INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

INDEX TO VOLUME 78 — 1984

1) **SUBJECT INDEX:**

A comprehensive index to all subjects covered in the *Gazette.*

2) **ALPHABETICAL CASE INDEX:**

An alphabetical list of all cases reported in the Recent Irish Cases supplements.

LIST OF ISSUE NUMBERS AND DATES:

1. - January/February
2. - March
3. - April
4. - May
5. - June
6. - July/August
7. - September
8. - October
9. - November
10. - December

SUBJECT INDEX

The method of alphabetisation used is *word-by-word.*

References are to issue number followed by page number.

References in italics denote photographs.

Abbreviations: edl. (editorial); ltr (letter).

2. ALPHABETICAL CASE INDEX

Note:

All cases reported in the Recent Irish Cases supplements are here listed in alphabetical order.

The method of alphabetisation used is *word-by-word.*

References are to *Gazette* issue number followed by page number in Supplement.

INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 1 January/February 1984

Bicentenary of Blackhall Place
1783 - 1983

The 200th anniversary of the building of the present headquarters of the Law Society — Blackhall Place — for its original purpose, the King's Hospital School, was marked on 7 December, 1983, by ceremonies attended by representatives of the present School. **(See photographs page 16.)**

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 1 January/February 1984

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

. . . Regulation Without Responsibility

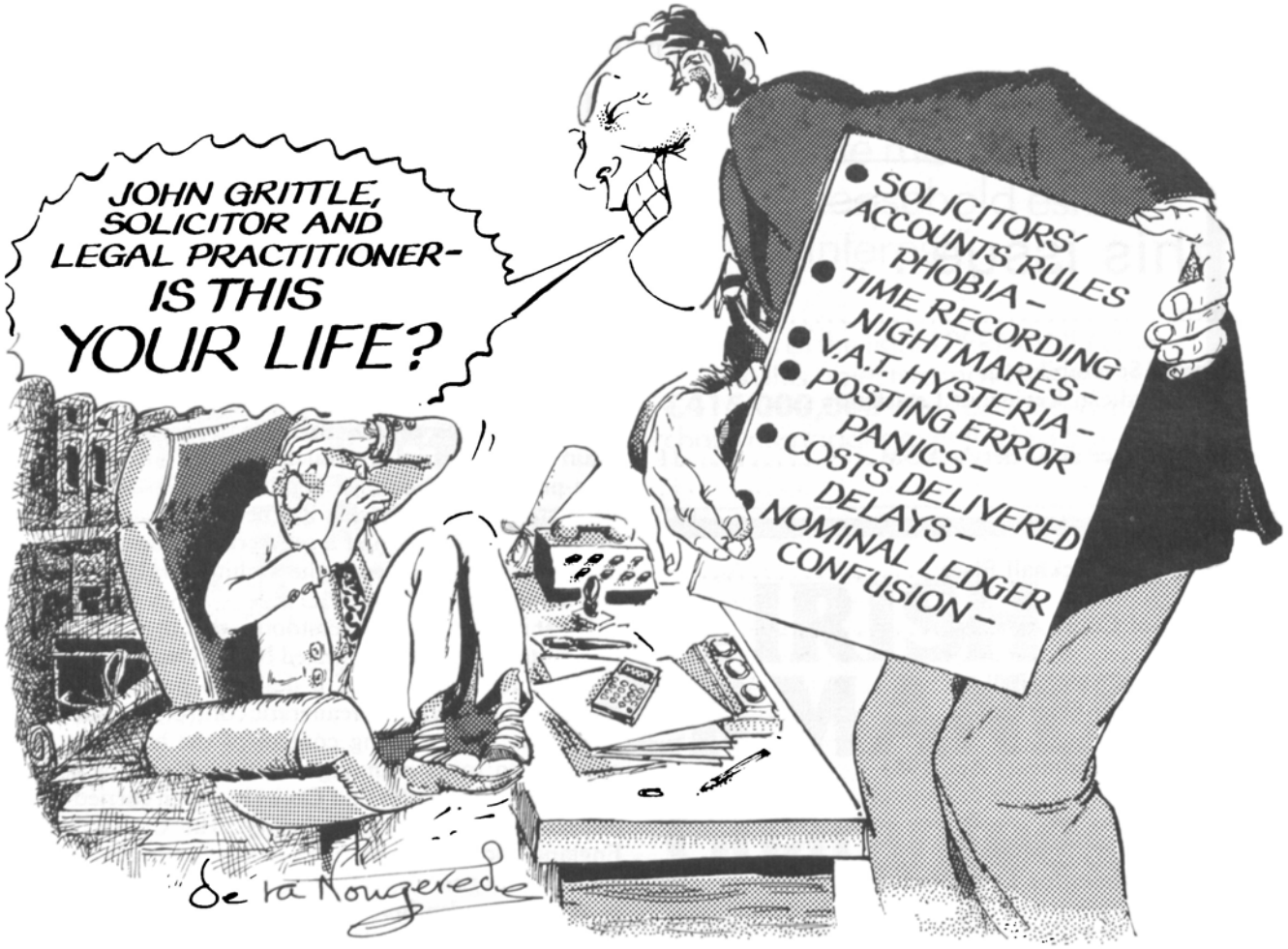
THE Maysfield Leisure Centre fire in Belfast, with its lesser echoes of the Stardust tragedy, highlighted again the delays in introducing in this jurisdiction the long-promised building regulations. It is generally understood that this delay has been in large part due to the difficulty in agreeing a self-certification system with the professional bodies in the architectural, engineering and surveying fields.

What is less widely understood is that the self-certification system has been suggested by the Department of the Environment, not out of a desire to provide a speedy system not involving bureaucratic control, but out of self-protection. The existing control of the buildings — as opposed to town planning — under Building Byelaws (principally in Dublin and Cork) has been carried out by inspectors of the local authority. The Courts both in England and Ireland have in recent years in cases such as *Dutton -v- Bognor Regis UDC* [1972] 1 Q.B. 373 and *Anns -v- Merton London Borough Council* [1978] A.C. 728 and *Siney -v- Dublin Corporation* [1980] I.R. 400 laid down clearly that a public body exercising control in such circumstances necessarily incurs liabilities to those who may inhabit, visit or purchase buildings which have been the subject of such control and supervision.

Perceiving that the extension of building control to all areas would involve a considerable increase not only in the number of public bodies at risk, but also in the extent of their risk, because of the greater stringencies of the draft building regulations as opposed to the Byelaws, the Department appears to have moved to protect such bodies from the consequences of the use of the same system of control over building regulations as previously applied to Byelaws.

Another recent example of a public body reneging on its responsibilities has been in the area of the completion of roads and services on housing estates. The normal practice has been for the local authority to require the developer to furnish a bond from an insurance company or other suitable surety to ensure that if the developer does not complete the roads and services there is a fund to meet the costs of completing the services. In a number of cases, the local authority has ignored the standard requirement contained in contract guarantee bonds that the insurer be notified of any claim under the bond before the expiry of the period of the bond or within the stated period after the expiry of the bond, with the result that, in effect, the bonds have been allowed to lapse without any claim being made. In some cases the authority has then

(Continued on p. 15)



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The Doctrine of Severability in the Judicial Review of Legislation

by
Gerard McCormack, B.C.L., LL.M.

OUR courts, in exercising the power of judicial review conferred by the Constitution, have eschewed the idea that their function is to act as councils of legislative revision free from restraint. The courts are not the sole repositories of sagacity nor are they ominiscient and a number of prudent devices have been fashioned which limit any oligarchic tendencies on their part. Many of these have an American provenance[1] and serve to limit the involvement of the courts in the political process. The presumption of constitutionality, which has a respectable pedigree in other jurisdictions creates a bias against a statute being found unconstitutional and reduces the impact of the judicial review role on the legislative policy-making prerogative.[2] The doctrine of separability in the judicial review of statutes also assists in the achievement of this objective. The effect was explained by Fitzgerald C.J. in *Maher -v- A.G.*[3]

> "The application of the doctrine of severability or separability in the judicial review of legislation has the effect that if a particular provision is held to be unconstitutional, and that provision is independent of, and severable from the rest, only the offending provision will be declared invalid".

Application of the Principle

These observations strongly articulate an idea which runs through several earlier cases. In *Deaton -v- A.G.*[4] the constitutional validity of s.186 of the Customs Consolidation Act 1876 was considered. This section gave the Revenue Commissioners power to select which of two penalties should be imposed by a Court. The Supreme Court, overruling Kenny J., held that the "selection of punishment" was an integral part of the administration of criminal justice and thus the impugned provision authorised the impermissible interference with the operations of the courts in a sphere reserved to them by the Constitution. However, O'Dalaigh C.J. giving the unanimous judgment of the Supreme Court stated:

> "The Constitution invalidates the section only to such an extent as it is inconsistent with or repugnant to the Constitution, i.e., to the extent that the selection of the penalty is committed to the Commissioner of Custom (now the Revenue Commissioners). The section therefore remains intact with the words at the conclusion of the Commissioners of Custom (now the Revenue Commissioners) deleted therefrom."[5]

In *The State (Sheerin) -v- Kennedy*[6] it was decided that the power conferred on the Minister for Justice by S.7 of the Prevention of Crime Act 1908 (as adopted) to determine whether an offender transferred from a Borstal institution to prison should undergo hard labour or not was invalid. The section was to be regarded as surviving but with the offending words deleted. Walsh J. said:

> "If there is no essential difference between a term of imprisonment and a term of detention, then I think the only portion of the section inconsistent with the provision of the Constitution is the words "with or" following the words "term of imprisonment" the absence of which would abolish power to commute detention to a term of imprisonment with hard labour."[7]

In *The State (C) -v- Minister for Justice*[8] the constitutionality of S.13 of the Lunatic Asylums (Ireland) Act 1875 was successfully assailed. Nevertheless the section for its want of constitutional *vires* did not fall in its entirety. The provisions purporting to empower an officer of the Executive to set at nought the District Court's remand were excised from the Act and the remainder of the section survived the offensive unaffected. O'Dalaigh C.J. said:

> "In the result my judgment is that the second part of section 13 of the Act of 1875 is inconsistent with the Constitution. . . . This inconsistency can be cured by the deletion of the words "It shall be in like manner certified" in line 9 down to the words "and be" in the fourteenth line of the section inclusive, the rest of the section being left intact."[9]

The principle of severance has equally been applied subsequent to the decision of the Supreme Court in *Maher -v- A.G.*[10]. In *In Re McAllister*[11] Kenny J. was of opinion that s.385 of the Irish Bankrupt and Insolvency Act 1857, to the extent that it provided for the commitment of a person to prison "there to remain without bail", exceeded the constitutional powers permitted to the legislature. He added:

> "It does not follow, however, that the whole of the section is repugnant to the Constitution and the relevant parts of the section should now read
>
> > 'It shall be lawful to commit such person to such prison as such court shall think fit, there to remain until he or she shall submit himself

> or herself to such court to be sworn and full answers make to the satisfaction of such court to all such lawful questions as shall be put'."[12]

In *The State (K.M.) -v- Minister for Foreign Affairs*[13] Finlay P. also performed surgical work on a statutory provision; this time an emanation from the Oireachtas, the Adoption Act, 1952, s.40 of which unduly interfered with the right of an illegitimate child to travel outside the State. However the learned judge found it possible, by reason of the operation of the doctrine of severance, to rescue particular portions of the provision from the constitutional infirmity which afflicted the remainder of the section; the resultant section "would be sufficient vindication and protection by the State of the right of an illegitimate child to travel in the manner in which I have defined that as a constitutional right and as such would be a constitutional section."[14]

Maher -v- A.G.

The separability principle was subjected to limitations by the Supreme Court decision in *Maher -v- A.G.*[15], wherein it was emphasised that its application must be coherent with the spirit of the general scheme of things postulated by the Constitution and the institutional disposition of law-making power. In this case the plaintiff was successful in having the provisions of s.44 (2) (a) of the Road Traffic Act 1968 declared unconstitutional on the ground that by making a certificate of blood alcohol content "conclusive evidence" as to the matter certified, the judicial function under the Constitution, which necessarily encompassed the power to determine whether all the essential ingredients of an offence had been proved against an accused person, had been invaded and infringed. Apart from the evidential conclusiveness attributed to the certificate the impugned provision was otherwise unobjectionable. Despite the fact that exclusion of the offending phrase would not necessitate the substitution of other words to give substance and sense to the section, the Supreme Court refused to accede to the argument that it could, consistently with the Constitution, perform this surgical function. Fitzgerald C.J. expressed himself as follows:

> "Article 15 .4 .2 . . . . lays down that every law enacted by the Oireachtas which is in any respect repugnant to the Constitution or to any provision thereof shall, but to the extent only of such repugnancy, be invalid; *therefore there is a presumption that a statute or a statutory provision is not intended to be constitutionally operative only as an entirety.* This presumption however, may be rebutted if it can be shown that, after part has been held unconstitutional the remainder may be held to stand independently and legally operable as representing the will of the legislature. But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity. It is essentially a matter of interpreting the will of the legislature in the light of the relevant constitutional provisions, and it must be borne in mind in all cases that Art. 15.2 . . . . provides that 'the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas. No other legislative authority has power to make laws for the State'. If, therefore the courts were to sever part of a statutory provision as unconstitutional and seek to give validity to what is left so as to produce an effect at variance with the legislative policy, the court would be invading a domain exclusive to the legislature and thus exceeding the Courts competency.[15]"

On reviewing the legislative history of the measure the Supreme Court found that the insertion of the word "conclusive" was a matter of deliberate legislative choice. The Oireachtas had specifically rejected the recommendation of the "*Commission on Driving while under the influence of Drink or a Drug*"[16] that the blood or urine analysis should be merely *prima facie* evidence. Thus a judicial preservation of S.44 (2) (a) with the phrase "conclusive" omitted, would amount to an impermissible usurpation of the legislative function by setting up as law something that the National Parliament had unambiguously denounced. It was also scarcely conceivable that if the word "conclusive" were to be dropped, the legislature would have been content to use the word "evidence" without the precision of qualifying words which were to be found elsewhere in the same section.

It has been noted[17] that there appears to be an element of internal inconsistency in the passage quoted above. The words italicised contain a presumption in favour of allowing a statute to be severed; whereas the very next sentence assumes the opposite, in that it states that a presumption needs to be rebutted before the remainder of the statute can be upheld. It would seem that the italicised words constitute a correct deduction from Art. 15.4.2 and that, as a consequence, the sentence following them is mistaken. If this proposition is correct then there is a presumption that, if the constitutionally improper parts of a statute have been severed, the remaining parts can be accorded the *imprimatur* of judicial approval.

Antecedents of these Limitations

Maher -v- A.G.[10] is by no means the only example of judicial reticence in the area of statutory reconstruction. In *Melling-v- O'Mathghamhma*[18] O'Dalaigh J. (as he then was) had opined that the court was not free where the framework of a section collapsed from constitutional infirmity to take upon itself restorative functions which were proper only to the legislature. Similarly in *O'Brien -v- Keogh*[19] the Supreme Court stated a propos S. 49 (2) (a) (11) of the Statute of Limitations 1957:

> "It is not possible to save by deletion some part of the impugned paragraph. The provision has no purpose without the words that establish the date of the running of the Statute. It must therefore for its constitutional frailty fall in its entirety."[20]

Likewise in the earlier case of *In Re Evelyn Doyle, an Infant*[21] it was said by the "old" Supreme Court in declaring invalid most of S.10 (1) (d) and (e) of the Children Act 1941:

> "It is unfortunate that this declaration involves the invalidation of provisions which if they stood alone

are quite in accord with the Constitution. They are however so inextricably entangled with the portion which we find repugnant to the Constitution that there is no way of avoiding this result".

Maher -v- A.G. merely gives sharper dogmatic shape to the general trend of judicial opinion on this topic.

Blake & Madigan -v- A.G.

The principles enunciated in *Maher -v- A.G.* were applied in *Blake & Madigan -v- A.G.*[22], a case involving an attack on the constitutionality of the Rent Restrictions Act 1960 (as amended). It was held that even if Part IV of the Act of 1960, restricting the right of landlords of controlled dwellings to recover possession could not be said to be infected with the constitutional infirmity invalidating the provisions governing rent control, it still could not survive constitutional challenge. It was an integral part of an unfair statutory scheme whereby certain tenants were singled out for specially favourable treatment on the basis of purely arbitrary criteria. It could not be said to have been enacted by the Oireachtas in a manner and in a context that would leave it with a separate and self-contained existence as a duly enacted measure representing the law-making will of the Oireachtas.

The technique of "reading down" a Statute

In *Maher -v- A.G.*[10] the Supreme Court also stressed the necessity to maintain the verbal integrity of a section before severance could constitutionally be effected.[23] This requirement resides rather uneasily with the technique of reading down a statute that had earlier found favour in *Educational Co. of Ireland -v- Fitzpatrick*[24], a case in which the right of an individual to abstain from membership of an association was asserted. The plaintiffs in the case obtained injunctive relief against picketing designed to get them to bring pressure to bear on some of their employees who were not members of a trade union to join it. Although Budd J. and the Supreme Court upholding him, were of the view that a trade dispute existed within the meaning of the Trade Disputes Act 1906, section 2 of which protected peaceful picketing, they also held that, in the words of Kingsmill Moore J.:

> "The Trade Disputes Act 1906 can no longer be relied upon to justify picketing in aid of a trade dispute, where that dispute is concerned with an attempt to deprive persons of the right of free association or free dissociation guaranteed by the Constitution. The definition of trade dispute must be read as if were attached thereto the words 'Provided that a dispute .... between workmen and workmen as to whether a person shall or shall not become or remain a member of a trade union .... shall not be deemed to be a trade dispute for the purposes of this Act[25]'."

These observations are fundamentally at odds with the limitations which have developed on the deployment of the doctrine of severance and seem to give the courts *carte blanche* to rewrite laws in constitutional form. This runs counter to the concept enshrined in Art. 15.2.1 of the Constitution that the Oireachtas has the sole and exclusive power of making laws for the State.

King -v- A.G.

The constitutional inability of the courts to tamper with the legislative will was emphasised again in *King -v- A.G.*[26], wherein it was made clear by a majority of the Supreme Court that the principles adumbrated in *Maher -v- A.G.* applied also to the pre-1937 statutes, whose continuance in force subject to possible inconsistency with the Constitution is asserted by Art. 50. O'Higgins C.J. dissented from this conclusion. He pointed out that Article 50 of the Constitution is almost identical with Article 73 of the Free State Constitution. In *The State (Kennedy) -v- Little*[27] O'Byrne J., who assisted in the drafting of the Free State Constitution, explained the rationale and effect of Article 73 stating that it was intended to set up the new state with the least possible change in the previously existing law and that Article 73 should be so construed as to effectuate this intention. Johnston J. added that we should be very slow to do anything that would have the effect of depriving the Saorstat of the benefit of the vast body of useful statutory law which regulated hundreds and thousands of necessary matters in the body politic at the date of the coming into operation of the Constitution.

The Chief Justice went on to distinguish the situation before the Court from the position obtaining in *Maher -v- A.G.* In the *Maher* case the Court was confronted with a law which derived its validity from its enactment by the Oireachtas whereas in cases under Art. 50 the law, to the extent of its consistency, continued in force as a law by reason of the Constitution itself. In the one case legislative intent may be relevant, in the other it is not. With the

exception of his references to legislative intent the remarks of Fitzgerald C.J. in *Maher -v- A.G.* were appropriate and proper to be applied to a question of consistency under Article 50. Section 4 of the Vagrancy Act 1824, the constitutional debility of which was established in *King -v- A.G.* created *inter alia*, the offence of loitering with intent to commit a felony. To prove the requisite intent no other act was required to be shown, instead such intent could be inferred from the prior disreputable past of an accused person. Moreover the application of the provision was limited to "suspected persons" and "reputed thieves". Thus the *gravamen* of the offence consisted of being a prescribed kind of person. It was held by the High Court and Supreme Court successively that the offence, in both evidential and substantive respect failed to comport with the basic norms of the legal order postulated by the Constitution. The Chief Justice believed that what should be excluded as inconsistent with the Constitution were the words "suspected" and "reputed thief" in the original version of the questioned provision contained in section 4 as well as the amendment sought to be made by s.15 of the Prevention of Crimes Act 1871.[28]

However this argument did not meet with approbation of the majority members of the court whose disinclination to accept its implications was, it is respectfully submitted, well-founded. Kenny J. pertinently observed[29] that the Parliament which passed the Act of 1824 had expressly circumscribed its effect by confining the sphere of its operation to "suspected persons" and "reputed thieves". The removal of these limitations would fundamentally alter and increase the scope of the section. Henchy J. did not accept that verbal amputation would necessarily cure the unconstitutionality alleged against the section as amended, but in any event was satisfied that the suggested rewriting of the phrase would not be within the judicial power of leaving part of a statutory provision intact after another part of it has been severed as unconstitutional in pursuance of Art. 50 s.l. The learned judge put the matter thus:

> "It is one thing to strike down on constitutional grounds a particular statutory provision. It is quite a different thing, and one for which there is no constitutional warrant, for the courts to attempt to breathe statutory and constitutional life into a set of words which acquire a new and separate existence after the severance, but were never enacted as law. That would be a legislative function, which the Constitution expressly reserves to the Oireachtas .... In other words, the Courts have no power to declare a truncated or residual part of a statutory provision to have constitutional validity as a law unless they first find that it had the force of law in Saorstat Eireann immediately prior to the coming into operation of the present Constitution. This necessarily involves a finding that, in that form and to that extent, it was expressly or impliedly enacted as a law by the legislative authority or authorities from which it emanated".[30]

Foreign precedents were also mustered in favour of this proposition. His Lordship referred *inter alia*, to *Lynch -v- U.S.*[31] There Brandeis J. said that no provision, however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall.[32]

Conclusion

Clearly, the power of the courts to sever unconstitutional portions of the statute is constricted. This limitation owes its origin to the separation-of-powers policy embodied in the Constitution. Courts, exercising the power of constitutional review, cannot undertake restorative functions which more properly pertain to the legislative arm of government. This was made clear by Keane J. in *Somjee -v- Minister for Justice*[33] wherein it was said that the court has no jurisdiction to substitute for the impugned enactment a form of enactment which it considers desirable. These sentiments are clearly consistent with the restrictions which have developed on the doctrine of severance. The courts have no mending power but it is difficult to see any objection on grounds of principle in the courts indicating to the Oireachtas the appropriate mode of enactment which should be substituted for the impugned provisions. Keane J. in *Somjee* felt this was precluded.[34] The practice however might be regarded as validated by long usage. As McCarthy J. explained in *Norris -v- A.G.*[35] the courts have not hesitated in making tolerably clear to the Legislature their views on the desirability of a particular piece of legislation they are called on to interpret.[36] This has nothing to do with the application of the principle of separability. In conclusion one might venture the opinion that the case law which has grown up on the subject of severance illustrates the sophistication of constitutional adjudication.

Footnotes

1. In *Ashwonder -v- T.V.A.* 297 U.S. 288 Brandeis J. at pp. 346-349 referred to a number of rules the U.S. Supreme Court has developed for its own governance in cases confessedly within its jurisdiction by means of which it avoids passing upon a large part of all the constitutional questions pressed on it for decision. These include a requirement of standing which must be met before a constitutional claim can be entertained and the principle that the court will not consider a constitutional question if there is also present some other ground upon which the case may be disposed of. For the application of these concepts to our courts exercising the power of constitutional review see *Cahill -v- Sutton* [1980] I.R. 269 and *M. -v- An Bord Uchtala and A.G.* [1977] I.R. 282.
2. In this connection it is apt to note what was said by Mr. de Valera on the subject of the "presumption of constitutionality" during the Dail debates on the draft Constitution:
   "Even where there is a Supreme Court, as there is in the United States of America, some of the best judges of those courts, when asked to decide as a constitutional court, have said, and put it as the foreground of their work and interpretation that, ordinarily, the view of the legislature, interpreting their Constitution should be their guide: that there is a presumption, and should be a presumption that they are doing their work reasonably and fairly, and that it is only in cases where there is clearly and definitely a departure, not merely from the letter of the Constitution, but from the spirit of the Constitution, that they should decide differently". 67 Dail Debates Col. 427.
3. [1973] I.R. 140, 147, and see generally Kelly *The Irish Constitution* (Dublin 1980) at pp. 65-67.
4. [1963] I.R. 170.
5. *Ibid* at p. 184.
6. [1966] I.R. 379.
7. *Ibid* at p. 395.
8. [1967] I.R. 106.

9. *Ibid* at p. 116. See also the judgment of Walsh J. at p. 123.
10. [1973] I.R. 140.
11. [1973] I.R. 238.
12. *Ibid* at p. 242.
13. [1979] I.R. 73.
14. *Ibid* at p. 84. The provision reads as follows:
    (1) No person shall remove out of the State a child under seven years of age who is an Irish citizen or cause or permit such removal.
    (2) Sub-section (1) shall not apply to the removal of an illegitimate child under one year of age by or with the approval of the mother or if the mother is dead, of a relative for the purpose of residing with the mother or a relative outside the State.
    (3) Sub-section (1) shall not apply to the removal of a child (not being an illegitimate child under one year of age) by or with the approval of a parent, guardian or relative of a child.
    The learned judge found that it was necessary to strike down only the whole of sub-section (2) and the part of sub-section (3) in brackets.
15. [1973] I.R. 140 at p. 147-148.
16. (1963) Prl. 7165.
17. See Morgan "The Emergency Powers Bill Reference - 11 (1979) 14 *Irish Jurist* (N.S.) 261 at p. 274 Footnote 107.
18. [1962] I.R. 1 at p. 43.
19. [1972] I.R. 144.
20. *Ibid* at p. 157.
21. Unreported Supreme Court, December 1955. The point was also taken in *Cowans -v- A.G.* [1961] I.R. 411.
22. [1982] I.R. 117.
23. There must be no "violence to the verbal integrity of the provision as enacted by the legislature" [1973] I.R. 140, 149. The Supreme Court seemed to suggest that this requirement was not satisfied on the facts in *Maher's* case but this is difficult to credit. All that severance would have required here was the exclusion of one adjective (conclusive). There was no need for verbal reformulation.
24. [1961] I.R. 345.
25. *Ibid* at p. 398.
26. [1981] I.R. 233.
27. [1939] I.R. 39.
28. Also of interest are the observations of the Chief Justice at page 250 of the report. "I am however, somewhat concerned at the wide nature of the declaration given by Mr. Justice Mc William in the High Court. The effect of this declaration is to remove from Section 4 of the Vagrancy Act (as amended) and from the Statute Books the offence known as 'loitering with intent'. The conduct prescribed in such an offence is, in my view, not only a serious and persistent social evil but also one which, in all ages and seasons, has, in its intimidation of law-abiding citizens, facilitated the commission of serious crime. To remove such an offence from the Statute book merely because the provisions creating it or providing for its prosecution contain elements of inconsistency with the Constitution is, in my view, far too sweeping an exercise of the power of judicial review."
29. *Ibid* at 264.
30. *Ibid* at 260.
31. (1934) 292 U.S. 571 at page 586. These words were cited with approval by the United States Supreme Court in *Regional Rail Reorganisation cases* (1974) 419 U.S. 102 at 136.
32. See also the observations of Viscount Simon in *A.G. for Alberta -v-A.G. for Canada* [1947] A.C. 503 at 518 which were referred to with approval by Lord Diplock in *Hinds -v- The Queen* [1976] 1 All E.R. 353 at 373. "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.
33. [1981] I.L.R.M. 324.
34. Ibid at 327. Note too Forde (1982) *17 Irish Jurist (N.S.)* 295 at 336-339.
35. Supreme Court, unreported, 13 May 1983.
36. In *Goulding Chemicals Ltd. -v- Bolger* [1977] I.R. 211 O'Higgins C.J. said that a change in the law of industrial relations might well merit consideration by the Oireachtas. Henchy J. in *Cahill -v- Sutton* [1980] I.R. 269 opined that the enactment of a provision postponing the running of time in personal injuries claims until the plaintiff discovers, or could with reasonable diligence discover, the damage merited urgent consideration by the legislature. □

There was an attendance of 59 members at the Annual General Meeting of the Incorporated Law Society of Ireland held at Blackhall Place, Dublin, on November 18th, 1983.

The President, Mr. Michael P. Houlihan, presided. The Minutes of the Half-yearly General Meeting, held on May 7th, 1983, were taken as read and signed.

Accounts/Balance Sheet

Commenting on the figures, which were for a period of eight months due to the change in the accounting year, Mr. Quentin Crivon said that if they were prepared on an annualised basis they would show a significant drop in miscellaneous income and in *Gazette* income and convey the impression that before long the Society would be "broke".

The President pointed out that there had been very heavy claims on the Compensation Fund. The figures in the accounts reflected the financial position prior to his taking up office, and he had taken steps at the beginning of the year to ensure that a brake was put on expenditure.

Mr. T. D. Shaw, chairman of the Finance Committee, explained that the figures which Mr. Crivon was quoting related to the sources and application of funds, reflecting the cash flow. The real figures relating to the Society's work were in the income and expenditure account which showed a surplus. The shortfall in the cash flow was due to a decline in the use of the premises for public functions. A determined effort had been made to contain the Society's expenditure and this was reflected in the fact that the increase in the subscription for the coming year would only be £10. The Finance Committee was budgetting for a break-even figure in the current year and again for the coming year.

Mr. Shaw explained the operation of the Compensation Fund and added that a first stage claim on the insurers had now been approved for payment. From the low figure reported in the accounts, the Compensation Fund now stood at £500,000. Mr. Crivon asked that, with the new arrangement, the members be given an outline of the accounting situation at the end of nine months at the Annual General Meeting.

Mr. Desmond Moran was informed that civil proceedings had been initiated against auditors arising out of the claims on the Compensation Fund. Mr. Moran argued that the Society should take criminal proceedings.

The audited accounts and balance sheet were agreed.

Council Election

The result of the Council election was published in the December, 1983 *Gazette.*

In reply to a query from Mr. Michael Murphy, Mr. Peter Prentice detailed how votes were spoiled in the course of the election. Mr. Moran urged that ballot papers which were voted on in numerical basis, be accepted. In reply, Mr. Doyle pointed out that the scrutineers gave careful consideration to each faulty ballot paper before declaring the vote a spoiled one. Mr. Donal Kelliher asked that in the case of future elections, the number entitled to vote should be specified.

Council Report

The President referred to the Council Report, as circulated to members and invited comment. The report was discussed under the following headings:

President and Council

Mr. T. C. G. O'Mahony commended the Council on agreeing to the appointment of a 'troubleshooter'.

Parliamentary

Mr. Crivon referred to the proposed Family Law Bill and asked if there had been any consultations with the Minister or his Department. Mr. John Buckley explained that the Conveyancing Committee had written to the Department offering help in a working party, but the Department stated it would not be organising a working party. As a result, the Conveyancing Committee had commissioned Mr. Patrick Horgan, U.C.C., to prepare a position paper which, hopefully, would be available by the end of January. This position paper would be submitted to the Department.

Mr. Crivon commented that the Society should be making representations to the Taoiseach and the appropriate Minister and not to Departmental officials who did not have the interests of the profession at heart.

The President explained that the Society had established a liaison with the solicitor members of the Oireachtas and while consultation was difficult to achieve, every effort would be made to do so at the political level.

Mr. Ken Murphy referred to the recent comments at the Fine Gael Ard Fheis by Deputy Bernard Allen on the subject of the Disciplinary Committee. The President said he had discussed this matter with the Minister and the Society would be putting forward specific proposals to provide for their representation on the Committee. In addition, the Society had two representatives on a Committee established by the Attorney General to review what might be termed "Lawyers law", with a view to amending legislation to clear out the deadwood.

Mr. David Pigot referred to the fact that the Society's representatives on the Superior Court Rules Committee had been extensively involved in the work of that Committee in producing amendments to the Superior Court Rules with a view to expediting business.

In reply to Mr. Moran, the Director General confirmed that the Roll of Solicitors was maintained in bound volumes.

Finance

Arising out of the Committee report, Mr. Brendan Garvan raised the question of professional indemnity insurance. The President gave a detailed report of developments over the year. The discussions with the various interests were still ongoing and at the moment, the market was very fluid. There was a possibility that the situation would become clearer towards the end of February but it seemed that for a number of years ahead, the Society would be advising members to seek

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quotations from the various interests operating in the field of professional indemnity insurance. Mr. Crivon referred to the discussions which he had from time to time with Mr. Carr, IUA, on the subject of continuity bonus. He felt it a pity that the Society had moved away from IUA as its official broker and, at the same time, thought it a mistake for the Society to back any particular firm, since circumstances tended to change.

The President explained that IUA gave credit to those solicitors who were with them for a number of years. The Society's problem in the past year was that the underwriters for the approved scheme sought a 90% increase in premium due to the heavy claims experienced and for that reason, the Society had to take action. It had to be accepted that it was in the profession's interest to have the insurance proceeds in one pot of money rather than have it spread around. The difficulty was that in that situation, particularly with the bad experience, there could be no guarantee of continuity. In reply to Mr. Garvan, he explained that it would not be possible to tie in with the English or Scots scheme since both schemes were on a compulsory basis and as a result, their premiums were significantly higher than those obtainable in this country. He explained to Mr. Crivon that a significant number of claims were in the conveyancing area.

Disciplinary

Referring to the media comment, Mr. Eunan McCarron congratulated the Disciplinary Committee on the work done over the year which represented a very considerable demand on the individual members of the Committee. He favoured the inclusion of lay representation in the Committee.

Litigation

Mr. Moran pointed out that the increase in the number of cases in the High Court was caused to a large extent by inflation and on that account, the Society should agitate continuously to have the jurisdiction increased. He also asked that representations be made with a view to having the fines under the Summary Jurisdiction Acts brought to a reasonable level. He paid tribute to Mr. Frewen's work in the Central Office since he had been assigned there. Mr. Murphy referred to the delays now arising in the District Court in Dublin, particularly to the work load in the Family Law area, and also, to the delay in the District Court Offices in getting documents out. The President said that representations on the matters mentioned had been made by him and by Mr. L. Shields in his capacity as President of the Dublin Solicitors' Bar Association.

