INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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GAZETTE

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- Adverse Possession and Encroachments by Tenants.
- EEC Directives — Product Liability Commercial Agents
- Duties of an Agent to a Principal — Part II

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GAZETTE
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Viewpoints

Legal Aid Board

The 1985 Annual Report of the Legal Aid Board confirms that the Civil Legal Aid Scheme has become, as far as Court proceedings are concerned, almost exclusively a *Family Law* Legal Aid Scheme. Of the 1331 cases in which certificates were issued for proceedings, a massive 1271 — over 95% — were in Family Law cases. On the Legal Advice side, the position is more satisfactory in that the proportion of Family Law cases is lower being 6,326 out of a total of 7,489. It is clear from these figures that, because of the priority which rightly has had to be given to Family Law cases, the scheme can now cater for only a small number of clients in other areas. The number of cases and the complexity of the legislative procedures, added to the difficulties which have arisen in relation to the administration by the District Court of its new jurisdiction in Family Law matters, all raise again the question of alternative procedures. It is to be hoped that the newly appointed Law Reform Commission may see as a priority the question of the review of the appropriateness of our Civil Courts as the forum for Family Law disputes. It may be that "Family Courts" will prove to be easier to campaign for than to operate, but there is a strong case for examining the proposal.

The Scheme is able to report progress in the opening of the new Law Centres, though not at the speed which had been hoped, and offered very belated assurance that the scheme is at last to be put on a statutory basis. The Scheme should not have been obliged to wait seven years for its political masters to do their homework. There have been improvements in the means test and changes in administrative practice which have enabled the Scheme to work more satisfactorily, notwithstanding the difficulties facing it. The Chairman does well in his Report to remind us that those "in need" include married women and children caught up in Family Law disputes and that services for numbers of them and others cannot be satisfactorily provided by virtue of the non-availability of funds for the expansion of the Scheme.

The Third Solicitor

Whether the market place proves more effective than legislation in ending the practice of charging borrowers the fees of Lending Institutions' solicitors for investigating the title to domestic property remains to be seen. Two recent developments have shown alternative approaches to the problem, one, that of A.I.B., in effectively adopting the recommendation of the Law Society Council in 1985 that Lending Institutions should accept Certificates of Title from borrowers' solicitors and, the other, the Building Societies Regulations 1987.

The regulation dealing with the investigation of title is very narrowly drafted, only limiting the Societies from charging the costs incurred in connection with the investigation of title to any property offered as security, either as a specific fee for that service or as part of "any fee" charged in respect of the loan. This clearly entitles a Building Society to continue its previous practice of requiring that its own solicitors investigate title on its behalf and to pay its own solicitors their fees for that work as part of its general administration expenses. Any increases in such expenses can only be recouped either by lowering the interest rate to investors or by charging borrowers a higher interest rate. Competition for funds among financial institutions is so intense that even if the Building Societies were

(Contd. on p.5)

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Adverse Possession and Encroachments by Tenants

The law governing the consequences of encroachments by tenants on land adjoining their own demised premises (whether belonging to the landlord or not) has received relatively little critical analysis in Irish legal literature.[1]

This topic involves consideration of the squatter tenant's position *vis á vis* his landlord after his encroachment has extinguished the title to the adjacent property and is closely related to, but to be distinguished from, the controversial issue concerning the right of the occupier of the adjoining property where he himself is a tenant, to deal with his interest despite its supposed extinguishment and defeat the squatters interest by, for instance, effecting a surrender to his own landlord.

That is an issue on which our Supreme Court in *Perry* v *Woodfarm Homes Ltd.*[2] and the House of Lords in *Fairweather* v *St. Marylebone Properties Ltd.*[3] have reached divergent conclusions and whilst the Supreme Court has denied the existence of any such right, the position of a squatter on leasehold property in this jurisdiction has been noted to be nonetheless unsatisfactory by reason of the landlord's ability to effect a forfeiture of the lease in question — a forfeiture which the squatters will in most cases be powerless to prevent.[4]

by
Stephen Pye, B.C.L.,
Barrister-at-Law

It must be stressed at the outset that the doctrine of encroachment does not stand in quite the same lamentable state but critical scrutiny of some of its aspects reveals a doctrine that suffers both from a lack of judicial consensus as to whether it has anything to do with the law of adverse possession where the encroachment is on land belonging to the tenant's landlord.

Statement of the Doctrine

The doctrine may be stated thus; any encroachment by a tenant on premises adjacent to his demised premises is presumed to be for the benefit of his landlord; consequently where the tenant, having been in adverse possession of the adjoining property for 12 years, has extinguished that adjoining owner's title, the squatter tenant's possessory title is presumed to endure only for the remainder of his own lease and not for the duration of the leasehold or freehold estate the title to which has been extinguished (*aliter* where the duration of the latter is shorter than that of the former).

The presumption applies even to encroachments over property not immediately adjacent to the squatter's own demised premises — the intervention of a stream,[5] or a road[6] has been held to be of no consequence, but encroachments clearly at a distance do not attract the presumption; in the words of one judge speaking of this matter as going more towards rebutting the presumption:- ''The intervention of a stream[(sic)] like the Rhine or the Rhone would probably rebut the *prima facie* presumption, when a small insignificant stream would not.''[7]

VIEWPOINTS (from p.3)

prepared to lower interest rates, other financial institutions would gain a competitive advantage. The alternative of increasing the interest rate to borrowers by a modest amount may well seem attractive to the Societies. If it does, then the only benefit to be gained by the borrower will be that, instead of being asked to pay solicitors' fees at the inception of the mortgage, he will pay them over the period of the mortgage. Borrowers would be glad not to have to pay at the beginning, but this arrangement hardly tackles the main problem, which is the necessity of the second investigation of title and is the need for the ''third'' solicitor.

The A.I.B. scheme seems immediately more attractive, since it should result in an absolute saving to the borrower both in the short and long term. Unfortunately A.I.B. are cast in the role of the ''Greeks bearing gifts'' because it's home lending scheme has always been criticised for linking the borrower's security for his home loan with all other sums which might be due to the Bank. In their ''two-mortgage'' scheme not only does the home loan transaction capture the home itself, but also any sums which the borrower might owe to the Bank by way of ordinary overdraft or term loan facilities for a business and, in addition, liabilities that might be due by the customer on foot of any sureties or guarantees. It seems unfair that a person seeking only to finance the purchase of a home, at the market rate of interest, should have to put that home at risk to secure other liabilities. Other Banks have taken a different line and have segregated home loans from the other borrowings. A.I.B., having resolved the ''third solicitor'' problem, would gain further plaudits if they were to follow their competitors in this regard. □

Smirk v Lyndale Developments Ltd.

Although the doctrine is of some antiquity, it is useful to outline the doctrine's application in greater detail by reference to a relatively recent decision of Pennycuick V.C. in *Smirk* v *Lyndale Developments Ltd.*[8], particularly as that case treats of a number of previous decisions in this area.

In *Smirk* the plaintiff tenant occupied two plots of land which lay immediately beyond a path running behind a house held by him under a service tenancy from British Railways which also owned those two plots. The plots were used by the plaintiff as a flower and vegetable garden — and the trial judge was to hold — one of those plots (the blue plot) had been occupied by the plaintiff for more than twelve years. Some time after having bought the freehold in the property comprised in the plaintiff's service tenancy together with the two plots of land behind it from British Railways, the defendants commenced a building development on the two plots. The plaintiff immediately sought a declaration that he had a good possessory title to the freehold in those two properties or, alternatively, that he held them as an extension of the locus of his tenancy in the house to which they were adjacent.

In relation to the plot which Pennycuick V.C. held the plaintiff to have been in effective occupation for 12 years, (the blue plot) the following *dicta* of Parke B. in *Kingsmill* v *Millard*[9] were drawn upon by his Lordship as correctly reflecting the position in law of the plaintiff *vis á vis* the defendant as regards that property:-

> "It is laid down in all cases — whether the enclosed land is part of the waste, or belongs to the landlord or a third party — that the presumption is, that the tenant has enclosed it for the benefit of his landlord, unless he has done some act disclaiming the landlord's title. I am disposed to discard the definition, that the encroachment is made "for the benefit of the landlord", and to adopt that of Lord Campbell, *viz,* that the encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit."

Therefore, the plaintiff's claim that he was entitled to the freehold in the blue plot failed by virtue of the presumption.

Pennycuick V.C.'s analysis of the authorities did not stop there, however, — he noted the difference in judicial opinion on the question of the doctrine's application to land which wasn't waste. The first instance decision in *Tabor* v *Godfrey*[10] and the data of Parke B. *(supra)* suggested the doctrine to apply irrespective of whether the land encroached upon constituted waste or not whereas the judgements of Lord Russell C.J. and Willes J. in *Lord Hastings* v *Saddler*[11] emphatically demurred to such a proposition. It was the former view which Pennycuick V.C. indicated his preference for, but since the lands involved in the case before him themselves appear to have been waste land, it might be said that his Lordship's remarks on this topic were obiter.

The dearth of Irish authority on the whole area of encroachments by tenants provides no definite answer to the question either. In the old case of *Irwin* v *Boyse*[11a] a view contrary to that expressed by Pennycuick V.C. is attributed to Ball J. but the few expressions of opinion thereafter by Irish Bench on this doctrine[12] leave to inference whether the broader view is to be regarded as correct or not.

Perhaps, the most satisfactory fashion in which this issue could be resolved by a Court now if it were required to deal with this problem would be for it to look at the rationale behind the presumption and consider whether that rationale holds good when applied to the situation of encroachments by tenants on non-waste land. Unfortunately, examination of what is the leading exposition of the doctrine's fundamental premise — the judgement of Willes J. in *Whitmore* v *Humphries*[13] — highlights the confusion which surrounds precisely what legal principles the courts are invoking where an encroachment by a tenant on lands belonging to his landlord fails to be considered.

Rationale of the Doctrine

Willes J. set forth his understanding of the doctrine's rationale as follows:-

> "The rule is based upon the obligation of the tenant to protect his landlord's rights, and to deliver up the subject of his tenancy in the same condition, fair wear and tear excepted, as that in which he enjoyed it. The result is to avoid questions which would otherwise frequently arise as to the property in land, and to exclude persons who have come in as tenants, and who are likely to encroach, from raising such questions."[14]

There is often great temptation and opportunity afforded to the tenant to take in adjoining land, which may or may not be his landlord's and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively.

These *dicta* when considered in the light of their application to the dispute before the Court in that case demonstrate how sight has been lost in some later judgements of the fact that *Whitmore* and other decisions have nothing to do with the operation of the Statute of Limitations but are in fact cases negativing the assertion made in them that the Statute over ran against the landlord in respect of the encroachments over the landlord's land.

In *Whitmore*, for example, the tenant had enclosed, with the assent of the landlord, a piece of the landlord's waste land adjoining the tenant's premises. Possession of the waste by the defendant (who was treated as successor-in-title to the tenant) was proved for 21 years and on the expiration of the lease of the demised premises the plaintiff lessor sought possession of both properties.

It was contended on behalf of the defendant that the landlord's oral assent to the enclosure of the waste by the defendant's predecessor-in-title gave rise to a tenancy-at-will which must be deemed to have determined one year from its commencement by virtue of the then statutory

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equivalent of s.17 of our Statute of Limitations Act, 1957. Accordingly, so the defendant's argument went, time would have begun to run against the landlord from that date in respect of the waste and so his title to it must have been extinguished.

Willes J. rejected this line of argument, on the evidence the reality of the agreement between the landlord and the tenant was that the encroachment should be on the same terms as are usually applicable to encroachments by virtue of the law and those terms negatived the running of time against the landlord until the tenancy in the demised premises of which the waste was to be deemed to be a part of had itself determined.

Before the expiry of determination of the tenancy in the demised premises the tenant is entitled to occupy the property encroached upon notwithstanding the non-operation of the Statute of Limitations. The decision in *Taber* v *Godfrey*[15] illustrates this proposition and although there the tenant had occupied the landlord's property for more than 12 years Charles J. expressly disavowed any reliance on the statute for his decision.

Estoppel and Encroachments

What then is the basis of the tenant's protection? Denning L. J. (as he then was) advanced the following explanation in *Perrott (J. F.) & Col. Ltd.* v *Cohen*[16]:-

"The principle underlying the cases on encroachment is not perhaps strictly an estoppel, but it is akin to it. If a tenant takes possession of adjoining property and by his conduct represents that he is holding it under the demise, then, if the landlord acts on that representation by allowing the tenant to remain in possession, the tenant cannot afterwards assert that he is holding it on any other footing. The tenant cannot, for instance, claim that he is holding it adversely to the landlord so as to acquire a title under the Limitation Act of 1939; nor can he claim that he is only a licensee, who has all the benefits of occupation but none of the burdens of the lease."

His Lordship then elaborated on the explanation by invoking the principle he had stated in *Central London Property Trust Ltd.* v *High Trees House Ltd.*[17] and continued:-

"Conversely, if a landlord should allow a tenant to occupy adjoining property, and by his conduct represents to the tenant that it is included in the demise, and the tenant acts on it by using it as such, the landlord cannot afterwards turn around and eject the tenant from it during the term of the lease. That was decided in *Tabor* v *Godfrey.*"[18]

Stated in this fashion, the law governing encroachments by tenants — at least over land belonging to the landlord — seems to be only a particular application of what is loosely called proprietary estoppel[19] yet the view expressed by Denning L. J. should be contrasted with the approach of the Court of Appeal just 9 months earlier in *King* v *Smith*[19a] (mentioned in another context, *post*) where the presumption was held applicable despite what appears to have been an acceptance by the Court that the Statute had run against the landlord.

That principles akin to estoppel were drawn upon by Denning L. J. in *Perrott* was understandable enough, though, since the tenant there had expressly represented to the landlord that the property encroached upon (essentially lavatories) was part of the demised premises. It followed, according to all the members of the court in that case, that the tenant's consequent inability to deny that the lavatories were included in his lease in respect of the delapidated state into which the lavatories had fallen into. A further interesting consequence of locating the basis of the encroachment doctrine in the law of estoppel is that (presumably) 12 years need not have elapsed before the tenant must be taken to be holding the particular property under the same terms, and subject to the same conditions, as the demised lease.

Having regard to the fact that *Perrott*, and in particular, the *dicta* of Denning L. J., *supra,* were referred to by Pennycuick V.C. in *Smirk* v *Lyndale Developments*,[20] it is rather surprising that his lordship's own judgment proceeded on the apparent footing that principles of adverse possession were involved. Nevertheless, it would be tempting to say that this discernible difference in approach to the problem of encroachments has no practical consequence. On one view of the doctrine's operation the tenant does not adversely occupy his landlord's adjoining land but rather is to be regarded as taking it by way of addition to the land comprised in his tenancy; on the other view the tenant's possession is adverse but is presumed to be for the benefit of the landlord so that any possessory title the tenant ultimately acquires is merely coterminous with his own tenancy.

Whilst, therefore, these two analyses are mutually exclusive in their operation, the same result is achieved by the application of either with the important proviso that the former view makes the covenants contained in the tenant's demise applicable in respect of the property encroached upon and, furthermore, should not require the tenant to have occupied the property for 12 years. It is not clear, however, what application the former analysis can have where the land encroached upon does not belong to the landlord but to a third party.

An opportunity was missed in the Court of Apeal in *Smirk* v *Lyndale Developments*[21] to comment on this matter. The plaintiff had appealed against Pennycuick V. C.'s finding that he did not even have a leasehold interest in the blue plot; the Vice-Chancellor's reasoning being that the plaintiff's original service tenancy (with which the interest in the blue plot was coterminous) had itself terminated on the service of a new rent book on him by the defendant in 1967 and no new right could have accrued in the meantime. It is outside the scope of this article to consider whether even on the view the Vice-Chancellor took of the effect of the new rent book, that that conclusion followed; the Court of Appeal reversed Pennycuick V. C.'s decision on this point and held that the original tenancy, and thus the interest in the blue plot, still subsisted. The judgment below was otherwise described variously as "very powerful and useful" and as having "untangled" the law in this area.[22] The writer will lastly discuss two further aspects of the doctrine of encroachment and then conclude with some general comments on this whole area.

Mergers and Encroachments

It might be thought that as the encroaching tenant's interest corresponds with the extent of his own tenancy, a tenant holding under a very long lease, a substantial portion of which term is unexpired, will not be too much troubled by the doctrine's operation and the possibility of his landlord claiming possession of the encroachment.

Whilst this is true, there is one situation where such a tenant may unwitingly deprive himself of his possessory title to the land encroached upon and this is where he decides to buy out the freehold in his own demised premises. Since his interest in the encroachment is co-terminous with the tenancy in his own premises and subsists only so long as it subsists, it follows that where the latter estate disappears upon the merger of it with the freehold in the demised premises being bought out by the tenant, his entitlement to the encroachment thereupon ceases. This is the *ratio* of the decision in *King* v *Smith.*[23]

The defendant, a weekly tenant of a residential premises encroached upon certain waste land adjoining the premises and which belonged to his landlord. Some time after the defendant had been in occupation for 12 years, the landlord's successor in title sold the waste land to the plaintiff and the freehold reversion in the defendant's premises to an investment company which in turn sold it to the defendant. The actual conveyance of the waste land to the plaintiffs was executed some two months after the conveyance by the defendant.

In proceedings brought by the plaintiff for possession of the waste land, the Court of Appeal held the defendant's interest in the waste land to have determined on the merger of his weekly tenancy in the premises with the fee simple. It followed that the freehold in the waste land had fallen into possession and the plaintiff as transferee of it was entitled to recover possession. Such a deleterious consequence for the tenant may be avoided, of course, should he buy out the freehold in the waste land also but this will depend on the willingness of the landlord to sell and *King* v *Smith*[24] amply illustrates the ability of the landlord to deal with the freehold in the waste without regard to the tenant. *King* v *Smith* is also relevant to the last aspect of the doctrine, *viz.* the matters and circumstances which the courts have indicated as rebutting the presumption.

Rebuttal of the Presumption

One must be circumspect in essaying an exhaustive statement of such matters and circumstances because much of the commentary on this point involves an indiscriminate adoption of *dicta* culled from cases which might more properly be characterised as turning on some other ground. In one of these cases — *Whitmore* v *Humphries*[25] — Willes J. indicated that where the tenant had evinced an intention to encroach for his own benefit the presumption was rebutted. This view must be contrasted with that approved by Pennycuick V.C. in *Smirk* and by the Court of Appeal in *King* v *Smith* to the effect that that intention must be communicated to his landlord or (to put it another way — there must be evidence that the landlord and tenant "so conducted themselves . . . as to show that the landlord treated the encroachment as not enuring to his benefit".[26] This would be so where, for instance, the landlord, on being informed by the tenant of his intention to convey the freehold in the encroachment to a third party takes no objection to this course,[27] or, possibly, where the landlord grants to the tenant a new lease without including the property previously encroached upon.[28]

Conclusions

Considering the large amount of leasehold land in this jurisdiction, the potential application of the doctrine which has been discussed to instances of encroachments by tenants must be considered as very great indeed[29] and it is, therefore all the more unfortunate that a practitioner turning to the decided cases for guidance in this area should find them in disarray even on so fundamental a point as to whether the doctrine, when properly understood, holds that the statute never runs in the encroaching tenant's favour but that such a tenant's rights derive instead from some sort of estoppel.

An enquiring mind casting an eye over this whole area will also, no doubt, be disappointed by the complete absence of discussion of the doctrine in *Fairweather* v *St. Marylebone Property Co.*[30] and *Perry* v *Woodfarm Homes Ltd.*[31] where arguably it merited some discussion. Whilst in both those cases the crucial issue to be determined was whether the squatter had any right to possession at all and not the duration of such a right if he had any, both the House of Lords and the Supreme Court assumed that the right, if established, would be for the duration of the lease encroached upon; indeed, in *Perry* where the squatter's claim succeeded, it appears from the report of the decision that the order of the Supreme Court declared the squatter to be entitled to possession of the strip in question for the remainder of the 999 year lease under which it was held, yet the squatter was himself holding the adjacent premises under a lease of only 250 years.[32]

That observation prompts the question whether the doctrine should have any play in respect of encroachments by tenants holding under long residential leases; the practical effect of modern legislation conferring rights of enfranchisement and entitlements of reversionary leases upon such tenants is to make them all but in name the full owners of the land in question.[33]

Those that may be eventually charged with the reform of the law relating to adverse possession of leasehold property because of the developments referred to at the beginning of this article may consider the doctrine of encroachment as part of their remit and propose as a major reform, the qualification on the doctrine's operation as suggested in the preceding paragraph; it is imperative though that whatever forum, legislative or judicial, next reviews this whole area that it address the central issue relating to the doctrine's underlying basis and whether the later cases have dislocated the doctrine from its original premise that the effect of the presumption is that the Statute must be taken to have never run in respect of the tenant's encroachment over his landlord's land.

□

FOOTNOTES:

1. A notable exception is the commentary to be found in Wylie, *"Adverse Possession: An Ailing Concept,"* (1965)16 N.I.L.Q. 467 at pp. 487-489.
2. [1975] I.R. 104.
3. [1963] A.C. 510.
4. See Wallace, *Adverse Possession of Leaseholds — The Case for Reform* (1975) 10 Ir. Jur. (n.s.) 74 at pp. 77-78 and Brady and Kerr, *The Limitation of Actions in the Republic of Ireland* (1984) at pp. 80-81.
5. *Lisburn (Earl)* v *Davies* (1866) L.R. 1 C.P. 259.
6. *Andrews* v *Hailes* (1853) 2 El & Bl. 349.
7. See *Lisburne (Earl)* v *Davies*, op.cit., at p.265 (per Erle C.J.).
8. [1975] Ch. 317. See notes in (1974) Vol. 38 Conv. (n.s.) 444 and (1975) Vol. 39 Conv. (n.s.) 298.
9. (1855) 11 Exch. 313 at p. 318.
10. (1895) 64 L.T.Q.B. 245
11. Ir. Cir. Rep. 341.
12. See *Oliver* v *Rooney* [1895] 1 I.R. 660; *Meares* v *Collis* [1927] I.R. 397 (*en passant* at p. 403)
13. (1871) L.R. 7C.P. 1.
14. Op. cit., at p.5.
15. (1895) 64. L.J.Q.B. 245.
16. [1951] 1 K.B. 705 at p. 710.
17. [1947] K.B. 130.
18. Ibid.
19. See Brady, *An English and An Irish View of Proprietary Estoppel*, (1970) 5 Ir. Jur. (n.s.) 239 and Pearce, *The Mistaken Improver of Land,* Vol. 79 G.I.L.S.I. (June, 1985) p. 179.

19a. [1950] 1 All E.R. 533 (Cohen L. J. was a member of the otherwise differently constituted Courts of Appeal in both cases).

20. [1975] Ch. 317.
21. Ibid., at p.335.
22. Op. cit. at pp.340 and 337 (per Walton J. and Lawton L. J. respectively)
23. [1950] 1 All E.R. 533.
24. [1950] 1 All E.R. 533.
25. (1871) L.R. 7 C.P. 1 at P.5.
26. See *Att. Gen.* v *Tomline* (1880) 15 Ch. D. 150 at pp. 161-162 (per Thesiger L. J.).
27. See *Kingsmill* v *Millard* (1855) 11 Exch. 313 at p.318 (per Parke B.)
28. See *East Stonehouse U.D.C.* v *Willoughby Bros. Ltd.* [1902] 2 K.B. 318 and *Att. Gen.* v *Tomline* (1880) 15 Ch.D. 150.
29. The doctrine, does not, it seems, apply where the squatter at the inception of his encroachment is not a tenant to the owner of the land being encroached upon — see *Dixon* v *Baty* (1886) L.R. 1 Ex. 259.
30. [1963] A.C. 510.
31. [1975] I.R. 104.
32. Op. cit., at p.110. Wylie, op. cit., at p. 487 seems to imply that the doctrine was applicable to the facts of *Fairweather.*
33. As to enfranchisement, see principally the Landlord and Tenant (Ground Rents) (No.2) Act, 1978, and as to reversionary leases, see the Landlord and Tenant (Amendment) Act, 1980.

IRISH SOCIETY FOR LABOUR LAW
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Articles 2 & 3 define "product" and "producer" and the onus of proof is clearly on the injured person.

A general limitation period of 3 years, to run from the day on which the Plaintiff became aware or should reasonably have become aware, of the damage, the defect and the identity of the producer, will apply to proceedings for damages under the Directive. However, the rights of an injured person are to be extinguished on the expiry of 10 years from the date on which the producer put the product into circulation — unless proceedings have been instituted in the meantime.

The Directive provides five defences to the "strict liability" principle and also provides for contributory negligence on the part of the injured person.

Practitioners are referred to the comprehensive article on the Directive by Mr. William Binchy in the March & April 1986 issues of The Law Society Gazette for further information.

E.E.C. Directive on Self Employed Commercial Agents

Present Progress of Directive

The E.E.C. Commission first submitted this draft Directive to the Council in January, 1979. The proposal was intended to eliminate distortion of competition arising because of different national laws relating to agency arrangements. In our jurisdiction such contracts are not constrained either by Statute or custom and practice. In Civil Law jurisdictions agents have rights, particularly rights arising on termination of agencies, which do not arise here.

The Directive was adopted by the E.E.C. in December, 1986, and must be implemented in Ireland by 1 January, 1994. When implemented it will have a significant impact on the relations between agents and their principals as it will not be possible to contract out of certain provisions including those which will entitle the agent to minimum compensation on the termination of his contract.

The Directive provides effectively a model contract including such material as:

(a) the definition of "Commercial Agent". The definition excludes, on the one hand, distributors who operate on a principal to principal basis and agents who are employees but who are remunerated partly on a commission basis (Art.3);

(b) the obligation to act in good faith, to supply relevant information, to keep principals' money separate from his own, to keep proper accounts (Art.5);

(c) to protect commercial or industrial secrets (Art.6);

(d) permitting the agent to carry on other activities provided they do not conflict with his obligations to his principal (Art. 7);

(e) entitling the agent to indemnity by his principal for any claim for damage if the claim results from a breach of industrial, commercial or other rights by the principal (Art. 8);

(f) delegating to the agents authority to represent the principal (Art.9);

(g) obliging the principal to act in good faith and assist the agent (Art 10);

(h) defining agent's right to remuneration and the circumstances in which the entitlement arises (Articles 11, 12, 13, 15, 16, and 17);

(i) providing for Special Commission where agent is obliged to collect monies for his principal (Art. 14);

(j) principal's obligation to provide a statement of account monthly (Art. 18);

(k) agent's right to indemnity even where principal fails to make full use of his services and his right to reimbursement of expenses (Art. 19 & 20);

(i) special provision for *del credere* agents;

(m) right of each party to receive written statement of terms of contract and of its termination (Arts. 23 & 24);

(n) definition of date of termination of contract for a specific term (Art. 25) and of contract for an indeterminate period (Art. 26) which shall not be less than six months;

(o) circumstances in which either party may terminate (Art. 27);

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(q) provision limiting restrictions on the business activities of the agent after the contract has terminated. In particular no limitation in excess of 2 years duration is valid (Art. 32);

(r) larger entities acting as agents (paid up capital greater than 100,000 ECU's or turnover in excess of 500,000 ECUs per annum) may derogate from Articles 14(4), 19, 21, 26(2) and 30;

(s) defining the limitation period for claims as 3 years, (Art. 34);

(t) providing that any stipulation derogating from Articles 8, 10(2)(c), 12(1)(a), 15, 18, 19, 21(1) (2) and (3), 23, 24, 27, 28, 29(2), 30, 32 and 34 shall be void (Art. 35).

You have been warned. Now is the time to take out the agency contracts file and review all existing arrangements in the light of these proposals.

What action should you take?

If you are a principal you should look at your contracts and your agent's to see if any of the provisions conflict with the mandatory provisions of the Directive. If they do then you may wish to terminate them and negotiate new arrangements which are not in conflict and at the same time introduce limitations on termination payments which are within the permitted perimeter. If the agency is for a term of years it may only be terminated by mutual consent.

If you are an Agent you should also consider whether renegotiation is desirable. It is likely that most agents will feel reassured by the provisions of the Directive which, in general, will enhance their position. Perhaps they should buy up all the available copies of this *Gazette* to ensure that their principals do not get wind of it.

David Pigot - Perennial Sportsman

Many Presidents have achieved distinctions in other fields of activity than the law, but none can have achieved such long standing success in the sporting world in Ireland as the present incumbent. David R. Pigot, or D. R. Pigot, Jnr. as he was originally described in cricketing records, has been playing senior competitive cricket in Dublin for forty-one consecutive seasons. He has played in 100 more senior matches than his nearest rival, Niall McConnell, having first played in the 1946 season. In his career with Dublin University and Phoenix — almost always as an opening batsman — he has scored a total of 14,042 runs, second only in Dublin cricket to "Ginger" O'Brien of Malahide. He has also taken 125 wickets, though he has not taken a wicket since 1976.

David Pigot (left) and Jack Short pictured on the occasion of the Ireland v. Scotland match, in Rathmines, August 1975.

It was in 1976 that he played the last of his 44 games for Ireland. His international career is remarkable in that having been first capped at a time which would have been late in most players' careers (he was 37 at the time) he proceeded to play for Ireland for a further eight years, gaining 41 consecutive caps. He scored 1,513 runs in seventy-three innings (once being not out) for an average of 19.39, his highest score being 88 which he achieved twice in the 1970 season, once against Scotland and once against The Combined Services. In spite of his having taken over 125 wickets in Dublin Senior Cricket, he never bowled for Ireland.

Of the matches David has played for Ireland the most memorable must be the West Indies match of 1969. On a "green" pitch at Sion Mills the West Indies side, including Clive Lloyd, Basil Butcher and John Shepherd, were bowled out by Alec O'Riordan and Duggie Goodwin for twenty-five. Not surprisingly Ireland won the match by nine wickets and batting on reached 125 for 8 declared, with David Pigot top scorer with 37.

David's sporting career has not been limited to cricket. He played rugby for Trinity, Monkstown and St. Mary's College — normally at scrum-half and at second team level, but with occasional appearances in the Senior Cup. On his retirement from rugby he took up hockey, never having played before, in 1959 joining Three Rock Rovers. By 1965/66 he was on their Senior League winning side and after a period on the second XI

(Continued on p.17)

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SOLICITORS' ACCOUNTS REGULATIONS NO. 2 OF 1984

Approved Banks

The Society has added Smurfit Paribas Bank Limited to the Banks listed in the First Schedule of the Solicitors Accounts Regulations No. 2 of 1984 — S.I. No. 304 of 1984.

In view of the foregoing, Smurfit Paribas Bank Limited is an approved Bank within the meaning of the Solicitors Accounts Regulations with effect from January 15th, 1987.

The First Schedule setting out the approved banks should be amended to read as follows:-

Agricultural Credit Corporation
Algemene Bank Nederland (Ireland) Limited
Allied Irish Banks Limited
Allied Irish Finance Company Limited
Allied Irish Investment Bank Limited
Anglo-Irish Bank Corporation plc.
Ansbacher & Company Limited
Bank of America NT & SA
Bank of Ireland
Bank of Ireland Finance Limited
Bank of Nova Scotia
Banque Nationale de Paris (Ireland) Limited
Barclays Bank International Limited
Barclays Commercial Bank Limited
Bowmaker (Ireland) Limited
Citibank N.A.
Chase Bank (Ireland) Limited
Credit Finance Bank Limited
First National Bank of Chicago
First Southern Bank Limited
Forward Trust (Ireland) Limited
Guiness & Mahon Limited
Hill Samuel & Company (Ireland) Limited
Hongkong and Shanghai Banking Corporation
Industrial Credit Company Limited
Investment Bank of Ireland Limited
Irish Bank of Commerce Limited
Irish Intercontinental Bank Limited
Lombard & Ulster Banking Ireland Limited
Mercantile Credit Company of Ireland Limited
Northern Bank Limited
Northern Bank Finance Corporation Limited
Post Office Savings Bank
Smurfit Paribas Bank Limited
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Trinity Bank Limited
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DAVID PIGOT (from p.15)

was back on their successful Senior League side in 1971 and '72. He was on an Irish Junior Cup winning side in 1978/79 and still turns out regularly for the fourth (of eight) XI, his last medal-winning appearance having been in the Intermediate Cup in 1982/83.

The tradition of the Law and Cricket runs deep in the Pigot family. David's Grandfather, J. H. Pigot was a Circuit Court Judge and President of the Irish Cricket Union. His father, also David R. Pigot, played twenty times for Ireland, playing for the same two Club sides, Dublin University and Phoenix as David Junior. David's son, also David R. Pigot, has followed both branches of the tradition; having qualified as a Solicitor he has played senior cricket for Dublin University and Phoenix and will Captain the Phoenix senior side in 1987.

Whether the combined effects of the duties of the President and a son at the helm will enable David to play his 600th senior match in 1987 remains to be seen. Rumour has it David Pigot is threatening to take up golf when he retires from cricket — who is to say that he will not be the first sexagenarian to play for Ireland?

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The Duties of an Agent to a Principal - II

(Part I of this article appeared in the December, 1986 issue)

by
Vincent J. G. Power
and
Kieran M. Hughes

Duty to Respect the Principal's Title

If an agent is in possession of property belonging to the principal, then the agent is under a duty to respect the principal's title to that property: the agent is estopped from denying the principal's title. This duty has been succinctly described by Fridman in the following terms: "(t)he agent cannot deny the title of the principal to goods, money, or land possessed by the agent on behalf of the principal."[59]

(a) *title of the principal*

An agent is under a duty to respect the principal's title. Thus, for example, a carrier entrusted as agent with goods by a principal cannot contest the principal's title.[60] An agent is incapable of acquiring title to a principal's land because the possession of the land by the agent is deemed to be that of the principal himself or herself.[61]

(b) *title of a third party*

What if a third party claims the principal's property? The agent may be able to avoid handing the *goods* to the principal by setting up the third party's rights to the property against the rights of the principal. That is to say, the agent may be able to plead *jus tertii.*[62] This possibility does not arise in the case of money[63] unless the agent was guilty of some wrongful act in connection with that money. Fridman states that acting wrongfully "involves (i) knowingly participating in a breach of trust by the principal or (ii) intermeddling with the trust property otherwise than merely as an agent or (iii) receiving or dealing with the money knowing that his principal has no right to pay it over or to instruct him to deal with it in the manner indicated or (iv) some dishonest act relating to the money."[64]

Duty to Account

The agent must pay over to the principal all money received to the use of the principal.[65]

In order to fulfil the duty to account, the agent is under a duty to keep the principal's property separate from his or her own, keep proper accounts and to produce those accounts to the principal (or a nominee) on request.[66] Interestingly, the duty to account exists even where the transaction (whereby the money is received) was void or illegal, so long as the contract of agency is not itself illegal.[67]

Duty Not to Make Secret Profits

An agent has no right to receive any financial benefit from the agency other than the remuneration provided under the agency itself. To receive any such payment is to make a *secret profit.* The agent is merely the medium through which the principal reaches a third party. It would be wrong for the agent to make some financial gain from the agency which was not disclosed to the principal. In essence, the agent is under a duty not to make a secret profit.

While an agent is in any event under a duty not to accept bribes or secret commissions *(infra)*, there need be no bribery, fraud or corruption involved in a "secret profit".

The agent's duty is not to make a *secret* profit. Thus if the principal *knows* that the agent is making the profit and does not object, then the agent is entitled to keep that profit.[68] Fridman goes further and states that: "if the profit, though secretly made, has not been obtained as a result of any fraud practised on the principal, the making of such profit will not deprive the agent of his rights against the principal, though the agent will not be able to keep his secret profit."[69]

Fridman explains this duty by stating that the agency agreement is a contract *uberrimae fides.*[70] Lord Denning has (as usual) made some interesting observations on this subject:

> "Once it is found that the agent has used his principal's property or his position so as to make money for himself, it matters not that the principal has lost no profits or suffered no damage . . Nor does it matter that the principal could not have done the act himself . . . Nor do you have to find that the act, which brought about the profit, was done within the course of his employment . . The reason is simply because it is money which the agent ought not to be allowed to keep. He gained an unjust benefit by the use of his principal's property or his position and must account for it."[71]

An agent must account to the principal for all profits.[72] *Turnbull* v *Garden*[73] is a clear example of an agent's duty not to make a secret profit — even if the agent is a gratuitous one. An agent was appointed to buy a cavalry outfit for the principal's son. The agent obtained some discounts on the outfit but charged the full price to the principal. The court held that the principal only had to indemnify the agent for the real cost of the outfit and no more: anything else would have been a secret profit allowing the agent to profit by a wrong. Another case is *Thompson* v *Meade.*[74] A stockbroker was instructed to purchase shares at a specific price. He obtained them at a lower price. The court held that he could not charge the client more than he actually paid for them: to do so would have allowed the agent a secret profit.

What happens if the agent breaches this duty? First, the agent is no longer entitled to the agency commission. Secondly, the prin-

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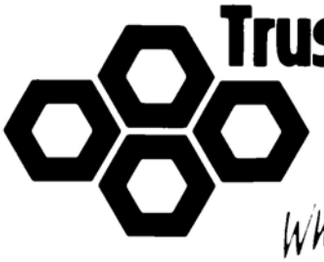

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cipal is entitled to dismiss the agent.[75]

Duty Not to Accept Bribes or Secret Commission

An agent is under a fiduciary duty not to accept bribes[76] or secret commissions.[77] Nor is an agent allowed to enter into an agreement *expecting* a bribe or secret commission. In the context of civil law,[78] a bribe has been judicially defined as:

> "For the purpose of civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent."[79]

A number of consequences flow from an agent accepting bribes or secret commissions.

First, the principal is entitled to dismiss the agent.[80] In *Boston Deep Sea Fishing & Ice Co.* v *Ansell,*[81] a company director (agent) accepted bribes. Those bribes were held to be sufficient to *ex post facto* justify his earlier dismissal (which had been for an insufficient reason).

Secondly, the agent is not entitled to remuneration or indemnity from the principal.[82] Of course, the agent cannot recover an unpaid bribe from the third party[83] that would allow him or her to profit from a wrong![84]

Thirdly, if the principal has paid the commission to the agent, then it is recoverable by the principal.[85]

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Fourthly, the agent who takes a bribe is liable to the principal either in an action for money had and received,[86] or in damages for fraud.[87] The principal must choose (i.e. *elect*) because the principal cannot recover twice over. If the principal takes an action for money had and received, then the bribe bears interest from the date of its receipt by the agent;[88] but if the bribe took the form of property, then the agent is liable to account to the principal for the highest value the property had while in the agent's possession.[89] The principal is not entitled to recover from the agent the bribe or secret commission where the principal knew of the fact that the agent was receiving such payment.[90]

Fifthly, the principal may elect to repudiate any transaction which was entered into by the agent as a result of a bribe.[91]

Remedies for Breaches of Duty

If an agent breaches one of the duties to the principal, what remedies are available to the principal?[92] There are at least seven possible remedies. The most important of these remedies are an action for damages; dismissal of the agent; action for account; action for breach of contract; action for torts committed; an injunction; and interest.

(1) *Action for Damages*

The agent may be liable in damages. These damages may be recoverable either in contract or tort. It must be stressed that first, gratuitous (i.e. non-contractual) agents cannot be liable in contract[93] (but they may be liable in tort) and secondly, damages in tort would be available where there is a duty of care.[94]

The measure of damages in contract is the actual loss sustained by the principal[95] which is the natural and probable consequence of the breach,[96] or within the contemplation of the parties at the time the contract was made.[97]

The learned editors of *Halsbury's Laws of England* state:

> "Where owing to the negligence of the agent the principal has been convicted of a criminal offence, whether or not the principal can recover by way of damages for that negligence any penalty imposed on him upon his conviction is the subject of conflicting authorities, but, where the liability for the offence is absolute, and the principal has not himself been guilty of any fault, negligence or dishonesty, but he has been grossly misled by his agent, he has been held entitled to recover the amount of the penalty from the agent."[98,99]

(2) *Dismissal of the Agent*

A principal in a continuing agency who discovers that the agent breached a duty is entitled to dismiss that agent without giving notice or paying compensation. The agent's breach of duty may *ex post facto* justify an earlier dismissal.[100]

(3) *Action for Account*

If the agent fails to pay to the principal on demand moneys received in the course of the agency, the principal may bring an action for money had and received[101] and, possibly, also claim an account.[102]

Where an action for account is successfully maintained, the agent is obliged to disclose all the money received by him or her on behalf of the principal.[103]

An agent is entitled to deduct any lawful[104] expenses and any sums due to the agent from the principal[105] once they have become due.[106]

As a general rule, settled accounts cannot be reopened.[107]

(4) *Action for Breach of Contract*

Where the agency agreement is a contractual one, the principal can sue for breach of contract.[108]

(5) *Action for Torts Committed*

Where a duty of care exists, a principal can sue the agent for any torts committed. For example, if the agent does not hand over the property received for and on behalf of the principal, the latter can bring an action for conversion of property.[109]

(6) *Injunction*

If an agent breaches a duty (such as disclosing or improperly using confidential information,[110] then the most appropriate remedy may be an injunction to restrain the defendant.

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(7) *Interest*

An agent is obliged to pay interest in respect of money received on behalf of the principal.[111]

An agent is under a duty to pay interest where there has been some default on his or her behalf.[112] Thus an agent is obliged to pay interest on all sums in respect of fraud[113] as well as bribes[114] and secret profits[115] received.

(Concluded)

FOOTNOTES

57. *Sheridan* v *Higgins* [1971] IR 291; and *Keay* v *Fenwick* (1876) 1 C.P.D. 745. Cf. *Dyas* v *Stafford* (1881) 7 LR Ir 590.
58. *De Bussche* v *Alt* (1878) 8 Ch.D. 286, *per* Theisiger L. J. at pp.310-11.
59. Murdoch, *ibid.* pp.55-56.
60. *Betteley* v *Reed* (1843) 4 QB 511; *Sheridan* v *New Quay Co.* (1858) 4 CBNS 618.
61. *Dixon* v *Hamond* (1819) 2 B & Ald 310; *Lyell* v *Kennedy* (1889) 14 App.Cas. 437. Cf. *Williams* v *Pott* (1871) LR 12 Eq. 149.
62. *Biddle* v *Bond* (1856) 6 B & S 225.
63. *Blaustein* v *Maltz, Mitchell & Co.* [1937] 2 KB 142, *per* Scott LJ at p.156.
64. *Op.cit.*, fn.1, at p.151.
65. *Blaustein* v *Maltz, Mitchell & Co.* [1937] 2 KB 142 *per* Slesser LJ at 151-4.) Closely related to an agent's duty to keep accounts is the duty of an agent to keep the principal's property separate from his or her own. This duty depends on the agency agreement itself: cf. *Henry* v *Hammond*; [1913] 2 KB 515.
66. *Gray* v *Haig* (1855) 20 Beav 219; *Dadswell* v *Jacobs* (1887) 34 ChD 278. If the agent does not keep accounts then every presumption consistent with the facts weighs against the agent and in favour of the principal: see *Gory* v *Haig* (1855) 20 Beav. 219.
67. *Bousfield* v *Wilson* (1846) 16 LJ Ex 44; *Booth* v *Hodgson* (1795) 6 Term Rep 405.)'' (p.152 *Cf. De Mattos* v *Benjamin* (1894) 63 LJQB 248; *Harry Parker Ltd.* v *Mason* [1940] 2 KB 590; and *Murray* v *Mann* (1848) 2 Exch 528. An agent is not obliged to produce accounts to any person with whom he or she has a reasonable dispute. *Dadswell* v *Jacobs* (1887) 34 ChD 278.
68. *Hippisley* v *Knee* [1905] 1 KB 1 at 9 *per* Kennedy J.
69. p.160. *Cf. Hippisley* v *Knee, ibid.*
70. p.157.
71. *Boardman* v *Phipps* [1965] 1 All ER 849 at 856 Cf. *Reading* v *AG* [1951] AC 507; *Swain* v *Law Society* [1982] 2 All ER 827.
72. *De Bussche* v *Alt* (1878) 8 ChD 286. *Cf. Boardman* v *Phibbs* [1967] 2 AC 46 (HL) and [1965] 1 All ER 849 at 856 *per* Lord Denning.
73. (1867) 20 LT 218.
74. (1891) 7 TLR 698
75. *Boston Deep Sea Fishing and Ice Co.* c *Ansell* (1888) 39 Ch.D. 339; *Andrews* v *Ramsey* [1903] 2 KB 635.
76. It is possible to discuss this duty in the context if secret profits, see *supra* the text accompanying footnotes 68-75, but it is as well to discuss it separately for the purposes of exposition.
77. *Boston Deep Sea Fishing & Ice Co.* v *Ansell ibid.* fn.75; *Swale* v *Ipswich Tannery Ltd. ibid.* fn.75.
78. The criminal law relating to bribery need not concern us in the present context.
79. *Industries & General Mortgage Co. Lewis* [1914] 2 All E.R. 573, *per* Slade J., at 575; *Cf. Taylor* v *Walker* (1958) 1 Lloyd's Rep. 490; *Panama etc. Telegraph Co.* v *India Rubber Etc., Telegraph Works* (1875) LR 10 Ch App 515, at 526. An agent is not liable to recover an unpaid bribe from a third party: *Harrington* v *Victoria Graving Docks* (1878) 3 QBD 549; *Meadow Schama & Co.* v *C. Mitchell & Co. Ltd.* (1973) 228 E.G. 1151.
80. *Boston Deep Sea Fishing & Ice Co.* v *Ansell, ibid.*, fn.75; *Swale* v *Ipswich Tannery Ltd., ibid.* fn.75.
81. *Ibid.* fn.75.
82. *Rhodes* v *Macalister* (1923) 29 Com. Cas. 19; *Shipway* v *Broadwood* (1899) 1 QB 369.
83. *Andrews* v *Ramsay* [1903] 2 KB 635; *Fulwood* v *Hurley* [1928] 1 KB 325.
84. Cf. text accompanying fn.2, *supra.*
85. *Ibid.*, fn.83.
86. *Cf. Boston Deep Sea Fishing & Ice Co.* v *Ansell, ibid.*, fn.75; *E. Green & Son Ltd.* v *Tughan & Co.* (1913) 30 TLR 64; *Fulwood* v *Hurley, ibid.*, fn.83.
87. *Mahesan* v *Malaysian Goivernment Officers' Co-operative Housing Society Ltd.* [1979] AC 374; *Hovenden & Sons* v *Millhoff* (1900) 83 Lt 41.
88. *Re Morvah Consols Tin Mining Co., McKay's Case* (1875) 2 Ch.D. 1.
89. *G. W. Insurance Co.* v *Cunliffe* (1874) 9 Ch.App. 525; *Re Haslam* (1902) 1 Ch. 765; *Baring* v *Stanton* (1876) 3 Ch.D. 502; *Norreys* v *Hodgson* (1897) 13 TLR 421; *Queen of Spain* v *Parr* (1869) 39 LJ Ch 73; *Green* v *Tughan* (1913) 30 TLR 64. *Cf. Fulwood* v *Hurley* (1928) 1 KB 498.
90. *Shipway* v *Broadwood* [1899] 1 QB 369.
91. This can be of critical importance but it is a point which is not beyond dispute.
92. Cf. Jones (1970) 86 LQR 463; Chitty on Contracts, *(op.cit., fn.1) vol. II, paras. 2301-4.*
93. Where the agent merely introduces the business there may also be no liability in contract: cf. *Cherry Ltd.* v *Allied Insurance Brokers Ltd.* [1978] 1 Lloyd's Rep. 274.
94. Cf. *Esso Petroleum Co. Ltd.* v *Mardon* [1976] QB 801.
95. *Smityv Price* (1862) 2 F & F 748; *Maydew* v *Forrester* (1814) 5 Taunt 615; *Neilson* v *James* (1882) 9 QBD 546; Cf. *Lewcock* v *Bromley* (1920) 127 LT 116; *Keppel* v *Wheeler* [1927] 1 KB 577. *Eastern Shipping Co. Ltd.* v *Quah Beng Kee* [1924] AC 177.
96. Cf. *Mainwaring* v *Brandon* (1818) 2 Moore CP 125; *Re United Service Co., Johnston's Claim* (1871) 6 Ch App 212.
97. *Hadley* v *Baxendale* (1854) 9 Exch. 341; *Boyd* v *Fitt* (1864) 11 LT 280; *Czarnikow* v *Koufos, The Heron II* [1969] 1 AC 350; *Jarvix* v *Swan's Tours Ltd.* [1973] 1 QB 223; *Jackson* v *Horizon Holidays Ltd.* [1975] 1 WLR 1468; *Woodar Investments Development Ltd.* v *Wimpey Construction (UK) Ltd.* [1980] 1 WLR 277; Cf. *Cia. Financiera ''Soleada''* v *Hamoor Tanker Corpn. Inc. (The Borag)* [1981] 1 WLR 274 for the position in tort.
98. ''See *Osman* v *J. Ralph Moss Ltd.* [1970] 1 Lloyd's Rep. 313, CA, where insurance brokers had grossly misled the principal as to the financial standing of an insurance company, with the result that the principal became uninsured and was convicted for driving while uninsured. Cf. *R. Leslie Ltd.* v *Reliable Advertising and Addressing Agency Ltd.* [1915] 1 KB 652; see also *Askey* v *Golden Wine Co. Ltd.* [1948] 2 All ER 35, . . .''
99. *Halsbury's Laws of England,* 4th ed., para. 784.
100. E.g. *Boston Deep Sea Fishing and Ice Co.* v *Ansell* (1888) 39 Ch.D. 339 at 357, *per* Cotton LJ and at p.364 *per* Bowen LJ. Cf *Andrews* v *Ramsay* [1903] 2 KB 635.
101. Cf. *Harsant* v *Blaine, MacDonald & Co.* (1887) 56 LJQB 511.
102. *Great Western Insurance Co. of New York* v *Cunliffe* (1874) 9 Ch App 525 at 541. Cf. *Seeger* v *Copydex Ltd. (No.2)* [1969] 1 WLR 809; *English* v *Dedham Vale Properties Ltd.* (1971 1 WLR 93.
103. *Boston Deep Sea Fishing and Ice Co.* v *Ansell* (1888) 39 Ch.D. 339 at p. 364 *per* Bowen LJ; *James & Co. Scheepvaart en Handelmij BV* v *Chinecrest Ltd.* [1979] 1 Lloyd's Rep. 126.
104. *Re Parker* (1882) 21 ChD 403, CA. Generally, the principal is not entitled to recover from the agent any money already paid over for an illegal purpose: cf. *Re Parker, ibid.*
105. *Dale* v *Sollet* (1767) 4 Burr. 2133.
106. *Wilkinson* v *North Suburban Properties Ltd.* (1959) 174 EG 213, CA. Cf. *Struthers* v *Smith* 1913 2 SLT 155.
107. Cf. *Parkinson* v *Hanbury* (1867) LR 2 HL 1.
108. E.G. *Kenney* v *Hall, Pain & Foster* (1976) 239 EG 355; *LB Martin Construction Ltd.* v *Gagliardi* (1977) ILR 1-1061.
109. Cf. *Bronester Ltd.* v *Priddle* [1961] 1 WLR 1294; *Rivoli Hats Ltd.* v *Gooch* [1953] 1 WLR 1190; *Clayton Newbury Ltd.* v *Findlay* [1953] 1 WLR 1194n.
110. Normally an agent who acquires informaion in the course of an agency must use that information solely for the purposes of that agency: see *Peter Pan Manufacturing Corp.* v *Corsets Silhouette Ltd.* [1963] 3 All ER 402.
111. *Webster* v *British Empire Mutual Life Assurance Co.* (1880) 15 ChD 169, CA. Cf. *Rogers* v *Boehm* (1799) 2 Esp. 702; *Burdick* v *Garrick* (1870) 5 Ch. App. 233; *Lord Chjedworth* v *Edwards* (1802) 8 Ves. 46.
113. *Earl of Hardwicke* v *Vernon* (1808) 14 Ves. 504.
114. *Boston Deep Sea Fishing and Ice Co.* v *Ansell, ibid.*, at footnote 75.
115. *Nantyglo and Blaina Ironworks Co.* v *Grave* (1878) 12 ChD 738.

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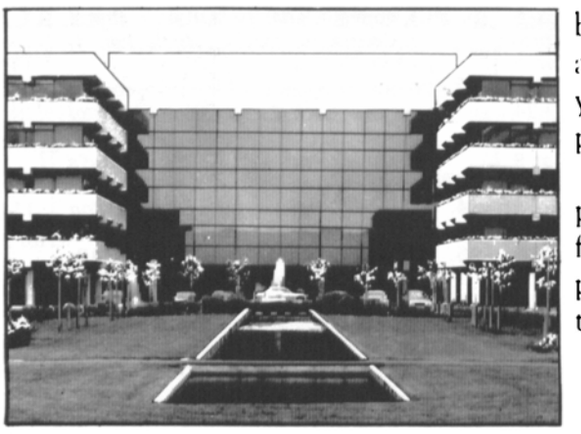

Allied Irish Bank

New Law Reform Commission Appointed

The Government has appointed Mr. Justice Ronan Keane to be the President of the Law Reform Commission. His appointment will be virtually a full time one, but he may sit as a High Court Judge if required by the President of the High Court. The other members of the Committee are Simon O'Leary, Barrister-at-Law, who will be a full time member, John F. Buckley, Solicitor, William Duncan, Lecturer in Law Trinity College, Dublin, and Maureen Gaffney, Clinical Psychologist, who will be part-time members.

The Commission has been asked to prepare in consultation with the Attorney-General a new programme for law reform for submission by the Taoiseach to the Government. The Government has indicated it's view that a short programme containing a small number of important issues where the law is out of date is desired.

The Government has indicated that among the areas where it believes law reform to be desirable and which it believes would benefit from study by the Commission are:

1. The reform of Conveyancing Law and Practice in areas where this could lead to savings for house purchasers.
2. Sexual offences generally, including the law relating to rape and child sexual abuse.
3. The law relating to sheriffs, the collection of taxes and debt collection.
4. A number of issues relating to compensation in personal injury cases.
5. Various criminal law matters, including sentencing policy, indexation of fines, confiscating the proceeds of crime and updating a number of offences which are still governed by nineteenth-century legislation.

The new Commission commenced it's work on the 2nd January 1987 and it is understood that it hopes to present it's draft programme shortly.

High Court Judge Appointed

The Government has appointed Mr. Richard Johnson, SC, to be a judge of the High Court to succeed Mr. Justice Ronan Keane, who is now Chairman of the Law Reform Commission.

Born in Tralee, Co. Kerry, in 1937 Mr. Johnson is son of the late District Justice D. F. Johnson. He was educated at CBS Tralee, Glenstal Abbey, and UCD. Called to the Bar in 1960, he has been a member of the Munster Circuit and has practised on the South West Circuit.

In Brief

Bar Council 1987 Officers

The Bar Council of Ireland has elected Mr. Seamus McKenna, SC, chairman for 1987. Mr. Ian Brennan was elected honorary secretary and Mr. Colm Allen honorary treasurer.

Other members of the Bar Council are: Senior — John Rogers, Attorney General; David Byrne, Paul Carney, Frank Clarke, Nial Fennelly, Patrick MacEntee, Seamus McKenna, Diarmuid O'Donovan, Peter Shanley, Ralph Sutton. Junior — Colm Allen, Bernadette Cronin, Elizabeth Dunne, Michael Durack, Kevin Feeney, John Gallagher, Michael O'Shea, Mary Ellen Ring, John Walsh.

Director Appointed to the Bar Council

The Bar Council wishes to announce the appointment of Mr. John Dowling to the new post of Director to the Council. He takes up duty on Monday 2nd February.

"The rapid increase in membership of the Law Library, which has grown from 300 barristers in 1976 to the present level of 640 is a reflection of the increased demand from the public for legal services from the Bar" said Seamus McKenna SC, Chairman of the Bar Council. "The Law Library" he continued, "is a collegiate centre for barristers unique to Ireland and the creation of the new Director post is one of the developments the Bar Council is undertaking to ensure that the representation of the interests of the profession and the clients of the profession is maintained at the highest levels."

John Dowling, aged 42, moves to the Bar Council from the Association of Higher Civil Servants where he was General Secretary since 1981. He is married to RTE Executive Joan Collins, and they have two daughters.

Mr. Dowling also worked as a Training Specialist with the Institute of Public Administration and as a Training Advisor with AnCO. He is a science graduate of Trinity College Dublin and began his career as a teacher before moving to the youth organisation Foroige. In recent years Mr. Dowling has undertaken post graduate studies in Industrial Relations.

Temporary Judges Nominated

The Government has nominated Mr. Michael Anthony Moriarty, SC, and Mr. John Bernard Cassidy, SC, for appointment by the President as temporary judges of the Circuit Court. A Government statement said that the appointments arose from the increase in work on some circuits. Mr. Moriarty (40) was educated at Blackrock College; University College, Dublin; and Kings Inns, Dublin. He was called to the Bar in October 1968, and to the Inner Bar in 1982.

Mr. Cassidy (55) was educated at Santa Sabena, Sutton; O'Connell's Schools, Dublin; UCD and Kings Inns. He was called to the Bar in 1950 and to the Inner Bar in 1973.

Shetland Helicopter Disaster

Ten firms of solicitors in Aberdeen have joined forces to seek compensation for families bereaved in the Shetland helicopter disaster.

They represent 14 families who lost relatives when 45 people were killed in the recent crash when the helicopter was bringing staff ashore from the Brent oilfield.

A statement from the solicitors said they would pool their experience and resources to investigate the circumstances of the tragedy and arrange representation at the accident inquiry.

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CORRESPONDENCE

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

5th February, 1987.

Dear Editor,

Re: Admission of Irish lawyers qualified five years to New York State Bar without examination.

I refer to my previous letter published in the July/August Gazette. The New York State Court of Appeals today announced the amendment of Rule 520.9 of its Rules for the Admission of Attorneys and Counsellors at Law. Effective February 15, 1987 the provision allowing foreign educated attorneys qualified five years to apply for admission without examination to the New York State Bar is eliminated. Applications for admission without examination received prior to that date will be considered. The Court said the change is "based upon its internal study and a review of submissions which were solicited by public notice on April 21, 1986. Upon compliance with applicable Rules, foreign-educated applicants may continue to seek admission in New York upon examination".

Yours sincerely,

Catherine Byrne,
Solicitor.

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Around 500 lawyers and their guests are expected to attend the 4th Biennial Conference of the IBA's Section on General Practice (SGP) which is being held in Montreaux, Switzerland from 28 June - 1 July 1987. The IBA is the world's foremost international association of lawyers with over 10,000 members in 115 countries and the SGP is one of its three Sections.

The format of the Conference will follow that so successfully employed at the Section's last meeting in Madrid: a Main Theme session will be held on the first day with the following two days being devoted to meetings of the 21 Divisions of the Section. The Main Theme, SERVING THE CONSUMER, is one which is both relevant and challenging to lawyers in any field.

Meetings of the Section's specialized Divisions will consider such topics as Medicine on Trial; Family Law, mediation/conciliation; International Tax Planning; Choosing and Motivating Inside and Outside Counsel; Litigation and Arbitration; Terrorism and Business Migration in Europe; The Cutting Edge of International Criminal Law; An analysis of the Law relating to Cultural Property and its infringement of individual rights and liberties; Regulation of the offering of foreign vacation homes; The work of the International Commission of Jurists (ICJ) and its affiliate, the Centre for the Independence of Judges and Lawyers (Geneva) as well as many others.

This Conference, in the beautiful lakeside setting of the Montreaux Conference Centre on the banks of Lake Geneva, promises to be the Section's most successful yet. As well as the varied working sessions a programme of tours to local places of interest such as Gruyeres and Berne has been arranged for delegates and their guests to enable them to sample the beautiful scenery of Switzerland. The Gala Dinner will be held at the spectacular Medieval Castle, Chateau Chillon on the banks of Lake Geneva.

Programmes and Registration Forms are available from: **Margaret Byrne, Librarian, Law Society, Blackhall Place, Dublin 7.**

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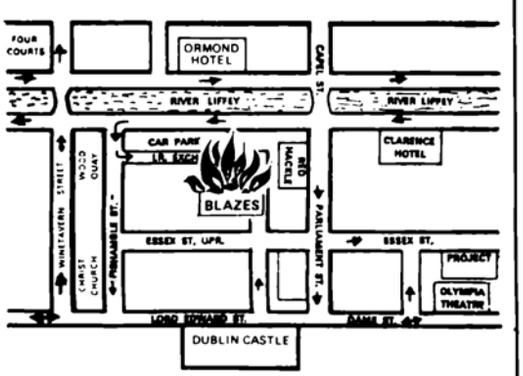

Professional Information

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 notificiation 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 February, 1987.

J. B. Fitzgerald (Registrar of Titles)

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

SCHEDULE OF REGISTERED OWNERS

Mary Gertrude Healy of Main Street, Lismore, Co. Waterford; Folio No.: 4005; Lands: Kilbree East; Area: 12a.2r.36p.; County: **WATERFORD.**

John Kennedy of Ballinclare, Glenmore, Co. Kilkenny; Folio No.: 1400; Lands: Ballinlammy; Area: 17a.0r.2p.; County: **KILKENNY.**

Bernard Gray of Muckanagh, Annaghmore, Co. Leitrim; Folio No.: (1) 5119, (2) 5122; Lands: (1) Muckanagh, (2) Muckanagh; Area: (1) 7a.2r.14p., (2) 25a.0r.6p.; County: **LEITRIM.**

Patrick Kelly of Ballymagree, Kilruane, Nenagh, Co. Tipperary; Folio No.: 21901; Lands: (1) Ballymagree, (2) Graigue, (3) Rathurles; Area: (1) 41a.3r.36p., (2) 5a.0r.3p., (3) 49a.2r.31p.; County: **TIPPERARY.**

Padraig O'Caoim of Croke House, Cloncliffe

Francis Noel O'Keeffe of Main Street, Banagher, Co. Offaly; Folio No.: 3546; Lands: Kilmeelchon; Area: 0a.2r.0p.; County: **OFFALY.**

Patrick O'Donnell of Templetney, Kilsheelan, Clonmel, Co. Tipperary; Folio No.: 6884; Area: 98a.0r.9p.; County: **TIPPERARY.**

James Grant of Garvary, Burnfoot, Co. Donegal; Folio No.: 4824 (closed to 18277F); Lands: Garvary (part) (E D Birdstown); Area: 32.537 acres; County: **DONEGAL.**

John Moffitt of Lowpark, Charlestown, Co. Mayo; Folio No.: 5609; Lands: Lowpark; Area: 25a.2r.23p.; County: **MAYO.**

Peter Cihlar of Derrylahan, Kilcar, Co. Donegal; Folio No.: 3507F; Lands: Derrylahan; Area: 0a.1r.13p.; County: **DONEGAL.**

Michael Hurley & Kathleen Hurley both of Coomnageehy, Skibbereen, Co. Cork; Folio No.: 12710F; Lands: Coomnageehy; Area: .500 acres; County: **CORK.**

Thomas Joseph McNiff of Kiltyhugh, Ballinamore, Co. Leitrim; Folio No.: 13892; Lands: (1) Kiltyhugh, (2) Mulnavannoge, (3) Stroke, (4) Kiltyhugh, (5) Mulnavannoge, (6) Stroke; Area: (1) 12a.2r.15p., (2) 0a.1r.29p., (3) 0a.1r.0p., (4) 4a.0r.32p., (5) 0a.3r.27p., (6) 0a.1r.15p.; County: **LEITRIM.**

William Healy of Ardeen, Buttevant, Co. Cork; Folio No.: 14446; Lands: Kilcolman West; Area: 59a.7r.0p.; County: **CORK.**

Christopher and Jacinta Kavanagh both of 139 Edenmore Avenue, Raheny, Dublin; Folio No.: 55910L; Lands: The property known as 139 Edenmore Avenue, situate in the Parish of Raheny and District of Raheny; Area: .....; County: **DUBLIN.**

Robert E. Wiley of Lowertown, Carnamoyle, Muff, Co. Donegal; Folio No.: 39081; Lands: Carnamoyle; Area: 49a.0r.16p.; County: **DONEGAL.**

Vincent Johnston & Mary B. Johnston of Ballycasheen, Killarney, Co. Kerry; Folio No.: 6424F; Lands: Ballycasheen; Area: 2 acres; County: **KERRY.**

John Feely of Branchfield; Carrownaden, Coolaney, County Sligo; Folio No.: 13603; Lands: Cloondrihara; Carrownacreevy; Carrownacreevy; Area: 10a.0r.32p.; 15a.2r.15p.; 10a.3r.2p.; County: **SLIGO.**

John Feeney (Junior) of Lecarrow, Charlestown, Co. Mayo; Folio No.: 2331; Lands: Lecarrow; Area: 16a.2r.34p.; County: **MAYO.**

Michael & Philomena Reynolds of 52 Lynn Heights, Mullingar, Co. Westmeath; Folio No.: 3151F; Lands: Ballinderry; County: **WESTMEATH.**

Lost Wills

KENNY, John Joseph, deceased, late of 16 Shanliss Way, Santry, Dublin. Will anybody having any knowledge of any Will made by the above-named who died on the 3rd January 1987 please contact Woodcock & Sons of 28 Molesworth Street, Dublin (Telephone number 761948).

P.W.R.

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William F. O'Grady, Solicitor, has commenced practice as and from the 2nd February 1987 under the style of O'Grady & Company, Solicitor.

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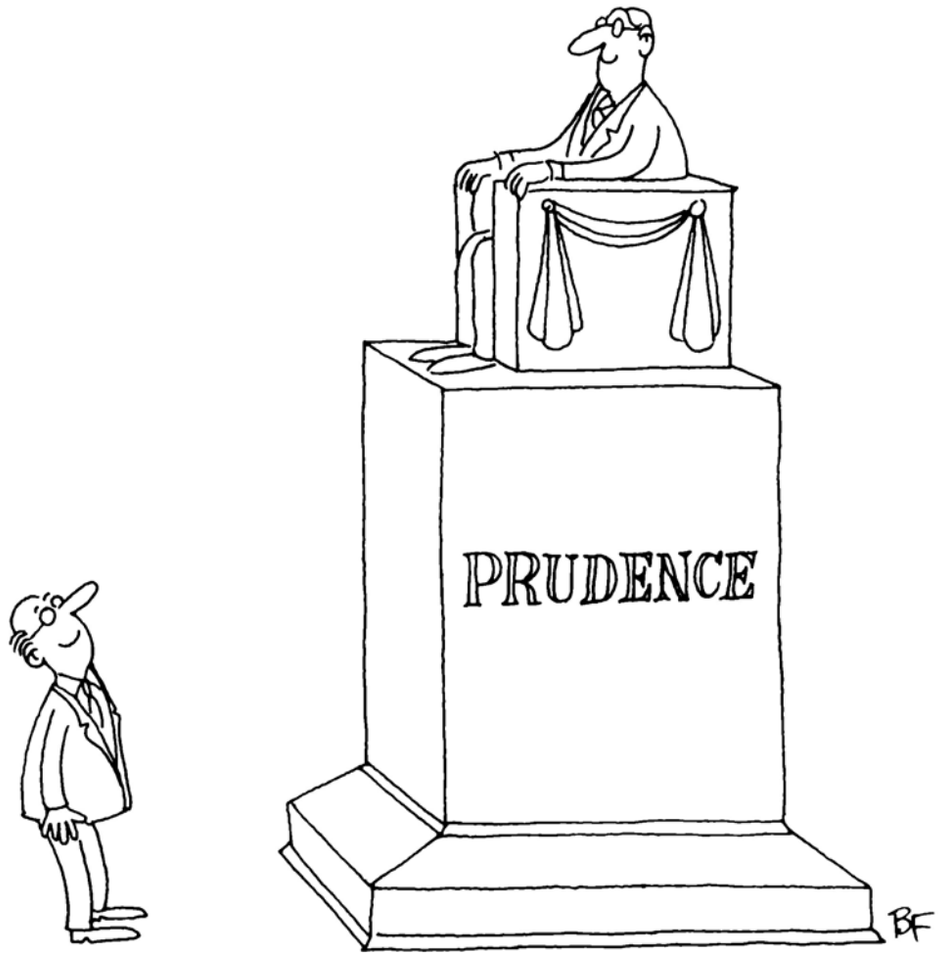

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Vol. 81 No.2 March 1987

Bertie Ahern T.D., Lord Mayor of Dublin (right) with Mr. David R. Pigot, President of the Incorporated Law Society.

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Alibi Notices ■
Stamp Duties and Mergers ■
The Judge in Ireland ■
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Viewpoints

Solicitor TD's

A significant feature of the recent Dail elections was the increase in the number of Solicitors elected T.D.'s. The trend in recent years is for the number of lawyers, who previously had been the best represented professional group in the Dail, to decline. In the 1987 election one Solicitor, David Molony, did not seek re-election and one sitting Deputy, Liam Cosgrave Junior, was defeated but, against these losses in numbers, seats were won for the first time by Dermot Ahern, Anne Colley, Charles Flanagan, Pat McCartan, John O'Donoghue and Brian Swift. They joined their re-elected professional colleagues, Patrick Cooney, Brian Cowen, Thomas Enright, Thomas Fitzpatrick, James O'Keefe, Desmond O'Malley, Alan Shatter and Mervyn Taylor.

It is to be welcomed that solicitors have been elected to represent the entire spectrum of political parties in Dail Eireann.

It is good to see that the younger members of the profession are taking an active interest in politics at this level. Solicitors have a good deal to contribute, not only as legislators, but also as people whose professional calling gives them a particular insight into the difficulties which face a citizen in contemporary Ireland.

Congratulations

Congratulations are due to John L. Murray S.C. on his appointment as Attorney General. In congratulating him, some words of appreciation of his predecessor would not be amiss.

At the time John Rogers took office he was the subject of a good deal of criticism, much of it relating to his youthfulness and alleged inexperience. His performance in office has brought widespread praise and nowhere more than in relation to his work in tackling the problem of compensation for the Stardust victims. By arranging for the establishment of the Tribunal, which has made awards to hundreds of victims, he brought to a sane and caring conclusion a situation which was rapidly becoming a public scandal. It had been abundantly clear that the normal processes of litigation through the Courts were not going to provide a solution to the victims' claims for damages. It was a situation in which the State had to accept responsibility to fund the compensation and the manner in which the Tribunal was established and operated has received widespread approval.

Whether the former Attorney-General's work in endeavouring to re-vitalise the operations of the Law Reform Commission will be successful remains to be seen. To date external factors have prevented a number of its recommendations being implemented. John Rogers took such steps as seemed to him to be necessary in establishing the new Commission. It remains for the Commission and it's legislative masters to prove that his faith was not misplaced.

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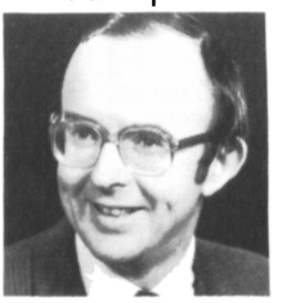

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ALIBI NOTICES

The concept of the Alibi Notice is a new one in Irish jurisprudence, though as with many other such novelties it has been borrowed from legislation in the U.K. It was introduced into our law by the Criminal Justice Act 1984. The aim of this Act was to revolutionize the Criminal Law in Ireland.

by
Michael J. Staines
(BCL, LLM), Solicitor

By virtue of Statutory Instrument No. 17/85 part of the Act came into operation on the 1st March 1985. We are now told that the remainder of the Act will come into force at the beginning of 1987. It is interesting therefore to examine one section of the Act which has been in operation since March 1985 and perhaps from that examination obtain pointers as to how the balance of the Act may affect the operation of the Criminal Law in the future.

The provisions in relation to Alibi Notices are contained in section 20 of the 1984 Act. The effect of this section is that in trials on indictment an accused person cannot rely on an alibi unless he has given the prosecution "Notice of Particulars" of that alibi within the prescribed time.

The first point to note is that the new procedure only applies to trials on indictment and therefore does not apply to trials in the District Court. Secondly whereas the word alibi is not defined in the Act, section 20 subsection 8 does define what is meant by "evidence in support of an alibi". It means evidence tending to show that by reason of the presence of the accused at a particular area at a particular time he was not, or was unlikely to have been at the place where the offence was committed at the time of its commission. There is to date no Irish case law interpreting this definition. The United Kingdom cases, however, have strictly construed the similar definition in their equivalent section.[1] In the United Kingdom Notice need only be given of alibis in relation to the place and time of the *commission* of the offence. It is not necessary therefore to give notice relating to dates and places unconcerned with the actual commission of the crime even though it may be a strong part of the prosecution case that the accused was at a certain place at a certain time. Examples from U.K. case law will make this point clearer. In *R. -v- Lewis*[2] the accused was charged with receiving certain postal orders on a Wednesday. It was part of the prosecution case that the accused was in the vicinity of a Post Office when similar stolen orders were cashed by others on the following Friday. It was held that the accused could adduce evidence in support of an alibi for the Friday despite the fact that notice had not ben given to the prosecution. Similarly in *R. -v- Hassan*[3] the accused had been charged that " . . . on dates between July and August 1968 in Cardiff he lived off the earnings of a prostitute". Part of the Crown case was that the police had seen him in the prostitute's house on a particular day. At his trial the accused had attempted to adduce alibi evidence in relation to that specific day. The trial judge refused to allow him to do so on the grounds that the requisite notice had not been served. It was held by the Courts of Appeal however, that as the offence charged was a continuing one, related to no particular location other than Cardiff, his proffered evidence was not caught by the section.

The prescribed time limits for service of the Notice of Alibi is set

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out in subsection 8. If the time limit is not adhered to the alibi may only be adduced by leave of the court. In Ireland the prescribed time period is in effect 14 days from the date the accused is sent forward for trial. The relevant period in the U.K. is seven days after the committal proceedings are completed. Again there is no judicial authority in Ireland as to how the trial Judge is to use his discretion. It would appear however that up to now the discretion has been exercised in favour of the accused persons in our courts. This practice accords with the position in the U.K. as set out in several different cases. In "Sullivan"[4] for instance, it was held that the mere fact that the Notice was served out of time does not of itself, as a general rule, justify the court in exercising its discretion to exclude. The discretion must be exercised judicially. In that case the Notice had been served out of time, but the trial was adjourned to allow the prosecutor to investigate the alibi. At the new hearing the defence was not allowed adduce the alibi evidence by the trial judge. It was held on appeal that the evidence ought to have been allowed in, and indeed Salmon L. J. referred to the prosecution's argument that the evidence ought to be excluded, solely on the grounds that the Notice was out of time as being "indefensible"[5] and "a bizarre contention"[6] in the circumstances of the case. In *R. -v- Cooper*[7] the appellants legal advisors failed to serve the Notice. The Appeal Court held that an accused person ought not to be put at a disadvantage by the errors of his legal advisors. The Trial Judge, it held, ought to have given leave for the evidence to be called subject to the service of a Notice outside time and to an adjournment to allow the prosecution to investigate the alibi.

Application of English Case Law in Irish Courts

The reasoning in these cases ought, I submit, to be followed here. The requirement that Notice of an Alibi must be given was introduced into our Law to allow the prosecution time to investigate the alibi – it was not introduced to punish defendants for their delay and laxity in preparing their defence. Nevertheless the defence lawyer ought not to rely on the discretion of a trial Judge to allow in a Notice served out of time. At best he will find himself the victim of barbed judicial comment, while at worst he may find that he himself may have to pay the expenses associated with an adjournment and retrial. In addition an accused person in those circumstances would appear to have no difficulty in sustaining a negligence action against his defence solicitor. Until now defence lawyers have had several weeks, if not months, to prepare the defence case and interview the accused person and any defence witnesses. That is no longer the case. The defence solicitor should not serve an Alibi Notice without first interviewing the alibi witnesses and taking a statement from them. As will be shown later the prosecution may be able to use the Alibi Notice as part of their case. It could be suicide from a defence point of view to nominate certain witnesses on the blind and discover later that not only could they not corroborate the alibi but in fact destroy it. Interviewing witnesses and taking statements can take a lot of time, particularly when one is busy with other cases and the 14 days can easily slip by without one noticing. Furthermore, as in all probability a barrister will be briefed for the Jury trial, it is only good practice that he or she should read the statements of the witnesses and settle the Notice before it is served. Here again the defence solicitor may be leaving himself open to an action for negligence if he himself decides to go ahead and serve an Alibi Notice without conferring with Counsel if it later transpires that Counsel would have advised against the serving of such Notice or would have in fact drafted it in a different way. I suggest therefore that if it appears at all from initial instructions that an alibi may be proffered, it is good practice to seek a remand for at least one month when the Book of Evidence is served, provided of course the client so consents. That month should be used to interview potential witnesses and to consult properly with Counsel. The Notice can then be easily drafted and served well within the period.

"Particulars"

Once it is decided to serve an Alibi Notice it is important to consider what details it ought to contain. The Act merely states that "Particulars" of the alibi should be given. It goes on to provide that the Notice must contain the name and address, if known, of any alibi witnesses. It does not however define what is meant by particulars. Furthermore there does not seem to be any case law even in the U.K. The Chief State Solicitor's Office in Ireland considers that the defence must in fact submit a Statement of Evidence of each witness. This is, I submit, much too wide a requirement. We are, thankfully, not yet at the stage where the defence must serve its own "Book of Evidence" on the prosecution. It is sufficient in my submission that the details of the alibi be made known, i.e. a note as to where the accused was at the particular time and place and a note as to who saw him there. Finally there is an onus on the defence to give the prosecution sufficient information to allow them to trace the witnesses.

Once the prosecution have received the Notice they then have the opportunity to investigate it. I am certain that this is going to give rise to a lot of difficulties and disagreements between prosecution and defence in the future. It is noteworthy first of all that the Act does not give any power to the prosecution to investigate the alibi.

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However the prosecution will argue that there is little point in their having Notice of an alibi unless they can investigate it. This is the accepted position in the U.K. Furthermore the prosecution there are entitled to interview whoever they like in relation to the alibi and this includes the defence witnesses. This is a revolutionary concept and is at variance with hundreds of years of practice. It is also very much open to abuse unless strict controls are exercised by both the prosecution and defence. Many alibi witnesses will never have come in contact with Garda officers or ever have been to a Garda Station before. It is possible that such witnesses could be frightened or tricked into making damaging statements by unscrupulous police officers. Even if the Garda Officer interviewing the witnesses behaves with all propriety the very fact of being in a Police Station may sufficiently upset a witness into making inconsistent statements. It has been alleged for instance in England that an alibi witness for one of the defendants in the Guilford Four case was assaulted and threatened in the Police Station to such a degree that he changed his statement in relation to the times of meeting her. Already in this country allegations have been made to me by potential alibi witnesses in one case that they have been threatened and bullied into withdrawing their evidence by Gardai. These allegations are at present under investigation by the Commissioner and the D.P.P.

Suggested Reforms in Procedure

To avoid some of these problems I would make the following suggestions. Firstly, alibi witnesses should only be interviewed by Garda Officers who are not directly concerned with the investigation of the crime. Secondly the interviews should occur at a location acceptable to witnesses and not necessarily a Garda Station. Thirdly the accused's solicitor should insist on his right to be present at all such interviews and should indicate when serving his Notice that he will only consent to the witnesses being interviewed if all these conditions are met. On a more general note it has been held in *R. -v- Rossborough*[8] that the prosecution can adduce evidence that the defence alibi witnesses had not attended for interview by the police in relation to the alibi.

The reason that I am advocating extreme caution in this area is not only the desire to avoid the potential intimidation of the defence witnesses but also the recognition that the Alibi Notice is a document that can harm if not destroy the defendant's case. It has been held in several cases in the U.K. that the prosecution may put the Alibi Notice into evidence as part of their case. In *R. -v- Rossborough*[8] it was held that the Notice was in fact equivalent to a statement by the accused. In the earlier case of *R. -v- Bridgen*[9] it was held that not only can the prosecution put the Notice into evidence, but that a trial Judge may comment on the fact that the accused did not call evidence in support of the alibi. Before the introduction of the requirement of Notice, if a defence witness for whatever reason decided not to give evidence neither the Court nor the prosecution need have been aware of the defence problem. Now if the above two cases are followed here the failure will be highlighted and the court will be asked to draw perjorative inferences which can only be damaging to the defence. The Act itself would appear to envisage, in certain circumstances, the prosecution leading evidence to disprove the alibi before in fact evidence in support of the alibi was given. (See Section 20 – Subsection 4.) The *Rossborough* case however is an extreme interpretation of this subsection. The judgment there differs considerably from the ruling of the Court of Appeal in the earlier case of *R. -v- Watts*.[10] There the court disapproved of the practice of the prosecution in invariably putting in the Notice as part of their case and advised that the prosecution should give the most careful consideration before so doing and should be prepared later to justify their decision. I would hope that our courts would choose to follow the spirit of the Judgement in *"Watts"*. It is again important to note that section 20 was not introduced in order to strengthen the prosecution's case but to ensure that they would not be surprised by the introduction of a last minute alibi which could have been disproved by them if they had sufficient time to investigate it. If the reasoning in *"Rossborough"* is accepted, one consequence severely detrimental to the accused and not envisaged by the draftors of the section will follow. An accused person has always had the right *not* to adduce any evidence if he is of the opinion that the prosecution case is so weak that the jury will acquit. If however an accused has served an Alibi Notice he may feel bound to call evidence and call witnesses in order not to leave the jury with the erroneous impression that he is unable to prove his alibi. Suppose for instance that at the Return for Trial the Book of Evidence discloses a very weak *prima facie* case against the accused. The accused has given his lawyers details of an alibi. However both he and his alibi witnesses are nervous and frightened of giving evidence in court. Furthermore, two of his witnesses, by coincidence, have a large number of previous convictions which of course can be put to them in cross-examination by the prosecution if they give

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evidence. The defence lawyers are now in a quandary. If they do not give Notice of Alibi, witnesses cannot be called without leave of the court. If they do serve Notice, they may feel that they have to call the witnesses, even if the case is almost non existent against the accused. The credibility of some of these witnesses may be undermined by the prosecution owing to their inexperience and nervousness, while cross-examination of those with convictions may clothe the accused, by association, with an aura of criminality. The decision as to whether or not to go into Evidence is a difficult enough one to make in the course of a trial. It is an impossible decision to make only on the basis of the Book of Evidence.

Implications of Present Practice

Very few cases run exactly as one would expect from the Book – additional evidence is often served long after the Return for Trial. Sometimes witnesses will not "swear up" or even turn up for the trial. The accused person is now in effect being asked to decide how he is going to run his case without even *hearing* the evidence against him. The problem is further exacerbated when one realises that the accused *himself* cannot give Alibi Evidence unless Notice is given. This was held in *R. -v- Jackson and Robertson,*[11] and has been followed here by at least one Circuit Judge, Judge Lynch. An alibi, after all, is a contention that at the relevant time the accused person was in a different place and not that he was with other people. Therefore if an accused wishes to deny the charges by saying that he was elsewhere at the time, he must give Notice.

Again, if Notice is given and if the accused is not called, the jury may draw inferences other than the only one they are entitled to make i.e., that the accused feels that there is not sufficient evidence against him at the end of the State's case to secure conviction. If Notice of the Alibi is not served on the basis that the defence lawyers believe that the case against the accused is so weak, difficulties will arise if the prosecution serves additional evidence outside the prescribed times. In such a case one would expect a trial Judge to exercise his discretion to allow Alibi evidence, but he might refuse to do so on the grounds that the accused at the relevant time deliberately chose not to avail of section 20. In any case if the defence lawyers make the wrong decision and the accused is convicted they might easily find themselves at the wrong end of a negligence action. It is to be hoped therefore that the decision in *"Watts"* will be followed, and that only in exceptional cases will the prosecution be allowed to make the Notice part of its own case.

Neither the Irish nor the U.K. Act require that the defence serve the Notice on the Court as opposed to the prosecution. There has been a practice direction in the U.K. since 1969 however, that Registrars of the Courts should be served with a copy.[12]

Conclusion

Finally, it has been held in *"Lewis"*[13] that it is not open to a trial Judge in his summing up to comment unfavourably on the fact that the defendant at the time of the arrest did not tell the arresting officers of his alibi. The Act itself had given the defendant a specific length of time to give Notice of the Alibi. This safeguard of an accused person's rights will of course be severely curtailed when the remainder of the Criminal Justice Act 1984 and in particular section 19 comes into operation in the near future.

The Criminal Justice Act 1984 is a revolutionary piece of legislation. What appears to be the more controversial sections have not yet come into operation. Section 20 of the Act was treated by observers at the time of its enactment as a relatively innocuous piece of legislation. It is my submission that unless the section is strictly construed in favour of the accused person, it will have far reaching consequences which have been outlined earlier. It is a little disturbing that the "innocuous" section will have such an effect on our criminal jurisprudence. One can only await the introduction of the more controversial sections with apprehension. □

FOOTNOTES

(1) Section 11 Criminal Justice Act 1967. It is almost word for word similar to our Section 20.
(2) *R. -v- Lewis.* Court of Appeal, Criminal Division, 53 Cr. App. Rep. 76. 4/11/68.
(3) *R. -v- Hassan.* Court of Appeal. Criminal Division, 54 Cr. App. Rep. 56. 30/10/69.
(4) *R. -v- Sullivan.* Court of Appeal Criminal Division,. 54 Cr. App. Rep. 389. 1/6/1970.
(5) at page 395.
(6) at page 397.
(7) *R. -v- Cooper.* Court of Appeal. Criminal Division, 69 Cr. App. Rep. 229. 21/5/1979.
(8) *R. -v- Rossborough.* Court of Appeal. Criminal Division, 81 Cr. App. Rep. 139. 19/3/1985.
(9) *R. -v- Brigen.* (1973). Crim. L.R. 579.
(10) *R. -v- Watts.* Court of Appeal. Criminal Division, 71 Cr. App. Rep. 152. 21/10/1982.
(11) *R. -v- Jackson and Robertson.* (1973). Crim. L.R. 356.
(12) Practice Note – Court of Appeal. Criminal Division, [1969] 1. ALL ER 1042. 20/3/1969.

See also an article by Michael McDowell B.L. in the 4th issue of the Criminal Law Journal, 1986.

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Meeting the People

Vincent Harrington, Solicitor, Roscommon, David R. Pigot, President of The Law Society and Chris Mahon, Director of Professional Services, Law Society on the Law Society's stand at the recent Brighter Homes Exhibition at the RDS in Dublin.

The number of visitors to the stand was substantially up on last year and the primary interest was reportedly in Wills, with a particularly strong demand for the Society's leaflet on the subject. Several helpful suggestions were made by members of the public who considered that such subjects as Investments, Labour Law and Citizens' Rights should be covered by the Society's leaflets. These suggestions will be considered by the Public Relations Committee which is reviewing leaflet publication on an ongoing basis.

Very few visitors expressed criticism or grievances against the profession. These matters are also to be considered by the PR Committee.

Sixty-six solicitors, from all parts of the country manned the stand continuously throughout the exhibition. Mr. Ken Murphy headed the PR Committee's organising group for the project.

MEDICO-LEGAL SOCIETY OF IRELAND

Annual Dinner 1987

The Annual Dinner of the Society will be held on **Saturday, 2nd May 1987** in the **United Service Club,** St. Stephen's Green, Dublin 2 by kind permission. The Dining Room of the Club is being reserved for the occasion.

The Dinner will commence at 8.00 p.m. and will be preceded by a Sherry Reception. The Sherry Reception will commence at 7.30 p.m. when members and their guests will be welcomed by the President of the Society, Mr. Eamonn G. Hall, Solicitor and Mrs. Hall. Guest speakers will propose the toasts of Medicine and Law. The Chief Justice, the Hon. Mr. Justice T. A. Finlay, will propose the toast of Medicine. Professor P. Meenan, M.D., B.L., President of the Medical Council, and a Past President of the Society will propose the toast of the Law.

The subscription for each person is IR£25.00. The subscription includes the **Sherry Reception and wines.** Communications in relation to the Dinner should be sent to the Hon. Secretary, Miss Mary McMurrough Murphy, B.L. at 2 Whitebeam Road, Clonskeagh, Dublin 14. Numbers may have to be limited. Therefore, priority may depend on receipt of subscriptions.

LEGISLATION

Measures enacted by the Oireachtas during 1986

TITLE OF ACT	DATE ENACTED	COMMENCEMENT DATE(S)
Courts Act, 1986 (No. 1 of 1986)	27 February, 1986	27 February, 1986 (Enactment date)
Valuation Act, 1986 (No. 2 of 1986)	4 March, 1986	4 March, 1986 (Enactment date)
Canals Act, 1986 (No. 3 of 1986)	11 March, 1986	To be appointed by Ministerial order
Air Transport Act, 1986 (No. 4 of 1986)	20 March, 1986	20 March, 1986 (Enactment date)
National Development Corporation Act, 1986 (No. 5 of 1986)	20 March, 1986	To be appointed by Ministerial order
Free Ports Act, 1986 (No. 6 of 1986)	27 March, 1986	To be appointed by Ministerial order/s
Slaughtered and Detained Animals (Compensation) Act, 1986 (No. 7 of 1986)	27 March, 1986	27 March, 1986 (Enactment date)
Social Welfare Act, 1986 (No. 8 of 1986)	27 March, 1986	27 March, 1986 (Enactment date)
Industrial Development Act, 1986 (No. 9 of 1986)	6 May, 1986	To be appointed by Ministerial order/s
Health (Amendment) Act, 1986 (No. 10 of 1986)	7 May, 1986	7 May, 1986 (Enactment date)
National Archives Act 1986 (No. 11 of 1986)	18 May, 1986	To be appointed by order/s of the Taoiseach.
Electoral (Amendment) Act, 1986 (No. 12 of 1986)	27 May, 1986	27 May, 1986 (Enactment date)
Finance Act, 1986 (No. 13 of 1986)	27 May, 1986	Part III, ss. 79, 83(a) and 85 - 1 March, 1986 ss.83 (b) and 89 to 91 (other than para. (a) of s.91) - 1 July, 1986. Part I, save as is otherwise expressly provided therein, - 6 April, 1986. All other sections - 27 May, 1986 (Enactment date)
Combat Poverty Agency Act, 1986 (No. 14 of 1986)	10 June, 1986	To be appointed by Ministerial order
Dublin Transport Authority Act, 1986 (No. 15 of 1986)	12 June, 1986	To be appointed by Ministerial order/s
Road Transport Act, 1986 (No. 16 of 1986)	12 June, 1986	To be appointed by Ministerial order/s
Chester Beatty Library Act, 1986 (No. 17 of 1986)	17 June, 1986	17 June, 1986 (Enactment date)
Air Navigation and Transport (Preinspection) Act, 1986 (No. 18 of 1986)	19 June, 1986	19 June, 1986 (Enactment date)
Urban Renewal Act, 1986 (No. 19 of 1986)	24 June, 1986	24 June, 1986 (Enactment date) (Establishment date for Custom House Docks Development Authority to be appointed by Ministerial order)
Shannon Free Airport Development Company Limited (Amendment) Act, 1986 (No. 20 of 1986)	25 June, 1986	25 June, 1986 (Enactment date)
Local Loans Fund (Amendment) Act, 1986 (No. 21 of 1986)	25 June, 1986	25 June, 1986 (Enactment date)
British & Irish Steam Packet Company Limited (Acquisition) (Amendment) Act, 1986	25 June, 1986	25 June, 1986 (Enactment date)
Irish Nationality and Citizenship Act, 1986 (No. 23 of 1986)	1 July, 1986	1 July, 1986 (Enactment date)
Domicile and Recognition of Foreign Divorces Act, 1986 (No. 24 of 1986)	2 July, 1986	2 October, 1986 (s.6(2) of the Act)

TITLE OF ACT	DATE ENACTED	COMMENCEMENT DATE(S)
Companies (Amendment) Act, 1986 (No. 25 of 1986)	12 July, 1986	To be appointed by Ministerial order/s
Courts (No. 2) Act 1986 (No. 26 of 1986)	12 July, 1986	Sections 2, 3(1), 3(3) to 3(5) and ss. 5 to 8 and Repeals of certain Acts provided for in ss. 9 and 10 - 12 July, 1986. Other sections by Ministerial order/s
Malicious Injuries (Amendment) Act, 1986 (No. 27 of 1986)	15 July, 1986	15 July, 1986 (Enactment date)
National Lottery Act, 1986 (No. 28 of 1986)	15 July, 1986	15 July, 1986 (Enactment date) and by Ministerial order/s.
Garda Siochana (Complaints) Act, 1986 (No. 29 of 1986)	15 July, 1986	To be appointed by Ministerial order
Dublin Metropolitan Streets Commission Act, 1986 (No. 30 of 1986)	27 November, 1986	To be appointed by Ministerial order/s
Transport (Re-organisation of Coras Iompair Eireann (No. 31 of 1986)	11 December, 1986	Vesting Days for three subsidiary companies to be appointed by Ministerial order.
Control of Dogs Act, 1986 (No. 32 of 1986)	17 December, 1986	To be appointed by Ministerial order/s
Courts (No. 3) Act, 1986 (No. 33 of 1986)	19 December, 1986	19 December, 1986 (Enactment date)
Income Tax (Amendment) Act, 1986 (No. 34 of 1986)	19 December, 1986	19 December, 1986 (Enactment date)
Electoral (Amendment) (No. 2) Act, 1986 (No. 35 of 1986)	22 December, 1986	22 December, 1986 (Enactment date)
Building Societies (Amendment) Act, 1986 (No. 36 of 1986)	22 December, 1986	22 December, 1986 (Enactment date)
European Communities (Amendment) Act, 1986 (No. 37 of 1986)	23 December, 1986	To be appointed by Ministerial order
Exchange Control (Continuance) Act, 1986 (No. 38 of 1986)	24 December, 1986	24 December, 1986 (Enactment date)
Appropriation Act, 1986 (No. 39 of 1986)	24 December, 1986	24 December, 1986 (Enactment date)

STATUTORY INSTRUMENTS

The following is a list of Statutory Instruments received in the Law Society Library (up to 27 February 1987) which appoint Commencement/Establishment/Vesting dates for 1986 Acts.

Canals Act, 1986 (Vesting Day) Order, 1986, S.I. No. 207 of 1986.

Companies (Amendment Act) 1986 (Commencement) Order, 1986, S.I. No. 257 of 1986.

Control of Dogs Act, 1986 (Commencement) Order, 1987, S.I. No. 16 of 1987.

Control of Dogs Act, 1986 (Commencement) (No.2) Order, 1987, S.I. No. 79 of 1987.

Dublin Metropolitan Streets Commission Act, 1986 (Commencement) Order, 1987, S.I. No. 15 of 1987.

Dublin Metropolitan Streets Commission (Establishment) Order, 1987, S.I. No. 14 of 1987.

Dublin Transport Authority Act, 1986 (Commencement) Order, 1986, S.I. No. 357 of 1986.

Dublin Transport Authority Act, 1986 (Establishment Day) Order, 1986, S.I. 358 of 1986.

Industrial Development Act, 1986 (Commencement) Order, 1986, S.I. No. 105 of 1986.

National Development Corporation Ltd. (Vesting Day) Order, 1986, S.I. No. 208 of 1986.

Road Transport Act, 1986 (Commencement) Order, 1986, S.I. No. 204 of 1986.

Road Transport Act, 1986 (Commencement) (No. 3) Order, 1986, S.I. No. 454 of 1986.

Transport Re-organisation of C.I.E.) Act, 1986 (Vesting Day) Order, 1987, S.I. No. 25 of 1987.

Urban Renewal Act, 1986 (Designated Areas) Order, 1986, S.I. No. 238 of 1986.

Urban Renewal Act, 1986 (Establishment of Custom House Docks Development Authority Order, 1986, S.I. No. 330 of 1986.

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Stamp Duty and Mergers

Stamp Duty on Leasehold Mergers/Surrenders

Since the recent *Ramsay* Case in the U.K., followed by *I.R.C. -v- Burmah Oil Company Limited* (1981) 54 T.C.200 and the famous (or infamous) *Furniss -v- Dawson* (1984) A.C.474 steps inserted into transactions solely for tax avoidance purposes would have no effect.

The *Ramsay* decision to a certain degree appears to be relied upon by the Revenue Commissioners although the cases are in course of being tested in Ireland.

In the realm of Stamp Duties in the U.K., these cases were held to have effect in *Ingram -v- I.R.C.* [1986] 2 W.L.R. 598). There, steps inserted into a transaction seeking to make use of the exclusion from the charge to duty of Agreements for leases for terms exceeding 35 years under section 75 of the U.K. Stamp Act, 1971 would be disregarded.

There is no equivalent section in Ireland but the principle laid down in this case could equally apply to other arrangements which have been utilised here. It is doubtful however, if any arrangement prior to the 11th June, 1985 would be called into question.

Duty was payable on the full purchase price – as per Mr. Justice Vinelott on Appeal. The facts of that case were as follows:

In 1984 a taxpayer wished to purchase a freehold property for £145,000.00. Four documents were executed to reduce the amount of Stamp Duty that would have been payable had the taxpayer acquired the house by the normal contract and conveyance.

The taxpayer (purchaser) and the vendor made an Agreement for a 999 year lease of the property at a premium of £145,000.00, and an annual rental of £25.00. Four days later the vendor contracted to sell the property subject to the agreement for the lease to a Company for £500.00.

Two days later, the Company agreed on a sub sale of the freehold to the taxpayer for £600.00, and shortly thereafter the property was conveyed to the taxpayer in accordance with the earlier agreements and the payments to the vendor of £145,000 and £500.00.

The Inland Revenue Commissioners adjudicated that Duty was chargeable on the conveyance at the full consideration, namely, £145,000.00 which was upheld in the High Court, Chancery Division.

by
BRIAN A. BOHAN,
Solicitor

In the U.K., section 111 of the Finance Act, 1984 now prevents schemes of this sort from achieving their purposes with effect from the 20th March, 1984, although *Ingram* took place before the 1984 Act.

Irish Legislation on the subject of Stamp Duty schemes began with the imposition of Duties S.I. No. 101 of 1977, and now section 31 of the Finance Act, 1978 which affected Stamp Duty on the surrender of leases.

Under that section a contract or agreement for the sale of any leasehold interest in any immovable property is charged with *ad valorem* Duty if:-

(a) the purchaser enters into possession before the execution and stamping of the conveyance, and

(b) the conveyance is not stamped within 9 months of first execution of the contract or agreement (or such longer period as the Revenue Commissioners allow).

