical/Mental health.

(d) Criminal convictions.

(e) Sexual life.

(f) Racial origin.

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(Left to right): John Hume, MEP, and Chris Mahon, Director Professional Services, Law Society.

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Reservation of Title

This essay was recently awarded the Professional Books (Butterworths) Prize by the Law Society.

A natural consequence of the growth in the area of "Insolvency" in the commercial world is that those who do business at a commercial level seek to protect themselves as much as possible from the potential insolvencies of those with whom they deal.

One way in which this protection can often be achieved is by what is known as "Reservation of Title".

The aim of this essay is firstly to examine the development of and raison d'etre behind Reservation of Title, secondly to point out the shortcomings in the law governing this area and finally to explore proposed reforms, their implications and repercussions.

By Mark Hanley

From a supplier's point of view that which is owed to him is an asset. However, until it is realised, it is also a worry, for once ownership of that which is supplied passes, the supplier is to a greater extent than he would probably wish, at the mercy of the debtor's bona fides, good sense and solvency.

If the debtor were to become insolvent the goods supplied would be part of his assets. They would be sold and the proceeds would be divided amongst his creditors. Meanwhile, the unpaid supplier would merely rank *pari passu* with the other ordinary creditors and would obtain only a share of the proceeds after preferential and secured creditors had been paid in full.

The Sale of Goods Act, 1893[1] together with a line of case-law[2] enable a supplier to insert into a contract for the supply of goods on credit what is known as a reservation or retention of title clause, the effect of which is to delay the passing of title in those goods until the supplier has been paid, thus enhancing his prospects of recovery. To put it another way, the supplier still owns the goods in the possession of the purchaser and the purchaser holds those goods as bailee for the supplier and so acts under a fiduciary duty to him.

In general terms there can be said to be two kinds of reservation of title clause.

The first kind reserves title to goods supplied until those specific goods are paid for, e.g. "The goods sold by the supplier to the purchaser under this contract, shall be and shall remain the property of the supplier until the full purchase price thereof has been paid to the supplier".

The second kind reserves title to the goods supplied until *all sums due* by the purchaser to the supplier have been discharged, e.g. "Property in goods supplied hereunder will pass to the purchaser when all goods, the subject of any contract between the supplier and the purchaser, have been paid for in full."

An advantage of using this second kind of clause is that if, for whatever reason, a reservation of title clause in Contract A were to be omitted or were to become ineffective, then there should be no reason why such a clause in Contract B should not protect the supplier in relation to goods supplied under both Contracts, at least to the extent of the value of the goods supplied under Contract B.

For example, if £15,000 worth of goods were supplied under Contract A (which is without any reservation of title clause) and £20,000 worth of goods were supplied under Contract B, (which includes a reservation of title clause) then irrespective of the balance due under either contract, until the full £35,000 is paid, title to goods supplied under Contract B remains with the supplier. In such a case, the purchaser has a choice of either paying the full £35,000 or fighting a claim for any balance due under Contract A **and** forfeiting possession of the goods supplied under Contract B together with any deposit or payments made on account of those goods.

As well as possessing this in *terrorem* capacity, 'all sums due' clauses, by their very nature, can help to create a relationship which is more fiduciary in character than that of a debtor to a creditor.

No longer are the parties dealing with a series of simple debts arising from contracts which may or may not call their relationship a fiduciary one. When reservations and debts are inter-linked and dependant on one another, the relationship obtains a fiduciary character, which is essential where possession, though not title, has been transferred.

The Fiduciary Relationship

Before a reservation of title clause can be enforced the supplier must establish that a fiduciary relationship exists between supplier and purchaser. Once this relationship is found to exist and once it is possible to identify and locate the goods supplied or the property representing those goods, the Courts will allow the supplier to trace his proprietary interest.

In *Aluminium Industrie Vaassen B. V. -v- Romalpa Aluminium Limited*[3] the Plaintiff Company had supplied a consignment of foil to the Defendant Company subject to reservation of title.

When the Defendant Company went into liquidation the suppliers claimed to be entitled to trace into the proceeds of sale of the foil which the Defendant Company had sold on to third parties. The Defendant Company argued that where any of the foil had been bought by bona fide purchasers,

the relationship between itself and the suppliers ceased to be that of bailor-bailee. Instead it claimed that the new relationship was one of creditor-debtor, the point being that if this were the case, the fiduciary relationship between the parties would be negatived and there could be no tracing remedy.

The Court of Appeal held that until the foil was paid for it remained the property of the supplier. Thus the Defendant Company was entitled to re-sell the foil on behalf of the supplier only. This it was bound to do to the extent to which money was still owed. The Defendant Company was consequently liable to account in a fiduciary capacity to the supplier for the proceeds of such sales.

As a result of the stance adopted by the Courts in cases such as this, the position between supplier and purchaser would seem ideally balanced. The contract which contains a reservation of title clause would seem to successfully represent the intended relationship between the parties and to protect all relevant rights at contract stage.

Because it is the function of the Courts to decide what was the intention of the parties at contract stage, the question can sometimes arise as to whether adequate notice of the reservation has been brought to the attention of the purchaser.

This question arose in *Sugar Distributors Limited -v- Monaghan Cash and Carry Limited*[4] where the parties had been doing business together for over two years Reservation of Title became the basis on which the Defendant was supplied. Carroll J. held that there was no special duty on the Plaintiff to draw the Defendant's attention specifically to the clause and that because the parties had been trading together on this basis for the fifteen months prior to the dispute, the Plaintiff, by putting the terms on which the goods were supplied on the face of the invoices, gave reasonable notice of the conditions applicable, so as to make them valid and binding on the Defendant.

In deciding that there was no special duty to bring the clause to the purchaser's notice, Carroll J. was following the principle that a person who signs a document containing contractual terms will normally be bound by them even though he may have read them and even though he may be ignorant of their precise legal effect.

Problems Arise

With regard to Reservation of Title however, there is more to consider than the supply contract, the reason being that there are usually parties other than the supplier and purchaser involved and consequently there are more rights which deserve the protection of law.

If the only parties affected by a reservation of title clause were the supplier and purchaser, the Courts would no doubt respect and protect the parties' freedom to contract. But this is very rarely the case. There are usually third parties, existing and prospective creditors for example, who have an interest in knowing exactly what it is the purchaser owns, how much the purchaser is worth and by corollary what it is that the purchaser doesn't own. Because these third parties tend to rely on this information in their dealings with the purchaser, they too have rights which deserve the protection of law.

For example, A has supplied plant and machinery on credit to B with a reservation of title clause included in the supply contract. C is considering whether or not to give or to extend credit to B. When C notices B's apparent ownership and apparent ability to pay for a spanking new plant and machinery, C will almost certainly be more disposed towards giving credit to B in the mistaken belief that B owns the plant and machinery. C should therefore be put on notice of what B in fact owns.

The general purpose of Section 99 of the Companies Act, 1963 is to make third parties such as actual and prospective creditors aware of the existence of charges over a debtor company's assets. This it does by requiring certain types of charges to be registered.

But does a reservation of title clause create a charge over the property reserved and if so at what stage and in which kinds of case is the supplier's proprietary interest converted into a compulsorily registerable charge?

On the one hand there is the argument that the supplier's rights of reservation amount to charges over the purchaser company, the purpose of which are to secure payment of the unpaid purchase price. Accordingly if these charges have not been registered they are void under Section 99 of the Companies Act, 1963.

At the same time there is the claim that since the provisions of the reservation of title clause prevent the buyer from ever enjoying any proprietary interest in that material until it has been paid for in full, the purchaser cannot create a charge over property in which he has no proprietary interest.

Having listened to these conflicting arguments which represent the opposite extremes in the debate, the Courts have had the unenviable task of having to balance the respective rights of the parties, a balance which, in the absence of statutory guidelines, inevitably depends more on the facts of each case than on the strict rule of law.

The Courts' Interpretation

In *Borden (U.K.) Limited -v- Scottish Timber Products Limited*[5] the Purchaser was supplied with resin to be used in the manufacture of chipboard, during which the resin became an inseparable contituent of the end-product. The Purchaser went into liquidation by which time all of the resin supplied had been used in the manufacturng process. The Supplier relied on the reservation of title clause which reserved title in respect of the resin only and not in respect of any form into which that resin might be converted. The Supplier claimed to be entitled to trace both into the chipboard and into the proceeds of sale of that chipboard to third parties.

The Court held that the resin which was the subject of the reservation of title clause had effectively been consumed. Because there was nothing in the Contract effective to create any interest in or charge over the newly manufactured chipboard or the proceeds of its sale the clause became redundant. In any case, had the reservation of title clause created such an interest or charge, such interest or charge would have been void for want of registration.

The consequence of the *Borden* Case therefore is that a retention of

title clause which attempts to retain title not only in the property originally supplied but also to the property in its newly manufactured, mixed or processed form is likely to cross the line between a valid retention of title by the supplier and a void creation of a charge by the company.

This point came up for discussion in *Bernard Somers -v- James Allen (Ireland) Limited*[6] where the *Borden* Case was cited with approval by Carroll J. who held that where goods are intended to be used in a manufacturing process, a reservation of title clause which does not reserve title to the goods in their newly processed form is not prevented from being an effective reservation of title so long as the goods still exist in the state in which they were supplied.

The view of the Courts that no set of generalised rules should apply to reservation of title clauses was underlined by McWilliam J. in *Frigoscandia (Contracting) Limited -v- Continental Irish Meat Limited and Laurence Crowley.*[7] In that case the Plaintiff had supplied machinery to the Defendant on the basis that until all sums due were paid, the machinery would remain the property of the Plaintiff. When a Receiver was appointed over the Defendant, the Plaintiff claimed to be entitled to recover possession of the machinery.

McWilliam J. held that the supplier was entitled to succeed in its claim, emphasising the nature of the machinery supplied which was such that the parties could not reasonably have contemplated its conv ersion into any other form.

In *Fried Krupp Huttenwarke A.G. and Kruppstahl A.G. -v- Quitmann Products and Dermot Fitzgerald*[8] an Irish Court was given the opportunity to decide on facts where the parties did clearly contemplate the conversion of the goods supplied into another form. The Plaintiff supplied steel to the Defendant to be used in the manufacture of pedal bins, bread bins and the like. In the supply contract the Plaintiff not only reserved title to the steel but also provided that ". . . processed goods are deemed to be reserved goods . . ." and that in the case of processing, blending and mixing of the reserved goods with other goods, the Plaintiff should acquire a joint title to the new goods in proportion to the ratio of the invoice values of the goods used.

Gannon J. followed the reasoning of Kenny J. in the earlier Irish case of *Re Interview Limited*[9] in holding that while the contractual relationship between the supplier and purchaser should be governed by the law of the country in which the contract was executed (i.e. West Germany), other contractual or statutory obligations to third parties were to be decided in accordance with Irish law.

The Judge then considered and approved earlier case-law on this matter and held that any of the supplier's unworked steel in the possession of the purchaser was not the property of the purchaser.

In relation to the converted steel the Judge held that the attempted assignment could only be construed as an equitable interest in the nature of a floating charge and as that charge has not been registered it was void.

The Present Position

At the moment, the law relating to Reservation of Title would seem to be that as long as the goods supplied remain in the form in which they were delivered or as long as the proceeds of sale of those goods remain in the possession of the purchaser and are separately identifiable, the supplier on credit may obtain protection against the insolvency of the purchaser by reserving title to those goods. But if at any time those goods are mixed with other goods or are consumed in some process, then by reserving title a charge is created which if unregistered is void.

This means that not only are suppliers of consumables unprotected but so too are suppliers of services. Once a service is supplied it cannot normally be taken back and so the facility of Reservation of Title becomes irrelevant to a supplier of services on credit. The size of the problem is apparent when one considers the large number of suppliers of services, from those who provide professional consultancy advice to building contractors.

It would seem therefore, that in the absence of statutory guidelines the law has been side-tracked onto a course which protects a minority to the detriment of the majority not on the basis of any notions of legal justice but on the factual nature of that which was supplied.

This problem is manifest not only before insolvency, at the supply contract stage, but more importantly on the insolvency of the purchaser. At that stage the supplier of consumables or services may often find that after reservors of title have reclaimed possession of their assets there is nothing left and the liquidator has nothing to administer.

The problem of course is a practical one. Title to a service can neither be reserved nor returned in most cases. The dividing line between an effective reservation of title and the creation of a charge,

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void for want of registration must, from a practical point of view, depend on the facts of each case, i.e. the nature of the goods supplied or the wording of the supply contract.

In spite of this, it is the Courts which are left to find some sort of equitable solution which will treat all suppliers on credit, equally. It is the Courts which are left to answer the concerns of suppliers of consumables or services that the estate of an insolvent customer should be maximised.

Since the early 1980's when the Courts settled on a consistent legal interpretation of the law governing Reservation of Title, suppliers who go to Court relying on their reservation of title clauses seem to approach the bench, cap in hand, to say that while we accept title to resin may disappear once it is caught up in the manufacturing process, would it be possible that title to leather might not similarly disappear when used in the production of hand bags[10] or that title to diesel engines might still be effective even when they are connected to other machinery[11].

These questions could go on *ad infinitum,* each case being put into its own pigeon hole. However, although no universal rule is apparent, case law seems to indicate a vague distrust towards and dislike of reservation of title clauses on the part of judges, who recognise that "this area of the law is . . . a maze if not a minefield."[12] and that "there is no logical reason why this class of creditor (suppliers of unconsumed goods) should be favoured as against other creditors such as the suppliers of consumables and services'..[13]

Reforms

In 1979 the Commission of the European Communities issued a proposal for a Council Directive on the legal consequences of Reservation of Title.[14]

The aim of this draft Directive however, is not primarily to bring about reform but rather to harmonise the laws of the Member States. With this in mind the proposal looks at Reservation of Title from the point of view of suppliers. Its effect if implemented in this Jurisdiction would be firstly to copper fasten the existing law of Reservation of Title, warts and all and secondly to strengthen the position of suppliers with regard to various restitutionary remedies which would be made available to them.

The draft Directive however is silent on the shortcomings in the law of Reservation of Title and I would submit that if adopted and implemented in this jurisdiction the Directive would serve only to hinder any movement towards reform which the Legislature may wish to pursue. It is therefore perhaps fortunate that after eight years the proposal still remains in draft form.

In 1982 the Cork Committee issued its report on the Law and Practice of Insolvency.[15] Having interviewed many of those in the front line of this area, the Committee went on to discuss the submissions made to glean a number of recommendations.

A large number of suggested reforms are based on the need for certainty without which the amount of interminable and expensive litigation in this area will unavoidably rise. The Committee

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AND THE PAIN AND THE FEARS
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however flatly refused from the outset to explore any proposals which if implemented would supposedly clarify the murky waters of Reservation of Title, believing "that certainty is unobtainable except perhaps by enactment covering the whole area of credit sales and security interest".[16]

The idea that such an exhaustive enactment could be possible presupposes that the present status of reservation of title clauses could be frozen, a pre-supposition which rests on doubtful grounds due to the wide variety of reservation of title clauses, the constantly changing nature of goods to which reservation of title clauses might relate and the general confusion surrounding the law relating to security in respect of goods.

The principle submission made to the Committee was that all reservation of title clauses should be void on insolvency. Although this is beautiful in its simplicity it is unfortunately akin to curing an aching toothache by way of a beheading.

The arguments submitted in favour of this proposition are firstly that it is unfair for a company which is financially insecure and which has been supplied on a reservation of title basis to be allowed to give the misleading impression that it owns what it possesses. Secondly, it was submitted that in the interests of society and of employees, it would be easier for a Receiver to revive an insolvent company's businesss and to sell it as a going concern, in the absence of reservors of title coming like vengeful Shylocks to reclaim their goods.

The Committee rejected this submission stating that:-

"It seems to us that a reservation of title clause is in substance a means whereby a supplier obtains protection similar to that obtained by a formal security. It would be anomolous for us to countenance the continuation of security in its ordinary form of fixed or floating charge, but to deny the continuation of the quasi-security of the reservation of title clause".[17]

A more substantial argument against the abolition of reservation of title clauses is the fact that it would be the owners of floating charges who would benefit the most. Remember that the reason why reservation of title clauses developed was that there was nothing left to be distributed after floating charges crystallised and were realised. The abolition of Reservation of Title therefore would be unlikely to benefit unsecured creditors. Instead it would mean that there would be more assets available to satisfy the owners of floating charges.

In dealing with the misleading impressions which could be given to actual and prospective creditors by a company's accounts, the Committee echoed the professional recommendation to Auditors that they should have regard to the substance and not the form of each transaction in giving a true and fair view of the company's affairs.

Having refused to recommend the curtailment or abolition of reservation of title clauses and thereby to tamper with the notion of freedom to contract, the Committee recommended that to keep the balance right, the parties who have exercised that freedom should be obliged to disclose what they have done.

The Committee referred to Article 9 of the Uniform Commercial Code in the U.S.A. which has introduced the practice of notice filing. Essentially this is a register of purchasers against whose names appear firstly the name of the supplier imposing Reservation of Title, secondly a generic description of the types or classes of goods being supplied and to be supplied and thirdly the maximum amount which at any one time can be secured by Reservation of Title.

If implemented, this recommendation would indeed appear to close the existing loop-hole in Section 99 of the 1963 Act in relation to notice to third parties.

However, if this new register were to be kept separate from the existing registration of charges, the problem would still remain of having to distinguish between a reservation of title and a charge. As we have seen, the line is not an easy one to draw and it is more than likely that some reservations of title would be registered as charges and vice versa.

It would therefore be necessary to link the two registers in such a way that if a mis-categorisation were made its rectification would be merely procedural.

In relation to the desire that a business should be kept going in the interests of society and of employees, the Committee recognised that a Receiver would have little chance of success if immediately upon insolvency all reservors of title were entitled to reclaim their goods at will.

The Committee therefore recommended that a statutory moratorium of up to one year from the commencement of a receivership should be placed on the contractual right of reservors of title. In other words a Receiver should be allowed to deal with the goods in a manner inconsistent with the title of the supplier for one year, at the end of which the Receiver would be obliged to account for the goods.

The Committee calls this a small penalty on those who have taken the benefit of Reservation of Title.

The Cork Committee's Report is of course merely a guideline for the benefit of the British Government but its recommendations if implemented here would seem bound to remove many of the uncertainties surrounding Reservation of Title together with some of the tensions which arise between supplier and purchaser when the latter goes into receivership.

Conclusion

It is clear from the foregoing that with the rising profile of Reservation of Title in Irish law, some sort of legislative reforms are necessary. Judicial techniques can only go so far in attempting to oil the machinery of the law governing Reservation of Title.

And when the Courts are put in the impossible position of having to balance the conflicting rights of suppliers, purchasers, third party purchasers, existing and prospective creditors etc. so that the avoidance of inequity to some, impinges on the rights of others, it is time for the machinery to be changed; a change which can be brought about only by legislative intervention.

Footnotes

1. Section 19 of the Sale of Goods Act, 1893.
2. Starting with *Bateman -v- Green and King*, (1868) I.R. 2 C. L. 166, 607.
3. [1976] 1 W.L.R. 676; [1976] 2 All E.R. 552.

4. [1982] I.L.R.M. 399.
5. [1979] 3 W.L.R. 672; [1981] Ch. 25.
6. [1984] I.L.R.M. 437.
7. [1982] I.L.R.M. 396.
8. [1982] I.L.R.M. 551.
9. [1975] I.R. 382.
10. *In re. Peachdart Limited,* [1983] 3 All E.R. 204; [1984] Ch. 131; [1983] 3 W.L.R. 878; [1983] B.C.L.C. 225.
11. *Hendy Lennox (Industrial Engines) Limited -v- Grahame Puttick Limited* [1984] 1 W.L.R. 485; [1984]2 All E.R. 152; [1984] B.C.L.C. 285.
12. Ibid. per Staughton J.
13. *Borden (U.K.) Limited -v- Scottish Timber Products Limited,* [1981] Ch. 25, per Templeman L. J. at page 42 of the Report.
    This view is expressed and elaborated upon in Insolvency Law and Practice, Report of the Cork Committee, (1982, Cmnd. 8558).
14. Commission of the European Communities, Document III/872/79 – EN Rev. 1.
15. Insolvency Law and Practice, Report of the Cork Committee, (1982, Cmnd. 8558).
16. At para. 1628 of the Report.
17. At para. 1633 of the Report.

FINAL EXAMINATION *FIRST PART*

Candidates for the above examination are advised that the examiners advisory meeting will be held on **Thursday, 13th July, 1989, at 6.00 p.m.** in the **Lecture Hall, Blackhall Place, Dublin 7.**

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Younger Members News

Report of Meeting of Joint Legal Education Committee at Edinburgh in May, 1989

By Professor Richard Woulfe

The Law Society of Scotland hosted the 1989 meeting of representatives of the Education Committees of the four Law Societies within the islands of Ireland and Britain. The meeting was held on Friday, 26th May under the chairpersonship of Mrs. Dorothy Dalton, convenor of the Legal Education Committee, and Professor Richard Woulfe, the Director of Education.

Much of the morning session was given over to the item of greatest interest to the Society, namely reciprocity of qualification within the two islands and the E.C. Directive on Mutual Recognition of Higher Education Diplomas.

Mr. John Randall reported on the progress of the University of Birmingham study into legal education and training in all the countries of the European Community. An update on the position will be given by the University at the next meeting of the working party on reciprocity of qualifications which will be held at Redditch on 12th July, 1989. The University hopes that the study will be the standard study used by legal education authorities throughout Europe.

On reciprocity of qualifications, the present position is that there is no reciprocity as between the Republic of Ireland and any of the three legal jurisdictions in the United Kingdom. As between those jurisdictions, concessions to ease movements are granted if the migrant solicitor is already qualified for three years or longer in his home jurisdiction. Anyone qualified for fewer than three years has to take the full examination cycle and undergo the same training requirements as anyone else seeking to qualify *de novo* as a solicitor in the host jurisdiction.

All four Societies have agreed to do away with the three year qualification requirement in the home jurisdiction before concessions are granted.

Neither the Law Society of Northern Ireland nor the Incorporated Law Society of Ireland plan to impose an examination on solicitors migrating to either jurisdiction from England and Wales. The Training Committee of the Law Society will be presented in the autumn with a paper on the examination system and the Chairman of the Training Committee Mr. Richard Harvey, indicated that there would in all likelihood be a modest examination, largely concerned with Conveyancing but also examining the awareness of the candidate of the differences between his home legal system and the system in England and Wales. The Law Society of Scotland had moved away from its present 14 hour examination to propose an examination in Conveyancing, Succession and the Scottish Legal System.

Scotland does not propose to impose any restriction on practice once the migrant solicitor has been admitted to the Roll in Scotland. The three other Societies have or contemplate a requirement that the migrant solicitor would hold a restricted Practising Certificate for not more than three and not less than two years after admission in the host jurisdiction. Professor Woulfe brought to the notice of the Committee the difference in the nature of this restriction between England and Wales on the one hand and Northern Ireland on the other. The only restriction placed on a newly qualified solicitor in England and Wales is that he may not set up as a sole practitioner within three years after admission. The restriction in Northern Ireland is that such a solicitor may not set up in practice on his own but neither may he enter into a partnership for a three year period which period is reducible to two years after a certain number of Continuing Legal Education points are accumulated. England and Wales have a requirement of minimum mandatory Continuing Legal Education for all solicitors within three years following admission.

The others sought from the delegates from the Incorporated Law Society of Ireland agreement for their Societies to move ahead with reciprocity before the enactment of the new Solicitors Bill into law in the Republic of Ireland. This agreement was confirmed by the two delegates of the Society who recognised that there was no prospect of the other Societies unilaterally easing moving to the jurisdictions of Irish solicitors in advance of the repeal of the Irish language and apprenticeship requirements presently imposed on them by the Republic's Solicitors Act, 1954. The Society's delegates thought there was a reasonable prospect that the repeal of these requirements would be in force before the next joint legal education committee meeting to be hosted by the Law Society of Northern Ireland in May 1990.

The two Societies in Ireland will need to discuss problems arising from qualification in both parts of the island, particularly in relation to discipline, the compensation fund and professional indemnity.

On the latter point, an English solicitor practising on the border with Scotland or an English solicitor practising as such in Paris or Brussels could get an endorsement on his professional indemnity policy extending cover extraterritorially in respect of his "practice as a solicitor".

The other three Law Societies have Regulations forbidding – and it is a disciplinary matter – a solicitor from engaging in practice in areas in which he is not competent.

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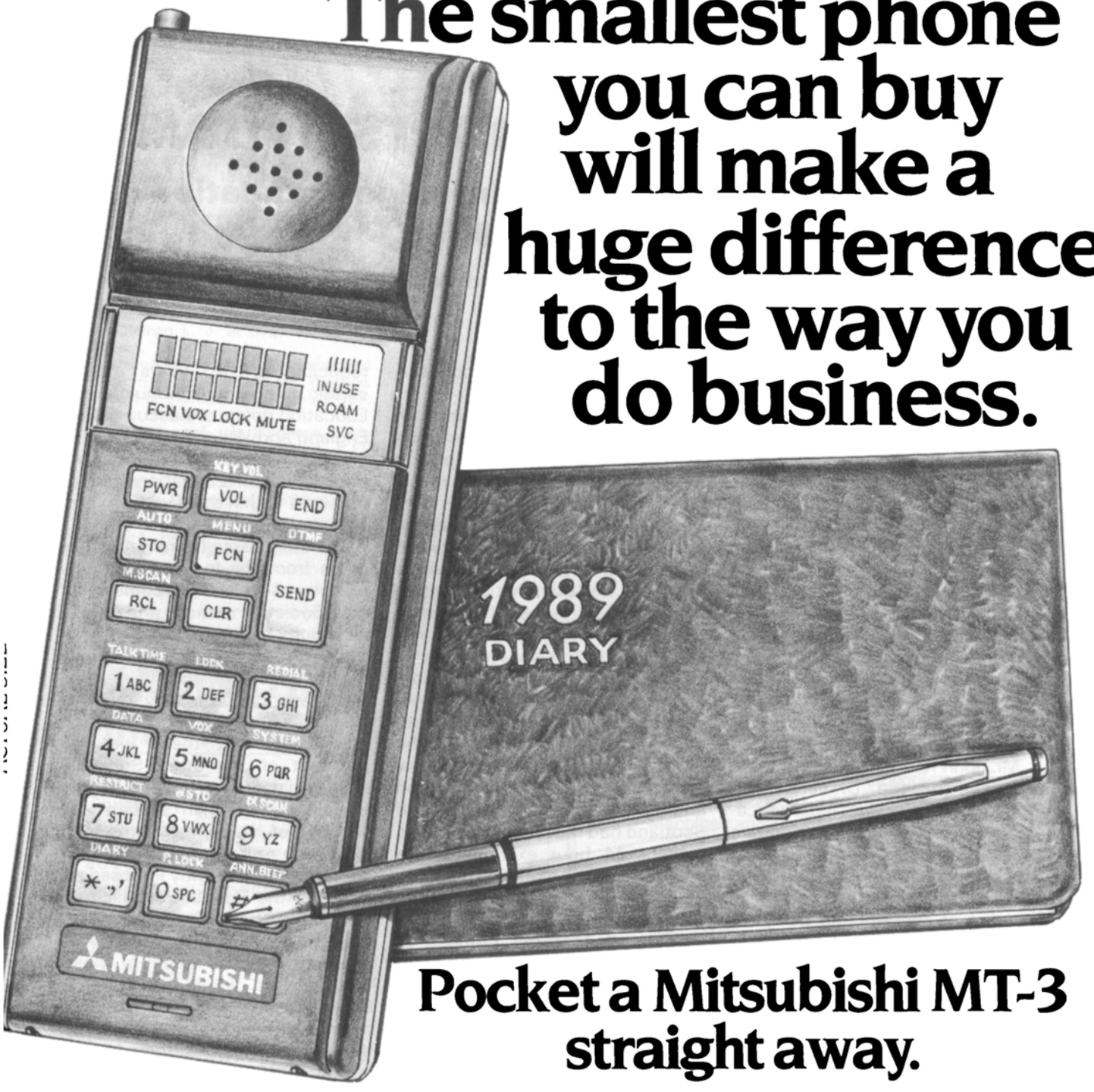

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Manpower planning – training and trainees

Scotland had just completed a survey on the profession. The ten page questionnaire was sent to the senior partner in each firm with a personalised covering letter from the President and it elicited a 65% response rate. In previous years, up to 50 of the approximately 430 recipients of Diplomas in Legal Practice were unable to obtain training places and therefore unable to qualify as solicitors. In the current year it looked as if virtually all Diploma holders obtained training places. There was some drop in the number taking Diploma Courses and the Society might find itself having too few trainees to meet future requirements. Assistant solicitors were difficult to get, especially in the country areas and their salaries had gone up. Forty per cent of the firms in Scotland take trainee solicitors (apprentices).

In England and Wales a survey was impending on the structure of the profession. To help meet their recruitment crisis 700 extra places for law students were being started in the Polytechnics in September/October 1989.

The experience in Northern Ireland was that fewer law graduates were going into the legal professions. There had been a drop from 145 to 120 in the number of applicants for places in the Institute of Professional Legal Studies in Belfast.

The Society's delegates stated that in the Republic the unfavourable demographic trend in the other jurisdictions was not repeated but that emigration of solicitors to England, especially to the South East of England, had meant a scarcity of assistant solicitors especially in country areas. It seemed likely that solicitors who had not previously taken apprentices might well have to do so in future on the basis of having to 'grow their own'.

All jurisdictions recorded a growth in fee support for trainees by legal firms. □

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Book Review

THE LAW REFORM COMMISSION, TENTH REPORT (1988)

16 pages. £1.50

Edward Gibbon in his *Decline and Fall of the Roman Empire* describes the attitude of the Locrians to their legal system. If any member of that community sought to propose an amendment in the law, he was obliged to stand forth in the assembly with a noose around his neck. "If the law was rejected", stated Gibbon, "the innovator was instantly strangled". Your reviewer does not recommend strangulation as a punishment but would not object to a law which would impose a financial levy on any member of the Cabinet who failed to bring forward draft legislative measures reforming the law within a stipulated period.

The most powerful source of law reform is that of general public opinion. There is also the powerful force of the vocal lobbyists. However, the layman and many politicians are not interested in lawyers' law. The words of Costello J. in a recent valuation case *Pfizer Chemical Corporation (Irish Independent* May 11, 1989), where he described the valuation code as "a confusing mosaic of partly repealed and imperfectly drafted Victorian statutes encrusted with a century and a half's judicial decisions", could be applied to much of our law – particularly lawyers' law – law that badly needs to be reformed.

The Law Reform Commission in its Tenth Report sets out the fruits of the year's work in relation to many branches of the law. The year's work is divided into research carried out and proposals for reform in relation to rape, malicious damage, debt collection (the law relating to sheriffs), the rule against hearsay in civil cases, child sexual abuse, conveyancing and land law, dishonesty, seizure of the proceeds of crime, retention of title and representation at the Hague Conference on Private International Law.

An interesting feature of the recent work of the Commission has been the establishment of specialised working groups which include experts from outside the Commission. A working group was established in relation to the legal, administrative and practical problems which are hampering the efficient collection of debts; following consultations with this working group, a report on the law relating to sheriffs was submitted to the Attorney General in September, 1988. The progress of the working group on Conveyancing and Land Law in the context of identifying anomalies in the law and proposals for improvement are also documented in the Tenth Report. Another working group is examining issues relating to "retention of title" clauses.

It has been stated that a great hindrance to law reform is indolence. Many become accustomed to existing rules and dislike the mental effort which change entails. Lawyers need to be more courageous and must strive to convince our rulers that law reform is worth the effort.

Eamonn G. Hall

REVIEW OF EUROPEAN COMMUNITY LAW IN IRELAND

By B. McMahon & F. Murphy
Published by Butterworths.
Price IR£49.50

It is now ten years since I went to work as a Stagiaire in the legal service of the EC Commission in Brussels. How much easier it would have been if I had had the benefit of this book then. Not only was I trying to come to terms with a foreign language but also with a foreign legal system.

The European Community legal system is a new one and an intimidating prospect for Irish Lawyers educated in the traditional mould. The community system has its origins and concepts firmly based in the continental civil law system. Of course, fear of the unknown can be overcome simply by coming to terms with the subject and by becoming familiar with its terminology and concepts. This is what "European Community Law in Ireland" by McMahon & Murphy clearly seeks to achieve.

Why could such a book not have been written before? The answer is simple, EEC Community Law is only about thirty years old.

The book was written in an attempt to introduce the Irish Lawyer to the community's legal system. It also traces and outlines the impact which the community's legal system has had on our national system and it focuses on the adjustments and the responses that were required of Ireland because of its accession to the community. Finally, it outlines the substantive law on the major areas such as The Free Movement of Goods, Persons, Services and Capital.

Even in a substantial work such as this book, which runs into over 500 pages, it is impossible to cover everything. Therefore, the authors have had to be somewhat selective and only give a passing mention to the European Coal & Steel Community and the Law of Euratom. However, it is worth bearing in mind that simply because the topic is not covered in the present edition of the book does not mean that it lacks significance or importance and hopefully some of the topics omitted from this edition will be covered in the future.

It was particularly exciting to see chapters dealing with the Common Agricultural Policy and the Common Fisheries Policies, both of which are areas of great significance to Irish citizens. I was particularly pleased with the section on Competition Law as this is certainly an area that Irish Lawyers need to become more familiar with and to use more extensively.

The Arthur Cox Foundation was once more positively used in assisting the publication of this excellent book.

John Schutte

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Solicitors Golfing Society

The Captains Prize (Patrick Reidy) was played (by kind permission) at Curragh Golf Club on Friday, 19th May, 1989.

The results were as follows:-

Captains Prize:
David Dillon (14) 43 points
Runner up:
Robert Marren (14) 41 points
3rd:
Quentin Crivon (28) 38 points
St. Patricks Plate:
John O'Brien (9) 40 points
Runner up:
Conor Mullaney 38 points
13 and Over:
James Cahill (15) 39 points
Runner up:
Kevin O'Donnell (20) 38 points
Veterans Cup:
Paddy O'Doherty (15) 36 points
Runner up:
Pat Tracy (14) 34 points
1st Nine:
Pat Carroll (24) 22 points
2nd Nine:
Brian O'Sullivan (6) 22 points
Over 30 miles from the Curragh:
Sean Kennedy (12) 37 points

85 players completed.

Richard Bennett,
Hon. Secretary

Appointment to The District Court
Ms. Thelma King, Solicitor, was recently appointed a District Court Justice. Ms. King qualified as a Solicitor in Michaelmas 1950, and was practising with Hayes & Sons, Solicitors, Dublin.

THE INCORPORATED LAW SOCIETY

seeks a full-time tutor for its Law School. Candidates must be solicitors of not less than 2 years standing and the appointment will be for 2 years. Applications, with C.V., should reach the undersigned by Friday, 14th July, 1989.

Professor Richard Woulfe,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

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CORRESPONDENCE

9th May 1989

The Editor,
Law Society Gazette,
Incorporated Law Society,
Blackhall Place,
Dublin 7.

Re: Amnesty International

Dear Editor,
May I use your correspondence column to notify readers that Amnesty International has re-started its Lawyers Group. The group comprises members of Amnesty who are solicitors, barristers and law students and it aims to use its legal expertise for the benefit of Amnesty; to participate as a legal presence in its campaigns and to alert lawyers generally of the concerns of Amnesty.

Some group members participate by taking part in the monthly postal appeals to governments and state officials, seeking release of prisoners of conscience, fair and prompt trials and the abolition of the death penalty. Others in the group also attend at regular meetings to discuss and further the above aims.

As this is the year in which Amnesty has launched a special campaign against the death penalty, world-wide, and as this is probably of special concern to lawyers, the group is issuing a special invitation to all lawyers to join Amnesty and within that, to become involved in the Lawyers group.

To join Amnesty International, please write to Amnesty International, 8 Shaw Street, Dublin 2, enclosing cheque £12.00 annual membership fee. Mark your letter for the attention of the Lawyers group if you would like to partake in any of the group's activities and you will then be notified of further activities of the group. Thank you for your attention and looking forward to a large response.

Yours sincerely,
Noeline Blackwell,
Amnesty International,
8 Shaw St.,
Dublin 2.

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26th day of June, 1989.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

John Gaynor, Lisaniskey, Kingscourt, Co. Çavan. Folio No.: 22318; Lands: Lisanisky; Area: 10.144 acres; County: **CAVAN.**

James O'Connor, Gurraneduff, Millstreet, Co. Cork. Folio No.: 1642 (revised); Lands: Gurraneduff; Area: 76a.3r.21p.; County: **CORK.**

The Corporation of Dun Laoghaire, Town Hall, Dun Laoghaire, County Dublin. Folio No.,: 15151; County: **DUBLIN.**

Bernard Magill, The Beaches, Greatconnell, Newbridge, Co. Kildare. Folio No.: 2782; Lands: Clownings; Area: 1a.2r.25p.; County: **KILDARE.**

Richard Kennedy, Raheenteigue, Tinahely, Co. Wicklow. Folio No.: 1177; Lands: Raheenteigue; Area: 137a.2r.34p.; County: **WICKLOW.**

Thomas Logan, Rooskey, Newtown-cunningham, Co. Donegal. Folio No.: 24767; Lands: Roosky; Area: 0a.0r.33p.; County: **DONEGAL.**

Michael Minogue, Mohober, Mullinahone, Co. Tipperary. Folio No.: 37949; Lands: Mohober & Fanningsbog; Area: 29a.0r.8p.; 8a.2r.14p.; 2a.0r.9p.; County: **TIPPERARY.**

Mary Duggan, 1 Arravale Terrace, Tipperary, Co. Tipperary. Folio No.: 25424; Lands: Ballyniland; Area: 0.444 acres; County: **TIPPERARY.**

William Ruttle, Bouliglass, Askeaton, Co. Limerick. Folio No.: 18591; Lands: Boolaglass; Area: 3a.3r.38p.; County: **LIMERICK.**

James McGrath, Glenbane, Upper Holycross, Thurles, Co. Tipperary. Folio No.: 19303; Lands: Glenbane Upper; Area: 34a.0r.0p.; County: **TIPPERARY.**

Michael Farrelly, Clifferna, Stradone, Co. Cavan. Folio No.: 8043; Lands: Drumhirk; Area: 27a.0r.10p.; County: **CAVAN.**

James Reid, Armitage of Killeen, Borrisokane, Co. Tipperary. Folio No.: 16641; Lands: Rathmore; Area: 13a.0r.16p.; County: **TIPPERARY.**

Timothy Cremmins, Glencollins, Ballydesmond, Co. Cork. Folio No.: 1257; Lands: Glencollins; Area: 74a.2r.27p.; County: **CORK.**

Anthony Cervi, Folio No..: 74350L; Lands: All that and those the dwellinghouse and premises known as "Lisnagall", Iona Road, Glasnevin, situate in the Parish of St. George and district of Glasnevin. County: **DUBLIN.**

Mary Anne Kingston, Gortigenane, Minane Bridge, Co. Cork. Folio No.: 3443; Lands: Ballinluig West; Area: 155a.2r.12p.; County: **CORK.**

Thomas Raftery, Willbrook, Castlerea, Co. Roscommon. Folio No.: 25506; Lands: (1) Willsbrook; (2) Willsbrook; (3) Cloonroughan; Area: (1) 7.913 acres; (2) 6.506 acres; (3) 7.856 acres; County: **ROSCOMMON.**

Henri Sant and Virginia Sant, 3 Mullinarry, Carrickmacross, Co. Monaghan. Folio No.: 1640F; Lands: Lisanisk; Area: .256 acres; County: **MONAGHAN.**

Olivia Ward of Gunnocks, Clonee, Co. Meath; Folio No.: 1329; Lands: Loughsallagh; Area: 100 acres; County: **MEATH.**

John Joseph Conway, Folio No.: 40410; Lands: Srahnamanragh; Area: 98a.2r.24p.; County: **MAYO.**

Edward Chmelar of Larkfield, Carlow; Folio No.: 8328F; Lands: Rathnapish; Area: 0.288 acres; County: **CARLOW.**

Josephine Dennigan, of Clooneena, Co. Longford. Folio No.: 377R; Lands: Kilmore Lower; Area: 14a.2r.2p.; County: **LONGFORD.**

Patrick Joseph Doherty of Keelogs, Churchill, Co. Donegal. Folio No.: 39659; Lands: Keeloges; Area: 25a.3r.35p.; County: **DONEGAL.**

Pauline Doyle and **James Doyle,** both of Ballard, Kilbride, Co. Wicklow; Folio No.: 130; Lands: Ballard Upper; Area: 8a.2r.36p.; County: **WICKLOW.**

William O'Donnell, Folio No.: 7741F; Lands: Cabra Glebe; Area: 10.279 acres; County: **DONEGAL.**

Sir John Keane, Cappoquin, Co. Waterford. Folio No.: 2603; Lands: Dysert; Area: 0a.1r.25p.; County: **WATERFORD.**

Allied Irish Banks, 3/4 Foster Place, Dublin 2. Folio No.: 8185; Lands: Townland of Irishtown, Barony of Upper Cross; County: **DUBLIN.**

Timothy Brick and Mary Brick, of Earl View, Caherbreagh, Tralee, Co. Kerry. Folio No.: 9546 and 8893; Lands: Garraun; Area: 8a.2r.5p and 12a.1r.31p.; County: **KERRY.**

REGISTRY OF DEEDS

NOTIFICATION OF CHANGE OF TELEPHONE NUMBER

With effect from Monday 15th May the telephone number of the Registry of Deeds offices has been changed to **(01) 732233.** Please note that this is the existing telephone number of the Land Registry offices.

Lost Wills

FITZGERALD, Alice, late of 26 Oulton Road, Clontarf, Dublin. Will anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 26th day of December 1985 please contact Barry Bowman and Company, Solicitors, 6 Main Street, Lucan, Co. Dublin. Tel. 280735/280734.

HANLON, Christopher Terence, late of 122 Lower Kimmage Road, in the City of Dublin, Department of Local Government temporary employee. Will anybody having knowledge of the whereabouts of a Will of the above-named deceased, who died on the 27th day of October, 1988, please contact Lehane & Hogan, Solicitors, 1 Upr. Ormond Quay, Dublin 7. Tel. (01) 775396/770737.

HALLAHAN, Daniel, retired gardener, late of 41 Beaufield Park, Stillorgan, Co. Dublin who died on the 21st February 1971. Will any person having knowledge of the whereabouts of a Will of the above named deceased please contact Behan & Company, Solicitors, Irish Permanent House, 12 Lr. Kilmacud Road, Stillorgan, Co. Dublin. Tel. (01) 832106.

CONNEELY, Edward (Ned), late of 67 Prospect Hill, Galway. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 22nd day of May, 1989, please contact Padhraic Harris & Co., Solicitors, Odeon House, Eyre Square, Galway.

Miscellaneous

REQUIRED: Full Seven Day Publicans Licence. Contact James E. Cahill and Company, Solicitors, Abbeyleix, Co. Laois. (0502) 31246/31220.

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INCORPORATED LAW SOCIETY OF IRELAND

Vol. 83 No. 7 July 1989

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- X-Rays and the Law.
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INCORPORATED LAW SOCIETY OF IRELAND
Vol. 83 No. 7 July 1989

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Cover Photo: (left to right): Rory McEntee, Chairman of The Law Society's Conveyancing Committee, Maeve Hayes, Solicitor, Chairman of the Sub-Committee on Undertakings, and Stewart MacKinnon, Manager, Irish Banks Standing Committee.

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Viewpoint

The announcement by the Government's Chief Whip that a number of Bills which had not completed their passage through the Dail prior to its dissolution, would be reintroduced is welcome. While the Dail did put a number of Bills through their final stages prior to dissolution there still remained a significant number of Bills which went back to square one. Some of the Bills which fell were of considerable social and public importance including the Child Care Bill, the Criminal Law (Rape) (Amendment) Bill and most disappointing of all the Building Control Bill. This Bill, first introducted in 1984, is to give statutory force to the New Building Regulations and follows on the report of the Stardust Tribunal.

Even the ''rushing through'' of the later stages of the Bills is an unsatisfactory part solution to the problem, the effect being that the Committee stages at which Bills should be subject to line by line review by the Deputies must clearly be skimped in many cases. It cannot be simply argued that Bills should retain the status which they had at the dissolution of a Dail since Bills must be seen to be instruments of Government policy and on four recent occasions on which the Dail has been dissolved a Government of a different political outlook to the previous Government has been returned. The question does arise however as to whether it is necessary that there should be so many Bills at so many different stages of progress through the Dail. If all the stages of a Bill could be taken within a relatively short space of time then on any sudden dissolution of the Dail there would not be likely to be many casualties. It is of course accepted that the Department responsible for the introduction of a Bill must be given an opportunity to consider observations made by Deputies at the Second stage of Bills and to give detailed consideration to amendments put down for the Committee stage. However it must be doubted whether the long gaps which seem to arise between the Second stages and Committee stages need necessarily be quite so extensive.

A different solution to the difficulty could involve the use of an American ''Committee Style'' method of processing legislation. Under this a draft Bill would be available for discussion in advance by a specialist Sub Committee of the Dail and/or Seanad so that what are now the Committee stages of Bills could be dealt with at a much earlier stage, ensuring rapid passage of the legislation through the Oireachtas once it had been reported out of the Sub Committee.

A further advantage of this system would be that interested parties would be able to make representations to the Committees in advance of the crystallization of the legislation. In our present system Bills tend to be regarded as being ''cast in stone'' at their introduction stage and it takes considerable effort to effect significant changes in them. Even when the need for significant changes is accepted it is usually a cause of considerable delay in the legislative process, witness the Companies Bill which is another of the significant measures which fell with the Dail.

It is time for a hard look to be taken by our Parliamentarians at the efficiency and efficacy of the legislative process in the Oireachtas. □

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New laws for co-ops?

New legislation governing co-operatives was promised by the Minister for Industry and Commerce (then Mr. Albert Reynolds TD) at the annual meeting of the Irish Co-operative Organisation Society (ICOS) on 7 November 1988. A modern code of co-operative law would be important to a wide range of interests: agri-groups, credit unions, new wave worker and community co-ops, self-help housing groups and the legal and accountancy professions.

by Anthony Quinn, Barrister-at-Law MA, BComm., Dip.Public Adm., FIIS, Dip. Legal Studies

The inadequacy of existing legislation on co-ops has been widely acknowledged by the co-operative movement and documented in authoritative reports. The Industrial and Provident Societies Act, 1893 is still the principal statute under which most co-operatives register with the official authority, the Registrar of Friendly Societies. The Act of 1893 should not be condemned solely on the basis of its Victorian origins. It was flexible and in general served its purposes fairly well over the past century. Flexibility has disadvantages reflected in the Industrial and Provident Societies Acts being used for business purposes remote from a co-op, a term which was not defined by statute. Societies' rules, such as those based on model rules of Irish Co-op Organisation Society (ICOS) are the usual indicators of a *bona fide* co-op. The main inadequacy is the lack of a modern code of laws to cater specifically for co-operatives operating in current commercial realities.

Reports call for New Laws

Many authoritative and representative reports have been prepared in recent decades regarding the Irish co-operative movement. During the Lemass era, the Report of the Committee on Co-operative Societies under the late Kevin Mangan, Registrar of Friendly Societies, recommended in 1963 that new legislation was required.[1] A subsequent Registrar stated in his annual statutory reports that he had submitted proposals for amending legislation to the Minister for Industry and Commerce in 1983.[2]

More recently there were three important reports: the Irish Congress of Trade Unions, 1985;[3] the Oireachtas Joint Committee on Small Businesses 1986;[4] and the Special Committee of the Society for Co-operative Studies in Ireland, 1986.[5] While details and emphasis differ, the reports' recommendations all point to the need for new legislation on co-operatives. The Co-op Studies Special Committee Report on the Wider Application of the Co-op System, 1986, reference 5, was vital. It represented a strong principled view among relevant co-operative umbrella organisations, trade unions and official agencies that new legislation should specifically include the internationally recognised co-op principles e.g. democratic control (one member, one vote in primary societies) based on members' participation rather than amounts of capital invested, and also co-operation among co-ops.[6]

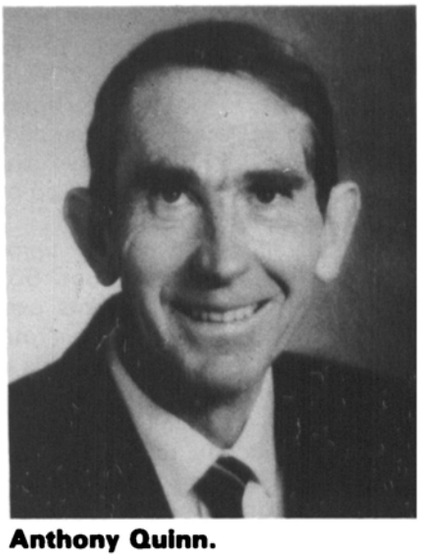
Some Amending Legislation

While the principal relevant Act remains that of 1893, there have been some amendments over the years. Following the Mangan report referred to above, reference 1, the Credit Union Act, 1966 facilitated official registration and supervision of credit unions which are a special category of industrial and provident societies. The Industrial and Provident Societies (Amendment) Act, 1978, included some law reform e.g. re winding-up of societies under the Companies Acts. The 1978 Act, however, was mainly aimed at deposit-taking societies such as PMPS rather than facilitating the co-operative movement.

Legislative Reform – a Difficult Task

Long delay in introducing a code of laws specifically for co-ops has compounded the task of law reform. The Minister for Industry and Commerce will presumably meet co-op interest groups to discuss possible changes. Most of those groups have already made their views known at earlier stages for the purposes of up-dating the law. A basic conflict could now arise regarding the extent to which co-op law should reflect pure co-op philosophy based on the internationally recognised principles such as democratic control through one-member, one-vote.

British Industrial and Provident Acts require societies to be *bona fide* co-ops before registration. As many Irish agricultural co-operatives are taking the route of forming Public Limited Companies, PLC, with shares traded on the Stock exchange, it is becoming very difficult to define precisely a *"bona fide* co-op''.



Anthony Quinn.

Complications

The main developments in recent years which complicate the task of reform of co-operative law are as follows:

(A) As *agricultural co-ops take the PLC/Stock Exchange route,* the large business groups become complex with mainstream limited companies co-existing alongside para-companies such as Industrial & Provident Societies. These groups may take different forms but the original co-op usually retains control. There is a strong thrust towards rationalisation and mergers.[7]

(B) A new wave is emerging of *small worker and community co-ops.* These are being stimulated by initiatives such as the Co-op Advisory Council and Development Unit in FAS – the Training and Employment Authority. The trade union movement is interested in worker co-ops. Housing co-ops are also active in rural and urban communities.[8]

(C) *Company Law is being reformed* for national and European Community reasons. This reform affects co-ops directly and indirectly. The large agri- groups include mainstream companies which are clearly subject to company law. Para- companies, however, cannot ignore those developments. For example, Industrial & Provident Societies wound-up under the Companies Act will be affected by reformed insolvency provisions.[9] For some purposes, amendments to Companies Acts define "company" to include para-companies such as Industrial & Provident Societies and Friendly Societies. Higher standards required of company directors will raise the standards expected of co-op board members.

(D) The all-Ireland *credit union movement,* with about 500 credit unions represents over 900,000 members with a total of half a billion Irish pounds in personal savings. Credit unions, a special category of co-op society, require specific new legislation to replace the Credit Union Act, 1966.[10] The large assets of the Credit Union movement and the effects of the financial services revolution must be taken into account.

Mr. R. Bourke, former Minister for Industry and Commerce, indicated that a new Credit Union Act would be introduced following a review.

Results of Complications

Due to the complexities outlined above, there are many variables to be considered in any reform of general co-op law. The needs of small community and worker groups are clearly distinct from those of the large agri-groups. While stricter provisions of reformed company law are relevant to those large commercial groups, the new wave community and worker co-ops could be stifled by severe and complex legal controls.

The inclusion of the international co-op principles in Statute law would be desirable in principle but could cause difficulties for the agri-groups which took the PLC/Stock Exchange route for the purposes of capitalisation. There may be pressure to dilute the co-op philosophy because of tension between (a) the co-op ideal of democratic control based on members' participation; and (b) company norms such as shareholders' rights based on capital invested. It may not now be possible to legally define *"bona fide* co-op" and flexibility may be necessary. In reply to a Dáil question, there was Ministerial recognition of such difficulties.[11]

Conclusion

The legislative task is formidable – to frame a modern code of law for Irish co-ops, taking account of tradition, principles, diversity, complications and business realities. Interest groups including those representing co-ops will have various views on details of law reform. It is, however, clearly necessary to up-date century-old laws as the Irish co-operative movement faces into the European new Century.

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***Anthony Quinn, Barrister-at-Law, MA, B.Comm, Dip. Pub. Adm., FIIS,** *has a special interest in studies of the co-operative movement. A former Assistant Principal of the Registry of Friendly Societies, the official registration body for co-ops, he served on the Special Committee on the Wider Application of the Co-op System referred to in this article at reference 5. He has published material in Ireland and abroad on the co-op movement. This article is written in his personal capacity.*

From the President . . .

Recently the Law Society hosted a Reception to launch four forms of undertaking that have been agreed between the Law Society and the Irish Bankers Federation which are:-

(a) Undertaking where title documents are lent to a solicitor for the purposes of inspection only and return;
(b) Undertaking where title documents are furnished to a solicitor for the purposes of sale or mortgage of property (or part of it) and to account to bank for net proceeds;
(c) Undertaking to deliver title documents to bank on completion of purchase; and
(d) Undertaking by solicitor for use in connection with bridging finance.

These are excellent documents which it has taken very many years to agree finally with the Banks but if they are used in all solicitor/bank situations where undertakings are required, there should be less confusion about undertakings in the future. For example, the undertaking for a sale or mortgage specifies that the undertaking is to account for net proceeds after deduction of prior mortgages, auctioneers' fees and legal costs and outlay, usual apportionment of outgoings and any insurance premiums deducted by the mortgagee and the undertaking is to pay either the net proceeds (estimated amount specified) or so much of the net proceeds as will satisfy the obligations of the client.

The forms also carry an important caution that solicitors are advised to make appropriate searches before completing the undertaking to ensure that all outstanding liens, mortgages and charges are identified.

Undertakings can indeed have serious implications for the Law Society as judgment was given in the Supreme Court recently against the Society in an action by the Trustee Savings Bank claiming against the Compensation Fund on foot of a fraudulent undertaking given by a former solicitor.

The Society disputed that the Compensation Fund was liable to the Bank in such circumstances but both the High Court and the Supreme Court held against us. There are serious implications for the Compensation Fund as this action was by way of a test case so that the total claims arising from this against the Fund will amount to approximately £0.25m. Most of this sum is already reserved in the accounts of the Compensation Fund.

The Guide to Professional Conduct of Solicitors in Ireland has a special section dealing with undertakings where it states that an undertaking of a solicitor is binding in law and the failure of a solicitor to honour an undertaking is unprofessional conduct. A solicitor is responsible for carrying out an undertaking given by any member of his staff and all undertakings should be signed by a principal or partner. Undertakings should not be given lightly and should only be given when it is clearly necessary to do so in the interests of the client and shall be deemed to be the personal undertaking of the solicitor unless the contrary be proved. If a solicitor does not intend to accept personal responsibility this should be clearly expressed in the undertaking. Before giving an undertaking involving any substantial sum there should be an irrevocable instruction in writing from the client and an irrevocable written retainer continuing in force until the undertaking is carried out and an undertaking should neither be given or sought with which it is not possible for a solicitor to comply in all respects.

Solicitors' undertakings have always played an important part in facilitating the speedy conduct of many types of financial transactions and it is important that the banking community continue to have confidence in our profession and that accordingly solicitors at all times honour their undertakings.

You should find copies of the new forms of undertakings included with this Gazette and hopefully you will appreciate how useful they should be in the future. □

James Nash F.S.S. Dip.

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Practice Notes

Liability of Vendor to Discharge Land Purchase Annuity

The Conveyancing Committee has been requested to indicate the recommended practice in relation to the discharge of Land Purchase Annuities in the light of the provisions of General Condition 16 of the current Incorporated Law Society of Ireland General Conditions of Sale.

General Condition 16 provides:

Subject to Condition 15, the purchaser shall be deemed to buy:

(a) with full notice of the actual state and condition of the subject property,

and

(b) subject to (i) all leases (if any) mentioned in the Particulars or in the Special Conditions and (ii) all rights of way, water, light, drainage and other easements, rights, reservations, privileges, liabilities, covenants, rents, outgoings and all incidents of tenure.

The Committee is of the view that a land Purchase Annuity is a charge and does not come within the terms of General Condition 16(b). Accordingly, the Committee recommends that in the absence of a Special Condition to the contrary, it is the Vendor's liability to Discharge the Land purchase Annuity affecting the property in sale. □

P.L.M.

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Following consultations with various organisations already providing services to alleviate these problems, the Association has decided that, initially, it will endeavour to raise funds with the object of assisting certain organisations which, although State-aided to some extent, urgently require additional funding. The organisations which the Association proposes to assist are as follows:-

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2. *St. Vincent's Trust, Henrietta Lane, Dublin*
3. *Father Peter McVerry S.J.*

The Association welcomes as members all those interested in this worthy cause. The membership fee is £10 per annum (£5 for those who have not completed 5 years in practice, apprentice Solicitors and Students).

If you wish to become a member, please forward your fee to any member of the undersigned Committee. Cheques should be made payable to the Treasurer, Concerned Lawyers Association for Social Problems. The postal address is Law Library. PO Box 2424. The subscription is £10 and £5 for those who have not completed five years in practice at the bar, apprentice solicitors and students. The fee will cover a period of membership from the 1st of August, 1989 to the 31st of July, 1990.

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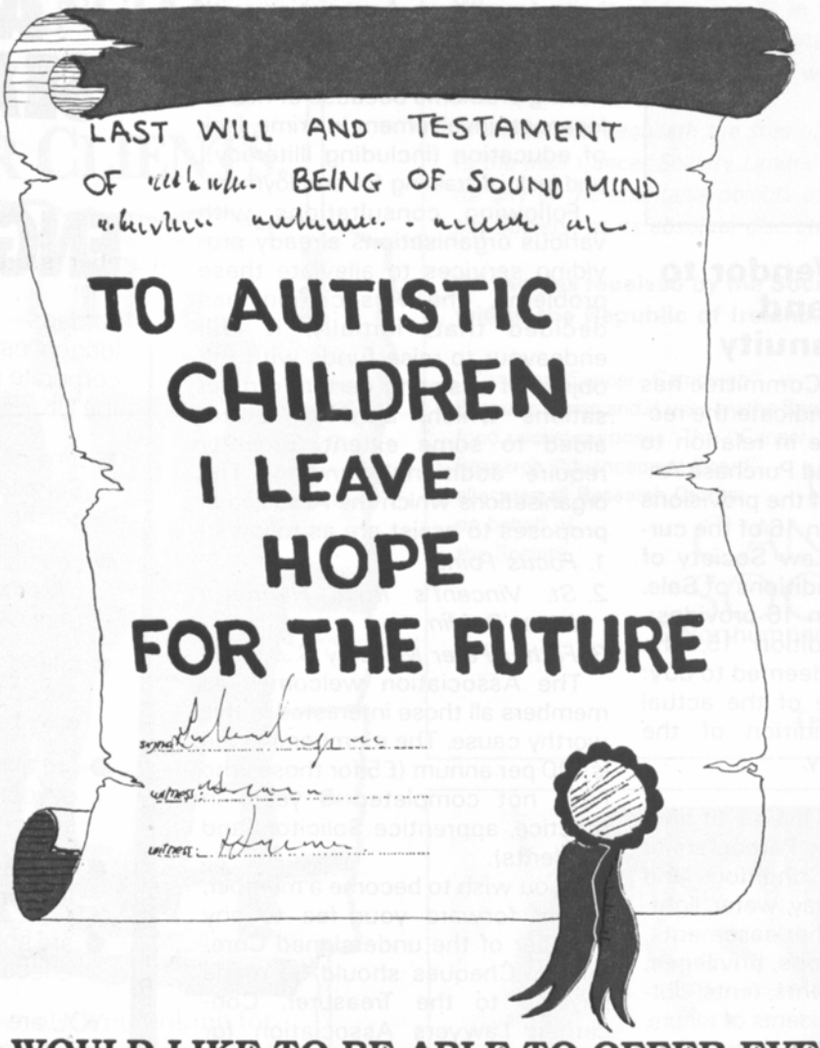

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"Dancing with the Dinosaurs"

A report on the Charity Ball held by the Irish Solicitors in London Bar Association
by
Cliona M. O'Tuama B.C.L., A.I.T.I., Solicitor, President of the Bar Association

The Irish Solicitors in London Bar Association, founded just over a year ago, held its first Charity Ball on Saturday 3 June 1989. The Ball was held in the spectacular surroundings of the Dinosaur Hall at the Natural History Museum, South Kensington, London.

We were honoured to have as our principal guest the Honourable Mr. Justice Niall McCarthy, who delivered a very witty after-dinner speech. We were also honoured that Maurice Curran travelled especially from Ireland for the event to represent the Incorporated Law Society of Ireland. The Law Society of England and Wales was represented by Bill Blackburn, a Council member and the Chairman of the Society's International Committee. John Randall, the Director of the Professional Standards and Development Directorate of The (English) Law Society also attended. Also present was a most distinguished member of our Association, Robert Johnston, a retired partner of McCann FitzGerald and the current President of the Confederation Fiscale Europeenne.

This Association was founded just over a year ago, principally to enable Irish solicitors on a collective basis to provide an effective lobby to press for progress on the subject of our re-qualification in the jurisdiction of England and Wales. Over the last few years many Irish solicitors have come to practise in England, particularly in London, and this Association now has approximately one hundred and fifty members, all of them practising in London. Indeed, Irish solicitors have helped to alleviate the severe recruitment crisis facing the legal profession in England and all our members have been very well received in this country and have been made feel most welcome by our respective firms and by the Law Society.

Due to the lack of legislative progress in Ireland in making the necessary amendments to the Solicitors' Acts, the respective Law Societies have been unable to enter into bilateral reciprocal arrangements regarding re-qualification as between the two jurisdictions. A vast amount of goodwill exists on both sides and representatives of both Law Societies meet on a regular basis. However, the EC Directive on the Mutual Recognition of Higher Education Diplomas, which was adopted by the Council of Ministers in Brussels on 21 December last, has finally provided the solution for us. Each member state will have 2 years from January 1989 within which to implement the Directive by the end of the current year.

From left to right: Mr. Robert W. R. Johnston, Mrs. Noelle Anne Curran, Miss Cliona M. O'Tuama, Mr. Maurice R. Curran, Mrs. Meeda Johnston, The Hon. Mr. Justice Niall StJohn McCarthy, Mrs. Barbara McCarthy.

From left to right: John Randall (Director of Professional Standards and Development of the English Law Society) speaking to organising Committee members of the Ball — Anne Counihan, Philip Lee and Cliona O'Tuama (President of ISLBA).

Having done everything possible in relation to our principal objective and re-qualification now being within our sight, the members of the Committee and I decided that we would like to hold a Charity Ball in order to raise funds to benefit poor young Irish immigrants in London, of whom there are, sadly, very many. I believe that successful Irish professional people in London owe a very large amount of our success to the good education which we received in Ireland and the privileged positions from which we started. There are, sadly, many other young Irish people in London who did not start with the same benefits and privileges and I feel very strongly that those who have succeeded should help those who, if they received the right advice and help, might also make a success of their lives in London. The Irish Youth Foundation, which has operated for several years in Ireland helping young people, is in the process of setting up a branch in England and we decided to give the funds raised by our Ball to them to be used for a specific purpose to be approved of by us to assist poor young Irish immigrants.

We were absolutely overwhelmed by the very generous support which we received from Irish firms of solicitors and other Irish institutions. Most of the major firms of solicitors made donations towards the Ball. The major donors were McCann FitzGerald, Arthur Cox and Aer Lingus. McCann FitzGerald is already operating a successful London office and we hope that Arthur Cox will soon follow suit! We also received generous donations from Max Abrahamson, Eugene F. Collins, William Fry, Gerrard Scallan & O'Brien, Hill Samuel Bank Ltd., and Matheson Ormsby Prentice. Our souvenir programme, produced especially for the event and printed at no cost by Ray Cotter of Rayprint, Dublin, attracted a great deal of interest and advertisements were taken by the major Irish banks and other Irish financial institutions with offices in London. London recruiting agents also seized the opportunity to advertise in our programme, as did P J Carroll, "The Irish Times", and "Image", the leading Irish social magazine. We are pleased to report all the money from the donations and the souvenir programme will be going direct to the benefiting Charity.

We devised a special form of "corporate table" and tables were quickly taken by Aer Lingus and Bank of Ireland. William Earley of McCann FitzGerald's London office also hosted a corporate table and another corporate table was hosted by A & L Goodbody, who now also have an office in London. Murray Sweeney solicitors of Limerick and Dublin flew an entire party to London for the event and also very generously donated a magnificent piece of Waterford crystal as a raffle prize. The first prize in the raffle was donated by Aer Lingus and other major raffle prizes were donated by Law Placements and Ryanair.

We were especially pleased that so many English lawyers attended the Ball and a special word of thanks is due to Keith Oliver of Peters & Peters, London, who took an entire table and who also acted as host for a group of Belgian law students, who happened to be in London for the weekend and whom he invited to the Ball. At 2.30 am the magnificent setting of the Natural History Museum provided the backdrop for the rendition of "Molly Malone" by the Belgians, which they had rehearsed especially for the event!

Due to the very generous donations and the success of our souvenir programme and raffle, we managed to raise £10,000 (sterling!) for the Irish Youth Foundation, which is no mean feat for a first attempt at charity fund raising!

We are entirely grateful to the Irish firms of solicitors who supported our Ball and apologise for the fact that its occurrence on an Irish bank holiday weekend prevented some others from coming. The Ball was a trememdous success and will certainly become an annual event on the London social scene! We hope that those who could not come this year will be able to attend next year.

Special thanks are due to all the organising Committee of the Ball: Anne Blayney, Roderick Bourke, Anne Counihan, Philip Lee, Patrick Long, our Hon. Secretary Adrienne McCann and Victor Timon. The person who helped me most with the organisation of the Ball was Philip Lee, who has now returned to the legal profession after several years as an oilman with "Shell". I do not think it inappropriate to single him out for my special thanks, as I probably would not have survived the pressures of the weeks immediately prior to the Ball without his assistance and support! □

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Younger Members News

GRAND QUIZ NIGHT

Law Society Last!

The YMC held its Annual Grand Quiz Night on 5th April this year in conjunction with the DSBA.

Once again, the Quiz was an outstanding success and was attended by over 300 solicitors. Generous sponsorship was provided by the Irish Permanent Building Society who were represented by a team on the night. For the first time, the Chairman of the YMC hosted a table with representatives from the 'younger' or 'junior' organisations of the Society of Surveyors and Chartered Surveyors, Irish Management Institute and the Irish Marketing Institute.

The winners of the Quiz were the Kilkenny team (who were regional winners of the YMC Waterford Quiz). The team generously re-donated £400 prize money towards the Solicitors Benevolent Fund.

The trophy for the team coming last (out of 65 teams let it be noted) was awarded to the Education Department of the Law Society!

GRAND QUIZ NIGHT — 5th APRIL 1989

From left to right: Michael Lanigan, Carl Johnson, Owen O'Mahony, Gerry O'Toole, Irish Permanent Building Society, Dun Laoghaire, Miriam Reynolds, Chairman, Younger Members Committee, David Dunne, and Michael Buggy.

Solicitors Bowled Over!

For the first time the Younger Members Commitee this year organised a Bowling Night (with excessive refreshments!) in conjunction with the Society of Younger Surveyors. We estimate that the event was attended by about 140 people – 70 solicitors and 70 surveyors.

The evening was thoroughly enjoyable as all who attended will already know! Generous sponsorship for the event was provided by the Phelan Partnership.

Solicitors please practise before next year's event! □

BOWLING NIGHT — 13th APRIL 1989

Keiron Diamond from the Phelan Partnership presenting first prize to Mary Lou Hartford (Bruce Shaw Partnership). Also in the photograph from left to right Deirdre Conroy (Phelan Partnership), Miriam Reynolds (Chairman, Younger Members Committee), Gerard Campbell, Brian Hartford, Peter McHale, Michael Scolland (Bruce Shaw Partnership), Pauline Daly, (Phelan Partnership) and John O'Neill (Bruce Shaw Partnership).

WATERFORD QUIZ NIGHT — WEDNESDAY, 29th MARCH 1989

From left to right: Sarah O'Keeffe, Apprentice Solicitor, Cormac Aherne, Irish Permanent Building Society, Waterford, Gabrielle Dalton, Younger Members Committee, Niamh Murrane, Solicitor, Mike Garvey, Irish Flight for Sight, Dick Tilson, Irish Permanent Building Society, Waterford, and Padraig Rohan, Irish Permanent Building Society.

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CCBE seeks reduction on VAT on lawyers' fees

The CCBE, the Council of the Bars and Law Societies of Countries in the European Communtiy held one of its regular meetings in May in Rhodes. The Irish representatives are:-

Mary Finlay, SC representing the Bar Council; and

John G Fish, solicitor who has recently replaced Raymond T Monahan; representing the Law Society.

A major part of the work of the meeting was devoted to the future of the Legal Profession in the context of the single internal market. The CCBE is working on a draft directive on the right of establishment for lawyers in the context of the directive on the mutual recognition of diplomas.

For the first time the American Bar Association was represented at the meeting. Their delegate, Mr. James Beery proposed the establishment of a Joint Working Group to consider how the EC Code of Conduct (shortly to be disseminated to all members by the Law Society) might be applied in relations between European and U S Lawyers.

Important Resolution on VAT

The meeting noting that legal services both by way of advice and representation are basic necessities and should be available as widely as possible to the public and that it is essential to facilitate as far as possible, freedom of access to justice for all citizens and noting that some member States had adopted lower rates of VAT for matters of social priority and that the imposition of VAT had the effect of increasing the cost of legal services for those unable to recover it, unanimously recommended that in so far as complete exemption is unobtainable, VAT should be applied to legal services at the lowest rate applicable to services which are classified as basic necessities. □

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LAWYERS DESK DIARY 1990

The pre-publication offer for the 1990 edition of the Lawyers Page-a-Day A4 Desk Diary @ £15 and the Week-to-View A4 Diary @ £10 (VAT and Postage included) has been distributed with the *Gazette* and members of the Society are requested to return the completed forms as soon as possible to ensure the reservation of their copies.

Land Registry Practice

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PEOPLE AND PLACES

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MIDLAND BAR ASSOCIATION

Photographed at a recent function in Tullamore to honour District Justice Seamus N. Mahon who retired recently were (L. to R.), Aidan O'Carroll, President Midland Bar Association, Mrs. Maylon Mahon, The Chief Justice, the Hon. Thomas Finlay, District Justice Mahon and Ms. Ann Romeril, Sec. Midland Bar Association.

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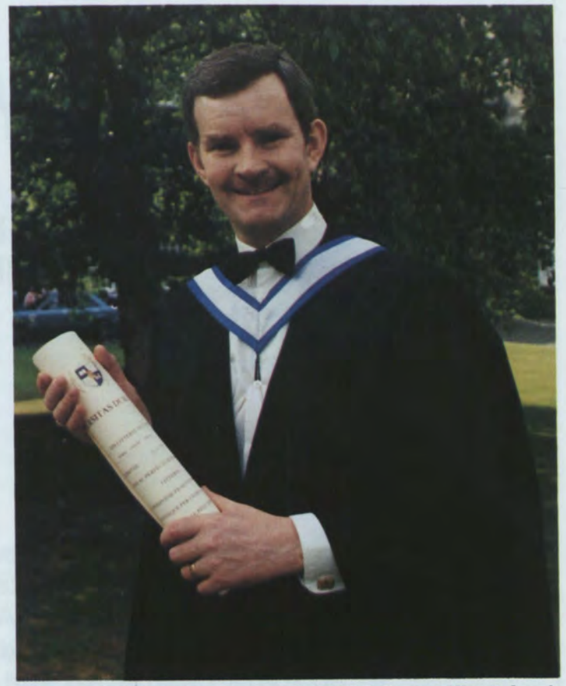

Thomas J. Cahill, Barrister-at-Law (U.C.D. and King's Inns) and member of the Chartered Institute of Transport in Ireland on the occasion of the award of a Master's Degree in Letters at the University of Dublin (Trinity College). This award followed his post graduate research by Thesis into *Drugs' Law and its Enforcement in the Republic of Ireland*. The occasion was also marked by a presentation to him by the Law Society of an original plaque representing The Scales of Justice. Mr. Cahill is a Consultant to the Society's Law School in Advocacy and Criminal Law.

LAW SOCIETY SUMMER BALL

(Left to right): Cathal McAllister, Bank of Ireland, with Katherine Delahunt, Solicitor, and Chris Mahon, Director Professional Services, Law Society.

Law Society Garden, Blackhall Place.

(Left to right): Maurice Curran, President of the Law Society, Ruth Margetson, Noelle Anne Curran and Ernest Margetson, Senior Vice President of the Law Society.

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X-Rays and the Law

As early as May 1896, x-ray plates were accepted in an English court when a Miss Gladys Ffoliett, a burlesque actress, sued the Nottingham Theatre Company for damages sustained in a fall, which occurred "in the line of duty". She fractured a small bone in her foot, and the x-ray evidence was accepted by the jury.

In February 1896 the second x-rays taken in America were used to locate a bullet in a leg wound. The first use of x-rays as evidence in a case of medical negligence occurred in America in the same year. At that time it took many minutes to obtain a study of adequate quality. Today, high quality radiographs, as they are now more properly called, are obtained in a fraction of a second.

Since their discovery in Germany in 1895, by W. C. Roentgen, x-rays have been used in many settings which have medico-legal implications. These have included identification of victims of various kinds of trauma, assessment of trauma and its nature, localisation of foreign material, identification of non-accidental injury, especially in children, and assessment of normal processes within the human (and animal) body.

X-rays are particularly helpful to lawyers in documenting the nature and extent of injury to the bony skeleton. Sequential studies following trauma can give an indication of how well healing is occurring and how likely it is that there will be further complications, e.g. arthritis in an adjacent joint. Studies which have been performed prior to an injury may be especially helpful for comparison. It is important that the x-ray films are accurately identified with as much information about the patient as possible and that this should be clearly legible. Photographic equipment which allows such information to be incorporated into the film is available. It is preferable that the technician who took the x-ray should be identifiable. The date and time of the study, and the side of the body involved should be clearly marked. X-rays should be interpreted by a doctor trained in radiology, because of the wide range of normal variation possible in the human body. Most radiologists have experienced cases referred to them as being abnormal, when, in fact, normal variation is the cause of the apparent abnormality. X-rays are now an extension of the clinical examination of a patient and are as valuable as the clinical findings, perhaps more so, from a legal point of view, as they provide a permanent record which is visible to all.

By
Samuel Hamilton,
Consultant Radiologist,
Meath and Adelaide
Hospitals, Dublin

Identification

Radiographs have proved useful in identifying victims of various disasters, such as aircraft crashes and fires. While the destruction caused in these may be severe, bone or bony fragments may remain. These can be x-rayed and, where a list of known victims is available, old radiographs may be obtained for comparison with post-mortem studies.

Views of the skull are helpful, as the frontal sinuses, which are air-containing spaces in the forehead, are unique for each individual (Fig. 1). Even identical twins will have different frontal sinuses. Comparison of pre- and post-mortem studies may allow identification or, more often, exclusion of the person whose old films are available. However, views of any part of the bony skeleton may be helpful in identification, as each individual is slightly different and may have characteristic features, including such things as old healed fractures or surgical changes. The age of a victim may be accurately established if the skeleton is not fully mature.

Identification is not limited to humans. Figure 2 shows a radiograph of a foot which was brought home one night by a family's dog. The skin and soft tissues had decomposed. This happened in an area where a multiple child killer had recently been convicted, but not all of the bodies had been found. The x-rays showed that the foot was not human, (probably that of a young bear), and a search for a child's corpse was not necessary.

Trauma

The use of radiographs in trauma is usually related to the assessment of suspected bony injury. This can occur in healthy or diseased bone and the radiologist can usually distinguish these. The trauma may be direct or indirect, and can result in a complete break or, especially in children, a partial break or even bowing of a bone without a break. In children it may be possible to give an indication of the age of a fracture, as typical changes occur at various stages of healing (Fig. 3). This is not so easy in adults, as the rate of healing varies considerably from person to person. However, an experienced radiologist can usually give some estimate as to the time scale involved. It is worth mentioning that some fractures may not be visible immediately, and require some degree of healing to have occurred before they will be seen on a radiograph. It is important to have proper viewing conditions for looking at radiographs. These are generally not present in a courtroom. Glossy photographs of x-rays may be taken, but these usually involve considerable minification, which may make the abnormality difficult to see.

In most areas of the body, changes occur with age. This is particularly so in the spine, which is an area commonly involved in accidents, including road traffic accidents. It is possible that an accident which does not cause a

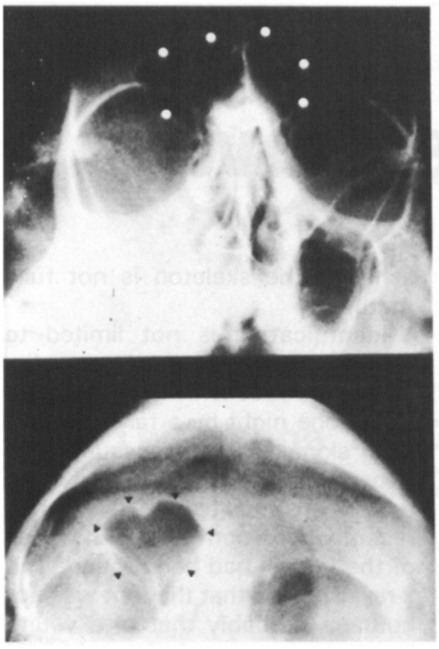

FIGURE 1

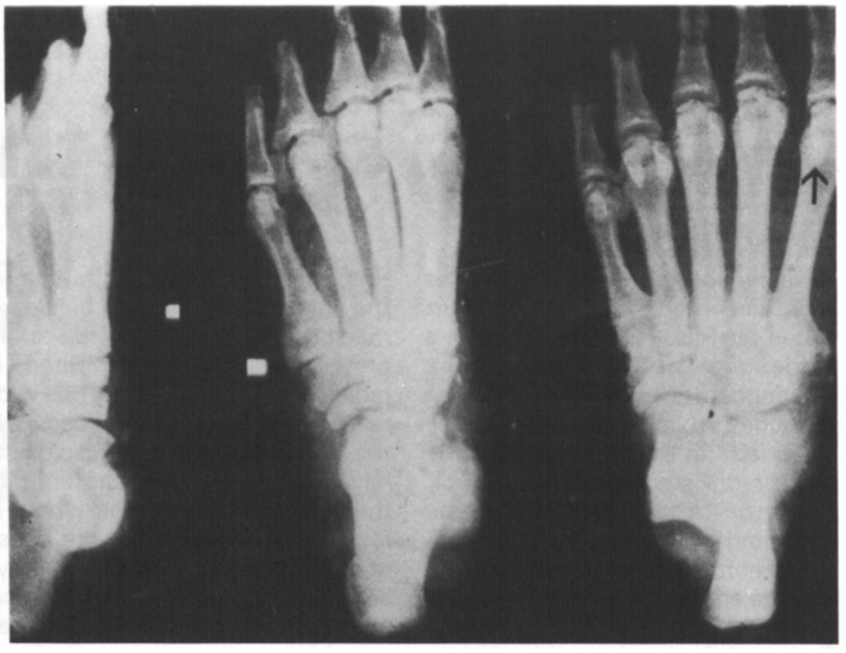

FIGURE 2

FIGURE 3

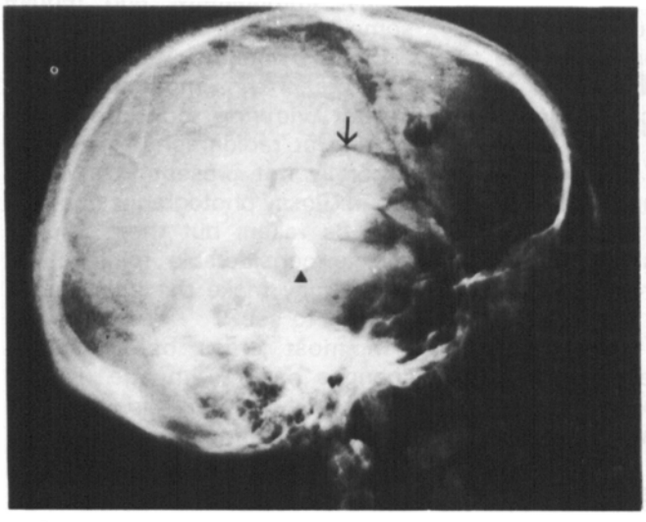

FIGURE 4

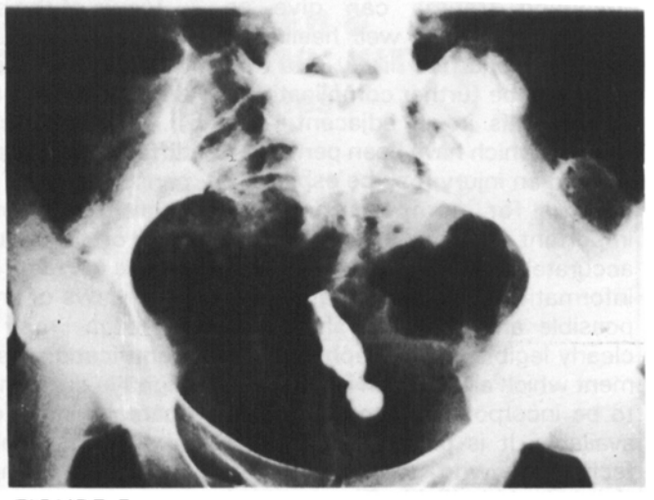

FIGURE 5

fracture, may aggravate the changes of normal ageing. Experience is required in the assessment of such areas, in order that what are natural ageing features are not misinterpreted as being directly due to injury. The radiologist can often ascertain this with a good degree of certainty.

Head injuries are a particularly important medico-legal area. In the majority of cases radiographs are not of significant help in diagnosis. They will show fractures of the skull, but will not give any indication of the extent of damage to the structures within the skull, principally the brain. Clinical examination of the patient is much more important in assessing brain injury, although sophisticated examination by computed tomography, (a "brain scan") is helpful in the appropriate clinical setting. Many serious cases of brain injury show no skull fracture on x-ray, and the radiograph can be misleading as to the extent of injury. Conversely, many fractures which do show on x-ray are relatively innocuous. The important factor in head injury is whether or not the brain is damaged and skull x-rays may not tell this.

A less common situation where x-rays may be useful is when strangulation is suspected. Views of the neck may show fractures of the hyoid bone or thyroid cartilage. These are small and are not commonly damaged in accidents. They can be damaged during post-mortem examination, making their assessment difficult, other than by radiography beforehand.

Non-accidental injury

In recent years the problem of non-accidental injury, or "battered baby" has become all to prevalent. The radiologist may be the first person to raise a suspicion of this as the child's injuries are often given a very plausible explanation. There are certain types of bony injury which are unlikely to occur accidentally. These include posterior fractures of ribs, fractures close to the growing ends of bones, vertebral fractures and spiral fractures of long bones. There are often injuries at different stages of healing, indicating several episodes of trauma. Minor bony injuries may not show immediately and follow-up examinations may be helpful. There are, however, some rare abnormalities which may mimic non-accidental injury but these can be excluded by a careful study of the whole skeleton.