Mr. T. C. G. O'Mahony raised the question of the publication of correspondence in the *Gazette* and the uses to which the premises at Blackhall Place were put. Mr. Buckley, on behalf of the *Gazette*, and the President, for the Premises Committee, replied to the queries raised. Mr. Murphy said that in reading the reports, he appreciated that the Council and its Committees had undertaken a lot of hard work during the year. He felt it a pity that there was not a greater feedback to the members. The President commented that the reports as presented to the Council in the first six months of the year were circulated to the individual members, and many appreciative comments had been received.

In relation to 'Law in the Schools', Mr. Garvan asked if the Committee had considered drawing up a list of speakers. He also inquired as to what the Society intended doing about the Criminal Justice Bill, 1983, and in particular, what action it proposed taking to defend the right to silence. The President said that the Committee organised a Symposium on 26th November, 1983, in Blackhall Place, on the Criminal Justice Bill. A sub-Committee had put in a considerable amount of work in examining the terms of the Bill and its report and recommendations would be considered by the Council with a view to public comment by the Society. In addition, the Association of Criminal Lawyers had made very worthwhile comments on the Bill for which he commended the Association. Mr. Anthony Ensor explained that it was clear that the approach of sending people into schools to talk on the subject of law was not acceptable to the school authorities. Other approaches were being considered by the sub-Committee concerned at the moment.

Education

Mr. Eugene McCague urged members to heed the plea that vacancies be made available for intending apprentices who had passed the final examination First Part, since with the downturn in the economy, placement was a problem. He also raised the question of the Society subsidising the Law School. Mr. Crivon put forward the contrary view that the Society was far too open in its acceptance of apprentices. He referred to the many recently qualified solicitors who were unable to obtain employment, and were opening legal offices without any experience. This course was bound to lead to a disaster and he urged that the Society should use the apprenticeship system as a regulatory method in times of over supply of solicitors. The President commented that the views put forward were not compatible. The whole issue had been raised by the Chairman, Education Committee, in a paper which would be considered by his Committee and by the Policy Committee in January. Mr. Ken Murphy commented that the Society should not be trying to limit the entry to the profession by subterfuge and should face up to the problem created by the present over supply situation.

Company Law

Mr. Crivon commented on the correspondence with the Accountancy Institutes regarding accountants undertaking work proper to the solicitors' profession and urged members to be more careful in dealing with members of the Accountancy Institutes.

Professional Indemnity

In reply to a query from Mr. T. C. G. O'Mahony regarding the inspection of files by an auditor employed by the Society, as required in a recent notice in the *Gazette*, Mr. Joseph Dundon explained the problems which had arisen and the manner in which such investigations would be carried out. In the ordinary way, the accountant would only be allowed access to the accountancy record on a file and not to any other material. The problem was being further reviewed by the Compensation Fund Committee in light of recommendations which he had made to it.

Law Clerks J.L.C.

Mr. G. M. Doyle asked that this item be listed in future Annual Reports.

The adoption of the Annual Report was proposed by Mr. Crivon and seconded by Mr. Moran, and agreed.

Bond Scheme Draw

The Director General read the list of successful numbers in the Draw for the prizes under the Society's bond schemes:

4 x £1,000 Prizes:	**6 x £500 Prizes:**
Bond Number:	Bond Number:
1186 —	2247 (Andrew F. Smyth)
1618 (Brian V. Hoey)	1270 (James Binchy)
1797 (Conal J. Clancy)	2244 (Enda P. O'Carroll)
1473 (Alphonsus Grogan &Brian Grogan)	1040 (Patrick G. Farrell)
	2089 (Steen O'Reilly & Co.)
	1324 (Aedin Meagher)

6 x £250 Prizes:	**5 x £100 Prizes:**
Bond Number:	Bond Number:
1613 (P. Donal Branigan)	1210 (Eric A. Plunkett,
2046 (Dominick H. Kearns)	deceased)
1874 (Thomas A. Menton)	2222 (John C. Kieran)
2109 —	1990 (William J. McGuire)
1937 (Patrick G. Noonan)	1770 (Kevin Smith)
2073 (George V. Maloney)	1008 (R. J. Branigan)

Next AGM

The date for the next meeting was fixed for Friday, 16th November, 1984.

The Chair was vacated by the President and was taken by Mr. F. O'Donnell, Senior Vice President. Mr. Desmond McLaughlin then proposed a vote of thanks to the President for the work he had done on behalf of the Society during his year of office. At the Special General Meeting held at the commencement of the year, he had told the members what he would do and looking at the report which had just been adopted, it was possible to see that the President had accomplished most of his targets. The work put in by the President during his year of office occupied a phenomenal amount of his time which placed demands on both his family and his practice. Mr. McLaughlin said he was glad to see that the President had re-activated the Younger Members' Committee and also, he was glad to see that the advantages of being a member of the Society had been listed in the report.

In seconding the vote of thanks, Mr. McCarron said the President had been a tower of strength to the Society and to the individual members of the profession during his year of office. Mr. Ken Murphy said he would like to be associated with the vote of thanks and appreciated particularly the priority the President had given to younger members of the profession. Mr. T. C. G. O'Mahony also expressed his appreciation. The vote of thanks was conveyed to the President by the Senior Vice President amidst applause.

This terminated the business of the meeting and the Senior Vice President declared the meeting closed. □

Sixty Years in Practice

On Friday, 16th December, 1983, the North and East Cork Solicitors' Bar Association made a presentation to Mr. Edmund Carroll, Solicitor, of Fermoy, to mark his attainment of sixty years continuous practice.

Mr. Carroll was admitted in Michaelmas Term 1924.

In the course of his speech of thanks in response to the presentation — a brief-case — Mr. Carroll said he was looking forward to celebrating his seventy-fifth year in practice, upon which occasion his colleagues would have to dig their hands into their pockets again!

Mr. Carroll entertained the guests with a number of legal anecdotes, including mention of a secretary who had included in an assignment an exception "unto the Minister for Lands of the wines and minerals. . . ."!

It is worth remarking that all in Mr. Carroll's life is not legal; he has been musical director of and a contributor to the Fermoy Operatic Society for over sixty years. The Society presented its sixtieth performance at Christmas.

Mr. Carroll is the father of Brian Carroll and Declan Carroll, solicitors, Valerie Carroll a former Barrister, and is uncle of Justin McCarthy, solicitor, all of whom work in the practice.

(l. to r.): Edmund Carroll, Solicitor; Gerard O'Keefe, Solicitor and Frank O'Donnell, President of the Law Society.

Practice Notes

Acceptance of Service involving Lloyd's Underwriters

It is unnecessary to make an application for leave to serve out of the jurisdiction in proceedings in which Lloyd's of London or Lloyd's Underwriters or syndicates are a named Defendant.

Pursuant to Clause 11 (D) of the European Communities (Non Life Insurance) Regulations 1976 (S.I 115 of 1976), the Lloyd's General Representative is obliged to accept service of such proceedings on behalf of any such Defendant and will do so at his registered address.

RAYMOND P. McGOVERN,
Lloyd's Underwriters' Sole General Representative,
11, Lower Ormond Quay,
Dublin 1. □

Family Home Protection Act, 1976. Transfer of Sites for Dwellinghouse — Certificates for Land Registry

The attention of Practitioners is drawn to the provisions of Section 2 (2) of the Family Home Protection Act which prescribes *inter alia* that a "dwelling" includes "any garden or portion of ground attached to and usually occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling".

It should be borne in mind that a site for a dwellinghouse which has been carved out of a holding may, although no house or building may ever have been on the site, still have formed part of a "garden or ground attached to and usually occupied with a dwelling", etc. Solicitors should take this into account when framing certificates for the Land Registry. □

COMMENT (Contd. from p. 3)

complained about the unsatisfactory nature of such bonds and has attempted to impose unworkable conditions in planning permissions in relation to future bonds.

These are but two recent examples of the phenomenon of increasingly large numbers of people escaping either individual or collective liabilities to the public in general, while endeavouring to impose even stricter obligations on the shrinking number of people who must bear such liability and who are engaged in the provision of essential services to the community. It is an unattractive feature of the growth of consumerism that it is increasingly spurred on by those who are immune, either because of the nature of their work, or their status, from the sort of consumer protection they so forcefully advocate. The limited jurisdiction given to the newly appointed Ombudsman points out the desire to conform to the norms of other democracies, however belatedly, while ensuring that as few boats as possible will be rocked within this jurisdiction.

"No Taxation without Representation" was the battle cry of the American Colonists in the 1770s. "No control without responsibility" might well be the private sector's equivalent slogan for the remainder of the 1980s. □

Bicentenary of Blackhall Place

Mr. Michael P. Houlihan, President of the Law Society (1982/83), presenting a Medal and a Scholarship to Paul Coughlan, Best Pupil in the Leaving Certificate class, King's Hospital School, with (from left) Mr. David Robertson, Headmaster of the King's Hospital; Mr. Frank O'Donnell, Senior Vice President of the Law Society (1982/83) and (far right) Mr. Harold Meyer, President of the Old Boys' Union of the school.

Mr. David Robertson, Headmaster of the King's Hospital School, presenting a shield of the Coat of Arms of the school to Mr. Michael P. Houlihan, President of the Law Society, (1982/83), with Mr. Frank O'Donnell, Senior Vice President, (1982/83) and (far right) Mr. Harold Meyer, President of the Old Boys' Union.

Investment of Court Awards

by
Des Peelo, F.C.A.*

THE scale of court awards has now become very large. In the particular case of road accident victims, awards of several hundred thousand pounds are now relatively commonplace. The receipt of such large sums by individuals not perhaps previously accustomed to handling money can present considerable problems, not least of which is the dilemma of investing it to best advantage. There have been a number of sad cases where the money has been unwisely invested or frittered away through foolish spending. Before reviewing how such money might best be invested, however, there are three overall features to be considered, namely, the needs of the individual, inflation and taxation.

Needs of the Individual

This is of paramount concern and requires very careful consideration. The victim may be the father or mother of a large and young family or, indeed, may have a dependent parent. Their financial needs, as well as those of the victim, have to be taken into account. The future medical requirements, if any, must be considered very carefully. In some cases continuous medical care will be necessary and in others the medical assessment may be that progressive disablement will occur so that at some future date heavy expenditure will become necessary, perhaps even involving something close to permanent hospitalisation. In other cases, there may be no necessity for future medical treatment. The extent to which future medical costs will be met by an outside party such as the State or the VHI will be a matter of fact in each case. If at all possible, it is best to plan to meet such future costs out of income rather than capital.

There may be immediate capital costs to be met in terms of house alterations, special medical equipment for use in the home or specialised transport. Again this will be a matter of fact in each case. A housekeeper or nurse may have to be employed in some cases and the cost of this will also have to be met from income. As explained later, there is a considerable tax snag involved here, as the cost of such assistance has to be met from after-tax income.

Finally, under this heading, day-to-day living expenses have to be considered. In some cases, the individual may have other income through employment or have the advantage of reduced living costs through residing at home or with a relative. A point not to be overlooked here is that although the person concerned may at present have secure living accommodation and care, this may not always be the case as parents or relatives may die and family circumstances alter. Too high a reliance on generating an immediate large income, which may be heavily taxed, could sharply reduce the prospects of long-term investment appreciation to meet just such an eventuality. From looking closely at the above points, a picture can be assembled of the actual financial needs of the person, both short and long term, as a first stage in devising an investment programme.

Inflation

Everybody knows that inflation reduces the purchasing power of money but, curiously, in relation to investment, the effect of inflation is not perhaps well understood. To illustrate this point, supposing you had £1,000 to invest now and inflation over the coming year was expected to be 15%; to maintain the purchasing power of the capital in one year's time would require the investment to have grown to £1,150. Now this is where the effect of inflation is misunderstood. If the investment had in fact generated a growth of 15% whether as interest earned or dividends received, and this income was then spent, effectively you are spending your capital. In other words, the income should be *reinvested* to keep the purchasing power of the capital intact. It is only income in excess of the inflation rate that is *real* income. The high rate of tax on most forms of investment income exacerbates the difficulty of achieving any kind of after-tax return to match the depreciation of the capital through inflation, yet alone generate a *real* income.

As a chilly reminder of the effect of inflation, consider that £1 in today's values will only have purchasing power of 62p in five year's time, if inflation runs at 10% p.a. during that period. Inflation in Ireland for the three years to 31 December 1982 has run at almost 18% p.a., though the expectation for the current year is 11%, a downward trend that, hopefully, may continue. When investing money in circumstances in which individuals with a life expectancy of perhaps thirty or forty years will be dependent on investment income for the duration of their lives, combatting inflation is clearly of paramount importance.

The effect of inflation on those dependent on investment income should therefore never, under any circumstances, be underestimated.

Taxation

Nobody has to be told that personal taxes are very high in Ireland. A single person, living on taxable investment income, currently reaches the top rate of Income Tax of 65% on income in excess of £11,450, a married person at £22,900. Capital gains are taxed on a sliding scale of 60% for short-term gains, 50% for gains within three years and 40% for gains realised after three years. Unlike the personal tax allowances and rate bands, however, it is only gains in excess of the inflation rate that are taxable.

This underlines the necessity of generating only enough after-tax income to meet the financial needs outlined earlier, with a pronounced emphasis towards longer term and lower taxed, capital appreciation. Tax-free income is

hard to obtain without risk. Some forms of investment that generate a tax-free income, such as Guaranteed Income Bonds, are not suitable investments as there is no protection whatsoever against inflation. Unit-linked funds though, which can yield a tax-free income, could be appropriate investments. These are covered later in this article.

There are a couple of points worth mentioning under the taxation heading. Unreimbursed medical expenses are tax-deductible, something which is not commonly realised. This can have the effect of rendering income, generated for the purpose of paying medical expenses, tax-free. For example, £1,000 of medical expenses can be deducted from £1,000 of taxable income, subject to the first £50 p.a. being excluded. There is no upper limit to the amount of medical expenses allowed. A claimant under this heading needs some careful advice, as it is only *"unreimbursed"* medical expenses that are allowable, so specific compensation awarded in this regard may obviate a claim.

Allowable medical expenses are defined as the prevention, diagnosis, alleviation or treatment of an ailment, injury, defect or disability. Routine maternity, dental or optical treatment is not allowed. The timing of a claim can prove important, as relief for medical expenses is normally computed by reference to the expenses *paid* in each Income Tax year but, if a claimant so elects, relief for any year may be determined by reference to the expenses relating to the health care actually *provided* in that year, irrespective of the date(s) of payment of the expenses. For example, this could prove important in situations where there may be expenses paid in a year when there was not enough taxable income to absorb these expenses.

If a claim to have medical expenses tax-deductible is likely to arise, very careful professional tax advice should be sought in advance.

In some cases, a housekeeper may be employed, either full-time or part-time, to assist a person who is incapacitated. The cost of this service has to be met from after-tax income, which can prove a strain on available finances. A special tax allowance, currently £700 p.a., is allowed to an incapacitated individual. Clearly this is a miserly allowance and, incidentally, is only available where the assistant is actually employed by the incapacitated individual. Medical evidence may be sought by the Revenue Commissioners before granting this allowance as, in strict theory, to be eligible the individual should be totally incapacitated.

A useful point to note here is that if a relative or friend is taking care of an incapacitated person on an on-going basis and that relative or friend has no or only a small taxable income, a deed of covenant between the two parties can prove a useful tax saving device. A tax adviser should be in a position to further explain the actual mechanics of such a deed.

Investment Requirements

The discussion above sets out the framework within which to compile an investment profile, the next stage being to compile a suitable investment portfolio. Here again, some basic requirements have to be considered. Ease of investment management is an important consideration. Buying a house in flats may sound a good idea, but who will collect the rents, organise repairs, replace vacating tenants and so on? Similarly, complicated tax returns involving multiple dividend warrants, interest coupons, etc., can be very confusing to somebody not experienced in such matters.

Minimising risk is clearly important. It can often be true to say that investments with minimal risk offer little protection against inflation. Bank deposits and investment in gilts are two obvious such investments. Property is often thought of as being risk-free, but of course it is not and, while it is unlikely that a substantial proportion of an investment will be lost, property values are a function of factors such as interest rates, demand for that particular type of property and the general economic outlook. For example, it cannot be assured that rent review clauses give automatic protection against inflation, as this assumes that the economic wherewithal is there to meet such increases, a situation which, for example, hardly pertains at the moment. Similarly, a defaulting tenant may not easily be replaced. Still, as explained below, property investment can be worthwhile.

Ability to realise the investment is next on the list of requirements. While an investment policy can be intrinsically aimed at being long term this is not to say that it should remain inviolate. An investment chosen for good reasons now may have a different profile in five years time. It is important therefore to be in a position to switch at least a significant proportion of investments, hopefully without undue loss, should the necessity arise to do so.

Which Investments?

In a short article it is not feasible to present all the advantages and disadvantages of the full range of possible investments. In the author's view, the most appropriate investments to meet most of the earlier criteria are property, ordinary shares and unit-linked funds.

Direct investment in property may not be easily made. Property covers residential, retail, offices and industrial and within each of these categories there are endless variations as to size, location, leases, quality of tenant, state of repair and so on. Only properties already let should be considered and any form of speculation or development disregarded. A reputable auctioneer should be employed to advise and seek a suitable property. If the sum is large enough, direct property investment should be looked at carefully, not only because historically, wise investment under this heading has proved successful but also, to a lesser extent, a person often feels more comfortable at being able to identify at least some of their investments in a solid form rather than totally through paper entitlements shown on share certificates, etc. Well chosen property also offers the advantage that the capital value in itself is likely to generally keep pace with inflation, so the income therefrom, even though it may be taxable, could be said to be *real* income.

Investment in ordinary shares, based on historical experience, matches much of what is said above about property, except that share values can prove much more volatile. A major difficulty is that, with the U.K. stock market closed to Irish investors by Exchange Control regulations, investment is effectively limited to about twelve shares that could be said to be actively traded on the Irish stock market. However, some of these shares, notably Smurfits and Cement Roadstone, recently joined by Rohan and Allied Irish Banks on a more modest scale, offer a geographical spread of investment through their

overseas interests. Over recent years, shares have not performed particularly well, reflecting the general economic malaise, though some individual shares have done well. Echoing the earlier point about inflation, a successful investment portfolio must substantially outperform the general stock market trends, which have not generally kept pace with the cost-of-living over recent years. A stockbroker will advise under this heading though, in the author's view, an investor would need to be thinking in terms of investing at least £30,000 to achieve a reasonable spread of investments and risk.

The last category, Unit-linked Funds, are a relatively new phenomenon. These Funds are operated through the medium of life insurance companies and there are now some 36 Funds available, spread over nine companies. These Funds are divided into five main categories — property, equity, gilts, cash and managed funds, the last being a mixture of all the others.

The expression unit-linked simply means that, for example, if the original fund was launched by selling one million units at £1 each (total fund therefore £1 million), this amount is then invested by the insurance company in property, equities, or whatever. The value of the units rises or falls depending on the subsequent total value of the fund divided by one million. The number of units in a fund is not fixed (neither is the total fund) and can expand or contract, depending on new investors or sales by existing investors.

Income tax and capital gains tax are paid within the fund itself, hence any increase in value is tax-free to the individual investor. The primary aim of the funds is capital growth, though most of the funds provide a facility for taking a regular tax-free income through the cashing-in of units at designated intervals. The point to watch here is, again, that it is only the *real* income, as defined earlier, that should be drawn if possible. Up to £50,000, sometimes more, can generally be invested in individual funds, though of course it would be wise to spread an investment over several funds. Remember there is no guarantee as to values — unit prices can go down as well as up, though the record to date has been generally very good. Some examples of average tax-free growth rates over recent years are set out below.

A point worth noting is that some funds offer a geographical spread of investments through investments in the U.K., and the U.S., and elsewhere. Professional advice on selecting suitable funds is important, as there can be a wide range of interpretations that could be placed on likely future performances of individual funds.

As legal advisers will be aware, investments for a Ward of Court must be made from the list contained in the Trustee (Authorised Investments) Act 1958 and amendments, which exclude the investments mentioned above. The authorised list is very restricted indeed, being largely confined to deposits with recognised financial institutions and government stocks, but one investment which is allowed is the Bank of Ireland Gilt Edged Unit Trust, which goes at least some way towards meeting the investment criteria mentioned in this article.

As a final and important point, remember that some investments pay commission to the intermediaries involved and, indeed, some such advisers only offer investments where commission can be obtained so that, while not suggesting the investment advice may be suspect, it may not be comprehensive and may not include all necessary tax advice. □

* *Partner, Peelo & Perry, Chartered Accountants.*

TAX-FREE GROWTH RATES

	Average Growth Rate Over			
	1 year	3 years	5 years	7 years
(to 31 December 1982)				
Irish Life Managed	+19.1%	+16.2%	+13.8%	+16.9%
New Ireland Property	+ 8.5%	+14.9%	+15.2%	-
Insurance Corporation Equity	+15.8%	+17.3%	-	-
Inflation	+12.3%	+17.9%	+15.4%	+15.5%

Presentation of Ship's Bell to Admiralty Court

The start of what is hoped will be a new tradition in the Irish courts was marked by a presentation which tock place recently on board the s.t.v.Asgard II in the Port of Dublin, when Mr. Niall McGovern, General Manager of Irish Shipping, presented the ship's bell from the Irish Pine to the High Court Admiralty Marshal, Gerard L. Frewen. The bell, which carries the name of the Irish Pine and the coat of arms of Irish Shipping, is handsomely mounted on a mahogany stand bearing a brass plate with details of the presentation of the bell for use in the Admiralty Court. Among those present at the ceremonial handing-over were Mr. Justice McMahon, Admiralty Judge of the High Court; Mr. Patrick Lindsay, Master of the High Court; Captain Langren, Personnel Superintendent of Irish Shipping; Captain Healy, Master of the s.t.v. Asgard II, and other senior members of Irish Shipping Limited.

The bell recalls the first vessel of the name to sail under the Irish flag during the Second World War. The ship was tragically lost with all hands in the North Atlantic, sunk on the 15th November, 1942 by a German U-boat, U-608. It took only three minutes for the ship to sink; although the U-boat recorded the lowering of a life-boat, none of the thirty-three crewmen survived the rough seas and freezing weather. U-608 was itself sunk in the Bay of Biscay in August, 1944.

The bell, which has now passed to the Admiralty Court, is that of the Irish Pine III, launched in 1973 and now passed into foreign ownership. It is intended that the bell will be placed in the Court of the Admiralty Judge when he is sitting for admiralty business. This rather specialised jurisdiction is exercised by a Judge of the Court nominated by the president of the High Court. Mr. Justice McMahon, the present holder of that nomination, is himself a keen yachtsman and is well-known in sailing circles in Ireland and further afield.

The Court of Admiralty in these islands has a long tradition. While its origins are lost in time, it is known that such a court existed in England in the 14th century. One Sir Thomas Beaufort claimed the title of "Admiral of the Fleet and Admiral of England, Ireland and Aquitaine" as far back as 1407. The Admiralty Court had a dual jurisdiction, 'instance' jurisdiction in such matters as maritime contract, seamen's wages, salvage, etc., and 'prize' jurisdiction in relation to the seizure and exploitation of enemy vessels and property. This latter jurisdiction enabled many holders of office to amass considerable personal fortunes, and led to frequent complaint by the unhappy victims of such practices. One unhappy Admiralty Marshal is remembered in *Empringham's Case*, when he was convicted in 1611, fined and imprisoned, and dispossessed of his ill-gotten gains.

It was not until the 1870's that the exceptional jurisdiction of the Admiralty Court was brought into line with that of the Courts of Common Law, and the system as it is known today came into being. England, being a maritime nation with a large merchant fleet, has greater need for an Admiralty Court than Ireland has. Nevertheless, ship collisions, salvage claims, disputed repair and supply bills, unpaid mortgages, etc., provide sufficient business for the Irish Court during the year. Earlier this year a German vessel was sold by the Admiralty Marshal by order of the Court; a year ago another vessel realised the sum of £380,000.00.

In England when the Admiralty Court is sitting, a silver oar some 33" in length is placed before the Judge. The history of the oar goes back to 1559, the year when Elizabeth Tudor ascended the English throne. The Irish Pine bell has a long way to go before it can lay claim to equal antiquity, but its first use in the High Court in 1983 will hopefully mark the beginning of a tradition which will continue for many years to come, and keep alive the memory of brave men who gave their lives in the service of Ireland's fledgling merchant navy. □

Companies (Amendment) Act, 1983

Part 3

by
William Earley, Solicitor

Class Rights

THE Act introduces in Section 38 and 39 new rules relating to variation and registration of class rights which apply to both public and private companies. These rules apply immediately to a newly-incorporated public limited company but otherwise at the end of the transitional period or, if earlier, the date of re-registration as a public limited company. References to "variation", except where the context otherwise requires, now include "abrogation". The Act also lays down rules for the convening and conduct of class meetings.

Class rights may now be varied in two cases where it was formerly not possible without a scheme of arrangement under Section 201 of the 1963 Act. First, where they are not set out in the Memorandum and there is no variation of rights clause in the Articles, when they may be varied with the written consent of the holders of 75% in nominal value of the shares of that class or by a special resolution passed at a meeting of that class. Secondly, where the class rights are set out in the Memorandum but neither the Memorandum nor the Articles contain a variation provision, then they may be varied by the unanimous consent of all members of the company.

Where there is a reduction of capital or a grant, variation, revocation or renewal of an authority for the directors to allot shares, either of which involves a variation of class rights, and the Memorandum or Articles contain provisions for the variation of those rights, then not only must such provisions be complied with but it is also necessary to have the written consent of 75% of the holders of the class or the sanction of a special resolution of such holders. Where class rights are attached by the Memorandum, and the Articles contain provisions for alteration which had been included at the date of incorporation then the rights may only be altered in accordance with those provisions. Where class rights are set out otherwise than in the Memorandum, and the Articles contain provisions (wherever included) for alteration they may only be altered in accordance with those provisions.

Special provisions now apply in respect of the quorum for meetings required by Section 38:

(a) the quorum shall be at least two persons holding or representing at least one-third in nominal value of the issued shares of the class in question or at an adjourned meeting one person holding shares of the class in question or his proxy;

(b) any holder of shares of the class in question present in person or by proxy may demand a poll.

In future particulars of the rights attached to any shares allotted must be filed with the Registrar of Companies within one month of the allotment, except where particulars of those rights have already been filed or are contained in the Memorandum or Articles. Particulars of any variation in the rights attached to any shares or the assignment of any name or new name to any class of shares must also be filed.

Maintenance of Capital

The new provisions relating to maintenance of capital fall into two categories;

(a) those which ensure that holders are informed when there has been a serious loss of capital;

(b) those which prohibit a company from having an interest in its own shares.

Section 40 provides that if at any time after the appointed day it becomes known to any of the directors of any company, public or private, that its net assets represent 50% or less of its paid-up capital, the directors must convene an extraordinary general meeting to consider whether any, and if so what, measures should be taken to "deal with the situation". The meeting must be convened within twenty-eight days of the first director becoming aware of the situation and must be held within fifty-six days.

Problems may well arise in the application of these provisions. For example the calling of a meeting of shareholders in these circumstances will cause adverse publicity, there could well be problems in deciding on what basis the assets should be valued and it is not clear what will be the effect of any resolution passed by the members.

Further, it should be noted that paragraph 28 of the Second Schedule to the Act inserts a new Rule 5 into the Second Schedule to the 1963 Act requiring the auditors to a Company to state in their report to the Annual Accounts whether or not, in their opinion, there exists at the balance sheet date a financial situation which index Section 40(1) of the 1983 Act would require the convening of an extraordinary general meeting of the company. This provision is slightly unsatisfactory in the short term as, while the "Financial situation" might be as stated in section 40 (1), it may have become known to a director prior to the appointed day, in which case an extraordinary general meeting would not be required by the Section.

Pursuant to Section 42, both public and private companies are prohibited from acquiring their own shares, and any purported acquisition is void, except by way of gift or reduction of capital. These provisions, however, do not affect the redemption of preference shares, a purchase of shares under a Court order or forfeiture or surrender of shares under the Articles.

Accordingly a company that has received its own shares by way of gift may now hold them in its own name.

Furthermore, where shares of either a public or private company are issued to a nominee or where a nominee acquires any partly-paid shares the shares are treated as being held by the nominee for his own account and the company is regarded as having no beneficial interest. If the nominee fails to pay the amount of any call in respect of such shares the directors at the time of issue (or the other subscribers to the Memorandum if the shares were issued to them as subscribers) are jointly and severally liable with him. These provisions do not apply to shares issued or transferred as a result of an application or an agreement made before the appointed day or where a nominee of a company acquires shares in such a way that the company has no beneficial interest in those shares, nor do they apply where a nominee of a public company acquires shares, otherwise than by subscription, with the financial assistance of the company and the company has a beneficial interest in the shares: in this latter case, however, the directors will be jointly and severally liable with the nominee to pay any call. The Court may grant relief to subscribers or directors who would otherwise have liability to pay calls if it appears that they acted honestly and reasonably and ought, in all the circumstances, fairly to be excused.

Certain special rules apply to public companies in most cases where shares are acquired by the company (or other persons) and the company has a beneficial interest in those shares or where shares are forfeited or surrendered. In these circumstances no voting rights may be exercised by the company (or by its nominee or other shareholders concerned) and the company must dispose of the shares within three years (or one year if the company provided financial assistance in connection with the acquisition) or cancel the shares and thereby effectively reduce the capital, in which event the directors must apply for re-registration as a private company if the cancellation has the effect of reducing the allotted capital below the authorised minimum.

Collateral with Section 42, paragraph 10 of the Second Schedule to the Act provides for amendment of Section 60 of the 1963 Act so as to provide that:

(a) the general exceptions under that Section to the prohibition on financial assistance given by a company in connection with the purchase of its own shares do not apply to public limited companies unless the Special Resolution required by that Section was passed prior to re-registration under the 1983 Act;

(b) a public limited company may only give assistance pursuant to sub-section (13) of Section 60 (dealing with employee share schemes) if its net assets are not thereby reduced or, to the extent that they are so reduced, that the financial assistance is provided from profits available for dividend.

Under Section 44, a lien or any other charge that a public company holds on its own shares is void except for a charge for any amount that is payable in respect of those shares or a charge in connection with any transaction entered into in the ordinary course of a company's business of lending money or providing credit or hire purchase.

Restrictions on Distribution

Part IV of the Act relating to distributions applies to public limited companies from original registration or from their re-registration under the Act and to private companies (to the extent that they apply at all) from the end of the transitional period.

'Distribution' is defined for the purpose of the Act as any distribution of a company's assets to its members, whether or not in cash, other than a distribution made by way of: (i) the issue of bonus shares, (ii) the redemption of preference shares in accordance with the usual rules, (iii) the reduction of share capital or (iv) the distribution of assets to members on a winding up.

Neither public or private companies may make a distribution except out of profits 'available for the purpose' which mean, in this context, the accumulated realised revenue or capital profits not previously either distributed or capitalised, less accumulated realised revenue or capital losses, so far as they have not been previously written off in either a reduction or a re-organisation of capital.

A public limited company (but not a private company) is precluded under Section 46 from making a distribution unless the amount of its net assets at the time of the proposed distribution exceed the aggregate of its called-up share capital and its 'undistributable reserves'. Further, any such distribution must not reduce the amount of its net assets below this aggregate. 'Undistributable reserves' for the purpose of this Section are stated to be: (a) the share premium account, (b) the capital redemption reserve fund, (c) the excess of accumulated unrealised profits, that have not been capitalised, over accumulated unrealised losses that have not previously been written off by a reduction or reorganisation of capital and (d) any reserve that the company is prohibited from distributing for any other reason.

The effect of this provision is that a public limited company must provide for any existing net unrealised losses before making a distribution. An old public company which re-registers as a public limited company will before paying any further dividend to its shareholders, be required to cover the amount of any unrealised profits which it has previously distributed by realised profits.

There are special provisions, in Sections 47 and 48 in respect of distributions by investment companies and assurance companies.

Section 49 deals with the accounts of a company which must be used in making determinations under this Part. Broadly the Statutory accounts for the last financial year are to be used, but if a distribution would be found to contravene the relevant section on the basis of such accounts, interim accounts may be used as would enable a reasonable judgment to be made in the matter.

Any member who receives an unlawful distribution is liable, under Section 50 to repay it to the company if at the time he received it he knew, or he had reasonable grounds to believe, that it was made in contravention of the provisions of this Part.

Unlimited Companies

Section 52 introduces for the first time in Irish Law a procedure whereby a limited company may, with the consent of all its members, re-register as unlimited. When the United Kingdom introduced such a provision in 1967,

at the same time as the abolition of the 'exempt private company' so that all private companies had to file annual accounts with the Companies Office in the U.K., many small private companies re-registered as unlimited so as to avoid these provisions. Given that personal guarantees were, and still are, required from proprietors of small limited companies from lenders or large suppliers, the benefits of limited liability were largely illusory. It remains to be seen whether or not any number of companies will make use of this provision in the face of the other provisions of this Act and of the (hopefully) imminent legislation implementing the Fourth Company Law Directive of the E.E.C. (which will introduce into this country a requirement for private companies to file annual accounts).

Re-registration must be applied for on the appropriate form (Form 84) signed by a director or the secretary and accompanied by:

(a) Memorandum and Articles of Association, amended as appropriate, depending on whether the company has registered Articles previously (as opposed to simply having adopted, or relying upon the deemed application of, Table A) and is or is not to have a share capital;

(b) Form 85, containing a form of assent to the re-registration by or on behalf of all members;

(c) a Statutory declaration made by the directors to the effect that the persons by whom or on whose behalf the Form 85 assent is subscribed constitute the whole of the membership, and, that the directors have taken all reasonable steps to satisfy themselves that any person subscribing on behalf of a member was legally empowered to do so.