If the Stamp Duty is paid on the contract or agreement:

(i) the conveyance is not chargeable.

(ii) the Revenue Commissioners will denote or transfer the stamp on production of the stamped contract or agreement and

(iii) the Duty will be refunded if the contract or agreement is rescinded or annulled.

This section presumes a contract or agreement to be in existence and to be in writing and if there is one, once the purchaser enters into possession, Stamp Duty is payable in exactly the same way as Stamp Duty is payable on the ordinary conveyance on sale.

The practice of effecting a surrender without a prior contract or Agreement continued where the Parties, in effect, trusted each other and did not reduce the contract or agreement to writing.

There is no compulsion on the taxpayer to submit the Instrument for stamping but it is an unstamped title document in these circumstances.

The vendor cannot preclude any Objections or Requisitions as to the stamping of any document executed after the 16th day of May, 1888 (see section 117 of The Stamp Act, 1891 – *ex parte Birkbeck Freehold Land Society* (1883) 24 C.H.D. 119 and *Abbott -v- Stratton* 3.S & L. 603 where an agreement to leave a document unstamped in a loan transaction, the borrower to pay any penalty if the stamping became necessary at any time, was not upheld by the Court – it was an attempt to evade Stamp Duty.)

Statutory Instrument Number 151 of 1985 (now incorporated into sections 96 and 99 Finance Act, 1986) made dramatic changes.

These two sections appear to end certain methods of Stamp avoidance (of which *Ingram* was a parallel). In fact section 96 would fall directly on the *Ingram* decision – the use of an arrangement where a vendor enters into an agreement to grant a long lease to a purchaser and then agrees to sell

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the reversion to a third party, the third party having previously purchased that reversion, then sells it to the original intended purchaser, will not succeed.

Section 96 also provides that a Declaration by Deed, under section 65 (2) of The Conveyancing and Law of Property Act, 1881, to the effect that from and after the execution of the Deed, a term subsisting in land shall be enlarged shall where the term was created by an Instrument executed *within 6 years of the date of the execution of the Deed* be charged to Stamp Duty as a conveyance or transfer on sale of that land for a consideration equal to the value of the land and that value is to be determined without regard to the term or any part of the term.

With regard to residential properties any lease that would comply with section 65 (2) of the 1881 Act would appear to be void under the Landlord and Tenant (No. 1) Act, 1978 whereby no new leases of residential property could be created unless it had been created before that Act, and, in the circumstances over 6 years have elapsed since then.

Section 65 only affects a lease of property with a residue unexpired of not less than 200 years of a term originally created for not less than 300 years. If there is no rent or merely a Peppercorn rent or other rent having no monetary value or the rent has been released or become barred by lapse of time and there exists no trust or right of redemption affecting the term in favour of the freeholder or other person entitled in reversion expectant on the term, the term can be enlarged into a Fee-Simple by means of a Declaration by Deed under subsection (2).

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The Declaration by Deed cannot affect a genuine merger. One must remember that this provision is confined to a Declaration under section 65 (2) of The Conveyancing and Law of Property Act, 1881 which enables Lessees of certain long leases which are granted Rent free or at a Peppercorn Rent or any other Rent which is valueless, or having value is released or barred, to execute a Deed declaring the terms to be enlarged into the Fee Simple. In these circumstances and in order to avoid the Charge, the "Lessee" is obliged to let the lease run for a period of 6 years and then make the appropriate Declaration under the section. If over 6 years has already run, there is no problem.

These provisions cannot effect a double charge to Stamp Duty but it has been held in *Speyer Brothers -v- I.R.C.* [1908] A.C.92 that where an Instrument falls to be stamped within the heads of two liabilities to Stamp Duty, the State is only entitled to one Tax but it may choose the higher Tax. If, therefore, a Purchaser mergers a leasehold and freehold interest in property by a separate Deed of Merger or in his Deed of purchase recites merger, the Revenue Commissioners may have the choice of selecting the head of charge:-

(a) As a conveyance on sale under the old provisions, or

(b) On the merger ot the two interests under The Finance Act, 1986, i.e. as a conveyance on sale.

If a leaseholder of long standing decides to purchase the freehold (say for £100.00) would Stamp Duty be payable on the value of the leasehold interest i.e. the document evidencing the merger of the leasehold interest in the superior interest will be stamped as a surrender of the leasehold interest?

Another "Scheme" aimed at, is the surrender of a leasehold interest to merge in the superior interest without any surrender deed for stamping. Under section, 99, the instrument bearing witness to or acknowledging the surrender or the merger is to be charged with Stamp Duty as if it were a surrender of the leasehold interest.

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An "Instrument" is defined in the Stamp Act 1891 section 122, as any document in writing. It seems, therefore, that the Statutory Declaration evidencing the surrender or merger or both will be stampable with *ad valorem* duty as if it were the surrender document.

In any of these cases, it is submitted that what the legislation has done is to make the surrender or merger, a conveyance on sale, and it will be stamped as such. If the legislators intended otherwise, words similar to section 74 Finance (1909-10) Act, 1910 would be used, substituting "value of the property" for "amount or value of the consideration" or to section 96 Finance Act, 1986, deeming the consideration to be equal to the value of the property. "Property" is not defined in the Stamp Duty Legislation, but in *Potter -v- I.R.C.* (1854) 10 Ex.147 at Page 156 it is stated that property is "that which belonged to a person exclusive of others and which could be the subject of bargain and sale to another".

The surrender (or merger) will be stamped:-

(a) upon a sale, as a conveyance on sale

(b) upon a security, as a Mortgage

(c) in every other case, £5.00.

In the case of a conveyance on sale, Stamp Duty is payable on the value or the amount of the consideration and in the case of an arms-length Agreement, the con-

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sideration will be set out in the contract or conveyance.

The First Schedule to the Stamp Act, 1891, provides that Stamp Duty is payable on *"Conveyance or Transfer on Sale* of any property (except such Stock as aforesaid) - where the amount or value of the consideration for the sale . . . ". Irish Conveyancing Law by J. G. W. Wylie at Paragraph 16, 108 states, "Stamp Duty is payable in respect of *conveyances on sale* . . . on an *ad valorem* basis, i.e. according to rates varying according to the amount of the *consideration*".

Section 54, Stamp Act, 1891 - For the purposes of this Act the expression "Conveyance on Sale" inclues every Instrument, and every Decree or Order of any Court or of any Commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.

Where the leaseholder, therefore purchased the freehold the consideration will be £100.00 and the appropriate Certificate of Value will be utilised. There is, of course, no transfer or vesting of the leasehold interest which can be charged under the main charging provisions.

The leasehold interest has already been transferred to and vested in the "purchaser" and the only property that is being transferred to or vested in him is the superior interest. There is therefore no sale (legal or equitable) of the leasehold interest which can be charged.

In short, therefore, the following appears to be the position:

(1) The creation of a leasehold term to reduce Stamp Duty on the conveyance of the superior interest will be ignored and the conveyance will be charged *ad valorem.*

(2) The Declaration by Deed only affects certain leases for valueless rent and is not subject to *ad valorem* Stamp Duty if it is made outside the period of 6 years of the creation of the term.

(3) In the absence of a Deed, the Instrument evidencing a surrender or merger of an inferior interest is stampable as a conveyance on sale, i.e. on the consideration passing or, in the case of a voluntary disposition, on the value of the property conveyed or transferred.

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Further details of the above are available from Bord Fáilte Éireann.

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The Judge in Ireland
Part I

Justice Cardozo, one of the great judicial helmsmen of the United States noted, extra-judicially, that the "earliest judge was the ruler who uttered the divine command and was king and priest combined".[1] Professor Heuston, the doyen of judicial biographers, considered that the judge "belongs to a priesthood for ever".[2] The judge and the priest have much in common. Members of a priesthood or not, Irish judges play a pivotal role in the affairs of men and in the affairs of state. The uniqueness of the judicial office in Ireland is emphasised by the words uttered by the judge on his or her appointment. The declaration is made "in the presence of Almighty God".[3] God is also invoked to "direct and sustain"[4] the newly appointed judge. The observations in this paper are offered by one of the uninitiated, a student of the juristic process.

by
Eamonn G. Hall,
Solicitor*

Historical Background

The *fons et origo* of the Judge in Ireland is Bunreacht na hEireann. The 1937 Constitution established a division of labour among the branches of government. The three arms of government were established as the legislature, the executive and the judiciary.[5] As Professor Kelly noted, the 1937 Constitution was "very largely a re-bottling of wine most of which was by then quite old and of familiar vintages".[6] By 1937 the judicial power was classically vintage.

The story of our judges is inextricably intertwined with this island's relationship with its nearest neighbours. On an autumn day, October 17th, 1171, Henry II of England landed in Ireland fortified with the Bull *Laudabiliter* and an emerald ring from Pope Adrian IV – the investiture of the right to rule Ireland. Matthew of Paris informs us in his chronicle that Henry held a council at Lismore "when the laws of England were by all freely received and confirmed with due legal solemnity".[7] Historians may doubt that version of history, but Henry did spend Christmas in Dublin and left for Wales on Easter Sunday, having initiated the process of exporting English law to this island and stifling the native Brehon law.

The *Curia Regis* or King's Court of the Norman Kings, together with the judicial institution of itinerant justices, were the precursors of the Royal Courts. The marking off of the judicial function was a gradual process. By the Middle Ages the judiciary was becoming independent in England. However, in the days of James I (1603 – 25) the judges still held their office *durante bene placito nostro* ("according to our good pleasure"). At the Revolution of 1688 the independence of the judges had been effectively established.

The Judicature (Ireland) Act of 1877, merged all the higher courts then in existence in Ireland into one court system – "the Supreme Court of Judicature in Ireland". The Supreme Court of Judicature had two permanent divisions – the High Court of Justice and the Court of Appeal. The Court of Appeal consisted of the Lord Chancellor, the Master of the Rolls, the Lord Chief Justice, the Chief Justice of the Common Pleas, the Chief Baron of the Exchequer and two Lords Justices. The new High Court was divided into five divisions, Chancery, Queen's Bench, Common Pleas, Exchequer and Probate and Matrimonial. There were also courts with limited local jurisdiction. By 1921, the higher courts had been reduced to a Court of Appeal and a High Court comprising a King's Bench Division and a Chancery Division.

In the aftermath of the Revolution of 1916 – 1922 the names of the courts changed, judicial titles changed, the robes of the judges became less colourful, but the radical change in the judicial structure that might have been expected never materialised. Article 73 of the Constitution of the Irish Free State authorised the establishment of a judiciary. The Courts of Justice Act 1924 established the courts as we know them today. The District Court was established with minor civil and criminal jurisdiction. The 1924 Act established a Circuit Court with greater civil jurisdiction and extended criminal jurisdiction, together with a High Court with full civil and criminal jurisdiction, a Court of Criminal Appeal and a Supreme Court. The 1922 Constitution was superseded by the 1937 Constitution, which once again established the judicial power. Article 34 of the 1937 Constitution provided that justice "shall be administered in courts established by law by judges appointed in the manner provided by (the) Constitution". The Courts (Establishment and Constitution) Act 1961 formally established the hierarchy of courts that we have today. These courts have the same structure as those established pursuant to the 1924 Act.

The Appointment of Judges

Judges are appointed by the President.[8] However, the President performs this task in accordance with Article 13.9 of the Constitution "only on the advice of the

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**Mr. Hall is the current President of the Medico-Legal Society of Ireland. This paper is the edited text of the presidential lecture delivered to the Medico-Legal Society of Ireland on the 29th October 1986.*

Government''. Accordingly, the appointment of judges by the President is a purely formal function, which leaves no discretion to the President. To be eligible for appointment to the Supreme Court or High Court a person must be a practising barrister of at least 12 years standing. In the Circuit Court the requisite period of practice for a barrister is 10 years. In the District Court a barrister or a solicitor must have the experience of 10 years practice before being considered eligible for appointment. Supreme and High Court judges must retire at 72, Circuit Court judges at 70 and District Court judges at 65.[9]

A judge may be removed from office for stated misbehaviour or incapacity, but only after resolutions calling for his or her removal have been passed by the Dail and the Senate.[10] There is provision for a judicial enquiry into the conduct or condition of health of a District Justice.[11] The Chief Justice is authorised to exercise a disciplinary function over judges of the District Court where he is of the opinion that the conduct of a judge of the District Court has brought the administration of justice into disrepute. The Chief Justice may interview the justice in private and inform him or her of his opinion.[12]

Sir Jonah Barrington, a native of Laois, a judge of the Irish Admiralty Court (1798 – 1830), is the only Irish judge to date to have been deprived of judicial office for misbehaviour after due process of law. Professor Osborough described Barrington's character as combining ''charm, conviviality and an utter lack of scruple''[13]. Barrington had diverted funds which suitors had paid into his court to alleviate his own financial problems. The House of Lords and the House of Commons presented an address to the Crown for his removal. The Crown directed that he be removed from office.[14]

Many factors play a part in the appointment of persons to the Irish Bench.[15] Factors such as age, preeminence as a lawyer, holding office as Chairman of the Bar Council and policital affiliations have been considerations. Studies on the judiciary in Ireland agree that political affiliations have played a significant part in the preferment of persons to the Irish Bench.[16] There is a convention that a serving Attorney General is offered any vacancy that occurs in the High Court.[17] It is uncertain whether that convention is observed at present. Truly it must be stated that after appointment to the Bench judges have proved to be independent of the Government of the day and of any party that may have been instrumental in their appointment. Elevation to the Bench does

> ''emancipate a man from many of the pressures to which he has been subjected. That great corrupter of the conscience, the local constituency is gone, and a man appointed (to the Bench) need only consult the law, his conscience and his aspirations for his country''[18].

The time has come for a fresh approach to the appointment of judges. It is not that the existing system has failed, but no sense of mystery or obscurity should surround the process of appointment to the judicial arm of government. The method of appointing judges in other jurisdictions merits examination. Our nearest neighbours have recently reviewed their procedures. The Lord Chancellor in England, who has the responsibility for the appointment of Judges up to and including the High Court, in a candid and forthright policy statement in 1985 laid down the criteria for judicial appointments in the United Kingdom. The Lord Chancellor made it clear that the best potential candidate ready and willing to accept the judicial post was appointed. Lord Hailsham stated:

> ''No considerations of party, politics, sex, religion or race must enter into my calculations and they do not. Personality, integrity, professional ability, experience, standing and capacity are the only criteria, coupled, of course, with the requirement that the candidate be physically capable of carrying out the duties of the post, and not disqualified by any personal unsuitability.''[19]

The Lord Chancellor confirmed that he systematically enlists the ''help and advice of numerous serving judges and senior lawyers''.[20] The view has been expressed that the judges and the senior members of both legal professions are probably the best judges of who will make good judges.[21]

Only good would come from a clear and forthright policy statement from the Government that no considerations of party, politics, sex, or religion would enter into deliberations concerning persons being considered for judicial appointment. The establishment of an advisory judicial appointments committee composed of senior judges, senior members of both professions and senior civil servants may merit consideration. The general body of the judges in a particular court where a vacancy has arisen has also been suggested as an advisory selection body.[22] Any such body would advise the Government on the appointment of members of the judiciary and would not infringe the constitutional requirement that judges are appointed on the advice of the Government. The eligibility of solicitors for appointment to the Circuit Court Bench should receive legislative consideration. Solicitors have been eligible for appointment as Circuit Judges in England since 1971.[23]

Role of the judge

Every judge when appointed ''solemnly and sincerely'' promises that he or she will duly and faithfully to the best of his or her knowledge and power execute the office of judge ''without fear or favour, affection or ill-will towards any man'' and that he or she will

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"uphold the Constitution and the laws"[24]. A primary function of the judge is, therefore, "the disinterested application of known law"[25]. The judge, at one level, is the umpire who is involved in the resolution of controversies between individual litigants and between the State and its citizens. In criminal cases the trial before a single judge or before a judge and jury has replaced the physical strife of trial by combat. A trial in court still involves strife but it is no longer physical strife. Sir John MacDonnell in his *Historical Trials* rightly observed that

> "a trial is in substance a struggle, a battle in a closed arena. It is a shock of contending forces, a contest which may arouse the fiercest passions".

The pages of the newspapers bear witness to these fierce passions. The judge is often performing the social service to the community of removing a sense of injustice.[26] In removing the injustice the decision of the judge may become cloaked with an air of infallibility because in practical terms the decision of the judge is often final. Thus, impartiality and the appearance of impartiality are fundamental qualities which the judge must possess to carry out this essential public service.[27]

At another level, the judges of the High and Supreme Courts interpret the Constitution. These judges are also invested with jurisdiction to consider the constitutional validity of any law.[28] Often this leads the judge in constitutional cases to be involved in reconciling competing social values. The judge on occasions, almost unconsciously, performs as a social engineer. When interpreting the Constitution, the judge is engaging in an exercise in statecraft.

Law Maker and Law Declarer

Does the Irish judge make law or merely declare what the law is? Much may depend on what we mean by "make" and "law". The classic Blackstonian view was that judges did not make law, but only declared what had always been the law.[29] The "felt necessities of the time(s)[30] have forced the dilution of Blackstone's thesis. Irish judges both declare what the law is and make law – but they make law within narrow confines. The law springs from three principal sources, the common law, statute law and, towering over both, the Constitution – the written expression of the soul of the State and its People. This State inherited the common law of England – that law formulated, developed and administered by judges in the old common law courts and based originally on the common customs of England and unwritten. In the application of the common law, judges, in the words of Justice Cardozo, often match the "colours of the case at hand against the many samples spread out upon their desk".[31] It is when the "colours do not match, when the references in the index fail, where there is no decisive precedent" that the judge makes law. By shaping the law for the parties in the instant case, by interpreting or reinterpreting the principles held in previously decided cases, the judge is determining the law for others who will follow. Gavan Duffy P., one of the leading judicial figures of our times, put it another way:

> "My duty is to apply the living principles that have come down to us in the broader spirit of our own day with due respect to binding authority, but with no undue respect for anachronisms. The law is not a mausoleum".[32]

The interpretation of statutes is an important part of the judicial function. The draftsman works with words. Words are imperfect instruments. The icy degree of certainty and precision found in mathematical formulae cannot easily be achieved with words. The judicial scope for "ironing out the creases"[33] in legislation is because

> " . . . of the inherent frailty of language, the difficulty of foreseeing and providing for all contingencies, the imperfections which must result in some degree from the pressures under which modern legislation has so often to be produced and the difficulties of expressing the finely balanced compromises of competing interests which the draftsman is sometimes called upon to formulate".[34]

In litigation, one party may argue that the words of the statute bear a particular meaning. The other party in the action argues the opposite. The judge states what the particular words mean in law. He who is the interpreter, he who breathes life into the words of a statute is often a law maker.

Judges of the High and Supreme Courts interpret the Constitution. The Constitution of 1937, is a dynamic and, in parts, a flexible document which has been expanded by judicial interpretation. The phenomenal changes that have occurred in Ireland since 1937 when the People adopted the 1937 Constitution could not possibly have been foreseen by the framers of the Constitution. The largely rural society of 1937 has been transformed into an industrial society where the State has an equal voice in a commonwealth of rich industrial nations of Western Europe – the European Communities. By its very nature the Constitution contains many vague and nebulous phrases. The meaning of phrases like "equal before the law" (Article 40.1), "in accordance with law" (Article 40.4.1), "the dwelling of every citizen is inviolable" (Article 40.5) to take just a few examples, is capable of being varied according to the tenor of the age when they fall for interpretation or reinterpretation. The nebulous words and phrases of the Constitution are often empty containers into which a resourceful judge can pour an interpretation which can cast the judge in the role of a law giver or law maker. In the words of Walsh J., in his foreword to O'Reilly and Redmond's *Cases and Materials on the Irish Constitution*

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"In constitutional law, there is a general warrant for judicial law making".[35]

In a significant judgment in 1965, Kenny J. as a judge of the High Court in *Ryan -v- Attorney General*[36] held that the rights guaranteed in Article 40.3 of the Constitution were not confined to those specifically enumerated. The Supreme Court agreed and thus paved the way for the establishment of many individual rights which had hitherto not been recognised in law. These rights include a right to work,[37] a right of access to the Courts,[38] a right to travel,[39] a right to marital privacy[40] and the right to communicate.[41] Professor Heuston has commented that the "speed with which new unspecified rights can be recognised and enforced (was) startling".[42] The power of the judiciary to declare fresh constitutional rights is judicial law making – albeit subject to certain restraints which are discussed infra.

Judges of the High Court and Supreme Court have the power to unmake laws.[43] This power is "of a delicate and awful nature"[44] because the judges are empowered to strike down statute law passed by the legislature which has been elected by the People. The judicial review clause of the Constitution undoubtedly acts consciously or subconsciously as a restraining influence on the executive and legislative arms of Government. This restraining influence tends to act as a stabilising force. However, there is a limit to judicial law making. All our ills cannot be cured by the Courts and the Constitution. Perhaps too much is expected from our judges and our Constitution. Justice Harlan's admonition can be applied to us:

> "The Constitution is not a panacea for every blot upon the public welfare; nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements."[45]

O'Higgins, C. J. put the matter firmly in another way in *Norris -v- Attorney General.*[46] He also took the opportunity of enunciating jurisprudential orthodoxy in relation to the power to alter "the laws of Ireland".

> "The sole function of this Court, in a case of this nature, (the plaintiff had claimed that sections of the Offences Against the Person Act, 1861 were inconsistent with the Constitution), is to interpret the Constitution and the law and to declare with objectivity and impartiality the result of that interpretation on the claim being considered. Judges may, and do, share with other citizens a concern and interest in desirable changes and reform in our laws; but, under the Constitution, they have no function in achieving such by judicial decision. It may be regarded as emphasising the obvious but, nevertheless, I think it proper to remind the plaintiff and others interested in these proceedings that the sole and exclusive power of altering the laws of Ireland is, by the Constitution, vested in the Oireachtas. The Courts declare what the law is – it is for the Oireachtas to make changes if it so thinks proper."[47]

Part 2 of this article will appear in the April issue.

NOTES

1. "What Medicine can do for Law", reprinted in *Selected Writings of B. N. Cardozo* ed. by M. E. Hall, (Matthew Bender, 1938) p.371.
2. R. F. V. Heuston "Lord Denning: The Man and his Times" in *Lord Denning: The Judge and the Law,* J. L. Jowell and J. P. W. B. McAuslan (eds) (Sweet & Maxwell, 1984) p.23.
3. Article 34.5.1. of *Bunreacht na hEireann* hereinafter referred to as "the Constitution".
4. Ibid.
5. Articles 6, 15, 28 and 34 of the Constitution; see a discussion on the judicial power by Kennedy C. J., in *Lynham -v- Butler* No. 2 [1933] IR 74.
6. Preface to *The Irish Constitution,* (Jurist Publishing Co. Ltd. second edition, 1984) p.xxvi.
7. *Chronica Majora* (Rolls Series) vol. 285.
8. Article 35 of the Constitution.
9. See generally the *Courts (Supplemental) Provisions Act, 1961.*
10. Article 35.4.1 of the Constitution in respect of Judges of the Supreme Court and High Court; Section 39 of the *Courts of Justice Act 1924* and Section 20 of the *Court of Justice (District Court) Act 1946* in respect of judges of the Circuit and District Courts.
11. Section 21 of the *Courts of Justice (District Court) Act 1961.*
12. Section 10(4) of the *Courts (Supplemental Provisions) Act 1961.*
13. "Sir Jonah Barrington" in A. W. B. Simpson (ed.) *Biographical Dictionary of the Common Law,* (Butterworths, 1984) p.35.
14. Todd *Parliamentary Government in England,* Vol. 2, p.736 et seq.
15. See P. Bartholomew, *The Irish Judiciary,* (I.P.A. 1971); Chapter VIII of V.T.H. Delany (ed. by C. Lysaght) *The Administration of Justice in Ireland* (IPA, 1975); S. U. Larsen *Law and Politics in Ireland: A Comparative Study;* Chapter 5 of G. M. Golding *George Gavan Duffy,* (Irish Academic Press, 1982) and Anon. "The Recruitment of the Judiciary", *The Irish Jurist* vol. XVI (1950) p.35.
16. Ibid.
17. See J. P. Casey *The Office of the Attorney General in Ireland,* (IPA, 1980), pp.176 – 178.
18. J. P. Frank *Marble Palace* (New York, Knopf, 1958), p.46.
19. Speech of Lord Chancellor to the Common Law Bar Association in the Inner Temple, July, 1985 reported in *Counsel* Michaelmas 1985 p.11.
20. See pamphlet entitled *Judicial Appointments* published in May 1986 by the Judicial Appointments Group, Lord Chancellor's Department, House of Lords, p. (iii).
21. The Master of the Rolls, Sir John Donaldson, in *Counsel,* Trinity/ Summer 1986, p.20.
22. See V. T. H. Delany (ed. by C. Lysaght) The *Administration of Justice in Ireland,* (IPA 4th edition, 1975) p.77.
23. *Courts Act 1971.*
24. Article 34.5 of the Constitution.
25. Professor Jaffe, *English and American Judges as Lawmakers,* (Clarendon Press, Oxford 1969), p.13.
26. See Patrick Devlin, *The Judge,* (Oxford University Press, 1981), p.3.
27. Ibid.
28. Article 34.3.2 of the Constitution.
29. *The Commentaries,* Book I, pp.88 – 89, See Hale, *History of the Common Law* p.90.
30. The words of Justice Holmes of the United States Supreme Court in *Common Law* p.1.
31. *Nature of the Judicial Process.* (Yale University Press), p.113.
32. *McInerney -v- Liddy* [1945] IR 100, 104.
33. Denning L. J., in *Seaford Court Estates Ltd. -v- Asher* [1949] 2 KB 481, p.484.
34. *The Interpretation of Statutes,* The Law Commission (UK) and The Scottish Law Commission (1974) HMSO. p.4.
35. Inc. Law Society 1980 p.xi.
36. [1965] IR 294.
37. *Murphy -v- Stewart* [1973] IR 117.
38. *Macauley -v- Minister for Posts and Telegraphs* (1966) IR 345; *O'Brien -v- Manufacturing Engineering Co. Ltd.* [1973] IR 334.
39. *State (M) -v- A.G.* [1979] IR 73.
40. *McGee -v- A.G.* [1974] IR 117.
41. *Attorney General and Minister for Posts and Telegraphs -v- Paperlink and Others* [1984] ILRM 373.
42. "Personal Rights under the Irish Constitution", *Irish Jurist* (1976) p.221.
43. Article 34.3.2 of the Constitution.
44. The words of Justice Iredell in *Calder -v- Bull,* 3 Dall 386 (1878) (US).
45. *Reynolds -v- Sims* 377 US, 533 (1964) dissenting opinion at 624.
46. [1984] IR 36.
47. Ibid., at p.53.

INCORPORATED LAW SOCIETY OF IRELAND

FINAL EXAMINATION – FIRST PART

Please note that four attempts at the Final Examination — First Part may now be made. The next sitting of the examination is on November 6, 1987. The closing date for receipt of applications is 24 September, 1987.

APPRENTICES SALARY

The following resolution was passed by the Council of the Law Society at its meeting on March 20th, 1987.

"From 1st May, 1987, the minimum salaries paid to solicitors apprentices who had entered the offices of their masters following completion of the Professional Course shall be as follows:-

1. £85.00 (Gross) per week for first six months.
2. £95.00 (Gross) per week for next six months.
3. £105.00 (Gross) per week for final period before the apprentice returns to the Law Society for the Advanced Course.

This recommendation is seen as having no application to those offices which pay the apprentices' fees for attending the Professional or Advanced Coiurse".

Practitioners with apprentices are asked to implement this recommendation from the 1st May, 1987.

Social Welfare Law in Ireland

A GUIDE TO ITS SOURCES

by

Gerry Whyte

The Irish Social Welfare Code appears to be vast and intractable, being contained in a principal Act of over 300 sections, together with 10 amending Acts and more than 200 statutory instruments.

This publication is offered as a guide to the sources of that code; its objective is not to explain the law, but rather to help readers locate it. Using the index the reader will be able to discover the statutory provisions and statutory instruments relating to any specific query. The publication also contains a Table of Amendments to the Social Welfare (Consolidation) Act 1981 and a list of all Social Welfare Statutory Instruments currently in force.

This book will be an invaluable guide to lawyers, both practitioners and academics; to government officials; to social workers, legislators, trade unionists and all voluntary groups.

The author lectures in Social Welfare Law in Trinity College Dublin. He is also a consultant in Social Welfare for the Incorporated Law Society's professional course. He is a barrister and co-author of *Irish Trade Union Law* and acts in an advisory capacity for a number of voluntary groups on social welfare matters.

Published by Round Hall Press, Blackrock, Co. Dublin. £9.95.

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RESTORED TO THE ROLL OF SOLICITORS

(1) By Order of the High Court dated 17th June, 1978, Gerard Coulter was suspended from practice until further notice. By Order of the High Court dated the 15th December, 1986, the said Order of the 17th June, 1978 suspending Gerard Coulter from practice was lifted on Mr. Coulter's undertaking *inter alia:-*

(1) Not to handle clients' funds.

(2) Not to open or operate a client account.

(3) Not to practice on his own or in partnership without leave of the Court.

(2) By Order of the High Court dated 7th July, 1986, Cyril Lynch was restored to the Roll of Solicitors as and from the 1st January, 1987; upon Mr. Lynch giving an undertaking to the High Court to practice only as an assistant solicitor and not to set up in practice on his own or in partnership with any other person or persons without the permission of the Court and to notify the Law Society of any pending employment.

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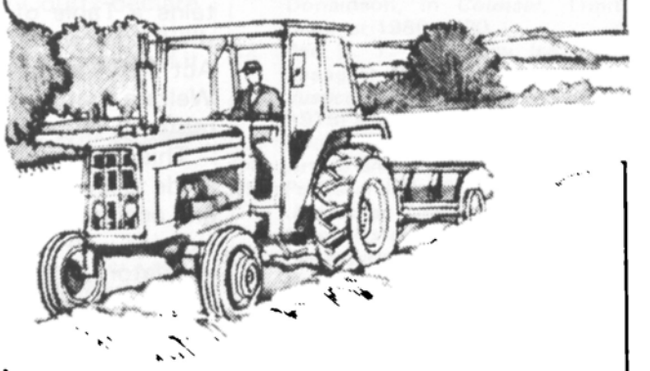

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CORRESPONDENCE

Editor,
The Gazette,
Law Society,
Dublin 7.

24th February, 1987.

Dear Sir,

I have been asked by the Minister of Justice, Mr. Alan M. Dukes, T.D., to refer to the article (''Comment . . . Summary Justice'') in your December 1986 issue which has been brought to his attention.

It is clear from the terms of that article that the writer of it has failed to understand the effect and implications of the Supreme Court judgment in the recent case of the *State (Clarke) v Roche and Senezio.* While that judgment did hold, as the article states, that ''on the terms of section 10 of the 1851 Act, it is an inescapable conclusion that the issue of a summons upon the making of a complaint was a judicial as distinct from an administratice act'', it did not go on to hold, as claimed in the article, that such act ''therefore'', had to be exercised personally by such holder of the office of District Court Clerk and could not be delegated to other District Court staff''. On the contrary, the clear implication in the judgment is that the issue of a summons under the 1851 Act, being a judicial act, could not be performed by a District Clerk at all.

In the result, your article confuses the two questions dealt with in the Supreme Court judgment, first, whether a complaint to ground a summons under the 1851 Act had to be personally considered by the District Court Clerk — which was the question decided by the High Court — and, second, whether a summons under the 1851 Act could be issued by a District Court Clerk (or Peace Commissioner) — which was not at issue in the High Court.

The article states that the Department of Justice should have anticipated the judgment of the Supreme Court since the previous High Court decision was delivered ''in the same terms as the affirming judgment of the Chief Justice''. As indicated, the High Court judgment dealt only with the question whether a complaint had to be considered by the District Court Clerk and on that issue the Department did, as the Minister explained publicly, ''anticipate'' the decision of the Supreme Court and made new arrangements accordingly for the issue of summonses.

The High Court judgment, however, had nothing whatsoever to say on the second question — whether the issue of a summons under the 1851 Act was a judicial function — and the *obiter* remarks in the Supreme Court judgment in this regard were not related to anything in the High Court judgment. It is this question alone — which of course has nothing to do with computers — that was dealt with in the Courts (No. 3) Act, 1986. This was clearly explained by the Minister in the Dáil and Seanad. He also explained why the relevant provisions of the 1851 Act were not being repealed. There is an obvious need to keep these provisions alive for the kind of summons which should be issued only after consideration by the Court and there is no reason why that should give rise to any uncertainty in the issue of summonses, as suggested by your article.

I enclose a copy of the Minister's statement in the Seanad on the recent Act which may be of assistance to your contributor in understanding the issues involved.

Finally may I draw attention in particular to the Minister's statement that the Act was a limited measure to deal in the short term with one specific issue; further legislation is in course of preparation which involves an examination of the wider aspects.

Yours faithfully,

R. G. Walshe,
Private Secretary.

Office of The Minister for Justice,
Dublin 2.

Editorial Note

If the Comment on this topic (Gazette, December, 1986), in the view of the Minister for Justice ''failed to understand the effect and implications of the Supreme Court judgment, it emphasises the importance of the very early introduction of new criminal procedure legislation, which would clearly provide for an *administrative* procedure for bringing accused persons before the District Court, whether by was of summons or after arrest. The Comment

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did not touch on the "Charge Sheet" procedure, where the Charge Sheet represents the "written complaint" of the prosecuting Garda to the District Justice before whom the arrested person is first brought. If the receiving of the "complaint" by the District Justice is a "judicial" act, then is there a duty on the Justice to "consider" that complaint before receiving it, and does that coincide with the actual procedure always followed in the District Courts?

The fact is that the criminal process today should not be dependent on an Act of 1851. We welcome the Minister's announcement (Seanad Eireann, December 19, 1986) that the Department of Justice "had for some time been working on proposals which would adopt procedures to bring them more into line with modern conditions."

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

24th February, 1987

Dear Mr. Ivers,

I refer to our recent discussion regarding complaints which you are receiving about delays in the issue of copy folios with filed plans attached.

The overall position is as follows. In 1986 we received 63,447 applications. We issued 63,372 copies. The average output was 5,281 copies a month. the total arrear at the end of the year was 1,887 applications, representing 8 days' work on the basis of the average output. In January 1987, 4,750 applications were lodged and 4,928 copies issued. The total arrear at the end of January was reduced to 1,709 applications.

These are the bald statistics which show that in an overall sense the position is reasonably satisfactory. However, the statistics disguise the fact that there are significant delays in some cases.

The system of issuing copy folios with filed plans attached was introduced throughout the Registry during the years 1979-1981. Prior to 1979 where the Land Registry index map was on the 6" scale copy maps were prepared and issued on the 6" scale which was a source of continuous complaints from solicitors. Under the new system where an application for a copy map is received and the index map is on the 6" scale, the relevant part of the index map is reconstructed on the 25" scale, a copy is attached to the folio and the applicant gets what appears to be a simple photocopy but in reality is a copy of a document which required a lot of mapping work before the copy could be made. Sometimes examination of Land Commission estate maps and, possibly, special surveys are involved before the reconstruction from 6" to 25" can be completed. In the circumstances long delays in some cases are unfortunately unavoidable at present.

In addition to the reconstruction work which is being carried out a map is attached to each new folio being opened. The aim is that eventually maps on the largest available Ordnance Survey scale will be attached to all folios. The issue of copies will then be a straightforward photocopying operation with minimal delays. At present we can meet only about 50% of the demand in this way but the proportion is increasing each year according as our reconstruction programme progresses.

We try to keep the spread of arrears and delays consistent throughout the country. Whenever we find that there are disporportionate delays in a particular area we redeploy staff to rectify the position.

I hope the above information clarifies the situation for you.

Yours sincerely,

P. McMahon,
Manager.
Land Registry,
Chancery St.,
Dublin 7.

The Director General,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

16th March, 1987

Dear Sir,

My new book on Probate and Administration is now substantially advanced. In it I attempt to deal with all aspects of Probate Law, Practice and Procedure, including guidelines on administration of estates and some elements of tax.

It is intended to be as practical as possible and so I have included in it topics which have been raised with me over the years by members of both branches of the profession.

I would now be grateful to hear from any practitioner with proposals about particular topics for inclusion in the book. I undertake to consider them all but, at this stage, I must also say that I cannot undertake to reply to them for obvious reasons. I must also say, with great regret, that I cannot enter into correspondence concerning problems which practitioners have on hand. I know practitioners will understand.

Yours faithfully,

Eamonn G. Mongey,
Ashleigh,
Carrickbrennan Rd.,
Monkstown,
Co. Dublin.
Tel. 806248

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

5th March, 1987

Dear Sir,

Children and parents need holidays and the need is greater when a child in the family is mentally handicapped. The child benefits by a change from its everyday environment; the child's parents benefit from a similar break.

BREAKAWAY is a scheme whereby parents with a happy normal family take a mentally handicapped child into their home for a fortnight during the Summer while the child's parents have a break. The Host family's legal responsibilities for the child are covered by a contract between the Agency placing the child, the natural parents and the Host parents. A qualified Social Worker and responsible Medical Officer are on call in the unlikely event of need during the hosting period.

BREAKAWAY has operated successfully in several areas in Ireland for five years and an effort is being made by Social Workers in mental handicap agencies to increase the number of families willing to be Hosts.

Parents of the child who is to have a holiday and parents who are considering acting as Hosts meet to exchange information before any decision is made. No financial commitment is incurred by either side; funding, where necessary, is made available through BREAKAWAY resources.

Members of the legal profession are earnestly asked to give consideration to acting as Hosts in work which is contributing to better understanding of mentally handicapped children and the eventual absorbing of these young people into a wider community life.

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Yours faithfully,

Patricia Kelly, B.S.S., C.Q.S.W.

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Called To The Inner Bar

Mr. Michael McDowell (36), Mount Pleasant Square, Ranelagh, Dublin, was called to the Inner Bar by the Chief Justice, Mr. Justice Finlay, in the Supreme Court in Dublin in March.

Mr. McDowell, who was called to the Bar in 1974, was elected a TD for the PD party in the Dublin South-East constituency in the recent general election.

Called to the Inner Bar on the same occasion were Mr. Gerald M. Tynan, North Circular Road, Limerick who was called to the Bar in 1968 and has practised on the South-West Circuit, and Mr. Liam Reidy (34), Windhover, Lavistown, Co. Kilkenny, who practises on the South-Eastern Circuit. He was called to the Bar in 1984.

London Merger

The London law firms Coward Chance and Clifford Turner have agreed to form a major international firm known as Clifford Chance. The merger will create a 160-partner firm with offices in 12 countries.

International Law Commission

Ireland's Permanent Representative to the UN in Geneva, Mr. Mahon Hayes, has been elected a member of the International Law Commission by the UN General Assembly. Mr. Hayes, who retains his post in Geneva, is a former head of the legal division of the Department of Foreign Affairs, and ambassador to Denmark, Norway and Iceland.

EEC Law on Unfair Terms

EEC proposals to harmonize Community law on unfair terms in consumer contracts have been criticised as "premature, over-ambitious and bureaucratic", by the Law Society of Scotland. The Society believes that laws on the sale of supply of goods and services should be tackled first and that the Commission's view that there should be a general clause in any new law which would list examples of unfair clauses will produce uncertainty. The strongest condemnation is reserved for the proposals for a system whereby contract clauses would be vetted, then become immune from challenge in the courts.

Solicitors Advertising

The Law Society in London has agreed to liberalise its advertising rules, but rejected a call to let solicitors set up client-referral arrangements with banks, building societies or estate agents.

The society's council agreed in principle to allow solicitors to advertise through mail services, television and sponsorship. The council rejected the idea of permitting referral arrangements because of the effects this could have on a solicitor's duty to provide independent advice.

A solicitor who was dealing with a client referred by a bank or building society would be inhibited from advising the client about better deals offered by rival companies.

In Brief

Some Recent Legal Appointments

Mr. James Paul McDonnell a Dublin Barrister, Mr. Thomas Alphonsus Fitzpatrick a Cavan Solicitor and Mr. William Harnett, a Dublin Solicitor have been appointed as Justices of the District Court.

Justice John Garavan Galway and Justice P. J. Brennan Mayo have been nominated as members of the District Court Rules Committee. The President of the District Court Justice Oliver A. Macklin has been appointed to the Committee on Court Practise and Procedure.

Professional Information

(continued from p.66)

MORRIS, Martin J., deceased, late of Granamore, Valleymount, County Wicklow. Would any person having knowledge of the whereabouts of a Will of the said deceased who died on the 31st of December, 1985, please contact Daragh Buckley, Solicitor, 47 Wellington Quay, Dublin 2. Telephone: (01) 770282.

QUINLAN, Monica, deceased. Late of 98 Ceanntfort, Mount Brown, Dublin 8. Will any person having knowledge of the whereabouts of a Will of the above-named Deceased made during the year 1986 please contact Denis Murnaghan & Company, Solicitors, 21 Upper Mount Street, Dublin 2 - telephone (01) 785944 - reference BC.

Estate Rev. Fr. Michael Sammon, deceased late of Crossboyne, Claremorris, County Mayo; Monivea, County Galway; and Louisburgh, County Mayo. Will any Solicitor holding a Will for Rev. Fr. Michael Sammon who died on the 20th day of February, 1987, please contact Michael Keane and Company, Solicitors, of Claremorris, County Mayo.

WALSH, Charles, deceased, late of 25A Nun's Island, Galway, formerly of Carrowbeg, Ower P.O., Galway. Would any person having any knowledge of the whereabouts of a Will of the said deceased, who died on the 1st day of February, 1987, please contact Higgins, Chambers & Co., Solicitors, Headford, County Galway. Phone: (093) 35656 and 35722.

MISCELLANEOUS

Students seeks apprenticeship. Passed the Final Examination - First Part in November 1986. Has been accepted for the September Professional Course. Please contact Sheila Maguire, "St. Joseph's", Dublin Road, Portlaoise, Co. Laois.

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General Litigation & District Court; Admitted 1982. Degree B.C.L. Quote reference "D".	Cork
Non contentious work; Taxation Law; Admitted 1985. B.C.L. Quote reference "E".	Dublin & Provinces
Litigation; General Experience; Admitted 1985. Degree B.C.L. Quote reference "F".	Dublin/ Provinces Considered
Good General Experience. Admitted 1986. Degree B.A. Quote reference "G".	Dublin
Commercial; General Experience. Admitted 1982. Degree B. Comm. Quote reference "H".	Dublin
Conveyancing; Tax Law. Admitted 1984. Degree B.A. (Law). Quote reference "I".	Dublin or within travelling distance
20 Years General Experience; Extensive Conveyancing; Admitted 1967. Quote reference "J".	Dublin or within travelling distance
Conveyancing; Probate; Litigation; Admitted 1978. Degree B.C.L. Quote reference "K".	Dublin/ Wicklow/ Offaly
Conveyancing; Litigation; Admitted 1986. Degree B.C.L. Quote reference "L".	Cork/Galway
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Junior Typist: Receptionist; Debtors/Creditors Controls; General Office Duties. Quote reference "4".	Dublin & Provinces
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Secretary: Dictaphone; Dealing with Clients; Telephone; General Office Duties (Limited Legal Exp.). Quote reference "6".	Dublin
Legal Assistant/Secretary: Typing; Shorthand; Bookkeeping; Probate; Administration; Conveyancing; Litigation; Interviewing Clients; Attending various Registries. Quote reference "7".	Part Time Dublin
Secretary: Dictaphone Typist; Experience in dealing with Clients. (No Legal Experience). Quote reference "8".	Dublin
Probate/Trust Executive: No Legal Qualifications but has worked for Top Legal Firms and holds some Accountancy Qualifications. Quote reference "9".	Dublin City/ County

Urgent Vacancies

(Short Random Selection)

EXPERIENCE REQUIRED	Location
Solicitor: With 3 years minimum post qualification. Experience in Litigation particularly Superior Courts; Knowledge of Commercial Work an Advantage; Partnership Prospects. Quote reference "V".	Limerick
Solicitor: Minimum of 5 years experience in Commercial and Conveyancing Law. Excellent Salary and Commissions. Quote reference "W".	Donegal
Solicitor: With approx. 3 years post qualification Experience emphasis on Litigation Plaintiff/ Defendant. Partnership prospects after one year contract. Quote reference "X".	Cavan

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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 notificiation 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.

17th day of April, 1987.

J. B. Fitzgerald (Registrar of Titles)

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

SCHEDULE OF REGISTERED OWNERS

Anne Dunphy, Kildrummy, Windgap, Co. Kilkenny. Folio No.: (1) 1211, (2) 1209, (3) 1050; Lands: (1) Kildrummy, (2) Kildrummy, (3) Garranhaloo; Area: (1) 35a.3r.37p.; (2) 6a.1r.24p.;(3) 27a.0r.0p.; County: **KILKENNY.**

Ted Breslin of Ardara, Co. Donegal; Folio No.: 39529; Lands: Woodhill; Area: 0a.1r.12p.; County: **DONEGAL.**

Edward O'Mahony of Corran, Waterfall, Co. Cork; Folio No.: 5630; Lands: Corran; Area: 63.162 acres; County: **CORK.**

Padraig J. Kinnerk, 112 Loughbollard Estate, Clane, Co. Kildare; Folio No.: 816L; Lands: Loughbollard Commons; Area: 0a.0r.7p.; County: **KILDARE.**

Timothy O'Neill of Bellefield, Enniscorthy, County Wexford; Folio No. 13716; Lands: Enniscorthy; Area: 2,550 acres; County: **WEXFORD.**

Thomas Feely, Mantua, Castlerea, Co. Roscommon; Folio No.: 23579; Lands: Ballyconboy; Edenan and Kinclare; Area: 41a.3r.32p., 1a.0r.15p.; County: **ROSCOMMON.**

Eileen Stephenson c/o Thos. Crozier & Son, Solicitors, 12 Lr. Hatch Street, Dublin 2; Folio No.: 411F; Lands: Cronagort East; Area: 1a.2r.5p.; Coiunty: **CLARE.**

John Moore McDowell & Nuala McDowell; Folio No.: 50123F; Lands: Situate on the North side of Wasdale Grove in the Parish of Rathfarnham and District of Terenure; Area: .....; County: **DUBLIN**

Patrick Egan, Clonfert, Ballinasloe, Co. Galway; Folio No.: 47285; Lands: Clonfert (Buston), Bishops Islands, Glebe, Clonfert Demesne; Area: 16a.3r.38p., 7a.2r.14p., 7a.0r.8p., 5a.0r.24p.; County: **GALWAY.**

David Fitzgerald of Clash East, Tralee, Co. Kerry; Folio No.: 17697; Lands: Clash East; Area: .....; County: **KERRY.**

Matthew Kennedy of Carnew, Co. Wexford; Folio No.: 2620; Lands: Cronyhorn Upper (part); Area: 23a.0r.12p.; County: **WICKLOW.**

Michael & Philomena Reynolds, 52 Lynn Heights, Mullingar, Co. Westmeath; Folio No.: 3151F; Lands: Ballinderry; Area: .....; County: **WESTMEATH.**

Martin Sinnott of 30 Bishopswater, Wexford, Co. Wexford; Folio No.: 19320; Lands: Ballysheen; County: **WEXFORD.**

Frank Dolan of Drumhurrin, Glangevlin, Co. Cavan; Folio No.: 19779; Lands: Tullynafreave; Area: .....; County: **CAVAN.**

Patrick McLaughlin of Cabadooey, Carndonagh, Co. Donegal; Folio No.: 700; Lands: Altashane or Cabadooey; Area: 15a,1r.36p.; County: **DONEGAL.**

Joseph Price, Loobnamuck, Swinford, Co. Mayo; Folio No.: 30204; Lands: Loobnamuck, Loobnamuck; Loobnamuck; Area: 20a.2r.12p., 10a.0r.16p., 0a.2r.6p.; County: **MAYO.**

Una Teresa Shelley, Mary Josephine Kennedy & Ellen McElligott of St. Columban's Convent, Magheramore, Wicklow; Folio No.: 8229; Lands: Magheramore; Area: 49a.3r.26p.; County: **WICKLOW.**

Edward Moran of Ballyhahill, Co. Limerick; Folio No.: 15491; Lands: Ballyhahill; Area: 0a.0r.11p.; County: **LIMERICK.**

Thomas Wilfred Carleton of Newpark, Drum, Monaghan, Co. Monaghan; Folio No.: 2952F; Lands: Maghernakelly; Area: 0.975 acres; County: **MONAGHAN.**

William Supple of Ballyvogue More, Goleen, Co. Cork; Folio No.: 13394; Lands: Ballyvogue More; Area: 3.088 acres; County: **CORK.**

Thomas Kerr of Drumroragh, Ballyjamesduff, Co. Cavan; Folio No.: 1104; Lands: Drumroragh; Area: 13a.3r.8p.; County: **CAVAN.**

John H. Kidd of Mulgeeth House, Enfield, Co. Kildare; Folio No.: (1) 12482, (2) 2902; Lands: (1) Mulgeeth, (2) Mucklon; Area: (1) 124a.0r.0p., 23a.2r.18p., 45a.3r.0p.; (2) 45a.0r.38p.; County: **KILDARE.**

Denis Mulligan of Rathmichael, Shankill; Folio No.: 465; Lands: The property situate in the Townland of Rathmichael and Barony of Rathdown; Area: (Hectares) 3.660. County: **DUBLIN.**

Freda Quinlan; Folio No. 72389L; Lands: The property being Flat No. 1 on the Ground Floor of the Block of Flats, known as Husband Court, situate at Percy Place, in the Parish of St. Peter, District of Pembroke and City of Dublin; Area: ..... County: **DUBLIN.**

Patrick Dineen of Garraneduff, Millstreet, Co. Cork. Folio No.: 1537; Lands: Garraneduff; Area: 78a.3r.18p.; County: **CORK.**

Patrick Andrew Kinsella, Reenmore, St. Mary's Road, Arklow, Co. Wicklow. Folio No.: 3678; Lands: Boleynass Upper (parts); Area: 7a.3r.20p.; County: **WICKLOW.**

Thomas Keenan of Abbeyshrule, Co. Longford. Folio No.: 9802; Lands: Lissakit; Area: 5a.3r.5p.; County: **LONGFORD.**

John James Murphy & Patrick Murphy, Beaghkearns, Monaghan. Folio No.: 2992; Lands: Lissacraw; Area: 7a.3r.14p.; County: **MONAGHAN.**

John O'Connell of The Presbytery, St. Theresa's, Shanganagh Terrace, Ballybrack, Co. Dublin. Folio No.: 3610F; Lands: Clonganny (parish of Donaghmore); Area: 0.713 acres; County: **WEXFORD.**

Peter Rodgers and Frances Rodgers both of 204 Ratoath Road, Cabra, Dublin 7. Folio No.: 39931L; Lands: The property known as No. 14 Broombridge Road in the Parish of Finglas, District of Cabragh, Co. Dublin; Area: . . .; County: **DUBLIN.**

Brendan Lynott, Carrowgarve, Crossmolina, County Mayo. Folio No.: 21823; Lands: Kinard; Carrowgarve South; Area: 10a.3r.30p., 43a.3r.12p.; County: **MAYO.**

Most Reverend Joseph Rodgers and others. Folio No.: 15106; Lands: Clonroad Beg; Area: 5a.0r.7p.; County: **CLARE.**

Edward Byrne, Mary Byrne and Patrick Joseph Byrne, all of 199 Collins Avenue West, Donnycarney, Dublin 9. Folio No.: 3319F; Lands: The property situate on the South side of Collins Avenue in the Parish of Artane, District of Clonturk and City of Dublin; Area: . . .; County: **DUBLIN.**

Michael Brennan, Ardeevin, Castleplunkett, Castlerea, County Roscommon. Folio No.: 14285; Lands: Ardeevin, Ardeevin; Area: 25a.1r.34p., 7a.1r.5p.; County: **ROSCOMMON.**

Niall O'Driscoll of Carrigbrea, Redemption Road, Cork. Folio No.: 4655L; Lands: North of Glen Heights Road; Area: 0a.0r.4p.; County: **CORK.**

Nellie Ramsey of Figary, Fahan, Co. Donegal. Folio No.: 9826; Lands: Figary; Area: 9a.3r.5p.; County: **DONEGAL.**

Eileen Murphy of "Martinville", Douglas Lawn, Cork. Folio No.: 25861; Lands: Callas; Area: 1a.0r.5p.; County: **CORK.**

Cyril F. and Marie Johnston both of Kileevan, Newbliss, Co. Monaghan. Folio No.: 1317F; Lands: Clonmore; Area: 0a.0r.14p.; County: **MONAGHAN.**

THE LAND REGISTRY
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IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF DUBLIN SIMON COMMUNITY **IN RESPECT OF 36, MELROSE AVENUE, DUBLIN.**

TAKE NOTICE that Dublin Simon Community having Registered Offices at 21, Marlborough Street, Dublin 1, has lodged an Application for its registration on the Leasehold Register free from encumbrances in respect of the above mentioned property.

Some of the original documents of title 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 missing original documents of titles are in existence. Any such notification should state the grounds on which the documents of title are held and quote Reference No. 83DN15393.

PAT O'BRIEN.
Examiner of Titles.

Lost Wills

CALLAGHAN, Sean, bachelor, late of 10, Knockmenagh Road, Clondalkin, Dublin 22. Would any person having knowledge of the whereabouts of a Will of the above named Deceased who died on the 3rd February, 1987, please contact Becker, Tansey & Co., Jubilee House, New Road, Clondalkin, Dublin 22.

DONEGAL, Maurice J., late of 17 Seabury Apartment, Sidney Parade Avenue, Sandymount, Dublin. Would any person having knowledge of the whereabouts of a Will (if any), of the above named Deceased who died on 6th March, 1987, please contact Messrs. Philpott, Creedon & Co., Solicitors, 43 Grand Parade, Cork.

GARRIHY, Austin, deceased, late of Ballymacrava, Kilshanny, Co. Clare. Will anybody having any knowledge of any Will made by the above named who died on the 27th November, 1986, please contact I. M. Houlihan & Sons, Solicitors, 10/11 Bindon Street, Ennis, Co. Clare, who are acting for the next of kin. (Tel.: (065) 28706/20707).

GILHEANY, Michael, late of 106 Foxrock Avenue, Foxrock, Dublin. Would any person having knowledge of a Will of the above named deceased who died on the 24th of January, 1987, please contact Arthur O'Hagan & Sons, Solicitors, of 9 Harcourt Street, Dublin 2, reference: 34.

HEWITT, John, (otherwise John J.), the Deceased late of Killeena, Knockraha, County Cork. Will any person having knowledge of a Will of the above named Deceased, who died on the 21st day of April, 1943, please contact Eamonn Fleming, Solicitor, 23 South Main Street, Bandon, Co. Cork. Telephone: (023) 44211.

(Continued on p63)

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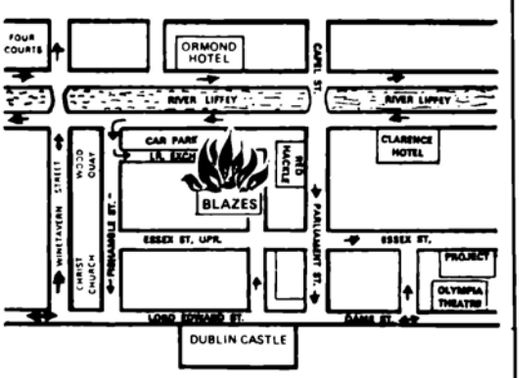

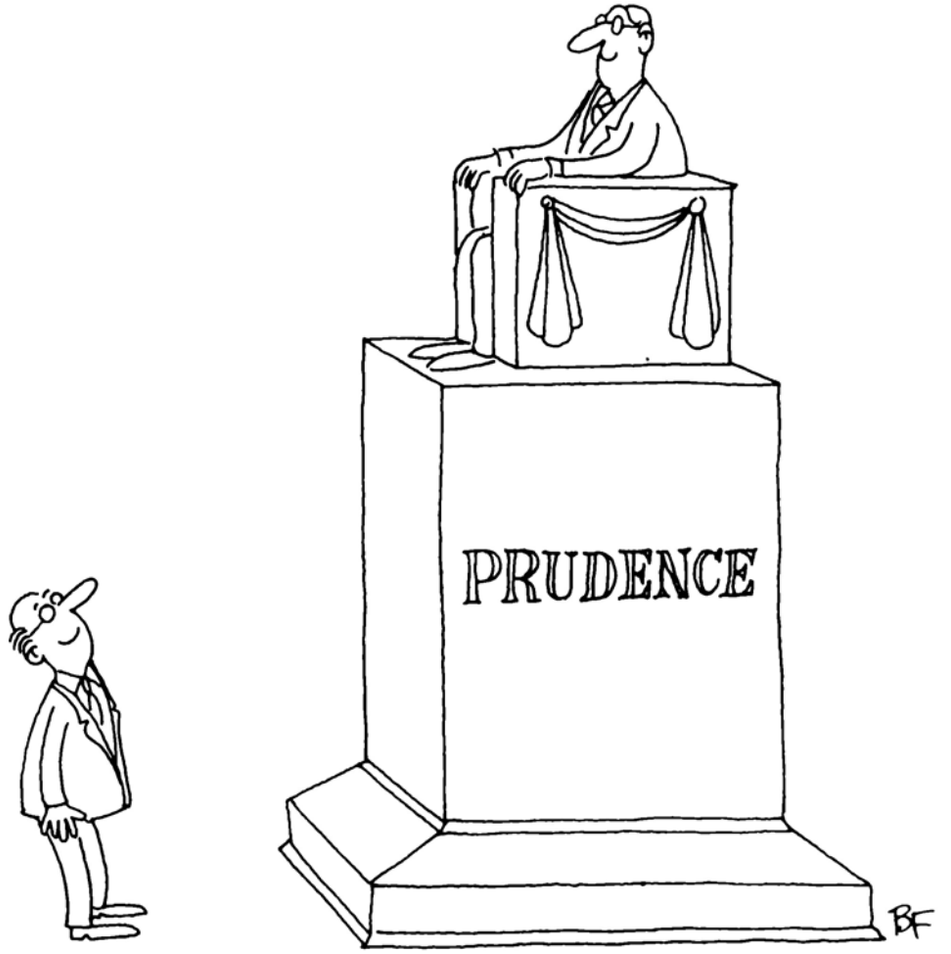

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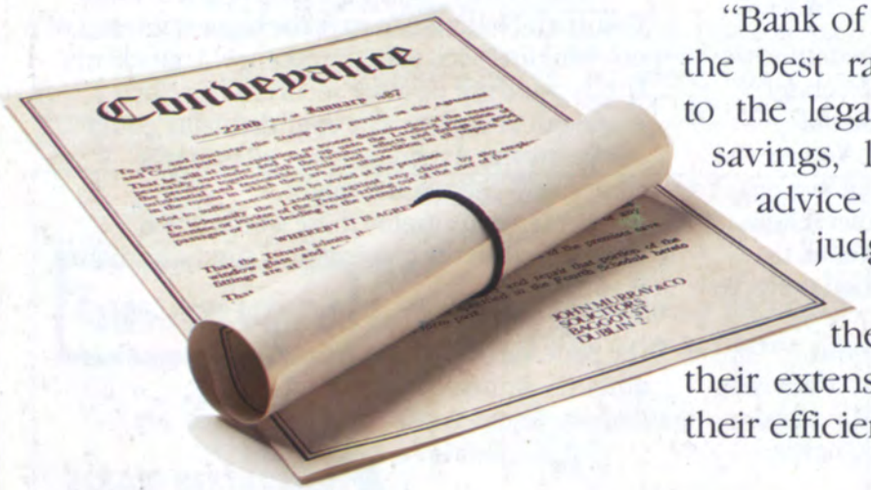

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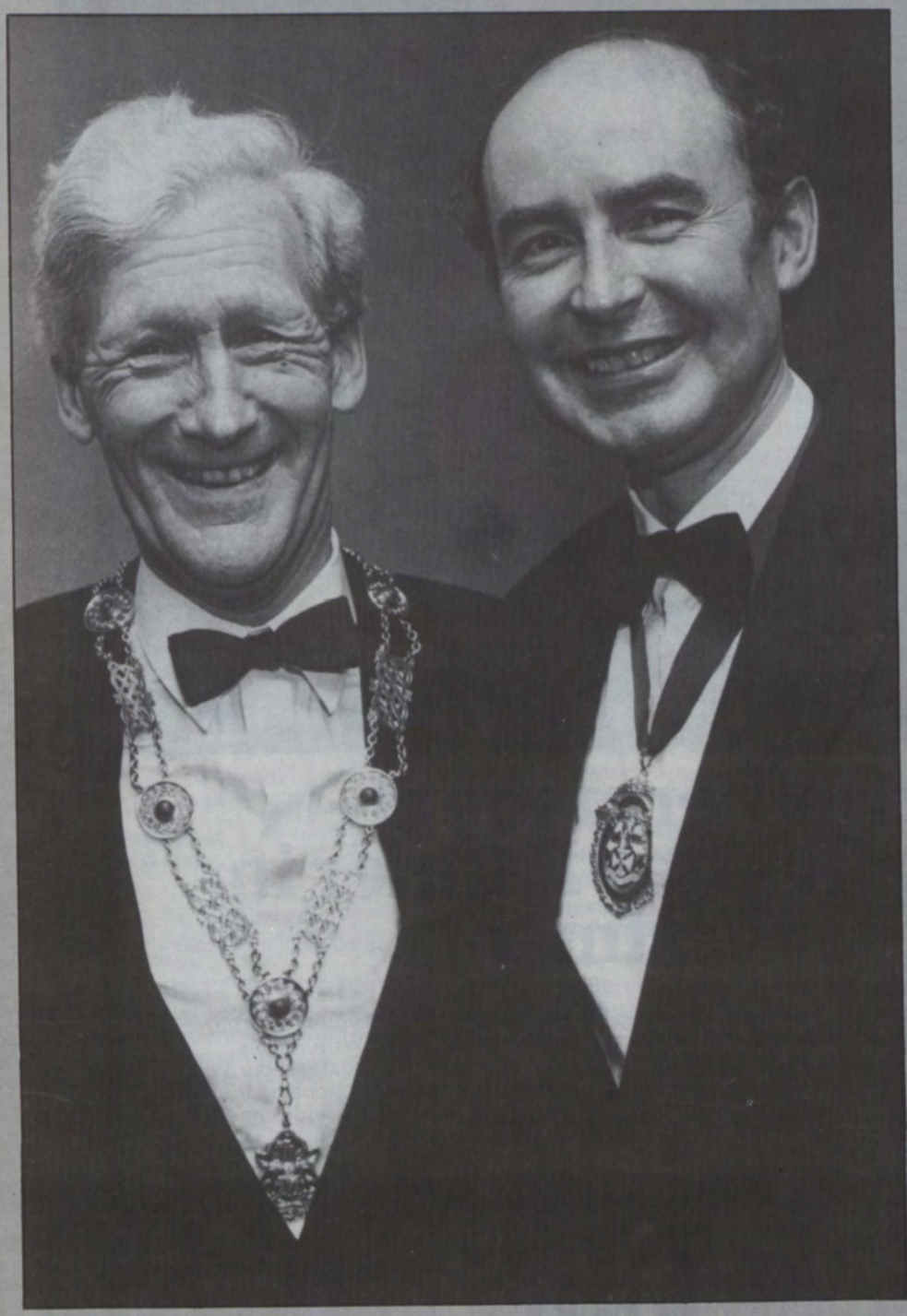

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INCORPORATED LAW SOCIETY OF IRELAND
Vol. 81 No. 3 April 1987

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Cover photo:
Law Society Council Dinner.
The President of the Law Society, David R. Pigot (left) with Tom Burgess, President, Law Society of Northern Ireland.

Viewpoints

It seems curious that at a time when a major British publisher is announcing the forthcoming publication of "A Guide to the Small Hotels of Britain and Ireland", new regulations made by Bord Failte seem likely to ensure that, in Dublin and Cork at least, no new small hotels will ever come into being.

The new regulations which Bord Failte proposes to make in 1987 will require an applicant seeking to register a new hotel in the Dublin and Cork Metropolitan districts to provide at least 45 guest bedrooms. The same regulation will apply to applicants for registration where premises have not been registered in the Register in any of the three preceding years. Practitioners will be aware of the considerable difficulties which have arisen in relation to "licensed premises" which appeared to have a publican's licence, but where in fact the only licence in existence was a hotel licence, which was no longer valid, the premises being no longer registered as a hotel.

The new proposals are disturbing in that they seem to reveal an attitude in Bord Failte which leans in favour of the construction of those faceless hotels whose internal layout is so similar that the visitor loses all sense of identity of the country or city in which the hotel is situate once he passes through its doors. One of the great virtues of the hotel industry in continental Europe, in countries such as France, Switzerland and Austria is the attractive family-run small hotels, even in the largest cities. Impersonality is only too readily available in the current world and it seems a pity that Bord Failte seem determined to increase it's influence in Ireland.

Snatch and Grab

The publicity given to recent tug-of-love cases involving the removal of children in the custody of one parent in one country to another by the other parent highlights the deficiencies of our legal system in this area. In one case, the President of the High Court, on being advised that the parent who had removed a child from the custody of the other parent in Ireland was believed to have left the jurisdiction, was reported as having said that there was little he could do to assist in such circumstances.

His position would have been very different had this country become a party to the Hague Convention on the Civil Aspects of International Child Abduction adopted in 1980, as recommended by the Law Reform Commission in 1985 and given the Convention the force of law in this jurisdiction.

The Convention, which the United States, the United Kingdom, Canada, France, Portugal and Switzerland have adopted, has as its principal purpose the return to its country of habitual residence of any child who has been unlawfully abducted into another country. The appropriate authority in the country to which the child has been taken is requested to order its return to the country of habitual residence if legal proceedings are instituted. In addition, the Convention establishes a system of co-operation between centralised authorities in each country to facilitate and expedite the repatriation process.

The Convention, while in one sense limiting the powers of Courts of a country to exercise its own jurisdiction over persons within its

(Contd. on p.73)

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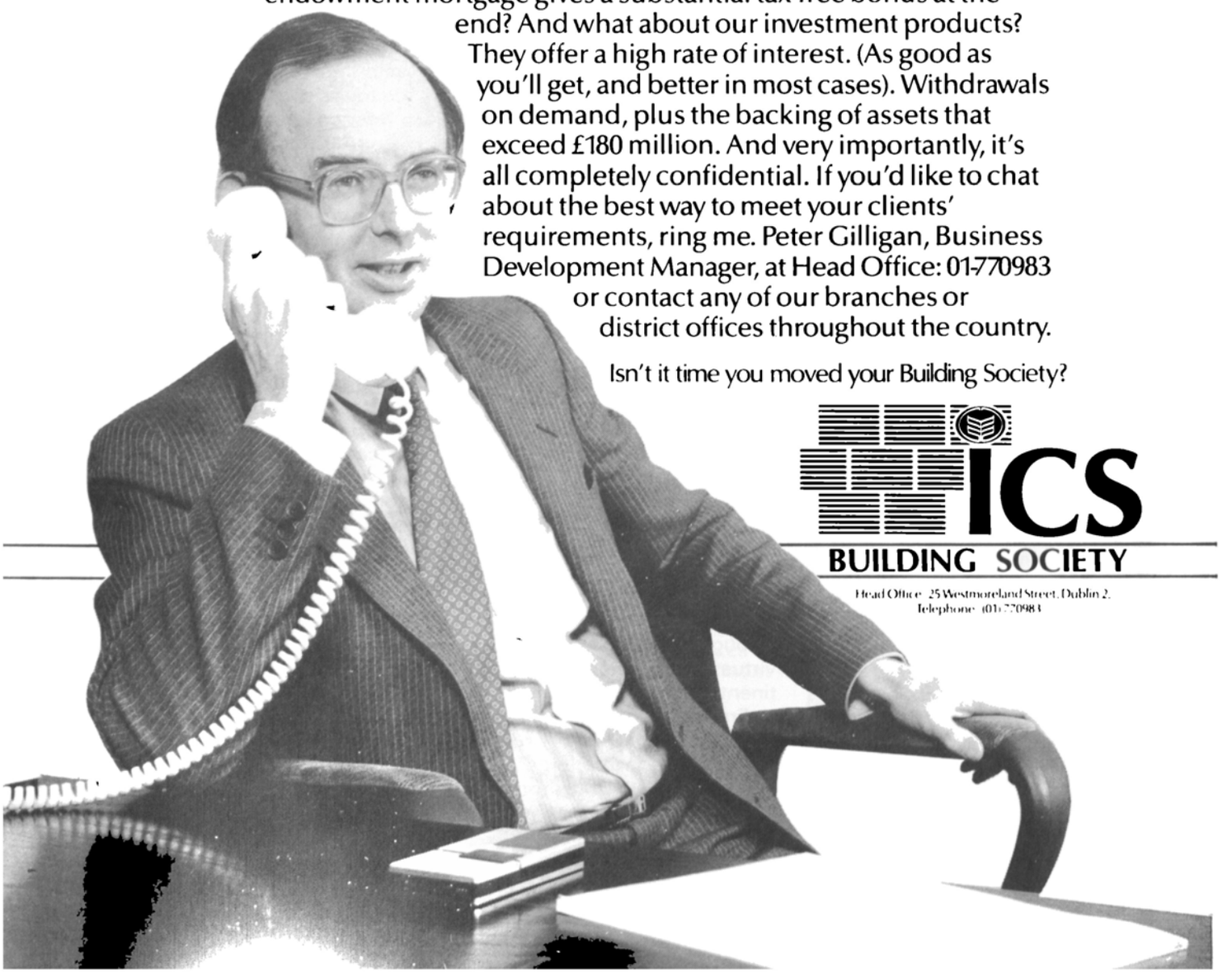

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The Judge in Ireland
Part 2

Band of Restraints

The judges do make law – but within narrow confines. The judges exercise their judicial power within a band of restraints – many of them self-imposed. As an introduction to the concept of restraints on the judicial power, it would be difficult to pass over the eloquent words of the philosopher judge, Justice Cardozo:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant, roaming at will in the pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains."[48]

The first restraint on the judge is that there must be a concrete issue to be decided between bona fide litigants. An exception is the President's power under Article 26 of the Constitution to refer a Bill passed by both Houses of the Oireachtas to the Supreme Court for a decision as to whether the Bill or any specified provision is repugnant to the Constitution. In any application for judicial review the parties must have "standing".[49] The litigant's interest must be adversely affected or be in imminent danger of being adversely affected. Where the constitutionality of a statute is challenged there is a judicial doctrine that laws passed by the Oireachtas are presumed to be constitutional unless and until the contrary is clearly established.[50]

The judge in his or her decision is expected to conform to certain well defined principles. There is above all else in the judicial process a sense of the legal order being determined by reason. The judge invariably gives reasons for his or her decision. Often these reasons are reduced to writing. The conclusion reached by the judge is expected to be based on a process of logical reasoning. The decision of the judge may be the subject of review by a higher court. The decisions of the judges are subject to criticism by the legal profession, including academic lawyers.

by
Eamonn G. Hall,
Solicitor*

A cardinal restraint on judges is the application of the doctrine of *stare decisis* – the almost sacred principle of the common law whereby precedents are binding and must be followed. Each division in the judicial hierarchy considers itself bound by the *ratio decidendi* (the reason or grounds of a judicial decision) of a case decided in an upper division. The Supreme Court, the apex of the internal judicial pyramid, does not consider itself bound by its former decisions.[51] Many lawyers and judges feel trapped by precedent. Sometimes the impression is given by a judge that the conclusion reached in a case being decided in court might be otherwise but for the binding precedent of a case decided by a higher court. Often in cases the search for avenues of escape from the binding precedents may not have been exhausted. Frequently it is possible to distinguish the case being decided from the essence or *ratio decidendi* of the earlier decision which appears at first reading

VIEWPOINTS (from p.71)

national territory, in another sense enhances the operation of the principle of the comity of Courts – that Courts in one country will normally recognise the validity of Orders of Courts in another country. To put the matter at its lowest, the number of cases in which the powers of a country's Court might be limited by the Convention might well be equalled by the number in which its orders could no longer be flouted by the removal of a child from its jurisdiction.

There are no more difficult cases than those involving the custody of children of broken marriages. It is hard to avoid concluding that, on occasion, the motive behind applications for custody is more to do with one spouse scoring a victory over the other than with the best interests of the child. If a child is in the lawful custody of a person or body in its country of habitual residence, it should be entitled to remain in such custody and not be at risk of being "snatched" to another country.

It may be that one reason which has delayed Ireland's adoption of the Convention is that consideration is being given to ratifying the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of Custody of Children, which Ireland signed in 1980. If so, it must be said that the two Conventions are far from mutually exclusive; adherence to one does not preclude adherence to the other and, indeed, since the Hague Convention is already in force in two non-European countries, the U.S. and Canada, with which Ireland has extensive contracts, there must be a strong argument for adopting the Hague Convention first. Seven years after these Conventions were prepared it is time for Ireland to take action, preferably to give both the force of law in Ireland, but certainly to ensure that at least the Hague Convention is brought into operation. □

to be binding. This can be done by narrowing down the essence of the earlier precedent to the minimum to which its reasoning may be reduced. Equally in a suitable case a judge can adopt the widest formulation that the *ratio decidendi* of a precedent will allow.

McCarthy J. in a revealing foreword to Byrne and McCutcheon's *The Irish Legal System: Cases and Materials,* blames lawyers in Ireland for "taking refuge in an unthinking and uncritical citation of precedent".[52] McCarthy J. noted "the degree to which the citation of precedent is made a substitute for reasoned argument and analysis of principle".[53] Sometimes there is need for a judicial boldness of spirit. Gavan Duffy J. in 1941 noted that "the absence of precedent would not weigh a feather in the scale" against the plaintiff's right "to have justice done"[54] – a case of *fiat justitia ruat coelum* ("let justice be done, though the heavens should fall").

The fertility of our case law, much of it unreported, may ultimately have the effect that the citation of precedent will lose its primacy. Judges may rely less on precedent and more on general principles.

Influences on the judicial process

Leaving aside the facts of the instant case, who or what influences the judges in the decision-making process? Walsh J. has observed, extra judicially, that in the context of constitutional law

> "there may yet be a field for a fascinating study in how judges choose among the possible solutions to any matter which comes before them . . . . Are their choices influenced by personal values and experience acquired either before or after coming to the Bench and by their relationships with judicial colleagues or other public officials? It may well be that judicial decisions are to some extent affected by the socio-economic background of the judge himself and by the environment in which he lives. It would be unreal to believe that a judge can be kept in a vacuum, isolated from all the currents of public opinion and the cultural and moral values of the people among whom he resides everyday."[55]

Pending that fascinating study – one can only surmise.

The advocate's influence on the judicial process may often be a crucial factor in finely balanced cases in deciding cases one way or the other. In time, in the higher courts, more emphasis will be placed on written submissions in advance of court hearings. At oral hearings, the interaction between the Bench and the advocate can often assist in narrowing the issues which fall for consideration. A Court, in the words of Justice Frankfurter, a judge of the United States Supreme Court, is not "a dozing audience for the reading of soliloquies but acts as a questioning body, utilizing oral argument as a means of exposing the difficulties of a case with a view to meeting them".[56] This view contrasts with the sentiments expressed in the motto which Christopher Palles, the last Lord Chief Baron of the Court of Exchequer in Ireland (1874 – 1916) was stated to have before him in court which read:

> "Keep your mind open and your mouth shut. When you open your mouth, you shut your mind."[57]

There are times for questions and times for silence.

There is the influence of academic writers. The prolificacy of our academics with the publication of textbooks on Irish law and critical articles in the law journals will have an increasing formative influence on the judicial process. The old rule that an academic writer was not an authority until he was dead – because he could then no longer change his mind – is no longer observed. In theory the legal academic writers have "the freedom . . . to differentiate the good growth from the rubbish" and to "mark for (judicial) rejection the diseased anachronism".[58] The day is dawning when Irish judges faced with a doubtful point of law will want to know what Irish academic writers have written about the issue. Barristers and solicitors appearing in such cases may be expected to come fortified with the Irish Jurist, the Dublin University Law Journal, the Irish Law Times and perhaps the Gazette of the Law Society, together with a pile of Irish textbooks. Alternatively, the lawyers may be expected to research the work of legal writers in their chambers and offices and come fortified with extracts from their comprehensive legal databases!

Intuitive judgment – the informed hunch – may play its part in the process of judgment. Intuitive judgment is often the product of extensive and balanced experience. The revealing insight of Justice Holmes in his lectures on the Common Law powerfully emphasises the role of experience:

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[59]

Intuition itself, however, cannot represent the essence of the judicial process. To give absolute reign to the jurisprudence of sentiment or feeling would be a mere licence for unfettered self-expression.

Consequentialism – consideration for the consequences that may flow generally if a particular case is decided in a particular way – may exert an influence, or perhaps afford an additional justification for deciding a finely balanced case in a particular way.

Have the religious teachings of the churches influenced the judges in Ireland in their judgments? It is estimated that ninety-five per cent of persons in this jurisdiction profess to be Roman Catholics. This statistic is obviously reflected in the religious persuasion of the judges. Professor Basil Chubb has observed that in the political domain "the impact of Catholic

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teaching has always been evident in the content of public policy on marriage, on divorce, contraception, censorship, health services and above all, education".[60] In the judicial domain, there was considerable scope for the influence of the teachings of the Roman Catholic Church in cases with a moral and social element. Writing in 1954 Vincent Grogan, a barrister and legal commentator, enunciated:

> "Our Courts and lawyers are not, however, left to the hazards of the unaided application of pure reason. They have judicial knowledge of the Universal Declaration of Human Rights. Further the Constitution recognises the truth of the Christian religion. Divine Revelation in the Old and New Testaments and the exposition of the Doctors of the Church are their binding precedents. The pronouncements of modern Christian leaders on the application of Divine Teaching to appease human problems are available for their guidance. Finally, in seeking for enlightenment, it is not too much to ask the individual, whatever his personal religious persuasion, to have particular regard to the Social Encyclicals in view both of their intrinsic merit and the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the majority of the citizens."[61]

Today, the official teachings of the Roman Catholic Church are highly unlikely to be the determining influence in any case involving a moral or social issue. The determining influences are more likely to be the spirit and letter of the Constitution, conscience and the aspirations that the judge holds for the nation.

Other influences on the judge are difficult to measure and may lie in the realm of the quasi-spiritual. These influences have been expressed by Evan E. Evans:

> "(O)ne of the most potent (of numerous influences) is the presence of a flame that burns within, the strength and constancy of which determines its influence. For want of a better name, we call it our conscience. Still another influence is the desire to justify the faith and confidence and sacrifice of others; the desire to measure up to parental expectations . . . . Then there is the determination to adhere to the resolutions and ideals of our youth. And finally, self respect is quite essential to happiness. A judge may get along without the good will and even the respect of others, though he may deeply desire them. But he can hardly live happily with himself without self respect . . . ."[62]

Judicial Style

Men are ruled with words. Pollock C. B. boldly stated that "Judges are philologists of the highest order".[63] Walsh J.'s extra-judicial observations on what may be loosely termed in this context "judicial style" are noteworthy:

> ". . . the judgment should be clear and unambiguous. When after careful study of all the relevant authorities, the judge feels that he can pronounce a clear decision, it is unnecessary to encumber it by having every step of the reasoning ladder laden with citations of other authorities. There is nothing more irritating to the reader than the rambling judicial opinion which pieces together great numbers of semi-irrelevant propositions of law, wanders through numerous cited cases and ends up by giving the impression that somewhere or other the judgment has said what the law is but leaves unclear what detail of the rule is newly decided."[64]

The words of the judge have the potential of representing the living embodiment of the law – long after the judge is gone. Even a dissenting judgment can "appeal to the brooding spirit of the law, to the intelligence of a future day".[65] William Hazlitt in his *Table Talk* stated that "words are the only things that last forever". Bacon put it another way: "Words when written, crystallise history". A judge's claim to immortality may not only rest on the subject matter of any case but also on the manner in which the judgment is expressed. The layman may care little for *elegantia juris,* but an eloquent literary style can preserve a judgment for posterity.

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Conclusion

Law, like life, has "its epochs of ebb and flow".[66] Each generation thinks that it is in the throes of a flood season. Each generation thinks that it is on the threshhold of exciting and challenging times. Our generation is no different. The essence of what is worth preserving is often that which is most constant. The due exercise of reason, intelligibility, analytical solidness and the spirit of integrity and impartiality have been the characteristics of what is best in the judicial process for centuries. These characteristics enable the judges in Ireland to act as a stabilising influence. □

NOTES

48. *The Nature of the Judicial Process,* (Yale University Press), p.141.
49. See *Cahill -v- Sutton* (1980) IR 269.
50. See *Pigs Marketing Board -v- Donnelly* [1939] IR 413). This principle has been repeated in many subsequent cases.

51. See *The State (Quinn) -v- Ryan* [1965] IR 70 and *Attorney General -v- Ryan's Car Hire Ltd.* [1965] IR 642.
52. Professional Books, 1986 p.iii.
53. Ibid.
54. *O'Doherty -v- A. G. & O'Donnell* [1941] IR 569.
55. Foreword to O'Reilly and Redmond, *Cases and Materials on the Irish Constitution,* (Inc. Law Society of Ireland 1980) p.xii.
56. "Memorial for Stanley M. Silverberg" in P. Elman (ed.), *Of Law and Men* (New York, Harcourt Brace & Co., 1956), pp.320 – 21.
57. V. T. H. Delany, *Christopher Palles* (A. Figgis & Co. Ltd., 1960) p.142.
58. R. Traynor, (Judge of the Californian Supreme Court) "Law and Social Change in a Democratic Society" 1956, *University of Illinois Law Forum.* 230, 233.
59. *Common Law* p.1.
60. *Government and Politics of Ireland,* (Longman, London, Second Edition) p.18.
61. V. Grogan, "The Constitution and Natural Law" *Christus Rex* VII (1954) 201 at 218.
62. E. A. Evans "Political Influences in the Selection of Federal Judges" *Wisconsin Law Review* (May 1948).
63. *Ex. p. Davis* (1857) 5 W.R. 522 at 523.
64. Foreword to McMahon and Binchy *A Casebook on the Irish Law of Torts,* (Professional Books) 1983 p.vi.
65. C. Evan Hughes *The Supreme Court of the United States* (New York, Columbia University Press, 1928), p.68.
66. H. D. Hazeltine, 1 *Cambridge Law Review* p.1.

**Mr. Hall is the current President of the Medico-Legal Society of Ireland. This paper is the edited text of the presidential lecture delivered to the Medico-Legal Society of Ireland on the 29th October 1986. Part I of this article appeared in the March 1987 Gazette.*

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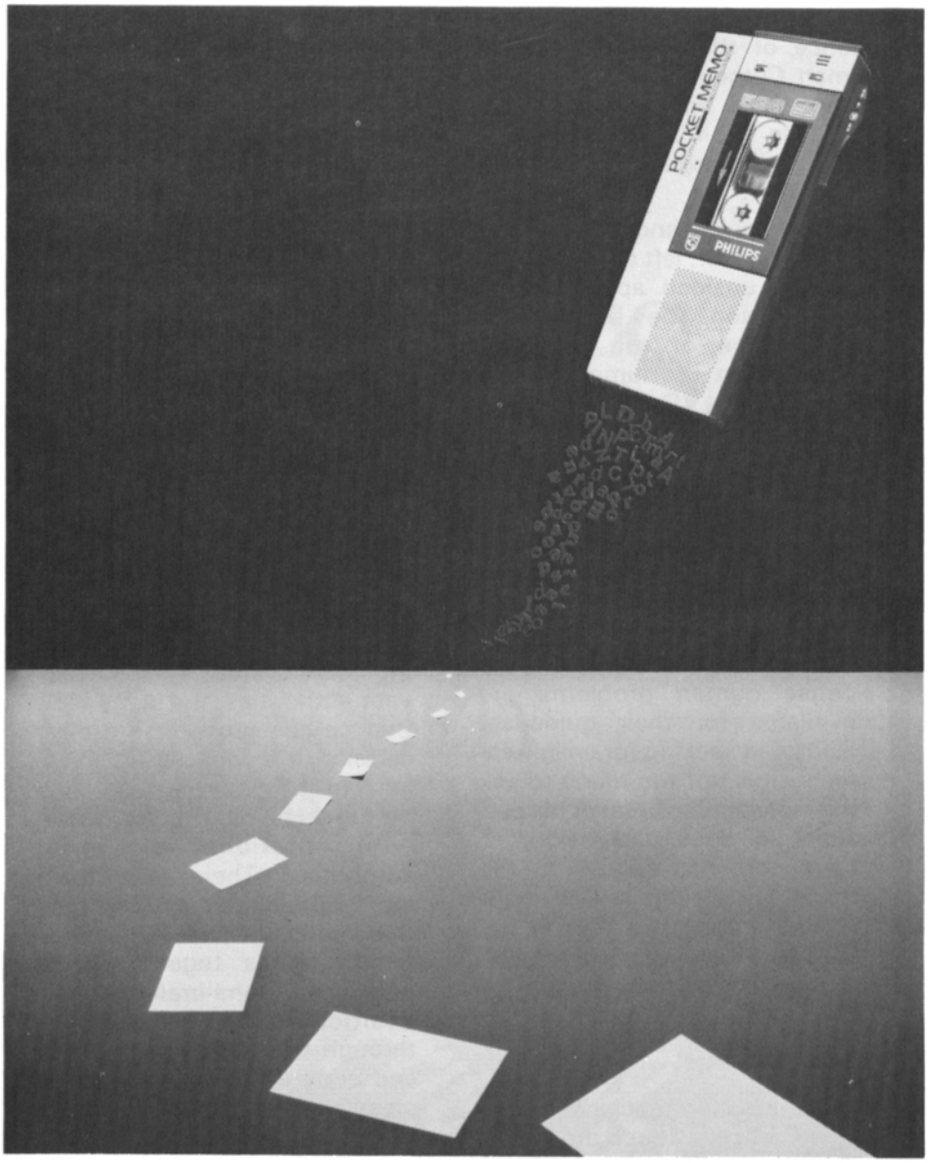

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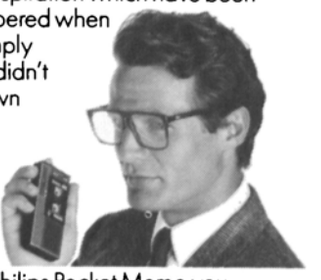

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Practice Note

Compliance with Planning Conditions when Estate in Charge

The Conveyancing Committee and the Joint Committee of the Law Society/Building Societies have been considering for some time the question of conveyancing practice in relation to evidence of compliance with conditions of Planning Permissions. A particular problem area is the sale of second hand houses where there is no evidence of compliance with financial or other conditions. It had been suggested that solicitors should not concern themselves about compliance with conditions where it was established that the roads and services had been taken in charge by the Planning Authority. The Committees have had discussions with representatives of the County and City Managers Association and Dublin County Council and accordingly make the following recommendations: —

1) Conveyancers dealing with the second or later purchase of residential houses where the roads and services are in charge of the Local Authority should not concern themselves with enquiries as to compliance with financial conditions in a Planning Permission unless they are on notice of some problem.
2) This recommendation applies only to houses forming part of a building estate and built at the same time as the main development. It does not apply to once-off houses or to infill development.
3) There have been instances where houses forming part of a building estate had been built without Planning Permission so this recommendation does not change the obligation on a purchaser's solicitor to see that there is, in fact, Planning Permission for the house and where appropriate under other recommendations to seek a certificate from an Architect or Engineer that the house has been built in accordance with the same.
4) The Committee wishes to draw the attention of practitioners to its long standing recommendation that it is unreasonable for solicitors to insist now on being furnished with documentation which it was not the practice to furnish at the time of a previous investigation of title. In particular, where payment of financial contributions and/or levies are being paid by instalments, solicitors should only be concerned with the payment of contributions up to the date of the first purchase of any house. □

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Reciprocity of Qualifications and Employment Opportunities Abroad

The purpose of this article is to update and amend an article bearing the same title which appeared in the April, 1986 Gazette. The objective is a more detailed examination of the position in Australia.

by
Professor Richard Woulfe
Director of Education, The Law Society

Traditionally, the State of Victoria in Australia has been the only other jurisdiction where an Irish solicitor could be admitted and could commence practice with little difficulty. Last year, however, new admission rules were introduced by the Council of Legal Education in Melbourne. Enquiries should, in the first instance, be addressed to:

Board of Examiners for Barristers and Solicitors,
Federal Court Building,
450 Little Bourke Street,
Melbourne 3000,
Victoria,
Australia.

A solicitor recently qualified in the Republic of Ireland must present himself for examination in Constitutional Law, Administrative Law and the Law of Property and then spend 12 months in a solicitor's office in Victoria. However, an Irish solicitor qualified for at least five years would be exempted from the requirement of post-admission practice and will be admitted to the Roll of Solicitors in the State of Victoria once he has passed the examination in the three subjects mentioned and observed the admission procedure.

None of the other Australian States recognise Irish legal qualifications but it is possible for a solicitor admitted in the State of Victoria to move to other states on meeting the requirements of those states.

No one, however, may enter Australia without a visa. Visas are of three types. A visitor's visa is the one given to people making a holiday trip to Australia but the holder of such a visa may not engage in employment in Australia. A working holiday visa is available to those in the 18–25 year age bracket. The purpose of the working holiday scheme is to enable young people to work for short periods in different locations in Australia and to fund such visits – at least in part – by taking temporary employment. The working holiday visa may not last beyond 12 months. The last type of visa is the migrant visa. An Irish solicitor wishing to live in Australia and take up employment there would require a migrant visa.

The following categories of migration visa are identified:–

1. Family Migration

The spouse, fiance, dependent child or parent of an Australian citizen or resident can migrate to Australia but must be sponsored. The Australian Authorities must be satisfied as to the good character and sound health of the proposed migrant and this applies across the board to all categories.

The independent and concessional category includes brothers, sisters, adult children, nieces and nephews of an Australian citizen or resident. People within this category must satisfy a points score and they are considered under the headings of employability, age (between 18 and 35 is the easiest time to move), education and skills – they must have a trade or profession which can be recognised in Australia. Sponsorship by persons within the listed degree of kindred gives extra points and all candidates must pass the points test based on these criteria. The sponsor must have been resident in Australia for at least two years and if the sponsor is an Australian citizen an extra five points are available.

2. Migration by skilled workers

If the skills of the proposed migrant lie within an area already well served by the existing Australian workforce then his prospects of obtaining a migrant visa are not good. If, on the other hand, he is on the list of occupations in demand in Australia then he gets an extra five points. It is within this area that employer nomination comes in. If an employer can prove to the Australian Authorities that a post cannot be filled by an Australian then the employer can nominate a migrant. This can go as far as group nominations for certain categories of persons in short supply in Australia such as nurses. Unhappily the profession of solicitor is not one where demand exceeds supply in Australia and it will be seen that lawyers are not included in the following list of persons whose professions or trades bring them within this category:–

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Employer Nomination Scheme:—

It really must be shown that Australia's labour pool is unable to fill the employer's needs and the vacancy must be:

a) genuine.
b) The employment must be full-time and permanent.
c) The proposed migrant must be experienced (3—5 years of on-the-job training).

3. Business Migration

This is confined to those going to Australia to expand business there. Proposed migrants must have a successful business record, feasible business plans of potential benefit to Australia and sufficient capital to establish themselves.

4. Retirement Migration

People who wish to retire in Australia must be over 55 and have adequate funds.

5. Special Eligibility Migration

Consideration will be given to people with a record of achievement in creative or sporting activities which would be seen as benefitting Australia.

6. Refugees and Special Humanitarian Migration.

It should be borne in mind that migration visas take a very long time to process.

Readers are reminded of something which was mentioned in the earlier article — applications for a migration visa for an Irish solicitor should come from the employer in Australia. An Irish solicitor seeking to work as a solicitor in Australia has little hope of a successful outcome to his application — made through the Australian Embassy, Fitzwilton House, Wilton Terrace, Dublin2 — unless he or she marries an Australian.

I am indebted to Mr. Gavin Buckley of Mallesons, Stephen, Jacques for up-to-the-minute information on the migration scene. □

V.A.T. blocks access to Courts

VAT, in some instances, has created inequality in the right of access to the Courts, said the President of the Law Society, Mr. David Pigot, when addressing new solicitors at the Parchment Presentation ceremony in March.

"It is obvious that the imposition of VAT greatly increased the cost, to clients not registered for VAT, of legal representation and advice . . . In rough and ready terms the cost of access to the Courts for a person registered for VAT is approximately 20% less than for a person who is not. I suggest that in these circumstances the tax is discriminatory against persons who are not registered for VAT and that, as all our citizens should be entitled to equal opportunity of access to the Courts, the application of VAT to solicitors' costs is arguably unconstitutional, at least in some instances."

He urged the Government to bring in legislation which would have the effect of abolishing VAT on Solicitors' Costs certainly in contentious matters in the Courts.

The President added: "VAT is by far the greatest single factor in increasing the total amount of legal costs paid by insurance companies in recent years in Personal Injury Actions, a factor that has necessarily resulted in increased insurance premiums to the public at large."

Commenting on conveyancing, the President said that an inhibiting factor in the transfer of property is the high level of Stamp Duty. It is on a sliding scale, but the scale has not been altered for many years. As the scale provides for a higher rate as the value of the property increases, the effect of inflation has been to increase the amount of Stamp Duty by a factor greater than inflation.

"I therefore urge the Government to widen the bands, thereby reducing the incidence of Stamp Duty on residential properties in particular. This hopefully would help to stimulate what has been a very poor market for several years."

Law Reform Commission

A reception was held recently to mark the appointment of Mr. Justice Ronan Keane as the new President of the Commission, as well as the appointment of new Commissioners. In the May issue of the Gazette, we intend to publish an abridged text of the address of the Taoiseach, Charles J. Haughey, T.D., and of the speech of the President.

As well as Mr. Justice Ronan Keane, the other members of the Commission are:

Simon P. O'Leary, former Senior Legal Assistant to the Director of Public Prosecutions;

John Buckley, Solicitor, partner in Messrs. Hickey Beauchamp, Kirwan & O'Reilly, former Junior Vice-President of the Law Society;

William Duncan, Senior Lecturer in Law and Registrar of Trinity College, Dublin;

Maureen Gaffney, Senior Clinical Psychologist, Eastern Health Board, Course Organiser, E.H.B./ Trinity College Training Scheme in Clinical Psychology.

In Brief

Food for Thought?

In the Central Criminal Court recently, a jury returned a verdict of not guilty on a Dublin restaurant proprietor charged with falsely imprisoning a patron of the restaurant, who tendered a cheque in payment of a bill amounting to over £150.00. The defendant was alleged to have detained the customer and some of his party from 11.45 p.m. until 4.20 a.m., while argument took place concerning payment of the bill. The defendant called the Gardaí who appear to have taken the view that the defendant was not entitled to detain the people concerned. The jury's verdict was unanimous, but reports so far available do not relate whether the bill was ultimately paid!

(Contd. on p.87)

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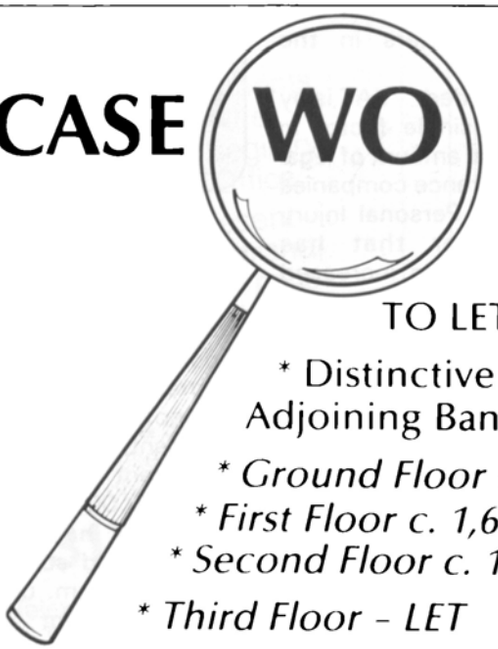

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IN BRIEF — **Contd. from p.85**

Retirement of Mr. Justice D'Arcy

Mr. Justice James D'Arcy retired from the Bench at the beginning of April. Born in Tipperary he studied history and law at Trinity College, Dublin. Called to the Bar in 1938 he practised on the Leinster Circuit until 1954 when he was called to the Inner Bar. For five years before being appointed to the Bench in 1976 he was Chairman of the Civil Service Arbitration Board. Subsequently he was appointed judicial Commissioner of the Land Commission.

Tributes to Mr. Justice D'Arcy were paid in Court by, among others, Mr. David R. Pigot, President, Law Society; Mr. Noel McDonald, S.C., and Miss Mary P. O'Donoghue on behalf of the Chief Registrar Mr. Gerard L. Frewen.

Chief Registrar of High Court dies

The death has occurred of Mr. Gerard L. Frewen, Chief Registrar at the High Court since 1984. He had previously been Registrar to the Court of Criminal Appeal for a number of years. Mr. Frewen, who was called to the bar in the 1950s, also held a diploma in European Law. He served as registrar to the tribunal which, under Mr. Justice Costello, inquired into the Whiddy Island disaster. He was also registrar to the Stardust tribunal.

During his time with the Court of Criminal Appeal he edited a two-volume book of that court's judgments.

Mr. Frewen is survived by his wife, three sons and one daughter.