Foreign bodies

The localisation of foreign material within the body is a situation uniquely suited to radiology. Many foreign bodies are encountered, some innocently, some through violence. Figure 4 shows the remains of the head of a nail which was fired into the skull by a nail gun, by a young man who committed suicide after killing his fiancee in a similar fashion. Some foreign bodies are swallowed by patients and others are inserted into body cavities (Fig. 5). In the case of gunshot wounds, x-rays are necessary to find the bullet fragments as they may travel a long way from the site of entry.

Radiographs of an assassinated foreign diplomat in London a few years ago showed a tiny metallic sphere which had been injected into him. This had contained a potent poison, but might never have been found without the x-ray study.

Non-metallic foreign bodies may also be identified and x-rays have been used to catch drug smugglers, who swallow the drugs in condoms. Generally it is more difficult to see non-metallic foreign bodies, however. Diamonds do not show on x-rays because of their carbon content. In America, a lady was detained on suspicion of swallowing a diamond in a jeweller's. She was mistakenly x-rayed to find the missing gem and a radiograph of her abdomen showed a diamond shaped opacity! When the jeweller was told that true diamonds do not show up, the charges were quickly dropped.

X-rays, which have the fascinating property of being able to pass through the body, essentially unnoticed, have a useful role to play in many medico-legal situations. Their accurate interpretation requires some expertise and a rigorous course of training. Newer modalities are now available for imaging various parts of the body. These involve the use of more sophisticated computer linked radiography (computed tomography, CT or CAT scan), high frequency sound waves (ultrasound), radio-isotopes (nuclear medicine) and magnetic fields (magnetic resonance imaging). These modalities are all available in Ireland, although not easily accessible in some instances, due to their high cost and limited numbers. X-rays, however, still remain the basis of many of the investigations performed, and are readily available.

Figure legends

Figure 1. Frontal sinuses of two people are outlined, showing quite different shapes.

Figure 2. Three views of an animal foot showing different bone configuration from man. Small bones in the toes (arrow) are more numerous.

Figure 3. Left side shows fracture of the radius (arrow) in a child's wrist. Middle shows healing one month later. Right shows healed fracture at four months.

Figure 4. Nail fragments (arrowhead) and skull fracture and air in the skull (arrow) are seen following suicide.

Figure 5. This disturbed young girl had inserted a plastic doll into her vagina. □

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Interview with
Thomas Finlay
Chief Justice, Supreme Court

The following is the text of an interview with the Hon. Mr. Justice Thomas Finlay, Chief Justice, which was published in a book entitled *"Judging The World: Law and Politics in the World's leading Courts"* by Gary Sturgess and Philip Chubb, published by Butterworths in 1988. It is reprinted with kind permission of the publishers.

Interviewer
Appointments to the bench are controlled by the executive and a lot of Irish appointments seem to have been of people who have formerly been politicians, or connected with political parties. Is that good or bad?

Thomas Finlay
Speaking in ideal terms, it is a bad thing. In a perfect society one should be able to devise a better method of appointing the judiciary. I would have thought, however, that in my experience – as with many apparently unjustifiable theoretical procedures – it has worked extremely well. I can't remember any example of a person appointed to a judicial post of any importance in my time (and I came to the Bar in the mid '40s) whose previous political loyalty had the slightest effect on his judgments or in any way affected his capacity, as it were, to stand up for the individual against the existing government. At the end of the day somebody must be accountable for the standard and type of judiciary that is appointed. There is a significant amount to be said for making politicians accountable for it. They are the ones to whom the people in general can turn if bad judicial appointments are being made. If appointments are made by some body of people who are relatively anonymous then there is no one to turn to and to blame.

Is the political life of judges before they come to the judiciary helpful in offering a breadth of experience?

I think it is rather a help. I myself was an active politician for a number of years; I was a member of Dáil Éireann for three years. I was appointed to the High Court Bench by the party I had opposed and I have subsequently been appointed to other posts, to the Presidency of the High Court and to the Chief Justiceship, by the party with which I had been associated. I think my experience in politics gave me a general, broad approach to matters and, like any other experience, probably helps you as a judge.

To what extent would you say that judges are political?

It depends on the sense in which you are using the term political. I think that a person's politics consists of a whole bundle of thoughts and philosophies apart from adherence to a party. He may be a person who is naturally conservative; he may be a person with a very considerable regard for the rights of the individual, a regard that is greater and deeper than his regard for law and order. There are all sorts of balances of political approach in any person who is interested in politics. In so far as that is so, that there can be politics with a small 'p', I think that, necessarily, every judge must have a bundle of these ideas and philosophies. They are bound to have some effect, though they should never be allowed to dominate his judgments. But I don't think this makes him political in the bad sense. It doesn't make him a part of a political party, nor does it mean that because he is conservative on one point he is going to be conservative on another.

I don't accept, certainly as far as the Irish judiciary is concerned, and particularly the Court of which I am the President, that there is a clear-cut cleavage between a right and left wing of the Court. The magazine commentators love this, but I don't believe it is true. It's much easier to write about the Court if you proceed on that basis, but in fact I think the performance of the judges shows that they approach individual cases in a different and individual way.

Where do you place the Supreme Court as an institution of government?

We have a constitutional theory called the separation of powers. The separation of powers consists essentially of the executive – the government of the day and all its officers, the legislature – the two houses and the President, and then the judiciary – the third separate power. I would have thought that in regard to the ordinary conditions of life, though not so much the economic of course, the judiciary, and in particular, the Supreme Court as the court of ultimate appeal, is contributing as much to the nuances of life in Ireland today as either of the two other separated powers of the Constitution.

How much do you think the Supreme Court has affected Irish society?

I suppose it has had two impacts, one of which was negative. h At periods in our history we have had a very disturbed country. There have been times when the enforcement of law and order became the sole objective, certainly a very dominant objective, of successive governments. At that time the Supreme Court, I would have thought, had a massively important negative role – protecting people against an excessive encroachment on their personal rights.

In more recent times, while that is still a very important aspect of the work of the Court, I suppose you could say that there is a positive aspect too, involving less dramatic rights of the individual. The right of privacy is one, also certain economic rights arising from the ownership of property. We have constitutional guarantees against the failure of the State to protect property rights. These have become the subject matter of decisions by the Supreme Court in more recent times and, I would hope, they have made a major contribution to the fairness of society.

You have mentioned that being a former politician can provide a broader understanding of the way in which society works. Do you find that, in the area of review of administrative decisions, there is an unspoken agreement between government and the judiciary that there is a point beyond which the judiciary can't go?

The answer to that is relatively straightforward: the judiciary has laid down, and interpreted the Constitution as laying down, a very clear-cut separation of powers between it and the government and between it and the legislature. It has been jealous in protecting its area. The most obvious way in which that happens is that pieces of legislation, for example, which are even partly capable of being interpreted as giving to some administrative officer, such as a civil servant or a Minister of State, the power to make what should be a judicial determination, are immediately struck down as being inconsistent with the Constitution.

As a *quid pro quo* to that, I think it would be fair to say that the courts have been careful to set the limits to their own jurisdiction and, in particular, have repeatedly stated that the choice of economic objectives, the choice of social objectives, is peculiarly a matter for government as controlled by the legislature. While the Court will impede or inhibit a government which appears to be invading the rights of an individual for no good reason, it will not impede or inhibit a government; on the basis that it – the Court – would prefer a different course or would be aiming at a different objective. If the government has an objective, then the Court will not intervene on the basis that the objective is wrong, provided the Court is satisfied that what is being done is necessary for achieving the stated objective.

I would have thought that, if the court was confronted with a social objective it didn't agree with, all sorts of technical legal mechanisms could be brought to bear?

I would hope we haven't ever done that and I certainly would be very strongly opposed to doing it. I don't think it has happened, literally. I think we have carefully maintained the separation of our powers, and we have not sought to invade the field of government.

There are occasions when it is impossible to divine the social policy of a government. What then is the social policy role of the court?

A very great number of rights, rights of property in particular but also other rights – freedom of association, freedom of speech and so on – all the constitutional rights of that description, are granted subject to the exigencies of the common good, public order and morality, various phrases of that kind. Where, therefore, there is a restriction or an invasion of one or other of these rights by a piece of legislation, the first inquiry which the Court must make is whether the legislation has an object that is plausibly related to the common good, the public good, public order or public morality. If there is, then it may be, provided the invasion is not excessive for that objective, that it is consistent with the Constitution. But if there is none, and if those contending for the constitutional validity of the measure cannot put up an objective plausibly related to the common good, then it may be that the invasion falls simply by reason of it being an invasion without justification.

The Hon. Mr. Justice Thomas A. Finlay, Chief Justice.

The American Supreme Court has the Brandeis brief, where social facts are brought before the Court. Do you have any similar mechanisms in Ireland?

We have none that we originate ourselves. Every case we try is a case on appeal. All other cases of a constitutional nature are appeals from the High Court and in the High Court there will be evidence led on social matters, economic matters, on social objectives, on the consequences of the statute or legislation, that type of thing. We will accept the finding of a High Court judge on that evidence, provided it is supported by the evidence. We won't make our own finding, won't hear our own evidence.

Would you be happy with dissenting opinions if you were allowed to have them?

I think not, although there are varying views about this. I know that some of my colleagues feel, and respectfully feel due to our allegiance to the Constitution, that it was an error not to provide this in the Constitution and that we would be better with dissenting judgments. I rather think not, because I think there is a lot to be said for coming as near to certainty and finality as you can get in constitutional issues. I think on balance the single decision is a good one.

Do you believe judges are isolated?

They must be isolated because, in a small community such as this, a very considerable amount of ordinary social activity is unwise. They become identified with people and points of view, and litigants may not think they are getting a fair trial. If you say: 'Are they being isolated from life as it goes on?' I don't think so. We haven't got a very pompous or severe form of isolation. I drive myself, I travel where I want, and engage in any sporting activity I want. I meet people, not as a judge but as an individual. Also, don't forget that watching cases going on before you every day in court is the closest you will get to humanity. So I don't think you become isolated in the full sense of the word at all. □

Continuing Legal Education Diary

29 July, 1989 (Saturday)
Milk Quotas. Kilcoran Lodge Hotel, Cahir, Co. Tipperary. 10 a.m.-1.00 p.m.

21 August, 1989 (Monday)
Capital Gains Tax. Blackhall Place. 9.30-5.00 p.m.

31 August, 1989 (Thursday)
Judicial Separation and Family Law Reform Act, 1989. Blackhall Place. 2.30-6.00 p.m.

19 September, 1989 (Tuesday)
Medical Negligence. Blackhall Place. 7.30-9.30 p.m.

22 September, 1989 (Friday)
Environmental Law. Blackhall Place. 9.30 a.m.-5.00 p.m.

28 September, 1989 (Thursday)
The Revenue and the Taxpayer. Berkeley Court Hotel, Dublin. 9.30 a.m.-5.30 p.m.

29 September-1st October, 1989 (7 p.m. Friday-1 p.m. Sunday).
Residential Advocacy Course, Bellinter, Navan, Co. Meath.

FOR YOUR DIARY

Society of Young Solicitors
Business and Finance Weekend
13-15 October 1989
Great Southern Hotel, Killarney

Fortuitous flutter

The following is an extract from "Phillips Fox Briefings" (Australia) for May 1989, submitted to the Gazette by David R. Pigot, Solicitor.

Sydney senior partner Ken Austin recently recalled a story that proves there is more than one way for a plaintiff to win a case.

Ken once acted for a client claiming damages after a motor vehicle accident. He advised the client that the damages might be assessed at around £500.

Much to Ken's dismay, his client was unsuccessful at the hearing of the matter.

But Ken was puzzled by his client's nonchalant reaction to the unfavourable verdict.

Asked to explain why he was not upset, the client told Ken that before the hearing he had contacted his bookmaker, who said plaintiffs usually won in these cases.

So the client backed himself to lose – investing £50 at odds of 10 to 1.

EMPLOYMENT OPPORTUNITIES

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For further details contact:

MIRIAM A. WALSH,
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BLACKHALL PLACE,
DUBLIN 7.

Insurance Consultancy and Risk Management

by
PEARSE KILCULLEN*

The role of the Insurance Consultant may best be considered under the following headings:

1. Consultation regarding cover.
2. Risk Management.
3. Consultation regarding claims.

No one would hand over the keys of their home, shop, or factory to the first one who comes along and offers to look after it, for the cheapest price. First of all, he would need to know a great deal more about the offerer – his integrity, expertise and qualifications for the job. Yet, every day, people hand over responsibility for their assets, sometimes running into millions of pounds, to Brokers or Insurance Companies with the lowest quotations. The true value of insurance cover is only known when the claim arises. With most commodities you get what you pay for – that does not necessarily apply to insurance where you may not get what you thought you paid for. The vital rule when buying insurance is – **If the cover is not adequate – the price does not matter.**

Eighty percent of commercial insurances in this country are arranged by insurance brokers. Many of these firms, particularly those who are members of the Corporation of Insurance Brokers of Ireland or the National Insurance Brokers Association, are highly reputable and provide an efficient service. Member firms must maintain professional indemnity insurance and produce Solvency Certificates each year. Until the legislation currently before the Oireachtas is passed, there is nothing to stop anyone describing himself as an insurance broker. No professional indemnity insurance is necessary, no level of expertise required and, very often, little to be had. If the current Bill passes through the Oireachtas in its present form, many of these firms may be forced to become agents, from whom a relatively low level of expertise will be required.

A policyholder wishing to obtain a second opinion may engage the services of a consultant who will:-

1. Examine all existing insurance contracts and visit all premises concerned.
2. Seek any additional information necessary e.g. the value of stocks at risk.
3. Advise on the scope of cover he considers the policyholder should have.
4. Identify present inadequacies in cover.
5. Suggest that professional reinstatement valuations for buildings be obtained and updated annually.
6. If thought necessary, recommend different insurers.
7. If thought necessary, recommend change of brokers.
8. Examine the circumstances leading up to the contract to try to identify and rectify any possible lack of disclosure which could give rise to serious problems at the claims stage.
9. Identify material risk alterations not advised to insurers – rectify the contractual position and alert the policyholder for the future.
10. Examine the possibility of losses arising due to computers being accessed by unauthorised persons.
11. Suggest ways in which cover may be arranged for new kinds of losses. If the policyholder is one who makes or supplies a product that can be consumed, inhaled or applied to the skin – he may be advised to arrange Malicious Product Tamper insurance. This new form of cover has been designed to indemnify a manufacturer for the cost of recalling a product, including inventory destruction, lost profits, business interruption, product rehabilitation and consequential loss. The recall of *Tylenol Extra Strength* in the U.S. in 1982, after contamination resulting in seven deaths, cost US$100m, with loss of sales amounting to US$400m. The significant thing about this loss was the fact that the Courts held that the cost of recall or sales losses did not fall within the scope of the Products Liability policy in force.

The consultant will not advise on price – that is the broker's job. He will recommend that all insurances be placed by reputable brokers.

Risk Management

In a large commercial concern the cost of claims controls the cost of insurance. In recent years we have seen some Employers' and Public Liability premiums increase tenfold in one year – an enormous burden for industry, particularly, if competing overseas. This has led to the growth of Risk Management which is the art of working with management to protect company assets and control or eliminate losses. It is relatively new in this country and only of interest to the larger industrial concerns.

The consultant would seek to introduce the following procedures:-

1. A major disaster plan.
2. A planned programme of accident/fire prevention under

Managing Director of J. P. Kilcullen & Co. Ltd., Insurance Consultants and Risk Managers, Blackrock, Co. Dublin.

which everyone knows what is expected of him.
3. A coherent plan under the control of a member of senior management to ensure that factory layout is neat, orderly and safe – with machinery/plant adequately guarded.
4. Insofar as is possible, a division of activities into self-contained units.
5. A contingency plan so that should the premises be destroyed e.g. by fire, arrangements can be made to continue production elsewhere with as little disruption as possible.
6. Many firms depend on others for parts or raw materials – contingency plans to use alternative suppliers should be updated frequently. A suppliers factory might burn down or a shipping strike in South America could disrupt the supply of raw materials.
7. A detailed examination of accidents and losses in the previous five years identifies areas for specific attention.
8. Many of the suggestions would have little to do with insurance e.g. it should be a company rule that key personnel do not fly together in the same aircraft.
9. If the concern is involved in the manufacture of food, drink, tobacco, cosmetics or pharmaceuticals – a special study will be recommended to render packaging as contamination proof as possible. This is a new and extremely difficult problem.

Claims

The end product of insurance is the claim and it is important to remember that it must be dealt with in terms of the contract which existed at the time of the loss. There may be different views on the precise content of that contract and it may be thought that the policy does not correctly or fully express the agreement entered into by the parties. In some cases insurers may take the view that no contract ever existed, being void ab initio due e.g. to failure to disclose all material facts in the preliminary negotiations.

When the loss arises, insurers adopt a passive role initially, whilst the policyholder must:-

1. Notify insurers immediately.
2. Notify the Gardai in some cases.
3. Present full details in writing.
4. Provide all the proof required.
5. Act in accordance with policy conditions.

Insurers will have their own experts, loss adjusters and, where necessary, the legal profession to look after their interest. The policyholder must fend for himself.

The consultant has a particular role to play when claims arise – very often this is the first intimation the policyholder has that his insurance arrangements may prove to be inadequate. Most claims are processed without difficulty, but a significant number arise each year where insurers and their policyholders do not see eye to eye. Problems may arise under the following headings:-

1. In the initial negotiations

This may be due to non-disclosure of material facts which entitle the insurer to avoid the policy from inception. This is an implied condition in all insurance contracts – it doesn't have to appear in the policy. The duty to disclose material facts doesn't just arise during preliminary negotiations – it also arises at each renewal of the policy. A material fact is one which influences the mind of a prudent underwriter in deciding whether to accept the risk and, on what terms. Proposal form wordings usually warn proposers of their duty in this respect. Much will depend on the circumstances of the non-disclosure, if the consultant had to concede the point and, on the attitude of the insurer as the non-disclosure defence is usually successful. In practice insurers often rely on the non-disclosure defence where their real reason for refusing indemnity is not sustainable.

2. Material risk alterations not advised to insurers.

Apart from the duty to disclose material facts at each renewal of the contract, many policies bear a condition that alterations which increase risk at *any* time, must be advised to insurers *and* accepted by them.

3. Cover exists but is inadequate.

This is a common problem and normally results in the policyholder bearing part of the loss. A typical example would be a building insured for £100,000 with a replacement cost of £200,000.

4. Insurers say loss not covered.

They may be quite correct in their interpretation but that is not always the case. The onus is on the policyholder, and his advisers, to show that cover applies to the particular incident. If pursued, the ultimate decision lies with the Supreme Court. Ambiguities will be held against insurers, as drawers of the document.

5. Insurers maintain that the incident is excluded by policy exception.

If the policyholder's consultant does not agree with this interpretation, he will negotiate with insurers and, if necessary, recommend arbitration.

6. Cover deficiency due to error or omission on the part of the intermediary.

Insurers having opted out on the grounds of non-disclosure, a claim could lie against the intermediary, particularly if he is a broker if, e.g. during negotiations with insurers he failed to disclose material facts within his knowledge. The Supreme Court decision re *Chariot Inn* is relevant.

7. Breach of Warranty.

A warranty is a stipulation that something will, or will not, be done – e.g. warranted that a burglar alarm be operative at all times when the premises is closed for business. A breach of warranty entitles insurers to refuse to deal with the particular loss.

8. Insurers refuse to provide indemnity because of breach of policy conditions.

This may arise after the loss has taken place – e.g. failure to report the loss to insurers within the specified time or provide full details, proofs, etc.

The role of the consultant is to interpret the contract and advise the policyholder, or his solicitor, on the correct course of action. He cannot guarantee to obtain what the policyholder wants – he does undertake to obtain what the policyholder is entitled to. In some cases this could be nothing. Having examined all relevant documentation and discussed the matter with the policyholder, the con-

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sultant will recommend action under one or more of the undernoted headings.

1. If everything appears to be in order – advise on procedures to be followed to quantify the loss within the time specified and present insurers, or their loss adjusters, with a detailed statement of claim. For example, in a major fire claim, the consultant should continue to be involved until finalised. If required, he should organise and work with a team of experts consisting of an architect, quantity surveyor, structural engineer, consulting engineer, etc. From his experience of this type of work he will know the most efficient professionals available throughout the country.

2. If some of the problems referred to earlier arise, he will discuss the particular points at issue with Insurers and endeavour to iron out the difficulties. Much will depend on how serious the problem may be but, in practice, insurers look favourably on this type of approach. Commercial considerations are relevant.

3. If the consultant is satisfied that insurers have not correctly interpreted the contract, he may recommend invoking the Arbitration Clause – if negotiation fails to resolve matters.

4. If the consultant is satisfied the contract is not as expressed in the policy – and negotiations have failed – he may recommend litigation.

5. The consultant might conclude that the loss is not covered or is expressly excluded by the policy. In the absence of special circumstances, he will recommend no further action be taken.

It is essential that the insurance consultant be involved at the *outset* of the claim; whether continuing involvement is necessary depends on the type of claim and the particular problems it presents.

The freak accident has become commonplace and things will happen in the future which have not occurred before. Whilst insurance follows the changing hazards of living, there will be times when both the underwriter and the consultant will have difficulty relating the event to the cover which exists.

We live in a rapidly changing world. Risks such as computer fraud, product guarantee, product recall, directors and officers liability, ransom and kidnap, satellite covers, decennial and legal fees, were unheard of ten years ago. A variety of new insurance contracts have been devised to cater for these risks – with the end of the tariff each insurer drafts his own wordings, many of which have not yet been tested and will doubtless give rise to interesting disputes in the future. □

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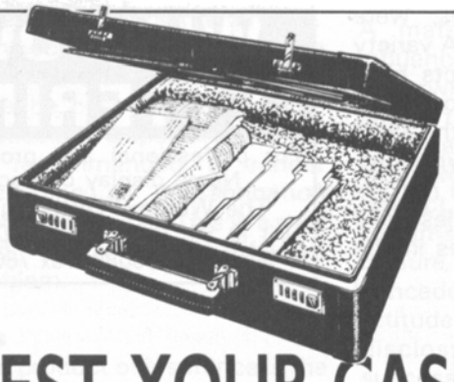

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Professional Information

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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 as 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.
25th day of July, 1989.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Elizabeth Mulvihill and Thomas Mulvihill of Glantannyalkeen, Lyrecrampone, Co. Kerry. Folio No.: 31461; Lands (1) Glantannyalkeen, (2) Cloughboola, (3) Dromadda Beg, (4), Glantannyalkeen; Area: (1) 161A. 3R. 36P. (2) 18A. 2P. (3) 13A. 20P. (4) 4A. 2R. County: **KERRY.**

Patrick Varley of Drummavooden, Carrick-on-Shannon, Co. Leitrim. Folio No.: 31395; Lands: Drumamoodan; Area: —: County: **ROSCOMMON.**

Francis & Anne Berry of 24 Ardilaun Road, Newcastle, Galway. Folio No.: 2048L: Lands: Newcastle: Area: —. County **GALWAY.**

Mary Clifton (otherwise Moylan) of Killehenny, Ballybunion, Co. Kerry. Folio No.: 21334; Lands: Killehenny; Area: 70125 perches. County: **KERRY.**

Thomas Ryan of Shanakill, Roscrea, Co. Tipperary. Folio No.: 18672; Lands: Dromard More; Area: 4A. 3R. 0P. County: **TIPPERARY.**

Noel Wallace of Ballinurd, Kilkerley, Dundalk, Co. Louth. Folio No.: 11164; Lands: Rathmore; Area: 0A. 3R. 29P. County: **LOUTH.**

Thomas Kelly of Feighs, Banagher, Co. Offaly. Folio No.: 13595. County: **KINGS.**

Rutledge Healy. Folio No.: 4855F. Lands: All that and those the property in the townland of Corgullion, in the Barony of Ballintober North. Area: 4,553 hectares. County: **ROSCOMMON.**

James Barry of Killathy, Ballyhooly, Co. Cork. Folio No.: 7298. Lands: Killathy; Area: 58A. 2R. 31P. County: **CORK.**

Anthony Monahan of Lourde Avenue, Kildare, Co. Kildare. Folio No.: 923F. Lands: Carragh; Area: 0A. 2R. 6P. County: **KILDARE.**

Lost Wills

BRERETON, John, late of Oldcourt, Carney, Nenagh, Co. Tipperary. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on the 6th day of May, 1989 please contact William X. White and Company, Solicitors, 6 Kellyville, Portlaoise, Co. Laoise.

HAYES, James, late of The Caravan, c/o John White, Cregg, Glandore, Co. Cork, obit. 27/5/89. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased, please contact Michael Corkery & Co., Solicitors, Camden House, Camden Quay, Cork. Tel. 021-509367, Fax. 021-505978.

McCABE, Elizabeth Vera, late of 29 St. Patrick's Terrace, Dundalk, Co. Louth. Will any person having knowledge of the wherabouts of a Will of the abovenamed deceased who died on 28 June, 1989, please contact Berrils & Co., 5 Francis St., Dundalk, Co. Louth. Tel: (042) 34219.

Miscellaneous

UNUSED 1988 (44th) Edition. Gore-Brown on Companies Vols. 1 & 2 together with updates to end of 1988. (Price new £225.00). £150.00. Tel. 832715.

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PROFESSIONAL INFORMATION

Please note that **Kevin O'Higgins and Vincent J. Dowling,** Solicitors, have formed a partnership to be known as O'Higgins Dowling, and are practising at 13 Lad Lane Upr., Wilton Place, Dublin 2. Tel. 613711. Fax 618314.

Mr. Dermot Scanlon, B.C.L., Solicitor, wishes to announce that he has acquired the practice of Goodbody & Kennedy, and is pleased that Mr. Kenneth C. P. Kennedy will remain as Consultant to the firm of J. D. Scanlon & Co. (incorporating Goodbody & Kennedy) Solicitors, O'Connor Square, Tullamore, Co. Offaly. Phone No. (0506) 51755/21103. Fax No. 51759.

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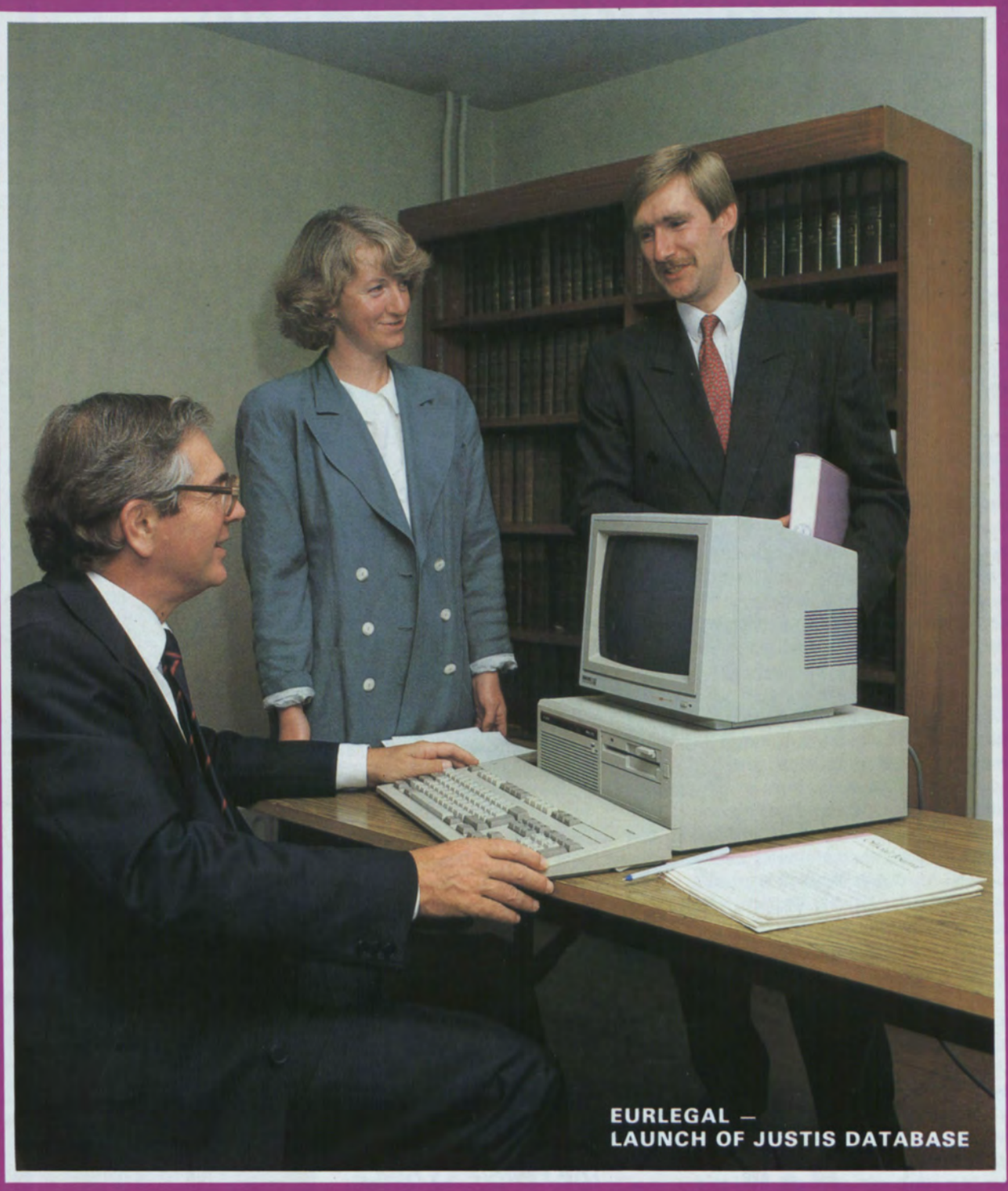

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Cover Photo: (left to right) John Fish, member of the Law Society's EC (1992) and International Affairs Committee, Margaret Byrne, Librarian, and Ken Murphy, Chairman of the Committee.

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Executive Editor:
Mary Gaynor

Committee:
Geraldine Clarke, Chairman
Eamonn G. Hall, Vice-Chairman
John F. Buckley
Gary Byrne
Patrick McMahon
Charles R. M. Meredith
Daire Murphy
John Schutte

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Viewpoint

"The Law Society should consider opening an office in Brussels to help keep the Solicitors' profession fully advised about 1992 legal developments". So said Peter Sutherland in Blackhall Place at the recent launch of 'EURLEGAL' – the Solicitors Profession's response to 1992.

In the course of a characteristically eloquent, incisive and thought-provoking address the former European Commissioner spoke of the enormous opportunity which the legal profession could lose to other advisers if it is not as geared up as they are to provide up-to-date information and analysis of the changes which 1992 is bringing to business, both in Ireland and throughout Europe.

He once again made the point, one that is usually missed about 1992, that it is a legal programme. Law lies at the very heart of the European Community. The Community itself was created by law, it has created its own system of law and all of its activities operate through this legal system. Although the objectives of the 1992 programme are political and economic, the programme itself is comprised entirely of law – literally hundreds of new laws all of which will have effect in Ireland.

All business activity is profoundly effected by the legal framework in which it is conducted. What is or is not legally possible for a company and its competitors is fundamental to every commercial decision. It is important for every business to know the law from two points of view. The first is compliance and the second is analysis which allows response to the opportunities which the law provides.

Concluding his speech he expressed himself to be very pleased with the advent of the JUSTIS on-line European Community Law data base. Through this the basic information to deal with any client query is only a phone call away. This system will only be of value, however, if solicitors identify the occasions when it can be availed of and then actually use it. In practical terms, how relevant will 1992 be for solicitors in Ireland? It is impossible to respond to such a question without speculating on the future of the legal profession in Europe generally.

At the European Summit meeting in Madrid on 26th and 27th June 1989 the Delors Committee report on Economic and Monetary Union dominated the agenda. The metaphor of a train leaving a station was much used to describe the result. That **all** the passengers were aboard is, for the moment at least, more significant than the now notorious lack of unanimous agreement among them as to either the length, or even the ultimate destination, of the journey. To most observers, however, it appears that a powerful process has commenced which will lead to more and more important decisions, effecting all our lives, being taken at European rather than national level.

As Peter Sutherland has pointed out, the European Community operates exclusively through making and enforcing laws. All laws require interpretation and application on the basis of legal principles, existing statutes and precedent cases. Lawyers invariably do well in a federal system and from this one might conclude that the future for the legal profession in Europe must be rosy. The more law that is created the more work there will be for lawyers.

That is far too simplistic an analysis, however. The whole thrust of 1992 and of Community orientation generally is towards free and open competition. Whether regulating or deregulating (and often it is difficult to distinguish the two) the Community does not look at professions but at activities. If the legal profession competes well

(Contd. on p.257)

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No Need to Notify?

Block Exemptions under Article 85 of the Treaty of Rome

The creation of the single European market by the end of 1992 means that businesses will no longer be trading in separate national markets, but in one market with common rules covering all twelve member States. The progress towards completion of the single market presents businesses with great challenges and opportunities, and inevitably businesses responding to those challenges will require the services of lawyers with knowledge and experience of the new developing legal environment. Many businesses have already reshaped their trading arrangements in anticipation of the single market, and many more will follow; increasing numbers of lawyers will be required to advise in relation to these developments and to draft distribution or agency agreements, franchising agreements, licences or clauses in joint venture or acquisition agreements. They must therefore recognise that all agreements, arrangements or undertakings between member States of the Community are subject to the competition laws of the Community.

The basic rules of European competition law are contained in Articles 85 to 90 of the Treaty of Rome and in the considerable number of regulations and notices of the Commission. In addition, a substantial body of case law has already developed in relation to specific aspects of competition law.

Article 85(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member States and have as their object or effect the prevention, restriction or distortion of competition within the Common Market: agreements prohibited by that Article are automatically void under Article 85(2).

Article 85(3) states that the provisions of Article 85(1) may be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings or any concerted practice or category of concerted practices which contributes

(a) to improving the production or distribution of goods or
(b) to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit and which does not:-
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

By
Arthur D. S. Moran,
Solicitor

If those two positive and two negative conditions of Article 85(3) are all satisfied, the agreement may be exempted from the provisions of Article 85(1) either on an individual basis after notification to the Directorate General for Competition (DGIV) in Brussels on Form A/B seeking the negative clearance, or, more commonly, pursuant to a block exemption. It is appropriate in all cases to consider whether a particular agreement can benefit or can be adapted to benefit from one of the block exemptions as an agreement benefitting from a block exemption does not require notification and thus saves the parties to the agreement considerable time, expense and uncertainty.

Broadly speaking, the regulations which provide block exemption derive from the application of the four conditions of Article 85(3) based upon the practical experience gained by the Commission in reviewing individual applications for negative clearance.

VIEWPOINT **(Contd from p.255)**

on quality and value for money there is every reason to believe it will thrive. If it does not do this then other professions and advisers will fill the gaps which the lawyers leave. The market, not the profession, will decide.

A crucial battleground will be European law as it applies to commercial activity in the Community. There is a great market for information in the business world on 1992 developments at the moment. Changes to the law and their implications are a very important part of this. Will the legal profession make this area its own or will complacency result in it being conceded to accountants and other advisers?

Peter Sutherland was a key member of the European Commission which devised, designed and commenced the implementation of the 1992 Programme. In Blackhall Place he spoke of the information market and pointed out that commercial clients would turn for advice on a particular measure to the source which first informed them of it, whether this was a lawyer or not. The 'Big 8' accountancy firms, with their enormous international resources, have established Brussels based information gathering and distribution systems.

Should the idea of a Law Society office in Brussels really be dismissed out of hand?

□

The classes of agreement which can qualify for block exemption and a brief synopsis of the criteria for block exemption are as follows:-

1. **Excusive Distribution Agreements**
Regulation 1983/83 outlines tha basic form of exclusive distribution agreement to which the Regulation applies a block exemption; prior to 1st July, 1983 the exemption was conferred by Regulation 67/67. The exemption applies to agreements "to which only two undertakings are party and whereby one party agrees with the other to supply certain goods for re-sale within the whole or a defined area of the Common Market only to that other". Certain restrictions are permitted, for example, the supplier may agree not to compete with the dealer/distributor by supplying direct to customers in the Distributor's Territory; the dealer may be obliged not to manufacture or distribute competing goods and may be required to purchase the goods only from the suppliers and the dealer may be prevented from seeking customers or establishing a branch or other distribution network for the goods outside his own territory. The supplier is entitled to require the dealer to purchase a full range of goods, to take minimum quantities of goods and impose promotional or packaging obligations on the dealer or to require the dealer to sell under trademark or in particular packaging specified by the supplier.

Article 3 of the Regulation lists certain non-permissable clauses which will deny the right to block exemption: if manufacturers of identical goods or goods considered by users as equivalent in view of their characteristics, price and intended use, enter into reciprocal exclusive distribution agreements between themselves in respect of such goods or if manufacturers of identical goods or goods considered by users as equivalent enter into a non-reciprocal exclusive distribution agreement between themselves in respect of such goods (unless one of them has a total annual turnover of no more than 100,000,000 ECU or about IR£77,500,000) or if users can obtain the contract goods in the territory only from the exclusive distributor and have no alternative source of supply outside the territory or if one or both of the parties makes it difficult for intermediaries or users to obtain the goods from other dealers inside the common market, particularly if one or both of them exercises industrial property rights so as to prevent dealers or users from obtaining or from selling in the territory property marked or otherwise properly marketed goods or exercises other rights to prevent dealers from obtaining goods from outside the contract territory. Article 3 applies also to goods manufactured by an undertaking connected with a party to the agreement (as defined in the Regulation).

The Regulation does not apply to beer supply or service station agreements which can be exempted under Regulation 1984/83.

The Regulation expires on 31 December 1997.

2. **Exclusive Purchasing Agreements**
Regulation 1984/83 relates to exclusive purchasing agreements between two undertakings of short or medium term duration and to beer supply agreements and service station agreements. For agreements prior to 1st July, 1983 the exemption was provided by Regulation 67/67. It acknowledges the fact that such agreements facilitate sales of a product and lead to intensive marketing and allow consumers a fair share of the advantage of regular supply. It permits no restriction on competition on the supplier other than the obligation not to distribute contract goods or goods competing with them in the reseller's territory and at his level of sales; the only permitted restriction against the reseller is the obligation not to manufacture or distribute goods competitive with the contract goods; the reseller can be required to purchase complete ranges of goods, minimum quantities, to sell under trademark and to undertake promotional activities without losing the benefit of block exemption. The Regulation does not apply block exemption to agreements between manufacturers of identical goods or if the contract goods comprise more than one type of goods or if the agreement is for more than five years or of indefinite duration. No restriction is permitted after termination of the agreement.

Drinks Industry
The Regulation recognises the arrangements common in the drinks industry where in return for special commercial or financial advantages resellers agree to purchase only from the supplier who grants such advantages and permits block exemption provided the obligations imposed on the reseller do not extend beyond the obligations not to sell beer and certain other drinks supplied by third parties of the same type as those produced by the supplier, in the event of selling third party products to sell in small quantities only and to advertise third party goods in a limited fashion. The exemption is not available where the agreement imposes obligations relating to goods other than drinks, is of more than 5 years duration for beer and other drinks or 10 years duration for beer alone.

The obligations can not be imposed on the successor to the reseller for a longer period than the reseller himself or where any restriction in relation to goods other than drinks is imposed. In the case of tied-houses the duration may extend to the entire period for which the reseller occupies the supplier's premises; the reseller must have the rights to obtain drinks other than beer from alternative sources if commercially more attractive.

Service Station Agreements
The block exemption also applies to service station agreements between two parties (supplier and reseller) where special commercial or financial advantages exist and the agreement relates only to certain

petroleum-based motor vehicle fuels and other fuels for resale in the service station. The following obligations are permitted to purchase such fuels only from the supplier, not to use lubricants supplied by a third party if the supplier has made available or financed lubrication plant or equipment, to advertise and to permit the supplier to service equipment supplied or financed by it. The exemption is not available where the agreement restricts the purchase of items other than fuels or the reseller's freedom to obtain other goods or applies for a period of more than 10 years or the period of occupation where the station is let to the reseller by the supplier:

The Commission has the right to withdraw the exemption if an agreement is found to have effects incompatible with Article 85(1) of the Treaty of Rome.

The Regulation expires on 31 December 1997.

3. **Specialisation Agreements**
Regulation 417/85 applies a block exemption to certain categories of specialisation agreement between a defined class of undertaking which provide reciprocal obligations either not to manufacture certain products or to manufacture certain products. The Regulation took effect on 1st March, 1985 and replaces Regulations 2779/72 and 3604/82. No restrictions on competition may be included other than an obligation not to conclude specialisation agreements with third parties in respect of similar products, to procure products exclusively from another party or to grant third parties the exclusive right to distribute the products subject to the specialisation agreement. Such agreements may impose an obligation to supply third parties with products, maintain minimum stocks and provide customer and guarantee services. The parties must observe defined turnover figures and the products must not account for more than 20% of the market for such products in the Community.

The Regulation expires on 31 December, 1997.

4. **Research and Development Agreements**
Regulation 418/85 applies a block exemption to certain categories of research and development agreements which promote technical and economic progress and increase the availability of technical knowledge and avoid duplication of research and development work. The work must be carried out within a defined framework and all parties to the agreement must have access to it. Article 3 sets out detailed provisions as to the permitted duration of such agreements and Articles 4 and 5 set out permitted restrictions or competition and other obligations between the parties themselves and third parties. The exemption does not apply where the parties are restricted in their freedom to carry out R+D independently or jointly with third parties in relation to unconnected fields of activity, are prohibited from challenging

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the validity of intellectual property rights held by the parties in the Common Market relevant to the R+D programme, are restricted as to the quantity of products they may manufacture or sell or in the determination of prices or customers or freedom of market or to allow manufacture by third parties or are required to refuse unreasonably to meet demand from purchasers or to make it difficult for purchasers to obtain products.

The Regulation, like Regulation 417/85, expires on 31 December, 1997.

5. **Selective Distribution and Motor Vehicle Agreements**
Regulation 123/85 relates to certain categories of motor vehicle distribution and servicing agreements to which two undertakings are party and in which one agrees to supply the other only within a particular territory of the Common Market or only the other and a specified number of other undertakings for the resale of motor vehicles and spare parts.

The dealer can be obliged among other things not to modify contract goods, not to manufacture competing goods, not to sell competing new vehicles or spare parts or use competing parts for maintenance, not to subcontract distribution or servicing or repairs to other dealers without consent, not to maintain distibution branches outside the dealer's territory or seek customers or entrust distribution to others outside his territory or supply to a reseller contract goods unless the reseller is an undertaking within the distribution system, to observe certain minimum standards, to order goods from the supplier only at certain times or within certain periods, to sell minimum quantities, keep certain minimum stocks, demonstration vehicles, perform guarantee work, free servicing, use only specified spare parts and to inform customers of use of parts from sources other than the supplier. The dealer must provide services in respect of contract goods sold in another territory of the Common Market by another dealer in the distribution network. The supplier cannot unreasonbly apply minimum requirements for distribution and servicing and must distinguish between categories of goods (i.e. vehicles and parts) in calculating discount and must supply any car in its current range marketed in the Member State of the dealer.

The Regulation expires on 30 June 1995.

6. **Patent Licences**
Regulation 2349/84 provides block exemption to certain categories of patent licensing agreements between two undertakings; such agreements may relate to national patents, European or Community patents as well as associated non-patented know-how. Such agreements may include obligations on the licensor not to license third parties or to exploit the licence itself, and obligations on the licensee to procure goods or services from the licensor, to pay a minimum royalty, restrict exploitation to particular applications, not to exploit the patent after expiration of the agreement, to mark products with details of the patentee, to ensure minimum quality standards and to inform the licensor of infringements of the patent. A number of provisions cannot be included in agreements if the block exemption is to apply, including, for example: prohibition on the licensee challenging the validity of the licensor's patent or other intellectual property rights, the duration of the licensing agreement beyond the term of the patent, restriction on either party competing with the other in respect of research and development, manufacture or sales, the charging of royalties on products not entirely or partially patented or manufactured by patented process, restriction as to the quantity of products either party may produce, freedom as to pricing and discounts, an obligation to assign improvements or new applications of the licensed patent, or a requirement to take further unwanted licenses.

Agreements between members of a patent pool or competitors in a joint venture or reciprocal agreements between competitors in relation to unprotected products are excluded from block exemption.

The Regulation expires on 31 December 1994.

7. **Franchise Agreements**
Regulation 4087/88, which took effect on 1st February 1989, grants a block exemption to franchise agreements between two undertakings, the franchisor and the franchisee, for the retailing of goods or the provision of services to end users, or a combination of these activities. It also covers cases where the relationship between the franchisor and the franchisee is made through a third undertaking, the master franchisee. However, the Regulation does not cover wholesale franchise agreements or industrial franchise agreements.

The exemption from Article 85(1) will operate where there is an obligation on the franchisor, in a defined area, not to grant the right to exploit all or part of the franchise to third parties or itself supply the franchisor's goods to third parties, and an obligation on the franchisee to refrain from seeking customers for the goods or services outside the defined area. The Regulation allows the presence of certain obligations on the franchisee in order to protect the franchisor's intellectual property rights, for example: to sell goods or provide services according to specifications laid down by the franchisor, not to engage in any similar business in the area which would compete with a member of the franchised network, to use its best endeavours to sell the goods or provide the services and to offer for sale a minimum range of goods and achieve a minimum turnover.

The exemption will apply even where the franchisee is obliged not to disclose to third parties the know-how provided by the franchisor or to communicate to the franchisor any experience gained in exploiting the franchise or not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise.

The exemption shall apply on condition that the franchisee is free to obtain goods that are the subject matter of the franchise from other franchisees and the franchisee is obliged to indicate its status as an independent undertaking. The exemption will not apply where undertakings producing goods or providing services which are identical or are considered by users as equivalent in view of their characteristics enter into franchise agreements in respect of such goods or services or generally where the franchisee is prevented from obtaining supplies of goods of a quality equivalent to those offered by the franchisor or where the franchisee is prevented from continuing to use the licensed know-how after termination of the agreement where the know-how has become generally known or easily accessible or if the franchisee is restricted by the franchisor in the determination of sale prices for the goods or services.

The Commission reserves the right to withdraw the benefit of the exemption pursuant to Regulation 19/65/EEC where it finds in a particular case that an agreement that is exempted, nevertheless has certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty of Rome, and in particular where territorial protection is awarded to the franchisee. The Regulation expires on 31 December 1999.

8. **Know-How Licences**

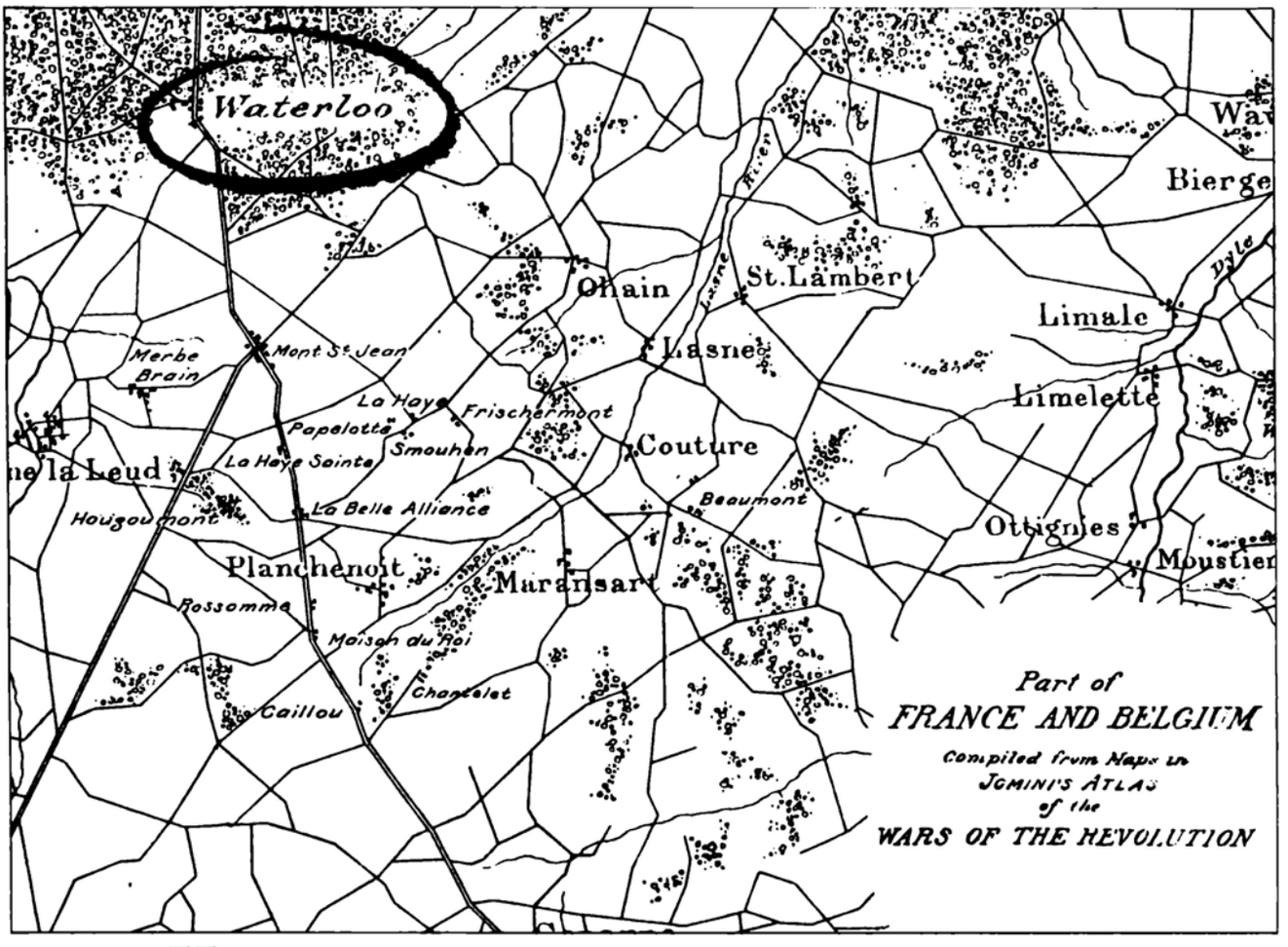
Regulation 556/89, which is effective from 1st April 1989, grants a block exemption to pure know-how licensing agreements and to mixed know-how and patent licensing agreements not exempted by Regulation 2349/84, including those agreements containing ancillary provisions relating to trade marks or other intellectual property rights, to which only two undertakings are party. The exemption will only apply where the know-how remains secret and substantial. "Know-how" means a body of technical information that is secret, substantial and identified in any appropriate form. "Secret" means that the know-how package is not generally known or easily accessible. "Substantial" means that the know-how includes information which is of importance for the whole or a significant part of (1) a manufacturing process or (2) a product or service or (3) for the development thereof.

The Regulation contains an exhaustive list of the restrictive obligations where the exemption will apply; they include restrictions which essentially confer exclusive rights on the licensee and territorial protection on one or both of the parties, for example, an obligation on the licensee not to exploit the licensed technology in territories within the Common Market which are reserved for the licensor. However, restrictive obligations which allow territorial protection between the licensor and the licensee for manufacture, use or sale are only exempt for a period not exceeding, for each licensed territory within the EEC, ten years from the date of signature of the first licence agreement entered into by the licensor for that territory in respect of the same technology. Where the licensee is obliged not to manufacture or use the licensed product in other licensed territories or is obliged not to pursue an active policy of putting licensed products on the market of those other territories, then the exemption shall extend for a period not exceeding ten years from the date of signature of the first licence agreement entered into by the licensor within the Common Market in respect of the same technology. An obligation on the licensee not to put the licensed product on the market in the territories licensed to other licensees within the Common Market may only extend for a period not exceeding five years from the date of the signature of the first licence agreement entered into by the licensor within the Common Market in respect of the same technology.

Article 2 of the Regulation provides that the exemption will apply notwithstanding the presence of certain other obligations regarded as being non-restrictive of competition; these include an obligation on the licensee not to divulge the know-how communicated by the licensor, an obligation on the licensee not to grant sub-licences or assign the licence, an obligation on the licensee not to exploit the licensed know-how after termination of the agreement insofar and as long as the know-how is still secret, an obligation on the licensee to observe minimum quality specifications for the licensed product and an obligation to inform the licensor of misappropriation of the know-how or infringements of the licensed patents.

Block exemption will not apply if the agreement contains restrictions on the licensee continuing to use the licensed know-how after the termination of the agreement where the know-how has meanwhile become publicly known, obliging the licensee to assign in whole or in part to the licensor rights to improvements or new applications of the licensed technology, or the charging of royalties for the use of know-how which has become publicly known by the action of the licensor or if one party is restricted in the determination of prices.

The Regulation provides it does not apply to certain arrangements. These include agreements between members of a patent or know-how pool which relate to the pooled technologies, know-how licensing agreements between competing undertakings which hold interests in joint venture, agreements under which one party grants the other a know-how licence and the other party grants the first party a patent, trademark or know-how licence or exclusive sales rights, where the parties are competitors in relation to the products covered by those agreements, agreements including the licensing of intellectual property rights other than patents or the licensing of softwares except where these rights or the software are of assistance in achieving the object of the licensed technology and there are no obligations restrictive of com-



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petition other than those attached to the licensed know-how and exempted under the Regulation. However, the Regulation does apply to pure know-how agreements or mixed agreements where the licensor is not the developer of the know-how or the patentee but is authorised by the developer or the patentee to grant a licence or a sub-licence.

The Commission reserves the right to withdraw the benefit of the Regulation pursuant to Regulation 1965/EEC where it finds in a particular case that an agreement exempted by the Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85(3).

The Regulation expires on 31st December 1999. □

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From the President . . .

In its recently promulgated programme, the new Government has included as an important heading, Law Reform. In the last edition of this Gazette, Eamonn Hall, in reviewing the Law Reform Commission's 10th Report, stated that the most powerful source of Law Reform is that of general public opinion. He also commented that the layman and many politicians are not interested in lawyers' law. Hopefully, the new Government's approach may prove that there has been a change of heart in this respect and certainly it is a change that is long overdue.

As I understand it in the field of Law Reform, the main parties involved are the Law Reform Commission, the Department of Justice and the Attorney General and through him the Parliamentary Draughtsmen. By 31st December, 1988 the Law Reform Commission had formulated and submitted to the Taoiseach 27 Reports containing proposals for reform of the law as well as 11 Working Papers, a Consultation Paper and 10 Annual Reports. The number of recommendations contained in those reports that have been enacted into law is depressingly few.

Various reasons can be advanced to explain why this is so. Amongst them being Public Service cutbacks which means that where previously there were ten Civil Servants of Assistant Principal or higher rank dealing with the subject of Law Reform, there are now five, and a serious and continuing shortage of experienced Parliamentary Draughtsmen. (I understand that the drafting of legislation only continues at its present pace by the employment on contract of three retired Parliamentary Draughtsmen). Apparently it takes three to five years to train Draughtsmen fully so the scope of the potential problem is very clear. Added to this we have a Parliament which appears to sit less days per year than almost any other Parliament in Europe. All in all, not a happy combination of circumstances.

It seems obvious to us lawyers that all the Government programmes in the world cannot be brought to fruition if the personnel are not available to convert these programmes into legislation. Thus it seems to me extraordinary that the dogma of fiscal rectitude should be applied so indiscriminately as to deprive the Executive and the Legislature of one necessary instrument, namely the drafters of legislation, that is indispensable for the making of law.

This may be an area in which we as a profession have failed to make our views clear and to urge sufficiently strongly upon Government how crucially important it is in the modern world, that the pace of change in our Society and the urgent necessity to conform to European standards in many areas of society, be not hindered by a ramshackle outdated system for the preparation and implementation into law of essential measures.

I am aware that the Law Reform Commission has recently produced a Report on Conveyancing and Land Law which I hope will not go the way of many previous Reports and be left to gather dust on some Civil Service shelf. I find it an embarrassment when discussing matters with lawyers in neighbouring countries to have to admit that we have had no major reforming Act in the Land Law or Conveyancing area since the last century; could it be that we would actually go an entire century without reform in this area? □

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The "European Economic Interest Grouping"

By
Anne M. Neary, Solicitor,
and
Richard Caplan, Solicitor*

The following is an outline of the main features of the European Economic Interest Grouping, what it is and how it works.

A) Statutory Basis of the EEIG

1. The Regulation on the European Economic Interest Grouping was adopted on 25th July 1985 by the Council of Ministers of the European Communities and came into force on 1st August 1989. A Regulation, unlike a Directive, is binding in its entirety and is directly applicable in all Member States without further national implementing legislation. In this instance, however, supplementary legislation will be needed to fulfil certain requirements of the Regulation.
2. The Company Law section of the Department of Industry and Commerce has prepared a Statutory Instrument (S.I. No. 191 of 1989) entitled European Communities (European Economic Interest Groupings) Regulations, 1989. This Instrument gives full effect to Council Regulation 2137/85. It provides a legal framework for groupings of natural persons, companies and other legal entities to enable them to co-operate effectively in economic activities across national frontiers within the European Community. The Statutory Instrument is divided into two parts, Part I relating to *Formation and Registration of Groupings,* Part II relating to *Membership of Groups.* There are two schedules attached to the Instrument, the first consisting of the full text of the Council Regulation and the second consisting of forms relating to EEIGs.

B) What is an EEIG?

1. An EEIG is unlike anything known to Irish law, being neither a company nor a partnership but having some of the characteristics of both. Basically, it is a hybrid form of undertaking designed to link together two or more businesses from separate Member States for the purpose of promoting co-operation within the Common Market.
2. Its *raison d'etre* is to enable its members to become more profitable by pooling activities, resources and services. It cannot be formed for the purpose of making a profit for itself, but there is no prohibition on making a profit as a consequence of its activities.
3. It is intended to facilitate and develop the business activities of its members, while respecting their legal and economic independence. Therefore, it can only carry on activities which are related to but no more than ancillary to the business of its members.
4. The economic link between the EEIG and its members is essential and entails two kinds of restrictions. Firstly, it cannot be used to create a new activity that has no connection with the activities of its members. This would necessitate the forming of a company. Secondly, the EEIG must not replace the economic activities of its members or become so important that their activities are taken over by it or become dependent on it. If that were to happen, it would behave like a company under the cloak of an EEIG.
5. The above limitations apart, the EEIG is entirely autonomous, having full legal capacity. The regulation leaves Member States the option whether to accord it legal personality. The view favoured in Britain is that the EEIG should be given full legal personality.

C) For what purpose can the EEIG be used?

1. The concept of the EEIG is based on the French GIE (*Groupement d'Interet Economique*) which was introduced in France in 1967 and has been used in large scale international co-operations such as the Airbus and the Ariane Space Project. Since its inception in 1967, 9,000 GIEs have been formed in France.
2. The EEIG can undertake activities in a multitude of fields. However, it must pursue an activity or activities which each of its members has in common and which would justify its existence.
3. The most obvious use of the EEIG is for the provision of services i.e. as a service company to provide management or specialist services (e.g. accountancy), or for joint leasing, selling, buying or distribution or joint research and development. Within its parameters, the use to which the EEIG can be put is varied and flexible.

D) Differences between an Irish company and an EEIG

An EEIG differs in many respects from a company registered under the Companies Act 1963 in Ireland e.g.:

1. A company can be formed for a wide variety of purposes. An EEIG is required to be formed solely for the purpose of facilitating and developing the economic activities of its members.

2. An EEIG must have a minimum of two members from separate Member States, who must be carrying on a business within the Community.
3. The members of an EEIG have unlimited joint and several liability.
4. Unlike a company, an EEIG may have no more than 500 employees.
5. An EEIG cannot hold a controlling interest in a member or in another undertaking, or exercise powers of control over another undertaking.
6. An EEIG cannot be a member of another EEIG.
7. An EEIG may not invite investments from the public.
8. There is no obligation on an EEIG to hold annual general meetings or make annual returns.
9. An EEIG requires no Memorandum and Articles of Association, merely a contract for the formation of the grouping, registration of which signals the formal creation of the EEIG as an autonomous legal body.
10. The members of an EEIG, who have to have been engaged in an economic activity prior to its creation, must fall within three categories i.e.
    a) natural persons engaged in business including the provision of professional services;
    b) companies or firms within the meaning of Article 58 of the Treaty of Rome;
    c) charitable bodies carrying on a business.
11. As mentioned above, an EEIG may not be formed for the purpose of making a profit for itself. However, there is no prohibition on making a profit as a consequence of its lawful activities.

E) Commercial base and taxation of the EEIG

1. There is considerable flexibility in the financing of an EEIG. It need not be set up with capital. Instead, the financing can be by way of cash in the form of a cash advance, regular subscriptions, in kind, or by way of services.
2. There is nothing to prevent an EEIG from borrowing from a bank or issuing medium-term notes, but it is prohibited from raising capital by issuing bonds or other securities for sale to the public.
3. If expenditure exceeds income, the proportion which each member will contribute will be determined by the contract for the formation of an EEIG. In the absence of such agreement, the Regulation provides that members shall contribute in equal shares.
4. The profits of an EEIG are deemed the profits of the members and are apportioned among them in the proportions laid down in the contract or, failing that, in equal shares. The Regulation has adopted the principle of tax transparency i.e. all profits (or losses) are eventually returned to the members.
5. It follows from the above that profits or losses are taxable in the hands of the members only. In all other respects, national tax laws will apply, particularly as regards what profits shall be subject to Irish taxation and the basis on which they will be apportioned to the members.
6. National law will govern matters concerning insolvency. The only specific restriction the Regulation places on the application of national law is that commencement of proceedings against an EEIG shall not by itself cause commencement of proceedings against the members. The reasoning is that there should be a common pool of assets for the benefit of all creditors. Territorial insolvency laws could stand in the way of this.

F) Formalities in setting up an EEIG

1. The formalities involved in setting up an EEIG are quite straight-forward and are based on two requirements:
    a) The conclusion of a written contract.
    b) Registration in the Member State in which the EEIG has its official address.
2. The minimum contents of the contract which must be filed at the Registry are:
    a) Name of the EEIG, preceded or followed by the word "EEIG".
    b) Official address.
    c) Objects.
    d) Name, business name, address etc. of each member.
    e) Duration of EEIG unless indefinite.
3. Notice of the formation of the EEIG must be published in the Official Journal of the European Communities.
4. As a safeguard to third parties, other documents and particulars must also be filed as and when certain events take place such as amendments to the contract, appointment of manager, transfer of official address, insolvency, etc.

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5. The members acting collectively are the decision-making body. Each member has one vote unless otherwise provided by the contract. However, for the protection of minority members, no one member may hold a majority of votes. Decisions specified by the Regulation as being of major importance will require a unanimous vote.
6. The appointment of a manager is mandatory and his acts are binding even when they are *ultra vires* the objects of the EEIG.

G) Law governing the EEIG

The interconnection between Community law and national law is quite complex. Where the Regulation does not contain mandatory provisions, it frequently leaves it to the contract or a decision of the members to settle any legal differences. Problems connected with the contract for the formation of the EEIG and its internal organisation must be resolved by the application of the law of the Member State in which the EEIG's official address is situated. Any question of law has to be referred under Article 177 of the EEC Treaty to the European Court of Justice for interpretation. □

**Anne M. Neary, Solicitor, practises in Ranelagh, Dublin, and Richard Caplan, Solicitor, practises with Robert Gore & Co., Solicitors at 17 Grosvenor Street, London.*

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Practice Notes

Certificate of Compliance with Planning Permission.

From what date must they be obtained?

In December 1979 the Conveyancing Committee recommended that solicitors should only insist on Certificates of Compliance with Planning Permission in relation to secondhand houses built since 1st January 1970. The Committee has received many queries in connection with this matter and it seems clear that the practice of getting Certificates of Compliance with Planning Permission in relation to all new houses was not as widespread as the Committee was led to believe when it made its original recommendation. Representations have been made to the Committee that in view of the fact that the date chosen is almost 19 years ago that some adjustment be made in the date and also that some steps should be taken to lobby for some statutory limit in relation to planning.

Having considered the matter very carefully the Committee has decided that:-

1. It is now revising its recommendation to only insist on Certificates of Compliance with Planning Permission in relation to houses built since 1st January 1975. Consequential changes to the Contract and to the Requisitions will be made at the next reprint. It is not intended that this date would be reviewed regularly. The Committee has chosen a date at which it is satisfied it either was or should have been universal practice in relation to the purchase of new houses to obtain Certificates of Compliance.
2. The Society made representations several years ago to the Department of the Environment seeking the imposition of some statutory limit in relation to planning breaches. It is also understood that the topic may be dealt with in a forthcoming Report by the Law Reform Commission. □

Land Registry

Application for a new folio for part of registered land not involving a change of ownership.

From time to time the need arises for an application to the Land Registry by a registered owner for the opening of a new folio for part of his registered land, separate from the rest, but not involving a change of ownership. For example, he may want to have the dwellinghouse and ground attached to it on a separate folio, or, he may want a new folio for a site on which he proposes to build a new dwellinghouse.

Practitioners are advised that the Land Registry will accept a simple application along the lines set out below. A formal transfer is not necessary or appropriate as it is not a transfer of the part to another person. At the same time care should be exercised to ensure that the application is within the ambience of the Family Home Pro-

The following form of application may be used:-

LAND REGISTRY

Application for a new folio for part of registered land not involving a change of ownership.

County: *Folio:*

I.....the registered owner of the lands described in Folio....., of the Register of..... County..... hereby apply for the opening of a new folio in respect of that part of my said lands specified in the Schedule hereto.

IT IS HEREBY CERTIFIED that the Irish Land Commission have given their consent pursuant to Section 12 of the Land Act 1965 to the sub-division of the lands described in Folio..... County .....

— OR —

IT IS HEREBY CERTIFIED that Folio..... of the Register of..... County..... is not affected by any of the circumstances listed in paragraph 6 of the general consent to sub-division dated 1st July 1980 SR 13/77.

SCHEDULE

Part of the townland of..... described in Folio ..... County..... containing..... or thereabouts statute measure being the lands edged in red and marked with the letter "B" on the O.S. map annexed hereto [and referred to in the Land Commission letter of consent to sub-division dated ..... lodged herewith].

Dated this day of 19

Signed by the said .....
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tection Act 1976; for example, that part of the ground attached to and usually occupied with the dwellinghouse is not omitted from the part with the dwellinghouse; or, that part of the ground attached to and usually occupied with the dwellinghouse is not included with the site.

The application involves a subdivision of a holding so that the provisions of Section 12 of the Land Act 1965 must be complied with and the consent lodged where appropriate.

The map attached to the application must comply with Land Registry mapping requirements.

The fee payable on the application is £10. Where a charge on the part is also lodged full fees are payable on the charge.

The High Court

The Books of the Accountant of this Court will be closed from Monday, 21st August to Friday, 22nd September, for the purpose of enabling the Accountant to balance the various accounts of suitors. Lodgments may be made during the period and the Accountant will invest money pursuant to Orders of the Court.

NOTICE

The High Court sittings during the long vacation 1989

During the Long Vacation, two Vacation Judges will sit at the Four Courts on Wednesday, the 9th day of August; on Wednesday, the 23rd of August; on Wednesday, 6th day of September and Wednesday, the 20th of September.

Interlocutory applications and matters (including Bankruptcy) will not be listed without a certificate from the Duty Registrar that the application is urgent and proper to be dealt with in Vacation.

The Master or Deputy Master will sit on Tuesday, the 8th day of August; Tuesday, the 22nd day of August and Tuesday, the 5th day of September.

THE HIGH COURT

Additional long vacation sittings

In addition to the above-mentioned fortnightly Vacation sittings, the Vacation Judge will be available in the Four Courts each day between the hours of 11 o'clock and 1 o'clock, but only if required to sit for a matter in which considerable urgency can be shown.

Bail Applications will be heard on each Friday during the Long Vacation.

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Mr. Peter Prost, Managing Director, Sedgwick Dineen	— "Solicitors Fianancial and Property Services"

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By Peter Prost, Managing Director of Sedgwick Dineen, Personal Financial Management

20 to 30 years the position of the solicitor has gradually been eroded through the expansion of activities by accountants, banks, insurance brokers and estate agents among others.

There is much talk of the "financial supermarket" or the "one stop shop" and whilst it is by no means certain that this concept will prove popularly acceptable in Ireland, nevertheless there are various institutions in the process of offering their services on this basis. No doubt it will not be long before these institutions are also providing legal services.

It is therefore very sensible for solicitors to seek to offer their clients as wide as possible a range of services. S.F.P.S. will assist in this development.

Through S.F.P.S. the Law Society has entered into an arrangement whereby Sedgwick Dineen Personal Financial Management has been appointed to provide financial advice to solicitors and their clients. This advice covers savings, lump sum investment, inheritance tax planning (Section 60), mortgages, life insurance, pensions and financial planning generally. Sedgwick Dineen is part of Sedgwick Financial Services, an international group of specialists in insurance and personal financial management. In fact, Sedgwick is the largest such group in Europe and among the three largest worldwide.

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For solicitors deciding not to join S.F.P.S. the alternatives open are:

1. To set up their own financial planning service – this requires the investment of substantial capital to provide the necessary expertise in the different areas;
2. To enter into similar arrangements with other firms – we believe that in this event it is unlikely that a similar level of marketing and training support would be supplied within the structure of the commission sharing arrangements between Sedgwick Dineen and participants in S.F.P.S.;
3. Not to become involved in the provision of financial services advice – we believe that in this instance a substantial business opportunity is being missed and

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Contd. from page 274.

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Article 5.1 of the Brussels Convention

By
John M. Bosnak*

The importance for day-to-day practice of the "Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters with protocol, Brussels, September 27 1968", known as the Brussels Convention, is ever increasing, especially since the accession of the United Kingdom on January 1st, 1987. Also in that month the European Court of Justice rendered a judgment of great importance for the legal practitioner, interested in international litigation.

It must be known even to beginners, that in principle a judgment in civil and commercial matters, given in an EEC-country can easily be enforced in another, as long as *jurisdiction* of the first judge is based on the Convention. Once the first judge has established his competence on the basis of the Convention, the judge of the country where the judgment has to be enforced is usually bound by it.

The most important rules concerning jurisdiction are laid down in section I, the General Provisions, where in article 2 the forum rei is to be found, and section 2, Special Jurisdiction of which article 5 paragraph 1 will be further analysed hereafter. Finally, sections 3, 4 and 5 provide for some other jurisdictional rules, which fall outside the scope of this article.

Article 5.1

Before the coming into force of the Accession Convention, meant to regulate the accession of the United Kingdom and Northern Ireland, the Irish Republic and Denmark, but which also contained some material changes, there existed a disparity between texts in various languages.

The text goes as follows:

A person domiciled in a contracting state may, in another contracting state be sued:

1. *in matters relating to a contract, in the court for the place of performance of the obligation in question.*

In the French and Dutch text words similar to the ones underlined above were absent.

Moreover, jurisdiction established by the performing of an obligation was thus far unknown in several convention states.

The article therefore gave rise to considerable controversy.

It was to be expected that the Court was soon to be seised in order to deal with this article. Obviously, it had become very popular because it is an attractive thought for a plaintiff to try and play a home game by means of this article. However, one encountered at least two pitfalls:

What is meant with "the obligation" (A), and what is the "place of performance" (B)? These problems are sometimes referred to as respectively the problem of *identification* and *localisation* of the obligation as meant in the article.

Jurisprudence

On both problems the Court handed down a judgment on October 6th 1976, the first judgments on the basis of the Brussels Convention. These judgments must have become familiar even to beginners: the twin judgments *De Bloos/ Bouyer* concerning pitall (A) and *Tessili/Dunlop* on pitfall (B).

Here follows a brief summary of the contents of the judgments.

a. "The obligation" is the contractual obligation which is the basis of the action, the *litigious* obligation therefore. As the result of this clarification by the Court the Dutch and the French texts of the original Brussels Convention were modified by the Accession Convention.

   Literally translated the Dutch text now reads ". . . . of the obligation, *on which the claim is based, is performed or has to be performed".*

   In French: ". . . . . .

   It should be noted that a litigious obligation is also the obligation, which according to the plaintiff has *not* been fulfilled.

b. "Place of performance": this has to be established according to the rules of Private International Law as applied by the court seised.

   This implies that this judge first has to find out which law he would apply, should he have jurisdiction and, subsequently, whether according to this law the place of performance of the litigious obligation is within his jurisdiction.

   Example: should I claim, as a seller, payment of the purchase price, then payment is the litigious obligation, the form of the place where payment had to be effected is competent ex article 5.1. Should I, as a purchaser, claim annullment of the purchase agreement, on the basis of breach of contract, then delivery is the litigious obligation and the forum, where such delivery had to take place or has taken place has jurisdiction.

Plurality of obligations

At first glance, the problems seemed to be solved by these decisions. However, there was some reason to doubt whether the front was to remain silent.

In *re De Bloos,* as it happened, the Court had also held: *"that in case of claims for payment of additional compensation the national*

court has to investigate whether according to the law applicable to the contract there is question of an autonomous contractual obligation or of an obligation taking the place of an obligation which has not been fulfilled'' (a).

What then has to happen with such an obligation? Does the judge declare himself competent in such a case as far as the ''Litigious obligation'' is at stake, and denies jurisdiction for other ''autonomous obligations'' as far as these are not performed within his jurisdiction? This would be at variance with the principle of concentration of obligations from one contract before one court, a principle which the Court of Justice had professed in the same judgment (and, for that matter, also in other judgments): *''that, according to the preamble, the purpose of the Convention is to establish jurisdiction of the courts of the contracting states within an international framework, to facilitate the recognition of judgments and, in order to assure its enforcement, to introduce a swift procedure''* (a).

Of course, referring several obligations based on the same contract to different courts is contrary to this philosophy.

In fact the question is what should be done when there is *plurality* of ''litigious'' obligations, which should, each of them, be performed in another jurisdiction. Verheul, a prominent author, remarks that in cases of plurality the Court can assume jurisdiction over claims, based on other litigious obligations, which, in fact, do not belong within his jurisdiction, as long as the actions are *related.*

The notion of related actions is elaborated in article 22 paragraph 3, which states: *''for the purposes of this article, actions are deemed to be related when they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings''.*

This seems a good solution, charming in its simplicity. A court seised will, indeed, have no trouble to find actions to be related. Should this not be the case, then it is reasonable to deny jurisdiction over the obligation which has nothing to do with the others. This could be the matter when the ''additional action'' is instituted solely with the object of removing the defendant from the jurisdiction of the court which would be competent in his case, a situation which article 6.2. tries to prevent in case of a dubious action on a warrant.

However, one could object against this way of dealing with the matter because it tends to be a ''plaintiff's solution'', encouraging forum-shopping. In the twilight zone between real related actions and its abuse the defendant's protection might well become an illusion. The Court therefore has not opted for this solution, but has introduced in a new judgment its own, separate rule for identification and localisation of the obligation on which the action is based, *especially in those cases when defendants need that protection most.*

Ivenel/Schwab

This judgment exactly focused on the problem, which is ''the obligation in question'', when there is plurality of litigious obligations.

However, it should immediately be added that in this judgment the judge of the facts had qualified the contract, from which the various obligations ensued, as an employment contract, so this was what the Court had to base itself upon.

In such a matter, the Court held, it should be established which of the obligations *characterised* the contract in question. In matters of labour contracts this is the performance of labour. If one simplifies the judgment, it could be said that wherever the labour is performed, the Court has jurisdiction.

A controversy between the learned authors ensued. Some thought that the criteria established in *De Bloos* were overruled and that from now on one shold see which was the obligation characterised in the contract. Others however had doubts and pointed out the fact that the Court explicitly based its decision on plurality in cases of *employment* contracts. This seems a more realistic approach, also because the judgment is entirely tailored to the situation of employment contracts. In the latter opinion therefore the problem still has not been solved in cases of plurality of autonomous obligations ensuing from contracts other than labour contracts.

If beginners can understand this, they can consider themselves advanced students. They are ripe for the second part of this story.

II. For (somewhat advanced students and those who already knew the above).

Shenavai/Kreischer.

Case

Shenavai, architect at Rockenhausen, FRG, summonsed his client, Kreischer (domiciled in the Netherlands) before the Amtsgericht Rochenhausen. Kreischer had not paid Shenavai's fees for designing three holiday houses in the neighbourhood of Rockenhausen. Kreischer contested the jurisdiction of the Amtsgericht stating that the place where the obligation in question had to be performed (payment of the architects fees) according to German Private International Law was at the client's domicile in the Netherlands. Therefore Rockenhausen was not the place where the litigious obligation had to be performed, which meant that this Amtsgericht had no jurisdiction. The Amtsgericht Rockenhausen followed this argument and held that it had no jurisdiction.

Shenavai appealed with the Landgericht Kaiserslautern.

The Court holds: (a) 4+5

4. **Initially the Landgericht took the view that according to German law the place of performance of a contract for architectural work is the place where the architect has his practice and the site of the future building. The place of performance of all obligations arising under the contract was the ''focal point'' of the contractual relationship as a whole. (''Demgemäss befinde sich der Erfüllungsort für alle Verpflichtungen aus dem Vertrag dort, wo der ''Schwerpunkt'' des gesamten Vertragsverhältnisses liege.'')
5. The Landgericht, however, added that it was hesitant, whether this interpretation was to be followed in cases concerning article 5 (1) of the Convention, because of the fact that certain rulings of the Court had based international jurisdiction on the place of

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performance of the contractual obligation, *which forms the actual basis of the legal proceedings**, in this case payment of fees. Under these circumstances the Landgericht considered it necessary to refer the following question to the Court of Justice:

"For the purposes of article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, is the place of performance, in the specific case of a claim for fees by an architect engaged solely in planning work, to be determined by reference to the *contractual obligation which forms the actual basis of the legal proceedings*" (in this case a debt payable at the place where the defendant is domiciled), or by reference to the *performance typical of the contract and characterising the contractual relationship as a whole** (that is to say the place where the architect has his practice and/or the site of the planned building)?"

Subsequently the Court gives a summary of the jurisprudence as laid down in Tessili and *De Bloos* judgments. The principle of promoting a swift procedure is specifically repeated here.

Then the Court continues: (a) 10+11+12

10. However, the general rule thus established, undergoes certain exceptions because of the fact that contracts may cover relationships of very different kinds, in view of their social implications as well as of the nature of the contractual performances. The Convention takes full account of this diversity by establishing certain special rules applicable to specific contractual relationships. For this reason, for instance, an exclusive jurisdiction has been created in matters of tenancies of immovable properties.
11. Based on these considerations, the Court has held in its ruling of 25.5.1982 *(Ivenel/Schwab,* 133/81) that in case of a claim founded on different obligations ensuing from a single representation contract (which was considered to be a labour contract according to the law of the court seised) the relevant obligation as meant in article 5 (1) of the Convention is the one *characterising the contract,* which normally is the performance of the labour.
12. It is therefore necessary to regard the question put before the Court as seeking to ascertain in particular whether, in proceedings for the recovery of fees due to an architect, the general rule laid down in *De Bloos/-Bouyer,* according to which the obligation to which reference should be made is *the obligation forming the basis of the plaintiff's action,* must be applied or whether, on the contrary, such a case has *special characteristics* analogous to those at issue in the Court's judgment in *Ivenel/ Schwab.*

The submissions presented to the Court concerned not only the question whether the nature of the contract in question must be taken into account when determining the obligations to which reference should be made, but also to the problem of the existence in the same case of several obligations serving as the basis for the legal proceedings.

Then the Court continues: (a) 16+17+18+19

16. The Court observed in the first place that contracts on employment and other contracts relating to subordinate work have certain special characteristics in comparison with other contracts even if the latter relate to the provision of services, since contracts of employment create a long-term relationship whereby the employee is placed in the framework of the particular business organisation of the undertaking or the employer and since contracts of employment are located at the place where the business is carried out and that place determines the application of mandatory provisions of law and collective agreements. Because of these special circumstances the Court of the place, where the obligation, which is characteristic for such contracts is to be performed, is best qualified to decide upon questions of law, ensuing from one or more obligations, founded on these contracts.
17. In the absence of such special characteristics, however, it is neither necessary nor prescribed, to identify the obligation characterising the contract and then to centralise jurisdiction at the place of its performance in proceedings concerning *all* contractual obligations. The variety and the multiplicity of contracts in general is such that in those cases where the special characteristics are absent that criterion could create uncertainty with regard to the

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jurisdiction of the Courts and the aim of the Convention was to reduce such uncertainties.

18. In contrast, such uncertainty does not exist in relation to contracts in general if the obligation which is laid down in the contract and *the performance of which is sought in the Court proceedings* is the only obligation taken into consideration. Normally the place where the obligation is to be performed constitutes the closest connecting factor between the dispute and the Court with jurisdiction; it is on the ground of that factor that, in matters relating to a contract, the place of performance of the obligations is the forum for disputes.
19. It is true that this rule does not give a solution whenever an action relates to *several* obligations arising under the same contract and serving as the basis for the proceedings brought by the plaintiff. However, in these cases the Court must determine its jurisdiction according to the principle that *secondary obligations follow the main obligations:* that is to say that the main obligation will determine jurisdiction where there are several obligations at issue. That was not, however, the position in the question referred by the Landgericht.

The Court ruled as follows:

"For the purpose of determining the place of performance within the meaning of article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the obligation to be taken into consideration in an action for the recovery of fees, commenced by an architect commissioned to prepare plains for the building of houses, is the *contractual obligation actually forming the basis of the legal proceedings".*

With these arguments the case has been settled in favour of those who had held the opinion that the test of the obligation characterising the contract was only to be applied in cases, ensuing from labour contracts.

However, the Court adds something extra: it is now even so that whenever there is question of *single obligations* ensuing from a labour contract subject to a procedure ex article 5.1., one should no longer look at the obligation on which the action is based when localising the place of performance (for example payment of salary) but to the place where the labour is performed. For the Court mentioned in paragraph 16 questions of law ensuing *from one* or more obligations, founded on these contracts.

How to tackle article 5.1?

From the jurisprudence mentioned above we can now distill the following scheme in order to test a case on the basis of article 5.1. (whenever parties have not themselves agreed upon the place of performance of the obligation in question).

1. **Identification.**
   Jurisdiction of the Court seised is determined:
   a. with labour contracts: by establishing the place where the labour is performed (proceed to 3).
   b. with other contracts:
      I. with single obligations: by establishing the obligation on which the action is based (proceed to 2).
      II. with plurality of obligations: by establishing which obligation is the "main obligation". The place of performance of *this* obligation determines jurisdiction.

2. **Localisation.**
   Once the relevant obligation is found, the Court seised must then by means of its *own* private international law determine the place of performance.

3. **Decision**
   If the labour is not performed within the jurisdiction of the court seised or if the obligation in question is not to be localised there, the Court denies jurisdiction:
   - in default cases (article 20 of the Brussels Convention);
   - when the defendant entered appearance solely to contest the jurisdiction.

Those who have read this article out of pure necessity may now opt out. The part which is most important for day-to-day practice is now finished. However, for those who, on the contrary, had their appetites whetted, we continue.

III. **For the connoisseurs**

In what we have discussed above, not all questions have been answered, whereas new questions have appeared.

Examples:

a. why does the Court, in *Ivenel,* refer to the Rome Convention of 1980 on the law applicable to contractual obligations and does not do so anymore in *Shenavai?*
b. is the test as outlined in *Ivenel* and *Shenavai* exclusively applicable to labour contracts or maybe also for other types of contracts?
c. what exactly does the Court mean with "main obligation" (*Shenavai,* paragraph 19) when there is plurality of litigious obligations?

a. The *Ivenel* judgment has met with violent criticism. Authors have reproached the Court that it has incorrectly used the Convention of Rome of 1980.