Re-registration takes place when the Registrar issues a Certificate of Incorporation appropriate to the status being assumed by the company. Such certificate is, again, conclusive evidence that all requirements have been complied with.

Past members of a company which has re-registered under Section 52 will not have to contribute, on a winding-up, more than they would have been liable to do so if the company had not re-registered, unless, of course, they become members again at some time after re-registration.

Section 53 introduces a new procedure, replacing the provisions of Section 20 of the 1963 Act, whereby an unlimited company may re-register as a limited company.

Section 53(7)(a) provides that, notwithstanding Section 207(I)(a) of the 1963 Act (which provides that a past member of a company shall not be liable to contribute any assets to a company in a winding-up if he has ceased to be a member for one year or more before the commencement of the winding-up) a past member of an unlimited company who was a member on re-registration of that company as limited, will be liable to contribute without limit to the assets of a company in respect of its debts and liabilities contracted before that time if the winding-up commences within three years of re-registration.

Section 207(I)(c) of the 1963 Act provides that no past member is liable to contribute unless it appears to the Court, on an application in this regard by a liquidator, that the existing members are unable to satisfy the contributions required. Section 53(7)(b) of the 1983 Act, however, provides that notwithstanding that sub-section (but subject to Section 53(7)(a)) where no persons who were members of the company on re-registration are existing members at the commencement of a winding-up), any person who on re-registration was a present or past member is liable to contribute without limit despite the fact the existing members have fully contributed as required by law.

Miscellaneous

Part VI of the Act contains miscellaneous provisions. The most important is that in Section 56, which makes it an offence for a person who is not a public limited company (or an old public company after the end of the general transitional period) who carries on a trade, profession or business using a name having as its last part, either in full or abbreviated form, "p.l.c." or "c.p.t.".

There are transitional provisions, however, whereby an old public company, having applied for re-registration under Section 12, may use either "limited" or "p.l.c." (in any of their forms) on its Common Seal and letterheads for a period of twelve months after re-registration and may, for a period of three years thereafter, use either form on its premises.

The penal provisions do not apply to external companies to which Part XI of the 1963 Act applies and which would be entitled to register as a p.l.c. if registered in the State.

Section 58 provides that a public limited company may no longer apply, under Section 24 of the 1963 Act, for a licence to dispense with 'limited' in its name. Any existing Section 14 licence shall cease to apply on re-registration.

Careful reference should also be made to the First and Third Schedule to the Act which make amendments or modifications to the 1963 Act, only the most important of which have been referred to in these Articles. □

American University offers programmes for Irish Law Graduates

The University of the Pacific, McGeorge School of Law, a major American law school with a European branch in Salzburg, Austria, is offering a variety of programmes in 1984 which may have appeal to law graduates in Ireland.

Among the programmes is one which includes a three-month training period with a law firm or company in the U.S. and leads to the LL.M. in Transnational Practice. That programme commences in late August 1984 with five weeks of seminars focusing on American Law at the school's Salzburg campus, encompasses the internship in the U.S. and concludes with five months of study at the home campus in California. The law school also can arrange internships on the Continent for those who may be interested in experience with a French, German, Dutch, Belgian or Scandinavian firm.

Other programmes include three summer sessions: the Salzburg Institute in International Legal Studies, the Edinburgh Institute in International Business Transactions, and the Budapest/Vienna Institute in East/West Law and Relations.

Information on the programmes may be had from McGeorge School of Law, Box 19, A5033 Salzburg, Austria.

A representative of the law school will visit Dublin on 19 April, 1984 and will interview prospective participants at The Law Society. Interviews may be scheduled by contacting the law school's Salzburg office.

McGEORGE SCHOOL OF LAW,
Ferdinand Porschestraße 6,
A5020 Salzburg, Austria.
Telephone (0662) 75520, Telex 631064 INLAW

THE TAXES ACT

THE SIXTH SUPPLEMENT to the loose-leaf volumes "The Taxes Acts" has now been published. The supplement embodies the amendments made by the Finance Act, 1983.

Copies of the supplement may be purchased from the Government Publications Sale Office, Sun Alliance House, Molesworth Street, Dublin 2. Price £8 (postage extra).

Revenue Commissioners,
Dublin Castle.

The Criminal Justice (Community Service) Act 1983

by
Gerald F. Griffin, Solicitor.

THE Criminal Justice (Community Service) Act, 1983 ("the Act") was passed by both Houses of the Oireachtas and became law on the 7th July, 1983. The Act will, however, only come into operation when ministerial order to that effect is made by the Minister for Justice.

The Act will be of great interest to practitioners, in that it offers the relevant Court an alternative sanction whereby an offender who is convicted of a criminal offence may be ordered by the Court which convicts him to perform under supervision and within a stated time, a specified number of hours of unpaid work for the benefit of the community. The order in question is called a "Community Service Order." The Act confers jurisdiction on the Circuit Court and the District Court, but specifically excludes the Special Criminal Court.

The Act provides that work under a Community Service Order will be organised and supervised by the Probation and Welfare Service of the Department of Justice. It applies to persons of or over the age of sixteen years who have been convicted of a criminal offence for which there is no mandatory sentence and in respect of which the Court could impose a sentence of penal servitude, imprisonment or detention in St. Patrick's Institution.

The Act preserves existing powers of the Courts to make other orders, such as an order disqualifying a person from holding a driving licence, or an order for payment of compensation. It should be noted that the Act does not affect the imposition of mandatory sentences, for example the mandatory disqualification on conviction for drunken driving.

There are certain conditions laid down in the Act as a pre-requisite for the making of a Community Service Order, which are as follows:

The Court must satisfy itself —

1. that, having considered a report on the offender from a probation officer, the offender is suitable for community service and
2. that the offender can be provided with work and
3. that the offender consents to the making of the order.

The Court must also explain to the offender the effect of the order, that he must perform satisfactorily within a period of twelve months a specified number of hours of work and that any change of address by the offender must be notified to the relevant officer. The offender must also be informed by the Court that it has the power to review the order either on the application of the probation officer or on the application of the offender, depending on the circumstances.

Subject to the above mentioned, the Court can direct a minimum of forty hours and a maximum of two hundred and forty hours to be worked in any twelve month period.

The Act also provides for the making of more than one Community Service Order in respect of an offender but with a maximum number of hours in any twelve month period not to exceed two hundred and forty hours.

An offender who is the subject matter of a Community Service Order has to comply with certain requirements, as follows:

(a) He is required to report to his supervising officer when called upon.

(b) He must perform satisfactorily the number of hours work required of him under the order and notify his supervising officer of any change of address. In making the order the Court must avoid, as far as possible, any interference with the offender's normal work or with his attendance at any educational establishment.

If the offender should fail, without reasonable excuse, to comply with the requirements of the order the offender can be brought before the District Court and the Court many impose a fine up to a maximum of £300.00.

There is no provision for a prison sentence in lieu of a fine.

Upon a complaint being made by the supervising officer, the offender may be summoned to appear before the District Court and, should the offender fail to appear, the Court may issue a warrant for his arrest.

As an alternative to imposing a fine, the Court may simply revoke the order and deal with the offender for the original offence in the normal manner.

The Act also lays down certain conditions where the offender changes his residence from one Court area to another and both the supervising officer and the offender have the right to apply to the District Court to review the order.

As indicated at the outset, the Act has not as yet come into operation and awaits the making of statutory instrument by the Minister for Justice. It is anticipated that certain difficulties will have to be overcome before the Minister can in fact bring the Act into operation. For example, a "Community Service Order" is not defined in the Act, although it is presumed that the service required of an offender would be such that it would be of benefit to the entire community.

There are certain instances where an order could be readily made, for example in cases of malicious damage and the removal of graffiti. However, the Act requires that the Court must be satisfied, prior to the making of the order, that the offender can be provided with work. It is possible that certain resistance may be encountered from

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THE DUBLIN CHAMBER OF COMMERCE
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the Trade Union movement to ensure that offenders do not encroach on the workload of local authority employees.

A further difficulty arises in that, whereas the Act provide for the organisation and supervision of Community Service Orders by the Probation and Welfare Service of the Department of Justice, it is difficult to see, how in view of the existing workload this additional burden could be absorbed by this Service. it is quite clear that a great deal of organisation and supervision will be required and that extra facilities and staff will be needed to ensure the smooth operation of the Community Service Order procedures. However, in view of the current embargo on public service recruitment appointments and the general cut back in Government expenditure, it may be some time before the provisions of the Act are made fully operational. □

Correspondence

The Editor 18 November, 1983
Law Society Gazette,
Blackhall Place,
Dublin 7.

Dear Sir,

I refer to your letter of 9 November, 1983 on the question of accommodation available in this branch for solicitors, who wish to discuss clients' affairs with our officials.

There is in fact an interview room on the second floor, which is available for such purposes. As it serves the entire branch, you will appreciate that at times it may be occupied when required. In such case the lobby of the public office is used or, if the solicitor so requests, the interview may take place at the official's desk if this would give more privacy.

Yours sincerely,
M. P. O'Connor,
Assistant Secretary,
Capital Taxes Branch,
Office of the Revenue Commissioners,
Dublin Castle,
Dublin 2.

The Editor, 22nd December 1983
Law Society Gazette,
Blackhall Place,
Dublin 7.

Dear Sir,

Now that the Company/Commercial Law Referral Service mentioned in the April/May issue of the *Gazette* has been in operation for a period of six months it would be of considerable interest, particularly in a time of recession, to members of the profession outside the 14 firms of Solicitors mentioned in the article to learn how the scheme has worked in practice, both from the viewpoint of the 14 firms operating the Referral Service and from the viewpoint of the firms referring business to them.

I wrote a letter to you, Sir, on the 1st June which was intended for publication in the *Gazette*. I have since understood from you that you felt that it was prudent for the Editorial Board to inform the Company Law Committee of this letter and I can readily appreciate the reasons for this. My letter was intended to complain, not about the principle of the Referral Service as such, but about the way in which it has been sprung on the profession through the medium of the *Gazette* without prior consultation with the profession. In my view, the original publication of the article (which was then repeated) could present serious problems for the profession as a form of public advertising for business by the 14 firms, even if unintentional, especially as the *Gazette* is available to and widely consulted by persons outside the profession. Furthermore, the article itself contained a clear inference that the listed firms had some unspecified expertise in Company and Commercial Law which the firms not in the list did not possess or were too indolent to apply.

In general the *Gazette* is not slow to publish correspondence of interest to the profession which is also of a controversial nature and I would instance Mrs. Flynn's letter dated 25th May which appeared in the May 1983 issue. I would therefore invite the Chairman of the Company Law Committee to respond publicly to the matters raised in this letter.

Yours sincerely,
Paul Guinness,
Solicitor,
Maxwell Weldon & Darley,
19 & 20 Lr. Baggot St.,
Dublin 2.

The Editor, 6th January, 1984
Law Society Gazette,
Blackhall Place,
Dublin 7.

Dear Sir,

Re: The Society of Young Solicitors.
Spring Seminar 1984

On behalf of the Society of Young Solicitors I would like to remind Members that the Society's Spring Seminar will take place in the Old Ground Hotel in Ennis on the Week-end of the 7th and 8th of April next.

At the date of writing the Programme is not entirely finalised. However, Max Abrahamson, Solicitor, will be lecturing on Arbitration, Daniel O'Keeffe, B.L., will be lecturing on Modern Banking Practice. There will also be lectures on Divorce Law, and on the avoidance of Professional Negligence Claims within a Solicitor's practice.

Booking Forms should be enclosed with this issue of the *Gazette*. Further Forms are available from the Law Society or the Writer.

Claire M. Callanan,
(On behalf of the Society of Young Solicitors,)
Gerrard, Scallan & O'Brien,
Solicitors,
69/71 St. Stephen's Green,
Dublin 2.

The Editor, 14th December, 1983
Law Society Gazette,
Blackhall Place,
Dublin 7.

Dear Sir,

Victorian Motorists in Dublin

I would be much obliged for information concerning the lives and times of Lawyers who were motorists in Dublin during the period to 1905.

Who was the first Lawyer to own a motor car here?

The cultural collision between the horse and the automobile emerged into the Law Courts and was well reported in "The Irish Motorist" even before the Motor Car Act of 1903.

Yours truly,
Cornelius F. Smith,
Chartered Accountant,
Modeshill,
34 Stillorgan Grove,
Blackrock,
Co. Dublin.

BOOK REVIEW

Judgments of the Court of Criminal Appeal 1924-1978, by Gerard L. Frewen, B.L., Dip. Eur., Law, Registrar of the High Court (Dublin: The Incorporated Council of Law Reporting for Ireland, 1982. 619pp. £37.50).

The introduction of the Criminal Legal Aid Act in 1962 and its subsequent implementation in 1965 did not then make any great impact on the legal profession. By 1970 only a small number of solicitors were on the Legal Aid panels and in some areas no solicitors were available for legally aided criminal defence work.

Today the situation is fundamentally different. Criminal practice forms a significant part of the work of the legal profession while criminal trials and related matters take up an increasing amount of court time. There are a number of reasons for these changes. One is the growth in crime. The report of the Commissioner of An Garda Síochána on crime published in June, 1982, noted that the number of indictable offences reported per year had risen from 38,000 in 1972 to just under 90,000 in 1981.

A second reason more directly bearing on the involvement of the legal profession was the decision of the Supreme Court in *The State (Healy) -v- Donoghue* [1976] I.R. 325, which made it obligatory on the courts to inform accused persons of limited means of their right to legal aid. A third reason is the increase in fees payable to solicitors and barristers under the Act.

Unfortunately, the increased importance of criminal practice has not been matched by any noticeable advance in publications on criminal law. Mr. Frewen's work is, therefore, particularly welcome. Part 1 is devoted to 75 judgments of the Court of Criminal Appeal which are published for the first time. These represent one-third of the unpublished reports of the Court and were chosen by Mr. Frewen after consideration of all the unpublished material. Practitioners need no longer suspect that important judgments may still be lurking somewhere among the files in the Office of the Court of Criminal Appeal. No doubt the present and future Registrars of that court will be grateful to Mr. Frewen!

Part 2 comprises judgments of the Court which have already appeared in the Irish Reports. It is useful to have these in one Volume. The detailed index will be of great assistance to the Judiciary and practitioners and also provides some help in relation to cross-reference.

While not a work that solicitors will regularly produce in the District Court, a familiarity with these judgments will greatly benefit solicitors in criminal practice. The status of dock identification, identification where witnesses have been shown photographs, identity parades, aspects of the hearsay rule are all dealt with in judgments reported in this book. These matters are frequently relevant in District Court criminal trials.

The past 5 years have seen a number of major judgments from the Court of Criminal Appeal. A Supplement incorporating these judgments will go to press shortly and is expected to be available by mid-1984.

Meanwhile, both Mr. Frewen and the Incorporated Council of Law Reporting for Ireland are to be congratulated for producing this excellent and much needed book. □

Garrett Sheehan

Books Received

Employment Appeals Decisions — 1979. Government Publications Sale Office, Molesworth Street, Dublin 2. £2.47. (Prl. 1430)

The second volume in what is intended to be a series of reports of important decisions by the Employment Appeals Tribunal under the Unfair Dismissals Act 1977 has been published by the Department of Labour. The first volume covered cases heard by the Tribunal in 1977 and 1978 while the new volume covers 1979.

The decisions cover such points as what constitutes conduct justifying dismissal, the requirements of natural justice to be observed before deciding on dismissal and whether dismissal ostensibly on the grounds of redundancy was, in fact, the real reason.

The Minister for Labour commenting on the publication, said that the response to the first volume had shown there was wide public interest in the decisions of the Tribunal under the Unfair Dismissals Act and that it was intended to have this volume of leading cases updated at regular intervals. □

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.

Dated 10th day of February, 1984.

B. Fitzgerald (Registrar of Titles)

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

1. **REGISTERED OWNER:** Della and John J. Keenan; Folio No.: 9709; Lands: Monksland; Area: 0a. 1r. 25p.; County: **WESTMEATH.**
2. **REGISTERED OWNER:** Michael and James Mahon of Stonestown, Delvin, Co. Westmeath; Folio No.: 87R and 89R (now closed to 2805F); Lands: Stonestown; Area: (1) 0a. 2r. 15p.; (F. 87R), (2) 4a. 0r. 28p.; (F.89R); County: **WESTMEATH.**
3. **REGISTERED OWNER:** (1) Margaret Donovan, (2) Noeline Morrissey; Folio No.: (1) 1434, (2) 1437; Lands: (1) Moneygall, (2) Moneygall; Area: (1) 3a. 1r. 0p., (2) 2a. 3r. 8p.; County: **KINGS.**
4. **REGISTERED OWNER:** Michael O'Neill, Kilmacrandy, Quin, Co. Clare; Folio No.: 12729; Lands: Kilmacrandy; Area: 52a. 3r. 6p.; County: **CLARE.**
5. **REGISTERED OWNER:** Joan M. Plunkett; Folio No.: 20144; Lands: Cartronkeel; Area: 0a. 1r. 19p.; County: **WESTMEATH.**
6. **REGISTERED OWNER:** Annie C. Egan, Main Street, Oughterard, County Galway; Folio No.: 52953; Lands: Ardnasillagh; Area: 1a. 2r. 3p.; County: **GALWAY.**
7. **REGISTERED OWNER:** Mary Nolan, c/o Patrick J. McEllin & Sons, Solicitors, Courthouse Road, Claremorris, County Mayo; Folio No.: 46178; Lands: Ballyhowly; Area: 0a. 0r. 18p.; County: **MAYO.**
8. **REGISTERED OWNER:** Patrick Kiely; Folio No.: 2879; Lands: Skehanagh; Area: 5a. 3r. 6p.; County: **GALWAY.**
9. **REGISTERED OWNER:** Joseph and Gertrude Sammon; Folio No.: 13108; Lands: Kilwarden; Area: 45.878 acres; County: **MEATH.**
10. **REGISTERED OWNER:** Palatiano Russell; Folio No.: 8336; Lands: Faithlegg; Area: 14a 1r. 28p.; County: **WATERFORD.**
11. **REGISTERED OWNER:** John O'Callaghan; Folio No.: 21070; Lands: Knockane; Area: 90.568 acres; County: **CORK.**
12. **REGISTERED OWNER:** Joseph Hinch and Catherine Mary Hinch; Folio No.: 7928; Lands: situate in the townland of Tolka and barony of Castleknock; Area: — ; County: **DUBLIN.**
13. **REGISTERED OWNER:** James Douglas; Folio No.: 16725; Lands: Knockmoy; Area: 0a. 0r. 21p.; County: **LAOIS.**
14. **REGISTERED OWNER:** Michael Shinny; Folio No.: 6506 now closed to F.20716; Lands: Carnane (relating to Folio 6506); Area: 6a. 2r. 9p.; County: **LIMERICK.**
15. **REGISTERED OWNER:** Patrick Doyle; Folio No.: 10522; Lands: Dromlusk; Area: 57a. 0r. 0p.; County: **KERRY.**
16. **REGISTERED OWNER:** James Bolger (deceased); Folio No.: 9932 & 9936 (now closed to 13412); Lands: (1) Knocktown, (2) Robinstown, (F.9936), Robinstown, (F.9932); Area: (1) 5a. 1r. 8p., (2) 3a. 2r. 12p., (F.9936), 10a. 0r. 15p., (F.9932); County: **WEXFORD.**
17. **REGISTERED OWNER:** Gerard Mullee, Mace North, Ayle, Westport, Co. Mayo; Folio No.: 17189; Lands: Mace North; Area: 1a. 3r. 34p.; 16a. 2r. 38p.; County: **MAYO.**
18. **REGISTERED OWNER:** Henry Holmes Flack; Folio No.: 2651; Lands: Tullybryan; Area: — ; County: **MONAGHAN.**
19. **REGISTERED OWNER:** Gerard Kavanagh and Marie Kavanagh; Folio No.: 2256F; Lands: Garrans; Area: 0.588 acres; County: **QUEENS.**
20. **REGISTERED OWNER:** Eva Lydon, Kilkelly, Co. Mayo; Folio No.: 23593; Lands: Kilkelly; Area: 16p.; County: **MAYO.**
21. **REGISTERED OWNER:** Edward Walsh; Folio No.: 3499 & 28202; Lands: (1) Ballyellane, (2) Walterstown; Area: (1) 15a. 1r. 6p., (2) 34a. 2r. 24p.; County: **CORK.**
22. **REGISTERED OWNER:** John Meagher; Folio No.: 14979; Lands: Gortlandroe (part); Area: 19a. 3r. 27p. County: **TIPPERARY.**
23. **REGISTERED OWNER:** Boland Selwood Limited (now Mirh Limited); Folio No.: 62923L; Lands: of Fox and Geese in the Barony of Uppercross, County of Dublin; Area: — ; County: **DUBLIN.**
24. **REGISTERED OWNER:** Patrick Holden and Gertrude Holden; Folio No.: 9418F; Lands: situate on the South Side of St. Fintan's Road in the Parish and District of Howth, County Dublin; Area: — ; County: **DUBLIN.**

Lost Wills

TIMONEY, Ellen, deceased, late of Ballydowd, Lucan, County Dublin. Would any person aware of the whereabouts of the original Will of Ellen Timoney dated the 17th June 1980 or any subsequent Will please contact Padraig Turley & Co., Solicitors, 158 Church Street, Dublin 7. Telephone Numbers 725544, 725401, 728324.

Lost Deed

DEED OF CONVEYANCE DATED 1957; John R. Halpin and Ors. 1st Part; Reps. Church Body, 2nd Part; Clara E. Motherwell, 3rd Part; Bridget E. Kelly, 4th Part. Premises described as ALL THAT AND THOSE that tenement and premises consisting of a Dwelling-house, Out-Offices, yard and garden, presently in the occupation of the said Bridget E. Kelly as a quarterly tenant situate in Whitehall Street in the town of Clones, Barony of Dartree and County of Monaghan being part or portion of the premises secondly described in said Indenture of Conveyance dated the 8th day of December, 1888 Sir Thomas Barrett Lennard to Charles James Soden and Robert Bell Booth and as more particularly delineated and described on the Map or plan endorsed on these presents and coloured green together with the right of way for all purposes in conjunction with adjoining owners over the passage way marked with the letters A.B.C. and D. on said Map and Plan. Will anyone knowing the whereabouts of the above Lost Deed please contact Messrs. Henry Murphy and Son, Solicitors, Clones, Co. Monaghan. Ref. JBM/MMcG.

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Miscellaneous

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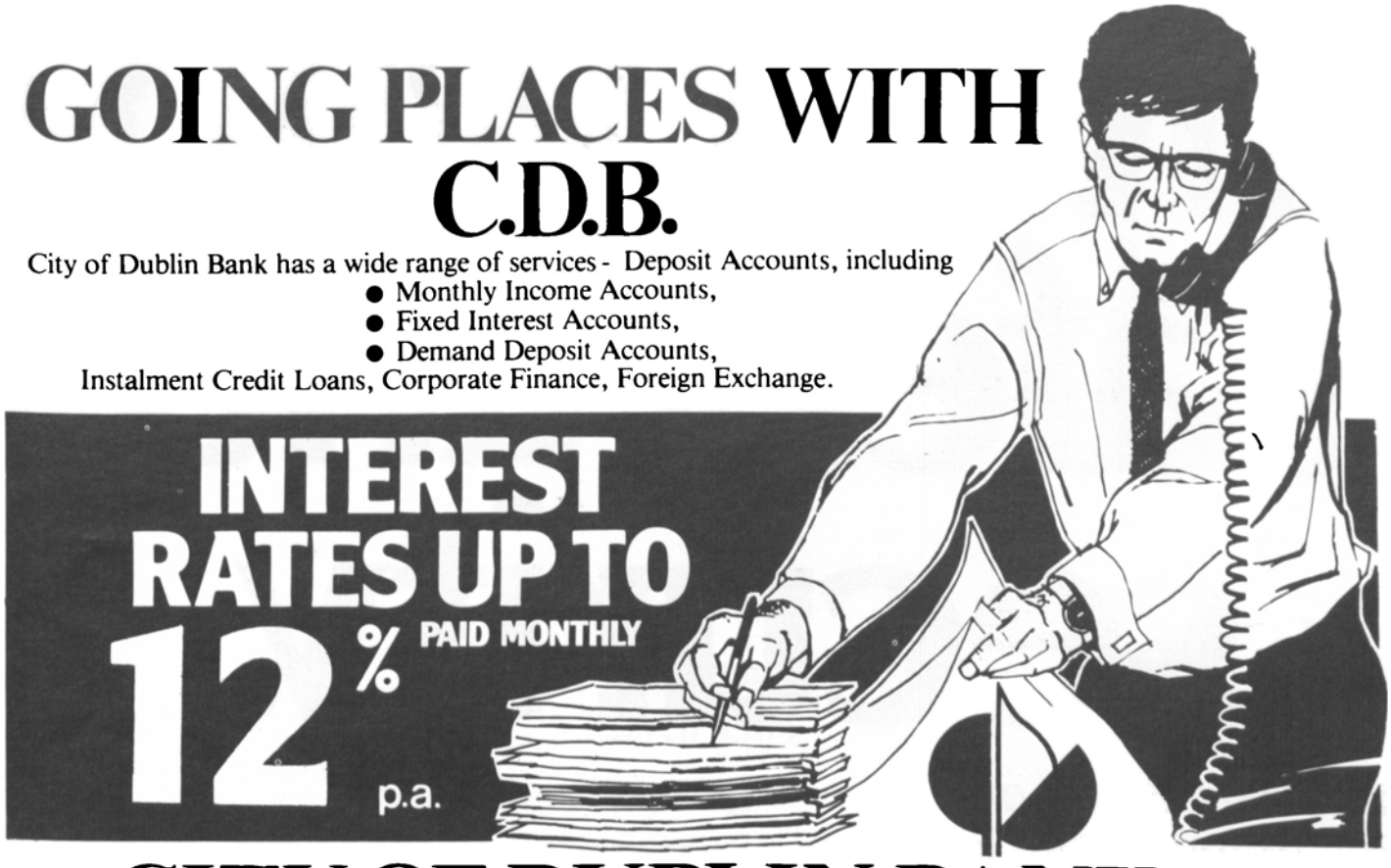

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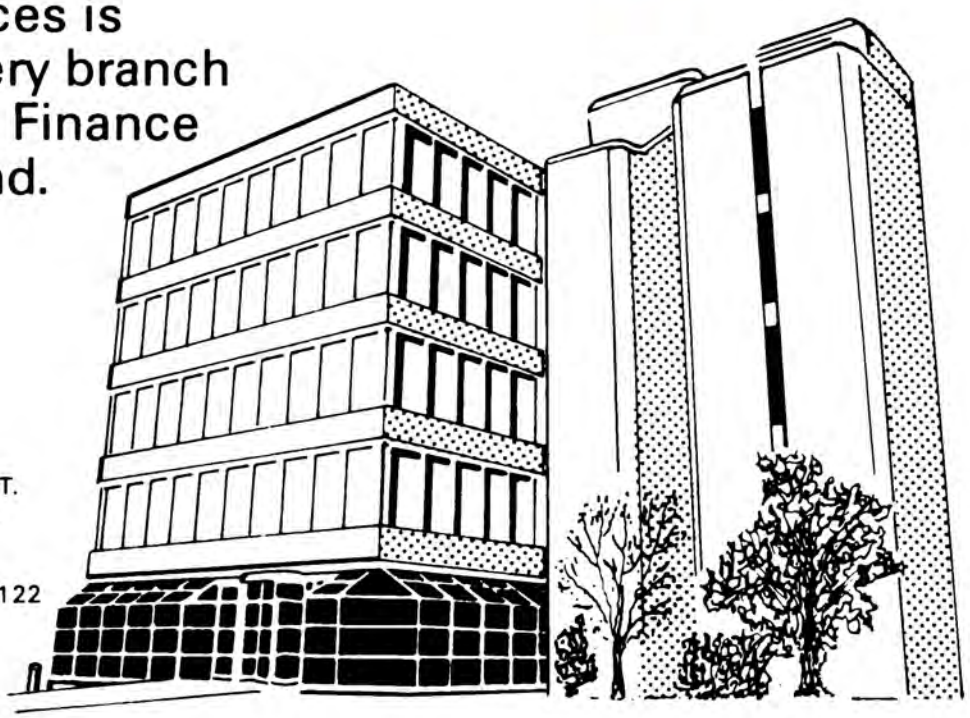

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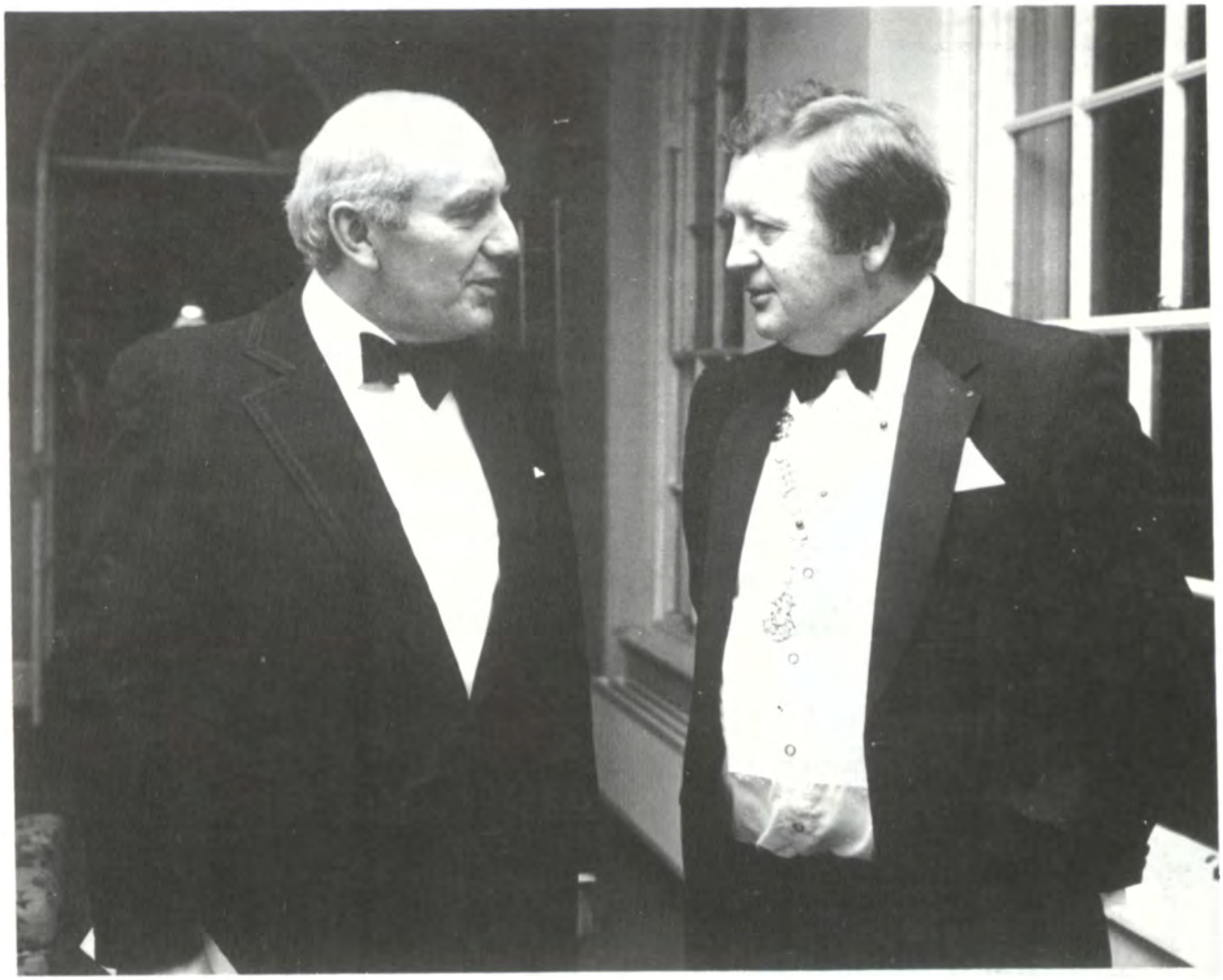
INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 2 March 1984

Law Society Council Dinner, 9 March 1984



The President of the Law Society, Mr. Frank O'Donnell (right) greets Mr. Patrick Cooney, Minister for Defence.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 2 March 1984

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

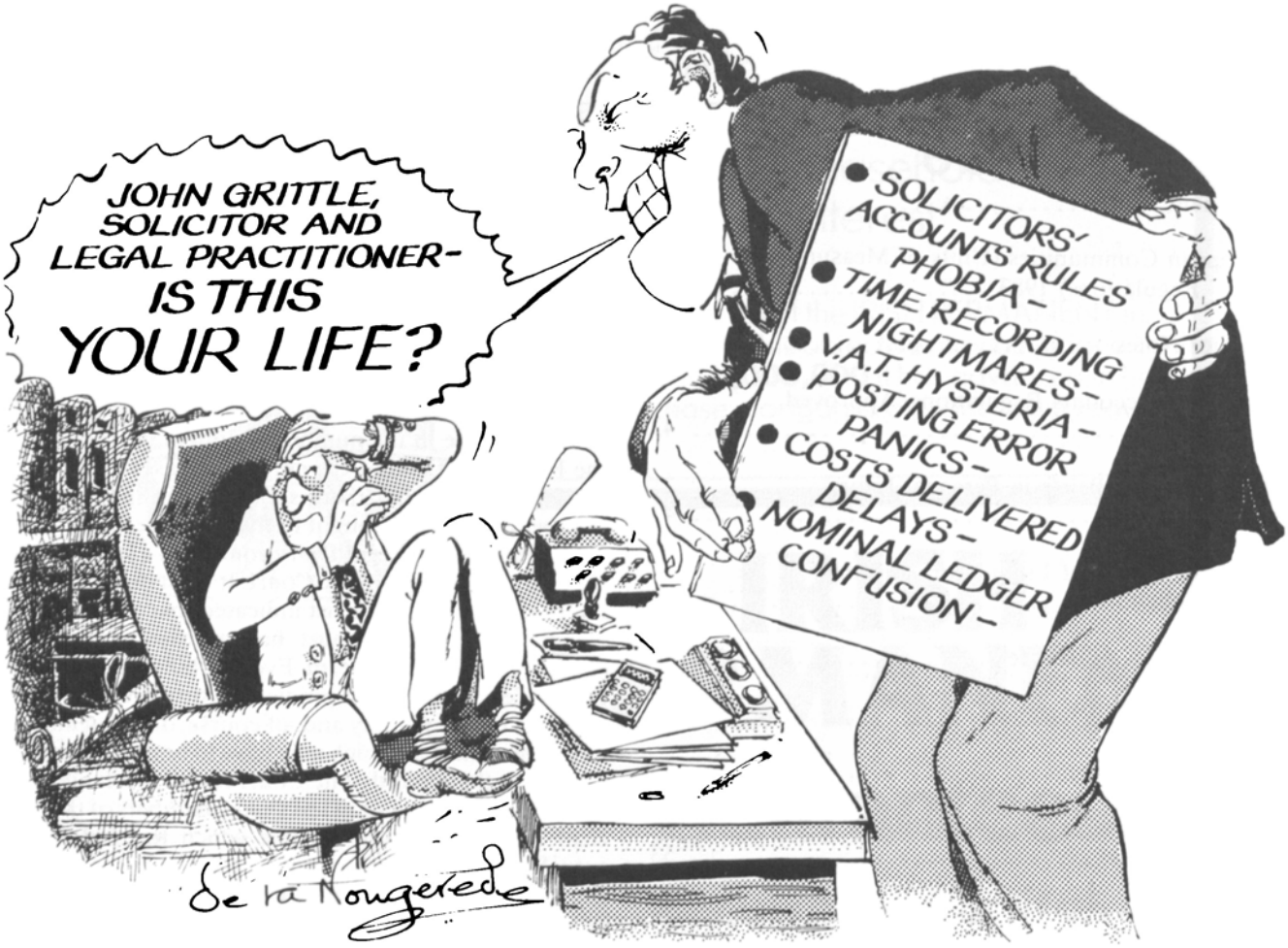
. . . A Court of Appeal?