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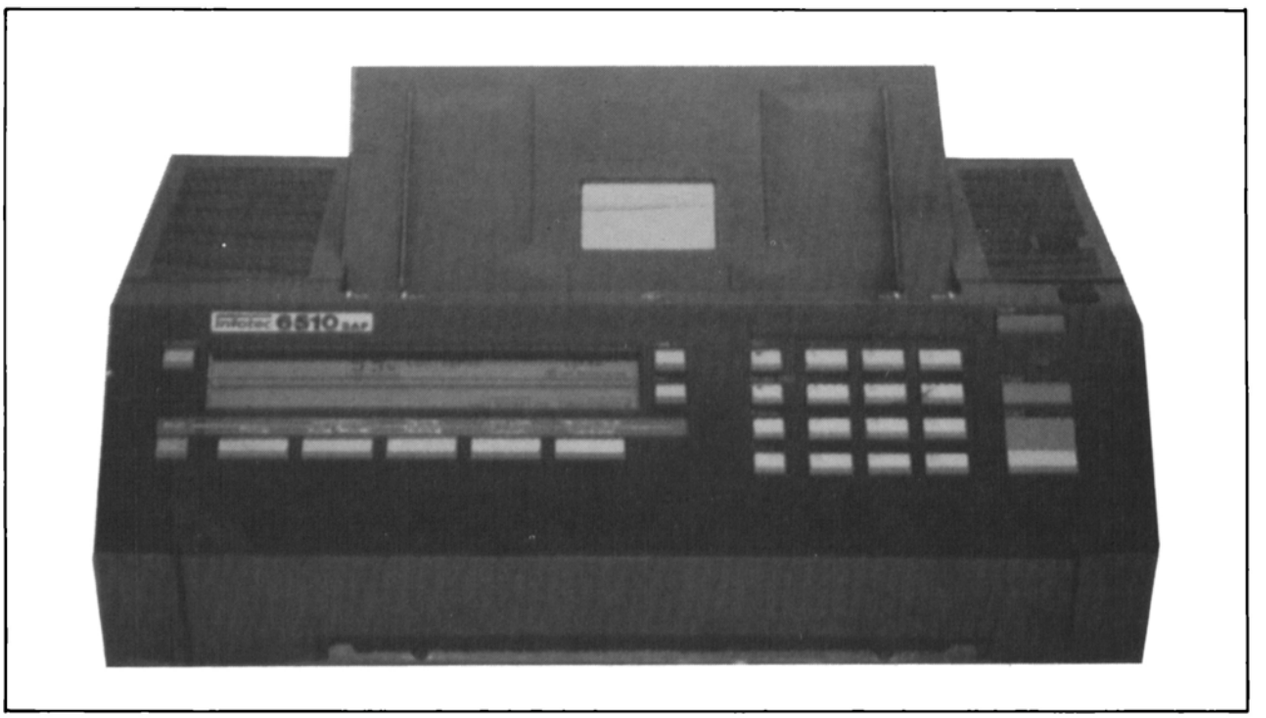

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Keep it out of Court

Mediation in Family Disputes

After thirty years of practice as a solicitor, I recently made a career change to work primarily as a Family Mediator.

A friend and colleague (solicitor, not mediator) quizzing me recently about my decision, remarked that while he liked what he had heard about mediation, he did not really understand how it worked, nor how solicitors and mediators should co-operate in Family Law matters. He believed other solicitors might be in the same position and suggested that I was as well qualified as anyone, and perhaps better than most, to explain mediation to lawyers.

This article is a response to his suggestion.

I can best explain mediation – at least as I practise it – by quoting from two documents. One is an introduction, explaining the process of mediation, which I *sometimes* send to couples who contact me, but are not sure if mediation is what they want, and which I *always* give to a couple who have started mediation, at the end of our first session.

The second is a paragraph that I include, as standard, in any Note of Agreement I prepare at the conclusion of a successful mediation. First, the introduction, which starts as follows:-

by
MICHAEL WILLIAMS
Family Meditator

Introduction to Family Mediation

"This introductory note is intended for couples who have started to negotiate the terms of their separation or who are thinking about doing so. If you are reading this note, you are probably at a very painful and difficult stage in your life. Let me start, then, with some encouragement.

"Now, when you are at a point in your marriage when either you or your spouse badly wants to leave it, is likely to be the worst time. From here on, it has been the experience of many people in your situation that things are unlikely to get worse, and may start to improve.

"Next, although you may feel uniquely wretched, many other people have been in the same mess, and have got over it, there are other people now facing the same problem, and there will be many more.

"Finally, the fact that you are reading this now suggests that you are facing the problem, that is, taking the first step towards solving it.

What is Family Mediation?

"A couple may expect to organise their separation better if they work it out together, rather than through the legal process which, almost unavoidably, tends to escalate conflict and lead to a confrontation in which one party or the other will emerge as loser. However, at a turning point in their lives, when emotions are very powerful, it will be hard for them to sit down together and talk rationally and sensibly about their futures and their children's futures.

"A couple contemplating parting may ask a third party to help them in their discussions and, among other things, try to keep the peace between them so that they can talk calmly and rationally. The third party may be a wise friend, in whom they both have confidence, a trusted adviser, or somebody else. He or she will be acting as a mediator, whether trained for that work or not.

"Some people believe that the work of a mediator will be best done by a man or woman who is trained for it, and has built up experience and know-how by working at it daily.

"Most people who have been through the process of mediation have said that the result was better for them than if they had left it in their lawyers' hands. For others, mediation hasn't worked, though most of these have thought they got something from it, and very few who have tried it have felt that it was a complete waste of time.

Who is Family Mediation for?

"Mediation is mostly used by couples who have agreed to part. A couple may also be helped by mediation if they have difficulties in their relationship, and see separation as a possible solution. It is not necessary that they should both want to separate; often one does, and the other either doesn't want to or is doubtful.

"Consulting a mediator does not mean making an irrevocable decision to part, but a mediator should help a couple to focus their minds on whether to live together or apart.

"Mediation may also be helpful to a couple who plan to live apart for a while, but don't necessarily intend to separate permanently."

At this stage, before going on to read the "Ground Rules" for mediation, my clients, and prospective clients, get a strongly worded (and underlined) warning as follows:-

"It is much harder work to negotiate your own agreement, with or without help, than to leave it to lawyers or others to

do it for you. Anyone starting mediation, or thinking of doing so, should be prepared for this."

I then go on to list the ground rules under which I work, in common with most mediators. The main ones, which are set out and explained at more length in the Introduction, are:

1. All discussions are 'off the record'. Since mediation is a 'without prejudice' process, the content of mediation discussions should not be referred to in Court.

2. The mediator will not be involved in any litigation between the parties, or called as a witness.

3. The mediator meets the couple together and will talk to them separately only if he thinks it is necessary and they both agree. (This may make his work harder than if he kept them apart and acted as a go-between, but experience suggests that a go-between is less likely to produce lasting and satisfactory agreements than a mediator who brings the couple together and helps them to see their conflicts as problems needing joint solution.)

4. It is essential that there should be full and *bona fide* disclosure of all relevant information. (This can be one of the most difficult rules to enforce.)

5. The last of my rules protects the right of both parties to seek independent advice, particularly, though not exclusively, legal advice, during the process.

My document goes on to outline arrangements with my clients about fees. I charge clients a fee per hour and am paid at the end of each session. If husband and wife are both earning, they will normally share the fee fairly, and this may be both the first time in months they have agreed anything and their first step towards agreeing a total package.

I do not charge a standard hourly rate, but relate my charge to their income. I aim not to add to the financial crisis that faces most separating couples and at the same time, since mediation should be a brief process, to charge enough so that they are not tempted to stick with it too long. I also want to receive a not too derisory reward for my services.

My document then continues:

Making it Work

"We will start out by trying to identify the areas of dispute. Financial support; where you will each live; continuity with your children when you are no longer sharing a home; and how to divide assets, are among the topics we may spend time on. We will look at each topic in turn, understand the issues, and see what you each need and whether you can reach agreement on it.

"If you do reach agreement, it will be a bargain that you both find acceptable. That means that you will have avoided getting into a situation, as in the Courts, where there must be at least one loser.

"It is much harder work to negotiate your own agreement, with or without help, than to leave it to lawyers or others to do it for you. Anyone starting mediation, or thinking of doing so, should be prepared for this."

"In our work together we will focus on the future, not on the past. Each of you may feel very strongly that the other is to blame for what has happened in your lives, and may want to tell me about the other's past behaviour. Try not to. It is no part of my job to judge either of you, or to apportion blame. It is part of my job, as I see it, to help the two of you to move on, and to focus on your future lives, and I will discourage recriminations about past behaviour, and discussions of past events, unless they seem to me relevant to the present and the future.

"What you actually agree in the course of mediation, or even if you fail to reach any agreement, is up to you. I may make suggestions, but we will be talking about your future lives, and the lives of your children, and it is up to you, and only you, to make decisions in what you think are your interests, and theirs. These will be your decisions and it does not matter whether I might have made different ones, in your place.

How long will the process last?

"Between four and eight sessions is normal. Either of you is free to terminate at any time, and if I think you are not going to be able to reach agreement, and that you would be wasting my time and your money by continuing, I will say so.

"It isn't always possible for a couple to reach final agreement, that can last indefinitely. For example, if they have young children, changes, both in financial arrangements and in "parenting", may have to be negotiated from time to time. A couple who have gone through mediation may be able to handle re-negotiation without help, but will be welcome to come back to mediation if they get stuck in their re-negotiations.

The end result

"If agreement is reached on all the issues we discuss, I will prepare an informally worded note of it, for your approval. Most couples then ask their Solicitors to draw up a formal agreement, incorporating the agreed points. Indeed, this may be essential, especially if further documentation is needed, or if, for example, a house has to be transferred into a different name, or sold.

"The piece of paper that you approve and bring to your lawyers is the tangible result of your work. I hope you may gain an intangible result, as well.

"This is an improved understanding of your own and each other's needs and wishes, some acceptance of the situation, somewhat less negative feelings towards each other and an increased ability to look to the future, and get on with your

lives and, for couples with children, to co-operate as parents.

"It may seem unlikely to you now that this will happen, but it is a benefit that does sometimes come out of the process."

The full text of the note I give my clients runs to three pages of print, and is not easy reading, but a couple who have read it should come into mediation with a clear picture of how the process operates."

I hope the foregoing precis is equally clear.

As the note indicates, an informally worded record of what the couple have agreed will be the end product of our work. No two agreements are the same: the essence of a mediator's work is that each bargain is unique, because it gives effect to the specific needs of the couple who have negotiated it. However, the draft I prepare and send to my clients for their approval always includes one standard clause, which is the second document I want to quote, and which runs as follows:-

"This note of understanding forms part of the mediation process, which we have agreed is an 'off the record" and without prejudice process and it does not have any legal effect. We want our lawyers to prepare a legally binding agreement to give effect to what we have agreed between us, as set out above, and to include in it any standard provisions normally included in separation agreements, such as agreement to live apart, agreement that neither of us should be responsible for the debts of the other, and any other provisions our lawyers agree are normal in such agreements. If our lawyers should disagree on the contents or wording of the formal agreement, we will aim to resolve the disagreement together or with our mediator. Until a formal agreement is prepared by the lawyers and signed by both of us, neither of us is bound by this agreement, and in any event neither of us will produce it in evidence in any Court."

When the couple bring the document to their lawyers, the mediator's work should in most cases be pretty well complete. However, the lawyers may have questions about the bargain the couple have reached, and they may want to raise those questions with the mediator, as well as, or instead of, with their client.

This brings me to the second part of my friend's question, namely, how should mediators and lawyers co-operate, in the interests of the clients they both serve?

First, I suggest that a lawyer dealing with a family break-up should always have in his mind the question whether his client's interests might be better served by trying to resolve the problem in mediation, rather than by going to law. If this seemed right, the lawyer's first letter, instead of threatening a writ, might say, "Without prejudice to my client's legal rights in this matter, she feels that her interests, and those of all the family, might best be served by the disagreements between you and her being resolved in mediation, and she is willing to try this process, if you agree to co-operate in it."

Secondly, I think lawyers should bear in mind that, if mediation is to be tried, the sooner this is done the better. The prospects will be much better if the couple meet their mediator before the threatening letters have begun to fly or the writs to issue and before they have dug themselves into their trenches and settled down for a long war. It is never too late to try mediation – I have worked with couples who had been in and out of Court for years and also with couples whose litigation stood adjourned and some of them have reached good agreements – but if it is to be tried, the sooner the couple start, the better, in most cases.

Thirdly, I believe that where a mediator is involved it will be useful if, at the beginning of his work, the lawyers for both parties indicate how far they want to be kept informed of progress in the mediation. I think it is usually best that the lawyers be involved in the process only to the extent that their clients may refer to them for advice during mediation but, if a lawyer wants to be kept up to date about progress in his client's mediation and if the couple agree, there is no problem on the mediator's side in keeping him informed.

Finally, I would urge caution on the part of a lawyer, when reviewing a Note of Understanding with his client. A conscientious lawyer, intending to do his duty to his client and to ensure that the bargain he makes serves what his lawyer sees as his best interests, may run the risk of actually harming his own client and the entire family if an intervention from him leads to an agreement collapsing.

A lawyer will give his client the best advice he can, but, when the client has gone through the mediation process and has reached an agreement, I feel the lawyer should approach that agreement with some respect. It may have been reached without legal advice and the lawyer may feel that his client has made excessive concessions in particular areas. However, it is an agreement the client has negotiated freely, it represents a bargain he is prepared to live with, recognising the needs of other members of the family, and it will affect all the family, perhaps in many and profound ways.

By helping the couples we work with to avoid confrontation and to resolve their problems co-operatively, we also relieve their lawyers of a weight of sad, depressing work, which the legal system is not geared to handle; which lawyers undertake reluctantly; for which they are, certainly in comparison to most other legal work, poorly rewarded; and where their very involvement, however well-intentioned they may be, may force their clients into hostile camps.

If a lawyer has reservations about his client's bargain, I suggest his advice might take the form of ensuring that the client appreciates the consequences of what he or she is proposing to do and the differences between the mediated agreement and a likely Court determination.

To put it another way, I would hope the lawyer might frame his advice in the form of "I do not think

a Court would award your wife as much maintenance as you are proposing to pay her", or "Your husband will see more of the children under this agreement than if he had gone to Court", and not as "You would be mad to agree to that!"

Best of all might be if the lawyer, before giving his client negative advice, 'phoned the mediator, and asked him, "Why is the maintenance so high?", or "How was it agreed that the children should spend weekends with their father?" He might get an answer that would satisfy him about the bargain.

How mediators help lawyers, I think, is very closely related to how they help their clients. By helping the couples we work with to avoid confrontation and to resolve their problems co-operatively, we also relieve their lawyers of a weight of sad, depressing work, which the legal system is not geared to handle; which lawyers undertake reluctantly; for which they are, certainly in comparison to most other legal work, poorly rewarded; and where their very involvement, however well-intentioned they may be, may force their clients into hostile camps.

As to how mediators might conduct their practices so as to maximise co-operation with the legal profession, I would be very interested to learn the views of members of the Law Society. As a mediator, it is my ambition to co-operate as fully as possible with the legal profession. □

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Book Review

Shatter's *Family Law in the Republic of Ireland,* (Third edition), Alan Joseph Shatter, T.D., B.A.Mod., Dip.Ed., Solicitor. £45.00.

The Third Edition of Shatter's *Family Law in the Republic of Ireland* embodies in one volume all the diverse sources of material on this subject.

The developments that have taken place in this area, both judicial and legislative, have been so numerous over the past six years that Shatter's Third Edition is virtually a new book.

The chapter on Nullity of Marriage is considerably extended because of the dramatic judicial developments that have taken place. These developments have occurred in the areas of absence of true consent to marriage and of duress and in the inability of a person to enter into and sustain a normal marriage relationship. The book discusses all the relevant judgments and it goes on to examine the various reports on the law of Nullity, which include suggested reforms and discusses how the grounds for Nullity could be clarified and possibly extended. However, the author is rightly cautious about using the nullity process as "a legal fiction" for divorce and stresses the need for people to know with certainty that a marriage is valid or not.

The chapter on matrimonial property has been considerably lengthened too. There have been a number of interesting judgments on the wife's right to establish a beneficial interest in property belonging to the husband. Although it details the various judgments and tries to reconcile and distinguish some of the conflicting authorities, the position remains that legislation is urgently required in this area. As the author states, "the present law fails to take into account that marriage is a form of partnership in which the parties play interdependent roles and to which the different contributions of each are of equal importance to the family welfare."

On the question of custody and guardianship of children, the book does not confine itself to these issues alone, but gives a detailed study of children's needs and the proposed legislation to protect them. When one considers that the Children's Act of 1908 is still at the foundation of the statutory provision in relation to children, the need for reform is obvious.

Alan Shatter examines the Bills presently before the Oireachtas on the Status of Children, the Care and Protection of Children and the Adoption of Children and one can only hope that these Bills in time will become law.

Thankfully, this book chronicles some good developments which have taken place in the legislative arena. The Family Law Act of 1981 abolished actions for criminal conversation and for enticement and harbouring of a spouse. This Act also abolished the action of breach of promise to marry. The Family Law (Protection of Spouses and Children) Act 1981 provides for the making of Barring Orders and Protection Orders. The Domicile and Recognition of Foreign Divorces Act 1986 abolishes the concept of a wife's dependent domicile on her husband after the commencement date, and makes new provisions as to when divorces granted in other countries are recognised here.

The other main legislative reform was the passing of the Courts Act 1981, which transfers from the High Court to the Circuit Court the primary jurisdiction to deal with family law cases and extends, to a certain extent, the District Court jurisdiction. Whereas this might appear to the lay person to be a good development, in reality this area needs a far more radical approach than a change of Court jurisdiction provides. Alan Shatter details his criticisms and suggests reforms on this matter and refers to the report of the Joint Committee on Marriage Breakdown which had a detailed chapter on the need for a new "Family Court structure".

In conclusion, lawyers and law students will find the Third Edition of Mr. Shatter's book invaluable. It provides detailed references to all the judgments which were heretofore scattered in unreported judgments, legal journals and reports. The book is well indexed and the footnotes provide invaluable assistance to the practitioner who wants to investigate in detail a particular point of law. The book also contains statistical information and analysis on social problems which make it an important source of reference. The use of the book will not be confined to legal personnel; it will be widely read and consulted by all who are interested in the family and the laws relating to it.

Muriel Walls

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Uninsured Drivers — a Legal Submission

The following is the text of a Submission from Professor Bryan M. E. McMahon, University College, Cork, with assistance from Philip O'Riordain, B.C.L., and Alan Synott, B.C.L., to the Select Committee on Crime, Lawlessness and Vandalism.

Introduction

1. Uninsured drivers can be divided into two categories:

(a) Those who can afford to insure themselves but deliberately fail to do so; and

(b) Those who due to economic circumstances have difficulty in paying the premium.

2. Drivers in category (a) do not insure presumably because they lack a social conscience and/or they do not fear the penalties which will be imposed if they are prosecuted and convicted. It appears from the penalties imposed that an uninsured driver would have to be convicted approximately three times in one year if the cumulative penalties were to equal his annual insurance premium. In this situation it makes economic sense for the motorist to "risk it".

3. The problem is exacerbated by the fact that uninsured drivers are also more likely to be involved in motor accidents than insured drivers. This is because driver type (a) above lacks a social conscience and his general social irresponsibility is also likely to manifest itself in his driving. Driver type (b), being economically deprived is likely to have a poorer quality and more dangerous vehicle and this increases his likelihood of having an accident. The matter is further compounded if the motorist is young. In such a case since young drivers are considered high risks, the insurance premium is loaded against them and the opportunity to build up a no-claims bonus is not available. In these circumstances the choice is frequently not to drive at all or to drive with no insurance. Some, it is true, will "side-line" themselves, but many will risk it.

4. For these reasons the rate of uninsured accidents will be disproportionately high. The cost of these will ultimately find its way *via* the Motor Insurance Bureau (M.I.B.), and the Insurance Companies back to the insured driver by way of increased premium. Raising the cost once more will of course further increase the amount of people who will not be able to afford the premium and who will decide to take to the road without cover. (It will also, presumably, cause a number of drivers to "trade down" by opting for a third party policy instead of a comprehensive policy in the future.)

5. The problem of the uninsured driver can be tackled on three fronts:

(i) Improved criminal enforcement;

(ii) Increased advertising to heighten social awareness;

(iii) Greater attempts to reduce the premiums.

6. Improved Criminal Enforcement

Increased penalties on the criminal side might improve the position somewhat, but one suspects that such a policy on its own might only have a limited effect on category (b) drivers. Many persons who have financial difficulty in meeting the premium need the car to improve their poor income. They may need the car to drive to work, to look for a job, to supplement their income by providing a service in the black economy ("foxers" and "nixers") or simply to avoid expensive public transport. Increasing fines and penalties for these people might have limited effect. The recent law which obliges insurance disks to be displayed, insofar as it facilitates detection, must be considered to be a step in the right direction. It is too early to say, however, whether it will have the desired effect of causing more drivers to insure.

This point is supported by the lead story in the *Evening Press* on Wednesday 19th November, 1986 which told of a huge trade currently in Dublin of packages of forged insurance certs, tax disks and driving licences available for £100.

The Gardai have found that most of the people caught with these forged documents have no previous criminal records and presumably they are now breaking the law because they find it impossible to abide by it and do not fear detection. Incidentally, the same story reported that the average fine for being caught with these forged documents was £50 thus substantiating paragraph 2 above.

7. Increased Advertising Campaign to Heighten Social Awareness

Equally important in this context, would be a campaign to improve people's social conscience in this matter. Some advertising analgous to the "T.V. Spongers" campaign might be a help. Ironically, the force of the social conscience argument, however, is somewhat weakened in the present case by the safety net provided by the Motor Insurance Bureau. In other words, an uninsured driver can say to himself, "it does not matter if I seriously injure another road user when I am not insured. He will not go without compensation. He will be able to claim from the M.I.B. in any event. All my conduct does in such circumstances is to spread the compensation between several insurance companies rather than impose it on one company." The less sophisticated motorist, however, probably does not think of the problem in this way. If it were made clear to this motorist that he might be sued personally and that by driving without insurance his personal fortune (even his home) might be at risk, an improvement might also be expected.

8. Reduction of the Insurance Premiums

High insurance premiums seem to be the principal reason why we have so many uninsured drivers in Ireland, and it would appear that unless a concentrated effort is made to reduce these premiums no real progress can be made in reducing the number of uninsured drivers. In this connection the following points are relevant. The premium income required by insurance companies reflects three cost factors:

(a) the volume of accidents in' society;

(b) the administration costs incurred and the profit margin required by insurance companies; and

(c) the level of claims and awards.

A further word should be said about each of these.

(a) The volume of accidents in society

To reduce the number of accidents greater enforcement of traffic regulations would help. It appears that there has been a reduction in the number of people killed on Irish roads in recent years although there may not have been a significant reduction in the total number of accidents. A more aggressive enforcement of traffic regulations by the Gardai, the introduction of the compulsory seat belt rule and an active T.V. campaign on the dangers of drinking and driving have all helped no doubt.

Similar lines of action should be continued so as not just to reduce the number of fatal accidents but also to reduce the total number of accidents, for in this context it is worth mentioning that in our system a non-fatal accident may be more costly to an insurance company than a fatal accident. Exhortation and education, however, may be equally important instruments in any effort to reduce the amount of accidents in society.

(b) Administrative costs and profit margins

There is room for believing that the insurance industry itself could contribute to the reduction of the premiums by reducing its own costs. The experience of Mr. K. Kelly, Administrator of PMPA, in recent years indicates that early settlements which avoid high legal costs and the restructuring of insurance premiums can result in substantial savings. (Mr. Kelly gave these as reasons for his ability to halve the losses of the PMPA from £27 million to £13 million in 1983.)

Furthermore, the insurance industry is on record as having said that it does nt have proper records or statistical data in relation to accidents, settlements, etc. (see MacLiam Report, 1982, para. 11 and para. 12), a factor which if true, makes it difficult to understand how they do business at all. Of all the industries, surely the insurance industry cannot conduct its business without an adequate statistical data bank.

Finally, in looking at the insurance companies' profits/losses in the motor business one must take into account the investment income generated by the premiums. Not to do so provides a false picture of what is happening in the industry.

(c) The level of claims and awards

It would be surprising if in a recessionary period insurance claims did not increase. I have no figures on this, but suspect that in recent years this indeed has been the case. The public are becoming more conscious of their legal rights and because of contracting legal business in other areas solicitors do not discourage litigation. The rules relating to liability are deficient and the method of handling such disputes in our legal system, is slow, inefficient and expensive. Moreover, it is a system which does not necessarily bring justice in its wake.

Under the present system to recover compensation for road traffic injuries the injured person must prove (i) that the defendant owed him a duty of care; (ii) that the defendant was in breach of this duty (i.e. acted unreasonably), (iii) that the plaintiff suffered damage and (iv) that the defendant's conduct caused the injuries to the plaintiff. The system aims at providing the plaintiff with full compensation if the defendant has been negligent.

There are, however, from the injured person's point of view, many factors which militate against full recovery. First, normally speaking, the plaintiff will only recover if he can *prove fault*. If he fails to do this he will get nothing. Second, his recovery will be reduced by the amount of his own fault if he has contributed to the injury. Third, in so far as physical or psychological injuries are involved, full appreciation in Court of his injuries is dependent on his ability to provide convincing medical evidence and prognoses. Fourth, immediate financial needs, uncertainty of outcome, inadequate advice, and fear of legal costs are all pressures which can suggest to the plaintiff that he should accept compensation well below that to which he might be objectively entitled; a bird in the hand being better than two in the bush. In other words, the system militates against full recovery. The pressures operating within the system are on the injured person to accept less than the system suggests he is entitled to. In practice, the lawyer advising will look upon each of these difficulties as a discounting factor. Difficulties in proof may suggest that the claim should be abated by 10%; weak medical evidence may also force a further 10% discount and so on. In the end the plaintiff may have to accept in settlement far less than that to which he is objectively entitled.

The system is fraught with hazards and risks for both injured persons and for the insurance companies. There is a large gambling dimension in the process. With justification it has been termed ''forensic lottery''. It is a dangerous jungle which at present requires a large legal input.

It is estimated that between 16% – 20% of motor insurance premiums are attributable to legal costs and it is clear that if these could be substantially modified insurance premiums might be proportionally reduced. An examination of the legal basis for compensating victims of motor accidents is long overdue. It is suggested that a system which provided for *strict liability* or which adopted a *no-fault system* would be cheaper and more efficient as well as being more just to all concerned. It would also reduce legal costs.

Short of this kind of fundamental ''rethink'' minor adjustments in the system (e.g. abolition of the jury

system of trial) are not likely to provide any great savings that will be noticed in insurance premiums. The insurance industry itself has admitted this in the recent debate on the Government's proposal to abolish juries in civil cases. Moreover, the most recent study of the English system, where there is no jury trial, concluded that the fault system is inefficient, dilatory and disproportionately expensive. (Lord Chancellor's Dept., Civil Justice Review, Consultation Paper: Personal Injuries Litigation, Feb. 1986, p. 36). From this is it clear that the inefficiency and the expense associated with the system are not caused by the presence or absence of the jury trial, but rather by the "fault system" which is present in both jurisdictions.

It is submitted, therefore, that the best way of handling the uninsured driver problem is to introduce a major reform which would move away from the fault system to a strict liability or no-fault system.

Interim Reforms — Some Proposals

Pending the introduction of such a major reform — which would probably meet with a lot of resistance from vested interests — the following suggestions might be considered within the present fault system:

A. Increased Hearings at Lower Level

It is suggested that most motor accident cases in Ireland are heard at a very high level of adjudication (frequently in the High Court) while the comparative situation in most other European States is that such cases are settled at a lower level, thus incurring lower costs. The possibility of hearing such claims at a lower level of adjudication should be investigated further. The increased jurisdiction of the Circuit Court which can now hear cases up to £15,000 should have made a contribution on this matter. Unfortunately, there are no studies done on the effect which this has had on keeping legal costs down. Moreover, it does not appear that litigants who bring their actions in the High Court and are awarded more than £7,500 but less than £15,000 are sufficiently penalised for not commencing their action at Circuit Court level. They may still be given High Court costs. (See Section 17 of Courts Act 1981.) This certainly does not encourage litigants or their advisers to commence their actions in the Circuit Court. A greater contribution could be expected if the jurisdiction of the Circuit Court were raised to £30,000.

B. The "Two Senior" Rule

The necessity for a total of eight lawyers to be involved in the normal High Court action should be discontinued. In particular, the "two Senior" rule should be abandoned. This rule of practice among the Senior Bar could be discouraged by providing that the costs of two Seniors should not be allowed on taxation of costs unless the trial judge gives a special certificate that the case warrants two seniors.

C. Greater Co-operation between Insurance Companies

The law of large numbers which states that the larger the group the more accurately the losses of the group can be predicted, is of course particularly relevant to the insurance industry which thrives on high degrees of certainty. Therefore, it is submitted that a common information bank should be established and that the possibility of establishing one insurance fund for all Irish motor risks should be examined. This need not be State run but could be an amalgamation of the companies presently operating in the area. Such a fund would benefit from higher certainty, economies of scale, and consistent policies relating to settlement, etc. Perhaps the companies involved in motor insurance should also, because of the smallness of the Irish market, explore the possibilities of greater co-operation and information sharing. Care would have to be taken, however, to ensure that competition would be maintained in this event and that a restrictive practice problem would not arise. Rational resource pooling on a reasonable scale should help to reduce premiums.

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D. Insurance Premiums might be tax deductible

Consideration should be given to making insurance premiums tax deductible. Loss of revenue to the government could be recovered by taxing other motoring expenses more heavily (e.g. petrol). Thus there would not in the long run be a large change in the motorists outlay or government's income but the "avoidable" costs of motoring (i.e. insurance) would be reduced thus making it more attractive to abide by the law especially if higher fines are to be imposed, (cf. generally Posner, The Economic Analysis of Law). The increased costs will be in areas which the motorist cannot possibly avoid (petrol, oil, etc.). This should have the effect of promoting the desired result which is universal insurance. The added advantage is that the payment on the insured items is a voluntary one insofar as petrol, etc. will be bought only when needed and the burden of payment is spread over a period of time thus facilitating the less well off. The question of diminishing returns on petrol taxation is not within the scope of this submission except to suggest that such problems may be alleviated by the reduction in insurance premium costs.

E. Abolish the Jury form of Trial?

Abolishing the jury form of trial will **not** have any appreciable effect on insurance premiums. This has already been admitted by the insurance industry itself. This conclusion is supported by an earlier study on the problem: see McMahon, *Judge or Jury? The Jury Trial for Personal Injury Cases*

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in Ireland. 1985. Cork University Press).

F. Fixed Dates for Hearings

The listing system for High Court actions appears to generate a lot of waste. Under the present system, for example, lawyers, litigants and expert witnesses (doctors and engineers especially) spend far too much time waiting around the High Court for their case to get before the judge. The wastage involved in this has not been quantified in this jurisdiction, but it is generally conceded to represent a substantial amount in costs. It is suggested that appreciable savings might be made if litigants were **guaranteed** a hearing at a fixed time on a fixed day. There would be no wastage from the litigants point of view in such an arrangement. The suggestion that the judge would be idle for long periods under such an arrangement would hardly bear scrutiny nowadays when High Court judges could be engaged in other work required of them, for example, the writing up of judgements in other cases. Moreover, it would be less wasteful from a social point of view to have a court not sitting than to have many expensive witnesses waiting for cases to come on. The judge's time is probably one of the cheapest factors in the litigation process.

The suggested fixed dates arrangement would be greatly reinforced by a supporting rule under which the Court would only allow settlements which were notified to it, say, 15 clear days before the date fixed for the hearing. These rules would greatly concentrate the parties' minds to settle in good time so that consequential adjustments in the hearing lists could be made without difficulty. It would also mean that decisions to settle or to fight would be made in a cool considered manner away from the pressure cooker atmosphere which characterises High Court negotiations nowadays and which militates against the plaintiff in particular. It would also mean that cases would get individual consideration and would not be basketed together in a group as can sometimes happen in the hectic negotiations that have become a feature of the High Court on Circuit especially. Although the suggestion made here would undoubtedly have some practical difficulties, these it is submitted, need not be insurmountable. In any event, in view of the benefits that would follow from such a rule, the suggestion is well worth closer scrutiny.

G. Expert Evidence

A large part of the Court's time in a typical personal injury case is concerned with the evaluation of the expert evidence of doctors and engineers. Cases frequently degenerate into a "battle of the experts" where each side produces its own reports lending credence to its own version of events.

There are, it is submitted, three problems with regard to expert evidence as it is now used. First, it is in the interests of a party to proceedings to choose his expert on the basis of who will make the best witness rather than on the basis of who is the best scientist. It is a common occurrence for solicitors to commission reports from a number of experts in any particular case and then to choose the report most favourable to their case for presentation to the Court. Secondly, it is submitted that a jury is by its nature ill-suited to determine conflict between experts. Frequently, it is felt that the jury is less impressed by the scientific nature of the evidence, which it may not fully appreciate, than by the impact of the witness's personality, demeanor, etc. Finally, it is suggested that the adversarial system, involving, as it does, examination-in-chief, cross-examination and re-examination, creates an unsuitable environment in which to effectively elucidate reliable expert opinion.

With respect to the first problem, it is suggested that the judge more frequently should use his Common Law right to call expert witnesses to assist the court. (See Rosenthal (1935) 2 Law and Contemp. Prob. 403). A better solution would be the establishment by Statute of a panel of expert witnesses in various fields whose services would be available to the parties. If the parties accept the report it could then constitute the set of agreed facts on which the trial will proceed. If a party disagrees with the Court expert it should be free to call its own expert knowing, however, that it may have to pay costs for its own expert at the end of the day if the Court in its discretion thinks it appropriate. □

Professional Information

(Contd. from p.102)

to acquire the fee simple in the said property.

2. Determining the purchase price payable in respect of the said Acquisition.

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 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 that may be necessary for the purpose of such a Lease.

Dated this 23rd day of April 1987.

Signed:
O'Reilly Doherty & Co.,
Solicitors for the Applicant,
6 Main Street, Finglas, Dublin 11.

To:
The County Registrar,
Courthouse, Clonmel,
County Tipperary.

To:

or whom this application may concern.

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B.E. M.I.E.I.

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Legal Secretary:- experience in Dictaphone; Reception; W.P. Quote Reference "D14".	
Legal Secretary:- excellent references. Quote Reference "D15".	Dublin
Legal Secretary:- experience in Shorthand; Dictaphone; W.P. Quote Reference "D16".	Dublin/ Cork & Galway
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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.
10th day of May, 1987.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Daniel Vaughan of Derrybeg House, Tulla, Co. Clare; Folio No.: 16938; Lands: (1) Derrymore West; (2) Derrymore West; (3) Derrymore West; (4) Derrymore West; (5) Derrymore West; Area: (1) 126a.3r.7p.; (2) 0a.2r.10p.; (3) 0a.3r.28p.; (4) 5a.2r.30p.; (5) 0a.2r.15p.; County: **CLARE**

Thomas O'Brien (deceased) and Ellen O'Brien; Folio No.: 10263F; Lands: 9 Brookville, North Road, Finglas, Dublin; County: **DUBLIN.**

John Joseph McCree of The Grange, Tullow, Co. Carlow; Folio No.: 413 revised to 4411F; Lands: Butlersgrange; Area: 179a.0r.30p.; County:. **Carlow.**

Patrick and Clare Hurley of 36 Avonmore Park, Mayfield, Cork; Folio No.: 29266F; Lands: Garryglass; Area: 0.913acres; County **CORK.**

David Molloy and Catherine Baker, 10 Robin Hood Villas, Palmerstown, Dublin; Folio No.: 18336; Lands: Property situate in townland of Palmerstown Lower and Barony of Upper Cross; County: **DUBLIN.**

Samuel Adam Patterson of Cortubber, Swan's Cross, Co. Monaghan; Folio No.: 19328; Lands: (1) Cortober; (2) Enagh; (3) Enagh; (4) Cortober; (5) Losset; Area: (1) 20a.1r.37p.; (2) 6a.3r.20p.; (3) 4a.2r.19p.; (4) 4a.3r.26p.; (5) 0a.2r.30p.; County: **MONAGHAN.**

Patrick Andrew Kinsella, of Reenmore, St. Mary's Road, Arklow, Co. Wicklow; Folio No.: 3678; Lands: Boleynass Upper (parts); Area: 7a.3r.20p.; County: **WICKLOW.**

William O'Connell and Ann Carroll; Folio No.: 7337L; Lands: Property situate in the townland of Balally and Barony of Rathdown; County: **DUBLIN.**

Michael Cronin of Ballyrussell, Cloyne, Co. Cork; Folio No.: 12356; Lands: Killinagh; Area: 40a.3r.32p.; County: **CORK.**

Alicia McNally of Naul Hill, Naul, Co. Dublin; Folio No.: 3071; Lands: Property situate in the Townland of Damastown and Barony of Balrothery West; County: **DUBLIN.**

Bridget Higgins of Nirvana, Lenaboy Gardens, Upper Salthill, Galway; Folio No.: 26473; Lands: Lenaboy; County: **GALWAY.**

Anthony Murphy, Mary Murphy and Catherine McGregor of Killaconnigan, Ballivor, Co. Meath; Folio No.: 4553F; Lands: Killaconnigan; County: **MEATH.**

Edward Reynolds of Carrickabane, Finea, Co. Westmeath; Folio No.: 12227; Lands: Carrickabane (parts); Area: (1) 1a.1r.20p.; (2) 6a.3r.37p.; County: **CAVAN.**

Mary Treacy of The Heath, Portlaoise, Co. Laois. Folio No.: 7194; Lands: Morett; Area 7a.1r.35p.; County: **LAOIS.**

Nora Nolan of Kilfenora, Spa, Co. Kerry; Folio No.: 539; Lands: Kilfenora; Area 43a.3r.22p.; County: **KERRY.**

Nora O'Donoghue of Western Villas, Western Road, Clonakilty, Co. Cork; Folio No.: 52441; Lands: Dunnycove; Area: 2a.3r.13p.; County: **CORK.**

Henry and Teresa O'Dowd (Folio No.: 6140) and **Henry O'Dowd** (Folio No.: 6223) of Carrownaworan, Lavagh, Ballymote, Co. Sligo; Lands: (1) Carrownaworan; (2) Carrownaworan; Area: (1) 15a.3r.26p.; (2) 32a.0r.22p.; County: **GALWAY.**

Lost Wills

BRAHAM, Mary Georgina, deceased, late of 6 Lambert House, Hornsey Lane, London N19, and formerly of 21 Sandymount Road, Dublin. Will any person having knowledge of a Will made by the above-named deceased, who died on 30th January, 1987, please contact Hayes and Sons, Solicitors, 15 St. Stephen's Green, Dublin 2. Reference TM/LIA.

RYAN, Mary Christina, deceased, late of 52 Clonliffe Gardens, Dublin 3. Will any person having knowledge of a Will made by the above named deceased, who died on 9th February, 1987, please contact Anthony F. O'Gorman & Co., Solicitors, Church Street, Gorey, Co. Wexford. Tel. (055) 21906/21054.

CORBET, Robert, deceased, late of Ballymanus, Stradbally, Co. Laois. Will any person having knowledge of the whereabouts of a Will of the above named deceased, who died on 4th March, 1986, please contact Fetherstonhaughs, Solicitors, O'Connell Square, Mountmellick, Co. Laois.

LAVERTY, Bridget, Bridie and Anthony, of 101 Home Farm Rd., Drumcondra, Dublin 9. Will any person knowing of the whereabouts of the Will of any of the above-named, or of the title deeds of the above premises, please contact David Walsh, Solicitor, 109 Ranelagh, Dublin 6. Tel. 973611.

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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 to 1984.

IN THE MATTER of an application pursuant to Section 17 of the Landlord and Tenant Act 1967.

Thomas Duane (Applicant)
and
The Representative of George Griffin Deceased (Respondents)

WHEREAS the Applicant is now entitled to a leasehold interest in all that and those the dwellinghouse offices and land situate lying and being on the northside of the Main Street of the City of Cashel in the Barony of Middlethird and the County of Tipperary measuring from North to South 124 feet 3 inches measuring at the North or front Main Street fourteen feet 10 inches and at the South or rear 22 feet bounded on the North by the Main Street on the South partly by premises in the occupation of William Maher as Tenant to Mr. Patrick Hackett and partly by premises in the occupation of the said Mr. Patrick Hackett and on the east by Margaret Molonys and Thomas Walshs holdings and on the West by Miss Ellen McSweeney's holding and the aforesaid premises in their occupation of the said William Maher as Tenant to Mr. Patrick Hackett and by Mr. Hackett's storehouse by Lease dated the 14th day of July one Thousand Eight Hundred and Ninety One for a term of 99 years 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 applicants are desirous of having the matter of the acquisition by them 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 Wednesday the 17th day of June 1987 at the hour of 11.30a.m. in 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 Cashel in Tipperary for an order:—

1. Determining that the Applicant is entitled

(Contd. on p.99)

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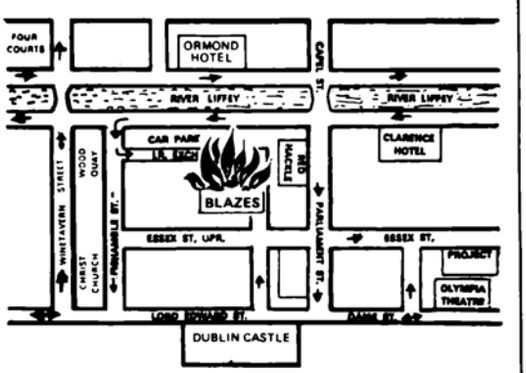

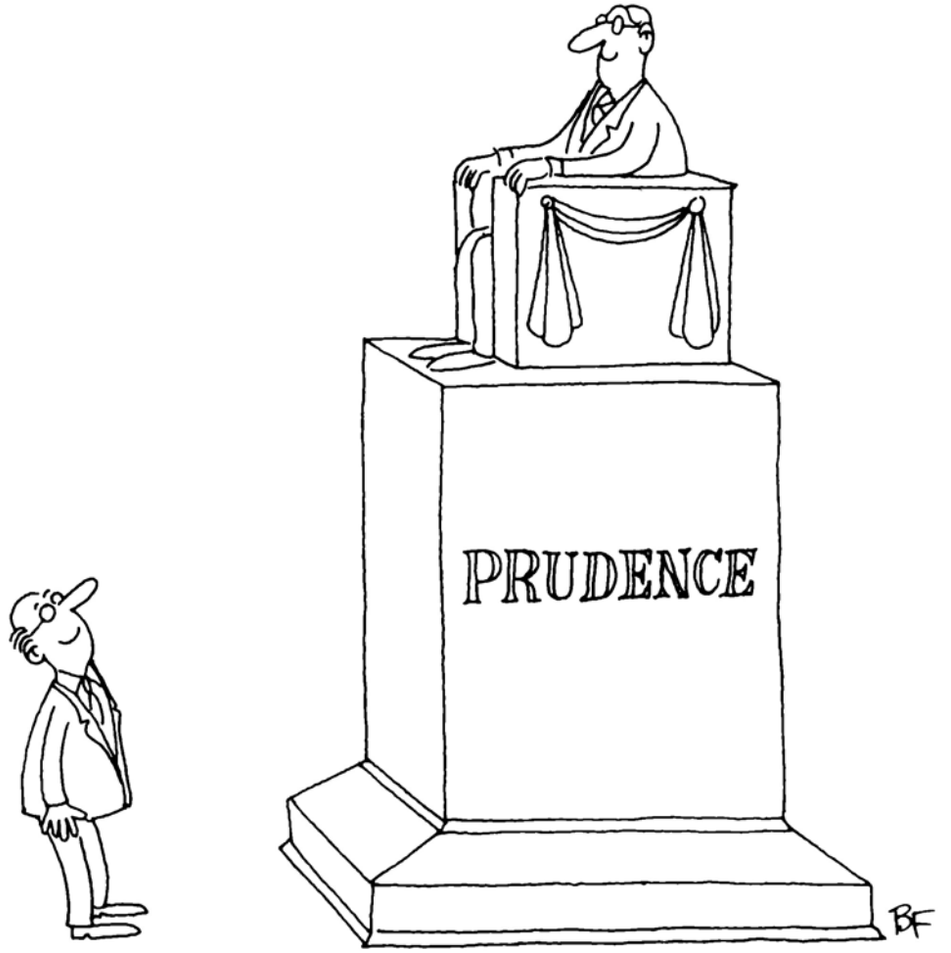

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Vol. 81 No. 4 May 1987

Attending the A.I.J.A. Dinner in the Law Society, Blackhall Place, were (left) Michael G. Irvine, Irish National Vice-President and Murray S. Levin, President of A.I.J.A.

Association Internationale des Jeunes Avocats (A.I.J.A.)
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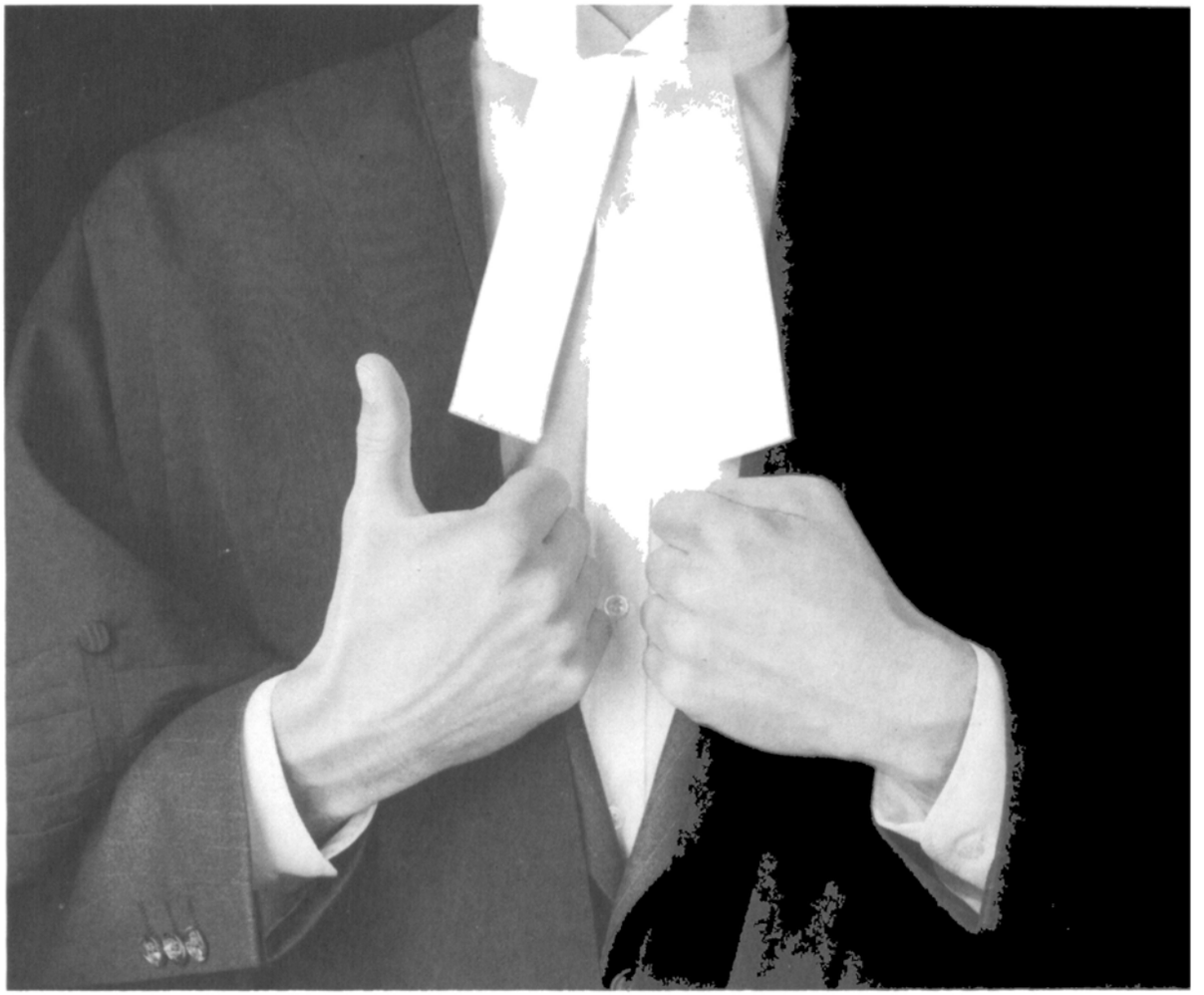

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Viewpoint

Garda Training Report

It is to be hoped that the current restrictions on public sector spending will not result in delay in implementing the recommendations of the recently published report on probationer training of the Garda Training Committee.

It is an unspoken criticism of the existing training system that the proposals of the Committee do not appear startling or radical but entirely logical.

Perhaps the most interesting section of the Report is that dealing with the role and function of the police in modern society. The Report offers the following definition:

A. To provide services within a legal framework and in accordance with the social values and aspirations of a democratic society in order *to help the community;*
   (i) To protect life and property, by guarding, patrolling and anticipating danger not only from criminal acts, but also from those acts which are natural, accidental or unintentional;
   (ii) To safeguard the liberties of the individual and preserve the public peace by seeking to create and maintain conditions under which people may go about their lawful affairs undisturbed and protected from harmful and dangerous conduct;
   (iii) To prevent crime and to seek, identify and eliminate the causes of crime;
   (iv) To detect offenders if crime is committed.

B. To encourage and advise the community on how to protect their persons and property from criminal behaviour.

C. To provide guidance and assistance:
   (i) In helping young people to achieve social maturity;
   (ii) In cases of tragedy, or family and/or other personal crises.

It would be difficult to argue that our society has not come to expect its police force to perform most, if not all, of these functions. It is obvious that only the most rigorous selection and training of recruits can lead to the establishment of a police force which can attempt to provide all those functions for our society.

The Report sees a need to completely revamp the recruitment process to meet the twin goals of efficiency and effectiveness. The screening out at an early stage of candidates who are clearly not suited for recruitment to the force is an aim that should be urgently pursued. The introduction of psychological and aptitude testing as well as stringent medical tests at an early stage of the recruitment process should lead firstly to a reduction in the number of those who proceed on to the final selection process and, secondly, to an improvement in the standard of those ultimately who are accepted as recruits into the force.

The recommendations that during the "on the beat" segments of the training programme that recruits should be attached to tutor gardai and that each division should have training sergeants whose principal function would be to monitor the effectiveness of the training programme for recruits in their division coupled with the fact that the recruit should not in future be regarded as part of the normal strength of a garda division (and therefore liable to be used to perform any of the normal functions of a garda) until after his second "on

(Contd. on p.109)

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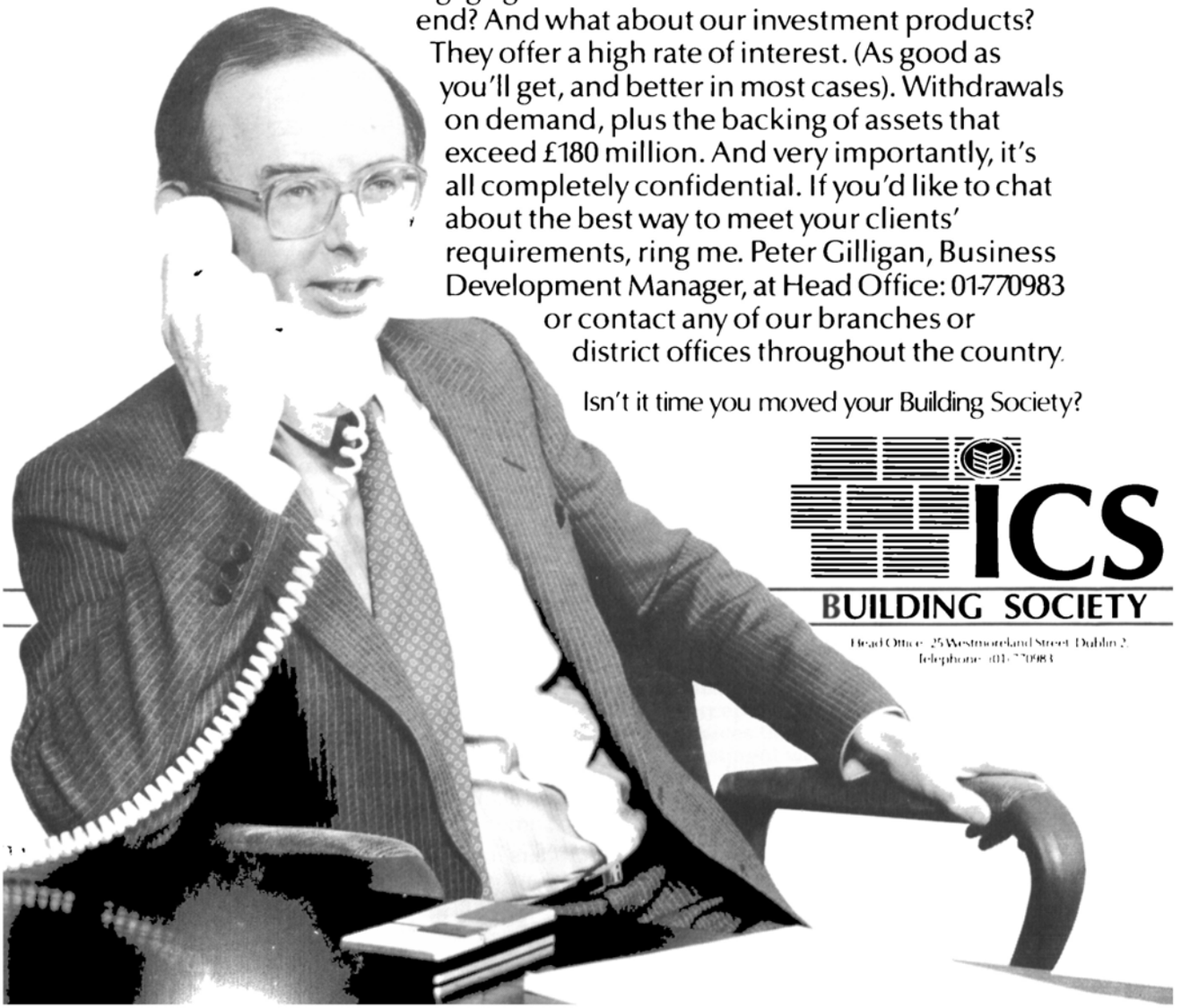

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Service out of the Jurisdiction and Choice of Law in Tort Cases

This article will first consider the principles upon which the High Court will grant leave to serve outside the jurisdiction in tort cases under Order 11, r.1(f) of the Rules of the Superior Courts 1986. The current legal position as regards Order 11, r. 1 (f) is considered in the unanimous judgment of the Supreme Court given by Walsh J. in *Grehan -v- Medical Incorporated and Valley Pines Associates.*[1] Second, it will be necessary to consider the position regarding choice of law in tort. The choice of law process may be explained as follows: once a court assumes jurisdiction in the case of a tort which was committed in a foreign country or a tort which was committed within the jurisdiction but which contained some foreign element, it may before considering the rights and liabilities of the parties in the case, first go through a selection process known as "choice of law" in order to determine by what law those rights and liabilities are to be determined. Finally, the case for reform of the choice of law rules will be considered and options for statutory reform will be suggested.

by
Gabriel J. McGann,
B.A.(Mod), LL.M. (Yale),
Barrister-at-Law

Although the private international law of tort has not heretofore featured much in the Irish courts, its importance will, it is submitted, increase for a number of reasons. First, it appears following *Grehan*'s case that a court must consider the choice of law implications when deciding whether to permit service out of the jurisdiction. Second, when the jurisdictional provisions of the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[2], which are quite liberal in regard to matters relating to tort, come into force in the State, it is also possible that cases involving Irish choice of law rules will come before the Irish courts more often than they have in the past. Third, in view of the increased mobility of persons and products, it is also more likely that our courts will be asked to hear actions based on foreign torts.

Order 11 - service out of the jurisdiction

As soon as an originating summons is prepared and its indorsement duly drafted, it must be issued out of the Central Office.[3] No summons for service out of the jurisdiction, or of which notice[4] is given out of the jurisdiction, may be issued without the leave of the Court.[5] Service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court in the cases specified in Order 11. In this regard, it was observed in *Grehan*'s case:

> "This arises in situations in which the defendant is not present within the jurisdiction but in which the case is so closely connected with Ireland or with Irish law that there is a justification for it being tried within this jurisdiction. O. 11 enumerates the circumstances in which jurisdiction may be assumed. This form of procedure was first provided for in the Common Law Procedure Act 1852 and the cases in which it could be exercised were specified in the Rules of Court. This was a modification of the common law position whereby courts exercised jurisdiction only where the defendant was served with the process within the jurisdiction or submitted to the jurisdiction."[6]

A number of general points emerge from the Irish cases. First, it is clear that the matter is one entirely at the discretion of the

VIEWPOINT (from p.107)

the beat" training period commences, should lead to the practical experience aspects of the training programme being taken more seriously than they have been in the past.

Even these recommendations however are unlikely to bear full fruit until there is seen to be a change in the attitude of the senior officers of the force (and of the Department of Justice) to the whole question of garda training. The narrow approach of the past has not been successful and it is clear that much of any success there has been in the training programme has been due to the dedication of those officers who have been entrusted with the supervision of the programme coupled with what must have been a generally high quality of recruits to the force.

If there is a criticism to be made of the format proposed for the actual training programme a "triple decker sandwich programme" which envisages the students spending three periods at the garda college interspersed with two lengthy periods of on the job training during a two year course, it is that it may be too complex. The Committee's proposals to fit the two periods of on the job training into the five layer programme have been carefully worked out but it must be said that the logistics of operating such a sophisticated sandwich course may prove extremely difficult in practice. There are always arguments about whether sandwich courses should end with on the job training or with a return to the classroom. Without wishing to detract from the ideas put forward by the Committee it may prove necessary in practice to restrict the sandwich to a four layer course. □

Court.[7] Thus, it has been remarked in 1896 in *McCrea -v- Knight:*

> "... even where service out of the jurisdiction may be allowed it is not necessarily to be allowed and it ought not to be allowed unless there is some ground of 'comparative convenience' to guide the discretion of the Court to the conclusion that a foreign defendant ought not to be brought to Ireland to stand his trial. I cannot limit the meaning of 'convenience'. It means fitness, propriety and suitableness — each and all three in the most general sense."[8]

Second, the High Court, when making an order giving leave for service out of the jurisdiction, should, as a matter of propriety if not necessity, specifically mention in the order the particular class of action within which the Court decides the intended action to fall.[9] Third, the list of cases specified in Order 11 is exhaustive. Service out of the jurisdiction can only be permitted under the authority either of a statute or of a rule of court having the force of a statute and those rules are to be found only in Order 11.[10]

Order 11, r.1 provides that:

> "(s)ervice out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever . . . (f) the action is founded on a tort committed within the jurisdiction."[11]

In addition, it is possible to bring an action founded on a tort under certain other rules of Order 11. Service out of the jurisdiction may, for example, be allowed under r.1 (g) if the summons includes a *bona fide* claim for an injunction as to anything to be done within the jurisdiction,[12] or for the prevention or removal of any nuisance within the jurisdiction. Under r.1 (h) leave may be allowed to serve any person out of the jurisdiction who is a necessary or proper party to an action properly brought[13] against some other person duly served within the jurisdiction. This rule may also permit service out of the jurisdiction in a tort action.

Order 11, r.1 (f) refers to an action "founded on a tort committed within the jurisdiction". This requires the court to search for the place where the tort was committed, the *"locus delicti"*. No difficulty arises in the case of a tort which is committed within the jurisdiction or where all the events including the actual bringing of the action occur within the State. Determining the *locus delicti* can be problematical when the defendant's act takes place in one country and the resulting harm is inflicted on the plaintiff in another country. It is a particular problem of the tort of negligence in which the negligent conduct and the consequent injuries may occur in different jurisdictions.[14]

This problem arose in *Grehan*'s case. The plaintiff, who was an Irish resident, underwent heart surgery in a Dublin hospital in June 1978. During the course of this surgery a heart valve was implanted in the plaintiff which, he claimed, was defective and as a result of which, he alleged, he was re-admitted to hospital with cardiac failure. He instituted proceedings for negligence against the first named defendant, a Minnesota-based corporation, who, while denying negligence and putting the plaintiff on proof of all the matters averred in his statement of claim, pleaded that the heart valve in question had been manufactured by the second named defendant. The plaintiff was then given liberty to join the second named defendant, Valley Pines Associates, as a defendant in the action. The second named defendant moved to have the order joining it set aside. In support of this application it was argued that it could not be sued in the Irish courts. For the plaintiff it was argued that while the second named defendant did manufacture the article in the United States it did so knowing that it would be distributed on a world-wide basis and that the distribution of the article in this country was done through the medium of the first named defendant. In the High Court Lynch J. refused the application on the ground that in order to do justice in the action it should be tried as one action. The second named defendant appealed to the Supreme Court. The appeal turned upon the question of whether or not this was a proper case in which the High Court ought to have exercised its discretion to order service of notice of the proceedings outside the jurisdiction on the second named defendant and to join it as a defendant in the action. It was admitted that at least a component part of the valve was manufactured by the second named defendant and was one of a number of such components sold and delivered by the second named defendant to the first named defendant in the United States. It was on this basis that the Supreme Court dealt with the second named defendant's appeal.

The outcome of the appeal depended on whether the action against the second named defendant was "founded on a tort committed within the jurisdiction". Before *Grehan*'s case, any one of a number of tests might have been applied.

Tests for establishing the *locus delicti* in O.11 cases

The problem has been considered in all other major common law jurisdictions. Prior to *Grehan*'s case, there does not appear to have been any reported decision of an Irish court dealing with the construction of O.11, r.1 (f), although the problem had been considered in other contexts.[15] Five tests were examined by Walsh J.:

(i) the "place of acting" test: the *locus delicti* is the place where the wrongful act was committed;

(ii) the "substance of the cause of action" test: the proper test to apply is when the tort is complete to look back over the series of events constituting it and to ask where does the substance of the cause of action arise;

(iii) the "last event" or "place of harm" test: the *locus delicti* is in the jurisdiction in which the last event occurred in the train of events making up the tort;

(iv) the restrictive test: this approach requires that all the elements of the tort must have been committed within the jurisdiction;

(v) the elective test: this approach permits the plaintiff to choose between the place of the event giving rise to the damage complained of or the place where the damage occurred.

O. 11, r.1 (f) — a new approach

None of these five tests was adopted by Walsh J. He said:

> '' . . . if it appears that any significant element in the commission of the tort occurs within this jurisdiction then the plaintiff will have at least fulfilled the threshold requirements set out in O. 11, r.1 (f). But that is not sufficient to raise a presumption or an inference that the court should exercise discretion in favour of making an order for service out of the jurisdiction. Any approach which insists on any one constituent element of the commission of the tort occurring within the jurisdiction can only give rise to difficulties. (In) (a)ny case before the court which clearly calls for the hearing of the proceedings in Ireland and for the application of Irish law to the case an order for service outside the jurisdiction should not be denied merely because of the fact that some significant element or elements in its commission occurred outside the jurisdiction. For example, in many cases it would be quite inappropriate that the invocation either of ''the place of injury'' or ''the last event rule'' should deny to a plaintiff the right of service out of the jurisdiction. It seems to me sufficient if any significant element has occurred within the jurisdiction. To require that the element should be *the most* significant one could render a plaintiff's task more uncertain and the outcome more arbitrary.''[16]

In Walsh J.'s view there were elements which occurred in Ireland which were sufficiently significant to warrant the order made by the High Court; these elements were,

(i) the fitting of the allegedly defective appliance, and

(ii) the injury.

It is not clear what the position would have been had only one of these elements occurred in Ireland. For example, the appliance might have been fitted in some third country or the intended plaintiff might have suffered cardiac failure whilst holidaying in some third country. Some assistance with this problem is to be found in an earlier passage of the judgment:

> ''It is clear that the issue (whether or not a tort is committed within the jurisdiction within the meaning of O. 11, r.1 (f)) is not merely a mechanical one because that would inevitably lead to arbitrary results. The Court must have regard to the implications for the plaintiff or the defendant if the trial is to take place within the State. The task of the Court is to interpret and to apply the rule in a way designed to ensure that justice and practical common sense prevail. **The Court therefore should interpret the rule in the light of a broad policy and in the light of its choice of law implications.** If more than one possible interpretation of the rule is available the one which serves to encourage the operation of sensible choice of law rules should be followed rather than one which would

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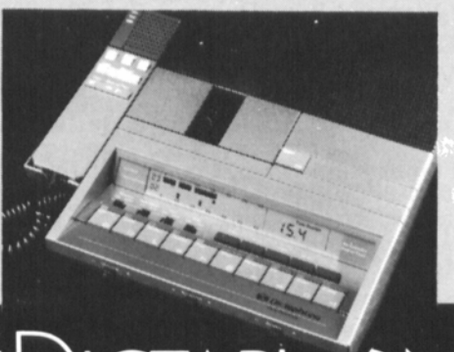

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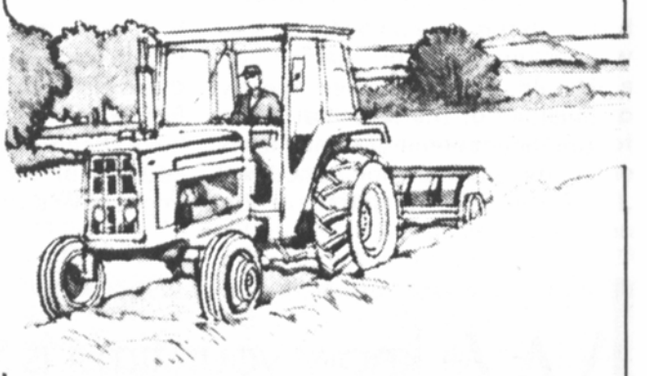

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tend to frustrate them.[17] (Emphasis added)

A broad policy

No clear indication is given of what this policy should be but it would appear to follow from the judgment that the threshold requirements of O. 11, r.1 (f) should be interpreted in a way that is favourable to the plaintiff so as to entitle him to serve out of the jurisdiction once any significant element occurs in the jurisdiction.

Sensible choice of law rules

It would appear from Walsh J.'s judgment that choice of law implications are a factor to be taken into account by the courts when deciding whether to order service out. Prior to *Grehan*'s case, it was generally understood that choice of law issues would arise only **at the hearing** in Ireland **of the substantive issues** in the case of a **foreign tort.** Following *Grehan's* case, it would now appear that a court, which is faced **at the preliminary stage** with an application for service outside the jurisdiction, must consider the choice of law implications of its decision. Thus, it seems, the Irish court must, **at this stage,** determine what the appropriate choice of law rule is.

What is the Irish law with regard to choice of law in tort? To the writer's knowledge, questions involving choice of law rules in tort have not been considered in any reported Irish decisions. In the absence of any relevant Irish authority, it was probable, before *Grehan*'s case, that an Irish court would have followed the English rules regarding choice of law. The present English and, indeed, Northern Ireland law is based on two leading cases: *Phillips -v- Eyre*[18] and *Boys -v- Chaplin.*[19] The rule in *Phillips -v- Eyre* means that (a) the rights and liabilities of the parties to an action in England or in Northern Ireland on a foreign tort are determined by the *lex fori,* that is, the internal law of England or of Northern Ireland; (b) the application of English or Northern Ireland law is subject to the qualification that the plaintiff's action in England or in Northern Ireland will succeed only to the extent that civil liability also exists, as between the same parties, under the *lex loci delicti.* The general rule is qualified by the so-called "*Boys -v- Chaplin* exception". Although no clear *ratio decidendi* emerges from the case as a whole, it appears, however, to be agreed that *Boys -v- Chaplin* has qualified the general rule in *Phillips -v- Eyre* by permitting certain exceptions to the invariable application of that general rule and thus introducing an element of flexibility, albeit of uncertain scope. The *Boys -v- Chaplin* exception has been described in Dicey & Morris as follows:

> "A particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.[20] "

It is clear from *Grehan*'s case that the rule in *Phillips -v- Eyre* (and, it would follow, the so-called *Boys -v- Chaplin* exception) does not form part of Irish law. Walsh J. said:

> "The rule in *Phillips -v- Eyre* has nothing to recommend it because it is capable of producing quite arbitrary decisions and it is a mixture of parochialism and a vehicle for being, in some cases, unduly generous to the plaintiff and, in others, unduly harsh."
>
> "In my view, so far as choice of law in torts cases is concerned, **the Irish Courts should be sufficiently flexible to be capable of responding to the individual issues presented in each case and to the social and economic dimensions of applying any particular choice of law rule in the proceedings in question.**"[21] (Emphasis added)

What is to replace the rule in Phillips -v- Eyre?

It is unfortunate that the flexible approach to choice of law issues suggested by the Supreme Court is not complemented by any restatement of the basic choice of law rule. What is to replace the rule in *Phillips -v- Eyre*? What should be the object of such a rule?

A new choice of law rule should, it is submitted, balance the need for certainty with the need to be sufficiently flexible to cater adequately for the circumstances of particular cases. This question has been recently considered in the context of English and Scottish law by a Joint Working Party of the English and Scottish Law Commissions.[22] The Joint Working Party was of the opinion that:

> "While it is important that our reformed choice of law rule should possess a high degree of certainty, it is also important that it should be sufficiently refined to be capable of selecting an appropriate system of law in as high a proportion of cases as possible so that the courts are only rarely faced with the choice of either applying an inappropriate law or using a device to escape altogether from the choice of law rule in tort . . . Unfortunately, these two factors (certainty and refinement) tend to pull in opposite directions, in that it is the simple rule which is more certain, and the refined rule which is less so. The appropriate balance between certainty and refinement is, in our view, the major test which an acceptable choice of law rule in tort . . . must satisfy."[23]

It is not surprising that the Joint Working Party concluded that the general rule in *Phillips -v- Eyre* itself is outdated and unnecessary in its heavy reliance on the *lex fori* and unjust in that the plaintiff is at a disadvantage, since he must show he has a good cause of action under two systems of law and not just one; conversely, it said, the general rule is considerably to the advantage of the defendant, who may escape liability if he can raise any substantive defence that is available under either of the two systems of law. The Working Party also concluded that the uncertainty of the *Boys -v- Chaplain* exception is unsatisfactory.

It examined eight options for reform and provisionally concluded that only two would be acceptable:[24]

(i) that subject to certain exceptions, the applicable law in actions in the United Kingdom on a foreign tort or delict should be that of the country where the tort or delict occurred. There would be presumptions which would indicate the applicable law for the most com-

monly occurring torts, such as personal injury and damage to property;

(ii) that the "proper law" should apply, that is the law of the country with which the occurrence and the parties had the closest and most real connection. Again, there would be presumptions which would indicate the applicable law for the most commonly occurring torts.

It is submitted that, in view of the judicial philosophy which Walsh J. advocated in *Grehan*'s case, the second option would be more apposite in an Irish context. In addition, there are other benefits with such a rule which, it is submitted, might be adopted in this country. As the Joint Working Party put it:

> "It would be possible to concentrate on the particular facts; the temptation to re-classify an issue so as to avoid treating it as an issue in tort . . . would be reduced; and such an approach would also wholly avoid the exceptions which . . . appear to us to be a necessary part of any choice of law system based upon a more closely defined general rule.[25] "

However, the great disadvantage of the proper law on its own is its uncertainty, and the Joint Working Party provisionally concluded that a pure proper law rule, without elaboration, would be unacceptably uncertain and unsuitable for statutory reform. It was correctly of the view that after a tort had occurred, it was clearly desirable that the parties in dispute should be able to ascertain their rights and liabilities as easily as possible and preferably without resort to litigation. Accordingly, it went on to make proposals for certain defined types of tort, which, it is submitted, avoids any problems of uncertainty. It proposed that the following presumptions should be added to the basic proper law rule: the country with which the occurrence and the parties had the closest and most real connection would, unless the contrary were shown, be presumed to be - (1) in a case of personal injury or damage to property, the country where the person was when he was injured or the property was when it was damaged (2) in a case of death, the country where the deceased was when he was fatally injured.

Law reform

In this writer's opinion, it is now necessary to introduce legislation providing for appropriate choice of law rules in tort cases and related matters. However, before any such legislation is introduced consideration will have to be given to the issues which are numerous and intricate and, it is submitted the Law Reform Commission is probably best equipped to carry out such review.[26] In view of the great complexity of the subject, it is highly desirable that detailed consideration be given to all aspects of choice of law in tort. It will be necessary, for example, to consider options for law reform not only in the case of the basic torts resulting in personal injury, death and damage to property, but also with respect to certain specific torts such as the economic torts and defamation.

One of the many problems which the Joint Working Party examined

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concerns the problem of classification of actions. In order to apply a particular choice of law rule in tort, a court must first be satisfied that the particular issue before it is one of tort. If the issue were classified not as an issue of tort, but as belonging to a different category then it would be some other choice of law rule and not the choice of law rule in tort which should select the appropriate law governing the issue. It will be necessary, therefore, in a comprehensive review of Irish private international law to make proposals as to how each issue should be classified for choice of law purposes. Such a review would also have to consider whether or not a particular issue should be regarded as procedural or substantive. Any matter which is regarded as procedural only will, under current private international law rules, be governed by the *lex fori* to the exclusion of any foreign law.

In addition such a review should consider two other questions incidentally arising from the Supreme Court judgment. The first question which the judgment **appears** to raise concerns the possibility of a departure from the rule, generally thought to prevail in this jurisdiction, that notwithstanding the existence of a foreign element, a tort committed in Ireland will in an action in Ireland be governed by Irish law only. Walsh J.'s dictum concerning choice of law implications in O. 11 applications does not **appear** to be limited to proceedings involving a tort committed in Ireland only and **may** also apply to proceedings involving a tort committed within this jurisdiction but with some foreign elements, and, possibly, to torts committed in some other jurisdiction with some Irish element. It may now be necessary, following service outside the jurisdiction under O. 11, r.1 (f), for the court trying the substantive issues to apply the relevant choice of law rule. Of course, it may be that such a rule would result in the application of Irish law either because it is the *lex fori* or the *lex loci delicti* or the "proper law" or for some other reason. The second question which possibly arises from the judgment concerns the process of what is known to continental lawyers as "depecage". In a case which raises more than one issue, it is possible for a court adopting this method to identify the individual tortious issues and consider the effect of the application separately to each of any particular choice of law rule.

The process of depecage may be illustrated by the following hypothetical case which is adapted from the Joint Working Party's consultation paper. Two Irish residents, A and B, go on a motoring holiday in a foreign country where (i) there is strict liability for motor accidents, but (ii) the survival of causes of action in tort is not permitted. Under Irish law, by contrast, liability is for negligence and the Civil Liability Acts 1961 to 1964 make provision for the survival of actions. While in this foreign country B is killed in an accident caused, without negligence, by A who was driving. A would be liable under foreign law but not under Irish law, as he had not been negligent. If either Irish law or the foreign law applied to *both* issues in an action in Ireland by the personal representatives of B's estate against A, the action would not succeed. On the other hand, if the issues were split it would be possible, for example, to apply the foreign law to determine the issue of standard of liability and Irish law to determine the question of the survival of the cause of action in favour of B's estate. If this were done, the action of B's estate would succeed.

It is not clear whether Walsh J. intended that a court should be free to split the issues in this manner when he spoke about the need for flexibility on the part of the Irish courts so as " . . . to be capable of responding to the individual issues presented in each case . . ." If this is what, in effect, he meant then *Grehan*'s case may result in different tortious issues in the same case being governed by different systems of law, notwithstanding that the occurrence and the parties are identical.[27]

It is interesting to note that the Joint Working Party did not favour the use of depecage in a statutory choice of law rule, being of the opinion, *inter alia,* that it would give rise to "practical difficulties, since the isolation of different issues in a single case requires that those issues be defined. While . . . the *locus delicti,* the parties and the occurrence lend themselves to objective identification, the same is less true of the issues, which may be capable of several different formulations".[28]

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Summary

1. At common law the courts exercised jurisdiction only where the defendant was served with the process within the jurisdiction.

2. Service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the courts in the cases specified in O. 11 of the Rules of the Superior Courts 1986.

3. O. 11, r.1 (f) provides that service out of the jurisdiction of the process may be allowed by the courts whenever an action is founded on a tort committed within the jurisdiction.

4. If it appears that any significant element in the commission of the tort occurs within the jurisdiction, then the plaintiff will have at least fulfilled the threshold requirements set out in O. 11, r.1 (f).

5. The issue of whether or not a tort is committed within the jurisdiction within the meaning of O. 11, r.1 (f) is not a mechanical one. The courts must have regard to the implications for the plaintiff or the defendant if the trial is to take place in the State. The task of the courts is to interpret and to apply

the rule in a way designed to ensure that justice and practical common sense prevail. The courts, therefore, should interpret the rule in the light of a broad policy and in the light of its choice of law implications. If more than one possible interpretation of the rule is available the one which serves to encourage the operation of sensible choice of law rules should be followed rather than one which would tend to frustrate them.

6. It is submitted that a broad policy requires the courts to interpret the requirements of O. 11, r.1 (f) in a way that is favourable to the plaintiff once any significant element occurs in the jurisdiction.

7. The choice of law rule known as the rule in *Phillips -v- Eyre* does not form part of Irish law.

8. An Irish choice of law rule in tort has yet to be formulated.

9. According to *Grehan*'s case, in applying any particular choice of law rule the courts should be sufficiently flexible to be capable of responding to the individual issues presented in each case and to the social and economic dimensions.

10. It is submitted that a reformed choice of law rule should be defined by statute and should possess a high degree of certainty; but it should be sufficiently refined to be capable of selecting an appropriate system of law in as high a proportion of cases as possible.

11. The Joint Working party provisionally proposed two options for reform in the United Kingdom legal systems: (i) the application, subject to an exception, of the law of the country where the tort or delict occured *(lex loci delicti),* and (ii) the proper law, subject to certain presumptions in the case of (a) torts or delicts resulting in death, personal injury or damage to property, and (b) defamation. It is submitted that the second of these options might be incorporated into Irish law.

12. Finally, it is submitted that this and other possible reforms in the private international law of tort should be examined by the Law Reform Commission.

FOOTNOTES

I am grateful to my colleague, Mark de Blácam, Barrister-at-law, who made valuable suggestions for the improvement of this article.

1. (1986) I.L.R.M. 627. See also A. V. Gill, "The Locus Delicti and choice of law in tort in Irish Private International Law" (1987) 1 I.L.T. 3.
2. See Gerald Moloney and George Kremlis, "The Brussels Convention on Jurisdiction and the Enforcement of Judgments" (1985) 79 Incorporated Law Society of Ireland Gazette 327.
3. O. 5, r.1, R.S.C. 1986.
4. 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 must be served upon him: *Ibid. O. 11, r.8.*
5. *Ibid.* O. 5, r.14.
6. (1986) I.L.R.M. at pp. 629—30, per Walsh J.
7. See also *Joynt -v- M'Crum* (1899) 1 I.R. 217; *Russell -v- Le Bert* (1896) 1 I.R. 334 at 339.
8. *M'Crea -v- Knight* (1896) 2 I.R. 619 at 625.
9. See *Shipsey -v- British and American Steam Navigation Company* (1936) I.R. 65 *per* Fitzgibbon J. at 88.
10. See *Brennan -v- Lockyer and Others* (1932) I.R. 100 at 101; *Shipsey -v- British and American Steam Navigation Company, supra* fn. 9 *per* Kennedy C. J. at 32; *per* Fitzgibbon J. at 83-4.
11. It should be observed that until the adoption of the Rules of Court of 1926 service out of the jurisdiction could not be allowed when the cause of action was founded on tort.
12. But the phrase "any injunction is sought" in O. 11, r.1 (g) is limited to injunctions which are "properly and necessarily sought in the indorsement of claim contained in the originating summons" and does not extend to injunctions sought by way of ancillary or interlocutory relief: *Serge Caudron -v- Air Zaire* (1986) I.L.R.M. 11 *per* Finlay C. J. at 20-3.
13. *Clare County Council -v- Wilson* (1913) 2 I.R. 89.
14. The same problem may arise under rule 1(g) which refers to nuisance.
15. In *Grehan*'s case, Walsh J. adverted to a number of Irish cases dealing with malicious injuries: *Fermanagh County Council -v- Farrendon* (1923) I.R. 180 and *Fermanagh County Council -v- The Board of Education of Donegal Presbytery* (1923) 2 I.R. 184; *M'Cullagh -v- The Irish Free State* 57 I.L.T. & S.J. 171; *Canning -v- Donegal County Council* (1969) Ir. Jur. Rep. 7. He also referred to *Wells -v- Secretary of State for Northern Ireland* (1981) N.I.J.B. (in which the provisions of the Criminal Damage (Compensation) (Northern Ireland) Order 1977 were considered), *Monaghan -v- Swan and Company* (1962) 96 I.L.T. & S.J. 93 (which involved an issue as to which circuit constituted "the circuit wherein the tort was alleged to have been committed") and *O'Daly -v- Gulf Oil Terminals (Ireland) Ltd.* (1981) I.L.R.M. 163 (in which Barrington J. considered whether the Irish courts should decline jurisdiction in favour of the French courts in the cases arising out of the 1979 Whiddy Oil terminal disaster).
16. (1986) I.L.R.M. at p. 638.
17. *Ibid.,* at p. 637.
18. (1944) K.B. 432.
19. (1971) A.C. 356.
20. *Conflict of Laws* (10th ed. 1980), pp. 942-5.
21. (1986) I.L.R.M., at p. 638.
22. See the Law Commission's Working Paper No. 87 and The Scottish Law Commission Consultative Memorandum No. 62 *Private International Law Choice of Law in Tort and Delict.*
23. *Ibid.* para. 4.18.
24. *Ibid.* paras. 4.24 - 4.140.
25. *Ibid.* paras. 4.130.
26. The First Programme of the Law Reform Commission stated that it was intended "as a long term project to prepare proposals for a statute codifying reforming and modernising the rules of conflict as they apply in the State". It was proposed in the interim period to examine with a view to making recommendations for law reform the rules of conflict, *inter alia,* in regard to "non-contractual obligations. The Commission made proposals on many aspects of private international law in the sphere of family law. No proposals were published on the private international law of tort ("non-contractual obligations"). The first task of the new Commission, which was recently appointed, will be to prepare, in consultation with the Attorney General, a new programme for law reform for submission by the Taoiseach to the Government. The Government has indicated (see Press Release dated 27th November 1986) that a short programme containing a small number of important issues where the law is out of date is desirable". It is regrettable that the choice of law rules in tort are not included in the areas mentioned by it as being "the areas where it believes law reform to be desirable and which it believes would benefit from study by the Commission."
27. Fn. 22 *supra.,* paras. 6.73 - 6.81.
28. *Ibid.* para. 6.79. □

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This graphic image emerged in the course of a discussion on one of the average solicitor's most heart-felt complaints about the Bar, namely counsel's ability to vanish when a case goes badly in Court, leaving only the solicitor to face the wrath of the client.

This was only one of the most minor of a score of topics of interest arising out of the relationship between solicitors and barristers which was examined and discussed at the first ever weekend conference involving both branches of the profession.

Perhaps the most remarkable thing is not that this conference happened but, rather, that it had never happened before. To the outsider, it would have seemed perfectly natural that solicitors and barristers would meet for a weekend, in this age of the Conference. No one, after all, has more in common with each other than they have, being in reality two branches of the same profession.

by
Ken Murphy*

It had never happened before in Ireland, however. Indeed, insofar as could be ascertained after several enquiries, it had never happened in Britain either. The uniqueness and perhaps without wishing to sound too pompous about it, the historic nature, of the joint conference held at the Talbot Hotel, Wexford on 4th and 5th April, 1987 by the Society of Young Solicitors and the Junior Bar deserves to be noted.

The idea for the conference was first put by the writer of this article to the then-Chairman of the Bar Council, Patrick McEntee S.C., approximately a year ago. Once certain details had been clarified, Mr. McEntee enthusiastically supported the project and in turn obtained the endorsement of the Bar Council for it. Without this support it could not have taken place.

While the Society of Young Solicitors has existed and organised conferences for over 21 years, no equivalent organisation exists to represent the Junior Bar. An *ad hoc* committee was set up, however, with three Solicitor representatives and three from the Bar and this worked for several months to make the necessary arrangements. The bulk of the daunting organisational work in selling the idea for this conference to an initially rather sceptical and conservative market within the Law Library was performed by the Joint Chairman of the Conference, Charles Meenan, B.L. These efforts culminated in the extremely impressive number of almost a hundred barristers who attended in Wexford.

While the majority of conference delegates arrived in time to avail of the Friday night bar extension and disco, the conference proper commenced on the Saturday morning, under the chairmanship of Charles Meenan, with a lecture entitled "Recent Developments in Personal Injury Litigation" given jointly by Diarmaid O' Donovan S.C. and Gerard O'Keeffe, Solicitor. This was a most enlightening, practical and enjoyable exposition by two experts on probably the single most important area of litigation practice.

The real centrepiece of the conference followed it at approximately 11.30a.m. and was entitled "Open Forum Discussion — Towards a Better Understanding between Solicitors and Barristers".

(left to right) Mr. Seamus McKenna, Chairman of the Bar Council; Mr. Ken Murphy, Chairman of the Society of Young Solicitors; Mr. Charles Meenan, Conference Organiser on behalf of The Junior Bar and Mr. David R. Pigot, President of The Law Society.

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This began as a panel discussion between three solicitors, Michael Houlihan, Frank Ward and Helen Doyle, on the one hand, and three barristers, Peter Shanley, Fergus O'Hagan and Katherine Shepherd, on the other hand, and it was chaired by this writer. It quickly developed, as intended, into an entirely open exchange of opinions, suggestions and observations involving the audience at large.

The solicitors were first asked to describe the qualities they look for in the counsel whom they brief. The emphasis was on speed, punctuality, knowledge of the law, approachability and in particular the ability to communicate concern about the case to the client.

The barristers were then asked to suggest ways in which solicitors could make a counsel's job easier. Leaving telephone numbers when names are given at the Law Library for 'call-back' was one example. Not having unrealistic expectations about how quickly papers can be returned was another. Much discussion centred on the perceived decline in the quality of briefs being sent to counsel in recent years and it was pointed out that a solicitor is not doing his job but is merely contributing to delay when he furnishes the easy "herewith copy file — please advise" kind of 'brief'.

Peter Shanley spoke of the lack of awareness among some solicitors of where their job ends and that of counsel begins. Constant interruption (by means of notes and gown-tugging) by a solicitor of counsel while the latter is addressing the court was deprecated.

The fact that this can be irritating for the judge as well as for the counsel was illustrated by a story told from the back of the hall by Paddy McEntee when he described how on one occasion on the Northern Circuit the interruptions became so intolerably persistent that he turned to his solicitor and in a loud stage whisper told him to "**** off!" which elicited the approbation "Well said, Mr. McEntee' from the Judge!

Following this contribution, the discussion within the packed conference hall (there was standing room only at the back) really took off and the chairman was faced with a forest of hands in the air from which to choose as speaker followed speaker. Contributions ranged over such matters as how to get papers back from dilatory counsel (a caustic rhyming telegram took the prize here), an appeal for solicitors to pay counsel's fees more quickly and the question of whether counsel should abandon the role of 'general practitioner' and develop more specialised knowledge of specific areas of law.

On the latter issue, the barristers argued that the market was too small in this country for a great deal of specialisation but it was agreed that future trends would probably be in this direction. There was enthusiastic support among solicitors for the idea that the Bar Council should publish a guide to enable identification of special expertise among barristers.

There followed several contributions on the question of whether or not solicitors should more frequently undertake advocacy in the Circuit and High Courts on behalf of their clients. This led inevitably to the question of whether any justification now existed for the rigid separation of the two branches of the profession. Although many different views were expressed on this, there was a consensus that the preparation of a case, and the presentation of that case in Court are essentially different functions and are more efficiently carried out by separate people in the interests of everyone, particularly the client.

With the trend towards increased pre-trial procedures, it was felt to be probably inevitable that the art of oral advocacy will decline somewhat in the future but there will always be a need for it particularly at the Criminal Bar. In general, barristers develop an expertise in advocacy which solicitors do not have and it is both more effective and cheaper for a client if a barrister's services are used in litigation than if they are not. Criticism and defence of both the 'two- Senior -and-compulsory-Junior' rule followed. The 'direct access' issue was also touched on with a number of speakers remarking on the dangers to both branches of the profession if the incidence were to increase of counsel taking instructions from clients without solicitors being present.

There appeared to be widespread support for the concept of merging the Blackhall Place and Kings Inns education systems to a much larger extent and this led to the final part of the discussion which was on the question of co-operation between both branches

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of the profession generally. On this issue, it was agreed on all sides that the level of co-operation between the representative bodies, namely the Bar Council and the Council of the Incorporated Law Society, had been far from good in the past. Peter Shanley, who is a member of the Bar Council, gave a powerful exposition of the dangers faced by both branches of the profession if there is a failure to communicate jointly and convincingly the merits of our respective positions (in the interests of both the public and ourselves) to the Restrictive Practices Commission which is currently investigating the legal profession.

Michael Houlihan also expressed regret at the misunderstandings and lack of co-operation which had too often in the past characterised relations between the Bar Council and the Council of the Incorporated Law Society and, in a view echoed by three other former Presidents of the Law Society who were present and spoke, welcomed the conference as a stepping stone to much better relations. One area of vital mutual interest in which a joint approach would be particularly welcome is public relations.

This particular session of the conference had been due to end so that people could go for lunch at 1 o'clock. Such was the level of importance which all present attached to the debate, however, that absolutely no one left the room until a halt was finally called by the chairman at 1.35!

What had taken place was generally agreed to have been an extraordinarily stimulating and long overdue discussion of matters of vital interest to the profession as a whole.

Social Events

Attention switched afterwards to the more relaxing social aspects of the weekend activities. As the tennis tournament had to be cancelled because of the inclement weather, the TV set in the bar became the focus of attention as all were united in their support for an event *almost* as unique as the conference – the Irish rugby team beating Wales in Cardiff.

The sight of what was on display in the hotel swimming pool (the so-called 'corpus of the law-yer!') it was remarked, constituted a powerful case for the retention of the wig and gown by barristers at all times and perhaps even their compulsory extension to solicitors!!

The Final Day

On the Sunday morning, we were treated to a brilliantly entertaining series of reminiscences of days gone by in the legal profession in Ireland by Mr. Justice Niall McCarthy of the Supreme Court under the title "The Way we Were". This attracted a very full audience particularly in view of what for some was the excessive enoyment of the dinner dance on the previous evening where the dance floor was still full at 3.30a.m., and the bar did not close until much much later.

When it was all over there was a general feeling that the conference represented a breakthrough in relations between the two branches of the profession, that the mutual suspicion and coolness of the past must now be buried, that the younger members of both branches had given a lead where their elders had failed and above all else a belief that this initiative must be built on with further conferences and other joint activity in the future.

Was it legitimate for the fear to exist in some quarters that the mere fact that a conference such as this was held at all represented the thin end of the wedge for the ultimate fusion of both branches of the profession?

"Fusion? Certainly not", responded Chairman of the Bar Council, Seamus McKenna, S.C. He allowed his eyes to linger a while on the dance floor, where scores of barristers and solicitors were giving practical expression to the spirit of the conference (while Gerard O'Keeffe on the stage attempted to reincarnate Elvis Presley), before adding, "except perhaps in the purely physical sense!" □

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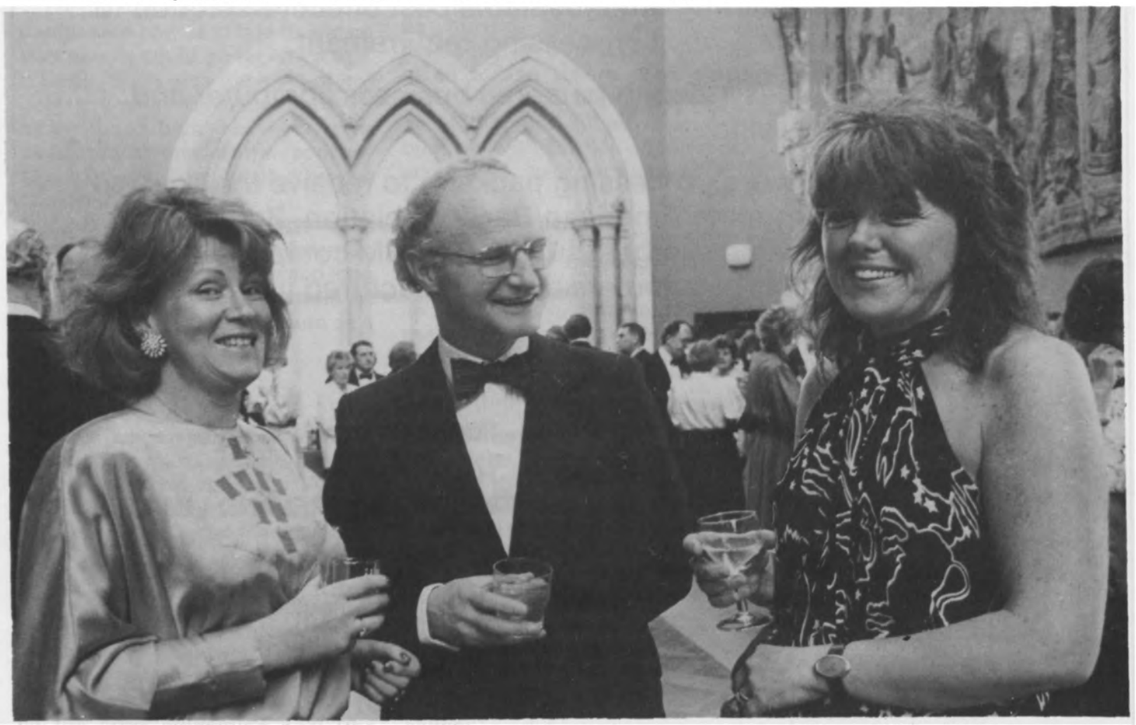
THE INCORPORATED LAW SOCIETY OF IRELAND ANNUAL CONFERENCE 1987

Pictured at the Incorporated Law Society reception in Kilkenny Castle were: Walter Smithwick, Kilkenny and David R. Pigot, President of The Incorporated Law Society of Ireland.



Paula Grant (left), Drogheda, William Glynn and Mayre Glynn, Limerick.

John Smithwick (centre), Kilkenny, Brian and Susanne Mahon, Tullamore.

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Capital Acquisitions Tax

Double Taxation Convention with the U.S. The Situs Rules

Under Section 66 of the Capital Acquisitions Tax Act, 1976, the Government may by Order declare that arrangements specified in the Order have been made with the Government of any territory outside the State in relation to affording relief from double taxation in respect of Gift Tax or Inheritance Tax under Irish Legislation and any Tax imposed under the laws of that other territory which is of a similar character or is chargeable by reference to death or to Gifts inter vivos.

Two Conventions relating to double taxation are now in force: —

(a) with the U.K. under Statutory Instrument No. 279 of 1978, this Convention applies to Gifts and Inheritances;

and

(b) with the U.S.A., the provisions of the First Schedule to the Finance Act, 1950 being applied to U.S. Federal Estate Tax and Irish Inheritance Tax under Article 1 (2). This Convention is considered to apply only to Inheritances.

There are various ways in which Double Taxation conventions can work but basically relief is confined to two types:

(a) where the ordinary Rules of each independent State apply and relief is given for Tax in one State against Tax in the other on property which is doubly taxed i.e. taxed in both States

or

(b) by providing a special situs code which will predetermine where certain property or type of property is situate and that such property or type of property will only be subject to Tax in the Country where it is situate.

The convention with the U.K. is of the first type, whereas the convention with the U.S.A. is a mix of the two types. It is with this latter convention that this Article is concerned.

The principal features are contained in Articles III to V.

(a) Articles III (1) and IV confirm the ordinary Rules relating to domicile and territorial scope of the two Taxes.

(b) Article V provides the relief by way of credit for the Tax levied in the country where the property is situate against the tax leviable in the other country.

by
Brian A. Bohan,
Solicitor

(c) Article III (2) contains the Situs Rules relating to assets where the deceased is domiciled in either Ireland or the U.S.A., or both. It changes the situs of certain classes of property, which can have the effect of avoiding Tax in one or other of the countries.

There are, therefore, two types of relief as mentioned before, viz: —

(a) Double Taxation relief.

(b) Relief by *situs*.

There is no provision in the convention for relief against Inheritance or other Death Taxes of the various states of the U.S.A., although unilateral relief could be given under Section 67 of the C.A.T. Act, 1976 for such Taxes. This section might also apply to give relief in respect of Irish Gift Tax and Federal Estate Tax on Gifts which are, otherwise, not dealt with in the convention.

The convention in the Finance Act, 1950, is not identical in all respects with the convention between Great Britain and the U.S. contained in the Double Taxation Relief (Estate Duty) (U.S.A.) Order, 1946 in the U.K. (S.R. & O. 1946, No. 1351),. although the differences are minimal.

Article III (1)

Article III (1) of the Irish convention provides that each country is to ascertain domicile in accordance with its own Law and there is, therefore, always the possibility that there could be a double domicile.

The question whether a person is an American citizen is determined exclusively by American law.

American nationality is treated the same as domicile, giving the U.S. authority to charge tax on global property. Once a person is a national of the U.S.A., it is immaterial if he is not domiciled there from the point of view of Federal Estate Tax; his global estate will be subject to Federal Estate Tax. If he was domiciled in the U.S.A., it is immaterial of which country he was a national. Article IV (2) provides that, for the purpose of tax and aggregation, neither country will take account of property situate outside its territory if the deceased was domiciled in the other country. This Rule, however, does not apply where both countries claim the domicile.

The Rule is subject to two exceptions:

(a) it will not apply in respect of U.S. Tax in the case of a U.S. citizen dying domiciled in Ireland;

or

(b) in respect of Irish tax, in the case of property passing under a disposition governed by Irish law (Settled Property).

By this means, the ordinary law of the respective states has been maintained.

Article III (2)

Article III (2) provides a *situs* code to be applied by both countries

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where the disponer dies domiciled in either or both, but the proviso at the end of the Article limits its operation.

The *Situs* Code is printed in full at the end of this article.

Where the property does not fall within the *Situs* Rules, the locality will be determined according to the law of the country other than that country in which the disponer was domiciled.

The *proviso* in Article III (2) states that if, apart from its Rules, including the last mentioned Rule, any property would: —

(a) be situate in the territory of one of the two countries,
and

(b) be liable to duty in that country,

then the Rules are not to apply to such property unless, by reason of their application or otherwise, duty would be imposed or would, but for some specific exemption, be imposed thereon by the *other* country.

This Supplementary Rule appears to mean that if property, for exmaple, is situated in Ireland under General Law but is deemed under the *Situs* Rules, to be situated in the U.S.A., the *Situs* Rules will not apply to that property unless, by reason of their application or otherwise, duty would be imposed in the U.S.A. on that property, or would be so imposed but for some specific exemption (e.g. initial exemption) on that property.