According to us the Convention has not been invoked by the Court in order to identify and localise the obligation in question, but only in order to give better motivation to the introduction of its self-developed jurisdiction rule, exclusively for labour relationships.

In order to establish a special rule to protect the weaker party the Court not only finds general principles within the context of the Convention, but also among the principles which form the basis of the Convention of Rome. Apparently the Court wanted to use this kind of argument in order to defend itself beforehand against critics that would point out to the wordings of the "founding fathers" of the Convention as laid down in the Jenard report who, at that time, did not (yet) wanted to create a special regime for employment relationships.

In paragraph 15 the Court therefore refers to "the development of the pertinent conflict rules" as frame of reference. The law is constantly developing and the Court wants to keep abreast of these developments. In order to bring this about the Court proceeded to develop its autonomous rule of jurisdiction in *Ivenel,* at that time still with reference to the 1980 Convention. This autonomous construction of rules of law has appeared clearly from the *Shevanai* judgment, in which the Court does not even bother to mention the 1980 Convention at all and limits itself in paragraph 16 to formulating very briefly and concisely the jurisdictional rule of *Ivenel.*

b. When identifying the obligation creating jurisdiction, we have seen that in matters of labour contracts one should find out what the characteristic obligation is, which in these cases, briefly said, is the obligation to perform the work; with other obligations it is the litigious obligation which creates jurisdiction.

Or could one just envisage other contracts which are suitable to be treated like a labour contract? The *Shevanai* judgment leaves the door ajar for this possibility. Does the Court not hold in paragraph 16: "contracts of employment *other contracts*"? Could it be possible that certain contracts, not being labour contracts but showing the same peculiarities as enumerated by the Court (permanent relationship, being placed in the framework of the organisation) fall under the same identification-regime? The answer to this question cannot easily be given but it seems that there is some room for a creative attorney acting on behalf of, for instance, a small (sub) contractor or a home-based housewife working on an hourly basis on her personal computer for a foreign company.

c. *In cauda venenum:* in paragraph 19 the Court, in an *obiter dictum,* tells us what to do in case of plurality of obligations, which do *not ensue* from a labour contract. The Court teaches us, that in that case the "main obligation" is decisive for establishing jurisdiction.

What could that be? Are we going to let the test of the characteristic obligation for establishing jurisdiction in via the back door?

It is again the attorneys' task to put this question to the test.

In our opinion there is something to it to work as much as possible with the notion of "related actions" as advocated by Verheul and "take along" all separate obligations. However, in doing this the basic assumption should always be that there must be as much relationship as possible between the action and the competent Court, for example when expert evidence is to be given or witnesses are to be heard. This relation also is a principle, frequently invoked by the Court.

One thing has become clear out of the above: there is still a lot of creative work for the attorney with an international practice (and are we not all with 1992 before us?) to do in exploring the uncharted areas of this fascinating Convention. □

(a) Author' translation.

** John M. Bosnak is a Dutch Lawyer and a partner in the firm of Winters & Bosnak, Arnhem, Netherlands.*

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Introduction
Freedom of movement throughout the Member States and the right to set up in business anywhere in the Community are fundamental rights guaranteed to citizens of the European Community under the Treaty of Rome. However, all Member States require specific qualifications before people are allowed to exercise certain professional activities in their countries. These qualifications are ordinarily awarded by national or professional authorities or by a higher education institution within the Member States. Permission to carry on these professional activities by non-nationals is usually on the basis of the possession of an equivalent qualification obtained elsewhere. At present, therefore, a person qualified to practise a particular profession in one Member State (very often their own) may have to obtain additional qualifications before being in a position to exercise that profession in another Member State.

Some Directives have already been adopted to make it easier for certain professions to practise elsewhere in the Community. This has been done by agreeing detailed regulations to harmonise training and other requirements for specific professional activities. Directives already in force cover doctors, nurses, dentists, veterinary surgeons, midwives, architects, pharmacists and general practitioners.

Change in Approach
These specific sectoral Directives proved difficult to agree and it was felt that a new way had to be found to facilitate the free movement of those holding professional qualifications. In 1985, the Commission proposed a new approach in this area through a Directive on a General System for the Recognition of Higher Education Qualifications (called 'Diplomas' in the Directive). The aim was to establish a system whereby Member States would mutually recognise qualifications required to practise regulated professions. The Directive was agreed in principle by the Council of Ministers towards the end of June 1988 and was formally adopted on 21st December, 1988. Member States will have two years after its adoption to implement it.

Scope of the General Directive
The Directive does not apply to professions which are subject to separate sectoral Directives such as those mentioned in the introduction.

The Directive provides for the general recognition in the Community of the qualifications required to exercise what are referred to in the Directive as professions which are regulated in a Member State. A regulated profession or regulated professional activity means a profession or activity the taking up or pursuit of which is made subject, by virtue of laws, regulations or administrative provisions, to having a qualification obtained after a period of higher education and professional training of at least three years duration. The education and training to obtain the qualification must have been received wholly or mainly in the European Community. Otherwise the holder of the qualification in question must have had three years professional experience certified by a Member State where a qualification obtained outside the Community is recognised. Professional activities which are reserved to holders of a diploma recognised by the Directive are also included as are those professional activities relating to health.

Associations
The Directive also recognises as a regulated activity any activity carried on by members of an association or organisation authorised by a Member State and whose objectives are to promote and maintain high standards in the corresponding professional field. These associations or organisations must be those which:

- award a diploma to its members;
- ensure that its members respect the rules of professional conduct which it prescribes;
- confer on them the right to use a title or designatory letters, or to benefit from a status corresponding to that Diploma.

In Ireland and the United Kingdom, this provision relates to organisations such as chartered bodies and institutions such as the Institute of Chartered Accountants in Ireland and The Institute of Public Administration.

Professions
Professions which are not regulated in any Member State are not covered by the Directive. If someone with a professional qualification comes to a Member State where that profession is not regulated, whether they come from a Member State which regulates the profession or not, then the Directive is not applicable. However, if a person goes to a Member State which regulates the profession even if the profession is not regulated in the Member State he or she comes from, then that person's qualifications must be examined and recognised under the terms of the Directive.

New Provisions
The Directive differs from earlier "sectoral" Directives in several important aspects, apart from its general character.

Firstly, recognition is to be based on mutual trust without the need for prior co-ordination of the education and training systems of the professions in question.

Secondly, recognition is accorded to the "finished

product'', i.e. a fully qualified professional having completed any professional training which may be required in addition to higher education qualifications.

Thirdly, in the case of important differences in education and training, or professional structure, the draft directive lays down compensatory mechanisms, in the form of either an adaptation period or an aptitude test.

Differences in length of training may be compensated for by evidence of professional experience i.e. the actual and lawful pursuit of the profession in a Member State. The length of professional experience required may not in any circumstances exceed four years.

Adaptation Period

Substantial differences in the scope or content of training may be compensated for by an adaptation period or an aptitude test. An adaptation period means the pursuit of a regulated profession in the Member State to which the person comes under the responsibility of someone who is already a qualified member of the profession concerned. Such a period of supervised practice may not exceed three years, may be accompanied by further training and will be subject to an assessment. An aptitude test means a test limited to the professional knowledge of the person made by the responsible authorities in the Member State to which the person comes, with the aim of assessing the ability of that person to pursue the regulated profession concerned in that Member State.

Requirement to provide evidence of professional experience or to undergo an adaptation period or aptitude test may not be applied simultaneously except in the case of those who migrate from a Member State which does not regulate the profession. Where a Member State wishes to make use of an adaptation period or an aptitude test, the person concerned must be given the right to choose between the two options. However, for professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity, a Member State may stipulate either an adaptation period or an aptitude test.

In each Member State a particular person will be nominated who will be responsible for co-ordinating the activities of the different responsible authorities and promoting uniform application of the Directive to all the professions concerned. Decisions on applications for recognition will have to be given within four months of the applicant presenting all the proper documents; otherwise he or she can take the matter to the Courts in the Member State concerned.

Further information can be obtained from:
Mr. Sean Nolan,
Department of Education,
Marlborough Street,
Dublin 2.
Telephone: 734700 □

APPOINTMENT OF LEGAL ADVISERS

Proposals are invited from firms of solicitors who would be interested in acting as legal advisers to the Director of Consumer Affairs and Fair Trade. *Closing date* for receipt of proposals is **12.00 noon on Monday, 9 October 1989.**

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LAW AGENCY

Younger Members' News

YMC SOCCER BLITZ – A SCORING SUCCESS!

The Younger Members Committee held its annual Soccer Blitz on Saturday, 27th May last at the Law Society, Blackhall Place.

This year's event was the most successful to date and was attended by over 300 people. Glorious sunshine shone from early morning to late evening and was complemented by the cool refreshments served by both Bill and our ice-cream man!

About 160 representatives from various legal offices around the country participated in the soccer tournament which was won by Gerrard Scallan & O'Brien, Dublin. Last year's captain of the winning team, John McCarthy, was also in receipt of a prize – this year for runner-up. Special thanks to John Larkin, A. & L. Goodbody, without whom the event might not have run so smoothly.

For the not-so-keen soccer fans, there was a mixed doubles American tennis tournament in which approximately 30 people took part.

To complete the family day out (and to the delight of the kiddies!) Montessori and Creche facilities were provided by Anne Farrell of Gateway Montessori School, Northumberland Road.

Throughout the day, all attendants were treated to the sounds of the Midnight Ramblers, our very own band of solicitors.

Finally, the YMC are extremely grateful to the Educational Building Society who generously sponsored the event, the proceeds of which go to the Solicitors Benevolent Fund.

The YMC wish to extend thanks to the above-named, and also to Patricia Boyd, Miley and Miley, Justin McKenna, Sheridan & Kenny, John Larkin, A. & L. Goodbody, Sandra Fisher, Secretary, YMC.

Thank you for attending. See you again next year on the last Saturday in May.

MIRIAM REYNOLDS
Chairman, YMC.

SOCCER BLITZ – 1989
Winning Team – Gerrard Scallan & O'Brien

Back Row Left to Right: Miriam Reynolds (Chairman, Younger Members Committee), Tom O'Meara (EBS), Joe Varlay, Ivan Smith (Captain), Sharon Keane, Brendan Dillon, Linda Nicholson, David Allen, Michael O'Mahony (Junior Vice-President), Claire Leonard (Solicitors Benevolent Association). *Front Row Left to Right:* Ruth Shipsey, Catherine Devoy, Orla Coyne, Mary Noonan, Eileen Farrell and Helena McCann.

YMC TENNIS TOURNAMENT – 1989
Left to Right: Miriam Reynolds (Chairman, Younger Members), Michael O'Mahony (Junior Vice-President), Ann Kelleher (Runner Up), Dermot McEvoy (Winner), Tom O'Meara (EBS), and Claire Leonard (Solicitors Benevolent Association).

AUTHORITATIVE AND RELIABLE REPORTS FROM SWEET & MAXWELL'S EUROPEAN LAW CENTRE

COMMON MARKET LAW REPORTS

WEEKLY

Editor: Neville March Hunnings

Common Market Law Reports provide weekly reports of cases from the European Court of Justice, the E.C. Commission and National Courts and Tribunals.

All major topics are covered, including:

- Anti-dumping
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- Competition Law
- Free Movement of Goods
- Value Added Tax

New material is constantly being added throughout the course of 1989 with particular emphasis on national cases, especially on the applications of EEC directives, such as VAT, employment and financial services.

Plus

MONTHLY

COMMON MARKET LAW REPORTS ANTITRUST SUPPLEMENT

The Antitrust Supplement, published monthly, is available as part of the CMLR subscription or on its own. All antitrust decisions and judgments from Community sources (particularly the European Court and the Commission) are covered in full text.

Other directly relevant documents such as parliamentary answers, DG1V Notices and Press Releases, draft and final antitrust legislation and coverage of the progress of relevant new cases are included.

1989 Annual Subscription to Common Market Law Reports including the Antitrust Supplement: £295.00 (UK); £335.00 (Overseas)
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QUARTERLY

Editor: P. J. Duffy

European Human Rights Reports are unique in that only they provide a complete and easily accessible picture of the whole operation of the Convention.

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- All friendly settlements and resolutions of the Committee of Ministers relating to human rights

Human rights issues covered include: criminal procedure, property law, aliens control, family law, sex and racial discrimination, professional ethics, company law and labour law.

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Back Volumes are available from 1979-1988.

CASE SEARCH MONTHLY

NEW

Editor: Neville March Hunnings

Case Search Monthly provides a much needed comprehensive running index of the case law of the European Court of Justice (both published and unpublished) and the EEC Commission together with much of the national and international case law on the European Communities as published in the Common Market Law Reports and elsewhere.

Following in the footsteps of the much acclaimed Gazetteer of European Law, **Case Search Monthly** will provide a clear and concise monthly guide for all those looking for relevant cases on European Community Law.

Case Search Monthly is cumulative during the year. As it builds you can discard one issue when the next one arrives. In addition, the December issue will be a bound volume for you to keep as a permanent reference.

1989 Annual Subscription: £155.00 (UK); £175.00 (Overseas)

EUROPEAN COMMERCIAL CASES

QUARTERLY

Editors: Marina Milmo, Neville March Hunnings

European Commercial Cases is a quarterly reporter on commercial matters in the courts of Europe. It translates and reports selected judgments in full text in English from European national courts and agencies on aspects of national commercial law which are of practical interest within the wider European community. **European Commercial Cases** also reports leading cases and follows the implementation by the national courts of existing or new legislation affecting commercial dealings within the European Community.

1989 Annual Subscription: £170.00 (UK); £190.00 (Overseas)
Back Volumes are available from 1978-1988. Price details available on application.

COMMERCIAL LAWS OF EUROPE

MONTHLY

Editor: Neville March Hunnings

Commercial Laws of Europe provides a monthly reporting service of national and international legislation. Major enactments in Western European countries are reported in full text, as are implementation decrees, international conventions and treaties, EEC mainstream directives and regulations.

All texts appear in English as well as in the original foreign language in a well annotated and easily accessible format.

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EUROPEAN LAW DIGEST

MONTHLY

Editor: Irene D. Snook

European Law Digest is a monthly abstracting service for the legislation and case law of Western Europe. It provides first level of knowledge in English and a finding guide to the laws of Western Europe through summaries of new laws and treaties and recent cases.

Coverage is at present focused on economic law (in its widest sense), human rights and all aspects of transnational law including Community law. Particular topics include:

- Banking and Insurance
- Business Organisation
- Competition
- Consumer Protection
- Human Rights
- Industry and Labour
- Intellectual Property
- Private International Law
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Editor: Michael Fysh

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Interview with
Thomas O'Higgins
Judge, Court of Justice of the European Communities

The following is the text of an interview with the Hon. Mr. Justice Thomas O'Higgins, Judge, Court of Justice of the European Communities which was published in a book entitled *Judging the World: Law and Politics in the World's leading Courts* by Gary Sturgess and Philip Chubb, published by Butterworths in 1988. It is reprinted with kind permission of the publishers.

Interviewer: *As somebody who was President of a national court, you would have some appreciation of how national courts feel having a super-national body sitting above them!*

Thomas O'Higgins: I do not think it is looked at exactly in that way. The Supreme Court in Ireland is the highest court in Ireland and I should imagine the House of Lords in England regards itself still as the highest court in England. It is not that the Court of Justice here monitors or supervises the decisions of the national courts – in fact it doesn't. Under article 177, it operates merely to ensure that there is a uniformity of interpretation of the Treaty and the regulations of Community law. It is the reference system under which a national court operates once it feels that an interpretation of a regulation, or directive, or piece of Community law is necessary for its decision. It refers the question of interpretation to us, we give the interpretation, and the national court proceeds with its job of deciding the case.

So you don't feel that the national courts are jealously guarding their preserve against the operation of this court?

No, quite the contrary. The remarkable thing has been the generous co-operation by the national jurisdictions and the functioning of the Treaty and of article 177. Were it not for that generous co-operation, there could not have been the remarkable development of community law and of trust and understanding in the Community itself that has taken place in the last two decades.

Could you talk about the relationship between the political arms of the Community institutions and the court?

Well, it is really hard to apply these terms to what is, after all, an organistaion in a very formative state – I am talking about Europe. The political arm I suppose would be the parliament. We do not have any relations or connections with the parliament. The executive, in the sense of the permanent controlling party, is the Commission and the Commission is a continual litigant here before the court, bringing proceedings to enforce the Treaty against different countries and so on. Sometimes it succeeds, sometimes not. But the court must maintain an absolutely rigid independence amongst the European institutions. If it did not do so it could not function and the fact that it has functioned and has, if I may say so, such high standing and respect in Europe indicates how successfully it has maintained its independence.

How political is the process of appointment to the court?

Appointments to the court are made on the nomination of a member state. The nominee must be endorsed by all the other states. It is not essential or necessary that a member state nominates one of its own nationals. A member state could nominate a national of any country, although I am bound to say it has not occurred. The requirement is that it should be a person who is a judge of the highest standing or have equal qualifications. So far as I know, nominations to this court have always been of people of the necessary qualifications and it will always continue to be so.

You have had a life in politics as well as in law. You were elected to the Dail Eireann, you were a Minister for Health, and you twice contested the Presidency. In your judicial career, have you found it difficult to divorce yourself from your politics?

No, I have not found it difficult. It is quite extraordinary that when you become a judge you take an oath and become very objective. You have an issue to be decided and you never consider who is on either side of that issue. You decide what has to be decided. I have never felt the slightest difficulty in operating as a judge, even though I have been active in politics and led an active political life.

Did you find nevertheless that people who had been closely associated with you in politics did not respect your independence as you did?

No, I have never had that experi-

The Hon. Mr. Justice Thomas O'Higgins.

ence and I have never heard of any other judge having that experience in Ireland. In Ireland a sort of judicial curtain falls down when you become a judge and it is respected by former friends and associates and the judges expect it to be respected. I have never heard of any kind of out-of-court approach to a judge. Nor would it be tolerated for one moment.

What is your view of the requirement that judgments of this court be unanimous?
It is a very difficult obligation to impose on people – it is one reason why I find the work here a little bit strange. But unanimity does lead to certainty. In the Supreme Court in Ireland we also have an obligation to reach a unanimous decision on any matter relating to the constitutional validity of a law. Judges may be agreed on whether the law is valid or invalid, but may have quite diverse reasons for so doing. So I sometimes felt the judgments lacked weight because the rationalisation was obviously very weak in certain places. It had to allow for conflicting reasons but without expressing them. The Constitution prohibits any indication of a contrary view. The judgment then has to be written as if it were the view of everybody. It is not a system which I think is perfect. I think it has weaknesses.

Can you foresee reform in that area of the court here?
The present system would have been preferred because of the overriding need for certainty. There may come a stage where people can say: 'Well, we have established the principle and now it would be better to have majority judgments and let each person express his view.' In fact, of course, a unanimous decision is arrived at, from a practical point of view, by a majority judgment. But you do not say that. □

A.I.J.A.

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EURLEGAL

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The Law Society Library is now linked up to JUSTIS, an on-line European Community law database, owned by Context Ltd., London. The database contains extracts from the EC treaties, secondary legislation, preparatory works and case law, and the full text of the Common Market Law Reports. The secondary legislation sector gives details of regulations, decisions and directives published in the EC Official Journal (items of short validity are omitted).

Using a PC the Library can search the database for measures or case law on a particular subject. The secondary legislation is cross-referenced to indicate earlier measures affected by a regulation or directive and any subsequent amending measures.

A print-out of the list of documents retrieved can be supplied. Photocopies of the full text of documents can be provided from the Library's set of Official Journals and other EC materials.

The cost of a search will be £12.50 incl. VAT. (This price will operate for an initial period and will be subject to review).

Demonstrations of the system, free of charge, will also be arranged by appointment.

Please contact Margaret Byrne or Mary Gaynor, at the Society's Library, regarding searches, demonstrations, or simply further information on JUSTIS.

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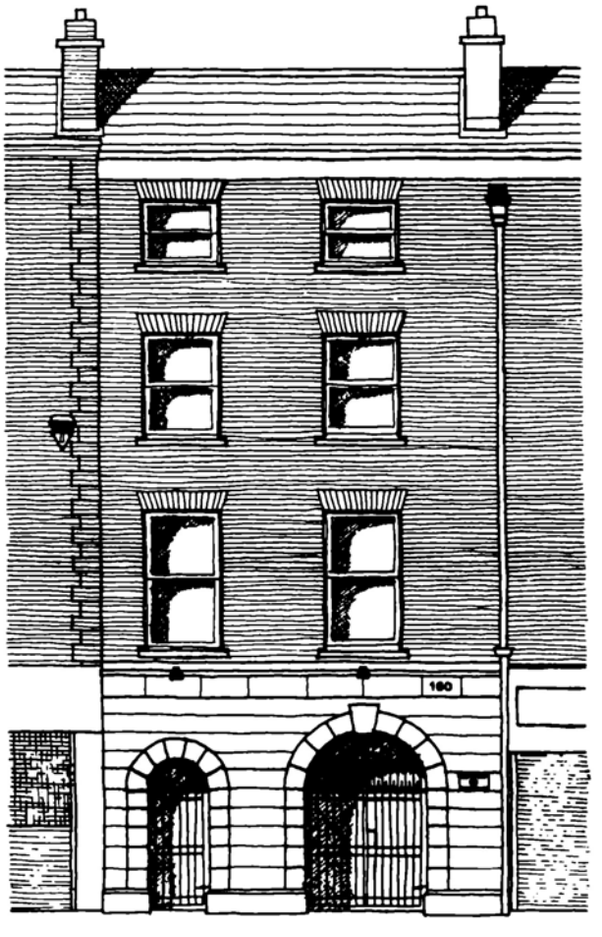

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ANNUAL GENERAL MEETING OF SYS

The Annual General Meeting of the Society of Young Solicitors took place on Saturday, 22nd July, 1989.

In his Chairman's report Mr. Terence McCrann paid tribute to the very hard working committee which had organised the conferences during the year with quiet professionalism. Mr. McCrann said that the SYS would continue to provide practical assistance to solicitors around the country and was committed to maintaining a high standard of lectures on an increasingly varied amount of legal topics.

Mr. McCrann said that the SYS was the only solicitors group which always held its conferences outside Dublin and the week-ends were perfect opportunities for solicitors to meet informally and discuss common problems. He said that the numbers attending the conferences were substantially increasing and that the tradition of having a joint conference with the Bar had proved a great success. With the swift changes occurring in the profession the SYS conferences would become increasingly important in providing a forum for discussing and preparing for these changes. Mr. McCrann also expressed a wish that the SYS liaise more closely with the younger members of the other European young solicitors groups.

The following officers were elected for 1989/90: —

Chairman:	Katherine Delahunt
Vice-Chairman:	Colin Sainsbury
Secretary:	Caroline Crowley
Treasurer:	James McCourt
PRO:	Jennifer Blunden

Committee: —

Outgoing Chairman	Terence McCrann
	Brian O'Connor
	Miriam Reynolds
	Mary Hayes
	Norman Spendlove
	Gavin Buckley
	Owen O'Sullivan
	Paul White
	Maureen Walsh

Submission of Articles for the Gazette

The Editorial Board welcomes the submission of articles for consideration with a view to publication. In general, the most acceptable length of articles for the *Gazette* is 3,000-4,000 words. However, shorter contributions will be welcomed and longer ones may be considered for publication. MSS should be typewritten on one side of the paper only, double spaced with wide margins. Footnotes should be kept to a minimum and numbered consecutively throughout the text with superscript arabic numerals. Cases and statutes should be cited accurately and in the correct format.

Contributions should be sent to:

Executive Editor,
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Correspondence

26 June 1989

Mr. Brian A. Bohan,
The Law Society,
Blackhall Place,
Dublin 7.

Dear Brian

I refer to your letter concerning the introduction of the general anti-avoidance legislation in this year's Finance Act.

Following the Supreme Court decision in what has become known as the *McGrath* case, it was clear, as indicated by me in my Budget speech on 25 January, that the means to counter tax avoidance schemes had to be fundamentally reviewed. It was also clear that the practice of relying solely on specific anti-avoidance provisions, taken only after abuses came to light, was no longer an adequate response to the type of tax avoidance schemes which were being marketed and to the growing sophistication of the tax avoidance industry. The Government had no choice but to take action. The alternative was to allow tax avoidance to continue on an ever-increasing scale to the extent that it would have endangered the public finances and our economic recovery.

The purpose of the general anti-avoidance section now enacted is to nullify the effects of transactions which have little or no commercial reality but are intended primarily to avoid or reduce a tax charge or to artificially create a tax deduction or tax refund.

The section makes clear that genuine business transactions, even if carried out in a tax efficient manner, will not be affected by the new legislation. There is no need for any uncertainty in the mind of the genuine businessman, whether foreign or domestic, or the person making legitimate use of a tax relief provided by the Oireachtas.

Concern was expressed about the grounds for appeal under the provision and in particular that an impossible burden of proof was being placed on taxpayers. While that was not in fact the case, in the spirit of reassuring taxpayers and making it clear that the provision was aimed only at tax avoiders, the approach to appealing against the Revenue opinion was changed from one of "reasonableness" to one of "correctness". This was done by way of amendment to the Bill at Committee Stage. It is now beyond doubt that the Appeal Commissioners and the Courts will uphold an opinion of the Revenue Commissioners only if they consider it to be correct, and they can look at all the relevant facts in arriving at their decision.

Your attention is also drawn to the procedures which must be followed before a benefit can be disallowed under the new provision. The Revenue Commissioners must first form an opinion that a transaction is a tax avoidance transaction. Having formed such an opinion, they must then notify the taxpayer concerned who has 30 days in which to contest it by appealing to the Appeal Commissioners. There is provision too for the rehearing of an appeal by the Circuit Court and the stating of a case for the High Court on a point of law.

There is, therefore, no question of giving an unfettered general power to the Revenue Commissioners. At the end of the day, an appeal to the Courts is available and, in the case of dispute, it will be the judgment of the Courts and not the opinion of tax officials which will finally determine the outcome.

Under existing arrangements the Revenue Commissioners are prepared in certain circumstances involving incentive reliefs to give an opinion in advance on the possible tax consequences of a proposed activity. In addition, the Revenue Commissioners will give, within the limits of their resources, opinions on the tax position of actions which have already taken place. These procedures will not be affected by the new provision. The Revenue Commissioners will continue to assist to the maximum extent possible in dealing with approaches from business or other interests about genuine transactions. What they understandably must be wary about is a request for an advance opinion on a hypothetical or artificial proposition which is aimed at constructing a tax avoidance scheme.

The new provision applies basically to transactions carried out on or after Budget day. Transactions carried out before Budget day are affected only where the tax which it is sought to avoid arises as a result of activities which take place after that day. To make this clear, I introduced an amendment to the provision at the Committee Stage.

In conclusion, I want to stress again that the new legislation does not make tax efficiency illegal – whether for business or family purposes. The target of the provision is, rather, those types of artificial transactions that are undertaken primarily for tax avoidance purposes.

Yours sincerely
ALBERT REYNOLDS
Minister for Finance.

The Editor,
Law Society Gazette,
Blackhall Place,
Dublin 7.

Dear Editor,

The article by Timothy Dalton, Solicitor, on the Civil Legal Aid Scheme, its scope and operation was helpful to Practitioners in their understanding of the *theory* of the scheme. The *reality* of the operation of the scheme however is very different from that outlined in the article.

The last annual report of the Civil Legal Aid Board was published in 1986 so that the official statistics are now completely out of date. The embargo on recruiting new solicitors has meant that no solicitors who have left the scheme in the past few years have been replaced. If a Centre reaches a staffing crisis a solicitor from another Centre is redeployed. The Centre at Ormond Quay now has *five* operating solicitors, whereas *18* months ago it had *eight.* The situation is often exacerbated by holidays, sick leave or maternity leave.

More and more frequently the Centres are closed to new clients. Mr. Dalton in his article accepts this but says that there is always a service for emergency cases. Every family case is an emergency case to the spouses and children involved.

Contd. on page 294.

First Irish Law Book in Braille launched

The first book on Irish law in braille format for blind and visually impaired persons was launched recently by Mr. Tim Dalton, Asst. Secretary, Department of Justice.

The book is the braille edition of "A Dictionary of Irish Law" by Henry Murdoch BL, with a Foreword by The Hon. Thomas A. Finlay, Chief Justice, and published by Topaz Publications, Dun Laoghaire. Mr. Murdoch is chairman of "Irish Blindcraft".

The braille edition comes in 18 volumes with over 1,700 pages. It has been produced on a non-commercial basis. At the launch, complimentary copies were presented to a blind student of law and to three rehabilitation libraries.

The braille project was sponsored by the Bank of Ireland. The books were produced by the computerised braille unit of Arbour Hill Prison.

Complimentary copies of the braille edition were presented to:

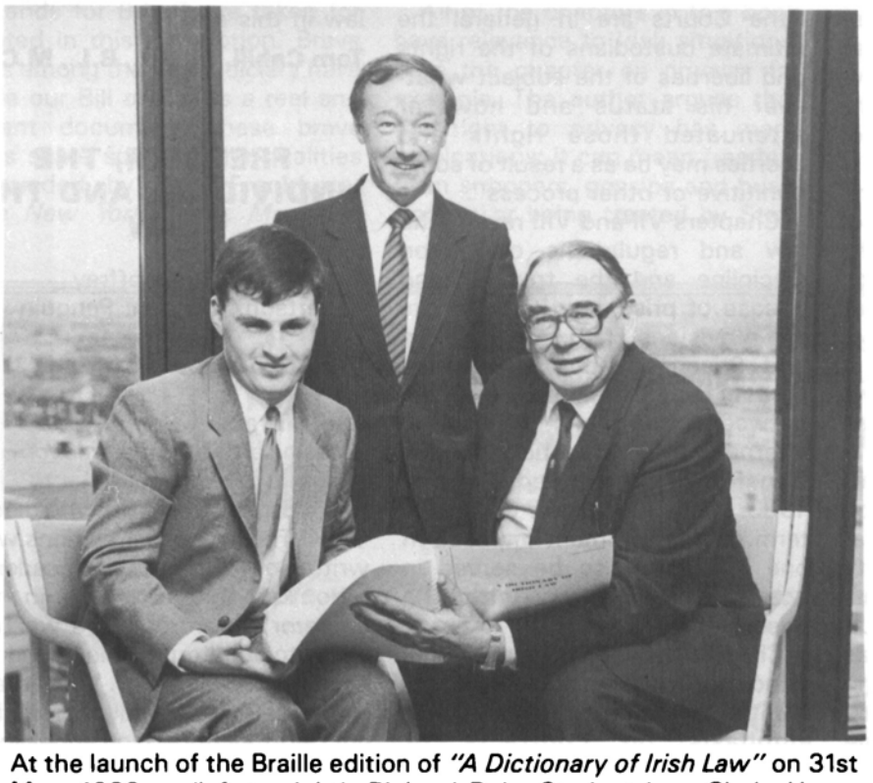
(a) **Mr. Richard Daly,** Student law clerk, Regional Technical College, Waterford and former student of St. Joseph's School for the Blind and Rosmini College, Drumcondra, Dublin;

(b) **Mr. Oliver Coffey,** Chairman of the National Council of the Blind for their library at Whitworth Road, Drumcondra, Dublin;

(c) **Ms. Margaret O'Leary,** Rehabilitation & Personnel Executive of the Rehabilitation Institute, for their library at Roslyn Park, Sandymount, Dublin;

(d) **Mr. Eric Doyle,** Chairman of the National Rehabilitation Board, for their library at Clyde Road, Dublin.

The author, **Henry Murdoch,** said that he hoped the braille edition would encourage other authors and publishers to explore the possibility of braille production of their books, now that the latest technology had made such production relatively easy. He particularly thanked the staff of Arbour Hill Prison who had taken to the project with such enthusiasm. □



At the launch of the Braille edition of *"A Dictionary of Irish Law"* on 31st May, 1989 — (left to right): Richard Daly, Student Law Clerk; Henry Murdoch, Author; James J. Ivers, Director General - Incorporated Law Society of Ireland.

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Book Reviews

IMPRISONMENT: THE LEGAL STATUS OF PRISONERS

By G. D. Treverton-Jones, M.A.Oxon. of the Inner Temple, Barrister. Sweet & Maxwell.

This book states and explains the body of law applicable to prisoners in the UK as at 1st September 1988 and is aptly prefaced by the quote of W. S. Churchill "The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country".

Chapter I outlines the history and structure of the penal system from a privately operated profit-making system to the present-day modern process under Home Office control. Included are the origins of the *Habeas Corpus* Acts and the contribution to reform of such well known persons as Elizabeth Fry whose work at Newgate from 1816 lasted for nearly 30 years.

Chapter II surveys the sentencing powers of the Court including the concept of extended sentencing. The object of extended sentencing is to enable the Courts to impose a longer term of imprisonment than the offence itself would have attracted, in order to "protect the public from the activities of persistent offenders".

Chapter III deals with prisoners' rights including the application of the Bill of Rights 1688 and the familiar European Convention on Human Rights (1950) to which all 21 members of the Council of Europe are parties. A reference is included to one of the strangest cases litigated in the UK, the case of *Meah -v- McCreamer* [1985] 1 All E.R. 367. The applicant, convicted of sexual assaults on women, successfully claimed that this was due to a personality change caused by head injuries/ brain damage sustained as a result of a road accident in which he was a vehicle passenger. Prior to the accident, though he had committed a number of criminal offences, he had manifested no violence towards women. The Courts held that since, but for the head injuries and subsequent personality change, the plaintiff would not have committed the offences for which he was serving a life sentence, he was entitled to substantial damages to compensate him for being in prison. He was awarded £60,000 general damages without specifying what proportion of that sum was specifically intended to compensate for his imprisonment.

Chapters IV and V detail the law relating to the classification of prisoners and the daily regime in prisons.

Chapter VI outlines the development of the law in the areas of prisoner's correspondence, visits and access to the Courts, the issues concerning the prisoner as a litigant and the various means of procuring or ensuring the attendance of a prisoner in court. Of interest are the decisions of the European Court of Human Rights in *Golder -v- United Kingdom* [1975] 1 E.H.R.R. 524 on prisoner's access to legal advice, *Silver -v- United Kingdom* [1980] 3 E.H.R.R. 475 and [1983] 5 E.H.R.R. 347 on censorship of mail to *inter alia* legal advisers and *R. -v- Board of Visitors Dartmouth Prison exp. Smith* [1987] Q.B. 106 on access to the Courts and the general impact of judicial review on Prison Regulations. The latter reminds us that "the Courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties may be as a result of some punititive or other process".

Chapters VII and VIII review the law and regulations on prison discipline and the transfer and release of prisoners. Included are the provisions of the Repatriation and Prisoners Act 1984 which permits the movement of prisoners between jurisdictions party to the International Convention on the Transfer of Sentenced Persons 1983. This Convention enables a term of imprisonment imposed in one jurisdiction to be served in another jurisdiction, with the prisoner's consent.

Chapter IX outlines the legal effects of a sentence of imprisonment upon life outside prison with emphasis on contracts of employment. The provisions of the Repatriation and Prisoners Act, 1984 are included. The effects of this legislation are that a person who has become a rehabilitated person in respect of a specified conviction is treated for most purposes as a person "who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction".

Finally the Prison Rules 1964 (as amended) and the European Prison Rules 1987 (Revised European version of the Standard Minimum Rules for the Treatment of Prisoners) are reproduced as appendices.

In relation to the complexity of law and regulations in particular areas, the reference to the decision of the European Court in *Sunday Times -v- United Kingdom* [1979] 2 E.H.R.R. 245 on the interpretation of "in accordance with law", is notable. Apart from the requirement that the relevant law must be adequately accessible to the ordinary citizen, there is the additional requirement that "it must be formulated with sufficient precision to enable the citizen to regulate his conduct accordingly".

There is no comparable work available on the domestic law of the Republic of Ireland and the UK text does provide a significant and interesting insight into a corpus of law in this area.

Tom Cahill, M.Litt., B.L., M.C.I.T.

FREEDOM, THE INDIVIDUAL AND THE LAW

6th Edition. By Geoffrey Robertson. (London: Penguin Books, 1989, paperback 442 pp. £7.99 sterling)

The library of many lawyers contains an edition of *Freedom, the Individual and the Law* by the late Harry Street, Solicitor, who died in 1984. The five earlier editions were written by "a street-wise academic who knew what was in the Emperor's wardrobe and was not afraid to point out to the crowd the need for new clothes". Very little of Harry Street's original text remains, but Geoffrey Robertson endeavours to maintain Harry Street's focus on the practical consequences of legal rules and those areas which require reform.

Geoffrey Robertson is a leading civil liberties barrister and the author of several legal works including *Obscenity* (1979), *People Against the Press* (1987), and *Media Law* (1984). His period as editor of the "Out of Court" column of *The Guardian* and chairman of the Radio 4 programme "You the Jury" have served him well in his mission to interest lawyers and laymen alike in his quest for law reform.

The topics one would expect in any book on fundamental rights are covered in this book. The various chapters cover a separate right or theme: Personal Liberty and Police Powers; Public Protest; Privacy; Official Secrecy; Censorship; Regulation: Film, Video and Television; Freedom of Expression; Fair Trial; Freedom of Movement; Freedom from Undue Control; Freedom from Discrimination; and the final chapter discusses the issue of a Bill of Rights for Britain. At the end of the book there is a very useful section on sources; a table of statutes, a table of cases and an index.

Ireland has its Bill of Rights – Bunreacht na hEíreann – and its interpreters, the judges, have ensured that many of the rights which Geoffrey Robertson demands for Britain are taken for granted in this jurisdiction. Brave souls among the Irish judiciary have made our Bill of Rights a real and vibrant document; these brave souls share some of the qualities expounded by Felix Frankfurter (*The New York Times Magazine* November 28, 1954): "A judge should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him – to make some forecast of the consequences of his action is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to the mysteries still in the womb of time is a gift of the imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof". There are timorous souls among the judiciary; Justice Benjamin Cardozo's words in *The Growth of the Law* (1924) come to mind: "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity."

All of the chapters in this book have relevance to Irish situations. Take the chapter on privacy, for example. The author argues that the right to privacy has many applications: it can mean freedom from snoopers, gossips and busybodies; or being treated by State officials with a measure of decency and dignity; or being entitled to indulge in harmless activities without observation or interference. An American judge in 1956 stated that the law of privacy could be characterised as "a haystack in a hurricane" (*Ettore -v- Philco Television Broadcasting Corp.* 229 F. 2d 481 at 485). Although some progress has been made on the right to privacy (see for instance the judgment of Hamilton P. in *Kennedy and Arnold -v- Ireland* [1988] ILRM 472), the metaphor of the haystack in a hurricane would not be entirely out of context if applied to the State of Irish law on privacy.

Henry David Thoreau stated in *Slavery in Massachusetts* (1854) that the law will never make men free; it is men who have got to make the law free. Men and women interested in freeing the law in the common good would benefit from reading this book. Students of constitutional law, the thinking practitioner, judges, policy-making civil servants, members of the executive and legislative arms of government would be forced into reflection on a reading of *Freedom, the Individual and the Law.*

Eamonn G. Hall
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Registration of Title Act, 1964
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25th day of August, 1989.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

William O'Grady, Glenkeen, Creggaunbaun, Louisburgh, Co. Mayo. Folio No.: 17254; Lands: (1) Glenkeen; (2) Glenkeen (1 undivided twenty-fourth part); (3) Cushinyen (1 undivided twenty-fourth part); (4) Srahroosky (1 undivided twenty-fourth part); Area: (1) 13a.2r.16p.; (2) 3,410a.2r.22p.; (3) 247a.3r.18p.; (4) 971a.2r.19p.; County: **MAYO.**

Patrick Melican, Leadmore, Kilrush, Co. Clare. Folio No.: 15019; Lands: Leadmore West; Area: 4a.1r.10p.; County: **CLARE.**

Patrick Lydon, Cappaghduff, Tourmakeady, Claremorris, Co. Mayo. Folio No.: 6722; Lands: Cappaghduff East; Area: 6a.2r.32p.; County: **MAYO.**

Joseph Headon, Folio No.: 30101F; Lands: All that and those the lands situate in the townland of Staffordstown and Barony of Balrothery East and comprised in folio no. 30101F of the County of Dublin; County: **DUBLIN.**

Irish Civil Service (Permanent) Building Society, (Instrument Number: 25/12/59); Folio No.: 74350L; County: **DUBLIN.**

Patrick Lee, Edenticlare, Cavan; Folio No.: 1810; Lands: Edenticlare; Area: 22a.1r.0p.; County: **CAVAN.**

Daniel Lynch, Lixnaw, Co. Kerry; Folio No.: 6020; Lands: Clogher; Area: 1a.2r.20p.; County: **KERRY.**

James Channon and Mary Teresa Channon, Lack, Annascaul, Co. Kerry. Folio No.: 6231F; Lands: Lack; Area: 0.413 acres; County: **KERRY.**

David O'Sullivan and Philomena O'Sullivan, Cullionbeg, Mullingar, Co. Westmeath. Folio No. 259F; Lands: Cullionbeg; Area: 0a.1r.5p.; County: **WESTMEATH.**

Nicholas French, Corbally, Enniscorthy, Co. Wexford. Folio No.: 1550 closed to Folio 2792F; Lands: (1) Corbally and (2) Tomnafunshoge; Area: (1) 35.463 acres; (2) 20a.2r.20p.; County: **WEXFORD.**

Catherine Mary Hackett, Ballinageragh Lixnaw, Co. Kerry. Folio No.: 3369; Lands: Ballynegeragh; Area: 3a.0r.12p.; County: **KERRY.**

Michael Bergin, Roscall, Ballyboughill, Co. Dublin. Folio No. 3514; Lands: Brownstown; County: **DUBLIN.**

Patrick D. Graham, 4 Killala Road, Cabra West. Folio No. 6790; County: **DUBLIN.**

Gerald and Agnes Tighe, Folio No. 23426L; County: **DUBLIN.**

Michael Murphy of Moulane, Rathcormac, Co. Cork – one undivided moiety; **Daniel Murphy** of Ballyhesta, Carrignavoa, Co. Cork (2/6 and 1/6). Folio No.: 1196; Lands: Moulane East; Area: 81a.2r.2p.; County: **CORK.**

Laurence O'Toole, 65 Amiens Street, Dublin/Ballymun House, Cloughran, Co. Dublin. Folio No.: 7771; Lands: Ballymun and Barony of Coolock; County: **DUBLIN.**

Thomas McDonnell, c/o Walker & O'Carroll, Solicitors, Athlone, Co. Westmeath. Folio No.: 1893F; Lands: Brideswell; Area: 0a.1r.20p.; County: **ROSCOMMON.**

Lost Wills

BUTLER, Christopher (Christy), late of Riverstown, Tramore, Co. Waterford and Tramore Golf Club, Tramore, Co. Waterford. Would anybody having knowledge of the whereabouts of the Will of the above named deceased who died on the 9th May, 1989 please contact James J. Hally, Solicitor, Strand Street, Tramore, Co. Waterford. Tel. (051) 86588.

SHARKEY, Robert, late of Windmill Road, Elphin and Flaska, Clooneyquinn, Elphin, Co. Roscommon. Would anyone having knowledge of a Will of the above named deceased who died on the 10th October 1988 please contact Messrs. Lyster Forde & Co., Solicitors, Bridge Street, Boyle, Co. Roscommon. Tel. 079-62583.

OSBORNE, John, late of John Street, Cashel, Co. Tipperary, ophthalmic surgeon. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 26th August 1988 please contact Charles M. Barry & Son, Solicitors, John Street, Cashel, Co. Tipperary.

McCARTHY, Michael, late of Kilkerran North, Ballinspittle, Kinsale, Co. Cork, farmer. Will anyone having knowledge of the whereabouts of the Will of the above named deceased who died on the 15th February 1988 please contact Messrs. P. J. O'Driscoll & Sons, Solicitors, 41 South Main Street, Bandon, Co. Cork.

MAHER, Catherine, late of 4 Ascal Ribh, Artane, Dublin 5. Would anyone having knowledge of the whereabouts of a Will dated 16th day of September, 1981 of the above named deceased, who died on the 14th December, 1988 please contact Actons, Solicitors, Kingram House, Kingram Place, Dublin 2.

Miscellaneous

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4 ROCHES TERRACE, COBH, CO. CORK – Denis and Mary Murphy. Anybody knowing the whereabouts of the title documents of the above premises please contact Mary Roche, County Solicitor, County Hall, Cork.

LAWYERS DESK DIARY 1990

The pre-publication offers for the 1990 edition of the Lawyers Page-a-Day A4 Desk Diary @ £15 and the Week-to-View A4 Diary @ £10 (VAT and Postage included) has been distributed with the *Gazette* and members of the Society are requested to return the completed forms as soon as possible to ensure the reservation of their copies.

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Contd. from page 290.

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There is no doubt with the enactment of the Judicial Separation and Family Reform Act that there will be more and more people seeking legal advice and aid through the scheme and the pressures on the service will be even greater.

It should also be remembered that the present scheme is not constituted on a statutory basis even though it has been in operation for almost nine years.

The proper provision for Legal Aid Services is a matter that the profession should address as the present arrangement is hopelessly inadequate to meet the needs of those entitled.

Yours sincerely,
MURIEL WALLS,
Solicitor,
Family Lawyers Association.

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Vol. 83 No. 9 September 1989

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Viewpoint

The Judicial Separation and Family Law Reform Act 1989 comes into operation on the 19th October next. This is the first Private Member's Bill to become law for three decades and history will show it to be a very significant piece of legislation with implications for society in general as well as the profession.

The practice of Family Law has unfortunately not been a priority within the profession, with those that do practise in this area not always regarded as ''real lawyers''. The statistics however, show that marital breakdown is on the increase and the legal implications of such breakdown on property, income and capital, on wills and probate are extensive. The profession must be able to meet the needs of those who find themselves in this situation and must in particular familiarise themselves with the provisions of the new Act.

The Judicial Separation Act now places a responsibility on any solicitor acting for either the applicant or the respondent to discuss with them the possibility of reconciliation, the process of mediation and the advantages of concluding matters by Deed of Separation and certify to the court that such discussion has taken place. In the case of reconciliation and mediation, a list of qualified persons or agencies must also be furnished. The question is – are such persons and agencies freely available? Marriage counselling services are run mainly by voluntary groups with the help of some government funding. The Pilot Scheme on Family Mediation which completed its three year programme in July last only received a committment to continuation of its service during the election campaign. There are only limited statutory based services *for families in crisis* despite the elevated position of the family in the Constitution. Further resources are required.

The grounds for application to the court for a decree of judicial separation have been broadened to include not only adultery and cruelty (or unreasonable behaviour) but also desertion and separation (with and without consent for one or three years respectively) and finally where the marriage has broken down to such an extent that a ''normal marital relationship'' has not existed for one year prior to the application. ''Normal marital relationship'' is, of course not defined in the Act and will make for interesting judicial interpretation! This ground is designed to cover a marriage which has irretrievably broken down and/or where a couple are separated in all respects except that they continue to reside in the same house.

The power of the court to make ancilliary financial, property, custody and other orders is now very extensive and will cover areas of property, succession and trusts. The court can award periodical payments (both secured and unsecured) for maintenance. It can make *lump sum orders* in addition to periodical payments. It can also make property adjustment orders which include ordering transfers of property, placing property in settlement, varying the entitlement of spouses under existing settlements and extinguishing or reducing such entitlements. The extinguishment of succession rights is left to the discretion of the court to decide at the time of granting the decree or at any time thereafter.

Contd. on page 315.

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Safety, Health & Welfare at Work Act 1989

Legislation on Occupational Health & Safety tends to attract only minority interest. Traditionally statutes in the area have been complex, technical and of limited application. These difficulties have been compounded by the fact that there are twenty pieces of relevant primary legislation and almost two hundred supporting regulations on the statute book at the moment. Even for lawyers this legal structure is daunting. For employers trying to assess their responsibilities or for employers trying to establish their rights the position is even more confusing. Against this background it is difficult not to have much sympathy with the view that one of the principle problems in the area is that there is simply "too much law".

The response of the legislature to this problem has been to pass another law. This one, however, is different. By the standards of its predecessors it is clear, simple and brief. Furthermore, it will in time replace all previous enactments. For these reasons alone, the Safety, Health and Welfare at Work Act 1989 is a very important and welcome statute. What makes it more significant though is the fact that it embodies a very broad approach to heath and safety at work. Previous enactments regulated the employment of an estimated 20% of the workforce, this Act will extend the scope of the law to almost everyone at work. In this respect it should be of concern to the majority rather than the minority.

This article will examine the content and *modus operandi* of the Safety Health & Welfare at Work Act. It will focus on the nature of the duties imposed and the methods of enforcement established. It will also examine the role of the new national authority which it provides for. Before embarking on those primary objectives, however, it will be beneficial to consider the genesis of the statute. This is particularly important because the "new approach" to legislation on health and safety at work, which is embodied in the Act, arises out of particular difficulties with previous statutes and the influence of two important reports on the question.[1]

By
Declan Madden, Solicitor, and John Brennan, Solicitor*

The Robens Report

In 1970 the Government of the United Kingdom appointed a committee on health and safety at work under the Chairmanship of Lord Robens. The committee produced its highly influential report in 1972. In the years since then the Robens Report has had a profound affect on the legislative approach to health and safety at work. That influence has not been confined to the U.K. Its analysis and recommendations have been generally accepted throughout Europe and statutes adopting the Robens approach have been passed in many countries.[2]

The Robens analysis suggested that the most important reason for accidents at work was apathy and that one of the fundamental reasons for that apathy was the fact that there was "too much law". It was suggested that the huge mass of law had an all pervasive psychological effect which encouraged people to see health and safety as someone else's business. Going beyond that the committee considered that much of the law was "intrinsically unsatisfactory" and it recommended a complete overhaul of the legal structure with a view to designing it to promote health and safety at work through a system of self regulation within industry. The new emphasis was to be on workplace involvement rather than central control.

Our own Health and Safety at Work Act 1980 involved a partial implementation of the Robens approach and it is clear that the current statute bears the imprint of similar origins. However, in examining the 1989 Act it is important to acknowledge the more direct influence of the Commission of Inquiry on Safety, Health and Welfare at Work which was established in this jurisdiction in 1980. The commission acted under the chairmanship of Mr. Justice Donal Barrington and its report was published in 1983.

The Barrington Analysis

The Barrington Commission recognised that one of the basic problems with existing legislation in the area was the absence of a consistent and comprehensive approach to the issue. Despite the volume of legal regulations only a small percentage of the workforce was protected by statute. Furthermore, even in those employments governed by the legislation there was apt to be confusion about its meaning and ignorance of its impact.

Much of this was caused by the legalistic draftsmanship and technical detail of many provisions. On top of that there was the "obsolesence factor" - the fact that many of the laws contained technical details which the rapid

pace of technological change rendered unimportant.

On the question of enforcement the Barrington Commission was equally damning of the existing system. It considered that the criminal law was not particularly well suited to bringing about preventative strategies – "concerned with fault, not with causation or prevention, and intervening after a serious breach of the law (and in practice, frequently after an accident) the Court's contribution to the prevention of accidents and illness is at best indirect."[3] Thus Barrington advocated the use of preventative executive actions to secure compliance with standards rather than reliance on sanctions for the breach of regulations.

Taking Barrington as a whole it is possible to see three key proposals which shape the present legislation:

1. The Commission favoured the adoption of a "Framework" Act to replace the multitude of existing statutes. It was to operate on the basis of the imposition of a small number of general duties rather than a multitude of specific ones.
2. The Commission recommended a different regime of enforcement to be based on the wider use of administrative orders - Improvement Notices and Prohibition Notices - which would encourage the prevention of accidents.
3. The Commission sought better management of safety issues through the use of Safety Statements, the achievement of workplace involvement and the designation of responsibilities in a clear and direct way.

It will be helpful to bear these key recommendations in mind as we examine the Safety, Health and Welfare at Work Act.

The 1989 Act

The Safety, Health & Welfare at Work Act 1989 passed all stages of the Oireachtas on 19th April 1989. It will come into operation when the Minister for Labour exercises the power given to him in Secion 1 (2) to declare all or part of its provisions effective.

The Act envisages a transition period between pre-existing legislation and the full operation of the Act itself. Section 4 provides for repeal of previous enactments. For example, Section 4, subsection (h) provides that the prohibition notice referred to in the Safety in Indùstry Act 1980 will be repealed when the relevant section of this Act which also deals with the prohibition notices comes into operation. Thus the obligations owed by employers to their employees will be increasingly governed by statute as provided for by this Act and by the rules and regulations made by the new National Authority (for Occupational Safety and Health), which will provide for a degree of industrial self-regulation for health and safety. In time it is envisaged that the Act will replace all previous enactments and statutes that fall within its ambit.

In drafting the legislation it is apparent that our obligations under the Single European Act have been taken into account. Article 118A of the Act provides that member states "shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area while maintaining the improvements made." The Article goes on to provide for the establishment of minimum requirements by way of Community Directives. Six draft Directives have now been proposed and it is expected that four of them will be adopted this year.[4]

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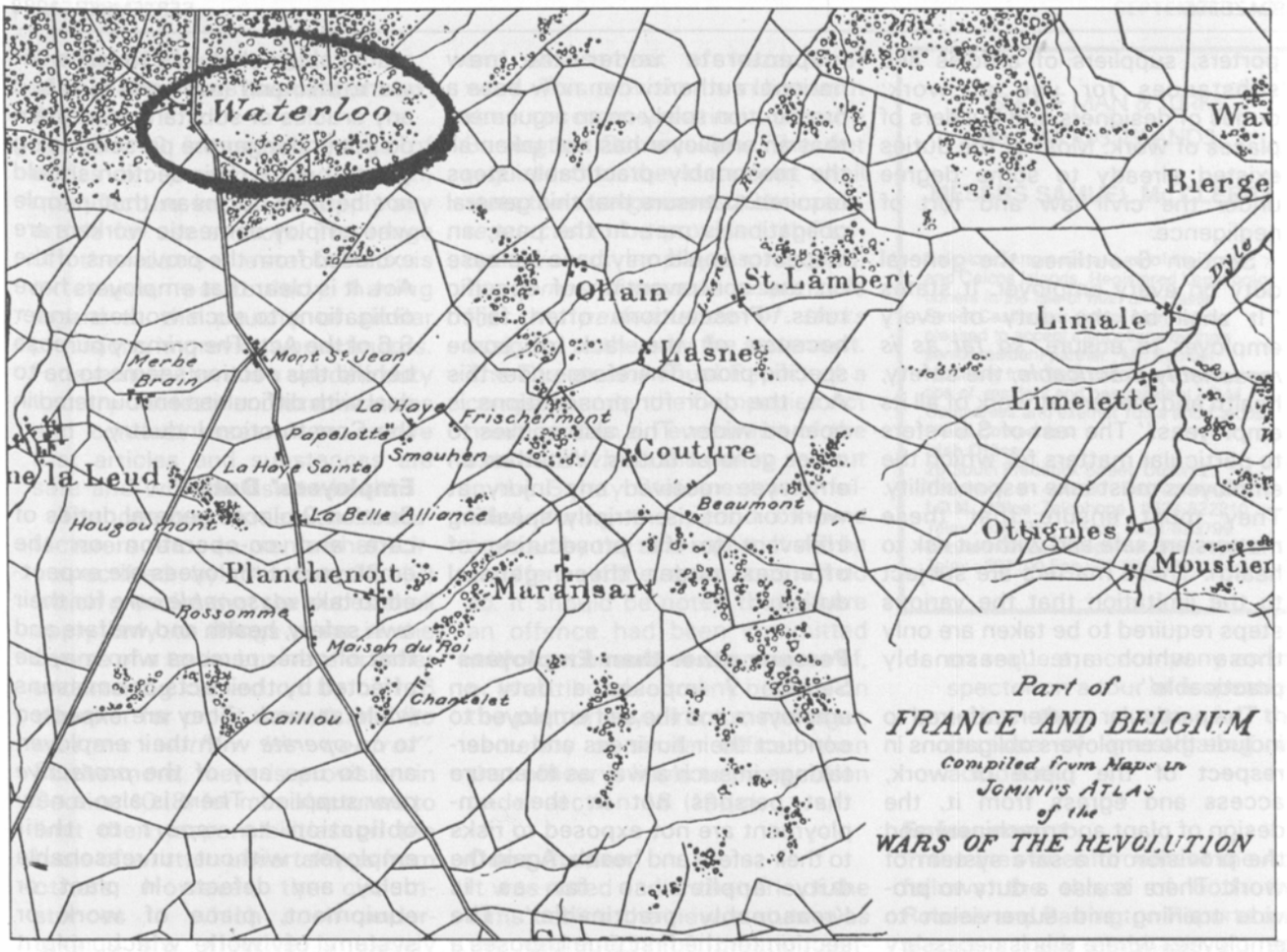
The new obligations contained in these Directives have been anticipated to some extent by the 1989 Act so it is not expected that any substantial amendment of the legislation will be required. It is recognised, however, that it may be necessary to introduce statutory regulations to implement some of the detailed provisions. This can be done under Section 28 which allows for the Minister to issue regulations after consultation with the New Authority.

The Act contains a number of important definitions which merit examination. It provides that a "place of work" includes any place, land or other location at, in, upon or near which, work is carried on whether occassionally or otherwise and in particular includes – (a) a premises, (b) an installation on land and any offshore installation (c) a tent, temporary structure of other moveable structure, and (d) a vehicle, vessel or aircraft."

The definition could hardly be more comprehensive and is much wider than any single provision in existing legislation. The definition of employee remains confined to persons employed under contracts of service and the distinction between employees and independent contractors is maintained. However, the importance of this distinction is diminished in practice by the duties imposed by Section 7 on people such as outside contractors who work on the premises. It is also worth mentioning that persons undergoing training for employement or receiving work experience, other than at school or university, are deemed to be employees of the person who provides such training or work experience.

The General Duties

Section 6 to 13 of the Act outline the general statutory obligations relating to the basic and over-riding responsibilities of employers, employees and others engaged in work activities. They are at the core of the Act. Very briefly, they are the general duties of employers to employees; the duties of employers and self-employed to the public; duties of persons who allow their workplace to be used by others who are not their employees; the duties of employees; the duties of designers, manufacturers, im-



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porters, suppliers of articles and substances for use at work; duties of designers and builders of places of work. Most of the duties existed already to some degree under the civil law and tort of negligence.

Section 6 outlines the general duty on every employer. It states "It shall be the duty of every employer to ensure, *so far as is reasonably practicable*, the safety, health and welfare at work of all its employees." The rest of S.6 refers to particular matters for which the employers must take responsibility. They must ensure that these matters are safe and without risk to health. These matters are subject to the limitation that the various steps required to be taken are only those which are "reasonably practicable".

The particular matters referred to include the employers obligations in respect of the place of work, access and egress from it, the design of plant and machinery and the provision of a safe system of work. There is also a duty to provide training and supervision to employees where this is necessary to ensure their safety and health. Where it is not reasonably practicable to control or eliminate hazards the employer is obliged to provide suitable protective clothing or equipment as appropriate.

In one sense, Section 6 is just a statutory statement of the existing common law duties of the employer under civil law. Its special significance, however, is that the inspectorate under the new national authority can now base a prosecution solely on an arguement that an employer has not taken all the reasonably practicable steps required to ensure that this general obligation is met. In the past, an inspector could only base his case on the contravention of specific rules. Prosecutions often failed because of the lack of some specific proof. Therefore, under this Act, the door for prosecutions is opened wider. This also applies to other general duties. Whether an employee received any injury at work or not, is, strictly speaking irrelevant to the prosecution of offences under these general duties.

Persons other than Employees

Section 7 imposes a duty on employers and the self employed to conduct their business and undertakings in such a way as to ensure that persons not in their employment are not exposed to risks to their safety and health, Again the duty applies so far as is "reasonably practicable". The section for the first time imposes a duty on the self-employed persons and its scope is as broad as can be imagined.

Secion 8 places a duty on persons in control or in charge of a non-domestic place of work, (which means any building or place that is not a private dwelling) which is made available to other persons who are not their employees, to ensure as far as reasonably practicable, that the places of work, their entrances and exits and any articles or substances in them do not endanger the persons using them at work. This section should *not* be read to mean that people who employ domestic workers are excluded from the provisions of the Act. It is clear that employers have obligations to such workers under S.6 of the Act. The primary purpose behind this section seems to be to deal with difficulties encountered in the Construction Industry.

Employees' Duties

Section 9 places general duties of care and co-operation on the employees. Employees are expected to take *reasonable care* for their own safety, health and welfare and that of other persons who may be affected by their acts or omissons while at work. They are expected to *co-operate* with their employer, and to use any of the *protective gear* supplied. There is also a new obligation to *report* to their employer without unreasonable delay any defects in plant or equipment, place of work or system of work which might endanger their safety or welfare. The significance of this new duty might well lie in civil proceedings arising out of accidents at work rather than through possibilities of enforcement by criminal law. In this context though it may be worth noting Section 60 which provides that breaches of the general duties (Section 6.11) do not create a right of action in civil proceedings.

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Duties of Designers, Manufacturers, Importers and Suppliers

Section 10 imposes a range of duties on persons who design, manufacture, import or supply any article for use at work. The range of the duties established is extensive, particularly having regard to the paucity of similar provisions in previous enactments. For example, there is a specific duty to carry out tests and examinations and conduct research to ensure that articles and substances are safe and without risk to health.

The onerous duties on manufacturers etc. is somewhat circumscribed by Section 10 (7) which provides that the duties shall apply only to things done in the course of a trade, business or other undertaking carried on by him (6 whether for profit or not) and *"to matters within his control"*. Furthermore, there is provision in Section 10 (8) for manufacturers to limit their responsibilities on the basis of writtten undertakings from others. However, the circumstances in which such undertakings are effective is closely restricted.

The provisions of Section 10 (7) and 10 (8) are of some interest, not least of all because of their novelty. Beyond that, however, it is not hard to imagine the difficulties which are likely to arise over such concepts as ''matters within his control''. Manufacturers, designers, suppliers etc are likely to seek undertakings from the purchaser as to the use to which the article will be put. Furthermore, in order to relieve them of potential liability such persons might require the purchaser to take specified steps to ensure that the article shall be safe. In such situations the purchase contract becomes an important document and it is to be anticipated that such contracts will become much more complex than heretofore. Whether this is desirable is open to some doubt especially in the context of a statute which is aimed at promoting safety as opposed to providing for liability in civil actions.

Safety Statements

Section 12 of the Act places a duty on employers and the self-employed to prepare Safety Statements based on the identification and assessment of hazards at work. This provision is in line with the recommendation of the Barrington Commission. The Act requires that the statement shall state the *arrangements* to be made, *resources* to be provided, the *co-operation* of employees required, the *names* of persons responsible for the *performance of tasks* assigned to them by the statement. The Directors Annual Report of a company under the Companies Act must contain an evaluation of the extent to which the policy set out in the Safety Statement was fulfilled during the period of time covered by the said report. It will be an offence if the report does not do so. It should be noted that where an offence had been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or similar officer, then that officer is liable to prosecution under section 48 (19)(a).

Consultation

It was noted earlier that one of the aims behind the new statute was the promotion of greater self-regulation at industry level. In this regard the process of consultation and workplace involvement was regarded as being crucial. The Act imposes a duty to consult in Section 13 but unlike the 1980 Act which established a definitive structure for consultation, the new Act is silent on mechanisms. It establishes the duty on employers and provides that employees *may* select and appoint from amongst their number a Safety Representative. There is no mention of Safety Committees.[5] If appointed, the Safety Representative will have certain rights. These include the following rights:-

- make representations to the employer
- investigate accidents and dangerous occurrences
- make oral or written representations to inspectors
- receive advice and information from inspectors
- subject to prior notice and agreement with the employer the Safety Representative may carry out inspections or investigations on foot of any complaint from an employee
- on request, accompany an inspector on a tour of inspection (other than a tour for the purpose of investigating an accident).

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Enforcement

In the area of enforcement the Act follows the thrust of both the Robens and Barrington Reports and places a new emphasis on administrative action as opposed to the use of the criminal law. Traditional methods do of course remain in force. Thus the national authority can prosecute any summary offence under any of the relevant statutory provisions through the courts in the normal way.[6] Penalties imposed on summary conviction can not exceed £1,000 but there is no limit to the possible fine in cases of conviction on indictment.

In relation to this question of prosecution it is important to note that Section 50 of the Act provides that in any criminal proceedings under a relevant statutory provision the onus of proof is on the accused to show that it was not reasonably practicable to do more than what was in fact done. The courts will be the judge of what is reasonably practicable. If a precaution is practicable it must be taken unless, in the circumstances as a whole, it would be unreasonable. It is clear from this that the responsibilities imposed on employers by the general duties are indeed as onerous as they appear.

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and 36. Under Section 35 inspectors are given the power to serve an *improvement direction* on a person in control of premises where he is of the opinion that activities involve or are likely to involve risk to safety and health of any person. The direction requires the person in control to submit an improvement plan to the inspector within a specified time. The inspector may direct that the plan be revised if he is not satisfied with the remedial action proposed.

A closely related power is provided for in Secion 36 which allows the inspector to issue an *improvement notice* where he is of the opinion that a person is contravening or has contravened any of the statutory provisions. The notice directs the person to remedy the contravention in question. A right of appeal to the District Court is provided for.

These provisions of the Act are new to Irish law. They are further supported by Section 37 of the Act which allows the inspector to serve prohibition notices where he is of the opinion that activities involve or are likely to involve a risk of serious personal injury to persons at any place of work. Similar provisions existed under Section 11 of the 1980 Act but an important difference lies in the fact that under that Act only the Minister for Labour had the power to issue the notice. That restriction may account for the fact that the power was very rarely if ever used.[7] The prohibition notice prohibits the carrying on of the activities specified in the notice.

Given the new range of remedies provided for, the inspectors are clearly in a better position to secure an improvement in standards of safety and health in industry. It seems likely that they will make considerable use of the powers conferred by Section 35 in particular. For persons whose traditional approach has been persuasive rather than coercive the improvement notice or direction is an effective and compatible enforcement device. The Act is much stronger as a result of its adoption.

Conclusion

The measure of the success of this piece of legislation will be its impact on workplace health and safety. It will be a number of years before a judgment on this issue is possible. Nevertheless, it must be recognised that the Act represents a radical departure from past practice and offers a hope that the unacceptably high toll of industrial accidents can be reduced. We take the view that when this Act is implemented the law on health and safety will no longer be a stumbling block in the way of increased safety and health at work. The legal parameters have been set in a very reasonable manner. Employers, workers and inspectors must now secure the objectives set.

References

1. Report of the Committee on Health & Safety at Work 1970-72 (the Robens Report) CMWD 5034
   Report of the Commission of Inquiry on Safety Health & Welfare at work 1983 (the Barrington Report) P1 1868
2. It is even evident that ILO Convention No 152 is based heavily on the Robens principles - one of the architects of the report has referred to it as "Robens re-visited".
3. Paragraph 17.5
4. The introduction of measures to encourage improvements in the safety and health of workers in the workplace (New Framework Directive)
   The minimum safety and health requirements for the workplace (1st Individual Directive)
   The minimum safety and health requirements for the use by workers of machines, equipment and installations (2nd Individual Directive)
   The minimum safety and health requirements for the use by workers of personal protective equipment (3rd Individual Directive).
5. It is envisaged that the existing Safety Committee structure will continue where it operates successfully but the system will no longer be based on statutory requirements.
6. At least seventeen separate offences arise out of the provisions of the Act itself.
7. This compares very unfavourably with the UK where roughly 4000 prohibition notices are served under the equivalent provisions (Section 22) of the Health and Safety at Work Act 1974.

* *Declan Madden and John Brennan are Solicitors with the Federated Union of Employers.*

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From the President . . .

When I was elected President of the Incorporated Law Society, one of my targets was to seek to persuade the Law Faculties in the various Universities to expand their Degrees to include options in Business Studies, Economics, Accountancy and Languages. The Law Society had put this proposal to the Universities some years ago but nothing had come of it.

We decided that it would be more effective to commence by talking to the Presidents of the University Colleges and the Provost of Trinity College and consequently they and their Registrars were invited to Dinner with some representatives of the Education Committee and the Vice Presidents and also, of course, the Director General and Professors Woulfe and Sweeney. The result was what everyone agreed was a tremendous and stimulating debate on the subject of Legal Education.

Following that meeting, I received invitations from all the Colleges to visit them and during the year travelled with Mr. Ivers and Professors Woulfe and Sweeney to U.C.C., the new University of Limerick, Trinity College and U.C.D. and we intend to visit U.C.G. shortly.

Again there has been an excellent exchange of views and whilst we pushed the objectives I have mentioned above, the members of the Law Faculties urged us very strongly to reconsider our policy of requiring law graduates to sit our entrance examination on the grounds that the standard of law degrees now was good enough to justify exemption from double examination and also that we were losing some of the best graduates altogether.

Having been involved in the setting up of our Law School back in the late 70s and indeed having been Chairman of the Education Committee on two occasions, I was well aware of their feelings in the matter.

As an aside I would have to say that it is a pity that communication between the Universities and the Law Society has been so poor in the last few years. We now intend to remedy that and set up a Joint Committee with them.

When we planned the new Law School and new training system, it was not proposed to ask law graduates to sit our entrance examination provided they had covered in their degree course the six "core" subjects of our examination. When in 1977 the Society decided that everyone seeking entry into its new training course, starting in 1979, should sit the entrance examination, law graduates were exempted from it until 1982 on the basis that it would be unfair to impose an entrance examination on someone who had embarked or was about to embark on a law degree course on the assumption that the conferring of that degree would mean he/she would not have to sit the entrance examination. In between 1982 and 1988 accordingly, law graduates and non-law graduates alike had to sit the entrance examination. The Society has been accused of operating an informal quota but let me categorically deny that that was ever so. Certain students and student representatives have continuously repeated this allegation, presumably on the basis that if you keep repeating a slander long enough, it comes to be believed. What they have not informed the media is that in one of the High Court cases it was found as a fact that the Law Society did not operate a quota.

In the only other High Court case that went to hearing the Judge stated:

> "I can find no evidence to suggest that the Education Committee acted in any way contrary to the principles of natural justice or fairness of procedures. At all times they showed consideration for the position of candidates and carried out their statutory obligations in a fair, reasonable and objective manner. In fact, it appears to me that the manner in which the examination was conducted, the results assessed and decisions reached by the Education Committee after careful consideration was exemplary".

Another allegation is that in some way places were being kept for children of solicitors and I was quoted from a 1978 Council Meeting as having stated that "I could see no difficulty in having, say, ten places reserved for families of members of the profession". The remainder of the quotation which was left out was "all other things being equal". The truncation of that quotation clearly shows bias against the Law Society and I name specifically the *Sunday Tribune* in this connection. There never has been, is not and I hope never will be a policy in the Law Society to provide separate places for children of solicitors. I cannot put the position more clearly than this.

The question of granting exemption from the Final Examination/ First Part was debated at the July and September meetings of the Law Society when by a very large majority, it was resolved that all law graduates of Universities in the Republic of Ireland will be exempt from the entrance examination provided their degrees include passes in the six subjects of the Society's Entrance Examination.

Non law graduates must pass each of six subjects, Tort, Contract, Property, Constitutional, Company and Criminal Law but a candidate who has obtained a pass in three or more subjects in any one sitting will be exempted from the subjects in any repeat sitting.

As you will be aware, this radical new policy of the Law Society has been generally very well received. Whilst the current training system has served us and the public well it is time for a change: we are now part of the Single Market so that our system not only has to produce solicitors to serve the people of Ireland but also must be in a position to take advantage of the opportunities for Irish solicitors inside the European Community.

Contd. on page 311.

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FROM THE PRESIDENT *Contd. from page 308.*

The admission of much greater numbers will mean that we must immediately increase the capacity of our Law School as the existing facilities accommodate only some 150 students per annum. We envisage that this figure may double within two years. Not only will these changes have major implications for the system of training but they will also involve a commitment by the profession to accept a much greater number of apprentices than it has in the past. It is my experience that the bigger offices are taking on more and more apprentices as the years go by. They appreciate that the best way of obtaining good solicitors is to grow them inside their own offices. I would urge country and smaller practitioners to take the same view and to grow their own future associates and assistants.

It is important for students to realise that in addition to passing or securing exemption from the entrance examination, they must also pass the First Irish Examination, become apprenticed and spend some time in a solicitor's office, before they can enter the Law School.

I want to pay tribute and issue more than a word of thanks to the consultants and tutors in our Law School. They have borne the heat in the kitchen over many years and I hope will continue to do so despite the inevitable increase in the number of courses. I would have wished to have involved them in the steps taken before the new direction was taken but I am sure they understand that this was not possible. Our examiners too deserve our best thanks. They have carried out their duties in a professional manner, exercising their independent function in all respects as it should be exercised.

In the Law Society, we are all very excited with this new development. In effect we have decided that it is not for us to determine or concern ourselves with the question of employment for solicitors after they have qualified. If someone decides to become a solicitor and achieves the necessary standards, then it is not the responsibility of the Law Society to ensure that there are job opportunities for such people when they qualify. However, having said that, I do hope that between the opportunities available here, in the U.K. and further afield in the Single Market not only in private practice but in Industry and in other fields, the products of our system, all of whom will be well trained, will be able to find satisfactory positions properly remunerated.

We look forward to the challenge of the 90s and of the 21st Century.

MAURICE R. CURRAN.

In defence of the Law Society's examiners

The following is the text of a letter to the Editor of the Sunday Tribune from Maurice R. Curran, President of the Law Society. The letter was printed in the Sunday Tribune of 24th September, 1989.

SIR — In the *Sunday Tribune* of 10 September, an article appeared in which I was quoted as saying:

"There is no hidden agenda. We have wiped the slate clean. We have abandoned the use of the exam as a control mechanism. Our second exam will have to change because we are to make our course shorter to get more students through. If the course is shorter, it will be more exam orientated."

Since some 80% of those entering the Society's Law School will no longer be subject to its entrance examination obviously the control of entry to the school effectively shifts to the universities which produce the law graduates. When I was speaking of the examination, therefore, I was speaking of future control of entry to the Law School and it was in this context that the Society was 'abandoning control'.

The public are now aware of the changes made by the Society earlier this month in the requirements to enter its Law School and these have been generally welcomed. They benefit both law graduates and candidates other than law graduates. It is clear, however, that a campaign, deliberately orchestrated, is afoot to discredit the Society's Entrance Examination. The Society is fully satisfied with the integrity of the examination. The preparation of each examination paper and the marking of the scripts are conducted under the supervision of external examiners all of whom are distinguished academics drawn from universities in the Republic. The scripts of all candidates even remotely approaching the margins of a pass/fail or a compensation level are checked by the external examiners. This ensures that any initial unevenness among internal examiners is picked up in good time.

The suggestion that the examiners received instructions from the Society to 'stiffen the examination' is as absurd as it is untrue. To suggest otherwise is an insult to committed practitioners and to distinguished academic lawyers of unquestionable probity and standing.

The Society has at all times been concerned and will continue to be concerned with the maintenance of the highest levels of professional competence among solicitors.

Maurice R. Curran,
President,
Incorporated Law
Society of Ireland,
Blackhall Place,
Dublin 7.

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Practice Notes

Sale by Mortgagee

The guidance of the Conveyancing Committee has been sought from time to time with regard to what enquiries a Purchaser should make from a Vendor who is a Mortgagee realizing his Security. It is considered that the holder of a *first Legal Mortgage* selling as a Mortgagee in possession should furnish the following:

1. **The Mortgage Deed**
   This is essential as the Power to Sell is based on the existence of a Deed of Mortgage and the terms thereof.
   AND

2. **Evidence to show that the Power of Sale has arisen.**
   A statutory right to sell arises by virtue of Section 19 of the Conveyancing Act 1881. For the right to arise the Mortgage Money must have become due. In most cases this can be established by checking the terms of the Mortgage Deed itself as it may fix a legal date for redemption. Once this date is past the right of sale has arisen. Where there is not a Fixed date for redemption the Purchaser should seek evidence by way of a Statutory Declaration that in the case of a Loan repayable by instalments the Borrower was in arrears or in the case of a loan repayable on demand that a formal demand had been made and no payments received on foot of same.

3. **Evidence that the Mortgagee is in a position to furnish Vacant Possession.**
   There is a distinction in the 1881 Act between when the Statutory Power of Sale arises (Section 19) and when the Power is exercisable (Section 20). From the Mortgagee's point of view it is important that he complies with the requirements of both sections. However, by virtue of Section 21(2) the Purchaser obtains a good title once a Power of Sale has arisen and he is not obliged to enquire as to whether it is also exercisable. Nevertheless a Purchaser should be concerned to ensure that the Mortgagee is in a position to furnish Vacant possession of the premises. This can be established in the first instance by a physical inspection of the property itself. However, it is suggested that in addition a Mortgagee should give some explanation as to the manner in which he obtained possession and that he has done so lawfully. The principal ways of getting possession are either on foot of a Court Order, on the exercise of a contractual right to take possession pursuant to the terms of the Mortgage Deed, on a surrender of possession by the Mortgagor or on an abandonment of the premises by the Mortgagor. It is considered sufficient for the Mortgagee to furnish a copy of the Court Order or if no Order was obtained furnish a letter setting out the circumstances under which it obtained possession.

4. **Evidence of compliance with the provisions of the Family Home Protection Act 1976**
   If the title to the property in sale is registered in the Land Registry subject to the Mortgagee's charge then the Purchaser need not seek evidence of compliance with the provisions of the Act on the creation of the Mortgage. If the title is unregistered then the normal conveyancing enquiries with regard to compliance with the Act on creation of the Mortgage should be made.
   Once the provisions of the Act have been complied with on the creation of the Mortgage the Mortgagee in enforcing his security on foot of the said Mortgage does not require the consent of the Mortgagor's spouse to the disposal. A Mortgagee is not a spouse and the conveyance from the Mortgagee is not a Conveyance within the meaning of Section 3 of the Act. There is accordingly no need for a Family Home Declaration in respect of the Conveyance itself.
   However it is necessary to enquire as to compliance with the Act on the occasion of the Mortgagee obtaining possession. Where possession is obtained on foot of a Court Order before the Court makes the Order it seeks evidence of notification of the Mortgagor's spouse pursuant to Section 7 of the Act to give the Spouse an opportunity of paying the arrears. Accordingly the interest of the Spouse is protected where a Court Order has been made.
   Where Possession is obtained on foot of a contractual right to possession and without the benefit of a Court Order the Mortgagee should furnish by way of a Solicitor's Certificate evidence that the appropriate Notice under Section 7 was served on the Spouse. If there is a surrender of abandonment of possession the Mortgagee should furnish a Solicitor's Certificate that before effecting any sale an appropriate Notice was served on the Spouse.

5. **Puisne Mortgages**
   If the Holder of a First Legal Mortgage is selling as Mortgagee in possession pursuant to his Statutory

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Powers of Sale then by virtue of Section 62 (10) of the Registration of Title Act 1964 and Section 21 (1) of the Conveyancing Act 1881 the Purchaser takes free of all Estates interests or rights ranking in priority *after* the first Legal Mortgage and there is no need to furnish formal Discharges or Releases of any Mortgages, Judgment Mortgages or other Burdens ranking subsequent to the first Legal Mortgage.

6. **Nominal Reversion** – Traditionally where there was a Mortgage by sub-demise it was the practice to include a provision whereby the Borrower appointed the Society or its Agent as his Attorney for the purpose of conveying the nominal reversion in the event of an enforced sale. Such a provision is no longer necessary as Section 80 of the Landlord & Tenant Act 1980 provides that if land the subject of a Mortgage by subdemise, either created before or after the commencement of the Act, is being sold for the enforcement of the Mortgage then the Purchaser is deemed to have acquired the interest of the Lessee for the entire of the unexpired term of the Lease including the period of the nominal reversion.

Form of Assurance from Mortgagee

The operative part of a Deed of Assurance from a Mortgagee in possession should take the following form:

1. **Registered Land -**
   Section 62 of the Registration of Title Act 1964 deals with the Power of Sale by a Mortgagee and Form 25 of the Land Registry Rules lays down the format of the Deed of Transfer whether the property is leasehold or Freehold and the operative part is as follows:
   "A being the Registered Owner of a Charge registered on the ____ day of 19 (or at Entry No. . . .) in exercise of the Power of Sale hereby transfers. . . . discharged from the said Charge and from all other Burdens entered in said Folio of the Register over which the said Charge ranks in priority. . . . "

2. **Unregistered Property -**
   In addition to the normal recitals the Mortgage Deed should be recited and the fact that the Mortgagee is selling as Mortgagee in possession. The operative words and habendum will be as follows:
   (i) **Unregistered Freehold -**
   AB as Mortgagee in exercise of the Powers vested in it by virtue of the said Mortgage and the Statute or Statues in that behalf and of every other Power them enabling hereby GRANT AND CONVEY unto . . .
   TO HOLD the same in Fee Simple free from all Right or Equity of Redemption and from all claims and demands under the said Mortgage"

2. (ii) **Unregistered Leasehold -**
   AB as Mortgage - As No. (i) above - assign rather than convey: "TO HOLD the same for all residue now unexpired of the said term of years granted by the Lease subject to the payment of the said yearly rent and to the performance and observance of the covenants on the part of the Lessee and conditions therein reserved and contained free from all right or equity of redemption and free from all claims and demands under the said Mortgage"

Having regard to the provisions of section 80 of the Landlord and Tenant (Amendment) Act 1980 the foregoing is sufficient whether the Mortgage was by way of Assignment of the Leasehold interest or subdemise. There is no longer any need to join an Attorney for the purpose of passing the nominal reversion. This is the case whether or not the Mortgage Deed itself provided for the appointment of an Attorney for this purpose.

In the case of the Leasehold Property (whether Registered or Unregistered) the Deed of Assurance should contain the usual covenant by the Purchaser to pay the rent reserved by the lease and to perform and observe the covenants on the part of the Lessee and the conditions contained therein.

RORY McENTEE
Chairman,
Conveyancing Committee.

Dublin Corporation – Searches

The Conveyancing Committee has been informed by Dublin Corporation that legal searches in connection with conveyancing in relation to road proposals can be carried out at its enquiries office, located at 2nd floor of Block 2, Civic Offices, Fishamble St. This office is open to the public on Mondays, Wednesdays and Fridays from 9.30 a.m. - 12.30 p.m.

With regard to compulsory purchase orders, these matters are dealt with in the Development Department, Exchange Buildings, Lord Edward St. Initial enquiries under this heading should be addressed by letter to the Principal Officer there. □

James Nash F.S.S. Dip.

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Objections & Requisitions on Title 1989 (Revised) Edition.

The 1989 Revised Edition of the Objections and Requisitions on Title contain a number of changes some of which relate to the wording or location of specific Requisitions without any change in substance. The substantive changes made are as follows:

Roads in Charge - Requis. 2.9 - This has been amended in line with the recent Conveyancing Committee recommendation that a Solicitors Certificate of the position concerning the taking in charge of Roads and Services be accepted, based on his inspection of the Local Authority Records or his personal knowledge.

Water & Refuse Charges - Requis. 10.6 - This has been amended to elicit details of Water and Refuse Charges which although not currrently payable in respect of Premises were previously payable and may be outstanding. This in conjunction with Requis. 10. 8 requires the Vendor to produce a receipt for such charges up to the last Accountable Date.

Land Act 1965 - Requis 17.1 - The words "if the property is not situate as aforesaid" have been inserted after Requis. 17.1. If the answer to 17.1 is in the affirmative then the remainder of this requisition need not be answered.

Exempted Developments - Requisition 25.1 - A specific reference to an Exempted Development has been added to emphasize that the Query relates to all Development whether exempted or not.