WHILE increasing attention is being given to the lengthening Court Lists in the High Court and certain Circuit Courts and District Courts, the fact that this overload of cases has not passed the Supreme Court by appears to have been ignored. It is a natural corollary to the increase in the number of Judges hearing cases in the High Court and to the number of cases being tried in the High Court that there should be an increase in the number of appeals brought to the Supreme Court. On the 23rd January, the Legal Diary contained a list of 54 cases for hearing in the Supreme Court. It must be assumed that their inclusion in such a list indicated that they were cases which the Supreme Court had a reasonable hope of reaching in the Hilary Term. Even in this particularly long Hilary Term, this would predicate a turnover of cases not far short of one per day and, of course, does not allow for any urgent matters which may have to be dealt with by the Court. As there is only one Court Room available for the Court and it cannot sit in less than Chambers of three, it is clear that the amount of time which the Judges must actually devote to the hearing of the cases must, in many cases, only leave them with their supposed leisure time to deal with the preliminary reading or consideration of their judgments.

It has to be said, albeit it with some temerity, that the Supreme Court, in manfully undertaking this heavy workload, copes with it sometimes to the detriment of the quality of its jurisprudence. It may be necessary for the Judges, in order to deliver their judgments with reasonable celerity, to lean more towards doing justice between the parties and applying the law in the individual case before them than in drawing together the threads of lines of authority which have been quoted to them. In the face of the fact that our Judges, unlike their counterparts in many other jurisdictions, have no legal assistants to do the donkey work of checking case references and must necessarily do all their own research, it is perhaps not surprising that from time to time judgments which have been promptly delivered, to the satisfaction of at least one of the litigating parties, may not always stand up to detailed analysis in the absence of clear indications from the Judges as to which particular lines of authority have or have not been followed in any individual case.

Is it not right to consider whether there should necessarily be an automatic right of appeal from all cases originating in the High Court to the Supreme Court? Is there not something to be said for interposing a Court of Appeal between the High Court and the Supreme Court in civil cases, as has already been done for criminal cases? Is there not a strong argument for restricting access to the

(continued on p. 47)



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European Communities (Units of Measurement) Regulations 1983

by
Gerald Moloney, Solicitor

THE European Communities (Units of Measurement) Regulations 1983[1] came into force on November 1st, 1983. The Regulations provide the legal basis for the use of the metric system in Ireland and outlaw from use many imperial and other non-metric units of measurement. The Regulations were adopted (2 years and 1 month later than was directed) to give effect to an EEC Council Directive of December, 1979.[2]

Before outlining the provisions of the 1983 Regulations, the Weights & Measures Act 1878 ought to be mentioned. The 1878 Act, which remains a principal source of law in the area of measurement, sought to consolidate the existing law relating to weights and measures and provided that "the same weights and measures shall be used throughout the United Kingdom". The Act laid down the imperial standards of measure and weight, provided the method for the exact calculation of such units of measurement as the yard, the pound, the gallon, etc., stipulated the effect on contracts of the use of units of measurement other than those authorised by the Act, provided penalties for improper weighing and measuring, provided for the appointment of Inspectors of weights and measures, provided for the application of the Act to Ireland and dealt with other matters relating to measurement. Interestingly, the Act provides what may be the first legal recognition of the metric system in this part of the world. The Third Schedule to the Act sets out the metric equivalents of the various imperial weights and measures and provides (Section 21) that "a contract or dealing shall not be invalid or open to objection on the ground that the weights or measures expressed or referred to therein are weights or measures in the metric system. . . .".

The Directive, on which the Regulations are based, is not dissimilar to the 1878 Act in the sense that it consolidates all Community provisions in the area and seeks to take the Community one step further towards a single and unified system of weighing and measuring. Given the volume of business transacted between the Member States, the desirability of a common system is obvious. It is worth quoting from the recitals to the Directive:—

> "Whereas units of measurement are essential in the use of all measuring instruments, to express measurements or any indication of quantity; whereas units of measurement are used in most fields of human activity; whereas it is necessary to ensure the greatest possible clarity in their use; whereas it is therefore necessary to make rules for their use within the Community for economic, public health, safety or administrative purposes".

The Directive is based on Article 100 of the Treaty of Rome, which provides for the issue of Directives for the approximation of the laws of the Member States.

The Regulations

The purpose of the Regulations is to specify:

(a) Those metric units of measurement authorised for use in Ireland; and

(b) Those non-metric units of measurement no longer authorised for use.

A. Authorised Units of Measurement

It is firstly provided that all S.I.[3] metric units set out in Schedule 1 to the Regulations are authorised for use in Ireland. The Schedule is highly technical (setting out, for example, metric units used only in such fields as physics and electronics), but does set out the metric Base Units, in the terms of which all other units of measurement will be described. These Base Units are — the Metre (length), the Kilogram (weight), the Second (time), the Ampere (electric current), the Kelvin (termperature), the Mole, (amount of substance) and the Candela (luminous intensity). These units have, of course, been in use on a voluntary basis for some time.[4]

The Schedule defines the method of calculation of these Base Units and provides their symbols. Finally, it is provided that all units of measurement in the metric system must be determined in accordance with the Schedule. In other words, the legal basis of the metric system is now contained in these Regulations.

B. Units of Measurement no longer authorised

The second main purpose of the Regulations is to provide for the withdrawal from use in Ireland of certain imperial and other non-metric units of measurement.

List of Unauthorised Units

Schedule 4 of the Regulations lists those units of measurement no longer authorised for use. With certain exceptions, the use of these units of measurement is now illegal. The more common of these outlawed units of measurement are as follows:—

- Weight: grain, dram, stone, quarter, central, hundredweight and ton.
- Length: hand, chain, furlong and nautical mile.
- Area: square inch, rood and square mile.
- Volume: cubic inch, cubic foot, cubic yard, bushel (there is an exception in relation to grain storage) and cran.
- Pressure: inch of water.
- Force: pound force and ton force.
- Illuminance: foot candle.

- Speed: knot.
- Power: horsepower: (There is an exception in relation to excise duty on mechanically propelled vehicles).
- Temperature: fahrenheit.

Other less common and more technical units of measurement are also withdrawn from use. The outlawing of the use of these units of measurement should have consequences in "most fields of human activity", to quote the Directive.[5]

Exceptions

There are certain exceptions to the general illegality of using the withdrawn units of measurement:

(a) Agreement

In any particular transaction it is not unlawful to use any unit of measurement which was hitherto customarily used in trade in like transactions, but only where there is agreement between the parties to the transaction. However, this exception does not apply to retail transactions or transactions relating to packaged goods where an unauthorised unit of measurement is used without its metric equivalent. Almost all goods manufactured for eventual retail sale will, therefore, not come within this exception.

(b) Supplemental Indications

A unit of measurement no longer authorised may still be used as a supplementary indication of quantity expressed in an authorised unit provided:—

- Firstly, that the indication in the authorised unit predominates and the supplemental indication be expressed in characters no larger than those of the corresponding indication in the authorised unit; and
- Secondly, that in the case of conflict the supplementary indication will be disregarded.

Although the goods of many manufacturers and distributors already come within the exception, those of many more do not. Even a narrow interpretation of the first condition of this exception would suggest that the metric indication must at least come before the outlawed imperial indication.

(c) Products already on the Market

A unit of measurement which has become unauthorised under the Regulations may continue to be used in relation to products and equipment already on the market or in service on November 1st, 1983. Similarily, an unauthorised unit may continue to be used in relation to parts and components necessary to supplement or replace parts or components of such products and equipment already on the market on November 1st, 1983.

Consequences of Contravention of the Regulations

(a) Criminal Offence

Any person who uses a unit of measurement in contravention of the Regulations commits an offence and is laible to a fine not exceeding £800. However, it is suggested (and this is confirmed by personnel in the relevant Government Department) that there is unlikely to be vigorous or widespread prosecution, at least until the business community has had a reasonable time to implement the provisions of the Regulations.

(b) Effect on Contracts

(i) Contracts entered into prior to November 1983.

Where a contract was entered into prior to November 1983 and falls to be performed or partly performed after that date, any reference to a unit withdrawn from use shall be deemed to be a reference to its metric equivalent (set out in Schedule 4). Therefore, any calculation under the contract shall be made by reference to that metric equivalent.

(ii) Contracts entered into after November 1983.

Although not altogether clear, the effect of the Regulations on contracts entered into after November, 1983, would seem to be simply that, subject to the exceptions mentioned above, contracts must now refer to the metric unit where the non-metric unit that would otherwise have been used has been outlawed. The consequence of not so doing is that an offence is committed, as explained above. In fact, Regulation 8 specifically provides that Section 19 of the 1878 Act shall cease to have effect in so far as it makes void a transaction not made according to the (imperial) weights and measures to which the Section refers.

However, although surely entirely unintentional, an unusual result is achieved when one considers, together, both Regulation 12 of the present Regulations and Section 76 of the 1878 Act. Section 76 is the first section of that Part of the Act entitled "Application of Act to Ireland", and deals only with transactions determined according to the weight of goods. Section 76 provides that any contract, bargain, sale or dealing for any quantity of any commodity sold, delivered or agreed for by weight will be void if not made according to the various denominations of imperial weight set out therein.

Regulation 12 (2) provides that any reference in any other enactment to a unit of measurement no longer authorised will be construed as a reference to its metric equivalent. I would suggest, therefore, that Section 76 now makes void any contract for goods which are to be determined by weight if it refers only to a non-metric unit of weight which is now outlawed (e.g. stone, hundredweight, ton, etc.,) and not its metric equivalent.

This result can only be avoided by specific agreement between the parties in accordance with the exception explained at 2 (a) above. However, such an agreement cannot be made where the transaction relates to packaged goods or is a retail transaction. An example may help to explain:— A contract entered into after 1st November, 1983, for the supply of 100 tons of fertiliser to be delivered in bags of 2 hundredweight each would, in my view, be unavoidably void.

Application of the Regulations

The Regulations have very broad application, it being provided that they apply to "measuring instruments used, measurements made and dimensions or quantities expressed in units, whether for trade or for any economic, public health, public safety or administrative purpose". The Regulations do not affect the use of units of measurement in air, sea, or rail transport, which are not authorised in the Regulations but which have been

accepted in international conventions.

Not affected by the Regulations are those non-metric units of measurement not specifically withdrawn from use. In other words, such units of measurement as the pint, the mile, the pound and the ounce are not outlawed. In fact, the Directive provides that the use of these and other units of measurement are authorised until a date which will be fixed by the EEC Council.

Finally, it is to be regretted that the Regulations, which amount to not much more than a direct transcription of the Directive, leave the situation with regard to units of measurement in a state of uncertainty. This fact is not helped by the usual surreptitious manner in which the Regulations were introduced. A more general criticism is the altogether unsatisfactory practice of amending Acts of Parliament by Statutory Instrument. □

Footnotes

1. Statutory Instrument No. 235 of 1983.
2. Council Directive 80/181/EEC of 20/12/1979. O.J. L39 15/2/80 page 40.
3. Systeme Internationale as adopted by the International Organisation for Standardisation in 1974.
4. European Communities (Units of Measurement) Regulations of 1976 — Repealed by the 1983 Regulations.
5. Schedule 2 provides a short list of highly technical units of measurement, the use of which is authorised only until December 1985. Schedule 3 describes the national standards for the metre and the kilogram. They are deposited with the IIRS.

For Your Diary . . .

7/8 April 1984 **Society of Young Solicitors Spring Seminar.** Old Ground Hotel, Ennis, Co. Clare. Topics include "Current Aspects of Banking Practice" (Speaker: Daniel O'Keefe, B.C.L., LL.B., A.C.A.); "Some Legal Problems in enacting Divorce Legislation — Facing the day after" (Speaker: Patrick Horgan, Lecturer in Law, UCC); "Arbitral Affairs" (Speaker: Max W. Abrahamson, Solicitor); "Practical Aspects of Risk Protection for the Client and the Solicitor" (Speaker: Michael P. Houlihan, Solicitor).

3/6 May 1984 **Law Society Annual Conference.** Europe Hotel, Killarney, Co. Kerry. Brochures giving full details and booking forms available shortly from Ms. M. O'Connor, Law Society, Blackhall Place, Dublin 7.

16 June 1984. **Solicitors' Apprentices Debating Society of Ireland.** Centenary Ball. President's Hall, Blackhall Place, Dublin 7. Tickets £21.00 each. (Apprentices — £10.00 each.)

3/7 September, 1984. **International Bar Association 20th Biennial Conference.** Programmes available from Margaret Byrne at the Law Society, Blackhall Place, Dublin 7 or from the IBA, 2 Harewood Place, London W1R 9HB.

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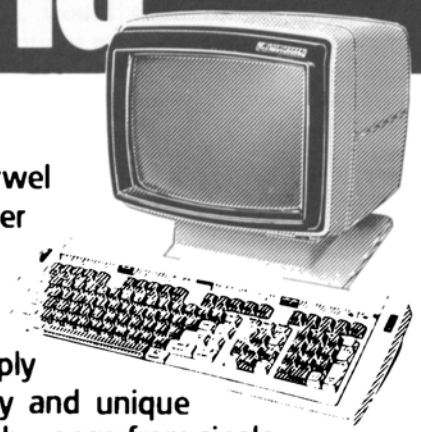

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Practice Notes

Forms 8-2 Solicitors

In response to complaints from Bar Associations, the Revenue Commissioners have indicated that District Offices are being reminded of the need to retain adequate supplies of Forms 8-2 Solicitor, for issue at the appropriate time. If, however, any particular solicitor is experiencing difficulties in the obtaining of supplies from time to time, it should be noted that supplies are available from the Information Section, Office of the Revenue Commissioners, 33/35, Nassau Street, Dublin 2. □

Deposits on Sales of Residential Property

The practice of seeking deposits of 25% of the purchase price on the conclusion of contracts for the sale of residential property declined following the recommendation made by the Conveyancing Committee in September 1981 that a deposit of 10% was generally more appropriate.

In response to some recent queries the Committee would like to reiterate that their recommendation was not intended to be an absolute one. There are clearly cases particularly where the consideration for the sale is a modest one or where an especially high price has been agreed in which a 10% deposit may not provide the vendor with a sufficient "cushion" in the event of the purchaser's default. Accordingly while the Committee stands over its earlier recommendation it repeats it was intended to have general but not universal application.

In the case of auctions the Committee is aware of a tendency, particularly where very valuable properties are concerned, for auctioneers to recommend the vendor to accept less than a 25% deposit. The Committee recommends if a solicitor acting for a prospective purchaser wishes to arrange for the payment of less than 25% he should arrange this with the vendor's solicitor in advance of the bidding. If a request is not made until after the property has been "knocked down" the vendor is clearly entitled to reject it. The Committee would not consider it reasonable to make such a request during the actual bidding. □

Companies (Amendment) Act, 1983

CORRECTION

In the November, 1983 issue of the *Gazette* at p.234, I referred to the "general transitional period" under the Act as expiring on 13th March 1985. This was, of course, incorrect and should have read 13th April, 1985, the date eighteen months from the "appointed" day, 13th October, 1983.

William Earley

Solicitors' Accounts Regulations/ Approved Banks

With effect from 12th January, 1984, the following banks have been added to the list of approved banks for the purpose of the Solicitors' Accounts Regulations 1967 as amended:

First Southern Bank Limited
Credit Finance Bank Limited
Hong Kong and Shanghai Banking Corporation.

The complete listing of approved banks is as follows:

Agricultural Credit Corporation Limited
Algemene Bank Nederland (Ireland) Limited
Allied Irish Banks Limited
Allied Irish Finance Company Limited
Allied Irish Investment Bank Limited
Anglo Irish Bank Limited
Ansbacher & Company Limited
Bank of America
Bank of Ireland
Bank of Ireland Finance Limited
Bank of Nova Scotia
Banque Nationale De Paris (Ireland) Limited
Barclays Bank International Limited
Barclays Commercial Bank Limited
Bowmaker (Ireland) Limited
Citibank N.A.
Chase Bank (Ireland) Limited
City of Dublin Bank Limited
Credit Finance Bank Limited
First National Bank of Chicago
First Southern Bank Limited
Forward Trust (Ireland) Limited
Guinness & Mahon Limited
Hill Samuel & Company (Ireland) Limited
Hong Kong 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
Royal Trust Bank (Ireland) Limited
Standard Chartered Bank Ireland Limited
Trinity Bank Limited
Trustee Savings Banks
Ulster Bank Limited
Ulster Investment Bank Limited
UDT Bank Limited

Preparation of Briefs in Personal Injury Actions

IN every contentious matter that goes to Trial, the Solicitors acting for each party will have to prepare initially draft Briefs for Counsel to advise Proofs and subsequently a full Brief for Counsel to appear on behalf of their client at the hearing of the action. Proper preparation of the Brief is of considerable importance to the client as, if there are shortcomings in the Brief, Counsel may not be adequately or fully instructed as to the nature of his client's claim or defence, and material (and perhaps even vital) points may not be raised, with possibly disastrous results from the client's point of view.

While no doubt views will differ as to what constitutes the "perfect" Brief, the purpose of this article is to indicate what it is felt the ordinary Brief in a running-down action should contain and the manner in which the same should be presented to Counsel. Briefs in different types of actions will differ in their essentials to no very great extent, different types of action, however, obviously involving differences in content.

The ordinary Brief in a running-down action should contain copies of the following:

(a) All of the pleadings (including letters and Notices seeking particulars and replies) in chronological order.

(b) Statements of witnesses (including Abstract of the Garda report and any statements obtained by the Gardai and map prepared by them).

(c) The Engineer's report (copy of his map and photographs ordinarily would be more conveniently briefed separately).

(d) Any other documentation relevant to the issue of liability.

(e) Medical Reports including any correspondence with the Doctors/Surgeons in regard to the Plaintiff's condition or the contents of their reports again in chronological order.

(f) A list of the special damages (which should correspond with those pleaded) together with vouchers and/or other documentation establishing the same.

(g) An Actuary's Report (where future loss of earnings is involved or in a fatal case).

(h) Inter party Correspondence (only what is relevant should be briefed).

(i) Any other documentation directed by Counsel in his Advice of Proofs.

(j) Opinions of Counsel, Advice of Proofs and any correspondence with Counsel dealing with the issue in the case.

It is suggested that the contents of the Brief be set out under the headings and in the order indicated above, each of the given headings occupying a separate section in the Brief, ideally with some form of divider between each section. The Brief should also contain formal instructions to Counsel which should be sufficiently detailed to enable Counsel reading the same to have a clear general picture of the facts of the case, the issues between the parties and the nature and extent of the personal injuries and loss involved. The Solicitor should indicate in these instructions his view, on the information contained in the Brief, of the respective merits of his own client's and the other party's case, and the arguments to be advanced in support of (and in opposition to) those views based on the available evidence. The Solicitor should also comment, at least briefly, on Counsel's Advice of Proofs. Where compliance with those directions has for some reason or other been impossible, the Solicitor will no doubt have sought further directions and any additional or substituted Proofs should be dealt with also in the Instructions.

Finally, the Brief may contain advices to Counsel in regard to the Consultation to be held prior to the hearing.

The draft Brief prepared for Council to advise Proofs will contain most (if not all) of the content set out above and quite frequently preliminary instructions for Counsel, these to be elaborated upon following receipt of Counsel's Advice of proofs and compliance therewith.

Before the completed Brief is sent to Counsel the same should be paginated and an Index prepared setting out the headings of each section of the Brief and, where necessary for Counsel's guidance under each heading, details of the contents thereof.

The final Brief should be properly bound there appearing on the cover of the Brief the title of the action, the party for whom Counsel is to appear, the name of the Counsel for whom the Brief is intended, the names of the Counsel who are appearing with him in the action, a note of the fee on Brief (if agreed prior to the hearing), and, finally, the identity of the Solicitor by whom he is instructed. □

Issued by the Litigation Committee of the Law Society and prepared by David R. Pigot, Solicitor, Dublin.

Incorporated Law Society of Ireland

LUNCH FACILITIES BLACKHALL PLACE

Members of the profession should note that lunch facilities are available in the Members' Lounge in Blackhall Place from 1 p.m. to 2.30 p.m. each day, Monday to Friday.

Reservations for lunch should be made at least 24 hours in advance.

A variety of lunch meals are available ranging from Soup & Rolls through Cold Buffet to a hot three course lunch.

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Fraud — Duties of Liquidators and their Solicitors

The following circular has been received from Mr. David Munro, Examiner of the High Court.

The question of fraudulent trading and other irregularities on the part of directors and other persons is arising with increasing regularity in Court liquidations. The summarised views of Mr. Collins, the Examiner, expressed in 1979 and approved by the then Chancery Judges provide a useful view of the realities. He said then:

> "Official Liquidators, when faced with improper conduct, like to take what they feel is a practical business decision and regard the financial aspect as the over-riding consideration. It is fair to say this is their main concern. Suspicion being one thing and proof another is no doubt one of the reasons why Receivers and Liquidators are often reluctant to report possible irregularities to the Director of Public Prosecutions. Expense is another factor but this I think is overplayed as the State in a proper case would have to accept responsibility for the prosecution expenses. Another is the understandable feeling that they may involve the professional men in complicated, time consuming, and badly compensated investigations which may ultimately result in decisions either not to prosecute at all or acquittals at the end of the day, without any financial return. However, such consideration in my view should not be allowed to prevail. It seems wrong that prosecutions are rarely if ever brought and if the relevant authorities were seen to be more vigilant it might act as a deterrent, apart from teaching a salutary lesson to some of the culprits if convictions were secured. In liquidations we must rely almost entirely on the liquidators who are eminently fitted to apply their professional skill and expertise to the books to uncover fraudulent trading and other offences.
>
> If, as is generally accepted, the problem exists, those aware of the situation should act decisively and not acquiesce or ignore what may amount to a public scandal in some cases. I am particularly concerned about the fate of creditors who justifiably often feel they have been defrauded and are left without redress while those responsible may be seen to prosper and are left to start up new businesses which may be equally questionable to those which previously failed."

Accordingly I am directed by the Chancery Judges to state that where an Official Liquidator or his Solicitors become aware of doubtful dealings and a *prima facie* case of fraud or of any offence under the Companies Act is apparent which may call for prosecution, it is their duty to make a report to the Examiner concerned for submission to the Judge. It should not be delayed till the completion of the case when the offences are stale. In those cases of apparent dishonest dealing where there is doubt about sufficient proof or where the course of conduct is not clearly covered due to the existing inadequacies of the law, a report of the facts should nevertheless be made. □

Vienna Site for 1984 International Bar Association Conference

Vienna is the chosen location for the 20th Conference of the International Bar Association which will be held between September 2nd and the 7th, 1984. The principal topics to be discussed at the conference will be:

1. Business Crime — The Role of the Law in its detection, prevention and cure.
2. Lawyer's Professional Liability — Should the Lawyer exclude, limit, or insure?

In addition more than 100 meetings to which all conferees are welcome will be held by the specialised committees of the I.B.A. during the Vienna meeting.

There will be a major programme of social events headed by a special performance of the Vienna State Opera, and also including a ball in the Hofburg (the former Imperial Palace).

Block bookings of accommodation have been made in all categories of hotels and in hostels.

It is anticipated that there will be a sizeable Irish contingent among the 2,000 lawyers and guests who are expected to attend. Programmes from the Conference are available from Margaret Byrne at the Library in the Law Society, Blackhall Place, or from the International Bar Association, 2 Harewood Place, London W1R 9HB. □

Comment (continued from p. 35)

Supreme Court to cases which involve significant points of law? There are precedents for such arrangements in other Common Law jurisdictions. Appeals cannot be taken as a matter of course to the House of Lords nor to the U.S. Supreme Court. In each of these jurisdictions there are Appellate Courts which deal with the great majority of cases coming from inferior courts on appeal. Only those which either the Appellate Court or the final court of jurisdiction deems suitable for consideration by such a final court can be taken to such final court.

The alternative solution which presents itself, namely, the appointment of additional judges to the Supreme Court so that the Court could divide itself into a larger number of Chambers and thus dispose of a greater number of appeals, is less attractive, if for no other reason than that it might result in a lowering of the level of consistency in the Court's decisions, which might well be of considerable significance in that category of cases which most lawyers would feel ought not to have to go to the Supreme Court for the hearing of an appeal, namely personal injury cases.

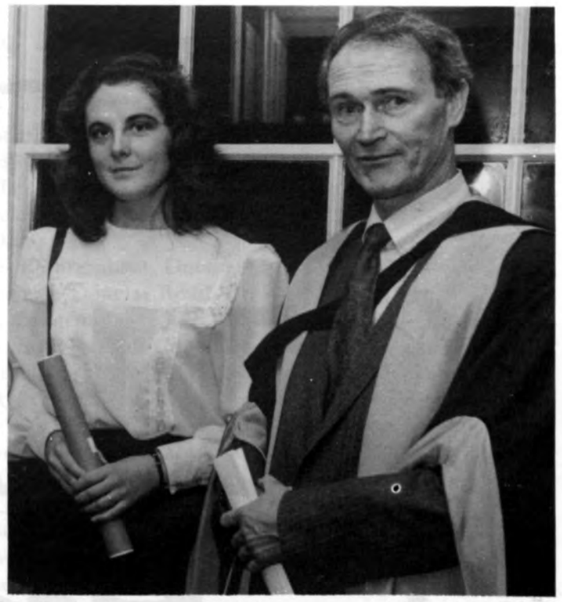
The interposition of a new Court of Appeal on the civil side should be considered as part of the comprehensive review of our Supreme Court system which is understood to be under way. □

Presentation of Parchments

9th Feburary 1984

Catherine A. Moore receiving her Parchment from her father, Mr. P. C. Moore, former President of the Society, watched by Mr. Frank O'Donnell, President of the Law Society and Professor Richard Woulfe, Director of Education.

Pictured at the Presentation of Parchments ceremony were (l. to r.): Nora Morris, Dublin; Finuala Ryan, Drogheda; John Fahy, Dublin and Margaret Mulrine, Donegal.



Professor Laurence Sweeney, Director of Training, with Miss Yvonne O'Hanlon, Dublin, who received her Parchment.

The President, Mr. Frank O'Donnell, presenting his Parchment to Noel M. Egan, Portarlington, Co. Laois, with his 4½ month old son, Michael.

Presentation of Parchments — February 9th, 1984

1. Barry, Kevin, B.A. (Mod), 41 Monalee Park, Castletroy, Co. Limerick.
2. Benville, Rory, B.C.L., Station House, Bray, Co. Wicklow.
3. Bermingham, Terence C., B.A., B.C.L., 15 Maiville, Turners Cross, Cork.
4. Bourke, James, B.Sc., 165 Roselawn Road, Castleknock, Dublin.
5. Breheny, Neil J., B.C.L., 113 Tritonville Road, Dublin.
6. Breslin, John G., B.A. (Mod), 68 Moyville Estate, Rathfarnham, Dublin.
7. Burke, Finola, B.C.L., "Derravara", Ballincurrig Park, Douglas Road, Cork.
8. Burke, Olive, Quay House, Beach Road, Clifden, Connemara, Co. Galway.
9. Butler, Michael F., B.A., Riverside, Bridge Street, Strokestown, Co. Roscommon.
10. Canning, Roger, B.A., 135 Elm Mount Road, Dublin.
11. Connolly, Roisin, B.C.L., 16 Zion Road, Rathgar, Dublin.
12. Doherty, John B., B.A., "Fernhurst", Ballyraine, Letterkenny, Donegal.
13. Donoghue, Mary P., B.C.L., Heathlawn, Killimor, Ballinasloe, Galway.
14. Egan, Noel M., B.C.L., Kilbride, Portarlington, Co. Laois.
15. Fahy, John, B.C.L., 21 Leopardstown Ave., Blackrock, Co. Dublin.
16. Forde, Christopher, The Moyne, Enniscorthy, Wexford.
17. Fortune, Garrett, B.C.L., Tullylough House, Cavan.
18. Gahan, Caitriona M., B.C.L., 99 Kincora Avenue, Clontarf, Dublin.
19. Gannon, Lorraine, Main Street, Ballinrobe, Co. Mayo.
20. Gillard-Curtin, Clare, LL.B., Mace, Annaghdown, Galway.
21. Harrison, Brendan, B.A., LL.B., 33 Avilla, Milford Grange, Castletroy, Co. Limerick.
22. Hegarty, Laurette, B.A., 51 Pembroke Road, Ballsbridge, Dublin.
23. Hehir-Mulryan, Christina, B.A., LL.B., Kiltulla, Oranmore, Galway.
24. Lawless, Mary, B.A., LL.B., Pearse Street, Belmullet, Mayo.
25. Lonergan, Donal G., B.C.L., 47 Hazelbrook Drive, Terenure, Dublin.
26. Meade, Margaret B., B.A., LL.B., Ennistymon Road, Miltown Malbay, Co. Clare.
27. Moore, Catherine A., B.C.L., 30 Ardagh Park, Blackrock, Dublin.
28. Moran, James, B.C.L., The Diamond, Clones, Co. Monaghan.
29. Morris, Nora F., B.A., 20 Dartry Park, Dartry, Dublin.
30. Mulrine, Margaret M., B.C.L., "Rosemount", Ballybofey, Co. Donegal.
31. Murphy, John P., B.C.L., "Coolgreena", 13 Oakfield Lawn, Ballinlough Road, Cork.
32. McCormick, Peter, B.C.L., 2 Barton Road, Rathfarnham, Dublin.
33. McDermott, Deirdre, B.C.L., 121 Ballyboden Road, Rathfarnham, Dublin.
34. McGartoll, Ruth, B.C.L., 65 Knocknashee, Goatstown, Dublin.
35. Nolan, John, B.C.L., 1 Dale Drive, Cill Mochuda, Stillorgan, Dublin.
36. O'Donohoe, David, B.C.L., 36 Dartry Road, Rathgar, Dublin.
37. O'Hanlon, Yvonne, B.C.L., 64 Monkstown Road, Blackrock, Dublin.
38. O'Mahony, James, 99 Georgian Village, Castleknock, Dublin.
39. O'Reilly, Hugh G., B.C.L., 110 Home Farm Road, Drumcondra, Dublin.
40. O'Reilly, Thomas P., B.A. (Mod), 18 Sandymount Green, Sandymount, Dublin.
41. O'Sullivan, Peter T., B.C.L., O'Connell Demesne, Castleisland, Kerry.
42. Power, Eithne, B.C.L., 14 Crescent Avenue, Limerick.
43. Rackard, Helen, B.C.L., Killanne, Enniscorthy, Co. Wexford.
44. Randles, Michael, B.C.L., 4 Apsley Court, Killumney, Ovens, Co. Cork.
45. Ryan, Finula M., B.C.L., Pilltown Road, Drogheda, Co. Louth.
46. Shaw, John, B.C.L., 15 Rushbrook Court, Templeogue, Dublin.
47. Sweetman, Patrick, B.C.L., 35 Ailesbury Road, Ballsbridge, Dublin.
48. Synnott, Alan, B.C.L., 35 Landscape Crescent, Churchtown, Dublin.
49. Toomey, Louise, (née Lardner), B.A., 512 River Forest Estate, Captains Hill, Leixlip, Co. Kildare.
50. Woods, Alanna, B.A., "Woodville", Carlingford, Co. Louth.

Journalism Prize Presented

The Law Society's Prize for the best article on a legal topic by a student of the Journalism Course at the College of Commerce, Rathmines, Dublin, was presented to Miss Deirdre Poole, of Blackrock, Co. Dublin, at the College last month.

The presentation, an inscribed piece of plate, was made by Mr. Chris Mahon, Director of Professional Services, on behalf of the Law Society during the College's annual diploma and prize-giving ceremony. The Society was thanked for its interest in the students by the College Principal, Mr. James Hickey. The winner and two runners-up also received cash awards from the Society.