The object of this is to prevent escape of tax in both countries. For example, L. T., an American-domiciled citizen, is life-tenant under his father's (U.S. domiciled) settlement, which contains an Irish bank account.

There is no U.S. tax because the life-tenant was neither the settlor nor competent to dispose of the property in settlement; Article III (2) (c) would deem the Bank Account to be situate in the U.S. under normal circumstances.

Because of this, the Account would escape tax in both countries. However, the proviso ensures that Rule (c), under which the account would be deemed situate in America, does not apply and Irish Inheritance Tax would be payable on the account.

On the other hand, if a person domiciled in the U.S. owns as part of his Free Estate Irish Government Securities, their *situs* is deemed under Rule (c) of Article III (2) to be in America, and Inheritance Tax would not be payable on them even though no tax is payable in the U.S. by reason of an exemption threshold.

Article IV (3) preserves the right of the Irish Authorities to impose tax on a settlement having Irish proper law.

Article V contains the provisions relating to the allowance or credit for tax in the other country.

Where either country imposes tax by reason of domicile or, in the case of the U.S. being its national, on property situate solely in the other country, the first country is to give a credit against its tax for the tax imposed on the same property in the second country, but the credit is not to exceed the amount of the tax on that property in the first country. For example, where property which is situate in the U.S.A. is taken on the death of a disponer who dies domiciled in Ireland, an allowance against Inheritance Tax is made for the amount of the Federal Estate Tax (up to the amount of the Inheritance Tax) payable in respect of the same property. The same will apply if the domiciles and situation were reversed and, for this purpose, locality or *situs* is determined in accordance with Article III (2).

Article V

In paragraph (3) of Article V, if the property is taken under a disposition regulated by Irish law, credit will also be given in Ireland.

Article V (2) provides for proportionate relief applicable where the disponer is deemed to be domiciled in both countries and property taken on his death is treated as situate in both countries.

Where this happens, an allowance is to be made by each country on the basis that the duty in each country is to be proportionately reduced to such an extent that the total duty payable in both is equal to the greater of the amounts which would otherwise be payable in the two countries separately. For example if £400.00 is the amount of the Inheritance Tax on the doubly taxed property and £600.00 is the amount of the Federal Estate Tax on the property (apart from the Convention) then the credit is as follows:

	Federal Estate Tax	**Inheritance Tax**	**Total**
Tax before credit	£600.00	£400.00	£1,000.00
Credit	£240.00	£160.00	£400.00
	(600 x 400) / (1000)	(400 x 400) / (1000)	
Net Tax	£360.00	£240.00	£600.00

N.B. The lesser amount of Tax is always utilised for the purpose of this calculation.

The latter part of Article IV (4) provides for the case where Ireland and the U.S.A. both deem domicile and there is property situate in a third territory which is taxed in that third territory, on the basis of *Situs* there. For example, the tax on this property before the application of any double taxation relief is as follows: —

Tax in Third Territory	£200.00
Tax in Ireland	£400.00
Tax in U.S.A.	£600.00

The Third Territory tax remains at £200.00. Under a Convention with the Third Territory, or under Section 67 of the C.A.T. Act, 1976, Ireland gives a credit of £200.00 against Inheritance Tax and claims a net amount of £200.00 Tax. The U.S.A. also gives a credit of £200.00 against its tax (under a Convention or unilaterally) and claims a net amount of £400.00 tax.

The credit to be given is then:

	Federal Estate Tax	**Inheritance Tax**	**Total**
Tax	£400.00	£200.00	£600.00
Credit	£130.00	£70.00	£200.00
	(400 x 200) / (600)	(200 x 200) / (600)	
Net Tax	£270.00	£130.00	£400.00
Third Territory			£200.00
			£600.00

Finance Act, 1950

Article III

(1) For the purposes of the present Convention, the question whether a decedent was domiciled in any part of the territory of one of the Contracting Parties at the time of his death shall be determined in accordance with the law in force in that territory.

(2) Where a person dies domiciled in any part of the territory of one Contracting Party, the *situs* of any rights or interests, legal or equitable, in or over any of the following classes of property which for the purposes of tax form part of the estate of such person or pass on his death, shall, for the purposes of the imposition of tax and for the purposes of the credit to be allowed under Article V, be determined exclusively in accordance with the following rules, but in cases not within such rules the *situs* of any such rights or interests shall be determined for those purposes in accordance with the law relating to tax in force in the territory of the other Contracting Party:

(a) Immovable property shall be deemed to be situated at the place where such property is located;

(b) Tangible movable property (other than such property for which specific provision is hereinafter made) and bank or currency notes, other forms of currency recognised as legal tender in the place of issue, negotiable bills of exchange and negotiable promissory notes, shall be deemed to be situated at the place where such property, notes, currency or documents are located at the time of death, or, if *in transitu,* at the place of destination.

(c) Debts, secured or unsecured, other than the forms of indebtedness for which specific provision is made herein, shall be deemed to be situate at the place of where the decedent was domiciled at the time of death.

(d) Shares or stock in a corporation other than a municipal or governmental corporation (including shares or stock held by a nominee where the beneficial ownership is evidenced by scrip certificates or otherwise) shall be deemed to be situate at the place in or under the laws of which such corporation was created or organized under the laws of the United Kingdom of Great Britain and Northern Ireland or under the laws of Northern Ireland, and if the shares or stock of such corporation when registered on a branch register of such corporation kept in Ireland are deemed under the laws of the United Kingdom or of Northern Ireland and of Ireland to be assets situated in Ireland, such shares or stock shall be deemed to be assets situated in Ireland;

(e) Moneys payable under a policy of assurance or insurance on the life of the decedent shall be deemed to be situated at the place where the decedent was domiciled at the time of death;

(f) Ships and aircraft and shares thereof shall be deemed to be situated at the place of registration or documentation of the ship or aircraft;

(g) Goodwill as a trade, business or professional asset shall be deemed to be situated at the place where the trade, business or profession to which it pertains is carried on;

(h) Patents, trade-marks and designs shall be deemed to be situated at the place where they are registered;

(i) Copyright, franchises, and rights or licences to use any copyrighted material, patent, trademark or design shall be deemed to be situated at the place where the rights arising therefrom are exercisable;

(j) Rights or causes of action *ex delicto* surviving for the benefit of an estate of a decedent shall be deemed to be situated at the place where such rights or causes of action arose;

(k) Judgment debts shall be deemed to be situated at the place where the judgment is recorded;

provided that if, apart from this paragraph, tax would be imposed by one Contracting Party on any property which is situated in its territory, this paragraph shall not apply to such property unless, by reason of its application or otherwise, tax is imposed or would be but for some specific exemption be imposed thereon by the other Contracting Party. □

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Administration of Estates

The Liabilities of Personal Representatives under the Social Welfare Code

A central distinction in the social welfare system is that between social insurance and social assistance payments. The former are based on the contributions made by the claimant to the Social Insurance Fund (collected now in the form of P.R.S.I.), while the latter are paid if the claimant satisfies the appropriate means test. From the point of view of legal form, both payments exist in the form of entitlements, but social assistance has certain characteristics which reflect the perception that it is a form of "hand-out", funded out of general taxation.

One such manifestation can be seen in the statutory obligations placed on the personal representative administering an estate where the deceased was in receipt of a non-contributory (i.e. means-tested) old age pension.[1] The purpose of this note is to detail these obligations and to consider other aspects of the social welfare code of relevance to the administration of estates.

by
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General provision for the old age pension is to be found in ss. 157 to 174 of the Social Welfare (Consolidation) Act 1981, (hereinafter referred to as "the 1981 Act") as amended. Reference is made to personal representatives in three of those sections.

Section 169

By virtue of s. 169(3), a personal representative is liable to repay to the Minister any sums paid to the claimant in respect of the old age pension while the statutory conditions were not fulfilled or while he had been disqualified for receiving the pension.[2] S. 169(7), as amended, provides that such sums may be deducted from any monies, on account of old age pension, to which the personal representative becomes entitled, *as personal representative.* This presumably refers to any pension outstanding at the date of the claimant's death, together with the pension payable, where appropriate, for the period of six weeks after that date.[3]

Section 172

S. 172 makes further provision for the repayment to the Minister of overpaid old age pension. Where a claimant, who is in receipt of, or has applied for, an old age pension, fails to notify the Department of any increase of means within three months after the end of the month in which such increase took place, he, or his personal representative, shall be liable to repay to the Minister on demand any sums received to which he was not entitled.

There are two statutory defences available to the claimant in this situation. If he can, first, establish to the satisfaction of the Minister that he, the claimant, was unaware of the increase in means — s. 172(2), or, second, prove that there was no fraudulent intent and that there are no significant resources available to the claimant — s. 172(4).

If the first defence is established, the claimant, or his estate, can arguably retain any overpaid pension, notwithstanding that there might be adequate monies available to satisfy any demand for repayment.

It is worth contrasting the obligation created by s. 172 to repay overpaid old age pension with the general obligation to repay overpaid social welfare payments. By virtue of s. 113(2) of the 1981 Act, regulations may provide, *inter alia,* for the repayment of social welfare in cases referred to in s. 300(5)(a) of the Act.[4] S. 300(5)(a), which deals with the revision of decisions by deciding officers or appeals officers, provides in relevant part:

> A revised decision . . . shall take effect as follows — (a) where any benefit . . . (or) assistance . . . will, by virtue of the revised decision, be disallowed or reduced . . . and the revised decision is given owing to the original decision having been given . . . by reason of any statement or representation (whether written or verbal) which was to the knowledge of the person making it false or misleading in a material respect or by reason of the wilful concealment of any material fact, (the revised decision) shall take effect as from the date on which the original decision took effect . . ."

The significant point to note here is that the revised decision reducing or disallowing a social welfare entitlement will only have retrospective effect.[5] By contrast, the obligation to repay overpaid old

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age pension under s. 169(3) is absolute in its terms and does not depend on the establishment of fraud. To the extent that there is any inconsistency between these two provisions in relation to the old age pension, it would appear to be resolved in favour of the application of s. 169(3), by virtue of the presumption of statutory interpretation, *generalia specialibus non derogant,* i.e. general provisions do not derogate from specific ones.[6]

Section 174

The third reference to personal representatives in this part of the 1981 Act occurs in s.174. Again a liability is imposed but, unlike ss. 169(3) and 172(2), on this occasion it is a *personal* one. S. 174(1) provides:

> The personal representative of a person who at any time was in receipt of old age pension, shall, at the request of a social welfare officer made for the purposes of an inquiry and report in relation to the pension, and within such period (not being less than 30 days) as may be specified in the request:
>
> (a) furnish to the officer such information, books and documents relating to the affairs of the person which are in the power, possession or procurement of the personal representative as he may reasonably require and permit the officer to take extracts from the books and documents and furnish to him such information as he may reasonably require in relation to such extracts, and
>
> (b) authorise the officer to inspect any entries relating to the affairs of the person in the books of any bank (including any savings bank) and to take copies of such entries and furnish to the officer such information which is within the power, possession or procurement of the personal representative as he may reasonably require in relation to such entries.

Failure to comply with s. 174(1) is an offence punishable, on summary conviction, to a fine not exceeding £500 or imprisonment for a term not exceeding 1 year, or to both such fine and imprisonment, or on conviction on indictment to a fine not exceeding £2,000 or imprisonment for a term not exceeding 2 years, or to both such fine and imprisonment.

Where a deceased claimant was in receipt of a non-contributory old age pension. S. 174(3) further requires the personal representative to notify the Minister in writing, not less than three months before the distribution of assets occurs, of his intention to distribute such assets. A personal representative who contravenes subsection 3 shall be *personally* liable to repay to the Minister an amount equal to the amount, if any, which was due to the Minister from the estate in respect of overpaid old age pension.

Miscellaneous

It is worth noting a number of miscellaneous aspects of the social welfare code which are of interest in this context. By virtue of s. 120 of the 1981 Act, unpaid social insurance contributions form part of the "preferential debts" which rank after funeral, testamentary and administration expenses in the administration of the estate. If a health board incurred expense in relation to the burial of the deceased, it may obtain repayment of such expenses from the estate of the deceased, or indeed, from any person liable to maintain the deceased immmediately before his death — s. 216 of the 1981 Act.

On the credit side, it should be noted that a number of social welfare payments fall due on the death of a person. Widows' pensions are, perhaps, the most obvious, but in addition it may be possible to claim a death grant (ss. 107—109); a survivor's benefit, for a widower who is incapable of self-support by reason of some physical or mental infirmity and whose wife had been in receipt of retirement pension or contributory old age pension (s. 87); and death benefit if the deceased died as a result of an occupational accident or disease (ss. 49—53).[7] Furthermore, if the deceased had been in receipt of any one of a number of specified social welfare payments and had an adult dependant, his social welfare payment continues to be paid for a period of 6 weeks after his death (s. 125). Finally, s. 112(4) empowers the Minister to make regulations providing that probate or other proof of title of the personal representative of any deceased person may be dispensed within the case of payment of social welfare payments and also providing for the manner of distribution of such payment. The implementing regulations here are the Social Welfare (Claims and Payments) Regulations, 1952, in particular art. 17 thereof.

FOOTNOTES

1. Hereinafter referred to simply as "the old age pension". It should be noted that the statutory provisions considered in this article also apply to the Blind Pension, which originated as a variant of the old age pension.
2. The statutory conditions for receipt of the non-contributory old age pension are that the claimant has attained 66 years of age and that he satisfies the appropriate means test. A claimant is disqualified — if he is absent from the State; is imprisoned for any offence; is in receipt of a contributory old age pension; or during the six month period following the date of a conviction under s. 169(1) of the 1981 Act.
3. S. 125 of the 1981 Act.
4. The relevant regulations are the Social Welfare (General Benefit) Regulations 1953 (S. I. No. 16/1953), as amended by S. I. No. 126/1963.
5. See *The State (Hoolahan) -v- Min. for Social Welfare,* unreported, High Court, 23 July, 1986.
6. Recently applied by the Supreme Court in *D.P.P. -v- Scott Grey,* unreported, 12 March 1986.
7. This can also be claimed as a grant in respect of funeral expenses — s. 53. □

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Law Reform Commission

The following are slightly shortened versions of the Address by the Taoiseach, Mr. Charles J. Haughey, T.D., at a Press Reception on Thursday, 23rd April, 1987, at 4.00p.m. to mark the appointment of the new members of The Law Reform Commission, and of the Reply by Mr. Justice Ronan Keane, President of the Commission.

The Taoiseach's Address

I am pleased to have the opportunity to welcome the new members of the Law Reform Commission and to congratulate them on their appointment. They have a difficult and complex task ahead of them and I would like to assure them of my own support and that of my Government in their work, which we see as being of major importance and significance.

Over twenty-five years ago, as Minister for Justice at the time, I published a White Paper on law reform. This arose from my belief that an important function of Government is to ensure that the law is just and equitable, that it reflects our traditions and is updated to correspond to social and economic change. To this end it was essential that the different branches of the law be examined at regular intervals, reviewed and reformed. This belief is even stronger today.

It is a feature of a complex modern society that the volume of laws enacted continues to rise inexorably. Governments tend to be preoccupied with pressing day to day policy and administrative issues and the bulk of legislation placed on the statute books reflects this. It is difficult for a Government to find the time or the resources to stand back, as it were, and take a detailed and detached look at the impact of this rapidly growing body of law on our legal and social structures.

The Law Reform Commission, having an independent standing, is a very suitable body to promote a systematic and sustained programme of law reform. The Commission can also present a clear view on controversial issues in a way which a body subject to political direction or pressure as to the content of its reports would find difficult.

It is essential that a spirit of co-operation exist between the Government, who must be able to influence the direction of the Commission's activities and priorities, and the Commission itself, which will have the responsibility of bringing forward proposals for specific reform measures. I believe that we can achieve this without compromising, in any way, the independence of the Commission in the contents of its reports.

A major challenge facing the Commission is the pressure for results. I know that complex legal issues call for mature and considered examination. Nevertheless, I would like to see what might be done to expedite particular reforms by revising the procedures under which the Commission operates. It might for instance be appropriate to be selective and concentrate on a smaller range of issues to facilitate early publication of recommendations in particular areas or assign priorities as between these areas.

I know that the President and members of the Commission will be giving serious consideration to their programme and procedures and related matters in the months ahead and I would like to wish them every success in their endeavours.

Mr. Justice Ronan Keane's reply:

When the new Commissioners were appointed, they were asked by the then Attorney General to review as a matter of urgency certain areas of law. These were:

(1) The reform of conveyancing law and practice in areas where this would lead to savings for house purchasers.

(2) Sexual offences generally, including the law relating to rape and child sexual abuse.

(3) The law relating to Sheriffs, the collection of taxes and debt collection.

(4) A number of issues relating to compensation in personal injury cases.

(5) Various criminal law matters, including sentencing policy, indexation of fines, confiscating the proceeds of crime and updating a number of offences which are still governed by 19th century legislation.

There is unlikely to be any controversy as to the pressing need for reforms in all these areas, although there will naturally be different views as to how they should be tackled. They raise problems which affect people acutely in their daily lives and they are areas in which the law is universally regarded as being in many serious respects out of date, inefficient and even unjust. The Commission believe that the choice of specific areas where the need for reform is urgent and widely accepted signals a new and important departure in the approach to law reform in general and the work of this Commission in particular.

Thus, the newspapers, radio and television give daily and horrific testimony to the scale of the problem of sexual offences in our society. The individual Commissioners who have already undertaken work in this area are in no doubt as to the gravity of the problems of child sexual abuse. Again, in the criminal law area, one does not have to be a Judge, Lawyer or Social Worker to know the scale of the problem: it affects society to an extent unthinkable twenty or thirty years ago. As for the problems of conveyancing, a growing number of people who buy their own homes encounter delays, frustration and expense which they find inexplicable and at times traumatic. In the area of debt collection, too, delays and frustration appear to be almost endemic in the system and nowhere is this more

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apparent than in the huge volume of uncollected tax which has presented successive administrations with so major a problem. Nor can there be any escaping the widespread dissatisfaction with the system of compensation in personal injury cases currently being administered by the Courts.

Because these topics are so unarguably urgent and relevant to people's real needs, some degree of optimism as to the prospects of any recommendations being implemented might seem reasonable. But to have the machinery of law reform in place is one thing: to secure its effective implementation in legislation is quite another. This is a problem which is common to law reform agencies in jurisdictions similar to our own to a greater or less degree. Ultimately, of course, the Commission's role must remain advisory, but we are convinced that it will become not merely advisory but futile as well, unless considerable care and thought is given to devising procedures which give the ultimate recommendations made by the Commission the optimum prospects of success in terms of implementation.

The traditional method of producing reports has been to publish a "Working Paper" in the first instance, await reactions to it and then publish a final report. The experience of law reform agencies, including this Commission, of this procedure has been singularly disheartening: the gloomy experience has been — and I stress again that this is not a problem unique to Ireland — that the response tends to be minimal. Since the Working Paper is published to the world at large and necessarily contains a detailed statement of the law and its defects along with provisional suggestions as to its reform, it must be produced with meticulous care. Moreover, since it is necessarily on occasions highly technical in its approach, a decent interval must be allowed for those who take the trouble to read it, to digest its comments and come up with helpful suggestions. This whole process is immensely time consuming and, in the vast majority of cases, wasteful. It has no doubt the useful by-product of making available to lawyers and law students an up-to-date statement of the law, but this is hardly a major function of a body such as this.

An extreme response to this problem would be simply to dispense with any prior consultation before the publication of a final report and recommendations. The Commission favours a more flexible approach, which it has been putting into practice during the first months of its existence. In some cases, where the contents of any preliminary examination of the problem is necessarily technical and legalistic, no useful purpose is served by publication to the world at large. In such a case, one option which is being availed of is to circulate on a limited basis preliminary findings by the Commission in the form of Discussion Papers. Another is to form Working Groups of persons with an interest in the topic to assist the Commission in identifying where the practical problems are and how they can best be tackled. Yet another is to commission other State or outside agencies to conduct empirical research so as to ensure that recommendations are not divorced from what is actually happening in the problem areas. In the field of legal research, which is obviously the most important instrument at the Commission's disposal, there can be fruitful cooperation with the law faculties of the third level instututions. In this latter field, particularly valuable results may be achieved by harnessing the capacity for work and intellectual energy of our young law graduates.

All these approaches should, in the view of the Commission, facilitate the formulation of proposals for law reform which are soundly based in empirical and academic research, while avoiding the frustration and delays which seem inevitably to flow from the old fashioned "Working Paper" procedure. There will, of course, be circumstances in which the topic being dealt with raises policy questions of such a nature as to require more than the circulation of a Discussion Paper on a limited basis before the Commission frames its proposals for reform.

If I may illustrate what has been done so far to put these new practices into operation, I might refer to the areas of conveyancing, debt collection and compensation for personal injuries. In each case, Working Groups have been established consisting of experts in the various fields to identify problems which have arisen and indicate possible solutions. In the area of criminal law, they have selected for initial examination the question of the receiving of stolen goods, which has been giving rise to serious problems in practice and which clearly lies at the root of much of the crime in our society. A detailed Discussion Paper setting out the existing law in this area, identifying the problems, summarising what has been done in other jurisdictions and indicating possible areas for reform has already been produced by the Commission and is being circulated on a limited basis with a view to stimulating comments. I have referred earlier to the preliminary investigations which are being carried out in the area of child sexual abuse. They have already involved discussions with people involved in the front line, such as the Rape Crisis Centre and the Sexual Assault Treatment Unit at the Rotunda Hospital. The Commission are also anxious to bring to comple-

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tion, preferably in the form of a draft Civil Evidence Bill, the valuable work already done by the Commission in this area and have produced a detailed discussion paper on certain technical aspects of the law of evidence which has also been circulated on a limited basis.

As to conveyancing, there has been no overall review of land or conveyancing law in Ireland in this century. The Working Group of specialists who are assisting the Commission in this area have wisely refrained from attempting any massive overhaul of the law in the short term, but instead have already isolated a number of specific anomalies where legislation can be relatively straightforward and uncontroversial, and where substantial advantages can be reaped in terms of savings both of time and expense.

In considering what changes might be necessary to produce a long term programme of law reform relevant to contemporary needs, it is inevitable that the reform of family law will loom large. That need was already apparent when the first programme of law reform was adopted in 1976, since there was included in it a number of aspects of family law. No less than eleven reports were published by the Commission dealing with various aspects of family law and, in addition, their reports recommended the accession by the State to a number of important conventions prepared by the Hague Conference on Private International Law. Of the many recommendations contained in these various reports, only three have been implemented.

The members of the Commission recognise that, while it is their role to advise, it is the prerogative of the Government and the Oireachtas to decide in areas of law reform. But it would be taking an unduly blinkered view of the wide-ranging functions imposed by the Oireachtas itself on the Law Reform Commission to suppose that its interest in a particular area of law is exhausted once it has published its report and recommendations. The Commission itself may have much to learn from criticisms advanced in the Oireachtas of proposals which it has made and from the reasons given from time to time by Ministers for not seeking the implementation of Commission recommendations. Equally, for its part, the Commission would be failing in its duty if it did not draw the attention of the public, as indeed it has already done in its annual reports, to the extent to which its recommendations have not been implemented. The Commission would also be failing in its statutory obligation to keep the law under review if it did not constantly monitor the progress of its recommendations, ascertain where it can the reasons for their not being implemented and draw the attention of the public specifically to those areas where, in its judgment, implementation is most urgently required.

All this, of course, is not to suggest that the Commission regards its work in the area of family law as now confined to monitoring the implementation of recommendations already made. The Commission has yet to make its recommendations as to the best type of judicial or Court structure or structures appropriate to deal with the different matters falling under the general heading of family law. It was already apparent to us that this is an aspect of the whole subject which is causing the gravest concern to those concerned with family law in all its aspects.

We are conscious of the fact that in the general area of family law there is a serious imbalance between reports and recommendations on the one hand and legislative activity or executive action on the other. I have already drawn attention to the wide range of Commission recommendations which remain unimplemented. But over this whole field, there are reports from other agencies, some of them in the public domain for many years, many of whose recommendations for legal change have yet to be implemented. Of these, it is only necessary to mention the Report of the Joint Committee of the Oireachtas on Marriage Breakdown, the Report of the Commission on the Status of Women, the Report of the Review Committee on Adoption Services, the Kennedy Report on Reformatory and Industrial School Systems and the final Report of the Task Force on Child Care Services. This is a disquietingly lengthy list and it suggests strongly that, while there has been much activity in the reporting field, motivated by a strong sense of the urgent need to reform the law and exhibiting a wealth of ideas and an abundance of good intentions, many of the specific proposals for reform are not being actively pursued. On the other hand, the Commission acknowledges that many others are in the nature of outline proposals only and require much research and examination before being considered as subjects for legislation.

It is the Commission's intention in the near future to publish a short Discussion Paper tentatively entitled *Strategies for Reform in Family Law* which will summarise the present state of affairs and suggest possible ways forward. Already preliminary soundings indicate that the priority for reform is the administration of justice in family cases.

The Commission are most anxious to obtain the views of all interested members of the public on the topics which they will be examining from time to time so as to ensure that the ever present danger of law reform proposals being produced in a vacuum isolated from reality can be avoided so far as is humanly possible. It would be most interested to receive from any members of the public views they may have or facts that they may wish to bring to the Commission's attention on any of these topics.

(Contd. on p. 135)

DOCUMENT EXAMINATION

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CORRESPONDENCE

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

5th May 1987

Protection of the Elderly

Dear Sir,

As Chairman of the National Council for the Aged, I have been having correspondence and discussions with Messrs Eric Brunker and Patrick Fagan of your Conveyancing Committee about the adequacy of the legal protection of the interests of certain elderly people. The National Council for the Aged — an advisory body to the Minister for Health on all aspects of the welfare of the elderly — is concerned, in particular, about the position of those elderly who irrevocably sign over their property or other assets to another party.

Some elderly people are particularly vulnerable at times of stress (e.g. just prior to entry into a long-stay institution) when external pressures may suggest the desirability of transferring assets to another party, usually a relative. In these circumstances, the elderly are in particular need of independent and adequate legal advice. Whilst in the majority of cases such advice is available, we are conscious that in some cases it may not be and there is evidence of some elderly persons not being fully aware of the implications of their actions. In view of the irrevocable nature of the asset transfers made this has given rise to hardship in certain cases.

While separate legal representation for the elderly person is a solution we would favour, we appreciate that this may not always be a practical proposition and in the alternative if separate representation is not possible we would ask that particular attention is given by the solicitor involved to ensure that the elderly person is fully capable of making a decision and that all the implications of that decision are fully explained in an impartial manner.

The Council would be most grateful if the Law Society would raise this issue with its members and make an appropriate recommendation as to practice in this area.

Yours sincerely,

L. J. Tuomey,
Chairman,
National Council for the Aged,
Corrigan House,
Fenian Street,
Dublin 2.

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Lady Solicitors' Golfing Society

Another successful outing was held on the 21st July 1986 at Newlands Golf Club. While the day remained fine, it did not produce scores which would threaten the handicaps nor did any new winners emerge. Mary Molloy and Elaine Anthony showed their usual consistency by producing 32 points and 31 points respectively in difficult conditions. Sheila O'Gorman came third with 27 points.

The best score came from one of our visitors, Frances Kearney, with 33 points. Kay O'Neill and Chris Ryan were second and third respectively with 31 points each.

Newlands have kindly agreed to have us again for our next outing. This will be on Thursday 30th July next, tee-off times 12 noon to 1.30p.m.; 2.30p.m. to 3.30p.m.

As usual, the dinner and presentation will take place afterwards, and again all prize donations will be welcome.

All applications to participate should be sent to:
Christine Scott,
43 St. Stephen's Green,
Dublin 2.

LAW REFORM COMMISSION

(Contd. from p. 134)

It is the Commission's intention, when significant progress has been made in the form of reports and recommendations on some at least of these items, to present to the Taoiseach a revised programme for law reform for consideration by the Government. In the hope that this process will be at least under way in the later part of the year, it is their present intention to arrange a seminar to be held in Trinity College in the autumn, at which proposals for law reform for possible inclusion in the Commission's draft programme will be subjected to detailed discussion and analysis by as many interested sections of the public as possible. □

Personnel Available

Qualified Personnel

(Short Random Selection)

Experience	Preferred Location
Conveyancing; Litigation; good general experience; Admitted 1985. Decree B.C.L. Quote Reference "H1".	Dublin & Provinces
Litigation; General Experience; Admitted 1985. Quote Reference "H3".	Dublin & Provinces
Conveyancing; Litigation; Admitted 1986. Degree B.C.L. Quote Reference "H5".	Cork/Galway
Good General Experience; Degree B.C.L. Quote Reference "H7".	Dublin & Provinces
Commercial Law; Litigation; Conveyancing; Probate; Debt Collection. Admitted 1986. Quote Reference "H9".	Dublin
Litigation; Matrimonial. Admitted 1981. Degree B.C.L. Quote Reference "H11".	Dublin & Provinces
Litigation; General Probate. Admitted 1982. Decree B.C.L. Quote Reference "H13".	Cork & County
Experienced in General Litigation; Conveyancing. Admitted 1983. Decree B.A. Quote Reference "H16".	Dublin & Kildare

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Experienced Law Clerk:- Debt Collection; Litigation; Probate; Conveyancing. Quote Reference "H 12".	Dublin
Legal Secretary:- Conveyancing; Word Processor Operator; Bookkeeping; General Office Duties. Quote Reference "H 4".	Dublin
Legal Secretary; Experience in Shorthand; Dictaphone; Debt Collection; Quote Reference "H 6"	Dublin
Junior:- Dictaphone; Receptionist; Limited Legal Experience. Quote Reference "H 8".	Dublin & Provinces
Legal Secretary:- Experience in Shorthand; Dictaphone; Debt Collecting; WP; Dealing with Clients. Quote Reference "H 10".	Dublin & Provinces
Temporary/Part Time Legal Secretary:- Shorthand; WP; General Office Duties. Quote Reference "H 14".	Dublin

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Legal Secretary required for Partner Dublin City Solicitors; 3 to 5 years experience; WP experience essential. Quote Reference "H 17".	Dublin
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Professional Information

Land Registry — Issue of New Land Certificates

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 notificiation 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 May, 1987.

J. B. Fitzgerald (Registrar of Titles)

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

SCHEDULE OF REGISTERED OWNERS

John Brown of High Warren, Baylin, Athlone, Co. Westmeath. Folio No.: 8910; Lands: Clonreuck; Area: 15a.2r.33p.; County: **WESTMEATH.**

Patrick and Sarah Ronane of Meeltraun (O'Flynn), Cloonfad, Ballyhaunis, Co. Mayo. Folio No.: 33671; Lands: (1) Meeltraun (O'Flynn), (2) Derrylahan; (3) Cloonfad East; Area: (1) 13a.3r.29p., (2) 7a.3r.16p., (3) 1a.2r.8p.; County: **ROSCOMMON.**

Mary Brennan of Ballymacavanny, Pettigo, Co. Donegal. Folio No.: 26785; Lands: (1) Ballymacavanny, (2) Tawlaght; Area: (1) 36a.0r.24p., (2) 18a.1r.0p.; County: **DONEGAL.**

Philip Stanley of Johnstownbridge, Enfield, Co. Meath. Folio No.: (1) 2893, (2) 2877 closed to 4001F, (3) 6645; Lands: (1) Johnstown, (2) Johnstown, (3) Kilmurry; Area: (1) 5a.04.24p., (2) 1a.3r.20p (1.875 acres), (3) 14a.2r.7p.; County: (1) and (2) **KILDARE** (3) **MEATH.**

John Fergus Ryan of Cherryorchard, Enniscorthy, Co. Wexford. Folio No.: 1455 revised to 11394F; Area: 55.168 acres; County: **WEXFORD.**

William Stanley Hughes of Annyart, Castleblayney, Co. Monaghan. Folio No.: 9970; Lands: Annyart (part), Area: 7a.1r.0p.; County: **MONAGHAN.**

Christopher McMahon of 43 Thorncliffe Park, Dublin 14. Folio No.: 22943; Lands: Ramstown; Area: 0a.2r.14p.; County: **OFFALY.**

Seamus and Helen Lyons of Carrickmacantire, Ballyhaunis, Co. Mayo. Folio No.: 186; Lands: (1) Carrickmacantire, (2) Carrickmacantire (an undivided moiety); Area: (1) 14a.3r.22p, 9a.0r.12p.; County: **MAYO.**

Bridget Crossan of Urrismenagh, Clonmany, Co. Donegal. Folio No.: 16018; Lands: (1) Urrismenagh, (2) Urrismenagh; Area: (1) 12a.1r.2p., (2) 911a.3r.26p.; County: **DONEGAL.**

John Joseph Hartney of Robertstown, Shanagolden, Co. Limerick. Folio No.: 15395; Lands: Ardlaman; Area: 21a.3r.20p.; County: **LIMERICK.**

Michael Brophy of Bantis, Cloughjordan, Co. Tipperary. Folio No.: 22060; Lands: (1) Bantis, (2) Bantis; Area: (1) 3a.2r.34p., (2) 6a.0r.36p.; County: **TIPPERARY.**

Stephen Nash of Mountshannon, Co. Clare. Folio No.: 1325F; Lands: (1) Middleline South, (2) Knockaphort, (3) Bohatel North (one undivided 44th part), (4) Bohatel South (one undivided 44th part), (5) Glenwanish (one undivided 44th part), (6) Sellernaun West (one undivided 44th part); Area: (1) 15.925 acres, (2) 9a.1r.10p., (3) 671a.3r.5p., (4) 228a.3r.36p., (5) 347a.0r.2p., (6) 33a.3r.30p.; County: **CLARE.**

Mairead Glavey of Brize, Claremorris, Co. Mayo. Folio No.: 42384; Lands: Coolaghbaun; Area: 32.373 acres; County: **MAYO.**

Michael Heavy of Lakeview, Moylough, Co. Galway. Folio No.: 27601; Lands: (1) Carrowkeel, (2) Moylough More, (3) Moylough More; Area: (1) 2a.0r.34p., (2) 8a.2r.33p., (3) 13a.3r.8p.; County: **GALWAY.**

Bridget Monica Dillon of Abbey Street, Ballyhaunis, Co. Mayo. Folio No.: 4787; Lands: Abbeyquarter; Area 0a.0r.20p.; County: **MAYO.**

Minnie Cresswell and Lily Cresswell of Tooban, Fahan, Co. Donegal. Folio No.: 6037; Lands: Tievebane; Area: 6a.1r.23p.; County: **DONEGAL.**

Thomas Brady of Ballyduffy, Moyne, Co. Cavan. Folio No.: 1041; Lands: Ballyduffy; Area: 18a.0r.4p.; County: **LONGFORD.**

Patrick J. Hayes & Co. Ltd. of Drombane, Dromkeen, Co. Limerick. Folio No.: 9354; Lands: Drombane; Area: 19a.1r.6p.; County: **LIMERICK.**

Michael Byrne of Ballygurteen, Castlewarren, Co. Kilkenny. Folio No.: 305; Lands: Coorleagh; Area: 26a.1r.18p.; County: **KILKENNY.**

Donal and Carmel Deasy of 64 Westcourt Heights, Ballincollig, Co. Cork. Folio No.: 53347; Lands: Fermoy; Area: 0a.1r.0p.; County: **CORK.**

Michael Rohan of Dungourney, Co. Cork. Folio No.: 15208F; Lands: Dungourney; Area: 53.24 acres; County: **CORK.**

Mary Leahy of Ballyclough, Ballysheedy, Co. Limerick. Folio No.: 9962F; Lands: Ballysheedy East; —County: **LIMERICK.**

Lost Wills

Hayes, Timothy, deceased, late of 120 John Carew Park, Limerick, formerly of Carrickoreilly, Caherconlish, Co. Limerick. Would anyone having knowledge of the whereabouts of a Will of the above-named deceased, who died on the 24th June, 1986, please contact M/s. Binchy & O'Sullivan, Solicitors, St. Michael Street, Tipperary. Ref. VO'S/6140.

Egan, Thomas, deceased, late of 29 Blessington Street, Dublin, and formerly of British Columbia, Canada. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased, who died on 8th February, 1987, please contact Arthur E. McMahon, Solicitors, Poplar Square, Naas, Co. Kildare. Tel. (045) 97936.

Whelan, Christina, deceased, late of 72 Monkstown Road, Blackrock, Co. Dublin. Would anyone having knowledge of the whereabouts of a Will of the above-named deceased, who died on 23rd March, 1987, please contact Messrs. Rowan & Co., Solicitors, 34 Fitzwilliam Sq., Dublin 2. Ref. AMB.

Lost Title Documents

In the matter of the Registration of Titles Act, 1964, and of the Application of Gertrude Farley in respect of "Urris", 74 Roebuck Rd., Dundrum,

Take notice that Gertrude Farley of "Urris", 74 Roebuck Rd., Dundrum, in the County of Dublin has lodged an application for her registration on the Freehold Register free from encumbrances in respect of the above-mentioned property.

The original documents of the leasehold title 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.

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The Profession

Joseph S. Cuddigan, Solicitor, has commenced practice under the style of Joseph S. Cuddigan & Co., Solicitor, 23 Marlboro Street, Cork. Tel. 270903/270733.

Miscellaneous

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THE SOLICITORS BENEVOLENT ASSOCIATION

GENERAL MEETING IN KILKENNY

Following the address of the President of the Society, Mr. David R. Pigot, at the Half-Yearly General Meeting in Kilkenny on 2nd May, 1987, Mr. John O'Connor, Chairman of the Solicitors Benevolent Association was called upon to outline the Association's activities. Following a resume of the Association's work, Mr. O'Connor stated that the Committee wished to thank the Bar Associations, the Younger Members Committee and individual Solicitors who had responded to the financial appeal made at the last General Meeting.

However, the Association remains in serious need of funds as there will clearly be a sizeable deficit this year. About 60 cases are currently being dealt with. Mr. O'Connor said that subscriptions from individual Solicitors may be sent to the Secretary of the Association, Ms Clare Leonard, at 40 Fitzwilliam Square, Dublin 2, or c/o Law Society, Blackhall Place, Dublin 7.

The President who had earlier in the day attended a meeting of the Directors of the Association thanked Mr. O'Connor and the other members of the Association Committee for their work which he said deserved the continued generous support of the profession.

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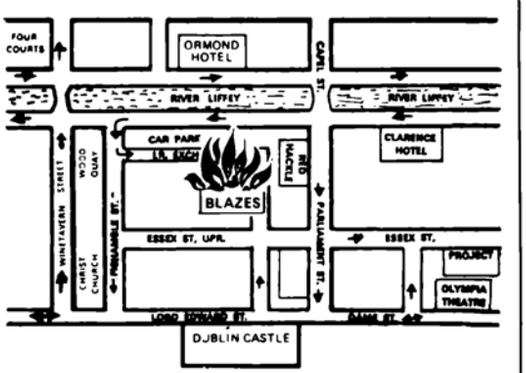

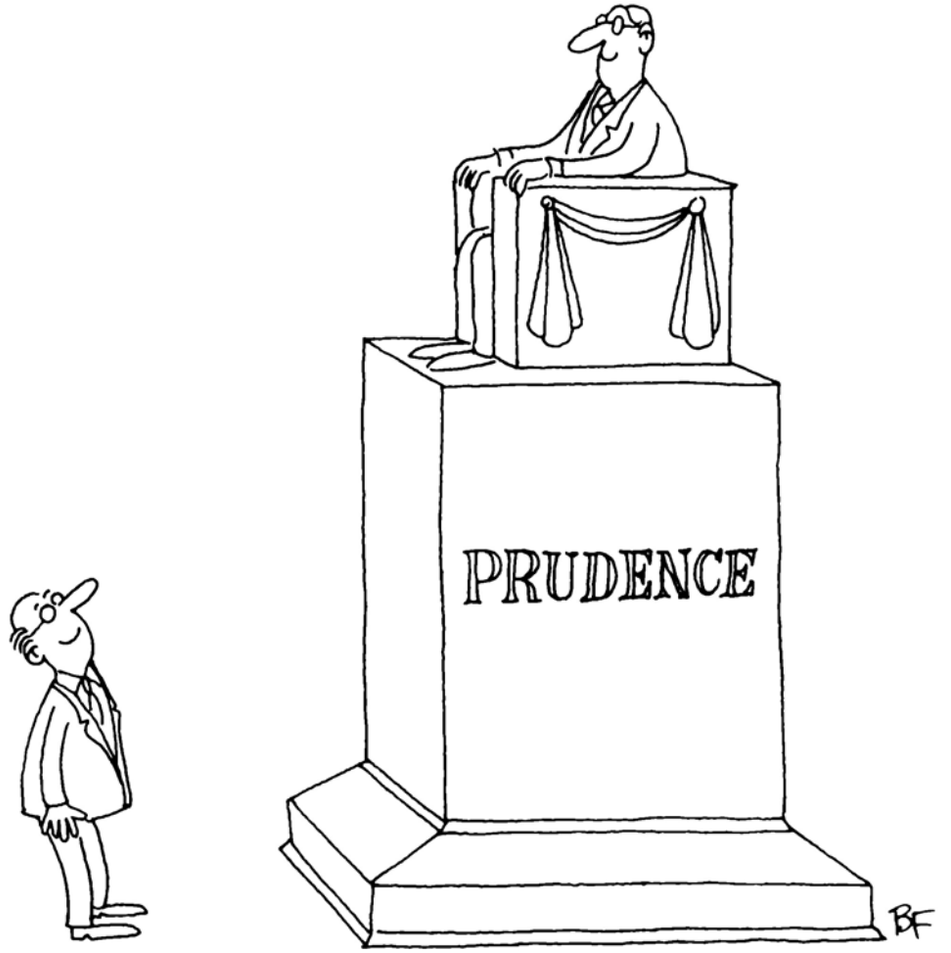

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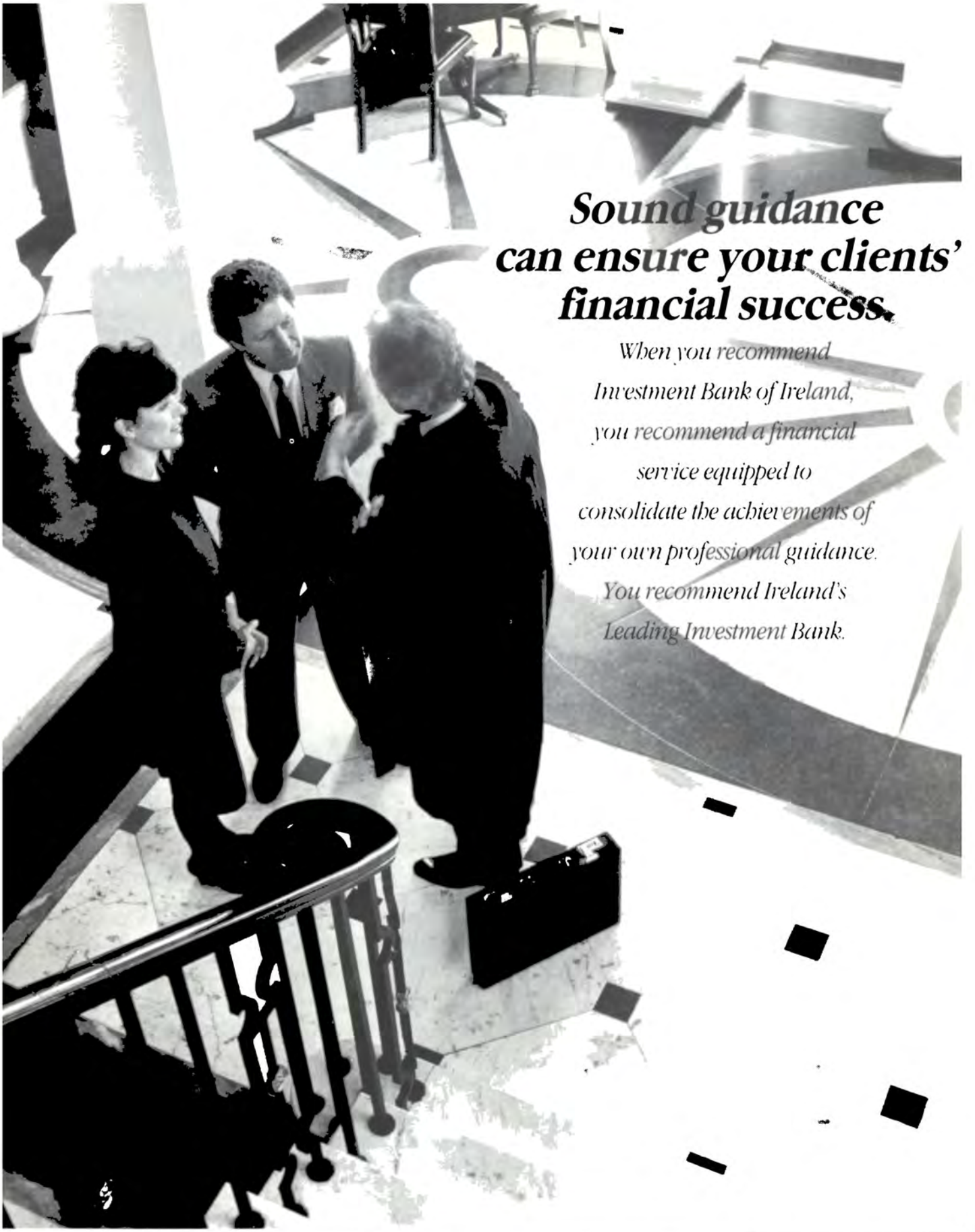

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INCORPORATED LAW SOCIETY OF IRELAND

Vol. 81 No. 5 June 1987

Mr. Jim Hickey, Principal of The College of Commerce, Rathmines, with Ms. Brenda Agnew, the Law Society's Education Officer and Law Clerks Course Co-ordinator.

Presentation of Certificates to Law Clerks
Blackhall Place, 18 June, 1987.

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INCORPORATED LAW SOCIETY OF IRELAND
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Viewpoint

The Minister for Justice's recent statement in reply to a Dail question that he had no plans at present to set up new Courts to hear civil appeals from the High Court is a disappointment. Not only is it an indication that no immediate change may be expected, but there was a clear implication that until a formal proposal was made to the Minister the matter would not be considered. It might have been expected that the Department of Justice, who have full knowledge of the serious overloading of the Courts' caseload, would already have had the matter under consideration. The Minister acknowledged that he was aware that the Chief Justice had recently raised the issue for debate. This was in the Cearbhall O'Dalaigh lecture in 1986, when Mr. Justice Finlay put forward strong arguments for the introduction of an intermediate Court of Appeals on the civil side.

The need for some alleviation of the burden of the Supreme Court Judges is manifest once the increase in their caseload is measured. In the legal year 1964/65, excluding interlocutory motions, 121 appeals were entered for hearing before the Supreme Court. In the legal year 1985/86 the comparable figure was 358. The figures for the current year show a continuation of this trend. A recent Legal Diary listed 109 cases as being ready for hearing by the Court.

With the High Court having under the Constitution primary jurisdiction in all areas there was, in the absence of any intermediate court on the civil side, no alternative but to have the Supreme Court hear appeals from the High Court. Litigants who brought (and, indeed, in most cases were obliged to bring) their actions in the High Court could hardly be deprived of their right of appeal.

It also has to be said, with due temerity, that the heavy caseload might lead to a decline in the jurisprudence of the Court. An appeallant court may well be able to do justice between the parties, deal satisfactorily with the arguments put before it by their advocates and yet produce a Judgement which may not be of great assistance to future litigants and their legal advisors. It may not always be apparent how the Court has resolved apparent conflict between previously decided cases, dealt with particular arguments, or even whether certain lines of argument were put to the Court. A final Court of Appeal should have sufficient time available to it to enable it to produce Judgements which will not only deal with the issues in the case but contribute further to the Court's jurisprudence.

There are no easy cases in the Supreme Court, none that do not require the study of transcripts of evidence, many that require the reading of substantial volumes of materials which have been put in evidence in the High Court and some where the amount of material to be considered by the Court following some lengthy and complex action is mind-boggling.

The introduction of a multi-Judge Court of Appeal should enable the overload on the Supreme Court to be reduced whilst still providing the litigant with an appeal to a different Court. This system has operated satisfactorily on the criminal side for over sixty years. It should now be introduced as a matter of urgency on the civil side. □

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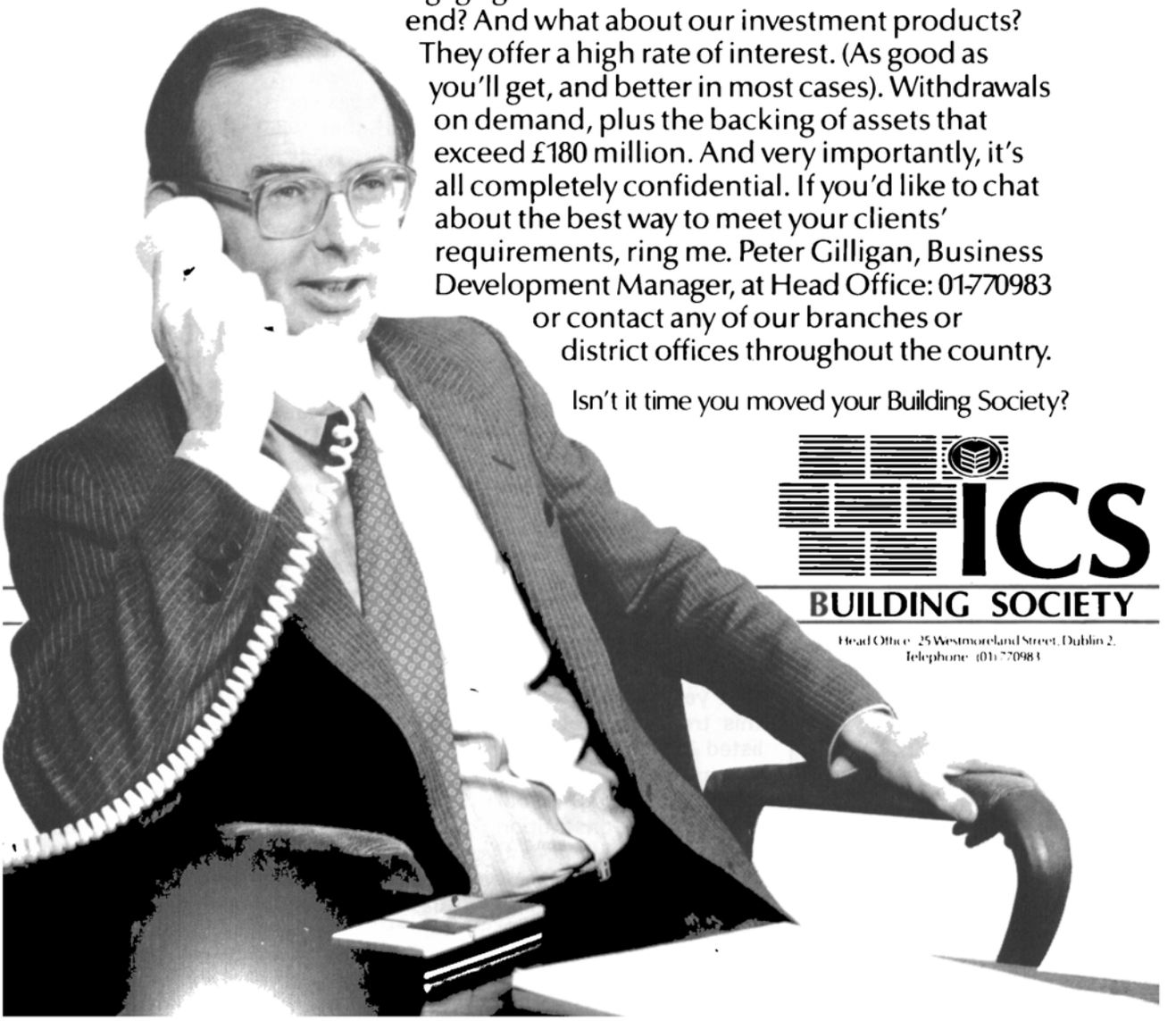

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Licensed Premises for Sale

In this article I propose to examine certain licensing problems which the general practitioner may encounter in a conveyancing transaction involving a licensed premises.

by
James V. Woods, B.L.

The identification of, and restrictions attaching to, 'Hotel Licences'

In general, a sight of the licence will indicate what is on offer — whether the licence is of a retail character, authorises sales both on and off the premises or off the premises only, covers intoxicating liquor generally or is restricted to certain liquors (beer or wine), or has any condition attached (six days or early closing). This is not so in the case of an 'hotel licence'. The Licensing (Ir.) Act, 1902, provided for the granting of a new licence in respect of an hotel "which expression shall refer to a house containing at least ten apartments set apart and used exclusively for the sleeping accommodation of travellers, and having no public bar for the sale of intoxicating liquors" (section 2, sub-section 2). The legislature did not draw a distinction either in substance or in description between a licence granted to premises on the basis that they are an hotel and other premises to which a full on-licence is attached and the licence issued by the Revenue Commissioners is the same in form in both cases — "Publican's Licence (Ordinary)". The possibility that this state of affairs may give rise to confusion or misunderstanding is acknowledged to the extent that the following note appears on the back of the licence so issued:

> "This form of licence is used for both (1) public-house and (2) certain hotels licensed under Section 2(2) of the Licensing (Ireland) Act, 1902. These hotel licences are subject to certain restrictions which do not apply to public-houses."

A solicitor who undertakes the legal business involved in the purchase of licensed premises owes a duty to his client to exercise care in relation to the identification of the type of licence attached to the premises and he also holds himself out as having adequate skill and knowledge properly to identify any restrictions attaching to that licence. Consequently , in the case of an 'hotel licence', he will not discharge his duty of care nor be aware of the restrictions by a mere sight of the licence.

Duty of Care

The duty to exercise care was considered in *Taylor -v- Ryan and Jones,* unreported judgment of Finlay P. delivered on 10 March 1983, and again in *Kelly and Anor. -v- Crowley*, unreported judgment of Murphy J. delivered on 5 March 1985. The cases concerned actions for negligence against solicitors acting for the purchasers of licensed premises. In both cases it did not emerge until after the sales had been completed that the licences had been granted on the grounds that the premises were hotels. In *Taylor -v- Ryan* the plaintiff intended to purchase a certain residential licensed public-house for one of his sons and having entered into a contract for that purpose he then instructed the second-named defendant to carry out the legal work concerning the purchase of the premises. The reply to a requisition requiring the vendor to specify the exact type of licence attached to the property was "copy licence furnished ordinary licence". Prior to the delivery and reply to the requisitions on title the solicitor for the vendor had furnished to the defendant a photostatic copy of the current licence. Shortly after the signing of the contract the plaintiff paid a special visit to the defendant/solicitor to warn him that he had been informed that there was no licence attaching to the premises or that there was something wrong with the licence. The defendant showed him the copy licence which he had received and reassured him that the premises were licensed. A few days later the plaintiff again voiced his fears concerning the licence but defendant reiterated that assurance. In the course of his judgment the President stated: —

> "I am driven to the conclusion however that since the existence of a valid licence attached to these premises was a fundamental part of the reason why the plaintiff was purchasing them and since the plaintiff himself put this defendant on notice in a persistent fashion of a doubt existing concerning the validity of the licence that it was not a sufficient precaution for this defendant to take to rely on his knowledge of the factual situation or on the knowledge of the plaintiff of the trading, custom and habits of the premises. After events established that a simple direct enquiry to the District Court office in Thurles which is the appropriate area for the premises licensed in Dundrum would have revealed that a licence was recorded at all material times as being what is known as a hotel licence. In my view in the particular circumstances of this case and on the express warnings given such an enquiry was a necessary reasonable standard of professional skill and care on the part of this defendant. I

therefore conclude that the plaintiff is entitled to damages."
(Pp.9–19)

In *Kelly -v- Crowley*, the requisitions concerning the type of licence were replied to by forwarding the original licence for inspection. Murphy J. had this to say concerning the duty of care:

"It seems to me that in every case in which a solicitor acts on behalf of a client in the purchase of premises in respect of which there has been granted a licence for the sale of intoxicating liquor, the solicitor is bound to concern himself with the nature of the licence attaching to the premises; the power of the vendor to procure such licence to be vested in the purchaser and the means by which such licence is transferred to or vested in the client . . . In the circumstances it seems to me that the conclusion is inescapable – even in the absence of evidence of any practice or custom in relation to the exercise of the solicitor's profession – that a solicitor acting on behalf of a lay client in the purchase of licensed premises is bound to make appropriate enquiries as to the nature of the licence attaching thereto." (Pp. 17–18)

Murphy J. later concluded:

". . . a direct obvious and conclusive means of putting a purchaser's solicitors in possession of all of the relevant facts with regard to the licence attaching to any given premises for sale"

was by an inspection of the relevant Register of Licences prior to the sale.

Sleeping accommodation for guests

If premises to which an hotel licence is attached cease to operate as an hotel by not having the required number of rooms for travellers then "the licence would cease to be a protection to the holder" *(Quinn -v- Bourke* (1906) 2 IR 94). If the licence was granted prior to the commencement of the Tourist Traffic Act 1952 (that is, 3 July 1952), 10 apartments must be kept available for the sleeping accommodation of travellers. In the case of a licence granted between 3 July 1952 and the commencement of the Intoxicating Liquor Act 1960 (that is, 4 July 1960), the requirement is for 10 rooms but, if the licence was granted consequent upon a declaration obtained under the 1952 Act and the premises are situate in a county borough, 20 rooms must be kept available. In the case of hotel licences granted subsequent to 4 July 1960 the requirement is for 20 rooms for premises situate in a county borough and 10 rooms if situate elsewhere.[1]

Public bar facilities

A licence granted on the basis that the premises constituted an hotel precludes the licensee from maintaining a public bar on the premises unless an order pursuant to section 19 of the Intoxicating Liquor Act 1960 is obtained. The grant of a section 19 order presents little difficulty and requires merely the extinguishment of an ordinary 7 day licence which may be drawn from anywhere within the State (see *Application of Dunne [1968] IR 105*). While the effect of such an order will be to remove the visual distinction between premises licensed on the basis of being an hotel and those licensed as an ordinary public-house, the order will not operate to relieve the licensee from continuing to trade as an hotel with the requisite number of rooms set apart for the sleeping accommodation of travellers nor from maintaining registration in the register of hotels.

Registration in the Register of Hotels

A requirement of registration in the register of hotels kept by Bórd Fáilte arises under the Tourist Traffic Acts and under the Licensing Acts.

Section 33 of the Tourist Traffic Act, 1939, as amended by s.3 TTA 1983, provides that it shall not be lawful for the proprietor of any premises to describe or hold out or permit any person to describe or hold out such premises as an hotel unless such premises are registered in the register of hotels and such proprietor is registered in that register as the registered proprietor of such premises. The penalty for contravention of the section is a fine not exceeding £500 together with, in the case of a continuing offence, a further fine (not exceeding £300 in all) not exceeding £20 for every day during which the offence is continued.

Section 20 of the Intoxicating Liquor Act 1960 provides that a renewal of hotel licences which were (i) originally granted consequent upon a declaration obtained under the Tourist Traffic Act 1952, or (ii) were granted after 4 July 1960, shall not be allowed unless the premises are registered in the register of hotels.

New Licence applied for in the case of an existing licensed hotel

A further complicating factor may arise in the case of pre-1960 hotel licences. If at any time after 4 July 1960 it became necessary to apply to the Circuit Court for a new licence in respect of the premises on the grounds that (i) there was a failure to renew the existing licence at any time within the previous five years or, (ii) the premises were extended by the incorporation of additional or adjoining premises, the licence so granted will be a new hotel licence and will carry with it the requirements of registration in the register of hotels and, if the premises are situated in a county borough, the maintenance of 20 rooms set apart for travellers.

In the *Application of Declan Bannerton [1984] ILRM 662*, premises known as the Mount Hotel, Ballinasloe, were first licensed on 29 March 1960 under the provisions of section 2(2) of the Licensing (Ir.) Act 1902. The licence was allowed to lapse in 1976 but a new licence was granted in respect of the premises within the relevant five year period at Galway Circuit Court on 28 July 1978. This licence was then renewed at each of the annual licensing sessions held in the years up to 1981. At the annual licensing court for the year 1982 objection was taken on behalf of the Gardai that the hotel was not registered in the register of hotels kept by Bórd Fáilte. The matter came before the High Court by way of a consultative case stated. The applicant accepted that the licence granted

by the Circuit Court in July 1978 was a new licence but submitted that since the premises for which the licence was granted had existed prior to the passing of the Intoxicating Liquor Act 1960 as an hotel licensed under the provisions of section 2(2) of the Licensing (Ir.) Act 1902, the licence granted by the Circuit Court in 1978 was not a licence to which section 20 of the 1960 Act applied. Barron J. rejected the submission:

> ''Section 20 of the Intoxicating Liquor Act 1960 does not refer to premises. It refers to a licence. Accordingly, it seems to me that it is immaterial whether or not the premises to which the licence relates was or was not so licensed prior to the passing of the Act. The licence under which the premises are now licensed was granted since the passing of the Act and accordingly the applicant's first submission fails.''

The decision in *Carrick Hall Holdings Ltd. -v- Dublin Corporation* [1983] ILRM 268 illustrates an unusual problem which may arise if the licence attached to premises was an hotel licence at any time after 1 October 1964. The facts in that case were that the plaintiff had purchased in 1975 an hotel to which an hotel licence was attached. He subsequently succeeded under other provisions of the Licensing Code in having an ordinary public-house licence granted in respect of the premises, and having converted part of the ground floor into a lounge bar carried on an ordinary publican's lounge bar trade. These changes led to a large increase in the licensed trade. An Bórd Pleanála, on a reference to it by the defendant, decided that a change of use of the premises from use as an hotel without a public bar to use as a hotel with a public bar was development within the meaning of the Local Government (Planning and Development) Act 1963, and was not exempted development. The plaintiff appealed to the High Court. He argued that as a licensed trade had been carried on before the construction of the public bar there had been no change of use. The appeal was dismissed, McWilliam J. holding that inten-

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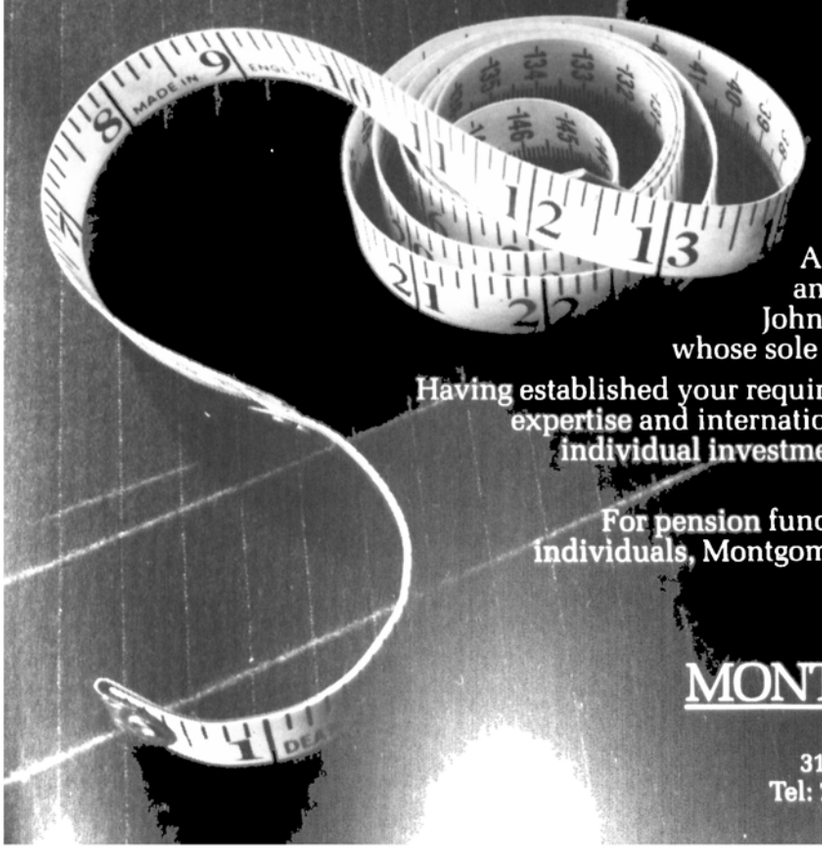

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sification of use can be a material change of use and an increase in vehicular traffic was relevant in deciding if there had been a material change of use. In this case the evidence was conclusive that the change from an hotel licence without a public bar to an ordinary 7 days licence with a public bar had changed the whole character of the business carried on and had caused an increase in traffic, parking, noise and other unsatisfactory changes in amenities for the local residents. Consequently, there were ample grounds for the decision of An Bórd Pleanála.

Alterations to Licensed Premises

It may come to light during the course of the conveyancing transaction that, down through the years, the licensed premises have been altered once or more times. The effect of any such alterations on the validity of the licence falls to be considered under the Licensing Code and the Planning Acts.

The Licensing Code

When alterations are carried out on licensed premises the question of whether a new licence should be applied for in the Circuit Court pursuant to the provisions of section 6 of the Licensing (Ir.) Act 1902, or whether a renewal certificate granted by the District Court would suffice, must be considered. The test to be applied in such circumstances is well-settled: are the premises, as altered, "substantially the same" as the previously licensed premises? If the Justice holds that they are, then he has jurisdiction to renew (or transfer) the licence (*R. -v- Bradford J.J.* (1896) 60 JP 265). The older authorities clearly show: (i) that the discretion of the Justice as to what are "substantially the same" premises is very elastic, and (ii) that the question is one of fact, not law, and the High Court will not intervene unless it is quite clear that there is no evidence to support the conclusion of fact. See cases cited at O'Connor's Justice of the Peace, vol. II, pp. 706—708.

When alterations have been carried out to licensed premises it is submitted that the proper course is to bring the fact of alteration to the Justice's attention at the next annual licensing court so that he may apply the jurisdictional test. However, failure to appraise the Court of the alterations will not deprive the Justice of jurisdiction to grant a renewal certificate after the completion of any such alterations or any subsequent renewal certificates. Even if the Justice erred in granting the first renewal certificate after the premises were altered, such was an error made within jurisdiction and if the order was not subsequently appealed or impeached by *certiorari* the licence issued on foot of such certificate must be regarded as valid. Such was the reasoning adopted in *The State (Attorney General) -v- Judge Durcan* [1964] IR 279, *Doreen Riordan's* Case [1981] ILRM 2, and *Bannerton's* Case [1984] ILRM 662.

In Judge *Durcan's* case the Circuit Judge granted a new licence for premises previously licensed but in respect of which the licence had lapsed. At the hearing evidence was adduced that the premises had been licensed during the previous five years when in fact the licence had expired six years before and was, accordingly, outside the relevant period for revival. The excise authorities refused to issue a licence on foot of the county registrar's certificate and the Attorney General sought to quash the grant of the certificate on *certiorari* proceedings. It was held by Davitt P. that, even if the Circuit Judge erred in holding that the premises had been licensed within the relevant period, such error was made in the course of the exercise by him of his jurisdiction, and, accordingly, could not be questioned on *certiorari*.

The facts in *Bannerton's* case have been noted earlier. Barron J. had to consider the validity of the renewal certificates granted in respect of a hotel licence and in respect of which evidence was not adduced of registration of the premises in the register of hotels kept by Bórd Fáilte as required by section 20 of the Intoxicating Liquor Act 1960. He held that the errors which resulted in the making of the orders were errors made within jurisdiction and as such *certiorari* would not longer lie to quash them. He says at p. 666:

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> "The orders which were made in error and which have not been quashed on *certiorari* nor reversed on appeal are in effect declarations that the hotel was registered at the date of the making of each order in the Register of Hotels kept by Bórd Fáilte."

By analogy with the reasoning adopted in *Bannerton's* case orders for the grant of renewal certificates are in effect declarations that the premises to which they refer are substantially the same as the previously licensed premises or, alternatively, are declarations to the effect that the premises as altered are duly entitled to be licensed.

The Planning Acts

Any unauthorised development or breach of condition attached to a planning permission will, in the normal course, give rise to the usual conveyancing queries. A further consideration arises — can a breach of the Planning Acts affect the jurisdiction of the Court to transfer or renew the licence? The jurisdiction of the Courts to grant, renew or transfer a licence is not dependant on the existence of a valid planning permission or on strict compliance with the Planning Acts. However, such a breach

could be taken into account by the Court in two ways. Firstly, the Court could say that a general implied power deriving from public policy entitles it to refuse the certificate where such grant, renewal or transfer would facilitate illegality. Secondly, the character of an applicant for the grant, renewal or transfer of a licence is a matter to which the Court must have regard and a breach of the Planning Acts could be regarded as such a matter. In *Comhaltas Ceolteoiri Eireann* (High Court 1977, No. 299SS), Finlay P. in his judgment delivered on 14 December 1977, had this to say in relation to allegations of breaches of the Planning Acts in licensing applications:

> "It is, however, proper that I should add my view that where what is before the learned District Justice by way of objection is an allegation of a breach of the Planning Acts that, subject to his entire discretion as to the validity and strength of such objection, it would certainly be open to him to have regard in the one case to any conviction obtained or proceedings instituted by the Planning Authority and in the other case to the absence of any proceedings or conviction. It would be open to a District Justice in his discretion to take the view that the body charged with the enforcement of planning permission and conditions attached to it being the same body as imposed those conditions is the person whom he might expect to act most vigilantly in relation to any breach."

To sum up under this heading, convictions under the Planning Acts may be taken into account by the Court as appertaining to the character of the applicant. In the case of alleged or apparent breaches of the Planning Code the fact that proceedings have not been instituted by the planning authority or other remedies pursued by either the authority or any other person entitled are factors which the Justice should consider.

Convictions and Endorsements

The existence of one or two convictions recorded against a licence will, quite naturally, be a matter of great concern to both vendor and purchaser. On 12 July 1986, the Supreme Court issued its judgment in *Fitzpatrick & Anor. -v- McCormack* (No. 145/85, Finlay C. J. *nem.diss.*). The net effect of this decision was to overturn the older authorities in regard to the status of persons holding under the authority of temporary (*ad interim*) transfers. It was held (1) that such transferees were, from the time the temporary transfer was granted, the holders of such licences; (2) that any conviction for recordable offences against the transferor (that is, the person in whose name the licence was issued) taking place after the grant of the *ad interim* transfer would not fall to be recorded on the licence. This decision will remove the worry of pending proceedings against the vendor.

Transfer of other licences and certificates attaching to licensed premises

Restaurant Certificate

There is no provision in the Licensing Code for having a restaurant certificate or a limited restaurant certificate transferred into the name of the purchaser until the annual licensing court. Nevertheless, there is no reason to suppose that the premises do not continue to be certified as a restaurant or limited restaurant.

Dance Licence

A public dancing licence is not transferable from the vendor to the purchaser. The latter can apply to the District Court for a new licence, with the consent of the licensee under the existing licence (section 8, Public Dance Halls Act 1935).

Music and Singing Licences

This licence is transferable on application to the District Court (section 51, Public Health Acts (Amendment) Act 1890).

Registration of Food Premises

Where a food business in a registered food premises is transferred from registered proprietor to another person, that person shall, within one month of the transfer, notify the health board in writing (article 44 (1), Food Hygiene Regulations 1950, as amended by the Food Hygiene (Amendment) Regulations 1971).

Registered Hotel Premises

Where the registered proprietor transfers, on sale or otherwise, the premises and the business carried on therein to another person, the transferee shall be entitled, on application in the prescribed form and manner to Bórd Fáilte and on satisfying the Bórd that he has become the proprietor of the said premises, to be registered as the registered proprietor of the said premises (section 40, Tourist Traffic Act 1939). □

FOOTNOTES

1. Bord Fáilte intend making regulations in July 1987 in relation to the requirements for the registration and renewal of registration of hotels. It is intended that these regulations will considerably update the physical requirements in respect of premises for registration. One major change concerns the number of bedrooms. An hotel which is coming for registration for the first time or has been out of registration for three years, will be required to have 45 bedrooms if in Dublin or Cork metropolitan areas and 20 bedrooms elsewhere.

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Members will be aware of the changes brought about by the Malicious Injuries (Amendment) Act of 1986 which curtailed and reduced the right to compensation for Malicious Damage.

Furthermore, as and from the 30th March, 1987, S.I. No. 42 of 1987, entitled the Malicious Injuries (Preliminary Notice) Regulations 1987, prescribes new Forms (set out in the Schedule thereto) of Preliminary Notice to be served in respect of damage or loss caused on or after the 15th day of July, 1986, which have not been served before the coming into operation of the new Regulations.

There are two Forms prescribed:

Form A refers to damage caused as referred to in Section 5 of the 1981 Act as amended by the 1986 Act (i.e. Riotous Assembly, Unlawful Organisation or Violent Organisations outside the Estate).

Form B applies to damage referred to in Section 6 of the 1981 Act as amended by the 1986 Act (i.e. compensation for the unlawful taking of property during a riot).

The provisions of this Statutory Instrument should be carefully noted by members to ensure that the provisions are fully appreciated and that the correct Forms are used where applicable. □

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David Gillespie (left) of Phelan Gillespie who are again sponsoring the legal offices football tournament shown with Peter Doyle, holding the trophy, one of the organisers of the tournament at the draw for the 1987 tournament.

LADY SOLICITORS GOLFING SOCIETY - MIXED SCRAMBLE, NEWLANDS GOLF CLUB - 28 MAY 1987 (left to right): Kevin O'Connor, Solicitor to Irish Life Building Society who sponsored the event; Declan Hayes, Investment Manager, Irish Life Building Society; Geraldine M. Lynch, Captain of the Lady Solicitors Golfing Society; Richard Bennett, Secretary of the Solicitors Golfing Society; Des Byrne, General Manager of Irish Life Building Society and Joe Joyce, Managing Director of the Galway Branch of the I.L.B.S.

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Jurisdiction of Courts and Enforcement of Judgements (European Communities) Bill*

This Bill first introduced in 1986, lapsed with the dissolution of the 24th Dáil and the outgoing Seanad. It was again presented by the Minister for Justice on 1st May, 1987. Due to pressure of business the Bill was withdrawn from the Dáil and re-introduced in the Seanad on 3 June, 1987.

This Bill seeks to enact into Irish legislation the 1968 Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, two subsequent Conventions required for the Accession of other States and other amendments, and the 1971 Protocol on the Interpretation of the Convention.

The first part of the Convention sets out to harmonise the rules on jurisdiction among all the contracting states to the Convention. Under the proposed legislation a person is domiciled in a State where he is "ordinarily resident" and a company must be incorporated, or have its central management and control, in a state to be domiciled there. A person domiciled in a state may be sued there.

If an individual is not domiciled in the State of the presiding court then the court will decide whether he is domiciled in another state by reference to the law of that other state. This will require evidence of the other state's law to be adduced at any hearing.

A defendant may be sued in a contracting state where he or she or it is not domiciled if the courts of that state are enabled to adjudicate by virtue of the Convention. These instances are set out at Title II of the 1968 Convention and in the Bill.

In summary, a person may be sued outside the state in which he/she/it is domiciled where: —

a) a contractual obligation is to be formed;
b) a maintenance creditor is habitually resident;
c) the harmful event occurs in tortious matters;
d) a branch or agency is situated in the case of a dispute about the operations of the branch or agency;
e) the trust is domiciled;'
f) a co-defendant is domiciled;
g) the original proceedings to a third party action have been commenced;
h) there is a counterclaim;
i) the insurance policy holder is domiciled;
j) the leading insurer is dommiciled, and
k) the branch or agency of a supplier which dealt with the consumer is domiciled except in the case of transport contracts.

by
Tony O'Connor,
Solicitor

In the event of proceedings involving the same cause of action and between the same parties being instituted in different contracting states, any court other than the court first seized shall of its own motion decline jurisdiction in favour of that court. Article 22 provides for similar rules for related actions.

Article 24 enables the courts of the contracting state to take provisional and protective measures which would include a "Mareva" type injunction procedure, even if another contracting state has jurisdiction as to the substantial issues.

The second part of the Convention relates to the recognition and enforcement of judgments. Title III of the Convention — set out in the Bill — seeks to facilitate the free movement of judgements by a reduction in the number of grounds which can operate in the domestic Courts of one contracting state, to prevent the recognition and enforcement of a judgement of a court of another contracting state and, secondly by the simplification of the enforcement procedures which will be common to the contracting states.

At present, it is, in general, only foreign judgements for fixed sums of money which can be enforced in Ireland. The Irish courts at present have a very broad power to refuse to enforce a foreign judgement. Under the proposed legislation a foreign judgement shall not be enparted here only: —

(i) if it is against public policy;
(ii) if it was given in default of appearance and sufficient time was not given to the defendant to file a defence;
(iii) if it is irreconcilable with another judgement recognised by the State;
(iv) if the judgement conflicts with a rule(s) of private international law of the State.

An application for the recognition or enforcement of a foreign judgement will, under the proposed legislation, be made to the Master of the High Court, and, presumably rules of Court regarding this type of application will be made when the Bill becomes law.

The Bill provides that the proof and admissibility of judgements and related translations and documents may be effected by duly authenticated documents.

**See Gerald Moloney and George Kremlis "The Brussels Convention on Jurisdiction and the Enforcement of Judgements", Gazette, December 1985 and Jan-Feb. 1986.*

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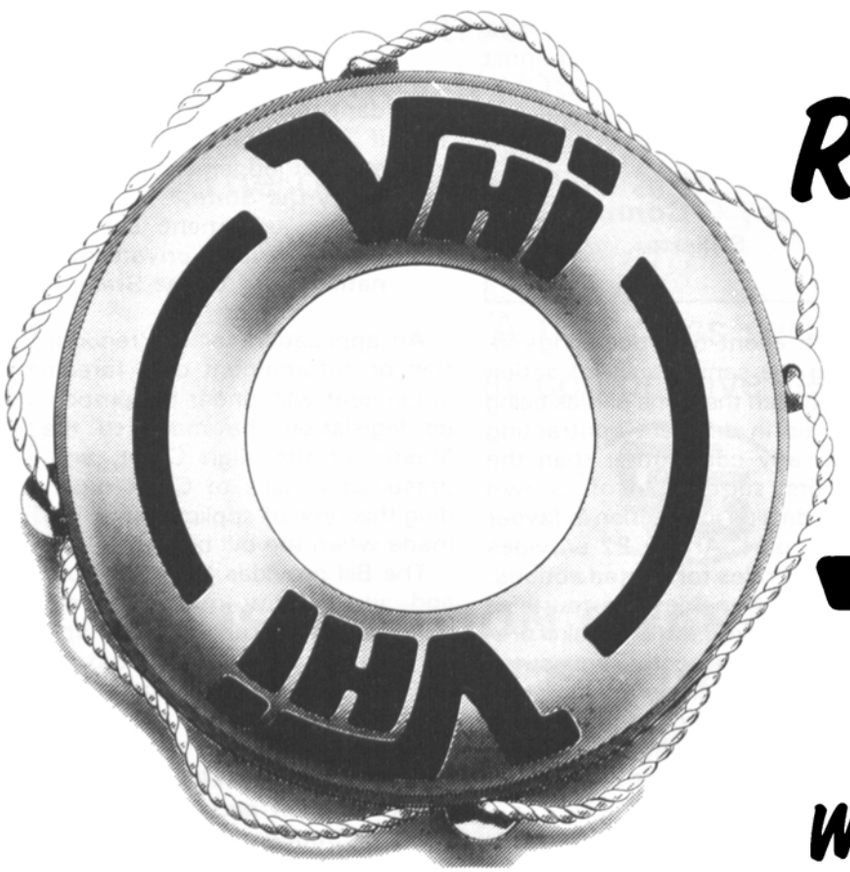

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Solicitors Golfing Society — 1986

The year 1986 was an historic one in the annals of the Solicitors Golfing Society insofar as it culminated in the participation by representatives of the Society in the first International Match against the Golf Club of the Law Society of England and Wales. The Match was played over two days at Hillside Golf Club and Formby Golf Club respectively in Southport, Lancs., and resulted in what can only be described as a splendid coming together of the two Golf Associations. The hospitality extended to the representatives of our Association was extremely kind and generous and each and every member of the team is looking forward to the chance to reciprocate the generosity shown by our English colleagues. As the Captain of the Society, I extend my sincere thanks to each and every member of the team for the splendid manner in which they carried the Irish flag both on and off the course. The result of the match showed the home team coming out on top, but the result was incidental as the long-term benefits to the Society and, indeed, to the profession at large as a result of the meeting of the two Societies is of much more importance.

The return match will be played, it is hoped, in Ballybunion and Tralee during the month of September and, hopefully, thereafter on a bi-annual basis we will host the match. Those representing the two countries were:

ENGLAND:
Nick Stones, John Jenkins, Pat Hill, Mike Harvey, Craig Mitchell, Henry Marshall, Andrew Rudkin, David Barker, Bev Charles and Brian Pettifer.

IRELAND:
Andy Smyth, Owen O'Brien, Gerry Walsh, John Lynch, Padraig Gearty, Frank O'Riordan, Cyril Coyle, Tommy O'Reilly, Johnny Burke and Richard Bennett.

With regard to the other affairs of the Society during the year, I had the pleasure of hosting my own Prize at my home club, Clontarf Golf Club, in June and am pleased to say that it was a very successful outing. The President's (Laurence Cullen) Prize at Carlow was also a much sought-after prize and the large attendance was a true expression of the esteem in which our President was held.

The annual match against the Northern Ireland Solicitors was, as ever, a very enjoyable occasion resulting in a win for the Society.

New combatants this year were Allied Irish Banks, plc. who presented a most magnificent trophy for competition for which sincere thanks are extended and we look forward to future meetings.

My successor for the year 1987 will be Cyril Coyle, a practitioner from Castleblayney, County Monaghan, to whom I wish a very successful year and trust that each and every member of the Society will give him their full support.

It would be very remiss of me if I did not make mention of the retirement of John (Jack) Lynch, who has carried out the onerous duties of Secretary of the Golf Society for very many years. To many people the Golf Society and Jack Lynch were synonymous. All members of the Society over the years owe him a great debt of gratitude for the amount of hard work and effort he put into making each outing such an enjoyable occasion. He deserves his rest and it is hoped that he will henceforth find the outings even more enjoyable and relaxing. I offer him my very sincere congratulations on his retirement and grateful thanks for all he has done and I am sure I speak for all my colleagues in wishing him every happiness in the future.

To his successor, Richie Bennett, I pledge my own unreserved allegiance and support, as I am certain that he will make a splendid successor to Jack Lynch and will ensure that the Society grows in strength. He needs your supprot and co-operation and I am sure this will be forthcoming.

I should like to thank my colleagues for the honour bestowed upon me in electing me Captain for 1986 and wish to assure them that it was an honour which I cherish and a year which I enjoyed immensely.

Andy Smyth.

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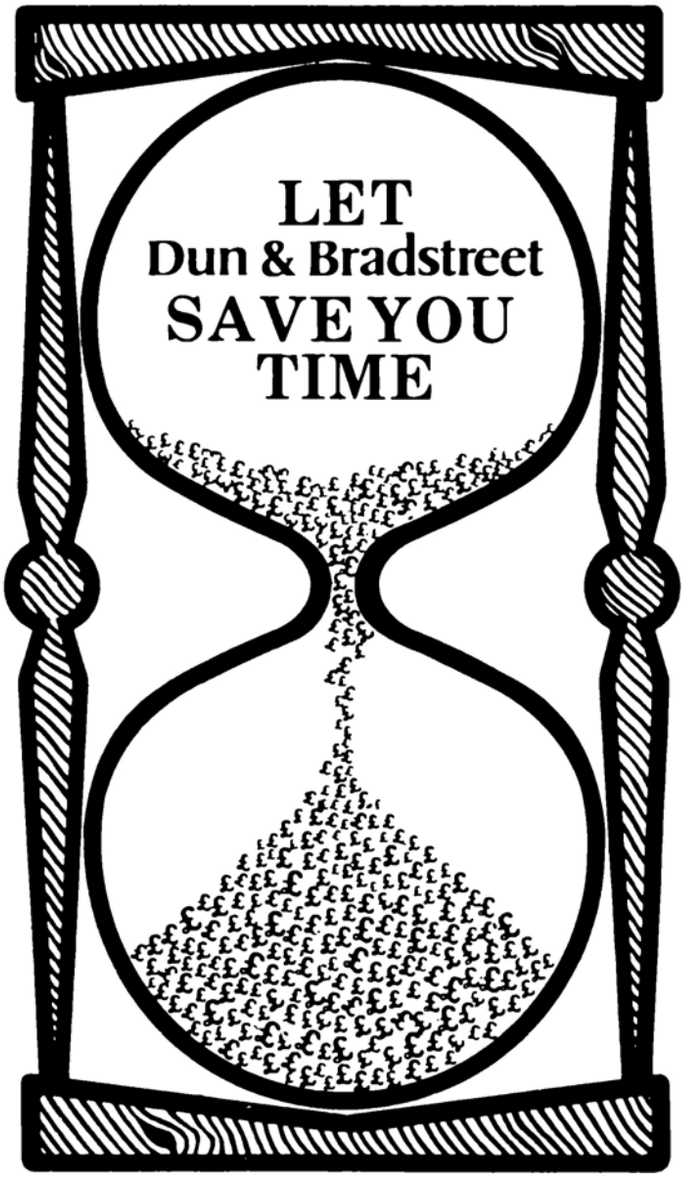

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An Accident Compensation Act

The New Zealand solution for an Irish Problem?

In the wake of recent criticism of our own profession by dissatisfied litigants and criticism of the Court System in High Court accident cases by insurance companies, it occurs that perhaps for some considerable time now the tail has in fact been wagging the dog, as we are as much ourselves the victims of the system as are the other parties concerned. There is no doubt that the effectiveness of the insurance industry's public relations capacity has exceeded that of our own. This has been borne out most succinctly by the proposed enactment of the Courts Bill 1986 abolishing Juries in certain actions before the High Court.

by
Michael P. Coghlan, M.A.,
Solicitor

Whether the proposed abolition will have a beneficial effect in terms of cost effectiveness and convenience to litigants to a large extent remains moot. But insurance companies clearly have a view on this matter. They have, in unison, howled "wolf" at the Jury System for some years now. Moreover they have defended increasing premium rates with consistent criticism of the legal system and its inherent inefficiencies. Delays prior to hearings and the two senior system have come in for particular attack.

While some of their complaints have much to commend them, they are clearly not the source for all the ills currently affecting the insurance industry in Ireland. Quite clearly the dramatic increase in the number of accident compensation claims, which have in turn arisen from increased road use, lagging safety standards in industry and indeed the increasingly litigous persona of the general public are more compelling factors. Indeed the problems of the insurance industry are not confined merely to the number of claims arising. Anyone with even a layman's appreciation of the improprieties disclosed by the collapse of the PMPA and more recently the Insurance Corporation of Ireland, will realise that managerial ineptitude constitutes a far greater danger to the industry's efficiency and profitability than the disposing of claims brought against it.

Coming back to my premise as to whether the tail has been wagging the dog or vice versa, it must be wondered whether the insurance industry within this country is not of itself the author of many of its own misfortunes and has successfully used the legal system and other local factors to disguise its own inherent incapacity to offer reasonable cover and reasonable compensation to Irish workers and road users etc. Secrecy is pervasive within the insurance industry. As a result it is difficult to obtain cogent information such as to justify the high premium rates for motor and property insurance which currently pertain. Statistical information, concerning the levels of accident compensation, the number of cases dealt with, the amount of insurance revenue generated, the mean average quantum per case etc., is generally a secret closely guarded by the Insurance Companies against one another and against the public in general. The reasons for this are to a large extent justifiable. Nevertheless, the atmosphere of secrecy has created a lack of perspective both within and without the insurance industry itself.

Premium increases have occurred without justification or explanation in the past. On 1st December, 1951 the Irish Standing Committee of Accident Officers Association (a group representing 37 Insurance Companies operating in Ireland at the time) increased premiums by 25% for private cars and by 15% for commercial vehicles. This was subsequently decided by an advisory body to the Minister for Industry and Commerce to be effectively double the increase required at the time. In the light of such occurrences as these, it is understandable that public subscribers should remain sceptical and hostile. This becomes even more apparent in the area of professional indemnity cover which has recently drawn our own profession to new heights of invective.

The question now to be addressed is what must we do (a) to properly regulate the insurance industry so that it performs profitably and efficiently, and (b) to protect the consumer from spiralling costs. In this connection there have been a number of attempts by Government Committees in the past to synthesise the problems and suggest improvements for the running of the insurance industry. In 1972 the O'Connor Report suggested increased control of the industry by Government and certain changes in the law on liability. An addendum to that report went further to suggest that an instalment payment scheme in cases of death and personal injury to victims of road accidents should be introduced. There was no unanimity, however, on more radical solutions to the industry's problems.

In 1974 the Honahan Committee reported on the increase on motor insurance premiums and recommended that each insurer should be required to submit to the Department of Industry and Commerce a bona fide scheme of compensation (thereby giving the department a power of veto over the said scheme). Since the Honahan report little forward movement has occurred. At the time, and perhaps reflective of the economy in general, the problems within the insurance industry were not perceived as being critical. Times have now clearly changed.

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by Michael F. O'Reilly

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Irish Tax Review, February 1987

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With regard to foregoing and in the light of the recent difficulties at ICI and the PMPA, both now under administration, I believe that the Government, at this point in time, has an excellent opportunity to scrutinize the performance of the insurance industry generally. In this regard I believe the time is particularly opportune for the Government to consider alternative systems of motor accident and occupational injury cover and compensation.

In particular, the concept of "No Fault Insurance" might prove attractive in a country such as our own. "No Fault Insurance" briefly means that all insurees of a particular class cover themselves with insurance and in the event of an accident are compensated by their own policy irrespective of whether or not they caused the accident.

This concept of insurance has been adopted in New Zealand and certain states within the United States where it has proven itself popular, efficient and most important, cost effective to policy holders. The system as adopted in New Zealand is particularly appropriate for consideration by this country. Having a similar climate, similar level and density of population, similar communications infrastructure and having inherited a similar system of law and commerce to our own, that country has embarked on a radically different approach to the problems surrounding accident and occupational injury compensation.

As a result of a Royal Commission established in December of 1967 and usually referred to as "The Woodhouse Report", it became clear that the problem of industrial injuries was impossible to resolve in isolation but had to be dealt with by way of reference to associated relevant matters (i.e. motor and general occupational injury cover).

The report entitled "Compensation for Personal Injury in New Zealand" stated: "We have made recommendations which recognise the inevitability of two fundamental principles.

1. No satisfactory system of injury insurance can be organised except on a basis of community responsibility.
2. Wisdom, logic and justice shall require that every citizen who is injured must be included, and equal losses must be given equal treatment. There must be comprehensive entitlement.

Moreover always accepting the obvious need to produce something which the country can afford, it seemed necessary to lay down three further rules, which, taken together with the two fundamental matters, must provide this framework for a new system. There must be complete rehabilitation. There must be real compensation — income related benefits from income losses, payment throughout the whole period of incapacity, and recognition of permanent bodily impairment as a loss in itself. Also there must be administrative efficiency."

The report labelled negligence actions as a form of lottery. It described the adversarial system as hindering rehabilitation and as being cumbersome, erratic and extravagant in operation.[1] (Words not inapt at times when applied to our own system for obtaining compensation.)

As a result of the Woodhouse recommendations The Accident Compensation Act became law in 1972 establishing two schemes:

1. An occupational injury claims scheme for wage earners;
2. A motor vehicle accident scheme.

In each case all workers and road users were levied at source. In this country this can be envisaged as paying ones insurance premium through tax and ones car insurance premium through road tax. A commission was established to administer the two schemes. The schemes have been enlarged to take into their net all citizens of New Zealand to include housewives and members of the armed forces. Visitors to New Zealand were automatically entitled except in cases of sickness. The Accident Insurance Corporation has now taken over from the Commission.

The scheme provided for a relatively small maximum lump sum benefit (*f*17,000 New Zealand pounds in 1983:,[2] irrespective of the nature of the injury. In addition, it offered a non-taxable "dependancy" income into the future where death had occurred.[3] Permanent injury victims receive in addition a weekly compensation on an earnings related basis. Temporarily injured victims receive a similar compensation during the term of their incapacity.

The Accident Compensation Corporation became in effect a semi-state insurance body which was self financing. It obtained its revenue partly from a Government grant but mainly from levy revenue and other investment income. During the early years of its existence it consistently earned more money than it paid out in compensation to accident and occupational injury victims. Indeed, it appears to have conducted its financial affairs so successfully that, it built up healthy reserves and became effectively independent of Government funding. In the statement of account balances for the year ended 31st March, 1985 the report of the Accident Insurance Corporation records that under the earners fund a total income of £199,953,000 was generated with total compensation of £202,382,000 paid out.[4]

Under the motor vehicle account £57,374,000 was earned against the sum of £69,855,000 discharged in compensation.[5] Neither of these sets of figures disclose the hidden income of the Corporation derived from the use of money received in premiums from subscribers to the scheme.

The Accident Compensation Act introduced a scheme of "no fault" insurance to New Zealand. This modified but did not eradicate litigation arising out of accident and occupational injury claims, as the issue of quantum always remained in dispute even though the issue of liability was dispensed with. In the context of our own system, it would appear to have the effect of reducing a hearing on liability to one of assessment of quantum only. Lawyers therefore continued

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to play a prominent part in dealing with claims brought under the Accident Compensation Act.

The Accident Compensation Corporation did not seek to render irrelevant private insurance institutions. The scope of the Act is not universal and private insurance corporations continue to function and indeed profit within the areas outside the ambit of the Corporation. Claimants under the Accident Compensation Scheme may also hold additional cover and are entitled to avail of traditional remedies under that cover notwithstanding their entitlement to compensation from the Corporation.

Perhaps the most ingenious aspect of the scheme is the concept of a limited lump sum in compensation for permanent injury similar to that laid down by our own civil liability act in fatal injury cases, coupled with a tax free "dependency income" into the future.[6] The "dependency income" was in effect hidden income for all revenue purposes. It was therefore to a dependant's advantage to obtain further employment at the earliest possible date notwithstanding his/her actual loss. This of itself has created a conducive atmosphere for rehabilitation. This has also preserved the Corporation from the requirement to discharge actuarially based lump sums of far greater proportions. It is thus able to invest the saved money taken in by way of premium income and derive benefit itself.

In stark contrast to the secretiveness of our own insurance industry the New Zealand authorities have shown great openness in their syystem. Under section 117 of the Accident Compensation Act of 1982, (an amending and consolidating further enactment), the Corporation must present a fully audited report to the New Zealand House of Representatives annually, setting out income and disbursements and generally accounting to Parliament for its activities during the previous financial year.

Finally it should be noted that the basis for underwriting claims brought against the Accident Compensation Corporation is national and not international. This means that the volatility of the industry in other countries does not affect it. This preserves subscribers to the scheme from sudden rises in premium from which we suffer from time to time when certain insurance companies experience underwriting difficulties outside this jurisdiction.

In conclusion I should say that the New Zealand Authorities have showed great pride in their system. They are satisfied as to its benefits and are anxious that others learn from it and follow their example.

I fully concur with this view. There is no doubt but that the initially high premium cost of motor insurance has contributed to the high proportion of uninsured drivers within this jurisdiction, which has in turn led to higher premiums through pressure on the MIBI. In this respect the insurance industry has been reactive rather than innovative. The same may be said of successive Irish Governments. For political and professional self interest reasons they have not wished to "rock the boat". The situation which we have inherited from their inactivity now however calls for radical re-thought. Within the infrastructure of an organisation such as the PMPA (presently under Government control), we have the basis for an entity which might become an equivalent to the New Zealand Accident Compensation Corporation. At this point in time the Government is in a unique position to take control of what can only be described to date as a deteriorating situation and, when considering the New Zealand example, a bark in a similar if radical direction which would lead in the medium and long term to the far reaching benefit of all the parties concerned.

FOOTNOTES:

1. Accident Compensation Coverage. J. L. Fahy. Ch. 1 at page 8.
2. Accident Compensation Act 1982. S. 78.
3. Accident Compensation Act 1982. S. 65 (2).
4. Report of the Accident Compensation Corporation for year ended 31st March 1985 at pp. 16/17.
5. Report of the Accident Compensation Corporation for year ended 31st March 1985 at pp. 16/77.
6. Accident Compensation Coverage. J. L. Fahy. Ch. 20 at page 67.

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John O'Connor, (Chairman).

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W. A. Honahan (Chairman).

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Solicitors will have the opportunity of hearing and speaking to Professor J. C. W. Wylie, author of several books, including the authoritative books on Irish Land Law and Conveyancing. The second speaker is Dr. John M. Kelly, a former Attorney General and Government Minister, presently a T.D., and who is well qualified to speak on the Irish Constitution from both practical and academic points of view. Mr. Eamonn E. Mongey is the third speaker, on Probate matters, and is acknowledged as a leading authority in the area. Mr. Mongey is now the Supreme Court Registrar.

The presence of these three excellent speakers will be of tremendous assistance to all practitioners and the Society of Young Solicitors are honoured and delighted to have people of such expertise. Of course, the Autumn weekend will include the usual fun and games which has always made the S.Y.S. weekend so popular, culminating with the Banquet on the Saturday night.

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ERRATUM

Administration of Estates: The Liabilities of Personal Representatives under the Social Welfare Code.

Published in May '87 Gazette, page 129, column 3.

The passage appearing in italics hereunder, was inadvertently omitted from the text.

The significant point to note here is that the revised decision reducing or disallowing a social welfare entitlement will only have retrospective effect *where the original decision resulted from a fraudulent misrepresentation on the part of the claimant. In The State (Hoolahan) -v- Minister for Social Welfare*[5]*, Barron J. held that before s.300(5)(a) could be invoked, the claimant must be given an opportunity to present his side of the case in relation to the allegation of fraud.* By contrast, the obligation to repay overpaid old age pension under s.169(3) is absolute in its terms and does not depend on the establishment of fraud.