New Flats - Expenditure on qualifying premises - Requis. 29.32 - This Requisition has been extended to identify the relevant period during which the expenditure was incurred. This information being required for the purpose of claiming the appropriate Relief.

A number of Requisitions have been laid out and positioned in such a manner as to make them easily detachable if they are not relevant or for use as pre Contract enquiries. □

THE TAXES ACTS

The Eleventh supplement to the loose-leaf volumes "The Taxes Acts" has now been published. The supplement embodies the amendments made by the Finance Act, 1988. Copies of the supplement may be purchased from the **Government Publications Sales Office, Sun Alliance House, Molesworth Street, Dublin 2. Price £7.50 (postage extra)**

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VIEWPOINT *Contd. from page 299.*

The scope of the legislation is very extensive and on every reading some new point or consideration can be found. One section which could cause a repeat of the conveyancing nightmare of the Family Home Protection Act or worse is the provision for *voidance of certain transactions*. The court may if it is satisfied that a spouse to proceedings has or is about to make a *disposition* of *any* property, (which will have the effect of defeating a claim for financial relief) can set aside the disposition or restrain the spouse from so disposing. Any such disposition is a "reviewable disposition" unless it was made for valuable consideration to a person who acted in good faith and without notice of any intention to defeat a claim for financial relief. Where the disposition takes place within three years and has the consequence of defeating an applicant's claim for financial relief the intention to defeat will be presumed unless the contrary is shown.

The Act also provides that the High Court and Circuit Family Court will have jurisdiction to hear applications for judicial separation. Furthermore *all* proceedings in the courts must be heard in as informal a manner as possible and neither judges nor barristers shall wear wigs and gowns. This should also have significant implications for the profession. Although solicitors have had a right of audience in the Superior Courts for some time this right has only been exercised infrequently. Now that the deterrent of distinction of dress is gone more of us should be encouraged to acquire the specialised advocacy skills necessary to present our clients case to the courts.

A discussion on the provisions of the Act will follow in a future issue of the *Gazette*. □

PEOPLE AND PLACES

(Left to right): Frank Lanigan, Vivian Matthews, Brian O'Mahony, Frank Heffernan, Brian McMahon, Walter Coleman (Team Manager, Coleman Cycles, Carlow), Frank O'Donnell, John Larkin and Brendan Walsh.

LUNATIC LAWYERS CYCLING CLUB

Malin – Mizen 1989

A group of lawyers recently completed a 400 mile cycle from Malin in County Donegal to Mizen Head.

The Charity Cycle was organised to raise money for the Hospice Foundation.

Frank Heffernan and Brian McMahon.

Brian O'Mahony.

Paddy Caulfield, Section Head, Four Courts.

Arbitration Room.

Brendan Walsh.

SOLICITORS' BUILDINGS – FOUR COURTS

Service of documents by FAX

When William Conyngham, Baron Plunkett, was Lord High Chancellor of Ireland and Stephen Woulfe was Lord Chief Baron of Ireland (c.late 1830s) the galloping horse was the fastest means of serving documents on land. Little had changed from the days of Brian Boru or, for that matter, since the days of the early Celts. Now in a little more than a few generations copy documents can be trasmitted in a few seconds over a telephone line to any part of the civilised world. The issue considered in this note is whether service by facsimile transmission (fax) of documents is good service in any circumstances.

Certain documents can only be served in a prescribed manner according to the *Rules of the Superior Courts* (1986): Order 9 (rule 2) provides that service of any summons on a defendant shall (subject as set out in Order 9) be effected by personal service if it be reasonably practicable. No service of a summons shall be required when the defendant, by his solicitor, accepts service, and undertakes in writing to enter an appearance (Order 9, rule 1). However, rule 2 of Order 121 of the *Rules of the Superior Courts* provides:

> "The delivery or service of any document under these Rules, for which personal service is not required, shall be effected by leaving the document or a copy therof (as may be appropriate) at, or sending the document or a copy therof (as may be appropriate) by registered prepaid post to, the residence or place of business in the State of the person to be served or the place of business in the State of the solicitor (if any) acting for him in the proceedings to which the document relates".

In rule 1 of Order 121 the term "document" is defined as including a pleading, notice, affidavit or order. Does the expression "leaving the document or a copy therof" include the transmission of such document by fax. This precise issue arose in the U.K. in the case of *Ralux NV/SA -v- Spencer Mason* which was decided by the Court of Appeal on May 15, 1989, *(The Times* May 18, 1989). The action concerned a sale of carpets by the plaintiffs, a Belgian company, to the defendants in 1985. After the issue and service

By
Eamonn G. Hall,
Solicitor.

of the writ in 1987, the plaintiffs obtained a default judgment. The defendants succeeded in setting aside the judgment on terms that the defendants pay £6,000 into court and serve a defence and counterclaim by 4 pm on April 18, 1988. The payment into court was made by the defendants on April 6 and on the same date the defendants applied for an extension of time in which to serve the defence and counterclaim. The District Registrar refused an application by the defendants for an extension of time in which to serve a defence and counterclaim on the plaintiffs.

The defendants' solicitors had until 4 pm on April 18 to serve the pleadings. A defence and counterclaim were hastily prepared and sent by fax. The documents arrived at the offices of the plaintiffs' solicitors at about 3.20 that afternoon. However, the plaintiffs' solicitors telephoned the defendants' solicitors to state that they were not prepared to accept service by fax. Thereupon the defendants' solicitors sent another fax to agents in the plaintiffs' solicitors' town who served the documents personally at 4.20 pm.

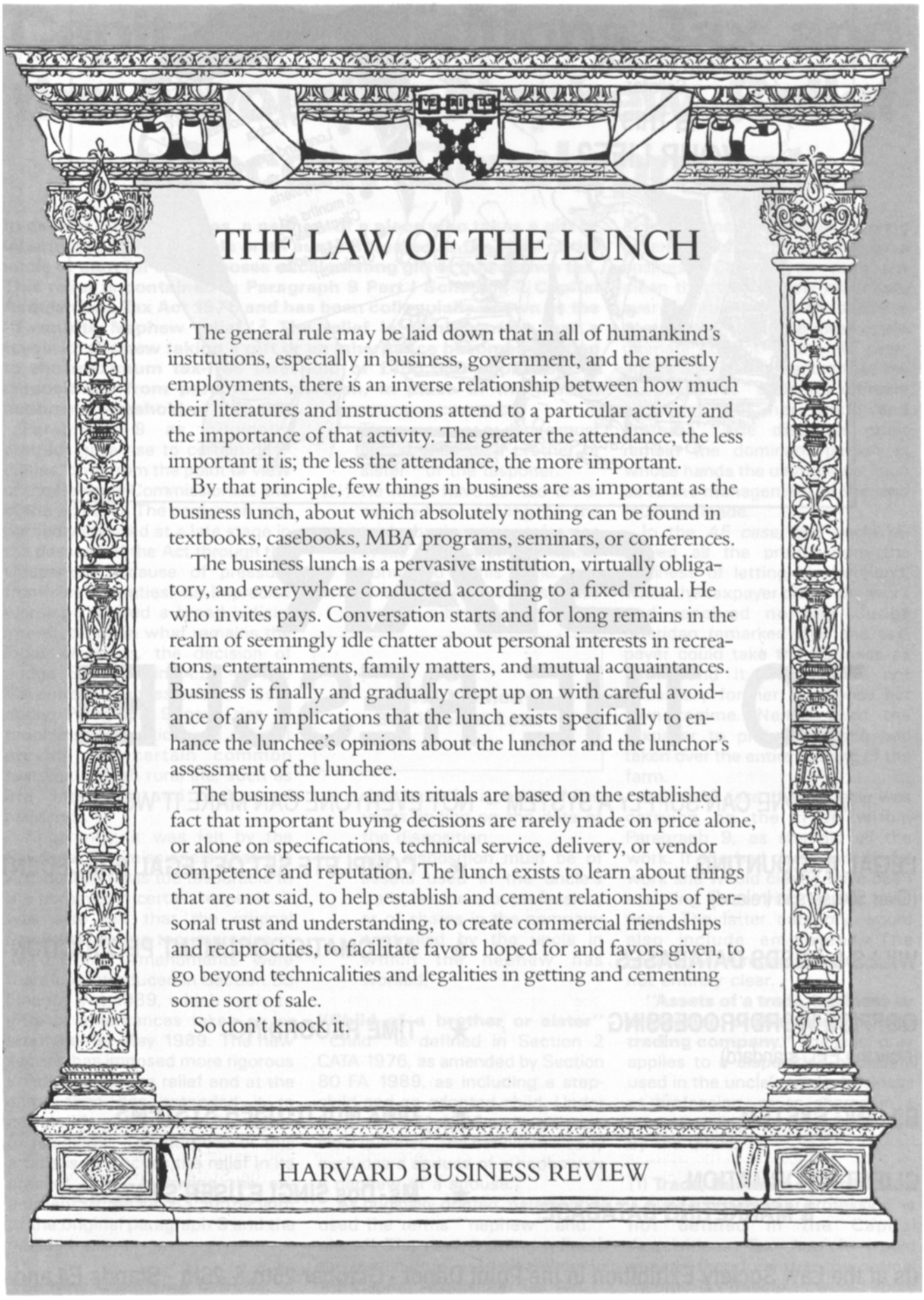
The defendants appealed the District Registrar's decision and sought either an extension of 14 days beyond April 18, or an extension from 4 pm to 5 pm on April 18.

Mr. John Rogers QC sitting as an additional judge of the Queens Bench Division dismissed the appeal on the ground of delay by the defendants. He stated that he had not been asked to determine whether proper service had been effected by the fax which arrived at 3.20 pm but it seemed to him that it was not appropriate service. The defendants appealed.

The Court of Appeal (O'Connor and Mustill L.JJ.) considered that the appeal should be allowed because the judge at first instance failed to consider either delay by the plaintiffs (in issuing and serving the writ), or prejudice of the plaintiffs (none could have been caused by an extension of twenty minutes beyond 4 pm).

The question whether sending a document by fax was good service was not directly in issue. The rules did not specifically deal with the matter. However, the Court of Appeal (O'Connor L.J. with whom Mustill L.J. agreed) was attracted by the argument that having regard to Order 65 (the appropriate parts of which are identical to Order 121 of the *Rules of the Superior Courts* in this jurisdiction) if a document in fact came into the hands of the party to be served, that was good service as far as ordinary service was concerned. If the serving party could prove that a legible copy of the document had come into the hands of the other party and the rules were otherwise complied with that was good service.

There is merit in construing rule 2 of Order 121 of the *Rules of the Superior Courts* to the effect that the expression "leaving the document or a copy therof . . at the residence or place of business in the State of the person to be served or the place of business in the State of the solicitor (if any) acting for him in the proceedings to which the document relates" includes service by fax transmission. A practice direction from the High Court would clarify the issue. □



THE LAW OF THE LUNCH

The general rule may be laid down that in all of humankind's institutions, especially in business, government, and the priestly employments, there is an inverse relationship between how much their literatures and instructions attend to a particular activity and the importance of that activity. The greater the attendance, the less important it is; the less the attendance, the more important.

By that principle, few things in business are as important as the business lunch, about which absolutely nothing can be found in textbooks, casebooks, MBA programs, seminars, or conferences.

The business lunch is a pervasive institution, virtually obligatory, and everywhere conducted according to a fixed ritual. He who invites pays. Conversation starts and for long remains in the realm of seemingly idle chatter about personal interests in recreations, entertainments, family matters, and mutual acquaintances. Business is finally and gradually crept up on with careful avoidance of any implications that the lunch exists specifically to enhance the lunchee's opinions about the lunchor and the lunchor's assessment of the lunchee.

The business lunch and its rituals are based on the established fact that important buying decisions are rarely made on price alone, or alone on specifications, technical service, delivery, or vendor competence and reputation. The lunch exists to learn about things that are not said, to help establish and cement relationships of personal trust and understanding, to create commercial friendships and reciprocities, to facilitate favors hoped for and favors given, to go beyond technicalities and legalities in getting and cementing some sort of sale.

So don't knock it.

HARVARD BUSINESS REVIEW

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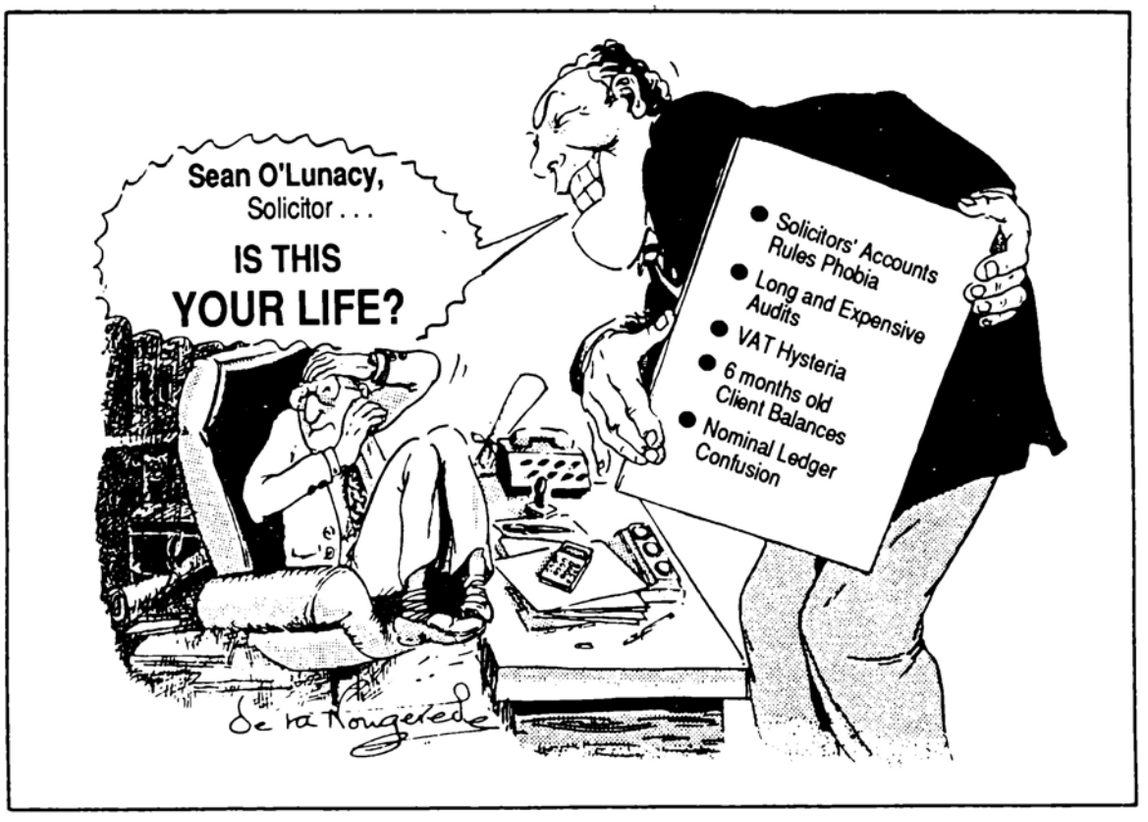

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Capital Acquisitions Tax and the Favourite Nephew Relief – Recent Developments

In certain circumstances, a nephew or a niece who takes a gift or inheritance from an uncle or an aunt[1] is treated as the child of the uncle or aunt for the purposes of calculating gift or inheritance tax. This relief is contained in Paragraph 9 Part I Schedule 2 Capital Acquisitions Tax Act 1976 and has been colloquially known as the "Favourite Nephew relief".[2] The relief is significant in that a favourite nephew taking a gift or an inheritance becomes entitled to the maximum tax-free threshold of £150,000 applicable to dispositions from parents to children, in place of the normal nephew's threshold of £20,000.

Paragraph 9 as originally drafted[3] gave rise to certain difficulties, both from the point of view of the Revenue Commissioners and of the taxpayer. The paragraph was hurriedly inserted at a late stage in the passage of the Act through the Oireachtas because of pressure from rural deputies. Its imprecise wording received a broad judicial interpretation in what remains the *locus classicus,* the decision of Judge Sheridan in *A.E. -v- The Revenue Commissioners.*[4] Secondly, Paragraph 9 gave rise to problems in practice and did not provide for certain common features of Irish rural life, such as life interests and rights of residence.

Apparently, it was felt by the Revenue Commissioners that the *A.E.* decision was too favourable to the taxpayer in certain respects. It was also felt that the original Paragraph 9 was too imprecise in its drafting. Amendments were therefore introduced in Section 83 Finance Act 1989, which apply to gifts or inheritances taken on or after the 1st May 1989. The new section has imposed more rigorous conditions for the relief and at the same time has extended it to certain life settlements and rights of residence. The purpose of this article is to discuss the relief in its present form, following the enactment of Secion 83, in the light of the original paragraph 9 and the decided cases.

The new Qualifying Criteria.
For the relief to apply the following conditions must be fulfilled:

(i) The successor or donee must be "a child of a brother or sister" of the disponer.

(ii) He must have carried on or assisted in carrying on the trade, business or profession of his uncle or of a company controlled by his uncle.

(iii) In so working he must have worked substantially on a full-time basis for a period of five years ending on the date of the disposition.

(iv) The disposition must be of assets used in the uncle's trade, business or profession, or of shares in the company controlled by the uncle in which the nephew has worked.

By David Kennedy Barrister-at-Law.

"Child of a brother or sister"
"Child" is defined in Section 2 CATA 1976, as amended by Section 80 FA 1989, as including a step-child and an adopted child. Under Section 74 FA 1988 an illegitimate child qualifies. The definition clearly excludes a spouse of a nephew or a nephew of a spouse.

As originally drafted, paragraph 9 used the terms "nephew" and "niece." The new wording reflects the terminology used elsewhere in the Capital Acquisition Tax Act.

"Carrying on or assisting in carrying on." Paragraph 9 makes a clear distinction between carrying on and assisting in carrying on a business. Carrying on does not mean that the nephew must take over the running of the business completely. The uncle must retain ultimate control. In the *AE case,* Judge Sheridan remarked that the tax-payer was "under the ultimate authority" of her uncle and stated:[5] "The disponer must remain the dominant person in whose hands the ultimate decision as to the management of the land must be made."

In the *AE case,* the uncle received all the profits from the business of letting his farmland, while the taxpayer did all the work and received no pay. Judge Sheridan remarked that the tax-payer could take the business as she found it and it was not necessary for her to impose her own regime. Neither had the taxpayer to prove that she had taken over the entire running of the farm.

In the *AE case,* the taxpayer was carrying on the trade within Paragraph 9, as she did all the work. If she had done part of the work she would clearly have been assisting in carrying on the business. The latter category would also include employees. The position with regard to partners is not entirely clear.

"Assets of a trade, business or profession, or shares in a private trading company." The relief only applies to a disposition of assets used in the uncle's trade, business or profession, or to shares in a private trading company controlled by the uncle.

(1) **Trade, Business or Profession**
'Trade, business or profession' is not defined in the Capital Acquisitions Tax Act. It would appear, therefore, that the normal Income Tax principles would apply in the case of trades and professions. The meaning of business

was considered and given a wide interpretation in the *AE case,* where it was of central importance.

In that case the taxpayer had received a gift of her uncle's farm. Prior to the gift the land had not been farmed actively by the uncle, but had been let to a third party as grazing for cattle. Under local custom, incorporated in the grazing agreement, the uncle was responsible for herding the cattle each day and for reporting any eventualities. The taxpayer performed her uncle's duties and visited the farm twice a day to herd the cattle, to examine the fencing and to check that the cattle were safe. Any farm pofits and the letting monies were payable solely to the uncle.

The Revenue Commissioners argued that the taxpayer could not avail of the relief under the old Paragraph 9 on the basis that her uncle's letting agreement did not constitute a business. Judge Sheridan did not agree. He looked at the situation in the light of the fact that the disponer was an[6] "ageing man living alone, unable, through advancing years, to engage in husbandry or agriculture with the same intensity as formerly." He stated that a failing or, indeed, failed business is nevertheless a business and that profit or an intention to make a business was not an essential part of the legal definition of the trade or business. He adopted the definition of Lindley L.J. in the case of *Rolls -v- Miller:*[7] ". . . the word (business) means almost anything which is an occupation as distinguished from a pleasure – anything which is an occupation or duty which requires attention as a business." He noted that the term business could not refer to isolated transactions and that it would have to be[8] "habitually and systematically exercised".

In the case before him, Judge Sheridan categorised the business as: [9]". . . letting of the farm, particularly with regard to the custom of the area which required the person who let out the farm to engage in herding the stock from the person taking the land".

Section 83 FA 1989 does not define "business" and accordingly it would appear that Judge Sheridan's definition remains unaltered. The definition is capable of encompassing a wide range of activities. Whether or not a particular activity qualifies for the relief will depend on the circumstances of each case.

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(2) Shares in a private trading company

The assets can also comprise shares in a company. Company is defined as a private trading company controlled by the uncle of which the uncle is a director. "Pivate Trading Company" is defined by Section 16 Sub-Section (2) CATA 1976 as a private company which is not a private non-trading company within Section 17 CATA, 1976. Broadly speaking, a private company is a company with not more than 50 shareholders, which has not issued shares as a result of a public invitation and which is under the control of not more than five persons. Section 17 defines a private non-trading company as a private company the income of which consists wholly or mainly of investment income and the property of which consists wholly or mainly of property from which investment income is derived. Effectively, therefore, a private trading company means a company carrying on a trade, business or profession.

The company must be controlled by the uncle. This is defined in Paragraph 9 as a company under the control of either the uncle, his nominees, or the trustees of a settlement made by him. Control is defined by Section 16 sub-section (4) CATA 1976 and generally includes having greater than 50% of the voting power, or control of the Board of Directors, or an entitlement to more than 50% of the dividends, or to 50% of the nominal value of the shares in the company.

These rules in Paragraph 9 regarding control are similar to the rules for private companies in the Capital Acquisitions Tax Act. As originally drafted, Paragraph 9 referred to "office or employment" of the uncle and to shares in a company carrying on a trade, business or profession. The old rules were, to say the least, difficult to interpret and the new provisions are welcome.

"Substantially on a full-time basis." The nephew must carry on or assist in carrying on the trade, business or profession "substantially on a full-time basis". Substantially on a full-time basis was not defined in paragraph 9 as originally enacted. It was considered in detail by Judge Sheridan in the *AE case,* where it was given a broad interpretation.

In that case Judge Sheridan pointed out that the term was not a term of art. In the absence of authority he proposed the following definition:[10] ". . . the continued presence of a niece or nephew on a day to day basis whereby their labour (including expertise) is put at the disposal of the disponer whereby material benefit is conferred on the disponer's business". He emphasised that the terms of the relief did not require that the disponer be *in loco parentis* to the beneficiary, nor that the nephew should live with the disponer.

In the case before him, Judge Sheridan noted that the taxpayer did the farm work for her uncle, any housework and more or less what he asked her to do. She herded the cattle each day, checking to see that all was in order and looked after the management of the farm and buildings. The taxpayer also did a certain amount of fencing. Because she was involved in raising her own family, she could not take a job elsewhere.

The Judge emphasised that the management of the land was the taxpayer's prime concern apart from her family and that she attempted to add material value to the land. He said that she did work of lasting value and that the busi-

ness would have collapsed but for her activites. The Judge therefore concluded that she worked substantially on a full-time basis in her uncle's business so as to fall within the terms of the relief.

Under Section 83 FA 1989, the nephew must now work a minimum number of hours per week in the business. This requirement is a precondition to the application of Judge Sheridan's test. Paragraph 9 (2) differentiates between two situations, firstly where the uncle is the owner and there are a number of other employees or helpers and secondly, where the uncle, "any" spouse and the nephew are the sole workers in the business. The time requirement in the latter is less than in the former.

The primary requirement now is that a nephew must work more than 24 hours a week for the disponer or the company, at the place where the business is carried on. An example of this is an employee of an uncle's company. This requirement is reduced to 15 hours in circumstances where the uncle and "any" spouse of the disponer and the nephew are the sole persons engaged in the business. This applies to situations where the uncle is unmarried as the wording is "any" spouse.

It would appear that these preconditions were introducted for two reasons: firstly, because the Revenue Commissioners felt that the principle in the *AE case* was too wide and, secondly, to provide for the decision of Judge Sheridan in the case of *D.R. -v- The Revenue Commissioners.*[11] In that case the taxpayer Appellant was the remainderman of a life settlement. The settlor was his uncle and the life tenant was the uncle's spouse. After the death of the uncle the nephew helped in the business and, when the spouse became incapacitated, he effectively took over the business. One of the questions which the Circuit Court had to decide was whether the nephew was working substantially on a full-time basis. The facts were that the business was a small rural public house. Generally in summer it was open during normal licensing hours and in winter it was open from 8.00 p.m. to closing time. The taxpayer had a full-time job at a local hospital, but worked in the pub most nights and at weekends. During the summertime, when the pub was open during the day, there was another employee to help. The nephew was effectively running the business. However, the Judge held, in an *ex tempore* judgment that because the other employee was working in the business, the taxpayer was not working substantially on a full-time basis. It was argued on behalf of the taxpayer that he was *assisting* substantially on a full-time basis, particularly having regard to the aunt's incapacity. This argument was rejected by the Court.

This decision may be compared with the decision in the *AE case* where the taxpayer Appellant spent less time but did all the work and where there were no other employees. The decision in the *D.R. Case* suggested that a taxpayer could not have alternative employment and be a favourite nephew at the same time. Aside from the question of whether a remainderman can be a favourite nephew (which is considered below) under Paragraph 9 as newly

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enacted, the taxpayer Appellant in the *D.R. case* would now qualify as a favourite nephew if he spent more than 24 hours per week in the business. He could not qualify if he spent less than that, having regard to the presence of the other employee.

Accordingly, a person can be a favourite nephew and can also have another employment, business or profession provided he qualifies under the time requirement and provided he fulfils the requirement in the *AE case* of working under the direction of the uncle and conferring material benefit upon the uncle's business.

"Relevant Period" The nephew must carry on or assist in the carrying on of the trade, business or profession substantially on a full-time basis for the relevant period. "Relevant Period" is defined by Paragraph 9(1) as (1) The period of five years ending on the date of the disposition or (2) The period of five years ending on the coming to an end of a limited interest where the interest was limited to the disponer.

"Date of the disposition" is defined in Section 2 CATA 1976 as, broadly speaking, the date of death in the case of an inheritance and the date of the last act whereby the disponer bound himself to provide the property in the case of a gift. Where there is a will or an intestacy the date of the disposition will be the date of death. Accordingly, the relevant period will be the period of five years ending on the date of death. In the case of a gift by way of voluntary transfer, the relevant period will be the period of five years ending on the date of the deed of transfer.

The second leg of the definition covers rights of residence, life interests and interests for a period certain, where the uncle grants the interest to himself. It is best illustrated by examples:-

Example One

Uncle (U), by deed of transfer, gifts the farm to his nephew (N) reserving a right of residence in one room of the farmhouse for his life. Under Section 28 CATA 1976 there are two inheritances, one on the date of the gift and one on U's death. The date of the disposition is the date of the deed of transfer. Accordingly, if N has worked for U for 5 years ending on the date of the deed of transfer, he will be treated as a favourite nephew for the purposes of *both* dispositions.

Example Two

U, by deed of transfer, settles property on himself for life with remainder to N. The date of the disposition is the date of the settlement. If N has worked for U for 5 years ending on the date of death of U, he will qualify as a favourite nephew.

Example Three

U, by Will, settles property on his wife (W) for life with remainder to N. The date of disposition is the date of death of U. If N has worked for U five years ending on the date of death of U, on the death of W he will qualify as a favourite nephew.

A peculiar feature of this example is that N could stop working on the date of U's death and could still qualify as a favourite nephew on W's death some years later. This is because the relevant period is the period of 5 years ending on the date of the *disposition*, which is the date of U's death.

Example Four

U, by Will, settles property on W for life with remainder to N. The date of disposition is the date of death of U. N only commences to work after U's death and works for five years ending on W's death. N will not qualify for the relief. This is because the relevant period is the period of five years ending on the date of the *disposition.* In this case, N was working for five years ending on the date of the *inheritance*, namely the date of W's death. The interest is not limited to U but to W and, accordingly, the second leg of the test does not apply.

The fourth example above has been considered by the Appeal Commissioners on at least two occasions. As originally drafted, Paragraph 9 referred to a period of five years ending on the *date of the gift or inheritance.* In Example Four above, the date of the inheritance is the date of death of W. Accordingly, in the *DR case*, the taxpayer Appellant argued that he qualified as a favourite nephew as he worked for five years ending on the date of the inheritance. This argument was rejected by the Appeal Commissioners on the ground that the nephew was not working in the business of the *disponer.* The disponer was the uncle and the uncle had been dead for some time. Because he had been dead for some time, the business could not be considered to be his business.

The situation in Example Three was considered by the Appeal Commissioners in the case of *K.K. -v- the Revenue Commissioners.*[12] In that case, the taxpayer Appellant worked for his uncle from an early age. His uncle died in 1941 and left the farm to his wife for life with remainder to the taxpayer Appellant. The life tenant did not die until some 40 years later. The taxpayer Appellant had worked on the farm for the entire period. The Appeal Commissioner held that paragraph 9, as originally drafted, required that the nephew work for a period of five years ending on the date of the inheritance in the trade of the disponer. In this case, the date of the inheritance was the date of death of the life tenant. As the uncle disponer had been dead for some 40 years at this time, it could not be said that the taxpayer Appellant was working in his uncle's business. Under Paragraph 9, as newly enacted, the taxpayer Appellant in this case would be entitled to relief, as he would have been working for five years ending on the date of the disposition. The date of the disposition would be the date of death of the uncle.

It should be noted that the period of five years must be continuous, subject to reasonable exclusions for sick leave and holidays. The nephew cannot for example work for four years, leave for two years and come back and work for another four years.

The new paragraph 9 also removes the anomaly whereby, if a gift was subject to a power of revocation and did not vest in possession in the nephew, the five year period did not begin to run until the power was terminated or the uncle died.

"Assets of a trade business or profession, or shares in a private trading Company".

The property comprised in the gift or inheritance for which relief is sought must have been used in connection with the trade, business or profession. Thus, if a farmer left his entire estate to a favourite nephew and the estate included the proceeds of life assurance policies and personal investments, such as shares in public companies, the

latter assets would not qualify for the relief. The non-qualifying assets would be treated as being taken from an uncle, rather than from a father, with the normal exemption of £20,000. These assets would then be aggregated with the other assets deemed to be taken from a father, in the normal way, for the purposes of calculating tax.

Shares are defined in Section 2 of the Act as "any interest whatsoever in the company which is analogous to a share in the company". This would include preference shares. It would also appear that, provided the company is a private trading company within the meaning of Section 16, CATA 1976, the company may own assets which would not be regarded as assets of the trade, for example, the proceeds of insurance on executives or shares in other companies.

3. Anti-avoidance

Under Paragraph 9, as newly enacted, the relief is not available to benefits taken under a discretionary trust. Where there is a discretionary trust, a person does not receive a taxable inheritance until property is appointed to him by the trustees. The date of the disposition is the date of the trust. Accordingly it would be open to a nephew to work for five years up to the creation of a discretionary trust and then to put the property in "cold storage" for some time, to be appointed out to him subsequently with the benefit of the relief. The anti-avoidance provision prevents this.

4. Capital Gains Tax

Section 26, Capital Gains Tax Act 1975, contains a relief similar to Paragraph 9 as originally enacted. This relief has not been changed by Section 83 FA 1989.

Generally speaking, there is no charge to Capital Gains Tax on property passing on death. A gift is deemed to be a disposal of assets which is liable to tax in the normal way. However, if a disponer gifts property to a child during his lifetime, the charge to tax which would otherwise arise may be avoided in certain circumstances. Relief is granted if the gift is of business assets and the individual is aged 55 years or more, provided that certain conditions are fulfilled. This is known as "Retirement Relief". If the disposal is to a child as defined, there is no charge to Capital Gains Tax.

For the purpose of "Retirement Relief", Child is defined as including: ". . . a nephew or a niece who has worked sustantially on a full-time basis for the period of five years ending with the disposal in carrying on or assisting in the carrying on of the trade, business or profession concerned or the work of or connected with the office or employment concerned". Business assets are defined as assets used in the course of a trade, farming, a profession, an office or an employment which the person making the disposal has owned for a period of not less that ten years ending on the date of the disposal.

The conditions of "Retirement Relief" are the same as those under the old Paragraph 9, except that the period of five years must, in the case of "Retirement Relief", end on the date of disposal. The assets must also have been owned by the uncle for a period of *ten* years.

Accordingly, a nephew may in certain circumstances, qualify for both reliefs. The interaction of the new Paragraph 9 and Section 26 CGTA 1975 remains to be seen and it may be that a person might

Contd. on page 330.

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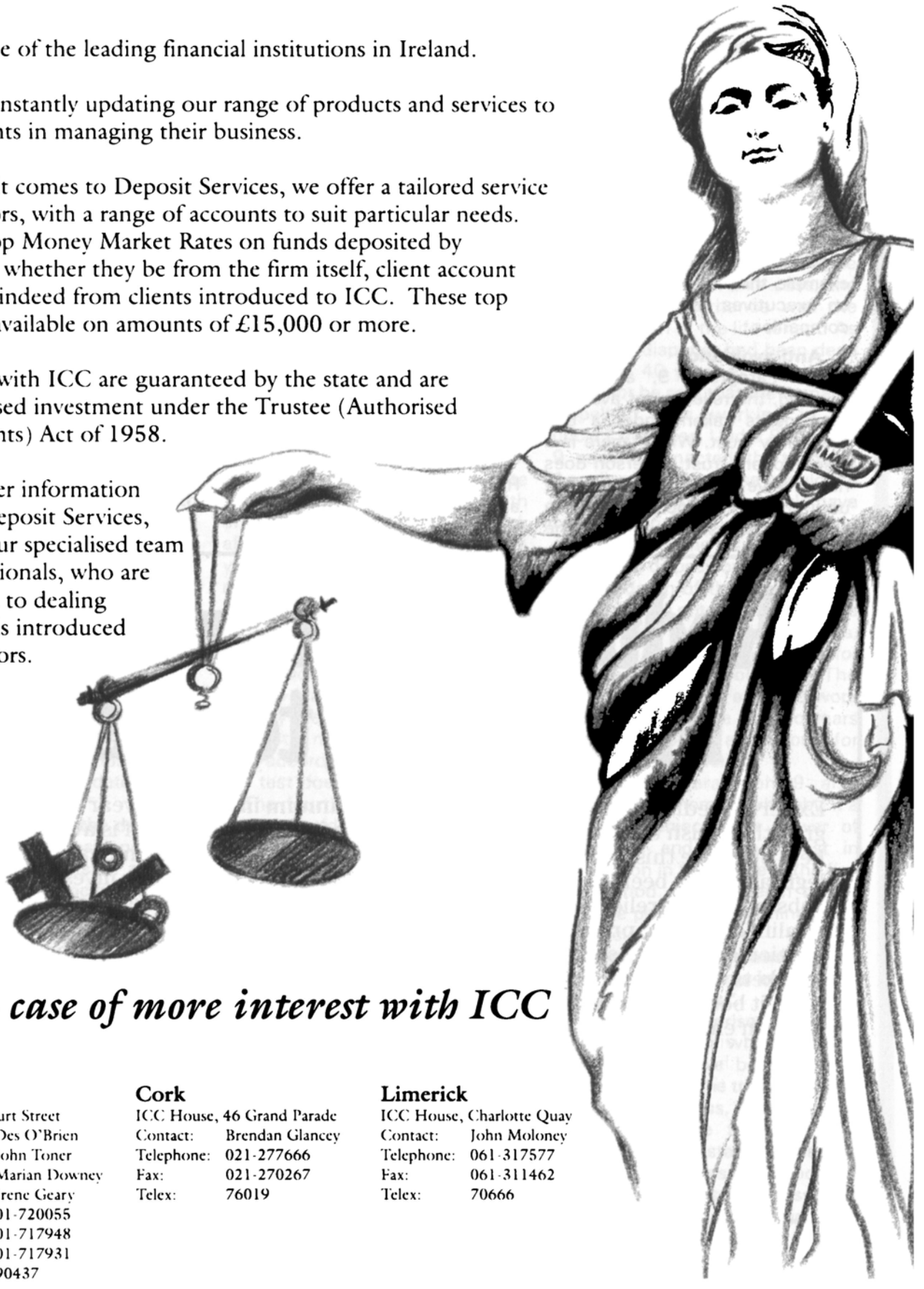

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Compensation Fund held liable to bank on basis of fraudulent undertaking.

A Solicitor obtained an advance from a bank by way of bridging finance on the strength of an undertaking presented to the bank on the notepaper of the firm of solicitors of which he was a partner and apparently signed by the other partner in that firm as had been required by the Bank. It was represented to the bank that a property owned by M and his wife was being sold and another property being purchased by them. No sale or purchase was contemplated and M's wife was unaware of the application to the bank for the loan and did not sign or authorize the signing of any application. The signature of the partner to the letter of undertaking was forged by M and the partner was unaware of the application for the loan. The bank advanced £60,000 by way of two drafts payable to the firm and the monies were lodged into the client account of the firm. The monies which were to be repaid to the bank in 6 months were not repaid though some payments of interest were made. M on investigation by the Law Society was found to be in default in relation to his client account and was struck off the Register of Solicitors. Section 21 (4) of the Solicitors (Amendment) Act 1960 reads:-

> "(4) Where it is proved to the satisfaction of the Society that any person has sustained loss in consequence of dishonesty on the part of any solicitor or any clerk or servant of a solicitor in connection with that solicitor's practice as a solicitor or in connection with any trust for which that solicitor is a trustee, then, subject to the provisions of this Section, the Society shall make a grant to that person out of the Fund and the amount of the grant shall be such as represents in the opinion of the Society full indemnity for that loss".

The Law Society contended that practice as a solicitor involved, as an essential ingredient, the solicitor or his firm having in respect of any particular activity, a client on whose behalf that activity is carried out. It was urged that the firm did not have any client since the pretence that it was carrying out conveyancing work in connection with the sale and purchase of houses was entirely false.

An alternative submission was that on the true construction of the sub section the phrase "any person" at the commencement of it, in the context of loss suffered in consequence of dishonesty in connection with the solicitor's practice as a solicitor as distinct from loss suffered in consequence of dishonesty by a solicitor as trustee, should be construed as being confined to a client of the solicitor. Reliance was placed on the provisions of Section 23 of the 1960 Act which provides for the making of reciprocal arrangements with Incorporated Law Society of Northern Ireland (referred to in the Section as "the Corresponding Society"). Sub section 2 of Section 23 reads:-

> "(2) Where a scheme operated by the corresponding Society requires corresponding practitioners controlled by that Society to contribute to any fund or insurance policy or to take out any insurance policy, for the compensation or indemnification of clients for or against losses due to defalcations of such practitioners or their agents or servants". . . . .

The Society argued that the use of the words "for the compensation or indemnification of clients" must be taken as having intended that the scheme which it had created in the provisions of Section 24 of the 1960 Act should also be a scheme confined to the indemnification or compensation of clients.

The bank contended that the words contained in Section 21 (4) were unambiguous and must be given their ordinary meaning without reliance on any of the other provisions of the Statute. They further argued that the provisions contained in Section 21 (4) of the Act dealing with dishonesty of a solicitor in connection with any trusts of which that solicitor is a trustee could not be interpreted as confining the portion of the Section dealing with dishonesty on the part of a solicitor in connection with that solicitor's practice as a solicitor to cases where the claim was made by a client because it was clearly a necessary provision to provide for dishonesty on the part of a solicitor acting as a trustee though not in his capacity as a solicitor. Secondly, with regard to the provisions of Section 23 it was submitted they could not be interpreted as doing anything more than providing for the special situation of the corresponding Society and of solicitors with practising certificates from both the corresponding Society and the Society and as such could not lend any aid to the interpretation of the sub section.

In the High Court Johnson J. in his judgment stated:-

> "Initially there is no doubt that M's dishonesty was in his private capacity and not in his capacity as a solicitor. In this regard, his initial interview with the Bank and the request for credit for himself and his wife for the sale and purchase of a house was dishonest, we know that there was no such intention. However, when the Bank requested the undertaking from M at that time M acted dishonestly by
>
> (1) writing an undertaking on behalf of M's firm the contents of which he knew to be false
> (2) forging the signature of his partner which he also knew to be dishonest.
>
> This he did on behalf of his firm of which he was a practising partner, and, in my opinion, it would be unrealistic to force an interpretation on the facts in this case other than that in perpetrating the falsehoods and dishonesties in this event that M was acting and purported to act and held himself out as acting as the firm and what was done was done in the name of his practice".

The Supreme Court came to the conclusion that Johnson J. was correct in the decision which he had reached and the reasons by which he had reached it. The Court could see no warrant for seeking to interpret the sub section concerned by consideration of other provisions in the Statute.

In its judgment the Supreme

Court said that once one was satisfied that on an unambiguous interpretation of Section 21 (4) the question to be decided in the case is as to whether what was done by M on this occasion in issuing the letter on the notepaper of his practice which was dated 11th June 1984 was dishonesty on his part in connection with his solicitor's practice the solution of that issue becomes self-evident. The whole terms of that letter, the basis on which it was requested by the Bank and the incidental fact that a previous letter written and signed by M himself was rejected by the bank, were all coercive evidence, that what the bank was seeking was a solicitor's letter issued by the practice and that the partner in that practice M dishonestly gave them such a letter in a false form. The Court dismissed the appeal of the Law Society.

It was therefore the effect of the judgment that the Bank was entitled to be paid by the Society out of the Compensation Funds such amount as represents indemnity for the Bank in respect of the loan made to it by M. □

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Younger Members' News

Lunatic Younger Member

The group of Lunatic Lawyers who recently cycled from Malin Head to Mizen Head included Younger Members Committee Vice Chairman, John Larkin. Having completed the cycle John is reputed to look very unlike a younger member. It took four days to complete the cycle and took the Lunatic Lawyers a distance of over 400 miles, all in aid of the Hospice Foundation.

Sponsorship monies are being received from all quarters and anyone who wishes to support this Lunatic Feat should send a cheque either to John at A & L Goodbody or to Sandra Fisher, Secretary, Younger Members Committee. Cheques should be made payable to The Hospice Foundation.

Working from Home

Home working could be a firm's answer to retaining the services of key personnel and minimising economic loss while at the same time allowing those people flexibility in their working lives! This is particularly so in the case of female solicitors looking for a career break to start a family or wishing to reorganise their schedules having had a family.

Corporate planners in the UK have identified the trend towards organisations in general allowing key staff to tailor their working lives to suit themselves as an important feature of the next decade. The "home office" can today be effectively equipped with reasonably priced technology.

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Family Mediation

Michael Williams
14, Charleville Road, Dublin 6.
Telephone: 978402

has been admitted to the Senior Membership of the American Academy of Family Mediators

Submission of Articles for the Gazette

The Editorial Board welcomes the submission of articles for consideration with a view to publication. In general, the most acceptable length of articles for the *Gazette* is 3,000-4,000 words. However, shorter contributions will be welcomed and longer ones may be considered for publication. MSS should be typewritten on one side of the paper only, double spaced with wide margins. Footnotes should be kept to a minimum and numbered consecutively throughout the text with superscript arabic numerals. Cases and statutes should be cited accurately and in the correct format.

Contributions should be sent to:
Executive Editor,
Law Society Gazette,
Blackhall Place,
DUBLIN 7.

Great Southern Hotel

Killarney, Co. Kerry, Ireland. Telephone: (064)31262. Telex: 73998. Fax: (064) 31642.

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Autumn Conference 1989. October 13th to 15th.

Contd. from page 325.

qualify under the more favourable terms of Section 26 and might not qualify under the new Paragraph 9.

5. Conclusion

The "Favourite Nephew Relief" is a very significant one and can result in an elimination of, or significant reduction in, a liability to Gift or Inheritance Tax. A similar relief is available from Capital Gains Tax. The broad interpretation of the old Paragraph 9 in the case of *A.E. -v- The Revenue Commissioners* has been curtailed by Section 83 FA 1989 and a nephew must now spend a minimum amount of hours per week in the business before he will qualify as a favourite nephew. At the same time as limiting the relief, Section 83 has extended it to include certain life settlements and rights of residence. These changes take effect from 1st May 1989. Practitioners should now review cases in which clients may qualify for the relief, as the new paragraph 9 offers considerable opportunities for tax planning in respect of both Gift and Inheritance Tax.

Notes:-

1. The terms "uncle" and "nephew" are used throughout this Article for convenience and include "aunt" and "niece".
2. The new Paragraph 9 (2) states: "For the purpose of computing the tax payable on a gift or inheritance the donee or successor shall be deemed to bear to the disponer the relationship of a child in any case where the donee or successor is a child of a brother or a child of a sister of the disponer and either
   (a) The donee or successor has worked substantially on a full-time basis for the disponer for the relevant period in carrying on, or in assisting in carrying on, the trade, business or profession of the disponer and the gift of inheritance consists of property which was used in connection with that business, trade or profession; or
   (b) The donee or successor has worked substantially on a full-time basis for a company for the relevant period in carrying on or in assisting in carrying on the trade, business or profession of the company and the gift or inheritance consists of shares in that company".
3. Paragraph 9, as originally drafted, stated: "In any case where:
   (a) The donee or successor is a nephew or niece of the disponer who has worked substantially on a full-time basis for the period of five years ending on the date of the gift or the date of the inheritance in carrying on or assisting in the carrying on of the trade, business, or profession or the work of or connected with the office or employment of the disponer; and
   (b) The gift or inheritance consists of property "which was used in connection with such trade, business, profession or employment or of shares in a company owning such property, then for the purpose of computing the tax payable on the gift or inheritance the donee or successor shall be deemed to bear to the disponer the relationship of a child".

   For a discussion see 'CAT-On Favourite Nephew Relief' *Gazette 79 ILSI 91, April 1985.*
4. *A.E. -v- The Revenue Commissioners* [1984] I.L.R.M. 301.
5. Ibid at p. 305.
6. Ibid at p. 304.
7. (1884) 27 Ch.D.
8. [1984] I.L.R.M. 301 at p. 304.
9. Ibid at p. 304.
10. [1984] I.L.R.M. 303.
11. Circuit Court - Unreported - June 1988 - Sheridan J.
12. Appeal Commissioners - Unreported - January 1989.

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Correspondence

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

10th August, 1989

Re: **Company Index Service**

Dear Mr. Ivers,

I have your letter of 27th July 1989 about difficulties experienced by one of your members in getting through to the Company Index Service.

The service operates from 9.15 am. to 1.00 pm. We find that it is a very labour-intensive operation, particularly at a time when limited staff resources underline the need to achieve maximum labour productivity. I can appreciate the difficulty outlined by your correspondent and I regret any inconvenience caused to your members in the use of the service. I assure you that efforts to develop speedier, more productive systems are a priority.

You will be aware that your members can obtain an instant response from our data base through the use of a P.C. and a modem. We hope to expand this service, within the next few months, to include a company name search. These services will offer a much speedier method of obtaining company details. It is hoped that greater utilisation of these new services will lessen the demands on the Company Index Service.

Yours sincerely,
PAUL FARRELL
Manager
Companies Registration Office,
Dublin Castle,
Dublin 2.

Mr. Brian Bohan,
Law Society Taxation Committee,
Blackhall Place,
Dublin 7.

30th June, 1989.

Re: **Certificates of Discharge from CAT**

Dear Brian,

I refer to your proposals regarding the issue of Certificates in certain difficult cases.

In the circumstances the Revenue Commissioners are willing to agree the following procedure on a trial basis:

When (a) the amount of tax owed cannot be borrowed
or,
(b) the purchaser's solicitor is unwilling to accept the undertaking of the vendor's solicitor,

both solicitors may, with the prior agreement of the Revenue, attend the Capital Taxes Branch to close the sale. The purchaser's solicitor will hand to the Revenue representative a bank draft (cheques will not be acceptable) for the tax plus interest to date of closing and in return will receive a certificate of discharge from Capital Acquisitions Tax.

As you state it is not envisaged that this procedure will be necessary in many cases and I would be grateful if solicitors would ensure that the procedure is availed of only in exceptional cases.

The procedure will be reviewed regularly and the Commissioners reserve the right to modify or abandon it if necessary.

Yours sincerely,
JOHN REID,
Principal Officer,
Office of The Revenue Commissioners,
Capital Taxes Branch,
Dublin Castle,
Dublin 2.

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

26th July, 1989.

Dear Mr. Ivers,

Thank you for your letter of 13th July, 1989, conveying good wishes on my appointment as Minister for Justice. I note your assurance of the Law Society's assistance in connection with the Government's programme of law reform. I know the Society has a special interest in the proposed Solicitors (Amendment) Bill and I too am anxious to ensure its early enactment.

Thank you for letting me have a copy of the Society's proposals for the reconstitution of the Land Registry and the Registry of Deeds as a Public Corporation. I was already aware of the Society's proposals in the context of the review of the operations of the Land Registry which I have undertaken. In this regard, I draw your attention to my reply to a Parliamentary Question on 18th July, 1989, in which, effectively, I announced the review. It is my intention to give full consideration to the Society's proposals in that review.

I am pleased to find that working relations between the Department of Justice and the Law Society have been very good and I hope they will continue in that spirit during my term of office as Minister.

Yours sincerely,
RAY BURKE, T.D.,
Minister for Justice.

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Stephen Watkins, (Director)

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The College is an independent and private institution which is financed largely through gifts, donations, and endowments. Your assistance would be very much appreciated, and would help to keep the College and Ireland in the forefront of Medical Research and Education.

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All monies received by the Society are expended within the Republic of Ireland.

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IRISH CANCER SOCIETY
5 Northumberland Road
Dublin 4
Ireland
Tel: 681855

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 as 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.
25th day of September, 1989.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Michael Joseph Mulhern, Crossmolina, Co. Mayo. Folio No.: 47456; Lands: (1) Knockalegan; (2) Abbeytown; Area: (1) 2a.2r.11p.; (2) 3a.0r.0p. County: **MAYO.**

Patrick Joseph Cannon, Rougheen, Ballaghaderreen, Co. Roscommon. Folio No.: 7345; Lands: Kiltimagh; Area: 5a.1r.13p. County: **MAYO.**

Kevin Byrne, Ballynagappagh, Clane, Co. Kildare. Folio No.: 13221; Lands: Ballynagappagh. County: **KILDARE.**

Seamus de Brun, Castlerea, Co. Roscommon. Folio No. 48L; Lands: Demesne. County: **ROSCOMMON.**

Fieldbrook Homes Ltd., 95 Haddington Road, Dublin 4. Folio No.: 4881; Lands: Part of the Lands situate on the South side of Main Street in the Village of Rush, Townland of Rush, Barony of Balrothery East and County of Dublin. County: **DUBLIN.**

Erik White, Unit 3C, Newtown Industrial Estate, Coolock, Co. Dublin / San Marco, Sloping Road, Santon, Isle of Man. Folio No. 24926 F; Lands: The property situate in the Townland of Newtown and Barony of Coolock. County: **DUBLIN.**

David Flannerty, Rostullus, Woodford, Co. Galway. Folio No.: 20775; Lands: (1) Rostollus; (2) Rostullus; Area: (1) 0a.0r.39p.; (2) 1a.2r.10p. (one undivided part). County: **GALWAY.**

Thomas Shiel, Kylebrack, Loughrea, Co. Galway. Folio No.: 57047; Lands: (1) Kylebrack East; (2) Kylebrack East; (3) Coppanagh; (4) Dalystown Demesne; (5) Dalystown Demense; Area: (1) 1.942 acres; (2) 1.743 acres; (3) 2.319 acres; (4) 5.200 acres; (5) 5.850 acres. County: **GALWAY.**

Patrick Melican, Leadmore, Kilrush, Co. Clare. Folio No.: 15019; Lands: Leadmore West; Area: 4a.1r.10p. County: **CLARE.**

John Francis Cassidy, 22 Parnell Street, Ennis, Co. Clare. Folio No.: 13895; Lands: Cloghleagh. County: **CLARE.**

Matthew Littleton, Lissofin, Tulla, Co. Clare. Folio No.: 7703 and 469F; Lands: (1) Tomeria; (2) Ballyblood; (3) Lissofin; Area: (1) 21a.2r.33p.; (2) 1a.0r.31p.; (3) 85a.2r.23p. County: **CLARE.**

John Fogarty, 37 Newland Road, Clondalkin, Co. Dublin. Folio No.: 5241F; Lands: Tomnamuck. County: **WEXFORD.**

John Daly and Kathleen Daly, both of 3 Hillcrest View, Lucan, Co. Dublin. Folio No.: 6216F; Lands: Neillstown. County: **MEATH.**

Michael Tackney of Cappanagh, Bailieborough, Co. Cavan. Folio No.: 18320; Lands: Capanagh; Area: 14a.0r.28p. County: **CAVAN.**

James A. Henson of Clonaltra, Moate, Co. Westmeath. Folio No.: 7982; Lands: (1) Clonaltra; (2) Hall; (3) Clonydonnin; Area: (1) 16a.2r.26p.; (2) 3a.3r.5p.; (3) 10a.3r.4p. County: **WESTMEATH.**

John C. Beechinor and Veronica Beechinor of 12 Cherry Park, Forest Road, Rathingle, Swords, Co. Dublin. Folio No.: 32291F; Lands: 12 Cherry Park, Forest Road, Rathingle, Townland of Forrestfields, Barony of Nethercross; County: **DUBLIN.**

Lost Title Documents

IN THE MATTER of the Registration of Titles Act 1964 and of the application of Margaret Dunne, orse. Peg Dunne, personal representative of Joseph Matthews in respect of property situate on the South East Side of O'Connell Square (formerly Market Square) in the Town of Edenderry and County of Kings and now known as No. 3 O'Connell Square, Edenderry.

TAKE NOTICE that Margaret Dunne orse Peg Dunne of No. 3 O'Connell Square, Edenderry, has lodged an Application for her registration on the Freehold Register free from incumbrances in respect of the above mentioned property. The original document of title is stated to have been lost or mislaid. The application may be inspected at this Registry. The Application will be proceeded with unless notification is received in the Registry within one calendar month from the date of publication of this Notice that the original Document of Title is in existence.

Any such notification should state the grounds on which the Document of Title is held and quote ref. No. T3554/89. The missing document is detailed in the schedule hereto.

Dated this the 31st July 1989
John Deeney
Examiner of Titles, Land Registry,
Chancery Street, Dublin 7.

SCHEDULE

1. Indenture of Conveyance made on 20th April 1923 between the Seventh Marquis of Downshire and Others and Joseph Matthews of Edenderry, County Offaly.

Lost Wills

GAYNOR, Peter, late of Stonefield, Ballinlough, Kells, Co. Meath. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on the 5th day of August, 1989 please contact Keavney Walsh & Co., Solicitors, Headfort Place, Kells, Co. Meath.

LYNCH, Bernard, late of Corlea, Kingscourt in the County of Cavan. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on the 8th day of August, 1989 please contact F. N. Murtagh & Company, Solicitors, Kingscourt, Co. Cavan. Tel. (042) 67503, Fax (042) 67429.

O'SHEA, Daniel Brendan, late of Kilcurrane West, Kenmare, Co. Kerry, Bachelor – anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 4th of July, 1989, please contact Martin Sheehan & Company, Solicitors, 16 South Mall, Cork.

HARTIGAN, Anne, late of 65 Sandymount Road, Dublin 4 and formerly of London. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 28th August, 1989, please contact Binchy & Partners, Solicitors, 38/39 Fitzwilliam Square, Dublin 2, Tel. 616144.

McCORMACK (otherwise CORMACK), Kathleen, late of Ballintubber, Castleknock, Dublin. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 17th day of July, 1989 please contact James J. Kearns & Son, Solicitors, Portumna, Co. Galway.

LINEHAN, Kathleen, late of Newtown, Bantry, Co. Cork. Will anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 11th August 1989, please contact Frank O'Mahony, Solicitor, Bantry, Co. Cork. Tel. (027) 50132.

WALSH, John J. (Reverend Fr.), late of Newrath, Waterford. Would anyone having knowledge of a will of the above named deceased who died on 26th June, 1989, please contact Messrs. Peter O'Connor & Son, Solicitors, 23 O'Connell St., Waterford. Tel. (051) 74909.

Miscellaneous

LAW BOOKS FOR SALE: Irish Digests; English Reports & Digests; 200 Irish and English texts. For list ring 906381 (evenings).

Miscellaneous

FOR SALE: Halsbury; The Laws of England. 2nd edition. 31 Vols. plus supplement. In perfect condition. Ph. 725452. Office Hours.

SEVEN DAY PUBLICAN'S LICENCE required – contact Cormac D. Dunne & Company, Solicitors, 91 Main Street, Cavan. Tel. No. 049-32555.

Professional Information

As and from Tuesday 29th August, 1989, the London office of McCann FitzGerald has relocated to:-

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The pre-publication offers for the 1990 edition of the Lawyers Page-a-Day A4 Desk Diary @ £15 and the Week-to-View A4 Diary @ £10 (VAT and Postage included) has been distributed with the *Gazette* and members of the Society are requested to return the completed forms as soon as possible to ensure the reservation of their copies.

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or write to her, with a full Curriculum Vitae, at **Laurence Simons Associates, 33 John's Mews, London WC1N 2NS.** All approaches will be treated in strict confidence.

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Where the property is used exclusively for Commercial purposes and has no residential content, then the Society will advance up to 60% of the valuation for the purchase of such properties. This facility will also be available to present owners who wish to refinance their borrowings at more attractive interest rates. Maximum term 15 years.

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GAZETTE

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LAW SOCIETY
OF IRELAND

Vol. 83 No. 10 October 1989

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- Solicitors Computer Systems – What Next?
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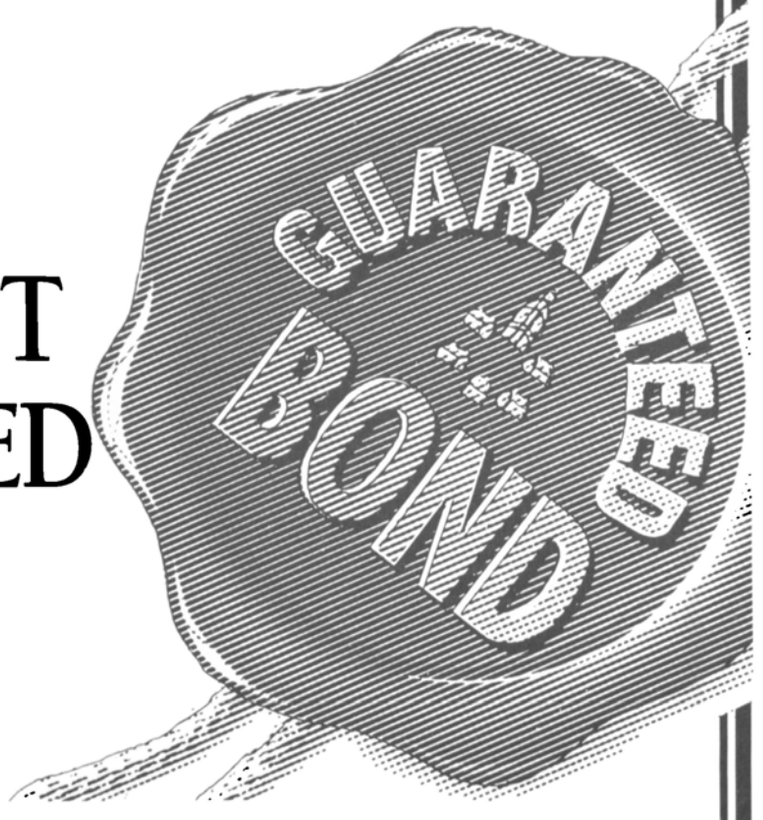

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★

Cover Photo: Younger Members Committee **Network** launch (left to right): Justin McKenna, YMC, Maurice Curran, President of the Law Society, Miriam Reynolds, Chairman of the YMC, Sandra Fisher, Secretary to the YMC. See also pages 355, 356.

★

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Viewpoint

Structured Settlements

Much has been said about the inadequacies and problems associated with the single lump sum method of compensation in personal injury claims and yet insurance companies haven't shown the slightest interest in remedying the situation. The concept of "structured settlements" has become very popular in other jurisdictions and could have benefits if adopted in this country.

When a plaintiff receives a lump sum of compensation it may well be the single largest amount of money he or she has ever received. For somebody who is not used to dealing with money there is a danger that it will be spent foolishly, rather than invested wisely. This is borne out by statistics in England and America which indicate that, even in the case of fairly substantial awards, half of the successful claimants will have spent the compensation within three years of receiving it and the vast majority will have done so within five years.

A further problem is that if the person is very seriously injured he is unlikely to get much advantage or pleasure from a large lump sum and it may well cause jealousy and resentment between him and his loved ones. It may put him in the position where he has to buy their affection by giving them presents of money or loans which will never be repaid.

Unless the lump sum is very skillfully invested inflation will erode it and may cause real hardship.

In the United States structured settlements have become very popular. In the United Kingdom the concept has recently received judicial approval. Essentially the idea is that the defendant agrees with the plaintiff that because he is so badly injured he will need an income of so much per week for the rest of his life.

In many cases the Defendant's Insurers buy an annuity to cover these payments. The annuity provides an income to the Plaintiff for life and the income can, within limits, be index-linked.

The primary advantage to the Defendant is that the cost of the annuity may well be less than a lump sum settlement. Statistics show that many seriously injured Plaintiffs do not live a long time.

On the other hand the Plaintiff can outlive his lump sum with resultant financial hardship. Under the concept of Structured Settlements he would be entitled to the continued income no matter how long he lives.

A key element in the success of "structured settlements" is that tax should not be payable on the payments received by the Plaintiff. This has been agreed with the US Revenue authorities for many years and has also been agreed in the UK between the Association of British Insurers and the Revenue. Some structured settlements are of a sophisticated nature providing for payment of lump sums at intervals when it is anticipated the Plaintiff will have particularly significant financial demands upon him. Structured settlements can provide a great sense of security for the claimant. Because the money is being rationed to him he does not have a lump sum to invest and will not incur the costs associated with investment nor is he in a position to squander the money or give it away to family and friends. Essentially he is protected from his own generosity and foolishness.

It is obvious that structured settlements have many advantages over the present system where a claimant is very seriously injured and will require ongoing attention for the rest of his life. It is therefore surprising that so little interest has been shown in Ireland in this concept which has financial, social and moral advantages which could benefit Plaintiffs, Defendants and their insurers. □

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Statutory Deductions from Damages in Tort

Lawyers frequently deal with actions involving the assessment of damages for loss of earnings or profits in personal injuries actions, and the assessment of damages in fatal accident actions. Various statutory provisions regulate what must be taken into account by way of money payments, pensions, gratuities, benefits or allowances in assessing such damages.[1] In the following paragraphs it is proposed inter alia to examine in detail the provisions in the Civil Liability Acts and the Social Welfare Acts which determine payments which must be taken into account.

By
Damien Maloney
B.A.(Mod.),
Barrister-at-Law

A Personal Injuries not Causing Death

In respect of personal injuries not causing death there are two main exclusionary provisions. Firstly, S.2 of the Civil Liability (Amendment) Act, 1964, provides that ". . . any sum payable in respect of the injury under any contract of insurance. . . " and ". . . any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury . . . " shall not be taken into account. In *Feeney -v-Ging*[2] the High Court held that university grants were not included in the expression ". . . or other like benefit. . . "

Secondly, S.306 (2) of the Social Welfare (Consolidation) Act, 1981, (hereinafter referred to as "the 1981 Act"), provides for a number of Social Welfare benefits which the section says shall not be taken into account viz. those listed under Part II of the 1981 Act,[3] together with the non-contributory widows or orphans pension and the childrens allowance.

In respect of personal injuries there are two main inclusionary provisions. They are S.68 of the 1981 Act and S.12 of the Social Welfare Act, 1984. It is proposed to discuss these in some detail.

Under S.68 of the 1981 Act all rights to injury benefit or disablement benefit which have accrued or probably will accrue in the five year period following the accrual of the cause of action shall be taken into account. S.68 (1) of the 1981 Act reads as follows:-

"Notwithstanding section 2 of the Civil Liability (Amendment) Act, 1964, and section 306 of this Act, in an action for damages for personal injuries (including any such action arising out of a contract) there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, the value of any rights which have accrued or will probably accrue to him therefrom in respect of injury benefit . . . or disablement benefit . . . for the five years beginning with the time when the cause of action accrued".

"Notwithstanding section 2 of the Civil Liability (Amendment) Act, 1964, and section 306 of [the 1981 Act] . . ."

These are the two exclusionary provisions referred to in the preceding paragraphs.

". . . in an action for damages for personal injuries (including any such action arising out of contract) . . ."

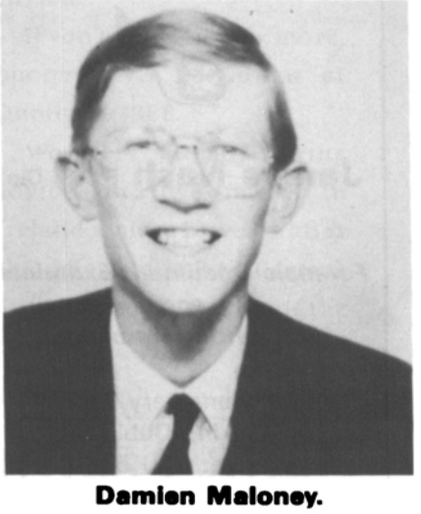
Thus S.68 operates whether the cause of action is founded in tort or contract. It is proposed to confine the present discussion to personal injuries actions founded on the commission of a tort, which is the usual case, as different considerations apply to actions based in contract.

". . . there shall in assessing those damages be taken into account . . ."

Professor Casey has considered the equivalent wording in the context of S.39 of the Social Welfare (Occupational Injuries) Act, 1966.[4] He was of the view that the words ". . . there shall be taken into account. . . " mean not simply "there shall be borne in mind" but "there shall be deducted". This was how the English Courts had construed the equivalent wording in English statutes. He thought it likely that the same approach to this matter would be followed in Ireland.

". . . against any loss of earnings or profits . . ."

Hence in personal injuries actions payments which must be taken into account must only be deducted against loss of earnings or loss of profits and cannot be deducted against general damages or any other item of special damages. However, in the case of personal injuries arising out of road traffic accidents payments which must be taken into account under S. 12 of the Social Welfare Act, 1984, are deductible against all damages, including general damages, which the recipient might otherwise receive.



Damien Maloney.

". . . which has accrued or probably will accrue to the injured person from the injuries . . ."

Thus the total loss of earnings before any deductions are made includes the loss to date and any future loss.

". . . the value of any rights . . ."

Professor Casey pointed to the problem as to whether "rights" is used in a jurisprudential or commercial sense. He referred to English authorities where the English Courts permitted benefits which the plaintiff had received, but to which he had no legal right, to be taken into account. There the word "rights" was used in a commercial sense. Casey referred to other foreign case law to the effect that "rights" meant "that to which the plaintiff is legally entitled". Such an interpretation he suggested was fraught with difficulties since it might give rise to instances where notional benefits which the plaintiff did not in fact receive were taken into account because a Judge held that the plaintiff should have received them. Casey suggested that the better view would appear to be that "rights" is used in a commercial sense.

". . . which have accrued or will probably accrue . . ."

In *O'Loughlin -v- Teeling*[5] the High Court had occasion to consider the phase ". . . or will probably accrue . . ." which appeared in S.12 of the Social Welfare Act, 1984. The case concerned a personal injuries action which arose out of a road traffic collision where the defendants unsuccessfully sought to have a further sum taken into account in assessing damages which represented the amount which would be paid in disability benefit to the plaintiff from the date of the trial to the expiry of five years from the date of the accident assuming that the plaintiff continued to receive such benefit. MacKenzie J. did take into account the disability benefit the plaintiff had previously received but His Lordship refused to take such further sum into account because it appeared from the evidence that the plaintiff was fit for light work and would shortly be able to resume his pre-accident work. In those circumstances the Department of Social Welfare could cut off the disability benefit and, therefore, one could not say with any probability that the plaintiff would continue to be in receipt of the disability benefit.

". . . in respect of injury benefit. . ."

Injury benefit, disablement benefit and death benefit are the three types of occupational injuries benefit available under the 1981 Act. Injury benefit[6] is the benefit payable to a person in insurable (occupational injuries) employment who suffers personal injury arising out of and in the course of his employment, or who suffers a prescribed occupational disease due to the nature of his work, which renders him incapable of work. It is payable during a period of incapacity for work but if the incapacity lasts beyond a period of 156 days the benefit ceases although the recipient may then be entitled to disablement benefit.

". . . or disablement benefit. . ."

Disablement benefit[7] is the benefit payable to a person in insurable (occupational injuries) employment who suffers a loss of physical or mental faculty arising out of and in the course of his employment. The rate of disablement benefit is greater if as a result of the relevant loss of faculty the beneficiary is incapable of work and is likely to remain permanently so incapable. Under S.68 (1) any increase in the disablement benefit to a beneficiary under S.46 of the 1981 Act because he requires constant care shall not be taken into account.

". . . for the five years beginning with the time when the cause of action accrued . . ."

In *Jackman -v- Corbett*[8] the issue was raised in the context of an identical wording in S.2(1) of the Law Reform (Personal Injuries) Act, 1948 (U.K.), as to whether the value of any of the benefits accruing after the expiry of the five year period were deductible. The Court of Appeal in England held that the section exhaustively defined the extent to which the benefits named in the section could be set off against the plaintiff's loss of earnings. It seems likely that this approach would be followed in Ireland.

There are at the moment two reported conflicting High Court decisions as to the interpretation of ". . . the date on which the cause of action accrued . . ." in the context of S.11(2) (b) of the Statute of Limitations, 1957. In *Morgan -v- Park Developments*[9] Carroll J. stated obiter that the date of the accrual in an action for negligence in the building of a housing estate was the date when the damage could reasonably have been discovered. However, in *Hegarty -v- O'Loughran*[10] Barron J. held that the date of the accrual in an action for negligence in the performance of a surgical operation was the date when the act causing the damage is committed.

Under S.68 (2) where the damages are subject to reduction because of the plaintiff's contributory negligence, the deduction in respect of the benefits as permitted by S.68 (1) is to be made from the total amount that would, apart from the deduction, have been recoverable. This operates to the plaintiff's advantage.[4]

S.12 of the Social Welfare Act, 1984, inserts a new S.306A after

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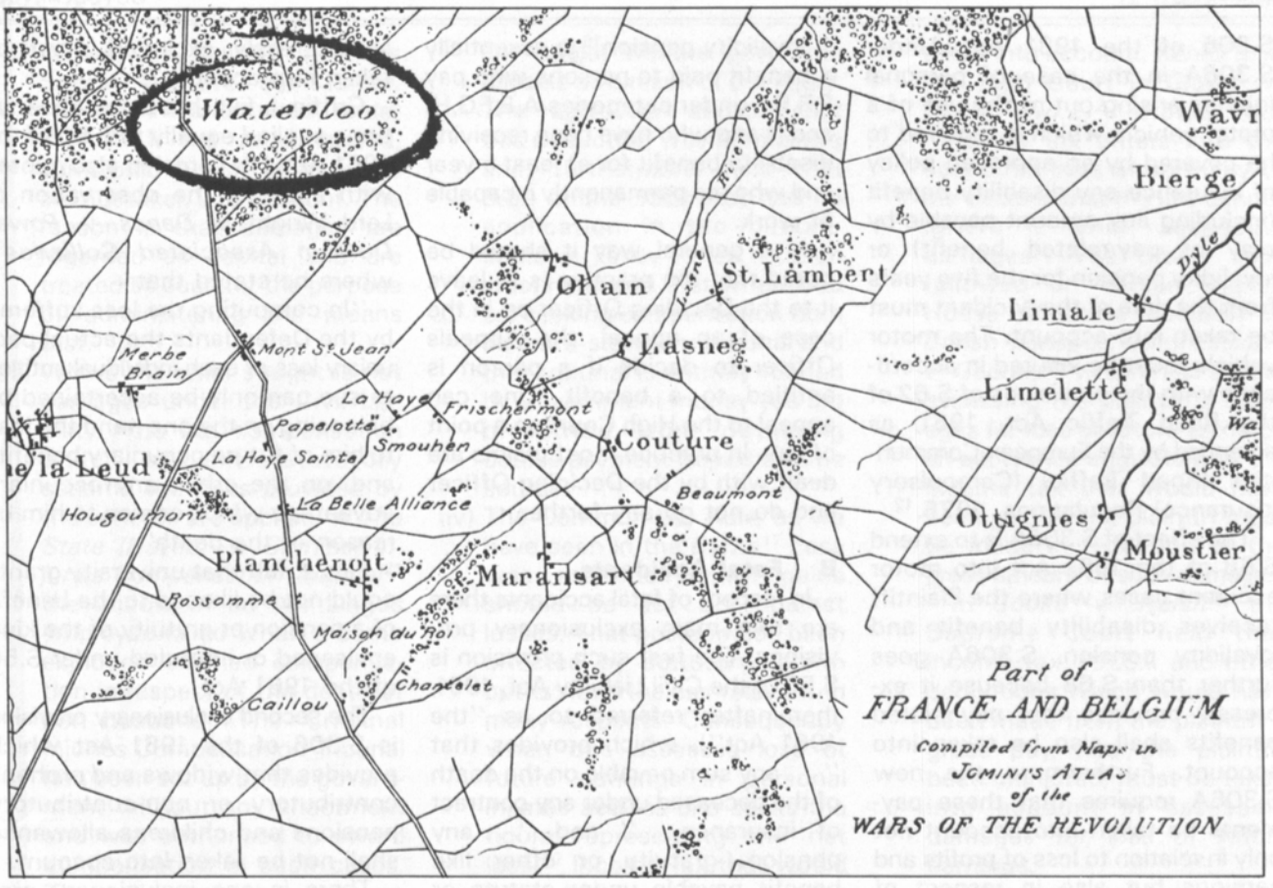

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S.306 of the 1981 Act. Under S.306A in the case of personal injuries arising out of the use of a motor vehicle which is required to be covered by an approved policy of insurance any disability benefit (including any amount payable by way of pay-related benefit) or invalidity pension for the five years from the date of the accident must be taken into account. The motor vehicle must be insured in accordance with the provisions of S.62 of the Road Traffic Act, 1961, as amended by the European Communities (Road Traffic) (Compulsory Insurance) Regulations, 1975.[12]

The effect of S.306A is to extend S.68 of the 1981 Act into motor accident cases where the Plaintiff receives disability benefit and invalidity pension. S.306A goes further than S.68 because it expressly provides that pay-related benefits shall also be taken into account. Furthermore the new S.306A requires that these payments be taken into account not only in relation to loss of profits and earnings but also in respect of general damages.

Disability benefit[13] is payable to persons who pay P.R.S.I. under categories A,E,F,G,H, and N and who are unable to work owing to illness or incapacity. It is a short-term benefit. It is paid in respect of the period of absence from work owing to temporary ill-health. Disability benefit is payable to an insured person who is ill, for instance with influenze, and is absent from work as a result, but returns when he has recovered.

Disability benefit is not the same as disablement benefit. Disablement benefit is only available where the person loses a mental or physical faculty. Furthermore disablement benefit is only available to a worker in insurable (occupational injuries) employment. Whereas disability benefit is available to a worker who is insured under the 1981 Act in an appropriate P.R.S.I. Class which procedure is less rigorous than being required to be insured under the occupational injuries provisions of the 1981 Act.

Pay-related benefit[14] is an additional rate payable to persons who pay P.R.S.I. under categories A,G,H, and N over and above the flat rate payments available in respect of certain benefits including disability benefit.

Invalidity pension[15] is essentially a benefit paid to persons who pay P.R.S.I. under categories A,E,F,G,H, and N and who have been receiving disability benefit for at least a year and who are permanently incapable of work.

In a general way it should be noted that the practice is to leave it to the Deciding Officer or, in the case of an appeal, the Appeals Officer to decide if a person is entitled to a benefit. One can appeal to the High Court on a point of law. In practice most claims are dealt with by the Deciding Officer and do not go any further.

B Fatal Accidents

In respect of fatal accidents there are two main exclusionary provisions. The first such provision is S.50 of the Civil Liability Act, 1961, (hereinafter referred to as "the 1961 Act"), which provides that ". . . any sum payable on the death of the deceased under any contract of insurance . . ." and ". . . any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the death of the deceased . . ." shall not be taken into account. The expression ". . . any pension, gratuity or other like benefit . . ." was judicially considered in *Feeney -v- Ging.*[2] In that case the deceased's children were in receipt of university grants which would not have been payable had the deceased lived. The submission was made that S.50 of the 1961 Act applied to university grants which, it was said, were included in the expression ". . . or other like benefit . . .". Ellis J. decided against the submission and held that the university grants were not benefits which are excluded from assessment under S.50 of the 1961 Act. In coming to this conclusion Ellis J. followed the approach of the Supreme Court in *O'Sullivan -v- C.I.E.*[16] Griffin J. in that case quoted with approval from an earlier judgment in *Byrne -v- Houlihan*[17] where Kingsmill Moore J. said:-

"That in computing the injury resulting from the death gains are in general to be set off against losses is shown by section 5 [of the Fatal Injuries Act, 1956] which by specifically excluding from such computation certain benefits by way of insurance moneys and pensions implies that benefits not so expressly excluded must be taken into account".

Griffin J. felt that these observations applied equally to S.50 of the 1961 Act. His Lordship also quoted with approval the observation of Lord Wright in *Danes -v- Powell Duffryn Associated Collieries*[18] where he stated that:-

"In computing the loss suffered by the Defendants the actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing on the one hand the loss to him of future pecuniary benefits and, on the other, any pecuniary advantage which comes to him by reason of the death".

Ellis J. felt that university grants could not be likened to the benefit of a pension or gratuity of the kind envisaged or intended under S.50 of the 1961 Act.

The second exclusionary provision is S.306 of the 1981 Act which provides that widows and orphans contributory or non-contributory pensions and childrens allowance shall not be taken into account.

There is one inclusionary provision. Under S.68 (3) of the 1981 Act the funeral expenses component of death benefit[19] shall be taken into account. Briefly, death benefit is available to widows and orphans where an insured person in insurable (occupational injuries) employment dies. Part of the death benefit is given to pay funeral expenses.

C Miscellaneous

(i) Special considerations apply in Garda Compensation cases. In *O'Looney -v- Minister for the Public Service*[20] a Garda who was injured in the performance of his duties claimed compensation under the Garda Siochana Compensation Act, 1941. S.10 (3) (a) of that Act requires that the Judge ". . . shall take into consideration . . ." any pension, allowance or gratuity out of public funds that the plaintiff is entitled to under the relevant Acts and Statutory Orders and Regulations in respect of the injuries which are the subject of the application under the Act. The Supreme Court held that the section requires that the value of the pension the Garda received be deducted from the value of the economic loss endured.

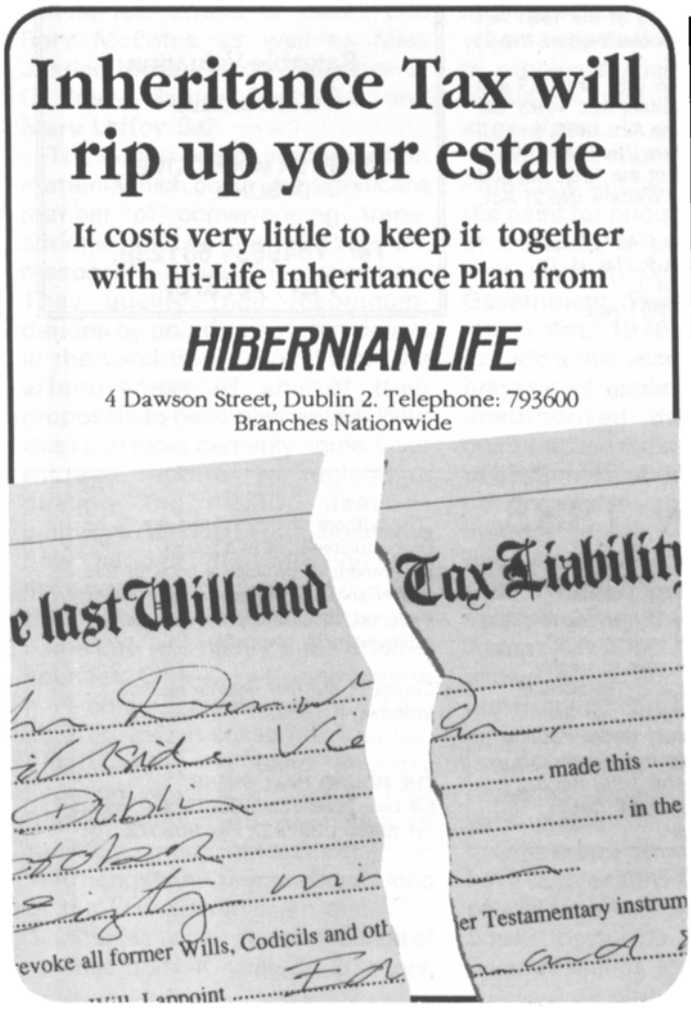
(ii) Where the Plaintiff receives Social Welfare assistance, which is means-tested, under the 1981 Act as amended, sums paid by way of damages are not taken into account. The reason is that damages are regarded as capital and are treated as such for the purpose of administering the means test.

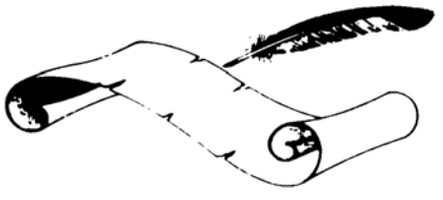
(iii) Where the relief sought is not damages under the Civil Liability Acts but compensation under an extra-statutory scheme the rules provided by the scheme are applied. In *The State (Hayes) -v- Criminal Injuries Compensation Tribunal*[21] the widow of an Aer Lingus employee killed when a bomb exploded claimed compensation in respect of the death of her husband. The Criminal Injuries Compensation Tribunal had been set up by the government without any enactment and was authorised to award compensation in such cases. The rules of the scheme provided that any award was to be reduced by the amount of any social welfare payments payable as a result of the injury. The High Court decided that this deduction was permissive and, furthermore, held that S.50 of the 1961 Act had no application in the circumstances. Finlay P. (as he then was) reasoned that where you are seeking compensation from an extra-statutory tribunal and that tribunal is entirely funded by Government money you are prevented from obtaining double payment from the same source.

(iv) The Common Lay Rule, as we have seen in the *Byrne*[17] case was essentially that gains should be set off against losses. That position has been affected by statutory reform but is nevertheless relevant in many respects. Consequently when one assesses loss of future earnings in personal injuries actions one seeks the figure representing the net loss.[22] Income Tax that would have been payable by the plaintiff, under PAYE or self-assessment and also PRSI, it taken into account. Kenny J. in the High Court in *Glover -v- B.L.N. (No.2)*[23] stated that "Income tax enters into the economic lives of so many of our citizens that the law cannot ignore it when assessing damages". The *Glover* case followed an earlier English House of Lords decision in *British Transport Commission -v- Gourley*[24] which held that in assessing the plaintiff's damages for loss of future earnings an allowance equivalent to the income tax that would have been paid by the plaintiff must be made in reduction of the gross amount of such damages.

In *Cooke -v- Walsh*[25] the Supreme Court held that Income tax, P.R.S.I. and other deductions which would have been made from the plaintiff's gross pay, had the plaintiff been uninjured, must be taken into account in assessing damages for loss of future earnings.

Different considerations apply to actions based in contract. Finlay P. (as he then





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was) in the High Court in *Hickey & Co. Ltd. -v- Roches Stores Ltd.*[26] held that where the plaintiff is awarded damages as compensation for loss of trading profits consequent upon a breach of contract no deduction shall be made from the damages in respect of income tax. This is because the damages for breach of contract are themselves chargeable to tax.