The awards were instituted two years ago, on the recommendation of the Public Relations Committee, to encourage the interest of young journalists in accurate and informative writing on law-related topics.

Miss Deirdre Poole's article was published in the *Gazette*, June, 1983.

Association Internationale des Jeunes Avocats

AIJA is organising the following:

1. **INTERNATIONAL ARBITRATION SEMINAR**

Date:	10th/11th May 1984
Place:	International Chamber of Commerce, Paris.
Purpose:	To enable Lawyers to become familiar with the general aspects of International Arbitration and the practical handling of Arbitration Cases.
Topics:	Why Arbitration?; What is International Arbitration?; How to phrase an Arbitration Clause; Ad-hoc or Institutional Arbitration; Uncitral, ICC London, AAA, Stockholm Arbitration; The choice of law; The intervention of national courts; Enforcement of Arbitration awards; A practical case.
Lecturers:	Experts from various countries, all practising lawyers.
Languages:	English and French with simultaneous translation.
Price:	Inclusive of all lunches and dinners. Members of AIJA - French Francs 3,200 Non-Members - French Francs 3,700 Special Reduction for Trainee Lawyers.

2. **ANNUAL CONGRESS 1984**

Date:	27th August / 2nd September 1984
Place:	Bordeaux, France.
Topics:	Legal Expenses Insurance; International White Collar Crime; Protection of Trade Names in the marketing of wines and spirits; International Arbitration.

Further information can be obtained from:

Michael W. Carrigan,
Solicitor,
Eugene F. Collins & Son,
61 Fitzwilliam Square,
Dublin, 2.

New Work on Construction Insurance

A welcome new book on Construction Insurance and the Irish Conditions of Contract has been published by the Association of Consulting Engineers in Ireland. The author Dr. Nael Bunni is a former Honorary Secretary of the Association and is well known as the Honorary Secretary of the Irish Branch of the Chartered Institute of Arbitrators.

Among the topics covered by the book will be:

1. The Need for Insurance.
2. The Nature of the Insurance required under standard Forms of Contract.
3. and Professional Indemnity Insurance.

The book is available from the Association of Consulting Engineers of Ireland, 63 Haddington Road, Dublin 4. (Office hours 10.00 a.m. to 1.00 p.m.) Price £15 plus £1 postage. □

Legal Services in the USA*

by
Geoffrey Bindman, Solicitor, London

Do-it-Yourself Law Centre

IN Los Angeles, the Do-it-Yourself Law Centre is a private firm operated by a partnership of lawyers. It has so far established three offices and has attracted a substantial number of clients by television advertising. After an initial diagnostic interview with the lawyer, the client whose problem is in a well-defined area, such as divorce, wills, private or simple litigation will be invited to buy a package which contains all the necessary forms and precedents, with simple instructions for completing them. Included in the price of the package ($300 for a divorce) is the right to attend, free of charge, a weekly 'workshop', held in the evening, at which the client can report on progress and obtain further advice and guidance from the lawyer. A range of layman's guides to the law is also offered for sale by the firm. If at any stage things start to go wrong, or the case turns out more complicated than expected and beyond the client's capacity to cope with on his own, the firm will take it over just like an ordinary lawyer — though the firm maintains that its fees are still less than those of traditional firms.

The firm claims that its worth is borne out by the large number of clients it attracts, and by attempts by other lawyers to copy its system. The packaged materials of the Do-it-Yourself Law Centre are copyright, but the firm is in the process of developing a licensing or franchising scheme which will enable other lawyers to use its material in return for fees or commission.

Profits

It is not clear how far such firms make profits from the do-it-yourself part of their business. Apart from those cases in which the client gives up part of the way through and hands over the whole job to the firm, it appears that a number of clients who think they may be able to handle their own cases are persuaded at the outset that they would be unwise to do so. In this way, the promise of 'do-it-yourself' attracts work which the firm might not otherwise come by. This certainly includes some substantial personal injury cases which are extremely lucrative and are competed for fiercely by California lawyers.

Nevertheless, for those who can cope, likely to be among the more educated but not necessarily so, the system seems to be a valuable resource. Certainly, apart from the risk of its being used unfairly to attract business by raising false hopes of saving expense, it is hard to see any harm in it, and why should the public not have the option of handling their own cases with assistance if they want it?

Bristol 'Self-help' Scheme

It may not be remembered by many that an attempt by a firm of English solicitors to advertise a scheme to help clients to handle their own cases has met fierce opposition from The Law Society. A Bristol firm has been operating a 'self-help' legal service since March 1979. One evening a week, the firm provides clients with space in which to work, and access to stationery, forms and literature, for a small fee, together with assistance where necessary from a solicitor on duty throughout the session. Unless the service can be advertised, however, few people are likely to hear about it, and the firm sought a waiver of the restriction on advertising in the Solicitors' Practice Rules. The Law Society refused even a limited, experimental, monitored waiver, taking the view that such a waiver would not be in the public interest. The firm sought to challenge the refusal of a waiver by complaining under the European Human Rights Convention that the restriction violated the right of freedom of expression conferred by Art 10 of the convention and that the UK Government was in breach of Art 13 by failing to provide an effective remedy for such a violation.

Unfortunately, the European Human Rights Commission declared the application inadmissible on the ground that the complainant had failed to test whether in fact there was a remedy under English law. The substantive arguments on the validity of advertising restrictions were not decided, even though there seems no practical possibility of having the Solicitors' Practice Rules declared invalid by an English court. In order to bring the substantive issue before the Commission, an action must be brought here merely to establish that it must fail, and the costs of its failure must be borne by the applicants unless The Law Society is prepared to pay them, or at least to waive its own costs if it defends the proceedings successfully. The 'self-help' idea is clearly a valuable one which it is in the public interest at least to test fully. If the Law Society is not prepared to grant a waiver, it should at least be prepared to facilitate the determination of the validity of its refusal under the Convention.

Legal Aid

The developments which have so far been described do not cater for the very poor; they depend on the ability of the client to meet the cost of the services, however much this may be reduced to the minimum. It would be wrong to suppose, however, that the publicly-funded sector is of no account. Since the systematic provision of federal funds for legal aid began under President Kennedy's Poverty Program, the budget (excluding criminal defence) rose in 1980 to $325 million, only about one quarter of the cost of civil legal aid in Britain in proportion to the population but hardly insignificant.

Legal aid in the USA is now administered by a federal agency, the Legal Services Corporation. Like its British counterpart, the Reagan Government is cutting back social services and the legal services budget has been

drastically reduced, resulting in the closure of a number of offices. Unlike British legal aid, only a very small proportion of legal aid funds in the US find their way to private practitioners. Instead, grants are handed out to locally-based organisations, which in most cases employ salaried lawyers and provide a free service to those eligible. Eligibility is determined by the lawyers themselves according to scales based on cost of living indices. Those who are below official poverty levels are eligible, but there is some variation from State to State and from city to city.

There is some irony in the exclusion of private practitioners in the land of free enterprise from a source of income to which British private practitioners were given access by a Labour Government. President Reagan is trying to remove this anomaly by requiring 10% of legal aid funds to be channelled to the private profession; but the basic salaried system (parallel to the law centre movement in Britian) remains the major form of public provision.

In Los Angeles, the Legal Aid Foundation in 1980 received over $3 million in grants which enabled it to operate eight law centres. Since the Reagan cuts, four of these have been closed, defeating the modest aim which had nearly been attained of providing one free lawyer for every 100,000 eligible members of the population. In California as a whole there are 76,000 practising lawyers, one for every 300 of the population.

The work done by the staff of the Legal Aid Foundation and other such legal aid offices covers all the ordinary problems of the poor and deprived, especially housing, and family problems and rights under social welfare programmes. There are many immigration problems affecting those who have come to California in large numbers from Mexico and other Latin American countries. Much of the immigration work is handled by a separate organisation associated with the Legal Aid Foundation.

Back-up Centres

Plainly, legal aid offices cannot hope to satisfy the demand for legal help from those who lack the means to pay even the cheapest private lawyers. Other resources mitigate the shortage to some degree. The offices of the Legal Aid Foundation deal with individual casework, as do most other legal aid offices in the USA, but the Legal Services Corporation also funds 'back-up-centres' which provide specialist advice for all the legal aid offices in the area which they serve and undertake litigation to test major points of law which affect a large number of people. In the State of California there are some thirty legal aid programmes, each employing between three and thirty lawyers. The Western Centre on Law and Poverty is the local back-up centre. It organises regular workshops for all legal aid lawyers doing particular kinds of work. Experiences are exchanged, and strategies are worked out for dealing with new developments in the common problems. The back-up centre acts as a clearing house for the whole legal aid movement. Where it gets involved directly in litigation it does so usually in conjunction with lawyers from one or more of the legal aid offices. Much of the litigation takes place in the Supreme Court of the State, where the director of the centre sees himself as 'attorney-general for the poor'. Whereas in Britain the law centres have had to choose between allocating their resources between casework and more broadly-based strategies of the kind which the back-up centres in the USA pursue (and have inevitably chosen the latter), in the USA there is room for both casework and a broader test-case strategy in the dual system of legal aid offices and back-up offices.

Test-case litigation is also conducted by 'public interest law centres', which generally are privately funded through charitable donations combined with such income as can be derived from costs awarded in successful litigation.

Class Actions

In Los Angeles, the Centre for Public Interest Law does not, however, focus essentially on problems of poor people, but has achieved some remarkable successes in preventing or delaying damaging environmental developments and by bringing class actions alleging race and sex discrimination. The class action procedure, by which a large number of people similarly affected may recover separate awards of damages under a single judgment, is a procedural resource not available in Britain, but which has been enormously successful, not only in providing redress for victims of widespread unlawful practices but in deterring such practices. Lawyers representing private litigants in class actions may receive contingent fees, but Public Interest Law Centres are precluded by their non-profit (charitable) status from accepting contingent fees. In civil rights cases the courts may, however, order the unsuccessful defendant to pay attorneys' fees, and these can contribute to their support. (Recent moves by the Reagan administration have reduced the level of such fees, and this may have the effect of reducing the scope of the work that Public Interest Law Centres can undertake.)

Like the back-up centres, Public Interest Law Centres generally do not undertake individual casework or deal directly with individual members of the public. Their work comes to them through organisations, and often through other lawyers who cannot afford to take on test cases where the prospect of payment is uncertain.

Voluntary Services

The inadequacies of legal aid are also supplemented by the voluntary efforts of ordinary private practitioners. In Britain, the tradition of voluntary legal service, perhaps never as strong as in the USA, declined markedly after the passing of the Legal Aid and Advice Act. No doubt, many practitioners in Britain felt they were absolved from voluntary service by the contribution they were making through income tax to the legal aid scheme.

In Los Angeles, 'Public Counsel' is an organisation financed wholly by local practitioners. It employs a small full-time staff of lawyers and has a panel of volunteers from any of the largest law firms in the city. Cases are referred to it by the Legal Aid Foundation, and by other agencies where the particular skills and resources of private firms may be of special value to poor litigants. In the field of civil rights, a national voluntary organisation of private practitioners operates: the Lawyers' Committee for Civil Rights, which was established after President Kennedy invited a number of leading lawyers to the White House in 1963 following racial disturbances and encouraged them to set to work to help secure redress for victims of racial discrimination. Many branches of the Lawyers' Committee have been set up in cities throughout

the USA, providing well-organised and effective free legal assistance.

University law schools are another source of free legal help. Most now have clinical programmes which seek to give law students practical experience before they graduate; under supervision by experienced practitioners they are permitted to appear in many courts. At UCLA Law School, the professor in charge of the clinical programme was previously the director of the Western Centre on Law and Poverty. The clinical programmes are often integrated with local legal aid offices, and some students go on to be employed with them after qualifying.

Public Defender

The legal aid programmes funded by the Legal Services Corporation, and the other organisations which have been mentioned, rarely undertake criminal cases. The Legal Services Corporation by its governing statute is prohibited from funding them. In many cities and States, however, there are public defender schemes funded by the appropriate government. There are also federal public defender schemes for those facing criminal charges in federal courts. In California, approximately 90% of all criminal defences are handled by the State Public Defender office, and the lawyers who work in it are generally very highly regarded for competence, independence and integrity. As in the case of cirminal legal aid in Britain, it is the court which determines in each case whether the accused should be defended at public expense. If so, the public defender will normally be assigned, but some private attorneys may be instructed at public expense where, for example, there are conflicts between co-defendants. There is evidence that the cost per case of the public defender office is very considerably lower than the cost of instructing private attorneys.

Contrasts

From this necessarily superficial survey, some striking contrasts stand out. In the USA public funding of legal services, though less proportionately than in Britain, is used almost entirely for salaried lawyers employed by community based organisations. In Britain, only a handful of salaried lawyers (outside industry and the Government's internal legal service) are to be found in the law centres and a few advice agencies. The Benson Commission did not encourage hopes for a larger salaried sector in Britain. Of course, in the last resort the independence of salaried lawyers is qualified by reliance on the federal, State or city governments who provide the money, and there is much current anxiety, for example, over attempts by Reagan nominees on the Legal Services Corporation to direct some of its resources towards the private profession. Generally, however, the vastly greater resources of US salaried services have permitted more varied and sophisticated forms of provision.

In Britain, legal aid has suffered from the limitation imposed on private practitioners by the need to make a profit and by restraints on competition. On the other hand, the opportunities for economic and professional advancement in a mixed practice result in more legal aid work in Britain being done by more experienced lawyers, though not necessarily the most able, who in both countries are often attracted to salaried service, at least in the early stages of their careers.

A major study published in the US in June 1980 by the Legal Service Corporation (the 'Delivery Systems Study') concluded that a salaried lawyer system was far more effective than a system based on private practice in

achieving significant improvements in living standards for poor people. The US system, helped by the class action, is thus more effective than the British in solving community problems as distinct from individual ones. This conclusion is supported by observations of the work of the back-up centres and public interest law centres, for which we have no counterpart at present.

Where public funding has not been provided, the lifting of advertising restrictions in the USA has helped private practitioners to develop improved services and to reduce fees. There is good reason to suppose, as was argued more fully in my first article, that similar advantages could be achieved here. □

* This article was published in the English Law Society Gazette and is reprinted here with kind permission of the author.

Correspondence

16th February, 1984

Dear Sir,

I recently experienced some difficulty in relation to the discontinuance of a High Court Jury action which may be of interest to other practitioners and which suggests that an amendment to Order 26 Rule 1 of the Rules of the Superior Courts would be desirable.

The position in my particular case where I acted for the Plaintiff was that the Reply had been filed and served but the case was settled prior to service of Notice of Trial. After the settlement terms had been implemented, I wished to have the Action discontinued.

Because the Reply had been filed, I was unable to file a simple Notice of Discontinuance. Equally, because Notice of Trial had not been served, I could not apply to the Registrar to have the case withdrawn on the basis of a letter of Consent from the Defendants' Solicitors.

I took the matter up with the Central Office and was correctly informed that the Action could not be discontinued without leave of the Court due to the provisions of Order 26 Rule 1 of the Rules of the Superior Courts, which basically state that an action cannot be discontinued after the Reply has been filed and before service of Notice of Trial without leave of the Court. Consequently, I had no alternative but to instruct Counsel to make the necessary Application to the Court.

Naturally, I could have simply proceeded to serve Notice of Trial even though the case was settled, and then have the case withdrawn by Consent from the List of cases set down. However, I did not wish to incur the cost and work of doing so when it was totally unnecessary.

Alternatively, I could have taken no steps whatsoever towards having the action discontinued and left the action in a "limbo" situation but that would not have been fair to the Officials of the Central Office who are constantly trying to improve the position of the High Court list.

It would appear to me that there is a strong case to be made for an amendment to Order 26 Rule 1 so as to allow for either the discontinuance or withdrawal of an action by consent even after the Reply has been filed without the necessity of making Application to the Court. Indeed, the Official in the Central Office with whom I was dealing agreed that such an amendment would greatly facilitate both the officials in the Central Office and the practitioners alike.

Accordingly, I would suggest that the matter be taken up by the appropriate Committee of the Law Society and hopefully a provision of the Superior Court Rules which appears to have become an inconvenience to both practitioners and officials in the Central Office, will be suitably amended.

Yours faithfully,
Paul V. Kelly,
Solicitor,
John V. Kelly & Co.,
Church St., Cavan.

12th February, 1984

A Chara,

re/ Accident Claims Consultants

I wish to bring to the attention of the profession, particularly those involved in litigation, the presence, in Dublin at any rate, of "Claims Consultants". Several of my colleagues have experienced to their loss, the presence of these so called Consultants.

Our potential clients are being lured by these Consultants with a catch call "no costs whatsoever, we will look after everything — You have a great case here". Yes, we have here in Dublin City, all the way from American soap opera, the old reliable fast talking ambulance chaser.

This new benevolent breed of competitor — not charging fees — not requiring retainers, and ensuring that liability is not an issue and that compensation will be made available at the earliest possible date. Delays and red tape, the alleged concomitants of tangling with the legal fraternity are now things of the past.

I learned at first hand recently of the *modus operandi* of these Consultants.

I was travelling on the Santry by-pass, north bound when I collided with a lady who was south bound but to the detriment of both of us she had chosen my side of the dual carriage way, thus colliding head-on with my car.

Having first pulled myself from the mangled remains of my motor car to the green verge in the middle of the road I was first met by a good samaritan who bid me sit down and relax. But, alas, not for long was I to enjoy her words of consolation and the gentle tending to my wounds. The relative solitude was cruelly interrupted by the very immediate presence of the Ambulance Chaser, (only this time he had beaten the ambulance) who promptly squeezed his business card into my shaking hand, uttering in my ear his opinion, both on quantum and liability. He assured me that there would be no delays in obtaining compensation and no cost whatever to myself.

Recently, I was speaking to a colleague who told me that clients of his were approached at their house by a representative of a firm of Consultants of similar mould, the day following an accident involving their infant daughter. Some few weeks later the clients having spoken with my colleague requested the papers from the Consultants and they were told that their fees must be discharged in advance of handing over the file.

It appears from similar reports from other friends that there is a number of these firms now in existence in the City.

The attention of the profession at large should be directed to the need for warning the public of the dangers inherent in dealing with these new intrusions on the legal scene.

Yours sincerely,
Finnian G. Doyle,
Solicitor,
28 Annamoe Terrace,
Cabra, Dublin 7.

19th January, 1984

Dear Sir,

I refer to the letter from Mr. John Carroll, Managing Director of the Housing Finance Agency, in your December issue.

Two aspects to the machinery for obtaining a Housing Finance Agency Loan seem to be causing delay, and they are as follows:—

1. It appears that some, if not all, Local Authorities require the Mortgage Deed to be executed before the cheque will even be bespoken from the Housing Finance Agency and it is not certain whether this is a requirement of the Agency or of the Local

Pictured at a recent meeting of The Medico-Legal Society of Ireland on 'Doctors and the Courts in the 1980s' were (from left): Dr. R. Doherty, The Medical Defence Union, London; Dr. J. Wall, Deputy Secretary, The Medical Defence Union, London; Miss Carmel Killeen, President, The Medico-Legal Society of Ireland; Dr. John Harbison, State Pathologist; Mr. Eamonn Hall, Hon. Secretary, The Medico-Legal Society of Ireland and Dr. Liam Daly, Director of the Central Mental Hospital, Dundrum.

MAYO BAR ASSOCIATION ANNUAL DRESS DANCE, 9 DECEMBER, 1983

(left to right): Mr. Frank Fitzgerald, Solicitor, Ballinrobe; M/s. Sheila Ryan, Solicitor, Westport; Mr. Frank O'Donnell, President of the Law Society; Mrs. Maeve O'Donnell and Mr. Tom Durcan, Solicitor, Castlebar.

Authority. In strict legal practice, this means that the Borrower, who, in Mr. Carroll's own words, is a person who might not otherwise be able to provide his own home, is forced to close the purchase on bridging finance so that he has title to execute the Mortgage to the Local Authority.

2. Some, if not all, Local Authorities appear to require that the Deed of Assurance to the Borrower be stamped before they will release the loan cheque to their own solicitors. This means that the Borrower has to provide anything up to £1,000 stamp duty in advance of the closing when in fact he is entitled to borrow 90% of the stamp duty and legal costs from the Agency.

Both these points give the impression that the machinery for obtaining loan cheques was dreamt up by a bureaucrat rather than a lawyer and the effect is to negative the advantages of the Housing Finance Agency Scheme with regard to the lending of stamp duty and legal fees in addition to the purchase price of the house and to put the Borrower in a very difficult position with regard to the obtaining of bridging finance and short-term finance for the above purposes.

Yours faithfully,
Kirwan & Kirwan,
Solicitors,
1 Rowe St., Wexford.

22nd February, 1984

Dear Sir,

As a Member may I through your column object to a representative of the Council of the Incorporated Law Society stating to a Law Students Congress (as reported in the *Irish Times* of Monday, 20th February) that Solicitors are widely seen by the public "as elitist money-grabbing crooks". No evidence is adduced by our colleague that the public perceive us as such and to say that they do so does nothing to enhance our reputation.

There are of course, certain persons both in the media and in the political arena who do not have a high regard for the Profession but they do not constitute the public nor can they be said to speak for them. Although there is room for much needed reform in legal practice and although there may be a small minority of Solicitors who do not meet the required standards of the Profession, this does not justify the bald statement that Solicitors are perceived as "crooks".

The speaker does not highlight the compensation fund established to protect the public against fraud and heavily contributed to by Solicitors nor does he highlight the extra disciplinary powers now being sought by the Society from the Government. He should also have mentioned that there is a responsibility on the public in choosing a Solicitor to satisfy themselves both as to his competence and expertise and perhaps also as to whether he carries Professional Indemnity Insurance.

It is my contention that the stage has not yet been reached whereby the public perceive our Profession as described by our Council Member but unless serious consideration is given by Practitioners to their public image that day may not be far away.

Yours sincerely,
Vincent Crowley,
Solicitor,
77 Merrion Square, Dublin 2.

Professional Information

Land Registry —

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated 20th day of March, 1984.

B. Fitzgerald (Registrar of Titles)

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

1. **REGISTERED OWNER:** Gertrude McHugh; Folio No.: 1359L; Lands: known as Number 14 Kincora Road situate in the district and parish of Clontarf City of Dublin; Area: — ; **CITY OF DUBLIN.**
2. **REGISTERED OWNER:** Michael Frayne, Drummanmore, Rooskey, Co. Roscommon; Folio No.: 6801F; Lands: Drumman More; Area: 1.669 acres; County: **ROSCOMMON.**
3. **REGISTERED OWNER:** Leonard Noone; Folio No.: 1862; Lands: Ballincar (part); Area: 11a. 2r. 15p; County: **SLIGO.**
4. **REGISTERED OWNER:** Stephen Walsh, Altamount Street, Westport, Co. Mayo; Folio No.: 47267; Lands: Killadangan; Area: 3a. 2r. 33p.; County: **MAYO.**
5. **REGISTERED OWNER:** Patrick Dermot Rath (orse Dermot Rath); Folio NO.: 7470; Lands: Dales; Area: 67a.3r.35p. County: **LOUTH.**
6. **REGISTERED OWNER:** John O'Brien; Folio No.: 6314; Lands: Ballyoughter; Area: 238a 1r. 37p.; County: **TIPPERARY.**
7. **REGISTERED OWNER:** Susan P. Hannon, O'Connell Street, Ballymote, Co. Sligo; Folio No.: 15337; Lands: Ballymote; Area: 0a. 0r. 4p.; County: **SLIGO.**
8. **REGISTERED OWNER:** William Clarke (Junior), Kilbeg, Claremorris, Co. Mayo; Folio No.: 1381; Lands: Clare (part); Area: 23a 3r. 7p.; County: **MAYO.**
9. **REGISTERED OWNER:** Mary Ellen Walsh, Tullinaglug, Tourlestrane, County Sligo; Folio No.: 9543; Lands: Laughil; Area: 14a. 2r. 32p.; County: **SLIGO.**
10. **REGISTERED OWNER:** Hugh Clarke, Owenbeg, County Sligo; Folio No.: 18785; Lands: (1) Owenbeg, (2) Owenbeg, (3) Owenbeg, (4) Oweny keevan or Tawnamaddo; Area: (1) 14a.2r.6p., (2) 6a.1r.22p., (3) 31a.3r.7p., (4) 1a.2r.22p.; County: **SLIGO.**
11. **REGISTERED OWNER:** Patrick Roddy; Folio No.: 2844; Lands: Rampark; Area: 19.461 acres; County: **LOUTH.**
12. **REGISTERED OWNER:** James Joseph Keegan (deceased); Folio No.: (1) 12823; Lands: (1) Annaghmacullen, (2) Sunnagh Beg, (3) Drumshanbo North; Area: (1) 19a.1r.10p., (2) 0a.1r.21p., (3) 0a.2r.20p.; County: **LEITRIM.**
13. **REGISTERED OWNER:** Phillip Heneghan, Balla, County Mayo; Folio No.: 11937; Lands: of Balla (Part); Area: 0a. 1r. 4p.; County: **MAYO.**
14. **REGISTERED OWNER:** Letterkenny Urban District Council; Folio No.: 37630; Lands: Ballyboe, Glencar, Barony of Kilmacrenan; Area: — ; County: **DONEGAL.**
15. **REGISTERED OWNER:** Robert Clarke; Folio No.: 16251; Lands: Loughanclonning; Area: 0a. 0r. 22p.; County: **WESTMEATH.**
16. **REGISTERED OWNER:** Owen Martin; Folio No.: 363; Lands: Garvagh; Area: 7a. 0r. 20p.; County: **DONEGAL.**
17. **REGISTERED OWNER:** Patrick Murray; Folio No.: 20649F; Lands: Castlepark; Area: 0.300 acres; County: **CORK.**
18. **REGISTERED OWNER:** Thomas Savage; Folio No.: 9178; Lands: Maddoxland; Area: 0a. 1r. 16½p.; County: **LOUTH.**
19. **REGISTERED OWNER:** Patrick Matthews (Junior); Folio No.: 7662; Lands: Castletown; Area: 1a. 1r. 26p.; County: **LOUTH.**
20. **REGISTERED OWNER:** Leslie Harrison; Folio No.: 14558; Lands: (1) Aghavore, (2) Aghavore; Area: (1) 16a.3r.13p., (2) 28a.3r.0p.; County: **LEITRIM.**
21. **REGISTERED OWNER:** Gerard and Noeleen Gunning; Folio No.: 16852F; Lands: situate in the Townland of Fairfield and barony of Coolock, County Dublin; Area: — ; County: **DUBLIN.**
22. **REGISTERED OWNER:** Thomas Enright and Elizabeth Enright; Folio No.: 16327; Lands: (1) Murher, (2) Murher; Area: (1) 31.738 acres, (2) 0.431 acres; County: **KERRY.**
23. **REGISTERED OWNER:** Philomena Mary Dukelow; Folio No.: 16203F; Lands: Ballinaspigmore; Area: — ; County: **CORK.**
24. **REGISTERED OWNER:** Annie O'Rourke; Folio No.: 42319; Lands: (1) Kilmacrah, (2) Masonbrook; Area: (1) 20a.3r.38p., (2) 9a.3r.25p.; County: **GALWAY.**
25. **REGISTERED OWNER:** James Bradshaw; Folio No.: 14621; Lands: situate in the Townland of Glenamuck in the Barony of Rathdown, County Dublin; Area: — ; County: **DUBLIN.**
26. **REGISTERED OWNER:** Michael Heffernan; Folio No.: 4597; Lands: Kilballyherberry; Area: 78a. 2r. 16p.; County: **TIPPERARY.**

Lost Wills

RYAN, Johanna (otherwise Josephine) (formerly Hayes) (née Hickey). Late of Curraghfoil, Doon, Co. Limerick. Date of Death July 14th 1983. Would any person holding a Will on behalf of the above-named please contact Messrs. Kieran T. Flynn & Co., Solicitors, St. Michael Street, Tipperary.

WARD, Edward late of Ballyduff, Ashford, County Wicklow. Died on the 21st of December 1983. Any person having knowledge of the whereabouts of any Will or having any knowledge of the whereabouts of the mother of the deceased, is requested to communicate with Messrs. Denis Hipwell & Co., Solicitors, Fitzwilliam Square, Wicklow. Telephone number (0404) 3320.

Employment

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The Profession

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Legal Consultative Council,
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Dublin 2.

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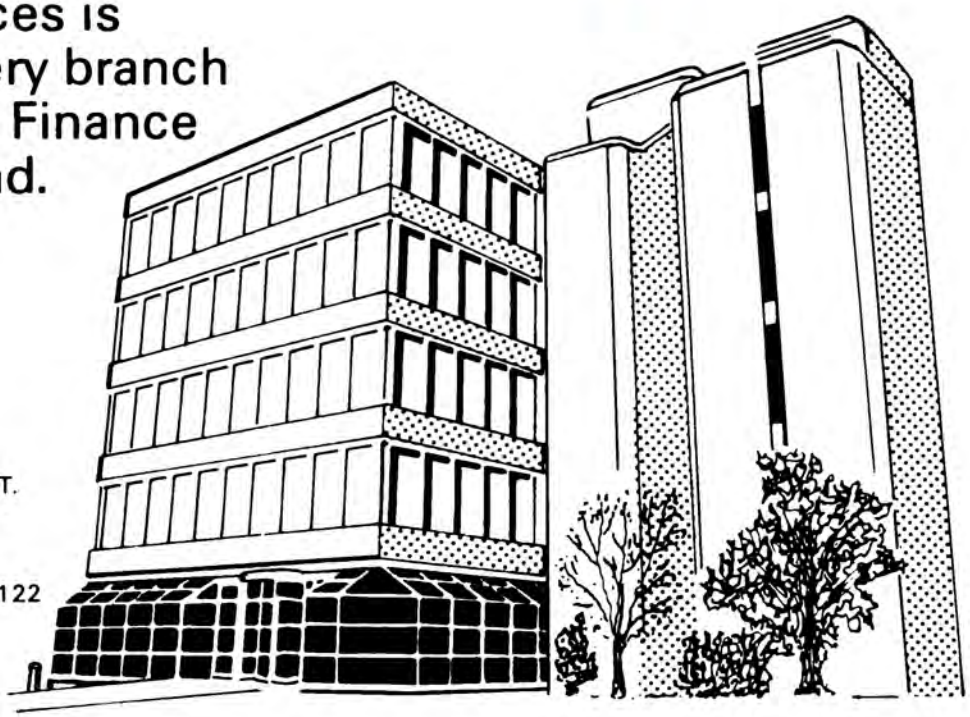

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 3 April 1984

With All My Worldly Goods . . .?

THE recent judgment of the Supreme Court in the case of *McC. -v- McC.* confirming that our Courts will only have regard to contributions, either direct or indirect, by a wife towards the purchase price or the discharge of mortgage instalments in relation to a Family Home when considering whether she has a right to claim an interest in such home, has already resulted in further pressure on the Government to expedite the introduction of legislation conferring on each spouse an equal share in the Family Home.

A comparative study of matrimonial property regimes carried out for the Law Society by Mr. Patrick Horgan of the Law Faculty of University College Cork has revealed some interesting facts. The most significant of these is that the doctrine proposed to be introduced here appears to be more radical than those operating in what might be thought to be more "progressive" jurisdictions, such as California or New Zealand. In a number of jurisdictions it appears that the legislation governing matrimonial property is primarily intended to lay down guidelines for the distribution of such property upon a dissolution of marriage and does not focus on the parties' entitlement during the marriage.

That shared ownership is socially desirable is unarguable — indeed, the majority of owner-occupied houses which have been purchased in recent years have been bought in the joint names of the spouses. Here at least the Government may be seen to be following, rather than forming, public opinion. It is not, however, necessarily true that legislation compelling or creating co-ownership is either necessary or desirable.

From the point of view of the practising lawyer, the use of the same definition of "Family Home" as in the Family Home Protection Act will inevitably give rise to the same sort of difficulties in relation to tenanted property as arose under that Act. The cases of *H & L -v- S* and *Walpole -v- Jay* highlighted the absence of formality which frequently attends the creation of short-term residential lettings and almost invariably attends either the surrender or other termination of such tenancies. The absence of such formality has given rise to considerable difficulties on subsequent sales of the landlord's interest. The initiators, drafters and legislators of the proposed law should consider how appropriate it is that arrangements which may easily be commonplace among the property owning classes should be imposed without serious consideration of the practical difficulties on those living in rented accommodation.

It is already clear that there are considerable difficulties facing the implementation of the proposed legislation — not least that of constitutionality, if it were to come into effect immediately and not *in futuro*. Other obvious difficulties relate to the effect of such legislation on existing arrangements, particularly those relating to marriages which have, either formally or informally, come to an end, the question of property acquired by gift or inheritance and the situation where property is already in co-ownership when one of the co-owners marries. It may be remarked that, in Ireland, the question of ownership of the Family Home has tended to become an issue only when the marriage has run into difficulties.

Since, therefore, the trend is already clear in the case of owner-occupied premises and there are clearly considerable difficulties involved in imposing the strait-jacket of presumed co-ownership on other categories, would it not be sufficient to implement the proposals made by the Law Reform Commission in their First Report on Family Law, which proposed that our Courts should have regard to the contributions made by a spouse, whether such contributions be financial, or by looking after the home, or caring for the family. It would surely be generally agreed that, where a spouse does not go out to work or generate any income but cares for the family and looks after the family home, that contribution is acknowledged by the parties by tacit agreement as being that party's contribution to the maintenance of the Family Home — a contribution which must be at least as valuable as a simple financial contribution to purchase price or mortgage repayments. □

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 3 April 1984

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

. . . My Neighbour's Keepers

THE first report of the Dáil Select Committee on Crime, Lawlessness and Vandalism is welcome, not only as an indication that the new Committee system is seen to be productive but also because the report has focussed on a topic of immediate public concern — the prevention of crime.