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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.
20th day of June, 1987.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Patrick Downes and James Downes of Main St., Miltown Malbay, Co. Clare; Folio No.: 27058; Lands: Fintra Beg; Area: 53a. 1r.31p. County: **CLARE.**

Patrick Raftery of Ballybaun, Ballinamore Bridge, Co. Galway; Folio No.: 1428; Lands: Coolusty; Area: 15a.1r.30p. County: **ROSCOMMON.**

Myles Kehoe of Orchard, Leighlinbridge, Co. Carlow; Folio No.: 5869F; Lands: (1) Orchard; (2) Orchard; Area: (1) 128a.2r. 23p.; (2) 15a.3r.4p. County: **CARLOW.**

Cornelius Connolly (Junior) of Ardaturrish Beg, Glengarriff, Co. Cork. Folio No.: 28020F; Lands: Ardaturrish Beg; Area: 0.914 acres; County: **CORK.**

Patrick McBride, Faymore, Creeslough, Co. Donegal; Folio No.: (1) 28217; (2) 28265; Lands: (1) Kilmacilloo; (2) Kilmacilloo; Area: (1) 37a.1r.28p.; (2) 8a.1r.20p.; County: **DONEGAL.**

Bridget Brunton; Folio No.: 99 L.S.D. Lands: Premises at 124 North Strand Road, situate in the Parish of St. Thomas and North Central District, City of Dublin; County: **DUBLIN.**

Jack Daly Construction Ltd., 12 Market St., Ennis, Co. Clare; Folio No.: 21720F; Lands: (1) Cappaduff; (2) Cappaduff; (3) Cloontyconnaught; (4) Bohateh North (one undivided 44th part); (5) Bohateh South (one undivided 44th part); (6) Glenmanish (one undivided 44th part); (7) Sellernaun West (one undivided 44th part); (8) Cappaduff; Area: (1) 10.013 acres; (2) 0.438 acres; (3) 1.000 acres; (4) 671.781 acres; (5) 228.975 acres; (6) 347.013 acres; (7) 33.938 acres; (8) 17.222 acres; County: **CLARE.**

William Teague of Ballinacarrow, Ballynacargy, Co. Westmeath; Folio No.: 18091; Lands: Ballynacarrow; County: **WESTMEATH.**

Michael Stynes of Ballynafagh, Prosperous, Naas, Co. Kildare; Folio No.: 11078; Lands: Ballynafagh; Area: 0.787 acres; County: **KILDARE.**

James Harrold of Boughilbo, Kilcoleman, Ardagh, Co. Limerick; Folio No.: 189; Lands: Boughilbo; Area: 0a.2r.6p.; County: **LIMERICK.**

Patrick Ryan of Tobernadarry, Shrule, Co. Mayo; Folio No.: 21667; Lands: (1) Tobbernadarry; (2) Moorgagagh; (3) Brownsisland; Area: (1) 17.925 acres; (2) 16.919 acres; (3) 00.544 acres; County: **MAYO.**

Robert Alexander Anderson of Tullynavin, Redcastle, Co. Donegal. Folio No.: 23354; Lands: Tullyally; Area: 28a.1r.0p.; County: **DONEGAL.**

Michael Boyle of Derrintonny, Selloo, Co. Monaghan. Folio No.: 17141 closed to Folio No.: 18448; Lands: Derrintonny; Area: 16a.1r.32p.; County: **MONAGHAN.**

Michael Cullen of Fawninoughan, Milford, Co. Donegal. Folio No.: 19763; Lands: Fawninoughan; Area: 44a.0r.0p.; County: **DONEGAL.**

Victor Phillip Doyle of 6 Riverside Grove, Coolock, Dublin 5. Folio No.: 7469L; Lands: 6 Riverside Grove, Coolock, Dublin 5; Area:— ; County: **DUBLIN.**

Noreen Doherty of Craig Muff, via Lifford, Co. Donegal. Folio No.: 11553; Lands: Craig (part); Area: 35a.0r.25p.; County: **DONEGAL.**

Martin Kelly of Lisnaville, Fuerty, Co. Roscommon. Folio No.: 35493; Lands: (1) Lissaneaville, (2) Lissaneaville, (3) Lissaneaville; Area: (1) 25a.0r.16p., (2) 9a.1r.32p., (3) 14a.3r.9p.; County: **ROSCOMMON.**

M. B. Investments Ltd. of 8 Prince of Wales Terrace, Bray, Co. Wicklow. Folio No.: 4059 Co. Dublin; Lands: Redcow; Area: 4.494 hectares; County: **DUBLIN.**

James Kenny of Liamagarrsion, Aghamore, Ballyhaunis, Co. Mayo. Folio No.: 8320; Lands: Lismaganshion; Area: 9a.2r.34p.; County: **MAYO.**

Edward McKiernan of Kilsob, Bawnboy, Co. Cavan. Folio No.: 19922; Lands: Newtown; Area: 13a.1r.5p.; County: **CAVAN.**

Graham Stamp and Renee Stamp of 109 St. Patricks Road, Walkinstown, Dublin 12. Folio No.: 473842; County: **DUBLIN.**

John Corrigan of Sroove, Townaghbrack, Co. Sligo. Folio No.: 949; Lands: Sroove; Area: 13a.0r.16p.; County: **SLIGO.**

James Doohan of Falcarragh, Co. Donegal. Folio No.: 15526; Lands: Falcarragh; Area: 0a.0r.30p.; County: **DONEGAL.**

Lost Wills

HOWARD, Ann, deceased, late of Main St., Swords, Co. Dublin. Will anyone knowing of the whereabouts of the Will of the above-named deceased, please contact Liam Moran & Co., Solicitors, 38 Main St., Swords, Co. Dublin.

KENNY, Kathleen, deceased, late of "Ard Greine", 9 Threadneedle Rd., Salthill, Galway. Will anyone knowing of the whereabouts of the Will of the above-named deceased, who died on 16 April, 1987, please contact Messrs. F. M. Fitzgerald & Co., Solicitors, Kiltartan House, Forster Street, Galway.

MARTIN, Manus Gerard, deceased. Will any person having knowledge of a Will of the late Manus Gerard Martin, of Aughadreenagh, Rossnakill, Co. Donegal, who died on 11 April, 1987, please contact McCloughan Gunn & Co., Solicitors, Ramelton, Letterkenny, Co. Donegal. Tel.: (074) 51005/51100.

HOARE, Cecilia, deceased, late of Nurse's Home, Cherryorchard, Dublin and Seffin, Birr, Co. Offaly. Will any person having knowledge of the whereabouts of the Will of the above-named deceased, please contact J. J. Kennedy & Co., Solicitors, Emmet Square, Birr, Co. Offaly.

FLYNN, Timothy, deceased, late of Ballybeg, Buttevant, in the County of Cork. Will anyone having knowledge of a Will of the above-named deceased, please contact Nagle and McCarthy, Solicitors, Buttevant, Co. Cork.

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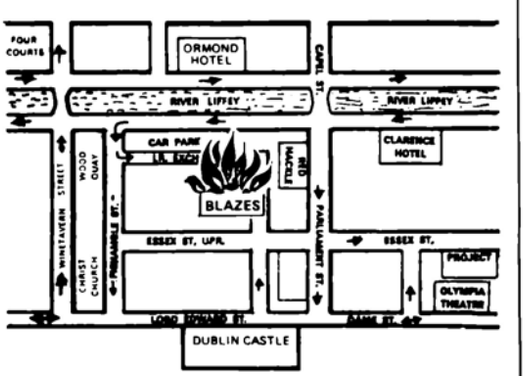

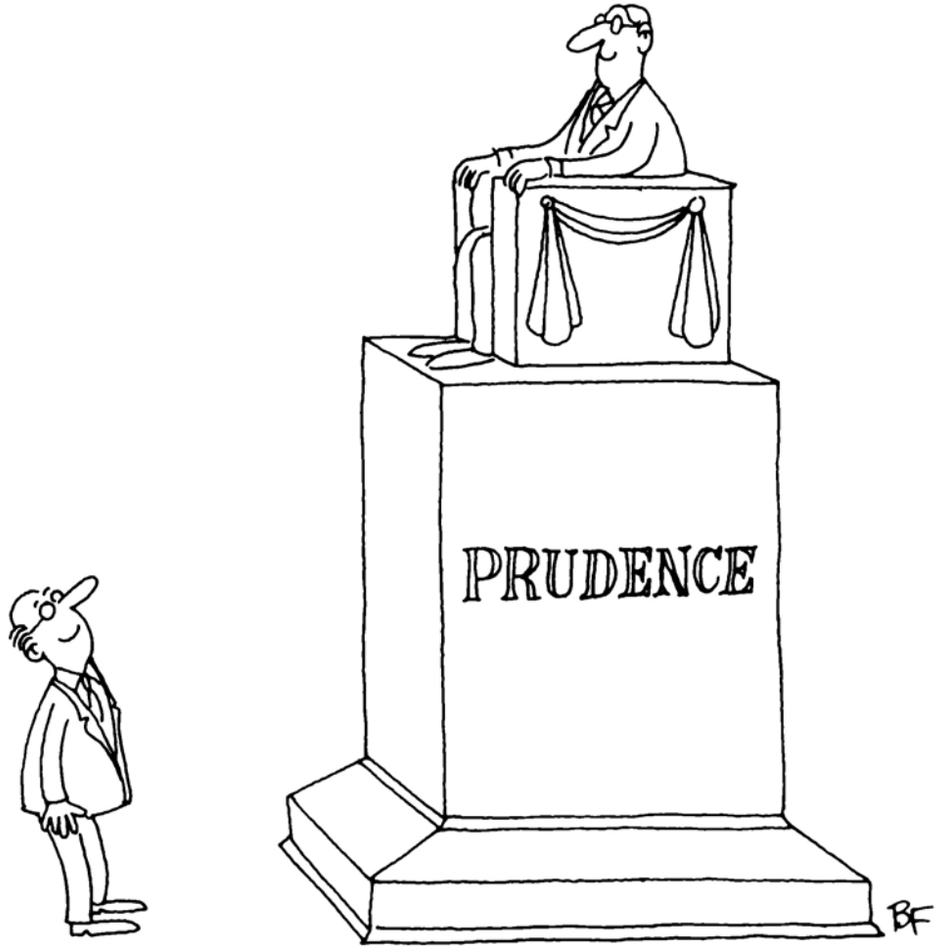

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 81 No. 6 July/Aug. 1987

International Association of Judges Dublin Conference, 1987.

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GAZETTE INCORPORATED LAW SOCIETY OF IRELAND
Vol. 81 No. 6 July/Aug. 1987

Viewpoint

Civil Litigation — a Case for Change?

The attention given to the objections by the Judges and the Bar in England to proposals from the Lord Chancellor's department for restricting vacations and lengthening the sitting hours of courts has obscured some of the other more interesting proposals contained in the Lord Chancellor's Civil Justice Review published earlier this year. Two proposals in particular are deserving of more careful consideration, one that courts should monitor the progress of cases more rigorously and the other suggesting the integration of County (rough equivalent of our Circuit) and High Courts in one system.

The tradition of the English judicial system has been that the courts are there to provide a forum for the conduct of civil litigation for the convenience of the parties, with a Judge acting as a referee. If the parties do not wish to proceed urgently with their litigation, then it is only when the case is perceived by the court administration to be clogging up the files that the parties will be required to either pursue or abandon the matter. Unfortunately, this approach may lead to a less than firm attitude being adopted by the courts in cases where only one of the parties (not always the defendant) is anxious to avoid a case coming to trial. It is notorious that settlements in a great many cases can only be achieved once there is an imminent danger of the parties having actually to appear in court. The proposal that the courts should take over the act of monitoring of cases once they have been initiated is one which has merit. The knowledge that the courts were monitoring the progress or lack of progress of cases might, of itself, be sufficient to encourage parties, and their lawyers, to pursue proceedings more actively.

The questioning of the existence of a hierarchic system of courts is equally valuable. The conclusion need not necessarily be reached that integration is either necessary or desirable, but an examination of why particular cases are allocated to particular levels of court is useful. The principal basis of allocation is, of course, financial and, while it might be argued that the significance of a claim for a few hundred pounds is as great to a person of modest means as one of twenty thousand pounds or more to a wealthy person or organisation, it would be difficult to argue that the High Court should be the forum for resolving such a claim. The total input of time by all those involved in the case would be out of proportion to the amount involved. In fact, the triple-decker nature of our system may already provide the most suitable solution, with the Circuit Court providing a reasonably accessible venue for a wide spread of claims at a cost well below that of the High Court, yet providing time for a more careful examination of the issues than is possible in the District Court.

It is, however, when we look at the allocation of specialist areas of law among the courts that questions may be raised about our present system. Many landlord and tenant claims are statutorily directed to the Circuit Court. The rateable valuation of the property (not perhaps the most useful of guidelines) determines whether other landlord and tenant disputes are to be heard in the Circuit or High Court. There seems much to be said for abolishing this artificial distinction and giving general jurisdiction to the Circuit Court to determine all landlord and tenant matters.

On the other hand, it is not at all clear that all matters involving limited companies need necessarily come within the purview of the High Court. There are applications which have to be made from time to time in relation to companies of

(Contd. on p. 177)

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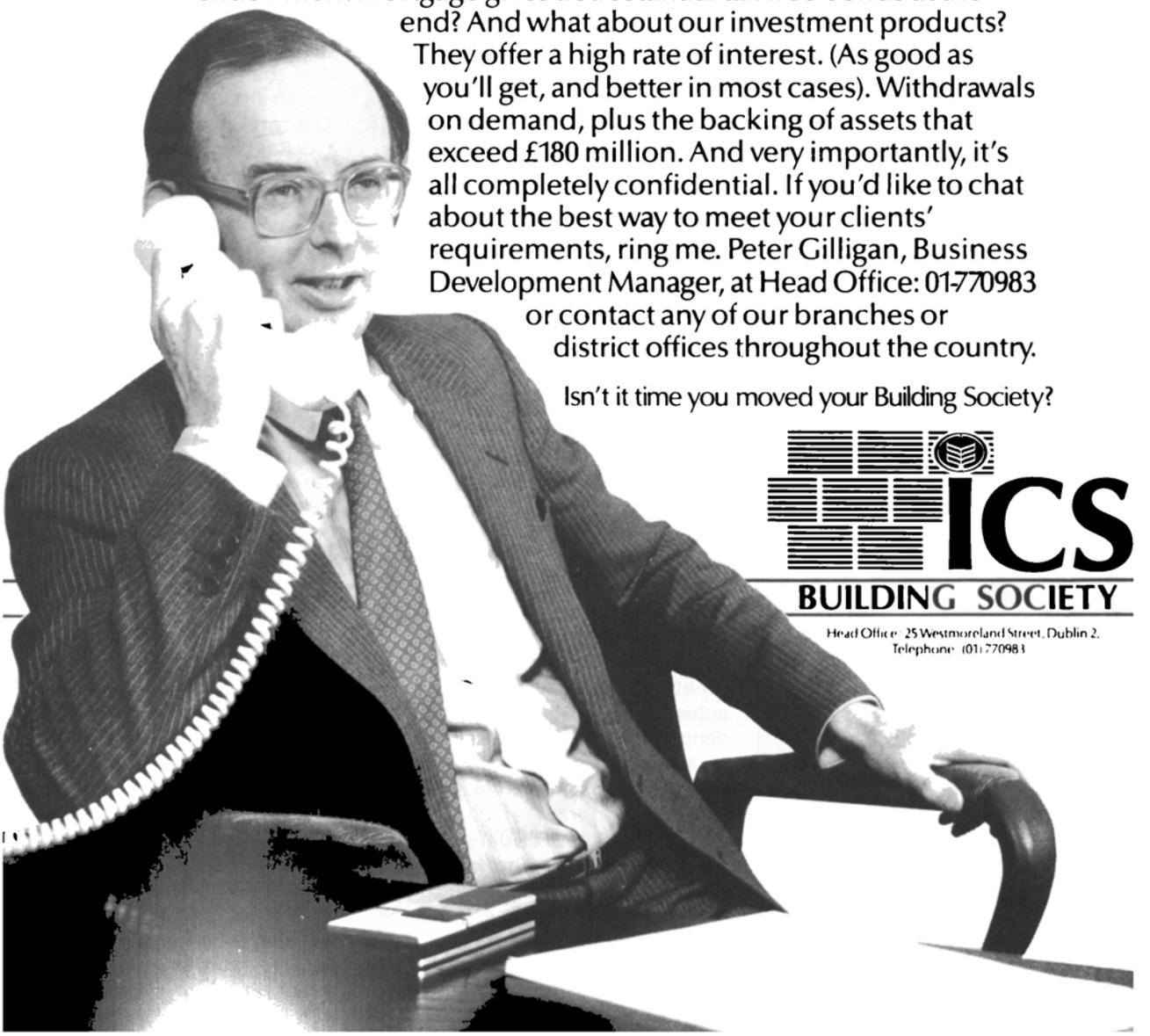

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Investor Protection

The effect of the changing U.K. regulations in Ireland

by
Ronan O'Houlihan and Dr. Eileen Fitzpatrick B.Sc., M.Appl.Sc., Ph.D.

The necessity of providing greater regulation within the securities industry has become increasingly apparent in recent years. Whilst inadequacies in the existing legislation have been obvious for some time, they have become more acute against a background of deregulation in international markets where the risk exposure for the investor can be increased. In Ireland this necessity has been brought into sharp focus by the proposed development of the Custom House Quay as an international financial centre. In order to establish the credibility of the centre, it must be structured on a three-tiered basis. The fiscal and physical infrastructure have been well analysed. It is our contention that the introduction of an appropriate regulatory framework is equally important if the centre is to attract international participants of the highest quality.

In the U.K., the final stages of deregulation (''Big Bang'') occurred in October last year. In conjunction with these changes a new legal framework, which will considerably step up the standard of investor protection, is about to be imposed.

The revolution in communications technology which has occurred in the financial world in the past decade has made 24-hour trading in financial markets the order of the day and placed them in a global rather than domestic context. As more and more markets deregulate and open up to foreign trade, the distinguishing line between international and domestic markets grows even finer. In the wake of these developments, London, by tradition a major international financial centre, was forced to deregulate to restore a competitive edge which it had been losing for some time. This was largely due to the existence of a system based on single capacity which separated functions into agency or principal roles, providing protection for investors through self-regulatory organisations such as the Stock Exchange. This, in combination with the high transaction costs entailed in fixed commissions, was causing London to fall behind other major financial markets which, by and large, had adopted the dual capacity system where brokers act as both principals and agents. On 27th October 1986 (''Big Bang'' Day) the Stock Exchange brought into effect the last of a package of reforms to its rules and trading arrangements of which the switchover to dual capacity and the abolition of fixed commission formed the major part.

Ronan O'Houlihan and
Dr.Eileen Fitzpatrick
are members of
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31 Mount Street, Dublin 2.

Traditional barriers thus broke down and multifunctional conglomerates, which offer a range of financial services became common. Within those conglomerates, because of the dual capacity system in which the broker is also a market maker, there is greater potential for the occurrence of ''conflicts of interest''. This is borne out by the recent events at Lloyds, which arose as a direct result of members being able to act in a dual capacity. It is ironic that, just as the rest of the City is converting to dual capacity, Lloyds have decided to revert to single capacity to avoid the re-occurrence of such a situation. Another important consequence of deregulation in the U.K. is that the powers of the old self-regulatory organisations became defunct. The resulting gap will be filled by a private city body, known as the Securities Investment Board, which will oversee a network of new self-regulatory organisations within the framework of the new legislation.

The changes which have occurred in the U.K. market have served to highlight the fact that we have no proper or, indeed, any statutory framework which seriously addresses the problems of the modern securities industry in Ireland. The immediate effect has been to create a regulatory vacuum in the Irish financial sector. Prior to

VIEWPOINT (from p. 175)

modest strength which might as usefully be brought in the Circuit Court as in the High, and with a corresponding reduction in expense.

There is, however, one area in which it can be strongly argued that there is a case for integrating the system and having one court deal with all matters and that is in the area of family law. The division of jurisdiction between the three levels of courts having original jurisdiction is puzzling. The attempt to extend the jurisdiction in family law matters to Circuit and District Courts has been quite unsatisfactory. Many District Courts are physically unsuitable for the conduct of family law cases and the length of the lists in many District Courts has created difficulties in ensuring that such hearings can be held *in camera* and still be dealt with quickly.

Perhaps the recently reviewed Committee on Court Practice and Procedure could be asked to take a hard look at the basis upon which jurisdiction is allocated to particular courts, with a view to removing some of the present anomalies. □

Big Bang we were subject to the regulations of the Federated Stock Exchange of the United Kingdom and Ireland (of which we were members) and relied on it to act as an effective regulatory body. With the expansion of the role of members of the Stock Exchange, we are now in a situation in which we continue to operate under a set of rules which are no longer comprehensive and have failed either to introduce regulation ourselves to fill the gap, or to adopt any of the new U.K. rules.

By failing to introduce a proper statutory framework, we in Ireland are placing ourselves in an extremely vulnerable position. There is a high risk that we will attract into this country business which enshrines practices no longer admissible in strictly regulated markets. This will rapidly act to reduce the credibility and standing of the Irish market.

The lack of regulation is particularly important in the light of the proposed new financial centre on Custom House Quay. If we are to be competitive in this area, it is likely that further deregulation will have to be introduced into the Irish finance industry, albeit in a form designed to suit the needs of the smaller Irish market. While dual capacity is permissible in the case of equities, it has not developed to any great extent. Dual capacity in the case of gilts has not been accepted by the Irish Authorities, following the refusal of the Department of Finance to allow gilt brokers to become "market makers". Effectively, we are now in an exposed position and the onus is on the Irish Authorities to take urgent steps to remedy the situation. The introduction of full deregulation without a supporting regulatory framework would be a sure formula for chaos. It is thus useful to examine in more detail the background to the changes which have occurred in the U.K. and the type of framework the authorities there have decided to implement.

The Prevention of Fraud (Investments) Act 1958 in the U.K. is based on pre-war legislation. The rapid changes in the securities industry since then have rendered that Act obsolete, a fact amply illustrated by its failure to protect investors in the wake of a string of investment scandals. The public outcry following the failure of two investment firms in particular, finally prompted the U.K. government to act on investor protection. In July 1981, Professor James Gower of Southampton University was commissioned by the U.K. Government to lead an investigation into investor protection in England. The investigation was to operate within the following terms of reference: —

(a) to consider the statutory protection now required by (i) private and (ii) business investors in securities and other property, including investors through unit trusts and open-ended investment companies operating in the United Kingdom;

(b) to consider the need for statutory control of dealers in securities investment consultants and investment managers, and

(c) to advise on the need for new legislation.

Published in 1984, the Gower Report was highly critical of existing investor protection and of the restrictive practices enshrined in the Stock Exchange. The Report proposed that the Prevention of Fraud (Investment) Act 1958 be repealed and replaced by a new Investor Protection Act. Everyone engaged in the investment business (defined in the widest terms) would have to register either direct with a government body or with an approved self-regulatory agency, which would have to comply with specified conditions. In its initial form, the Report proposed the establishment of an independent commission to watch over the new system. This latter proposal was met by strong opposition from the City which had, by tradition, been self-regulatory and operated largely under "club rules". In the event, and largely due to rearguard action by the Bank of England, the proposed commission was replaced by a private City body known as the Securities and Investment Board (S.I.B.). Essentially, the Gower Report settled for self-regulation within a statutory framework. The Report eventually formed the basis of the Financial Services Act, which recently passed through the final stages of Parliament, but has not yet been brought into effect.

Criticisms

Inevitably, the Gower Report and the legislation based on it remains highly controversial. It had to try to strike a balance between the demands of the securities industry to remain self-regulatory and the necessity of imposing a statutory framework on that industry. Most of the controversy centres around these two issues.

One of the most serious criticisms levelled at the new system has come from Sir John Nott, a former Cabinet Minister, and now Chairman of Lazards, a leading London-based Merchant Bank. In his view, the City was unwise to promote the concept of practitioner-based regulation and the Bank of England even more so. He argues that when the next downturn in the market arrives firms will inevitably go bankrupt and no one is going to distinguish politically between bankruptcy and fraud. The blame will descend on the City self-regulators and most certainly on the Bank of England for failing to police the system. He feels that the City, and especially the Bank of England, have played into Government's hands and placed themselves in an exposed position.

Another criticism suggests that legislation based on the Gower Report does not tackle the sweeping changes which occurred in the City after Big Bang (deregulation). In recent months, "insider dealing" scandals have shed further doubts on the ability of the City to regulate itself, especially in the deregulated market. A U.K. Labour Party document published in March of this year argues that the City needs to be brought under at least the same standards of supervision and legal restrictions as other areas of business life — a view shared by many outside the City, including Dr. David Owen the U.K. Social Democratic Party Leader, who believes that independent outsiders, rather than City insiders, should be made a majority on the S.I.B. The central issue here is that practitioner-based regulation is naturally suspect of using its powers to discriminate in favour of itself or against those offering innovation or uncomfortable competition. Self-regulation is traditionally argued as being tighter than a legalistic code. It sets

standards rather than rules and operates on the basis of a "club ethic". Its success rests implicitly on the ability of its members to keep out or so to "disoblige" undesirables that they can no longer carry on effective business. It is noteworthy, however, that under this system protection for the private client and small investor was largely incidental. Historically, the system has worked reasonably well, but it is debatable if it can do so in the post-deregulation market, where club rules are no longer in control.

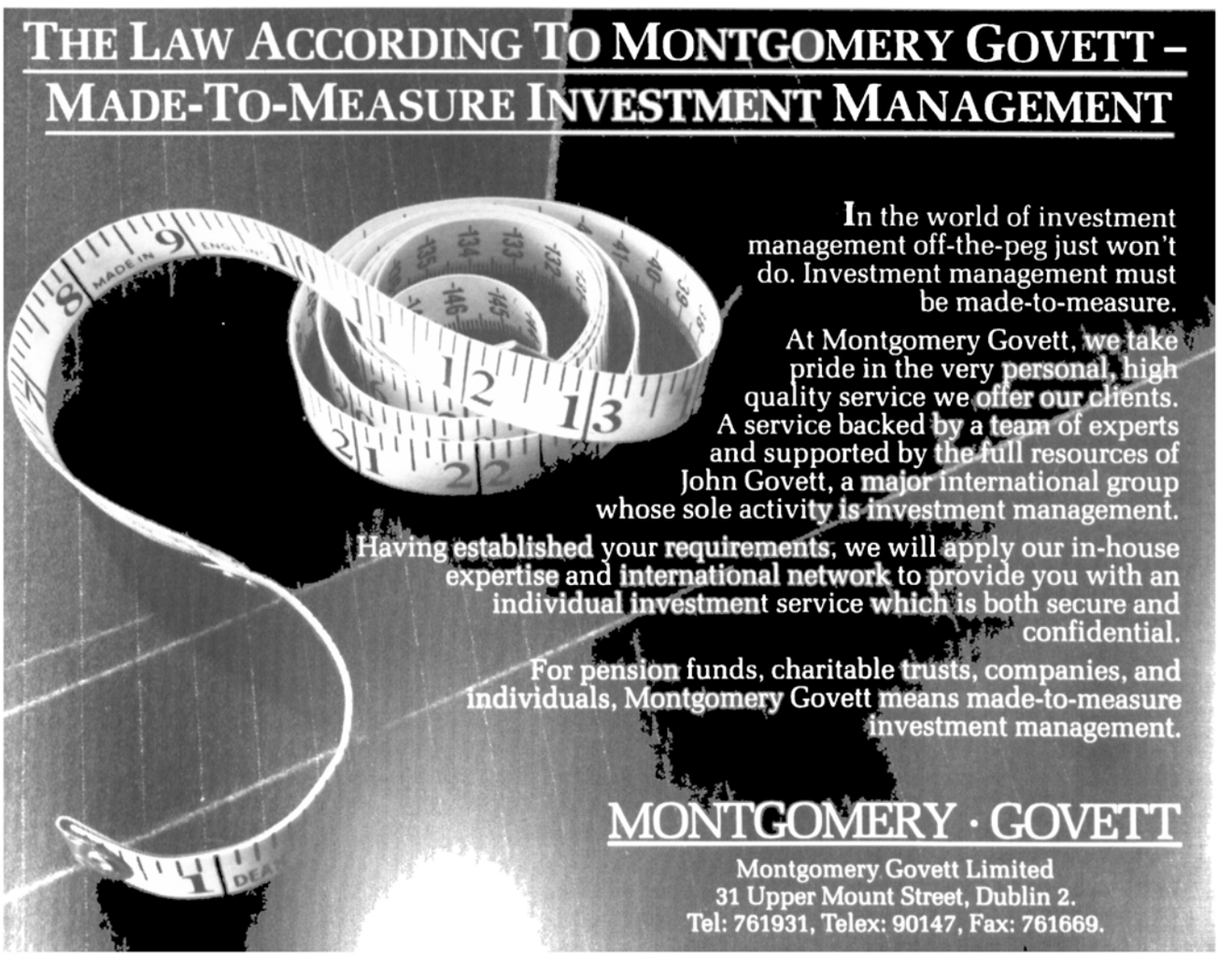
The case for practitioner-based regulation

A strong case can also be made *for* practitioner-based regulation. The City employs a large number of people, earns an enormous amount of foreign exchange and pays a great deal of tax. Modern technology, in combination with global deregulation, has made the City extremely vulnerable to competition from overseas financial centres. The imposition of a heavy handed legalistic system could easily drive business away irrevocably. In addition, too many restrictions will tend to drive business underground or offshore — a situation in which it will be impossible to protect investors. This is the essence of the case for practitioner-based regulation. The Stock Exchange in London is quoted as a prime example of successful practitioner-based regulation. It has a reputation for strict adherence to high standards and, since 1973, has had a successful system which ensures compensation in the event of a Stock Exchange firm failure.

In addition, there is the argument that practitioners will have more experience of the investment markets and will thus be able to regulate them more sensitively than civil servants, especially in areas where suspected malpractices are shadowy or legally hard to define. A good example of this is the practice of "churning". This occurs when clients are persuaded to do deals where the only merit is to generate commission. There is a fine line, however, between churning and simple bad judgement. Churning is thus not only hard to prove but also difficult to define.

It cannot be assumed, however, that there is a straightforward choice between an independent statutory agency and a practitioner-based regulatory body. Even an independent agency, such as the U.S. Securities and Exchange Commission (the S.E.C.) which had policed the American stock markets for 50 years does not operate independently of practitioner-based bodies such as the N.Y. Stock Exchange. In secondary trading, for example, the S.E.C. has had to delegate its control almost entirely to self-regulatory organisations.

Despite extensive debate, the new rules have, in principle, been acknowledged as a major advance in investor protection. Even the most hardened advocates of practitioner-based regulation acknowledge the need for tight regulation in certain areas, for example, the so-called "over the counter" markets to which the public have access. The new Financial Services Act has been designed to regulate not only the U.K. Stock Exchange but all bodies which engage in various aspects of the investment business. Thus Life Assurance and Unit Trust companies, Investment Management companies and a whole range of Financial Intermediaries will fall



under the scope of the Act. To date, five self-regulatory organisations, each with memberships drawn from various categories of the Finance Industry, have been formed. The S.I.B. will delegate authority to these organisations who in turn will ensure that their members comply with the new regulations. In addition to these five self-regulatory organisations, bodies representing solicitors and chartered and certified accountants have expressed interest in becoming Recognised Professional Bodies whose function will be to regulate members engaged in the finance business. It is also likely that many of the compliance officers who will serve to watch over the new system will be drawn from the ranks of solicitors and accountants. It is still far from certain that investor protection will be tighter in practice and it is already becoming clear that the deregulated market will require much more policing than was once hoped.

Implications for Ireland

The implications for Ireland are clear; if we are to develop a healthy securities industry, a proper regulatory framework within which it can successfully and efficiently operate is a prerequisite. The changes which have taken place in London have affected the Dublin Stock Exchange but there has been a complete absence of corresponding activity here in the area of regulation and investor protection. The question of establishing an appropriate supervisory framework is not only important for the protection of the Irish investor, but becomes critical if the proposed financial centre on Custom House Quay is to become anything more than an administrative centre. This need not necessarily mirror the United Kingdom's framework, because of our separate requirements. The small size of the Irish market may not require a system as complex as that of the United Kingdom, a factor which should work to our advantage in developing a regulatory framework which protects Irish investors while taking into consideration the broader requirements of developing the Custom House Quay as an International Financial Centre. □

KERRY LAW SOCIETY 50th ANNIVERSARY GALA

Kerry Law Society recently celebrated its 50th Anniversary with a Gala Ball. Pictured on the occasion from L to R: Peter Callery, Solr.; Louise McDonough, Co. Registrar; Judge John Gleeson; Mary Twomey, Solr.; David Pigot, Pres. Incorporated Law Society of Ireland; Mary O'Halloran, Solr.; Donal Byrne, Pres. Kerry Law Society; M. L. O'Connell, Chairman Kerry Law Society; Michael O'Donnell, Solr.; Angela Condon, Solr.; District Justice Humphrey Kelleher; District Justice Mary Martin and Jim Ivers, Director General, Incorporated Law Society of Ireland.

Practice Notes

District Court Civil Proceedings

(1) It would expedite the order of business if at least one week's notice would be given of applications for adjournments, so as not to waste court time.

(2) Counterclaims should be lodged at least four days before the hearing of any case and the relevant serial number (as shown on Civil Process) is to be quoted on said counterclaims.

(3) Consents to granting of Decrees should be in writing or by appearance in Court.

(4) Spare copies of correspondence, professional reports, maps, etc., should be handed in to Court for perusal by the Judge at the hearing.

Oliver A. Macklin,
President of the District Court.

The High Court

The Books of the Account of this Court will be closed from Monday, 24th August to Friday, 25th September, for the purpose of enabling the Accountant to balance the various accounts of suitors. Lodgements may be made during the period and the Accountant will invest money pursuant to Orders of the Court.

The High Court Sitting During the Long Vacation

During the Long Vacation, two Vacation Judges will sit at the Four Courts on Wednesday, the 12th day of August; on Wednesday, the 26th day of August; on Wednesday, the 9th day of September and Wednesday, the 23rd day 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 11th day of August; Tuesday, the 25th day of August; Tuesday, the 8th day of September and Tuesday, the 22nd 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.

Notice

Practitioners should note that except for strong reasons which are acceptable to the Court, Motions will not be adjourned to the last Motion day of this term.

Long Vacation 1987

The several offices of the High Court and Supreme Court are open for public business during the Long Vacation from 10.30 o'clock in the forenoon to 1 o'clock in the afternoon on Monday to Friday (inclusive) in each week (except Monday, 3rd August).

The offices of the Accountant of the Courts of Justice in common with other offices is open for public business at the above mentioned times and lodgment schedules and payment schedules may be filed there throughout the Long Vacation.

Privities for lodgment may be bespoken and lodgments made throughout the Long Vacation and monies lodged will be invested by the Accountant.

Payments pursuant to directions in payment schedules will be made during the Long Vacation provided that the payment schedule is filed in the Accountant's Office *not later than 1 o'clock in the afternoon of Friday, 21st August, 1987.*

Directions for payment contained in payment schedules filed in the Accountant's Office from Monday, 24th September, 1987, will not be acted upon during that period. Consequently there will be arrears outstanding when full activity is resumed on Monday, 28th September, 1987, and the discharge of such arrears will take several weeks. □

Administration of Estates

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Additional copies of the booklet are available from the Society at £3.00 per copy incl. postage.

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INTERNATIONAL ASSOCIATION OF JUDGES DUBLIN CONFERENCE, 1987

Members of the United Kingdom delegation were (left to right): the Rt. Hon. Sir Basil Kelly (Northern Ireland) and Lady Kelly, the Hon. Sir Jean-Pierre Warner and Lady Warner.

(Left to right): Mr. Justice Roelof Manschot (Netherlands), Mr. Justice Declan Costello and Mr. Justice Karl Müller (Austria).

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In furtherence of its objective of promoting the study, research and discussion of Labour Law in Ireland, the Society publishes an annual Journal containing papers delivered to the Society, a selection of Labour Law cases and reviews of recent literature on the subject. The Journal is essential reading for lawyers and students with an involvement in Labour Law.

The 1986 issue of the Journal is now available. It includes feature articles by Tony Kerr and Keith Ewing on the former Minister for Labour's proposals for the reform of trade dispute and industrial relations legislation, by Deirdre Curtin on Community Law and occupational pension schemes, by Colin Walker on the work of the Rights Commissioners and by Gerry Whyte on the Report of the Commission on Social Welfare. There is also a comprehensive review of developments in Irish Labour Law over the year written by Tony Kerr.

Cases reported inlcude the Supreme Court decisions in *State (Aer Lingus v. Labour Court* and *State (I.P.U. v. E.A.T.* and the High Court decisions in *Irish Leathers Ltd. v. Minister for Labour* and *Minister for Labour v. P.M.P.A.*

A limited number of copies of the 1984 and 1985 Journal (Volumes 3 and 4) are also available (Price £10.00 each plus 50p postage).

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"Who Does the Law Serve?"

At a recent seminar, organised by the Coolock, Dublin, Community Law Centre in conjunction with the Free Legal Advice Centres, Thomas D. Shaw, Senior Vice-President of the Law Society, pointed out that means tests, inevitably delays and long waiting lists had resulted in the Civil Legal Aid Scheme failing to provide the speed and recourse to justice which anybody connected with the law would like to have seen. He asked whether it was better to have the present Scheme, in its limited and incomplete form, or would it be better to abolish the present Scheme in favour of some other which must, of its nature, operate on a totally voluntary basis, such as at present operated by F.L.A.C. and the Civil Legal Aid Board. He regretted that no system had evolved to enable the two to work side by side. Mr. Shaw added that the supply of civil legal aid should be broad and comprehensive, and he criticised successive governments for failing to allocate adequate funding for civil legal aid. □

In Brief

International Labour Organisation

Miss Justice Mella Carroll has been appointed to the Administrative Tribunal of the International Labour Organisation based in Geneva. She will continue to serve as a High Court judge in Ireland to which she was appointed in 1980.

The Tribunal acts as the court of final appeal in disputes on administrative and personnel matters arising between the staff and management of 23 international organisations. □

The Honorable Society of King's Inns

A concise illustrative history of the King's Inns by Daire Hogan, Solicitor, was launched by the Chief Justice at a reception in the King's Inns Library on 25 June.

The booklet is available for sale at the King's Inns, the Law Library and the Law Society Reception Desk; price £2.00. □

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— from the *Twelfth annual report of the Lay Observer 1986 (HMSO).*

The Lay Observer is appointed by the Lord Chancellor of England to review the Law Society's treatment of complaints against solicitors. The present holder of the office is Mr. Lionel Lightman who was appointed last year. □

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Some Unusual Periods of Limitation

Ignorantia Legis Haud Excusat

by
Petria McDonnell, Solicitor

There is a depressing finality in the realisation that your client's claim is statute barred. It is proposed in this brief practice note to draw attention to the appropriate limitation periods in specific types of action where any practitioner might well be "caught short" to the detriment of their client (and their professional indemnity premium).

International Air Transport (Warsaw Convention 1921 — 2 years)

The 1929 Warsaw Convention (as amended by the 1955 Protocol) governs *international* carriage of persons, luggage and goods. Ireland has ratified the Warsaw Convention by virtue of the Air Navigation and Transport Act 1936. Ireland has also ratified the 1955 Protocol by virtue of the Air Navigation Transport Act 1959 and has ratified the Guadalajara Convention by virtue of the Air Navigation and Transport Act 1965.

Anyone dealing with a claim on behalf of a deceased dependent, injured air crash victim or owner or consignee of luggage or goods should carefully consider the provisions of the Convention and Protocol which, it should be stressed, relates to the international carriage. Most airline tickets refer in practice to the Warsaw Convention and to the limitation of damages allowed under its terms. It should be noted that the provisions of the Convention may apply even in the absence of a ticket and in the case of "gratuitious carriage" by an air transport undertaking.

For the purposes of this practice note which deals with limitation periods (as opposed to the limit of damages provided for under the Convention) the relevant part of the Convention is Article 29 which reads as follows:—

(i) "The right to damages shall be barred if an action is not brought within *two years,* reckoned from the date of arrival at the destination, or from the date on which the aircraft should have arrived, or from the date on which the carriage stopped.

(ii) The method of calculating the aforesaid period shall be determined by the Law of the Court seized of the case."

(For the avoidance of confusion, readers might amend the current edition of the Law Directory at page 27 dealing with airline claims and should obliterate the reference to three years.)

International Carriage of Goods by Road (CMR Rules 1 year)

The carriage of goods both to and from Ireland is frequently governed by the provisions of an international Convention commonly known as the CMR Convention (or the CMR Rules). While the Convention has been incorporated into English legislation by the Carriage of Goods by Road Act 1965, it has not been ratified by Ireland. Despite this, many contracts for carriage to and from Ireland incorporate, by agreement, the CMR Rules. In all such cases the carrier will issue a CMR Consignment Note. While the note will refer to the rules themselves it will probably not refer to the appropriate limitation periods — so it is incumbent on you, me and us to know what they are.

Article 32 of the Convention provides that the period of limitation for commencing an action arising out of contract of carriage governed by the provisions of the CMR Rules, shall be *one year.* If wilful misconduct can be proved, the limitation period is extended to three years. As wilful misconduct may be very difficult to establish, it is advisable to commence proceedings within the one year limitation period irrespective of the conduct of the carrier.

The period of limitation runs from different dates depending on the nature of the claim e.g. partial loss, damage or delay in delivery, or total loss. For example, where a claim is in respect of partial damage to goods, the limitation period begins to run from the date of delivery.

The Rules provide that where a written claim has been submitted, the period of limitation will be suspended until such time as the carrier rejects the claim by notification in writing and returns the documents which were attached to the Notification of Claim. (See *I.C.I. plc. and I.C.I. France S. A.* -v- *Mat Transport Ltd.* [1987] 1 (Loyds Re. 354).

It is essential that Solicitors acting for carriers and indeed importers of goods should familiarise themselves with the conditions of the Convention as they are frequently incorporated into international carriage contracts. A most useful guideline to the CMR Rules by Brian J. McGovern, B.L. is to be found in the November 1985 issue of the Gazette.

Maritime Collisions (2 years — Civil Liability Act 1961 s.46).

Section 46(2) of the Civil Liability Act 1961 imposes a two year limitation period in respect of claims for damage, loss of life or injury arising out of a collision between two vessels. Sub-section 3 allows the Court to extend the two year limitation period *if* it is satisfied that the Plaintiff during the two year period has had no reasonable opportunity of arresting the Defendant vessel within the Irish jurisdiction *or* (assuming the vessel belongs to a foreign owner) within the territorial waters of the country to which the Plaintiff's vessel belongs or in which the Plaintiff resides or has a principal place of business.

Section 46(2) of the above Act is not confined to large sailing

vessels but applies equally to collisions involving fishing vessels, barges, cruisers and yachts all of which will fall within the definition of a "vessel". Section 46(2) specifically refers to the Merchant Shipping Act 1894 in which "vessel", is defined in Section 742 as follows: —

> "vessel includes any ship or boat or any other description of vessel used in navigation". (see also *Barber -v- Burke & Others* [1980] ILRM Page 186).

Two other points should be noted. It is arguable, although not entirely clear that the 2 year limitation period applies only to *in rem* proceedings against a vessel as opposed to proceedings brought *in personam* against the owner of the vessel. Secondly, it is unlikely that this section would apply to a collision on an island waterway (see The Goring [1987] 2 All ER page 246).

(Readers with a copy of "A Casebook on the Irish Law of Torts" by McMahon & Binchy should note, at page 646, the existence of the above little known section. That publication refers to Section 8 of the Maritime Conventions Act 1911 which has been repealed by S.46(2).

Salvage Claims (2 years) Civil Liability Act 1961 S.46(4)

For those scanning this practice note the relevant limitation period is two years as provided for by Section 46(4) of the Civil Liability Act 1961.

For those prepared to read a little further, the position is interesting and indeed curious. The limitation period for salvage claims was originally governed by the provisions of the Maritime Conventions Act 1911 which provided, under Section 8 that the appropriate limitation period was two years "in respect of *any* salvage service", such period to be calculated from the date when the damage or loss or injury was caused or the salvage services were rendered. Section 8 was repealed by the Civil Liability Act 1961 and replaced by Section 46 of that Act. Subsection 2, as mentioned above provides that the limitation period for collisions is two years and Subsection 4 purports to impose a similar limitation period in respect of "salvage or other expenses consequent upon that fault". In amending the 1911 Act the scope of the salvage services contemplated has been narrowed from "any salvage service" to salvage linked with "fault".

The effect of these Subsections when read together is that the two year limit applies only to such salvage claims which arise as damages because of the sole or concurrent fault of a vessel. In all other cases where salvage services are rendered (in the absence of "fault"), e.g. to a vessel in distress or where an abandoned yacht has been rescued, there is no time limit applicable under Irish Law for salvage actions *in rem*.

This "curiosity" was drawn to the attention of the Minister for Transport and Power in 1970 by the Irish Maritime Law Association. It was indicated that amending legislation would be "considered" and there the matter rests.

International Carriage of Goods by Sea (Hague Rules — 1 year)

This is an area which should be equated with a legal minefield and one must tread warily. Within the scope of this practice note, the net point to be borne in mind is that if the relevant documentation refers to the application of the Hague Rules (or the amended version thereof known as the Hague Visby Rules) the appropriate limitation period is *one year*. Article III Rule 6 of the Hague Rules provides that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless a suit is brought within one year after delivery of the goods or the date when the goods should have been delivered". (Nothing could be clearer *if* you have managed to spot the reference to the Hague Rules in the microscopically small print of the contract documentation and *if* you are familiar with the provisions of the Hague Rules.)

Where are these Rules to be found? *Mirabile dictu* Ireland has actually ratified the 1924 Brussels Convention which gave rise to the Hague Rules and you will find them in the Second Schedule attached to the 1947 Merchant Shipping Act. When do they apply?
Under Section 13 of that Act, the Rules "shall have effect" where goods are carried on foot of a bill of lading *from* any port in the State. While the Section goes on to provide that the Rules apply where goods are being shipped "to any other port whether in or outside the State" in practice they rarely apply to the shipment of goods to other Irish ports or to Britain for two reasons. Firstly, such shipments are rarely covered by a negotiable bill of lading and secondly, Section 13(4) allows a carrier to contract out of the rules and impose different conditions where goods are being shipped to another Irish port or to Great Britain or Northern Ireland, provided a non-negotiable bill of lading is issued.

While the Act refers to *outward* traffic in cases where a bill of lading is used, the scope of their application does not end there. Frequently goods are carried on foot

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of a sea waybill or consignment note. Such documents frequently incorporate the provisions of the Hague Rules. Note also that contracts in respect of goods being carried *to* this country frequently incorporate the provisions of the Hague Rules (or of the amended version, namely the Hague Visby Rules which have a similar limitation period).

A wise precaution when dealing with claims arising out of the international carriage of goods by sea (or by road) is to assume that the limitation period is one year on the basis that the Hague Rules (or the CMR Rules) probably apply. □

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The Editor of the book is Dr. Patrick Ussher, Fellow of Trinity College, and Associate Editor, Brian J. O'Connor, a partner with McCann Fitzgerald Sutton Dudley, assisted by the late Prof. Charles McCarthy, Professor of Industrial Relations at Trinity College, who died in September, 1986.

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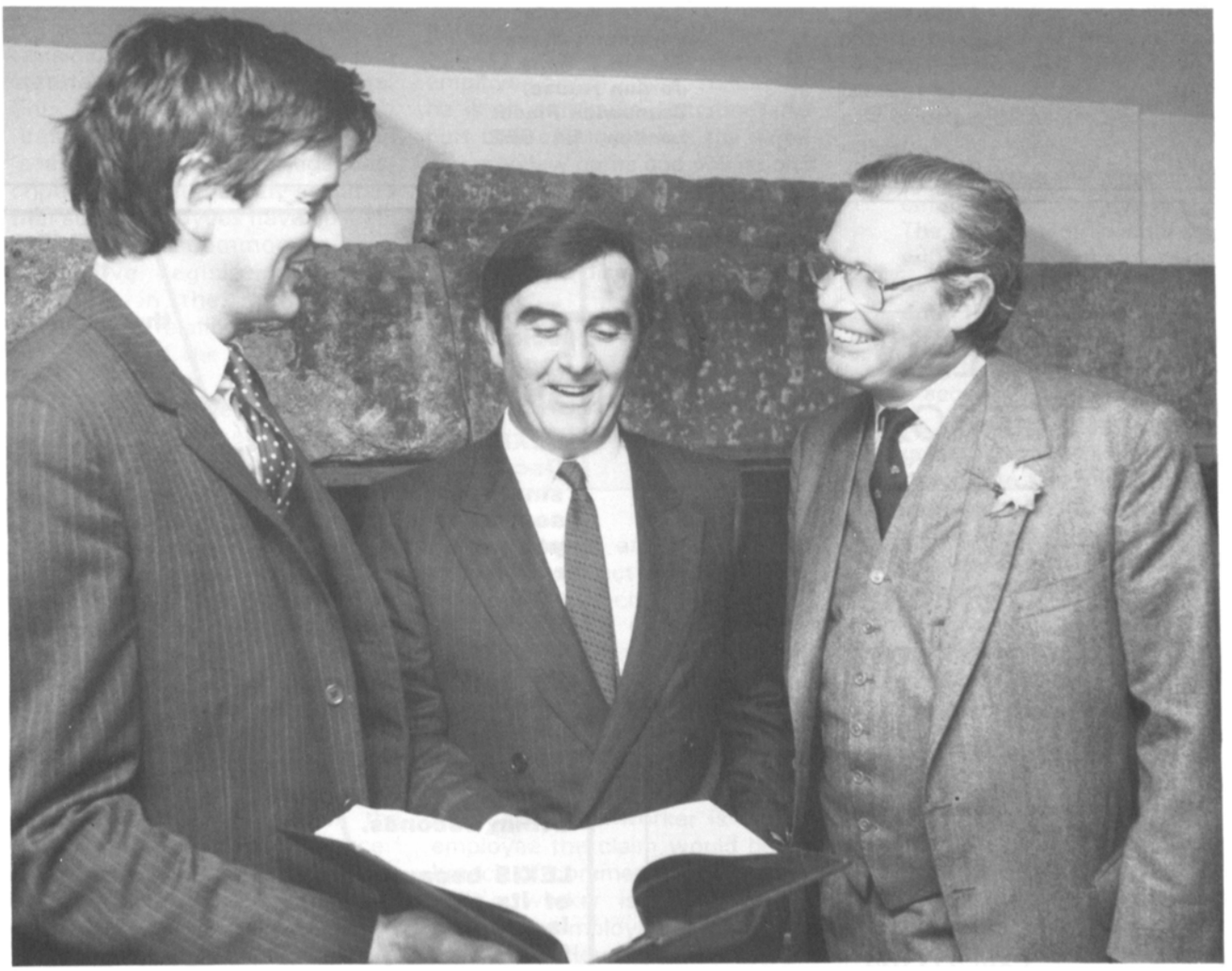

Pictured at the launch of "Doing Business in Ireland" in the Atrium, Trinity College, Dublin, on June 10th, 1987, are from left to right: Professor Patrick Ussher, Fellow Trinity College, Editor "Doing Business in Ireland", the Attorney General, Mr. John Murray SC and Associate Editor, Mr. Brian O'Connor, Solicitor, McCann Fitzgerald Sutton Dudley.

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Temporary and Part-time Employees

Temporary and part-time workers have become an increasing part of our workforce; part-time employment being 6.7% of total employment in 1983 and females comprising 72% of total part-time workers.[1] As of 1st April, 1985, the total number of part-time employees was 68,900 of which 51,400 were female and 17,500 male.[2] The economic recession has resulted in an increasing number unemployed, approximately ¼ million at year end 1986. Thus by necessity persons are considering alternative ways and means of working, e.g. being self-employed, shorter working weeks, job sharing.[3] Indeed, more recently, Ireland's two largest trade unions — the IT&GWU and the FWUI have had an advertising campaign directed towards part-time (and lower paid) employees for membership purposes. Such campaign is significant as trade unions have suffered considerably from loss of members due to the employment situation.

The purpose of this article is to consider both the legal status and statutory rights of such workers. The descriptions 'temporary', 'casual', 'short-term', and 'seasonal work' are not legal descriptions. It is frequently assumed that such employees have no legel rights under common law or protective legislation. Thus, resulting in the myth of an employment relationship having no application of the law. Nonetheless, there are a considerable number of employees who do not fall within the scope of protective legislation (e.g. work less than 18 hours per week). One UK specialist in employment law criticised the fact that so many of these 'marginal' workers fell outside the scope of protective legislation; the reason being that nearly all statutory rights created since the 1960s are limited to employees under a contract of employment (i.e. contract of service). In view of this limitation, it is questionable as to whether such statutory rights should continue to rest on the common law contract of service.[4] The I.L.O. state that approximately 60% of the world's labour force are not effectively protected by employment legislation.[5]

Employee or Independent Contractor

At common law the duration of a person's employment is not relevant as to whether he is an employee or not. Thus, so long as he is an employee, a temporary/part time employee has the same common law rights and obligations as the full-time employee. Accordingly, such employee can bring a claim for breach of contract i.e. wrongful dismissal.

by
Frances Meenan,
Solicitor

Such claims are few. Should breach of contract arise the Courts may require specific performance of the contract (re-employment) but this is very rare, damages are the most likely remedy as the common law permits either party to bring the contract to an end by due notice. Thus damages limited to the notice period may be minimal. If the worker is not an employee the claim would be for breach of commercial contract.

If a worker is an employee, protective employment legislation may apply. However, to fall within the scope of the legislation he must be normally expected to work at least 18 hours per week and have the requisite continuous service (52 weeks Unfair Dismissals Act, 1977, 13 weeks Minimum Notice and Terms of Employment Acts, 1973 and 1984 and 104 weeks Redundancy Payments Acts, 1967—1984). Should there be breach of contract (dismissal), the employee has the option of pursuing a claim for wrongful dismissal or claiming under the Unfair Dismissals Act, 1977. Most employees claim unfair dismissal as recourse to the Employment Appeals Tribunal is speedy and no costs are involved. Also, the Tribunal can award re-instatement, re-engagement or compensation (as appropriate) under the Act.

In deciding whether a person is an independent contractor or an employee the Courts are more inclined towards concluding that a contract of service exists. The Courts ask two questions (in summary), namely:—

1. Who controls the work of the employee?
   The modern work relationship with many skilled employees has rendered this question and the resulting answer rather unsatisfactory. Accordingly the Courts have devised a second question.
2. 'Is the employee fully integrated into the business?'
   In reply to this question, the legal status of a number of categories of temporary employees can be highlighted.

Home Workers

In a number of UK decided cases, home workers have been held to be employees. In *Airfix Footwear Limited -v- Cope,*[6] Mrs. Cope worked at home making shoe heels; the company provided her with tools and issued instructions. She worked a five day week for seven years; was paid a piece rate and there were no tax deductions. She was considered an employee.

Casuals

There is no definition for this oft used colloquialism. In practice,

such workers are on stand-by to do work as required with no fixed hours or attendance arrangements. More recently UK case law has attempted to define their status; unfortunately, the answers are inconclusive.

In *O'Kelly and Others -v- Trusthouse Forte plc,*[7] the claimants were 'regular casual' wine waiters. The Court of Appeal considered that as these waiters were carrying on business on their own account, they were not employees. However, in *Four Seasons (Inn on the Park) Limited -v- Hamerat,*[8] a wine waiter had worked for seven years, was paid for the hours he worked and received no sick pay or holidays. The waiter was considered an employee as if he had refused work, future work would have been withheld. In both these cases the Courts looked at the economic realities behind the relationship.

The Irish Employment Appeals Tribunal has been less adventurous in comparison to the views in the *Trusthouse Forte* case. The status of 'permanent casuals' was considered in *Byrne -v- Gartan Limited.*[9] It was held that the claimant a waitress, in the Royal Dublin Hotel was an employee. Her work was controlled by her employer, reason being that over the years of the relationship, the expectation arose of the employee's availability to work and of the opportunity to work.

The Tribunal also took the same view in *Kelly -v- Irish Press Limited.*[10] In this case the claimant was association football correspondent for the *Sunday Press* since 1952. It was contended that he was not an employee as he only worked part-time and had another full time job; he did not have income tax or PRSI deducted from his newspaper earnings. It was determined that his work was an integral part of the business. The Tribunal relied on the High Court decision of Miss Justice Carroll in *Re Sunday Tribune (in liquidation).*[11] The Judge considered a number of classes of newspaper contributors. She considered that a person may be an employee even though employed part-time and employed by different employers. The Irish Press determination under the Unfair Dismissals Act, 1977 was not appealed to the Circuit Court. The Court considered Mr. Kelly was not an employee, and thus, did not fall within the scope of the Act.[12] Clarke, J. considered the relationship between the parties and asked a number of questions: –

- Does the sports editor have to accept his articles?
- Would Mr. Kelly be in breach of contract if he did not provide the newspaper with an article.
- Could the newspaper get an injunction if he gave the article to another journal?

The questions were answered in the negative on the basis that each was a free agent. Each was free to accept or not accept work. There was a fresh offer and acceptance on each occasion. Accordingly, there was no contract of service. The *Tribune* case was also referred to in this judgment and Mr. Kelly was equated with Ronit Lentin, a freelance contributor with the Tribune who was paid for commissioned work, not necessarily appearing weekly on a rate per word basis. She visited the office

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only once per week and she would either suggest a topic for an article or be asked to contribute an article. She was not considered an employee as she was under no obligation to contribute on a regular basis.

It might be noted that technically, the Tribunal's Determination on minimum notice in the *Irish Press* case still stands unless appealed and overruled by the High Court i.e. for the purpose of that Act,[13] he is still an employee. Such an appeal may be made on a point of law only to the High Court. However, for precedent purposes, the Circuit Court judgment has higher authority than that of the Tribunal.

Agency Workers

These are workers who register with employment agencies, whose business it is to enter into contracts with such workers and then make them available to a third party (the hirer), who requires the services of a temporary worker. The legal status of such workers is both complicated and unfortunate. In *Construction Industry Training Board -v- Labour Force Limited,*[14] it was stated 'where A contracts with B to render services exclusively to C, the contract is not a contract for services (or of service), but a contract sui generis, a different type of contract from either of the familiar two'. Accordingly, such worker is not an employee of the agency or the hiring employer.

This issue was recently considered by the High Court in *Minister for Labour and PMPA Insurance Company Limited (under administration).*[15] The case reached the High Court by way of case stated from the District Court — on the question as to whether the 'agency temp' was an employee or not. The Minister had prosecuted the PMPA under the Holidays (Employees) Act, 1973 contending such person had an entitlement under that Act by virtue of being an employee. One must be an employee to fall within the scope of that Act. Barron, J. relied on the *Construction Industry Training Board* case in considering that there was neither an express nor an implied contract between the PMPA and the 'temp'. Accordingly, the person was not an employee and thus did not have an entitlement under the Holidays Act.

This view was previously upheld by the Tribunal in *O'Dowd and Kinsella -v- PMPA Insurance Company Limited and Alfred Marks Bureau.*[16] The claimants had signed up with the Bureau to perform temporary work as and when it became available. The Bureau supplied temporary staff to, among others the PMPA when requested. Miss Kinsella claiming redundancy and minimum notice, was sent to the PMPA by the Bureau as a temporary worker in July 1981 and remained there until the end of March, 1984, when the employment of such temporary workers by the PMPA was phased out.

Miss Kinsella was offered a temporary post elsewhere by the Bureau but declined due to changed domestic circumstances. (Miss O' Dowd did not attend the hearing before the Tribunal.) Both the Bureau and the PMPA denied the claimants were employees. The Bureau merely acted as a referral agency and did not employ them; the PMPA did not treat them as employees and did not have control over which temporary workers were sent. Mis Kinsella accepted she was employed on a temporary basis subject to one hour's notice of termination. However, she considered that she should be entitled to notice and redundancy in accordance with the Acts due to her long service with the same company. The Tribunal considered that the claimants were not employees of either the Bureau or the PMPA, and their claims failed.

However, in *Treanor -v- McCall*[17] the Tribunal was satisfied that the claimant, supplied by the agency, was an employee of the hirer. The agency was paid a regular fee to perform accounting functions and the hirer could decide on whom he would employ and the rate of pay. (It would appear that such arrangements did not fall within the normal arrangements for such agency workers.)

Protective Legislation

In order to fall within the scope of protective legislation (the Unfair Dismissals Act, 1977; the Reunancy Payents Acts, 1967 to 1984; the Minimum Notice and Terms of Employment Acts, 1973 and 1984; and the Maternity Protection of Employees Act, 1981) a temporary worker must be an employee working under a contract of service.

Aspects of such legislation which affects temporary employees will now be considered.

Hours

In order to fall within the scope of such legislation an employee must normally be expected to work 18 hours per week. Frequently this matter is difficult to determine.

The law does not specifically provide for averaging the hours over a period of time.[18] The only practical way of determining the hours is to look at hours actually worked and the custom and practice associated with the duties, e.g. regular rostered overtime. In *Mulvaney -v- Professional Contract Cleaners Limited*[19] the Tribunal considered that the claimant worked less than 21 hours per week (the previous hourly ceiling which has been amended by the Protection of Employees (Employers' Insolvency) Act, 1984 to 18 hours). This was

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supported by the fact that she paid the J2 rate of PRSI, a rate payable by employees working less than 18 hours per week. In *Edwards -v- Aerials & Electronics (Ireland) Limited,*[20] it was held that as both employer and employee could not provide evidence as to hours worked — the hours worked were deemed indeterminate and the claim failed.

Employees who are 'on-call' may fall within the scope of the legislation, for example, in *Bartlett -v- Kerry County Council,*[21] the claimant was employed as a part-time fireman with no specific hours of work — by virtue of being 'on-call' for at least 21 hours per week he fell within the scope of the Unfair Dismissals Act, 1977. See also *Gormley -v- Leitrim County Council.*[22]

Continuity

Assuming a 'temporary' worker is an employee and works the requisite hours, the next conideration is continuity of service. Two claims under the Unfair Dismissals Act are worth considering — the rules for continuity are contained in the First Schedule to the Minimum Notice and Terms of Employment Act, 1973 — in *Broderick -v- Victor Hotel,*[23] a perennial problem arose, 'is there a dismissal or not?' A seasonal employee was considered to have continuous service as she was laid off during the winter season. She was laid off at the end of a winter season and claimed she was dismissed. It was held that she had continuity but there was no dismissal as she was still on lay-off. Thus, she was still an employee and not entitled to claim under either Act.

Under the continuity rules, there is no break in continuity if there is a dismissal followed by immediate re-employment by the employer. This rule was applied in *Roscrea Meat Products Limited -v- Mullins and Others,*[24] where temporary workers claimed unfair dismissal. The company argued they were only hired from time to time, and each time their service was broken. It was held they had continuity as looking at the pattern of their employment, they were seasonal employees.

A seasonal employee may also have continuity for the purposes of redundancy, which rules are contained in the Third Schedule of the Redundancy Payments Act, 1967 (as amended).[25] In *Cowman -v- Bon Voyage Travel Limited,*[26] a seasonal employee for 10 years with authorised absences and periods of lay-off was entitled to a redundancy payment on the basis of her continuous reckonable service.

Fixed Term Contracts

The Unfair Dismissals Act, 1977 (section 2(2)(b)) provides that the Act does not apply to the non-renewal of a fixed term or a specified purpose contract, provided the contract is in writing, signed by both parties and it is stated that the Act will not apply to the termination of the contract.

The main area of concern is what is the position on the non-renewal of a second or subsequent fixed term contract. From an employer's viewpoint the position is unfortunate as it may be concluded that the Tribunal would view the periods of employment as continuous and unless there is good reason for termination of employment (or non-renewal of the contract), it would be held to be an unfair dismissal.

Thus, employers may not use the device of fixed term contracts to avoid this legislation. It is worth quoting the views of the Tribunal in the case of *Fitzgerald -v- St. Patrick's College,*[27] which claim was based on the non-renewal of a fixed term contract. The contract had been renewed twice before this — 'if the mere expiry of a fixed term contract of employment were to be regarded as a substantial ground for the non-renewal of employment, the Unfair Dismissals Act, 1977 could be rendered abortive in many cases. An employer could side step its provisions by employing his employees on fixed term contracts only. Then, to get rid of an employee, on whatever grounds, be they trivial or substantial, fanciful or solid, fair or unfair, he need only wait until that employee's fixed term contract expired, and then refuse to renew it'.

Specified purpose contracts which are entered into in order to complete a special project (for example) must be viewed cautiously also, for example, if an employee were employed to do a specific job and he spent time doing other work, it may render the contract not to be for a genuine purpose, the effect being that the employee may well fall within the scope of the Act if he has the requisite 52 weeks service.

Of course, an employer would well use the defence of redundancy if a claim is brought for unfair dismissal following the non-renewal of a second or subsequent contract (this is assuming the employee has the requisite 52 weeks service to fall within the scope of the Unfair Dismissals Act, 1977). Further an employer could be liable for redundancy payment if the employee has 104 weeks continuous service and there is a redundancy situation on the expiry of a fixed term contract (section 7, Redundancy Payments Act, 1967).

The maternity legislation will not apply to female employees who work under a fixed term contract for either less than 26 weeks or of which there are less than 26 weeks to run at the date of taking maternity leave, (section 1, Maternity Protection of Employees Act, 1981).

Temporary Officers

Officers of health boards, local authorities and so forth are exluded from the scope of the Unfair Dismissals Act (Section 2(1) (j)). Problems arise in the case of temporary doctors and nurses in the health boards as they are deemed officers.

Western Health Board -v- Quigley,[28] highlighted the problems associated with temporary officers in health boards. Mrs. Quigley was a statutory registered psychiatric nurse who was appointed a temporary staff nurse in 1974. In October, 1974 she was notified that her temporary employment was being extended up to 31 December 1974. She received no further communication but continued to work up to November, 1977 when she received a notice terminating her temporary employment on 31 December, 1977. She considered that she was unfairly dismissed and brought a claim to the Tribunal who awarded her reinstatement which decision was affirmed on appeal by the Circuit Court.

On appeal to the High Court the Health Board argued that a psychiatric nurse must be employed either as a temporary or as a permanent officer — the Board only had power to appoint her as a temporary officer for a fixed term. Mrs. Quigley argued that she was a 'servant' within the meaning of Section 14 of the Health Act, 1970 — thus, bringing her within the scope of the Unfair Dismissals Act, 1977. Section 14 provides that a Chief Executive Officer of a Health Board may appoint 'officers' or 'servants'; section 15 of the same Act provides that the Local Authorities (Officers and Employees) Acts, 1926 and 1940 apply to the appointment of officers of Health Boards as the Minister with the consent of the Local Appointments Commissioners may determine. Psychiatric nurses have been defined by the Minister as 'minor officers'. The Local Government (Officers) Regulations 1943 (No. 161 of 1943) provide for the appointment of temporary officers. A temporary officer is defined as meaning an officer who is appointed to hold an office *(inter alia)* for a specified period . . .

Barrington, J. considered that she was not a 'servant' as by custom and practice psychiatric nurses are officers not servants — servants 'discharge minor and subordinate duties' in mental hospitals, e.g. maids, caretakers etc. Thus, a psychiatric nurse is either a temporary or a permanent officer. Accordingly, the Health Board succeeded in its appeal and Mrs. Quigley was held not to fall within the scope of the Act.

The case of *Mid-Western Health Board -v- Ponnampalam*[29] was decided in a similar manner. Mr. Ponnampalam had been working as a temporary consultant surgeon for 20 months from February, 1978 to October, 1979 when he was notified that his appointment would discontinue as a permanent surgeon had been appointed. The reason why a temporary locum was appointed for that period was because all permanent appointments have to go through the Local Appointments Commission which takes some time. He brought a claim that he was unfairly dismissed and the Employment Appeals Tribunal awarded him re-instatement. As in the *Quigley* case, sections 14 and 15 of the Health Act, 1970 and the Health Officers Order, 1958 (No. 47 of 1958) apply; that Order specifies lists of major offices including all senior positions. Accordingly, on appeal it was held he was an officer and the Health Board succeeded.

There have been other claims under the Unfair Dismissals Act, 1977 which have determined that temporary employees were 'temporary officers' of Health Boards, notably *O'Sullivan -v- Western Health Board* (clinical psychologist),[30] *Gallagher -v- Western Health Board* (ophthalmic nurse).[31]

Apprentices

The Unfair Dismissals Act (Section 4), provides that it does not apply to the dismissal of a person who is or was employed under a statutory apprenticeship (i.e. an apprenticeship under the Industrial Training Act, 1967) if the dismissal takes place within six months after the commencement of the apprenticeship or within one month after the completion thereof. In *McNamara -v- Castlelock Construction and Development Limited,*[32] it was contended that the claimant, employed as a third year apprentice, fell outside the scope of the Act, because he had less than one years service, and more than six months service. It was held that he had a viable claim although having less than one years service, he had more than six months service.

The Redundancy Payments Act, 1967 (Section 7(4), 1967 Act) provides that an apprentice can be dismissed within one month of the completion of his apprenticeship and not be entitled to a redundancy payment. Employers must ensure that when they look at the date of such dismissal, they include the notice period i.e. it must expire prior to the end of that one month.

Equality

There are no service or weekly hour requirements for employees to fall within the scope of the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977. Section 2(3) of the 1974 Act provides that an employer can pay different rates of pay on grounds other than sex. In a number of cases female part-time employees sought equal pay for performing 'like work' with full time male employees. In *Two Female Employees -v- Dunnes*

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Stores (Navan) Limited,[33] the part-time female sales assistants were considered to be doing work of equal value (like work) with the full-time male porters. It was recommended the females be paid the same hourly rate and be assimilated on to the full-time salary scale on the basis of cumulative hours worked – (obviously taking them longer to reach various service points on the scale). In *19 Female Employees -v- St. Patrick's College,*[34] part-time female cleaners sought an equal rate of pay with the full-time male operatives. It was recommended that the same hourly rate be paid to the cleaners.

More recently, there was a judgment from the European Court of Justice which considered rights to pensions for part-time employees – *Bilka-Kaufhaus GmbH -v- Weber von Hartz.*[35] It was held that the exclusion of part-time employees from occupational pension schemes contravenes Article 119 of the Treaty of Rome, if this exclusion affects significantly more women than men, unless the employer can show that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex. It might be noted that pension schemes are considered to fall within the definition of 'remuneration' in the Irish Anti-Discrimination (Pay) Act. Accordingly, part-time employees could well found such a claim in this country assuming such alleged discrimination is on the grounds of sex and the employer cannot show that the alleged discrimination is on grounds other than sex.

In *Employment Equality Agency -v- Packard Electric Ireland Limited, IT&GWU and AT&GWY,*[36] a clause in a collective agreement between the company and the unions was considered under the 1977 Act. The clause barred twilight shift staff (part-time) who had been laid-off or made redundant from that shift from applying for full-time work until 26 weeks had elapsed from date of redundancy (and in practice the lay-off). This practice was considered to be indirect discrimination towards twilight shift workers which mainly comprised married women.

Job Sharing

Job sharing as a form of work arrangement has been receiving considerable attention in recent years. It may be defined as one full-time permanent post and its benefits being shared by, more usually, two employees. There are many permutations and combinations of job sharing. It provides for certain flexibility in work arrangements for employees who wish to work only part-time but the difference being that they are working within the confines of a full-time post.

Such arrangement is more usually taken up by female employees who may wish to devote more time to family responsibilities. From the legal viewpoint, the law as described above would apply.

Employee Participation

The Worker Participation (State Enterprise) Act, 1977 (as amended) provides for the election of employees of designated state enterprises to the Board of Directors. In order to vote in such elections an employee must be over 18 years and have one years service, and in order to stand for such election the employee must have three years service, such employees being full-time. Recently the Employee Participation (State Enterprises) Bill, 1986 was published – the definition of employee has been widened to include part-time staff working a minimum of 18 hours per week.

Conclusions

The application of the law and protective legislation is complicated and further, arguably restrictive for both employer and employee. Such restrictions are immediately apparent in relation to fixed term contracts. Statistically, there is an increase in the number of employees doing part-time work. However, the legal constraints do not seem to be keeping abreast with the requirements for flexibility by both employer and employee.

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    Section 8 in summary provides that if an employee has been made redundant or laid-off for an average annual period of more than 12 weeks in a four year period, there will not be an entitlement to redundancy payment:–
    – until the average annual period has elapsed
    – if he resumes work before the period has elapsed
    – if before the period elapses there is an offer of re-employment which the employee unreasonably refuses.
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3. Redmond, Mary, Beyond the Net – Protecting the Individual Worker 1983 2 JISLL p. 1. □

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On the 4th of July last another Independence Day dawned, this time quite by accident. The story began when the Younger Members Committee were asked by their counterparts in the Irish Institute of Auctioneers and Valuers to enter a team in their mixed soccer blitz. The venue was to be Blackrock Rugby Club. The date the 4th of July.

A team consisting in the main of last year's winners of the Law Society's Soccer Blitz took the field against the combined might of the auctioneering profession. Several hours later, following games against Gerard Farrelly & Co., James Adams & Co., Druker Fanning & Partners, The Valuation Office and Allen & Townsend, they found themselves in the final, having scored 17 goals and conceded only two.

As daylight began to fade, the "Legal Eagles" lined out in the final against Gerard Farrelly & Co., winners of the competition for the previous two years. The Law Society opened the scoring with a fine goal from Pat O'Neill. However, shortly after the start of the second half, Gerard Farrelly & Co. equalised with a deflected shot. The scene was set for an exciting finale, but straight from the restart the game was put beyond doubt with the finest goal of the competition, scored by Charles Burke. The solicitors had got their just per cent!

The Irish Nationwide Building Society Perpetual Trophy was presented to Dan Murphy on behalf of the Law Society.

The Law Society team consisted of the following:

Pat O'Neill (Fitzpatrick, Ludlow & Son), Jo Ebbs (Fitzpatrick, Ludlow & Son), Ray Noone (Kelly & Co.), John Kilroy (Kilroy & Co.), J. J. Cummins (Cummins, Daly & Co.), Charles Burke (Hanby, Wallace & Co.) and Dan Murphy (Hanby, Wallace & Co.).

The Younger Members Committee would like to take this opportunity to thank the IAVI for their kind invitation to participate and remind you all of the Law Society Mixed Soccer Blitz in aid of the Solicitors Benevolent Fund on the 5th September. See you all there!

Dan Murphy,
Younger Members Committee.

Paul Romeril

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Venue: **The Law Society,
Blackhall Place,
Dublin 7.**

Date: **Saturday, 5th September, 1987.**

Details have been furnished to the Honorary Secretary of each Bar Association.
Each Bar Association will be asked to provide a mixed soccer team for the event.
The Soccer Competition will be followed by live music.

If you require further details/application forms, please contact:

**Ms. Sandra Fisher,
The Law Society,
Blackhall Place,
Dublin 7.**

Tel: (01) 710711

or

**Mr. Dan Murphy,
Hanby Wallace & Co.,
Solicitors,
130 Rathgar Road,
Rathgar, Dublin 6.
Tel: (01) 979047/979402**

MEDICO-LEGAL SOCIETY OF IRELAND

Attending a recent meeting of the Medico-Legal Society of Ireland were Mr. Eamonn Hall, President of The Society, and the Hon. Mr. Justice Niall McCarthy.

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CORRESPONDENCE

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

30th June, 1987

Re: *Capital Gains Tax*

Purchase of Business Premises held under short-term lease

Dear Sir,

A matter concerning the above has recently come to my attention and I think it should be brought to the attention of the Profession in general, as it would appear to have serious implications for anybody thinking of buying a business premises or, indeed, any property not being a principal private residence, held under a short-term lease.

Following consultation with the Revenue Commissioners and having taken the Advice of Counsel, it would appear that when a person purchases a property held under a lease with less than fifty years left to run, such leasehold interest is regarded as a "wasting asset" and any premium payable by the purchaser will, at the expiration of the term of years granted by the lease, be deemed to have wasted completely. To take a simple example: X purchases a property held under a twenty-one year lease with three years left to run and he pays a consideration of £25,000.00. When the lease expires he avails of his rights under the Landlord and Tenant (Amendment) Act 1980 and obtains a thirty-five year lease with five yearly rent reviews at a market rent for the property. Five years later he sells the property for £45,000.00.

When the Revenue Commissioners come to assess X's Capital Gains Tax liability, they will regard the £25,000 paid by X initially for the interest in the premises as having "wasted" over the three years remaining on the twenty-one year lease. This means no deduction can be made from the consideration of £45,000 received in respect of the £25,000 initially paid. Therefore, if X is a married man he can avail of the £4,000 exemption for chargeable gains and he may be able to seek relief for enhancement expenditure. In such a case as this X could be liable for Capital Gains Tax at the rate of 40% on £41,000.00, giving a tax bill of £16,400.00. X may be able to seek "roll over" relief, but this will merely be putting off the "evil day" as same is only a deferral of tax.

Whilst the Revenue Commissioners will admit that X in such a case has paid £25,000, not only for three years left to run on the twenty one year lease, but also in the expectation of taking up his Statutory rights for a further thirty-five year lease, they interpret

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Irish Tax Review, February 1987

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Schedule 3 of the Capital Gains Tax Act 1975 as meaning that any consideration paid wastes totally once the initial leasehold interest has expired.

This information is clearly of great relevance to any persons thinking of buying commercial property held under a short-term lease and Solicitors should obviously advise clients of the position when advising them initially. In the light of the above information, a prospective purchaser might obviously wish to renegotiate the purchase price downwards.

Finally, it may be advisable for the Law Society to take up this matter with the Revenue Commissioners and perhaps to seek Counsel's Opinion on the interpretation of the 1975 Act and the Constitutionality thereof in the light of the above.

Yours sincerely,

Pierce O'Sullivan, Esq.,
Solicitor.

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Bray, Co. Wicklow.

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Submission of Articles

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 aspaced and 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.

WHERE THERE'S A WILL THIS IS THE WAY...

When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

"I devise and bequeath the sum of Pounds to the Irish Cancer Society Limited to be applied by it for any of the charitable objects of the Society, as it, the Society, at its absolute discretion, may decide."

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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.
12th day of August, 1987.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Michael King of Tuberona, Dundalk, Co. Louth; Folio No.: 12894; Lands: Balbriggan; Area: 1a.2r.2p.; County: **LOUTH.**

Owen Molloy of Kilmurray South, Kilmacanogue, Co. Wicklow; Folio No.: 7480; Lands: Glencap Commons South; Area: 0a.1r.30p.; County: **WICKLOW.**

William Delaney of Ballyhale, Co. Kilkenny; Folio No.: 11277; Lands: Ballyhale; Area: 0a.1r.34p.; County: **KILKENNY.**

Malachy Maloney, Castlegar, Co. Galway; Folio No.: 19564; Lands: Castlegar; Area: 35a.1r.1p.: County: **GALWAY.**

Robert George Hutchinson of Clonandra, Redhills, Co. Cavan; Folio No.: 18141; County: **CAVAN.**

John Michael McGonagle, Carrowmena, Lecamey P.O., Co. Donegal; Folio No.: 37975; Lands: Carrowmenagh; Area 25.903 acres; County: **DONEGAL.**

Matthew Crehan, Kilcoosk, Newbridge, Co. Galway. Folio No: 575F; Lands: (1) Kilcoosh; (2) Summerhill; Area: (1) 2a.2r.12p.; (2) 1a.2r.3p.; County: **GALWAY.**

John Mahon, Farniharpy, Skreen P.O., Co. Sligo. Folio No.: 16540; Lands: (1) Farranyharpy; (2) Farranyharpy; Area: (1) 24a.3r.10p.; (2) 13a.3r.10p.; County: **SLIGO.**

John Melican, Carrownakilly, Newmarket-on-Fergus, Co. Clare; Folio No.: 23771; Lands: (1) Carrownakilly; (2) Carrownakilly; (3) Ing East; (4) Ing East; Area: (1) 34a.1r.17p.; (2) 3a.2r.37p.; (3) 3a.1r.20p.; (4) 4a.0r.0p.; County: **CLARE.**

Graham Stamp and Renee Stamp of 109 St. Patrick's Road, Walkinstown, Dublin 12; Folio No.: 47384L; County: **DUBLIN.**

Nora and Robert McGrattan of Flat 3, St. David's Court, Clontarf, Dublin 3; Folio No.;49709L; County: **DUBLIN.**

Patrick Ryan and Katherine Patricia Ryan of Drombane Cross, Thurles, Co. Tipperary; Folio No.: 12098; Lands: Drumbane; Area: 37a.0r.25p.; County: **TIPPERARY.**

Seamus Murray of Camus, Belmont, Co. Offaly; Folio No.: 12329; Lands: Camus; Area: 1a.0r.39p.; County: **OFFALY (KINGS).**

John Hynes of Crannavone, Cahir, Co. Tipperary; Folio No.: 533(R); Lands: Crannavone; Area: 24a.3r.4p.; County: **TIPPERARY.**

Henry Denis Macklin, Folio No.: 8935L; Lands: Farnahue; County: **CORK.**

Patrick Sheehan of 44 Braemor Road, Churchtown, Dublin; Folio No.: 6422; Lands: Derry East; Area: 4a.1r.14p.; County: **KERRY.**

Michael Carroll; Folio No.: 15717; Lands: Rossestown; Area: 5a.0r.8p.; County: **TIPPERARY.**

Declan Nolan and Philomena Nolan of 13 Dun an Oir, Old Bawn, Tallaght, Co. Dublin; Folio No.: 36274L; Lands: Old Bawn (Part); County: **DUBLIN.**

Edward J. Fitzgerald and Barbara Fitzgerald, both of Beenbane, Waterville, Co. Kerry; Folio No.: 29159; Lands: (1) Beenbane; (2) Beenbane; (3) Beenbane; Area: (1) 4a.2r.0p.; (2) 10a.0r.5p.; (3) 7a.3r.0p.; County: **KERRY.**

John Christy of Toome, Co. Monaghan; Folio No.: 998; Lands: Tullanacrunat North; Area: 11a.0r.10p.; County: **MONAGHAN.**

Derek Maguire and Angela McCabe of 4 Ashdale Park, Dundalk, Co. Louth; Folio No.: 5521F; Lands: Marshes Lower; County: **LOUTH.**

Michael Russell (Jnr.), Cooladerry, Ballyporeen, Cahir, Co. Tipperary; Folio No.: 10387; Lands: Dangan; Area: 33a.1r.35p.; County: **TIPPERARY.**

John Hamilton, of Rue, Tubercurry, Co. Sligo; Folio No.: 1102F; Lands: Rue; Area: 1a.2r.0p.; County: **SLIGO.**

John Duggan, 10 St. Munchin's Terrace, Thomondgate, Limerick; Folio No.: 29191; Lands: Ballycannan West; Area: 0a.1r.13p.; County: **CLARE.**

John O'Meara of Lelagh, Rathcabbin, Roscrea, Co. Tipperary; Folio No.: 27689; Lands: Curraghglass; Area: 24a.0r.33p.; County: **TIPPERARY.**

Arthur Doyle of Main Street, Castledermot, Co. Kildare; Folio No.: 969; Lands: Davidstown Upper; Area: 86a.2r.9p.; County: **KILDARE.**

Frederick Valentine Wright and Bridget M. Wright, both of 1 Rosary Gardens West, Dun Laoghaire, Co. Dublin; Folio No.: 15957; Lands: 1 Rosary Gardens West situate on the west side of Library Road in the town and borough of Dun Laoghaire, Co. Dublin; County: **DUBLIN.**

James Joseph McKernan (orse James McKernan) of Derrycreevy, Castleblayney, Co. Monaghan. **John McKernan** of Derrycreevy, Castleblayney, Co. Monaghan; Folio No.: 10039; Lands: Derrycreevy (parts); Area: 27a.2r.22p.; County: **MONAGHAN.**

Patrick Brady of Killywilly, Ballyhugh, Belturbet, Co. Cavan; Folio No.: 20655 closed to 6433F; Lands: (1) Killywilly; (2) Killywilly; Area: (1) 0.779 hectares; (2) 5.475 hectares; County: **CAVAN.**

James Madigan, Ballysallagh, Newmarket-on-Fergus, Co. Clare; Folio No.: 2935; Lands: Ballysallagh West; Area: 89a.0r.0p.; County: **CLARE.**

John Melia, 386 Portmarnock Crescent, Portmarnock, Co. Dublin; Folio No.: 4845F; County: **DUBLIN.**

John Donoghue, Ballymadun, Balrothery West, Co. Dublin; Folio No.: 9055; County: **DUBLIN.**

Patrick Kilgallon, Moneen, Castlebar, Co. Mayo; Folio No.: 609F; Lands: A plot of ground with the house thereon situate to the south side of Lucan Street and Lower Charles Street in the town of Castlebar, Barony of Carra and county of Mayo. County: **MAYO.**

Derrick & Rosaleen Wilkins, (nee Cleary) of Kilnagleary, Carrigaline, Co. Cork (formerly of 31 Summerton Park, Ballinlough, Cork and Rossmanagher, 20 Ardfallen Road, Douglas, Cork, respectively. Folio No.: 17450F; Lands: Kilnagleary; Area: 0.250 acres; County: **CORK.**

Richard William Markby of Scart, Caherconlish, Co. Limerick. Folio No.: 3999; Lands: Scart; Area: 38a.1r.11p.; County: **LIMERICK.**

Peter Doyle, 60 Beaumont Road, Dublin 9. Folio No.: 1070L; County: **DUBLIN.**

Renata Zugel of Ballyrane, Killinick, Co. Wexford. Folio No.: 23221; Lands: Ballyrane; Area: 7a.1r.8p.; County: **WEXFORD.**

Michael Phelan of Shannon Rd., Mountrath, Co. Laois. Folio No.: 7956; Lands: Rosskelton; Area: 5.385 hectares; County: **QUEENS (LAOIS).**

Lost Wills

McCARTHY, Mona deceased, otherwise Agnes Mona McCarthy, late of 81, Ballymun Road, Glasnevin, Dublin 11. Will anyone having knowledge of the whereabouts of a will of the above named deceased, who died on 14th November 1985, please contact Hickey Beauchamp Kirwan & O'Reilly, Solicitors, Dollard House, Wellington Quay, Dublin 2. Ref. MG/J.M.B.

MULLIN, Martin deceased, late of Ballygowan, Abbey, Loughrea, Co. Galway. Will anyone having knowledge of the whereabouts of the will of the above named deceased who died on 31st May, 1962, please contact Messrs. James J. Kearns & Son, Solicitors, Portumna, Co. Galway. Ref. C/1047/RH.

O'DOHERTY, Patrick, deceased, late of 16 Dalkey Park, Dalkey, Co. Dublin. Will anyone having knowledge of the whereabouts of a will of the above named deceased who died on 16th June 1987, please contact Binchy & Partners, Solicitors, 37/39 Fitzwilliam Square, Dublin 2.

MacCARTHY, Maurice, deceased, late of 27 Callary Road, Mount Merrion, Co. Dublin, (Lt. Col.). Will anyone having knowledge of a will or codicil of the above named deceased, who died on 4th June, 1987, please contact George Drevar Fottrell & Sons, Solicitors, 15 Upr. Fitzwilliam Street, Dublin 2. Ref. 2.

CREGG, Bartholomew, deceased, late of Lisserlough, Boyle, Co. Sligo, and formerly of New York, U.S.A. Will anyone having knowledge of the whereabouts of a will of the above named deceased, who died on 13th May 1987, kindly contact Messrs. Henry J. Wynne & Co., Solicitors, Boyle, Co. Roscommon.

GRADY, Michael, deceased, late of Currownamaddy, Lecarrow, Co. Roscommon. Will anyone having knowledge of the whereabouts of a will of the above named deceased who died on 20th June 1987 at Baggot Street Hospital, Dublin 2, please contact Tormey & Co., Solicitors, Athlone, Co. Westmeath. Ref. 30/SG.

Miscellaneous

Personalised grinds required in the coree subjects for the Final Examination, First Part. The subjects are Contract, Company, Property, Tort and Constitutional. Please contact immediately. Phone 697094.

SOLICITORS' PRACTICE REQUIRED: Vendor to remain as partner, consultant or retire. Premises not important. Let your accountant talk to ours initially: James Harnett & Co., Chartered Accountant, 97 Haddington Road, Dublin 4.

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The Profession

Myles D. Gilvarry, Solicitor, is pleased to announce that he has commenced practice under the style and title of Miles D. Gilvarry & Co., Solicitors, at 5 Chapel Street, Castlebar, Co. Mayo. Tel. (094) 22433.

Lost Title Deeds

Premises: 2 Comyn Place, Drumcondra, Dublin 9.
James Joseph Quinn, deceased and **Cecilia Quinn,** deceased.
Will anyone having knowledge of the whereabouts of the documents of title relating to the above property please contact Eamonn Gallagher & Co., Solicitors, 33 Belton Park Road, Dublin 9, Phone 319857.

SOLICITORS ACCOUNTS

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A.C.M.A., F.C.C.A.

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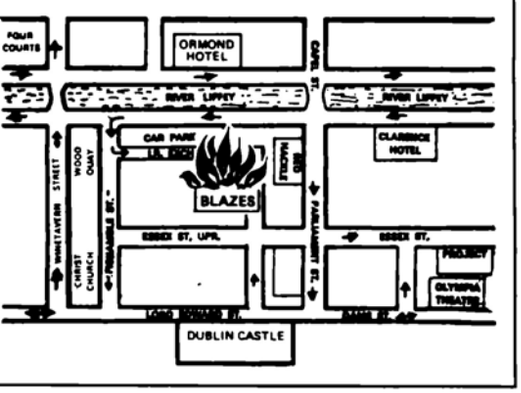

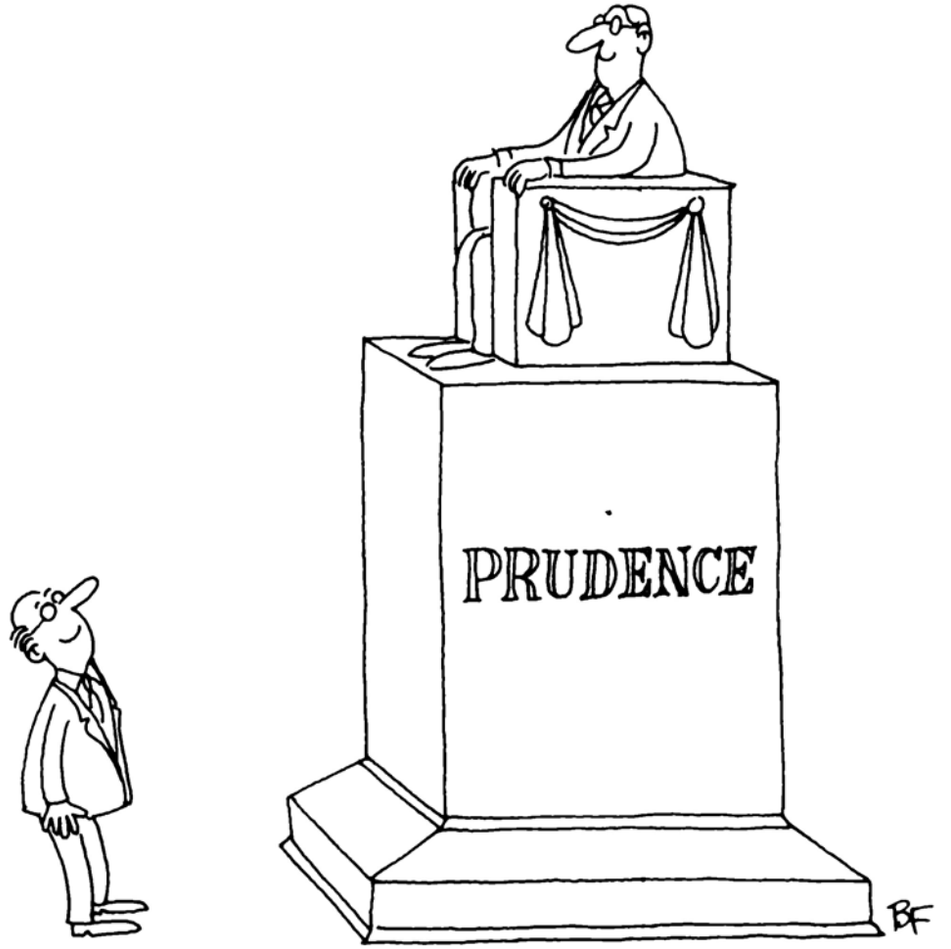

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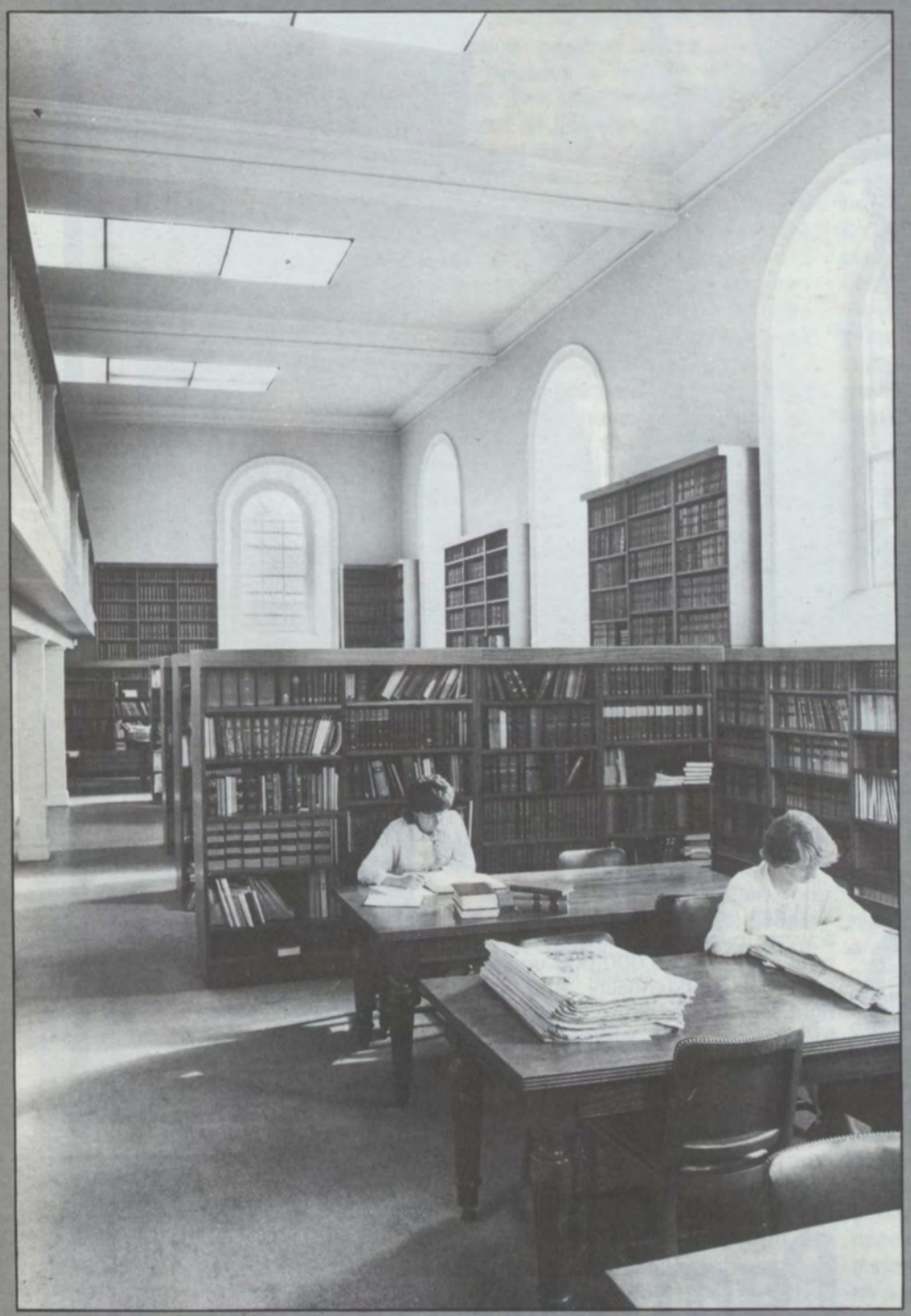
GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 81 No. 7 September 1987



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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 81 No. 7 September 1987

Viewpoint

Hold that Constitution

The growth of Summer Schools as forums for debate on significant social or political issues in Ireland has become a feature of recent years. This year's MacGill Summer School at Glenties, Co. Donegal, devoted its attention to the Irish Constitution. The contributors to the debate, mostly politicians of different hues, appeared to accept as axiomatic that our 50-year-old Constitution needed radical revision. Fortunately, perhaps, all they seemed to have in common was the desire for change.

Our Courts in interpreting the Constitution have, arguably, proved more adept than the Oireachtas in taking the temperature of the nation as far as social attitudes are concerned. Indeed, the attempts that have been made by various Governments to change the Constitution on significant political or social issues have not been remarkably successful. The proposed changes in relation to proportional representation (twice) and divorce were lost. However much politicians who would describe themselves as "liberal" may wish to change those provisions of the 1937 Constitution which they would regard as illiberal — such as the restriction on divorce — it is clear that the people are not ready to endorse such changes. To assert that there has been an utter transformation in Irish Society since 1937 is to fly in the face of the evidence offered by the recent Divorce and Right to Life Referendums that, at least so far as constitutional change is concerned, the transformation is far from complete.

It was argued that the Constitution over-emphasizes the right to private property and that this poses a substantial obstacle to the renewal of centres of our towns and cities or, indeed, the acquisition of property for any public purpose. There have been suggestions that vast sums of compensation have been paid to landowners because of some constitutional requirements. Those arguing along these lines do not seem to have paid much attention to recent Supreme Court decisions, the effect of which seems to be that a law providing for expropriation of an individual's property would only be unconstitutional if it represented an unust attack on individual property rights. It can hardly be contemplated that a constitution would only permit expropriation of property where fair compensation is being paid. The Fifth Amendment to the U.S. Constitution provides a useful precedent, "nor shall private property be taken for public use without just compensation".

In truth, the incompetence of administrators (in one significant case, the inability to repeat legislative provisions verbatim) have opened the doors to claims for what appear to be excessive amounts of compensation, rather than any constitutional protections.

Another criticism which has been made seems to bring with it its own internal contradiction. If, as one distinguished academic has said, the Constitution "has become a prison which we have reinforced by divisive referendums on morality" there can be little immediate prospect that we can "put behind us the confessional nature of the Constitution", as he suggests. The Constitution has to be adopted by the people.