(v) Voluntary or *ex gratia* payments made by a third party where there is no obligation to pay the plaintiff will not be taken into account. However, where an employer continues to pay wages to the plaintiff and he is contractually obliged to do so those wages will be taken into account.[27] Consequently sick pay is deductible.

NOTES

1. The statutory position as to what payments, made in respect of personal injury or death, shall be taken into account is governed by S.50 of the Civil Liability Act. 1961, S.2 of the Civil Liability (Amendmant) Act, 1964, and Ss.68 and 306 of the Social Welfare (Consolidation) Act, 1981, as amended by S.12 of the Social Welfare Act, 1984. There were earlier statutes which altered the Common Law position but they have been repealed. The Fatal Accidents Act, 1908, and the Fatal Injuries Act, 1956, were replaced by Part IV of the Civil Liability Act, 1961. The Workman's Compensation Acts, 1934 to 1955, were amended by Part V of the Civil Liability Act, 1961, and later repealed by S.40 of the Social Welfare (Occupational Injuries) Act, 1966, which was in its turn replaced by Ss.68, 306 and 310 of the Social Welfare (Consolidation) Act, 1981.
2. Ellis J, 17 December 1982, unreported, 7032P/1978.
3. S.306 (2) of the 1981 Act provides that subject to S.68 the following benefits listed in Part II shall not be taken into account: disability benefit, unemployment benefit, injury benefit, disablement benefit, death benefit, pay-related benefit, contributory old age pension and retirement pension including any survivors benefit under S.87, maternity allowance, invalidity pension, contributory widows and orphans pensions, deserted wifes benefit, maternity grant, death grant. S.306 (2) is not also subject to S.12 of the Social Welfare Act, 1984.
4. J. Casey, "The Occupational Injuries Act: Some Reflections", 4 Ir. Jur. (n.s.) 234 at 243-246 (1969).
5. [1988] I.L.R.M. 617 (Ex tempore judgement of MacKenzie J, H. Ct.).
6. Ss.36, 42 and 54 of the 1981 Act and S.13 of the Social Welfare Act, 1986. Insurable (ocupational injuries) employment is, subject to the exceptions mentioned in S.38 of the 1981 Act, a reference to any employment for the time being specified in Part I of the First Schedule to the 1981 Act, and not being an employment specified in Part (ii) of that Schedule.
7. Ss.43 and 45 of the 1981 Act.
8. [1987] 2 A11 E. R. 699 C. A.
9. [1983] I.L.R.M. 156, H. Ct.
10. [1987] I.L.R.M. 603, H. Ct.
11. See generally M. Hayden, "The Date of Discoverability Rule and S.II of the 1957 Statute of Limitations," Gazette of the Incorporated Law Society of Ireland, June, 1988, vol.82 (No.5), at P.125.
12. S. I. No.178 of 1975.
13. Ss.18, 19, 22 and 23 of the 1981 Act and S.8 (I) of the Social Welfare (No.2) Act. 1987.
14. Ss.72 and 74 of the 1981 Act, Ss.7 and 8 of the Social Welfare Act. 1983, S.II of the Social Welfare Act, 1986, and S.II of the Social Welfare (No.2) Act. 1987.
15. Ss.88, 89 and 56 of the 1981 Act and S.9 of the Social Welfare (No.2) Act, 1987.
16. [1978] I.R. 409 at P.424, Sup.Ct.
17. [1966] I.R. 274 at P.278, H. Ct.
18. [1942] A.C. 601, H. L.
19. Ss.49-53 of the 1981 Act.
20. Sup. Ct., 15 December 1986, 1986 unreported, 53/86.
21. [1982] I.L.R.M. 210, H. Ct.
22. For a contrary view see B. McMahon & W. Binchy, Irish Law of Torts, chapter 33 (1981) at P.576 where the authors say that the practice in Ireland seems to be that no account is taken of liability to tax in personal injuries litigation. However the text predates the decision of the Supreme Court in *Cooke -v- Walsh* ([1984] I.L.R.M. 208).
23. [1973] I. R. 432, H. Ct.
24. [1956] A. C. 185, H. L.
25. [1984] I.L.R.M. 208, Sup. Ct.
26. [1980] I.L.R.M. 107, H. Ct.
27. See generally B. McMahon & W. Binchy, *Irish Law of Torts,* chapter 33 (1981).
28. See generally G. Whyte, "Social Welfare Payments and the Assessments of Damages in Civil Actions", Gazette of the Incorporated Law Society of Ireland November, 1987, vol. 81 (No.9) at P.281; R. Clark. "Damages and the Social Welfare 'Overlap', "19 Ir. Jur. (n.s.) 40 (1984) and J. White, Irish Law of Damages for Personal Injuries and Deaths (1989).
29. I would like to thank John Kehoe B.L. and, my former master, Patrick Hanratty B.L. for their helpful comments on an earlier draft of this article. □

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From the President . . .

I have recently during the year discussed the need for greater law reform in this country but the recent publication of a Law Reform Commission Report on Land Law and Conveyancing Law persuades me to return to the topic. This Report was prepared by a working group headed by John F. Buckley, Law Commissioner, and including colleagues, Ernest B. Farrell and Rory McEntee as well as Miss Justice Mella Carroll, Professor J. C. Brady, George Brady S.C. and Mary Laffoy S.C.

The Group has concentrated on matters which occur in a significant number of conveyancing transactions which give rise to unreasonable delays in completion. They qualify their recommendations by pointing out that delays in the Land Registry will limit the effectiveness of any of their proposals to be implemented. With this I can most certainly agree. Over thirteen months to register a dealing and 42,000 dealings waiting to be dealt with, illustrates how serious the situation has become. The point is also made that some 22 years after the Act came into force, only three original counties, Carlow, Laois and Meath, have compulsory registration. I am amazed that there is not a public outcry over the Land Registry situation, which is an issue the Law Society is constantly pushing with the Department of Justice.

Amongst the recommendations of the Law Commission are:

1. A reduction of statutory period of title from 40 years to 20 years;
2. Amendments to the rule against perpetuities particularly in relation to options and easements;
3. Amendment of the position of Judgment Mortgages registered between the making of a contract for sale and completion of the transaction;
4. Abolition of the rule whereby damages cannot be awarded in an action for breach of contract against a vendor who has failed to show good title.

I was amused to read their recommendation that the fee tail estate should not be abolished! Twice in a professional career extending almost to 30 years, have I come across a fee tail and in each case have immediately barred the entail and turned it into a fee simple. I find it difficult to believe any lawyer would advise the creation of a fee tail today.

Some of these recommendations (and items I have not mentioned) may seem somewhat remote to most practitioners but the section where they deal with rectifications of problems arising from modern legislation will be more readily appreciated. In particular, recommendations that the Family Home Protection Act be amended to avoid the need for enquiry into the giving of consents in prior transactions, that section 27 of the Local Government (Planning & Development) Act, 1976 be amended to include a five year time limit on the bringing of applications for either unauthorised developments or unauthorised uses, the amendment of section 45 of the Land Act so as not to prevent the vesting of an interest in land that is neither agricultural nor pastoral and is less than two hectares, and the recommendation that the Landlord & Tenant Act should be amended to allow parties contract out of the provisions of Part II of the 1980 Act as it applies to business tenancies provided both parties have independent legal advice, seem to me very useful.

One area I should have liked to have seen dealt with is the question of searches. If it was arranged that bankruptcy, *lis pendens,* and revenue claims for inheritance tax would only affect property if registered with the Land Registry or Registry of Deeds, it would considerably simplify the conveyancing process. If likewise there was only one register to cover all planning matters including road proposals and compulsory purchases, would it not be helpful? I suspect suggestions of this nature might be found too radical to be accepted by Government.

The Report is a most interesting document and I would recommend it to all solicitors who have an interest in conveyancing.

Some of the provisions included in the U.K. Law of Property (Miscellaneous Provisions) Act, 1989 might also merit consideration including one that deeds need not be written on paper or parchment nor need there be a seal for valid execution of a deed by an individual. Another interesting provision is that a contract for the sale or other disposition of an interest in land can in future only be made in writing and only by incorporating *all* the terms which the parties have expressly agreed in one document or when the contracts are exchanged in each of them. The requirement that the contract must incorporate all the terms which the parties have expressly agreed coupled with the general rule that a solicitor does not have implied authority to enter into a contract for sale or to purchase a property on behalf of his client should do away with a lot of problems for solicitors in that jurisdiction. Perhaps the relevant authorities might take these points into account when they come to prepare I hope in the very near future some legislation to improve and to simplify the conveyancing process. □

MAURICE R. CURRAN
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Judging the world

Interview with Brian Walsh
Justice, Supreme Court; Judge, European Court of Human Rights.

The following is the text of an interview with the Hon. Mr. Justice Brian Walsh, Judge, European Court of Human Rights, which was published in a book entitled *Judging the World: Law and Politics in the World's leading Courts* by Gary Sturgess and Philip Chubb, published by Butterworths in 1988. It is reprinted with kind permission of the publishers.

Interviewer
What was the basis of your being selected to serve on the Irish court?

Brian Walsh
When the Prime Minister offered me the appointment he said he would just like to mention one thing - he would never again refer to it - but he said he would like the Supreme Court to become more like the United States Supreme Court. So I pointed out to him there were certain differences. But that was his general idea. I understand, from what I learned subsequently, that he said much the same thing to the new Chief Justice, who was appointed the same day. That was the late Cearbhall O Dalaigh. Obviously it was the Prime Minister's wish that the court should be more active in its interpretative role. It was put very briefly but quite clearly. I am not saying that necessarily influenced me in any particular way, because I think the horse was chosen for the course. He probably felt he was taking to somebody who had much the same views. I certainly was very much influenced by the American experience. I had studied it to a very considerable extent and kept myself familiar with it all through my career.

You were very young, forty-two. Why did you accept the appointment?

I had been a very active practitioner but I was also very interested in law. I thought I would like to be in the position of being able to decide the legal issues without having to fight for one particular side of it. So it put me in a position where I could make a more objective contribution towards the development of law, particularly constitutional law, which was a particular interest of mine.

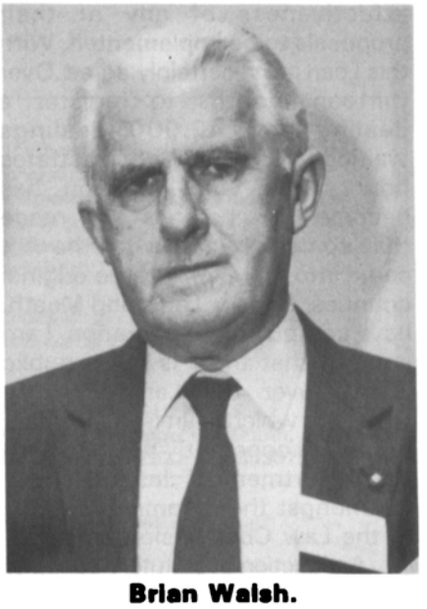
What happened in the partnership between you and the Chief Justice?

Nothing that was designed happened. It was just that each of us had this particular outlook and, as we constituted two-fifths of the court and the others were not unsympathetic to our point of view, it was a question of making the running. And in most cases the other judges, or most of them, would agree. It was really a case of what I might call a newer and younger generation of judges coming in. To that extent the judges were probably more forward-looking in the field of constitutional development, in giving life to a Constitution which, in the early days perhaps, had been regarded as an ornament rather than something of actual practical utility.

From 1961 onwards the Constitution became very much part of life and its impact could be felt among the ordinary people, who suddenly became conscious of the fact that they had a Constitution, that it could be implemented and that, in fact, many parts of it were self-executing and did not require any supporting legislation. The consciousness of this suddenly burst upon the public and it just happened to be that, in the years commencing around about 1960-61, the court, for a variety of reasons, became very active. The most important reason was that it got the cases. The court is not self-starting and depends on cases. So it was a happy coincidence of the right cases coming along at a time when the court was most receptive to new ideas.

The court may not be self-starting, but in cases which may have little relevance to the Constitution you can still develop the constitutional law by focusing on what may be peripheral issues and then bringing them to the centre. Do you agree?

Yes, that can be done. To use modern parlance, one can put



Brian Walsh.

down markers in advance for future events. The Constitution in Ireland has been brought in - even to the construction of common law - to every sphere of legal activity. By laying down markers one might inspire practitioners to pick them up and use them in the next case that may be more central. We certainly didn't stick to the rigid system of saying nothing about anything except the precise point before us, and we didn't attempt to avoid issues. In other words, we got away from what is perhaps the easier judicial approach of saying no. We went out of our way to try and find remedies and, effectively, adopted the view that if the Constitution provided a right, there was automatically a remedy; and one doesn't have to wait for legislation to provide a remedy.

What sort of markers did you lay down?

The question of personal liberty was very important, It was laid down very early on that every citizen had a right of access to the courts and, for example, on a matter like extradition, could not be hustled out of the country before he got to the court. In fact we held a Chief of Police in contempt of court for having done that. That was something quite new, because we struck down the law which permitted that at the same time. We said any law which would impede access to the courts was automatically unconstitutional because access to the courts was a guaranteed fundamental right. Now that had wide repercussions.

Then, later on, when we came to the question of admissibility of evidence, we laid down the rule that any evidence obtained in violation of a constitutional right was automatically excluded even though it might have been, say in the case of a statement, completely voluntary. The court held that the safeguard in the Constitution was the higher interest. That also had very widespread repercussions. Quite a number of convictions have been quashed, even when the facts were really beyond dispute, because the incriminating admissions were obtained in violation of the constitutional rights of the accused.

The Constitution has been construed, particularly in relation to Article 40, in much the way that the 14th Amendment of the United States Constitution is construed. It covers a great variety of cases but, essentially, they all support the view of the primacy of the Constitution. On the other hand, the view that had been taken in England was that how evidence was obtained was immaterial, save in the case of statements obtained involuntarily. Once they were voluntary, they were admitted irrespective of any illegality connected with obtaining them. We distinguished between, say, confessions obtained in violation of the law from those in violation of the Constitution. The latter were absolutely excluded no matter how true they were; the others were subject to a different test: whether they were voluntary. The constitutional cases emphasised this concept of fairness. Over the years, the courts have held that the Constitution contains, without expressly stating it, a guarantee of fair procedures, not merely before the courts themselves but even in the police activities.

So these were the developments which arose from the early markers put down by the court. Then, when the precise cases came along, they were laid down quite definitely. But by laying down these indications in advance, then people's minds and practitioners' minds were directed towards these issues. Arguments they mightn't have thought would be worth putting years earlier they now, suddenly, saw might be of use.

You upheld the primacy of the Constitution and you found certain footholds for human rights under it. But how good was the constitutional material that you had to work with?

The material was very good, because the Constitution, in its fundamental rights area, is essentially a natural law document. It doesn't seek to confer rights. It recognises and guarantees to protect what it regards as pre-existing rights, which are inherent in the human person because he is a human person. Therefore that gives the courts a very wide scope because, while particular rights in this context are mentioned in the Constitution, courts have held that there are also great numbers of unenumerated rights. So, effectively that means that, in the progress of time, the judges have the opportunity to think up extra rights depending on the state of progress of whatever age we are in. That is logical because the Constitution gives legal effect to moral concepts and is, therefore, far from being a document based on legal positivism. It was the opposite. One would search one's mind for what is a human right, or a natural right, and give effect to that. The Constitution gave the judges that great latitude and, as the Constitution of Ireland can only be amended by a national referendum, it meant in effect that no decision of the court could be changed without a national referendum, save by the court itself. The parliament was completely excluded from changing any constitutional interpretation.

What happened with the court after that initial spurt of activism?

I think it is still relatively active, but there are fewer cases which lend themselves to this. The whole field of personal liberty was virtually exhausted in about twelve to fifteen years. But the court still finds occasion to strike down laws as being unconstitutional. One of the noticeable things has been that, in recent years, a number of cases concerning property rights have begun to emerge and the court has given important decisions in that field. For example, it struck down the rent control legislation. This was done mainly because it was based upon the criteria established in about 1915, so it had become quite unreal. Then, when an amending law was brought in, the court struck that down also because it wasn't sufficient. The third law brought in wasn't challenged so it still stands.

The executive arm of government appointed you and, through the Prime Minister, urged you towards a more activist role. Yet when you went about being more active, the political arms of government didn't respond particularly well to it. Is that correct?

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More than likely the Prime Minister was expressing his own personal view, and perhaps that of one or two others. It wasn't presented as a view of the government collectively. Most members of the government would probably have been unconscious of the ideas involved. But of course governments change, and members of the government change. If decisions are given which appear to impede policies, the civil servants are perhaps the first to notice. They then advise the Minister that the courts are becoming difficult or obstructive, or something like that. It is very noticeable that when a particular party is in power it tends to view the courts with a less liberal eye than when it is in opposition. Whatever party is in opposition always sees more merit in the court than the party in power. I think that is the natural order of things in every country.

What was the reaction of government in those early days when you were making decisions they didn't like?

There was no overt reaction whatsoever. There wouldn't be a word of criticism uttered publicly. It is an unspoken rule that no person in politics ever suggests the courts are wrong. Likewise the judges, in discharging their duties in interpreting the law and the Constitution, would never venture any opinion on the activities of parliamentarians.

That is the unspoken rule. But you knew, others knew, that there was a lot of activity behind the scenes which was implicitly critical of what the court was doing.

Well, yes, to an extent, because naturally governments are satisfied that what they are doing is the right thing. If they find that the courts think otherwise, they may feel aggrieved. But I don't think they take it to heart too much. Occasionally it may affect, perhaps, their choice of judges in the future. But again, they are not really in a position to know what anybody would turn out like. Most members of the government would not be personally acquainted with most members of the bar and judicial appointments are confined to members of the bar. They might be influenced by general reputation, or perhaps the advice of the Attorney-General, but I think in most cases most members of the government would never have even met most people who are appointed to be judges.

How did you respond to those who said the Supreme Court was in danger of becoming the third arm of the legislature?

We responded to that quite simply. We said that judicial power is a co-ordinate of government, therefore it has its own function in the government of the State. The Constitution sets out that the organs of government are the judiciary, the executive and the legislature. We are not subordinates of any other department of State. Therefore the fact that our decisions may appear to affect the government of the country is to be expected, because we are part of the government of the country.

Do you feel that in being an activist judge you are not really being a judge, you are being a politician?

No, I don't feel that at all. The Constitution, like the United States Constitution, is written in the present tense. Therefore, if you come to construe a particular Article in this year, you reason it in the light of this year, not in the light of the year it was adopted by the people. There was a view at one time that one should try to ascertain what people thought about various things at the date of the coming into operation of the Constitution, but that has been abandoned long since. We don't have to hark back to what somebody thought forty or fifty years ago. Therefore certain values may be more or less important in a different age. For example, the guarantee of free primary education is contained in the Constitution. It doesn't mean it is the same standard of education as it was, because the 1980s version of education may require a very much higher standard than the 1930s.

How do you respond, though, to the literalist, conservative, strict constructionist judge who says you are operating not as a judge but a politician?

We don't construe the Constitution in such a way that you have to make it deviate around all the institutions existing at the time. To draw an analogy: in a new country like, say, Australia or Canada, the railways are built in a straight line and the people follow the railways. In the older European countries the railways had to follow very circuitous routes to go and search out all the people. Now our constitutional interpretation will be the straight line one. We don't bend the Constitution to take into account some existing institution. We take the Constitution as meaning what it says. It is written in relatively informal language. The more conservative view, on the other hand, would be to try to get the Constitution to embrace all pre-existing institutions and concepts, which would be like building your circuitous railway.

For example, many common law doctrines were thrown overboard because they conflicted with the concepts of the Constitution. Some, what I would call old-fashioned, lawyers might have thought that anything which conflicts with the common law must be construed narrowly. We don't accept that. Anything which conflicts with the wording or the spirit of the Constitution is automatically out, whether it be a law or whether it be a common law doctrine.

There was a referendum on the abortion question and the court was made quite central to it. A body of people were pressing for a constitutional amendment on the grounds that if there were not one the court would change the law on abortion, and permit it. What were your views on this?

Theoretically it is possible, in the sense that the Supreme Court might arrive at the conclusion that this is a matter of private life, as it decided in the question of the importation of contraceptives. That was the fear, that the court might have the same approach to it. My own personal view is that it probably wasn't necessary. In two judgments I had expressly pointed out that in my view the provisions

as to the safeguard of the person covered the unborn life too. Naturally people who want to make sure of it want it written in and not left dependent on the opinion of judges.

Did it alarm you that on a major political question the Supreme Court was being brought to the forefront?

It didn't alarm me at all in the sense that, first of all, I didn't think there was any possibility in the forseeable future of it happening. But secondly, it didn't alarm me because the Supreme Court has exercised a very powerful influence on the framing of certain types of legislative interpretation. So I think that the fears expressed were not so much a distrust of the court but, more, a recognition of the power of the Supreme Court. In the case where we said the restriction on the importation of contraceptives for a married couple was unconstitutional, as being an invasion of their marital privacy, that was seen by everybody, including the politicians, as having got the politicians off the hook. They could go ahead and legislate and say they had to do it because the Supreme Court said so. But if it had been left to them to volunteer to do it, then some of them would have been under great pressure from their constituents.

When, after serving with O Dalaigh for eleven years, he went to the European Court of Justice, would you say he expected you to be Chief Justice?

I think so but we never discussed it. I don't know whether he expected it, he may have hoped it, but being a realist he might have realised that the expectation would be less than the hope.

Now, many years later, Chief Justices have come and gone and you are still not Chief Justice. Do you see that as a political criticism of your work?

Oh, well, I don't know. It's very hard to see it as anything in particular. It's not a matter that impinges very much on my thought. In many ways being President of a court is slightly more inhibiting than being an ordinary member and so it doesn't affect me personally. The judges are in no sense regarded as working for the Chief Justice, they are colleagues of virtually equal standing.

That time that you spent with O Dalaigh; were they heady days for you?

Well, one wasn't conscious of it at the time but, looking back on it, reading some of the judgements I wrote myself twenty years ago, I feel I must have had a great deal of energy in those days. I was of course much younger than I am now. I wasn't conscious of it. I felt this was something I could do, I wanted to do it and I did it. I always believed, of course, that a judge's function is to decide, not to dodge the issue. Therefore I never found it difficult to decide anything. I had also to make sure that my decision could be sustained with reasoning. I must confess that to that extent life wasn't difficult for me, because I had no trouble in arriving at decisions. One was conscious that this was new ground, yes, but it didn't intoxicate one. Perhaps one felt a certain gratitude that one was there at that time to participate in this.

What was O Dalaigh like?

O Dalaigh was a man of absolute integrity and, in many ways, a very self-effacing, very modest man. But he was extremely rigid in points of principle and he would never, never, never even consider, for a moment, that some point should be softened so as not to displease somebody. Even when he was Attorney-General, which effectively is almost being a member of the government, the members of the government were quite afraid of him in the sense that none of them would even dare to make a suggestion to him about anything. He wasn't in the slightest bit aggressive, quite the opposite. He was a man of deep humility, but there was a certain aura about him which put people off any prospect of making anything like an improper suggestion to him. And this was conveyed on the bench to everybody and they never, never suggested that his decisions were influenced by anything except the highest principle.

Perhaps some people in the peak of the administration might have thought he was unduly rigid but then of course rigidity is a virtue in law; although perhaps not so much in politics, where flexibility may be necessary. But the great difference of course is that judges are making decisions on the basis that they are for all time, whereas policy considerations which influence a government can change from day to day. Therefore a decision which may be perfectly justifiable today may, with equal justification, be changed tomorrow for purely policy reasons. But the courts can't operate like that. In the words of a famous American jurist, the Constitution means what the Supreme Court says it means; it is as simple as that, and the judges are conscious of that in making decisions.

O Dalaigh was an excellent exponent of that view. He was also a great upholder of the view that every person should be heard. He was a man of utmost politeness. It had been the habit of judges to refer to prisoners by their surname, without calling them Mr. He always made a point of referring, even to the most disreputable character in court, as Mr. or Miss, as the case might be, and never did anything to offend their human dignity. I am afraid this should have been done by all judges but even to this day is not. He was an infinitely polite man; very, very patient, but quite rigid in principle. I never saw him lose his temper. I never saw him cut anybody off. He was very patient. He followed the old adage that every man is entitled to his day in court.

It's been said that you were the force behind O Dalaigh in many ways. How did you work together?

We didn't work in tandem in that sense. Judges here in the Supreme Court don't really have much in the way of conferences, there might be a brief discussion sometimes. But he and I had much the same outlook on things, if you like, and I had perhaps the time and the ability to do a great deal of research and build up the thing. Even if I did perhaps formulate a lot of the stuff it would have been worthless unless he agreed with it. So to that extent we didn't work in tandem

but our views coincided, although not always in every particular.

What has been the relationship between Irish law and the European institutions?

Every country in Europe save the United Kingdom has a written constitution. So with our entry into the European Community we were going into a system which we were already well aware of from our own system. The Treaties are all subject, in the last analysis, to the interpretations of the European Court of Justice at Luxembourg. So to that extent every country has surrendered a bit of sovereignty. But to us that was nothing new because we lived under a system where there was judicial review anyway. So we didn't suffer from the shock which perhaps may have been suffered in the United Kingdom, where the system of parliamentary supremacy reigns and no law can ever be challenged once it has been passed. We were quite accustomed to striking down laws. It is similar with the European Convention on Human Rights. While it is not part of the domestic law of Ireland, virtually all the guarantees contained in it are in the Irish Constitution. That is why there have been so few Irish cases brought – only two so far. Complaints would already be dealt with in the Irish courts.

How does being a judge of a national court compare with being a judge at the European Court of Human Rights?

The experience is quite pleasant in the sense that virtually every matter I've dealt with since 1980, when I went to the European Court of Human Rights, I had already dealt with in one form or another here. The same problems keep cropping up, as do the same problems that have been encountered in the United States. Quite recently in Strasbourg we had to decide a case involving a property matter in Britain. We actually applied a decision of the United States Supreme Court that touched exactly on the point. I might add that this delighted the United States Supreme Court - it was the first time they had ever been mentioned in a decision of the ECJ. They were very pleased by it. I got a letter from them about it. They like to know that their judgments are of worldwide value. □

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LAW SOCIETY APPOINTMENT

Audrey Geraghty.

Audrey Geraghty, who was Media Officer of The Law Society for the last two years has left to study in Paris. We extend our best wishes to her and welcome her successor, Sandra Fisher. Sandra has been Executive Assistant to the Director General for the past four years.

Sandra Fisher.

Solicitors Financial Property Services Workshop Itinerary

LOCATION	HOTEL	TIME	DATE
Bray	The Royal Hotel. Tel: 862935	6.30-9.30	Wednesday, 1st November
Carlow Town	Seven Oaks. Tel: 0503-31308	6.30-9.30	Thursday, 2nd November
New Ross	Five Counties. Tel: 058-43517	6.30-9.30	Tuesday, 7th November
Cork	Imperial Hotel. Tel: 021-965333	2.30-5.30 6.30-9.30	Wednesday, 8th November
Limerick	Limerick Inn. Tel: 061-51544	2.30-5.30	Thursday, 9th November
Galway	Great Southern. Tel: 091-64041 Leonard Murphy/Derry McGarry	6.30-9.30	Tuesday, 14th November
Sligo	Sligo Park. Tel: 071-60291	2.00-5.00	Wednesday, 15th November
Donegal	Central Hotel. Tel: 073-21027	7.00-9.30	Wednesday, 15th November
Monaghan	Nuremore. Tel: 042-61438	6.30-9.30	Monday, 20th November
Athlone	Prince of Wales. Tel: 0902-72626	2.30-5.30	Tuesday, 21st November
Dublin	Blackhall Place	2.30-5.30 6.30-9.30	Thursday, 23rd November

Invitations will be issued in due course.

Younger Members News

Younger Members *Network* Scheme

The YMC *Network* scheme was formally launched by the President, Maurice Curran, on Tuesday, 10 October 1989.

Network is intended to be an informal channel of communication between the Younger Members Committee (YMC), a Committee of the Law Society, and younger members of the profession around the country.

The objections of *Network* are:

1. Make the YMC more representative of those whom it serves at Law Society level.
2. Be a mode through which younger members will have "a say" on any developments relating to the profession, in particular developments affecting younger members.
3. Bring the Society closer to the members whom it represents and enhance better relations between the Society and members.
4. Be an informal system of feedback through which the members of the profession not involved in the running of the Society will have an opportunity to voice opinions, suggestions etc. through their YM representatives.
5. Act as a source of material (either articles or photographs) for the *Gazette*.
6. Promote social exchange among the profession.

The mechanics of the *Network* scheme are as follows:

1. Each YM representative has been contacted by a member of the Younger Members Committee.
2. On a monthly basis, probably during the second week of each month, the YM representative will make contact with his/her YMC member and relate any relevant matters. The manner, frequency etc. of contact is a matter entirely between the YM representative and the YMC member.
3. As the YMC meets, generally, during the third or fourth week of each month, each YMC member will bring to that meeting the views, suggestions, criticisms, etc. relayed by the YM representatives.
4. After each meeting, the YM representative will be contacted by the relevant YMC member or by another member of the Committee.
5. It is open to each YM representative to organise "meetings" with local younger members if he/she so wishes or to rely on "word of mouth" as a basis for the views expressed.
6. The YM representatives are not required to attend YMC meetings. However, if a YM representative wishes to attend an occasional meeting or if he/she is in the vicinity on the evening of a meeting, he/she will be more than welcome to attend.

A list of YM representatives who are participating in *Network* are set out below:

Over the coming year we hope to work closely with our *Network* members and to involve them in the work of the Committee. I would ask all Bar Association and members to assist their YM representatives. If you would like to comment on any particular issue or make a suggestion please contact your YM representative or any member of the Younger Members Committee.

MIRIAM REYNOLDS
Chairman
Younger Members Committee

NETWORK

COUNTY	YM REPRESENTATIVE
CAVAN	JENNY McGLADE
CLARE	DAVID CASEY
CORK	SIMON MURPHY
	KATHY IRWIN
DONEGAL	MARGARET McGINLEY
GALWAY	ROSANNA SEALE,
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KERRY	SEAMUS CADOGAN
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New facilities at Four Courts

The volume of work transacted in the Four Courts is prodigious by anyone's reckoning. The solicitors who haunt the Round Hall and the immediate environs of the Four Courts and their ancillary staff have long operated in relatively marginal conditions with few of the comforts of life. While the Law Society's Consultation Rooms and the limited facilities provided by the Law Society office were of invaluable assistance, it has long been felt by practitioners that an upgrading of facilities for the transaction of legal business in the Four Courts was long overdue.

In 1988 the Office of Public Works surrendered their lease on a portion of the Solicitors Buildings in the Four Courts which had previously been used as the Judges Library and the Scrivenery Office. With the building of new administrative offices for the Four Courts on the site of the old Four Courts Hotel, a great number of long standing administrative problems were solved and the Judges Library and the Scrivenery Office could at last be accommodated elsewhere.

The immediate reaction from the profession was more Consultation Rooms, but with the demise of juries in running down actions a lot of people were unsure if the demand for Consultation Rooms would remain constant or decrease. Then there was the "more and more telephones" lobby, not to mention the brave few who wanted saunas and massage parlours.

However, Brian Mahon, solicitor of Tullamore, and Chairman of the Premises Committee, called for a draft plan from Chris Mahon, the Secretary to the Premises Committee. After trawling the opinions of a large number of solicitors who frequently practise in the Four Courts it was obvious that there were certain facilities which were regarded as the basic minimum. People were certainly anxious to have a better standard of Consultation Room. It was felt that with the upsurge in the number of arbitrations taking place, proper facilities for the function would also be very useful.

The Law Society office in the Four Courts was very small and very uncomfortable both for the staff who worked there and for the solicitors who crammed into the small space in front of the counter in the middle of a hectic day. Clearly something had to be done about that situation.

A Document Exchange linked to the Exchange in Merrion Square and to Document Exchanges throughout the Country was a clear favourtie and negotiations were opened with Ken Mills, the Managing Director of the D.D.E., with a view to creating a Document Exchange franchise.

One facility which had been talked about for years and indeed dreamt about by many was a Solicitors Shop. This shop was seen as providing every item generally used in a solicitors office together with some of the daily comforts of life such as newspapers, cigarettes and snacks. It was obvious that this facility would also have to be franchised, and was eventually put in the capable hands of Legal & General Stationers.

After much discussion by the Premises Committee and the eventual general approval of the Council of the Law Society, the following facilities were agreed upon:-

a. Larger office facilities incorporating extra telephones, an in and out Fax and better photocopying facilities;
b. New and better Consultation Rooms;
c. A large Arbitration Room suitable for international arbitrations if necessary;
d. A Document Exchange;
e. A solicitors shop.

The President of the Law Society, Mr. Maurice R. Curran, at a Press Reception in the Solicitors Buildings in the Four Courts on the 29th September, 1989 opened the above facilities for use by the profession with the enthusiastic reception of all those present. There were representatives of the judiciary, the Department of Justice, the Four Courts Administration, the Court Reporters and a large number of members of the Council of the Law Society, the Dublin Solicitors Bar Association and the Presidents and Secretaries of Bar Associations throughout the Country.

Brian Mahon, Chairman of the Premises Committee, has assured everybody that he has not finished yet and that slowly but surely the other facilities in the Four Courts will be brought up to a standard which members of the profession will appreciate and which will enable them to carry out their work in the Four Courts in relative peace and comfort. □

EMPLOYMENT OPPORTUNITIES

The Law Society wishes to advise that through its Employment Register, it facilitates Solicitors currently seeking employment or contemplating a change of present employment.

For further details contact:

MIRIAM A. WALSH,
EDUCATION OFFICER,
THE LAW SOCIETY,
BLACKHALL PLACE,
DUBLIN 7.

PEOPLE AND PLACES

(Left to right): Eugene O'Connor, Patricia Boyd, Miriam Reynolds, Chairman, YMC, John Larkin, Sandra Fisher, Gabrielle Dalton, Richard Cooke, Eva Tobin and Justin McKenna.

Younger Members NETWORK Launch

10 October, 1989

(See page 355)

Michael Lanigan, Liz Galvin, Liam Keane, Margaret McGinley, Roseann Seale, Gabrielle Dalton and Richard Cooke.

Gerry Griffin, Hilary Molloy, Sarah O'Keeffe, Justin McKenna, Kathy Irwin and Paul Spring.

Maurice Curran, President, Miriam Reynolds, Chairman, YMC, Brid Mimnagh and Ernest Margetson, Senior Vice-President, Law Society.

Gerry Griffin, Frances Twomey, Justin McKenna, Geraldine Clarke, Chairman of the Public Relations Committee, and Shane Johnson.

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Solicitors Computer Systems What Next? Unix -v- Networking

The following is the text of an address given at the Solicitors Financial Controllers Association Seminar, Newpark Hotel, Kilkenny on 15th September, 1989.

Recent developments of Computer Systems for Solicitors Offices have gone badly awry. Considering the present level of automation in Irish solicitors practices, it is surprising that the new standards have been set for those who wish to acquire computer systems. We can take some consolation from the knowledge that the situation in Britain and America is, if anything, worse.

Hereunder, I describe the Solicitors' Computer System of the future and debate the methods likely to be used in the Office of the 1990s.

By
Frank Lanigan
Solicitor*

STANDARDS

In 1985 the Technology Committee of the Law Society set a code of standards, which were, in effect, minimum contractual requirements for those supplying the profession. In the early days these standards protected the legal profession from unscrupulous computer salesmen and led to a successful implementation of basic computer systems in solicitors offices. However, despite massive changes in the market in the last two years, no clear standards have been set for the new systems of the 90s.

Solicitors have now become quite dependent on computers but find it hard to trust them. As neither the Law Society nor the industry has established any new standards, the busy solicitor's firm, without clear guidance, is afraid to invest heavily in new technology, while other professions, particularly the Accountants, are marching ahead. Many solicitors have turned to their accountants to advise them on computer acquisition. I believe this to be a serious mistake. So, what next?

WHAT NEXT?

The Flexible Computer System

- The flexible computer system will be a tool for producing documents or accounts as heretofore, but it will also be a storage method for the legal information which passes through the office, which the Solicitor needs for the conduct of his affairs.
- It will be less obsolescent. The Solicitors office will not have a computer system which will go out of date over-night.
- It will be able to cope with the changes required by 1992, the restriction of traditional methods of fee creation and the extension of areas of work available to the Solicitors profession in information technology and financial and property Services.
- It will not be tied down to any single computer vendor or proprietary operating system and will not be restricted in terms of expansion.
- Information gathered elsewhere on other computer systems will be capable of being transferred to it.
- It will be able to carry out word processing, accounts, time recording and costing, payroll, internal data base, client information, archive and library facilities, communications to data bases such as the Land Registry, the Companies Office, financial and property services, online banking etc.
- It will be capable of performing a substantial number of tasks all at the one time.
- As new services become available it will be able to take them on board without fuss or great expense.

DO FLEXIBLE SYSTEMS EXIST?

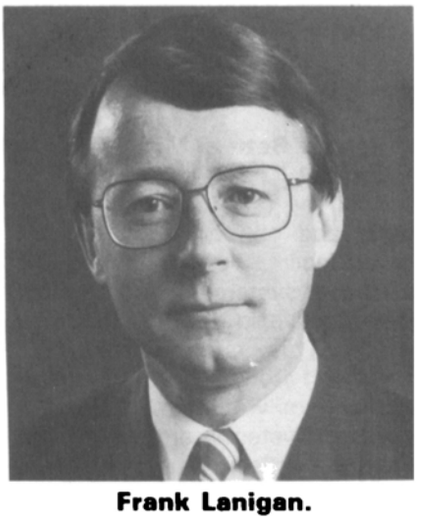
YES! Some years ago such a multi purpose computer system would have been a mainframe computer with data processing and word processing facilities, an administration manager, a huge maintenance contract and rigid operating procedures.

This is no longer the case. The advent of multi-user systems, with the capacity to carry out this work has reduced the cost and brought this type of flexible system to reality and within the budget of most firms.

WHAT ARE MULTI-USER AND NETWORK SYSTEMS?

Multi-User Systems

A Multi-User System is one whereby there is a Central Computer/ Processor and a series of non-



Frank Lanigan.

processing screens attached to it. The screens are not dumb, but the main processing is left to the Central Computer and thereby all the screens are working in the computer itself rather than processing on their own. The screens using such system can carry out any one or more of the functions available on the computer.

The computer system allows multiple numbers of people to connect to it [MULTI-USER]. They can do any number of different tasks on it, such as word processing, accounts, database or external communications [MULTI-TASKING]. These tasks can all be done and continued at the same time and the user can flick back and forth between tasks [MULTI-FUNCTION].

The method of organising all these computer facilities is called the UNIX operating system. Such a system is usually called a multi-user system. If UNIX is not used, a multiple system of linked personal computers is loosely called a "network".

Network Systems

The network system is one whereby a group of P.C. terminals are linked in a network. Each terminal has its own processing capacity. This may be a hard disk or floppy disk.

In the better network systems, the contents of each processor can be saved in a Central Storage or Processing Unit (often described as a 'file server' or 'console unit') for extraction later.

The purpose of a network system is to enable a series of different personal computers to operate together in such a way that information processed on one computer can be stored in a central computer, i.e. a file server and accessed by another personal computer working elsewhere on the ring.

Which is Better, Multi-User or Network?

This is the core question of this paper and one on which I have strong feelings. In my opinion, the Multi-user system is now the most cost effective solution in a solicitor's office. This is because it is structured around the UNIX operating system whereas the present network systems are structured around the single-user MSDOS operating system.

To explain further, UNIX was designed for many screens, many functions, many tasks and many users whereas network systems are centred around a series of single user PCs linked in a manner which, in my opinion, does not suit the running of a solicitor's business.

COMPARISON OF MULTI-USER AND NETWORK SYSTEMS

Multi-User Systems – The Unix Solution.

The writer favours a multi-user approach. Unix, the operating system in use for multi-user computers has become the principal business operating system of the late 1980s. The main business applications of the early 1990s, including legal offices, will be straight Unix applications.

What is it?

I dare not try to explain here how the Unix operating system works. Suffice to say that it is a business computer tool to which all the users have access and which has no limit of application. This means that one can link all or any of the functions carried on in a solicitors office, large or small. For example, one can link Solicitors accounts with word processing, word processing with accounts, client information on data base and information retrieval, etc. etc. Information contained in one section of a computer system can be related to a function of another. Meanwhile, the operator sees none of this as the Unix operating system sits behind the sceen and is effectively invisible.

Who uses it?

A huge volume of business orientated software is written for Unix. There are constant developments in office automation through Unix which has left other operating systems behind.

The success of Unix can be gauged by the fact that the large computer Vendors such as I.B.M., D.E.C., Unisys, Wang, Nixdorf, Bull, I.C.L. etc. have all now embraced Unix, leaving their own proprietary systems behind. This leaves the customer free to choose whatever hardware he wishes and operate it under Unix.

All government contracts in U.S.A. and Europe specify the Unix operating system. More and more Irish government contracts specify Unix. Multi-Nationals are changing over to Unix for Contracts, large or small, because it is the same language, no matter what machine it is running on. This has recently been acknowledged by I.B.M., who have made huge commitment to Unix and have set out to make it the Standard of the Nineties.

Unix runs on Mainframes, Minicomputers, Microcomputers and Personal Computers. It is now the principal offering on the new breed of Super-micros using the 386 and 486 (Buzzwords!) chips. Programs, documents and data on one system are easily transported to another. Perhaps this is why it is so successful.

HOW DOES UNIX MULTI-USER FIT INTO THE SOLICITORS OFFICE?

A solicitor's firm using Unix needs to know absolutely nothing about its operation. Being an operating system it simply puts program options on screen for users to employ, and sits invisibly behind.

A typical Unix multi-user application in a Solicitors office can be as follows:-

- The Solicitor uses the screen for obtaining office information, accounts, client information, communications, electronic mail telephone numbers, fax numbers, monitoring assistants' work etc.
- The paralegal obtains information for the purpose of dealing with files and uses the system also for generating word processing and accounts documents.
- The other fee-earners and staff use the system for word processing, precedent document production, accounts input, information searching, printing and maintenance. All the word processing in the office is done on the system. All daily letters and documents are produced on the system and printed on high speed laser printers.
- Precedents are produced automatically be paralegal and office staff. The Solicitor checks the documents which do not need to be heavily proof-read as they come from checked precedents.
- Instant information in relation to all the accounts of the firm is available at all times. Up to date exception reporting on all the

functions of the office including profitability, overheads, taxation, work-in-progress and new business is instantly available.

The office payroll is handled in minutes.

- Time recording and time costing are performed and monitored by the system.
- Billing is automatically calculated and produced and statements, reminders and internal reports are created to report on profitability and cash flow.
- Trends in the practice are analysed and profitability increased or unprofitable work lessened.
- High quality legal documentation is produced quickly and profitably.
- Standardised systems reduce the havoc caused by staff mobility.
- Access to internal office information is instantaneous. This applies to files, clients (for conflict purposes), deeds, closed files, wills and their location, the financial status of every Client in his dealings with the office, all phone numbers, fax numbers, addresses of clients and contacts etc.
- Internal memos are sent by electronic mail, external mail is sent electronically also. This reduces waste paper around offices and communicates quickly.
- Office diaries are maintained which enable scheduling of appointments electronically between any number of people without memos or messages, taking account of holidays, court appearances etc.

WHEN WILL THIS BE AVAILABLE?

Now!

All of the above type of work is available to the present Solicitors office. I am aware that most, if not all of these facilities are available in certain offices who have invested in technology for the future. On a Unix system, all of the above are available, as indeed are automated document production systems and expert systems in the legal office.

Office Automation

There have been substantial advances in software in Unix Office Automation over the last few years. As Unix developed from the business sector, those using the Unix system have concentrated on development of office automation products. The structure of Unix has allowed Office Automation to emulate existing office methods while taking them successfully into the computer world.

Thus, for example, word processors followed from the typewriter, Electronic mail from the post, electronic diary from the diary, electronic messaging from the memo-pad and electronic calculations from the notebook or calculator. The progression is not frightening in concept to the learner, but the increase in efficiency is notable. The real advantage of Unix in the office is that all of the above facilities are to hand on screen and are capable of being related to each other and to the Accounts and other databases.

NETWORK SYSTEMS

While Unix systems developed from the operation of larger computers, network systems developed from the highly successful personal computer [PC]. Many solicitors acquired personal computers for various functions, principally word processing. Network systems were devised to try and link them together in a manageable form so that information on one PC could be used by other linked PCs.

Development has been uneven. The basic principle of a series of computers linked to a central processor for storage and processing was initially successful in the mainframe market, but the costs were huge. Attempts to operate networks with smaller PCs were not so successful, particularly in the legal market. That is not to say that it couldn't be done; but nobody seemed to get it right.

There have been substantial developments in the last few years but, unlike Unix, these development are still subject to limits of operation.

LIMITATIONS OF NETWORK SYSTEMS

Technically, Networks are limited by the basis on which the system originated. The most successful networking system (Novell) is based on MSDOS. MSDOS is the operating system used by the personal computer such as the I.B.M. P.C.

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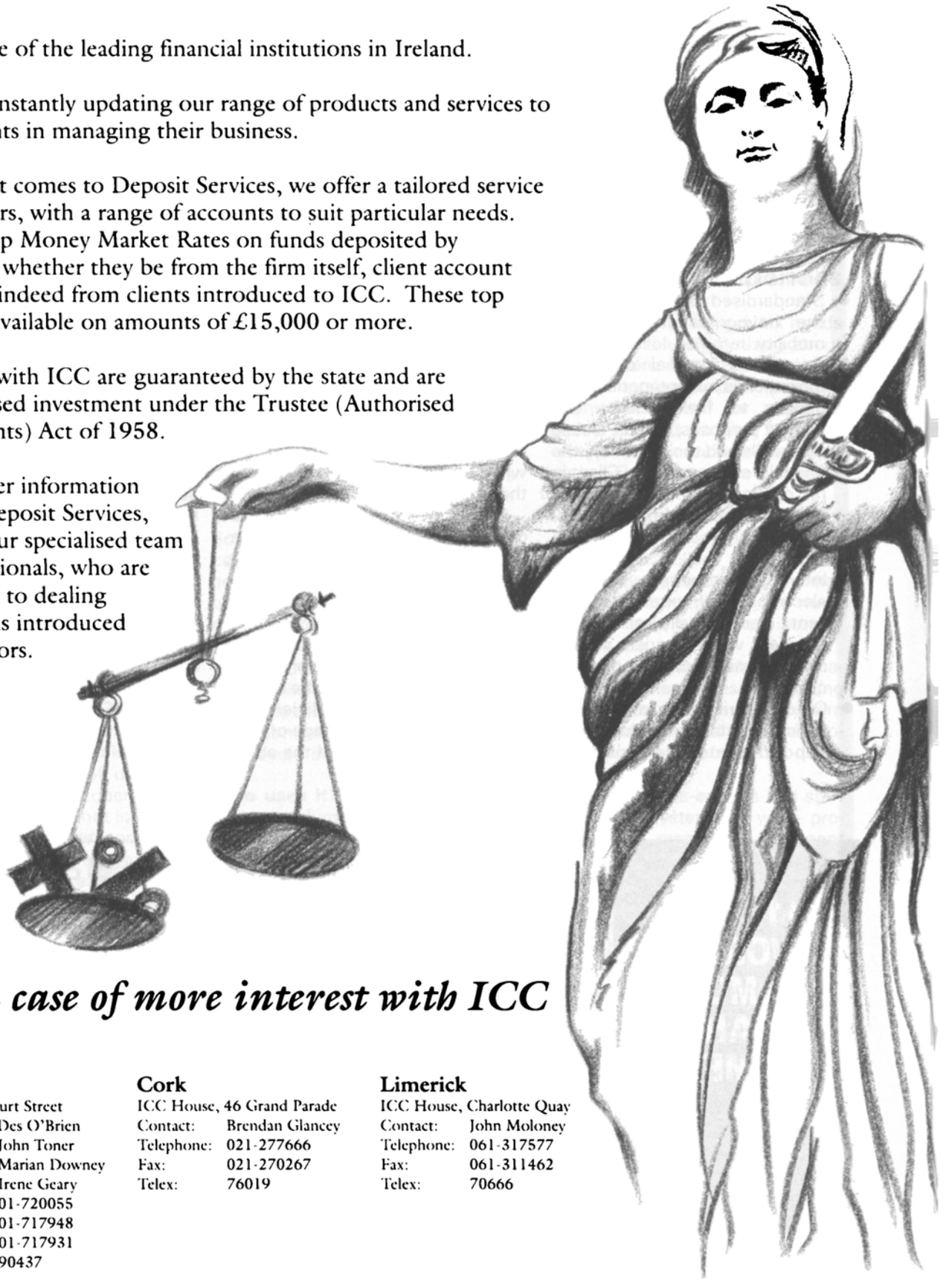

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Fax: 021-270267
Telex: 76019

Limerick
ICC House, Charlotte Quay
Contact: John Moloney
Telephone: 061-317577
Fax: 061-311462
Telex: 70666

This operating system is a single-user based system. As a result it carries inherent problems from an organisational point of view. While these may not be apparent to a network user initially, the limitations of such a system become apparent with use and when the question of development or expansion comes up. As the system was designed for single users, a network is therefore a collection of single-users with all the problems that this entails.

I believe that Network systems as recommended to the legal profession by consultants have serious design, specification and organisational limitations because:-

- The single-user, single function design of the terminals is not suitable to the multiple functions required in a solicitor's practice. The technology, being single-user in concept, is generally unproven in the legal market.
- There is no easy access to the code with which the component programs are written.
- The latest network word processing systems are standardised for general use but cannot easily be geared towards the Solicitor's specific requirements.
- If the network is based on a particular word processing system such as Wordperfect, Multimate, Wordstar etc. it is tied into it. Unlike Unix, no special software such as accounts or data base can be readily integrated with the word processing software provided. This restricts development.
- It lacks a windowing facility to enable multi-tasking to be done at any given time, e.g. accounts, word processing, data base, all on line. Therefore, moving between functions is laborious and time consuming. The organisation required by the central administration is quite complex. This means that an office administrator is required, who must be highly trained in the use of a network system, with consequent rigidity in its use and expansion. This is hardly labour-saving. If you do not have an administrator, one amateur operator could undo months of work.
- In a network, each person is totally independent from the other. There is no uniformity in the information and no supervisory access by the system administrator or the Solicitors using the system. It is hard to set standards as between different users.
- Networking systems have been very uneven in their application. Some have been disastrous. In the absence of guidance, the legal profession is at sea in practical terms.
- The principle of the network requires that, if you need a precedent document from the system, you must first find it! If this is successful, you then copy it over from the P.C. or file server onto your own P.C. If a number of users attempt to copy a particular document at a given time this can lead to problems. There is also a heavy use of the computer system leading to slow-down or blockage.
- In a network some of the users do not use up the available space on their P.C.'s, while others overuse, with consequent degradation in the network.
- If the network consists of diskless workstations then there is the ultimate degradation resulting from a multi-user concept in a single-user environment . . . a computer with nowhere to go. Because each user in a network tends to develop his own precedent bank, there is no uniformity. This means that a lot of material copied over on a regular back up is unnecessary and there is a huge amount of duplication. Housekeeping can become an impossible problem without severe central control.

Why then do solicitors buy networks?

Because their accountants tell them to do so!

Accountants have set up consultancy services to advise on computer systems. Accountants have taken to PCs heavily and believe in them. This is because the accountants work suits a PC environment, everybody doing their own special work, low central processing requirements and a multiplicity of figure-based programs off the shelf such as Lotus 1-2-3-, Supercalc and Dbase III. Word processing and document production are lower in their priorities.

This suits accountants but are wholly inappropriate for solicitors because *accountants process figures but solicitors process words.* The sooner solicitors start advising their own the better.

Conclusion

This paper is a debate between multi-user and networking systems in the solicitors office.

The writer plumps for multi-user systems. They are now tried and tested. They are based on the highly successful Unix operating system, which, like the solicitor of the future, has the ability to be flexible.

With the development of 80386 and 80486 technology and the massive arrival of computer-giant I.B.M. into the Unix arena, Unix has a bright and established future.

My conclusion is that the legal office system of the immediate future will be a Unix system, be multi functional, multi tasking, multi-user, be capable of running a Solicitors office in word processing, accounts, data base, information retrieval, external data bases, electronic mail and external communications etc. Such a computer is and will be the main tool in the internal organisation of the successful Solicitors office.

*Frank Lanigan is a Solicitor practising in Carlow. He is a former chairman of the Law Society's Technology Committee and is Chairman of Star Computers (Ireland) Ltd., and Managing Director of QZRS Ltd.

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Set-Off and Counterclaim — Deciphering the Irish Rules

By
Christopher Doyle,
Barrister-at-Law.

Since *Prendergast -v- Biddle*[1] is the leading Irish case on Set-Off and Counterclaim, it is most unfortunate that it was never reported. The modern reader is faced with a transcript so appalling that it calls for the skills of an archeologist rather than a lawyer. And deciphering the four Judgements delivered in the Supreme Court may not make one much wiser. In 1957 the Supreme Court frequently sat with four Judges; on the face of it one might assume this to be true of *Prendergast* in which there were four judgements delivered. Given that these four Judgments contain widely divergent views on the procedure in such cases, one would have some difficulty working out the ratio. Research[2] will reveal that Martin Maguire J. sat on the appeal and concurred with Lavery J., thus forming with O'Dalaigh J. a clear majority view. Unfortunately the lack of a proper Report has led to widespread quotation of Kingmill Moore J's Judgment with the assumption that he can speak for the majority; in fact, certain passages in his Judgment cannot be reconciled with the majority view, or even with other passages in the same Judgment.

Facts

The Plaintiff issued a Summary Summons for £1,992 due for training and maintenance of the Defendant's horses: the Defendant admitted the debt but sought leave to defend by filing a Counterclaim for damages for breach of a contract to sell a half share in a mare. Murnaghan J. refused to give leave to file a counterclaim stating[3] that the Plaintiff appeared to be entitled to Judgment and that if he had discretion, he would exercise it in the Plaintiff's favour. The Defendant appealed to the Supreme Court, who dismissed the appeal by a 4/1 majority.

Procedure

The problem for the Supreme Court was a possible conflict between two of the Rules of Court: and since the 1986 Rules contain almost identical provisions, the divergence between them remains.

Order 19 Rule 2 of the 1986 Rules (replacing Order 19 Rule 3 of the 1905 Rules) provides:-

> "A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sounds in damages or not, and such set off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court may, on the application of the plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof".

Order 37 Rule 7 of the same Rules (replacing Order XV Rule 5 of the 1926 Rules) in dealing with a Motion for liberty to enter final Judgment on a Summary Summons, provides:-

> "Upon the hearing of any such motion by the Court, the Court may give judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just".

If Order 19 prevails, a Defendant has the right even in summary proceedings to file a Defence by way of counterclaim and it would be for the Plaintiff to seek to have it struck out; therefore a Judge hearing a contested Motion for summary judgment should, it appears, give leave to defend whereever a plausible counterclaim is suggested. But from Order 37 it appears that on a Summary Summons a defendant has no right to file a Defence without express leave of the Court; and while the language of Rule 7 may be wide enough to entitle a Judge to give leave for filing a Counterclaim which is not a defence, other rules of the same Order refer to a good defence going to the Plaintiff's claim.[4] Overall, Order 37 would not appear to allow the filing of a Counterclaim which does not meet the Plaintiff's claim.

The Judgments

Maguire C.J., dissenting, was satisfied that Order 19 should prevail. He was fortified by Seciton 27 (3) of the Judicature Act, 1877 which empowers a Court on the hearing of the Plaintiff's claim to give the Defendant any relief he might have been entitled to on a separate action against the Plaintiff. He said:

Christopher Doyle.

"The real issue between the parties is who is indebted to the other and in what sum . . . no case is made that there would be any confusion arising on the trial of the action. Obviously it would be confined to the issue on the Counterclaim, Accordingly I see no reason for denying to the Defendant her right under the Act of 1877 and Rule 19 (3) to set up her counterclaim".[5]

Lavery and O'Dalaigh J.J. were certain that the summary procedure permits a defendant to raise a defence to the merits, or by way of set off (common law or equitable) but not to file an unconnected counterclaim. Lavery J. said:-

"In my opinion the trial Judge must pronounce Judgment and if there is no defence – either set off or any other – he must give Judgment for the Plaintiff. The procedure by Summary Summons was provided in order to enable speedy justice to be done in particular cases where there is either no issue to be tried or the issues involved are simple and capable of being easily determined. I conclude that it would be contrary to the spirit and the letter of the Rules to deny a Plaintiff such relief."[6]

O'Dalaigh J. said:-

"I therefore cannot see that the new Rule can in any way be cut down or controlled by the provisions of the Judicature Act . . . that the Rules of 1926 permit a Judge to enter up Judgment for a liquidated sum admitted to be due is not a matter for surprise. The law attaches to a Judgment debt several privileges."[7]

Since Martin Maguire J. concurred with Lavery J., this was in effect the view of the Court.

Kingsmill Moore J's Judgment is the fullest and best known, but also the most problematical. At page 10 he said:-

"If there appears to be a defence, or a set off, common law or equitable (which is regarded as a defence) the case must to to a plenary hearing where such defence can be fully investigated . . . if however, there is no defence suggested it seems to me that the Plaintiff is entitled to his Judgment".

If this is the ratio of his Judgment then he was in full agreement with the other majority judges. However, at pages 6 to 7 there is a passage which must be considered because it has recently been cited with approval in the High court[8] and which suggests an approach closer to that of Maguire C.J. The relevant extract is:-

"If however the Defendant while admitting that he has no direct defence to the claim, puts forward a plausible counterclaim, a difficult problem must arise . . . on the one hand it may be asked why a Plaintiff with a proved and perhaps uncontested claim should wait for judgment or execution of judgment on his claim because the Defendant asserts an improved (sic) and contestable counterclaim. On the other hand it may equally be asked why a defendant should be required to pay the Plaintiff's demand when he asserts and may be able to prove that the Plaintiff owes him a larger amount. To such questions there can be no hard and fast answer. It seems to me that a Judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of these claims and also the financial position of the parties. If for instance the Defendant could show that the Plaintiff was in embarrassed circumstances it might be considered a reason why the Plaintiff should not be allowed to get Judgment . . . until after the Counterclaim had been heard . . . I mention only some of the factors which a Judge before whom the Application comes may have to take into account in the exercise of his discretion".

This can only mean that the Judge has a discretion to allow the filing of an unrelated counterclaim – a statement which flatly contradicts the Judgments of Lavery and O'Dalaigh JJ. and the later part of Kingsmill Moore J.'s own judgment.

Ratio

To summarise, so far as one can, the effect of the decision: all the Judges agreed that a Defendant may contest the Plaintiff's entitlement to a summary judgment on its merits.

All agreed a Defendant may set off any liquidated sum due from the Plaintiff – this is a defence, not a counterclaim.

All agreed the Defendant may as a defence set off an unliquidated sum by way of equitable set off i.e. where the claims are so closely related that in justice they must be regarded as part of the same claim.[9]

As to a counterclaim for an unliquidated amount not amounting to an equitable set off, three of the Judges took the view that the Court had no discretion but must give the Plaintiff Judgment, the fourth took a directly contrary view and stated that the Court must allow the Defendant to file the counterclaim, while the fifth firstly suggested that the Court has a discretion and then apparently altered his view to agree with that of the majority.

It appears therefore, that the ratio of *Prendergast -v- Biddle* is that a counterclaim for unliquidated damages can never be pleaded against a claim for a liquidated amount which is admitted to be due.

Subsequent Law

Given the problem of finding the ratio of *Prendergast* it is not surprising that in subsequent cases Judges have confined themselves to quoting whatever extract seems appropriate; however the danger of missing what was the majority view is obvious. In *Gerrit van Gelderen -v- Seafield Gentex*[10] Kenny J. quoted a passage from Kingsmill Moore J's Judgment to support the rule that unliquidated damages can never be set off against a claim for a negotiable instrument. In *Agra Trading -v- Minister for Agriculture*[11] the Court was faced with the same problem as in *Prendergast*: the Plaintiff sought summary judgment for a liquidated sum, the Defendant admitted a debt and sought to file a counterclaim seeking unliquidated damages. Barrington J. referred[12] to the divergence between Order 19 Rule 2 and Order 37 Rule 7 and then stated that the parties agreed it was within his discretion whether or not to allow a counterclaim to be filed.[13] He referred for guidance to the passage at pages six and seven of Kingsmill Moore J.'s Judgment in *Prendergast* quoted above. Applying the conditions there he found

that the Plaintiff was solvent, had a proven claim, and had acted speedily, whereas the Defendant's claim was dubious, unquantifiable and likely to involve great delay; accordingly he refused leave to defend.

The Judge cannot be faulted for his evaluation of the relevant factors or his conclusion. But (whatever was agreed by the parties) did he in fact have a discretion to allow an unrelated counterclaim? It appears that three out of five Judges in *Prendergast* while doubtless agreeing with the result he reached, would have found that he should have dismissed the Defendant's application out of hand, while Kingsmill Moore J., on whom he relied, expressed different views in different parts of his Judgment.

Conclusion

The point is not academic: in practice many defendants in summary claims will have plausible cross allegations involving unliquidated amounts. The rules for determining equitable set off are not always easy to apply, and in any case many cross claims clearly fall outside that category, counting as unrelated counterclaims, not defences. One case likely to arise in practice is the claim by a Bank on an overdrawn current account met by a cross allegation of libel in dishonouring cheques drawn on it. Should the Court find that this is a set off, it may clearly be pleaded; should the Court find it to be a counterclaim the practice in the High Court now apparently runs contrary to authority, and the authority most likely to be cited in this regard is in effect a dissenting view. Hopefully when the issue next reaches the Supreme Court, *Prendergast -v- Biddle* will be reviewed and a clear indication given as to whether the majority view, the contrary but equally rigid view of Maguire C.J., or the discretion suggested by Kingsmill Moore J., is the correct approach.

(1) Supreme Court, 31st July, 1957, Unreported.
(2) Particular thanks are due to Miss Peggy McQuinn, of the Supreme Court Office Judgments Section, for her invaluable assistance in checking the Supreme Court records.
(3) It is not clear whether his Judgment was reserved or extempore, although the Supreme Court evidently had a full note of it.
(4) Order 37, Rule 8,9.
(5) At page 6 of his Judgment.
(6) At page 4 of his Judgment.
(7) At page 2 of his Judgment.
(8) Agra Trading -v- Minister for Agriculture, High Court, 19th May, 1983, Unreported.
(9) For a full review of this area of the law, see Hanak -v- Green [1958] 2 Q.B. 9.
(10) [1978] I.R. 167.
(11) See Footnote (8) above.
(12) At pages 10 to 11 of his Unreported Judgment.
(13) At page 11 of his Unreported Judgment. □

INSURANCE ACT SEMINAR

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on

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Practice Notes

Powers of Attorney

The Society has been asked by members for guidance in relation to the granting of Powers of Attorney by persons who fear they may become incapable of looking after their affairs.

There is no alternative to Wardship where a person owning property becomes incapable of managing it. It is understood that the Law Reform Commission is currently studying the possibility of introducing a system of Enduring Powers of Attorney under which the attorney can continue to act even though the donor becomes incapable. Enduring Powers of Attorney have been introduced in a number of other Common Law jurisdictions. Unless and until a system of Enduring Powers of Attorney is introduced by legislation attorneys who act under powers of attorney, at a time when the donor has become incapable, do so at their own risk.

Practitioners who are requested to prepare Powers of Attorney for people in Nursing Homes or intending to go to Nursing Homes to cover possible future incapacity should be aware that the Power of Attorney ceases to be effective once the Donor becomes incapable. □

Undertakings

Despite regular Practice Notes in Newsletters and the Gazette dealing with Undertakings (including the Health Warning on the inside of the red cover of the Law Society printed forms of Undertaking) the Registrar's Committee is still constantly having to deal with failure by Solicitors to comply with their Undertakings. In most of these cases the Solicitor is in difficulty for one of two reasons.

1. He should never have given the Undertaking in the first place.
2. He had not received proper authorisation to give the Undertaking.

What has become clear to the Registrar's Committee is that there are various Undertakings which should *never* be given and there are other Undertakings which, if given, should be *clearly* expressed to be *conditional*.

If a solicitor is undertaking only to use his best endevours to procure something this should be clearly stated.

Problems arise when a Client wants his Undertaking so as to get money to complete some other transaction and the Solicitor is put on the spot. Unfortunately, all too often, it is easier to give an Undertaking and hope that everything will go right rather than trying to explain the intricacies of Undertakings to a client who does not want to hear.

In practice most Undertakings which should not have been given in the first place still sort themselves out. (This creates further pressure on the Solicitor when the Bank Manager tells your client that your colleague down the road gave an Undertaking in similar circumstances).

Hereunder are some of the pitfalls which can arise.

1. **Unconditional undertaking to hand over the proceeds of sale of a property subject to a mortgage in favour of a lending institution.**
   All is well if the sale goes ahead. If the sale breaks down and repayments are not being made and the Lending Institution gets an order for sale, the solicitor will be in difficulty.
2. **Undertaking to pay a beneficiary a share in an intestacy.**
   Even with the authority of the beneficiary and the proposed Administrator if a Solicitor gives an Undertaking prior to the issue of a Grant of Administration and if the Administrator dies he will be left without control of the matter. In certain circumstances similar problems may arise where there is an Undertaking in relation to the payment of a legacy.
3. **Undertakings to furnish client's statutory declarations.**
   If Declarations are in existence they can be handed over. If they are not in existence the Solicitor should not undertake since he cannot ensure their completion.
4. **Undertakings given before the commencement of a transaction.**
   If a Solicitor gives an Undertaking before the transaction commences and before he has got the control of matters he may find that his client goes to another Solicitor who is totally unaware of your Undertaking. There may be a second Undertaking to a second Bank!
5. **Allied Irish Banks Home Loan System.**
   Under the A.I.B. Home Loan system a Solicitor gives his undertaking before any of the documents are signed. The Solicitor must ensure that he does not negotiate the loan cheque until all transfers, mortgages and other documents required by the Bank are executed by the Borrower.
6. **Undertakings to furnish Capital Acquisitions Tax Act Clearance Certificates**
   (a) In circumstances where the property has qualified for Agricultural Relief under the C.A.T. Acts which is lost by virtue of the sale but which will be regained if there is re-investment within a year pursuant to Section 19 of the 1976 Act, has the Vendor's Solicitor retained sufficient funds to cover the possibility that the Vendor did not re-invest the proceeds?
   (b) If Special Condition in the Contract provides "on closing the purchaser shall accept an Undertaking from the Vendor's Solicitor to furnish Certificate from Capital Acquisitions Tax in respect of the death of the deceased registered owner". Before the closing of the sale the Solicitor must ensure that he has the necessary authority from his client to give the Undertaking to the Purchaser's Solicitor and further he must have the authority to retain sufficient funds to discharge the outstanding tax.
7. **Deeds on Accountable Receipt from the Bank.**
   In Family Transfer situations solicitors obtain Deeds on Accountable Receipt from the Bank for the purpose of the

7. transfer from father to son. By completing the Accountable receipt form the solicitor is giving an undertaking to return the Deeds in the son's name. The son's authority is therefore needed before the Accountable receipt is signed.
8. **Did the Wording of your Undertaking Protect your Lien for Costs**
   If not, collect your costs before giving the Undertaking.

Think before you give the next Undertaking.

(Unless your are quite happy to discharge your obligations from your own personal funds).

P.L.M.

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PROGRAMME FOR SESSION 1989-1990

1. *TUESDAY, 10th October 1989:*
   John D. Cooke, B.C.L.; LL.B., Senior Counsel — THE MEDICAL AND LEGAL PROFESSIONS IN THE E.C. AFTER 1992".

2. *TUESDAY, 14th NOVEMBER 1989:*
   Fred Lowe, Senior Clinical Psychologist, Eastern Health Board and Chief Superintendent Patrick Doocey, South Central Metropolitan Division – "VIOLENCE IN OUR SOCIETY TODAY".

3. *TUESDAY, 9th JANUARY 1990:*
   Dr. Seamus Ryan – "THE PRESIDENTIAL ADDRESS.

4. *TUESDAY, 13th FEBRUARY 1990:*
   Dr. Peter O'Connor, Casualty Consultant, The Mater Hospital and Joe O'Farrell, Director, Allied Insurance Consultants Ltd. – "PERSONAL INJURY CLAIMS AND LIABILITY".

5 *TUESDAY, 13th MARCH 1990:*
   E. R. Adrian Glover, Solicitor – "MEDICAL RECORDS AND THE LEGAL SYSTEM GENERALLY".

Details in relation to the Annual Dinner and the Annual General Meeting will be published later.

NOTES

Lectures take place at 8.30 p.m. at the United Service Club, St. Stephen's Green, Dublin 2, by kind permission.

Members and their guests are invited to join the Council and guest speakers for dinner at the Club at 6 p.m. for 6.30 p.m. on the evening of each lecture. Members intending to dine must communicate, not later than the previous day, with the Honorary Secretary, Miss Mary MacMurrough Murphy, B.L. at 2 Whitebeam Road, Clonskeagh, Dublin 14 (Telephone 694280) or at the Law Library, Four Courts, Dublin 7 (Telephone 720622).

Membership of the Society is open to members of the Medical and Legal Professions and to others especially interested in Medico-Legal matters. The current annual subscription is £10.00. Membership proposal forms and full details may be obtained from the Honorary Secretary.

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Statutory Self Assessment for Capital Acquisitions Tax

INTRODUCTION

Since 1 September, 1989, self assessment has been mandatory for capital acquisitions tax. For solicitors, this means that, when a return of a gift or an inheritance is being made on behalf of a client, they must ensure that

- **the return is made on a special self assessment form (form I.T.38);**
- **the tax, and any interest on tax, is assessed on that return;**
- **the amount of the tax, and any interest, is forwarded with the return to the Revenue Commissioners.**

An important point to note is that self assessment is mandatory for *all cases where a return has not yet been made.*

by
John Reid
and
Tony Fitzpatrick
Capital Taxes Branch

The introduction of mandatory self assessment follows an extremely successful voluntary scheme which had been administered by the Capital Taxes Branch in co-operation with the Law Society and local Bar Associations. As part of the voluntary scheme the Capital Taxes Branch, in co-operation with the professional bodies, provided training seminars on self assessment throughout the country. Over 1,000 solicitors have now attended these seminars. This suggests that solicitors as a profession are well prepared to meet the challenge of self assessment, and to benefit from the speedier and more streamlined administration which self assessment offers. This is borne out by a very encouraging feature of the voluntary scheme – self assessments made by solicitors were mostly error-free. This contrasts strongly with the experience in other tax jurisdictions such as Australia where, during the introductory phase of self assessment, assessments were incorrectly made in a very high proportion of cases.

This article provides an overview of the new statutory arrangements – in respect of legislation, administration and compliance.

LEGISLATION

The relevant legislation is contained in Chapter II of Part V of the Finance Act. 1989 (sections 74 to 79 inclusive). The key sections from a solicitor's point of view are as follows:

Section 74 is the principal section involved. It is largely a redraft of Section 36 of the Capital Acquisitions Tax Act 1976 (''delivery of returns''). It incorporates amendments to that secion contained in the 1982 and 1984 Finance Acts which were necessitated by the amendments in these Acts to the method of computing tax. Broadly speaking, a person who is primarily accountable for the payment of gift tax or inheritance tax (usually the donee or the successor) must, within four months of the valuation date or 1 September, 1989, whichever is the later, *and without being notified to do so,*

- deliver a return to the Revenue Commissioners;
- make on that return an assessment of the tax and interest due by him;
- forward the amount of the assessment to the Revenue Commissioners.

The return needs to be delivered only when the taxable value of the gift or inheritance involved by itself, or when aggregated with the taxable values of other gifts or inheritances taken by the donee or successor, exceeds 80% of an amount which is tax-free in the computation of tax on the gift or inheritance involved. However, irrespective of this 80% rule, the donee or successor must comply with the self assessment provisions in respect of a gift or inheritance, if required by notice in writing by the Revenue Commissioners, within four months of such notice being given.

Section 36 of the Capital Acquisitions Tax Act, 1976, as originally enacted, contained provisions requiring

- accountable persons other than donees or successors (for example, personal representatives or trustees) to deliver a return on request from the Revenue Commissioners;
- any accountable person to deliver, on request from the Revenue Commissioners, an

CAPITAL ACQUISITION TAX SELF ASSESSMENT KEY FEATURES

- tax must be self assessed;
- payment of the tax any any interest must accompany the return;
- interest is payable on all tax not paid within four months of the valuation date;
- training seminars for solicitors have been run by the Capital Taxes Branch; further seminars will be provided on demand;
- a Tax Advisory Service has been established in the Capital Taxes Branch; staff are available to provide advice – by telephone or by interview;
- assessment workshops will be organised on demand.

additional return if it appeared to the Revenue Commissioners that a return already made by that accountable person was defective;

- any accountable person to deliver to the Revenue Commissioners, without being required by them, an additional return if he became aware that the return or additional return already delivered by him was defective.

These provisions are retained in the revised legislation but tax and interest must be assessed on the return, and payment must accompany delivery of the return.

Where tax may be paid by instalments, provision it made for the self assessment and payment of the instalments due at the date of assessment and for the payment of any further instalments when they become due. Provision is also made for the discharge of inheritance tax by transfer of Government securities, the requirements being that any payment of tax and interest (in excess of the nominal value of the Government security or securities) should accompany the return and that any transfer of the security or securities to the Minister for Finance should be completed expeditiously.

The new section 36 also authorises the Revenue Commissioners, for audit purposes, to call for a statement, with supporting evidence if necessary, relating to property comprised in a gift or inheritance. They may also inspect any property comprised in a gift or inheritance and any books, records, accounts or other documents which may be relevant to the assessment of tax in respect of a gift or inheritance.

Section 76. Under the original capital acquisitions tax legislation, interest was not charged on tax where a return was delivered by an accountable person within three months of the valuation date, and a further interest-free period of one month was allowed for payment when the tax was assessed by the Revenue Commissioners. This maximum interest-free concession of four months is now being applied by this section to self assessments of tax made by or on behalf of the accountable person.

The section also enables the Revenue Commissioners to treat conditional or incorrect payments of tax as payments on account of tax.

Section 77 updated the penalties contained in section 63 of the Capital Acquisitions Tax Act, 1976. Failure to comply with the self assessment requirements could result in a penalty of £2,000.

Section 78 contains various consequential provisions arising from the fact that the 3% discretionary trust tax imposed by the Finance Act, 1984, is now also subject to mandatory self assessment.

Section 79 imposes a surcharge in respect of any serious undervaluation of an asset which is comprised in a gift or inheritance and which is included in a return delivered by or on behalf of an accountable person. Over the years, many solicitors have commented on the difficulty encountered from time to time in persuading clients to submit realistic valuations, particularly for real property, despite the fact that in many instances these undervaluations led to delays and additional compliance costs for taxpayers and their advisers. The purpose in legislating for this surcharge was hopefully to eliminate the practice of submitting serious undervaluations. The surcharge consists of an amount (30%, 20% or 10%) of the tax ultimately attributable to the undervalued asset, and where imposed will be legally deemed to constitute part of the tax due. The operation of the surcharge is illustrated in the accompanying box.

ADMINISTRATION

The new process

The new procedures are as follows:

(1) Completion of a tax return (form I.T.38); assessment of tax and interest (if any) by the taxpayer or by his or her agent;

(2) Lodgement in the Capital Taxes Branch of the completed return with a remittance for the tax and interest due;

(3) Checking of each return for arithmetic accuracy by staff in the Capital Taxes Branch. Minor errors will be corrected by Revenue staff. If significant errors are discovered the return will be sent back for reassessment. *It is important to note that the delays arising from the submission of incomplete or incorrect returns could result in additional interest charges. The administrative practice which operated until recently, whereby interest was not charged on outstanding tax during periods when the returns were lodged with the Capital Taxes Branch, will no longer apply. Interest on overdue tax will be charged from the valuation date.*

(4) All returns are screened to determine whether a detailed examination (an audit) is required in respect of all aspects of the gift or inheritance.

(5) Each return form includes an application for a certificate of discharge from capital acquisitions tax (the red form C.A.11).

Operation of the surcharge for serious undervaluations provided for in section 79, Finance Act, 1989

An accountable person delivers a return in respect of a house devised to him absolutely by his deceased brother. The market value of the house is ascertained by the Revenue Commissioners at £50,000 under section 15 of the Capital Acquisitions Tax Act, 1976. The tax ultimately payable on the valuation of £50,000 is £8,000

If the value of the house shown in the return delivered by the brother of the deceased person

- is £35,000, that £35,000 is 70% of £50,000, and no surcharge is involved;
- is £25,000, that £25,000 is 50% of £50,000, and the surcharge is 10% of £8,000 = £800;
- is £20,000, that £20,000 is 40% of £50,000, and the surcharge is 20% of £8,000 = £1,600;
- is £15,000, that £15,000 is 30% of £50,000, and the surcharge is 30% of £8,000 = £2,400.

In addition to the usual rights of appeal in respect of valuations, the taxpayer has an additional right of appeal to the Appeal Commissioners against the imposition of the surcharge on the basis that he had reasonable grounds for his estimate of the market value of the asset giving rise to the surcharge.

Completion of this application will ensure the immediate issue of a certificate of discharge if the return and payment are accepted without audit. If the application is not completed and the assessment is accepted as final, a note to that effect will issue.

Audits

Effective auditing is a necessary part of self assessment. If provides an essential protection both for the tax yield and for complying taxpayers and their advisers. Experience in the United States and other self assessing tax jurisdictions has shown that the additional tax yield from auditing selected tax returns is considerable.

The auditing of capital acquisitions tax returns will take a number of different forms:

(a) it may simply be a question of obtaining a second opinion on the value of an asset. Valuations of immovable property may be referred to the Valuation Office in the same manner as before, or shares in a private company may be referred to the Valuation Section of the Capital Taxes Branch, again in the same manner as before;

(b) written requests may isssue for detailed information relating to all or particular circumstances surrounding a gift or inheritance or relating to the assets comprised in a gift or inheritance; or

(c) field audits: members of the staff of the Capital Taxes Branch may in the course of a field audit interview taxpayers and their agents and advisers. They also have authority to inspect any property comprised in a gift or inheritance, or any books, records, accounts or other documents relating to any property as may in the opinion of the Revenue Commissioners be relevant to the assessment of tax in respect of a gift or inheritance.

COMPLIANCE

What will happen if self assessed returns are not submitted?

The Capital Taxes Branch is no longer accepting returns on the old direct assessment return forms (I.T.3 and G.T.1) which are now obsolete. There is a legal requirement to submit *self assessed returns* and to pay any tax due. Failure to meet this requirement will result in penalty proceedings.

Advisory service for taxpayers and solicitors

The introduction of self assessment for capital acquisitions tax has been accompanied by an unprecedented educational programme, including training seminars. A further programme of more advanced seminars is now underway and has already been attended by over 300 solicitors. Additional sessions of this advanced seminar for Bar Associations or other groups of solicitors will be organised on request.

Advice is also available directly from the Capital Taxes Branch. During each working day, an experienced Revenue official will be assigned to offer advice on specific or general difficulties (telephone (01) – 792777; extension 2244/2247). Solicitors are also invited to make appointments to bring cases into the Capital Taxes Branch in Dublin where help will be provided. This facility is obviously more convenient for Dublin solicitors than for practitioners in the rest of the country. However, officers in the Capital Taxes Branch will be available to travel outside Dublin to give assistance on form completion if there is sufficient demand. Arrangements for such visits can be made through the secretaries of the local Bar Associations.

Solicitors should also find the new self assessment form (I.T.38) helpful in completing assessments. The form was specifically designed to lead the person completing it step-by-step through the self assessment computation. An accompanying instruction booklet (I.T.39) has also been issued. The design and content of the self assessment form and booklet took on board contributions and comments made by several solicitors and any further comments or criticisms will be welcomed.

A better and more efficient system

The voluntary scheme showed that self assessment yielded considerable benefits. Delays and uncertainty were reduced and the administration of estates was speeded up considerably. There is every reason to believe that, with the continued co-operation of solicitors, the change to mandatory self assessment will be smooth and efficient. □

COMPANY NAMES AT RISK

A new policy introduced by the Companies Office on 12th January 1989, means that it is very easy for unrelated parties to register companies with similar names.

The onus for detecting that a name has been registered, which is similar to your company's name rests with you. The incorporation date, rather than the date trading commences is critical in determining whether an objection to a name will be considered.

Over 15,000 new names will be registered in 1989 and it is essential that all companies arrange to monitor these new names. Name Watch Ireland ensures effective protection of company names. For more information, please contact ***James Daly.***

NAME WATCH

IRELAND LIMITED

Dollard House, Wellington Quay, Dublin 2.
Telephone: 791384. Facsimile: 796470.

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 as 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.
25th day of October, 1989.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Timothy Joseph Kelleher, Killavoy, Banteer, Co. Cork. Folio No.: 1409; Lands: Killavoy; Area: 19a.3r.25p.; County: **CORK.**

Patrick Brendan Kelly, Booldurragh, Fenagh, Co. Carlow. Folio No.: 3195F; Lands: Booldurragh; Area: 17.864 hectares; County: **CARLOW.**

Bernard Gillane, Folio No.: 17870; Lands: Streamstown; Area: 12a.3r.31p.; County: **GALWAY.**

Oliver Underhill and Michael P. Maguire, 6 Mooreville, Rathdowney, Co. Laois. Folio No.: 1414F; Lands: Rathdowney; County: **QUEENS.**

Mary Moylan, Killehenny, Ballybunnion, Co. Kerry. Folio No.: 21334; Lands: Killehenny; Area: 7.125 perches; County: **KERRY.**

Patrick Daly, Church Street, Tullamore, Co. Offaly. Folio No.: 3119; Lands: Cloncollog; Area: 13a.1r.9p.; County: **OFFALY.**

Thomas Callaghan, Boho, Ballintubber, Co. Roscommon. Folio No.: 6943F; Lands: Arm; Area: 1.378 hectares; County: **ROSCOMMON.**

Patrick Joseph Cannon, Rougheen, Ballaghadereen, Co. Roscommon. Folio No.: 7345; Lands: Kiltimagh; Area: 5a.1r.13p.; County: **MAYO.**

James Keenan, Folio No.: 20351; Lands: Tawlaght (Barony of Boyle); Area: 7.822 acres; County: **ROSCOMMON.**

Patrick McNally, Rolestown, Stamullen, Co. Meath. Folio No.: 9609; Lands: Moorestown; Area: 8a.3r.10p.; County: **MEATH.**

Margaret Courtney, Ballycloghan, Carrickboy, Co. Longford. Folio No.: 5511; Lands: Ballycloghan; Area: 18a.2r.3p.; County: **LONGFORD.**

John Joseph Sleator and Mary Sleator, Ballynure, Grangecon, Co. Wicklow, (Tenants in Common). Folio No.: 2684F; Lands: (1) Ballynure Park; (2) Knoxtershill; Area: (1) 42.344 acres; (2) 77.169 acres; County: **WICKLOW.**

John Hannon, Kiltemplin, Patrickswell, Co. Limerick. Folio No.: 13029; Lands: Kiltemplin; Area: 22.275 hectares; County: **LIMERICK.**

Francis McCabe, Ballyconnell, Belturbet, Co. Cavan. Folio No.: 13309; Lands: Lecharrownahone (part); Area: 21a.3r.34p Barony Tullyhaw; County: **CAVAN.**

Joseph Fitzpatrick, 13 Railway View, Roscrea, Co. Tipperary. Folio No.: 36540; Lands: Townparks; County: **TIPPERARY.**

Most Reverend Peter Birch, Reverend Thomas Murphy and Reverend Garret Phelan. Folio No.: 1047; Lands: Rossaneny; Area: 9a.3r.2p.; County: **KILKENNY.**

James Gleeson, New Bridge, Cappamore, Co. Limerick. Folio No.: 21394; Lands: Gortaclareen; Area: (1) 41a.3r.36p.; (2) 5a.1r.9p.; County: **LIMERICK.**

Owen Molloy, Kilmurray South, Kilmacanogue, Co. Wicklow. Folio No.: 5982; Lands: Kilmurray South; Area: 4a.1r.7p.; County: **WICKLOW.**

Desmond Pakenham-Keady and Kathleen Elizabeth Pakenham-Keady, Barnaculia, Killiney, Co. Dublin; Folio No.: 7157F; Lands: Curraghtown; Area: 0.656 acres; County: **MEATH.**

John Doyle and Audrey Doyle, 56 Willowbrook Lawns, Celbridge, Co. Kildare. Folio No.: 10032F; Lands: Aghards (part); County: **KILDARE.**

Oliver Synnott and Juanita Synnott, Platin, Drogheda, Co. Meath. Folio No.: 21628; Lands: Platin; County: **MEATH.**

Henry McGrane, Anne McMahon and John English, Dunleer, Co. Louth. Folio No.: 567F; Lands: Dillonstown; Area: 0a.1r.0p.; County: **LOUTH.**

Sean Moynihan, West End, Rathmore, Co. Kerry; Folio No.: 22248; Lands: Shinnagh; Area: 0a.0r.24p.; County: **KERRY.**

Thomas Palmer, Ballycoras Road, Kilternan, Co. Dublin; Folio No.: 6800F; Lands: Ballybawn Lower; Area: 1 acre; County: **DUBLIN.**

Owen Clarke, Ledonigan, Bailieborough, Co. Cavan. Folio No.: 736F; Lands: (1) Ledonigan, (2) Tullywaltry; Area: (1) 3a.3r.0p., (2) 9a.0r.36p.; County: **CAVAN.**

LANDLORD AND TENANT APPLICATION

THE CIRCUIT COURT

South Eastern Circuit
County of Tipperary.