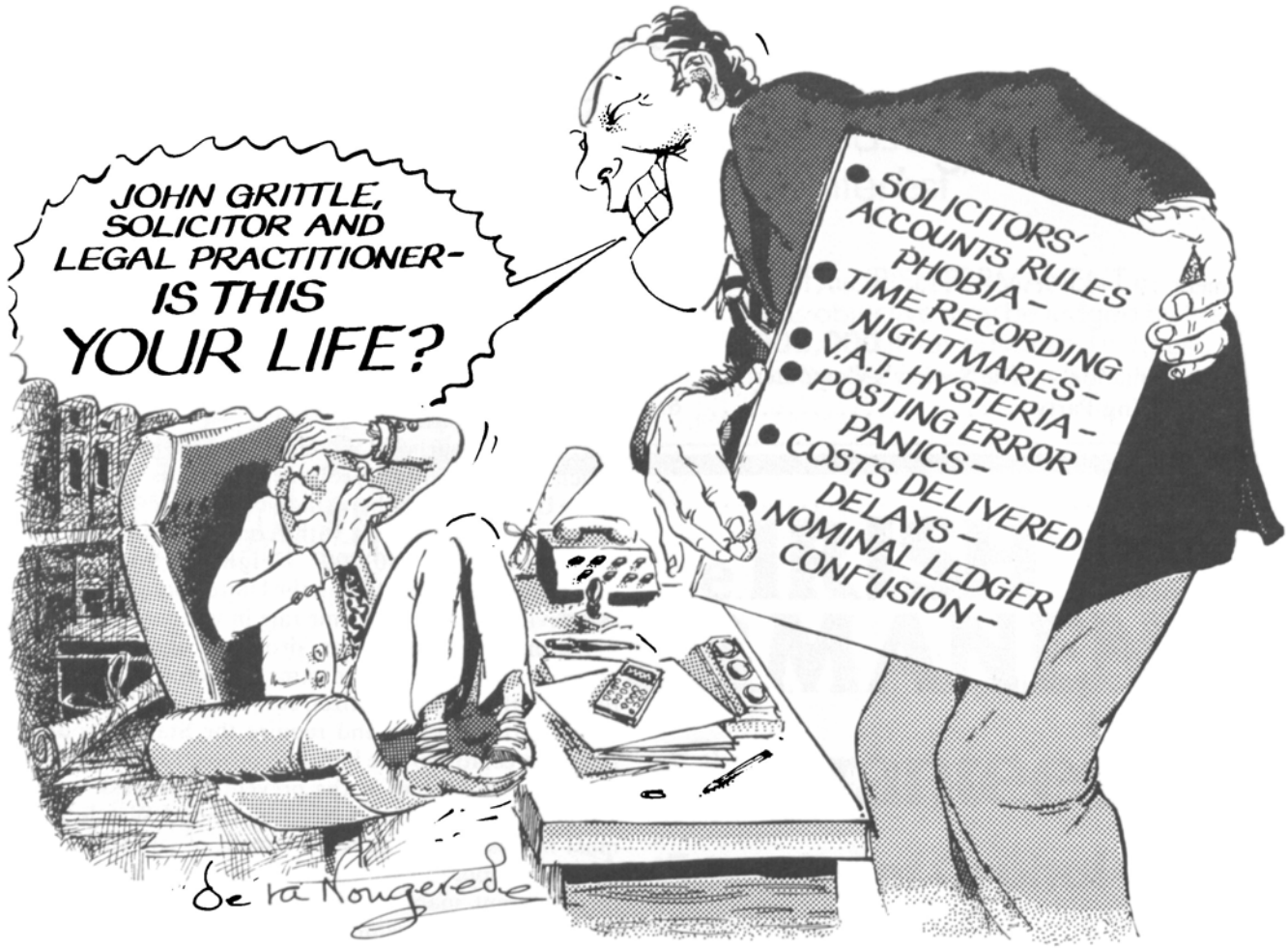
The Neighbourhood Watch system, the introduction of which the Committee recommends, has its recent origins in the United States where since its introduction in the late 1970s it has already met with remarkable success. There are reportedly 80,000 Neighbourhood Watch programmes in operation in the United States and there is clear evidence that the crime rate in various communities operating the system has dropped significantly. The introduction of the system came as a result of the recognition that the ordinary citizen could not lock himself away in his fortress-home and require the State, through its police force, to provide him with protection without some participation by him in the preventive process.

The introduction of a Neighbourhood Watch System must not be seen as an endorsement of vigilante groups. While it is appreciated that in some cases frustration with the apparent inability of the Gardai to cope with the problem of drug-pushing has led law-abiding citizens to form such groups — and apparently rid their communities of these merchants of death — the dangers inherent in such unofficial groups have already manifested themselves.

Such systems will not, by themselves, eliminate crime and would in no sense be a substitute for adequate policing. Hopefully, however, they will reduce the amount of spontaneous opportunist crime and vandalism. Once the need for the citizen to involve himself in this area of crime prevention is seen, and seen to be beneficial, it may encourage greater participation by the citizen in other activities devoted to the reduction and elimination of the causes of crime.

Some might question the choice of the Finglas area of Dublin for the introduction of the first pilot scheme in Ireland. Perhaps the choice of other longer-established communities in the City such as Drimnagh or Ballyfermot, where there is already substantial evidence of community spirit, might have been more appropriate. It would be a pity if the scheme were not to be seen as successful in its first test merely because an area admitted to have its own special difficulties had been chosen as the locus for the test.

A minor caveat: it must be questioned whether, in these days of acronyms, the name Civilian Observation Patrol is the best that could be chosen for the Irish version of the Neighbourhood Watch. □



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Automation — The Society's Computer Working Party

by
David Beattie, Solicitor

THE growing awareness in the profession at large of the profusion of electronic accounting aids now available in the market-place for solicitors gives rise to a range of problems almost as large as the number of machines themselves. Large firms of solicitors are of sufficient scale to justify the appointment of independent consultants, reporting directly to an individual partnership on selection and implementation of computer systems. However, it is difficult to find consultants who are truly independent. Medium and small offices will, in any event, find it difficult to justify the cost of engaging a consultant and will generally be forced to take uneducated decisions on computerisation. The rate of change in the world of computers is such that it is very easy to sit back and wait to see what new machine appears next year. This can be a mistake, as experience to date shows that there will never be a perfect time to buy. Taking a "wait and see" attitude may merely postpone the time for starting to grapple with new technology and the implementation of more efficient office procedures to benefit partners, staff and clients of a practice. Computerisation has potential advantages in cost control and availability of management information to an office which is too big for the managing partner to retain a constant grasp of all financial information. This is matched, however, by the potential disadvantages which may arise from making a wrong decision on computerisation, which can result in hundreds of hours of otherwise potentially chargeable time going unbilled, or being wasted in trying to retrieve the situation.

Ad hoc Committee established

Aware of these factors, a number of practitioners in medium to large sized offices in Dublin met together on an *ad hoc* basis in 1981, to try to pool resources in seeking advice on the area of computerising accounts and time records. They soon realised that there were numbers of their colleagues in smaller offices who were also interested in the topic. Accordingly the Council of the Law Society was asked to appoint an *ad hoc* committee to investigate the position with regard to the supply of computerised accounting and time recording systems in the Republic and to make recommendations as to the most suitable systems. The Committee was chaired by Rory O'Donnell and its other members were John Buckley, Joseph Dundon and Charles Meredith. The Committee decided to appoint a Consultant to carry out the investigation and System Dynamics Limited was appointed Consultant. A working party was established to liaise with the Consultant, consisting of Messrs. Rory O'Donnell, John Buckley, Terence Liston, Kieran Murphy, David Beattie and Bart Mooney assisted by Brendan Doherty of System Dynamics Limited. The Consultant's brief was to examine all the systems currently on the market capable of running Solicitors' accounts and time recording and to produce a report on them. The Consultants' fees were to be met by a levy on all interested firms, pitched at two levels — larger firms (which were deemed to be firms with six or more fee earners, each contributed £500 and smaller firms each contributed £100). Unfortunately the sum originally collected did not meet the likely fees of the consultants and the Law Society was persuaded to make up any shortfall on the basis that they would be reimbursed out of any sum subsequently collected.

These financial considerations caused a considerable delay, but eventually the Committee met in 1982 and decided to approach every computer manufacturer or software house advertising or promoting its products for the solicitors' profession in this country to ask them to put forward a submission or proposal for computerising two specimen offices. Information on the volume of work in the offices represented on the working party was obtained by ascertaining the number of clients with live cases, the total number of cases in the office which were live, the typical number of book-keeping entries for each case and typical duration of each case. From this information a detailed set of requirements was drawn up for a typical small office based on approximately one hundred clients and two hundred to three hundred matters and for a larger office with a sub-office having from twenty to thirty fee earners and five thousand matters. This information was sent to all the companies active in the market and an advertisement was placed in *Irish Computer Weekly*, so that every supplier would be on notice of the study and have an opportunity of participating. With one or two exceptions, the replies were extremely slow in coming in and in order to vet these it was decided that no supplier would be considered who could not show a track record for his system. Any supplier who could show their system operating in a solicitor's practice in this country with a satisfied user or a number of such systems operating in the UK was considered. Solicitors' firms were approached directly to investigate their experiences and level of satisfaction with their suppliers and the Committee is most grateful for the assistance given by those approached. The vast majority of potential suppliers were unable to meet these criteria. Of those who did, six produced detailed responses but the remainder were unable to deal convincingly with the specifications.

Two of the six were ruled out, one on the basis of a doubtful track record (on feedback from within the profession) and the other on the basis of price. More information was sent to the remaining four and they were

asked to provide a more detailed specification. All of the four are essentially United Kingdom in origin, and their limited support presence in this country considerably reduced their appeal.

All four of the suppliers corresponded in considerable detail to the more rigorous final specification. Two were judged by the Committee to be less attractive than the remaining two. One was rejected because it was not quite so attractive or easy to use as the remaining systems and was running on somewhat old-fashioned hardware. The second was rejected on the grounds of considerable uncertainty regarding the commitment of the supplier to the legal profession, cost and, finally, because the hardware came from a great variety of sources. The latter point gave rise to concern that it would be difficult to provide effective service for the system and that only the software house itself could maintain the unique amalgam of hardware.

The final two systems ran "neck-and-neck". One had the advantage of a number of impressive sales in this country and considerable customer satisfaction, but appeared less flexible and was initially reluctant to commit itself to providing fulltime service backup based in this country. The other, whilst having a very impressive U.K. sales record, had no existing customers in this country but was prepared to commit itself to set up a service base in Dublin and seemed to be in a better position to react to hardware developments and expansion in the customer's volume of work.

Following the completion of this stage of its work, a meeting of all the contributors to the funds of the Committee was convened. It was decided that a majority of the original party involved wished to purchase systems. The Committee, with the assistance of Systems Dynamics, was asked to enter final negotiations with the two "front runners" with a view to making a final assessment of their capabilities and of also ascertaining the costs for an office midway in size between the two original specimen offices. Either of the two remaining suppliers was in a position to meet the criteria required by the Committee. However, following these further negotiations, a majority of the subscribers decided to proceed with the Company which had first offered to set up service facility in Dublin. Certain reductions were negotiated for a group purchase and a number of medium sized firms have decided to enter a co-ordinated purchase deal.

Copies of the report are still available. They should still be useful for anybody considering embarking on an investigation of the market-place. Any firm may purchase same in return for a contribution to its size as detailed above.

Lessons Learned

During the work of the Committee each member learned a number of valuable lessons from his exposure to the market, of which the more useful ones are summarised below:—

1. Having originally set its brief to avoid a consideration of word-processing, the Committee came to the conclusion that for the smaller office computerised accounts and word-processing should be considered together. In most cases, the expense of a word-

processor can be justified more easily than that of a computer for accounts. For some small offices it might well be wise to have a micro-computer capable of doing both moderately well at a reasonable cost. Indeed, either of the front-running systems is well capable of carrying out word-processing as well as accounting and time recording with the software currently available.

2. All committee members were badgered by salesmen. All salesmen will tell you that their machine can do everything which you care to ask. In fact this is probably true in theory, but what is important is a track record. No firm should allow itself to be used as the guinea pig for a new system.
3. Computerised accounts are not a panacea for all ills. During its research the Committee heard of a number of sad cases where computers were sold to offices on the basis that unwieldly or dis-organised accounts could be rectified. Generally the computers only made them worse. The Committee also heard of extremely well-organised offices with accounts in order, which, due to an incompatability between the existing office system and the computer system installed, led to chaos and a vast expense in both loss of records and fee earners' time.
4. The introduction of time recording is or should be carried out at a separate time to the introduction of computerised accounts. Time recording generally causes a problem with personnel and the discipline of maintaining hand written time sheets rather than a problem with the computer which is normally well capable of handling it.
5. The market is in a constant state of flux and nobody should reckon on being able to sell a secondhand computer at the end of its life in its first location.
6. One of the members of the Committee from a smaller office, having been very keen on installing a computer at the beginning of the exercise, decided at the end that the time was not right. This followed on his having played a very detailed and active part in the business of the Committee and surely goes to reinforce the points above. It emphasises the need to get to grips with the technology before being in a position to assess one's own needs.
7. It is very important for one senior principal in a firm purchasing a computer for accounts to take charge of the operation. It must be somebody who is sufficiently interested and committed to the whole idea to enforce the necessary discipline on his colleagues and staff. Similarly, this person should learn to operate the machine so as not to be solely dependant on one staff member.
8. The quality of software is much more variable than that of hardware and accordingly a much greater emphasis must be placed on the assessment of the software and on obtaining a realistic and enforceable commitment, not only to service and maintain software, but also to update it to take account of statutory and other changes. Obviously a software package which can run on different sizes of computer within a range will be particularly useful, as it allows a system to be expanded easily and more cheaply than would otherwise be the case. *Thus we believe that the best approach is to deal with software houses first and be guided by them in selecting appropriate hardware to run their system.*
9. The availability of nationwide rapid service for both hardware and software is vital.
10. When approaching any software house, it is important to have accurate figures regarding the volume of information which the machine will be required to process. Some suppliers seem not to place sufficient emphasis on these figures, which may explain why a number of suppliers regularly sell machines which are too small for the job. In the worst circumstance not only will a replacement or additional machine have to be purchased but (if the software supplied is not compatible throughout a range of equipment) new software may have to be obtained and office forms and procedures altered (yet again!) to fit in with it.
11. It is important to negotiate for an adequate training scheme for operators and accounts personnel and to ensure that additional training may be arranged should this prove necessary.
12. *Finally and most importantly, service and reliability is far more important than any other single factor. Whilst extremely reliable, all the reputable systems are also extremely complicated. There is a very limited number of people who are capable of fixing them if something goes wrong. The consequences of having a major breakdown for any period can be appalling.*

Reference should be made to the *Gazette*, November, 1982, p.205 'Small law Firms Dos and Don'ts for Acquiring a Computer' by Thomas S. Clay, Altman & Weil Inc. Management Consultants.

All the members of the Committee are happy to discuss their findings in general terms with any member of the profession and to share their experience, where this can be useful. Naturally, however, they (and the Law Society would presumably encourage this) prefer to deal with those who have read the report and contributed to the expenses of the exercise! □

Incorporated Law Society of Ireland

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Members of the profession should note that lunch facilities are available in the Members' Lounge in Blackhall Place from 1 p.m. to 2.30 p.m. each day, Monday to Friday.

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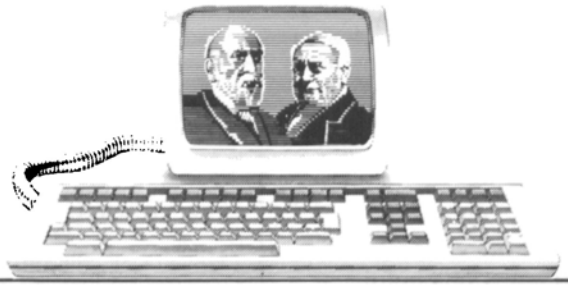

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Practice Notes

Drafting and Preparation of Legal Documents by Unqualified Persons

The Company Law Committee of the Society has been monitoring the drafting and preparation of legal documents by unqualified persons such as accountants. The matter is governed by Section 58 of the Solicitors' Act 1954 which provides that it is an offence for an unqualified person to draw or prepare a document relating to real or personal estate or any legal proceedings unless the document is one specifically excepted by Sub-Section 4 of Section 58. The Society may consider taking legal action against persons who are in breach of the Section in the event of sufficient evidence being furnished to it. Solicitors are therefore requested to assist the Society by furnishing evidence to the Company Law Committee of any contravention of Section 58 which comes to their notice.

It should be noted that if a Solicitor places reliance on a document prepared by a non-legally qualified person such Solicitor may lay himself open to a claim in negligence. □

Dublin Metropolitan District Civil Proceedings

A civil process for hearing in the centre City courts of the Dublin Metropolitan District should be made returnable for a Monday at 10.30 a.m. in Court No. 7, Dolphin House, East Essex Street, Dublin 2, instead of Court No. 9 as heretofore. On the return day dates will be fixed for the trial of defended civil processes. Undefended civil processes, if ready, will be heard and disposed of on the return day. □

County Dublin District Courts

It may be of interest to practitioners to learn that as and from 1st May, 1984, the following changes will take place in County Dublin District Courts:

Howth:	The first, second, third and fourth Mondays of every month at 10.30 a.m. Civil business on the fourth Monday of every second month, starting Monday, 28th May.
Swords:	Every Tuesday at 10.30 p.m. Civil business on the third Tuesday.
Lucan:	The first, second and fourth Thursday at 10.30 a.m. Civil business on the second Thursday.
Balbriggan:	The first, second, third and fourth Fridays of every month at 10.30 a.m. Civil business on the third Friday.
Dundrum:	The first, second and fourth Fridays of every month at 10.30 a.m. □

Section 45 Land Act, 1965

By Statutory Instrument number 144/1983 the Minister for Agriculture has added an additional category of "qualified person" to Section 45 of the Land Act, 1965. The additional category is a person who is a citizen of a member State of the European Communities and who

(a) is exercising in the State the right of establishment as a self employed person under Article 52 of the E.E.C. Treaty by way of an economic activity the nature of which is specified in the relevant certificate given by that person under subsection 3 of the said Section 45 and

(b) is acquiring an interest in land to which the said Section 45 applied for the purpose of or in connection with such exercise of that right.

The Statutory Instrument is in fact considerably more limited than one might believe, as the person must be exercising the right of establishment as a *self employed* person and must be acquiring the interest for the purpose of or in connection with the exercise of that right of establishment.

It would not appear to include foreign Nationals who buy holiday or retirement homes in Ireland or even Company Executives purchasing homes in the country. It would not appear to apply to Companies and accordingly it would appear that it may only apply to, for example, a Stud Farm acquisition by an individual non-National. □

Withdrawal of Actions Which Have Been Set Down

The attention of practitioners is drawn to Order 26, rule 2 of the Rules of the Superior Courts which reads:

> "When a cause had been entered for trial, it may be withdrawn by either Plaintiff or Defendant, upon producing to the proper officer a consent in writing signed by the parties."

Where a party wishes to withdraw an Action under this rule, the solicitor for such party should write to the Chief Registrar of the High Court quoting both Record Number and List Number, requesting that the Action be withdrawn and enclosing a letter of consent to such withdrawal from the solicitor for the other party.

This rule does not apply to Actions involving persons in wardship, infant Plaintiffs or fatal injuries or actions in which money has been lodged. In such cases an Order of the Court will be required, except where money lodged is being accepted in satisfaction of a claim.

Where, accordingly, Actions which have been set down have been settled on terms which require only an order striking out no application to the Court is necessary.

EAMONN G. MONGEY
Chief Registrar
□

(continued on p. 75)

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Actions Set Down For Hearing Acceptance of Sum Paid Into Court In Satisfaction of a Claim

Practitioners are advised that a Court Order for payment out is no longer required where a Notice of Acceptance of money lodged in Court is served pursuant to Order 22 rule 4, as inserted by R.S.C. (No. 1 of 1970), in an action which has been set down for hearing. Prior to making application to the Accountant, however, practitioners must inform the Chief Registrar in writing that the Action has been settled and may be taken out of the relevant list for trial, quoting both Record Number and List Number. A copy of such written notification should be lodged with the Accountant when making an application for payment out.

EAMONN G. MONGEY
Chief Registrar
□

Guardianship of Infants Act, 1964 Family Law (Maintenance of Spouses and Children) Act, 1976 Family Law (Protection of Spouses and Children) Act, 1981

Having regard to the decision of Mr. Justice Gannon in *R. -v- R. and The Attorney General*, delivered on the 16th of February, 1984 the attention of practitioners is drawn to the following practice direction.

In any case where relief is sought in The High Court, under any of the above-named Acts, the Summons shall be returnable before the Master in the ordinary way and thereafter shall be put in the list before the Judge sitting for Family Law on a Friday Motion day.

The parties must on that occasion attend and submit such evidence or arguments as they see fit as to whether the case is one appropriate for The High Court to exercise its jurisdiction under one or other of the above Acts, or whether it is a case which should be remitted to the Circuit Court or District Court. A decision will then be made on that issue and, depending upon the nature of that decision, the case will be listed for hearing. Such listing will not determine the appropriate scale of costs, if any, to be awarded, which will be subject to the provisions of Section 17(4) of Courts Act, 1981. □

Restriction on Local Authority Officers engaging in Private Practice

The Minister for the Environment has recently made a statutory instrument (No. 69/1984) entitled LOCAL GOVERNMENT (OFFICERS) REGULATIONS 1984 under which the holders of wholetime offices, the qualifications for which are wholly or in part professional, are to be restricted from engaging in private practice in the profession in which they are employed by the Local Authority or Local Authorities or in any cognate profession.

The Regulations apply to Officers of Local Authorities for whom the Minister for the Environment is the appropriate Minister under the Local Government Acts, and came into force on the 1st April 1984. □

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Deposits	231,350,972
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BOOK REVIEW

"The Irish Criminal Process" by Edward F. Ryan and Philip P. Magee. Published by Mercier Press, 595p. 1983. Price IR£40.00.

Criminal Law and Procedure in Ireland has undergone significant changes over the past twenty years. The law itself has become, mostly as a result of judicial decisions, much more complex and technical. There is a continuing tension between the desire to detect and convict wrong-doers on the one hand, and the safe-guarding of the personal rights of the citizen on the other. To some extent, the safe-guards are greater than those in England, and this is due in the most part to the existence of a written Constitution here. Solicitors have a much greater access to persons in custody in Garda Stations. Such persons cannot be held for questioning (except under certain "Emergency" Legislation) and must be brought before a Court or other authority as soon as practicable. Legal Aid has been recognised as a constitutional right, and a duty has been placed on our Judges and Justices to inform an accused person of this right. On the other hand, the last eight years have witnessed to some extent at least a delimitation of these essential safe-guards. It has been held, for instance, that there is no obligation on members of the Gardai to inform suspected persons of their right to have a solicitor attend at the Garda Station. The right to legal aid has been limited to accused persons, and therefore not available to suspects being held in Garda Stations. The Prosecution has been granted the right to appeal from acquittals of the Central Criminal Court, 100 years of precedents have been disregarded in extradition cases, and the law in relation to the admissability of statements and other evidence has been changed by successive Supreme Court decisions.

A new book on our Criminal Process is therefore long overdue, and would indeed be of great assistance both to students and practitioners alike if it could bring some order to the chaos that is at present our Criminal Law. The book succeeds to a large extent in achieving this somewhat impossible aim. It consists of almost five hundred pages of text, which is well set out, and easily read. It also contains approximately one hundred pages of appendices, together with the usual tables of cases and statutes. The authors have obviously read very extensively and quote not only from Irish and English authorities, but also from decisions handed down in other jurisdictions.

The appendices are extremely valuable. They contain several tables which would be of great assistance to practitioners. The table of indictable offences sets out the penalty for each offence, and indicates whether, and then in what circumstances, this offence may be triable summarily. When practising in the District Court one can often be unsure as to whether one's client can be dealt with by the District Court, and this table will therefore be very welcome. Similarly, in the higher Courts, there can often be doubt as to the maximum sentence for an offence, particularly in cases where the accused is convicted of a lesser offence on the indictment. No longer will be it necessary for devils to be sent scarpering off to the Law Library to discover the exact sentence applicable! A second table sets out the Statutory Powers of Arrest without a warrant. Many criminal cases, especially those concerning alleged assaults on Gardai, turn on whether the Garda was acting lawfully when he made an arrest. This table will, therefore, be of great assistance, but it might be just as well to double check before relying on it. In a recent case, Counsel specifically relied on this table, and argued that there was no power of arrest for dangerous driving, unless, of course, it caused serious injury. Unfortunately, the 1967 Road Traffic Act had amended the 1961 Act, and the table did not advert to this fact. Additional lists of Statutory Powers of both Entry and Search are included in the text of the book, and again, these should prove very useful.

Many different aspects of the Criminal Process are covered in the book. There is a chapter dealing with the distinction between serious and minor offences, and this chapter does not, quite correctly in my opinion, lay too much stress on the distinction between felonies and misdemeanours. Further chapters deal with the Courts and the various limitations on jurisdiction. Extradition is only mentioned in passing, and this explains what appears to me to be a misreading of *McGlinchey's* case. Another chapter deals with the preparation of the Prosecution case. I felt that the section on fingerprints was somewhat vague and I think it is important to point out that there are in fact no regulations governing the taking of fingerprints of suspected, as opposed to accused, persons. The fingerprints of a suspect may be taken unless he objects, and his prints can be used in evidence against him, even though he is not informed by the Gardai that there is no obligation on him to give his prints. The section on the

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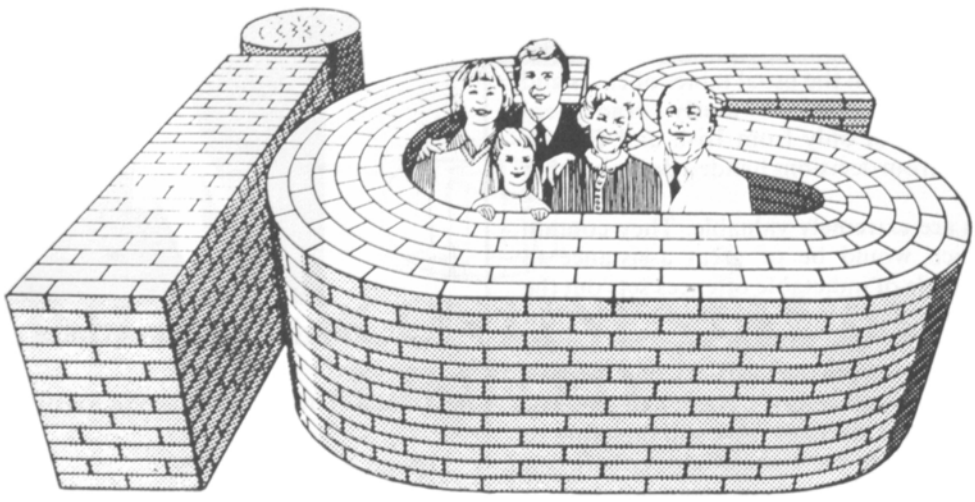

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admissability of statements is interesting, and I was glad to note that the authors exhibited a welcome scepticism towards confessions which unfortunately most of our Judges do not possess. They quote at length from a Judgment given by Cave J., in the last century, when he wondered why "voluntary" confessions were usually only produced in cases where there was no other evidence, and why if these confessions were freely made, prisoners wished to recant them immediately they appeared in Court. The authors make the very important point that of all the stages of immersion in the Criminal Process, the accused is more vulnerable in the Police Station, because, as stated earlier, this is the one occasion when suspected persons are not provided with legal aid and assistance. When the new Criminal Justice Bill becomes law, this lacuna will become even more important.

I was disappointed with the chapter dealing with the procedures in the District Court. The authors quote liberally from the relevant Statute law, but do not refer to some of the important case law.

There is no mention for instance of *McFadden's* case which in effect altered procedures which had been long standing in the District Court, because they did not meet the fundamental requirements of fairness under the Constitution. Similarly, depositions are dealt with in detail, without even mentioning the fact that the procedures for taking depositions have changed radically over the past couple of years. These new procedures are discussed in *Sherry's* case.

From a student's point of view, the chapters on the arraignment and trial are excellent, and certainly any student who wishes to understand the procedures on trial by indictment need only read the chapter to gain a good understanding of what is going on. From the practitioners viewpoint, however, I felt it glossed over several of the problems. For instance, it does not deal with the question of whether an accused person ought to give evidence first, before any of his witnesses are called if it is, in fact intended that he should give evidence. Secondly, there is no discussion as to whether applications for separate trials must be made to the actual Trial Judge who will be hearing the case. This would appear to be the legal position, and so can cause great difficulties. For instance, in the Dublin Circuit Criminal Court, it is often impossible to know in advance which particular Judge will hear which particular case. As adjournments are very rarely granted, both the accused person and their witnesses must be prepared to go ahead with their Trial on that day for fear that the actual Trial Judge will not grant the application for separate trials. One way of overcoming this problem is to ask the President of the Circuit Court to nominate his Trial Judge, thus enabling the Defence to apply some days beforehand. The section on plea bargaining does not reflect what actually goes on, in my opinion. The authors state that the Prosecution should never either offer to accept a plea of guilty to a lesser offence, or even invite the Defence "to treat". As Trials in the Central and Circuit Criminal Courts are conducted invariably by Barristers, they have a great opportunity to discuss the case beforehand and arrange a satisfactory deal.

The authors also touch on another problem, which in my opinion has far graver consequences than actual plea bargaining. It is generally accepted that persons who plead guilty are, and indeed ought to be, dealt with more leniently than persons who are convicted after a Trial. There is nothing wrong in principal with this unwritten rule, and indeed its existence is to be welcomed, provided accused persons who would otherwise plead not guilty, do not feel constrained to plead guilty. Recently, however, it has been the experience of Defence lawyers that certainly in relation to one or two specific types of crimes, such as the supply of drugs, the difference in sentencing is so great that accused persons are constrained to plead guilty to the offence. In some cases, they do so despite the fact that there is very little evidence against them in relation to the charge of *supplying* drugs, but they are afraid to take the chance of conviction with the huge sentence that would almost invariably be meted out to them. Indeed, many persons who have pleaded guilty to possession with intent to supply have been dealt with much more leniently than those who have been acquitted of this offence, and convicted merely of simple possession of drugs.

There are many other aspects of this book I would like to have discussed. I would differ with the authors somewhat on their analysis of the legal position of Statements taken in contravention of the Judges' Rules. I cannot understand how they could have written concerning the State Side Order of Certiorari without mentioning the case of *Roche -v- Delap*, which has drastically curtailed the use of this remedy. On the other hand, however, the law has changed so quickly and so much that small lapses must be forgiven. At no stage do the authors attempt to look at the Criminal Process from a criminological prospective, and there is therefore no discussion accorded to academic or practical considerations of what constitutes crime itself and what makes some acts criminal and others not, or the usefulness or otherwise of the various penalties and places of incarceration which have evolved to deal with criminal behaviour.

Both authors have put a large amount of work and effort into producing this book, and I would recommend it to both practitioners and students alike. Unfortunately, from the authors' viewpoint, the new Criminal Justice Bill will have the effect of changing the Criminal Law Process even more radically than it has changed in the last few years, and it may be that in two or three years, much of this book will have to be re-written. □

Michael Staines

A Profile of Lawyer Lifestyles

by
Rosslyn S. Smith

(Reprinted from the American Bar Association Journal)

DID you ever wonder if you're earning as much as other lawyers? When you worked on a Saturday, were you curious if other lawyers put in that much time? The *ABA Journal* wondered too, and for the first time ever developed a profile of what it's like to work as a lawyer.

Some highlights of the survey are:

- As a group, ABA lawyers work very hard. Four of five work more than 40 hours a week, and more than eight of 10 work at least one Saturday a month. almost 30 percent work every Saturday.
- Most lawyers have an office practice. The average lawyer member works 47 hours a week but spends less than 1.25 hours a week in court.
- Despite the long hours and career pressures, 89 percent said they are happy with their career choice.

These findings are just the highlights of a survey conducted by the *ABA Journal* in May 1983, based on questionnaires sent to two random samples of 2,000 ABA members. One sample received questions on time management, and the other on their attitudes about the profession. Both samples answered the same basic core of questions on age, income and type of practice; 895 responded to the time management survey, 841 to the attitude survey.

The profile drawn from this survey shows that, in general, ABA lawyers are young professionals making a go of relatively small practices. If they don't actually feel prosperous, they are generally optimistic about their financial future.

They were drawn to the practice of law because they felt it would be a fulfilling use of their talents, and they liked the nature of the work. But their basic value orientation is to family and friends. This in turn creates a conflict, for while most of them are happy in their career choice, they are vexed that the heavy demands on their time keep them from their families. This conflict is illustrated by the particularly high percentage of young lawyers who are uncertain whether they would chose law a second time. It is an open question whether this conflict is strong enough to cause these lawyers to switch careers or to force changes in the way law is now practiced.

A youthful profession

The practice of law may be old and steeped in tradition, but the practitioners are on the average surprisingly young. The median age for men in the sample is 37 years and for women, 31. Only 15 percent are over 50. The median age of lawyers began dropping in the 1970s, reflecting the huge number of new law school graduates in that decade.

Of the lawyers surveyed, 87 percent were male and 13 percent female. The number of women in the profession has grown rapidly and will continue to do so, in view of the fact tht 37 percent of all students in law school are women.

Although the ABA is often associated with large law firms with corporate clients, its members are predominately in general practice in small to medium-sized law firms. Of the respondents, 72 percent are in private practice, 11 percent in corporate law departments and 6 percent work as government lawyers, including prosecutors. The remaining 10 percent are judges, teachers or pursue non-legal careers. While 6 percent of members are over 65, only 1 percent of the more than 1,700 respondents considered themselves retired from practice.