Since 1791 when the "Bill of Rights" was passed, the United States has seen only 16 amendments (one being a repeal of an earlier one). It certainly is not the case that the U.S. Constitution is a simple document capable of instant and literal interpretation. What it does, and here it sets a headline for all succeeding constitutions, is to set out certain fundamental principles. These must be sufficiently

(contd. on p. 214)

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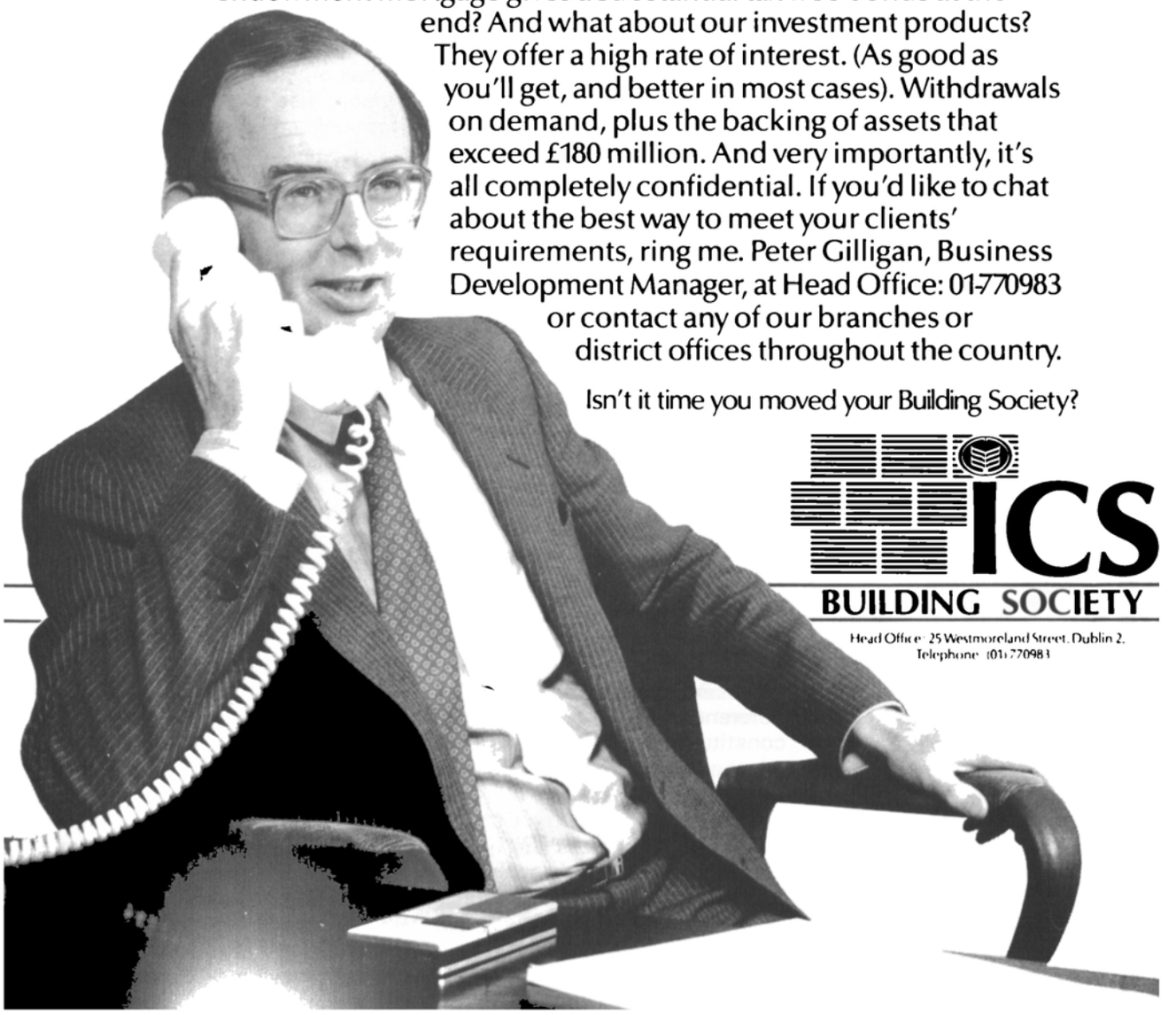

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The Running of Time in Professional Negligence Cases

On October 9 last year, the Supreme Court of Canada gave judgment in *Central Trust Co. -v- Rafuse.*[1] It is a decision of crucial significance to practitioners throughout the common law world. The central question was whether a solicitor was liable to a client in tort as well as in contract for the damage caused by a failure to meet the requisite standard of care in the performance of the services for which the solicitor had been retained. A consequential question however, assuming there was a failure to meet the requisite standard of care, was whether the action against the solicitor was statute-barred.

by
TONY KERR
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The first question – whether there can be concurrent liability in contract and tort for negligence in the performance of professional services – has been the subject of conflicting judicial opinion[2] and has spawned a considerable body of academic commentary.[3] In this jurisdiction the question was considered by the former Supreme Court in *Deignan -v- Greene.*[4] Kingsmill Moore J. was of the opinion that, as the mutual rights and duties of solicitor and client were regulated by the contract, the solicitor was not separately liable in tort for negligence in the conduct of the business entrusted to him.[5] O'Dalaigh, J. was also most sceptical about a claim in tort. He said "it may indeed be that the categories of negligence are never closed; but it does not necessarily follow that all the rejected claims of other branches of the law can there find a sanctuary."[6] Twenty-five years later, however, the Supreme Court, without having been referred to *Deignan -v- Greene,* came to the opposite conclusion and unanimously ruled, in *Finlay -v- Murtagh,*[7] that a solicitor was liable to a client in tort as well as in contract. To hold that an action by a client against a solicitor of breach of his professional duty of care was "necessarily and exclusively one in contract", said Henchy J., was "incompatible with modern developments in the law of tort" and authorities to that effect "should be overruled".[8] This was also the view adopted by the Supreme Court of Canada in *Rafuse.*

After an exhaustive survey of academic and judicial opinion on the question of concurrent liability in Canada, Britain, Australia, New Zealand, the United States of America and Ireland,[9] Le Dain J., delivering the judgment of the Court, concluded:[10]

1. The common law duty of care was not confined to relationships that arose apart from contract – the question was whether there was a relationship of sufficient proximity, not how it arose;
2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty that is asserted as the foundation of tortious liability must not depend on specific obligations or duties created by the express terms of the contract;[11]
3. Concurrent liability in tort would not be admitted if its effect would be to permit a plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort;
4. These principles applied to the liability of a solicitor to a client for negligence in the performance of the professional services for which he had been retained, there being "no sound reason of principle or policy" why a solicitor should be in a different position in respect of concurrent liability from that of other professionals.

Subject to the qualification mentioned in the third of Le Dain J.'s conclusions a plaintiff, where concurrent liability in tort and contract exists, has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence.[12]

Significance of distinction between tortious and contractual liability

A number of important consequences turn on the differences in the rules applicable to contractual and tortious liability – the measure of damages, entitlement to jury trial and limitation periods to name but three. *Finlay -v- Murtagh* involved the second-mentioned consequence and *Rafuse* involved the last mentioned. The defendant solicitors acted for the plaintiff company in connection with a mortgage loan to a motel and restaurant company. Both the plaintiff and defendant knew that the proceeds of the loan were to be used to assist certain individuals to purchase the shares of the company. Neither, apparently, was aware that in Canadian law, as in Irish, it is unlawful for a company to give financial assistance for the purpose of or in connection with a purchase by any person of any shares in the company.[13] In foreclosure proceedings, which eventually went all the way to the Supreme Court of Canada,[14] it was held that the mortgage was void and unenforceable and the plaintiff subsequently instituted proceedings against the defendant. At first instance Hallett J. dismissed the action[15] and the plaintiff's appeal to the Appeal Division of the Nova Scotia Supreme Court was

also dismissed.[16] Without deciding whether there was concurrent liability, the Appeal Division held that the action was statute-barred, whether it was in contract or in tort. The plaintiff thereupon appealed to the Supreme Court of Canada.

The relevant dates were as follows:

December 31, 1968 mortgage executed and taken by defendants as security for the loan;

January 17, 1969 certificate of title stating that the mortgage formed a first charge on the property given by defendants;

April 21, 1977 validity of mortgage challenged in the plaintiff's institution of an action for foreclosure;

April 22, 1980 mortgage held to be void by Supreme Court of Canada;

October 22, 1980 plaintiff's action for negligence instituted.

The relevant limitation legislation provided that such an action should be commenced "within six years after the cause of any such action arose". The Appeal Division of the Nova Scotia Supreme Court had held the plaintiff's cause of action for negligence arose when the negligence occurred and not when it was discovered or ought to have been discovered by the plaintiff with the exercise of reasonable diligence. As to when the damage occurred, Jones J. A. said that it occurred on January 17, 1969, when the solicitor gave the certificate of title. "(T)he mortgage was void when it was delivered. The loss at that point was the face value of the defective mortgage."[17] Le Dain J., like the court below, rejected the submission that the damage occurred when the mortgage was declared void by the Supreme Court of Canada. He was of the opinion that the damage occurred when the defendants took the mortgage on December 31, 1968, because, as a result of it being void *ab initio,* the company acquired no interest in the property as security for the loan.

Clearly therefore, if time began to run from 1968 or 1969 the plaintiff's action was statute barred after a maximum of six years only if the claim was based *on contract.* However more and more superior courts in common law jurisdictions, including Ireland, have acknowledged the "harshness" and "injustice" of a rule that a cause of action for the tort of negligence may arise for the purpose of a statute of limitations before the injured party has discovered or could have discovered the damage.[18] Carroll J., in *Morgan -v- Park Developments Ltd.,*[19] was of the opinion that to bar a plaintiff's action in tort before he knew he had one was "indefensible" in the light of the Constitution and said, albeit *obiter*, that s.11(2) of the Statute of Limitations 1957, was to be interpreted as permitting the postponement of the running of time until such time as the damage could be discovered. In *City of Kamloops -v- Nielson*[20] Wilson J., speaking for the majority of the Supreme Court of Canada in the course of deciding a claim against a municipality for negligent failure to prevent the construction of a house with defective foundations, was of a similar opinion.

In *Rafuse,* Le Dain J., was of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arose for purposes of a limitation

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period when the material facts on which it is based had been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. He saw no "principled reason" for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence and held that a "discoverability" rule should be applied to the plaintiff's cause of action in *tort*.[21] Since the defendants gave the trust company a certificate that the mortgage was a first charge on the property, thereby implying that it was a valid mortgage, the earliest that it could be said that the plaintiff discovered or should have discovered the defendant's negligence by the exercise of reasonable diligence was in April or May of 1977 when the validity of the mortgage was challenged in the action for foreclosure. Accordingly the plaintiff's action for negligence was not statute-barred.

To hold that time should not begin to run until the plaintiff has discovered, or ought to have discovered, the damage seems eminently fair and just when viewed from the plaintiff's perspective; it does introduce, however, the very element of uncertainty the elimination of which is the fundamental benefit conferred by the statute. The Statute of Limitations 1957 is designed to protect defendants from stale claims relating to long past incidents about which their records may no longer be in existence and as to which their witnesses, if available, may well have no accurate recollection. A hearing in such circumstances could be rightly described as a "travesty of justice".[22] One could expect, therefore, that defendants, faced with a claim which had not been instituted until many years after the occurrence of the events which formed the basis of the claim, to invite the court to exercise its inherent power to stay proceedings where the passage of time alone would effect a potential unfairness.[23] Thus uncertainty would be piled upon uncertainty. One can only hope that the legislative inactivity in this area will not continue much longer. □

REFERENCES:

(1) Now reported 31 D.L.R. (4th) 481.

(2) Judgments against concurrent liability innclude those of the English Court of Appeal in *Groom -v- Crocker* [1939] 1 K.B. 194; of Pigeon, Martland and Judson J.J. in *J. Nunes Diamonds Ltd. -v- Dominion Electric Protection Co. (1972) 26 D.L.R. (3rd) 699, 727–728; of the New Zealand Court of Appeal in McLaren Maycroft & Co. -v- Fletcher Development Co. Ltd. (1973) 2 N.Z.L.R. 100; of Murphy J. in Macpherson & Kelley v- Kevin J. Prunty and Associates* [1983] V.R. 573, 587; and of Connnolly J. in *Aluminium Products (Qld) Pty. Ltd. -v- Hill* [1981] Qd.R. 33, 53. Judgments in favour of concurrent liability include those of Oliver J. (as he then was) in *Midland Bank Trust Co. Ltd. -v- Kemp* [1979] Ch. 384; of Spence and Laskin JJ. in *Nunes Diamonds, supra,* at 723; of Lush and Beach JJ. in *Macpherson, supra;* of Douglas and Campbell JJ. in *Aluminium Products, supra;* and of Glass J. A. in *Brickhill -v- Cooke* [1984] 3 N.S.W.L.R. 396, 401.

(3) See, for example, Dwyer "Solicitor's Negligence — Tort or Contract" (1982) 56 *A.L.J.* 524, French "The Contract/Tort Dilemma" (1983) 5 *Otago L.R.* 236, Kaye "The Liability of Solicitors in Tort" (1984) 100 *L.Q.R.* 680.

(4) Unreported, 21 October 1954 (61/1954).

(5) At p.3 of his unreported judgment.

(6) At p.6 of his unreported judgment.

(7) [1979] I.R. 249.

(8) At page 257.

(9) *Finlay -v- Murtagh* is considered at 517. A rare instance of a relevant Irish decision being brought to the attention of a foreign court.

(10) At 521–522.

(11) See also Henchy J. in *Finlay -v- Murtagh* at 257.

(12) See also Griffin J. in *Finlay -v- Murtagh* at 263, and Miffin C. J. T. D. in *Power -v- Halley* (1979) 88 D.L.R. (3rd) 381, 388.

(13) Section 60(1) of the Companies Act 1963. See generally Ussher, *Company Law in Ireland* (London 1986), at pp. 319–324.

(14) *Central and Eastern Trust Co. -v- Irving Oil Ltd.* (1980) 110 D.L.R. (3rd) 257.

(15) (1982) 139 D.L.R. (3rd) 385.

(16) (1983) 147 D.L.R. (3rd) 260.

(17) At 274.

(18) See Brady and Kerr, *The Limitation of Actions in the Republic of Ireland* (Dublin, 1984) at pp. 43–47.

(19) [1983] I.L.R.M. 156, noted by Kerr, (1983) 5 *D.U.L.J. (n.s.)* 133 and see Brady and Kerr, *op cit.,* at pp. 50–52.

(20) (1984) 10 D.L.R. (4th) 641.

(21) 31 D.L.R. (4th) at 536.

(22) *Per* Henchy J., *O'Keeffe -v- Commissioners of Public Works.*

(23) This power was exercised in *O'Domhnaill -v- Merick.*

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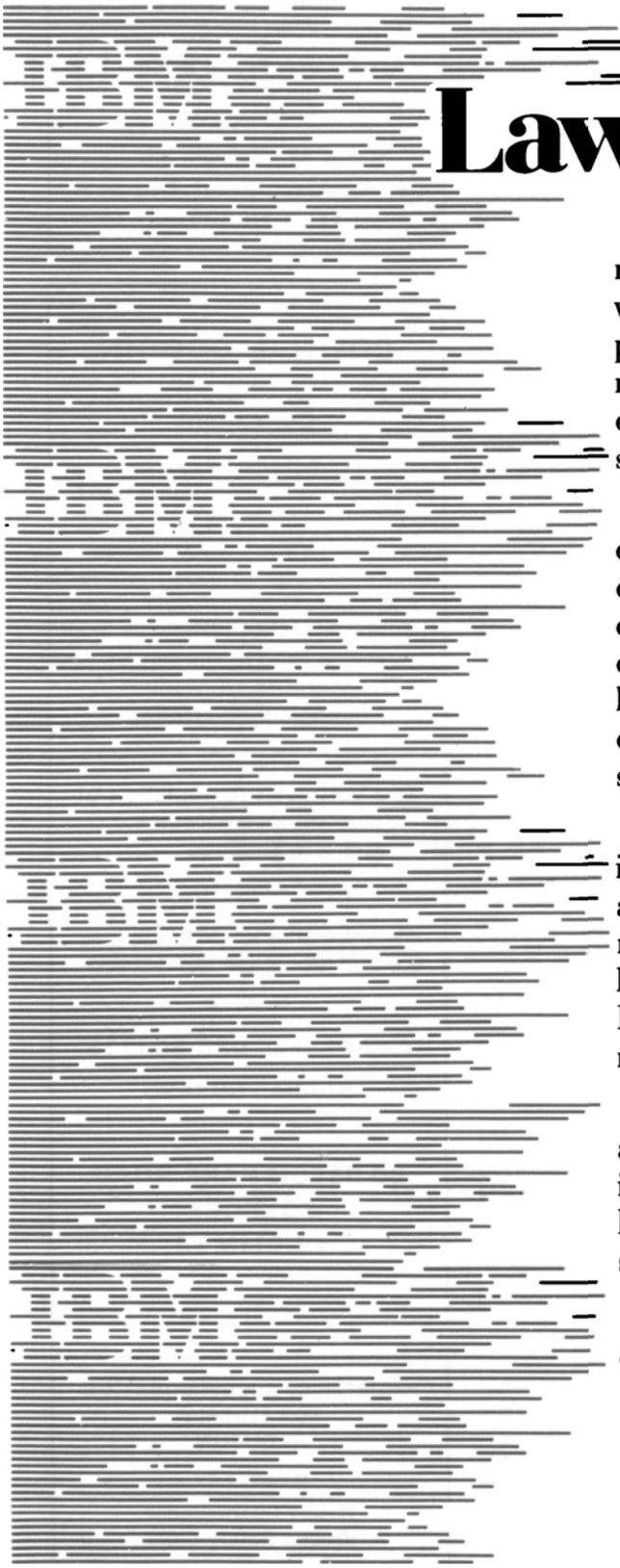

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The Mara-Cycle

Fundraising for The Solicitors' Benevolent Association

by
Frank O'Donnell
Solicitor (and Cyclist)

Brendan Walsh, colleague, Dublin raconteur and philosopher, mountain climber and cyclist, agreed to raise money for the Solicitors' Benevolent Association, if I sat on a bicycle to Belfast and back. Brendan had concluded that people's charitable instincts would more likely be aroused by the thought of my trying to cycle that distance and by the likelihood of my expiring in the process. In fact, the first sum committed by Diarmuid Barry of Killybegs, was conditional upon the production of an affidavit from the cycle manufacturers, Peugeot, averring that their bicycles were strong enough to carry my lithe frame that distance. Diarmuid Barry's cynical query was the first of many, all of which strengthened my resolve to successfully complete the Mara-Cycle.

I learned, after many preparatory training weeks pounding the byroads of Wicklow under the uncompromising supervision of Brendan Walsh that my odyssey would be made easier by putting out of mind how far I had to go. This served me well on my journey northwards until some distance outside Belfast, when stewards announced that there were ten miles to go. From then on, every mile was announced with tiring regularity: "Nine miles to go, eight miles to go . . .", the dragging miles were ultimately only made shorter by the encouraging announcement of one wag: "A pint for less than a pound in Belfast".

Included among the 3,200-odd cyclists who left Dublin at 8 a.m. on Saturday, June 27, 1987 were some 1,000 Northerners who had cycled down the previous day. They were readily recognisable as they were the ones who obeyed the traffic lights and who skidded on the oil (sponsored by CIE, et al?) as the 'peleton' entered Westmoreland Street.

North to Balbriggan the route was littered with cyclists fixing punctures. As I entered the quiet backwater(?) of Balbriggan, I wondered whether this was still the bailiwick where the McGowan Writ ran?.

I thought of the late Gerry McGowan, who was known as 'the Mayor of Balbriggan', and of Joe McGowan and the oft-recalled north County Dublin case of *Rogan v. Hogan.* Apparently, Mr. Hogan, while driving his car in the early hours of the morning, had demolished Mr. Rogan's shed adjoining the main Skerries Road. Mr. Hogan, in his evidence, tried to suggest that the shed appeared to have moved out in front of him. This was a very novel and radical theory at the time, as moving statues were not yet in vogue. Joe McGowan, in cross-examination, enquired of Mr. Hogan as to the speed his car was travelling at the time of impact. Mr. Hogan replied: "Between 25 and 30, Sir". Mr. Rogan stood up at the back of the Court and interjected: "If so, my shed was doing 60"! Rogan triumphed and McGowan flourished. A postscript to that forensic tale is that Mr. Hogan's solicitor was the then youthful and enthusiastic Dublin-based Denis McDowell,

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who, for the first and only time in his illustrious career, had risked playing an 'away game' in Balbriggan District Court.

As I cycled towards Drogheda, I conversed with fellow-cyclists. One who came alongside, detecting a northern accent, enquired as to whether I was "coming or going". Another, already more weary than I, explained his reasons for being on this foolhardy expedition as someone who could not resist a bargain and that, while in California last winter, he had seen bicycles for sale at the equivalent of £45 each. He first bought one and then, because they were so cheap, decided to buy another and brought them home. He then decided at Easter that he would have to make use of his purchases and, for that reason, decided to participate. He was one of the few I eventually left behind.

As we travelled out of Dundalk, up into the Newry Hills, (a car driver hardly notices these hills, but a cyclist does!) I was passed out by a pack of four, who then proceeded to collide with one another, with me just avoiding the melee. This was the first of two near personal disasters, one accidental and the later one clearly constituting 'voluntary assumption of risk' on my part. Samaritan-like, I assisted the four to get re-started and rapport was struck, which saw us lunching together in a nearby hotel. The four were mature members of the "Castlebellingham Spokes Club". After one and a half hours, I decided to leave the luncheon scene. Curiously, on my return journey from Belfast the following day, I called into the same hotel and saw the same four. I did not enquire whether their presence was continuous or a coincidental second visit like my own!

Newry to Belfast is a tortuous series of ups and downs. To add to the discomfort, the rain started about 30 miles out from Belfast, during which time I suffered my first and only puncture. I hoped that Brendan Walsh, who was behind me, might come along but no such luck! I changed the tube myself.

To the second near personal disaster. Within the precincts of Belfast, I decided to have a photograph taken with bicycle and perspiration. Having dismounted, I handed the camera to a young passer-by, asking him to kindly take my photograph. The youth took possession of the camera and turned and ran off with it. I looked around to see where I was, and saw the surrounding walls proclaiming "Shankill" and "No Surrender". I called after him "Go on you Fenian b.....". The youth stopped instantly, turned and came back, saying with surprise "ye're one of us". He took my photo and returned the camera.

The Belfast rendezvous with Brendan Walsh eventually materialised and plans for the evening were unfolded. They revolved around ensuring that I was sufficiently rested and that my liquid requirements were replenished for the return journey. Brendan thinks of everything, and so when I returned to Dublin I bought shares in 'Sudocrem'!

Brendan woke me at 5 a.m. on Sunday and handed me a list of names and telephone numbers. Any colleague who had accompanied his commitment to our fund with cryptic, cynical or injurious remarks were on this list. Mary Collins (she of the 'Dromartin' Collins) was the first to answer, passing the telephone to Tony (otherwise, Anthony) who was, apparently, awake. I delivered my message of goodwill and hope that it was not too early to call and was off the line before I could receive his equally well-meaning response. Denis McDowell was wide awake and, apparently, on his way to bed. Padraic Gearty does not keep his 'phone beside the bed, neither does Diarmuid Barry or Kevin Smith!

There were no lingering stops on the return to Dublin, but plenty of liquid, mainly of the innocuous kind. The highlight was a half hour's chat at Balbriggan with a tea lady who convinced me that she had organised the whole Mara-Cycle.

I learned a whole new cycling vocabulary on this trip — such as "pack", "slipstream" and "windbreak" — enough to be able to converse in colloquial terms with Sean Kelly and Stephen Roche. Also, I experienced a mystery — a pack of eight well-organised, regularly rotating their front man on their leader's command, passed me on three different occasions on the way back. I never remember passing them. That was a mystery.

This two-day cycle marathon was a novel experience, made all the more satisfying as I knew Brendan Walsh had received commitments in excess of £10,000 for the Solicitors' Benevolent Association. Any colleague out there who has overlooked making a much-needed contribution to this deserving charity, I appeal to you now to send your contribution to Ms Clare Leonard, Secretary, Solicitors' Benevolent Association, 40 Fitzwilliam Square, Dublin 2, or c/o The Law Society, Blackhall Place, Dublin 7.

Brendan Walsh deserves particular thanks from all of us for conceiving the idea, implementing it and procuring so much sponsorship. All I had to do was sit on a bike to Belfast and back! □

Viewpoint

(Contd. from P. 207)

adaptable to cope with current problems and current needs. As Mr. Justice Walsh has said: "the Constitution is in the present tense, and, the ultimate question always remains, what do the words of the text mean in our time?" Our Judges have done well by the State in construing the Constitution in this light. Could it be that it is our politicians, rather than our Constitution, that are in need of change? The summation by one of our most distinguished political commentators of this debate that "we should let well enough alone" has much to commend it. It is not only lawyers who believe that there is sometimes merit in maintaining the *status quo*. □

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Licensed Haulier and the Road Transport Act, 1986

by
JOHN P. ROWAN
Solicitor

In order to understand the changes introduced by the Road Transport Act, 1986, it is necessary to examine the historical factors giving rise to them.

Legal regulation of road haulage began in the 1930s. Competition between rail and road transport was intense, and the railways were tending to lose out. Unrestricted competition meant that the vast investment in the railway system was endangered. For that reason, and also in the interest of road safety and industry in general, it was essential that only responsible firms should be allowed to operate in the haulage business.

Prior to 1932 there was practically no statutory regulation of goods traffic by road at all. The Road Transport Act, 1933 was passed "to make further and better provision for the regulation and control of the carriage of passengers, merchandise, and mails by road". The Act regulated the conditions under which a person could enter the road haulage business. Anyone, or the successor in title of anyone, who carried on an existing merchandise road transport business could apply before the 1st April 1934 for a certificate which, if issued, entitled him to apply for a merchandise licence. The Carrier, in his application, had to state the number of vehicles which he was using in his merchandise road transport business. Having satisfied the provisions required by the Act the applicant was issued with a merchandise licence. Apart from some few exceptions the merchandise licences authorised by the Act of 1933 are the forerunners of those in operation today.

Apart from the requirement of a merchandise licence each vehicle belonging to a licensee had to carry a vehicle plate. These were (and still are) issued at designated Garda stations.

The 1933 Act prohibited anyone from entering into an agreement for the carriage of goods for reward with a person other than a licensee under a merchandise licence if the goods were to be carried outside an exempted area. A person employing such a carrier was liable to a fine not exceeding £10 (£1,000 under the 1986 Act). The exempted areas referred to above were areas within a radius of 15 miles of Dublin and Cork and 10 miles of other nominated cities and towns.

As a result of the foregoing it can be said that unless a person was:

(a) carrying his own goods, or
(b) operating in an exempted area or
(c) the holder of a merchandise licence

he could not lawfully carry goods for reward.

The Act made provision for the transfer of both licences and plates, but a plate could not be issued except to a licensee.

An individual or company could acquire extra merchandise licences and plates. At the time of writing one company has in excess of 70 licensed vehicles. However, there were no new merchandise licences issued. Any acquired had to be, for example, inherited or purchased.

The 1935 Road Transport Act clarified the position of an individual or company employing his/its own transport to carry is/its own goods making it clear that a licence was not required.

In 1971 the Road Transport Act allowed the holder of a merchandise licence to increase the number of vehicles operated by him.

The European Communities Act 1972 was an enabling Act, to allow Acts adopted by the institutions of the Communities to become binding on the State and to become part of the domestic law from the 1st January, 1973. This Act allowed many Community Transport Regulations to be applied in Ireland including the requirements of good repute, sound financial standing and professional competence for those involved in carriage for reward.

The main change brought about by the 1986 Act will be in force from 30th September, 1988. From that date only one licence will be obtainable, a Road Freight Carrier's Licence. There will be no exempted areas and no question of a licence being transferred. There are interim measures relating to existing merchandise licences, national road freight carrier's licences and international road freight carriers' licences. These are designed to

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facilitate existing carriers in the period up to 30th September, 1988.

After the above date a Road Freight Carrier's Licence will be granted to any applicant who satisfies the EEC requirements of good repute, sound financial standing and professional competence. So, there will no longer be a need to inherit or purchase a licence. If the requirements are fulfilled a licence will be issued. There will be no limitation regarding the number of vehicles operated under a licence but those that are authorised must be plated at a Garda Siochana Vehicle Plate Issuing Station.

We will now look at the E.E.C. requirements relating to Good Repute, Sound Financial Standing and Professional Competence.

(a) Good Repute

Under the European Communities (Merchandise Road Transport) Regulations, 1977 and 1981 convictions for the following offences will be taken into account in assessing "Good Repute":—

(i) Offences relating to Road Tax.

(ii) Offences under the Road Traffic Act 1961 e.g., dangerous driving, drunk driving, defective vehicle, no insurance etc. (See Appendix V for complete list of offences).

(iii) Offences under Road Transport Act, 1933 i.e., Illegal Haulage (S.9 R.T.A. 1933, S.28, R.T.A. 1958) or offences committed in E.E.C. member states corresponding to any of the foregoing offences.

(iv) Any other convictions.

(b) Sound Financial Standing

This requirement can be satisfied by:—

(i) indicating that a vehicle or vehicles is/are taxed or insured, or

(ii) proof that the vehicle is leased for over one year or that finance is available to purchase it, or

(iii) Bank or other financial reference indicating sufficient capital available to operate the business.

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(c) Professional Competence

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(i) A National Certificate of Competence for Ireland only, or

(ii) An International Certificate of Competence covering both national and international operations.

These apply to the operator or a manager of the business.

Certificates of Competence are issued to the following:

1. Persons who prior to 1975 lawfully operated a road transport business.

2. People holding certain diplomas.

3. Persons who pass an examination in the following subjects:

(a) Road Safety
(b) Technical Matters
(c) Access to the Market
(d) Financial Management
(e) Law.

The examinations for Certificates of Competence are conducted by the Chartered Institute of Transport.

Although reference has been made to it before the Act provides for the imposition of penalties up to £5,000 for offences involving illegal haulage and up to £1,000 in the case of persons found guilty of engaging unauthorised carriers to carry goods for reward. (Section 14[6])

Vehicle Plates

Every licensee under a Road Freight Carrier's licence must have a vehicle plate affixed to each vehicle used in the business. These are issued through Garda Siochana Vehicle Plate Issuing Stations of which there are ninety, all in major towns throughout the country. When application is made it must be accompanied by the Licence and details of the vehicle for which the plate is required.

There are heavy penalties for switching plates and in a case where one is not displayed or is illegible both the owner and the driver can be fined up to £500.

The modern plate is affixed to the cab windscreen.

The 1986 Act provides for the appointment of Transport Officers who have very wide powers to ensure that the provisions of the Act are adhered to.

Since 1933 the number of individuals or firms involved in the Road Haulage business has been restricted. From October 1988, provided the requirements are fulfilled, there will no longer be restrictions. It will be interesting to see what changes result from increased competition and in particular the effect this will have on standard conditions of Carriage.

As we have seen above the Act introduces major changes relating to carriers of goods for reward. It replaces the Road Transport Act of 1933 for all practical purposes. It brings the carriage of goods for reward in Ireland into line with the competition policy of the European Community. Hopefully it will achieve one of the aims of the 1933 Act by ensuring that only responsible individuals and firms operate in the haulage business. □

Administration of Estates

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Additional copies of the booklet are available from the Society at £3.00 per copy incl. postage.

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ALL MEMBERS of the Legal Profession are invited to attend the **MICHAELMAS LAW TERM ANNUAL SERVICES:—**

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at 9.30 a.m. on Saturday the 3rd day of October, 1987

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Practice Note

IDA GRANTS

The Industrial Development Authority Act, 1986 consolidated the Industrial Development Authority Acts, 1950-1981. At the same time, there has been a major review by the Industrial Development Authority ("the IDA") regarding the procedures under which grants are made available to industrial undertakings. The IDA has resolved to concentrate and export orientated companies.

Practitioners will however be more interested in the practical effects that such changes in orientation and IDA philosophy will have with clients who are obtaining grant assistance from the IDA.

In the first instance, the IDA are emphasising that it is hoped that a far greater degree of agreement will have been reached between a potential recipient of IDA funds and the IDA prior to a legal grant agreement being put before the undertaking. Central to this level of understanding will be a performance criteria agreed between the IDA and the prospective grantee.

Grants, save those for small industries, will be related to performance of the grantee and hence it is possible the IDA will seek to effect stage payments of the grant which will only be made in the event of the agreed targets by the Grantee being attained.

If there is a situation where the capital development costs of the grantee are large the IDA will pay the grant at the outset of the project but will insert a clawback provision into the Grant Agreement in place of the performance related provision outlined above. The clawback provision will apply for the entire period of the grant and will be for the entire sum of the grant, with provision in some cases for repayment to be claimed on a pro-rate basis for the grantee's shortfall in performance.

The IDA will also insist in future that the parent company whose subsidiary is the grantee guarantee obligations of the grantee undertaken in the Grant Agreement. This guarantee may either be given separately or the parent company may be joined in the Grant Agreement. If there is no parent company, the grantee will be requested to give a charge over its assets and a Priorities Agreement will be entered into by the IDA with other secured creditors.

The IDA have also altered the provisions in regard to Royalties. Any royalty in excess of 5% of the turnover must be taken from profits available for distribution by the grantee. The Grant Agreement on the face of it will allow 5% royalty to be availed of.

Many of the concessions heretofore readily conceded in negotiations with the IDA will not now be available. These include the allowance of a write down of contingent liability to 50% of the grant after 5 years of the grant period has elapsed. The IDA will now insist on a cash injection to share capital of 25% of the finance to be provided by the Grantee.

The IDA are anxious to emphasise that the text of the draft Grant Agreements has been extremely carefully considered and therefore what are seemingly minor amendments will have to receive, at the least, Board agreement prior to being approved.

Michael G. Irvine, Solicitor
Company Law Committee

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BOOK REVIEW

Patrick Ussher. *Company Law in Ireland.* London, Sweet & Maxwell, 1986. xlvii & 577 pp. Price Ir£21.79.

In the past two years, the lot of the Irish student of company law has changed for the better. Where formerly, no reliable Irish text-book on the subject existed, now four text-books, and two case-books on the subject not only foster access to essential information, but stimulate critical and comparative analysis of the law. The search is no longer for quantity but quality. This book, like Mr. Justice Ronan Keane's *Company Law in The Republic of Ireland.* Butterworth's, London, 1985, is a summary of exemplary comprehensiveness and lucidity — quantity and quality combined.

Dr. Ussher's book provides a fuller but by no means less elegant synthesis of the subject, than all its rivals, but it must be conceded that Ussher's work goes well beyond them in other directions. It is not only a full and scholarly portrayal of the "state of the art", but also a book in which the depth of analysis of the Irish cases is matched by the range of disciplined and practical, if speculative consideration accorded to legislative provisions, proposals for reform, and academic authority originating in this jurisdiction and elsewhere.

The non-lawyer will see one further merit to this book, that may at first escape the occluded vision of the specialist company lawyer. The book offers, at a sophisticated level, a thoughtful analysis of the role and method of legal intervention in the area of company law. It is no dry treatise on Irish law, but an insight into the effect on practice, in the "real world", of the theory behind the Irish law. It is a book which has elicited considerable praise from professional economists with a legal training.

Of the strikingly good chapters of this book, the ones on company capital and corporate borrowing, are particularly clear and comprehensive. But to show how intellectually well-ordered the book is, take two contiguous chapters. Consider how Ussher deals with the relationship between the evolution of the law relating to directors, and his analysis of the complex protections afforded under Irish law to shareholders, graphically if inaccurately termed "minority protection".

Many of the cases on section 205 of the Companies Act 1963 are distinguished by a strange judicial reluctance to refer to previous Irish authority, and consequently give the impression of constituting not so much a wilderness of single instances, as a series of judicial applications of "visceral ad hocery". Every student appreciates that there is some relation between the section 205 cases and the evolving attitude of the courts to the way in which directors exercise their fiduciary and common law duties. Ussher however takes this perception to its logical conclusion. His exposition of the Irish case-law on Section 205 and 213 (f) of the Companies Act, 1963, his discussion of the alteration of individual and class rights is expressly based upon, and is ordered by his appreciation of the legal and commercial change in the role of the company director in Ireland. Ussher forces us to review our appreciation of the S. 205 cases as constituting not so much disorder, as an evolutionary process whereby more is judicially expected from company directors.

These two chapters point the reader not only to a critical evaluation of the fraudulent trading cases, but to a vantage point where many of the features of the 1987 Companies Bill appear not only to punish the rogue, but to deter the prudent — not perhaps the most encouraging prospect for Irish industry.

Constraints of space on the reviewer, rather than lack of merit on the part of the work reviewed, preclude further specific encomium.

The only criticisms I offer, relate to the overall balance of the text. Two specific instances come to mind in chapter four and chapter sixteen.

First, in his discussion of the law on *ultra vires* Ussher is, I think, right to disagree with Keane J.'s decision in *Northern Bank Finance Corporation v Quinn & Achates Investment Co.,* but since the arguments for and against the decision depend on whether statutory protection is afforded to those ignorant of the memorandum or, on the other hand, of the true effect of the memorandum, the discussion could have been briefer. This case is cited and discussed at least ten times, but Ussher's own criticisms of the decision force one to question that decision's correctness. Mr. Justice Keane, like a great author, may have nodded — but Dr. Ussher may have shaken his head too forcefully albeit in the other direction.

The whole sorry saga of the conflict between section 8 of the Companies Act, 1963, and section 6 of S.I. 163 of 1973 could also have been treated more summarily. As Ussher himself says, this is a legislative blunder. Is his extensive discussion worth-while, in the light of prospective legislative moves in England, which, if adopted, will mitigate the most reprehensible excesses of the *ultra vires* doctrine? Doubtless, legislative moves elsewhere will be followed by the Oireachtas —with its customary rapidity. On the other hand, the implications of English decisions in this area, in particular that of the Court of Appeal in *Rolled Steel Products v British Steel Corporation* merit fuller treatment on grounds of the practical importance of its commercial implications.

Secondly, the discussion of liquidation is uneven. Ussher's account of the practice and procedure of the different kinds of liquidation is, with respect, insufficiently detailed, by comparison with his review of the law relating to fraudulent preference and fraudulent trading.

These are inconsiderable, in comparison to the book's worth. No doubt the next edition will encapsulate the provisions of the 1986 Act and any subsequent legislation.

Ussher writes with considerable elegance and precision. He argues with force, dexterity and conviction. His practical experience as a barrister and law don has in no way dimmed the vigour of his enthusiasm. His book is a model of what a good law treatise should be, since it conveys a clear and convincing picture accurately, relates the law to the society which engenders and is served by it; and is critical, constructive and imaginative. It refers

systematically, not only to Irish statute and case-law, but also to periodical literature. After a full academic year's use of this text in the classroom, and researching a number of "real-life" problems with its aid, my admiration for it increases.

Dr. David Tomkin

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at

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7th and 8th October 1987

Due to the enormous success of the Brighter Homes Exhibition, the Law Society, under the auspices of the Public Relations Committee is taking a stand at the National Ploughing Championships on 7th and 8th of October.

Mr. Brian Mahon, Tullamore, representing the Midlands Bar Association would be pleased to hear from any members wishing to participate in the manning of the stand, which will provide an excellent vehicle for positive Public Relations within the rural community.

Brian can be contacted at:

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QUIZ NIGHTS — OCTOBER 1987

Last April the Younger Members Committee in association with the Irish Permanent Building Society conducted a Quiz Night in Blackhall Place which was an outstanding success.

Hugh Cunniam alias Hugh O'Brien, Ireland's well-known disc jockey cum solicitor, hosted the night magnificently. It was well attended — over 130 participants. The President's Hall was buzzing with activity . . . scorekeepers, adjudicators, question-setters, barmen, barwaitresses, seasoned drinkers and eventually, after a dramatic tie, a victorious team.

This sparkling occasion is about to be repeated not once but several times. Please note provisionally:-

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TULLAMORE	BRIDGEHOUSE INN	Thurs. Jan. 21st 8 pm
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Each team will consist of 4 members under the direction of a captain. It is hoped that there will be 30 tables at each venue. Generous prizes will be provided compliments of the Irish Permanent Building Society. Subscriptions of £5.00 per head should ensure that the Solicitors Benevolent Association will be well looked after.

Anyone who would like more details of these Quiz Nights should contact JUSTIN McKENNA, Chairman, Younger Members Committee.

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New Circuit Court judge welcomed

Judge Frank Spain was welcomed to the Circuit Court Bench as he sat for the first time at the Dublin Circuit Criminal Court recently. Judge Spain was welcomed on behalf of the Bar, the Chief State Solicitor and his staff, the Court Registrar and his staff, the Gardai and the Incorporated Law Society.

In Brief

Family Law Symposium for Dublin

A public symposium "The Family and the Law — Progress and Projections", will take place at Blackhall Place, Dublin, on Saturday, October 10th.

This has been organised by the Law Society's Public Relations Committee to provide a fresh assessment of Family Law as a follow-up to the initial symposium on the subject held at the Law Society in October 1980.

Speakers for the event will include Dr. Patrick Tubridy, Consultant Psychiatrist; Mrs. Maura Wall Murphy, Director, Marriage Conciliation Service; Senator Mary Robinson, S.C., and Mr. Alan Shatter, T.D., Solicitor and author of *Family Law in the Republic of Ireland.*

While the symposium is primarily intended for the general public, it is hoped that members of the profession will attend as these occasions provide excellent opportunities for informal meetings with representatives of organisations interested in the subject and the legal profession. Catering arrangements will be facilitated if solicitors planning to attend will advise the office of the Director of Professional Services as soon as possible. □

CORRESPONDENCE

The Editor,
Gazette,
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Dear Sirs,

As part of its service to the business community, the Goethe Institute is proposing to offer in Autumn 1987 a course **"German for Lawyers".** This is a continuation of a course which was conducted in Spring 1987, and which was found most useful by most participants. The emphasis of the course is on the development of reading skills for legal texts, such as contracts, leases and court documentation, and the reading and formulation of legal correspondence through German. Useful vocabulary lists are also supplied as part of the course, including stock phrases which appear frequently in correspondence. The Institute recommends that anyone participating in the course should have approximately two years knowledge of German. The course is scheduled to take place on Wednesday evenings, 6.00—7.45. Anyone interested should direct their enquiries to Marika Dunne at the Institute, or to the undersigned.

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Irish Society for Labour Law,
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THE INTERNATIONAL LAW ASSOCIATION

The next meeting of the Irish Branch of the International Law Association will take place on Friday, 2nd October, at 6.30 p.m., at Newman House, 85/86 St. Stephen's Green. The speaker will be Professor Ian Brownlie, Professor of International Law at the University of Oxford. Professor Brownlie will be speaking about the practical applications of public international law.

Anyone interested in joining the Association, and in attending the talk and the dinner afterwards, is asked to contact Dennis Driscoll, Faculty of Law, University College Galway. (Tel.: 091-24411).

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How do you Know?

The Problem with 'knowingly' in the Licensing Laws

Most lawyers will be aware of the problems of proof created by the presence in the relevant section or charge of the word 'knowingly'. In this connection the enforcement of Section 10 of the Intoxicating Liquor Act 1924 — *Licensee* supplying drink to person under 18 — instantly springs to mind. First we must ask ourselves a purely grammatical question — does the word 'knowingly' in that section refer merely to the 'supplying', the age of the person to whom the drink was supplied, or to both?

by
DAVID LEAHY
C.P.A., Dip.Law,
Asst. Commissioner,
Chairman of Editorial Board
of Garda Siochana Guide.

Generally speaking it has always been assumed that the word 'knowingly' in this context referred to knowledge of the age of the customer rather than to knowledge of 'supplying' apparently on the grounds that one cannot 'unknowingly' supply. What if the licence holder (the only person guilty of an offence under Section 10) is absent from the premises at the relevant time? No doubt the court, as it does in prosecutions under Section 2 of the Intoxicating Liquor Act 1927, for breaches of the closing regulations, would still hold the licensee liable for the acts of the servant but with knowledge of the age of the customer on the part of the publican remaining a matter of conjecture as to proof.

Curiously Section 2 of the 1927 Act — breaches of closing regulations — does not refer to a licence holder but merely enacts that *'any person'* who sells etc. shall be guilty of an offence. The word 'knowingly' is not used. It might be remarked here that the standard form of summons used for Section 2 prosecutions contains the words 'you being licensed' etc. It is arguable that this phrase should not be included in the charge. Of course an endorsement pursuant to Section 25 would only follow on conviction of the licence holder and not in the case of conviction of a barman alone. Since the principle of 'strict liability' has obviously been applied to an extent in Section 2 prosecutions since the passing of the 1927 Act, a prosecution against an assistant alone will be a rare occurrence. Endorsement would of course not follow in such a case. A charge of 'supplying', except perhaps as an abettor, would not lie against an employee for a breach of Section 10 of the 1924 Act in view of the phraseology of that Section.

Section 16 of the Licensing Act 1872 provides that:

If any licensed person—
(1) *knowingly* harbours or *knowingly* suffers to remain on his premises any (Garda) during any part of the time appointed for such (Garda) being on duty unless . . . ,
or
(2) supplies any liquor etc. to any (Garda) on duty,
he is guilty of an offence.

It will be noted that the word 'knowingly' is excluded from (2) although it is included in (1). The reason is, one supposes, that in (1) the publican or his staff might be unaware of the Garda's presence on the premises, or does the 'knowingly' govern the 'on duty' portion or both? The position is not clear. In *Sherras -v- De Rutzen* [1895] 1 Q.B. 918 the publican was charged with selling drink to a policeman on duty as at (2) above. The policeman was in uniform but he had removed his armband which was required to be worn at all times while on duty. The case for the defence was that the defendant could not have known that the policeman was on duty. However although the charge as laid was proved, the Appeal Court reversed the conviction on the ground that the publican had no way of knowing that the policeman was on duty in the absence of his admission; in other words the necessary *Mens Rea* was absent.

It might be remarked here that in cases under Section 13 of the Licensing Act 1872 it was held that knowledge or belief of the publican of the condition of the person alleged to be drunk is not necessary to constitute the offence of selling drink to a drunken person, although it is necessary in the case of a charge for permitting drunkenness. The word 'knowingly does not occur in either charge.

There is no doubt but that the legislature has used the word 'knowingly' in some instances to ensure that guilty knowledge was a prerequisite of conviction. It would seem to be used or not used in many other cases without much reflection on its ramifications. Recent decisions in England show a tendency to regard cases such as pollution, drugs, etc. which are of great public concern as coming under the heading of 'strict liability', where convictions follow on proof of the charge irrespective of the state of the defendant's mind. If supplying drink to a young person can be regarded as one of these serious offences of strict liability, then it would seem that it may not be necessary to prove that the publican knew that the customer was under age at time of sale, if the word 'knowingly' was removed from Section 10 of the 1924 Act.

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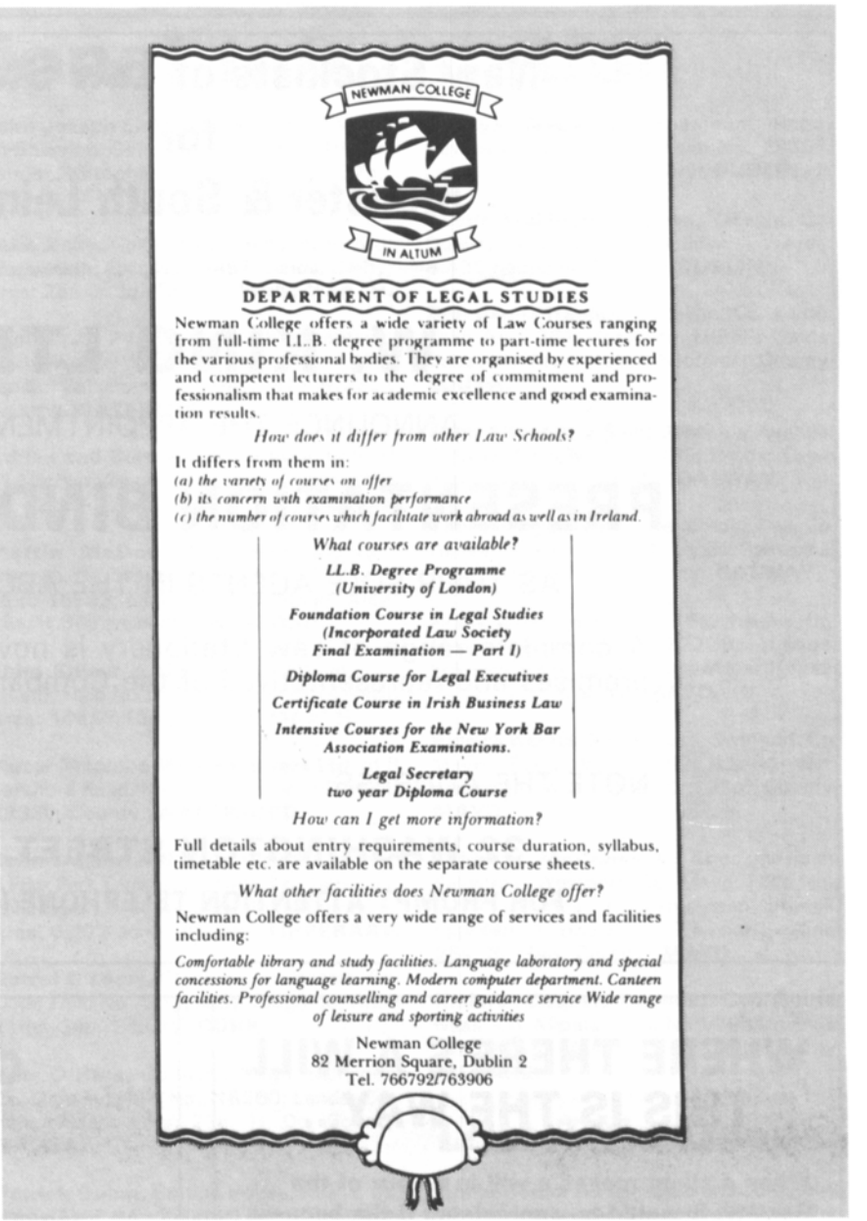
With regard to Section 10 it cannot be denied that there is some public concern at the present time with regard to sales of drink to young people and there seems to be a general desire that the law should be changed to make it more difficult for licensees to avoid conviction by meeting the prosecution case with the assertion 'I did not know the person was under 18'.

At least a partial remedy might be to remove the word 'knowingly' from Section 10, but provide for a defence if the publican can show that he took all reasonable precautions to establish the customer's age before sale. It is only fair that this defence should be available in view of the drastic nature of the consequences of convictions attached to Section 10 by way of endorsement.

On the other hand, if a court should hold that the removal of the word 'knowingly' from Section 10 did not thereby make the offence one of strict liability, we are back to square one in a *Sherras -v- de Rutzen* situation; in other words the prosecution, to be successful, would have to prove that the publican knew the customer was under age when he supplied him with intoxicating liquor, i.e. would have again to incorporate 'knowingly' by implication.

The problem is a complex one and it is difficult to suggest a sensible solution which would be fair to all parties. □



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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:

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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.
28th day of September, 1987.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

James McGann, Falsk, Strokestown, Co. Roscommon; Folio No.: 33522; Lands: (1) Tonroe; (2) Lissawaddy; (3) Tonroe; (4) Ballyglass; Area: (1) 6a.3r.0p; (2) 21a.2r.34p.; (3) 5a.3r.11p.; (4) 1a.0r.13p.; County: **ROSCOMMON.**

Thomas McKinney, c/o Andrew Brennan, Lemgare, Clontibret, Co. Monaghan; Folio No.: 11761; Lands: Lemgare; Area: 12a.2r.33p.; County: **MONAGHAN.**

Patrick McGuirk, of Radrum, Dunraymond, Co. Monaghan; Folio No.: 16606; Lands: Radrum; Area: 15a.0r.23p.; County: **MONAGHAN.**

Peter Geiran, c/o National Gallery, Merrion Square, Dublin 2; Folio No.: 4188F Co. Dublin; Lands: Property situate in the townland of Ballinteer and Barony of Rathdown, known as 9 Mayfield Terrace, Ballinteer; County: **DUBLIN.**

Teresa O'Neill of Ballydavid House, Bansha, Co. Tipperary; Folio No.: 145R; Lands: Ballydavid; Area: 110a.2r.28p.: County: **TIPPERARY.**

James and Catherine Kavanagh of Kiltilly, Clonamon, Ferns, Co. Wexford; Folio No.: 1964; Lands: Kiltilly; Area: 73a.3r.9p.; County: **WEXFORD.**

Paschal D. Graham of Tolerton, Ballickmoyler, Carlow, Co. Laois; Folio No.: 1322; Lands: Ardateggle; Area: 28a.1r.12p.; County: **QUEENS (LAOIS).**

Ellen O'Brien of Ballinearly, Kilmacow, Co. Kilkenny; Folio No.: 15323; Lands: Ballynearla; County: **KILKENNY.**

Thomas Whyte, Ardcarn, Ballinasloe, Co. Roscommon; Folio No.: 18447; Lands: (1) Ardcarn; (2) Beagh (Brabazon); (3) Beagh (Brabazon); Area: (1) 18a.0r.29p.; (2) 3a.2r.38p.; (3) 1a.2r.25p.; County: **ROSCOMMON.**

John Joseph Earley of Kiltoghert, Carrick-on-Shannon, Co. Leitrim; Folio No.: 16195; Lands: Kiltoghert; Area: 26a.3r.37p.; County: **LEITRIM.**

John Kelly, Castletown, Geoghegan, Co. Westmeath; Folio No.: 4457; Lands: Garhy; Area: 26a.3r.2p.; County: **WESTMEATH.**

James J. Parkinson of Ballycarnane, Tramore, Co. Waterford; Folio No.: 1924; Lands: Ballycarnane; Area: 81a.3r.25p.; County: **WATERFORD.**

Adrian and Bernadette Harkins, both of 71 Merrion Village, Ballsbridge, Dublin; Folio No: 52253F; Lands: Merrion; County: **DUBLIN.**

Martin McDonald of Monasootagh, Camolin, Co. Wexford; Folio No.: 2523 closed to 15133; Lands: Monasootagh; Area: 36a.1r.38p.; County; **WEXFORD.**

John Spicer & Co. Ltd. of Navan, Co. Meath; Folio No.: 6489; Lands: Limekilnhill; Area: 10a.2r.19p.; County: **MEATH.**

Finzer Machine Manufacturers Ltd. of 8 Sandford Road, Ranelagh, Dublin; Folio No.: 3833L; County: **WATERFORD.**

John Walshe and Mary Walshe, both of 6 Prior Park Terrace, Clonmel, Co. Tipperary; Folio No.: 11736F; Lands: Barnn Demesne; Area: 0.273 acres; County; **TIPPERARY.**

Daniel O'Leary, Cloghroe, Inniscarra, Co. Cork; Folio No.: 91; Lands: Cloghroe; Area: 115a. 34p. County: **CORK.**

Kate O'Hara, Cornamucklagh, Ballymoe, Co. Galway; Folio No.: 16260; Lands: Cornamucklagh; Area: 23a. 1r. 0p. County: **GALWAY.**

Patrick Quinn, Station House, Kilalla, Co. Mayo; Folio No.: 27066; Lands: Townplots West; Area: 10a. 0r. 15p. County: **MAYO.**

Dunwater Development Ltd. of 8 Arundel Square, Waterford; Folio No.: 8757; Lands: Coxtown East; Area: 17.169 acres; County: **WATERFORD.**

Ven. Archdeacon Francis Ryan and others, The Presbytery, Tipperary and the Parochial House, Caherconlish, Co. Limerick, respectively; Folio No.: 22446; Lands: Hundred Acres East; Area: 1a. 0r. 3p. County: **LIMERICK.**

Ross Diocesan Trustees, The Presbytery, Clonakilty, Co. Cork and **V. Rev. Patrick Fullam** of Barryroe, Lislevane, Bandon, Co. Cork; Folio No. 53453; Lands: Tirnanean; Area: 2a. 0r. 1p. County: **CORK.**

JOHN A. DOYLE, Ballintombay, Rathdrum, Co. Wicklow; Folio No.: (1) 3578; (2) 3589; Lands: (1) Ballintombay Upper; (2) Ballintombay Lower; Area: (1) 69a. 0r. 3p. (2) 12a. 0r. 0p. County: **WICKLOW**

Mary Collins, Ballydonoghue, Tarbet, Co. Limerick; Folio No.: 1004; Lands: Ballydonoghue; Area: 49a. 0r. 20p. County: **LIMERICK.**

George Wade, 25 Peamount Road, Newcastle, Co. Dublin; Folio No. 2965F; Lands: —; Area: —; County: **DUBLIN.**

Austin Muldoon, Oldbawn, Tallaght, Co. Dublin; Folio No.: 20; Lands: —; Area: 8.435 hectares; County: **DUBLIN.**

Brendan O'Hanlon, Ducavan, Co. Louth; Folio No.: 261 closed to 7825F; Lands: Ducavan; Area: 4.919 hectares; County: **LOUTH.**

John Elwood, 2 Saint Joseph's Avenue, Galway; Folio No.: 21043F; Lands: Town Parks; Area: —; County: **GALWAY.**

Thomas Egan, Rahasane, Craughwell, Co. Galway; Folio No.: 3951; Lands: Rahasane; Area: 60a. 0r. 20p. County: **GALWAY.**

Frank Waldron, Knox St., Ballyhaunis, Co. Mayo; Folio No. 17739; Lands: Pollnacroaghy Carownluggaun (part); Area: 1a. 2r. 11p. County: **MAYO.**

Patrick Kerins, Barnacogue, Swinford, Co. Mayo; Folio No.: 3252; Lands: Barnacahoge; Area: 36a. 0r. 33p. County: **MAYO.**

John J. McCormack, Knockmoyleen, Ballycroy, Westport, Co. Mayo; Folio No.: 27771; Lands: Knockmoyleen (Knockmoyleen 1 undivided 7th part); Area: 25a. 3r. 34p. County: **MAYO.**

Kildare County Council, Courthouse, Naas, Co. Kildare. Folio No.: 2984; Lands: Johnstown; Area: 7a.2r.32p.; County: **KILDARE.**

Lost Title Deeds

Annie Corcoran, deceased and **Josephine Coulter,** deceased; Premises: 2 Glenn Terrace, Glkasthule, Co. Dublin.

Will anyone having knowledge of the Documents of Title relating to the above property please contact A. T. Diamond & Co., Solicitors, 217 Clontarf Rd., Clontarf, Dublin 3. Phone: 333792/334126.

THE LAND REGISTRY
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IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF **JAMES JOSEPH DENNENY** IN RESPECT OF PROPERTY IN PORTRANE BARONY NETHERCROSS, CO. DUBLIN.

TAKE NOTICE that James Joseph Denneny, 51 Portrane, Donabate, County Dublin has lodged an Application for cancellation of the Leasehold interest registered as a burden on Folio 15519 County Dublin.

The Original Lease dated 16th March, 1959 from James Sheehan to Mary Sheehan in respect of the above property is stated to have been lost or mislaid.

The Application will be proceeded with unless notification is received in the Registry within one calender month from the date of publication of this Notice that the original Lease is in existence. Any such notification should state the grounds on which the Lease is held and quote Reference No. 87DN08462.

PAT O'BRIEN, Chief Examiner of Titles

Lost Wills

McGUIRK , Joan, deceased. Will any person having knowledge of the whereabouts of a Will of the above named deceased, late of St. Annes, Monastery, Enniskerry, Co. Wicklow, who died on 3rd July, 1987, please contact Joseph F. Maguire & Co., Solicitors, 98 Main Street, Bray, Co. Wicklow. Tel. 862399.

McCAFFREY, Gerard, deceased, late of 104 Ramleh Park, Milltown, Dublin 6. Will any person having knowledge of the whereabouts of a Will of the above named deceased, please contact M. A. Regan, McEntee & Co., Solicitors, High Street, Trim, Co. Meath.

IGOE, Joseph, deceased, late of Muckanagh, Glasson, Athlone, Co. Westmeath. Will any person having knowledge of the whereabouts of a Will of the above named deceased, who died on 4th August 1987, please contact Messrs. Noonan & Cuddy, Solicitors, Society Street, Ballinasloe, Co. Galway.

GARVEY, Sean (otherwise John), deceased, late of Clash East, Tralee, Co. Kerry. Will any person having knowledge of the whereabouts of a Will of the above named deceased, who died on 5th June 1987, please contact Messrs. Pierse O'Sullivan & Co., Solicitors, 9 Ashe Street, Tralee, Co. Kerry. Ref: MOS.FT.176. Tel. (066) 22900.

HARRISON, Mrs. Rose Alice, deceased, late of "Carrigowan", 39 Nutley Avenue, Dublin 4. Will any person having knowledge of the whereabouts of a Will of the above named deceased, please contact Donal Lambe & Co., Solicitors, 60 Merrion Square, Dublin 2. Tel. 688221/605188.

O'DONNNELL, Pierce (otherwise Percival or Percy), deceased, late of Bannoxtown, Fethard, Co. Tipperary. Will any person having knowledge of the whereabouts of a Will of the above named deceased, who died on 3rd April, 1987, please contact Albert C. O'Dwyer, Solicitor, Barrack Street, Cahir, Co. Tipperary. (Tel. 052-41280).

LAWLOR, Ann B., deceased, late of 5 Athy Road, Carlow. Will anyone having knowledge of the whereabouts of a will of the above named deceased, who died on 15 August, 1987, please contact Millet and Matthews, Solicitors, Baltinglass, Co. Wicklow.

DAVEY, Andrew, deceased, late of St. Columba's Hospital, Sligo, and formerly of Bristol, England, and Knockbrack, Keash, Ballymote, Co. Sligo. Will any person having knowledge of the whereabouts of a Will of the above-named deceased, who died on 24 July, 1987, please contact Johnson & Johnson, Solicitors, Ballymote, Co. Sligo. Reference KJ/GS.

McKENNY, Michael, deceased, late of 7 Bremore Court, Balbriggan, formerly of 3 Eccles St., Dublin. Will any person having knowledge of a will made by the above named deceased, who died on 12 August, 1987, please contact Messrs. Orpen Franks & Co., 28/30 Burlington Rd., Dublin 4. Tel. 689622.

ROWE, Jennifer, deceased, late of Clogher, Rathkenny, Co. Meath. Will anyone having knowledge of the whereabouts of a Will of the above named deceased, who died on 14 February, 1987, please contact Binchy & Partners, Solicitors, 37/9 Fitzwilliam Square, Dublin 2. (Ref. ES/mp.)

BARRY, John, deceased, late of Monanimy Lower, Killavullen, Mallow, Co. Cork. Will anyone having knowledge of the whereabouts of a will of the above named deceased, who died on 19 August, 1987, please contact Patrick McGrath & Son, Solicitors, O'Rahilly St., Nenagh, Co. Tipperary. Ref. EMG.

The Profession

McDermot Scanlon, LL.B. has commenced practice under the style of J. D. Scanlon & Co., at O'Connor Square, Tullamore, Co. Offaly. Tel. (0506) 51755/51759.

Padhraic Harris, B.A., LL.B., has commenced practice under the style of Padhraic Harris & Co., Solicitoirs, Odeon House, Eyre Square, Galway. Tel. (091) 62066.

Colm A. Houlihan, has commenced practice under the style of Colm A. Houlihan & Co., Solicitors, at 4 Tuckey St., Cork. Tel. (021) 272481.

Bernadette M. Cahill, B.A., LL.B., and **Marie Hegarty,** B.A. have commenced practice under the style of Cahill and Hegarty, Solicitors, St. Catherine's Hall, Catherine St., Waterford. Tel. (051) 79299.

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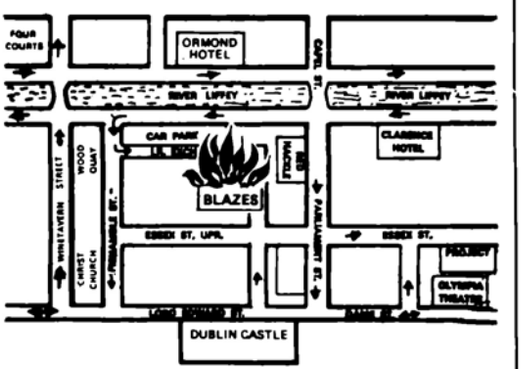

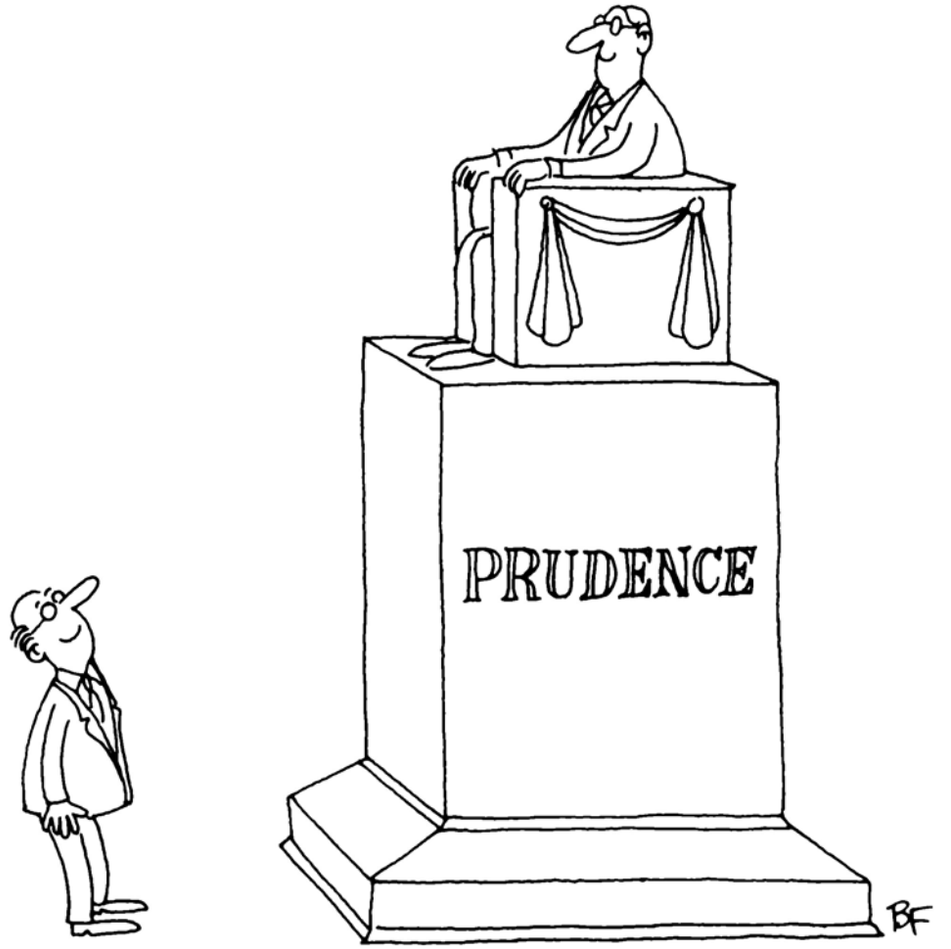

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Vol. 81 No. 8 October 1987

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Mr. Adrian Bourke (left), Chairman of The Society's Public Relations Committee with guest speaker Dr. Patrick Tubridy, MB MRC Psych., DPM, Consultant Psychiatrist.

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

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Viewpoint

Only the Bath Water!

Disturbing trends are becoming apparent in the campaign for the reduction in public spending. Various Agencies and Schemes outside the direct Civil Service are apparently being singled out for closure or merger, with their functions being subsumed in various Departments. Apart from doubts as to whether the carrying out of the function of these Agencies by Departments is likely to give much in the way of savings, the loss of the independent position and approach which these Agencies have been able to take could well be sorely felt.

The Health Education Bureau in its relatively short existence has achieved considerable progress with its campaigns, notably that against smoking. It is abundantly clear that major reductions in the cost of health services would be achieved if the community could be persuaded to adopt a healthier lifestyle. Many of the patients in our hospitals are there because of excessive smoking, the abuse of alcohol or failure to take a reasonable amount of exercise. Each of these areas was targeted by the Health Education Bureau. Can we believe that the Department of Health is to be transformed into a dynamic health education-oriented body? It certainly has not been so in the past which, presumably, was the reason for establishing the Health Education Bureau in the first place.

The National Social Service Board, whose functions included the support and development of community information centres and the promotion and development of voluntary social services, is also to go, with its functions being taken over by the Department of Social Welfare. Again, there must be doubts whether that Department is an appropriate body to be entrusted with the functions of the Board.

An Foras Forbartha has, on a relatively small budget, managed to make a valuable contribution in many areas affecting the environment and the buildings in which we live and work. Its study on house purchase transactions was a most valuable document, shattering a number of the myths in that area. Those who came into contact with the officials who compiled the report were extremely impressed by the thoroughness and impartiality with which they approached their task. An Foras Forbartha monitored a wide range of activities in the general area of the environment. There must be grave doubts whether these activities can be carried on in the future in the same way as they were in the past, since many involved the monitoring of performance of Government Departments or officials, local or other statutory authorities.

Are any real savings going to be made by the closure of the Health Education Bureau and An Foras Forbartha? Can Government Departments provide the same level of service at lesser cost? Will sizeable rents continue to be paid for buildings which have been emptied following these closures? Have the resources of the various Departments been so under-utilized that by engaging only a limited number of the staff of the former Agencies they can provide an adequate service in the areas previously covered? If they have not been so under-utilized, how can the same, or even an adequate, level of service be guaranteed in the future?

The cuts in the funding of the Ombudsman's office must necessarily result in a considerable lessening of the activities of the Ombudsman. It is no secret that the Ombudsman has come into head-on collision with various Government Departments in the exercise of his duty to enquire into

(contd. on p. 241)

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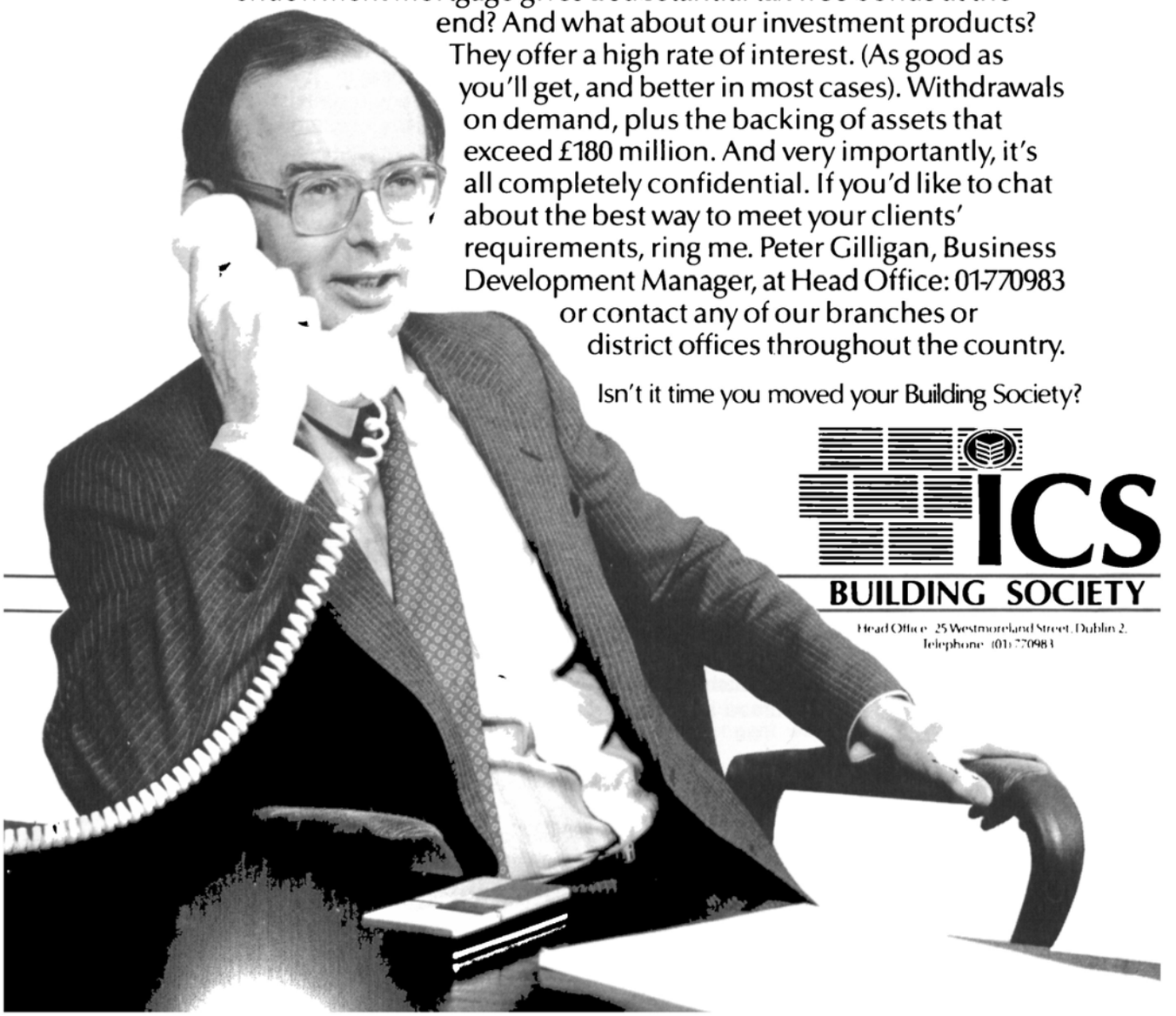

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Insurance Premiums — How can they be reduced?

In the recent past a number of articles have been published in the Law Society Gazette concerning the high cost of motor and liability insurance in this country. In the most recent article (Gazette, June 1987: "An Accident Compensation Act — The New Zealand Solution for an Irish Problem", by Michael P. Coghlan, M.A., Solicitor), Michael P. Coghlan comments on this matter and argues in favour of a no-fault system of compensation similar to that currently in use in New Zealand. I will deal later with the question of fault versus no-fault libaility but first I would like to correct a few inaccuracies in Mr. Coghlan's article.

Mr. Coghlan states that "the insurance industry has used the legal system and other local factors to disguise its own inherent incapacity to offer reasonable cover and reasonable compensation to Irish workers and road users". This is a somewhat surprising statement. It is now generally accepted, I would have thought, that compensation levels in Ireland are much more generous than our nearest neighbour, the U.K. and, indeed, than most other European countries. Insurance companies have consistently provided cover to Irish motorists and employers even when on occasions pure commercial considerations would, in normal circumstances, force a company to decline cover. The insurance industry operates a voluntary agreement with the Minister for Industry & Commerce under which insurance companies have undertaken to provide motor insurance to all persons licensed to drive a vehicle, except where to do so would be contrary to public interest.

Reference is made by Mr. Coghlan to the secretiveness of the insurance industry and the unavailability of cogent information to justify the high premium rates for motor and property insurance. Indeed Mr. Coghlan goes back over 35 years to 1st December 1951 to quote an example of a decision taken to increase motor premiums which the then Government decided was unjustified. Mr. Coghlan then uses this 35-year-old example to suggest that the public are right to be sceptical about and hostile towards the insurance industry.

by
AIDAN CASSELLS,
Irish Insurance Federation Secretary

I suspect that the reason Mr. Coghlan had to go back to 1951 to find an example of an unjustified (SIC) premium increase was that he had difficulty in turning up any more recent examples. This is not surprising because since the early 1970's insurers have been subject to strict price control and all decisions to increase premiums must be individually justified by companies to the Department of Industry & Commerce. Even though price control was abolished in 1985, insurers have voluntarily agreed to continue providing the Department with advance notice of proposed premium increases and the relevant statistics to justify same.

On the broader question of secrecy, I wonder if Mr. Coghlan has ever had the opportunity to read the Summary of Statements of Assurance Business (more commonly known as the "Blue Book") which is published every year by the Department of Industry & Commerce. The Blue Book contains detailed financial information on the performance of each company, including Revenue Accounts showing premium income, claims paid and provisions for outstanding claims, commission and management expenses, for each of the main classes of business. I can think of no other industry where so much detailed information is available publicly on a company by company basis.

The last inaccuracy I would like to correct in Mr. Coghlan's article is the suggestion that premium rates in Ireland are influenced by

VIEWPOINT *(contd. from p.239)*

administrative actions, delays or inaction which adversely affect persons in their dealings with Government Departments and offices. It is difficult to avoid coming to the conclusion that his effectiveness in pursuing complaints has been a factor in the decision to reduce his funding, when it might well have been argued that, in view of the number of functions being reassigned to various Government Departments, there would have been an even greater need for the Ombudsman.

It is difficult not to see in these trends an attempt by the Civil Service Departments to reel in these effective Agencies and to place the hand of centralized administration over the entire area of the Public Service.

Cuts in Public Service spending must involve fewer *civil* servants working with much greater productivity, not the concentration of all activities under the immediate control of a Department. It is depressing to find that the fresh winds which had been blowing through Irish society, partly as a result of the freeing up of activities such as those of the Health Education Bureau and An Foras Forbartha, are apparently to be stilled. □

underwriting difficulties in other jurisdictions. Rates charged in Ireland are invariably based on Irish experience and consequently overseas results do not have a direct effect on Irish rates. The only exception I can think of to this general rule is professional indemnity insurance which traditionally has been placed in the London market, and therefore has been subject to the volatility, both favourable and unfavourable, of the world-wide results for this business.

Why are insurance costs high in Ireland?

In Ireland insurance costs are high for four main reasons:

- the high number of accidents on our roads and in the workplace;
- the high level of claims' consciousness in this country;
- the excessive cost of settling claims under our present legal system;
- the high level of uninsured driving in the case of motor insurance.

The Irish Insurance Federation (the IIF) accepts that the cost of insurance in this country is too high and is concerned that if immediate steps are not taken to reduce both the number and cost of claims, then there is every likelihood that more policyholders will be unable or unwilling to pay the premium levels required to fund the cost of claims. It is for this reason that the IIF recently made a detailed submission to Government on the steps that should be taken to reduce the frequency and cost of claims.

Our present legal system is inefficient, slow, cumbersome and in need of urgent reform. Legal fees and disbursements on average represent 25% of total claims costs. A recent survey carried out by the IIF shows that solicitors' costs and outlay account for approximately 80% of insurance companies' legal fees bill, and that 69% of total solicitors' fees is profit costs and 11% is disbursements.

These figures do not include solicitor and own client costs, payable directly by the client, which can, I understand, amount to a sum up to 10% of the damages awarded. Can such costs be justified to the consumer in present harsh economic circumstances?

The increased level of claims' consciousness in recent years is a further important factor which has pushed up insurance premiums. The substantial increase in the number of claims for whip-lash injuries over the last five years or so is a good example of this phenomenon. One wonders to what extent the legal profession and, perhaps also the medical profession, has contributed to this increased claims' consciousness, which has also, I believe, led to an increase in spurious actions. Indeed Professor Bryan M. E. McMahon, of UCC, in his article in the April 1987 *Gazette* ("Uninsured Drivers — A Legal Submission") referred to the problem and I quote what he said because I feel it is very important:

> "It would be surprising if in a recessionary period insurance claims did not increase. I have no figures on this but suggest that in recent years this indeed has been the case. The public are becoming more conscious of

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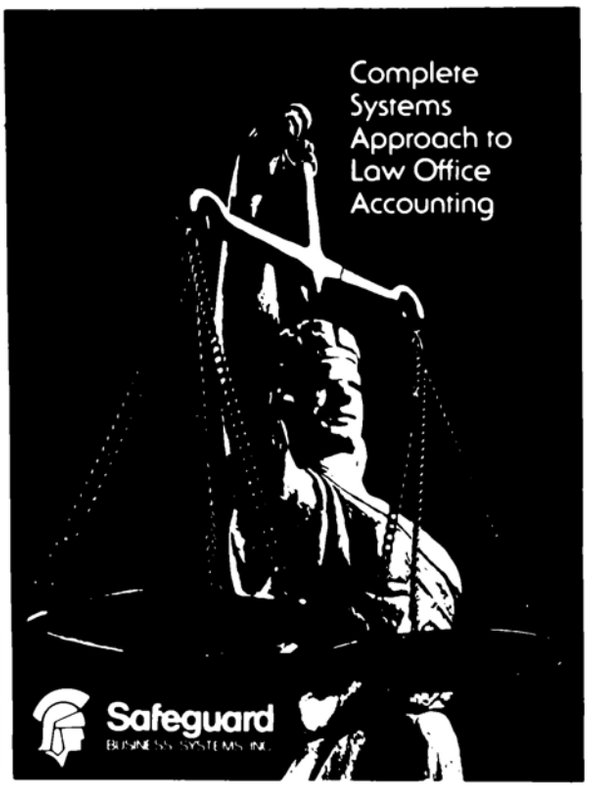

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their legal rights and because of contracting legal business in other areas, solicitors do not discourage litigation."

It is essential that all parties involved in the legal process look closely at the present legal system to ensure that it is made more efficient and less costly to operate within. The only real point of debate, in my view, is how significant the reforms should be to achieve a more efficient and cost-effective system which will lead to lower claims' costs and therefore premium levels.

Fault versus no-fault liability

The desirability of replacing the present tort (negligence) system with a no-fault liability system is an argument which has been debated in many jurisdictions over the past twenty years or so. The O'Connor Committee of Enquiry into Motor Insurance looked at this issue in the early seventies and a majority recommended against it. The U.K. Royal Commission on Civil Liability and Compensation for Personal Injury also studied this question and its Report published in 1978, though somewhat divided on the issue, recommended the maintenance of the tort system coupled with a limited no-fault scheme providing compensation similar to that paid to injured employees under the U.K. Industrial Injuries Scheme. The U.K. Government never implemented this recommendation. Other countries and states both in America and Canada have introduced no-fault liability but I would hasten to add not all of these Schemes have led to the expected drop in premiums which their sponsors had predicted.

It must be stressed at the outset that the introduction of no-fault liability, unless it is coupled with a very significant drop in the levels of compensation being awarded at present to injured victims, would lead to a very significant increase in the cost of motor and other forms of liability insurance. Under a no-fault system of liability all persons injured in road accidents would be entitled to claim full compensation, irrespective of their own fault. Consequently, plaintiffs, who currently cannot claim compensation under the tort system because they were responsible for the accident, or canonly claim partial compensation due to their own contributory negligence, would be able, under a no-fault system, to claim full compensation.

No-fault liability systems, in as far as my research has shown, usually incorporate an agreed schedule for compensation both in respect of loss of earnings and lump sum payments for certain types of non-pecuniary compensation. As a result, the need to involve the legal profession in such a system is significantly reduced, thereby producing a substantial saving in legal costs. This I believe is the position in New Zealand and I was surprised to read Mr. Coghlan's statement that lawyers continued "to play a prominent part in dealing with claims" brought under the New Zealand system.

It should not be overlooked that in Ireland we already have a limited form of no-fault compensation under our social welfare system and there is every likelihood, if a more specific no-fault compensation system for road and other accidents were introduced, that it may be linked to our present social welfare system. An interesting constitutional issue arises in relation to no-fault compensation. Would it be possible under our Constitution to introduce a scheme restricted to motor and work accidents or could it be argued that victims of all accidents, be they at home, in public places etc., should be equally entitled under the Constitution to the same system of compensation? The cost implications of a general no-fault scheme for all accidents needs no emphasis.

The insurance industry does not feel that such a radical departure from the present tort system is necessary in order to contain and ultimately reduce insurance costs. We feel that the introduction of major reform to the present legal system would lead to a material reduction in claims costs. We would also question if a move away from the tort system is in the public interest. The present tort system does create for the individual an awareness of his responsibility to his fellow citizens. The maintenance of the tort system under which the individual

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is penalised for his own wrongdoing does to some extent act as a deterrent against general irresponsibility and is a positive encouragement to a sense of responsibility towards one's fellow citizens.

I have yet to be convinced that a centralised State compensation system for motor or work accidents would be more efficient and cost effective than a private insurance system under which commercial and competitive factors will automatically weed out the inefficient.

How can insurance premiums be reduced?

The IIF believes that insurance premiums can be reduced by:

(a) reducing the number of accidents;

(b) improving the efficiency of the legal system and reforming certain aspects of the current practices governing the calculation of damages;

(c) the elimination of uninsured driving.

The IIF proposals under each of these headings are as follows:

How to reduce accidents

★ establish a special Garda Traffic Squad to enforce existing road traffic legislation especially drink/driving laws, speed, seat belt usage;

★ provisional licences to be granted only to those who have undergone a minimum number of certified driving lessons;

★ automatic repeat of driving test for those convicted of careless/drunken driving;

★ restricted driving licences to be granted to young drivers;

★ immediate implementation of Barrington Report on Safety in the Workplace;

★ appointment of additional safety inspectors.

★ stiffer penalties for those convicted of breaking road traffic or work safety regulations.

How to reduce claims costs

★ abolish trial by jury in High Court civil actions;

★ statutory limit on compensation for "general damages" of £75,000;

★ no compensation to be awarded for "general damages" where injuries are not serious or permanent;

★ when calculating compensation for future loss of earnings full credit to be taken for payments received from State and, in the case of work accidents, also benefits received under pension and permanent health insurance schemes which are funded entirely by the employer;

★ improved pre-trial procedures including automatic exchange of medical and other expert reports;

★ removal of restrictions on increasing/reducing lodgments;

★ introduction of a final date for agreed settlements which should be at least fifteen days before the date of the scheduled hearing;

★ removal or substantial reduction of VAT and other taxes on legal fees and documents.

How to eliminate uninsured driving

★ stricter enforcement of the law;

★ minimum fine of £500;

★ Gardai to be given power to impound vehicle.

Finally, I would question Mr. Coghlan's assertion that the effectiveness of the insurance industry's public relations has exceeded that of the legal profession. We have been campaigning for major reform of the legal system since the early 1970's but to date without much success. The legal lobby against such change has been more effective. Perhaps the balance is about to change! □

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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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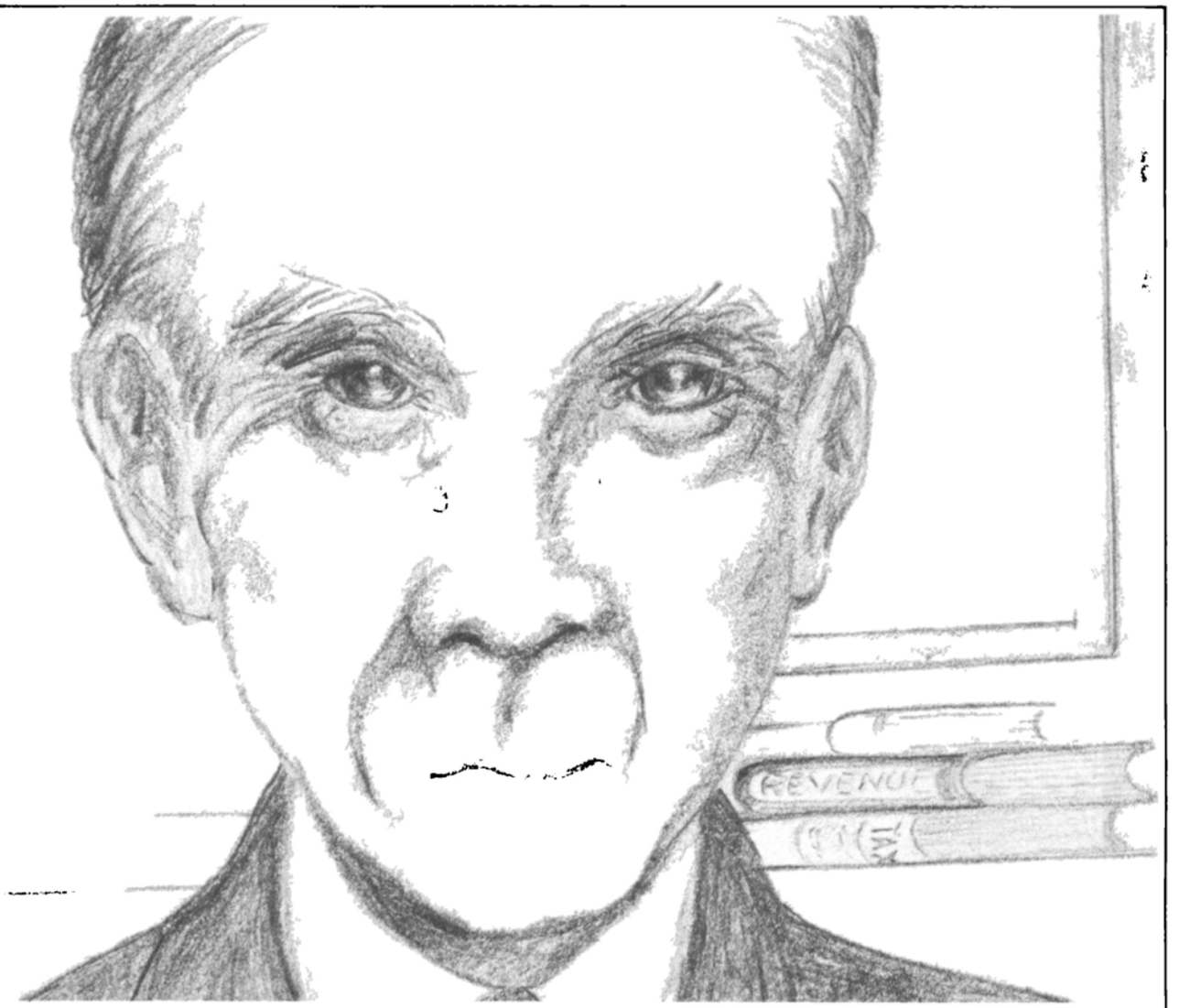

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Doing Business in Ireland

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by
Professor L. G. Sweeney
Director of Training

So what was it? It was an attempt to replicate in Ireland a similar and highly successful venture "Doing Business in Japan" run in mid-1984 by Minnesota Continuing Legal Education in conjunction with JETRO (Japan External Trade Organisation) which generated many millions of dollars in increased trade on both sides of the Pacific.

Planned over a period of two years from July 1985, the proposal was first mooted by the writer in Washington to Frank Harris, the Executive Director of Minnesota Continuing Legal Education who pioneered the Japanese venture. Accepted by Minnesota C.L.E. and adopted shortly thereafter by the C.L.E. sub-Committee under John Buckley (who in fact opened the Conference) and the Education Committee under its then Chairman, Laurence Shields (who contributed two papers to the Conference), it had three objectives:

1. To highlight to U.S. lawyers and businessmen and, in particular, the many Minnesota lawyers with an Irish ethnic background the attractions of Ireland as a place in which to set up in business. (Maximum taxation of 10%, guaranteed up to the year 2,000; a young, highly educated, computer-literate population, hungry for jobs, availability of sophisticated telecommunication services and a stable democratically structured society);
2. To explore the scope for joint ventures between Irish and American businesses;
3. To provide the opportunity to establish professional and personal relationships between Irish and American lawyers and, perhaps, to encourage Irish lawyers to begin to match the level of penetration into the business affairs of their clients that is commonplace among U.S. lawyers.

How successful was it? Too early to say, of course, although there are positive indicators. Of that more later. But the programme was unquestionably a success, with contributions from no fewer than thirty-two speakers, many of them pre-eminent in their respective fields. The U.S. Ambassador, Margaret Heckler, herself a lawyer, who gave the opening address and the Minister for Industry and Commerce Mr. Albert Reynolds (who, although supplied with a script, spoke *extempore* and to good effect for 20 minutes) set the tone on the first day, devoted to Ireland's attractions as a business base. A major presentation by Kieran McGowan, Executive Director of the I.D.A. was followed by an excellent and wide ranging luncheon address on Ireland's economy by Liam Connellan, Director General of the Confederation of Irish Industry whose talk generated a broad spread of questions, ably dealt with. Papers on the forms of doing business in Ireland by Laurence Shields and on tax considerations, particularly tax incentives and abatement programmes, by Patrick McDonald of Stokes Kennedy Crowley (Peat Marwick in Ireland) were followed by Case Histories presented by I.B.M. and Wescan, U.S. businesses with U.S. operations based in Ireland over many years.

Day Two, introduced by the Senior Vice-President Tom Shaw in the absence of the President, was devoted to solid law with qualified lawyers from the E.E.C. and private practices in Brussels covering broad policy and specific practice in competition, licensing, distribution and franchising within the Community. The legal framework for import/export trade and investment was covered by Damien McCarthy of Price Waterhouse; Laurence Shields gave his second paper, this time on protection of trademarks and technology and Eugene Fanning, calling on his many years in the New York office of Arthur Cox & Co., contrasted the practice of law in the United States and in Ireland and pointed to the need for something comparable to the Uniform Financial Commercial Code as a solution to the complexities of doing business in Europe.

At lunch that day Ernie Margetson, listed as third speaker, professed dismay at having to follow two brilliant contributions by the Honourable John Simonett of the Minnesota Supreme Court and Mr. Justice Liam Hamilton, President of the High Court, but matched them flawlessly in wit, style and anecdote.

The afternoon of that day was devoted to a tour of the Four Courts led by Professor Richard Woulfe and, for the hardier souls in the party, a visit to the Whiskey Corner in Irish Distillers.

Mr. Des Peelo developed, managed and chaired Day Three. Des Peelo is the Society's Consultant on the Advanced Course on financial affairs and is already a contributor to the Society's C.L.E. programme. Originally planned as focussing on finance, the day developed into what became a solidly professional exercise in reassurance with Senator Brian Hilary covering Industrial Relations; Senator Maurice Manning the Political Environment; Dr. Declan Glynn, Chief Executive of the National Board for Science and Technology on High Tech in Irish Business; Dr. Michael Casey, Manager, Banking

Department, Central Bank of Ireland on *inter alia* the role of the Central Bank, security of foreign capital, currency exchange issues and money markets. Anchorman for this session was John Donnelly, Managing Partner of Deloitte Haskins & Sells who gave an overview of the realities — good and bad — of running a business in Ireland. This last session was important as a necessary counter to what might have been otherwise a cloying succession of honeycomb offerings.

A central feature of the final day was again a series of Case Histories, two from companies operating successfully from an Irish base — Bailey's Irish Cream running a highly successful market in the U.S.; Thermo-King in the Middle East and the Minnesota Trade Office, seeking to promote joint ventures with its counterparts abroad, Coras Trachtala and the I.D.A. in our own case. (A suggestion that Baileys might present a complimentary sample of their product at lunch led to the presentation of sample *bottles* to all participants.) Commissioner David Speer of the Minnesota Department of Trade and Economic Development and his Executive Director Michael Olsen (who moved to the Minnesota Trade Office after 25 years as an International lawyer) both presented papers. Other significant contributors on the final day were Robert Chalker, Executive Director of the U.S. Chamber of Commerce in Ireland, Sean Condon, former Head of C.T.T., now of Condon International Marketing who gave the luncheon address and was also very supportive of the venture; Franklin Jesse, described as "Minnesota's leading international lawyer" who gave a full-scale rundown on the merits and demerits of joint ventures abroad and Noel Sweeney, former Head of Marketing, Bord Failte, now running Marketing Decisions, who gave necessary coverage to a vital and otherwise neglected area of our economic scene, tourism.

Social highlights of the Conference were a reception in the Law Society on the first day, a banquet at Trinity College Dublin with traditional Irish entertainment provided by "Just Friends" and, for the spouses programme, visits to Malahide Castle and Glendalough and a talk on "Conducting a Family Dig" by Michael Byrne, Solicitor, of the Irish Family History Society.

So did it work? Undoubtedly with earlier marketing there would have been a larger attendance by both Societies. However the Minnesota Trade Office has established contacts with our State Agencies and expressed themselves well pleased with the Conference. Many other participants expressed themselves as highly impressed with the quality of the presentations and indicated that they would be spreading the word on their return, mostly to Minnesota but also to Florida, Washington and Connecticut.

Apart from these at least five participants have already stated that they have learned enough to determine at least to pursue enquiries further. One, a manufacturer of reverse osmosis filtration systems for the dairy industry, who was looking to the continent as a base for his operation has now declared himself a lot more interested in Ireland as a result of the conference and has already engaged as his adviser another participant and speaker, Frank Jesse, who, as he says, he would not otherwise have met. A second, interested in the financing of toll bridges and private roads made early contact with one of Ireland's leading figures in this field and had a second follow-up meeting with him. A third, holding a substantial market share in neighbouring states in the vegetable canning business has been briefed by the

Her Excellency Margaret M. Heckler, U.S. Ambassador, with Mr. Brian O'Connor, Solicitor and author of *"Doing Business in Ireland"*, and (back row left to right): Mr. Frank Harris, Executive Director of Minnesota Continuing Legal Education, and Professor Laurence G. Sweeney, Director of Training, Law Society.

appropriate I.D.A. Executive and put in touch with the right person in the nearest I.D.A. office in the U.S. The International Sales Manager of a cutlery manufacturer will be making a presentation to his Board on his return. Finally a marketing specialist in a regular visit to Ireland now expects to start "some kind of business deal" as a result of the Conference.

It will be some time before any kind of guesstimate can be made about concrete results flowing from the Conference, if indeed it can ever be measured. Tracing the genesis of a business initiative and following its outcome may not be a precise science. Even so, the decision has been made to make the attempt and in a year or so it may be possible to be more specific about whether — good relationships apart, and the value of these is not to be minimised — the very considerable work involved has been worthwhile. Certainly we hammered home the central message that the country desperately needs jobs, and it would not take many of these to justify the enterprise. □

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SPORTS NEWS

Law Society Athletic Club

The Law Society Athletic Club was founded in March 1985 and accepted as a member of the Irish Intervarsities Athletic Association. All apprentices are entitled to membership of the Club and therefore eligible for selection for the intervarsities championships.

The Club's first venture into intervarsities competition was at the 1986 Track and Field Championships held at College Park. Unfortunately the Club's two most experienced athletes, Gerry Dunne and Gerry McGrath were unable to compete owing to injury but a number of other members did participate. The Club also took part in the first Intervarsity Road Relays hosted by Maynooth College in February 1987. Although unable to field a full team and again without the services of Gerry Dunne the team nevertheless finished a creditable 8th of 12.