NOTICE OF APPLICATION TO THE COUNTY REGISTRAR

In the matter of the Landlord and Tenant Ground Rent Acts 1967–1984.

In the matter of an application pursuant to Section 17 of the Landlord and Tenant Act, 1967.

THE VERY REVEREND
CANON JOHN J. LAMBE P.P.,
Applicant
– and –
THE SUCCESSOR IN TITLE TO
THE ESTATE OF
EDMOND S. POE, DECEASED
Respondents

WHEREAS the applicant is now entitled to a leasehold interest under an Indenture of lease dated 22nd day of August, 1901 and made between Edmond S. Poe as Lessor of the First Part, Judith Hogan of the Second Part, His Grace Most Reverend Thomas Croke and the Reverend Edmond Bourke and Joseph Phelan all of the Third Part for a term of 99 years therefrom in ALL THAT AND THOSE the plot and piece of ground situate in the townland of Clonimiclon, parish of Boulick, barony of Slievedaragh and County of Tipperary measuring in breadth in the front 84 feet or thereabouts, in breadth of the rear of 84 feet or thereabouts and bounded in the North East, North West and South West by the holding of Judith Hogan aforesaid and on the South East by the road leading from Ballysloe to Grange which said lot or piece of ground was previously held by the said Judith Hogan as Tenant to the said Lessor. And WHEREON there has since been built a schoolhouse called Clonimiclane National School (orse. Clonimiclon National School) for the education of the children of the parish aforesaid and WHEREAS the respondent is the person now and at all relevant times entitled to the fee simple interest in the said property as sole trustee thereof and WHEREAS the applicant is desirous of having the matter of the acquisition by him of the fee simple interest and all matters relating therewith determined by the County Registrar for the County of Tipperary pursuant to the provisions of the said acts.

TAKE NOTICE that on the 15th day of November, 1989 at 12 o'clock noon or on the first available opportunity thereafter application will be made by the County Registrar for the County of Tipperary at the Courthouse, Thurles in the County of Tipperary for an Order:–

1. Determining that the applicant is entitled as the sole Trustee appointed to succeed the said Most Reverend Thomas Croke, the Reverend Edmond Bourke and Joseph Phelan to acquire the fee simple in the said property.

2. Determining the purchase price payable in respect of the said acquisition.
3. Determining the person or persons entitled to receive the said purchase money and in what proportion.
4. Appointing an Officer of the Courts to execute a Conveyance of the fee simple interest in the said property in the event of the persons required by Statute to Convey same, refusing or failing to do so.
5. For payment of costs payable by the parties in respect of the said application such further or other relief that may be necessary for the purposes of such a lease.

Dated this 12th day of September, 1989.

Thomas F. Griffin & Co.,
Solicitors for the Applicant,
Parnell Street, Thurles,
Co. Tipperary.

TO:
The County Registrar,
The Courthouse,
CLONMEL.

TO:
or to whom this application may concern.

LANDLORD AND TENANT APPLICATION THE CIRCUIT COURT

South Eastern Circuit
County of Tipperary.

NOTICE OF APPLICATION TO THE COUNTY REGISTRAR

In the matter of the Landlord and Tenant Ground Rent Acts 1967–1984.

In the matter of an application pursuant to Section 17 of the Landlord and Tenant Act, 1967.

ROSE LEAHY
Applicant
– and –
THE DE COURCY DUFF ESTATE
Respondents

WHEREAS the applicant is now entitled to a yearly tenancy in ALL THAT AND THOSE the part of the lands of Borris land South in the Barony of Upper Ormond and County of Tipperary and now commonly known as Pallas Street, Borrisoleigh in the County of Tipperary containing 1 rood and 27 perches statute measure or thereabouts with the four dwelling houses and premises thereon as tenant to one Laurence Egan as part of the De Courcy Duff Estate by virtue of an Indenture dated 31st day of October, 1911 and WHEREAS the Respondents are the persons now and at all relevant times entitled to the fee simple interest in the said property and WHEREAS the applicant is desirous of having the matter of the acquisition by her of the fee simple interest and all matters relating therewith determined by the County Registrar of the County of Tipperary pursuant to the provisions of the said Acts.

TAKE NOTICE that on the 15th day of November, 1989 at 11 o'clock on the forenoon or on the first available date thereafter application will be made to the County Registrar for the County of Tipperary at the Courthouse, Thurles in the County of Tipperary for an Order:–

1. Determining that the applicant is entitled to acquire the fee simple in the said property.
2. Determining the purchase price payable in respect of the said acquisition.
3. Determining the person or persons entitled to receive said purchase money and in what proportion.
4. Appointing an Officer of the Courts to execute a Conveyance of the fee simple interest on the said property in the event of the persons required by Statute to Convey the same refusing or failing to do so.
5. For payment of costs payable by the parties in respect of the said application such further or other relief as may seem to meet the purchases herein.

Dated this 12th day of September, 1989.

Thomas F. Griffin & Co.,
Solicitors for the Applicant,
Parnell Street, Thurles,
Co. Tipperary.

TO:
The County Registrar,
The Courthouse,
CLONMEL.

Patrick J. O'Meara & Co.,
Solicitors for the Respondents (appointed),
Thurles, Co. Tipperary.

Or to whom this application may concern.

IN THE MATTER OF THE LANDLORD & TENANT GROUND RENTS ACTS, 1967 to 1984, MAURICE LEAMY, and ANN(e) MARIE LEAMY, APPLICANTS. DALE ESTATE, RESPONDENTS

WHEREAS the Applicants have applied to me for an Order declaring that they are entitled to acquire the Fee Simple Interest in "All That and Those the Dwellinghouse and Premises, situated at No. 66, Kenyon Street, (Formerly Barrack Street), in the Town of Nenagh, Barony of Lower Ormond and County of Tipperary, and formerly held under a Yearly Tenancy to the Dale Estate and for such further or other Orders as may be necessary in the matter I HEREBY GIVE NOTICE that I will sit at the Courthouse, Nenagh, on the 29th day of November, 1989, at 3.30 p.m. to hear said Application and any Submissions by any interested Parties thereto.

Signed/...PATRICK J. McCORMACK.....
County Reigstrar.

TO/
All of Whom it May Concern.

The Profession

Eleanor Wardlaw & Co. and M. J. O'Connor & Co. have pleasure in announcing that from 26 October, 1989, Eleanor Wardlaw, Solicitor, will practise with M. J. O'Connor & Co., Solicitors, at 2 George St., Wexford. Tel. Nos. (053) 22555 and (053) 23266. Fax No. (053) 24365.

Missing Deeds

We act for the devisee of lands at Tarramud, Clarenbridge, Co. Galway, who seeks registration of her title in the Land Registry. These lands were conveyed by deed dated the 9th August, 1921 to Andrew Forde and Edward O'Hara both of Cloughlahard, Kilcolgan, County Galway as joint tenants in common the assurance being Anne Redington with trustees Thomas Redington and Major Thomas Wilson Lynch. The same lands were subject of a further deed 17th October, 1921 by the said Andrew Forde and Edward O'Hara. This severed the joint tenancy leaving each with sole title to half the lands.

Both deeds were duly registered and memorials have been submitted to the Examiner of Titles. The Examiner requires search to be made for the original deeds and specifies "from solicitors consulted (by the Forde and O'Hara families) and from other solicitors".

We would be obliged to hear from solicitors in the Tuam, Athenry, Oranmore or Gort areas of County Galway or in Galway City who might have knowledge of the whereabouts of the missing documents.

T. Dillon-Leetch & Sons, Solicitors, Ballyhaunis, Co. Mayo. Tel: (0907) 30004

Lost Wills

O'SULLIVAN, Sheila, late of No. 14, Lennox Place, Dublin 8, (retired Civil Servant). Will any person having knowledge of the whereabouts of a Will of the above-named deceased who died on the 23rd day of August, 1989, please contact C. W. Ashe & Co., Solicitors, The Square, Macroom, Co. Cork, Tel. (026) 41005, Fax: (026) 42157.

ROONEY, Patrick, late of 31, Griffith Parade, Dublin 11. Will anybody having knowledge of the whereabouts of a Will of the above-named Deceased who died on the 7th of September 1982, please contact Joseph T. Deane & Associates, Solicitors, 28/30, Exchequer Street, Dublin 2. Tel. (01) 712869.

Miscellaneous

PARTNERSHIP: Sole Practitioner seeks to enter into partnership in Dublin area. Box No. 100.

FOR SALE: Irish reports on microfiche 1917-77, plus microfiche reader. Phone: (01) 979626 after 6.00 p.m.

Employment

MEMBER of the Medico-Legal Society seeks forensic work, including research and analysis. Box No. 110.

GALWAY LL.B. GRADUATE, experienced typist and WP, seeks position as Law Clerk/Legal Assistant/Secretary. Full or part-time. Anything considered. Tel. 091-26029 (mornings).

LEGAL SEC./P.A./PERSON FRIDAY, with lots of initiative and many years of experience in conveyancing, probate, litigation, etc., currently employed and living 12 miles from city centre, desires new horizons. *What offers?* Reply Box No. 120.

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Legal Recruitment

OPPORTUNITIES IN ENGLAND/IRELAND

Our clients include all sizes and types of firms of solicitors from small local practices to international firms and companies in all sectors. Many of them are interested in Irish lawyers with good academic qualifications and experience in commercial work. A small selection from the positions we are currently instructed to fill is set out below.

LONDON

CONSTRUCTION LAWYER **TO £30,000**
Our client, a specialist firm in central London with an excellent reputation in the construction field, seeks a 1 to 3 year qualified solicitor with relevant experience to join the team. Early responsibility is envisaged.

COMPANY/COMMERCIAL **TO £33,000**
A high calibre 1 to 3 year qualified lawyer with a first class academic background is sought by this medium sized City firm. Working closely with the senior partner, the successful applicant will be involved in all aspects of corporate work including substantial mergers and acquisitions.

COMMERCIAL LITIGATION **TO £30,000**
This medium sized Inns' firm seeks an 18 month to 2 year qualified solicitor with experience in a broad range of commercial litigation work to join its expanding department. First class opportunities exist for the suitable candidate.

PROVINCES/IRELAND

GALWAY **TO £30,000 + CAR**
This insurance company requires a solicitor with company/commercial experience to handle a variety of work including acquisitions, company formations, share schemes and a range of other matters.

DEVON **TO £30,000**
The Tiverton Office of this large firm based in the South West seeks a solicitor with up to 4 years' experience of trust and tax work to undertake a broad workload on behalf of a commercial and agricultural land owning client base.

NOTTINGHAM **c. £20,000 + CAR**
An assistant to the head of the contracts department is sought to join this high-technology company. Applicants must have a minimum of 1 years' contract experience and wish to work in a highly commercial and fast moving enviroment.

Our consultant, Anne Stephenson, is an Irish solicitor with extensive legal recruitment experience in the English market. With this background she is able to fully understand your requirements, advise and assist you in making the move. For further information, please contact **Anne Stephenson** on

031 831 3270

or write to her, with a full Curriculum Vitae, at **Laurence Simons Associates, 33 John's Mews, London WC1N 2NS.** All approaches will be treated in strict confidence.

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The Society will advance up to 90% of the valuation of the house. Maximum term 20 years.

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The Society provides for new and existing borrowers up to 90% of the current market value of the property including, where applicable, the amount outstanding in relation to any prior Mortgage and any other domestic borrowings. Maximum term 15 years.

Residential Investment Property
The Society will advance up to 70% of the value for the purchase of Residential Investment Properties for single or multi-unit lettings. This facility is also available to owners who wish to refinance such properties at more attractive interest rates. Maximum term 15 years.

Residential/Commercial Property
The Society will advance up to 65% of the valuation for the purchase of Commercial Properties (offices, shops etc.) which incorporate some residential accommodation. This facility is also available to current owners who wish to refinance their borrowings at more attractive interest rates. Maximum term 15 years.

Commercial Property
Where the property is used exclusively for Commercial purposes and has no residential content, then the Society will advance up to 60% of the valuation for the purchase of such properties. This facility will also be available to present owners who wish to refinance their borrowings at more attractive interest rates. Maximum term 15 years.

Finance for Other Purposes
Where an applicant owns his own property or has an existing Mortgage on it, the Society will advance funds for family education or other domestic or general purposes. The sum advanced can include, where applicable, an additional sum to cover any prior Mortgage on the property concerned. Maximum term 15 years.

METHODS OF REPAYMENT

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This is the traditional method of repaying mortgages where the borrower's monthly repayment consists partly of capital and partly of interest.

Endowment Mortgages
Under this method of repayment the borrower only pays interest to the Society. Payment of the capital sum is catered for by an Endowment Insurance Policy which is scheduled to terminate at the same time as the mortgage. In this way the borrower maximises the tax advantages and may also have the added benefit of a tax free bonus at maturity.

Pension Linked Mortgages
This facility is aimed at the self employed or those in non-pensionable employment. As with Endowment Mortgages the payment to the Society consists of interest only. Payment of the capital sum is catered for by the tax free cash element of an accumulated pension fund.

Unit Linked Mortgages
As with Endowment and Pension Linked Mortgages interest only is paid to the Society. The borrower also enters a Unit Linked Savings Contract with an insurance company with the expectation that the accumulated value of this fund will be adequate to repay the capital sum.

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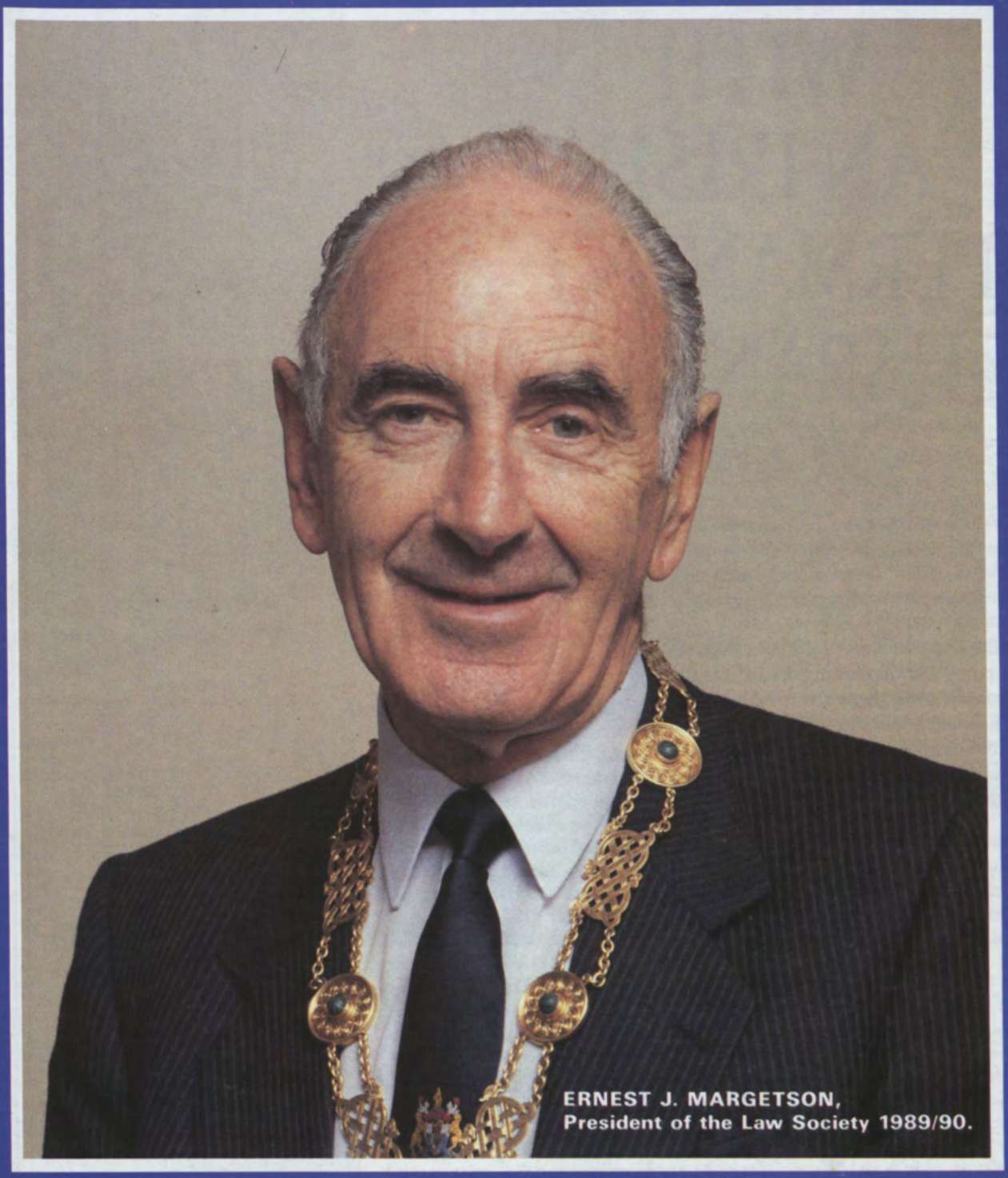
GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 83 No. 11 November 1989



ERNEST J. MARGETSON,
President of the Law Society 1989/90.

- Company Auditor — Principles of Civil Liability
- Status of Children born outside marriage and their property rights
- Law Tech '89

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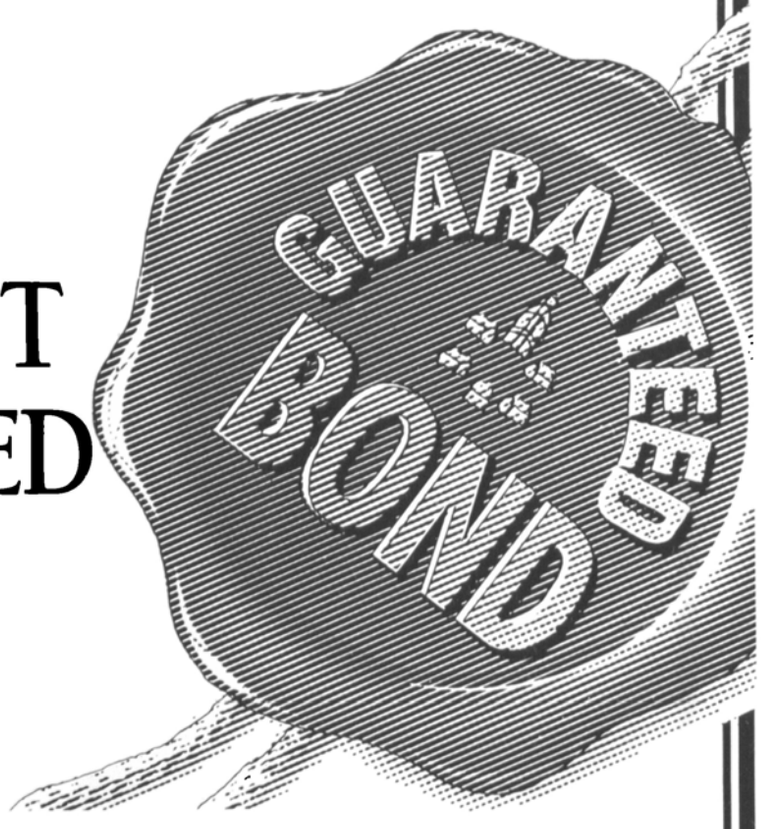

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GAZETTE
INCORPORATED LAW SOCIETY OF IRELAND
Vol. 83 No. 11 November 1989

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Executive Editor:
Mary Gaynor

Committee:
Eamonn G. Hall, Chairman
Michael V. O'Mahony, Vice-Chairman
John F. Buckley
Gary Byrne
Patrick McMahon
Charles R. M. Meredith
Daire Murphy
John Schutte

Advertising:
Seán Ó hOisín. Telephone: 305236
Fax: 307860

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Tel.: 710711. Telex: 31219. Fax: 710704.

Viewpoint

In the welter of comment critical of the British Criminal Justice system following the release of the Guildford Four there is an underlying assumption that "it could not happen here". The Irish Council for Civil Liberties have done well to draw public attention to the fact that not only could it but it did happen here, in the case of the DPP and Christopher Anthony Lynch. This is a horrifying example of how an innocent person could be convicted largely on the basis of confessions made to the Gardaí. There was in fact independent evidence to cast grave doubts on whether some of the statements contained in the confessions could in fact have been correct and indeed as to whether Mr. Lynch could have committed the murder. It must also be said that the position of a person suspected of a crime who is brought to a Garda Station for questioning has disimporved, rather than improved, since the Lynch case. Section 4 of the Criminal Justice Act 1984 gives the Gardaí power to detain a suspect for a possible maximum of 20 hours during which interrogation can be carried out.

It has been suggested that corroborative evidence should be required to support confessions made by suspects in Garda custody. This may be taking the matter too far because there is a wide range of minor offences, particularly house breaking where an admission by the suspect is probably the only evidence that is ever going to link that suspect with the particular crime. It may therefore be permissible to allow confessions to minor offences to be sufficient grounds for conviction in the absence of any corroborative evidence.

Where more serious offences are concerned there is clearly a danger on relying on the confessions alone. Much time is frequently spent in major criminal trials in arguments as to the admissibility of confessions made in police custody and much time spent in argument as to what precisely took place and was said during the interrogation.

In England and Wales a procedure for the video recording of interrogations has been introduced on a trial basis and it is argued that this would provide irrefutable evidence of the manner in which the interrogation was conducted.

In Scotland, as in many other European countries, interrogation of suspects in serious criminal cases is carried out not by the police but by an independent officer whose function it is to carry out a formal interrogation of the suspect all of which is adequately recorded and forms the basis of the decision whether to prosecute or not. The introduction of such a system in Ireland might well not only give better protection to suspects who are innocent but also significantly shorten the length of major criminal trials as the evidence acquired in the interrogation would be unassailable. □

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Will ICS keep me in the dark on the progress of my application?	☐ YES	☑ NO
Will my client need to have a particular property in mind?	☐ YES	☑ NO
Will there be any delay in getting the cheque?	☐ YES	☑ NO
Can I get better service from another financial institution?	☐ YES	☑ NO

When it comes to a mortgage there's no better building society than ICS for understanding the needs of you and your clients. That's why we keep you in touch with every stage of your client's mortgage application. What's more (or should we say less) is that your client's application will be approved in principle within twenty four hours and we can issue a formal offer of advance in five working days. There's no better building society than ICS, especially when it comes to mortgages.

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Maurice Owens	Tony Moroney	Eileen Wall
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Michael Dowling	Sean O'Beirne	Joe Harte

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The Company Auditor – Principles of Civil Liability

Under Section 160 of the Companies Act of 1963, an Auditor must be appointed at each A.G.M. to conduct the annual audit and to produce a certified set of accounts together with an auditor's report for presentation to members of that company in general meeting.

The function of the statutory auditor was examined by Lindley L.J. in *Re London & General Bank* (No. 2) [1895] 2 Ch. 673. He stated at p. 682 that "It is no part of an auditor's duty to give advice, either to the directors or shareholders as to what they ought to do . . . His business is to ascertain and state the true financial position of the company at the time of the audit and his duty is confined to that".

An auditor may incur liability in the carrying out of his statutory duties, but he cannot protect himself by restricting his activities to arithmetical calculation and strict verification of figures. As Lord Denning put it in *Fomento (Sterling Area) Limited -v- Selsdon Fountain Pen Company* [1958] 1 WLR 45:-

"His vital task is to take care to see that errors are not made, be they errors of computation or errors of omission or commission, or downright untruths . . . he must come to it with an enquiring mind, not suspicious of dishonesty".

An auditor should not only check the accuracy of the figures supplied to him but also examine the accounting systems used by the company in producing figures. In *Kelly -v- Boland* [1989] ILRM 373 at p. 388 Mr. Justice Lardner stated: "It is clear that an auditor cannot conduct an examination of all the company's transactions during the particular period. He is concerned to see that there is an adequate and proper system for recording transactions, that such transactions are properly authorised and that the assets of the company are properly looked after and safeguarded". Should an auditor encounter a point of law in conducting the audit, he may feel able to deal with the problem himself, but he is entitled to seek legal advice and the terms of his appointment must be interpreted as covering his seeking such advice (*Bevan -v- Webb* [1901] 2 Ch 59). It is in the area of tort that the Company Auditor's liability in common with that of other financial advisers has undergone major change in recent years. The present article will therefore concentrate on tortious rather than contractual and statutory liability.

By
Margo Ford, B.A., LL.B.
Barrister-at-Law

The standard of care to be exercised by an auditor in carrying out his duties was examined by Hanna J. in *Leech -v- Stokes* [1937] IR 787. The auditor had been engaged to prepare the annual Profit and Loss Accounts for income tax purposes. He certified the accuracy of the accounts, having failed to detect embezzlement by a company clerk. After examining the relevant authorities, Hanna J. stated at p.798, that the duty of the auditor was "under the circumstances of the particular case and of his employment to exercise such skill and care as a diligent skilled and cautious auditor would exercise according to the practice of the profession". In the case of *Kelly -v- Boland,* supra, Mr. Justice Lardner accepted evidence of S.S.A.P.'s as good evidence of the standard of care appropriate to auditors in conducting an audit. The evidence of expert witnesses is also heavily relied upon, as it is in all professional liability cases. Under the new Companies (No. 2) Bill 1987, the professional accountancy bodies must adopt standard codes of conduct for their members, together with means of enforcement. The codes will be of great assistance to the Courts in providing them with a guide to good accountancy practice. Should he fail to exercise due care in fulfilling his auditing duties, the company auditor may incur statutory, contractual and/or tortious liability. I propose to deal with each in turn.

Statutory Liability

The duties of the Company Auditor under present legislation are to certify the Annual Accounts, Balance Sheet, Profit and Loss Account and group accounts, approve the Directors' Report and to prepare his own Report for presentation to the members of the company. He is not responsible for ensuring that the Auditor's Report actually reaches the members. In carrying out his statutory duties, the Company Auditor acts as an officer of the company and, as such, he may be the subject of Secion 298 misfeasance proceedings. It should be noted that if the particular auditor's contract included duties and obliga-

Margo Ford.

tions additional to his statutory duties they do not attract liability under Statute.

Should the company go into liquidation, Section 298 provides that a creditor, the liquidator or a member may apply to the court to have the conduct of any "officer", including the auditor, examined. If the court finds that the officer has ". . . misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust . . ." it may compel the officer concerned to repay or restore the company property in whole or in part, with interest.

Section 198 of the new Bill states that there is an onus on every company to keep proper books of account and that the directors must take all reasonable steps to ensure the company meets the Section's requirements. Section 194 obliges the company auditor to inform the company and the Registrar if he forms the opinion that the company is in contravention of Section 198 by "failing to cause to be kept proper books of account".

Failure to keep proper books of account may in a subsequent liquidation lead to the personal liability of any one of the officers for the debts of the company where it is proved to the Court's satisfaction that the officer was in default (Section 200). It could be argued that the auditor who has served a notice under Section 194 has exhausted his obligations in ensuring that proper books of account are kept and that he cannot be subsequently held liable under Section 200 if the company failed to keep proper books of account.

Contractual Liability

An auditor may be liable to the company in damages if he fails to fulfil his contractual obligations. This is true, not only of substantive breaches, but also of the failure to reach professional standards in carrying out his contractual obligations. The terms of his contract are normally contained in an express service agreement with the company with further terms possibly laid out in the company Articles and other contract documents. The auditor has no contractual relationship with the members of the company and so will not incur any contractual liability to them for breach of contract, although he may incur concurrent liability on agency or negligence principles (*Caparo Industries -v- Dickman,* post).

Where a company sues its own auditor for breach of contract, it must prove a consequential loss and damages will be compensatory. Damages will usually be minimal in such cases as it is difficult for the company to prove that it suffered losses that it would not otherwise have suffered, as a result of its reliance on inaccurate figures which the auditor certified as being correct in his audit of the accounts.

Tortious Liability

If an auditor knowingly gives false information to any party about the company's financial standing he will be liable in damages for fraud at Common Law. If he has acted in a negligent rather than a fraudulent manner, his liability will be the same as any professional who knows, or ought to know that his skill and judgment are being relied upon.

If he fails to exercise reasonable care he may be liable in damages not only to the company, but to shareholders and third parties (including investors) who, he foresaw, or should have foreseen, would rely on the accuracy of the certified accounts and opinions expressed by him in his capacity as auditor. He may be liable under the ordinary principles of negligence and/or the principles governing negligent misstatement. In a case of *Anns -v- Merton London Borough Council* [1978] A.C. 728, Lord Wilberforce said at p. 751: "Through a trilogy of cases in this House, *Donoghue -v- Stevenson, Hedley Byrne & Company Limited -v- Heller* and *Home Office -v- Dorset Yacht Company Limited.*, the position has been reached that in order to establish that a duty of care arises in a particular situation it is not necessary to bring the facts of that situation within those previous situations in which a duty of care has been held to exist, rather, the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered the damage there is sufficient relationship of proximity or neighbourhood, such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or reduce or limit the scope of the duty or the class of persons to whom it is owed or the damage to which a breach of it may give rise (see the *Dorset Yacht* case per Lord Reid).

In an unreported decision delivered on the 25/11/'80 (*McSweeney -v- Bourke*) Ms. Justice Carroll expressed her reluctance to extend financial advisers' liability for negligent mis-statement beyond those to whom the statement was actually made, saying at p. 17:

"Irrespective of contract, the adviser has a primary duty of care to the client and there may or may not be a duty to third parties. If the advice given is not given negligently *vis-a-vis* the client in the first instance but is given with all due care, there is no breach of duty to the client. If an adviser is not negligent *vis-a-vis* the client and does not purport to advise any person other than the client, I do not see how a third party who knows of the advice given to the client and carries out steps outlined in that advice (ultimatley to his own detriment) can claim that the advice was negligent in relation to him".

In later cases the High Court has, however, accepted that an auditor's liability to third parties hinges on foreseeability, namely "was it foreseeable that reliance would be placed on the auditor's advice or opinion by the third party?" In *Kelly*

James Nash F.S.S. Dip.

Forensic Document Examiner and Handwriting Consultant

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Clondalkin, Dublin 22.
Telephone: (01) 571323

-v- Boland & Ors., unreported, *supra,* the plaintiffs claimed damages for negligent mis-statement by the company auditor based on his failure to detect errors in stock-taking figures in the company's audited accounts. The accounts were used in subsequent negotiations leading to the purchase of the business assets by the plaintiffs. Lardner J. cited Woolf J's statement of the law on auditors' liability in *J.E.B. Fasteners -v- Marks Bloom & Company,* [1981] 3 All ER 289, with approval. At p. 296 Woolf J. said:-

''Without laying down any principle which is intended to be of general application on the basis of the authorities which I have cited, the appropriate test for establishing whether a duty of care exists, appears in this case to be whether the defendants knew or reasonably should have foreseen at the time the accounts were audited that a person might rely on those accounts for the purpose of deciding whether or not to take over the company and therefore could suffer loss if the accounts were inaccurate. Such an approach does place limitations on those entitled to contend that there has been a breach of duty owed to them. First of all, they must have relied on the accounts and, second, they must have done so in circumstances where the auditors either knew that they would be relying on their accuracy or ought to have known that they might.''

The longer the period that has elapsed between the audit and the time that reliance was placed upon the audited accounts, the more difficult it will be for a plaintiff to establish that the auditor ought to have foreseen that his certificate would be relied upon.

In *Kelly -v- Boland and Ors.,* the auditor was aware of an imminent sale of the business when he audited the 1976 Accounts. Lardner J. was also of the opinion that when the 1975 audit was conducted, the auditor ought, in the light of his knowledge at the time, to have foreseen that reliance might be placed on the accuracy of the accounts in a subsequent sale of the business and assets of the company. The company was in financial difficulties at the time. Lardner J. dismissed the plaintiffs' claim in relation to the '73 and '74 audits.

Although Mr. Justice Lardner found that, having regard to the professional standards prevailing at the time of certification, the auditors were negligent in failing to ensure the accuracy of the stock-taking figures by attending at and observing the stocktaking exercise, he nevertheless held against the plaintiffs. He held the plaintiffs had failed to prove that any inaccuracies in the figures for stock had misled them as to the profits and losses for the years '75 and '76.

In a claim for negligent mis-statement, it is therefore clearly not sufficient to prove that there were inaccuracies in the audited accounts and that the auditor was negligent in failing to detect them. It must further be proved that the plaintiff relied upon the accuracy of the accounts, and such reliance was foreseeable and further that the plaintiff suffered economic loss as a result. In *J.E.B. Fasteners -v- Marks Bloom & Company,* supra, the plaintiffs proved the auditors had been negligent in conducting the audit and that the company accounts had given a false and misleading impression of the company's financial position. The plaintiffs pleaded reliance on the audited accounts in their takeover of the company, but Woolf J. refused the plaintiffs' claim for damages concluding that even if the plaintiffs had known ''the true financial position of the company at the time'' they would not have acted any differently and consequently they had failed to establish a sufficient nexus between the auditor's negligence and their economic loss.

The recent case of *Caparo Industries plc -v- Dickman and Ors.* [1989] 2WLR 316 shows a further development of the law in this area. The English Court of Appeal in a 2:1 decision (O'Connor, Bingham and Taylor L.JJ.) re-examined the role of the statutory auditor in the particular context of a public limited company. Lord Justice Bingham stated the primary duty in and about the preparation of the company's annual accounts rests with the directors. The auditor's role, he said, was secondary and accessory, his

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task was to vet the accounts and provide the shareholders with independent and reliable information on the company's financial standing.

The facts of the case were that fraudulent misrepresentations made by the Chairman and Chief Executive of the company (F. plc.) had been included in the audited accounts. The accounts had been certified by the auditor who had failed to detect the falsity of the representations. The plaintiffs, being the holders of 100,000 shares, purchased further shares following the publication of the audited accounts. They gave evidence that they had relied on the accuracy of the accounts when purchasing the additional shares and that the audited accounts had also been instrumental in the plaintiffs' decision to take over the company six months later. The potential liability of the auditors in the circumstances was examined by Lawson J. by way of preliminary issue. The plaintiffs were suing both in their capacities as individual shareholders and as potential investors holding no shares. Lawson J. held at first instance that the auditor did not owe them a duty of care in either capacity, when carrying out his statutory function. The Court of Appeal, however, (O'Connor L. J. dissenting in part) held that the auditor owed a duty of care not only to the general body of shareholders, with whom he had a relationship close to contract, but also to the individual shareholder. The relationship between the statutory adutior and the individual shareholder was sufficiently proximate to ground a duty of care in carrying out his statutory duties. It was just and equitble to recognise the existence of that duty of care. The relationship between the auditors and the individual potential investors was, their Lordships held, less proximate. The auditor was not engaged to report to them but to the shareholders, the relationship between them was not contractual and the nexus or link between them was tenuous. It would neither be just nor equitable to find a duty of care existed between the auditors and the individual potential investor. Lord Justice Bingham laid down three clear tests to be satisfied before a duty of care could be found to exist between the plaintiffs and the auditors –

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(1) **Foreseeability:** was it foreseeable that the individual shareholders and investors would rely on the accuracy of the audited accounts and the audit report?

(2) **Proximity:** was the relationship between the auditor and the shareholders and potential investors sufficiently close to establish a duty of care?

(3) **Fairness:** was it just and reasonable that the Court should impose a duty of care on the auditor in the circumstances?

His Lordship held the plaintiffs had satisfied the three tests as individual shareholders and Lord Justice Taylor agreed that such a liability had been established. O'Connor L. J., dissenting in part, held that in the circumstances of the case before him he could see no reason for imposing upon the statutory auditor any duty to shareholders at Common Law in addition to the duties he owed to them under Statute. Those duties, he said, were owed to them as a body and not as individuals. This would, of course, mean that the plaintiffs would not be entitled to sue in their individual capacity for a breach of duty or statutory duty. The Court was unanimous, however, in holding that the auditors did not owe the plaintiffs any duty of care in their capacity as potential investors holding no shares. The importance of the case rests in the Court of Appeal's acceptance that a company auditor can owe a duty of care in the exercise of his statutory function, not only to the company, his employer, but also to individual shareholders, who would then be entitled to sue him in that capacity for economic loss they have suffered as a result of his negligence.

Avoiding Liability

In the absence of a contractual relationship with parties other than the company (e.g. an agreement to conduct a private audit) an exclusion clause published with the audited accounts and purporting to except the auditor from liability would be ineffective against such parties due to lack of privity. The auditor's contractual relationship is with the company itself and he cannot exclude his liability to the company by means of an exclusion clause or disclaimer by virtue of Section 200 of the Companies Act 1963. That section prohibits any provision "either in the company Articles or any contract with the company or otherwise" which purports to exempt a company auditor from any liability "which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company".

An auditor may enjoy a limited indemnity from the company in respect of his costs in successfully defending himself against civil or criminal proceedings, where the company Articles or his contract provide for such an indemnity. As with other agents, however, the auditor is not entitled to reimbursement or an indemnity from the company for loss occasioned to another if it is due to his own negligence. Where proceedings contemplated by Section 200 (above) are taken against or apprehended by a bona fide auditor he may apply to the High Court

under Section 391 for indemnity. The Court has a residual power to grant relief to the auditor if it is satisfied that "he has acted honestly and reasonably and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused".

If a company auditor finds that he is unable to fulfil his duties due to a refusal or failure on the part of the directors to supply him with accurate or sufficient information, he may have no option but to resign from his office before the expiration of his term or before the next annual general meeting. The new Bill allows such a resignation subject to certain conditions. Section 171 provides that a duly appointed auditor may, by way of a notice in writing, resign during his term of office, provided he reports to the members (by way of a written statement) any problems or irregularities in the company's affairs of which he is aware and which are connected with his resignation. If there are none, he must provide them with a statement to that effect. The company itself is obliged to serve copies of the statement on the Registrar and all those entitled to attend at a general meeting. Should an auditor be found to have acted from improper motives in circulation and content of his statement, he may find himself liable for the costs of any court application for an order relieving the company from the Section's service obligation. The Court may grant such relief if it is satisfied that the rights conferred on the auditor by the Section are being abused to "secure needless publicity for defamatory matter". The Bill does not appear to have envisaged the auditor being made a party "notice or otherwise" to such an application. The Section repeats in part Section 161 of the Companies Act 1963.

SUMMARY

In the present economic climate, companies' audited accounts are increasingly being relied upon for financial information by those wishing to invest in the company. They are no longer examined by the company management alone when plotting the course of its financial management and reviewing its performance.

The growth in the number of cases being brought against company auditors must be attributed to the increased circulation of information contained in audited accounts and audit reports to existing and potential investors. The company auditor should be aware of this when certifying the accuracy of the accounts and in writing up his report for presentation to the shareholders' meeting.

It is clear from recent case law that the statutory auditor will not be held liable for loss occasioned by a misleading or inaccurate audit to those who, without his knowledge or foresight, relied on the audit. If he was, or ought to have been aware, that a particular party would be relying on the accuracy of the audit then the auditor may owe him a duty of care, even though he is under no duty to report to him directly. This potential liability rests on recent developments in the law on negligent mis-statement. This issue of liability is decided on the basis of forseeability, the closeness of the relationship and, possibly, on the fairness of imposing liability on the auditor in the circumstances.

The parties to whom the statutory auditor may incur liability should he fail to conduct his audit with due care, skill and attention, and the nature of that liability, may be summarised as follows:-

a) **The Company**
His contract is with the company and, consequently, he may be liable to it in damages for breach of contract should he cause the company economic loss through a badly conducted audit.

He may also have concurrent liability for negligence and negligent mis-statement. Again, the company must prove an economic loss resulting from the auditor's negligence.

In addition he may incur statutory liability in a subsequent liquidation situation under S298 of the Principal Act and S198 of the new Bill.

b) **The Shareholders**
The auditor's relationship with the shareholders has been described as one akin to contract, but his potential liability to them is tortious. He is under a duty to report accurately to them on the company's financial position. If he should not do so then the company auditor may find himself liable to compensate the shareholders (as a body and possibly individually), in damages for negligence and negligent mis-statement for any resultant economic loss.

c) **Investors**
The negligent auditor's potential liability to an investor depends on whether he knew, or ought to have known, that that particular investor would be relying on his audit. He owes no duty of care to potential investors as they are innumerable and cannot be identified with any certainty.

Although the company auditor cannot be expected to guarantee the accuracy of the figures, opinions and forecasts in his audit report, he must exercise the standards of care, skill and diligence of a suitably qualified and experienced member of his profession in conducting the audit. It is vital, therefore, that he keep up to date with developments in general auditing practices, and that the profession circulate guidelines to all its members on a regular basis.

Following these guidelines is perhaps the best way of minimising the risk of incurring liability. □

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From the President . . .

Having been elected President of the Law Society at the Council meeting on 16th November this is my first message to the profession. Firstly, I would like to congratulate my predecessor Maurice Curran who put in a tremendous amount of work during the year, travelled extensively and spared no effort in working for the benefit of the profession. It was a difficult year with matters such as the Building Societies Act and the recently implemented changes in the education system. We were fortunate in having Maurice Curran there to lead and guide us through some difficult times. I genuinely say "thank you Maurice".

Obviously it is impossible to anticipate what will arise during the coming twelve months but it seems fairly certain that we will receive the report of the Fair Trade Commission on legal services and hopefully the Solicitors Bill will be introduced in the Oireachtas. We already have Committees appointed who will be in a position to deal immediately with both of these subjects and take all steps that may be necessary. I can assure the profession that they will be fully briefed on all developments and there will be full consultation through the Bar Associations.

During my year I look forward to travelling throughout the country and meeting as many members of the profession as I possibly can. I hope that all the members will attend the various Bar Association meetings at which I will be present as this is one of the great opportunities to keep you fully updated with what is going on in Blackhall Place and also gives me the opportunity of hearing the thoughts and views of the members of the profession. I am very anxious during my year that there should be regular consultation and communication between the Council and officers of the Society and all the members throughout the country.

I am also very anxious to urge all members to join the Solicitors Financial & Property Services Company as there are great benefits to be gained. I am glad to say that at the moment the membership figures are very encouraging. I have also no doubts that the meetings and workshops now being arranged throughout the country will further promote and encourage membership. In my view this is the best opportunity that the profession have had for many years to restore the image in the public mind that the Solicitor should be the advisor on financial matters. We are all aware of the erosion that has been suffered by Solicitors through the expansion of the activities of the Accountants, Banks, Insurance Brokers and Estate Agents.

Later on during the early part of 1990 I will be urging all the members of the profession to make certain that they have Professional Indemnity Insurance and that they have adequate cover. In this regard I ask all the members to support our own Solicitors Mutual Defence Fund Limited. I know that earlier this year other companies were offering very competitive rates but I think it is interesting that none of these rates was available or was offered until such time as we established our own Fund. It is to the mutual interest of all members to support our own Fund.

I will just close by saying how greatly I appreciate the honour that has been bestowed upon me by my profession and I will try my utmost to serve the profession up to the same high standard as my predecessors have done. It is my intention during my year to have as much consultation as possible with the profession and I will be very pleased to meet any members of the profession who would like to discuss any topics of current interest and to hear their views. I will of course be greatly dependent upon the help and co-operation of the Council and the various Committees.

Ernest J. Margetson

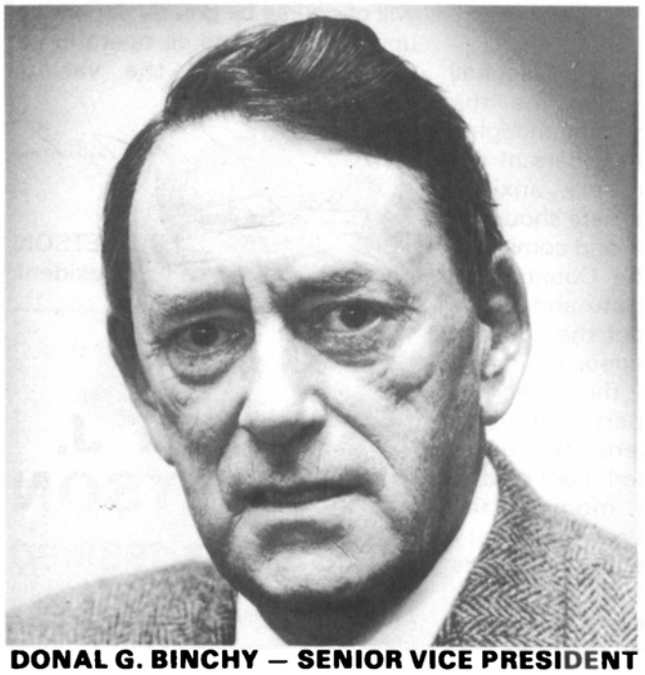
ERNEST J. MARGETSON,
President.

ERNEST J. MARGETSON

PRESIDENT 1989/90

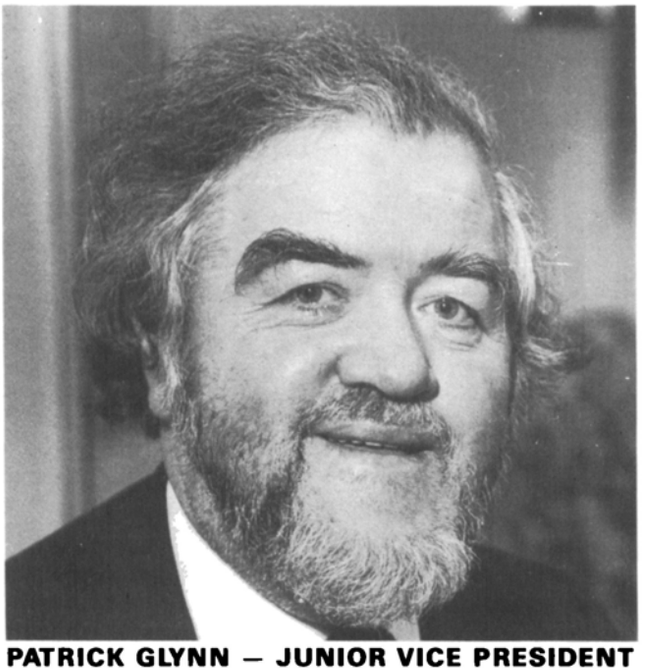
Mr. Ernest J. Margetson has been elected President of the Law Society. Mr. Margetson was educated at the High School and Trinity College, Dublin, and was admitted as a solicitor in 1951. He is senior partner in the firm of Matheson Ormsby Prentice. He was Honorary Secretary of the Dublin Solicitors Bar Association and also President of that Association. He was elected to the Council in 1974 and has served as Chairman of the Professional Purposes, Compensation Fund, Registrars and Finance Committees. He was Junior Vice-President of the Society for the year 1982/83. He is a Director of Solicitors Financial & Property Services Company and Solicitors Mutual Defence Fund Ltd. Mr. Margetson and his wife, Ruth, have two children, Stuart and Gay. Stuart is also a partner in Matheson Ormsby Prentice.

LAW SOCIETY — VICE PRESIDENTS 1989/90



DONAL G. BINCHY — SENIOR VICE PRESIDENT

Donal G. Binchy is Senior partner in the firm of O'Brien & Binchy, Solicitors, Clonmel, and is son of the late James A. Binchy, Solicitor. He was educated at Christian Brothers, Clonmel and at Clongowes Wood College. He qualified and was admitted as Solicitor in 1951 and was awarded the Society's Silver Medal in his Final Law examination. he was President of the County Tipperary Bar Association in the year 1980/81. He has been a member of the Council since 1975. He has served terms as Chairman of the Society's Parliamentary, Taxation and Education Committees and has been one of the Consultants on the Society's Advanced Taxation Course.



PATRICK GLYNN — JUNIOR VICE PRESIDENT

Patrick A. Glynn is a partner in Leahy & O'Sullivan, Solicitors, Limerick. He was educated at Crescent College, Limerick, and qualified as a Solicitor in 1956. He was President of the County & City of Limerick Bar Association 1978/1980 and has been a member of the Council since 1977. He was Chairman of the Professional Purposes Committee of the Society 1986/88 and is currently a member of the Compensation Fund Committee.

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The Society of Young Solicitors held its Autumn Seminar in the Killarney Great Southern Hotel, County Kerry in October. Sponsored by the Solicitors Financial and Property Services Company (Ireland) the theme for the weekend was Business and Finance.

In true SYS spirit, the weekend got off to a flying start with over 140 "young" solicitors including a contingent from Northern Ireland led by **Paul Spring** fortifying themselves against the rigours of the weekend ahead aboard the Champagne Express from Dublin to Killarney. Upon arrival a few short steps led to the old world charm of the Great Southern Hotel where conference delegates were entertained into the small hours by **Paul White** on piano.

On Saturday morning everyone rose at dawn and the stamina of the true young solicitor was reflected in the capactiy attendance at the opening lecture on "Company Takeovers" given by **Mr. Michael Irvine**, solicitor. A panel discussion on financial products/services for the personal and corporate client followed in which topics ranging from the futures exchange, the business expansion scheme, the financial services centre and the solicitors financial and property services were covered. The speakers were **Mr. Anthony Kirwan**, solicitor, **Mr. David Sanfey**, solicitor, **Mr. Brendan Russell, IDA** and **Mr. Peter Prost**, Managing Director, Sedgwick Dineen.

Saturday afternoon saw the tourists out in force with local attractions such as Ross Castle and Muckross House being visited by many and jaunting cars being hired by as many more. The Lake District also attracted considerable interest with at least one member of the group taking the opportunity to get in some swimming practice.

The social highlight of the weekend was undoubtedly the Banquet and Dance on Saturday evening at which members of the Kerry Law Society also attended. Mayo was also well represented. **Katherine Delahunt**, the Chairman of the SYS, expressed thanks to all concerned for the success of the weekend. Special thanks are due to **Miriam Reynolds** for trojan work behind the scenes. A large measure of the success of the weekend must also be attributed to the friendliness and efficiency of the staff of the Great Southern Hotel.

The closing lecture was given on Sunday morning by **Mr. Desmond Peelo, FCA.** The topic was "Financial Advice to Clients: The Untapped Resource For Solicitors". Many questions were raised afterwards from the floor demonstrating the awakening interest in this subject.

Lecture scripts on all of the topics covered at the weekend are available from **Norman Spendlove**, 15 Braemor Park, Churchtown, Dublin 14, Telephone 683842.

The SYS Spring Seminar takes place in The Great Southern Hotel, Galway, on the weekend of the 6th/8th April 1990. This is a joint conference with solicitors from England, Scotland and Northern Ireland. All topics will have a European content with particular emphasis on practice and procedure for solicitors in handling European Community cases and speakers will include a number of high profile representatives from institutions of the European Community.

Jennifer Blunden, PRO.
Society of Young Solicitors.

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LAW AGENCY

Law Tech 89

The first combined exhibition of technology for accountants, solicitors and barristers was a clear success. It was a great benefit to suppliers of general office equipment who catered for both professions. **Ann Hegarty of Cantec** found the greatest interest was in their heat binders: no doubt a side effect of the productivity of laser printers, which enables those WP precedents to get even longer – defeating the strongest of staplers and the most determined of secretaries aided with hammers. It had been rumoured that some firms had gone to Plan Expo downstairs looking for Hilti guns and Black & Deckers to help solve their binding problems. **Cantec's Peter McPartland** found that business was very good this year after being dissappointing last year. There is a new trend in office design. To maximise space, desks are built in units on the walls, especially in corners where computer terminals dictating machines etc. are all fitted tidily in place with no exposed wiring. The centre of the room is reserved for a conference table. To fit in with this **Peter Hynes** of **DEVTECH** has space saving multi-purpose Storage cabinets which can line the walls, They are beautifully designed – a far cry from the gun grey metal of the steel deeds cabinets of old. The more equipment a firm purchases the higher the overheads go. Turning to the recent spate of investment in Fax machines and Laser printers **Equitrac Corporation** was there to show you how to record painlessly their use as Client disbursements. Both **Martin Sawyer of Sabre Business Systems Ltd.** and **Patrick Shaw** of **Castletown Press plc** felt that last year's exhibition was great and this year was quiet enough. They had a great year last year with the installation of Cobra Legal accounting systems into many firms. Last year for a multi user system one had to buy an Alpha mini-computer: this year they had it running on a PC(286) installed with a special card with a MB of memory. **Patrick Shaw** had a very reasonably priced PC with a removeable 44MB hard disk. The disk cost £250. **Rick Deegan** of **BCL** was another convert to PCs and Unic/Xenis. His accounts system will run on Wang VS, PCs and Unix/Xenis. His Case management system (the first in Ireland) will run on a PC as well as Wang, and his Debt Collection system (used by one of the biggest financial institutions in Ireland) will also run on a PC. All his systems will shortly be running on Unix. This is the year that the PC has come of age for the legal profession with Unix pushing very hard for a place in the sun.

There was some great value in hardware. **David Kelly** of **Softech Computers Ltd.** had IBM Model 30 286 computers with a 20 MB Hard Disk reduced from £2,829 to £2,100. He had a twin bin Brother Laser Printer that printed on both sides of the paper reduced from £3,500 to £2,800. It had a very large selection of fonts, maybe not as many as the Kyocera but a much better choice with Pica and Elite being replaced by a better looking Brougham 12 and 10 point. As well as a 10 point Times Roman (the largest on the Kyocera) there was a 12.5 point Anelia proportional spacing which looked terrific. Like the Kyocera they had six printer emulations. They also has a single bin single sided Brother Laser reduced from £2,200 to £1,750. **Sharptext** had the new Kyocera 2200S with postscript for desktop publishing. Kyocera certainly led the way with speed and the number and quality of fonts. However, they should not rest on their laurels too long, and must address their market weaknesses such as cost, particularly the drum kits. **Seamus Murray** of **Business Electronic Equipment** had great value in a Hyundai 286 PC and a Ricoh PC6000 Laser Printer for under £3,000. He also demonstrated the excellent Q&A Word Processor and Database. **Michael McKeown** of **Tomorrow's World** primarly dealt with accountants but had some very price competitive equipment from Olivetti, as well as the Mac which has the best user interface in the world. **Seamus Brennan** of **Office Automation** demonstrated an Alcatel photocopier with reduction and four colours at a very competitive price.

One piece of software of interest to both solicitors and accountants was The Company Secretary from **Datacare.** It could print annual returns, notices of change of registered office and change of Directors and Secretary. Modules could be added for minutes and maintaining the statutory register. **Frank Lanigan** of **Star**, the great believer in UNIX, had his multi-user system running on Convergent Technology 68030. The accounts package SOLPAK has been completely re-written and updated in the past year. He too has been looking at PCs. and has opted for IBM running AIX (their version of UNIX). His systems professional **Norman Hull**, who represents Ireland and is Chairman of the European Unix User Group, apart from answering any possible question I could put to him, demonstrated the incredible speed of AIX on the 25 MHz IBM 70. The major problem with Unix, namely that of speed, appears to have been addressed. **Bernard Donnelly** of **Orchard**, fully recovered after his recent illness, bounced into his stand (the largest at the show) in casual wear – welcome relief in a sea of suits. His sales director **Mark O'Dwyer** and newly recruited **Martin Roper** had convened large numbers of accountants and solicitors to sample their wares (a simple task for Martin after his years at the Oak). JUSTAX, their accounts system, will run on a PC and on a network system. Barristers were catered for by **Legal & General** as well as by BAR-MASTER from **Pascal Software Ltd. Reliance Business Systems Ltd.** had a very sophisticated cheque writing system, and Kalamazoo-Alluset Business Systems will ensure that you have a proper manual system, a vital necessity before one can computerise. Computers are marvellous for accounts, WP, indexes and databases but legal text is still best held in Book Form. **Butterworths**, as well as demonstrating Itelis for the latest judgments, had their excellent latest publication White on Irish Law on Damages for Personal Injuries and Death.

There were more than 50 stands at the exhibition and I didn't have time to visit them all. There was a great range of equipment, and nothing that I saw was irrelevant. The stand executives were extremely

SOLICITORS GOLFING SOCIETY

The Golfing Society President's (Maurice Curran) Prize was played at Lahinch on the 15th of September 1989.

The results were as follows:

Winner:
Eugene Cush (on back nine) 34 points off 9.
Runner Up:
Brian Whitaker 34 points off 3.
Third Prize:
Owen O'Brien 27 points off 8.
Fourth Prize:
Tom Shaw 26 points off 5.
Ryan Cup:
(12 and over) Tom Dalton (back nine) 33 points off 16.
Runner Up:
Brian Morton 33 points off 18.
12 Handicap & Over:
Aidan O'Carroll 31 points off 8.
Runner Up:
David Alexander 30 points off 10.
First Nine:
Robert Cussen 16 points.
Back Nine:
Cyril Coyle 21 points.
Director General's Cup:
Harry Fehilly
Over Thirty Miles:
Kevin O'Donnell.

At the Annual General Meeting of the Society held at Lahinch Golf Club, Mr. Noel Tanham was elected Captain of the Society. Mr. Richard Bennett was re-elected as Secretary and Mr. William Jolley was re-elected as Treasurer.

Richard Bennett
Hon. Secretary

LADY SOLICITORS INVITATION CLASSIC

Held in Kilternan Golf Club on Friday 8th September 1989

RESULTS

1st	Marian Petty	38 pts
2nd	Barbara Ceillier	37 pts
3rd	Barbara Stafford	34 pts

Best Visitor:
Bridget Brownan
Best Novice:
Deirdre Durcan
Best Gross:
Mary Irvine 30 pts
Best 1st Nine:
Catherine O'Donnell 21 pts
Best 2nd Nine:
Geraldine Lynch 19 pts
Best Golfing member of Judicary:
District Justice Gillian Hussey

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MEDICO-LEGAL SOCIETY OF IRELAND

PROGRAMME FOR SESSION 1989-90

1. *TUESDAY, 9th JANUARY 1990:*
Dr. Seamus Ryan – "THE PRESIDENTIAL ADDRESS".

2. *TUESDAY, 13th FEBRUARY 1990:*
Dr. Peter O'Connor, Casualty Consultant, The Mater Hospital, and Joe O'Farrell, Director, Allied Insurance Consultants Ltd. – "PERSONAL INJURY CLAIMS AND LIABILITY".

3. *TUESDAY, 13th MARCH 1990:*
E. R. Adrian Glover, Solicitor – "MEDICAL RECORDS AND THE LEGAL SYSTEM GENERALLY".

Details in relation to the Annual Dinner and the Annual General Meeting will be published later.

NOTES

Lectures take place at 8.30 p.m. at the United Service Club, St. Stephen's Green, Dublin 2, by kind permission.

Members and their guests are invited to join the Council and guest speakers for dinner at the Club at 6 p.m. for 6.30 p.m. on the evening of each lecture. Members intending to dine must communicate, not later than the previous day, with the Honorary Secretary, Miss Mary MacMurrough Murphy, B.L. at 2 Whitebeam Road, Clonskeagh, Dublin 14 (Telephone 694280) or at the Law Library, Four Courts, Dublin 7 (Telephone 720622).

Membership of the Society is open to members of the Medical and Legal Professions and to others especially interested in Medico-Legal matters. The current annual subscription is £10.00. Membership proposal forms and full details may be obtained from the Honorary Secretary.

Law Tech 89

Contd.

helpful and knowledgeable. It was a great opportunity for those in the profession about to dip their toes or upgrade to find out what was available to them as well as the latest trends. The exhibitors found the solicitors are even more computer aware than they were last year. □

Have you ordered your Lawyers Desk Diary 1990?

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Order Forms are included in this issue of 'The Gazette'
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EURLEGAL

All the EC information you need — just a phone call away!

The Law Society Library is now linked up to JUSTIS, an on-line European Community law database, owned by Context Ltd., London. The database contains extracts from the EC treaties, secondary legislation, preparatory works and case law, and the full text of the Common Market Law Reports. The secondary legislation sector gives details of regulations, decisions and directives published in the EC Official Journal (items of short validity are omitted).

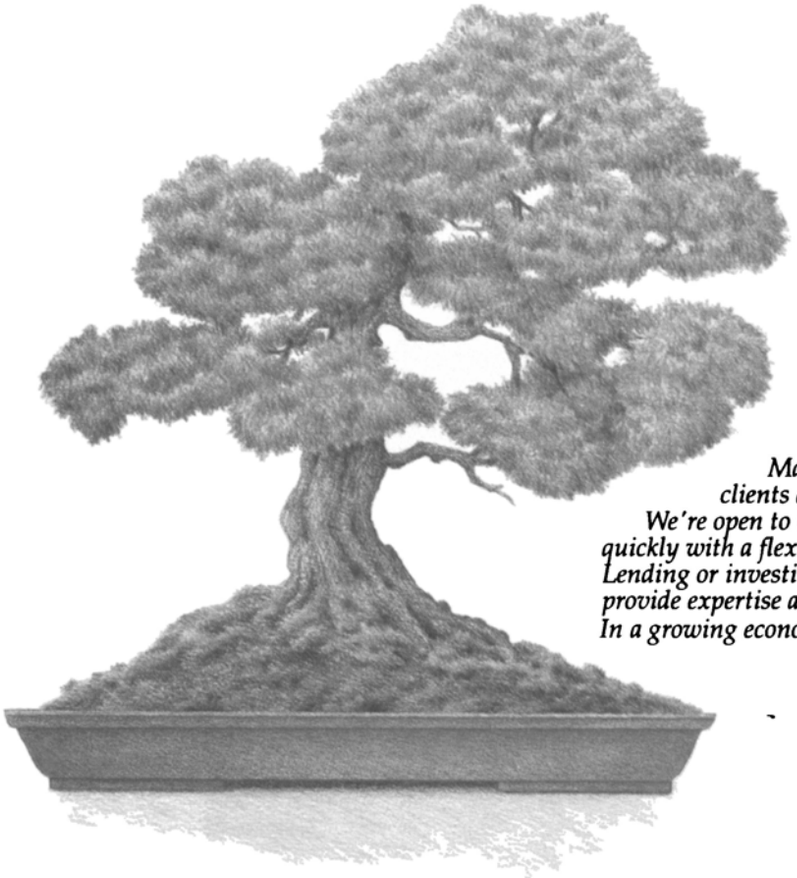
Using a PC the Library can search the database for measures or case law on a particular subject. The secondary legislation is cross-referenced to indicate earlier measures affected by a regulation or directive and any subsequent amending measures.

A print-out of the list of documents retrieved can be supplied. Photocopies of the full text of documents can be provided from the Library's set of Official Journals and other EC materials.

The cost of a search will be £12.50 incl. VAT. (This price will operate for an initial period and will be subject to review).

Demonstrations of the system, free of charge, will also be arranged by appointment.

Please contact Margaret Byrne or Mary Gaynor, at the Society's Library, regarding searches, demonstrations, or simply further information on JUSTIS.



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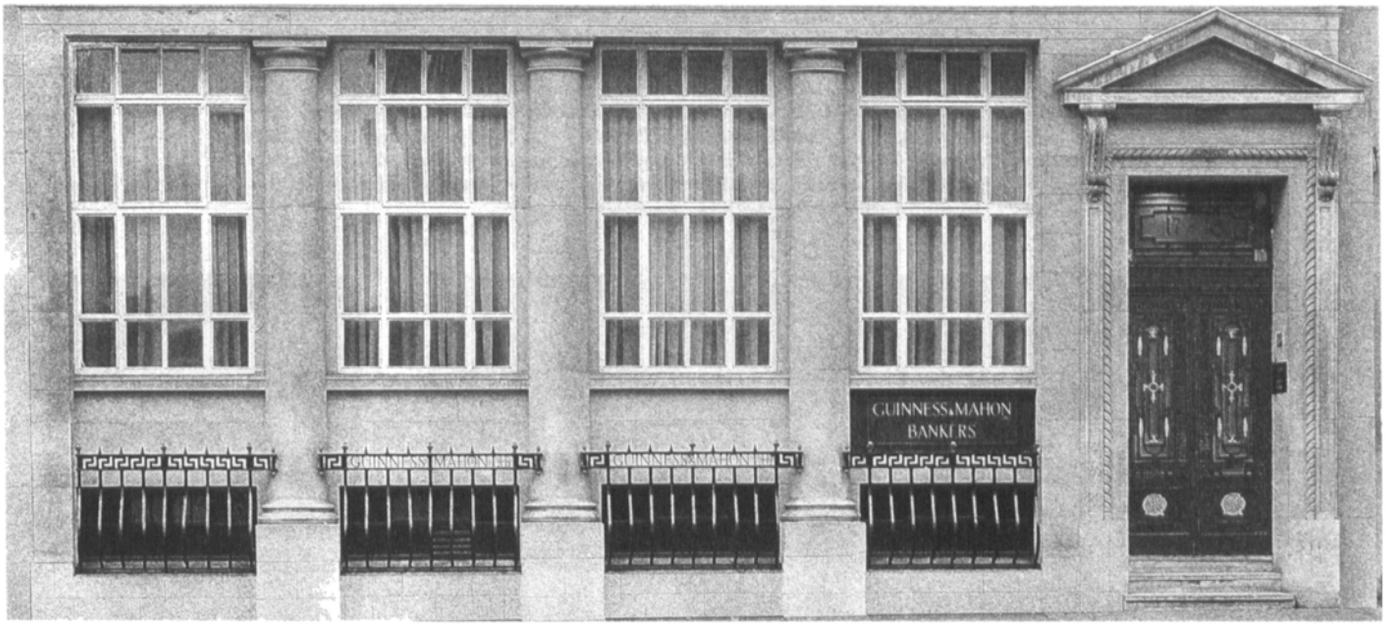

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PEOPLE AND PLACES

Irish Centre for European Law Seminar on Legal Aspects of EC/EFTA Relations. (Left to right): Dr. John Temple Lang, Sven Norberg, Legal Adviser, EFTA, The Hon. Judge Ole Due, President of the Court of Justice of the European Communities, Ernest J. Margetson, Senior Vice-President, Law Society, Gesandter Dr. Winifried Lang, Ministry of Foreign Affairs, Austria, and Pernilla Lindh, Under Secretary, Legal Affairs, Ministry of Foreign Affairs, Sweden.

The Hon. Judge Ole Due, President of the Court of Justice of the European Communities, with Mary Robinson, S.C., Director, Irish Centre for European Law and Ernest J. Margetson, Senior Vice-President of the Law Society.

Jim Heney, Solicitor. Audrey Nutley — Orchard Computer Group. William B. Devine — Hanby Wallace & Co.

Pauline Tully, Group Accountant, Bowen Moneycare, introducing The Bowen Professional Partnership Plan, which entitles participating Solicitors to share commission on Bowen Group services, to Paul Keane, Solicitor, Reddy, Charlton & McKnight, at the Lawtech Exhibition.

Business Electronic Equipment Ltd. Willie Lewins — B.E.E. Bryan F. Fox — Bryan F. Fox.

President of the Law Council of Australia visits Blackhall Place (left to right): Maurice Curran, President of the Law Society; Mahla Pearlman, President of the Law Council of Australia; His Excellency Brian Burke, Australian Ambassador, and John L. Murray, Attorney General.

ASSOCIATION OF CRIMINAL LAWYERS MEETING

"PRISONERS – AFTER WHITAKER?"

Thursday, 14th December at 8.00 p.m.

CHAIRMAN: ***PAT McCARTAN, T.D.***

SPEAKERS: ***CONOR GEARTY, Solicitor, CAMBRIDGE UNIVERSITY.***

SENATOR JOE COSTELLO.

Please Put This In Your Diary NOW.

Younger Members News

The Lisbon Link

The Portuguese Young Lawyers Association held its Tenth Anniversary Conference in Lisbon from 3rd November to 5th November 1989. A group from the Younger Members Committee of the Law Society consisting of Miriam Reynolds – Chairman, Justin McKenna, Eva Tobin, Patricia Boyd and Sandra Fisher flew out from a cold and windy Dublin to attend the Conference.

Warm weather and a warm welcome greeted the Irish delegates. The programme was short but lively, opening on the Friday night with an address from Francisco Pimentel, the Chairman of the Portuguese Association. This was followed by an elegant reception at Lisbon's magnificent City Hall hosted by the Mayor.

The theme of the Saturday morning session was Young Lawyers Associations and the Conference was addressed by the President of A.I.J.A., Hugo Pinheiro Torres and papers were also read by a French Lawyer and a Portuguese Lawyer. We contributed by giving a short account of how the Young Members Committee functions in Ireland and it emerged that our Committee was unique amongst Young Lawyers Associations in Europe in that it is not independent from the Law Society. The afternoon session dealt with legal ethics and papers were delivered by Karen MacKenzie of England, Paolo Panella from Naples and Rodolfo Manuel Lavrador from Lisbon. Many of the ethical problems discussed were common to all the jurisdictions represented but we were surprised to discover that the Portuguese Law Society has no equivalent to our Compensation Fund nor does it have a method whereby a Portuguese Lawyer can be struck off the Rolls.

The closing dinner took place on the Saturday night in a former palace, the present headquarters of the Portuguese Red Cross. The delegates were treated to some impromptu Irish music and song!

The grand finale of the conference was the "Tagus Fluvial Tour" on Sunday. A cruise with wonderful views over the wide river of Lisbon, its seven hills, its red tiled rooves, riverside monuments, and passing the earthquake-proof suspension bridge.

Two important points were gleaned from the conference. Firstly, the need for language training for Irish Lawyers. The multi-lingual European delegates put us to shame but it must be pointed out that none of them could follow our toasts "as Gaeilge"! The second surprising factor was that when one of our delegates injured herself after falling on a wet and slippery floor, where the proposed Defendant would have had no answer on liability, none of the Portuguese Lawyers jumped forward to offer his or her services. Needless to say, all our Irish colleagues would have been willing to act were it not for the language barrier.

LAW SOCIETY

ANNUAL CONFERENCE 1990

Thursday, 3rd May to Sunday, 6th May 1990

HOTEL EUROPE
KILLARNEY
CO. KERRY

(Left to right): Eva Tobin, Patricia Boyd, Marlen Bulterman, Sandra Fisher, Justin McKenna, Isabel Magalahes Olavo, Niall Fogarty and Miriam Reynolds.

The Law relating to the Status of Children born outside Marriage and their Property Rights

PART I

By
Christopher Lehane, B.L.,
Assistant Probate Officer

The law governing the succession rights of illegitimate persons and succession rights to the estates of such persons can be said to fall into three distinct periods:-

1. The Common Law Position (which applies to all deaths prior to 19/5/'31).
2. The law between the Legitimacy Act 1931 (19/5'31) and The Status of Children Act 1987 (operative date for property rights (Part V) 14/6/'88).
3. The law since the Status of Children Act 1988 (all *Wills made on or after* and *deaths intestate on or after 14/6/'88)*

1. THE COMMON LAW POSITION

The Common Law Position was that of 'Nullus Filius' (i.e. a bastard has no heirs). This actually means that the only next of kin an illegitimate child could have would be *his lawful* issue and his succession rights were confined thereto. He had no succession rights to *either* of his parent's estates (nor they to his), nor to any other relations of his.

2. THE LEGITIMACY ACT 1931

This is existing law for *all Wills* (and instruments creating Powers of Appointment) *made before 14/6'88* and *all deaths Intestate before that date.*

The Act provides as follows:

S. 1 (i) If parents subsequently marry each other the child is legitimated.

(ii) A child cannot be legitimated by above marriage unless the father and mother of such person could have been lawfully married to each other at time of birth or at some time during preceding 10 months.

S. 2 (i) The illegitimatge or his issue can apply to Court for a declaration.

S. 3 (i) Once legitimated he is entitled to take normal (legitimate) share
(a) in an estate of an Intestate dying after legitimation date.
(b) under any disposition coming into operation after the date of legitimation.
(c) under any entail created after the date of legitimation.

S. 3 (ii) If the right depends on seniority he will so rank from date of legitimation.

(iii) Disposition may express a contrary intention which would prevail.

S. 4 (i) Where a legitimated person dies, normal succession rights apply, as if legitimated person had been born legitimate.

S. 5 (i) If illegitimate dies before marriage of both his parents to each other (which would have legitimated him) but leaving a spouse, children or remoter issue who were alive at the date of the marriage then, for purposes of the interests of the spouse, child etc. and to the spouse, child, etc. the illegitimate child shall be deemed to have been legitimated at the date of the marriage.

N.B.

S. 9 (i) An illegitimate child (or, if he is dead, his issue) has succession rights to his *Mother* but only where she leaves *no legitimate issue surviving.*

(ii) Likewise, a mother has succession rights to her child as if he were born legitimate.

S. 11 (i) Date of legitimation means the date of the marriage leading to the legitimation or where the marriage occurred before the 19/5/'31 then said date.

Schedule

1. Registrar General could register a person as legitimated on information supplied by both parents.
2. Father can on original registration of birth allow his name to be entered as father.
3. Court could order Registrar to register a man as father.
4. While putting a duty on parents to re-register the child as legitimated after marriage, failure to do so does *not* affect his legitimation.

The Succession Act 1965 did not make any changes improving the rights of illegitimate children.

Two major constitutional cases were brought seeking to equalise the rights of illegitimate children with legitimate children, both of which failed.

In the estate of NW, 29/5/1979, unreported.

McWilliam J. **Held:**

"(i) General Rule at Common Law, **'Nullus Filius',** that a bastard can have no kindred except legitimate issue, has been

accepted to the present day, however inequitable it may appear to be in modern times. An exception has been made in favour of an illegitimate child to his/her mother and vice versa by the Legitimacy Act 1939.

Facts: Mother of illegitimate predeceased and maternal 1st cousins claimed they were his next-of-kin.

Held: 1. Legislature intended to include only *legitimate* blood relations in ascertainment of the next-of-kin.

2. There was no discrimination against the child as *he* was not deprived because he was illegitimate. Only claim made is that first cousins were discriminated against, but that could not succeed on any constitutional ground.

***O'B -v- S* [1984] IR 316, Supreme Court**

Held:

1. The Word *'issue'* in Ss. 67 & 69 of the Succession Act refers only to legitimate children, as the Legislature did make provision in S. 110 for children born outside marriage having the right in the particular circumstances therein referred to (i.e. legitimated and adopted children) to succeed. The only reasonable construction was that the Legislature intended the word 'issue' to refer solely to issue born within marriage.
2. There was no constitutional right to inherit on Intestacy and any reference in Article 43 guaranteeing a right to inherit property required only that the State must not attempt to pass any law to abolish the general right to inherit property **bequeathed** by one person to another.

In a third case **Johnston -v- Ireland,** (1986) 9 EHRR 203, brought to the European Court on Human Rights, Ireland was found to be in breach of its obligations under the European Convention on Human Rights. The Court held that the absence in this country of an appropriate legal regime reflecting the natural family ties between unmarried parents and their child amounted to a failure to respect the family life of the parents and child. The failure to grant succession rights, in particular, between a child born out of wedlock and his father was condemned as discriminatory and held to be in breach of the Convention.

The Law Reform Commission's Report on Illegitimacy (LRC – 4 – 1982) recommended the abolition of the status of illegitimacy. Having recommended the abolition of the status in the Report, the Commission did not limit any of the consequential rights this would confer on non-marital children or their next of kin. With the Legislature in the Status of Children Act 1987 adopting most of the recommendations of the Commission, Irish Law now goes further than any other country in the world, save New Zealand, in granting equal rights to illegitimate children.

3. THE STATUS OF CHILDREN ACT 1987

Purpose

To equalise the rights under law of all children whether born within or outside marriage. This is achieved by setting out the general principle that in this and in all future legislation relationships are to be determined without regard to whether the parents of any person have married each other.

Date of Operation of Act

The Act was enacted on the 14th day of December 1987. Part 1 of the Act, with the exceptions of Sections 3 and 4, came into operation on the 14th of December 1987. The said Sections 3 & 4 of Part 1 came into effect on the 14th of January 1988. However, the main Parts of the Act, Parts 2-9, only came into force on the 14th of June 1988. As Part 5 of the Act deals with property rights *the 14th of June* 1988 is therefore the operative date of the Act for Probate purposes.

Section 3 sets out the general principle central to the Act:

(i) **In deducing any relationship for the purposes of the Act or any Act of the Oireachtas passed after the commencement of this section the relationship between every person and his father and mother (or either of them) shall, unless the contrary intention appears, be determined irrespective of whether his father and mother are or have been married to each other and all other relationships shall be determined accordingly.**

(ii) An adopted child is deemed from date of adoption to be the child of the adoptors and not the child of any other person. The adoption order terminates the legal relationship between the child and his natural parents; all rights (including succession rights) and obligations between the parties cease from date of order.

Part V (Sections 26-32) deals with property rights and so affects *Wills* (and other dispositions) and Intestate Succession.

Wills (Section 27)

The operative date of the Act is for all Wills *made on or after* the *14th day of June 1988.* A Coidcil made after the 14th of June 1988 does not bring an earlier dated Will under the operation of the Act – (Section 27 (7) below).

INTESTATE SUCCESSION (Section 29)

The operative date of the Act is for all *deaths Intestate on or after the 14th day of June 1988.*

WILLS – SECTION 27

Subsection (1) states that "in any Will (or other disposition) made after the 14th of June 1988 any relationship between persons shall be determined in accordance with Section 3 of this Act."

Before the 14th of June 1988 a Will which referred to 'child' or 'issue' was construed as referring only to a legitimate child or issue. Now a Will made after this date

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with the same words will be construed as referring to both non-marital and marital children.

N.B. Testators may still exclude non-marital children by specifically stating the bequest is to pass to his legitimate issue only.

It was not considered proper that the date of operation of the Act for Wills should be the date of death of the testator as testators draft Wills in the light of rules of construction that exist at the time of the execution. The Act reverses the rule of construction to include non-marital children wherever a gift to a child or children is given unless the contrary intention appears. It was suggested that to attempt to make the date of death the operative date would be contrary to Article 43 of the Constitution.

Subsection (2) states that certain provisions of Section 3 of The Legitimacy Act 1931 (which conferred on legitimated children from the date of their legitimation the same rights as legitimate children) shall not apply in respect of dispositions made after the 14th of June 1988.

However, it goes on to state that these Legitimacy Act provisions do still apply to protect legitimated children's rights where the disposition refers only to persons who are, or whose relationship is deduced, through legitimate persons e.g. "– to my legitimate child."

Subsection (3) confers rights of children adopted in Ireland pursuant to Section 26 of The Adoption Act 1952 on children adopted abroad whose adoptions are recognised under Irish Law.

Subsection (4): Where a Will is made on or after the 14/6/1988 and a child is adopted after the date of the Will, he is now included in the bequest; hitherto children adopted after date of Will were excluded e.g. where a gift is given "to children of ny son X", and Z is adopted after the Will was made (after 14/6/'88), Z now is entitled to share with other children of son X whereas before he would have been excluded.

Subsection (7): A will (or other disposition) made before the 14th of June 1988 shall **not** be brought under the Act's operation just because the Will was confirmed by a Codicil executed after the 14th of June 1988.

Section 28 (applies to both Wills and Intestacies).

Section 28 states that the word 'issue' shall now be construed in accordance with the new S. 4A of the 1965 Act as inserted by S. 29 of the 1987 Act. The word 'issue' now includes non marital children, therefore *O'B -v- S,* supra, is overruled.

INTESTATE SUCCESSION – SECTION 29

Section 29 amends Section 4 of the Succession Act 1965 by inserting a new Section 4A (1) which states effectively that **all relationships shall be deduced for the purposes of the 1965 Act irrespective of the marital status of a person's parents.** With the abolition of the status of illegitimacy non marital children have equal succession rights with marital children to the estates of all their blood relations and vice versa.

Section 29 inserts a new Section 4A (2) which sets up a **rebuttable** presumption that a child whose parents have not married each other and who dies intestate is **not survived by his father** or **by any person related to him through his father.**

SECTION 30 inserts after Section 27 of the Succession Act a new Section 27A which sets up a rebuttable presumption for the purposes of determining who is entitled to take out Probate or Letters of Administrtion that a deceased person was not survived by any relative whose parents have not married each other or who is related to him through such a person.

* Section 4A (2) of the 1965 Act, as inserted by Section 29 of the 1987 Act, deals specifically with the father of a non marital child, where the said child died intestate, and presumes the father and all those claiming through him to have predeceased the child.
* Section 30 of the 1987 Act is a far more general presumption covering entitlements to Grants of Probate and Administration, presuming that where a non marital child relationship affects the title to a Grant all those persons who would be entitled to apply for a Grant on the basis of that non marital relationship shall be presumed to have predeceased the deceased.

Question: How has the 1987 Act affected Probate Law and practice in relation to (i) Wills, (ii) Deaths Intestate?

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NATIONWIDE

1. **Wills** (S. 27 – Wills made on or after the 14/6/1988)
   (i) **Title to Grant**
   One's entitlement to prove a Will is affected by the Act only in the situation where the executor is not applying and the residue is left e.g. "to my children" or "to my issue" which if the Will was made after the 14/6/1988 will now include (unless the contrary intention appears therein) non marital children. Non marital children equally with marital children of the testator will be residuary legatees and devisees under the Will and entitled to the Grant, with the Executor not applying.
   (ii) **Entitlement in Distribution**
   As stated above, unless the Will specifically gives a gift to his marital (legitimate) 'issue'/'children' all references to children or issue will now include (for Wills made on or after 14/6/1988) non marital children and they will take equally in distribution.
   (iii) **Applications under Section 117 of the Succession Act 1965**
   Section 31 of the 1987 Act gives non marital children of **Testators dying after 14/6/1988** a right to make an application under S. 117 of the Succession Act.
   By allowing the date of the testator's death as the operative date many more non marital children may benefit under S. 117 than can benefit under S. 27 of the 1987 Act, which only applies to **Wills made after 14/6/1988.**
2. **INTESTACIES** (S. 29 – all deaths Intestate on or after 14/6/1988).
   In deducing any relationship with regard to an intestate dying on or after the 14/6/1988 no regard shall be had to the marital status of a person's parents.
   Having equalised the rights under law of all children whether born within or outside marriage the Act goes on to set out the two presumptions mentioned above: (1) Section 4A (2) of the 1965 Act, as inserted by Section 29 of the 1987 Act, which sets up the specific presumption that the the father of a non marital child and all persons claiming through him predeceased the child, unless the contrary is shown, (2) Section 30 of the 1987 Act sets out the general presumption when a person is applying for a Grant, that the deceased was not survived by any person whose parents have not married each other or by any person claiming through such person, unless the contrary is shown. The purpose of these presumptions is to reduce the effect on existing Probate Law and practice of the equalisation of rights of marital and non marital children.
   To understand the effect of the 1987 Act on Intestate Law it is necessary to know how far Solicitors can rely on these 2 presumptions when seeking to establish (1) Entitlement to Grants and (ii) Entitlements in Distribution.