With all that has been written about the increasing specialization of the profession, it should be noted that 44 percent of those surveyed indicated they were in general practice. Twenty-two percent concentrated in corporate law, 11 percent in tax and 9 percent in real estate. One in every four checked off more than one area of concentration of practice.

Lawyers live close to their work. Among the commuters, 39 percent spent less than 15 minutes getting to work, 31 percent spent 16 to 30 minutes and 14 percent spent 31 to 45 minutes. Lawyers prefer to drive: 71 percent commute by private car, as opposed to only 7 percent who take a bus, 5 percent who ride a train and 5 percent who take a subway.

Today's lawyers have joined the computer age. The figures from the lifestyle surveys correspond to another survey taken by the *ABA Journal* in January 1983, which found that 70 percent of all law offices in the country had at least one data or word processing terminal. This earlier survey also found that 47 percent of ABA members were considering the purchase of a computer for business or home use in the near future. Even very small law firms have computerized. The results show that law firms own a computer terminal when their size reaches four or more lawyers.

Financial rewards

Not surprisingly, the income of lawyers increases as they grow older, with maximum earnings arriving between 51 and 55. There is an interesting large jump in income that occurs around age 40; because election to partnerhsip usually takes place in a lawyer's mid to late 30s, this sudden income boost is readily explained.

When broken down according to gender, the survey results showed a large gap in income between men and women, with women lawyers earning considerably less. This difference can be explained by the fact that women are relative newcomers to the profession and that women lawyers tend to be younger and less experienced than male lawyers. Women also are more likely to work in government or corporate law departments where the top salaries are consistently less than the top salaries in private

practice. (See the October 1983 *ABA Journal*, page 1384, "Women Lawyers Work Harder, Are Paid Less, but They're Happy"). This disparity vanishes, however, when total household income is counted.

Because financial well-being is largely a matter of perception, lawyers were asked what they thought about their economic status. One-third of all lawyers 30 or older felt they were only "doing OK". Of those under 30, approximately 40 percent placed themselves in this category. Another 50 percent of those under 30 felt they were "up and coming," while only 5 percent in this age range felt "affluent."

As the answers move up the age scale, more and more members see themselves as affluent and fewer as up and coming. At 41 to 45 only 14 percent said they were up and coming, but 55 percent considered themselves affluent. And despite some very high incomes, only 1 percent of all those surveyed considered themselves "rich."

A similar pattern emerges when the answers to this question are sorted by the sex of the lawyer. Of the women lawyers 35 percent felt they were up and coming and 25 percent felt affluent. The percentages for the male respondents are the reverse, with 35 percent proclaiming themselves affluent and 25 percent up and coming.

Members also were asked their opinion of the income of the average lawyer. Only 1 percent thought the average lawyer earned far too much, while 44 percent thought the average lawyer earned somewhat less than he or she should, and 11 percent thought lawyers earned far less than what was appropriate.

Working long hours

According to the results of the time management portion of this survey, the average ABA member works 47 hours a week. This work week includes an average of four meetings with clients taking a total of three hours, plus and slightly more than four hours per week spent on the telephone. It also includes one hour and 15 minutes in the courtroom, a figure that strongly illustrates the amount of preparation time needed to bring a case to court.

In addition to these hours, the average work week of an ABA member includes two hours of civic and *pro bono publico* work, plus three hours and 20 minutes commuting time. The strenuous nature of this schedule is apparent from the answers to the questions on weekend work. Not only do 83 percent work at least one Saturday a month, but 57 percent work at least one Sunday a month, too. Long vacations aren't in vogue, either. Fourteen percent say they have taken less than one week off, and only 19 percent took more than three weeks.

Seventy-two percent of lawyers travel for business purposes. Among the travellers, 73 percent are out of town one to five days a month; 21 percent for six to 10 days a month; only 6 percent for more than 10 days monthly.

Does hard work lead to success? The results of the survey were inconclusive. There was no relationship between working hours and income among any of the age groups analysed. The only pattern that emerged was the tendency for women to work slightly fewer hours than men, with a median of 44 as compared to 47.5 for men. This difference appears to be related to the smaller percentage of women in private practice as opposed to government and corporate legal departments.

With all the demands on their professional time, ABA members still manage to show a strong interest in maintaining professional contacts and broadening their intellectual horizons. Ninety-five percent belong to their state bar association, 80 to a local or county bar and almost one-third to some specialized bar. This desire to associate with other lawyers was the major reason cited for joining the ABA. When asked if they were interested in further formal studies, 46 percent expressed an interest in learning more about computers, 37 percent in studying finance and 24 percent each in investments and foreign languages.

Why Law?

When asked their reasons for selecting law as a career, one-third of the sample indicated that their choice had been based on a sense of justice and a desire to help others. The answers to this question were surprisingly uniform across the age and sex of the respondent. The notable exceptions are, first, that almost twice the percentage of women than men had based their career choice on a sense of justice or a desire to help people. Second, while only 11 percent of the sample as a whole had based their career choice on the influence of family, almost 25 percent of those over 55 gave this reason. Third, members 30 and under were twice as likely as the sample to indicate that they considered law as a stepping stone to another career.

When asked if they were happy with their career choice, an overwhelming number responded that they were. Only 5 percent said they were moderately unhappy with law as a career, and only 1 percent indicated total unhappiness.

Among those who replied that they were moderately or totally happy with their career choice, age brought increasing contentment. At 30 or under, 51 percent were moderately happy and 34 percent totally happy. At 50, 45 percent were moderately happy and 45 percent were totally happy. At 66 and over, 79 percent were totally happy and 15 percent moderately happy.

Because 89 percent of the lawyers surveyed said they were happy with their career choice, it is surprising to discover that only 59 percent said they would choose law again if given a second chance. The pattern here showed great variation by age, with younger lawyers saying they would switch careers if it were possible. At 30, half said they would not change careers, but 35 percent were uncertain. At 50, 63 percent would not change, while at 66 and older, 78 percent would not change.

The great time demands of the practice of law seem to be the source of this equivocal attitude toward careers. When asked what one factor they would change in their working life, more than 51 percent expressed a desire for more time for family and leisure.

The second most frequently cited source of dissatisfaction was the nature of the work itself. Fourteen percent, including many lawyers 30 or younger, indicated they would like to be doing work that was less routine in nature. Ten percent said they wished they had more time for other business interests.

Younger members also were somewhat more likely to express a desire to have more clients, while members between the ages of 40 to 65 were more likely to want more time for other business interests.

The lawyer-client relationship itself was not a major source of dissatisfaction. When asked their opinion on this, most members in the survey felt the majority of clients are honest and above board in their dealings with their lawyers and that the relationship is about the same as it has always been. If there is tension, those surveyed believe it stems from the legal process itself and from the unyielding demands of time.

Fifty-five percent felt that clients do not understand the lawyer's role as advocate and that too many clients expect legal miracles à la Perry Mason. Only 31 percent felt otherwise. The demands of time also weigh heavily on the lawyer-client relationship. Seven of every 10 members felt clients did not understand their lawyers' workload in general, and an overwhelming 83 percent expressed the feeling that clients don't understand the amount of work that goes into preparing their case. □

(Rosslyn S. Smith is a lawyer in Chicago and the former assistant publisher and controller of the ABA Journal. *She designed and administered the surveys on which this article is based.)*

"Planning and Development Law" 2nd Edition Launched 10 April 1984.

Attending the Launch of the 2nd Edition of the late Eamonn Walsh's "Planning and Development Law" were (left to right) Mr. Frank Benson, Chairman of An Bord Pleanála, Mr. Frank O'Donnell, President of the Law Society and the Hon. Mr. Justice Ronan Keane, who edited the second revised edition.

ROYAL COLLEGE OF SURGEONS IN IRELAND

The Royal College of Surgeons in Ireland is an independent Institution founded in 1784. It has responsibility for postgraduate education of surgeons, radiologists, anaesthetists, dentists and nurses. The College manages an International Medical School for the training of doctors, many of whom come from Third World countries where there is a great demand and need for doctors.

Research in the College includes work on cancer, thrombosis, high blood pressure, heart and blood vessel disease, blindness, mental handicap, birth defects and many other human ailments. The College being an independent institution is financed largely through gifts and donations. Your donation, covenant or legacy, will help to keep the college in the forefront of medical research and medical education. The College is officially recognised as a Charity by the Revenue Commissioners. All contributions will be gratefully received. Enquiries to: The Registrar, Royal College of Surgeons in Ireland, St. Stephen's Green, Dublin 2.

Association Internationale des Jeunes Avocats

ANNUAL CONGRESS 1984

Date: 27th August / 2nd September 1984

Place: Bordeaux, France.

Topics: Legal Expenses Insurance; International White Collar Crime; Protection of Trade Names in the marketing of wines and spirits; International Arbitration.

Further information can be obtained from:

Michael W. Carrigan,
Solicitor,
Eugene F. Collins & Son,
61 Fitzwilliam Square,
Dublin, 2.

For Your Diary . . .

3/6 May 1984 **Law Society Annual Conference.** Europe Hotel, Killarney, Co. Kerry. Brochures giving full details and booking forms available shortly from Ms. M. O'Connor, Law Society, Blackhall Place, Dublin 7.

8 May 1984. Law Society Joint Symposium — **"Planning at the Crossroads".** Gresham Hotel, Dublin, 1.45 p.m. Fee: £25.00.

25 May 1984. **Continuing Legal Education Seminar.** "Landlord and Tenant Law," Dublin. For further details contact Geraldine Pearse, Solicitor, Law Society, Blackhall Place, Dublin 7.

28 May 1984. **Continuing Legal Education Seminar.** "Planning Law" (Repeat), Dublin. For further details contact Geraldine Pearse, Solicitor, Law Society, Blackhall Place, Dublin 7.

8 June 1984. **Continuing Legal Education Seminar.** "Landlord and Tenant Law", Cork. For further details contact Geraldine Pearse, Solicitor, Law Society, Blackhall Place, Dublin 7.

11 June 1984. **Continuing Legal Education Seminar.** "Advocacy (Criminal)". Dublin. For further details contact Geraldine Pearse, Solicitor, Law Society, Blackhall Place, Dublin 7.

16 June 1984. **Solicitors' Apprentices Debating Society of Ireland.** Centenary Ball. President's Hall, Blackhall Place, Dublin 7. Tickets £21.00 each. (Apprentices — £10.00 each.)

26 June 1982. **Solicitors' Golfing Society.** President's Prize, 1984. Elm Park Golf Club.

3/7 September, 1984. **International Bar Association 20th Biennial Conference.** Programmes available from Margaret Byrne at the Law Society, Blackhall Place, Dublin 7 or from the IBA, 2 Harewood Place, London W1R 9HB.

14 September 1984. **Solicitors' Golfing Society.** Captain's Prize, 1984. Dundalk Golf Club.

Intended Law Society publication on Public Health Acts

The Publications Committee is seeking an author for a work on the Public Health Acts.

Vanston's Law relating to Public Health in Ireland, the leading work on the subject, was last published in 1913, since which there has been a large volume of relevant statute and case law.

Those interested please contact Ms. Margaret Byrne, Librarian, The Law Society, Blackhall Place, Dublin 7.

Law Society marks G.A.A. Centenary Year

To mark the G.A.A. Centenary Year a Dinner was hosted by the President of the Incorporated Law Society of Ireland, Mr. Frank O'Donnell, at Blackhall Place on 2 April, 1984, at which a set of Clarenbridge crystal decanters was presented to the President of the G.A.A., Mr. Paddy Buggy. The photograph includes (left to right):— Back row: Liam Mulvihill, Director-General, G.A.A.; Padraic Gearty, James J. Ivers, Director General, Law Society; Donal Kelliher, Garry McMahon, John McKnight, Tony Hanahoe. Front row: Jack Lynch, Frank O'Donnell, President of the Law Society, Paddy Buggy, President of the G.A.A., and Sean O'Neill.

Correspondence

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

2nd March, 1984

Dear Sir,

Re: A.G.M. 1983

I note the Report headed "Small Attendance at Society's AGM" in the January/February 1984 *Gazette*, and that only fifty-nine Solicitors attended the Society's AGM.

I did not attend this AGM. I have never attended an AGM. Indeed, most of my colleagues have never attended an AGM.

The AGM always takes place on a Friday morning. For most of us, any weekday morning is an extremely busy time. This is particularly true of younger solicitors, who are more likely to be in Court on a weekday morning in Criminal or Civil cases. Personally, I find that Friday is one of my busier days, no matter how I schedule my work.

Because the AGM is held on a Friday, only the most dedicated of country solicitors can attend. The *Gazette* Report indicates that the speakers at this year's meeting were mainly Dublin based, and from my memory of previous AGM Reports, very few country members usually attend. Those who do attend are usually members of the Council.

I see that next year's AGM is fixed for Friday the 16th November 1984. If I could have attended this or any AGM, I would have proposed that in future the AGM be held on a Saturday morning. If this were so, I would certainly attend, as would many of my colleagues, to whom I have spoken. In view of this year's derisory attendance, failure to make the necessary change to Saturday seems unjustifiable.

Yours faithfully,
Michael O'Malley,
Solicitor,
43 Upr. Gardiner St., Dublin 1.

Professional Information (continued from p.90)

Lost Title Documents

IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF ANGELA O'DONNELL IN RESPECT OF 26, ST. ASSAM RD., RATHENY, DUBLIN 5.

TAKE NOTICE that Angela O'Donnell of 26 St. Assams Road, Raheny in the City of Dublin 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 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. 83DN03361.

Dated this 2nd day of March 1984.

P. O'Brien,
Chief Examiner of Titles,
Land Registry,
Nassau Building,
Setanta Centre,
Dublin 2.

Professional Information

Land Registry —

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated 25th day of April, 1984.

J. B. Fitzgerald (Registrar of Titles)

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

1. **REGISTERED OWNER:** Margaret Mary Towey, Market Street, Ballaghaderreen, County Roscommon; Folio No.: 11948; Lands: Ballaghaderreen; Area: 0a.0r.5p.; County: **ROSCOMMON.**
2. **REGISTERED OWNER:** Amond M. Lavery; Folio No.: 13782; Lands: Cappagh; Area: 0a.2r.0p.; County: **KILDARE.**
3. **REGISTERED OWNER:** Gabriel Loy; Folio No.: 4821 F; Lands: Newry Road (West Side); Area: — ; County: **LOUTH.**
4. **REGISTERED OWNER:** John Dempsey; Folio No.: 16784; Lands: Borris Little; Area: — ; County: **LAOIS.**
5. **REGISTERED OWNER:** Barna Buildings Limited; Folio No.: (1) 20059, (2) 22969; Lands: (1) Moyne Upper, (2) Moyne Upper; Area: (1) 4a.0r.37p., (2) 1a.0r.13p.; County: **WEXFORD.**
6. **REGISTERED OWNER:** George Geoghegan; Folio No.: 2348; Lands: Cooltrimegish; Area: 22a.1r.25p.; County: **MONAGHAN.**
7. **REGISTERED OWNER:** Joseph Bailey; Folio No.: 6945; Lands: (1) Drumnacarra, (2) Drumnacarra; Area: (1) 5a.2r.16p., (2) 2a.1r.10p.; County: **LOUTH.**
8. **REGISTERED OWNER:** Patrick Cunningham, Ardagh, Carrowbeg. Westport, Co. Mayo; Folio No.: 43152; Lands: (1) Knockboy, (2) Knockboy, (3) Gubfadda, (4) Kid Island East, (5) Oghillees (one undivided 19th Part); Area: (1) 15a.3r.34p., (2) 3a.2r.15p., (3) 0a.2r.5p., (4) 0a.1r.4p., (5) 829a.3r.32p.; County: **MAYO.**
9. **REGISTERED OWNER:** Laurence (otherwise Lawrence) Connell, Violet Hill, Broadford, County Clare; Folio No.: 18697; Lands: (1) Violet Hill, (2) O'Shea's Acres; Area: (1) 10a.1r.14p., (2) 16a.3r.13p.; County: **CLARE.**
10. **REGISTERED OWNER:** Martin Flynn; Folio No.: 462L; Lands: Singland; Area: — ; County: **LIMERICK.**
11. **REGISTERED OWNER:** Patrick J. Hickey; Folio No.: 15217; Lands: Ramstown; Area: 1a.2r.0p.; County: **WEXFORD.**
12. **REGISTERED OWNER:** Martin Murphy, Main Street, Tulla, County Clare; Folio No.: 16872; Lands: Clogher; Area: 31a.3r.5p.; County: **CLARE.**
13. **REGISTERED OWNER:** Denis O'Brien, Shanahill East, Castlemaine, Co. Kerry; Folio No.: 22977; Lands: (1) Shanakeal, (2) Shanakeal; Area: (1) 14a.3r.36p, (2) 828a.0r.20p.; County: **KERRY.**
14. **REGISTERED OWNER:** Desmond and Youlanda Kelly; Folio No.: 57646L; Lands: situate in part of the Townland of Hartstown and Blakestown in the Barony of Castleknock, County of Dublin shown as plan 69 edged green on the Registry Map (O.S. Supply Map L5 to O.S. 17/LO); Area: — ; County: **DUBLIN.**
15. **REGISTERED OWNER:** Helen Elizabeth Irwin; Folio No.: 32194; Lands: Clahene; Area: 0a.1r.4p.; County: **KERRY.**
16. **REGISTERED OWNER:** Julia Bernard; Folio No.: 40971L; Lands: Boherboy Road, Rathcooney; Area: — ; County: **CORK.**
17. **REGISTERED OWNER:** John Kelly; Folio No.: 10932F; Lands: Tankardstown; Area: 2.997 acres; County: **CARLOW.**
18. **REGISTERED OWNER:** Johanna O'Sullivan; Folio No.: 22382; Lands: Laherfineen; Area: 22a.3r.9p.; County: **CORK.**
19. **REGISTERED OWNER:** Michael Behan; Folio No.: 390; Lands: Scrubb; Area: 8a.3r.25p.; County: **OFFALY.**
20. **REGISTERED OWNER:** Patrick Kelly; Folio No.: 7162 (now closed to 12317; Lands: (1) Togher, (2) Clareisland, (3) Moneybeg; Area: (1) 16a.2r.17p., (2) 1a.3r.16p., (3) 0a.2r.0p.; County: **WESTMEATH.**
21. **REGISTERED OWNER:** Maureen Mulcahy; Folio No.: 3887; Lands: Coolanagh; Area: 34a.0r.39p.; County: **CORK.**
22. **REGISTERED OWNER:** Richard Whaley; Folio No.: 12958; Lands: (1) Hurdlestown, (2) Hurdlestown, (3) Bloomsberry, (4) Hurdlestown; Area: (1) 10.606 acres, (2) 9.969, (3) 217.637, (4) 79.013; County: **MEATH.**
23. **REGISTERED OWNER:** (1) The Dairy Disposal Company Ltd., (2) The Newmarket Dairy Company Ltd.; Folio No.: (1) 20101 (now closed to 31035), (2) 29411; Lands: (1) 0a.1r.32p. (F.20101), (1) Toomswest, (2) Dromatimore, (3) Kilmore, (4) Magoohy, (5) Kilmore, (6) Derrycool, (7) Killowen; Area: (1) 0a.1r.32p. (F.20101), (1) 0a.0r.33p., (2) 0a.2r.0p.; (3) 0a.0r.35p.; (4) 0a.1r.0p.; (5) 0a.0r.4½p.; (6) 0a.0r 3p.; (7) 0a.0r.22p.; County: **CORK.**
24. **REGISTERED OWNER:** Francis Smyth; Folio No.: 1797; Lands: Smear; Area: 4a.2r.18p.; County: **LONGFORD.**
25. **REGISTERED OWNER:** William Walsh; Folio No.: 12462; Lands: Portnascully; Area: 42a.2r.21p.; County: **KILKENNY.**

Lost Wills

COX, Catherine, deceased, late of Toberdaly, Rhode, County Offaly. Would anybody who knows the whereabouts of the Original Will of the deceased, who died on the 29th March, 1976, please contact James J. O'Sullivan & Co., Solicitors, Portarlington, Co. Laois. Telephone No. (0502) 23182/23528.

DOOHAN, Margaret Anne late of Number 16 Marren Park, Ballymote, County Sligo. Will any person having knowledge of the whereabouts of any Will of the above named deceased who died on the 10th day of March, 1984, please contact Messrs. Johnson & Johnson, Solicitors, Ballymote, County Sligo.

FUREY, James, deceased, late of Carrownadarney, Geevagh, Via Boyle, Co. Sligo. **BYRNE, John Joseph,** otherwise Jack Beirne, deceased, late of Carricknahorna East, Ballinafad, Co. Sligo. Will any person having knowledge of the Wills of the above named deceased who died on the 11th August, 1983 and the 10th of February, 1984 respectively, please contact William G. Lyster, Solicitor, Bridge Street, Boyle, Co. Roscommon.

GARRETT, Brother James, late of Sacred Heart College, Ballinafad, Belcarra, Castlebar, Co. Mayo. Date of Death 13th February 1984. Would any person having knowledge of the whereabouts of any Will of the above named deceased please contact G. J. Moloney and Company, Solicitors, Courthouse Chambers, 27/29, Washington Street, Cork. Telephone No. 25261.

KEEGAN, Kathleen, deceased, late of Kiltarnaght, Newport, Co. Mayo, and who formerly resided at 27 Katherine Street, Locust Valley, County of Nassau and State of New York, and Currane, Borris, Co. Carlow. Date of death 28th of April, 1978. Will any person having knowledge of the whereabouts of the original Will of the above named Deceased dated the 12th day of April, 1973 or any subsequent Will, please communicate with Messrs. John M. Foley & Company, Solicitors, Bagenalstown, Co. Carlow.

LACEY, Patrick late of 24 Macken Street, Wexford (otherwise 6 Barrack Street Wexford) who died on 16th January 1982. Would any person having knowledge of the whereabouts of Will of the deceased please communicate with Messrs. M. J. O'Connor & Co. Solicitors, 2, George Street, Wexford.

MULLEN, Kevin (Monsignor) late Apostolic Nuncio to Cuba who died in Havana on the 14th September, 1983, home address: Rosemount, Mount Nugent, Co. Cavan. Would any person having knowledge of any Will made by the above-named deceased please communicate with Messrs. Arthur Cox & Company, Solicitors, 42/45 St. Stephen's Green, Dublin 2.

O'SULLIVAN, Bridie, deceased, late of Ballyfandeen, Lahinch, Co. Clare. Would any person knowing of the whereabouts of the Will of the above-named deceased, who died on 10/11 January, 1984, please contact Messrs. M. Petty & Co., Solicitors, Parliament Street, Ennistymon, Co. Clare.

Miscellaneous

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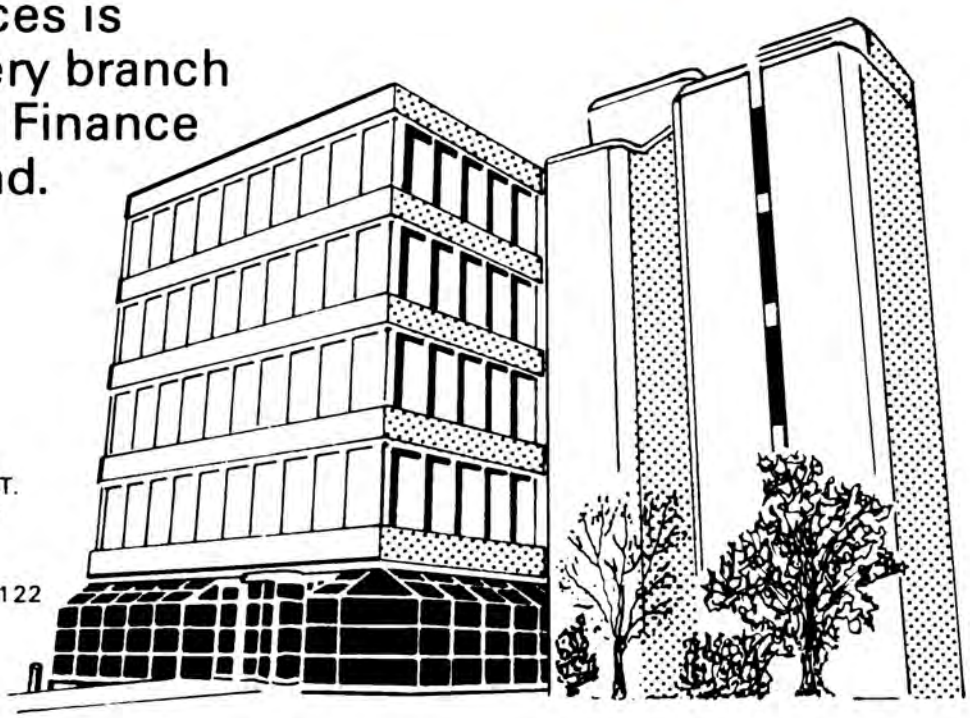

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 4 May 1984

Launch of "A Sourcebook on Planning Law in Ireland" Blackhall Place, 22 May, 1984

The authors, Philip O'Sullivan, S.C., (left) and Katharine Shepherd, Barrister-at-Law, at the launching of their book "A Sourcebook on Planning Law in Ireland", pictured with (centre) Frank O'Donnell, President of the Law Society, Frank Benson, Chairman of An Bord Pleanala and Walter Beatty, Chairman of the Law Society's Publications Committee. The book is published by Professional Books Ltd.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 4 May 1984

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

. . . A New Iniquity

THE new aggregation rules for Capital Acquisitions Tax proposed in the 1984 Finance Bill suggests that the Revenue is less concerned with pursuing those who evade tax and more with imposiong even greater burdens and obligations on those already within the tax net. The records which individuals would have to keep in order that appropriate returns of gifts and inheritances be made are not in practice kept by individuals. It is only when the financial affairs of a person's estate or trust are managed by professional administrators, be they solicitors, accountants or trustee departments, that adequate records might be available.

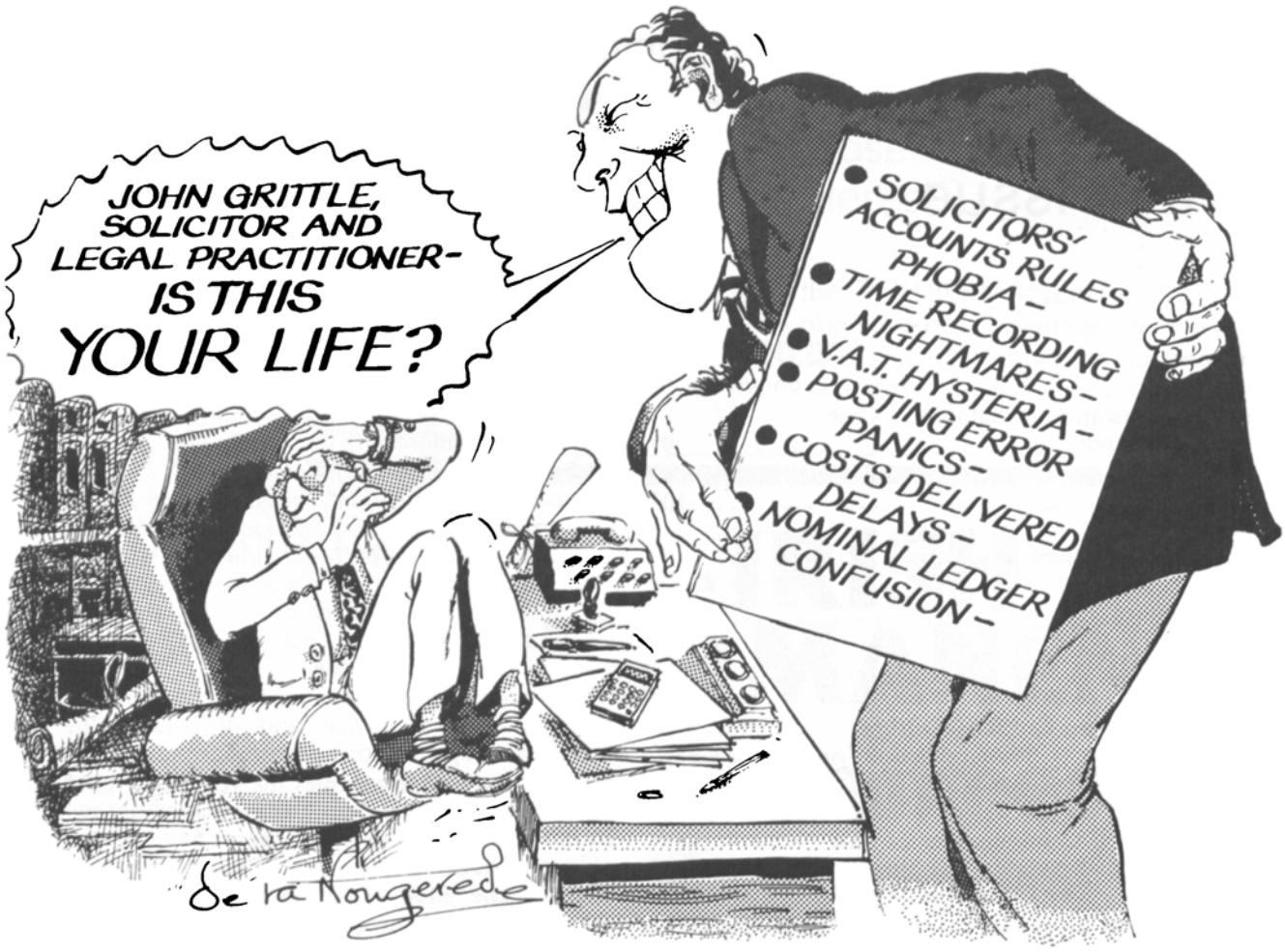
The proposed legislation is bound to lead to further evasion, both accidental and deliberate. The black economy will gain further devotees as the suit-case rather than the settlement becomes the vehicle for gifts.

As Capital Acquisitions Tax moves rapidly away from its initial simplicity many lay people have, not unreasonably, abandoned all attempts to keep abreast of its radical changes. The "£150,000 threshold" has become as fixed in the general subconscious as the need for "furnished lettings" used to be. If the ordinary house-owning tax payer realised how seriously the present proposals erode this threshold they would be deluging their TDs with objections to the proposals.

Two examples of the changes should suffice to highlight the problem:

1. If a brother dies leaving his sister a half interest in a commercial property which is let to a tenant with a capital value of £20,000 no tax will be payable on the gift because the first £20,000 of such gift is exempt as a gift between Table 2 Categories of persons. If later the sister's husband dies leaving her a house valued at £40,000 and a pension with a capitalized value of £20,000 (a total of £60,000 but with no liquid assets) tax will be payable at the level of £5,000 because the normal spouses £150,000 threshold will have been largely nullified by the previous use of the Table 2 threshold on the earlier gift from the brother.
2. If a widow has inherited a house and pension from her husband valued at £60,000, she not having received any previous gifts or inheritance, no tax will be payable. If she subsequently receives a legacy of £500 from a neighbour tax will immediately be payable amounting to £100.

(continued on p.101)



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Judicial Application of Salomon's Case in Ireland

by
Gerard McCormack, B.C.L., LL.M.

IT is a fundamental principle of company law that a company is a distinct entity, separate from its shareholders. The relationship of principal and agent does not exist between the company and its shareholders; it cannot be said, therefore, that a company carries on business on behalf of its shareholders. This principle is regarded as having been firmly established by *Salomon -v- Salomon & Co.*[1]. The statements of principle in this landmark decision were applied by Barrington J. in an analogous instance in *Irish Permanent Building Society -v- Registrar of Building Societies and Irish Life Building Society.*[2]

In the *Irish Permanent* case the issue revolved around whether the Irish Life Building Society having such close connections with a major financial institution, the Irish Life Assurance Co., was capable of registration under the Building Societies Act, 1976. The plaintiffs submitted that the society was not capable of registration because it was not an autonomous co-operative society but the subsidiary of another body, the Irish Life Assurance Co. The argument was advanced that such an association would open the door for abuses and some potential abuses which might result from the Assurance Co.'s control of the society were opened to the Judge. Barrington J. proved unresponsive to these submissions. Reference was made to the course of events in *Salomon's* case,[1] when that case had been heard before the Court of Appeal. In the Court of Appeal Lopes L. J. was emphatic. He said the Companies Act contemplated the incorporation of independent *bona fide* members, who had a mind and will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his business in the same way as before, when he was a sole trader. To legalise such a transaction would be a scandal.[4]

These sentiments were totally rejected in the House of Lords. Their Lordships expressed the view that there was no warrant for saying what was done was contrary to the true intent and meaning of the Companies Act. Lord Macnaghten put the matter pithily:

> "The company is at law a different person from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons receive the profits, the company is not in law the agent of the subscribers or a trustee for them."[5]

Thus the plaintiff in the *Irish Permanent* case was faced with the formidable hurdle of *Salomon -v- Salomon & Co.* an attempt was made to surmount the problem by drawing attention to differences in wording between the Building Societies Act and the Companies Act. Section 5 of the Companies Act, 1963 provides that any seven or more persons or, in the case of a private company, any two or more persons "associated for any lawful purpose" may by "subscribing their names" to a memorandum of association form an incorporated company. S.8 of the 1976 Building Societies Act, on the other hand, provides that any ten or more persons not disqualified by law may form a building society by "agreeing on rules". It was contended that an "agreement" of ten persons contemplated ten individual wills converging on a particular course. There could be no agreement if all of the ten persons were nominees of the same person. Barrington J. did not favour this subtle exercise in semantics. The submissions on this score were, in his view, based on too fine and metaphysical a distinction to be useful in dealing with practical affairs.