The 1987 Invervarsity Cross Country Championships were organized by NIHE Limerick and although the Club was again unable to field the full team of 6 in the team contest, the individual representatives were very successful, Gerry Dunne finishing in second place and Gerry McGrath in fourth.

In May of 1987 the same two competitors earned further honours in the Intervarsity Track & Field Championships held at the Antrim Forum with the New University of Ulster as host. On the opening day Gerry McGrath finished in second place in the 10,000 metres won by Robert Byron of Queens. Gerry Dunne qualified for the 800 metres final by winning his heat. The 800 metres final was very closely contested with the winner John Fox of UCD being timed at 1 min. 53.8 secs., while the second, third and fourth all recorded the same time of 1 min. 54 secs. Gerry Dunne was placed third. Attempts by the two athletes to win the 5,000 and 1,500 metres respectively proved more courageous than realistic and they had to settle for 5th place in each of these races.

Their good performances however led to their being invited to appear in the Dublin Universities Selection for a quadrangular match involving Yale and Harvard selection and teams from Dublin County Board and the Eastern Region. The competition in the 5,000 metre race was particularly stiffened although Gerry McGrath led the field as they entered the final straight he was outpaced and finished unplaced. Gerry Dunne fared better in the mile where he was placed 3rd in a closely contested race.

It is to be hoped that the success of the founder members will spur the remaining members of the Club to further achievement and other apprentices with athletic abilities to join the Club and continue its success. Although there is obviously a good deal of dedication and hard training required for success at intervarsity level each of the intervarsity functions has a substantial social side to them and the evenings festivities after racing have proved extremely enjoyable.

New blood is always required in students sports clubs and as the present members are likely soon to qualify and will no longer be eligible to represent the Club successors are urgently needed. Those interested should contact Gerry Dunne, Fitzwilliam Street, Dublin 2, or Gerry McGrath at 6 Parnell Square, Dublin 1. □

Solicitors Apprentices Rugby Club (SARC)

Last year the Solicitors Apprentices Rugby Club (SARC) was formed by John Gardiner with the intention of offering the beleaguered apprentice an outlet from the frustrations of the office. The response, we are glad to say, was enthusiastic and in all, three matches were played. After a lapse of a number of years we once again took on our old enemy, The Bar, for the Joseph McGowan Cup. The initial match was a draw and the replay ended in a narrow victory for Counsel.

Thanks to generous sponsorship from the Law Society, a trip was undertaken to Edinburgh to play our Scottish counterparts (which trip remarkably coincided with the International weekend). Unfortunately we were narrowly beaten by a rather big team from the Old Edinburgh Law Society, although we did have an interesting post match discussion on the problems of conveyancing unregistered land in the respective jurisdictions.

As the new rugby season dawns we are anxious to get in touch with any new players who are interested. The matches envisaged are our annual challenge match for the Joseph McGowan Cup against The Bar, hopefully a return fixture when our Scottish friends return for the International in January 1988, and very hopefully a trip to London in March 1988 to play our British counterparts.

Prospective candidates are asked to contact John Shaw, c/o J. A. Shaw & Co., Solicitors, Mullingar. Please also indicate your favourite position, your general availability and your prowess at sticking your Master for a few quid to cover your expenses.

P.S. — Absolutely no training involved!

Solicitors Golfing Society

International Match -v- Law Society Golf Club

The second of what is now an annual fixture between the Solicitors Golfing Society and the Law Society Golf Club (Great Britain) was held on the 10th and 11th September, 1987 at Tralee and Ballybunion Golf clubs.

Our guests declared the whole occasion, from being marooned by a spring tide at Tralee Golf Club, to the culinary delights of the Tankard in Fenit, the Ballygarry House Hotel and the spectacular scenery throughout, to be an unqualified success.

Our visitors emerged victorious by 13 points to 11 by winning the last match of the 24 played over the two days.

At the concluding dinner in Tralee, Mr. Brian Pettifer of the Law Society Golf Club presented a delightful Silver Trophy which was duly presented by Mr. Cyril Coyle (Captain SGS) to Eric Auckland (Captain, LSGC).

All are now looking forward to next year's fixture in England.

Teams:

Solicitors Golfing Society

Cyril Coyle (Captain)
Richard Bennett
John Bourke
Padraig Gearty
Owen O'Brien
Thomas O'Reilly
Frank O'Riordan
Cyril Osborne
David Pigot
Tom Shaw
Andrew Smyth
Gerard Walsh

Law Society Golf Club

Eric Auckland
David Barker
Craig Mitchell
John Jenkins
Michael Harvey
Beverley Charles
Andrew Rudkin
Brian Pettifer
Henry Marshall
Nick Stone
Alan Bull
Ian Nutton

International Match -v- Northern Ireland

This year's venue for the Enterprise Trophy was the magnificent Royal County Down Golf Club at Newcastle where the home team recaptured the trophy by a five match to three victory.

As is traditional, the trophy was presented to the victors after a memorable dinner.

E.B.S. Trophy for Young Members Soccer Winners

Cormac Brioscu, Business Development Dept., Educational Building Society, presenting the E.B.S. Trophy to Sharon Thompson, Captain of the winning Croskerrys Team. Included is Dan Murphy, Young Members Committee, The Incorporated Law Society of Ireland.

Results:

Northern Ireland		Solicitors Golfing Society
John Boston & Jim Donnelly	beat 2–1	Tom Shaw & Connor Breen
Paul O'Kane & Peter Conlon	beat 2 up	Frank Johnson & Patrick Macklin
Peter Stewart & Michael Gilfeather	beat 3–2	Brian O'Brien Cyril Coyle
Joe McGuigan & James Cullen	beat 3–2	Owen O'Brien & Gerry Walsh
Stratton Milles & John Rogers	lost 2–1	John Bourke & Declan Foley
Brian McCann & Denis Kearney	beat 2–1	Pat McGonigle & Michael Quinlan
Seamus Connolly Kieran Connolly	lost 1 up	Joe McGowan Brian Rigney
Rory McShane & Eugene Daly	lost 4–3	Richard Bennett Bill Jolley.

MEDICO-LEGAL SOCIETY OF IRELAND

Programme for Session 1987–1988

1. **Wednesday, 28th October 1987:**
   Rev. Dr. Patrick Hannon, D.D., B.L., Professor of Fundamental Moral Theology at St. Patrick's College, Maynooth — "Organ Transplants, an Ethical Problem?".

2. **Wednesday, 25th November 1987:**
   Kevin Haugh, S.C. and Dr. Dan Murphy, M.B., F.F.O.M., D.I.H., Director of Occupational Medical Services at the Department of Labour — "Occupational and Environmental Diseases and the Statute of Limitations".

3. **Thursday, 28th January 1988:**
   Dr. Declan Gilsenan, M.R.C.Path. — The Presidential Address.

4. **Thursday, 25th February 1988:**
   The Hon. Mr. Justice Ronan Keane, Judge of the High Court, President of the Law Reform Commission — "Reforming our Laws".

5. **Thursday, 31st March 1988:**
   Dr. Gerard Byrne, Consultant Child Psychiatrist, St. John of God's Child and Family Centre, Rathgar and the Charlemont Clinic — "True and False Allegations of Child Sexual Abuse".

Details in relation to the Annual Dinner and the Annual General Meeting will be published later.

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 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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Data Protection Legislation: A Task for the Dáil?

by
WALTER KILROY*

The amount of information held by computers on each of us grows as we become an increasingly computerised society. Banks, government departments and employers hold large quantities of sensitive personal records, which they are free to swop and compare if they wish, in the absence of any data protection legislation in Ireland.

Most European countries, as well as the US, Australia and New Zealand, have some kind of data protection legislation on their statute books. The principles involved are that (1) personal data (i.e. information relating to an identifiable individual) must be *accurate and open to inspection,* and if necessary, *correction;* (2) personal data must be *secure* from unauthorised access or distribution.

Credit reference agencies are often cited as an example of personal record keeping for which there should be controls. They provide information to businesses on an individual's credit rating. A customer may find a credit facility or overdraft being refused, unaware that this is because of information supplied by a credit reference agency. The information may be incorrect or out of date, possibly arising out of a misunderstanding or disputed payment, and is not available to the individual to contest.

Council of Europe Convention

The Council of Europe has drawn up a Convention for the Protection of the Individual with regard to Automatic Processing of Data. This came into force in October 1985. Its eight principles, set out in Articles, 5, 6 and 7, were incorporated in the UK's Data Protection Act (1984). Ireland was unable to sign the Convention however, as no legislation was being prepared by the government which would enforce it here.

The Convention may however prove to be the major factor in bringing about data protection legislation in Ireland. It restricts the type of information which may be transferred by computer from countries where it is in force to those without equivalent safeguards. The European countries where it applies include France and Germany, with Britain also operating restrictions. Ireland's trade with these countries could be adversely affected, as well as making the country less attractive for foreign investors, if databases are not secure and transfers are subject to restrictions.

The Constitutional basis for privacy has usually been accepted by the courts in a general sense. The recent High Court award to two journalists whose telephones were tapped *(Arnold and Kennedy vs. Ireland and Others)* (High Court, unreported, 12.1.1987) is relevant, however. The European Court of Human Rights found that a case of phone tapping in Britain was also in breach of the European Convention on Human Rights and Fundamental Freedoms *(Malone vs. UK,* 1984).

Seanad Bill

A private member's bill which had been introduced in the Seanad in September 1985 sought to set out rights regarding personal records. The **Freedom of Information Bill (1985)** introduced by Sen. Brendan Ryan, was referred to the Joint Oireachtas Committee on Legislation. It was not however, considered by the Committee in the lifetime of the last Dail, and so lapsed, and would have to be re-introduced. Part of the Bill dealt with public access to official documents, subject to certain exemptions. The other part dealt with "personal records", which provided that companies, financial institutions and public bodies (including government departments) were to be limited in the nature and extent of the personal records they could hold. This relates to the requirement in many other European countries that personal data may be held for specific purposes only, which in some cases must be registered with a national data regulatory agency.

The first concern in this area is that records be accurate. The 1985 Bill provided that an individual should have a right to see a copy of his/her own personal record (Section 35), with the exception of Garda records (Section 31(f)). It provided that the "data subject" might request corrections, additions, or deletions (Section 36), which could be appealed to court of law and that if unsuccessful, the person concerned might have a statement appended to the record, setting out the areas of dispute.

The other main concern is that of security. Section 31 of the Bill specifies that the written permission of the person concerned was to be required for any disclosure of information to an outside body, with certain exceptions. These included disclosures to the Gardaí, Revenue

Mr. Kilroy is the winner of the Law Society Journalism Prize 1987. This annual prize is intended to encourage interest in the writing of articles on legal topics among students studying for the Graduate Diploma in Journalism at NIHE, Dublin.

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Commissioners or pursuant to a court order, the Central Statistics Office, or for anonymous statistical purposes; or between public bodies in certain cases.

The Bill broadly followed the principles of the European Convention for the Protection of the Individual with regard to Automatic Processing of Data. The exception is that the Bill did not require strong security measures against outside access or alteration of files, or their accidental or unauthorised destruction. This features in all the existing European data protection legislation, and is one of the factors in the push for new laws here.

Also, the Bill did not provide for the establishment of a regulatory authority, or for any system of registration or licensing of personal data holders. The Swedish Data Privacy Act 1973, which was the first legislation in this area in Europe, is administered by a 'Data Inspection Board'. This employs about 30 people and handles complaints as well as licensing users. The Act was amended in 1979 so that licences were only required for holders of sensitive information, such as medical or criminal records.

The Freedom of Information Bill (1985) sought to make breaches of its requirements a criminal offence. All the comparable European legislation include sanctions, and the UK Data Protection Act (1984) makes it clear that compensation may be awarded by a court for loss or damage resulting from passing on incorrect personal data.

We are fortunate in having a decade of experience in over ten countries when it comes to drawing up Ireland's data protection legislation. Whether it comes from the business community or the civil liberties lobby, it seems that laws to prevent personal data abuses — intentional or otherwise — are firmly on the legislators' agenda. We await the early re-introduction of a Freedom of Information Bill. □

Law Society Family Law Seminar — 10 October, 1987

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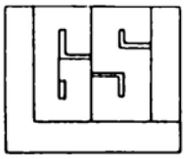

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Professional Information

Land Registry — issue of New Land Certificates

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.
23rd day of October, 1987.
J. B. Fitzgerald (Registrar of Titles),
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

James Dermody, Knockmoylan, Mullinavat, Co. Kilkenny. Folio No.: 1034; Lands: Knockmoylan; Area: 104a.0r.13p. County: **KILKENNY**

Julie O'Sullivan of 59 Woodlawn Park Avenue, Firhouse, Dublin 14; Folio No.: 39574F; Lands: Property situate in the Barony of Uppercross and Townland of Tymon South, known as 59 Woodland Park Avenue, Firhouse, Dublin 14; County: **DUBLIN.**

Patrick J. Fitzpatrick of Ballycarroll, Portlaoise, Co. Laois; Folio No.: 3730F; Lands: Ballycarroll; Area 0.820 acres; County: **LAOIS (Queens).**

Ellen Hayden of Kilmeany, Carlow, Co. Carlow; Folio No.: 7026 closed to 4757F; Lands: Kilmeany; County: **CARLOW.**

Edmond Fitzgerald of Shanballymore, Mallow, Co. Cork and **Joan Carey** of Mallow Road, Doneraile, Mallow, Co. Cork; Folio No.: 1784F; Lands: Shanagh; County: **CORK.**

Edward Gallagher of Thor, Crolly, Letterkenny, Co. Donegal; Folio No.: 17531; Lands: (1) Drumnasillagh; (2) Drumnasillagh (one undivided third part of part); Area: (1) 54a.1r.16p.; (2) 45a.2r.23p.; County: **DONEGAL.**

Maxwell Stamp of Annestown, Tramore, Co. Waterford; Folio No.,: 4216; Lands: Annestown; Area: 3a.2r.27p. County: **WATERFORD.**

Michael Nicholas of Soppog Muff, Co. Donegal; Folio No.: 2597F; Lands: Derryvane; Area: 26a.3r.8p.; County: **DONEGAL.**

Festus McCann, Syddan Hall, Lobinstown, Co. Meath; Folio No.: 26073; Lands: Glebe; Area: 1a.0r.0p.; County: **MEATH.**

John Madden of Caherconlish, Co. Limerick; Folio No.: 3897; Lands: Caherconlish; Area: 2a.0r.11p.; County: **LIMERICK.**

Thomas Christopher McCormack and **Mary Josephine McCormack,** of 32 Clyde Road, Ballsbridge, Dublin 4; Folio No.: 2576L; Lands: Dunleer; Area: 0a.0r.25p.; County: **LOUTH.**

Kildare County Council, Courthouse, Naas, Co. Kildare; Folio No.: 2894; Lands: Johnstown; Area: 7a.2r.32p.; County: **Kildare.**

Michael Garvey, Lisdeen, Kilkee, Co. Clare; Folio No.: 19; Lands: (1) Lisdeen; (2) Lisdeen; Area: (1) 7a.2r.36p.; (2) 0a.3r.26p.; County: **CLARE.**

Daniel Bennett of "Annaverna", Doyle Road, Turner's Cross, Cork; Folio No.: 57739; Lands: Ballincurrig; Area: 0a.0r.32p.; County: **CORK.**

Mary Agnes Harrington of Dromdaleague, Drimoleague, Co. Cork; Folio No.: 28279; County: **CORK.**

Daniel O'Farrell, 6 Rockfield Park, Coolmine Woods, Clonsilla, Co. Dublin; Folio No.: 21672L; County: **DUBLIN.**

Daniel and Michael Kerr, both of Tully, Ballysheerin, Letterkenny, Co. Donegal. Folio No.: 11045; Lands: Clooney and Gortnamona (parts); Area: 16a.3r.26p.; County: **DONEGAL.**

Lost Title Documents

IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF JOHN HEALY AND MARY HEALY IN RESPECT OF LANDS IN THE TOWNLAND OF SLIEVETHOUL, BARONY OF NEWCASTLE, COUNTY DUBLIN.

TAKE NOTICE that John Healy and Mary Healy, of Slievethoul, Brittas, County Dublin have lodged an Application for their registration on the Freehold Register free from encumbrances in respect of the above mentioned property.

The original documents of title 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. 87DNO2413. The missing documents are detailed in the schedule hereto.

Dated this 9th day of October, 1987.

SCHEDULE

a. Deed of Conveyance dated 26th April, 1963 — Nicholas J. Cosgrave and James Dillon to Michael Dowling.
b. Deed of Conveyance dated 9th September, 1968 — James Connor to Michael Dowling.
c. Deed of Conveyance dated 2nd November, 1972 — Michael Dowling to John Hinch.
d. Deed of Conveyance dated 12th September, 1974 — John Hinch to John Healy and Mary Healy.

M. O'Neill,
Examiner of Titles

Lost Wills

O'NEILL, Maurice, deceased, late of Tyredagh, Tulla, who died on 6th August, 1987. Will anyone knowing of the whereabouts of a will of the above-named deceased please contact James M. Nash & Co., Solicitors, Scariff, Co. Clare.

CASEY, Michael, deceased, late of 191 Downpatrick Road, Crumlin, Dublin 12. Will anyone having knowledge of the whereabouts of a will of the above-named deceased, who died on 26th January, 1984, please contact Delahunty O'Connor & Co., Solicitors, 179 Crumlin Road, Dublin 12.

LYONS, Thomas, deceased, late of Feaghmore, Eyrecourt, Ballinasloe, County Galway. Will anyone having knowledge of the whereabouts of a will of the above-named deceased, who died on 30th May, 1987, please contact Owen M. Carty, Solicitor, Irishtown, Athlone, Co. Westmeath. Tel. (0902) 74418/75518.

BLAKE, R. Charles, deceased, late of 41 Elton Park, Dun Laoghaire, Co. Dublin. Will anyone having knowledge of the whereabouts of a will of the above-named deceased, who died on 19th July, 1987, please contact Collins Crowley & Co., Solicitors, 30 Kildare Street, Dublin 2, Tel. 767192, 767193. FAX 616027.

KEATINGE, William George, deceased, late of Flat 8, Cambridge Court, Cambridge Road, Dublin 6. Will anyone having knowledge of the whereabouts of the will of the above-named deceased, who died on 31st August, 1987, please contact Collis & Ward, Solicitors, 1 Lr. Merrion Street, Dublin 2.

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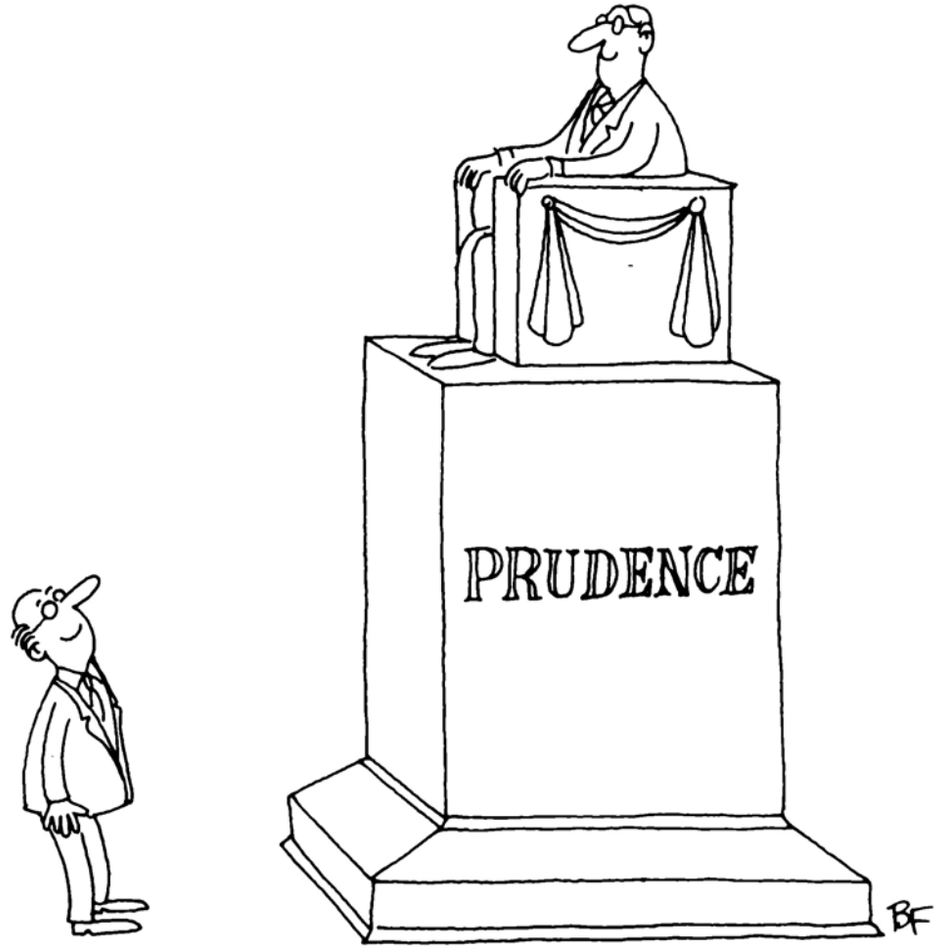

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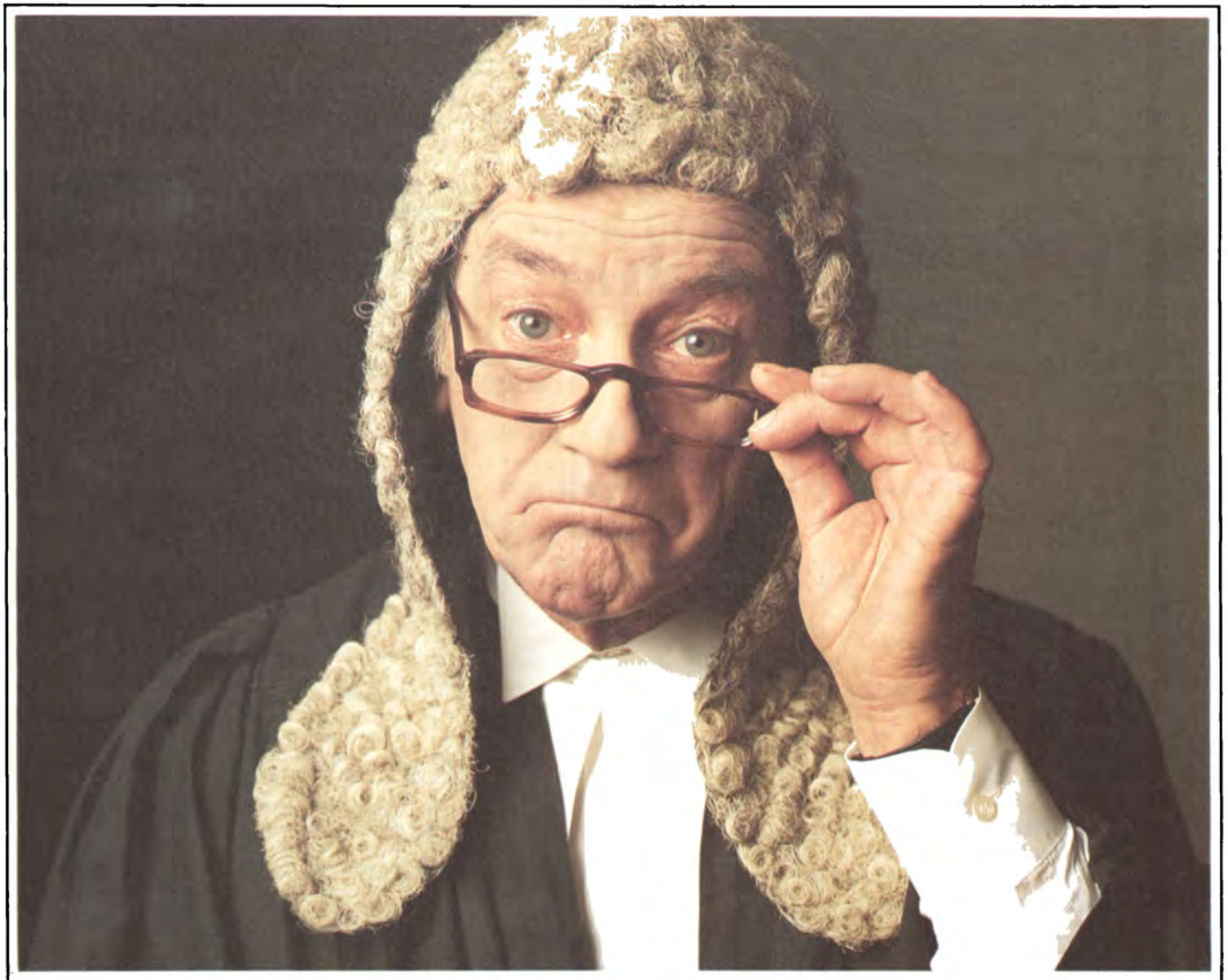

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 81 No. 9 November 1987

"Meeting the Challenge of Change".

John Loosemore (left), and Robert Parsons, speakers at the recent series of one day seminars hosted by the Public Relations Committee of The Law Society.

- Role and Function of the Lawyer in the Modern World
- Social Welfare Payments and Assessment of Damages
- Debenture — attestation of Company Seal

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 81 No. 9 November 1987

Viewpoint

Severe criticism, much of it grossly unfair, has been levelled at the performance of the Gardaí in their hunt for the kidnappers of the unfortunate Mr. John O'Grady. We have been treated to the curious spectacle of the Minister with jurisdiction over the Gardaí joining in the criticism while, at the same time, *The Irish Press* was calling for resignations in the wake of the matter. In other countries it would have been the Minister himself who would have been offering to resign. Unfortunately, perhaps, we have not established a tradition of Ministers accepting the Truman Doctrine that "the buck stops here" and so the Minister, as with a number of his predecessors on equally embarrassing occasions, felt no pressure to go.

That there have been failures in the course of the operation cannot be denied - but there have been far greater successes - the victim was rescued alive as a result of the courage of two ordinary Gardaí, one of whom has paid a severe price for his bravery, and a number of persons have been located and charged, all as a result of ordinary foot-slogging police work - investigation and follow-up.

When we look at the cause of the failures, let us not be too readily impressed with the calls for "more and better resources". "Resources" is a code word with two main meanings:-

1. expensive equipment and technology, and
2. more overtime.

With hindsight, the Conroy Commission's recommendation of overtime which brought short-term industrial peace to the force has, like so many other short-term solutions to industrial relations maladies, proved to contain the germs of a worse disease. The time has come to reconsider seriously the appropriateness of a rigid overtime system in a police force such as ours. That is not to say that Gardaí should not be adequately rewarded for commitments which they are required to make beyond the norm.

The equipment solution is a new facet of the old Irish Public Service fallacy that providing something that everyone can see is patent evidence that the problem has been solved! It used to be new buildings that provided this evidence until it became appallingly clear that we had far too many public buildings for our needs. Buildings have now been replaced by "new equipment and the most modern technology" as the ideal solution. Whether the equipment and technology provides any more genuine solution to the problems than the buildings used to is extremely doubtful.

If we analyse the failures at Midleton, Limerick and Tipperary in the search operation, it does not appear that lack of resources was a significant factor. What does appear is a failure to establish and operate proper systems. The Midleton group of Gardaí, perhaps prematurely closing in in advance of the arrival of their military support, found themselves outflanked. Gardaí at check points are said to have waved a taxi with two suspects through more than one check point. Finally, the arrangements for the detention of potentially unwilling suspects at Tipperary Garda Station were inadequate. The conclusion to be drawn from this is that the Gardaí's methods of operation reveal deficiencies in organisation which may well be traced ultimately to the inadequate training of the force.

We have commented before on the need to implement the Report on Probationer Training in the Garda Siochána. It has lain on the desks of Ministers for Justice in two successive governments for far too long. The production and implementation of the Report on Officer Training needs to be expedited. Hopefully, the fact that the new Commissioner was a member of

(contd. on p. 287)

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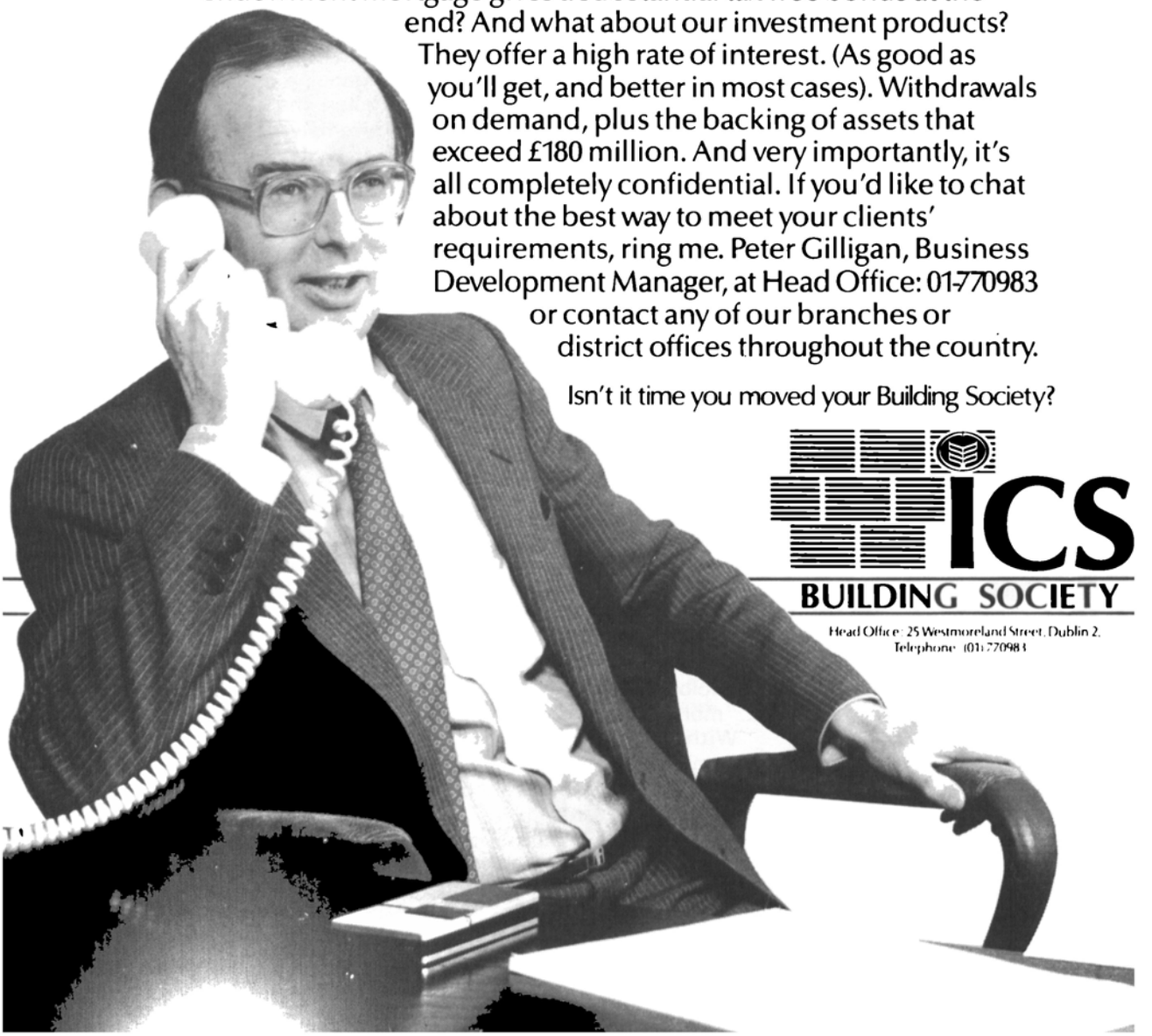

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Role and Function of the Lawyer in the Modern World

This article is intended to examine in general terms the role of the lawyer from his original function to that which is prevalent today. There is a crisis in the law in the sense that there is doubt and uncertainty about the future path that lawyers should take and hence the rules that should govern the profession. Lawyers are, by nature, intensely conservative and reactionary save for the few who like to shock and would espouse any cause that was radical, extrovert or eccentric. When doubt arises in any field it is best to return to basic fundamentals and accordingly it is worthwhile examining the original reasons for the calling or profession of lawyers.

by
DAVID BIART
Lately Senior Partner, Thomas Eggar & Son, Chichester, England*

There have been lawyers in existence since the world began (although by tradition theirs is not the oldest profession!). As soon as human beings began living together in any kind of community it became necessary to formulate rules for governing that community, in order to make it thrive and develop its economy and culture for the sake of its existence both in present and future generations. Lawyers were necessary to assist in the making of laws and in their interpretation and to assist the administration of justice for the individual according to the particular ethos to which a community found itself by choice or circumstance governed. Laws would vary in their complexity depending upon whether the community was small and simple with few wants or whether it was part of the sophisticated civilisations of the middle and far east. It was, from these two cradles of civilisation that culture spread to the rest of the Mediterranean, to North West Europe and the New World. Perhaps the continent of Africa, as a whole, stayed isolated in its own culture.

Structure of Society

Briefly, communities were originally nomadic, continual movement being necessary to find food for families and livestock. As the community grew in size and increased in knowledge it remained in a settled place relying for its existence upon agriculture. It was not long before the inquisitive and acquisitive nature of the human species could only be satisfied by trade between centres. Inevitably this led to the building of empires depending for their structure upon geographical boundaries rather than those set by race or religion.

The First Literacy

The pace of development was accelerated by communication through the written word, however simple may have been the original hieroglyphs. There can be little doubt of the power of the written word, as distinct from the spoken word. A document, however simple, was a data bank in its own right and those persons, through literacy, who could retrieve from it and could communicate its contents to each other had an advantage over those who were illiterate.

The Second Literacy

The impact of printing dramatically increased the number of literate persons and speeded the whole

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process of exchange of ideas and communication of thought. John Maynard Keynes propounded that ideas were the most powerful influence in human society. The impact of printing upon society was tremendous and may be properly termed the second literacy.

The Third Literacy

This is the mechanical assembly of words and figures inaugurated by computer technology. Without doubt this is the most revolutionary of the grades of literacy, boosted as it is by the speed of modern communications whether radionic or cable.

Work patterns

The establishment of information technology in all its forms has to be coupled with a dramatic change in work patterns in the world from the reliance upon manufacturing industries (making things) for the employment of labour and the earning of wages to a reliance upon what are popularly called the service industries (which may mean different things to different people).

Transcendent influences

Superimposed upon the powers of nation states and the privileges and disciplines, or freedoms and restrictions, which those powers prescribed through their Constitutions for their subjects, have always been the intellectual influences of human beings, no matter by which nation state they might be governed. Hence religion crossed the frontiers defined by national boundaries and interfered with the laws of nation states. Because of this influence and the extra territorial use to which it was put, individuals owed as much to the head of their religious sect as to the head of the nation state which was their home. This was the cause of savage war in all parts of the world. In Europe it was the conflict between Roman Catholics and Protestants. In other countries the conflict lay between Mohammedan, Hindu and Christian. Life and death were and are governed by the allegiance of an individual to religious belief and submission to the rules of that belief in the place of the rules of the nation state.

Religion transcended national boundaries and still does, causing grevious dissension in many parts of the world from Ireland through the Balkans into Russia, the Middle East, India and beyond. It is true to say that there is no part of the world where these conflicts between national loyalties and transcendent loyalties and the power that each brings has not caused and does not cause not only comfort and joy but hardship and tragedy.

In more recent times, from the middle of the last century, there has been the parallel influence of humanist doctrines of which Marxism is the most obvious example. These ideologies, whether divine or human, pay no regard to national boundaries and the laws that govern individual nations bounded by a line upon a map. The ideologies and the intellectual force behind them have culminated in the formulation of a new set of laws generically called Human Rights. Whatever may be said, these are bound to conflict with national laws and 'interfere' with the internal laws of nation states.

Role of the lawyer

The above is a brief and inadequate thumbnail sketch, upon an enormous canvas. What has it to do with the role and function of the lawyer and his service to the consumer? The answer must surely be that the impact of the Third Literacy coupled with the change in the pattern of work has altered the function of the lawyer from where it has lain in the developed countries in the last two centuries. This development, along with the transcendence of ideas across national boundaries, requires the reassessment of the role and function of the lawyer. Without such reassessment it is difficult, if not impossible, to know how he can serve the consumer.

Function of the lawyer

The original function of the lawyer was that of an advocate. He had to represent the views of his client to the power that administered the law. He was necessary for two reasons. He was articulate and learned (that is to say that he could read and write) and he also knew what the law was. Initially, his concern with the administration of property was limited. By way of example, in England, property was transferred by livery of seisin. This was simply the handing over of soil on the boundaries of land before witnesses and was not committed to writing. The writing of wills and their proof (or probate) developed gradually but was administered by the Church and not by the State. The necessity to prove a will and involve a lawyer is only now coming about in some places in the world.

Hence, by degrees, lawyers extended their practice from representation of their clients before a court and became more involved not only in the law of property of all kinds but in the use, development and administration of it. Property, in its scope, became very wide. Corporeal hereditaments are easy to recognise but the great development has been in those that are incorporeal. More and more the lawyer is concerned not just with land but with the use of land and rights in it; with copyright, patents, trade marks — intellectual property of all kinds; with shares in companies and the issue and transfer of them; with the holding of bonds and options for futures; with the property in a job whether secured by a service contract or by means of a statute; with a licence to do something whether to fly an aeroplane or fleet of aeroplanes or to extract minerals; with the property rights of a state to levy taxes and keep them; with the property of an individual in a live performance. The list is becoming endless. All of these forms of property have become more and more complex and led to the development of that person known as 'the business lawyer'. He is quite distinct from the advocate and his function is quite different from that of the advocate. The business lawyer and the businessman are complementary to each other. Furthermore, the function and knowledge of the business lawyer overlaps those of other professions — the accountant, the architect, the surveyor, the patent agent, the stock broker, the insurance broker, the commodity broker, the actuary, or the licensed dealer in investment business. Not only is the business lawyer involved in advising on the

many and varied forms of property but he is concerned with administering the organisations that own these properties as a director or manager at various levels.

This must raise the question whether the business lawyer is able to continue in the traditional profession of law in competition with large institutions whose business is that of property, transfer of property, mortgages, pensions, investment, broking of various kinds, banking, insurance or whatever. These businesses are highly profitable and an individual who chooses to be a lawyer expects to be paid the same as those employed by such institutions and if he cannot do so then he leaves the profession of law as such and joins the outside business world. The question is — does he cease to be a professional in the true sense of the word? Has his function changed?

Money

This heading is used rather than 'remuneration' or 'compensation' because money in its strict sense is purely a lubricant (although sadly it has come to be regarded as a commodity in its own right) and is no more than a measure of productivity. Productivity is the result of effective work; i.e. activity that creates a product that has a market and hence has worth. Digging a hole in the ground and putting the soil back is hard work but worthless and hence cannot be classed as production. Extracting minerals or growing food surplus to requirements lacks value. Lack of effective work equals poor productivity equals poverty. True productivity creates wealth. Without wealth *people* cannot be looked after and will ultimately die in the streets as beggars. The history of civilisations is littered with examples. The process is not always slow.

Increasingly, as business has become more complex, wealth has accumulated in the hands of incorporated bodies, controlled more and more by a diversity of shareholders, and hence the business lawyer has been remunerated by a slice of that wealth. To do so, he has had to specialise, because of the need of that wealth-creating body to be advised on and have its property protected by someone knowledgeable in the complexity of the laws by which its business is governed. The gulf between the amount of money received by the business lawyer and the lawyer engaged in general practice is vast. Yet the need for the general practitioner is greater than ever. Private individuals wish to be advised upon their rights and to have them represented to a court, to a tribunal or to another private individual. The dedication and responsibility of lawyers in this field is as great or greater than those engaged in business law. The sense of personal injustice in the mind of an individual is not easily erased and the prevention of it and consequently the future of the individual and his ability to cope with life is in the hands of his lawyer. The adrenalin flows with the same, if not greater force. The money received by the advocate in general practice is usually inadequate. The private client can frequently not afford to pay an adequate fee, and if he can does not regard it as justified. The system of taxation of costs actively encourages that.

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The state, i.e. the government of a country, can step in with a system of legal aid or the funding of advice centres but this has three disadvantages:

(a) Governments will not pay adequately for good lawyers in private practice, and the system becomes stuck in the treacle of bureaucracy.

(b) He who pays the piper calls the tune and the employment by the state of an advocate will ultimately colour the nature of the advice given to an individual. Pressure will be brought upon the lawyer in all kinds of subtle ways. However altruistic may have been the original intention the resultant oppression is almost certainly inevitable.

(c) Good lawyers, by nature, possess independent minds and the best of them may well not wish to be engaged in what they will regard as a servile role.

There can be no doubting the high costs of litigation which puts it out of reach of the majority of private clients. This is partly due to the over bureaucratic structures of the legal machine itself. It is also true to say that people as a whole, in the free world, take their freedom for granted and do not expect to pay for it. They undervalue how precious freedom is. They will pay enormous sums of money for a shiny new motor car full of gadgetry or elaborate commodity products, but are prepared to pay little or nothing for the quality of life that enables them to enjoy these things, namely — freedom of expression and from oppression. To this extent, the consumer is his own worst enemy.

Conclusion

From the above sketchy synopsis of the modern environment the following conclusions can be drawn:

(1) Lawyers are divided into two categories which need different regulation:

(a) *The Contentious Lawyer* who will give general advice and act as an advocate. He will have right of audience before every court, although he may need a special licence to appear in the final court of appeal. He will possess a high degree of academic knowledge. He will employ paralegals who the lawyer, himself, will largely have trained to assist him by means of drafting documents, pleadings, letters etc. The education of paralegals will be general. Their training in an office will be specific and narrowed to a particular function. Hence their knowledge of law, as such, need only be limited provided they have good understanding of the use of language and the Third Literacy. Their task is to relieve the lawyer from the drudgery of routine drafting and interviewing. The Contentious Lawyer will remain an Officer of the Court.

(b) *The Business Lawyer.* He will be a specialist in his chosen field and will be employed by a business house: this may be a merchant bank, insurance company, or financial institution. To compete with such business houses, large firms of business lawyers — the city practice — will form themselves into such institutions. They will be incorporated with limited liability and capable of support by outside equity participation. They will be multidisciplinary. The Business Lawyer will not be an Officer of the Court.

(2) The rules of conduct of law and bar associations will need to be altered to meet these changing requirements.

(3) The conflict will have to be reconciled, one way or the other, between the costs of Regulation and the much lesser costs of Competition. The conflict is between protection of the consumer by Regulation on the one hand and the freedom of the practitioner upon the other.

(4) There will be differences between developed countries and those still developing. Possibly the greater percentage of literacy in industrial countries reduces the necessity for greater regulation. The professions grew up because their members were the only literate and articulate people. George Bernard Shaw said that the professions were a conspiracy against the public; the professions would reply that their members put the interests of others first.

(5) The lawyer as such should revert to his traditional role of advocate and general practitioner as distinct from the business lawyer. The function of the contentious lawyer and business lawyer needs to be divided. It would be wrong for there to be equity participation in the outcome of a dispute in court. The ancient rules of maintenance and champerty must surely be still applicable.

(6) Only licensed practitioners should appear in court. Their fees should be freely negotiable and not subjected to control by a taxing master (save where costs are in the cause). Price control does not work. Lawyers are being required to run their offices on business lines. No business can operate successfully by the rigid system of price control that the taxing master imposes. Control should be more by competition than by regulation.

(7) Contingency fees militate against the quality of the product and encourage high pressure tactics in a market not made for them. The product of the lawyer is his advice and ability to present his client's case or represent his interests. Remuneration or compensation for that product should be in a free market. The main criterion for charging will be time. Practice licences will require all lawyers to state their terms of business in advance.

(8) The licensed advocate may practise on his own or in partnership. He or his firm may enter into a contract or series of contracts with firms of business lawyers or business houses. The old-fashioned 'retainer' may return.

(9) In general terms, and in order to meet the requirements of the modern consumer, the rules of conduct of the profession, i.e. the terms of a licence to practise, need greater liberalisation. Lawyers are required to run their practices on commercial lines and accordingly, and (hard though it is for the majority of lawyers to accept the idea that the professions are not a race apart) the law will become one of the other service industries. To survive and thrive commercially the profession will have to retain a highly competent standard of work.

(10) The degree of regulation by the professional licence will vary according to the degree of development reached by the particular country. The more advanced the country, the greater will be the liberalisation.

(11) The issue of licences will remain under the control of the profession with very high standards of examination and pupillage.

(12) The consumer must recognise that he cannot have his cake and eat it. Regulation and competition are irreconcilable. The recent dispute between the Office of Fair Trading and the Securities and Investment Board in the United Kingdom has made this plain, if it was not obvious before. Concentration upon the high calibre of entry into the profession, that is to say those licensed to practise law, allows greater liberalisation of regulation.

The above propositions in the conclusion are put forward as a basis for discussion and with no pre-conceived notion that they are a cure for all ills. It must be said, however, that failure on the part of the profession to recognise the demand for commercialisation and on the part of the consumer to accept the risks of less regulation will lower the quality of the lawyer and destroy professionalism. By its nature, a high degree of commercialisation produces a high quality product. That is what the consumer wants and he will reward the lawyer accordingly. □

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* David Biart is Co-Chairman of Committee 10 (Professional Development and Technology) of the International Bar Association's Section on General Practice. This article was first presented as a paper at the SGP's 4th Biennial Conference, Montreaux, June 1987, at a Session of Committee 10. It was published in the September, 1987 issue of the *International Legal Practitioner,* and is reprinted with kind permission of the author and publisher.

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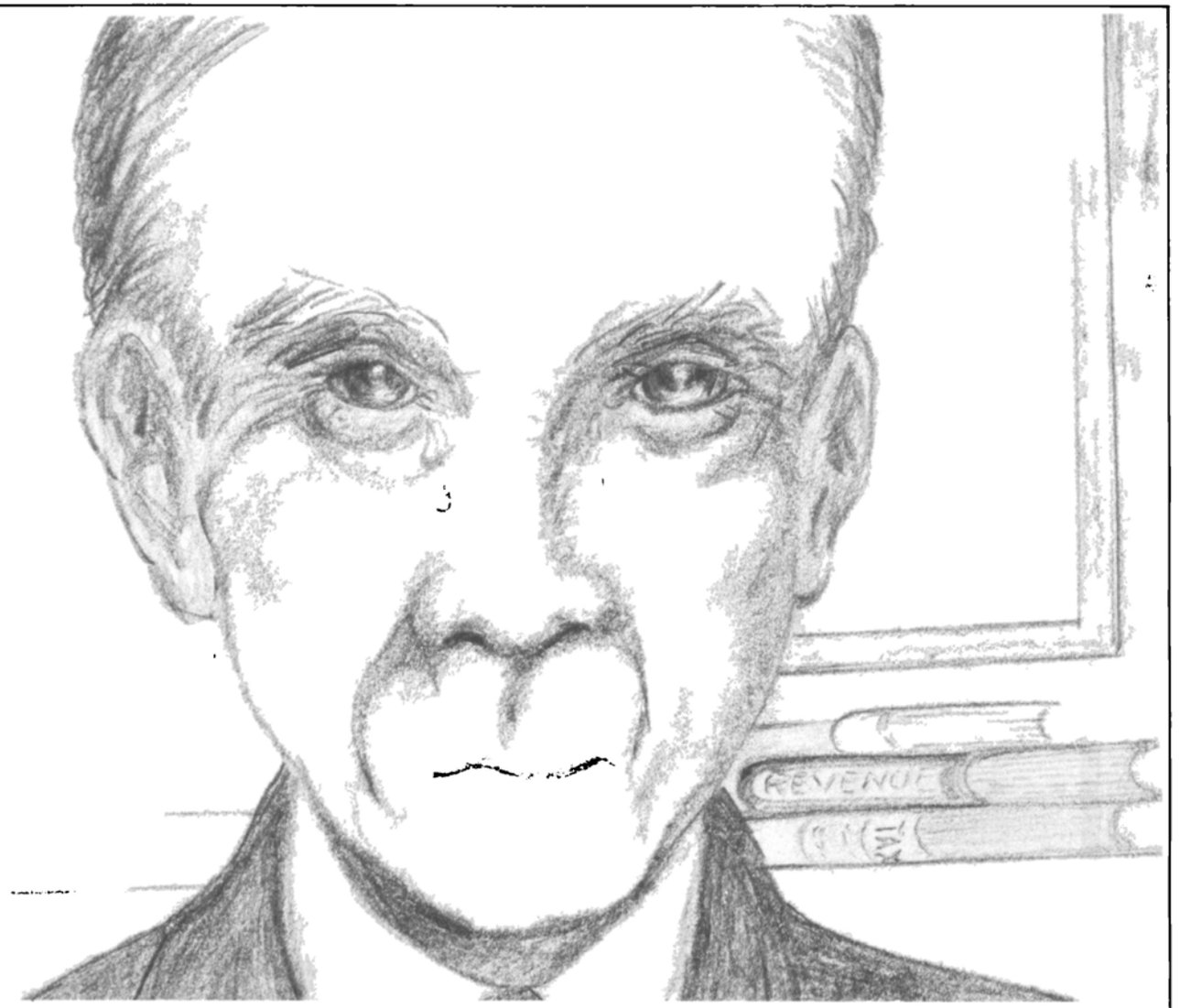

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Practice Notes

Farm Tax

The Farm Tax Act of 1985 provided for the introduction of a new Tax on agricultural land called "Farm Tax"; the Tax was to be an annual one, payable to the Local Authority in whose functional area the land is located. The occupier of land was to be liable for the Tax calculated at a fixed sum per adjusted acre of his holding ("a taxable farm"). It was envisaged that an appropriate rate of Tax per adjusted acre would be assessed each year by the Government.

It was originally envisaged that the Tax would be fully operative from the 5th April 1986, but classification of holdings had not gone as expeditiously as the Government had hoped. The Farm Tax Commissioner and his staff initially focused on classifying farms of over 150 adjusted acres. Statutory Instrument No. 321 of 1986 provided that holdings of 150 adjusted acres and over would be liable for Farm Tax at £10 per adjusted acre. Farm Tax paid *before 30th June 1987* could be set as a credit against the Income Tax due for the years 1985/86, 1986/87 to 1987/88.

The Minister for Finance in his 1987 budget speech announced the abolition of Farm Tax, and enabling legislation is due to be introduced. Accordingly, Tax was payable for only the year (1986) and then only in respect of farms of 150 adjusted acres or more which were included in the 1986 Farm Classification List. The Local Authority maintains a Farm Tax Record of all farms within its functional area which are liable to the Tax. The time for appealing the classification of an occupiers farm for 1986 has expired.

Section 21 of the Act provides that Farm Tax is a charge on the lands and is to be treated as one of the burdens referred to in Section 72 of the Registration of Titles Act 1964 (attaching to the land even though not registered as a burden on the Folio). The Charge is similar to that for Capital Acquisition Tax, in that the lands do not remain charged as against a bona-fide purchaser or mortgagee after the expiration of twelve years from the date on which the Tax became due.

There is an additional provision that if there is a bona-fide sale or mortgage for a consideration of less than £20,000 then, if the total consideration between the parties for sale or mortgage within the previous two years do not exceed £20,000, the land should be treated as free of the charge.

There is provision for obtaining a Certificate of Discharge from the Local Authority. The Act envisages that a fee may be charged for such a Certificate. On purchasing, leasing or taking a mortgage or charge on agricultural land where the consideration or the amount of the mortgage or charge exceeds £20,000, enquiries should be made as to whether the property formed part of a holding included in the 1986 Farm Classification List. If it did, evidence of payment of the Tax should be obtained. It should be noted that in assessing the liability of a farm to Farm Tax, the Commissioner had regard to all the lands occupied by the farmer, even though these might be registered on a number of different Folios or located many miles away from each other. This being the case, it would not be sufficient for a purchaser/lessee/mortgagee merely to check whether the lands acquired formed part of a Folio comprising less than 150 acres. Enquiries must be directed to the totality of the vendor/lessor/mortgagor's lands.

When purchasing, leasing or taking a mortgage or charge of agricultural land where the consideration exceeds £20,000 it is suggested the following Requisition be raised:

> Is the property part or all of a Taxable Farm within the meaning of Section 3 of the Farm Tax Act 1985. If so, and the consideration/mortgage debt exceeds £20,000 either:-
>
> (i) in this sale/mortgage or
>
> (ii) in the aggregate of this and previous sales/mortgages in the last 12 years between the parties, furnish a certificate of Discharge from Farm Tax for 1986.

It is understood that proceedings challenging the constitutionality of the Farm Tax legislation have been instituted in the High Court. While it is understood that some District Justices have adjourned summonses brought under the legislation, purchasers solicitors would of course still be advised to make the appropriate enquiries. □

Certificate of No Deaths or Voluntary Dispositions on Title

A Certificate is required in the case of registered land where the Vendor/Lessor/Mortgagor has not been registered as full owner for twelve years or more. A Certificate is not required with regard to unregistered land as the devolution of the Property will be clear from an examination of the Title.

Under the provisions of Section 47 of the Capital Acquisition Tax Act 1976 Gift Tax and Inheritance Tax are a Charge on the property forming part of the Gift or Inheritance. The Act provides that the Tax shall not as against a bona fide Purchaser for value remain charged after the expiration of a period of 12 years from the date of the Gift or Inheritance. A Purchaser/Lessee/Mortgagee of Registered Land should obtain on closing a Certificate confirming that there have been no deaths or voluntary dispositions on title within the previous twelve years. A Certificate of no Deaths or Voluntary Dispositions is not required for unregistered property as the position would be apparent from an examination of Title. In the event of their being deaths or voluntary dispositions on title within the previous twelve years an appropriate Certificate of Discharge from Capital Acquisition Tax will be required.

Under the provisions of the Bankruptcy code an Official Assignee in Bankruptcy has power to set aside Voluntary Dispositions in cetain circumstances. The Conveyancing Committee has previously recommended that should a voluntary disposition appear on title within the previous 10 years a Declaration as to the Disponers solvency at the date of the disposition

should be furnished. The practice accordingly grew up of seeking on closing a Certificate that there were no voluntary dispositions within the previous 10 years. The Certificate mentioned above as to deaths or voluntary dispositions within the 12 year period covers in addition to dispositions which might give rise to CAT liability any dispositions for which a Declaration of Solvency will be required. A Certificate that there were no voluntary disposition for the previous 10 years would be adequate for Bankruptcy purposes but inadequate for Gift Tax purposes (Gift Tax being a Charge for 12 years).

The Committee recommends that the former practice with regard to registered land of obtaining a Certificate that there were no deaths on title within the last 12 years and no voluntary dispositions on title within the last 10 years should be altered and a Certificate should be obtained that there were no Deaths of Voluntary disposition within the last 12 years. □

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Malicious Injury Acts, 1981-'86

The following is the text of a Practice Note issued on 30 October 1987, by the President of the District Court.

In regard to the weekly malicious injury list in District Court No. 10, Dolphin House, Essex Street East, Dublin 2, a practice has grown up whereby claims which have been adjourned generally (presumably by reason of settlements) are re-entered and again adjourned generally. In some instances there is a repetition of this procedure over many months. This is a time-wasting exercise for the Courts, for Court Officials and staff and for the parties, their witnesses and legal advisors.

I understand that a number of claims, adjourned generally from time to time, have in fact been re-entered for weekly Court lists for some months to come. In regard to these, in order to give all parties adequate notice, it is proposed that applications to further adjourn generally may be entertained up to and including the Court list for 28th January, 1988, and thereafter any claims should be relisted only for consent Decrees or for hearing on the relisted date or on a date to be fixed by the Court, or for such other order as the Court sees fit.

I would ask for the co-operation of solicitors for applicants and Local Authorities in the implementation of this new procedure which is intended for the benefit of all, and in the interest of efficiency in Court administration. □

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Social Welfare Payments and the Assessments of Damages in Civil Actions

One of the areas in which social welfare law most often features in a solicitor's practice relates to the interaction between social welfare payments and the award of damages in a civil action. The best account of this area of the law is by Dr. Robert Clark in an article entitled "Damages and the Social Welfare 'Overlap'", (1984) 19 *Ir. Jur. (n.s.)* 40. It is not intended in this brief note to cover ground already dealt with by Dr. Clark, but rather to focus attention on the difficulties inherent in a not uncommon practice among solicitors in this area. I refer to the practice of reimbursing Health Boards for Supplementary Welfare Allowance (S.W.A.) paid to successful plaintiffs in personal injuries cases.

by
Gerry Whyte
BCL., LL.M., M.A., B.L.
Lecturer in Law, Trinity College.

The S.W.A. scheme is a means-tested scheme, provided for in ss. 199 to 222 of the Social Welfare (Consolidation) Act, 1981 and administered by the country's Health Boards, which is meant to ensure that every resident in the State has a certain minimum income. Many people rely on S.W.A. while awaiting a decision of the Department of Social Welfare as to their entitlement to other payments, or in order to top up such payments. For approximately 50,000 people, however, S.W.A. is their primary source of income, usually because they have exhausted their entitlement to social insurance, or had inadequate social insurance records to begin with, and are ineligible for unemployment assistance because they are incapable of work. Where such a person applies for S.W.A. and is the plaintiff in a pending personal injuries claim, the general practice of the Health Boards would appear to be to grant the allowance on condition that the claimant give an undertaking in writing to reimburse the authorities out of any damages subsequently awarded or agreed. Is such an undertaking legally effective, or can a solicitor advise the claimant to retain both the damages and the S.W.A.? Surprising as it may seem, the validity of the undertaking would appear to be doubtful.

In the first place, the Health Boards are not given any express or implied powers to distribute S.W.A. by way of loan, yet that is surely what is attempted in demanding that the claimant undertake to repay any S.W.A. granted to him. Consequently it is arguable that the Health Boards are acting *ultra vires* in insisting on such an arrangement. Furthermore it is significant that s.206 of the 1981 Act does empower the authorities to impose certain conditions on the granting of S.W.A. — the claimant may be asked to register for employment or to apply for such other benefits or assistance as he might be entitled to — but makes no provision for the type of arrangement currently under consideration.

Can the Health Boards invoke the doctrine of estoppel against the claimant? Generally speaking a statutory authority cannot extend its powers by creating an estoppel — *Re Green Dale Building Co.*[1] This principle is usually applied in a situation in which the other party seeks to rely on a representation or promise made by the authority — see e.g. *Power -v- Minister for Social Welfare.*[2] But can the authority itself rely on a promise made by the other party? Where the effect of that reliance would be to allow the authority to engage in activity which would otherwise be *ultra vires* it would seem that the answer in principle should be no.

Finally, it should be noted that the 1981 Act authorises the Health Boards to recover S.W.A., initially intended as an outright grant, in five specific situations. These are as follows:

1. Ss.130(3), 152 and 194 allow the Health Boards to recover S.W.A. out of arrears of benefit or assistance payable to a claimant by the Department of Social Welfare.
2. S.213(2) permits the Boards to recover S.W.A. paid in cases of urgency to persons in remunerative full-time work.
3. S.215 empowers the Boards to recover S.W.A. paid to a claimant from any person liable to maintain such claimant.
4. S.216(4) empowers the Boards to recover expenses incurred in providing for the burial of specified persons.
5. Art. 10(1) of the Social Welfare (General Benefit) Regulations 1953, (S.I. No. 16/1953) authorises the Boards to recover S.W.A. erroneously paid to a claimant as a result of the latter knowingly making a false or misleading statement or misrepresenting or wilfully concealing a material fact.

However, none of the foregoing covers the situation of the claimant with the potentially successful personal injuries action. Consequently one is led to conclude that, at present, there is no statutory basis for seeking to recover S.W.A. paid to such a person.

No doubt this is a lacuna in the law which deserves attention and a reform giving the Health Boards the powers which they believe they currently enjoy does not appear unreasonable. At the same time it should be pointed out that at present the defendant can benefit from the payment of S.W.A. to the plaintiff, as s.50 of the Civil Liability Act, 1961, as amended by s.2 of the Civil Liability (Amendment) Act, 1964, which instructs the courts to disregard certain welfare payments in computing damages in personal injuries cases, does not include *means-tested* payments in that list.[3] Consequently any reform should take into account the overall position of the parties to the litigation. Pending such reforms, however, solicitors would do well to pause before parting with their client's money to the Health Boards, lest that should result in more professional negligence actions. □

Footnotes
1. [1977] I.R.256.
2. Unreported, High Court, 9 July 1987.
3. See Clark, *loc. cit.* pp. 41-42.

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Law Reform Commission— Conveyancing and Land Law Reforms

Shortly after it took office in January 1987, the newly appointed Law Reform Commission set up a working group on conveyancing and land law. The members of the working group are Miss Justice Carroll, Mary Laffoy, S.C., George Brady, S.C., Professor James C. Brady, Ernest B. Farrell and Rory McEntee, Solicitors, under the chairmanship of John F. Buckley, a member of the Commission.

The Commission had been asked by the Government to make recommendations in this area that would lead to the reform of conveyancing law and practice in areas where this could lead to savings for house purchasers. The Group has accordingly adopted as a primary target the identification of anomalies in the law that cause difficulty or delays in normal house purchase and other conveyancing transactions. The Group is naturally anxious to obtain suggestions from practitioners and academics to assist them in identifying anomalies in this area of law and difficulties which be readily be dealt with.

The Group has already agreed to consider at a future time certain proposed amendments to aspects of land law, including the following:

1. The abolition of the fee tail estate.
2. The repeal of the Rule in *Shelly's* case.
3. The repeal of the Rule in *Whitby & Mitchell.*
4. The modernisation of the law governing Powers of Attorney and the possible introduction of an enduring Power of Attorney.
5. The repeal of the Statute of Uses.
6. The introduction of a trust concept to co-ownership of interests in land.
7. The abolition of the Rules restricting the enforcement of positive covenants in relation to freehold land.
8. The introduction of a provision permitting contracting out of the Landlord & Tenant Act in limited cases.

Among the topics which the Group has already considered are:

1. The introduction of the parliamentary conveyance doctrine to clarify the title acquired by adverse possession to leasehold property.
2. The exclusion from the operation of the Rules against Perpetuities of the creation of easements and other interests in land, including options.
3. The introduction of a provision to enable merger to take place where the owner of a Lessee's interest in portion only of land held under Lease acquires the fee simple reversion.
4. The clarification of the law relating to partition, following the decision of *O'D -v- O'D.*
5. The amendment of the law relating to definition of certain terms such as "month" which, in the absence of other definition, means "lunar" month.
6. The introduction of simpler procedures for the severance of joint tenancies.
7. The clarification of the requirements for evidencing the consent of Landlords to assignments of Lessee's interests.
8. The release of tenant's surety from their obligations where an Assignment with the written consent of the Lessor has been obtained.
9. Confirmation that a surety for a tenant remains bound in the event of a transfer of the Lessor's interest.

Conveyancing:

1. The reduction of the statutory period of title under the Vendor and Purchaser Acts from forty years to twenty years.
2. The apportionment of the risk relating to property as between Vendor and Purchaser during the period from contract to completion.
3. The introduction of a time limit for the bringing of applications under Section 27 of the Local Government (Planning & Development) Act 1976.
4. The removal of the power of Sheriffs to seize leasehold property, which power is rarely exercised.
5. The removal of the need to obtain consent under Section 45 of the Land Act in respect of the transfer of properties which, though not technically "urban" are clearly not "rural" either.
6. The removal from the compulsory registration provisions contained in the Registration of Title Act of certain lands affected by the Irish Church Acts.
7. The amendment of the Family Home Protection Act so as to provide a time limit behind which purchasers need not enquire as to the giving of consents or the evidencing of such consents and the clarification that "assents" by personal representatives do not fall within the provisions of the Act.
8. The amendment of the requirement that companies notify the Companies Office of the registration of judgement mortgages against companies and the validating of the notice of such mortgages by the judgement creditor.

The Commission welcomes suggestions for the reform of other anomalies or other proposals for change. They should be addressed to the Commission at Ardilaun House, 111 St. Stephen's Green, Dublin 2.

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Debenture — Attestation of Company Seal

It must be surprising to the practitioner to read that the absence of a director's counter signature to the sealing of a debenture, notwithstanding the Articles of Association of the company concerned, would still constitute a valid execution by the company, yet this was the conclusion reached by the English High Court (Chancery Division) in the case of *T.C.B. Limited -v- W. A. Gray* [1986] 3 C.M.L.R. 439.

by
JOHN G. FISH,
Solicitor

In that case Mr. Gray, a director and majority shareholder of the company, caused the company to issue a debenture in favour of T.C.B. in order to secure a loan of five million pounds. In addition, Mr. Gray executed a guarantee for the company's obligations to T.C.B. without limitation (although this was also a matter in dispute). By the company's Articles such an instrument had to be signed by a director and counter signed by the secretary or another director. In fact the debenture, although sealed, was signed by a stranger, namely Mr. Gray's solicitor acting for Mr. Gray under a power of attorney, and counter-signed by the company secretary. It was not actually signed by any director. Nevertheless under Section 9.(1) of the English European Communities Act, 1972 the English High Court held that this was an authentic act of the company which could be enforced by a third party against the company.

As part of his defence to the claim by T.C.B., Mr. Gray pleaded that the debenture was invalid insofar as the seal of the company had not been affixed in accordance with the Articles of Association and furthermore, as there was no power in the Articles of the company enabling a director to act by his attorney, by applying the principle of *"delegatus non potest delegare"*, the seal was not affixed in accordance with the requirements of the Articles and accordingly the debenture was not the act of the company.

Whilst the Vice-Chancellor, Sir Nicholas Browne-Wilkinson expressed the view that there would be much more force in those submissions, nevertheless Section 9.(1) of the European Communities Act, 1972 provided a complete answer. Under the old law, a person dealing with a corporation was required to look at the company's Memorandum and Articles of Association to satisfy himself that the transaction was within the corporate capacity of the company and was to be carried through in accordance with the requirements of its Articles. The rigour of those requirements was only tempered to the extent that the rule in *Royal British Bank -v- Turquand* (1856) 6 E. & B.327 allowed third parties to assume that acts of internal management had been properly carried out.

In his judgment the Vice-Chancellor stated that it was relevant to note that the manifest purpose of both the Directive and the relevant section of the European Communities Act, 1972 was to enable people to deal with the company in good faith without being adversely affected by any limits on the company's capacity or its rules for internal management. Given good faith a third party is able to deal with a company through its "organs".

Following an examination of the relevant section the Vice-Chancellor held that a minute resolving to accept the facility and to accept the debenture under the common seal of the company stood as irrefutable evidence against the company that the grant of the debenture was a transaction decided on by the directors. Accordingly the necessary basis for applying Section 9.(1) of the English European Communities Act, 1972 existed as between the company and T.C.B. and therefore the debenture was valid and Mr. Gray's defence failed.

Although not quite couched in the same language, the equivalent regulation under Irish law is regulation 6. of the European Communities (Companies) Regulations, 1973 (S.I. No. 163 of 1973).

Mr. Gray subsequently brought an appeal to the Court of Appeal as to his liability as Guarantor, but this was dismissed by the Court of Appeal (Times Law Reports, July 21 1987).

Apart altogether from the application of community law to the execution of documents by companies, the case makes some interesting reading on other issues such as the lack of a seal on the relevant power of attorney but, not least, the fact that it was one of those cases where the solicitors concerned were given a matter of three or four days (inclusive of a week-end) to prepare almost 100 security documents. It was not surprising therefore that every "i" had not been dotted or "t" crossed with near fatal consequences — if community law had not come to the rescue. □

Viewpoint

(Contd. from p. 271)

the Committee which produced the Report on Training may help to bring early action on it. Commissioner Doherty, to whom we offer our best wishes and support, could have no more lasting memorial to his term of office than that during it Garda training began to be overhauled and modernised so as to bring it into line with modern requirements. □

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CYCLING FOR SOLICITORS BENEVOLENT ASSOCIATION

At the Annual General Meeting of the Law Society on November 12, Mr. John M. O'Connor, President of the Solicitors' Benevolent Association paid tribute to the muscular efforts last June of Frank O'Donnell who risked life and limb in cycling from Dublin to Belfast and back, and of Brendan Walsh in generating the sponsorship which raised more than £10,000 for the Benevolent Association. As a token of appreciation of their joint efforts Ms. Clare Leonard, Secretary of the S.B.A. presented Frank and Brendan with S.B.A./Coq Sportif "Yellow Jerseys".

Fitter and slimmer — Frank O'Donnell, Solicitor and Mara-cyclist (left) and Brendan Walsh, Solicitor, proudly display their "yellow jerseys" with Clare Leonard, Secretary of the Solicitors' Benevolent Association.

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We set out hereunder the addresses by the Archbishop of Dublin, the Most Reverend D. A. Caird, and by the Most Reverend Desmond Williams, D.D., Auxiliary Bishop of Dublin, given at the Church of Ireland and Roman Catholic Services to mark the commencement of the Michaelmas Term on 5th October 1987.

Most Reverend D. A. Caird

Justice, like other virtues, is usually conspicuous only in its absence. Those who would find it difficult to define or even to discuss justice in the abstract, find no difficulty in seeing the injustice in a situation presented, for instance, by one of those teams of investigative reporters on radio or television, where an old couple are cheated out of their life savings by the false promises of a crook, and are brought to face penury and disaster at the end of their lives. We see the injustice clearly and we boil with indignation, because the dignity of another human being has been assailed and hurt. But to define justice in the abstract is another matter which has engaged the most subtle minds recorded in history, engaged and often defeated.

The *Republic* of Plato is a sustained attempt to define Justice both at the level of the Greek city-state and at the level of the individual citizen. Following the Socratic method he reviewed and dismissed various contemporary definitions of Justice, including the cynical definition of Thrassymachus that justice is the interest of the strong party; he reached his own definition that Justice is "the harmony of the virtues", that it is the quality which enables the individual to live at peace with himself and which enables all the classes and denizens of the State to live in peace and co-operation for the good of the whole.

Such a wide definition is perhaps of little help to us in our search to discover what justice requires in given specific circumstances. But it does turn our mind in the right direction, and through its emphasis on the community as well as the individual, it balances another definition of Justice which has had great influence in Western society: the classical definition of St. Thomas — *reddere suum cui* — to every man his due.

Again we are not really helped forward by this definition, for the very fount of our dilemma is to determine what is due to a man or woman in the particular circumstances of their lives. It is for the wisdom and insight to determine this within the great framework of the system of laws which has grown up over centuries, indeed millenia, and which embodies the experience of society through the ages, that we pray.

Though *"reddere suum cui"* can only be a very rough guide to the nature of just dealing at the complex level of sophisticated modern society in determining, for instance, a just pay level in relation to the work which various groups and individuals in society do, in relation to one another: e.g., the miner and the stockbroker, the dentist and the deepsea fisherman, the home help and the actress, where incomparable values are involved, where taste and choice are active and where no common unit can be employed; this definition is significant, however, at the level of basic human rights, in the context of what is due to each human being, as a human being, irrespective of race, creed, class, colour, education, work, religious or political outlook or affiliation.

The attempt to define and list those basic human rights may be traced to the Decalogue (Exodus 20). The six commandments defining one's duty to one's neighbour could well be cast in terms of human rights, while the first four commandments may be regarded as the theological prologue to the declaration. The Decalogue was given when the nation of Israel was reduced to its bare bones in the desert. These were the minimum moral requirements to maintain the life and harmony of the nation at the level of its desert wanderings, when all superfluous social structures had been abandoned and rock bottom reached in the life of a people.

José Bonino, reflecting on the present deep concern of the Christian world with this issue of human rights, writes: "When this joint origin, Hebrew, Greek and Christian, of modern freedom is recognised, it becomes possible to explore the Christian element in it, although it is impossible to isolate it from other moments in this dynamic. It is this Christian element that gives Christians a strong basis to stand for human rights in the critical situations which are faced in many areas of the world. The search for theological foundations has gravitated in the direction of securing a firm basis for the universality of human dignity and rights. It has rested basically on the doctrine of creation and/or the doctrine of redemption. The human being as God's creation and his image, has his or her dignity as God's steward and representative, the unity of the human race constitutes a strong basis for asserting the rights of all."

For theologians like Jürgen Moltman the quest for human rights has resolved itself largely into a question of human dignity, witness his book "On Human Dignity". All human rights derive from the dignity of mankind. "The task of Christian theology," he writes, "does not lie in presenting once again what thousands of jurists, parliamentarians and diplomats in the United Nations have already completed. However, Christian theology also cannot dispense itself from the discussion of and the struggle for the realisation of human rights. In the name of the creation of man according to the image of God, in the name of the incarnation of God for the reconciliation of the world, and in the name of the coming Kingdom of God for the fulfilment of history, the Church is charged with the responsibility for the humanity of man as well as for his rights and duties in time. We see the theological contribution of the Christian Church in the grounding of the fundamental human rights upon God's right to man. The Christian faith has over and above the different rights and duties of

man to esteem the one indivisible dignity of man in his life with God, without in so doing excluding other religions and humanistic substantiations of human rights."

To keep human life fully human requires more, as Niebuhr has said, than a recognition of the basic human rights, though it implies at least that. It requires a true mutuality, interaction, reciprocity between human beings at both personal and corporate level; it requires the mutual respect and harmony which is both Platonic and Christian; it requires not justice in the strict juridical sense, but in the enriched sense that approximates to Christian love. "For Righteousness and Justice are the foundations of your throne." □

Most Reverend D. Williams

We are gathered here on this solemn occasion to invoke the blessing of the Holy Spirit on the occasion of the opening of the new Law Term. The theme of the readings which I have chosen for today's celebration is "Peace". We are all to be messengers of peace, as you have just heard in St. John's Gospel, "As the Father sent me so am I sending you". You will have noticed how when Jesus came and stood among them his greeting was a greeting of peace. The disciples were filled with joy, whereas previously they had been behind closed doors for fear of the Jews. You heard Isiah telling us that in the Old Testament understanding, peace was the product of justice and integrity. It was the spirit of God from above that turned the wilderness into "fertile land" and that gave us "safe houses, quiet dwellings, and a peaceful home". That Old Testament understanding of justice was of a harmony which derived from a fidelity to right relationships with God, with our neighbour, and with the world around us. In the words of the Psalm "Justice shall march before him and peace shall follow his steps."

You will have noticed how in the New Testament, St. James develops this theme, indicating "that the wisdom that comes down from above makes for peace, it is kindly and considerate, it is full of compassion and shows itself by doing good". And the excerpt from that letter of St. James ended by assuring us that "peacemakers when they work for peace sow the seeds which will bear fruit in holiness."

Modern Church teaching echoes this biblical emphasis on peace as the product of a justice which itself must be a guiding principle for the relationships between individuals, and between individuals and society.

The legal system carries a heavy burden of responsibility, since it is the major social mechanism for regulating human affairs according to accepted principles of justice. The biblical concept of law is of a social contract, a means of organising social and human affairs in a manner which ensures justice, order, and a degree of harmony, leading to peace. But the law as a code of justice, will always be imperfect, because it operates within the limitations of human knowledge, and is administered by imperfect humans. That our legal system should sometimes fail to meet the challenge of justice is a flaw which derives from its position as a human institution supremely vulnerable to human error.

Like many social institutions, the legal system can at times defend the interests of the strong against the weak. The challenge to the Christian lawyer is the call to be a Christian, a challenge which we must take up in every area of our lives, in every legal case, in every legal dispute, in our dealings with clients. There can be no room in the life of the Christian lawyer for anything other than a deep rooted desire to serve and help each and every client, in the model of the one who came among us "as one who serves".

We are heirs to a code of Christian justice which offers us a yardstick against which to measure our legal system. Modern Church teaching has given a new emphasis to the Gospel message of distributive and social justice seen as a means of guaranteeing the full participation of all people in the common life of our community. The legal system must participate in creating the structures and the legal mechanisms which will facilitate even for the poor and deprived the active participation in the life of our country. As an example, it is to be hoped that the present Government will honour its commitment to introduce a Homeless Persons' Bill this autumn, and that the Bill will include provision for a review or appeal system, subject to law, to enable the homeless to seek their rights to decent accommodation.

Our legal code in this country places a great emphasis on the individual; but its role in relation to the area of social policy seems to be extremely limited. An example is the much quoted constitutional guarantee of the dignity and place of the family in our society. Yet this guarantee has not been translated into measures within our social welfare legislation which would provide for an adequate income for all families. Indeed, the report of the Commission on Social Welfare, published over a year ago, documented shocking levels of poverty among the families of the unemployed, a group which was found to be at the highest risk of poverty. One is tempted to compare the priority placed on the constitutional guarantees to the family, with the manner in which the Courts uphold the guarantee to private property even in recent judgements. There must surely be implications here for the relative importance which our legal system attaches to commutative as opposed to distributive and social justice.

The law occupies a critical position as a key social institution. As such it reflects the existing divisions within our society between rich and poor. When we reflect on the reality of our criminal law and the relationship between criminality and socio-economic background, we must face the question of whether the law in fact adopts two different standards: one for the unemployed young person accused of robbery or shop lifting, the other for the company director accused of fraud.

The lawyer in a special way reflects the conscience of our society, especially for those who come to you seeking justice, guidance and help. As lawyers, you help to form the society we live in. In these days, our Christian challenge must lead us to apply moral Christian principles to our everyday lives. You will recall the letter of St. James "If there are any

wise or learned men among you let them show it by their good lives with humility and wisdom in their actions''.

It is appropriate to extend a warm word of praise to the gallant efforts of the Free Legal Advice Centres which try to provide a voluntary service to some of the most vulnerable and oppressed groups in our society. Young solicitors and barristers, and some not so young, give freely of their expertise to advise and represent those who have welfare, employment or family law problems. This is making a real contribution to a more just society. To carry on this service against a background of severe funding problems, as the Free Legal Advice Centres did over the past year, is a testimony of the true Christian concern for those who live in poverty. The record of these Centres in defending the interests of the voiceless is a welcome development for a profession which has not always considered areas such as social welfare legislation as a priority. The inclusion of this subject on the Law Society's curriculum has marked a growing realisation of the duty of solicitors towards the poor; may we hope to see their colleagues in the King's Inns follow suit in the near future?

In this country, we have a growing body of social legislation in the areas of health, welfare, housing provision and in the field of family law. Lawyers and the legal system play an important role in interpreting the rights of individuals under this body of law. Unfortunately, the potential role of lawyers in this area is often severely limited by the fact that the poor are intimidated by legal language, knowledge and processes which are so mystifying to the outsider. Access to legal service is also restricted because of financial considerations. The skeleton Civil Legal Aid Scheme operated by the State leaves much to be desired. The fact that its eight Centres operate only in urban areas, and that three of its four Dublin based centres are located in the City Centre, means that vast tracts of rural areas and large suburban areas have no local service. And indeed, the means test operated under the scheme sets an income ceiling so low that it excludes many who simply could not afford to pay the going rate for legal services.

In the area of civil and human rights, the Christian teaching on justice offers a strong critique of the erosion of individual civil liberties. The implications of cases in a neighbouring jurisdiction which have received much publicity lately raise serious questions about the accountability of the criminal justice system in that country, and must place upon the Irish legal system an obligation to proceed very cautiously in any consideration of extraditing Irish citizens to that jurisdiction. Our own legal system must continue to examine very critically the operating of Section 30 of the Offences Against the State Act. The detention aspects of the new Criminal Justice Act provide a further opportunity for our legal system to weigh up the rights of the individual to civil liberties balanced against the defence of the State and the common good.

The Christian lawyer must insist that in justice every human be treated with dignity and with respect. May I remind you of St. James who said ''the wisdom that comes down from above is essentially something pure; it also makes for peace, and is kindly and considerate; it is full of compassion, and shows itself by doing good; nor is there any trace of partiality or hypocrisy in it''.

In this Mass, let us now join in praying that in the coming year, as members of the legal profession in Ireland, you may live a life of Christian fulfilment, answering Christ's challenge of love, to build a community where, in the words of Isaiah, ''my people will live in a peaceful home, in safe houses, in quiet dwellings, where integrity will bring peace, where justice will give lasting security''. □

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BOOK REVIEW

The Honorable Society of King's Inns, by Daire Hogan is a recently published booklet and was conceived and produced primarily to "provide visitors to the Inns with an informative and readable guide".

The result is a well researched, organised and pleasantly readable product which should be of interest to anybody curious as to the history of the King's Inns buildings or the legal professions.

Comprising some twelve pages of text and particularly well illustrated the guide deals with the planning, financing and construction of the building itself. Of more particular interest to solicitors will be the fact that it covers, as extensively as is possible in such a short work, the development of the "Inns" as a professional entity and its historical links with the Solicitors profession and with its own professions in England and Northern Ireland.

Mr. Hogan has included a bibliography for the benefit of the more serious student and the booklet costing £2.00 may be purchased from the library of The Incorporated Law Society or directly from The King's Inns. □

Daire Murphy

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Relocation of Court Offices in Áras Uí Dhálaigh

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First Floor:-
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- Jury Office.
- Official Assignee's Office, the High Court.
- Probate Office, the High Court.

In Brief

Second Floor:-
- Office of Wards of Court, the High Court.
- Accountant's Office, the High Court. Examiner's Office, the High Court.
- Office of the General Solicitors for Minors and Wards of Court.

Third Floor:-
- Office of the Taxing Masters of the High Court.

Fourth Floor:-
- High Court Family Court Room.
- Circuit Court Family Court Room.
- Circuit Court Family Court Office.
- Examiner (Bankruptcy), the High Court.

Please note that access to and egress from the building is available only through the main entrance on The Quays (Inns Quay) for legal practitioners and the general public. The side entrance, stairways and lifts at the Morgan Place side of the building are available to staff of Áras Uí Dhálaigh only. □

The Chancery Art Society Changes its Constitution and Embraces Solicitors

The Chancery Art Society has changed its constitution and now embraces members of the Legal Profession as well as staff of the Land Registry and the Courts.

The objects of the Society are to provide opportunities for artists connected with the Land Registry, the Courts and the Legal Profession to exhibit their works of art, and, generally, to promote Art.

Solicitors interested in exhibiting in the Society's next exhibition, (scheduled for March, 1988), should write to Dee Crowe, Land Registry, Chancery Street, Dublin 7.

Kevin Gallagher,
P.R.O.,
The Chancery Art Society.
□

The Dublin Solicitors' Bar Association

At the Annual General Meeting of the Association the following were elected:-

President	Terence E. Dixon
Vice President	Geraldine Clarke
Hon. Secretary	Daire Murphy
Hon Treasurer	Rosemary Kearon
Council	Gerry Doherty
	Dominic Dowling
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	Ruadhan Killeen
	Justin McKenna
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	Dave Walley

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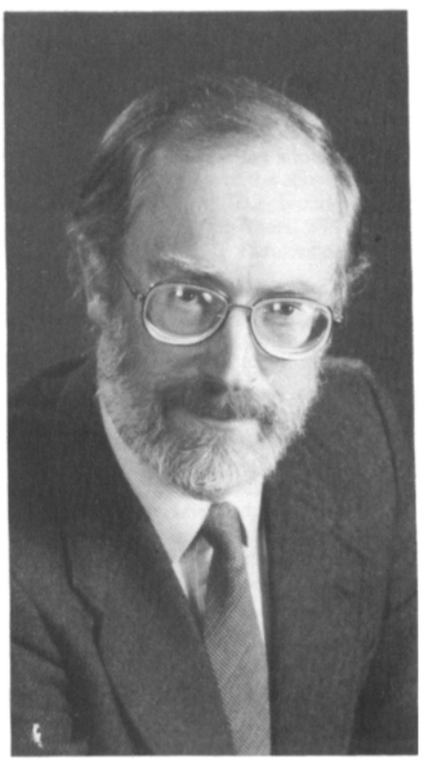

Terence E. Dixon, President Dublin Solicitors Bar Association, 1987-1988.

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An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate 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.
1st day of December, 1987.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Julia O'Sullivan, 59 Woodlawn Park Avenue, Firhouse, Dublin 14. Folio No.: 39574F; Lands: Property situate in the Barony of Uppercross and Townland of Tymon South, known as 59 Woodlawn Park Avenue, Firhouse, Dublin 14; County: **DUBLIN.**

Terence E. Dunne, Court Square, Stradbally, Co. Laois. Folio No.: 2191; Lands: Duneany; Area: 94a. 2r. 8p.; County: **KILDARE.**

John Donnelly, Ballybrittas, Portarlington, Co. Laois. Folio No.: 13054; Lands: Ballybrittas; Area: 31a. 3r. 12p.; County: **LAOIS.**

Bernard Wallace, Derryeary, Belturbet, Co. Cavan. Folio No.: 24521; Lands: (1) Corlaghaloo, (2) Drummoy, (3) Corlaghaloo; Area: (1) 13a. 0r. 9p., (2) 0a. 1r. 20p., (3) 1a. 1r. 21p.; County: **CAVAN.**

Patrick McCool (Junior), Kinaderry, Welchtown, Co. Donegal. Folio No.: 1517; Lands: Kinnaderry (Part); Area: 28a. 3r. 6p.; County: **DONEGAL.**

Ellen Jennings, Main St., Ballinrobe, Co. Mayo. Folio No.: 11457; Lands: Cornaroya; Area: 0a. 0r. 28p., County: **MAYO.**

Patrick McCallion, Carn Bral, Quigley's Point, Co. Donegal. Folio No.: 42540; Lands: Aught; Area: 1a. 0r. 0p.; County: **DONEGAL.**

Brian & Kathleen Smith, Folio No.: 1741F; Lands: Townland of Grange, Barony of Coolock; County: **DUBLIN.**

Patricia Englishby, of 58 Avondale, Trim, Co. Meath. Folio No.: 1933F; Lands: Townparks North; Area: 0a. 0r. 12p. County: **MEATH.**

Elizabeth and Colm Curry, both of Barrack Hill, Belturbet, Co. Cavan. Folio No.: (1) 3949F, (2) 22356; (3) 1364F; Lands: (1) Corlaghaloo, (2) Derryhoo, (3) Corlaghaloo; Area: (1) 21.650 acres, (2) 7a. 2r. 37p. and 4a. 3r. 14p., (3) 25a. 3r. 25p.; County: **CAVAN.**

Laurence O'Toole, 119 Brandon Rd., Crumlin, Dublin 12. Folio No.: 3125L, County: **DUBLIN.**

Maria Cassidy, of Lisoarty, Clones, Co. Monaghan; Folio No.: 1392F; Lands: Lisoarty; Area: 1,094 acres; County: **MONAGHAN.**

Patrick Sweeney, of Liscaugh, Doon, Co. Limerick; Folio No. 21912; Lands: Doon; Area: —; County: **LIMERICK.**

Michael O'Hara, of Cloonaugh, Drumlish, Co. Longford. Folio No.: 7019; Lands: (1) Kilnashee (Part), (2) Cloonagh; Area: (1) 14a. 2r. 8p., (2) 0a. 3r. 25p.; County: **LONGFORD.**

Joseph Whelehan, of Kilnagarnagh, Athlone, Co. Westmeath. Folio No.: 8299; Lands: (1) Kilnagarnagh, (2) Kilnagarnagh; Area: (1) 21.85 acres, (2) 16a. 1r. 6p.; County: **KINGS.**

West Wicklow Development Co. Ltd., Tinode Lodge, Manor Kilbride, Blessington, Co. Wicklow. Folio No.: 1265F, Lands: Burgage Moyle; Area: 8a. 2r. 3p; County: **WICKLOW.**

David Diamond, Gibstown, Navan, Co. Meath. Folio No.: 1211F; Lands: Gibstown; Area: 0a. 1r. 29p. County: **MEATH.**

Adrian Barry & Kathleen Barry, 11 Glenageary Woods, Dun Laoghaire, Co. Dublin. Folio Nos.: (1) 99F, (2) 1709F; Lands: (1) Ballygunnercastle, (2) Ballygunnercastle; Area: (1) 1a. 1r. 2p, (2) 0a. 1r. 29p. County: **WATERFORD.**

Mary Teresita McPhillip (in religion Sister Teresita), Sr. Josephine O'Grady Walsh, Sr. Stanislaus Power, and Sr. Agatha Walsh all of the Mercy Convent, Carrick-on-Suir, Co. Tipperary. Folio No.: 2171; Lands: Knocknaconnery; Area: 11a. 2rd. 3p.; County: **TIPPERARY.**

Martin and Bernadette Kenirons of Roolagh, Ballina (Killaloe), Co. Tipperary. Folio No.: 34063; Lands: Roolagh; Area: 7.324 acres; County: **TIPPERARY.**

Patrick Devin of Branigans Cross, Droigheda, Co. Louth. Folio No.: 1403; Lands: Collon; Area: 12a. 3r. 30p.; County: **LOUTH.**

Mary Catherine & Patrick Harrington of Clash Road, Little Island, Co. Cork. Folio No.: 43091; Lands: Ballytrasna; County: **CORK.**

Francis McPartland, c/o A. McMorrow, Solicitor, Bundoran, Co. Donegal. Folio No.: 10360; Lands: Cornageeha; Area: 8a. 1r. 35p. County: **LEITRIM.**

Joan Frances Carleton of Coolshannagh, Monaghan, Co. Monaghan. Folio No.: 8813; Lands: Corraghbrack; Area: 34a. 3r. 30p. County: **MONAGHAN.**

William Meaney, Cuilnakillen, Lahardane, Ballina, Co. Mayo. Folio No.: 1233F; Lands: Cloonsunna; Area: 1a. 1r. 36p.; County: **MAYO.**

Michael Molloy of Ballinree, Killyon, Birr, Co. Offaly. Folio No.: 18055; Lands: (1) Rathure North, (2) Rathure North, (3) Ballinree, (4) Rathure South; Area: (1) 24a. 3r. 33p., (2) 62a. 0r. 15p., (3) 22a. 1r. 24p., (4) 9a. 3r. 10p.; County: **OFFALY.**

John & Jenny Clifford of Ards, Beaufort, Co. Kerry. Folio No. 2054; Lands: Ards; Area: 92a. 0r. 11p.; County: **KERRY.**

John Fitzgerald of Dromtrasna, Hartnett, Abbeyfeale, Co. Limerick. Folio No.: 7789F; Lands: Dromtrasna (Hartnett); County: **LIMERICK.**

John O'Meara of Beechwood, Nenagh, Co. Tipperary. Folio No.: 35110; Lands: (1) Graigue, (2) Graigue; Area: (1) 34a. 1r. 30p., (2) 19a. 2r. 22p. County: **TIPPERARY.**

Lost Wills

BOYLE, Michael, deceased, late of O'Neill Avenue, Newry, Co. Down. Will anyone having knowledge of a Will or a Testamentary Disposition executed by the above-named deceased, who died on 25 January 1976, please contact Martin P. Crilly, Solicitors, 7 Main St., Carrickmacross, Co. Monaghan. Tel. (042) 61102, 61957.

WALSH, Patrick, late of Kyle, Rathdowney, Co. Laois. Will anyone having knowledge of the whereabouts of a will of the above-named deceased, who died on 10 February 1987, please contact Binchy & Partners, 38/39 Fitzwilliam Square, Dublin 2. Reference MH.

O'HOLOHAN, MRS. WINIFRED, late of St. Monica's Home, Belvedere Place, Dublin 1. Will anyone having knowledge of the whereabouts of a will of the above named deceased, who died on 29 September, made after 1971, please contact Lorcan O'Holohan, 69 Grosvenor Square, Dublin 6.

MARY ELIZABETH HEASLIP, deceased. Will anyone having knowledge of a will of the above-named deceased, formerly of Moher, Carrickaboy, Co. Cavan and 22 Bold St., Auckington, Lancashire, please contact G. V. Maloney & Co., Solicitors, 6 Farnham St., Cavan. Tel. (049) 31444.

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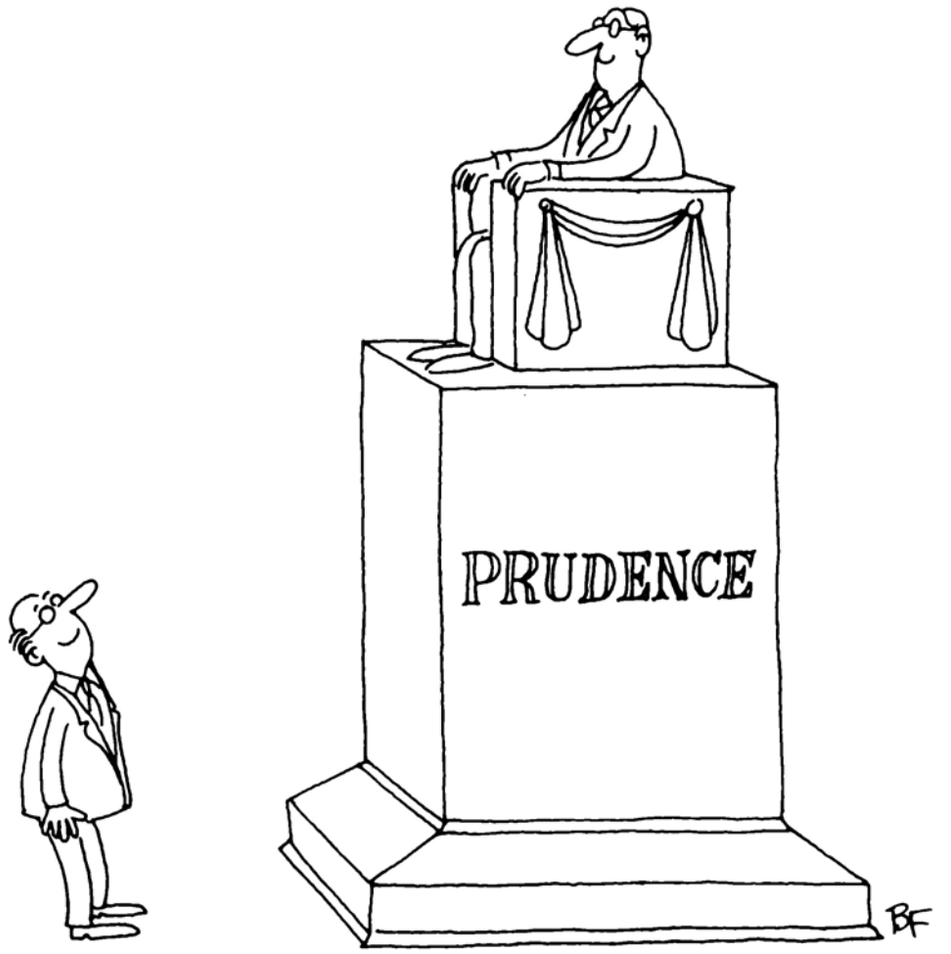

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 81 No. 10 December 1987

The President 1987/88

Thomas D. Shaw, Senior Partner in J. A. Shaw & Co., Solicitors, Mullingar, has been elected President of the Society. He was educated at St. Gerard's School, Bray, Clongowes Wood College, and at University College Dublin where he obtained a BCL degree. He qualified as a solicitor in 1959 and is married with six children.

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INCORPORATED LAW SOCIETY OF IRELAND
Vol. 81 No. 10 December 1987

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Viewpoint

The recent announcement by the Minister for the Environment that Building Societies will be permitted to compete in the provision of conveyancing and estate agency services received more attention in the media than most other aspects of the Minister's proposals though the details of this particular development were remarkably scarce. The actual text of the Minister's statement suggests that this is a further depressing example of our legislative process succumbing to the temptation to follow developments in Britain without adequate consideration as to whether the position in the two jurisdictions is sufficiently similar.

The Minister has indicated his awareness of the potential for conflict of interest but considers that sufficient safeguards can be devised. No doubt the Department are eagerly awaiting the publication of the guidelines in Britain. The length of time which the Lord Chancellor's Department has taken to produce these guidelines, they are now expected "early in 1988", suggests that the problem of conflict of interest may be more difficult to resolve than the Minister anticipates.

Just how anxious the major Building Societies may be to engage in conveyancing on a wide scale at the current level of fees, which of course are statutorily controlled, may be open to question. The only Society whose chief executive has argued loudly for this innovation was not noted for the keeness of its charges when its own in-house lawyer examined titles in mortgage transactions. Domestic conveyancing is no golden goose. Falling or levelling-off house purchase prices, to which conveyancing fees are linked, while operating costs continue to increase, have eroded the profit margin to such an extent that many of the larger firms of solicitors have no enthusiasm to take on much ordinary residential conveyancing.

Many conveyancers might be tempted to wish the Building Societies well in involvement in the complex business which domestic conveyancing has become in this country. A combination of factors, including the failure to update our Land and Conveyancing laws, an under-financed Land Registry which cannot provide the level of service it would wish mixed with the self inflicted wounds of some of our legislation, render residential conveyancing unattractive. Building Societies would be welcome to the task of conveying the Family Home of the couple on their second "marriage" with the unlawful extension which has no byelaw approval and where the parties are squabbling as to whether the light fittings were included in the sale.