   (i) **Title to Grant**
   The Solicitor may rely on the presumption set out in Section 4A (2) of the 1965 Act that the father of an intestate non marital child predeceased the child unless his applicant actually knew that the father had survived him. The onus is otherwise on the father, or those claiming through him, to bring to the attention of the applicant that the father survived the child.
   The position is the same with the wider Section 30, 1987 Act, presumption and the Solicitor may presume all next of kin, claiming a non marital link to the deceased, to have predeceased the deceased until the contrary is proved to him.
   The practical effect of these presumptions on the drafting of titles is illustrated in the following examples:
   (a) **A bachelor without father** (or a bachelor without parent – where the mother predeceased). A Solicitor may draft this title to allow a brother apply for a Grant notwithstanding his lack of knowledge of whether the father survived. He can rely on the Section 4A (2) presumption that the father predeceased.
   (b) **A bachelor without parent brother or sister.** Relying on the Section 30 presumption that a deceased person is presumed not to have been survived by any relative whose parents have not married each other or who is related to him through such a person, it is not necessary in drafting titles to clear off the possibility that a bachelor or spinster might have had any issue. There is therefore no need to change existing drafting of these titles which will still read "a bachelor (spinster) without parent – and I am the lawful brother."
   (c) **A Widower – and I am the LAWFUL son**
   A Bachelor – and I am the LAWFUL son
   It was mooted in Probate circles that the word "**lawful**' would have to be dropped in titles to ensure no distinction would be made between 'marital child titles' and 'non marital child titles' the former reading "a Widower and I am the **lawful son**" the latter reading "a Bachelor and I am **the son**." The approach adopted by the Probate Officer is to adopt the word '**lawful**' for all non marital children applying, who have established their rights to a Grant. This is in keeping with the spirit of the Act which preserves existing practice as much as possible. The correct title for a non marital child to his father is therefore "**A Bachelor – and I am the lawful son.**"

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In summary when drafting titles applying for Grants a Solicitor can rely on Section 4A (2) and Section 30 presumptions without enquiring about fathers or relatives claiming non marital links to the deceased; he can presume them all to have predeceased until the contrary is proved to him. Where the Solicitor's applicant is a non marital **child/nephew/cousin** he can be described in Oath as the lawful child/newphew/cousin, the same as any marital child/nephew/cousin etc.

(We shall deal with the necessary proofs for such applicants below).

(ii) **Entitlement in Distribution – Can Solicitors rely on Sections 4A (2) and 30 Presumptions when distributing the estate?**

In that the Grant follows the interest the converse is also true: the interest follows the Grant. If you are entitled to rely on the presumptions to allow your applicants apply for a Grant you should be entitled to distribute the estate accordingly amongst them.

E.g. Solicitor relies on Section 4A (2) that a father of an intestate predeceased, showing a title in the Oath for Administrator as "A bachelor without parent and I am the lawful brother," where the mother predeceased with no lawful sisters other brothers or issue of predeceased brothers or sisters alive at the deceased's death the applicant takes the whole estate.

There are strong arguments which can be advanced from both sides as to whether the presumptions should or should not be relied upon, particularly in the distribution of the estate.

In Favour of Reliance on the presumptions it can be argued that:

1. There are 3 obligatory common law proofs which must be established to presume in law the death of a person, **firstly** that he was unheard of for 7 years, **secondly** that there are persons who would have been likely to have heard from him and obviously have not and **thirdly** that all due inquiries have been made. Obviously as none of these 3 proofs was required by the Act the statutory presumptions of death can be availed of much more easily than the common law presumption.
2. Unlike the common law presumption of death which requires a court order, these presumptions do not but arise automatically from the Act.
3. These presumptions are rebuttable presumptions of law, which are presumptions which must be made in the absence of evidence to the contrary.

It can therefore be argued that the onus clearly rests on the non marital father and non marital next of kin to assert their rights (i.e. to rebut the presumption of death) and not on the marital next of kin to make any extensive inquiries.

It can be argued against reliance on the presumptions that:

1. As the presumptions are rebuttable by evidence to the contrary it follows that if the non-marital next of kin (e.g. non marital father/uncle) who survived the deceased could prove that the Grantee, at the time of the extraction of the grant, actually knew of the existence of such non marital next of kin yet excluded them in the distributions of the estate, such Grantee could find himself penalised for any losses sustained or costs incurred through his actions.
2. If the proposed applicant does not actually know whether the non marital father (hereinafter simply called the father) or non marital next of kin with

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priority to him (hereinafter called the non marital next of kin) survived the deceased, with reasonably simple inquiries he would be able to find out whether they did survive. They may have lived close to the deceased or kept in contact with him where in these circumstances they would hear of his death and seek to assert their new rights conferred by the 1987 Act, thereby obliging the Grantee to recall the assets for redistribution.

Furthermore Section 46 (3) of the 1987 Act presumes a man, whose name appears as father of a child on a birth certificate, to be the lawful father of that child. Such a man, presumed by the Act to be the father, would probably not even require a Court Order to seek to have the first Grant revoked and cancelled and the distributed assets surrendered to him.

Having considered the arguments both for and against reliance on the presumptions it is worth noting the recommendations of the Law Reform Commission on this point, as set out in pages 142, 143 and 144 of the Law Reform Commission Report on Illegitimacy (LRC 4 – 1982) (previously quoted) on which the Act was based.

Under the heading "Protection of Trustees Administrators and Executors," the Commission first poses the problem that unless some special protection is given to these people they will be under a substantial obligation of enquiry and conduct, the scope of which could only be ascertained by each question in turn having to come to Court for decision. In favouring the adoption of the English and New Zealand approach of exempting the Trustees Executors and Administrators from an obligation to enquire into whether there are claimants born outside marriage and relieving them from liability for distributing the property in disregard to the claims of such persons the Commission fully acknowledged that the result of any such provisions would be to sacrifice the rights of children born outside (but not inside) marriage in the interest of practical administrative convenience, but felt it was necessary in the circumstances.

The Commission made, in all, 3 recommendations on this issue, the first one being the only one actually enacted by the 1987 Act, in the form of the presumptions set out in Section 4A (2) of the 1965 Act (as inserted by Section 29 of the 1987 Act) and Section 30 of the 1987 Act. The Commission, as stated above, recommended **"that legislation should include provisions exempting trustees, Executors and Administrators from the obligation to enquire as to whether there are claimants born outside marriage."** The aforesaid presumptions do relieve them from enquiring as to whether there are such claimants by presuming that all such persons have predeceased.

The Legistlature did not enact the further 2 recommendations of the Commission, the first being that **Trustees, Executors and Administrators should also be relieved from liability where they administer estates in ignorance of claims of non marital next of kin.** The second recommendation was that **these exemption provisions should not prejudice the right of any non marital next of kin to follow the property, or any property representing it, into the hands of any purchaser for value who may have received it.** There was no need for the enactment of the second recommendation guaranteeing the right of non marital next of kin to follow property erroneously transferred, or any property representing same, into the hands of any person other than a purchaser for value. Such a right, besides being a well accepted principle at Common Law, is already specifically conferred on all unpaid beneficiaries by Section 59 of the Succession Act 1965.

The dropping of the other recommendation, however, is significant. The Legislature's failure to enact the recommendation relieving personal representatives from liability where they administer estates in ignorance of the claims of non marital next of kin must be regarded as weakening somewhat the reliance that personal representatives may place on the presumptions.

The relief from liability was dropped from the Bill with all parties agreeing in the Dail that it was overprotective of personal representatives. The Minister, in proposing the amendment of the Bill, stated that the relief would have discriminated against non marital next of kin in that it would have left personal representatives free to distribute an estate without making any effort to trace persons who would have a claim under the Act. Furthermore, he stated he was doing so on legal advice that the relief from liability was unnecessary having regard to the protection afforded to personal representatives under Section 49 of the Succession Act 1965, once the personal representatives published the apporpriate notices.

Section 49 applies equally to unknown next of kin as it does to creditors of an estate (See Re Aldhous [1955] 2 All E.R. 80).

There are two points to note from the Dail's deliberations on this matter. Firstly, despite enacting two presumptions enabling per-

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A CASE IN NEED

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The Solicitors' Benevolent Association assists such cases - and many others where the age of dependants of members of the profession ranges from "under 10" to "over eighty". The Committee of the Association meets monthly and its work covers the entire country, north and south. The Committee funds come from annual subscriptions from members of the Law Society of Northern Ireland and The Incorporated Law Society of Ireland, together with additional subscriptions received from Bar Associations, and individual Solicitors or firms of Solicitors. In recent years the calls on the Association's resources have become more numerous and this year the Committee faces a relatively large deficit. It urgently needs extra funds. Subscriptions can be sent to the Secretary, Ms Clare Leonard, The Solicitors' Benevolent Association, 40 Lr. Fitzwilliam Square, Dublin 2, or c/o The Law Society, Blackhall Place, Dublin 7.

sonal representatives to presume all possible claimants under the Act to have predeceased, the obvious intention in dropping the relief from liability for personal representatives in these cases was to ensure that they were still under a reasonable duty of inquiry to trace such persons. Secondly, personal representatives, as was stated, may still cover themselves from personal liability by publishing Section 49 notices seeking non marital next of kin to assert their rights.

Besides being very costly, Section 49 notices in these circumstances may well give rise to bogus claims being made against an estate. The solicitor would obviously require such claimants to seek declarations of parentage in the courts. In the absence of such applications, at what stage can the solicitor ignore such claims and rely on the presumptions? In such instances where the solicitor feels the claim clearly will not succeed, he may apply to the Probate Judge for directions without issuing the usual special summons in the High Court for an order of the Chancery Court to enable him to proceed with his administration of the estate.

In the vast majority of cases, however, personal representatives will know, or with reasonable inquiries will be able to find out, if there was any child born outside marriage who would be a potential claimant under the Act. If they are quite positive no such claim could exist there would, in my opinion, be no need to publish Section 49 notices. It is accepted practice in Probate matters generally that where a personal representative has acted at all times *bona fide* in accordance with statute he will not be held personally liable and any costs and losses thereby incurred in his administration will be taken from the estate.

It is suggested that in circumstances where a claim could arise under the Act, a prudent Solicitor would adopt the following guidelines:

(1) If his applicant knew the father or non marital next of kin survived the deceased he cannot rely on the presumptions. Once he knows they survived, neither can he publish S.49 notices and rely on the fact that the notices have not been replied to (See Re Beatty (1892) 29 LR Ir 290).

(2) If with reasonable inquiries it could be easily ascertained whether the father or non marital next of kin survived the deceased, for practical reasons, to avoid a lot of unnecessary trouble later when they would assert their rights, it would not be advisable to rely on the presumptions without firstly making those inquiries and publishing the appropriate S.49 notices.

(3) If reasonable inquiries would not reveal a claimant under the Act because, for example, the identity of the father is unknown and no name of a father appears on the birth cert then the presumptions can be relied upon to the full, as regards both entitlement to Grants and in the distribution of the estates. The onus clearly rests on the non marital father and non marital next of kin in such cases to assert their rights. If the marital next of kin extract a Grant and wait 6 years any possible claims against them will be statute barred.

Part 2 of this article will appear in the December, 1989 *Gazette*.

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The Solicitors Benevolent Association

As most Practitioners know, the Solicitors Benevolent Association includes Solicitors who are members of both The Law Society of Northern Ireland and the Incorporated Law Society of Ireland. In September last the Directors held their meeting at Law Society House, Belfast. The attendance included the Chairman, John M. O'Connor, and the Secretary, Clare Leonard (Dublin), and Directors from Northern Ireland, Thomas A. Burgess and J. Brian Garrett.

Assistance to beneficiaries is provided on a confidential basis and so meetings of the Directors are private affairs. However, after the September meeting the Secretary, Clare Leonard, mentioned two specific news items to highlight the wide ranging support which is now being provided for the S.B.A. by those connected with the profession – in addition to annual subscriptions. Colin Haddick, President of the Law Society of Northern Ireland, when attending the A.B.A. Conference in Honolulu and the Australian Legal Convention in Sydney last August participated in both a 10 km run and a 14 km run, and the proceeds of his sponsored runs are in both cases to be donated to the Association. The second news item concerns a Christmas Concert planned for Friday the 1st of December next at Blackhall Place, Dublin, when Mrs. Nanette Ivers (wife of the Director-General of the Incorporated Law Society) will be the principal Soloist. The Garda Band, whom many have seen at Lansdowne Road Rugby Internationals, have also agreed to participate in the planned Concert and the proceeds are to be donated to the Association.

As Clare Leonard commented at the luncheon following the meeting at Law Society House – "The Association warmly welcomes the support it receives and wishes to thank the many who in a variety of ways encourage and assist the Directors in their work". □

BOOK REVIEWS

THE INTERPRETATION OF CONTRACTS

By Kim Lewison
Published by Sweet & Maxwell
Pages: 368 (Text) xlix (Table of Cases etc)
Price: UK £45.00

The title of this beautifully written, well researched and attractively presented book could, to an extent, be said to belie its content, which covers in considerable detail not only the interpretation, but also the construction, of contracts, and extends to kindred areas in the realm of deeds. It sets out to fill a gap (which undoubtedly needed filling) and, in so doing, spans a wide canvas magnificently. What else could be expected from the pen of so eminent a lawyer as Mr. Kim Lewison, whose impressive knowledge and expertise is reflected throughout the work?

The construction and interpretation of documents is not by any means an exact science. Indeed, its study can be one of great frustration, each case being so dependent, initially, upon the precision of expression and the particularity of circumstances, and, ultimately, on the view taken by the Court in the face of such arguments as are advanced to it. The topic is vast in scope, vague in perception, and complex in application. Nevertheless, certain principles have emerged, and these have been diagnosed, dissected and ventilated by Mr. Lewison with great thoroughness. Some of the relevant concepts have the force of rules of law, whilst others are merely guidelines. Many are clothed with the mantle of established respectability, whilst a number appear to have been culled painstakingly by the Author from more recent decisions. Although these canons of construction are in the nature of beacons towards enlightenment, they sometimes shine in different directions. Mr. Lewison makes a most valiant effort to cut through all the inherent obscurities, and has succeeded in categorising the various elements in a manner which is both discernible and practicable.

The Book is structured into separate chapters with numbered paragraphs. Each of these is headed with a statement of principle, which is then discussed in some depth with copious and often generous excerpts from judgments. The Author deals both with views which have subsequently been over-ruled and those which do not always coincide with his own. Many of the paragraphs are followed by illustrative summaries of decided cases, which are incidentally presented in such a manner as to tempt the reader to test his own mettle.

The entire subject derives essentially from case law as is demonstrated aptly by this work. The latter is full of material not otherwise available in a single volume of recent vintage. Not only are the mainstream avenues explored therein, but the Author embarks on enlightening forays into the territories of exemption provisions, penalty clauses, implied terms, the primacy (or otherwise) of plans and a myriad of other interesting topics. In appropriate cases, he explains why the application of a particular doctrine may produce varying results, as in the instances of executory and executed contracts. There is a fund of information and I anticipate that the views expressed will, for the most part, find favour.

It should be noted that the interpretation of wills and statutes and the important remedy of rectification are outside the scope of this book.

The absence of references to Irish decisions is hardly a reflection on Mr. Lewison's compilation. The general principles enunciated will, for the most part, be applicable within this jurisdiction, and the few instances where warning bells might have to be sounded for Irish readers are sufficiently identifiable as not to warrant mention here.

Where a publication is fundamentally meritorious, the primary task of a reviewer must be to draw attention to its existence. This volume may be so categorised, and its excellence tempts universal recommendation. I would, however, regard it more as a work of reference rather than a text book, though this is not, of course, to suggest that it should be eschewed by students or omitted from their curricula. It would be an important addition to the libraries of practising and academic lawyers and those engaged in the field of arbitration.

The need for this book is not, *per se,* a condemnation of the manner in which lawyers have applied themselves to the art of drafting. After all, well worded documents do, for one reason or another, become the subject of litigation. It is nevertheless true that the bulk of the cases wherein the intervention of the Courts is sought in the areas of construction and interpretation owe their presence there to defective drafting or poor appreciation of underlying circumstances. Even allowing for the assistance derived from modern technology, the flurry and fluster of professional practice militate against the allocation of the time, application, patience and persistence, which is so often required in order to achieve the ideal in drafting terms. Occasionally a document launched in good order will be rendered a nonsense by the ravages of amendments, the consequences of which may pass unnoticed in the heat of negotiation or because of other pressures.

I have one serious reservation about Mr. Lewison's book. This concerns the index, which I found to be very inadequate in point of detail. However, my commendations still stand. □

Patrick Fagan
Solicitor

THE IRISH INSTITUTIONAL INVESTMENT REFERENCE JOURNAL 1989

Anglesea Publications Ltd., Dublin 1989 (Telephone 681355, Fax 681678)
Ed. Dr. Terence Ryan, TCD.
194 pp. Hardback. IR£37.50 (incl. p&p).

The appearance of this most interesting publication coincides with a period of rapid change in the Irish financial markets. Exchange controls have been relaxed significantly this year, the property market has surged after almost a decade of stagnation, technical developments (especially in information processing, computing and telecommunications) continue apace and 1992 approaches.

The first issue of this Journal (which will presumably appear annually) contains over 30 articles spread over approximately 140

pages of A4 size. In addition, there is a Data Section and Company and Personnel Details.

The articles are generally 3 or 4 pages in length. Senior persons in virtually every major player in the financial services sector are counted among the authors. Most emphasis is given to various aspects of pension funds and fund management, the gilt and equity markets and certain institutions including the Stock Exchange and the Irish Futures and Options Exchange (IFOX). The articles strike a nice balance; they are neither superficial nor incomprehensibly technical. Most are in the nature of "overviews" in the chosen areas of the specialist authors and enable the non-financial specialist (or, indeed, sub-specialist) reader to follow salient recent developments in, or significant aspects of, the chosen topics. The subject-matter of the contributions is not merely well-chosen, being relevant to the financially aware solicitor, but the contributions are also well balanced with relatively little avoidable overlap between them.

Taste and interest are quintessentially subjective. But the reader of this volume has a rich and varied menu from which to choose. Far be it from the present reviewer to limit the horizons of the worldly wise and prescient solicitor. But some topics do particularly catch the legal eye. Frank Close of Ulster Investment Bank has written on the subject of "Property Unitisation"; the promoters of this concept, following a UK model, aim to create a market whereby units in a single property could be traded. The chosen vehicle for this would be the creation of what amount to saleable rent charges. Securities could be made available in units created on the "unitisation" of a single property; these could be traded as a unit in an authorised unit trust (or SPOT – single property ownership trust). The other device in the UK is known as a PINC – property income certificates – giving a contractual right to share in a property's rental income flow together with a share in a specifically created management company reponsible to the investors for the management of property. Property lawyers will be particularly interested in the legal (real property), conveyancing and taxation aspects of the scheme which it is intended to launch in Ireland in the near future.

The article by Michael Lane of New Ireland Assurance Co. plc on the Investment Duties of Pension Fund Trustees will be of wider interest. Most solicitors could derive benefit from the review of trustee's duties generally.

Other topics of particular relevance to legal practitioners include those on "Currency Hedging in Pension Fund Investment Performance" (by Donal O'Mahony of Allied Irish Investment Managers Ltd) and on "Capital Movements and Exchange Control" (by Robin Clapham of Industrial Credit Corporation Fund Management Ltd.) both of which will be of interest not only in the context of pension funds but in the wider area of commercial practice generally.

However, while adverting above to a number of items which would seem of special interest to lawyers, credit must be accorded to the articles as a whole. They are characterised by their clarity, usefulness and overall readability.

It may seem curmudgeonly to suggest one or two aspects of the work which might merit attention on a future occasion. Matters which might usefully have been treated of among the essays this year are the pension fund levy and the European Community legal regime on UCITs. Moreover, the section of the work entitled "Data Section" consists largely of lists of people and entities (with their key personnel) involved in the investment area; this is information which must change well-nigh weekly and could perhaps be included in replaceable loose-leaf form and/or provided on screen. If it were possible at a future date, there would be merit in segregating the work into, on the one hand, a journal published periodically in permanent form containing the articles and kindred matter and, on the other, a handbook in loose-leaf form or on screen setting forth the more rapidly evolving reference information.

None of the foregoing observations ought to detract from the commendable achievement of the editor, Dr. Terence Ryan, and his team of contributors. Irish and other professionals will be indebted for the industry and learning evident in an admirably produced volume. In an era of accelerating deregulation and the blurring of traditional boundaries between the professions solicitors would be wise to include this work among their reading.

Patrick J.C. McGovern
Solicitor

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Applications with accompanying C.V. to Professor Richard Woulfe, by December 15th, 1989.

CORRESPONDENCE

16, Fitzwilliam Place,
Dublin 2.

20 October 1989

The Editor,
The Gazette,
The Law Society

Re: Stamp Duty on non-grant type new Houses

Dear Madam,
I was involved with others in the discussions with the Revenue Commissioners in the early 1970s which culminated in the memorandum in the November 1976 Gazette setting out guidelines which in effect were agreed with the Revenue Commissioners. An addendum was published in the May 1978 Gazette and a further note in July/August 1978 Gazette.

Because of this, I seem to get quite a few queries from Practioners who are having disputes with the Revenue Commissioners.

One irritant is that the Revenue Commissioners seem to think that they agreed with the Law Society that where stamp duty was being assessed on site value only, that the site value would be taken as quarter of the aggregate figure shown in the Building Contract/Agreement for Sale.

No such agreement was ever made. What did happen is that the Revenue Commissioners introduced a rule of thumb to look closely at all cases where the site value was shown to be less than 25% of the total. In my opinion this was caused by Solicitors putting in derisory figures for site value. I was part of a deputation that met the Revenue Commissioners on the point when it was agreed that the site value should be a realistic market value. If the site was purchased by the Builder a few months before, in an arms length deal, the Commissioners agreed to accept that true value regardlees of what percentage it was of the total. It was following that meeting that the practice note in the July/August '78 Gazette was published.

The purpose of this letter is to put Solicitors on notice of the true position.

Yours faithfully,
RORY O'DONNELL,
Solicitor

Allied Irish Bank,
P.O. Box 452,
Ballsbridge,
Dublin 4.

16 October 1989

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

Re: Master Lease

Dear Mr. Ivers,
We often get requests from Solicitors for Master Leases and have a sufficient stock in our Stationery Department to last for some time. Should you or members of the Incorporated Law Society require copies of the Lease we shall be pleased to supply them.

Yours sincerely,
JOHN CURRAN
Senior Marketing Manager,
Agriculture/Natural Resources.

Dept. of Labour
Davitt House,
Mespil Road,
Dublin 4.

31 October, 1989

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

Dear Mr. Ivers,
Thank you for your letter of the 5th September, 1989 in connection with the amount of arrears collected annually under the Law Clerks' ERO.

As regards your suggestion about the Labour Court's Report, the Report contains details on all EROs and I am afraid an exception could not be made in respect of the Law Clerks. Your Society is free however to make whatever points you wish in the matter.

You also raised the issue of publishing my letter of 1st September, 1989 in your Society's Gazette. You might publish it in terms of the attached, stating that the Department has given the information to the Society on the enforcement of the ERO.

Your Society's continued efforts to try and improve awareness of and compliance with the ERO are greatly appreciated.

Yours sincerely,
KEVIN BONNER
Assistant Secretary

Department of Labour
In respect of the arrears under the Law Clerk's ERO for 1987 and 1988 the position is that of the £21,588.93 collected in 1987 from 57 employers in respect of 82 employees, £8,936.66 or 41.39% was in amounts in excess of £1,000 from 5 employers in respect of 13 employees with the balance of £12,652.27 or 58.61% coming from 52 employers in respect of 69 employees in amounts from as little as £17.22 to a maximum of £872.06. The 1988 position is that of the £45,731.96 collected from 102 employers in respect of 133 employees, £23,278.10 or 50.90% was in amounts in excess of £1,000 from 12 employers in respect of 20 employees with the balance of £22,453.86 or 49.10% coming from 90 employers in respect of 113 employees in amounts from £5.64 to £960.37.

In most cases where breaches of the ERO relating to underpayments are detected in the course of routine inspections the empoyers pay the arrears promptly, often without any written request from the Department to do so. In the remaining minority, arrears are paid on receipt of a letter from the Department stating that underpayments have been discovered. The Department has since the beginning of 1988 notified the Incorporated Law Society of breaches in cases where employers have not responded to its requests to have matters put right. Before notifying the Society employers are informed in writing that unless matters are put right the Society will be notified of the breaches.

In summary, [i] a big percentage of the arrears collected comes from employers in small amounts and [ii] the vast majority of employers pay as soon as the underpayments are brought to their attention.

The Department will continue to keep the Law Society informed of breaches in cases where the employer fails to put matters right when requested and is aware that

non-compliance will result in the Law Society being informed.

The Department appreciates the assistance which the Law Society has given in solving serious cases of under-payment, where the employer has refused to comply with the Department's written request. However, in view of the fact that over 100 employers were in breach of the ERO in 1988, it would appear that a significant number of employers are unaware of, or unwilling to abide by, the terms of the ERO. The Department feels that any efforts which the Society can make to inform its members generally of the terms of the ERO, and of the Society's attitude to breaches of it, would be most helpful.

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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 as 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.
24th day of November, 1989.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Joseph Shevlin, Moyles, Inniskeen, Co. Monaghan. Folio No.: 1277; Lands: Moyles; Area: 11a.Or.18p.; County: **MONAGHAN.**

Michael J. & Catherine Reilly, Derryoul, Kilkelly, Co. Mayo. Folio No.: 4881; Lands: Derryoul; Area: 16a.2r.16p.; County: **MAYO.**

Patrick O'Hagan (Builder), St. Margarets, Stillorgan Park, Blackrock, Co. Dublin. Folio No.: 17277; Lands: Townland of Cornelscourt, Barony of Rathdown; Area: 0.144 hectares; County: **DUBLIN.**

William Patrick Walsh & Nora Christine Walsh, Rathduff, Grenagh, Co. Cork; Folio No.: 48859; Lands: (1) Grenagh South (2) Kilmona (3) Rathduff; Area: (1) 18a.1r.18p. (2) 20a.Or.27p. (3) 48a.3r.36p.; County: **CORK.**

William O'Brien & Mary O'Brien, Clash, Little Island, Co. Cork, Folio No.: 49312; Lands: Ballytrasna; Area: 0a.1r.0p; County: **CORK.**

Joseph Doherty, Folio No.; 15919; Lands: Annagh; Area: 40a.2r.39p.; County: **GALWAY.**

Rev. Father John Haran, Doonshaskin, Ballinfull, Co. Sligo; Folio No.: 4840; Lands: Doonshaskin; Area: 11a.1r.15p; County: **SLIGO.**

Denis Sullivan & Mary Sullivan, Mweelin, Emlaghmore, Killarney, Co. Kerry, Folio No.: 1779; Lands: Mweelin; Area: 24a.1r.11p.; County: **KERRY.**

Slaney Meat Packing Co. Ltd., 38/40 Parliament Street, Dublin 2., Folio No.: 21673; Lands: Ryland Lower; Area: 1a.2r.35p.; County: **WEXFORD.**

Mary Farrelly & Frances Farrelly, 107 Bandon Road, Drimnagh, Dublin. Folio No.: 3508 L; County: **DUBLIN.**

Owen Clarke, Ledonigan, Bailieborough, Co. Cavan, Folio No.: 736F; Lands: (1) Ledonigan (2) Tullywaltry; Area: (1) 3a.3r.0p. (2) 9a.Or.36p.; County: **CAVAN.**

Frank Casey, Cruagh, Rathfarnham, Co. Dublin, Folio No.: 23468; Lands: Ballinatray Lower; Area: 0a.1r.17p.; County: **WEXFORD.**

The Council of the County of Wicklow, Folio No.: 9689; Lands: Bray – Barony of Rathdown; Area: 1a.3r.30p.; County: **WICKLOW.**

Brendan & Monica Smith, 7 Oaklands, Church Lane, Greystones, Co. Wicklow, Folio No.: 2765F; Lands: Rathdown Lower; County: **WICKLOW.**

William Ryan, Ballinahalla, Clogheen, Co. Tipperary, Folio No.: 507; Lands: Ballyhistbeg; Area: 15a.3r.7p.; County: **TIPPERARY.**

James Laffey, Main Street, Kiltimagh, Mayo, Folio No.: 21893; Lands: A plot of ground with the building thereon in the North West side of the Market Place in the town of Kiltimagh situate in the Barony of Gallen and County of Mayo.; County: **MAYO.**

Patrick J. Casey, 3 Parkvillas, Father O'Coigleys Place, Dundalk, Co. Louth., Folio No.: 4L; Lands: Demesne; County: **LOUTH.**

William Foley & Elizabeth Mary Foley, Brownstown, Newbawn, Co. Wexford., Folio No.: 15482; Lands: Brownstown; Area: 148a.1r.10p.; County: **WEXFORD.**

Joseph Sheahan, Askeaton, Co. Limerick; Folio No.: 3967F; Lands: Coolrahnee; County: **LIMERICK.**

William X. Lysaght, Raheen, Tuamgraney, Co. Clare, Folio No.: 26227; Lands: Clondrinagh; Area: 0a.3r.20p.; County: **LIMERICK.**

John Paul Curtin, 25 Lavitts Quay, Cork., Folio No.: 24751; Lands: Claycastle; Area: 0a.0r.32p.; County: **CORK.**

Audrey McKenna, Inch, Stradbally, Portlaoise, County Laois.; Folio No.: 99L; Lands: West of Green Road; Area: 0a.0r.16p.; County: **QUEENS.**

Anthony Cervi, 35 Finglas Rd., Dublin. Folio No.: 190LSD (Certificate of Title); Lands: All that and those the dwelling house and premises known as "Lisnagall", Iona Rd., Glasnevin, situate in the Parish of St. George and district of Glasnevin; **City of DUBLIN.**

John Meere, Limerick Road, Ennis, Co. Clare. Folio No.: 39L; Lands: The leasehold estate in part of the land of Clonroad Beg in the Barony of Islands with the dwelling house thereon situate on the west side of Limerick Road in the town of Ennis; County: **CLARE.**

Lost Wills

Ryan, Thomas (otherwise Thomas Carmel), late of 94A Upper Drumcondra Road, Dublin 9, and formerly of 119 Finglas Park, Finglas, Dublin 11. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on 16th September, 1989 please contact A & L Goodbody, Solicitors, 1 Earlsfort Centre, Lower Hatch Street, Dublin 2. Tel (01) 613311.

Donnelly, Margaret Mary (known as Rita), deceased, late of 6 Devlin Road, Cabra, Dublin 7. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on 7th September, 1989 please contact Marion Maguire at 286 Palmerstown Woods, Clondalkin, Dublin 22, Tel. 571444 or 965033 (Office).

McAllister, Margaret, late of 250 Howth Road, Killester, Dublin. Will anyone having knowledge of the whereabouts of the original Will of the above named deceased who died on 6th September, 1987 please contact John J. O'Hare & Co., Solicitors, Marshalsea House, Merchants Quay, Dublin 8.

Greaney, Timothy Andrew (Rev. Fr.), late of the Missionary Society of St. Columban's, Navan, Co. Meath and St. Mary's Cathedral, Killarney, Co. Kerry. Will anybody having knowledge of the whereabouts of the original Will of the above named deceased dated 25th of September, 1982 please contact Messrs. John J. McDonald & Company, Solicitors, of 42E Palmerstown Road, Rathmines, Dublin 6, Tel (01) 977499.

Sexton, Michael, late of 200 Phibsborough Avenue, Fairview, Dublin 3 and Knock, Inch, Ennis, Co. Clare. Would anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 4th of September, 1989, please contact John Casey and Company, Solicitors, Bindon House, Bindon Street, Ennis, Co. Clare.

Sexton, Anthony, late of Knock, Inch, Ennis, Co. Clare. Would anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 28th July, 1978, please contact John Casey and Company, Solicitors, Bindon House, Bindon Street, Ennis, Co. Clare.

Miscellaneous

Seven Days Publican's Licence required for provincial area. Replies to Donal M. Gahan & Co., Solicitors, 127 Ranelagh, Dublin 6. Tel. 979254/977933.

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Cont. on page 414.

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 83 No. 12 December 1989

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- Larceny Bill, 1989
- Whiplash
- Status of Children born outside Marriage and their Property Rights

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GAZETTE
INCORPORATED LAW SOCIETY OF IRELAND
Vol. 83 No. 12 December 1989

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Cover Photo:
Solicitors Benevolent Association Christmas Concert. Mrs. Nanette Ivers, Mezzo Soprano, with Ms. Marie Askin, Pianist.

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Published at Blackhall Place, Dublin 7.
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Viewpoint

In a comprehensive report on Receiving Stolen Property published in 1987, the Law Reform Commission stated:-

> ''Our present law on Receiving is in many respects unnecessarily favourable to the accused; presents unreasonable obstacles to the prosecution and is seriously out of date . . . it also facilitates crimes of dishonesty over a wide area''.

The Larceny Bill 1989 is a direct response to this report. The principal changes incorporated in the Bill are the introduction of the new offence of dishonest handling of stolen property (following the English Theft Act 1968) and a refining of the necessary *mens rea* required for conviction. The Law Reform Commission Report perceived the present requirement, that an accused in order to be guilty of receiving must know the property to be stolen, to be the core of the problem. It advocated the concept of recklessness in its place. While the Government has not gone all the way with its recommendation, it now proposes that guilty knowledge shall comprise ''knowing or believing'' and goes on to say in Section 3(2):-

> ''Believing property to be stolen property includes thinking that such property was probably stolen property''.

Lawyers will rightly quibble with the retention of Section 43 of the Larceny Act 1916 in amended form which allows the prosecution to adduce evidence of previous convictions under the Larceny Act within the previous five years or evidence of possession of other stolen property within the previous 12 months. The Law Reform Commission recommended the repeal of this section. It is rarely if ever used and is probably open to constitutional challenge.

The Bill contains a number of other proposals. It seeks to end the situation where a person accused of receiving can be acquitted by proving he was the thief, and now makes the possession of articles for the purpose of taking a car or stealing from one an offence. In addition it makes the handling of property stolen outside the jurisdiction an offence here.

The Larceny Bill 1989 introduces a number of necessary and welcome reforms. There are now three Criminal Justice Bills before Dáil Éireann with more to follow. The manner in which Ray Burke T.D. has assumed the Office of Minister for Justice allows for cautious optimism. Having achnowledged the Government's gratitude to the Law Reform Commission will he now allow that body the resources necessary to carry out a comprehensive review of our Criminal law?

Finally one hopes that Mr. Burke will address the problems in our prisons. Years of neglect by successive governments have made these institutions profoundly inhuman. Has he the energy and commitment to take the Whitaker Report off the shelf? □

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The Larceny Bill 1989 — New Offence of Handling Stolen Property

PART I

By
Willie O'Dea,
LLM, Barrister at Law,
Lecturer in Law,
University of Limerick

At present the Irish Law which makes receiving stolen property an offence is contained in Section 33 of the Larceny Act 1916.[1] That provides as follows:

> "Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence . . . . "[2]

This provision has been judicially interpreted in a large number of cases over the years. It has given rise to two fundamental problems. As a result of these problems it is extremely difficult to secure a conviction for receiving in this country. The first problem is that as can be seen from the definition above, the accused has to "receive" the property. Receiving is not defined in Section 33. The essence of the concept of receiving however, is that the accused person has taken the property either into his possession or under his control.[3] That is the 'Actus Reus' of the crime. The second problem that arises (and again this is obvious from reading section 33), is that, in order to get a conviction the State must prove that the accused actually knew that the property was stolen. Constructive knowledge or suspicion is not sufficient. Actual knowledge has to be proved.[4] We shall now examine how the Larceny Bill 1989[4a] proceeds to handle each of those problems so as to make it easier to convict:

"The 1989 Bill replaces the existing offence of receiving stolen property with a new offence of handling stolen property."

(1) The 'Actus Reus' of receiving

The 1989 Bill replaces the existing offence of receiving stolen property with a new offence of handling stolen property.[5] This extends the scope of the offence very widely. Under the terms of the Bill a person handles stolen property if he "dishonestly"[6] either (1) receives the property or (2) undertakes or assists in its retention, removal, disposal or (3) arranges to retain, remove or dispose of or realise the property for the benefit of another person.[7] As already stated, the 1916 legislation obliged the State to prove that the property had come into the possession or under the control of the accused. This gave rise to great difficulties in practice.[8] Many of those difficulties centred around the extent to which the alleged receiver had to be conscious of the fact that the stolen goods were in his possession or under his control.[9]

". . . the Larceny Bill 1989 . . . creates a new offence which no longer requires that the stolen property would come into the possession or even within the control of the accused."

The distinction that the courts evolved between actual and constructive possession increased rather than reduced the difficulties in this area.[10] Difficult legal questions arose, such as for example whether goods were "received" by the accused, if they were received by a person over whom the accused had control. (See for example the cases of *R. v. Wiley* (1850) 2 Den 37 and *Attorney General -v- Nugent and Byrne* (1964) 98 ILTR 139). The concept of possession (and indeed control) proved to be extremely elusive and difficult to establish. These difficulties have been swept away by the Larceny Bill 1989, which, as already stated, creates a new offence which no longer requires that the stolen property would come into the possession or even within the control of the accused. A telephone call by the accused or a word by the accused or even arguably a gesture by the accused would be sufficient to constitute the offence of handling under the 1989 legislation. The description of the new offence as "handling" seems to suggest some physical contact.[11] It is clear that in order to commit the offence of handling as set out in the 1989 legislation no such physical contact with the stolen property is necessary. Per-

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haps the term 'dealing' with stolen property would be preferable to handling stolen property. It would certainly be more consistent with the definition of handling in the 1989 legislation.[12]

Even though the concept of possession is no longer a central feature of the Actus Reus of handling stolen property the concept is still expressly retained in the Bill. Section 7(3) of the Bill provides that property ceases to be regarded as stolen property when it has been restored to the owner or to other lawful possession or custody. The difficulties encountered by the courts in that line of cases where property came back into possession of the lawful owner or his agent or other lawful authority were very great indeed. They have given rise to very sharp divisions of opinion amongst the courts. The early case of *R. v. Villensky* [1892] 20B 597 can be contrasted with the case of *R. v. King* [1938] 2AllER 662.[13] It is clear that in the latter case the court took a very different view of the law than the court in the earlier decision. On the other hand the latter decision has been harshly criticised by various commentators.[14]

Section 7 sub-section 3 does not take a positiion on the matter. There is no hint to be found in the wording of the sub-section of which view of the law was preferred by the Irish parliamentary draftsman. This matter will have to be resolved by the courts at some future stage.

"The new mens rea i.e. knowing or believing property to be stolen is a repetition of Section 22 of the English Theft Act 1968."

(2) **The 'Mens Rea'**

As stated already, a person could not be convicted for receiving under the 1916 legislation unless the State could establish that he actually knew the property was stolen. The new legislation states

> "a person who handles stolen property knowing or believing it to have been stolen property shall be guilty . . . "[15]

The legislation goes on to state:-

> "Believing property to be stolen property includes thinking that such property was probably stolen property".[16]

The new mens rea i.e. knowing or believing property to be stolen is a repetition of Section 22 of the English Theft Act 1968.[17] However, the definition of believing property to be stolen as thinking that such property was probably stolen is new. It is easy to trace its origin however. In the United Kingdom in the case of *R. v. Moys* 79Cr App R 72 (CA, 1984) the accused was charged with handling stolen property under Section 22 of the Theft Act 1968. The trial judge told the jury that strong suspicion coupled with a deliberate shutting of the eyes was not merely an alternative to belief under Section 22 but was equivalent to belief under that Section. The Court of Appeal held that this was not a correct charge to the jury.[18] Lord Lane CJ observed

> "the question is a subjective one and it must be proved that the defendant was aware of the theft or that he believed the goods to be stolen. Suspicion that they were stolen, even coupled with the fact that he shut his eyes in the circumstances, is not enough, although those matters may be taken into account by a jury when deciding whether or not the necessary knowledge or belief existed").

However, in the subsequent Court of Appeal case *R. v. Harris* 84 Cr App R 75 (CA1986), Lawton L.J. referring to the passage from the judgement of Lord Lane C. J. in *R. v. Moys* remarked

> "it was submitted . . . on behalf of the appellant that some such direction [as that indicated by Lord Lane C. J.] should be given in every case where the issue is whether the defendant believed that the goods were stolen. We doubt whether this is so. We have to look at all the circumstances of every case. It is for the judge to decide from the feel of the case which is before him whether the jury require further assistance in the meaning of belief".[19]

". . . the Irish Parliamentary draftsman decided to elaborate on the meaning of the word "believe" . . ."

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It would seem that the Irish Parliamentary draftsman decided to elaborate on the meaning of the word "believe" in this context in order to resolve these difficulties and to make it quite clear that the term 'belief' would include suspicion. That is certainly not an approach that recommended itself to the Law Reform Commission when they considered the subject. The Commission referring to the use of the word 'belief' in the 1984 Act (Section 32) state that the affect of using this word in the 1968 Act was "unfortunate".[20] The Commission went on to state

> "there is an inherent problem with using the word belief in this context which the English courts were correct in sensing. Belief admits of degrees of commitment ranging from certitude to suspicion. There is little advantage in a legislative definition which leaves the question of the accused's mens rea in such an imprecise state".[21]

"The new legislation 'Mens Rea' created by the 1989 Larceny Bill gives rise to a great deal of uncertainty and confusion."

At already stated, the further elaboration of the definition of "belief" by the Irish draftsman is probably designed to get around this type of difficulty and bring suspicion within the ambit of belief. The Law Reform Commission recommended that the Mens Rea

of the offence of handling should be actual knowledge or recklessness.[22] It is submitted that this approach is far preferable to the approach adopted in the 1989 Larceny Bill. The concept of recklessness has given rise to its own difficulites.[23] However, it is far preferable to what the Irish draftsman has attempted in the 1989 Larceny Bill which represents a well meaning but fudged and, it is submitted, inadequate compromise between Section 22 of the 1968 Theft Act (English) and the recommendation of the Law Reform Commission. The approach adopted by the Irish draftsman could prove self defeating. If there is one thing which has become very evident from a study of this area of the law it is that the greater the complexity the greater the opportunity an accused person would have of getting round the law because of a technicality. The more precise and simple the legislation is, then the greater the chance there will be that an accused person will not succeed on a technicality. The 1989 legislation as drafted will increase the difficulties of a trial judge giving an adequate direction to a jury. Consequently the danger of a trial judge's charge to a jury being quashed as being inadequate will be considerably increased. The new legislative ''Mens Rea' created by the 1989 Larceny Bill gives rise to a great deal of uncertainty and confusion. It is difficult to know whether any significance will be attached to the fact that the definition of belief is not that believing property *means* thinking that the property was probably stolen but rather that it *includes* thinking that such property was probably stolen.[24] It is impossible to predict the significance of the use of the word ''probably'' here. The only thing that can be predicted with certainty is that there will be a great deal of uncertainty in this area of the law for the immediate future.

OTHER CHANGES IN THE 1989 BILL

The 1989 Bill incorporates a number of other changes in the law. Some of these are very welcome. However, some of them are unwelcome in varying degrees.

''The 1989 legislation provides a uniform maximum sentence . . .''

A. **Sentencing**

The 1916 legislation contained different maximum sentances for larcenies committed in different circumstances. These were the legacy of social concerns of a bygone era and did not reflect current reality. For example the larcency of wills carried a maximum sentence of penal servitude for life. The larcency of documents of title attracted a comparatively light maximum sentence of five years penal servitude. The 1989 legislation provides a uniform maximum sentence of ten years imprisonment for all the larceny offences covered by the 1916 Act and for embezzlement, fraudulent conversion. obtaining property by false pretenses and blackmail.[25] It also provides a maximum sentence of fourteen years imprisonment for handling.[26] Section 2 of the 1989 Bill provides that possession of certain articles for use in larceny and other related offences is in itself an offence.[27] The maximum penalty is five years imprisonment on first conviction and ten years on second and subsequent convictions. This introduction of uniformity in maximum sentances is to be welcomed. it does not follow the recommendation by the Law Reform Commission to the effect that the same sentence should be provided for larceny and handling.[28] That is understandable. The Irish legislature is obviously concerned to send a signal that it regards handling or receiving stolen property as a more heinous offence than ordinary larceny.[29] Space does not permit me to go into this matter in detail but it is sufficient to say that there are strng grounds for this opinion.[30]

''The Irish legislature is obviously concerned to send a signal that it regards handling or receiving stolen property as a more heinous offence than ordinary larceny.''

The Law Reform Commission also recommended that the court would in addition to any penalty imposed be able to order payment of compensation by the handler whether or not the offence was committed by the handler himself.[31] This recommendatin is not followed in the 1989 legislation. That is to be regretted.[32]

B. **NEW DEFINITION OF STOLEN PROPERTY.**

The 1916 Larceny Act punished the receiving of property which was either ''stolen or obtained in any way whatsoever under circumstances which amounted to a felony or misdemeanor''.[33] The 1989 Bill does not follow that definition. It contains a separate definition of ''stolen'' property. That is contained in Section 7 (4) of the Bill. The Bill treats property as stolen property for the purpose of handling offences whether it was obtained by larceny, embezzlement, fraudulent conversion, false pretences or blackmail. It is submitted that basically the approach adopted in the 1916 Act is preferable. The 1989 Bill leaves out some property wrongfully obtained otherwise than in the various ways set out in section 7 (4). For example property which has been the subject of a customs offence such as smuggling is not covered.[34] One slight difficulty that emerged from the interpretation of the definition of stolen property in the 1916 Act is highlighted in the case of *DPP -v- Niesier* (1958) 3AllER 662. In that case it was held that where a person is charged with receiving property under the 1916 Act under circumstances which amount to a misdemeanour the property must be proved to have been originally acquired by an offence which amounted to a misdemeanour. It was held that the same applied when a person was charged with receiving property under circumstances which amounted to a felony.[35] This problem is now eliminated by Secion 7 (4) of the 1989 Act. However, that difficulty

''The 1989 Bill leaves out some property wrongfully obtained . . .''

could have been eliminated quite easily. By and large the approach adopted in the 1916 Act in this context is preferable to the approach adopted in the 1989 Bill.

C. **PROPERTY STOLEN IN THE UNITED KINGDOM.**

By a curious anomaly property stolen in England, Scotland or Wales was not "stolen" property for the purposes of the offence of receiving stolen property under the 1916 Act. This arose from a Supreme Court interpretition of the Adaptation of Enactments Act 1922.[36] This was clearly unsatisfactory.[37] It gave rise to the ridiculous situation that a person could be charged in the Republic of Ireland with receiving stolen property in the Republic of Ireland if that property was stolen anywhere else in the world except England, Scotland or Wales. Section 7 (1) of the 1989 Bill removes that anomaly. This is a welcome change. The sub-section states that handling stolen property will be an offence here if the property was acquired in a way which

> "amounted to an offence where and at the time the property was stolen".

". . . property stolen in England, Scotland or Wales was not "stolen" property for the purposes of the offence of receiving stolen property under the 1916 Act."

One cannot help wondering however what the situation will be where the stealing has ceased to be an offence where it was stolen at the time the property was handled here. It would surely be anomalous if a person could be convicted in this country of handling property which was originally acquired abroad if the means by which it was acquired has ceased to be an offence at the time the property was handled here.[38] However, a literal reading of the 1989 Bill would seem to give rise to that result.

D. **ATTEMPTED RECEIVING**

If a person is to be convicted of handling stolen property then obviously the property must be stolen in the first place. But what if the accused believes the property is stolen and acts dishonestly and handles the property (within the definition of handling in the 1989 Bill)? The accused in this case obviously did not succeed in committing the offence of handling stolen property, but should it not be possible to charge him with a separate offence of attempting to handle stolen property? This question came before the House of Lords in the case of *Haughton -v- Smith*[39] In that case the House of Lords held that in circumstances such as this the accused could not be found guilty of attempting to handle stolen property. Apparently the basis for this decision is that a person cannot be accused of attempting the impossible.[40] That problem was solved in England by the passage of the Criminal Appeals Act 1981 which allowed the accused to be convicted of attempting to handle stolen property in such circumstances. There is nothing in the 1989 Bill which corresponds with the Criminal Appeals Act 1981. It is difficult to know under what circumstances a person could be convicted in this jurisdiction of attempting to handle or receive stolen property. This is a matter which certainly needs attention.

". . . should it not be possible to charge [the accused] with a separate offence of attempting to handle stolen property?"

E. **ALTERNATIVE VERDICTS**

Section 81 of the 1989 Bill provides that a person charged with larceny, embezzlement, fraudulent conversion, obtaining by false pretences or blackmail may be found guilty, as an alternative, of handling stolen property if the evidence proves handling. This is to be welcomed. It overcomes the type of difficulty illustrated by cases such as *O'Leary -v- Cunningham*[41]

F. **SHIFT IN THE EVIDENTIAL BURDEN**

Section 3 of the 1989 Larceny Bill repeals Section 33 of the 1916 Act and replaces it with a new Section 33. The new Section 33 (2) (b) states

> "where a person (1) receives stolen property, or (2) undertakes a retention, removal, disposal or realization by or for the benefit of another person, or (3) arranges to do any of the things specified in sub-paragraph (1) or (2) of this paragraph in such circumstances that it is reasonable to conclude that he knew or believed the property to be stolen property he shall be taken to have so known or believed unless the court or the jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he so knew or believed".

"It certainly does not discharge the prosecution from the onus of proving that the accused is guilty in all the circumstances."

Inevitably there has been some debate about the exact effect of this. On the surface it could be argued that it shifts the onus of proof on to the accused. if that were its effect it would certainly be controversial. On balance however, it does not appear to do that. It certainly does not discharge the prosecution from the onus of proving that the accused is guilty in all the circumstances. There is, it is contended, still no onus on the accused to provide any explanation. The effect of Section 33 will be to allow inferences to be drawn if the accused does not given an explanation or if his explanation is not satisfactory. It would appear that what the legislature are doing in Section 32 (2b) is putting into statutory form the decision of the Irish Court of Criminal Appeal in The People *AG -v- Oglesby.*[42]

Conclusion

It can be seen that the 1989 Bill is far from perfect. However, it does provide some much needed and

welcome changes in this area of criminal law. Apparently the original brief of the Law Reform Commission was to look at the entire law relating to larceny. This is clear from the very first paragraph of their Report. The Commission did not consider the entire law relating to theft because of the extremely limited resources available to it. That is also clear in the first paragraph of their Report. That is a deplorable situation. The 1916 Act which is the governing legislation on the Irish law relating to larceny is not suitable to modern conditions. The entire area of Irish Criminal law relating to larceny and theft needs to be overhauled as a matter of urgency.[43] That would have to be borne very firmly in mind by the Law Reform Commission when they come to make their recommendations on the general law of larceny in this country. It is also suggested that when the Law Reform Commission come to do this they should take careful note of certain matters which are not dealt with adequately under Irish Criminal Law as it stands at the present time. These include:

"The entire area of Irish Criminal law relating to larceny and theft needs to be overhauled as a matter of urgency."

(1) Dishonest debt evasion. Where debts are dishonestly evaded it is arguable that the civil law is not sufficient to deal with the matter. It is the sort of activity that should certainly be criminalised particularly when there was every intention to evade from the beginning.

(2) Dishonest acquisition of services and labour which is also unprovided for either in the 1916 Act or in the 1989 Bill.

(3) Unauthorsied use of cheque cards and credit cards. The creation of a specific offence to cover this area is probably necessary.[44]

(4) Computer fraud. Special provision is probably necessary here also.[45]

Footnotes

1. Sec. 33 (11) states:-
   "Every person who receives any property, believing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to a felony or misdemeanour shall be guilty of an offence of the like degree . . . . "
2. The sentence is penal servitude for any period not exceeding seven years, see S.33 (1) (a) and S.33 (1) (b);
3. See the case of *A.G. -v- Nugent & Byrnes* (1964) 98 I.L.T.R. 139. See also *Minister for Posts & Telegraphs -v- Campbell* [1966] I.R. 69 particularly Davitt P. at pp. 73-74.
4. See the People -v- Berber and Levey [1944] I.R. 405. See especially pp. 411-412. See also Hanlan -v- Fleming [1981] I.R. 489 (Supreme Court).

4(a) Welcomed in effusive terms by the media see e.g. editorial of the *Irish Independent* dated 12th October 1989 which stated "We welcome this Bill. As the Law Reform Commission concluded two years ago the law as it stands is out of date and has come to be unduly favourable to the accused. These new provisions will be of invaluable assistance to the Garda and the Prosecution authorities in dealing with known receivers of stolen property. And if receiving is thereby curtailed so too we believe will be theft".

5. See S. 3 of the Larcency Bill, 1989 which repeals S. 33 of the Larceny Act, 1916 and replaces it with a new S. 33.
6. It can be argued that is was unnecessary to add this further element to the mens rea. As we shall see later in this article the concept of dishonesty which has been imported from the 1968 Theft Act in England has given rise to grave difficulties in practice. It is interesting to see the House of Lords struggling with this concept in cases such as *R. -v- Morris* [1983] 3 All.E.R. 294. See also *R. -v- Feely* [1973] Q.B. 530. *R. -v- McGyver* [1982] I All.E.R. 491 *R. -v- Ghosh* [1982] Q.B. 1053. See also Dail Debates Vol. 392 No. 3 col. 788.
7. See new Section 33 (2) (a) (2) and new Section 33 (2) (a) (3). For example in *R. -v- Smyth* 6 Cox C.C. 554, Earl, J, said (at p.556) "Possession is one of the most vague of all vague terms, and shifts its meaning according to the subject matter to which it is applied, varying very much in its sense, as it is introduced into either civil or into criminal proceedings".
8. See. *R. -v- Lawless* C.C.A. 6/11/1968.
9. See *People -v- Byrne* 3 ILTR 348 also *R. -v- Miller,* 6 Cox CC 353 (Irish Court of Criminal Appeal, 1853).
10. See Law Reform Commission Report No. 23 on Receiving Stolen Property at p. 511. This can give rise to confusion e.g. in the Dail Debates Vol. 392, No. 3 at col. 768. Deputy Liam Kavanagh fell into this trap. He said "One of the great faults of the Bill as I see it is that it deals only with physical handling and therefore it is a little outdated. There are many sophisticated ways of doing business but unfortunately the same sophisticated ways can be used to commit crimes".

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11. See Dail Debates vol. 392 No. 3, col.784 (Deputy O'Dea col. 809, Deputy Flanagan, col. 823, see Law Reform Commission Report col. 14 to 16.
12. See Smith & Hogan, Criminal law, p. 454 to 455, 1st Edition 1965.
13. See also Proof of Larcency in Receiving Cases 101 Solicitors Journal, 238 (1957).
14. New S. 33 (1).
15. See S 22 (1).
16. The Court of Appeal felt the trial Judge's error arose from an incorrect understanding of a paragraph in Archbold on Criminal Law, 41st edition para. 18/165.
17. At p.79.
18. See Law Reform Commission Report paragraph 120 at p.94.
19. Law Reform Commission Report p.94. In an article called "The Mishandling of Handling," (1981 Criminal Law Review p.682) Spencer said "sometimes you would think that the Courts were trying to make a dog's breakfast of the law of handling stolen goods. In one line of cases on secion 22 of the Theft Act 1968 they interpreted the words "knowing or believing as knowing them to be stolen" so perpetuating the defect in the earlier law which the addition of the words" or believing "was designed to cure".
20. Law Reform Commission Report paragraph, 130 p.100. In relation to the definition of recklessness for this purpose the Law Reform Commission was attracted by the approach favoured by the American Law Institute in Section 202 (2) (c) of the tentatative draft No. 4 of the Model Penal Code which they considered should form the basis of the legislative definition in this country.
21. See article by Mary McAleese, 'Just What is Recklessness', 1981 Dublin University Law Journal 29; see Dail Debates vol. 392, No. 3, 26 October 1989, col. 798, (per Deputy O'Dea).
22. See S. 9.
23. S. 3.
24. Ss. 22 and 23.
25. Paragraph 151 p.110. It is worthwhile to note that the Law Reform Commission did not definitely recommend that the maximum sentence should be ten years. The relevant part of the recommendation states "the same sentence should be provided for larceny and handling. Perhaps a period of ten years would be appropriate".
26. See Dail Debate Vol. 392, No. 3 col. 786/787.
27. Law Reform Commission paragraph 151, p.110. See also Dail Debates Vol. 392 No. 3, 26 October 1989, col. 791.
28. When replying at col. 965 of the Dail Debates, the Minister, Mr. Burke, stated Deputy O'Keeffe as well as Deputies McCartan and O'Dea raised the question of the recommendation made by the Law Reform Commission regarding the ordering by court of payment of compensation by the offender to the victim . . I can assure the deputies that this [matter] is under consideration in my department and I hope to be in a position in the reasonably near future to put proposals to the Government".
29. S.33 (1) (a) and (b).
30. See Law Reform Commission Report pp.11-13; see also page 103 paragraph 134, where the Law Reform Commission stated: "we consider the legislation should provide that the offence would be committed in respect of goods unlawfully obtained and that it should not be necessary to specify how the goods were unlawfully obtained. Unlawfully obtained could be defined as obtained in circumstances amounting to an offence (including any breach of S. 186 of the Customs Consolidation Act, 1876). The definition should be extended to cover cases where the goods were obtained lawfully, however subsequently criminally misappropriated.
31. See Law Reform Commission Report paragraph 39 p.27.
32. See *The State (Gilsenan) -v- McMorrow,* [1978] IR. 372, also *The People (Attorney General) -v- Ruttledge* [1978] IR 376.
33. See Law Reform Commission, p.22 See Dail Debates vol. 392, No. 3, 26 October 1989, col. 799.
34. See especially Lord Hailsham L.C. "I do not think that it is possible to convert a completed act of handling, which is not itself criminal because it was not the handling of stolen goods, into a criminal act by the simple device of alleging that it was an attempt to handle stolen goods, on the grounds that at the time of handling the accused falsely believed them to be stolen. In my opinion it would not be for the court to manufacture a new criminal offence not authorised by the legislature".
35. [1975] EC 476, page 490.
36. See Law Reform Commission, p.40. See also *People -v- Carney* [1951] IR 324.
37. See especially Kenny. J. at p.165.
38. However, it has now been confirmed that the Law Reform Commission is examining the general law relating to larceny. See Dail Debates, vol. 392, No. 3, at col. 787. In his reply at col. 966 the Minister stated: "I accept the need for a more thorough-going look at the Larceny Act. As referred to by Deputy O'Dea, the Law Reform Commission is in fact looking at the whole area of dishonesty and will be making further reports on the matter. They saw receiving of stolen property as an area requiring priority attention and dealt with it separately. When the further reports are received they will be dealt with and should enable us to take a useful step towards an ultimate codification of the criminal law by perhaps codifying in one statute relating to theft etc. However, because of the complexity of the matter which is compounded by the fact that the main provision is now over seventy years old, this process will be complex and protracted. The Government agree with the Commission that receiving should be tackled now".
39. [1975] AC 476.
40. Since it was impossible to handle stolen property (as the property was not stolen) the accused could not be convicted of attempting to do this.
41. Supreme Court, unreported, 28.7.80.
42. [1966] IR 163.
43. However, a note of warning must be sounded for the Law Reform Commission when, eventually, they do come to report on this. The English Theft Act of 1968 has been proved to be far from perfect. Its implementation has not been without problems. Grave difficulties have been encountered in the interpretation of terms like "appropriation" and "dishonesty".
44. See Section 13 (1) of the Debtors (Ireland) Act 1872 which, it is suggested, is only a partial solution.
45. Given the difficulty involved in establishing a "taking", or, "obtaining on conversions" – See McCutcheon – The Larceny Act 1916 pp.144-145.

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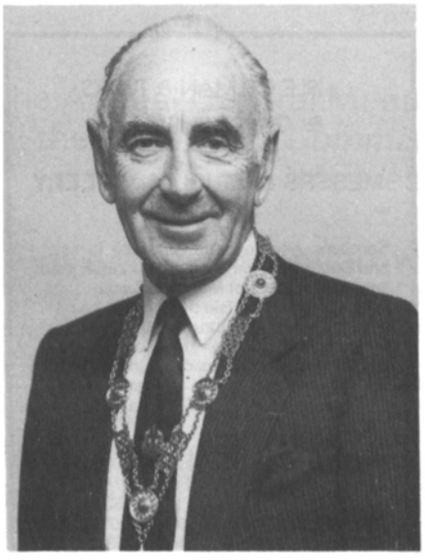

By the time you read this message we will be in the "90s". Accordingly I would like to wish all the members of the Profession a happy and prosperous New Year and continued success throughout the entire decade.

Since I have taken office, I have already visited a number of the Bar Associations throughout the country. One of the things that has been brought home to me is the fact that every day and every year solicitors are working harder and harder. They have to do this to stand still and in endeavouring to carry out their client's wishes, and in trying to provide an efficient legal service. They have to face the frustrations of mounting delays in the Civil Service, the administration of our Courts and of course the chaotic situation that now exists in the Land Registry. Surely the Government must realise that in many specialised areas such as those mentioned above the existing embargo on the recruitment of staff cannot continue. How can the economy of a country improve if, for example, it can take up to two years to register a plot of land in the Land Registry and up to six months simply to obtain a Land Certificate to establish ownership to the property. The arrears are increasing day by day and I understand that at present the overall arrears in transactions is in the region of 50,000.

We have heard a great deal recently regarding the Green Paper and the White Paper in England and Wales on the re-organisation of the Courts and the Judicial system. The Courts and Legal Services Bill has now been introduced and this has given a greater right of audience to solicitors in England and Wales. Whilst we already have a full right of audience in all Courts in this country, we do not of course have the opportunity of appointment to the Bench other than in the District Court. The President of the Law Society of England and Wales in commenting on the UK Bill said as follows:- "This Bill provides a modern statutory foundation for the legal profession of the future in which outdated restrictions will have no part. Solicitors can now see a future in which there will be no artificial obstacles facing those who wish to develop their skills in court advocacy, leading on to eventual possible appointment as a Judge".

During the month of January, members will see advertisements appearing in the Press for the appointment of a Director General of the Society. Our present Director General will be retiring at the end of October having given the Society 17 years of devoted and excellent service. However, I will be saying more about this at a later date. □

Ernest J Margetson

ERNEST J. MARGETSON,
President.

YOUNGER MEMBERS COMMITTEE

The Younger Members Committee would like to take this opportunity to thank all those involved with its activities during the last year. In particular the Committee would like to thank all who supported the Quiz Nights, Soccer Blitz and the Bowling Night. This support was very much appreciated.

The YMC is currently working on its programme for 1990 and further details will appear in future issues of the *Gazette*.

YOUNGER MEMBERS COMMITTEE,
DECEMBER 1989.

INCORPORATED LAW SOCIETY OF IRELAND

Members are advised that the Public Relations Committee has published a notice regarding land registry delays, a copy of which is enclosed with this issue of the *Gazette*. It is intended that this notice be displayed in Solicitors' offices to inform clients of the present difficulties with land registry dealings.

Incorporated Law Society of Ireland

Annual Election 1989/90

The following is the Report of the Scrutineers of the Ballot held on November 14th, 1989, pursuant to Bye-Law 6(16)(g) of the Incorporated Law Society of Ireland:

(i) The number of outer envelopes containing voting paper envelopes returned to the Society was **2,092**.

(ii) The number of voting papers rejected for failure to comply with clause (13) (a) (ii), (iii), (iv) or (v) of this Bye-law in relation to the annual election, or clause (13) (b) (ii), (iii), (iv) or (v) of this Bye-law in relation to a provincial election was **7**.

(iii) The number of voting papers adjudged spoiled for failure to comply with clause (13) (a) (i) of this Bye-law in relation to the annual election, or clause (13) (b)(i) of this Bye-law in relation to a provincial election was **14**.

(iv) The number of papers adjudged spoilt by reason of non-compliance with Direction 3 of the Directions for Voting on the Voting Paper was **2**.

(v) The number of valid voting papers included in the court was **2,069**, and

(vi) The number of votes received by each candidate (in order of highest to lowest) indicating the candidates who have been provisionally declared elected and the candidates who have not been provisionally declared elected were as set out below.

Mr. Ernest J. Margetson is deemed to have been elected.

The following candidates are provisionally declared elected, by the number of votes appearing after their names.

	Deemed Elected
1. Margetson, Ernest J.	
2. Quinlan, Moya	1,163
3. Shaw, Thomas D.	1,127
4. O'Donnell, Rory	1,097
5. Ensor, Anthony H.	1,094
6. Binchy, Donal G.	1,064
7. Neary, Anne	1,044
8. O'Donnell, P. Frank	984
9. Clarke, Geraldine M.	958
10. O'Connor, Patrick	950
11. Bourke, Adrian P.	948
12. O'Mahony, Michael V.	941
13. McMahon, Brian M.	926
14. Collins, Anthony E.	909
15. Irvine, Michael G.	896
16. Monahan, Raymond T.	884
17. Binchy, Owen M.	884
18. Lynch, Elma	858
19. Daly, Francis D.	855
20. Shields, Laurence K.	843
21. Curran, Maurice R.	830
22. Daly, Patrick J.	819
23. Mahon, Brian J.	815
24. Smyth, Andrew F.	812
25. Griffin, Gerard F.	811
26. Pigot, David R.	754
27. Glynn, Patrick A.	752
28. Cantillon, Ernest J.	746
29. O'Sullivan, Eugene	718
30. Joyce, Philip M.	716
31. Donegan, James D.	697

The following are the names of the candidates who have not been provisionally elected and the number of votes received by them appears after their names.

32. Murphy, Ken	656
33. Harte, John B.	642
34. Flanagan, Brendan	620
35. O'Brien, Liam M.	603
36. McKenna, Justin	600
37. Dowling, Dominic M.	590
38. Reynolds, Miriam	587
39. Tansey, Damien M.	584

As there were four candidates nominated for the four seats for provincial delegate there was no election and the four candidates for these seats were returned unopposed as follows:-

Connaught – McEllin, Edward M.
Leinster – Lanigan, Frank
Munster – O'Connell, Michael G.
Ulster – Murphy, Peter F.R.

Dated this 14th November, 1989.
Signed by Scrutineers.

R. J. Tierney	John Maher
Peter D. Prentice	Walter Beatty
L. F. Branigan	Eamonn G. Hall
Donal P. O'Hagan	Andrew J. O'Donnelly
Terence E. Dixon	Liam Young
Clare Leonard	James J. Ivers

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President: The Hon. Mr. Justice Brian Walsh.

The Annual General Meeting of the Irish Society for European Law will be held in the *European Commission Office,* 39 Molesworth Street, Dublin 2, on Wednesday January 17, 1990 at 6 p.m.

A wine reception will be held after the Annual General Meeting.

All interested persons are welcome to attend the Annual General Meeting and the wine reception.

Persons interested in joining the Society should communicate with the Honorary Secretary, Ann Walsh, Solicitor, T.T.L. Overend, McCarron & Gibbons, Solicitors, 9 Upper Mount Street, Dublin 2.

POSTS IN THE INCORPORATED LAW SOCIETY

FULL-TIME TUTOR
Applications are invited from solicitors for the post of Full-Time Tutor in the Society's Law School. The appointment will be for one or two years possibly renewable. Competitive salary. Features of the post include contribution to course design and daily contact with leading practitioners. Free C.L.E. Courses.

EDUCATION OFFICER
The Law School of the Society requires a solicitor for one year to act as Education Officer. The salary will be commensurate with experience. The job will include liaison with students, servicing the Education and Education Advisory Committees, administering the Society's examination system and will provide an opportunity to contribute to computerisation of the Law School system and materials.

PROFESSIONAL COURSE EXAMINERS
Applications are invited for the posts of examiners for the Law Society's Final Examination 2nd Part (the Professional Course) in each of the following subjects: **Conveyancing, Litigation, Probate and Administration, Capital Tax.**

Applicants should have practical experience in the subjects selected or have experience of tutoring in those subjects on the Professional Course.

The fee is £10 per script.

Applications for all posts, with accompanying C.V. to:

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Incorporated Law Society of Ireland,
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Law Society.....

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Whiplash

Whiplash injury of the spine and supporting structures is arguably the most common injury experienced by victims of motor accidents in the Republic today. Public perception of whiplash is of a minor injury, often exaggerated by the patient. Unfortunately, lawyers can be of a similiar opinion, and this article should improve their understanding of this debilitating injury.

By
Cahal J, Muldoon,
F.R.C.S.Ed.,
F.D.S.R.C.S

The force of impact on the spine and skull varies in proportion to the speed of collision. Studies show a rear end impact at 10 mph produces a force of nine times gravity (9g) in the area of the lower spine, and causes a whiplash effect of acceleration and deceleration or hyperextension (backward) and hyperflexion (forward) movement of the spine. By leverage the impact force at the lower spine is amplified almost threefold at the upper spine and skull, and thus the skull contents suffer a force of twenty three times gravity (23g) even at this low speed of 10 mph. Thus, speeds of 30 mph can bring forces up to seventy times gravity (70g) to bear on the skull contents.

". . . speeds of 30 mph can bring forces up to seventy times gravity (70g) to bear on the skull contents."

Although the range of movement between any two adjacent vertebrae is very restricted (probably blocked by the intervertebral discs), the spine has a relatively wide range of movement due to the sum of all the vertebral movements. Hyperextension and hyperflexion greatly exceed the normal movement range of the spinal joints, and they react as any other joint, e.g. ankle, subjected to sprain. Traumatic arthrosis with oedema (swelling) of their synovial lining and supporting ligaments is produced. This swelling may cause pressure on the nerves which exit from the spinal cord through the intervertebral foramina.

The three main nerve types which emanate from the spinal cord through the intervertebral foramina are: (i) sensory, (ii) motor and (iii) sympathetic. Pressure on the sensory nerves causes pain or paraesthesiae (numbness) over the dermatome (the portion of skin subserved by the particular nerve). Motor nerve impingement may produce power loss, as when one's knee suddenly gives way. Injury to the sympathetic nervous system is suspected when blurring of vision and hearing upsets occur.

". . . the syndrome of pain and muscle spasm is self-perpetuating."

The paraspinal muscles are arranged in mirror images of each other on either side of the spine, and work together by proprioception to maintain a normal posture throughout all movements. Some of these muscles are torn and injured by the whiplash mechanism, and are painful in use. This pain and the pressure on the sensory nerves due to joint swelling will produce a reflex arc involving the motor nerves, and cause muscle spasm. Pain and spasm prompt inappropriate movements of complementary muscles e.g. spasm of one trapezius muscle activates the contralateral trapezius muscle of the neck and upper back, and so the syndrome of pain and muscle spasm is self-perpetuating.

". . . pain and discomfort interfere with sleep, and this compounds tiredness and irritability."

At the upper end of the spine, the skull and brain suffer approximately three times as much force as the lumbar area. Injury to the frontal cortex, temporal lobes and tissues around the limbic system of the brain results. These areas govern mood, feelings and behaviour in the normal subject, and their injury is followed by poor memory, decreased concentration and irritability. The pain and discomfort interfere with sleep, and this compounds tiredness and irritability.

The muscles of the throat and the temporomandibular joint can also be strained by whiplash, and pain on swallowing and chewing is then seen.

Headache is a prominent part of this syndrome, and may arise in two ways. Firstly, sudden deceleration/acceleration of the brain within its fixed compartment of the skull causes a contra coup effect, with cortical oedema and micro haemorrhages of the brain stem. Secondly, reflex spasm of the muscles in the back of the skull and upper neck produces a tension headache at the back of the skull.

"The patient . . . is unable to sit comfortably or adopt a normal posture on standing."

Cahal J. Muldoon.

The patient thus has painful restricted movement of his neck and back, and is unable to sit comfortably or adopt a normal posture on standing. He is plagued by pain on movement, paraesthesiae of the extremities, headache, blurred vision, dysfunction of the temporomandibular joint, poor memory, poor concentration, disturbed sleep pattern and resultant irritability.

The muscles affected are tender to palpation, especially at points of origin over the spine, and muscle spasm may be distinguished by the palpating hand. Rarely areas of sensory loss are demonstrated with muscle atrophy and reduced reflexes of the limbs. Hearing disturbance is gauged by audiometry and EMG (internal ear test) changes, and ocular muscle imbalance is often demonstrated in patients complaining of blurred vision.

Radiographs of the spine rarely show bone injury as it is the intervertebral joint structures (synovial membrane, supporting ligaments and muscles) that are affected. However, it is important to assess the condition of the spine at the time of accident as a baseline for comparison later (possibility of arthritis at a later date).

"The treatment of whiplash injury should be directed towards curing the pathology produced by the force, and relief of the symptoms."

Electro encephalogram of the brain waves (EEG) will disclose major organic injury of the brain. Follow up computerized axial tomography (CT) scan is indicated should this be positive. It is considered wise to perform haemoglobin tests to establish the presence or otherwise of anaemia, especially in women.

The treatment of whiplash injury should be directed towards curing the pathology produced by the force, and relief of the symptoms. It is particularly important to offer continuous care with encouragement and a graduated increase in therapy. Anit-inflammatory drugs are prescribed to reduce the inflammation of the joints and surrounding tissues. A cervical support collar may be used to rest the area and allow healing to commence over the first few days. Painful reflex spasm produced in the muscles is relieved by analgesic medication. Physical therapy plays an important role in the treatment of whiplash injuries. Ultrasound or deep heat therapy helps to heal the inflammatory processes in the muscles and paraspinal structures. Early treatment with mobilization and exercise regimes further reduces dysfunction.

"People who were relatively fit prior to the accident with good muscle tone and who are treated as above, tend to recover relatively easily."

Older people, people with poor muscle tone and people with depression tend to have difficulty in recovering from these accidents. People who were relatively fit prior to the accident with good muscle tone and who are treated as above, tend to recover relatively easily.

"It is important . . . to read the immediate post-accident radiographs . . . to assess possible development of [arthritis]."

Arthritis is seen in many cervical spine x-rays. The large majority of these patients do not complain of pain or limitation of movement. Studies in the United States show that thirty three (33) per cent of all adults and ninety (90) per cent of those over sixty five (65) show osteoarthritic changes on x-ray. It is important, therefore, to read the immediate post-accident radiographs as a baseline of spoldylotic changes, and compare at twelve (12) and twenty four (24) months to assess possible development of the condition.

". . . neck pain persists for six months in seventy five per cent (75%) and for two years in sixty five per cent (65%) of patients with whiplash injuries."

Whiplash injuries result in multiple complaints and prolonged disability. The authenticity of these complaints is often queried due to subsequent litigation. However, neck pain persists for six months in seventy five per cent (75%) and for two years in sixty five per cent (65%) of patients with whiplash injuries. It is also reported in medical literature that forty five per cent (45%) continue to complain

". . . figures and the possible incidence of arthritis . . . dictate a careful measured treatment regime and prolonged follow-up with regular review and radiographs . . ."

long after a satisfactory outcome of the legal action. These figures and the possible incidence of arthritis in a whiplash damaged spine dictate a careful measured treatment regime and prolonged follow-up with regular review and radiographs before final assessment of disability can be ascertained. This process enables the lawyer to better present his client's case at litigation. □

LAW SOCIETY

ANNUAL CONFERENCE 1990

Thursday, 3rd May to Sunday, 6th May 1990

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Practice Notes

Fax Transmissions

A member has advised the Technology Committee that fax-transmissions will fade if the actual fax transmission is covered by plastic of any sort, i.e. plastic folders or pockets. Complete fading can occur within one month of being continuously exposed to plastic. □

Dalkon Shield Intra Uterine Device

The extensive media coverage over the last month will have made it clear to all those involved in the Dalkin Shiled litigation against A. H. Robins, the manufacturers of the intra uterine device known as the Dalkon Shield that the Supreme Court decision in the United States has now effectively cleared the way for the implementation of the Sixth plan of reorganisation presented by A. H. Robins under Chapter 11 of the Bankruptcy code of the United States of America. I have recieved many telephone calls from Solicitors around the Country seeking information and advice on procedure with regard to this litigation. The American Trust established to evaluate claims and to distribute the available funds has been reasonably forthcoming in circulating information but there are a great many areas of confusion especially in relation to status of late claims, availability of medical records and the types of injuries attributable to the use of the Dalkon Shield.

This is a situation that would very much benefit from a unified approach and the sharing of information and it would be beneficial to practitioners to share a common resource of information and ideas. For this reason I would be glad to hear from all those who are engaged in the Dalkon Shield Litigation with a view to establishing a register of such practitioners and with a view to establishing a forum of advice and discussion. Practitioners should also bear in mind that the obligation that they have assumed in processing a claim in America may extend to their advising on the rights of their clients with respect to the possible responsibility of medical centres, clinics and doctors in this country and this aspect should not be neglected.

A Victims Association has been established and a number of solicitors have contacted that Association. However, it should be borne in mind that the Association appears to be promoting the idea that Claimants be represented by a New York firm of Lawyers and clients already legally represented in Ireland received Service Retainer Agreements from that US firm direct and through the offices of the Victims Association.

The address to which those interested should write is Edward O'Neill, Edward O'Neill & Company, Solicitors, 69 Phibsboro Road, Dublin 7. □

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The Law Society wishes to advise that through its Employment Register, it facilitates Solicitors currently seeking employment or contemplating a change of present employment.

For further details contact:

MIRIAM A. WALSH,
EDUCATION OFFICER,
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Law Society Committees 1989/90

The following are the Chairmen and Vice Chairmen of the Law Society's Committees for 1989/90.

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Younger Members:
Miriam Reynolds (Chairman)
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MEDICO-LEGAL SOCIETY OF IRELAND

PROGRAMME FOR SESSION 1989-90

1. *TUESDAY, 9th JANUARY 1990:*
   Dr. Seamus Ryan — "THE PRESIDENTIAL ADDRESS".
2. *TUESDAY, 13th FEBRUARY 1990:*
   Dr. Peter O'Connor, Casualty Consultant, The Mater Hospital, and Joe O'Farrell, Director, Allied Insurance Consultants Ltd. — "PERSONAL INJURY CLAIMS AND LIABILITY".
3. *TUESDAY, 13th MARCH 1990:*
   E. R. Adrian Glover, Solicitor — "MEDICAL RECORDS AND THE LEGAL SYSTEM GENERALLY".

Details in relation to the Annual General Meeting will be published later.

NOTES

Lectures take place at 8.30 p.m. at the United Service Club, St. Stephen's Green, Dublin 2, by kind permission.

Members and their guests are invited to join the Council and guest speakers for dinner at the Club at 6 p.m. for 6.30 p.m. on the evening of each lecture. Members intending to dine must communicate, not later than the previous day, with the Honorary Secretary, Miss Mary MacMurrough Murphy, B.L. at 2 Whitebeam Road, Clonskeagh, Dublin 14 (Telephone 694280) or at the Law Library, Four Courts, Dublin 7 (Telephone 720622).

Membership of the Society is open to members of the Medical and Legal Professions and to others especially interested in Medico-Legal matters. The current annual subscription is £10.00. Membership proposal forms and full details may be obtained from the Honorary Secretary.

The Irish Solicitors in London Bar Association Annual General Meeting

The Annual General Meeting of the Irish Solicitors in London Bar Association was held at the Law Society, Chancery Lane, London WC2 on 25 October 1989. The meeting was chaired by Mr. John Randall, the Director of the Law Society's Professional Standards and Development Directorate.

The outgoing President, Miss Cliona O'Tuama, delivered a report on the work done by the Association since its formal inauguration in April 1988. She spoke of developments in connection with the Association's quest for the re-qualification of Irish solicitors in England and Wales. She also spoke of the success of the Association's Charity Ball held in London on 3 June, both financially and in promoting the position of Irish solicitors in London.

Mr Peter Sutherland, the former Irish member of the European Commission and current Chairman of Allied Irish Banks, was unanimously elected Patron of the Association. Miss O'Tuama was re-elected President.

". . . reciprocity between the Law Society of England and Wales and the Irish Law Society was not possible until such time as the Oireachtas had amended the relevant provisions of the Irish Solicitors Acts."

After the formal business of the Annual General Meeting had taken place, Mr. John Randall addressed the meeting on the subject of the re-qualification of Irish solicitors in England and Wales. He explained that progress in connection with reciprocity between the Law Society of England and Wales and the Irish Law Society was not possible until such time as the Oireachtas had amended the relevant provisions of the Irish Solicitors Acts. He spoke about the progress being made by the English Law Society in the implementation of the EC Directive on the Mutual Recognition of Higher Education Diplomas. He also said that it would be possible for Irish solicitors to become partners in their respective firms in the event of multi-national partnerships becoming permitted, even if they had not been admitted in England and Wales.

After the meeting, Cliona O'Tuama said that she was very pleased with the attendance at the Annual General Meeting, which was tribute to John Randall and his assistance to the Association since its inauguration. She said that she was particularly pleased that Peter Sutherland had agreed to be Patron. "Our Constitution provides for a Patron, who must be 'a distinguished Irish lawyer'. I can think of no Irish lawyer who is as well respected in London as Peter Sutherland. As Commissioner with responsibility for competition, he played a major role in the development of EC Competition Law. His name commands great respect throughout English legal circles and I am very honoured that he agreed to be our Patron. Having Peter Sutherland as our Patron will in no small way help to enhance the image of this Association in the eyes of English colleagues".

The Committee of the Irish Solicitors in London Bar Association elected for 1989/90 is as follows:-

President: Miss Cliona O'Tuama; *Vice-President:* Miss Anne Counihan; *Hon. Secretary:* Mr. James Healy; *Hon. Treasurer:* Mr. Roderick Bourke; *Ordinary Members:* Miss Anne Lawler, Mr. Philip Lee, Mr. Patrick Long and Mr. Victor Timon. □

Cliona O'Tuama.

STATUTORY REQUIREMENTS

Judicial Separation and Family Law Reform Act 1989

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PEOPLE AND PLACES

PRESENTATION OF CHEQUE BY LUNATIC LAWYERS CYCLING CLUB TO HOSPICE FOUNDATION (left to right): Harry Cassidy, Investment Bank of Ireland, sponsors; Frank Lanigan, Solicitor; Aisling Kilroy, Development Manager, Hospice Foundation, and George V. Byrne, Business Manager, Hospice Foundation. The occasion was the presentation of £13,500 proceeds of the Lunatic Lawyers Cycling Club Malin-Mizen Cycle to various Hospice Home Care teams in Donegal, Sligo/Mayo, Galway, Clare, Cork/Kerry, Waterford and Carlow/Kilkenny. This cheque was for £3,000.00 and was donated by the solicitors in Dublin for the new hospice under construction in Raheny.

Contributions Welcome

Please send photographs of legal interest to:-

**The Editor, Gazette,
Law Society, Blackhall Place, Dublin 7.**

Geraldine M. Clarke, Solicitor, has been elected President of the Dublin Solicitors Bar Association. Geraldine practises with Gleeson McGrath Baldwin, Solicitors, Dublin, and is a former Chairman of the Gazette Editorial Board.