There must be a serious doubt whether, if a proper level of service is to be given to people engaging in the biggest investment of their lives, it can be done more cheaply by large organisations like Building Societies with their significant overheads and day to day running costs. The best answer the solicitors' profession can give to these proposals is to continue to provide a satisfactory level of service to individual clients to whom personal attention is given at fees which are, in comparison to most other countries quite modest. □

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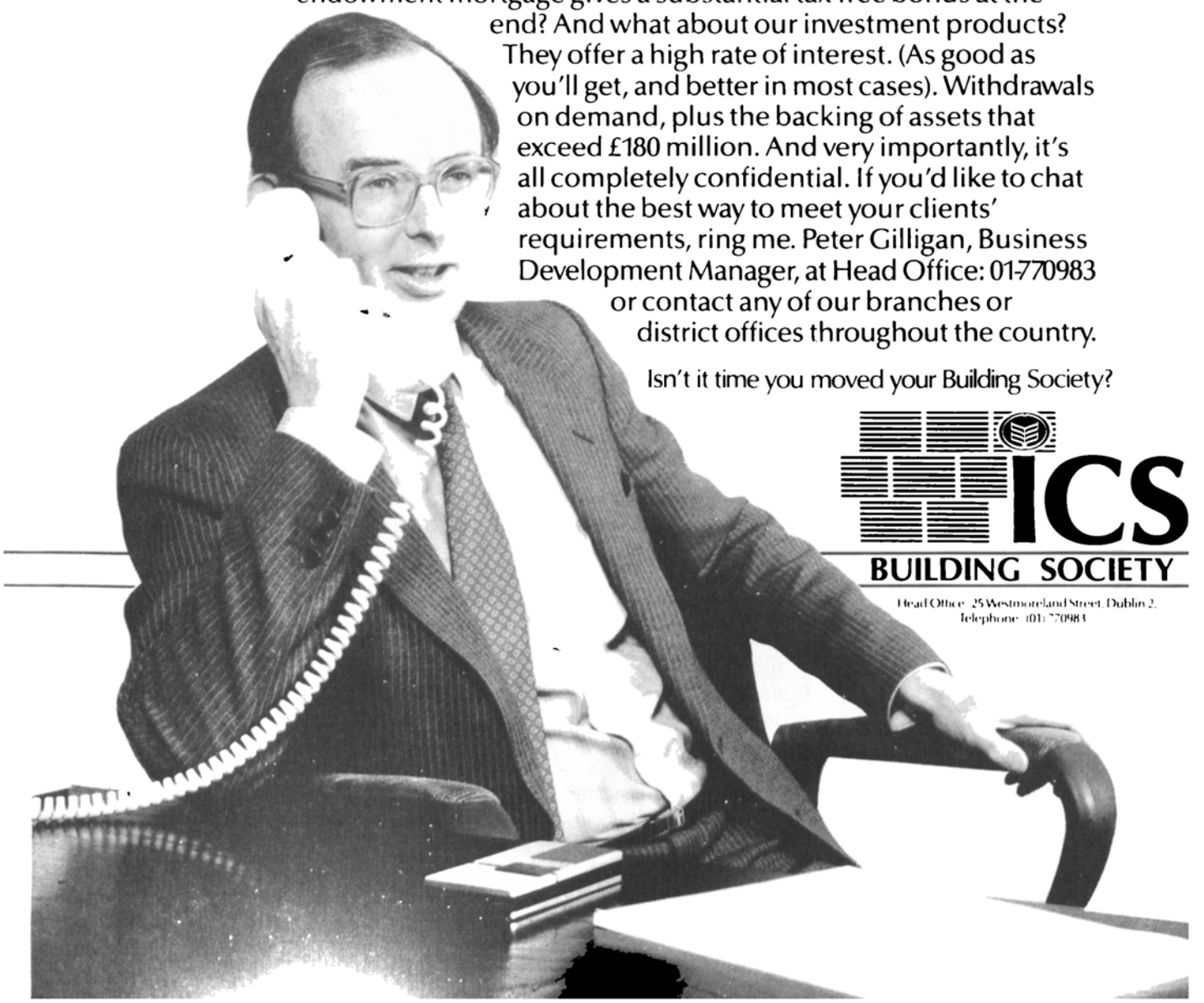

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Inheritance Tax on Discretionary Trusts

Part I

Two pieces of legislation, grafted on to the main corpus of capital acquisitions tax legislation with considerable if misplaced legislative ingenuity, have so far escaped detailed analysis. Both are aimed at "discretionary trusts" as defined in s.105 Finance Act 1984 ("FA 1984").

by
CHARLES HACCIUS
B.L.

The first, contained in ss.104 to 109 FA 1984, imposes what is referred to as an "inheritance tax" of 3% on the market value of property subject to a discretionary trust on the last to occur of the three events mentioned in paras. (a) (b) and (c) of s.106(1). As such, it is a one-off capital levy which, in view of its comparatively infrequent occurrence, has so far attracted relatively little comment.

The second, contained in ss.102 to 108 FA 1986, is complementary to the first, and is effectively a revival of the former wealth tax under a different name. Although likewise termed an "inheritance tax", it is quite clearly nothing of the kind, being imposed on an annual basis at 1% on the market value of property subject to a "chargeable discretionary trust" on each 5th April. The stringent reporting requirement in s.104(e) FA 1986, involving self-assessment of the tax payable and advance payment of the tax so assessed, combine to make the tax an unmitigated nuisance.

If previous experience is anything to go by, the new tax will generate little revenue for the State but a rich harvest of paper work. In itself this may not be a bad thing. It will undoubtedly maintain and even create employment and as such be of at least indirect benefit to the Irish economy. One can see no other possible purpose in reviving a tax which has already proved a spectacular failure.

Although necessitating entry into a fantasy world peopled by legislative freaks having no existence outside the pages of the statute book, the manner in which the Irish Parliamentary Draftsman has succeeded in grafting what is a wealth tax in all but name on to the existing inheritance tax legislation compels respect, if not admiration. Afficionados will recognise it as a legislative tour de force which deserves a wider and more appreciative audience than the mere tax paying public.

Background

S.10 of the Capital Acquisitions Tax Act 1976 ("CATA 1976") provides that a capital acquisitions tax "to be called inheritance tax, shall . . . be charged levied and paid upon the taxable value of every taxable inheritance taken by a successor . . . on or after the 1st day of April 1975". An "inheritance" (taxable or otherwise) is taken "where, under or in consequence of any disposition, a person becomes beneficially entitled in possession on a death to any benefit . . . otherwise than for full consideration in money or money's worth": s.11 (1) CATA 1976.

The statutory definition of the word "inheritance" thus lays down three requirements, all three of which must be satisfied if an "inheritance" is to be taken:-

(1) a person (referred to in the capital acquisitions tax legislation as "the successor") must have "become" "beneficially entitled in possession" to a "benefit", and

(2) the successor must have become so entitled "under or in consequence of "a disposition", and

(3) the successor must have become so entitled "otherwise than for full consideration in money or money's worth".

If any one of these three conditions is not satisfied no "inheritance" will be taken and no inheritance tax will be payable.

The expressions "become" and "beneficially entitled" in condition (1) are not without the benefit of judicial interpretation. Much case law has grown up in relation to s.2 of the Succession Duty Act 1853 ("SDA 1853") upon which the capital acquisitions tax is largely based.

"Become"

". . . becoming entitled means . . . entering into the state of being entitled from the state of not being entitled. In other words to 'become entitled' means to acquire a right or title": *Wilcox -v- Smith* 4 Drew. 40, 50 per Kindersley VC.

"Beneficially"

"Then 'beneficially' means, of course, for his own benefit in contradistinction to being entitled as a trustee": *Wilcox -v- Smith, supra,* 50 per Kindersley VC.

"Entitled in possession"

This is the subject of an express statutory definition in s.2(1) CATA 1976, which defines the expression as "the present right to the enjoyment of property as opposed to having a future such right". As such the definition echoes judicial definitions, notably those of Lord Reid in *Gartside -v- IRC* [1968] AC 553,607, and of Viscount Dilhorne in *Pearson -v- IRC* [1980] STC 318, 326.

Quite clearly, the expression does not extend to the interest of a potential object of a discretionary trust. Such an object admittedly has an "interest" capable of protection by a court of equity, but not one conferring on him either a "present right to the enjoyment of property" or even any "future such right" within the meaning of the abovementioned definition: *Gartside -v- IRC* [1968] AC 553. It follows that if a potential object dies the other objects do not

thereby become "entitled in possession" to a "benefit" and accordingly take no inheritance: *in re Trafford's Settlement Trusts* [1984] STC 236. The consequence is that no inheritance tax is payable on the death of a potential object of a discretionary trust. By its very nature, a discretionary trust enables capital acquisitions tax to be held at bay until such time as the trustees decide to exercise their discretion. It is in order to remedy this deficiency in the capital acquisitions tax legislation that the Legislature has enacted ss.104 to 109 FA 1984 and the additional provisions in ss. 102 to 108 FA 1986.

Referring to these now in chronological order:-

S.106(1)FA 1984

S. 106(1)FA 1984 provides that when "property" becomes "subject to" a "discretionary trust" (as defined in s.104) the trust itself is to be deemed to have taken an inheritance on the latest of the following three dates:-

(a) the date upon which the property became subject to the discretionary trust, or
(b) the date of the disponer's death, or
(c) the date on which there ceases to be a "principal object" of the trust who is under the age of 25 years.

The latest to occur of these dates is referred to as "the date of the inheritance": s.106(1). Property subject to the trust on that date is subject to a once-off inheritance tax at a flat rate of 3%: s.109.

At first sight s.106(1) appears to be relatively straightforward. Further inquiry shows that this is not so, "the date of the inheritance" depending to a very great extent on who is the "disponer" in relation to the trust. As the examples set out below will demonstrate, identification of the "disponer" in relation to a particular discretionary trust can be a matter of some difficulty and it by no means follows that the settlor named in the trust instrument is the "disponer" in relation to the trust thereby created.

The three dates mentioned in paras. (a) (b) and (c) of s. 106(1) above are each the subject of extensive statutory and judicial exposition:-

Paragraph (a)

Property which "became subject" to a discretionary trust before 25 January 1984 is "deemed to have become subject to the trust on that date"; s.106(2). Such property does not escape the levy of inheritance tax under s.106(1) merely by having become subject to a discretionary trust before that date.

Paragraph (b)

The "disponer" referred to in s.106(1)(b) is clearly the disponer "under or in consequence" of whose "disposition" the property became subject to the discretionary trust. S.2(1) CATA 1976 defines the word "disponer" as the person "who, for the purposes of the disposition, directly or indirectly provided the property comprised in the disposition".

This definition, which is based on the UK income tax legislation relating to settlements, is effectively no different from that in s.2 SDA 1853, which defined the equivalent expression "predecessor" in the former succession duty legislation as "the person from whom the interest of the successor is or shall be derived". Case law is plentiful, both in relation to the UK income tax legislation upon which the definition of "disponer" in s.2(1) CATA 1976 is based and in relation to the definition of the corresponding word "predecessor" in the former succession duty legislation. Used with discretion, it provides valuable guidance in identifying the "disponer" in relation to a particular discretionary trust.

Example (1)

A gives shares in a family company to his step-daughter B, the market value of which amounts to £100,000. B subsequently announces her engagement to C, who is employed by a competitor. A therefore asks B to transfer her shares to her (B's) brother D, who is employed by the company, assuring her (B) that she need not be disappointed because he (A) will shortly do far better for her. She accordingly transfers her shares in the family company to D, whereupon A settles investments having a value of £200,000 upon discretionary trusts for the benefit of B and her children. A and not B is the "disponer" in relation to the trust: *A. G. -v- Biggs* [1907] 2 IR 400. "This (£200,000) was not paid to or through her: it did not pass through her hands and she never possessed or enjoyed or controlled it. There was no complete gift of it to her, nor did she bring it into settlement. It was paid by her stepfather to the trustees of her settlement for the benefit of herself and her children, and until so paid it was (A's) proper money. He therefore was the (disponer) . . . ": 408 per Johnson J.

Example (2)

On H's marriage to W, he (H) effects a policy of life assurance on his life for a sum of £100,000 payable on his attaining the age of 60 years. Having taken out the policy, he assigns it to the trustees of a discretionary trust established by his future father-in-law for the benefit of W and the children of the marriage. H's godmother C (who is unrelated to him) offers to pay and pays the premiums payable in respect of the policy. After some years, the trustees surrender the policy and the proceeds of the surrender are held by the trustees as property of the discretionary trust established by H's father-in-law. H and not C is the disponer in relation to the proceeds of the policy: *A. G. -v- Riall* [1906] 2 IR 122. "Now, (C) never had any interest in the policy. It was effected, not by her, but by (H): there was no devolution of it, and the disposition of it necessary to bring it within section 2 was its assignment by (H) alone upon trusts under which she (C) took no interest. She was not, therefore, according to the ordinary meaning of the words, the 'settlor', 'disponer', . . . or other person from 'the interest' in the policy derived, and is therefore . . . not within the definition of 'predecessor' in section 2": 129 per Palles CB.

Example 3

A dies intestate, whereupon his sole surviving brother B takes out letters of administration believing himself to be the sole surviving next of kin. A certain Mrs. D appears and claims one-half of A's estate on the ground that she is the daughter of C, a long lost sister of A and B. B does not accept Mrs. D's claim, but enters into a deed of family arrangement whereby he (B) settles £30,000 of A's estate on

discretionary trusts for the benefit of Mrs. D and her children. Mrs. D and not B is the "disponer" in relation to these trusts: *A. G. -v- Baker* 4 H & N 19. "The deed proceeded on a claim of right on (Mrs. D's) part. The arrangement embodied in the deed was one of which she was the head, and not (B). If I were called upon to decide the question I should say that (Mrs. D) was the settlor": 30 per Pollock CB.

Example (4)

A child actress, A, is awarded a part in a major film. On the advice of her father's accountants, a company is incorporated which enters into a contract with the film studio to provide her services for an agreed consideration. At the same time a discretionary trust fund is established with an initial trust fund of £100, provided by A's father, B, who is named in the trust instrument as the settlor. The trustees apply the initial trust fund of £100 in taking up 100 shares of £1 in the capital of the company. No further shares are issued. The effect of the arrangement is to divert A's earnings from herself personally to the company, the shares in which increase in value as payments are made to it by the studio. Before carrying the scheme into effect, B's accountants endeavour to explain its effect to A, who is totally uninterested and signs the relevant documents without even reading them.

The property "subject to" the trust is clearly the 100 shares of £1 in the capital of the company. What is less easy to identify is the "disposition" under or in consequence of which the shares became subject to the trust, and the "disponer" in relation to that "disposition".

On the one hand, it is arguable that the "disposition" under or in consequence of which the shares became subject to the trust could only be the trust instrument itself, in relation to which B and not A is clearly the "disponer". Authority for this view is to be found in *Chamberlain -v- CIR* 25 TC 317.

On the other hand, it is equally well arguable that the shares became subject to the trust under or in consequence of an "arrangement" in relation to which A and not B was the disponer. Support for this latter view is to be found in the extended meaning given to the word "disposition" by s.2(1) CATA 1976, which in para. (b) of the definition of "disposition" defines it to include an "arrangement, whether made by a single operation or by associated operation". It is accordingly arguable that the "disponer" in relation to a disposition which is an "arrangement" is the person who "directly or indirectly" provides the property "comprised in" the arrangement, and which as part of that arrangement "becomes subject to" the trust. Authority for this alternative view is to be found in *Mills -v- CIR* 49 TC 367 in which it was held that by entering into the arrangement A had ". . . secured that what she earned by her acting should be paid to Sussex Productions and so she indirectly provided funds for the trust": 408 per Viscount Dilhorne.

The general definition of "disponer" in s.2(1) CATA 1976 is supplemented by four paragraphs which identify the "disponer" in specific instances. Paras (a) (b) and (c) of the definition provide that the "disponer" in relation to a will or other testamen-

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tory disposition, on intestacy or in relation to a legal right under ss.111 and 117 Succession Act 1965 to a share of a deceased person's estate is to be the deceased.

Para (d) provides that if A makes a "reciprocal arrangement" with B to provide property for the purposes of a disposition by B, A and not B is to be treated as the "disponer" in relation to the disposition.

"Reciprocal arrangement"

Whereas there appears to be no expression of judicial opinion in regard to the expression "reciprocal arrangement", authority is not hard to find regarding the word "arrangement". The meaning attributed to the word by judicial definitions is so wide that one wonders whether the word "reciprocal" serves any useful purpose whatever.

The word "arrangement" is said to be "apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons — a plan arranged between them which may not be enforceable at law": *Newton -v- C of T* [1958] AC 450, 465 per Lord Denning. The word comprehends "not only the initial plan but all transactions by which it is carried out . . . be they conveyances, transfers or anything else": 465 Lord Denning.

Nor need the plan be carried out as originally conceived. "Merely because the final step . . . is left unresolved at the outset and decided upon later does not seem to me to rob the scheme of the necessary unity to justify it being called an 'arrangement'": *Crossland -v- Hawkins* 39 TC 493, 505 per Donovan LJ.

Nevertheless, "in order that something can be described as an 'arrangement' it must have a certain unity in its composition": *CIR -v- Morton* 24 TC 259, 271 per Lord Normand. If the requisite "unity of composition" is absent, there can be no "arrangement" within the meaning of para. (d), "reciprocal" or otherwise.

Example (5)

Blackacre is settled to the use of A for life with remainder to the use of his nephew B in tail. A and B disentail and convey Blackacre to such uses as they shall jointly appoint. A wishes to appoint £20,000 to his three daughters C, D and E. In exercise of their joint power of appointment A and B charge Blackacre with the payment on A's death of £20,000 to the use of C, D and E on discretionary trusts, A covenanting to pay an annuity of £2,250 p.a. to B during the remainder of his (A's) lifetime.

In the normal course of events, B and not A would be the "disponer" in relation to the discretionary trusts created by the exercise of the joint power of appointment: *Braybrooke -v- A. G.* 9 HLC 150, *A. G. -v- Floyer* 9 HLC 477, *A. G. -v- Smythe* 9 HLC 197. In the present instance, however, A and not B would be treated as the disponer: *in re Jenkinson* 24 Beav. 64. ". . . it must be taken to be clear that the proceedings emanated from (A) who was desirous of settling a sum of money on his daughters, and that he is the settlor of that sum of money, and that (B) consented and agreed to join with him to enable him to make that settlement, and that (B) received a pecuniary consideration for enabling (A) to make that settlement": 72 per Romilly MR.

It is open to question whether para. (d) serves any useful purpose. A "reciprocal arrangement" within the meaning of para. (d) of the definition in s.2(1) CATA 1976 of the word "disponer" will also be an "arrangement" within the meaning of para. (b) of the definition in the same section of the word "disposition". The "disponer" in relation to such an "arrangement" as that instanced in Example (5) above would be A, quite independently of any such specific provision as para. (d) of the definition of "disponer" in s.2(1) CATA 1975: *Crossland -v- Hawkins* 39 TC 493, *Mills -v- CIR* 49 TC 367.

Para (C)

After the complexities of para. (d) it is a relief to turn to the comparative simplicity of para. (c) of s.106(1) FA 1984. S.104 defines the expression "principal object" to include the disponer's "spouse" and "children" but not his grandchildren, unless by a child predeceasing the disponer.

The apparent simplicity of the definition turns out to be illusory when one realises that it refers one back to the vexed question of who, in relation to the trust, is the "disponer"? In Example (4) above, for instance, the question whether there are any "principal objects" at all depends on whether A or B can be said to be the "disponer" in relation to the trust holding the 100 shares of £1 in the company hiring out A's services. If the "disponer" is B, Mrs. B and A will both be "principal objects" as defined and "the date of the inheritance" will be the date upon which A ceases to be under the age of 25 years: s.106(1) (c) FA 1984. If the disponer is A, there will be no "principal objects" and "the date of the inheritance" will be the date of A's death: s.106(1) (b) FA 1984.

Part 2 of this article will be published in the January/February issue.

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From the President . . .

The Challenge of Change

I have often heard it said "We are living in a changing world" and how true this is in the Law Society and Solicitors' Profession at the moment.

I am greatly conscious that I am taking office in a year in which Conveyancing practice has gone through a revolution and in which it is likely that the shape of litigation may totally change in the next twelve months. Against these changes, which will certainly mean reduced incomes and increased competition for the profession, must be balanced the undeniable fact of increased overheads and falling profit margins. Indeed, practitioners are working harder and harder and harder to stand still.

It is too easy to put down your head in the sand and hope the storm may blow away. It clearly will not. What must be faced in this world of ours is that change (and rapid change at that) is well nigh inevitable and instead of running away from it, we must grasp the opportunity which it brings to make changes in our offices and practices which will increase our efficiency and profitability and give us hope to face the future.

The Law Society is trying to help practitioners to make these changes and one of the measures was the sponsoring of the lectures by Loosemore & Parsons around the Country, which was the subject of much favourable comment among the profession.

I hope that the Annual Conference will continue this work and will concentrate on the development of this theme to the benefit of the profession. The more efficient we are in our offices, the better our image will be to the general public.

I also hope that the columns of this publication will be broadened during the year, not only to include matters of general interest and information to members, but also to concentrate in areas where it can be shown that new work can be developed for the benefit of the solicitors practice.

The year ahead represents a great challenge. Let us face it together so that whatever happens in 1988, no one can say that we did not face and tackle our problems. I am confident that they can be overcome. I am taking up the fight.

THOMAS D. SHAW
President

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Practice Notes

Litigation Committee. Criminal Legal Aid — Change of Solicitor

When a solicitor is assigned by a Court to represent a defendant in a criminal matter, the Court is the only tribunal that can discharge that assigned solicitor. A client cannot discharge the assigned solicitor without permission of the Court. Therefore:

(1) If a client informs the assigned solicitor that he no longer wishes him to act, the assigned solicitor should bring this to the attention of the Court as soon as possible and it is then up to the Court to discharge the solicitor from his assignment.

(2) If an assigned solicitor receives a letter from another solicitor enclosing a notification from the client that the client wishes to discharge the assigned solicitor, the assigned solicitor should, if he deems it necessary or desirable, attempt to contact the client directly to verify the client's wishes; and must, in any event, bring the matter to the attention of the Court as soon as possible.

(3) If a client informs the assigned solicitor (either directly or through another solicitor) that he has engaged another solicitor in a private capacity, the assigned solicitor must bring the matter to the attention of the Court as soon as possible.

(4) An assigned solicitor is under no obligation to hand over any papers in his possession to the client or the intended new solicitor until the assigned solicitor has been discharged by the Court.

(5) A solicitor should not interview a client, if that client has already been granted legal aid and assigned a solicitor, without informing that already assigned solicitor. A solicitor should not seek to interview such a client unless he has specific instructions from that client, or, if the client is a young person (i.e. under 17 years old), his/her parents or guardians. □

Common Law Motions

Where the Court on a motion for judgment in default of Defence in actions claiming unliquidated damages in tort or contract makes an Order on consent or otherwise extending the time for delivery of Defence the applicant may also request the Court to adjourn the motion generally with liberty to re-enter.

If no Defence is delivered within the time fixed (or other further time agreed between the parties) the motion may be brought before the Court on service of Notice of re-entry and lodgment of a copy thereof and of the original Notice and Order in the Central Office without the necessity of complying again with the provisions of Order 27 r. 9(1) and (2) of the Rules of the Superior Courts. □

Ex-Parte Application

Practitioners are requested to file the grounding Affidavit in the Central Office beforehand and use a certified copy bearing the record number issued by the Central Office on moving the application. □

Court Fees

Exemption from Court fees applies only to *habeas corpus* proceedings, proceedings under the Extradition Act 1965, bail applications and proceedings in a *criminal* case by way of *Certiorari* or *Mandamus*.

In all other cases the fees at present chargeable pursuant to the Supreme Court and High Court (Fees) Order 1986 are £6 in respect of filing an Affidavit and an additional £17 in respect of an originating ex-parte application.

The specific nature of the Order sought will need to be ascertained to establish whether proceedings by way of Judicial Review are exempt from Court fees. It should be noted that proceedings by way of prohibition are not exempt even in criminal cases. □

Death Certificates

Members are advised that the cost of Death Certificates has been increased from £3.00 to £5.00. □

Transfer between Spouses under the F.H.P.A. 1976

Practitioners should be careful to note that the exemption from stamp duty and registration fees enjoyed on transfers of the Family Home into the joint names of both spouses under the Family Protection Act, 1976, does not extend to Capital Acquisition tax.

Such a voluntary disposition constitutes a gift inter-vivos for the purpose of the C.A.T. Act, 1976. Accordingly on re-sale or mortgage it is necessary to produce a certificate of Clearance from C.A.T.

In addition, by virtue of the new computation rules contained in the Finance Act 1984, applicable to all gifts taken by the same Donee on or after the 2nd June 1982 are agreeable for the purpose of assessing the threshould amount. Thus, on such transfers under the F.H.P. Act, instructions should be obtained as to all previous gifts or inheritances received by the Donee spouse after the 2nd June 1982 and advice given accordingly. □

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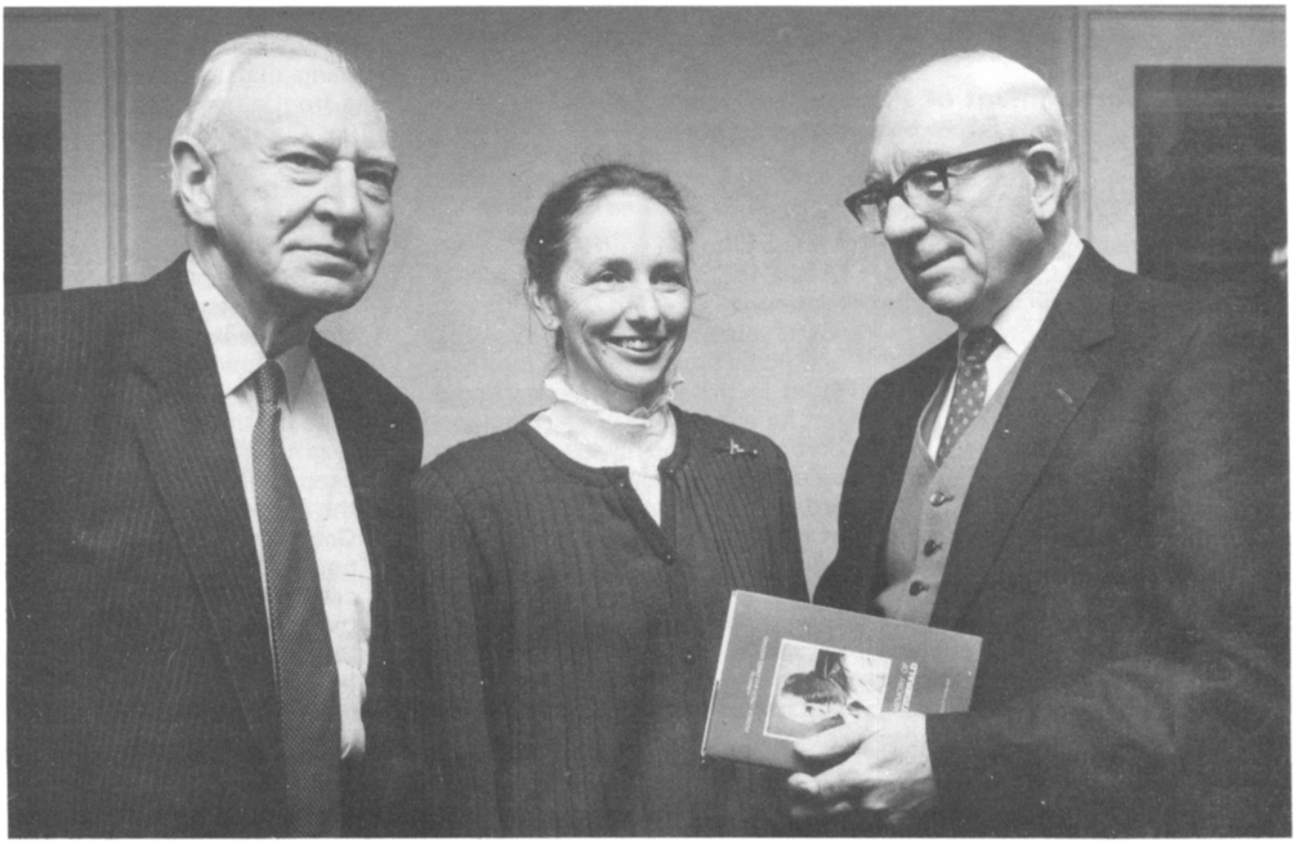
It is anticipated that this Seminar will be widely attended and the admission fee can be paid in advance to the Treasurer, Mr. Joseph Curran.

Please note that the Annual General Meeting of the Criminal Lawyers Association will be held at Blackhall Place at 6.30 p.m. on Tuesday, the 16th February, 1988. (Please put both of these dates in your diary).



LAUNCH OF "ESSAYS IN MEMORY OF ALEXIS FITZGERALD" - 3 December, 1987

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Contract for Sale

Apportionment of Purchase Monies between the property and the contents

The Conveyancing Committee wishes to draw to the attention of practitioners the decision of the Court of Appeal in England in the case of *Saunders and Anor -v- Edwards and Anor.* [1987] 2 All ER 651.

The facts are as follows:

The Plaintiffs agreed to purchase from the Defendants the Defendant's leasehold interest in a flat for £45,000 to include certain fixtures and fittings. Prior to executing the contract, the Plaintiffs were shown around the flat and were particularly keen to buy it because it appeared to include a roof terrace. The Defendants fraudulently represented that the flat included the roof terrace. The Plaintiffs wished to save stamp duty and at their request the Defendants agreed that the total purchase price of £45,000 should be apportioned as to £40,000 for the property and £5,000 for the fixtures and fittings.

It was clear from the correspondence that the agreed apportionment was merely to facilitate the plaintiffs in reducing their stamp duty liability: the sum of £5,000 was far greater than the actual market value of the fixtures and fittings.

After completing the transaction and on discovering that the flat did not, in fact, include the roof terrace, the Plaintiffs sued the Defendants for damages for fraudulent mis-representation. The Plaintiffs' claim was in tort only and did not include a claim for damages for breach of Contract.

The Plaintiffs were successful at first instance and were awarded damages. The Defendants appealed, not against the finding of fraudulent mis-representation but against the entitlement of the Plaintiffs to damages. The nub of the appeal turned on whether the Plaintiffs were bound by the value of £5,000 put upon the chattels for the purposes of reducing stamp duty. There was expert evidence that at the date of completion of the transaction in November 1983, the value of the flat with a roof garden was £48,250 and without a roof garden was £40,650. The Defendants argued that the Plaintiffs should be bound by the apportionment in the Contract and should not be allowed to pen up that apportionment and rely upon the true value of the fixtures and fittings in order to arrive at the proper value of the flat they had bought.

In the Court of Appeal Lord Justice Kerr concluded the fixtures and fittings were worth something between £500 and £1,000. He rejected the Defendants arguments but stated that the practice of attributing false values to fixtures and fittings in order to avoid stamp duty cannot be condoned; he indicated that if a solicitor is involved in an apportionment of this kind which he knows not to be in accordance with the facts, then he must be guilty of professional misconduct and possible criminal offences; he also indicated that the consequences for buyers may well be that their Contract becomes unenforceable. The relevant maxim is *ex turpi causa non oritur actio,* meaning that an action does not arise from a base cause.

The Court of Appeal held in favour of the Plaintiffs and dismissed the Defendant's appeal on the grounds that:

(a) The Plaintiffs had a non-answerable claim against the Defendants for fraudulent misrepresentation,

(b) the Defendant's own moral culpability greatly outweighed that of the Plaintiffs and he ought not to be allowed to keep the fruits of his fraud and,

(c) the illegal apportionment in the Contract was wholly unconnected with the Plaintiffs cause of action in tort and that the Plaintiff would have suffered loss as a result of the fraudulent mis-representation regardless of whether or not the Contract contained the illegal apportionment.

Lord Justice Kerr said in the Court of Appeal that there were a number of authorities which showed that the *ex turpi causa* defence lies mainly in the field of contractual claims and only rarely in tort. The *ex turpi causa* defence therefore failed. □

Felix McTiernan
Conveyancing Committee

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LAW AGENCY

Broad Discussions at Society's Annual General Meeting

The President, Mr. David R. Pigot presided at the Annual General Meeting of the Incorporated Law Society of Ireland at Blackhall Place, Dublin, on November 12th 1987.

The formal notice convening the meeting and the minutes of the Half Yearly General Meeting having been taken as read, the Chairman of the Finance Committee, Mr. Ernest J. Margetson proposed the adoption of the audited accounts and balance sheet, Mr. Brendan Garvan queried the Law Society's control over expenditure in view of the increase of 24% in total expenditure from 1984 to 1986. He contended that it was out of control and that the increase in the numbers paying membership subscriptions and Practising Certificate fees should have enabled the Society to reduce the Practising Certificate fee level.

The extra income generated by the increased numbers was (a) Membership Subscription £3,000 in 1985 and £10,000 in 1986 and (b) Practising Certificate fees £38,000 in 1985 and £27,000 in 1986, to add to the total annual income of (approximately) £1m.

Mr. Margetson stressed that expenditure was strictly controlled and all items were continuously examined to ensure that they were justifiable. The 1986 accounts showed such expenses as payroll and related costs which included an extra solicitor for the Complaints Department, Public Relations expenditure on the video "Its the Law" and "The Newsletter". The extra expenditure had received the approval of Council and such outlays, particularly the extra professional support in the Complaints area and investment in new technology, will show beneficial effects.

The Chairman also pointed out that the total annual amount payable per member was, in fact £6 less in 1986 than immediately prior to 1984. Mr. Garvan stated that he was referring to the Practising Certificate fee level (the Membership Subscription/Practising Certificate fee increased by 9% in 1985 and 5% in 1986).

No further points were raised and the accounts were then adopted.

New Bye Law Proposed

In opening the Report of the Council for discussion, the President said that he would take with it the resolution standing in the name of Mr. Maurice R. Curran and Mr. Rory O'Donnell.

The following Resolution was then proposed:-

"That Bye Law 38(b) be deleted and replaced by the following subclause:-

38 (b) Any past President of the Society who has ceased at any time to be a member of the Council and who notifies the Council in writing of his desire to participate in the affairs of the Council shall so long as he remains a member of the Society:-

(i) In the first year after he ceases to be a member be entitled to receive notices and agendas, papers for and to attend at all meetings of the Council, and to speak and vote thereat;

(ii) In any subsequent year shall be entitled to receive notices and agendas, papers for and to attend at all meetings of the Council, and to speak and vote thereat provided that in the previous year he has attended at least five meetings of the Council;

(iii) Any past President of the Society who has ceased at any time to be a member of the Council and who does not qualify under the provisions of sub-clauses (i) or (ii) above shall, so long as he remains a member of the Society, have the privilege of receiving notices and agenda papers for and to attend at all meetings of the Council and to speak but not to vote thereat;

Provided however that any such privilege as is provided in sub-clauses (i) or (ii) above may be suspended or removed from any such past President in the same manner as is provided in Bye Laws 47 and 48 of the Society for the suspension and removal of a member of Council.

Mr. Curran said that in proposing the Resolution, he had in mind a limited number of Past Presidents who attended regularly at the Council, participated in discussions and regretted that they could not vote. The resolution had been worked to ensure that on particular issues, Past Presidents would not come out of the woodwork to have a deciding voice on a decision. The adoption of the Resolution would give younger members a greater opportunity of election to the Council.

Mr. John Maher said that as a Past President he was wholeheartedly in support of the Resolution. As a regular attender at the Council he had a feeling of isolation in having no vote on issues discussed. The proposal was a reasonable compromise between the Past President having no vote and the interest of the elected Council Member.

Mr. Ken Murphy said he was against the Resolution. It would make the Council more remote and unresponsive to members than is currently the situation. He listed the votes on major issues which had been taken over recent years and said he did not know how the Past Presidents would have voted, had they a vote, but they had very fixed views and were by nature conservative. Several members of the Younger Members' Committee were opposed to the proposition as was the Committee of the Society of Young Solicitors. He was not convinced that in adopting it, the Society would be going in the right direction for the 1990's.

Due to a nearby fire alarm operating for nearly half an hour making continuance of the meeting in the President's Hall impossible, the meeting adjourned to the Members Lounge.

Mr. John Buckley suggested that the adoption of the Resolution as it stood would leave the Council with a very long tail of Past Presidents. While he had sympathy with the principle of the Resolution, he felt that to make it practical past Presidents should only be allowed the vote for a further three years at maximum. Mr. Don Binchy said that when the idea of service on the Council by Past Presidents was first offered it was done so as to induce young members to go for election to the Council. In practice that had not happened.

Committee Work

Mr. Adrian Bourke said the formula worked out some years ago was satisfactory in that the major work of the Council was done in Committees. The attendance requirement would be more meaningful if it embraced attendance at Committees as well as at the Council. Mr. Daire Murphy said there was a continuing concern that the Council could be remote from the ordinary members. One answer to those who felt remote was that it was up to them to elect their own representatives. The Law Society needed an input from Past Presidents but was a vote necessary to achieve that input? It would be open to Past Presidents to stand for election if they wanted to vote. Mr. P. Brennan welcomed any development which would give the Law Society the benefit of the long experience of Past Presidents, but Mr. Andy Smyth asked why, if the Resolution was adopted, Past Presidents would bother going up for election since under the Resolution they would have a vote.

Mr. Justin McKenna supported the Resolution since he did not regard the absence of Past Presidents from the election list as a threat to democracy. Mr. Pat O'Connor supported the motion but would like a limit in the number of years of entitlement as suggested earlier.

Mr. Michael Williams said that the Council was elected from year to year and people have a vote in the Council because they are elected in that particular year. In that way, over time, the changing views within the profession are accommodated. Insofar as the Resolution was concerned, there would be no problem until the voice of those wanting change was outvoted by the votes of the more conservative Past Presidents. Ms. Anne Neary wondered how many additional votes the resolution would produce. She pointed out that out of a profession of about 3,500, only 1,100 bothered to vote.

Mr. Peter Prentice said that he was the originator of the motion to allow past Presidents to attend the Council on the basis that while there was need for an experienced view on the Council, the up-and-coming members should not find it too difficult to get elected. He was opposed to the Motion and was supported by Mr. Bruce St. J. Blake. Mr. Curran then replied.

On a show of hands the motion was defeated.

The President then dealt with the Reports of the various committees. On the report of the Education Committee, Mr. Desmond Moran referred to the article on Court Etiquette in the November issue of the Gazette dealing with the Advocacy Course. He commented that he was disappointed at the standard of cross examination shown by younger solicitors and wondered how many of the modern apprentices were brought to an action by their Masters. The remaining sections of the report were agreed. The Annual Report of the Council was then adopted.

Election of Auditors

Mr. Margetson proposed the reappointment of Messrs. Coopers & Lybrand as Auditors to the Society for the coming year. He welcomed Mr. Dick Lane, a partner of the firm and Mr. Brendan Kavanagh, Audit Manager, and thanked them for their help to the Society over the year. The proposal was seconded by Mr. D. Binchy and agreed.

Council for 1987/88

The Scrutineers Report which was tabled was accepted. The outcome of the ballot was as follows:-

	Total Votes
1. Quinlan, Moya	1099
2. Binchy, Donal G.	1053
3. O'Donnell, Rory	1050
4. Ensor, Anthony H.	1048
5. O'Donnell, P. Frank	980
6. O'Mahony, Michael V.	958
7. Bourke, Adrian P.	938
8. Pigot, David R.	937
9. Margetson, Ernest J.	915
10. Collins, Anthony E.	906
11. Clarke, Geraldine M.	879
12. O'Connor, Patrick	875
13. Smyth, Andrew F.	856
14. Shields, Laurence K.	853
15. Lynch, Elma	840
16. Daly, Francis D.	837
17. Daly, Patrick J.	830
18. Monahan, Raymond T.	828
19. McMahon, Brian M.	817
20. Irvine, Michael Glynn	815
21. Cullen, Laurence	813
22. Curran, Maurice R.	799
23. Mahon, Brian J.	794
24. Glynn, Patrick A.	782
25. Murphy, Ken	779
26. Killeen, Carmel S.	743
27. Matthews, Vivian C.	709
28. Harte, John B.	675
29. Donegan, James D.	671
30. Griffin, Gerard F.	657

Note

Under Bye Law 29A the Senior Vice President (Mr. Thomas D. Shaw) is deemed to be elected.

Provincial Delegates

Connaught - McEllin, Edward M.
Leinster - Lanigan, Frank
Munster - O'Connell, Michael
Ulster - Murphy, Peter F. R.

Single European Act

In the absence of Mr. T. C. G. O'Mahony (abroad) and Mr. Brendan Garvan who had to leave the meeting earlier, the following motion was proposed by Mr. Anthony Murphy and seconded by Mr. Brendan Fahy:-

> "We call on the Council of the Society and/or its appropriate Committee(s) to explain the neglect of the Society to investigate and enlighten the country on the serious constitutional implications of the Single European Act, or to lend appropriate assistance or cooperation to Legal Consultative Council on its lone pioneering of this enormous task.

The Society gave its Lecture Hall free of charge for an SEA public meeting on December 8th, 1986. It purports to charge Legal C.C. for use of a Consultation Room on 6 occasions (usually at lunchtime) for consultative meetings on SEA. Legal C.C. had been invited to freely avial of such facility since the early 1970's for its occasional lunchtime meetings of Solicitors and Counsel concerned about matters of fundamental and constitutional importance, enjoying valuable assistance from such as Honourable Mr. Justice Brian Walsh; the Society President, Mr. Walter Beatty and the Society Secretary, the late Mr. Eric Plunkett. Do the members consider that the Society is doing its duty in so exacting payment where some of its members helped to fulfil an important function neglected by it?''

Mr. Anthony Murphy outlined the background to the resolution. Mr. Margetson, Chairman of the Finance Committee, commented that it was not the practice of the Society to provide rooms free for any activity. Insofar as the Single European Act was concerned, the President considered that this was an area of politics and as such should not involve the Society. Accordingly he proposed that the Resolution be rejected. On being put to the meeting, and the Resolution was declared LOST.

Solicitors Benevolent Association

On the invitation of the President, Mr. John O'Connor, Chairman, addressed the meeting on the work of the Solicitors Benevolent Association and on the support it had received during the year through the good offices of Mr. Brendan Walsh and Mr. Frank O'Donnell who participated in the Maracycle to Belfast. That participation exercise had produced almost £15,000 — a very welcome cash injection. At Mr. O'Connor's request the secretary of the Society, Ms. Clare Leonard then presented Mr. Walsh and Mr. O'Donnell with Yellow Jerseys.

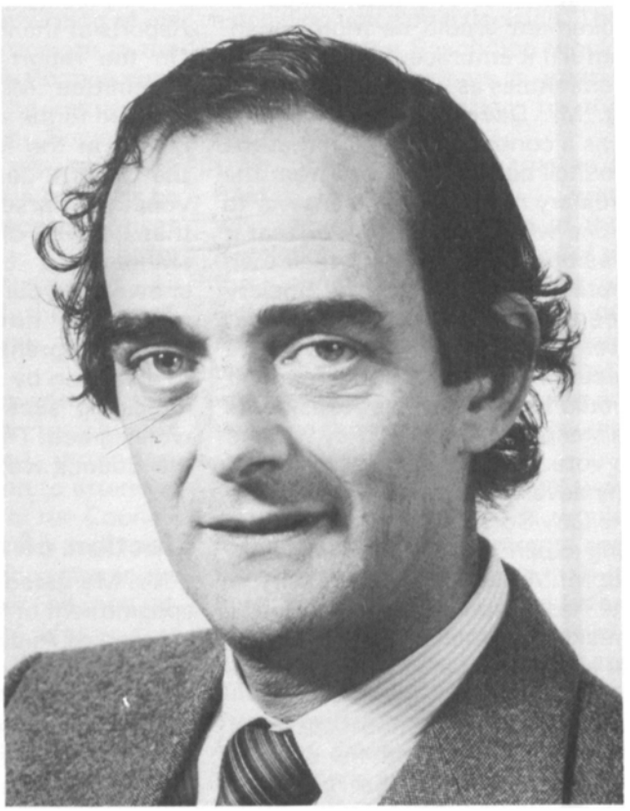
Prize Bond Draw

The results of the draw were tabled. The successful bonds were: —

£1,000	*Bond Number*
Hugh O'Donnell	1450
John P. Aylmer	2003
Patrick Macklin	2239
John Hooper	1268
£500	
Patrick J. O'Gara	2268
John Baily	1375
John & Robert Kieran	2218
William L. Duggan	1933
Michael Hayes	2138
Patrick McEntee	1203
Sean T. Kennedy	2023

Maurice R. Curran - Senior Vice President 1987/88

Maurice R. Curran was educated at Blackrock College and U.C.D. obtaining B.C.L. and LL.B. degrees with First Class Honours. He qualified as a Solicitor in 1961, having been awarded the Overend & Findlater Scholarships. He joined the firm of Walker Son & Mason, now Mason Hayes & Curran, in which he is currently Managing Partner.



Rory O'Donnell - Junior Vice President 1987/88

Rory O'Donnell is Senior Partner in Rory O'Donnell & Company, 16 Fitzwilliam Place, Dublin 2. He was educated at Killenard National School, Monasterevin C.B.S. and De La Salle Brothers, Kildare. He was admitted as a Solicitor in 1961. He worked for Dominic Dowling for 6 years before setting up a practice on his own. He has been closely associated with the Dublin Solicitors Bar Association of which he was President in 1981/82.

£250	*Bond Number*
Peter Smithwick	1614
William McGuire	1993
Michael M. Smyth	1935
William McGuire	1984
Maurice M. A. Power	2202
Dominick H. Kearns	1404
£100	
Peter J. McKenna	1126
Oliver D. G. McArdle	1666

Annual General Meeting

Thursday, 17th November, 1988 at 6.30 p.m. was fixed as the date for the next Annual General Meeting.

At the conclusion of the formal business the Senior Vice President, Mr. Thomas D. Shaw, took the chair. Mr. William D. Hodgins said that representing the Tipperary Bar Association, he would like to thank Mr. Pigot for all his work during his year of office. In particular he appreciated the effort made to visit Bar Associations. Such visits were very much appreciated. He also felt sure that Mr. Pigot had represented the Society well on his visits to representatives of the legal profession in other countries. The motion was formally seconded by Mr. Desmond Moran and carried with applause.

The meeting then terminated. □

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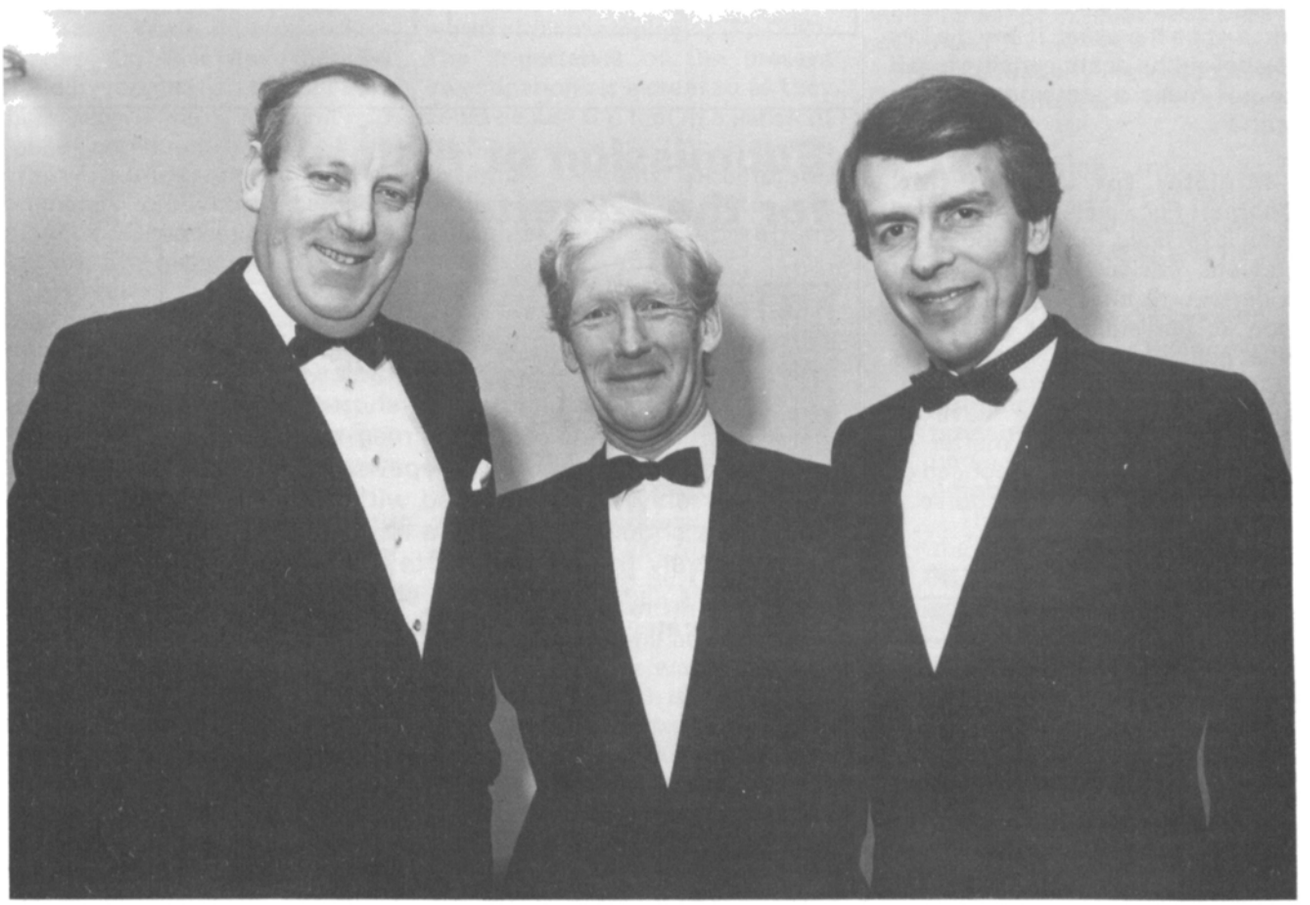

OUTGOING PRESIDENT'S DINNER

(Left to right): Mr. Tom Shaw, Senior Vice President; Mr. Pigot, outgoing President of the Law Society and Mr. Ray Monahan, Junior Vice President.

YES, MINISTER FOR JUSTICE

(Dail Debates. 10 November 1987)

Solicitors' Fees

Mr. McCoy asked the Minister for Justice the plans, if any, he had to abolish the torts of maintenance and champerty in order to render lawful the charging of contingency fees by solicitors.

Minister for Justice (Mr. Collins): Legislation would be necessary to enable such a change to be made. I could not undertake to include, by way of reply to parliamentary questions, what specific legislative proposals I might have in a particular area. Any proposals I may have in relation to the subject matter of this question will be announced in the ordinary way in due course.

Death Penalty.

Mr. McCoy asked the Minister for Justice the plans, if any, he has to abolish the death penalty; and if he will make a statement on the matter.

Minister for Justice (Mr. Collins): For reasons which have been explained in this House on previous occasions, I could not undertake to indicate, by way of reply to parliamentary questions, what specific legislative proposals I might have in a particular area. Any proposals I may have in relation to the subject matter of this question will be announced in the ordinary way in due course.

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A G M

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6.30 p.m.

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.

"Pressure on the Screwdrivers"

A recent development in the Anti-Dumping law of the European Communities.

The economic strength of Japan and its current large trading surplus with the rest of the World has caused concern among its principal trading partners i.e., the US and EEC. Japanese Industry has been producing on a massive scale and has dumped much of its surplus in the EEC. During 1984 the EEC passed tough anti-dumping measures in order to counter this flood of Japanese merchandise. However, the Japanese managed to circumvent the anti-dumping rules by establishing assembly only operations ("screwdriver operations") within the EEC. During the summer of 1987, the EEC amended its trade protection code in order to bring these operations within the scope of the anti-dumping framework. The cases against the Japanese Corporations mentioned in this article are the first to be taken under the new law. The article analyses the text of the "screwdriver" law, the new "Article 13 of Regulation 2176/94", as amended by Regulation 1761/87.[1] The contents of the Commission Notices concerning the proposed investigations are also discussed.

September 1st 1987 saw the opening of a new and vigorous chapter in the European Community Trade Protection Programme. On that day the law agreed by member states last July which allows the Community to impose anti-dumping duties on unfairly under-priced non-Community products assembled inside the EC was invoked for the first time. The measure is designed to prevent non-Community manufacturers from establishing plants within the EC to assemble products which are the subject of definitive anti-dumping duties.

The action is being taken against Japanese firms, Brother Industries Limited, Canon Corporation, Matsushita Electric Company Limited, Tokyo Electric Company Limited, Sharp Corporation and Silver Seiko in relation to Electronic Typewriters. Tokyo Electric Company is also facing anti-dumping duties concerning electronic scales originating in Japan. The threatened imposition of measures described in a Financial Times article as "one of the toughest anti-dumping laws in the world" has caused grave concern in Japan. The Keidanren (Japanese Industry Confederation) has warned that this extension of anti-dumping rules could lead to a reduction in Japanese investment in the Community (currently estimated to be two billion dollars worth of plant employing 72,000). The importance of the present investigations is increased as they could be just the first in a series of such moves by the Commission's External Relations Directorate. Other possible targets are Japanese backed operations producing photocopiers, mechanical excavators and electric motors.

by
CATHAL T. O'CONAILL
B.C.L., Solicitor

It is envisaged by Commission sources that definitive anti-dumping duties will be imposed in the present cases within the next three months which is considerably quicker than the time for conventional anti-dumping duties. Indeed lawyers acting for the Japanese corporations involved have been quoted as saying that the Commission is trying to make their defence unnecessarily difficult by setting an unreasonably short time (15 days) to respond to the case.

Background — E.C. Trade Protection Framework

Article 3 (b) of the Treaty of Rome sets out as one of the objectives of the E.C. "the establishment of a common customs tariff and of a common commercial policy towards third countries." Article 113 of the Treaty dealing with the Common Commercial Policy (C.C.P.) is the legal basis for E.C. trade protection measures.

The Community has had exclusive responsibility for the implementation of the C.C.P. since 1st January 1970 (the end of the transitional period). The Court of Justice has ruled that this consolidation of power in the hands of the Community precludes member states from implementing or adopting measures different from those which the Community seeks to adopt in relation to third countries.[2]

The Community has adopted four instruments of trade protection:—

(1) Anti-dumping measures: Regulation 2176/84[3] hereinafter called the Regulation), Decision 2177/84[4] and Regulation 1761/87;

(2) Countervailing Measures: Regulation 2176/84 and ECSC Decision 2177/84;

(3) Safeguard measures: these measures are authorised under various regulations, notably Regulation 288/82.[5]

These regulations represent the implementation of Article XIX of GATT which authorises safeguard measures where a product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products.

(4) The New Commercial Policy Instrument. Since 1984 the Community has been empowered to take measures

against "the illicit commercial practices" of third countries in the context of GATT.

Determining the incidence of Anti-Dumping

The Regulation is the basic instrument on the protection against dumped or subsidised imports from countries outside the E.C. The preamble places the Regulation firmly in an international context, stating that the anti-dumping rules "are adopted in accordance with existing international obligations in particular those arising from Article VI of the General Agreement on Tarrifs and Trade."

In order to proceed to anti-dumping the Community must satisfy itself of:

(a) The existence of Dumping;

(b) The existence of an Injury;

(c) The existence of a Community Interest e.g. serious threat to a Community industry, requiring intervention.

(a) The existence of Dumping

The Regulation, article 2 states:

> "A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product."

A reading of the article indicates that four matters have to be established in order to determine that dumping has taken place: (1) The determination of normal value; (2) the determination of export price; (3) the comparison of normal value and export price; (4) the assessment of the dumping margin. These criteria can often be measured without too much difficulty when dealing with products from say Japan. However, problems can arise where products from a non-market economy, e.g. Poland or Czechoslovakia are concerned.

(b) The Existence of Injury

Article 4 ssl of the Regulation states:

> "determination of injury shall be made only if the dumped or subsidised imports are through the effects of dumping or subsidisation causing injury i.e. causing or threatening to cause material injury to an established Community industry or material retarding the establishment of such an industry."

In his opinion to the Court in the *Ball Bearings* case [1979] ECR 1212, Advocate General Wannt stated that "Injury" is an "economic question not readily open to judicial review".

(c) The Existence of a Community Interest

The Commission "Guide to the European Communities Anti-dumping and Countervailing Legislation states at article 12:

> "Community interest may cover a wide range of factors but the most important are the interest of consumers and processors of the imported product and the need to have regard to the competitive situation within the Community market."

Article 13 of the Regulation

Article 13ssl states:

> "anti-dumping or countervailing duties whether provisional or definitive shall be imposed by regulation."

Sub-section 4 (a) stipulates that

> "Anti-dumping and countervailing duties shall be neither *imposed nor increased with retroactive effect* (writer's emphasis).

However, ss 4 (b) does empower the Council in certain circumstances e.g. where there is a history of dumping, sporadic dumping, where "injury which is difficult to repair is caused by massive imports in a relatively short time", or "in the case of violation of an undertaking".

Regulation 1761/87 has extended the scope of Article 13 by introducing a new sub-section 10. Paragraph 10 (a) stipulates that

> "definitive anti-dumping duties may be imposed by way of derogation from the second sentence of paragraph 4 (a) on products that are introduced into the commerce of the Community *after having been assembled or produced in the Community* (writer's emphasis) provided that assembly or production is carried out by a *party* which is *related* or *associated* to any of the manufacturers *whose exports of the like product are subject to a definitive anti-dumping duty* (writer's emphasis), the assembly or production operation was *started* or *substantially increased* (writer's emphasis) after the opening of the anti-dumping investigation, the value of parts or materials used in the assembly or production operation and originating in the country of exportation of the product subject to the anti-dumping duty exceeds the value of all other parts or materials used by at least 50%."

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Sub-section 10 (c) provides that

> "The rate of the anti-dumping duty shall be that applicable to the manufacturer in the country of origin of the like product subject to an anti-dumping duty to which the party in the Community carrying out the assembly or production is related or associated. The amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty applicable to the exporter of the complete product on the cif value of the parts or materials imported; it shall not exceed that required to prevent circumvention of the anti-dumping duty;"

Investigations 87/C/235/02 and 87/C/235/08 (1 September 1987)

The investigations are the first initiated by the Commission under Art. 13 (10) of the Regulation. Both investigation notices follow an identical framework. The only difference is that the first investigation concerns electronic typewriters whilst the second involves electronic scales. It is proposed therefore to examine the text of the first investigation notice as the comments made thereon will be equally applicable to the second notice.

The first paragraph of the Electronic Typewriters investigation states:

> "The Commission has received a complaint alleging that Brother Industries Ltd., Canon Inc., Matsushita Electric Co. Ltd., Tokyo Electric Co. Ltd., Sharp Corporation, Silver Seiko Ltd., are importing parts of electronic typewriters originating in Japan into the Commmunity and subsequently assembling them under conditions laid down by Article 13 (10) of Regulation (EEC) No. 2176/84 of 23 July 1984 on protection against dumped and subsidised imports from countries not members of the European Economic Community, as amended by Council Regulation (EEC) No. 1761/87 of 22 June 1987."

The third paragraph entitled "Conditions of Article 13 (10) follows the procedure stipulated in Article 13 (10) of the Regulation. It recites that by Council Regulation 1698/85 a definitive anti-dumping duty was imposed on imports of electronic typewriters originating in Japan. The complaint relating to anti-dumping (lodged by the *Committee of Europe's Typewriter Manufacturers)*:

> "alleges that the exporters Brother Industries Ltd., Canon Inc., Matsushita Electric Co. Ltd., Tokyo Electric Co. Ltd., Sharp Corporation and Silver Seiko Ltd., whose exports of electric typewriters to the Community are subject to the definitive duty, are fulfilling the conditions of Article 13 (10). It is in particular alleged that these exporters have established in the Community related or associated companies which assemble a like product, namely electronic typewriters, from parts originating in Japan that the assembly operations were started or have substantially increased after the opening of the anti-dumping investigation into imports of electronic typewriters originating in Japan and that the value of the parts used for the assembly operations, and originating in Japan exceeds the value of all other parts used by at least 50%."

Interested parties are requested to make known their views in writing. The Commission undertakes to hear interested parties, provided they can:

> "show that they are likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard orally."

The notice further follows the scheme of the Regulation by providing that

> "If the required information and argumentation is not received in adequate form within the time limit specified above, the Community authorities may take findings on the basis of the facts available in accordance with Article 7 (7)(b) of Regulation (EEC) No. 2176/84."

Conclusion

The investigations break new ground in the Community Trade Protection Programme. In the light of the strained trade relations between Japan and the Community the matter will remain at the forefront of the political agenda. Indeed, the importance attached by the Japanese to the E.C. anti-dumping framework has been underlined by a separate challenge by the Brother Corporation to the method which the Commission uses to calculate sales prices which go into its anti-dumping calculations. This *case* has been brought to the Court of Justice by the Japanese corporations involved in the present "screwdriver" investigations, and the Advocate General's opinion is expected early next year.

Footnotes

(1) OJ No. C 167, 26.6.1987, p.9.

(2) [1975] E.C.R. 1355 at p.1364.

(3) Council Regulation (EEC) No. 2176/84 on protection against dumped or subsidised imports from countries not members of the European Economic Community – OJ No.L 201, 30.7.1984 at p.1.

(4) Commission Decision No. 2177/84/ECSC on protection against dumped or subsidised imports from countries not members of the European Coal and Steel Community – OJ No. L 201, 30.7.1984, p.17.

(5) Council Regulation (EEC) No. 288/82 on common rules for imports – OJ No. L 35, 9.2.1982, p.1.

□

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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.
5th 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

George B. and Kathleen C. Sheaffer, both of "Idle Wild", Elaghbeg, Co. Donegal. Folio No.: 40145; Lands: Muff; Area: 0a. 2r. 5p.; County: **DONEGAL.**

Laurence O'Dwyer, of Dromineen, Pallasgreen, Co. Limerick. Folio No.: 21435; Lands: (1) Dromeenboy, (2) Dromeenboy, (3) Cunnagavale, (4) Cunnagavale, (5) Dromeenboy, (6) Dromeenboy; Area: (1) 59a. 2r. 29p., (2) 5a. 1r. 12p., (3) 1a. 0r. 5p., (4) 0a. 2r. 0p., (5) 16a. 2r. 28p., (6) 40a. 0r. 23p.; County: **LIMERICK.**

Timothy Alexander Pepper, of Dohallet, Shercock, Co. Cavan. Folio No.: 15409; Lands: Dohallet; Area: 36a. 0r. 17p.; County: **CAVAN.**

Patrick O'Hora, of Farrandeelian, Ballina, Co. Mayo. Folio No.: 21515; Lands: (1) Farrandeelian, (2) Carrowkeribly; Area: (1) 15a. 1r. 35p., (2) 4a. 1r. 14p.; County: **MAYO.**

Dermot Farrell, of Garthy, Castletown-Geoghegan, Co. Westmeath. Folio No.: 4486; Lands: Garthy; Area: 27a. 2r. 27p.; County: **WESTMEATH.** .

John Julian, of Killeen, Maganey, Co. Kildare. Folio No.: 6709; Lands: (1) Clonagh, (2) Clonagh, (3) Clonagh; Area: (1) 32a. 3r. 33p., (2) 23a. 2r. 8p., (3) 14a. 1r. 25p.; County: **LAOIS (QUEENS).**

James Walsh, of Clonconry More, Broadford, Co. Clare. Folio No. 7911; Lands: Cloonyconry More (part); Area: 156a. 2r. 0p.; County: **CLARE.**

Donal Kelly, of Kilcrimple, Gort, Co. Galway. Folio No.: 4085; Lands: Kilcrimple; Area: 69a. 1r. 15p.; County: **GALWAY.**

W. J. Sloan Ltd., of Main St., Boyle, Co. Roscommon. Folio No.: 5577; Lands: Green Street in the town of Boyle, being a portion of the lands of Knocknashee; Area: 0a. 0r. 3½p.; County: **ROSCOMMON.**

Edward William Rickerby, of Main Street, Shillelagh, Co. Wicklow. Folio No.: 2438; Lands: Ballard; Area: 0a. 1r. 30p.; County: **WICKLOW.**

Vincent Finucane, of Lakelawn, Ballykeeffe, Mungret, Co. Limerick. Folio No.: 26407; Lands: Ballykeeffe; Area: 0a. 2r. 3p.; County: **LIMERICK.**

Michael S. James, c/o Messrs. Fitzgerald, McCormick & Kelly, Solicitors, Teeling St., Sligo. Folio No.: 1958F; Lands: Cuppanagh; Area: 10.156 acres; County: **SLIGO.**

William Glynn, of Ashfield, Kilchrest, Loughrea, Co. Galway. Folio No.: 21802; Lands: (1) Kilchrest (part), (2) Ballycuddy (part), (3) Ballycuddy (part), (4) Ballycuddy (part); Area: (1) 1a. 2r. 4p., (2) 25a. 2r. 20p., (3) 95a. 3r. 0p., (4) 4a. 3r. 0p.; County: **GALWAY.**

Bernard A. McGee, of Kilnaleck, Co. Cavan. Folio No. 5359 closed to 1107F; Lands: (1) Kill, (2) Kill, (3) Kill, (4) Kill, (5) Omard; Area: (1) 15a. 1r. 0p., (2) 9a. 1r. 3p., (3) 0a. 2r. 17p., (4) 4a. 3r. 36p., (5) 31a. 3r. 20p.; County: **CAVAN.**

Patrick Crowley, of Rylane, Coachford, Co. Cork. Folio No. 33838; Lands: Knocknagoon; Area: 3.656 acres; County: **CORK.**

Thomas Mulligan, of Crosswell, Creggs, Co. Roscommon. Folio No.: 5671F; Lands: (1) Garraun North, (2) Rosmoylan, (3) Garraun North; Area: (1) 42.975 acres, (2) 2.363 acres, (3) 3.469 acres; County: **ROSCOMMON.**

Patrick Feeley, of Carrowphadeen, Lecarrow, Knockcroghery, Co. Roscommon. Folio No.: 42; Lands: Carrowphadeen; Area: 33a. 0r. 0p.; County: **ROSCOMMON.**

Christopher Connolly, deceased, c/o Gore & Grimes, Solicitors, 6 Cavendish Row, Dublin 1. Folio No.: 2557L; County: **DUBLIN.**

Thomas A. Connolly, of Ballyfoyle, Mageney, Co. Kildare. Folio No.: 11950; Lands: Ballynagall; Area: 7a. 3r. 10p.; County: **LAOIS.**

Francis William Alan Timms and **Margaret Alice Timms,** both of 18 Kildare Street, Dublin 2. Folio No.: 6420; Lands: Kilpedder East; Area: 0a. 2r. 0p.; County: **WICKLOW.**

Rev. Eugene McKenna, of Drumillard, Co. Monaghan. Folio No.: 2423; Lands: Kilkit; Area: 0a. 1r. 4p.; County: **MONAGHAN.**

Frederick Ozanam Trust Incorporated. Folio No.: 4093 situate in the westside of the Finglas Road, parish of Glasnevin and district of Glasnevin; County: **DUBLIN.**

Ledbury Investment Co. Ltd., of 96 South Mall, Cork. Folio No.: 35608; Lands: Ballyphehane; Area: 5a. 2r. 20p.; County: **CORK.**

Patrick Carroll, of Kilcarry, Clonegal, Ferns, Co. Wexford. Folio No.: 3691F; Lands: Coolroe; Area: 45.667 acres; County **CARLOW.**

Thomas F. Ryan, of Shanakill, Roscrea, Co. Tipperary. Folio No.: 32015; Lands: (1) Dromard More, (2) Shanakill, (3) Shanakill, (4) Shanakill; Area: (1) 3a. 1r. 30p., (2) 76a. 1r. 26p., (3) 12a. 1r. 21p., (4) 4a. 3r. 24p.; County: **TIPPERARY.**

Owen M. Gillespie, of Bunbeg, Letterkenny, Co. Donegal. Folio No.: 6200F; Lands: Magheraclogher; Area: 0.231 acres; County: **DONEGAL.**

Thomas Kiernan. Folio No.: (1) 222R, (2) 9459. Lands: (1) Ballynacross, (2) (a) Grassyard (b) Carragh; Area: (1) 31a.3r.15p., (2) (a) 6a.30p. (b) 4a.1r.9p.; County: **LONGFORD.**

Lost Wills

DULLAGHAN, Peter, late of Bush, Riverstown, Dundalk, Co. Louth. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on 8 January 1947, please contact Peter Woods and Son, Solicitors, 18 Francis Street, Dundalk, Co. Louth. Ref. D247.

DUNFORD, Violet, deceased, late of 8 Shelton Gardens, Dublin 12. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on 2 December, 1987, please contact Messrs. P. J. O'Driscoll & Sons, 179 Church Street, Dublin 7. Tel. 728144. Fax No. 728425. Ref. GM.

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Lost Title Documents

IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF CARMEL BURNS IN RESPECT OF PROPERTY 29 CABRA PARK, PHIBSBORO, COUNTY DUBLIN

TAKE NOTICE that Carmel Burns of 4 Cornamuckle, Bloomfield, Castleblayney, County Monaghan has lodged an Application for her 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 document of title are held and quote Reference No. 86DN15296. The missing documents are detailed in the schedule hereto.

Dated the 16th December, 1987

M. O'NEILL
Examiner of Titles

SCHEDULE

(a) Original Lease dated 5th April, 1906, Charles Coates and City and County Permanent Benefit Building Society to Laurence William Murphy.

(b) Original Deed of Assignment dated 16th March, 1936, Sarah O'Loughlin to Annie McAree.

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.

THE SOLICITORS' BENEVOLENT ASSOCIATION

A CASE IN NEED

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Recent Irish Cases

Edited by
Gary Byrne

FAMILY HOME PROTECTION ACT 1976
Equitable Deposit of Title Deeds — Consent of Spouse — Prior Consent

The Bank took an equitable deposit of the Land Certificate of the Defendant on 14 March 1978, the Defendant having brought his Land Certificate to the Bank with the intention of leaving it with the Bank as security for a loan which they had agreed to give him. The Bank Manager pointed out to the Defendant that his wife, who was not with him at the time, would have to call and give her consent to the transaction. The Defendant left the Bank, leaving his Land Certificate in the custody of the Bank and later on the same day his wife called and signed the necessary consent to comply with the provisions of the Family Home Protection Act 1976. The Defendant contended that the consent of his wife was not a prior consent in writing as required by Section 3 of the Family Home Protection Act 1976.

HELD: "If the attempt by the Defendant to effect a mortgage by equitable deposit of his Land Certificate was already complete before his wife called in to execute the consent, then it was not a 'prior consent' as required by the Act, and the transaction should be regarded as void. However, in the particular circumstances of the present case, the Bank and the Defendant impliedly agreed to the retention by the Bank of the Land Certificate as mere custodians thereof until such time as the Defendant's wife came in to sign the necessary consent, and that a tacit agreement should be implied as between the Bank and the Defendant that as and from the time when Mrs. Hanrahan signed the consent, the character in which the Land Certificate was held by the Bank should change and that from that time forward they should be entitled to retain it in the capacity of equitable mortgagees."

Governor & Company of the Bank of Ireland -v- John Hanrahan, High Court per O'Hanlon J., 10 February 1987, unreported.

Nicholas Comyn

PLANNING
Compensation — Grounds of Refusal of Permission

The Claimant lodged an application for permission for residential development of lands at Killiney, Co. Dublin. The Planning Authority decided to refuse permission and the Claimant appealed against the decision to An Bord Pleanala. An Taisce also appealed against the decision on the grounds that the Planning Authority's decision to refuse was not strong enough. An Bord Pleanala refused to grant the permission for the following reasons:

1. The proposed development would be contrary to the zoning objectives for the area and both the Dun Laoghaire Development Plan 1976 and Draft Plan 1983. These zoning objectives are considered reasonable and the development would, therefore, be contrary to the proper planning and development of the area.
2. The proposed development, including the access road, driveways, boundary walls, and the considerable excavation, would be seriously injurious to the overall character of the area and contrary to its proper planning and development.

The Claimant sought compensation under Section 55 of the Local Government (Planning and Development) Act 1963 measured at the sum of £2,375,000 for the loss of development value. Section 56 of the same Act provides that compensation under Section 55 is not to be payable . . .

"(g) in respect of the refusal of permission for development if the reason or one of the reasons for the refusal is the necessity of preserving any view or prospect of special amenity value or special interest.

(h) in respect of the refusal of permission for development in an area to which a special amenity area order relates.

(i) in respect of the refusal of permission for development comprising any structure or any addition to or extension of a structure if the reason or one of the reasons for the refusal is that the structure, addition or extension —

(i) would infringe an existing building line, or, where none exists, a building line determined by the planning authority or by the Minister, (ii) would be under a public road, (iii) would seriously injure the amenities, or depreciate the value, of property in the vicinity."

The Arbitrator appointed to determine the compensation which might be payable stated a case for the opinion of the High Court on the following question:

"A. Does Section 56(1)(g) apply on the basis of the refusal given in such a way to preclude compensation being paid pursuant of *(sic)* Section 55 of the Act.

B. Do the grounds of refusal given comply fully with Section 56(1)(g)(iii) of the aforesaid Act so as to enable compensation to be precluded."

The High Court (per Murphy J.) held that neither of the two reasons stated by An Bord Pleanala was such as to defeat the claim for compensation. The Planning Authority appealed to the Supreme Court. That Court held that if a Planning Authority sought to defeat a claim for compensation brought by an individual it must do so within the confines of Section 56 and the exclusion must be clearly established and that it must be assumed that An Bord Pleanala in departing from the reasons ascribed by the Planning Authority for refusing permission must be assumed to have done so after due consideration and knowledge of the consequences.

The Court referred to a passage from the Law of Local Government in the Republic of Ireland by Keane at page 198 where the author stated that ("the Bord") should also ensure that the wording of the refusal does not confer a right of compensation where none was intended by the legislature."

The Court held that the reason stated by the Planning Authority did not come within the ambit of Section 56(1)(i)(iii) also indicating that it could not equate "overall character" and "amenities".

Finally the Court approved the reasoning of Murphy J. that if An Bord Pleanala had wanted to use the appropriate terms it could have done so, it was well aware of the form of wording that would defeat a claim for compensation "it is highly likely that for one reason or another it must have appreciated the desirability, indeed the requirement of precise wording, it did not use such precise wording and the applicants claim was not to be defeated by not merely straining the language but by introducing further and other language into it."

The Court dismissed the appeal.

XJS Investments Ltd. and Dun Laoghaire Corporation Supreme Court (per McCarthy J. nem. diss.) 11 December 1986.

John Buckley

COSTS
Solicitor and Client Bill — Taxation — Jurisdiction of Taxing Master

A dispute arose between the Prosecutors and their clients in respect of a Bill of Costs. They had acted for her in matrimonial proceedings in which she had been successful, and in which her husband had been ordered to pay her costs. The Solicitors had received payment on account of costs during the Action. After Judgement, without drawing a party and party bill or seeking to agree a figure for costs with the husband's Solicitors, the Prosecutors sent their client an "up to date Bill of Account". The client requested the Prosecutors to send the bill to her husband's Solicitors. The Prosecutors declined to do this until they had been paid their costs because they anticipated considerable difficulty in enforcing the Order for costs because the husband was in England.

The client paid the amount of the bill and issued a requisition to tax the bill under Or. 99 Rule 15(e) under the 1962 Rules of the Superior Court. The Prosecutors submitted that the Taxing Master had no jurisdiction to tax a bill, after it had been paid, without an order of the Court. The Taxing Master rejected this objection and proceeded to tax a more detailed bill which he had required the Prosecutors to submit. The amount of the bill was reduced and the Prosecutors were disallowed the costs of taxation and directed to take up the Certificate of Taxation and to pay the fees thereon.

The Prosecutors did not do this but sought an order of *certiorari* on the grounds: 1. that the Taxing Master had no jurisdiction to tax a Bill of Costs after payment thereof without an order of the Court referring such Bill of Costs to him pursuant to s.6 of the Attorneys and Solicitors (Ireland) Act 1849, 2. that the Taxing Master was *functus officio* on the date in question. The High Court

refused to make the conditional order absolute and the Prosecutors appealed to the Supreme Court.

The Supreme Court rejected the view of the High Court that Order 99 Rule 15(e) conferred on the Taxing Master the power to tax without any Court order, as between Solicitor and client in addition to the jurisdiction which he had to tax bills referred under the 1849 Act. The Court noted that the jurisdiction of the Rules Committee was found in Section 36 of the Courts of Justice Act 1924 and that the Eighth Schedule of the Courts (Supplemental Provisions) Act of 1961 provided for the jurisdiction of the Taxing Master.

Referring to *East Donegal Co-Operative -v- The Attorney-General* (1970) IR 317 and *City View Press Ltd. and Another -v- An Chomhairle Oiliuna and Others* (1980) IR 381 the Court held that while the powers duties and functions of the Taxing Master might be changed or extended by statute and perhaps by rule of Court, the authority to do so by rule of Court must derive from the statute which creates the rule making authority. There was no such enabling provision in section 36 of the 1924 Act. The Court noted that the combined effect of Sections 2 and 6 of the 1849 Act in respect of a Bill of Costs for Solicitor and Client charges duly delivered would appear to be that:

(1) The Solicitor cannot lawfully sue for one month after delivery.

(2) The client has a period of twelve months within which to demand and obtain taxation.

(3) After the expiry of twelve months or after payment of the amount of the bill, then the Court may, if the special circumstances of the case appear to require the same, refer the bill to taxation, provided the application to the Court is made within twelve calendar months after payment.

(4) After the expiry of the latter period, there is no statutory power to refer for taxation.

The Prosecutors appeal was allowed.

The State (Gallagher Shatter) -v- de Valera, Supreme Court, 20 December 1984 (per McCarthy J.), (1986) ILRM 3.

John Buckley

COSTS
Solicitor and Client Bill — Requirement of Superior Court Rules

The Plaintiff's father engaged the Defendants to bring proceedings on behalf of the Plaintiff who was under age at the time, for damages for injuries sustained in a motor accident. The Plaintiff came of age during the course of the proceedings.

The Defendant had advised the Plaintiff's father and later the Plaintiff herself that over and above the party and party costs which he would recover from the other side there would be certain Solicitor and Client costs payable by the Plaintiff. The proceedings were settled for the sum of £19,000. When the Defendant received the settlement cheque he deducted £1,500 in respect of such costs and sent on the balance of £17,500 to the Plaintiff. The Defendant claimed that at the time of the settlement the Plaintiff had agreed to this figure of £1,500 for Solicitor and Client costs but the Plaintiff denied this. The Plaintiff sought particulars of the fees in July 1984 from the Defendant who declined to furnish particulars unless the Plaintiff agreed to pay the fees payable to the Legal Costs Accountant for preparing the bill. After the intervention of the Law Society the Plaintiff furnished in September 1984, a document stated to be "a Bill of professional fees, outlay and V.A.T. Orla Smyth in account with Thomas Montgomery & Son." The Law Society advised the Plaintiff that she could either have this bill taxed or could insist on being furnished with an itemised Bill of Costs and if she decided on the latter course she could not be billed with the fees due to the Legal Costs Accountant.

After an interval of a little over a year the Plaintiff's father wrote on her behalf seeking an itemised bill and the Defendant again sought payment of the Legal Costs Accountant's fees.

On 16 April 1986 the Plaintiff signed a requisition to tax under Order 90 Rule 15(e) of the Rules of the Superior Courts 1962 but no taxation could take place without an order of the Court in view of the decision of the Supreme Court in the State (Gallagher Shatter) -v- De Valera (1986) ILRM.3, The Plaintiff issued a Special Summons seeking an order pursuant to Section 2 of the Attorneys and Solicitors (Ireland) Act 1849 referring the Bill to taxation and seeking the furnishing of a detailed Bill of Costs for taxation.

The Court accepted the Plaintiff's evidence that she had been advised that she would be liable for Solicitor and Client costs up to a maximum of £1,500 but had not agreed to pay the sum of £1,500. The Court rejected the Defendants argument that the Plaintiff was not entitled to the Order because twelve months had elapsed since the delivery of the bill in September 1984 and payment of the £1,500 several months earlier. The Court referred to the requirements of the Superior Court Rules, Order 99 Rule 30(5) which provided that:

1. The Solicitor cannot lawfully sue for one month after delivery.
2. The Client has a period of twelve months within which to demand and obtain taxation.
3. After the expiry of twelve months or after payment of the amount of the bill, then the Court may, if the special circumstances of the case appear to require the same, refer the bill to taxation, provided the application to the Court is made within twelve calendar months after payment.
4. After the expiration of the latter period, there is no statutory power to refer for taxation,

and noted the view of Buckley L. J. in the case of *re Osborne and Osborne* (1913) 3 KB 862 where he stated "a Solicitor's bill against his client for costs in an action in which party and party costs are recoverable against the opposite party ought to contain the whole bill of the fees, charges and disbursements in reference to the business to which it relates and not merely a bill of the extra costs chargeable as between Solicitor and Client . . . a Solicitor should deliver a bill of the whole costs giving his Client credit for the sum received for party and party costs. Accordingly in *Cobett -v- Wood* (1908) 2 KB 420 it was decided in this Court that a bill not containing the items allowed on taxation between party and party was not a sufficient bill within the Solicitors Act." The Court held that the bill furnished in this case by the Defendants was not such a bill as constituted a bona fide compliance with the 1849 Act and accordingly the provisions of Section 2 limiting the reference to taxation to twelve months from the delivery of the bill did not apply. Neither did the provisions of Section 6 apply as no bill as was envisaged by Section 2 had been paid by the Plaintiff.

The Court accordingly directed the Defendant to furnish to the Plaintiff a detailed Bill of Costs and that on such Bill being delivered it would be open to the Plaintiff to have the Bill referred to taxation.

Orla Smyth -v- William J. Montgomery The High Court (per Blayney J.) 7 July 1986.

John Buckley

GUARANTEE
Bond — Rights of Surety — Obligations of Creditor — Terms of Contract

J. J. Murphy and Company Limited was engaged in the warehousing of spirits and beers which were liable to excise duty when delivered from a warehouse. By Deed of Bond executed under seal the defendant bound itself to pay to the Minister for Finance on behalf of the Revenue Commissioners the sum of £1.4 million conditional upon the failure of J. J. Murphy and Company Limited to pay the excise duties chargeable in respect of spirits delivered from bonded warehouses on which duty was not paid on delivery but was deferred for a period certain by agreement with the Revenue Commissioners. The defendant entered into a similar bond in respect of excise duty on beer. Subsequently the Revenue Commissioners demanded payment of, and obtained judgment in the High Court for, the full sum of £504,416 being the total amount due in respect of the spirits and beer. The accuracy of the total was not in dispute.

Section 24 of the Excise Collection and Management Act, 1841 (4 Vict. cap. 20) provides inter alia that all goods and commodities in respect of which any excise duty is imposed by law, and all materials for producing such goods and commodities, in the custody or possession of the person carrying on such trade, or in the custody or possession of any factor, agent or other person in trust for or for the use of the person carrying on such trade, shall be chargeable with all excise duties which, during the time of such custody or possession shall have become chargeable or be in arrears or owing from the person carrying on such trade; and shall be subject to all penalties and forfeitures which during any such custody or possession shall be or shall have been incurred by the person carrying on such trade and all such goods and materials shall remain liable to all such duties, penalties and forfeitures; and it should be lawful to levy thereon such duties, penalties and forfeitures, and for that

purpose to seize, remove and dispose of the same as the goods and chattels of the debtor for the recovery or enforcement of any such duties and penalties.

The defendant submitted that by virtue of Section 24 the Revenue Commissioners had a statutory lien; that the defendant as surety could not have enjoyed or enforced such lien, but that the Revenue Commissioners should have enforced it against such goods, realised the goods and applied the sum realised in lessening the excise duty payable.

The defendant relied upon an extract on page 132 of Rowlatt on Principal and Surety 4th edition (1982).

> "It is arguable that a surety has an equity . . . to stay a creditor attempting unfairly to place the whole burden of the debt upon the surety, at least in special circumstances, e.g. where there is a solvent principal debtor, or solvent co-sureties who could easily be but are not joined in the action, or a security which could easily be realised to pay the whole debt . . . one situation in which the surety's equity has been held maintainable against the creditor is where the creditor has an opportunity to recover the debt from the principal debtor which will not be available to the surety."

HELD:

"It is well settled that it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, though solvent, unless this be expressly stipulated in the surety document. There is authority for the proposition that the creditor does not have to resort to securities received by the creditor from the principal debtor — see *Ranelaugh (Earl) -v- Hayes* (1683) 1 Vern. 189; *Wilks -v- Heeley* (1832) 1 Cr. & M.249; Re Howe ex parte Brett (1871) 6 Ch. App 838, 841, cases cited in Halsbury's Laws of England, Vol. 15, p.488/9."

"Again, where parties, met upon equal terms, in the ordinary course of business enter into a written contract, the law does not look to or, indeed, permit terms to be added to such contract — it applies the rule of strict construction. In the absence of a mistake or some impropriety, neither of which is suggested here, the law will not infer an additional term to the contract nor call in aid some alleged equity which would delay, if not defeat, in whole or in part, the remedy expressly provided for in the contract."

It was further held, in upholding the High Court Order in favour of the Plaintiff (McWilliam J, 14 May, 1984), that it was not necessary to determine whether or not the Revenue Commissioners had a statutory lien and the Court should not accept the defendant's plea to hold that the Revenue Commissioners accepted the Bond on the basis that, if default were made, the Commissioners would engage upon the exercise contemplated by Section 24 with all its problems of possible priorities, retention of title and possibly lessening other claims by the Revenue Commissioners in respect of different forms of taxation; the defendant failed to make any provision for such exercise in the terms of the Bond.

A. G. -v- Sun Alliance and London Insurance Limited — Supreme Court (per McCarthy J.) 28 February 1985 — unreported.

William Johnston

TAX

Pig Rearing carried on by partnership in an agricultural area constitutes "Farming" for tax purposes.

The question of law for the opinion of the High Court in this case stated was whether upon the facts admitted and found by the Appeal Commissioners, there was evidence upon which they could properly arrive at their decision that the activity of pig rearing carried on by the partnership is not "farming" as defined in S13(1) of the Finance Act 1974, and whether, upon such facts, their decision was correct in law.

S13 of the Finance Act 1974 reads as follows:—

(1) In this Chapter "farming", "farm land" and "occupation" have the same meaning as in S18(1) of the Finance Act 1969.

(2) Any reference in this Chapter to farm land occupied by an individual includes farm land deemed, by virtue of S.17 to be occupied by him.

(3) A reference in this Chapter . . . to the rateable valuation of farm land occupied by an individual for a year of assessment or part of a year of assessment is reference to the total rateable valuation of all farm land occupied by him and of all farm land deemed to be occupied by him for that year of assessment, or part of a year of assessment calculated in accordance with the provisions of S17(5), (6) and (7).

Provided that, in calculating the rateable valuation of farm land for the purposes of this Chapter, the rateable valuation of any building on the land shall be excluded."

S18 of the Finance Act 1969 reads as follows:

(1) In this Section—

"farming" means farming farm land, that is, land in the State wholly or mainly occupied for the purposes of husbandry, the profits or gains from the occupation of which would, but for the repeal by this Act of Schedule B of the Income Tax Act 1967 be chargeable under that Schedule; "occupation", in relation to any land, means having the use thereof;

The holding in the instant case consisted of some nine acres of land in an agricultural area with a rateable valuation of £4.50. Some three acres were covered with sixteen pig houses purpose built by the Appellants for the purpose of their enterprise. Some one and a half to two acres were covered by slurry tanks and the remaining four to five acres provided spaces between the pig houses and open areas. Healthy pigs were not allowed outside the pig houses at all, but in summer months, sick pigs (between 2% and 3% of the total on hand at any one time) were put out into pens set up in the spaces between the pig houses. Fresh air was the main curative for these animals but they were also allowed to root and eat any herbage in the pens.

The question was whether the Appellants could properly be regarded as being engaged in "farming", as defined in S18 of the 1969 Act.

The fact that the proviso to S13(3) provides that the rateable valuation of buildings on the land are to be excluded in calculating the rateable valuation of farmland for the purposes of the chapter would, contrary to the view expressed by the Appeal Commissioners, imply that the buildings would otherwise, subject to the provisions of the Valuation Acts, be included. Under the Valuation Acts one would look at this holding, including both lands and buildings, as one unit and in that context the buildings would properly be referred to as "farm buildings".

The main debate in the hearing turned upon the meaning of the term "husbandry" in S18 of the Finance Act 1969. Husbandry has always been regarded as including the tilling of the soil. But it has a much wider connotation and includes those concerned with the management of resources.

In the Scottish case of *Keir -v- Gillespie* 7 T.C. page 473 the Scottish Court of Session held that the term "husbandry" in S21 of the Finance Act 1918 was not restricted to tillage or cultivation of the soil, but included the use of lands for the purpose of grazing sheep.

The tillage of the soil and the rearing and management of livestock for food would come within the primary meaning of the word "husbandry". A difficulty arises from the secondary connotation of the term. Certain activities are regarded as "husbandry" when carried on as part of the traditional activities of the farm but are not regarded as husbandry when carried on in isolation. Butter-making, jam-making or the cutting of turf or timber may be examples. In re *Cavan Co-Operative Society* the Irish Kings Bench Division (Gibson Madden and Kenny JJ.) held that a registered co-operative society carrying on the manufacture and sale of butter was not carrying on the business of husbandry within the meaning of Section 39 of the Finance (No. 2) Act 1915. In that case Kenny J. said (at page 608):

> " . . . The work of the Society in connection with the milk which it received from the Suppliers is not the work of a producer but a mere mechanical operation that could not in its essence be regarded as husbandry. Husbandry presupposes a connection with land and production of crops or food in some shape."

In the instant case the Appellants were using their holding for the specialised purpose of rearing and fattening pigs. This was not a case of mixed farming where one activity is regarded as husbandry because it is carried on in association with general farming activities. Either what the Appellants were doing on this holding fell in its own right, under the general definition of "husbandry" or it did not.

In the U.K. and Scottish cases of *Lean and Dickson -v- Ball* (10 T.C. 345) and *Jones -v- Nuttall* (10 T.C. 349) the test to decide whether the business can properly be described as husbandry was whether the enterprise makes use to a material extent of the fruits of the soil and the land is not simply used as a space or stance for holding animals. However, in the Irish case of

The Revenue Commissioners -v- No. (101 ILTR 197) decided in the year 1965, Judge Ryan regarded this test as being "too artificial for Irish conditions".

It was considered that a sufficient guide was suggested in *Cavan Co-Operative Society* (1917). 2 IR 608.

> "Husbandry presupposes a connection with land and production of crops or food in some shape."

It was held that the activity in which the Appellants were engaged was husbandry: it was a development in modern farming. Accordingly, the Appellants in using the land for the purposes of rearing and fattening pigs and generally looking after their health and welfare were farming the lands.

HELD:
The decision of the Appeal Commissioners was not correct in law and their question was accordingly answered in the negative.

Knockhall Piggeries and Others and J. H. Kerrane, Inspector of Taxes — High Court (per Barrington J.) 2 May 1985, (1985) ILRM 655.

Desmond Rooney

BUILDING SOCIETIES

Registration of change of Rules of Building Societies — Review of Building Societies Act 1976 — Whether altered rules contravened Sections of the Building Societies Act.

The Plaintiff Society altered its rules by Special Resolution to comply with a Statutory Instrument made by the Minister for Industry Trade Commerce and Tourism pursuant to the Mergers, Take-Overs and Monopolies (Control) Act 1978. The procedure for altering rules is provided for by Section 12 of the 1976 Building Societies Act and this Section also provides for an appeal to the Court against the refusal of the Registrar to register a proposed alteration of the rules. Under the terms of Section 12, the Registrar must register an alteration of the rules of the Society if he finds that they are in accordance with the Act.

In this case the Registrar refused to register the proposed rules which provided for two categories of Director and different voting rights for different types of investor (member).

The proposed rules provided for a procedure whereby investment directors would be appointed, removed and replaced by holders of investment shares and that similarly ordinary directors would be appointed, removed or replaced by holders of savings shares. The Registrar decided that these provisions were not in accordance with the statutory provisions and "in particular Section 10 of the Building Societies Act 1976". The Court held that these proposed rules in respect of different classes of Directors were not prohibited by the Act. Further in dealing with the management of the Society the proposed rules provided for the appointment of an alternate Director by a Director of the Society. It was held that these proposed rules were lawful.

The Court further held that in this particular case the proposed rules providing for the issue of shares which had only qualified or no voting rights or which provided that the voting rights attached to some shares could be more weighty than others was not in contravention of the Statute. This was so because the Statute particularly provided in Section 22(7) that certain Societies which complied with the provision of Section 22 (7)(b) could issue shares to which voting rights did not attach.

The Court held that the Act of 1976 must be considered as setting out a general framework for Building Societies but does not purport to legislate in detail for the government of each Society. The Minister has extensive powers under Section 10 (Subsection 3), of the Act, allowing him the means of ensuring control. The Act was not intended, however, to burden the registrar of Friendly Societies with the type of power which is vested in the Minister, which is essentially power to be exercised to control policy. The Registrar has a function to the extent that when the Minister does prescribe some such regulation under Section 10 of the Act, the Registrar has a duty to perform as laid down in the Act, but otherwise his duty is to see that the rules made are not in conflict with the provisions of the Statute. The Court held that in the present case the Registrar's objections could not be sustained and that, in effect, he strayed into the field of policy which is reserved to the Minister.

The appeal was dismissed and the order of the High Court confirmed.

In the matter of the Building Societies Act 1976. The Irish Civil Service Building Society versus the Registrar of Friendly Societies (1985) IR 179.

Frank O'Flynn

GARDA COMPENSATION

Garda Siochana (Compensation) Acts 1941—1945 — Statutory Interpretation — Case Stated to Supreme Court — Whether in Assessing compensation for Financial Loss regard should be had to a Pension already payable.

The President of the High Court stated a case for the Supreme Court in the hearing of an action brought by the plaintiff against the defendant pursuant to the provisions of the Garda Siochana (Compensation) Acts 1941—1945 for personal injuries maliciously inflicted upon him in the course of the performance of his duties as a Member of the Garda Siochana in 1983. On the date the injuries were inflicted the plaintiff was 43 years old. As a result of his injuries he was discharged from the Garda Siochana in June, 1985. If the injuries had not been sustained and he remained a Member of the Garda Siochana he could have retired at any time between December, 1990 and April, 1997. In June, 1985 on retirement the plaintiff was awarded a pension of £5,993 per annum and a retirement gratuity of £11,823.00. If he had continued as a Member of the Garda Siochana until normal retirement he would have received a pension of 50% of his then basic pay and a gratuity equal to one and a half times his basic pay.

At the hearing before the President of the High Court the Defendant requested the Judge to take into consideration by way of deduction from the actuarial calculations of the loss of salary an actuarial calculation of the value of the special pension being paid to the plaintiff and that not to do so would be to compensate the plaintiff twice for his financial loss incurred.

The plaintiff contended that the Pension should not be taken into account in determining the actual financial loss suffered by the plaintiff.

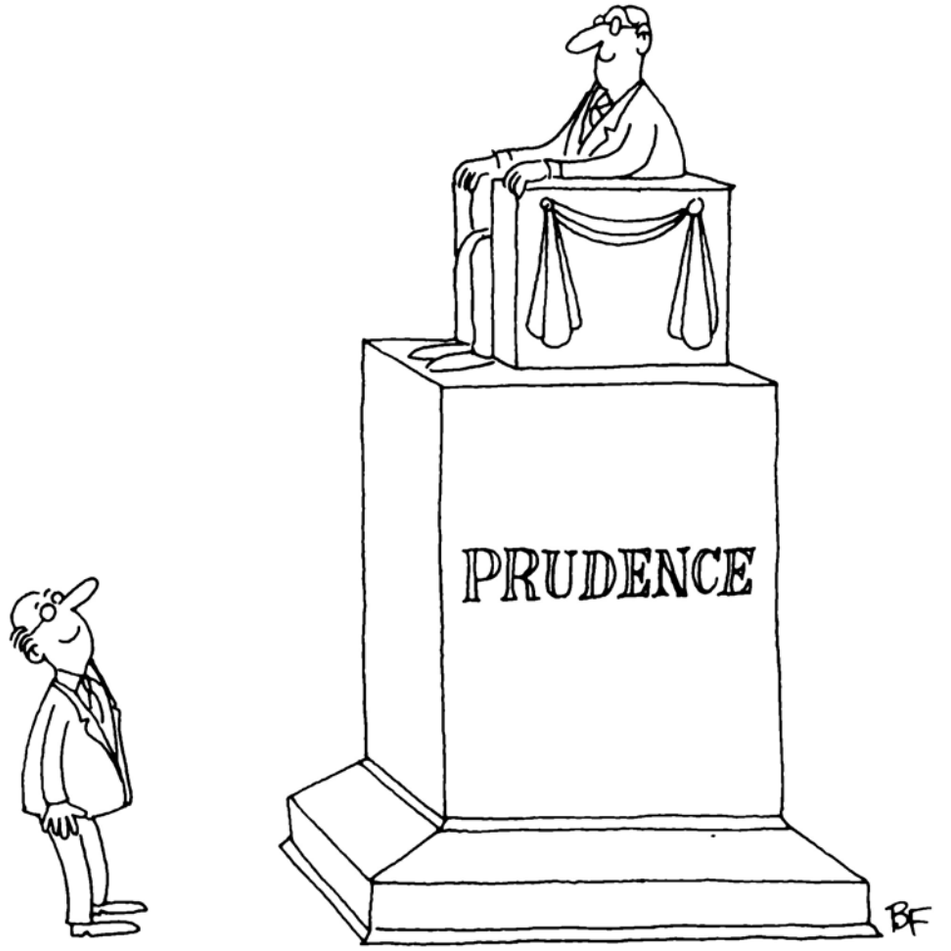
The question of law put by the President of the High Court for the opinion of the Supreme Court was whether in assessing the compensation payable to the plaintiff for the financial loss, he should have regard to the pension now payable to him and deduct the value of this pension from the loss proved.

HELD:

1. S.10, Paragraph 3 of the Act of 1941 requires the Judge to take into consideration the fact, if it be a fact, that the plaintiff was entitled under the relevant Acts and Statutory Orders and Regulations to a pension allowance or gratuity out of public funds in respect of the injuries which are the subject of the application. The word "shall take into consideration" in the statutory context in which they appear mean that they are to be included in the mathematical calculation and are not to be construed as simply a direction to consider the matter in the course of an intellectual exercise.
2. Accordingly if the earning power of the plaintiff was not in any way diminished it is clear that no compensation could be awarded under that heading. If his earning power is totally lost or simply diminished, then the compensation to be awarded should be the sum appropriate under that heading to the actual and prospective economic loss proved.
3. The answer to the question posed by the President of the High Court is that the value of the special pension should be deducted from the value of the economic loss proved. *McCarthy J.* dissenting, held that S.10 Sub-section 3 requires the Judge in fixing the amount of compensation to bear in mind the fact that the plaintiff is entitled to the special pension. It does not follow that the whole or any part of the annual sum or any capital value of the same should be deducted from the total sum assessed or from any item which goes to make up the total sum. The question from the President should therefore be answered by stating that in assessing the compensation payable not for financial loss but as a whole the Judge should take into consideration the fact that the plaintiff is in receipt of the special pension but should disregard its amount.

Gerald O'Looney -v- The Minister for the Public Service. Supreme Court (per Walsh J.) 14 December 1986.

Eugene O'Sullivan



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