The President of the Law Society 1988/89, Maurice R. Curran, planting a tree to mark his Presidency of the Society, supported by Chris Mahon, Director, Professional Services.

UCC BCL CLASS OF 1978 REUNION
Front row, left to right: Maire McManus, Bridget Hynes, Deirdre McMichael, Joan Sisk, Kathleen Dineen, Geraldine Keane.
Middle row, left to right: John Godwin, Michael Prenderville, Justin McCarthy, Ruth Walsh, Louise Murray, Eamonn Murray, Diarmuid Kelleher, Gerald O'Flynn, Elaine Sweeney, Kay Cogan-Davy, Sarah O'Regan, Sean Cahill.
Back row, left to right: John Brooks, Michael Burke, Justin Condon, Michael Dunlear, Eamonn Fleming, Jerry Healy, Colm Hollihan, Patrick Long, Daniel Murphy.

Vicki Robinson, Solicitor, and her husband Michael Sweeney, pictured on their wedding day in University Church, St. Stephen's Green.

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ditor: Neville March Hunnings

mmon Market Law Reports provide weekly reports of cases from the European Court Justice, the E.C. Commission and National Courts and Tribunals.
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MONTHLY

OMMON MARKET AW REPORTS ANTITRUST SUPPLEMENT

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ASE SEARCH MONTHLY

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itor: Neville March Hunnings

ase Search Monthly provides a much needed comprehensive running index of the law of the European Court of Justice (both published and unpublished) and the EEC mmission together with much of the national and international case law on the European mmunities as published in the Common Market Law Reports and elsewhere.
ollowing in the footsteps of the much acclaimed Gazetteer of European Law, **Case rch Monthly** will provide a clear and concise monthly guide for all those looking for rant cases on European Community Law.
ase Search Monthly is cumulative during the year. As it builds you can discard one e when the next one arrives. In addition, the December issue will be a bound volume for to keep as a permanent reference.

9 Annual Subscription: £155.00 (UK); £175.00 (Overseas)

EUROPEAN COMMERCIAL CASES

QUARTERLY

Editors: Marina Milmo, Neville March Hunnings

European Commercial Cases is a quarterly reporter on commercial matters in the courts of Europe. It translates and reports selected judgments in full text in English from European national courts and agencies on aspects of national commercial law which are of practical interest within the wider European community. **European Commercial Cases** also reports leading cases and follows the implementation by the national courts of existing or new legislation affecting commercial dealings within the European Community.

1989 Annual Subscription: £170.00 (UK); £190.00 (Overseas)
Back Volumes are available from 1978-1988. Price details available on application.

COMMERCIAL LAWS OF EUROPE

MONTHLY

Editor: Neville March Hunnings

Commercial Laws of Europe provides a monthly reporting service of national and international legislation. Major enactments in Western European countries are reported in full text, as are implementation decrees, international conventions and treaties, EEC mainstream directives and regulations.

All texts appear in English as well as in the original foreign language in a well annotated and easily accessible format.

Finally, EEC texts issued by the Council are accompanied by the original explanatory notes of the EC Commission both on the overall purposes of the act and on the individual articles.

Major topics covered include:
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1989 Annual Subscription: £200.00 (UK); £220.00 (Overseas)
Back Volumes are available from 1978-1988. Price details available on application.

EUROPEAN LAW DIGEST

MONTHLY

Editor: Irene D. Snook

European Law Digest is a monthly abstracting service for the legislation and case law of Western Europe. It provides first level of knowledge in English and a finding guide to the laws of Western Europe through summaries of new laws and treaties and recent cases.

Coverage is at present focused on economic law (in its widest sense), human rights and all aspects of transnational law including Community law. Particular topics include:
• Banking and Insurance • Business Organisation • Competition • Consumer Protection • Human Rights • Industry and Labour • Intellectual Property • Private International Law • Product Liability • Professions • Taxation • Transport

1989 Annual Subscription: £185.00 (UK); £210.00 (Overseas)
Back Volumes are available from 1973-1988. Price details available on application.

FLEET STREET REPORTS

MONTHLY

Editor: Michael Fysh

Fleet Street Reports provides lawyers throughout the world with an essential reference source to all major cases on Industrial Property Law from Courts in the United Kingdom and the English-speaking world outside North America.
Published monthly, the topics covered include:
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Lawbrief

Edited by:
Eamonn G. Hall, Solicitor.

Committee to examine legal procedures in the wake of the Guilford Four case

Dail Eireann was told on November 29, 1989 that the members of the committee are Judge Frank Martin, chairman; Mr. Edwin Alkin, Attorney General's Office, Mr. Henry Abbott, barrister-at-law; Mr. Frank Ward, solicitor; Mr. Hugh Sreenan, assistant commissioner, Garda Siochana; Mr. Patrick Terry, Department of Justice; Mr. Paul Murray, Department of Justice (committee secretary).

Its terms of reference are:

"(1) – To examine whether there is need for a procedure whereby persons who have been convicted of criminal offences and who have exhausted the normal appeals procedures can have their cases further reviewed and, if so, to make recommendations as to what procedure should be provided and in what circumstances it should apply, and

"(2) – Given that uncorroborated inculpatory admissions made by an accused to the Garda Siochana can be sufficient, to examine whether additional safeguards are needed to ensure that such admissions are properly obtained and recorded and to make recommendations accordingly."

Land Registry: Dáil Motion, November 14 and 15, 1989

Mr. J. O'Keeffe: I move:

"That Dáil Éireann deplores the enormous delays and the deteriorating position in the Land Registry and calls for its establishment as an efficient business orientated semi-State Corporation."

". . . the entire system is on the verge of collapse."

It is very clear that the system of registration of title is breaking down. The Land Registry was established about 100 years ago by the Registration of Title Act, 1891, which now operates under the 1964 Act. The then Minister for Justice, Deputy Charles J. Haughey, in introducing that Bill stated that the system of registration provided provided for in the 1964 Bill was intended to be cheap, simple and effective. Twenty five years later it is clear that the Land Registry measures up to none of these criteria. In fact, the entire system is on the verge of collapse. This has frightening implications for anybody who owns a house, farm, shop or plot of ground where the title is registered in the Land Registry.

[The Land Registry] is failing utterly to provide any reasonable standard of service for its customers and the general public.

. . . Firstly, additional arrears are accumulating by the day. At the end of 1988 the overall arrears in transactions totalled 32,000. This figure has increased every month since January and reached a total of 49,000 at the end of October. In fact 12,000 dealings which had been lodged in the last couple of months have not even been accepted and numbered within the system. Secondly, it can now take up to 20-24 months to register a plot of ground in the Land Registry and up to six months simply to obtain a land certificate proving ownership of property.

Thirdly, this is a system which obviously lends itself to computerisation. A fair amount of progress was made in the early part of this decade but this has now ground to a halt. The computer expert in the registry resigned at the end of last month.

. . . Fourthly, I have to refer to the position of maps in the registry. All the advice I have received is that these maps are deteriorating rapidly. Fifthly, the 1964 Act envisaged compulsory registration of all the property in the State. That was one of the basic rationales behind the 1964 Act. What is the present position? To date, 25 years later, only three counties – Carlow, Laois and Meath – have been brought within the ambit of the compulsory registration provisions of the Act.

". . . staff morale is one of helpless frustration."

Sixtly, I want to touch on the position of the management and staff of the registry all of whom, from my experience initially as a lawyer and latterly as a politician, have shown unfailing courtesy. Because of the present position in the registry, the operation of that system has been described to me as "crisis management of the worst order" while, needless to say, staff morale is one of helpless frustration.

Seventhly, the Act provides that the registry, and I quote from the 1964 Act, "shall be under the control and management of an officer who shall be called the Registrar of Titles who shall be appointed by the Government". The word "shall" is very interesting. Why? A year ago the registrar retired but what has happened since? Nothing. Why has no appointment been made by the Government? This matter has been raised a number of times with the Government but no explanation has been given for this failure.

. . . From speaking to solicitors I am aware that High Court mandamus proceedings are being prepared because of their inability to register their clients' titles.

"The proposal . . . to establish a semi-State corporation has the approval of the Incorporated Law Society."

. . . Furthermore, the Minister will have to take account of the fact that the registry do not charge fees for Government or ACC work at present. One would balance out the other. The main point I am making is that the problem is not one of finance. Under the new structures which I propose I do not envisage any difficulty about finances. There is also the possibility of a considerable increase in the level of income if an efficient service were

available from the Land Registry.

. . . The proposal I am making to establish a semi-State corporation has the approval of the Incorporated Law Society.

Mr. Flanagan: I agree wholeheartedly with a discussion document produced by the Incorporated Law Society in November 1988 which stated that the Land Registry and indeed the Registry of Deeds are inappropriately placed under the auspices of the Department of Justice.

The purpose of the motion is to change matters and I hope that . . . it will spur the Minister for Justice into some badly needed action.

The Minister for Justice, Mr. Burke: I move amendment No. 1.

to delete the words after "Dail Éireann" and substitute the following:

"notes that the Minister for Justice is carrying out an urgent general review of the operations of the Land Registry and Registry of Deeds with a view to bringing about substantial improvements in the level of services provided by the Registries."

". . . the delays currently being experienced by members of the public and by the legal profession who use the registries are unacceptable."

. . . The services provided by the registries are essential to the public interest and I fully accept the point made in the motion that the delays currently being experienced by members of the public and by the legal profession who use the registries are unacceptable. It is my intention to take the necessary steps to minimise delays and to ensure that the services are provided in an efficient and cost-effective manner. However, before I can finalise the steps which are necessary, I need to review the operation of the registries and to examine carefully the various options which are open to me, including the option of establishing a semi-State corporation.

Much reference has been made tonight to the fact that the Law Society referred to the semi-State structure as being the ideal structure in their review of the operation of the Land Registry. Like most other people, including all the Members of this House, their main concern was not the structure but to try to remove the delays for people.

. . . Reconstitution of the registries as some form of semi-State corporation would require legislation which would take a considerable amount of time. Apart from difficulties in drawing up detailed proposals and drafting a Bill, the legislation would not be without controversy.

". . . I will not delay in putting proposals to the Government in the matter as soon as the review is complete, which will be shortly."

Shortly after taking up office in July, I informed the House that I had undertaken a full review of the operations of the Land Registry and Registry of Deeds. That review is still on-going as a matter or urgency and is not being long-fingered. There are a number of options open to me and I believe that all possible solutions must be carefully examined so that in the end the best interests of the public will be served by whatever solution is implemented. I am, however, aware of the need for urgency in finalising my review and I can assure the House that I will not delay in putting proposals to Government in the matter as soon as the review is complete which will be shortly.

Mr. Ferris:

The Labour Party amendment to this motion reads:

"with the freedom to retain and invest whatever surplus it accumulates in modernisation of equipment and facilities, and in adequate professional staffing levels.

Mr. O'Leary, Mr. Davern, Mr. Spring, Mr. O'Donoghue, Mr. D. Ahern, Mr. Clohessy, Mr. McCartan, Mr. Sheehan, Mr. Carey, Mrs. Taylor-Quinn and Mr. Deenihan also spoke on the motion.

The Minister's amendment was accepted by 66 votes to 62.

Amending Legislation – Solicitors' Acts

Mr. Allen asked the Minister for Justice when he proposes to introduce legislation to amend the Solicitors Acts.

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J113/1	Garda Siochana Complaints Board Annual Report 1988-89. (Pl. 6637) (110g)	£2.20	42p
J114	Rules of the Superior Courts (No. 1), 1989. Guide to changes in the Rules of the Superior Courts, 1986. (100g)	£2.65	42p

Minister for Justice (Mr. Burke): A Bill to amend the Solicitors Acts, 1954-1960 is at a very advanced stage of preparation in my Department and will be introduced as soon as possible. As Deputies will, no doubt, be aware the Fair Trade Commission have been conducting a study into the legal profession and I understand their report is expected shortly. Any recommendations made by the commission would need to be taken into account before the Bill is finalised.

Dáil Debate, November 9, 1989

Family Home Protection Legislation.

Mr. Flanagan asked the Minister for Justice if it is his intention to amend the **Family Home Protection Act, 1976**, having regard to the fact that the Act provided no protection to a spouse in a situation where a creditor applied for the sale of a family home on foot of a judgment mortgage against the family home, for the amount of a debt obtained against the other spouse on the basis that the Family Home Protection Act only applies to conveyances by one or other of the spouses and not by a third party and that consequently a judgment mortgage is not a conveyance within the meaning of the Act, but an operation of law, resulting in a situation whereby a spouse can freely obtain an unsecured loan, which if not repaid can be registered against the family home and ultimately lead to the sale of the family home, in spite of the absence of consent by the other spouse.

Minister for Justice (Mr. Burke): I have no proposals to amend the Family Home Protection Act, 1967, so as to apply it to judgment mortgages obtained by third parties. When the Act was initiated the then Minister for Justice made clear in the House that the legislation was not intended to apply to judgment mortgages - though there is provision whereby a spouse may apply to the court for protection if the other spouse is behaving improvidently with the intention of putting the continued ownership of the family home in jeopardy. In addition, if the Act were to give protection to spouses against sales by judgment mortgages no doubt it could operate to the disadvantage of spouses who seek in the ordinary way to arrange credit.

". . . the legislation was not intended to apply to judgment mortgages . . . "

Recent case law in any event suggests that a spouse who is in actual occupation of a family home and who has acquired a beneficial interest in that home has rights of occupation as co-owner of the home which would be binding on a judgment mortgagee seeking a sale. Moreover, the effect of the legislation which is being prepared in my Department to give each spouse equal rights in the ownership of the family home and contents will be to strengthen the position of the non-owning spouse. A recent High Court decision which is under appeal to the Supreme Court could also have implications for this area.

Dáil Debates, November 21, 1989

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Contributions should be sent to:

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The Law relating to the Status of Children born outside Marriage and their Property Rights

PART II

By
Christopher Lehane, B.L.,
Deputy Probate Officer

WHAT ARE THE NECESSARY PROOFS FOR THE FOLLOWING APPLICANTS FOR A GRANT AND WHAT PROCEDURES MUST THEY FOLLOW TO OBTAIN SAME?

(1) Non marital child to mother and mother to non marital child.
(2) Non marital child to father and father to non marital child.

and finally

(3) Where an applicant is applying for a Grant on the basis of a relationship which is deduced through a person whose parents have not married each other e.g. non marital nephew to his uncle.

The most important proof in all these cases is obviously the birth certificate. The long form of birth cert must be exibited in the Oath for Administrator. The standard of proof in all these cases is proof on the balance of probabilities and no corroboration is required. The Law Reform Commission at p. 111 of their Report proposed the dropping of the requirement for corroboration and proposed the standard of proof required being proof on the balance of probabilities, as they felt "the requirement for corroboration could cause injustice since the Court might be perfectly satisfied on the evidence that a person is the parent of a child but would be obliged nonetheless to refuse the application on account of the absence of corroboration." The Act at S.10 on Guardianship, S.15 on maintenance and S.35 (8) on declarations of parentage adopts this standard of proof.

1. **Non Marital Child to Mother Mother to Non Marital Child**
The long form of birth certificate must be produced showing the mother's name and address. Where the mother's name and/or address has changed from that set out in the birth certificate the applicant must swear a separate affidavit clearly identifying the mother and clarifying the change of name and/or address.
2. **Non Marital Child to Father Father to Non Marital Child**
Where the father's name and address appears on the birth certificate (long form) and it corresponds to that of the deceased at the time of death all that is required is that the birth certificate be exhibited in the Oath as above. Section 46 (3) presumes that father registered on the birth certificate to be the father of the child. Where the father's name and/or address in the birth certificate has changed since the date when he was reguistered as father a detailed affidavit is required identifying the father and clarifying the change of name and/or address.

Where the father's name does not appear on the birth cert the application may be entered in the Probate Officer's list by ex parte motion grounded on an affidavit of the applicant. The Affidavit should set out all relevent facts in order to establish clearly the non marital link. If the Probate Officer is not convinced on the balance of probabilities, he will refer the case to Court for a declaration of paternity. In such cases however, it may be advisable to seek a declaration of paternity in the first instance as the Probate Officer would require very cogent evidence indeed to enable him to make an order giving liberty to such applicants to apply. Such evidence could include the ordering of blood tests. The power to order blood tests was conferred solely on the Circuit Court by Part VII of the Act. Furthermore as the Probate Officer's list is *ex parte*, an applicant to this list is not under any duty to put next of kin of the deceased on notice of his application.

If the non marital link is disputed by the marital next of kin the applicant should apply to Court directly for a declaration as to parenthood. If the Marital next of kin do not dispute the claims of the non marital next of kin yet on balance the Probate Officer is not satisfied with the proofs of the latter, application may be made to the Probate Judge on motion for an order giving liberty to extract a

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Grant *(Re. J. G. Graham deceased,* 12 June, 1989, Gannon J., unreported).

(The procedures for seeking a declaration of parentage are fully discussed below).

3. **Remoter Relationships than Parent – Child where the applicant is claiming through a person whose parents have not married each other e.g. 'Non Mariatal Nephew' to uncle.**

   Where a title is traced through a person whose parents have not married each other it will be necessary for the applicant to establish that relationship in the same manner as described above e.g. a nephew applying for a Grant in the estate of his paternal uncle will have to establish his parenthood and swear that his father was the brother of the deceased.

Firstly the applicant must swear the usual title in the Oath:

Intestate **"a bachelor without parent brother or sister and I am the lawful nephew**

[he must then go on to state]

being the lawful son of XX lawful brother of and who predeceased the deceased. I beg to refer to my supplemental affidavit sworn the . . . day of . . . establishing my parenthood filed herewith."

A separate affidavit establishing the parenthood of the nephew in accordance with the requirements set out in heading 2 above would also be filed with the Oath.

The Probate Officer would require this application to be entered in his ex parte list on motion for consideration. Similarly as above if on the balance of probabilities the Probate Officer is satisfied that the necessary requirements have been proved he will make an order giving liberty to the applicant to apply for a Grant of Administration.

WHO IS ENTITLED TO TAKE PROCEEDINGS SEEKING A DECLARATION OF PARENTAGE?

Part V1 of the Act deals with declarations of parentage. section 35 of the Act confines applications for declarations to persons born in the State (other than adopted children) and persons born outside the State (other than adopted children) who can show good and proper reasons for applying in this jurisdiction. It does not matter that the alleged parent is deceased (Section 35(2)). Where an application is made on behalf of a minor the Court is given power to refuse to hear the application if it considers that the minor's interests would be harmed thereby (Section 35(4)). The Court will grant the declaration where parentage is proved on the balance of probabilities (Section 35 (8)). Any such declaration is binding on the parties to the proceedings and on all parties claiming through them: where the Attorney-General is joined it is binding on the State. Section 34 confers the jurisdiction to grant such declarations on the Circuit Court stating that such jurisdiction is in addition to other jurisdiction to grant a declaration of parentage or to make an order which has the effect of such declaration.

As the preamble to the Act states, one of the new provisions it introduces is this statutory procedure which enables any person to obtain a Court declaration as to his parentage – formerly only a mother could take proceedings, simply claiming a declaration which would establish a legal relationship between the father and the child and not seek any consequential relief. The new procedure, as stated above, is also in addition to and will not supercede or replace the existing procedure under which a person's parentage can if it is raised as a preliminary issue, in say maintenance or succession proceedings, be determined for the purpose of these proceedings. The new procedure only caters for the situation where no relief other than a declaration as to one's parentage is sought.

It is submitted that Section 35 of the Act is much too restrictive in allowing the child only to make an application for a declaratory order. In so confining the ambit of such applications the Act fails in its objective of seeking to wash away the status of illegitimacy, except where absolutely necessary to retain it having regard to the relationship existing between the father and mother. Where an application is made for a declaration on behalf of a minor the Court's power under Section 35(4) to refuse to hear the application if it considers that the minor's interests would be harmed thereby together with the power under Section 35(5) to join the Attorney-General where there is no other party to oppose the application, adequately safeguards against frivolous or vexatious applications under the Act.

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The Law Reform Commission, following broadly the views of its English counterpart, recommended that it should be open to the mother, a man alleging that he is the father, the child and any person with a proper interest to take proceedings seeking a declaration of parentage. The Commission wisely pointed out that the necessity for such a declaration would arise in the case where an executor or administrator had received prior information of the existence of a person who claimed to be a parent and would as such be concerned in the administration of the estate.

It is probably true that most applications for declarations as to parenthood by putative fathers or by those claiming through them would be made in the course of proceedings seeking other relief e.g. a claim for a declaration of parentage in order to establish succession rights to a deceased child. The Probate Officer will always require a Court Order to establish the legal relationship between father and child, rebutting the presumptions set out in Sections 4A(2) of the 1965 Act and 30 of the 1987 Act in situations where the father's name does not appear on the birth certificate. If such applicants were permitted to establish the relationship by Court declaration in the child's lifetime they would be able to avail of the blood tests denied them in succession proceedings on the child's death.

Obviously few would have sympathy for a father who would delay seeking to establish his paternity until after the child's death. In other situations, however, a father may have perfectly good reasons for seeking a declaration of parentage of a child. Likewise, he may wish to establish that the relationship between the child and himself does not exist. This right would be desirable where a false allegation of paternity has been made or a rebuttable presumption has arisen but is contested. Such a father has no right to seek a declaration of non-parentage under the Act, but must hope the child will make an application for a declaration under Section 35 which he could then successfully defend.

It is submitted that in a situation where no relief is sought other than a declaration of parentage, a claimant under the Act, not entitled to apply under Section 35 thereof, is entitled to apply to the High Court for such a declaration. The High Court has full and original jurisdiction to hear and determine all matters of justiciable controversy and provision is specifically made in Order 79 Rule 29 of the Superior Court Rules for the making of binding declarations whether any consequential relief is or could be claimed. The applicant must of course prove his locus standi for making the application to the satisfaction of the Court. Furthermore, as stated above, Section 34 of the Act specifically acknowledges that the jurisdiction conferred on the Circuit Court under Section 35 is in addition to other jurisdiction already in the Courts to make such declarations.

BLOOD TESTS

Part VII of the Act deals with blood tests. Section 38 of the Act empowers the Court of its own motion or on application by any party to the proceedings to give a direction for the use of blood tests to assist the Court in determining questions of parentage in civil proceedings. The definition of blood tests is wide enough to avail of the major technological developments in this field including DNA profiling.

While blood tests were used before, the major innovation in the Act is to allow the Court, where a party refuses to give a blood sample, to draw what inferences it thinks appropriate from the refusal to give a sample (Section 42(1)). The Court may dismiss proceedings for a declaration of parentage if a party (obviously bringing the proceedings) refuses to comply with its direction (Section 42 (2)). Where a party who refuses to comply with said direction seeks to rely on a presumption of paternity in his favour the Court, notwithstanding that such presumption has not been rebutted, may dismiss his claim (Section 42(3)).

PRESUMPTIONS AND EVIDENTIAL PROVISIONS

Part VIII of the Act makes a number of significant changes in the law of evidence.

The presumptions of legitimacy arising out of marriage and illegitimacy arising out of divorce a *mensa et thoro* abolished by Section 44 are effectively replaced by presumptions of paternity and non-paternity repectively at Section 46. Findings of parentage in guardianship or maintenance proceedings are to be accepted as prima facia evidence in subsequent proceedings. All these presumptions are now rebuttable on the balance of probabilities.

Section 47 give statutory recognition to the decision of the High Court in *S -v- S [1983]* IR 68 which abolished the old rule (known as the rule in *Russell -v- Russell)* whereby spouses could not give evidence which would tend to show that a child of one of them was illegitimate.

REGISTRATION AND REREGISTRATION OF BIRTHS

Part IX of the Act changes the registration of births with regard to the registration of the father where the parents are unmarried. Before the Act, both unmarried parents had to attend at the registration office to sign the register. With the passing of the Act the position for unmarried parents is now the same as for married parents. The details for registration of a birth for both marital and non marital children may now be supplied to the Registrar by a person who attended at the birth or a member of the staff of the hospital.

The procedure set down in *S -v- S* (supra) for the registration of the father of the child in circumstances where the said father is not the husband of the mother (married to another) and where no presumption of non-paternity arises and all three are consenting thereto, was put on a statutory footing. Whereas before the decision in *S -v- S*, a Court declaration of paternity was necessary to place the real father on the register, now, where all three parties consent, the Registrar may record the real father on the register.

Cases under Part V of the Act

Re JGG, 12th June, 1989, Gannon J., unreported.

Facts: The testator died on the 4th of October 1988, a bachelor without parent, brother, sister or nephew leaving him surviving one lawful and only niece. The testator executed a Will on the 30th day of June 1977 leaving all the residue of

his estate to the mother of his child born outside marriage. He identified the child as his daughter in the Will when bequeathing her certain lands. As the mother of the child predeceased the testator the residue of his estate fell to be administered as of intestacy. The niece consented to the application for a Grant by the daughter, corroborating her evidence to the Court that all three had always lived together as a family and that he always acknowledged the applicant as his daughter.

Held: Applicant was given liberty to apply for a Grant as his lawful daughter.

Re JM, 24th July 1989, Gannon J., unreported.

The deceased died intestate on the 24th of December 1988 a bachelor without parent. A dispute arose between a sister born in wedlock and a brother born outside wedlock as to who was the more appropriate applicant for a Grant to their deceased brother's estate. The sister contended that as the brother had previously agreed to let her act as administrator and she had engaged solicitors to defend a possible action against the estate, that she should extract the Grant. She never disputed his claim to a half share of the estate. The case was settled before the Court with the brother agreeing to allow the sister apply for the Grant and the sister agreeing to share the assets equally between them.

Amendments to the Rules of the Superior Courts necessitated by the passing of the Status of Children Act 1987

(Statutory Instrument 20 of 1989)

Orders 79 and 80 of the Rules which set out the procedures of the Probate Office and District Probate Registries respectively, were similarly amended by the substitution of new Rules for Rules 5 (1) (C), 5 (1) (E), 5 (5), 65 of Order 79 and Rules 6 (1) (C), 6 (1) (E), 6 (5), 63 of Order 80. As the Rules substituted in Order 80 are identical to those substituted in Order 79 only the latter are set out below.

Order 79 Rule 5 (1) determines the priority of each class of next of kin to a beneficial interest and their entitlement to a Grant in the estate of a person who dies intestate. Rule 5 (1) (E) which covers the order of priority of children now widens the definititon of children to include any person entitled by virtue of the Status of Children Act to succeed to the estate of the deceased. Rule 5 (1) (E) which covers the order of priority of parents states that while both normally have equal entitlements to a Grant the mother only is entitled where the presumption set out in Section 4A(2) of the 1965 Act applies.

Order 79 Rule 5 (5), states that the provisions of the Adoption Acts 1952 – 1988, (as construed in accordance with Section 27 (3) of the Status of Children act 1987) shall apply in determining the title to a Grant as they apply to a devolution of property on intestacy.

Order 79 Rule 65 states that no Grant may issue in the estate of a person with no known next of kin who dies either wholly or partially intestate without the consent of the Attorney General.

SUMMARY

It must be acknowledged that while the status of illegitimacy has not been totally abolished considerable advancement in the rights of children born outside marriage has been brought about by the Status of Children Act. With the passing of the Act children born outside marriage are substantially in the same position with regard to guardianship, maintenance and property rights as children born in marriage. All legal discriminations against children born outside marriage have, as far as possible, been removed by the Act.

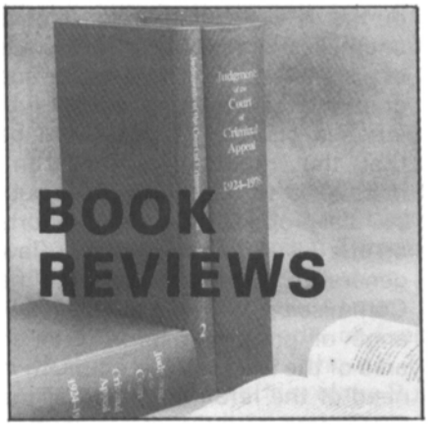
As the Act applies only to Wills made on or after the 14th day of June 1988 and to the estates of persons dying intestate on or after said date, the distinction between children born in wedlock and those born outside wedlock will remain for some time to come. The presumptions set out in Sections 4A(2) of the 1965 Act and Section 30 of the 1987 Act, while necessary to reduce significantly the substantial obligation of inquiry on personal representatives to trace claimants under the act, will likewise preserve the aforesaid distinction in law. In guardianship matters the total abolition of the distinction between children born in wedlock and those born outside wedlock would necessarily have entailed automatic joint guardianship for both unmarried parents. Obviously this would not have been in the best interest of the child and few would idsagree with the retention of the distinction in law to allow the Courts decide whether the father should be a joint guardian with the mother.

In criticism of the Act I believe that the duty of inquiry on personal representatives to trace claimants under the Act could be more clearly defined therein. Despite the presumptions set out in Sections 4A(2) and 30 aforesaid, since personal representatives were not relieved from personal liability where they administer estates in ignorance of the claims of persons entitled under the Act, they would still appear to be under a reasonable duty of inquiry to trace such persons. Furthermore I believe that it is too restrictive to confine applications for declarations to children only where no other relief is sought, having regard firstly to the safeguards against frivolous and vexations applications which are contained in the Act and secondly to the general power in the Courts to refuse to grant declarations where the applicant fails to establish his *locus standi* in the matter.

Part V of the Act proved to be the most controversial Part 10 thereof, taking more debating time in its passeage through the Oireachtas than any other part of the Bill. Fears were expressed that this legislation would result in a torrent of bogus claims by unscrupulous persons for declarations of parentage. After more than one year in operation, however, and bearing in mind that applications are restricted to Wills made on or after the 14th day of June 1988 and to deaths intestate on or after the same date, the statistics reveal that to date, at any rate, these fears have not been realised. The Probate Office and the District Probate Registries have to date processed only two Court applications by persons claiming succession rights pursuant to Part V and no application for a Grant has been received pursuant to said Part.

Finaly, I would like to stress that brevity and expedience only have prompted me to use the words 'marital' and 'non marital' and I must apologise for their continued use throughout. These terms were

Contd. on p.447.



ANNUAL REVIEW OF IRISH LAW 1988

By R. Byrne and W. Binchy
[Dublin: The Round Hall Press 1989. lix and 489pp. (incl index) Hardback £55]

Chinese emperors initiated the project of recording all the knowledge then available in a series of books: this was to become the first encyclopaedia. Today, the law reports, the statutes and the writings of legal scholars are the repositories of legal knowledge. A mini-encyclopaedia, some form of synthesis, was needed to pull all the strands of legal knowledge together in a cohesive manner. *The Annual Review of Irish Law* is such a mini-encyclopaedia – a synthesis of the developments in the law in 1988.

The express intentions of the authors as stated in their Preface is to provide a review of legal developments, judicial and statutory, that occurred during 1988. In the context of case law, judgments are reviewed which were delivered in 1988. Among the headings in the book are administrative law, agriculture, commercial law, company law, conflict of laws, contract law, constitutional law, criminal law, equitable remedies, family law, labour law, land law, practice and procedure, safety and health, statutory interpretation, telecommunications, torts and transport. Each chapter is subdivided into other appropriate headings.

In the chapter on administrative law, judicial review of administrative action rightly receives prominent attention. The frontiers of this rubric of the law are being constantly pushed forward in the interest of the aggrieved individual. The case of *Flanagan -v- University College Dublin* [1989] ILRM 469, which involved a disciplinary hearing and which has considerable implications for domestic tribunals, is considered in some detail. Barron J. considered that the applicant should have received in writing details of the precise charge being made and the basic facts alleged to constitute the alleged offence. The applicant should have been allowed to be represented by someone of her choice and should have been informed of such right. At the hearing itself, the applicant should have been able to hear the evidence against her, to challenge that evidence on cross-examination, and to present her own evidence. The reader will find the basic facts of the case set out in clear terms together with the essence of the judgment. An analysis of the judgment is provided and its relationship to other cases in the same area of law is also considered.

The concept of legitimate expectation is also extensively reviewed in the chapter on administrative law. This new concept became implanted in Irish law in 1988. The authors refer to the 1986 judgment of Murphy J. in *Goldrick and Coleman -v- Dublin Corporation* High Court, 10 November 1986, in which Murphy J. had doubted whether the concept of legitimate expectation as discussed by the House of Lords in *Council of Civil Service Unions -v- Minister for the Public Service* (the GCHQ case) [1985] AC 374 was part of Irish law. However, in 1988 'the searchers of the juristic heavens' – our judges, resorted to the concept of legitimate expectation in an effort to achieve justice within the sphere of their juristic domains. In fact, the concept of legitimate expectation was raised in five cases in 1988, *Conroy -v- Garda Commissioner*, High Court, 9 February 1988, *Duggan and Others -v- An Taoiseach*, [1989] ILRM 710, *Garda Representative Association -v- Ireland* [1989] ILRM 1, *Devitt -v- Minister for Education* [1989] ILRM 639 and *Egan -v- Minister for Defence*, High Court, 24 November 1988. The judges involved in these cases quoted with approval the reference to legitimate expectation by Finlay CJ in the leading judgment of the Supreme Court in *Webb -v- Ireland* [1988] ILRM 565; [1988] IR 353. The concept of legitimate expectation is now part of our juris-

Contd. from p.446.

dropped from the Bill during its passage through the Seanad and have been shunned as mere tags in substitution for the words legitimate and illegitimate but carrying, nevertheless, a similar social stigma. It is hoped that in time, with the operation of the Act, the circumstances in which it will be necessary to draw distinctions between children based on such grounds will be very few indeed. □

Submission of Articles for the Gazette

The Editorial Board welcomes the submission of articles for consideration with a view to publication. In general, the most acceptable length of articles for the *Gazette* is 3,000-4,000 words. However, shorter contributions will be welcomed and longer ones may be considered for publication. MSS should be typewritten on one side of the paper only, double spaced with wide margins. Footnotes should be kept to a minimum and numbered consecutively throughout the text with superscript arabic numerals. Cases and statutes should be cited accurately and in the correct format.

Contributions should be sent to:
Executive Editor,
Law Society Gazette,
Blackhall Place,
DUBLIN 7.

prudence. The comprehensive and balanced analysis afforded to administrative law issues in the *Annual Review* is also to be found in the other chapters of the Review.

Disraeli noted that "so sweet was the delight of study". Selden wrote that "patience was chiefest fruit of study". Nevertheless, we need not assume that the 470 pages of text in the *Annual Review* were achieved without effort on the part of the authors. It has truly been stated that there never was a great book that did not cost unspeakable labour. Your reviewer and many practitioners were greatly assisted in their professional endeavours by the fruits of the research carried out by Raymond Byrne and William Binchy as manifested in the *Annual Review 1987*. The task of professional legal advisers will continue to be made easier with the *Annual Review 1988*.

Finally, your reviewer noted in this *Gazette* in relation to last year's *Annual Review* that Raymond Byrne and William Binchy had examined 'an avalanche of judicial opinions and legislative enactments', had 'succeeded in separating the gold from the alloy in the coinage of the law and had admirably distilled the notable features of that law within the confines of their *Annual Review*'. It was stated that the Round Hall Press expected the 1987 Review to be the first of a series; 'a new Irish institution had been inaugurated'. Your reviewer is glad to report that the new Irish institution in the form of the *Annual Review 1988* is flourishing. Raymond Byrne and William Binchy have produced a vademecum which judges, legal practitioners, academics and students should cherish.

Eamonn G. Hall

VALUATION OF PROPERTY FOR RATING PURPOSES

Valuation Office, October 1989

The Valuation Office has recently published a handy, if somewhat cursory, guide to the underlying legislation and the practical procedures currently associated with the Irish rating system.

The principal statutory enactments are listed and the effect of certain provisions loosely described. Sadly, the booklet fails to answer one of the fundamental questions that has bothered your reviewer throughout the whole of his professional career – namely, how on earth are rateable valuations arrived at? Paragraph 8 purports to describe the "basis of valuation" but, beyond a somewhat vague exclamation of "net annual value", falls far short of real enlightenment; the word "eureka" is noticeably absent from one's spontaneous reactions.

One may be glad to hear – or one may not, as the case may be – that the Act of 1988 provides for "continuous revision" to replace the hitherto intended "annual cycle" for revision of the Valuation Lists, with effect from 1st February, 1989. Section 3 of that Act empowers an owner or occupier of property, or the rating authority or the Valuation Office to apply *at any time* for a revision of valuation, and prescribes the appropriate procedures for determination of all such applications.

Perhaps the most useful part of this booklet is its description of the procedures whereby an owner or occupier may appeal against a revision of valuation, in the first instance, to the Commissioner of Valuation and, in the second instance, the Valuation Tribunal – a new statutory animal born of the 1988 Act.

Charles R.M. Meredith

LAW REFORM COMMISSION REPORT ON LAND LAW AND CONVEYANCING LAW

(1) General Proposals CRC 30-1989. IR£5.00

INTRODUCTION

The Law Reform Commission has just published its first Report on Land and Conveyancing Law*. The background to this Report is that the Attorney General requested the Law Reform Commission in 1987 to look at the reform of "conveyancing law and practice in areas where this could lead to savings for house purchasers". The resulting Report makes a number of useful proposals which might lead to some small savings for house purchasers but, on balance, the Report does not achieve to any significant extent the aim set for it by the Attorney General. For the most part, this Report only recommends changes in the law which would remove anomalies or redundant provisions of a somewhat technical nature and does not recommend major substantive changes. It may well be that the intention of the Commission is to deal with more substantial proposals in its later reports on the issue of conveyancing law generally. It is hoped that the Commission will rise to the challenge of proposing reforms in an area of the law which is so much in need of the reforming hand of the Oireachtas.

SIMPLIFYING AND MODERNISING CONVEYANCING

The First Part of the Report is devoted to possible changes which would simplify and modernise conveyancing.

Title Period

The Commission looked at the Statutory Period of Title in open contracts. Section 1 of the Vendor and Purchaser Act 1874 provides that the vendor must trace back his title for 40 years. The Commission recommends that the term for which title must be shown under the Vendor & Purchaser Act 1874 be reduced from 40 to 20 years. This is a sensible proposal though of limited application.

Partial Merger

In order to avoid any doubts which might arise in the future, the Commission recommends that a person, who is entitled to a leasehold interest in a portion only or property held under a lease and actually acquires any superior interest in that property, be legally entitled, if he so wished, to merge the leasehold interest in the next of all superior interests held by him.

Fee Tail

In spite of suggestions that the fee tail estate be abolished, the Commission recommends its retention but that it be registered at the Registry of Deeds or the Land Registry (as appropriate) instead of the High Court as at present.

Partition

Following the doubts arising from the *O'D -v- O'D* (1983) and *FF -v- CF* (1985) decisions in the High Court, the Commission recommends that, to resolve the matter, a statutory provision should be enacted

restoring the statutory power of partition and empowering the court to order a sale of property in lieu of partition.

Perpetuities
The Commission has indicated that it is taking a serious and detailed look at the Rule Against Perpetuities. As an interim measure, it recommends that easements, options, profits a prendre and rent charges over land should be removed from the effect of the Rule Against Perpetuities and that any such amendment to the law should provide that the Rule never applied to those interests.

Words
What is in a word? At present, there are few statutory provisions which can help conveyancers in interpreting certain key words like "month". The Supreme Court decision in *Vone Securities -v- Clarke* (1979) highlights the problems involved. Thus, the Commission sensibly suggests that legislation should be enacted which gives legal meaning to a number of key words and phrases (such as expressions of person, distance and time).

Judgment Mortgage
Anyone interested in property need not be reminded of either the importance of judgment mortgages or the complicated state of the law on judgment mortgages after the *Tempany -v- Hynes* decision. The Commission believes that, for the purpose of judgment mortgages, when a binding contract for the sale of land has been entered into, the law should treat the beneficial ownership as having passed to the purchaser from the time the contract was made, subject to the condition subsequent that he completes the sale.

Joint Tenancy
The Commission has suggested that freehold land should be severable and convertible into a tenancy in common by a simple deed between the parties in the same way as a leasehold estate may be severed.

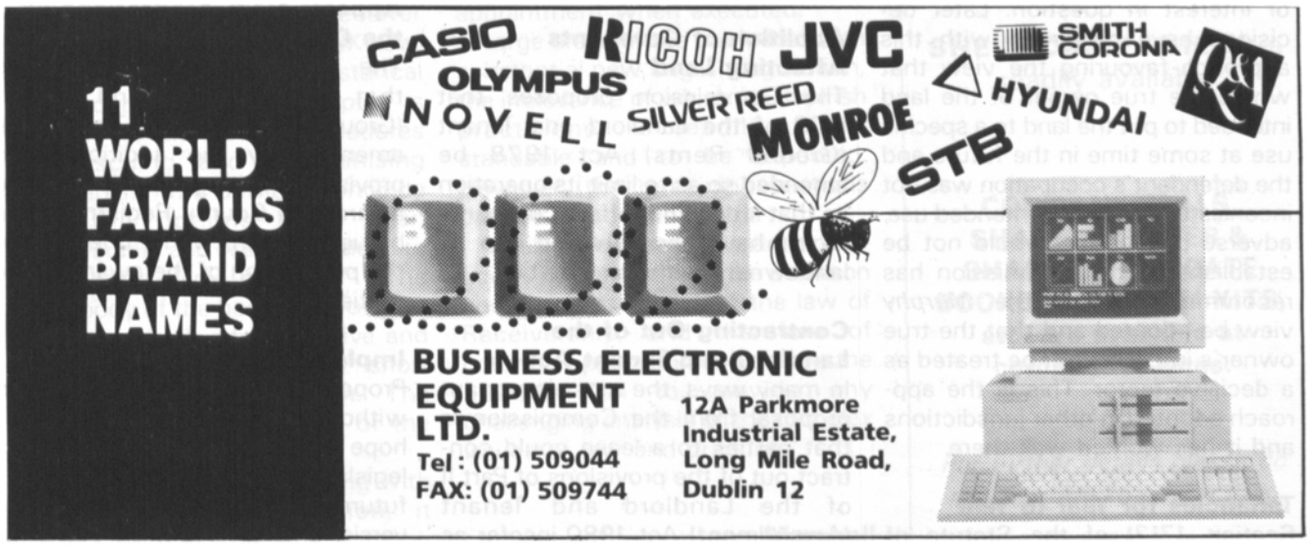
Bain -v- Fothergill
As a general rule, if there is a breach of contract by the vendor then the purchaser is entitled to damages. However, based on the decision in the case of *Bain -v- Fothergill*, where the breach relied upon by the purchaser is the vendor's failure to show good title then, provided the vendor was not fraudulent or acting in bad faith, the purchaser is not entitled to recover damages for loss of bargain but is limited to recovering the deposit and solicitor's fees. The Commission believes that the rule in *Bain -v- Fothergill* has outlived its usefulness and should be abolished. It is difficult to disagree with the Commission on this point!

Forfeiture
Section 8 of the Forfeiture Act 1870 states that a convict may not make any disposition of property while in prison. This provision is not only of little significance in practice but probably unconstitutional as well. The Commission has recommended its abolition.

RECTIFICATION OF ANOMALIES ARISING FROM MODERN LEGISLATION

Planning
Section 27 of the Local Government (Planning and Development) Act 1976 allows for the High Court to prohibit the continuance of the development of land for which planning permission is required and which is being carried on without permission. This is a provision of considerable practical and political significance. The Commission has recommended that it be amended (a) by extending the provisions of S.27(1) (a) to cover development which has been completed without the necessary planning permission and (b) to include in the section, a five year limit on the bringing of applications whether in respect of developments or unauthorised uses. Both of these proposals, particularly the second, are quite sensible and would reduce a house buyers's cost (but would they also reduce the house buyer's protection?).

Land Act 1965, S.45
Section 45 requires an "unqualified person" (within the meaning of the section) who acquires an interest in land not situated in a county borough, borough, district or town to obtain the consent of the Land Commission to the vesting of the land in him. Most trading companies would be "unqualified persons". The problem is that "rural areas" are being built up. Shopping centres such as those in Dundrum, Rathfarnham & Stillorgan are in rural areas and the



Commission has sensibly suggested an amendment which would mean that plots of less than 2 hectares and which were not going to be used for either pastoral or agricultural purposes would not be subject to Section 45. This is a sensible and worthwhile suggestion which would ease the problems (at least in part) of the conveyors of shopping centres.

The Family Home Protection Act
Under the Family Home Protection Act, the prior written consent of a spouse must be given to any "conveyance" of the family home. Many conveyancers now have to spend a long time obtaining and checking spouses' consents in previous transactions involving family homes since 1976. The Commission has recommended that where there has been a conveyancee (in the strict sense) of a family home without any objection from the other spouse for more than 6 years then such a conveyance should no longer be deemed to be void and that evidence of any consent by the spouse of supporting evidence for any such consent should no longer be required.

AMENDMENTS OF PERIOD OF LIMITATION

Adverse Possession
In *Murphy -v- Murphy* (1980) "adverse possession" was held to mean simply that the possession claimed to be adverse must be inconsistent with the title of the true owner with such inconsistency necessarily involving an intention by the occupier to exclude the true owner from enjoyment of the estate or interest in question. Later decisions have disagreed with this approach favouring the view that where the true owner of the land intended to put the land to a specific use at some time in the future and the defendant's occupation was not inconsistent with that intended use, adverse possession would not be established. The Commission has recommended that the *Murphy* view be adopted and that the true owner's intention not be treated as a decisive factor. This is the approach adopted in other jurisdictions and it has worked well there.

Tenancies for Year to Year
Section 17(2) of the Statute of Limitations 1957 provides that a tenancy from year to year or other period without a lease in writing is deemed to be extinguished at the end of the first year or other period. Thus, where there is an oral periodic tenancy, the tenancy automatically comes to an end at the end of the first year or whatever the period may be. The Commission recommends abolishing the distinction contained in S.17(2) between periodic tenancies in writing and those created orally.

AMENDMENTS TO LANDLORD AND TENANT LAW

Guarantor's Covenants
The Commission has recommended that there be a statutory provision enacted which would provide that the benefit of a guarantor's covenant should pass with the transfer of the lessor's interest. This would be an eminently practical and useful development which has already happened in English law.

Landlord's Consent to Assignment
The Commission recommends that Section 16 of Deasy's Act 1860, where the estate or interest of any original tenant in any lease was assigned with the consent of the landlord the consent of the lessor need merely be in writing executed by the lessor or the lessor's lawfully authorised agent. This would clear some of the doubts cast on S.16 because of the enactment of S.35 of the Landlord and Tenant (Ground Rents) Act 1967 which repealed S.10 of Deasy's Act and is thus a very worthwhile proposal from the Commission.

Abolition of Covenants Affecting Land
The Commission proposes that S.28 of the Landlord and Tenant (Ground Rents) Act 1978 be amended so as to limit its operation so that it does not affect covenants which have been entered into by landowners with third parties.

Contracting Out of the Landlord and Tenant Act
In many ways, the most important proposal from the Commission is that parties to a lease could contract out of the provisions of Part II of the Landlord and Tenant (Amendment) Act 1980 insofar as it applies to business tenancies provided that both parties have independent legal advice. This is a proposal of considerable utility and will be of use to a wide range of landlords and tenants particularly those involved in temporary letting agreements.

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New Tenancy under the 1980 Act
Section 23 of the Landlord and Tenant (Amendment) Act 1980 provides that the Court must fix the duration of the new tenancy which a tenant is entitled to under the Act at thirty-five years or such lesser term as the tenant may nominate. In fact, a tenant could (and some have) seek a tenancy for as little as one year. This is not always satisfactory from the landlord's point of view. The Commission has thus recommended that if the terms of the lease have to be fixed by the court then the term should be such a period being not more than thirty-five years and not less than five years as the court should determine. This proposal ties in well with the five year rent revision provisions under the Act and could work quite well in practice.

Appeals from Arbitrations by the County Registrar
The Commission has suggested that the Landlord and Tenant (Ground Rents) Act 1967 should be amended by the addition of a provision requiring appeals from the award of a County Registrar to be brought within twenty-one days of the publication of the award to the parties.

Implementation
Proposals are virtually meaningless without implementation. One must hope that these proposals are given legislative force in the very near future. Most of them are uncontroversial and all would be useful at

one time or another. Even if they are implemented, their effectiveness may still be limited by the more fundamental problems in Irish land law such as the fact that the average delay for registering the transfer of part of the lands in a folio is still over a year!

Eric Brunker

THE LAW AND PRACTICE OF ADMINISTRATIVE RECEIVERSHIP AND ASSOCIATED REMEDIES BY LANGE AND HARTWIG

Until the passing of the UK Insolvency Act 1985 the Laws in Ireland and the UK applicable to Receiverships and Liquidations were broadly similar. The 1985 and 1986 Insolvency Acts introduced a new creature at Law, the much heralded administrator, whose task was envisaged to be the rescue of insolvent companies and the enhancement of realisations if liquidation should ensue. Less publicised but equally important for the commercial community are the changes introduced by that legislation in relation to the law of Receivership generally. Under the Insolvency Act 1986, a Receiver appointed on foot of a floating charge over all or substantially all of the assets of a company is renamed "an Administrative Receiver".

This text is not an analysis of the Law of Administrative Receivership. Rather it compares and contrasts the function and powers of a Receiver, an Administrative Receiver and an Administrator under UK Law. Following a brief note on historical background, the first chapter is devoted to alternative procedures for rescuing and re-organising companies. The authors conclude that the options other than Receivership and Administration are not "particularly effective". The main body of the book is devoted to Receivers, both administrative and otherwise, followed by a short chapter on Administration. The book includes the full text of the amended Insolvency Rules.

As with many texts dealing with substantial new legislation, it suffers from a tendency to paraphrase the legislation. This is obvious from large numbers of the foot notes, which refer to the relevant sections of the Insolvency Act 1986.

Unfortunately the authors deal mainly with the procedures and routine areas with which experienced practitioners are accustomed to dealing but do not examine the many problems of practice. Three and a half pages are devoted to a discussion of the law of Set-off. The authors enunciate at length the principle that pre-and post-receivership debts cannot be set off but the problem of setting off different types of claims, quantified and unquantified, preferential and non-preferential, is not discussed and even the important decision in *In re. Unit 2 Windows (In Liquidation)* [1985] 3AllER 647 is omitted.

Furthermore, there is little critical analysis of the legislation or commentary on difficulties which may arise either as a result of the legislation or in the absence of provisions. For example where an administrator is appointed by the Court, a Debenture holder has a period of five days within which to exercise his right to appoint an Administrative Receiver. The authors do not comment on how a Court may be expected to view timing difficulties nor whether a practice has grown up of specifying in the order the time at which it was made. The absence of such consideration is surprising in view of the fact that the authors note that it is now the practice for Debenture holders to note the time of appointment of an Administrative Receiver on the deed of appointment when executed.

Large areas of the book deal with substantial new English legislation, the irrelevance of which for the Irish practitioner is readily understandable and to be expected. However, the remaining sections cannot be so vindicated.

Whilst these sections are superficially concerned with the common underlying principles of the law of Receivership, and therefore of potential application to Irish law, the authors fail to provide any challenging analysis of the complex issues of law and practice. □

Jane Marshall

COMPANY SERVICE

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CORRESPONDENCE

The Editor,
Gazette,
Blackhall Place,
DUBLIN 7.

22nd November 1989

Dear Madam,

re: Structured Settlements

The ''Viewpoint'' column in the October 1989 issue of the Gazette, which supports the concept of structured settlements in place of single lump sum compensation for personal injury claims, states that ''insurance companies have not shown the slighest interest in remedying the situation''.

To set the record straight, I would like to inform you and your readers that the Irish Insurance Federation, on behalf of its member companies, transact the vast bulk of motor and general liability insurance business in Ireland, and has been actively studying the concept of structured settlements for some time. In order to facilitate the introduction of structured settlements in this jurisdiction, a number of taxation issues need to be resolved. Also the underwriting of annuities to cover structured settlement payments is a specialised science, which will take some time to develop.

We have already raised the subject of the tax treatment of such settlements with the Revenue Commissioners, illustrating the concept with examples from the system agreed between the Association of British Insurers and the U.K. Inland Revenue. We anticipate that discussions will shortly be entered into with the Revenue Commissioners on the feasibility of introducing special fiscal arrangements for structured settlements in Ireland.

Yours faithfully,
MIKE KEMP,
General Insurance Executive
Irish Insurance Federation,
Russell House,
Russell Court,
St. Stephen's Green,
Dublin 2.

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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 as 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.
27th day of December, 1989.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Timothy Spillane, Gortnacapal, Scartaglen, Co. Kerry. Folio No.: 27419; Lands: Scartaglin; Area: 1a.0r.0p. County: **KERRY.**

Frederick Martin, 4 Rockville Road, Blackrock. Co. Dublin (is full owner of 1 undivided share). Folio No.: 929F; Lands: 109 Naas Road, Bluebell, Dublin 12, County: **DUBLIN.**

Cornelius Walsh, Gurteenavallig, Tarbert, Co. Kerry. Folio No.: 5304; Lands: Meelcon; Area: 38a.3r.32p. County: **KERRY.**

Annie O'Callaghan, Earl St., Kanturk, Co. Cork. Folio No.: 768; Lands: Curragh; Area: 6a.1r.0p. County:: **CORK.**

Bay Meadows Estates Limited, Folio No.: 19743F; Lands: Broadmeadow Barony, Nethercross, County: **DUBLIN.**

Timothy & Nora O'Sullivan, Rathcooney, Co. Cork. Folio No.: 7996F; Lands: Rathcooney, County: **CORK.**

Patrick McNally, Rolestown, Stamullen, Co. Meath. Folio No.: 9609; Lands: Moorestown; Area: 8a.3r.10p. County: **MEATH.**

Thomas Kiely, 7 Thomas Terrace, Dungarvan, Co. Waterford. Folio No.: 2841F; Lands: Mount O'Dell; Area: 0.319 Acres. County: **WATERFORD.**

Nora Breen, Cahereen West, Castleisland, Co. Kerry. Folio No.: 29207; Lands: Cahereen West; Area: 0a.1r.0p. County **KERRY.**

James Ephrem O'Keeffe, 18 Castlegrania Park, Boreenmanna Road, Cork. Folio No.: 60353; Lands. Lisnahorna; Area: 0a.2r.0p. County: **CORK.**

Edward Newman, Wooddown, The Downs, Mullingar, Co. Westmeath. Folio No.: 8038; Lands: Clongawny; Area: 24a.0r.9p. County: **WESTMEATH.**

Henry Smyth, Lisanny, Loughduff, Co. Cavan. Folio No.: 5445; Lands: Lisanny; Area: 17a.0r.6p. County: **CAVAN.**

John Rafferty, c/o McEntee & O'Doherty, Solrs., Co. Monaghan. Folio No.: 11085; Lands (1) Cloghernagh, (2) Knocknagrave; Area: (1) 13a.0r.24p. (Cloghernagh), (2) 7a.3r.3p. (Knocknagrave), County: **MONAGHAN.**

Mide Roisin O'Connor, 7 Beechlawn, Dundrum, Co. Dublin. Folio No.: 8740L; Lands: Dundrum, County: **DUBLIN.**

Elizabeth James, Cabra Brook, Churchill Post Office, Letterkenny, Co. Donegal. Folio No.: 42559; Lands: (1) Cabra Brook. (2) Drumcavany; Area: (1) 13a.1r.0p. (Cabra Brook), (2) 22.536 acres (Drumcavany), County: **DONEGAL.**

John C. Watson c/o John P. Clifford, Solicitor, Caherciveen, Co. Kerry, tenant in common and **Patrick Laverty** c/o John P. Clifford, Solicitor, Caherciveen, Co. Kerry, tenant in common. Folio No.: 2290F; Lands: Drom; Area: 1a.0r.23p. County: **KERRY.**

Francis McCabe, Ballyconnell, Belturbet, Co. Cavan, Folio No: 13309; Lands: Lecharrownahone; Area: 21a.3r.34p. County: **CAVAN.**

John Robinson and Anne Hodgins, of "Roseville", 81 Sandyford Road, Dublin 14. Folio No: 66138F; County: **DUBLIN.**

Bernard Byrne (Junior), of Bayview, Clogherhead, Co. Louth, Folio No: 1736F; County: **LOUTH.**

Timothy Crowley of 26 Leitrim St., Cork as tenant in common of an undivided moiety. Folio No: 11414; Lands: Commons; Area: 34a.3r.10p. County: **CORK.**

Andrew Brady, Folio No: 18373; County: **DUBLIN.**

Thomas Palmer of Ballycoras Road, Kilternan, Co. Dublin. Folio No.: 6800F; Lands: Ballybawn Lower; Area: 1 acre; County: **WICKLOW.**

Joseph Mulhern and Richard Brennan of Main Street, Kiltimagh, Co. Mayo, and Aiden Street, Kiltimagh, Co. Mayo. Folio No.: 7285; Lands: Part of the lands of Kiltimagh, containing 31 perches or thereabouts statute measure situate in the Barony of Gallen and County of Mayo being the plot of ground known as the Market Place in Aiden Street in the town of Kiltimagh; County: **MAYO.**

Lost Wills

Murphy, Bridget, deceased, late of 48 Thomas Court, Dublin 8 and Ballydonnell, Kinnegad, Co. Westmeath. Will any person knowing the whereabouts of the Will of the above named deceased please get in touch with Matthew F.J. Moore, Solicitor, Edenderry, Offaly. The deceased lady was in the employment of Messrs. Guinness plc.

Wynne, Matthew, late of Taverone, Cloonloo, Co. Sligo. Will any person having knowledge of the whereabouts of the last will dated 12 August, 1987, of the above-named deceased who died on 5 March, 1989, please contact Kelly & Ryan, Solicitors, Teeling St., Sligo. Tel.: 071-62855.

Miscellaneous

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Recent Irish Cases

Edited by
Gary Byrne, Solicitor

EVIDENCE

Section 29 Certificate from the Court of Criminal Appeal as to whether a Statement by an investigating Garda amounted to an improper inducement by threat, so as to invalidate a Statement of Admission made immediately afterwards by the Applicant.

The Applicant had been convicted in the Special Criminal Court of the possession of firearms and ammunition. The Court of Criminal Appeal refused his Appeal, but the Court gave a Certificate under Section 29 of the Courts of Justice Act 1924, enabling him to appeal on one point to the Supreme Court.

The firearms and ammunition had been found in a house in which the Applicant lived with his mother and other members of his family. He was not in the house when the property was found. Approximately one month later, he surrendered himself to Gardai in the presence of his Solicitor. He refused to discuss the matter of the property with the Gardai, despite intensive questioning for approximately seven and a half hours. Then the investigating Officer asked the following questions: "Will I have to get some Member to go up to your family and find out from them if anybody at 78 Rossmore Avenue is going to take responsibility for the property in the house?" Immediately afterwards, the accused made a statement of admission. This was the only evidence against him. He was convicted in the Special Criminal Court. On appeal, the Court of Criminal Appeal found that this question of the Investigating Officer had induced the accused to make the statement of admission. They held, however, that it did not amount to an improper inducement, and accordingly they upheld his conviction.

The Supreme Court were unanimous in holding that the question of the Gardai Officer did amount to improper inducement by threat. Henchy J. reiterated the rule that the test of whether an inducement is an improper one is an objective one. It is no part of the test to consider the intention or the motive of the person making the statement. In the present case, it was obvious that the applicant's sudden confession was made essentially for the purpose of avoiding the proposed visit of a Garda to his family. The applicant himself had treated the question as a threat.

McCarthy, J. in a concurring Judgment, **HELD** that the test is whether the incriminating statement can be free from any reasonable doubt but that it was a statement voluntarily made.

Walsh, J. in his concurring Judgment, again reiterated that the test was the effect that the question produced on the Prisoner, and not the intention or even the hopes of the interviewer. The effect of the question in this case was calculated to convey to the applicant that his family would be left undisturbed if he accepted responsibility. *D.P.P. -v- Hoey. Supreme Court Henchy, McCarthy, Walsh, JJ. (Griffin and Henderman J.J. concurring) 16 December* [1987] I.R. 646.

MICHAEL STAINES

CRIMINAL PROCEDURE ACT 1967

Once an accused has been sent forward for trial, he is not entitled to seek depositions of any new prosecution witness, whose Statement of Evidence is not contained in the Book of Evidence.

At the Preliminary Examination of the charges against him, the Accused had called, on deposition, all of the witnesses whose Statements were contained in the Book of Evidence. He was then sent forward to the Circuit Court for trial. Subsequently, he was served with a Notice of Additional Evidence, relating to evidence to be given by several additional witnesses, whose Statements had not been contained in the Book of Evidence. The Accused claimed in the course of the present proceedings that he should be entitled to call these additional witnesses on deposition. He also submitted that where the Prosecution is or ought to be aware that a certain person would be required to give evidence, failure to disclose the existence of that person to the Accused at the Preliminary Examination stage, is, in effect, a breach of the Criminal Procedure Act 1967, and denies the right of the accused to a meaningful Preliminary Examination.

HELD by Barron J. that the obligation is on the Prosecution to ensure that there is a proper preliminary investigation of the charges. He continued "If a material witness, or material evidence, is not before the Court, it is a question of degree whether or not a real examination has taken place. Where the Prosecution acts consciously and deliberately to exclude some person or thing at that stage, this might invalidate a return for trial." However, in the present case, there was nothing to indicate such conscious or deliberate action. The preliminary investigation could not be re-opened. Accordingly, the Accused's contention failed.

Gilligan -v- the D.P.P. The High Court (per Barron J.) 17 November 1987, unreported.

MICHAEL STAINES

NEGOTIABLE INSTRUMENTS

The giving of a cheque in discharge of a debt may be conditional upon the cheque being met.

The Defendant sold shares in the P.M.P.A. Insurance Company to the Plaintiff for £400,000.00. The Plaintiff paid for these shares by drawing a cheque for this sum on its own account and handing it to the Defendant, who endorsed it and handed it back to the Plaintiff in discharge of certain monies owed by the Defendant to the Plaintiff. The Plaintiff, relying, *inter alia,* on *Marreco -v- Richardson* [1908] 2 K.B. 584 argued that as the cheque was not met (due to the intervention of the Registrar of Friendly Societies) the original indebtedness together with further interest was due.

HELD: It is an exception to the general rule, that the giving of a cheque for a debt is payment conditional on the cheque being met, where the Drawer of the cheque and the Creditor are one and the same person and the cheque is drawn on the Drawers/Creditors own account. In this case the Defendant discharged his indebtedness by endorsing and handing back to the Plaintiff, the Plaintiff's own cheque which it was held was accepted as unconditional payment. In referring to the general role the Court referred to the cases of *Griffiths and Owen* 13 Mind W. 58 and *Belshaw and Bush* 11 C.B. 191.

Private Motorists Provident Society Limited -v- Joseph Moore – High Court per (Murphy J.) – 2 October 1987. [1988] ILRM 526.

LARRY BRENNAN

ROAD TRAFFIC ACTS

Medical Bureau of Road Safety Certificate – Section 22 and Section 23(2) Road Traffic (Amendment) Act, 1978 – Whether Certificate was issued in the prescribed form – Whether Certificate should state on its face that it was issued under Section 22 of the Act.

The Respondent was arrested by the Appellant under Section 49(6) of the Road Traffic Act, 1961 and pursuant to the provisions of the Act he provided a blood specimen which was forwarded to the Medical Bureau of Road Safety for analysis. Subsequently, the Bureau issued a document which specified the concentration of alcohol in the specimen provided. This document purported to be a Certificate in the form prescribed by the Road Traffic (Amendment) Act, 1978 (Part III) Regulations, 1978. On foot of the document the Defendant was convicted under Section 49 of the Road Traffic Act in the District Court.

Section 22(3) of the Road Traffic Act, 1961 provides, *inter alia,* that as soon as possible after they have determined the concentration of alcohol in the specimen in accordance with Sub-section 1 of the Act,:–

> "....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...."

Section 23(2) of the same Act provides as follows:–

> "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...."

It was accepted in the District Court by the Defendant that the Certificate was in the form prescribed by the 1978 Regulations but it was submitted that it did not comply with the provisions of Section 23(2) of the Act in that it was not expressed to have been issued under Section 22 of the Act. It contained a heading in heavy print which read:–

"Certificate to be issued by the Medical Bureau of Road Safety under Section 22 of the Road Traffic (Amendment) Act, 1978."

It was further contended in the District Court that this heading did not form part of the Certificate.

The Respondent was convicted in the District Court and appealed to the High Court by way of case stated. In the High Court it was submitted on behalf of the Respondent that because the "heading" did not form part of the Certificate and because it referred to a Certificate "to be issued" by the Bureau under Section 22, this so called heading was inadequate and the Certificate should have contained a specific statement to the effect that "This Certificate is issued under Section 22 of the Act" or words to that effect.

In both Courts the Certificate was contrasted with the one provided for in the Regulations made under the 1968 Road Traffic Act which Certificate had a sentence stating that the Certificate was issued under Paragraph (a) Sub-section 3 of Section 43 of the Road Traffic Act, 1968. It was also pointed out that the insertion of such statement was restored by the draftsman under the 1987 Regulations, the draftsman apparently considering that the wording of Section 23(2) required a statement that the Certificate is issued under the Act.

The learned High Court Judge found in favour of the Respondent and his decision was appealed to the Supreme Court.

After reviewing the facts and the evidence it was held in the Supreme Court that no reasonable individual receiving the Certificate and reading it could conclude other than that it was issued and was on its face shown to be issued by the Medical Bureau of Road Safety under Section 22 of the Act. The form of words used in the Certificate was unimportant so long as it was clear to the recipient that the Certificate was issued under Section 22 of the Act. The Supreme Court accordingly upheld the Appeal answered question submitted in the case stated in the following manner:-

"The document issued by the Medical Bureau of Road Safety dated the 21st of October, 1985 satisfied the requirements of Section 22 and Section 23(2) of the Road Traffic (Amendment) Act, 1978."

John Connolly -v- Liam Sweeney - Supreme Court - per Griffin J. and McCarthy J. (Finlay C.J. concurring) - 17 December, 1987. [1988] ILRM 483.

GEORGE BRUEN

EMPLOYERS' LIABILITY

Plaintiff employed in Defendant's dairy injured in fall on broken milk bottle - no protective gloves supplied - no evidence of practice in other dairies or of any common practice - case withdrawn from Jury - Plaintiff successfully appealed - injury was forseeable and there was a question for Jury to determine.

The Plaintiff sustained injuries on his forearm near his right wrist whilst working at the Defendant's dairy premises at Rathfarnham, Dublin. His duties involved both getting out crates of bottled milk for delivery and tidying up at the end of a loading session; crates with broken bottles would be rejected and the Plaintiff's job included sorting out the broken bottles by hand and stacking crates containing sound bottles. Whilst carrying a crate the Plaintiff stood on the neck of a bottle and fell causing the bottle to fall out of the crate thereby breaking and causing injury to his forearm. He sued his employers on the express basis that he was not supplied with proper protective clothing such as appropriate gloves with gauntlets. The evidence for the Plaintiff included that of an Engineer who testified as to the need to wear appropriate gloves in the glass manufacturing industry but had been unable, due to refusal of access, to learn what was established practice in commercial dairies. At conclusion of Plaintiff's case, Counsel for the Defendant relying on a statement of law in the case of *Bradley -v- C.I.E.* [1976] I.R.217 successfully applied to withdraw the case from the Jury on the grounds that the Plaintiff had failed to establish that employers in the same business supplied gloves or if not that his employers were obviously imprudent or unreasonable in not providing the particular gloves and gauntlets. The Plaintiff's Appeal was upheld by majority decision (Hederman J. and McCarthy J. - Finlay C.J. Diss).

HELD: There was adequate evidence upon which the Jury might conclude that it was unreasonable on the part of the employers not to provide appropriate protective gloves and gauntlets to employees involved in carrying crates of empty bottles, some of them broken and consequently jagged. The essential question in all actions of negligence is whether or not the party charged has failed to take reasonable care whether by act or omission and (Per McCarthy J): "*Bradley's* case is not to be construed as laying down for all time two unchanging compartments into one or both of which every Plaintiff claim must be brought if it is to succeed"

Finlay C.J. in his minority judgment was of opinion that the Plaintiff must prove in accordance with the principles laid down in *Bradley -v- C.I.E.* and in this instance the injury might just as easily have been inflicted on the Plaintiff's side, his shoulder or his chest as it was on his arm. It would clearly not be reasonable or practicable for an employer to seek to protect his workmen as to the whole of his body or the upper part of his body from cutting by broken glass whilst carrying out the type of work which the Plaintiff was doing on this occassion.

Richard Kennedy -v- Hughes Dairy Ltd. - Supreme Court per McCarthy J. & Hederman J. - (Finlay C. J diss.) 22nd July 1988 - [1989] ILRM 117.

FRANKLIN O'SULLIVAN

PROCEDURE - CASE STATED

The Circuit Court has jurisdiction to state a Case to the Supreme Court at any time in proceedings pursuant to Section 16 of the Courts Act 1947 although in general all material facts ought to be found first.

On the hearing of an application to the Circuit Court for a licence under the Intoxicating Liquor Acts objectors sought to rely on a number of points. One such point involved a contention that the Court was precluded by the Intoxicating Liquor Acts from granting the licence. Having heard evidence on that point alone, and before hearing evidence as to the other grounds of objection, the Circuit Judge purported to state a Case, pursuant to Section 16 of the Courts Act 1947, for the opinion of the Supreme Court on the point of statutory interpretation under the Intoxicating Liquor Acts. A preliminary point arose as to whether the Supreme Court was prevented from answering a Case Stated under Section 16 before all the evidence which might under certain circumstances fall to be considered by the Circuit Court had been heard. In support of the contention that the Court was so prevented reliance was placed on the earlier Supreme Court decisions in *Corley -v- Gill* [1975] IR 313 and *Dolan -v- Corn Exchange* [1975] IR 315.

HELD by the Supreme Court (Finlay C. J. and Walsh J., McCarthy J. concurring; Henchy and Griffin J. J. dissenting).

1. (i) Section 16 did not unambiguously prohibit the stating of a Case until all the evidence had been heard and concluded;

   (ii) the adjournment of pronouncement of judgment or order by the Circuit Court pending determination by the Supreme Court of the Case Stated was mandatory notwithstanding the use of the word "may" in Section 16 but that conclusion did not exclude the power of the Circuit Court to adjourn any other part of the proceedings pending before it as well as the pronouncement of the judgment or order;

   (iii) every court had an inherent jurisdiction in order to secure the due administration of justice to adjourn any part of the hearing of a case before it and Section 16 did not clearly and unambiguously remove that jurisdiction;

   (iv) bearing in mind the purpose of Section 16 and the procedure which the Oireachtas intended to create, a court must have ample powers of ensuring that it does not pronounce or deliver a judgment which is not justly in accordance with the facts and the law as found and that a Case could be stated at any stage of the proceedings;

   (v) it was generally desirable that all the material facts should be found and the evidence concerning them heard before a Case was stated and, without deciding it finally, it was difficult to conceive of a Case stated without any evidence at all;

   (vi) having regard to the Supreme Court authorities on *Stare Decisis*, the requirements to do justice in the instant case and the fundamental importance of relationships between the Circuit Court and the Supreme Court, the power of the Supreme Court to entertain a Case stated was more flexible and more expansive than decided in *Corley -v- Gill* and *Dolan -v- Corn Exchange;* and

   (vii) accordingly, it was proper for the Supreme Court to hear and determine the question raised in the Case stated.

2. (Per McCarthy J)

   (i) the decision when to state a Case was best left to the discretion of the Circuit Court; and

(ii) there was judicial support for the proposition that decisions of the Supreme Court by less than its full complement of members might be reviewed.

3. (Per Henchy and Griffin J. J. dissenting)

(i) the issue was ruled by the decisions in *Corley -v- Gill* and *Dolan -v- Corn Exchange;* and

(ii) accordingly, because all the evidence which might have been adduced had not been heard, the Case stated by the Circuit Court was *ultra vires*.

Raymond Doyle -v- Ciaran Hearne, Robert Dunne and Brendan Keegan (Supreme Court, Finlay C. J, Henchy, Griffin and McCarthy J. J. – Walsh J. concurring with Finlay C. J. and McCarthy J.) 31 July 1987. [1988] ILRM 318.

PATRICK J. C. McGOVERN

RES JUDICATA

Whether a compromised consent High Court Order against a County Council in a claim under the Malicious Injuries Act 1981 is thereafter binding on third parties bringing claims arising out of the same incident in the Circuit Court.

The Appellants were the original respondents in the Circuit Court to an Application under the Malicious Damage Act 1981 for compensation for damage to property owned by the applicants and stored in a Hotel premises at the time that the Hotel was destroyed by a fire.

An application for compensation by the owners of the Hotel premises had previously been decided by the Circuit Court in their favour. This decision had been appealed by the County Council to the High Court where the parties compromised the case between them and an order was made *inter alia* to the following effect.

"That the sum of £845,000 awarded to the applicant by the said Order for the damage complained of in the Notice of Application dated the 19th day of September 1978 be reduced to £422,500."

The application, the subject matter of the present appeal, did not come on for hearing in the Circuit Court until after the above compromise had been reached. The argument in the present case, in the Circuit Court, centered on whether the finding that the fire was malicious in the proceedings by the owners of the Hotel premises bound the County Council in the proceedings by these applicants. The Circuit Court Judge found that the County Council were so bound and the County Council appealed this decision to the High Court.

On appeal, Counsel for the Applicants argued that the issue of liability for the fire was *res judicata* and that the fact that it was a judgement by consent did not affect its capacity to be a judgment *in rem*.

Counsel for the County Council submitted:-

1. That the consent order in the High Court recognised that a substantial issue had arisen on the question of malice and that therefore the parties to that action had compromised that substantial issue on a commercial basis.
2. That if the proceedings had been other than under the malicious injuries code such a compromise could have been made privately. The Order was necessitated because the County Council had no power to compromise and therefore had to have a judgment.
3. If a local authority were estopped from denying malice then in subsequent proceedings the authority might be prevented from relying on further evidence which might have come to hand since the first proceedings.
4. That if estoppel arose there would have to be mutuality and it would have to apply against all other persons injured by the fire.

Lynch J. adopted the reasoning of the Court of Appeal in Northern Ireland in the case of *Sharon Shaw -v- James Sloan* and *Adrian Gribben and Frank Gribben* [1982] N.I. 393. He found that the applicants sought to rely on a judgment obtained by another person with whom they were not in privity. It was perhaps easier to see how injustice could be worked in the converse case – if one party should bring a claim under the malicious code and should fail to establish malice because of insufficiency of evidence then all other persons injured by the fire would be barred from maintaining a claim. To deprive such a person of this access to the Courts would be a grave injustice. Whilst there was a great deal to be said for treating one of several cases as a test case binding all other cases arising out of the same circumstances that had not been done in this case. The County Council had never lured the Applicants into a false sense of security and no question of any estoppel by their conduct arose. He therefore reversed the order of the Circuit Court refering the case back to that Court so that all issues therein might be tried.

McCarthy Construction Limited -v- the County Council of the County of Waterford – 6 July 1987 – (High Court per Lynch J.) unreported.

DAIRE M. MURPHY

PROCEDURE

Validity of summonses – Conviction on hearing in District Court within six months of Offences – whether Defendant could raise on appeal the defence open to him but not availed of at the Summary Trial – whether initiation of proceedings in the District Court within six months constituted a valid complaint.

The Defendant was convicted on 1 January, 1986 of seven separate offences under the Road Traffic Acts, all alleged to have occurred on 11 September, 1985. A fine with imprisonment in default was imposed in respect of each summons. The Defendant did not appear and was not represented in the District Court but appealed the District Court decision to the Circuit Court.

In the Circuit Court the Defendant submitted that the Summonses which had been issued had been issued in accordance with a procedure which, in the case of *the State (Clarke) -v- Roche* [1987] ILRM 309 the Supreme Court had already held to be invalid. The Complainant, relying on *the State (Roche) -v- Delap,* [1980] I.R. 170 asserted that it was not open to the Defendant to make this point on appeal. The Defendant offered no further evidence in the Circuit Court.

The matter then came before the Supreme Court by way of a case stated from the learned Circuit Court Judge wherein he raised five questions for determination by the Court as follows:-

(a) Is the Respondent (Defendant) entitled to raise the question of the validity of the complaint in the Circuit Court at the hearing of the appeal?

(b) If the answer to Question (a) is in the affirmative, is the respondent's right to raise the question of the complaint affected by the fact that he did not raise this issue in the District Court?

(c) If the answer to the above Question (a) is in the negative, are the facts that the District Justice has made the Orders herein and the Respondent has lodged a Notice of Appeal to the said District Court Orders and that the Respondent has appeared in the Circuit Court, sufficient to give jurisdiction to the Circuit Court to hear these appeals?

(d) If the answer to Question (a) above is in the affirmative, then on the evidence in these cases before me, was there sufficient evidence of the making of a valid complaint?

(e) Does the hearing of the case in the District Court within six months of the date of the offence amount to valid complaint?

On the evidence given and accepted by the learned Circuit Court Judge, the Supreme Court was satisfied that, having regard to the decision in *the State (Clarke) -v- Roche,* no valid complaint had been made prior to the issue and service of the Summonses. Counsel for the Complainant did not seriously dispute that, but rather relied upon the initiation of the proceedings before the District Justice within six months as constituting a valid complaint under Section 10 of the Petty Session (Ireland) Act 1851. Furthermore, Counsel for the Complainant argued that if no complaint had been validly made this went as a fundamental matter to the jurisdiction of the Court to entertain the charges in the first instance. In such circumstances the District Court Orders could only be set aside on the basis of judicial review and not, as in the instant case, by way of appeal to the Circuit Court. The Complainant, in his submissions relied on the following authorities:-

The Minister for Agriculture -v- Norgro, [1980] I.R. 155;
Attorney General (McDonnell) -v- Higgins, [1964] I.R. 374;
D.P.P. -v- Gill, [1980]I.R. 263;
People -v- Keogh, [1985] I.R. 444;
State (Roche) -v- Delap, [1980] I.R. 170;
State (A.G.) -v- Connolly, [1948] I.R.176;
State (McLoughlin) -v- Shannon, [1948] I.R. 439;
A.G. -v- Mallen, [1957] I.R. 344.

Counsel for the Defendant advanced the following arguments:-

1. Failure to make a valid complaint within six months of the offences was a matter of defence. In view of the fact that the Circuit Court appeal was a hearing *de novo,* the Defendant was entitled to raise the point and it was immaterial whether or not it had been raised in the District Court.

2. The Summonses issued and served on the Defendant referred to a "complaint previously made". Therefore the Complainant was estopped from asserting that the initiation of proceedings in the District Court was a valid complaint.
3. To treat the initiation of the District Court proceedings as a valid complaint was a wholly unfair and unconstitutional procedure whereby a Defendant could be charged with an offence and tried in respect thereof in his/her absence.

Having reviewed the facts and the law applicable the Supreme Court replied as follows to the five questions raised by the learned Circuit Court Judge:-

(a) The jurisdiction of the Court to hear and determine the charge is founded on the making of the Complaint and not on any Summons which may issue from the complaint. Therefore the validity of the complaint is a matter of defence which must be raised by the defence and which, if raised, must be determined by the Court before which it is raised *(The Minister for Agriculture -v- Norgo)*.

(b) It follows inevitably, since the Circuit Court appeal is truly a hearing *de novo*, that the Defendant could not conceivably be debarred from raising the point in the Circuit Court, merely because it hadn't been raised in the District Court.

(c) There was no doubt as to the jurisdiction of the learned Circuit Court Judge to hear the appeal as the Order of the District Justice on the face of it was valid and the penalties imposed were within the jurisdiction of the District Court. Neither could the Circuit Court Judge exclude the issue raised by the Defendant as to the validity of the complaint.

(d) & (e) It is quite clear that under section 10 of the Petty Sessions (Ireland) Act 1851 a complaint may be made to a District Justice. This happens every time a person is brought before the District Court in the custody of a Garda and there charged with an offence. In the present case, if there were any doubts as to whether the Defendant was aware that the charges set out in the Summonses would be heard in the District Court, then to deem the initiation of the proceedings in the District Court as the making of the Complaint and to try the Defendant immediately thereafter would be unconstitutional. However this was not the case. It was never suggested that the Defendant did not expect the cases to be heard in the District Court on the date for which the Summonses were returnable. That being so, the point raised by the Defendant was purely a technical point without, as regards the real justice of the case, any merit or substance. If the Defendant were to be entitled to rely on such a point then the Complainant must be equally so entitled. The question of treating the initiation of the proceedings in the District Court as the making of a Complaint within the statutory period, is such a technical point on which, the Court was satisfied the Complainant was entitled to rely. The reply therefore to Question (d) was that there was sufficient evidence of the making of a valid complaint and to Question (e) that such evidence consisted of the initiation and hearing of the case in the District Court within six months of the date of the offence.

In summary, therefore, the Supreme Court answered the questions as follows:-

(a) In the affirmative.
(b) In the negative.
(c) Does not arise.
(d) In the affirmative.
(e) In the affirmative.

Director of Public Prosecutions at the suit of Patrick Nagle -v- John Flynn – Supreme Court (per Finlay C.J. Nem Diss) 10 December, 1987 – [1987] I.R. 534.

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The Society will advance up to 65% of the valuation for the purchase of Commercial Properties (offices, shops etc.) which incorporate some residential accommodation. This facility is also available to current owners who wish to refinance their borrowings at more attractive interest rates. Maximum term 15 years.

Commercial Property
Where the property is used exclusively for Commercial purposes and has no residential content, then the Society will advance up to 60% of the valuation for the purchase of such properties. This facility will also be available to present owners who wish to refinance their borrowings at more attractive interest rates. Maximum term 15 years.

Finance for Other Purposes
Where an applicant owns his own property or has an existing Mortgage on it, the Society will advance funds for family education or other domestic or general purposes. The sum advanced can include, where applicable, an additional sum to cover any prior Mortgage on the property concerned. Maximum term 15 years.

METHODS OF REPAYMENT

The Irish Nationwide offers a wide variety of repayment methods which are tailored to suit the needs of every individual applicant. These are:

Capital and Interest
This is the traditional method of repaying mortgages where the borrower's monthly repayment consists partly of capital and partly of interest.

Endowment Mortgages
Under this method of repayment the borrower only pays interest to the Society. Payment of the capital sum is catered for by an Endowment Insurance Policy which is scheduled to terminate at the same time as the mortgage. In this way the borrower maximises the tax advantages and may also have the added benefit of a tax free bonus at maturity.

Pension Linked Mortgages
This facility is aimed at the self employed or those in non-pensionable employment. As with Endowment Mortgages the payment to the Society consists of interest only. Payment of the capital sum is catered for by the tax free cash element of an accumulated pension fund.

Unit Linked Mortgages
As with Endowment and Pension Linked Mortgages interest only is paid to the Society. The borrower also enters a Unit Linked Savings Contract with an insurance company with the expectation that the accumulated value of this fund will be adequate to repay the capital sum.

Irish Nationwide also provide the most comprehensive range of associated insurance services including:

- Householders Comprehensive Building, Contents and All Risks Insurance Cover
- Mortgage Protection Assurance
- Comprehensive Traders Combined Policies
- A unique Repayment Protection Plan

And the payment of all insurance premiums is spread over 12 months.

For a better alternative source of finance contact Irish Nationwide today.

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BUILDING SOCIETY

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Making an investment decision is really like any other judgement we make. It's all about assessing an opportunity and using sound reasoning to follow it through. That's where experience and precision count.

It's these very qualities which make IBI Ireland's leading investment bank, managing a portfolio of close to £3 billion on behalf of a broad range of investors; large and small.

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28 South Mall, Cork. (021) 275711.
Park House, Forster Street, Galway. (091) 63167/8/9.