The "Boomerang effect"[7]

The doctrine of separate corporate entity has, therefore, received forthright judicial recognition in this jurisdiction. Sometimes, however, the principle acts as a two-edged sword and works to the disadvantage of an incorporator. One such case was *Battle -v- Irish Art Promotion Centre Ltd.*[8] Here an applicant, who was the managing director and major shareholder of the defendant company, applied *ex parte* for liberty to conduct the defence of the company on its behalf at the hearing of the plaintiff's action. The application was refused by the High Court and Supreme Court successively. In seeking an appropriate order the applicant was actuated by practical considerations of cost. The company had insufficient assets to permit of solicitor and counsel being engaged to present its defence and if the plaintiff's action should succeed the applicant would be damaged in his business reputation. The Supreme Court expressed a certain sympathy but were generally unmoved by this *ad misercordiam* plea. O'Dalaigh, C.J. surveyed the case-law on this particular point which tended towards the conclusion that, in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other servant or agent.[9] He went on:

> "This is an infirmity of the company which derives from its own very nature. The creation of the company is the act of its subscribers; the subscribers, in discarding their own *personae* for the *persona* of the company doubtless did so for the advantages which incorporation offers to traders. In seeking incorporation they thereby lose the right of audience which they would have as individuals; but the choice has been their own."[10]

Lifting the Veil

The doctrine of separate corporate entity is not applied as a rigid inflexible rule. The Holmesian *dictum* that the life of the law has not been logic but experience, springs to this mind on this occasion. A variety of techniques have been employed to circumvent the principle embodied in *Salomon's* case when its unrestricted application would undermine some overriding interest. As Professor Gower states in these exceptional instances the law either goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies.[11] It is difficult, however, to formulate a set of coherent propositions from the numerous judicial decisions.[12] In most cases the authority of *Salomon's* case is accepted without question as it was in *Smallman -v- O'Moore and Newman.*[13]

In *Smallman's* case the defendants had carried on a partnership business as building contractors. Later they decided to incorporate, which transformation was effected. Notice of the formation of the company was circulated to the suppliers of the partnership and published in two trade gazettes. After the registration of the company, business was continued in the partnership name so that cheques were paid by a director and the secretary of the company upon forms displaying the company name. The plaintiffs had been suppliers of the defendants prior to the formation of the company and continued, as they thought, after its formation, to supply goods to the defendants. Davitt P. found, however, that the parties were not *ad idem.* The plaintiffs believed they were supplying the goods to the partnership while the defendants believed they were being supplied to the company. In these circumstances a claim for the price of the goods failed and the plaintiffs were burdened with the responsibility of having to institute fresh proceedings. This was a most unjust result. It does not appear to have been suggested that the court should pierce the corporate veil. Arguably the court ought to have recognised the continued identity of the business when the company took over from the unincorporated firm especially when there was a great potential for customers being misled. On the other hand the facts of *Smallman -v- O'Moore and Newman* bear a strong similarity to those in the English case of *Davies -v- Elsby Bros. Ltd.*[14] where the court reached much the same result. In the latter case again a company had taken over from an unincorporated firm. Legal proceedings were instituted against the wrong defendant and it was held the court had no power to allow the writ to be amended by substituting the right defendant once the limitation period had expired.

Smallman -v- O'Moore and Newman is to be contrasted with the recent decision in *Chemical Bank -v- McCormack.*[15] This case concerned an order for inspection of bank accounts under the Bankers' Books Evidence Act, 1879 (as amended). It was argued that the order should be amended by deleting the reference to two companies on the ground that notice had not been given to them. Carroll J., without elaboration, said this contention failed to take account of the relationship of the defendant with the companies. The defendant had been formally notified of the order through his solicitor. As the defendant and the companies were in reality one and the same, notice would be deemed to be sufficient. This line of reasoning was undoubtedly inspired by a determination to defeat the claims of a less than meritorious party.

Roundabout Ltd. -v- Beirne[16]

In this case a flagrant attempt to avail of the corporate entity principle was allowed to succeed. Premises were closed down in circumstances giving rise to a trade dispute. Then the premises were leased (with an option to purchase) to the plaintiff company, the directors of which were the owners of the premises, their accountant and three barmen. When the licensed premises were subsequently re-opened for business by the plaintiff company, the entire work was carried out by the directors themselves. The barmen-directors were paid a fixed yearly sum by way of directors' remuneration in such irregular intervals and in such irregular proportions as was found convenient. The barmen were at the mercy of the other directors in relation to security of tenure. Dixon J. decided that the plaintiffs had accomplished a successful subterfuge and further picketing of the premises was restrained. The trade dispute did not attach to the premises and so the provisions of the Trade Dispute Act, 1906 were rendered inoperative. The earlier Irish case of *Ferguson -v- O'Gorman*[17] where Meredith J. refused to be deceived by a similar ploy was distinguished on somewhat unconvincing grounds. In *Ferguson -v- O'Gorman,* unlike in the present case, the premises had been taken over as a going concern. Furthermore in *Roundabout Ltd. -v- O'Beirne* the new company did not employ anyone so that there were no workmen on whom pressure could be brought to bear by picketing the premises.

Roundabout Ltd. -v- O'Beirne is a case in which legal technicalities were allowed to prevail over industrial realities and commonsense. In *Examite Ltd. -v-*

Whittaker[18] Lord Denning was askance at the notion that the statutory provisions governing industrial disputes could be evaded in such a fashion. He demonstrated a preparedness to lift the veil in these circumstances. Such an approach is consistent with the view taken by the courts in other cases where parties have tried to make use of the separate personality concept in order to resile from legal obligations. In *Gilford Motor Co. Ltd. -v- Horne*[19] the defendant had entered into a valid agreement not to solicit the plaintiff's customers or to compete with it for a certain time after leaving its employment. Upon cessation of his employment the defendant formed a company which carried on a competing business and caused the whole of its shares to be allotted to his wife and an employee of the company who were appointed to be its directors. An injunction was issued against him and the company. The order against the company was grounded on the fact that it had been formed to facilitate the defendant in breaking the agreement with the plaintiff and he was in control of its affairs. Similar considerations influenced the judgment in *Jones -v- Lipman*.[20] Here the defendant, after having agreed to sell the land to the plaintiff, sought to resist an order of specific performance by conveying the land to a company which he controlled. Russell J. described the company as a mere mask which the defendant held before his eyes in an attempt to avoid recognition by the eye of equity. Specific performance was awarded against both him and the company.

Powers Supermarkets Ltd. -v- Crumlin Investments Ltd. and Dunnes Stores Ltd.[21]

Courts are less reluctant to pierce the corporate veil in relation to group entities. There is a tendency to heed the substance behind the legal form by treating a whole group of holding and subsidiary companies as one entity. This was an approach that found favour with Costello J. in *Powers Supermarkets Ltd. -v- Crumlin Investments Ltd. and Dunnes Stores Ltd.* Here a shopping centre was developed by Crumlin Investments Ltd. and a number of tenants took leases of different units in it. One of these leases was granted to Quinnsworth Ltd., a wholly owned subsidiary of Powers Supermarkets Ltd. The lease contained, *inter alia*, the following covenant by the lessor:

> "Not during the term to grant a Lease for or to sell or permit or suffer the sale by any of its tenants or so far as within the Landlord's control any sub or under tenants of groceries or food products in or over an area exceeding 3,000 square feet in any one unit forming part of the shopping centre unless so ordered or directed by any court of competent jurisdiction."

The development was not a commercial success and Crumlin Investments Ltd. was ultimately acquired as a wholly-owned subsidiary by Dunnes Stores Ltd. The latter company formed part of the Dunnes Stores Group which numbered approximately 150 companies. Crumlin Investments Ltd. then proceeded to sell the fee simple in a unit in the centre to another member of the Group, which intended to open a supermarket in competition with Quinnsworth Ltd. Costello J. restrained them from implementing their objective.

There are two strands to this decision. The second concerned principles of land law governing the running of restrictive covenants. The second defendants were bound by the restrictive covenant as successors in title of the original covenantor, not being *bona fide* purchasers for value without notice. In this connection Costello J. referred to Wylie's *Irish Land Law*[22] and *London and S.W. Railway Co. -v- Gomm.*[23] While the lessor company did not expressly covenant on behalf of its successors and assigns, it could not have been intended that the day after the execution of this lease the lessor would have been at liberty to convey the fee simple of a unit in a shopping centre so as to permit a grantee of the fee simple to trade in a way forbidden to a lessee of the same unit.

Thus, productive use was made of the presumed intention of the parties. An earnest determination not to defeat the reasonable expectations of the covenantee is also manifest in the judicial rejection of the rule of separate corporate personality as applied to the facts of this particular case. Costello J. firmly stated that both Crumlin Investments Ltd. and Dunnes Stores (Crumlin) Ltd. should be regarded as constituting part of a single entity, namely the Dunnes Stores Group. There was no materiality in the difference in legal nomenclature. The Dunne family were actively involved in the running of the Dunnes Stores Group of Companies, and their wishes prevailed in respect of each company in the group. Purchases of stock on a company's behalf were made by the purchasing panel of the Dunnes Stores Group who apportioned liability for purchases to each trading company in the Group to whom the goods were invoiced. There was no proper system of directors and shareholders meetings. The companies were controlled by members of the Dunne family (or their servants and agents) meeting informally to manage the affairs of the Group as a whole or by individual members taking decisions on the family's behalf. Costello J., in addition called attention to the derisory consideration for the conveyance, the absence of the usual covenants and the failure to register the deed. All these factors strongly suggested that the various corporate hats worn by members of the Dunne family were a facade concealing the true facts.

The learned Judge however did not rest content with such a conclusion. Instead of confining himself to the specifics of the case he proceeded to enunciate a broader and more general rule. Costello J. said that the Court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group or another member of the group if this conforms to the economic and commercial reality of the situation. Two English authorities were mentioned in support of this proposition. The first was *Smith, Stone and Knight -v- Birmingham Corporation*[24] where Atkinson J. enumerated a set of points which a court might bring into the reckoning when deciding whether or not to lift the veil in relation to a group of associated companies. The first point was: were the profits treated as the profits of the parent company? Secondly, were the persons conducting the business appointed by the parent company? Thirdly, was the parent company the head and brain of the trading venture? Fourthly, did the parent company govern the adventure, decide what should be done and what capital should be embarked on the venture? Fifthly, did the company make the profits by its skill and direction? Sixthly, was the parent company in effectual and constant control.

More controversially, Costello J. also relied to some extent on *D.H.N. Ltd. -v- Tower Hamlets London Borough Council,*[25] a case dealing with the payment of compensa-

tion for the compulsory acquisition of property. The Court of Appeal treated three companies associated in the wholesale grocery business as a single economic entity for the purpose of awarding compensation. Lord Denning pointed out that the group of companies was virtually the same as a partnership in which all three were partners and therefore they were not to be treated separately so as to defeat the claim to compensation on a technical point.

D.H.N. is a case in which the court lifted the veil in favour of the members of a group of companies. The case was critically commented upon by the House of Lords in the subsequent Scottish decision *Woolfson -v- Strathclyde Co.*[26] which does not appear to have been cited by Costello J. in *Powers Supermarkets.* Lord Keith said the proper test to apply was to enquire whether there were special factors indicating that the corporate veil was a mere sham concealing the true realities of the situation. He doubted whether this test had been correctly applied in *D.H.N. Ltd. -v- Tower Hamlets L.B.C.* It is difficult to see, however, how similar criticism could be valid in relation to *Powers Supermarkets Ltd.* Furthermore, in that case the courts were concerned with the position of outsiders transacting business with a company and not with corporators seeking to discard the *corporate persona* when its adoption seemed inimical to their interests.

Other Irish Authorities

Two other Irish cases merit comment at this point although they do not add much in the way of analysis of the central considerations involved in lifting the veil. In *P.M.P.S. and Moore -v- Attorney General*[27] it was submitted that a shareholder in an incorporated body such as a provident society, while he had various contractual rights in and against that body, arising from his investment, had no property rights in its assets or business and accordingly no *locus standi* to complain in relation to injury done to the society. Such an argument won the approval of the courts in *Macaura -v- Northern Assurance Co.*[28] where the point was taken that because a shareholder had no legal or equitable interest in the company's property, he could not insure it. On this occasion, however, the court proved unreceptive to the general train of reasoning. O'Higgins C.J. unequivocally stated that a shareholder, to the extent of his investment, had an interest in the society and contractual rights arising therefrom. This interest and those contractual rights were property rights capable of being harmed by injury done to the society. As such, a shareholder was able to invoke the protections afforded property rights by Article 40.3 of the Constitution.

It emerges that a shareholder is not completely defenceless on the constitutional plane as regards harm suffered by the company of which he is a member. Costello J. arrived at the same conclusion in *Attorney General -v- Paperlink Ltd. via* a somewhat different route. In the *P.M.P.S.* case the plaintiff asserted that his constitutionally guaranteed property rights were being infringed. Here the infringement alleged was that of a constitutionally guaranteed right to earn a livelihood. The learned judge said these disparate arguments did not have any real effect on the outcome. If persons were actively engaged in a business carried on by a company of which they were shareholders and directors then they were not merely investors in a company but were exercising a constitutional right to earn a livelihood through the instrumentality of the company.

Conclusion

Doubtless it is true that as a matter of general principle the courts treat a company as an independent entity, separate from the persons who might, from time to time, constitute its members. However, this principle is not universally adhered to as an absolute rule. The doctrine of separate corporate personality is relaxed in certain exceptional instances where it tends towards an inequitable conclusion. It is not easy to discern any unifying set of guidelines among this wilderness of single instances.[30] Cases are decided on a fairly *ad hoc* basis with little regard for satisfactory concepts that admit of more generalised application. This approach breeds uncertainty. Judges need to intellectualise their decisions to a greater extent. Until this task is achieved the subjective judgment is likely to hold sway. □

Footnotes

1. [1897] AC 30.
2. [1981] ILRM 242. See also *McMahon -v- Murtagh Properties Ltd.* [1983] ILRM 342. Here Barrington J. held that the practice of companies holding their intoxicating liquor licences through nominees has no basis in sound logic. A company is entitled itself to hold its licence without resorting to the device of having a nominee. On incorporation a limited liability company becomes a body corporate capable of exercising all the functions of an incorporated company and having a perpetual succession and a Common Seal.
3. For the Court of Appeal judgment see [1895] 2 Ch 329.
4. *Ibid.*, at 341.
5. [1897] AC 30 at 51.
6. [1981] ILRM 242 at 261-264.
7. The phrase is that of Sir Otto Kahn-Freund in "Some Reflections on Company Law Reform" (1944) 7 MLR 54 at 56.
8. [1968] IR 252.
9. The following authorities were examined: *Scriven -v- Jescott Leeds Ltd.* 53 Sol. Jo. 101, *Frinton & Walton UDC -v- Walton & District Sand & Mineral Co. Ltd.* [1938] 1 ALL ER 649, *Tritonia Ltd. -v- Equity & Law Life Assurance Society* [1943] AC 584 and *Charles P. Kinnell & Co. -v- Harding Wace & Co.* [1918] 1 KB 405.
10. [1968] IR at 253.
11. *Principles of Modern Company Law* (4th ed. 1979) at p.112.
12. It should be noted that there are a number of specific exceptions to the *Salomon* principle provided for under statute. Under section 297 of the Companies Act, 1963, for example, on a winding-up of a company persons party to the carrying on of the business of that company in a fraudulent manner may be declared personally liable for the debts of the company to such extent as the court thinks fit.
13. [1959] IR 220.
14. [1961] 1 WLR 170.
15. [1983] ILRM 351.
16. [1959] IR 423.
17. [1937] IR 620.
18. [1977] IRLR 312.
19. [1933] Ch 935.
20. [1962] 1 ALL ER 442. In the American case *United States -v- Milwaukee Refrigerator Transit Co.* [1905] 142 Fed 247 Sanborn J. said that a corporation will be looked upon as a legal entity as a general rule but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons.
21. High Court, unreported, 22 June 1981. The case is noted by B. M. Hannigan in (1983) 5 DULJ (ns) 111.
22. (London 1975). The learned judge mentioned specifically paragraphs 19.25 to 19.43.
23. [1882] 20 Ch D 5.
24. [1939] 4 All ER 116.
25. [1976] 1 WLR 852.
26. [1978] SC (HL) 90.
27. Supreme Court, unreported, 6 May 1983.
28. [1925] AC 619.
29. High Court, unreported, 15 July 1983.
30. Professor Gower *op. cit.* at p.138 observes that the results in individual cases may be commendable but it smacks of palm tree justice rather than the application of legal rules.

Comment (continued from p. 95)

The receipt of gifts or inheritances from Table 2 persons (brother, sister, uncle, aunt, child or grandparent) or Table 3 (from all more distant relationships and strangers) may have a fatal effect on the *supposed* £150,000 threshold available to Table 1 gifts between spouses.

The responsibilities of executors and trustees under the new system will be extremely difficult because of their secondary liability for the tax. They may have considerable difficulty in ascertaining what previous gifts or inheritances legatees under the particular will or trust with which they are concerned may have received and may therefore be obliged to retain as much as 55% of the legacies until certificates of discharge are available. The fact that many of these will not issue until some time after the valuation date of the gift or inheritance means that legatees may have to be kept out of their legacies for considerable periods.

The cost of administering taxation of this nature is already seen to be excessive in relation to the returns to the Revenue. These obligations on the ordinary house-owning over-burdened tax payer will add a further unnecessary expense to the burdens already being imposed on that category of persons with little benefit to the Revenue. It would be far better if the Revenue resources were devoted to the investigation of deliberate evasion and not to the monitoring of the records kept by the more honest members of the community of modest gifts or inheritances. □

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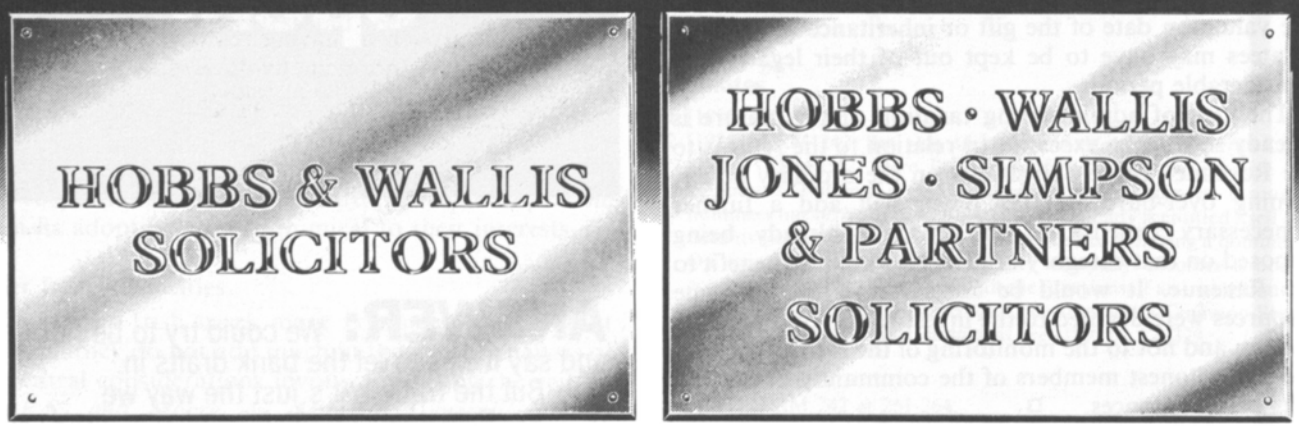

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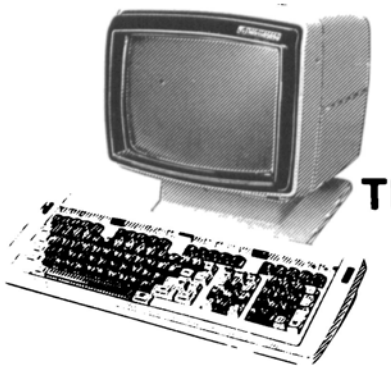

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Education Note

Final Examination — First Part 1983 : A Report

The Society held its Final Examination — First Part (the "Entry" Examination) in December 1983. The provisional results were announced by the Education Committee on January 31st, 1983.

The Society's examiners for the Final Examination — First Part were:

Subject	Internal Examiner
Tort	Mr. Patrick McGovern, Solicitor
Contract	Mr. William Johnston, Solicitor
Property	Ms. Mary B. P. O'Mahoney, Solicitor
Constitutional Law	Mr. Eamonn G. Hall, Solicitor
Company Law	Mr. Owen O'Connell, Solicitor
Criminal Law	Mr. Brendan Garvan, Solicitor

Subject	External Examiner
Tort	Professor Bryan M. McMahon (U.C.C.)
Contract	Dr. Henry Ellis, (N.I.H.E.) Limerick)
Property	Professor J. C. Brady, (U.C.D.)
Constitutional Law	Professor R. F. V. Heuston, (D.U.)
Company Law	Mr. Patrick Ussher, (D.U.)
Criminal Law	Professor Kevin Boyle, (U.C.G.)

The examination papers are set by the Internal Examiners, subject to the approval of the External Examiners. The External Examiners review a cross-section of all scripts and all scripts of those candidates whose marks are on the borderline of Pass or Failure and are the final arbiters of the marks to be awarded to such candidates.

The Internal Examiners present written reports on the examinations and all the Examiners are invited to meet with the Education Committee immediately prior to the consideration of the results.

312 candidates sat the full examination in 1983. 159 of them were declared to have passed the examination. 77 of the candidates passed all the subjects which they sat (Law Graduates are exempt from Criminal Law which is not one of the five competitive subjects). 82 candidates were allowed compensation from other subjects.

209 candidates were graduates in law, of whom 129 (62%) passed. Other candidates totalled 103, with a pass rate of 29%, i.e., 30 passes.

The following compensation rules were applied on this occasion:

1. No candidate who failed to reach the pass mark (50) in three subjects or more was allowed to compensate.
2. No candidate who achieved less than 40 marks in any subject was allowed to compensate.
3. Candidates who had not achieved a total of over 250 marks were not entitled to compensate.
4. Any candidate who had achieved less than 50 marks in two subjects was only entitled to compensate if that candidate had achieved 45 marks or more in both of those subjects and had a total of 260. □

Solicitors' Benevolent Association

At the recent Annual General Meeting of the Association, held at Blackhall Place, Dublin, Mr. Eunan McCarron proposed the adoption of the Association's 120th Annual Report.

Mr. McCarron expressed the Association's sorrow by reason of the death during the year of Eric A. Plunkett, who was both a Trustee and, *ex-officio*, a Director of the Association. Mr. Colm Price of Dublin had been elected a Metropolitan Director in his place.

Mr. McCarron thanked the various Solicitors' Bar Associations and the Society of Young Solicitors for their subscriptions and took the opportunity of reminding those Bar Associations which have not subscribed that it is hoped they will do so in the current year.

Referring to income, Mr. McCarron said that Donations and Legacies, at £10,128.00 showed a pleasant increase and he mentioned in particular the success of the first "Soirée", held in 1982, which raised £2,744.00. The hardworking Committee, under the direction of Noelle Maguire and Claire Leonard, are arranging another Soirée to be held at the Law Society, Blackhall Place, on 22nd June next.

Mr. McCarron also referred to the loan of £20,000.00 to Abbeyfield (Dublin) Society Limited, which provides a special type of accommodation for elderly people, bridging the gap between living in a private house and an "Old Person's Home". The Solicitors' Benevolent Society is now entitled to nominate two residents and two Directors. Miss Thelma King is a Committee member. Arrangements are being made for an elderly Solicitor to be moved into an Abbeyfield House on the Howth Road in the near future.

The amount paid out in grants during the past year was £58,231.00 and the average payment made to those assisted was £1,200.00.

Mr. McCarron thanked the outgoing President of the Law Society for his interest in the Association and thanked the Law Society and its staff for helping in collecting the subscriptions and for permitting the Association to hold its meetings at Blackhall Place. □

Practice Notes

Rates of Disposal of Jury Actions in the High Court

In a speech delivered at the Annual Dinner Dance of Limerick Bar Association, the Minister for Justice quoted some interesting statistics of the average number of jury actions disposed of in the High Courts sitting outside Dublin since Michaelmas 1982. The average numbers of cases disposed of per week were:—

Dundalk	83
Limerick	69
Kilkenny	61
Sligo	58
Galway	57
Cork	43

The Minister also noted that the volume of business being entered in the High Court is showing a marked decrease presumably due to the effect of the coming into force of the Courts Act. The Minister also noted that there were delay problems in the Circuit Court, particularly on the civil side, and confirmed that he was having the position in the Circuit Court examined as a matter of urgency. □

Notification of List Number

The Litigation Committee of the Law Society have considered the question of whether the Plaintiff's Solicitor should advise the Defendant's Solicitor of the list number when setting an action down for Trial.

It was decided to recommend that henceforth Plaintiffs' Solicitors should in all cases notify Defendants' Solicitors of the list number when setting an action down. □

For Your Diary . . .

8 June 1984. **Continuing Legal Education Seminar.** "Landlord and Tenant Law", Cork. For further details contact Geraldine Pearse, Solicitor, Law Society, Blackhall Place, Dublin 7.

16 June 1984. **Solicitors' Apprentices Debating Society of Ireland.** Centenary Ball. President's Hall, Blackhall Place, Dublin 7. Tickets £21.00 each. (Apprentices — £10.00 each.)

25 June 1984. **Continuing Legal Education Seminar.** "Advocacy (Criminal)". Dublin. For further details contact Geraldine Pearse, Solicitor, Law Society, Blackhall Place, Dublin 7.

26 June 1982. **Solicitors' Golfing Society.** President's Prize, 1984. Elm Park Golf Club.

3/7 September, 1984. **International Bar Association 20th Biennial Conference.** Programmes available from Margaret Byrne at the Law Society, Blackhall Place, Dublin 7 or from the IBA, 2 Harewood Place, London W1R 9HB.

14 September 1984. **Solicitors' Golfing Society.** Captain's Prize, 1984. Dundalk Golf Club.

Fire Services Act, 1981. S. 24

All notifications under Section 24 of the Fire Services Act, 1981, for Dublin City and County (excluding the Borough of Dun Laoghaire) should be forwarded direct to the Chief Fire Officer, Fire Brigade Headquarters, Tara St., Dublin, and **not** to the City Hall. □

The Uncertain and Crooked Cord of Discretion —

Some Reflections on *Furniss v. Dawson*

by
Charles Haccius, Barrister-at-Law

SO far, the recent House of Lords decision of *Furniss -v- Dawson* [1984] STC 153 HL has generated more heat than light. The purpose of this article is to endeavour to dispel some of the misconceptions which have grown up around the decision and set out what in the writer's submission it actually lays down, and, what is equally important, what it does not.

1. What does it actually decide?

The decision follows three earlier decisions of the House of Lords, the first two of which were *Eilbeck -v- Rawling* and *Ramsay -v- CIR* (both of which were reported at 54TC101) and the third of which, delivered subsequently and reported at 54TC200, was *CIR -v- Burmah Oil Co. Furniss -v- Dawson* is noteworthy as the first occasion upon which the approach adopted by the House of Lords in the three earlier decisions referred to above has been formulated with any degree of precision. The approach, and its consequences, are stated in unequivocal terms by Lord Brightman, with whom the other members of the House concurred. The approach is as follows:—

If:—

(i) There was a "pre-ordained series of transactions" (which "may or may not include the achievement of a legitimate commercial (i.e. business) end", and

(ii) the series includes "steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax",

these inserted steps "are to be disregarded for fiscal purposes. The Court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied": per Lord Brightman.

This does not mean (as some financial journalists have assumed) that where the two conditions referred to above are both satisfied, the Revenue can simply brush aside the various steps taken and assess tax as if they had never happened. The effect of the *Furniss -v- Dawson* approach differs from that of the Australian and New Zealand anti-avoidance legislation considered by the Privy Council in *Peate -v- C. of T.* [1966] 2 All ER 766 and *Mangin -v- CIR* [1971] 1 All ER 179 in that it authorises the Revenue to proceed directly from point A to point Z, and then assess tax by reference to what it finds at point Z. It does not authorise the Revenue (as under the Australian and New Zealand legislation) to assess tax on the assumption that the taxpayer never left point A.

Whether the two conditions referred to above are both present is a matter of fact to be determined in each case by the Appeal Commissioners (or in Ireland by the Circuit Court in the event of a re-hearing). The findings are "inferences to be drawn from the primary facts" with which an appellate court, whose jurisdiction is limited to questions of law, can interfere only where the inference drawn by the Appeal Commissioners (or by the Circuit Court) is "insupportable on the basis of the primary facts so found": per Lord Brightman.

It follows as a corollary from the principle that the inserted steps "are to be disregarded for fiscal purposes" that the Revenue can levy tax only on the "end result", and not on the "inserted steps". Where A sells to B, and B sells on to C, the Revenue can levy tax on the basis of a sale by A to C, but is precluded from endeavouring to levy tax also on the intermediate sales by A to B, and by B to C. "There could be no additional capital gains tax on the steps by which the disposal was achieved, namely, the sale first to (B) and then by (B) to (C), because it is the Crown's case that the fiscal consequences of the introduction of (B) are to be disregarded. The Revenue cannot, and does not claim to, have it both ways": per Lord Brightman.

2. Does it apply in Ireland?

The traditional approach in construing tax legislation is that laid down over a hundred years ago in *Partington -v- A.G.* LR 4 HL 100. "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute": 122 per Lord Cairns LC.

Some fifty years later the principle stated by Lord Cairns LC was reaffirmed in *Cape Brandy Syndicate -v- CIR* 12 TC 358 ". . . in a taxing act one has to look merely at what is said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used": 366 per Rowlatt J.

Such was the state of the authorities when *CIR -v- Westminster* 19 TC 490 came before the House of Lords. The facts of the case were simple. The Duke of Westminster, instead of paying wages to his gardener, entered into a covenant to pay him a fixed annual sum, which was to be payable to him whether or not he remained in the Duke's employment. As such, the annual payment was deductible from the Duke's total income for surtax

purposes, which would not have been the case had he (the Duke) paid his gardener wages in the ordinary way.

The Revenue, not unnaturally, contended that the annual payments were in substance wages and sought to disallow them as deductions when assessing the Duke to surtax. This approach drew a stinging rebuke from the House of Lords of the day. "Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of 'the substance' seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable": 520 per Lord Tomlin.

In *O'Sullivan -v- P. Ltd.* 3 ITC 355 the doctrine of 'the substance' was considered and decisively rejected by Kenny J. who based his decision squarely on the principle laid down (or rather reaffirmed) by Lord Tomlin in *CIR -v- Westminster* 19 TC 490. "Prior to the decision in *IRC -v- Duke of Westminster* [1936] AC 1 there was some judicial support for the view that in determining liability to tax, the substance of the transaction was to be looked at: this was assumed to mean the financial results and not the legal effects of a transaction determining liability for tax purposes. This view was rejected in the *Duke of Westminster's* case": 360 per Kenny J. So far as the High Court (and also the Appeal Commissioners and Circuit Court) is concerned, at any rate, the principle reaffirmed in *CIR -v- Westminster* 19 TC 490 and adopted by Kenny J. in *O'Sullivan -v- P. Ltd.* 3 ITC 355 represents the law of Ireland at the time of writing.

3. Will the Supreme Court follow *Furniss -v- Dawson*?

While what may, for the sake of brevity, be referred to as the *Westminster* approach represents the law of Ireland at the time of writing so far as the High Court and inferior tribunals are concerned the matter is *res integra* so far as the Supreme Court is concerned. The Supreme Court could, if it saw fit to do so, overrule existing authority and adopt the *Furniss -v- Dawson* approach in construing tax legislation. Whether it would be acting in accordance with the Constitution in so doing is another matter.

Lord Scarman admitted frankly in *Furniss -v- Dawson* that the approach therein formulated was "judge-made law". While there is no way under the British Constitution (short of express statutory prohibition) of preventing the highest tribunal in the land from crossing "the line where interpretation ceases and legislation begins" referred to by Lord Donovan in *Mangin -v- CIR* [1971] 1 All ER 179, 185 and thereby assuming legislative powers which it does not possess, the same is not necessarily so in Ireland, where the supreme authority is a written constitution to which the legislature and the judiciary alike are subject. Whether the Constitution would permit the judiciary to follow the example of their British colleagues and to arrogate to themselves extra statutory powers of levying tax otherwise than in accordance with the legal relations created by the taxpayer is debateable.

To what extend the *Furniss -v- Dawson* approach is open to question may be gauged by considering the facts of the decision itself. The taxpayer A was the beneficial owner of the entire issued share capital of a private limited company A Ltd., the acquisition cost of which to him for capital gains tax purposes was £y. Being advised that on selling his shareholding in A Ltd. to a purchasr C for £x he would incur capital gains tax on a chargeable gain of £(x-y) A sold his shareholding in A Ltd. to B Ltd. for £x, in exchange for the issue to him, credited as fully paid up, of x ordinary shares of £1 in the capital of B Ltd. A Ltd., thus, became a wholly owned subsidiary of B Ltd. B Ltd. then sold its shareholding in A Ltd. to C for £x. The sale by A to C of A's shareholding in A Ltd. thus took place in two steps instead of one, but had the following important consequences under the then capital gains tax legislation. The first step, the exchange by A of his shareholding in A Ltd. for shares in B Ltd., would have been treated under the then capital gains tax legislation (construed in accordance with the *Westminster* approach) as a "re-organisation" of the share capital of A Ltd. and B Ltd. within the meaning of the U.K. equivalent to paras 2 and 4 in Schedule 2 of the Capital Gains Tax Act 1975, involving no disposal by A of his shareholding in A Ltd. B Ltd., on the other hand, would have been treated under the U.K. equivalent to s.9(2) (a) Capital Gains Tax Act 1975 as having acquired its shareholding in B Ltd. at the "market value" thereof. Since B Ltd. would shortly afterwards have disposed of its shareholding in A Ltd. to an arm's length third party C for £x, £x would have been an accurate indication of the "market value" of A's shareholding in A Ltd. at the date of its acquisition by B Ltd. In the result, B Ltd. would have been treated as having acquired its shareholding in A Ltd. for £x and as having disposed of it to C at the same price, thus realising a chargeable gain of £ nil. A would therefore be treated under the capital gains tax legislation, construed according to the *Westminster* approach, as having made no disposal, B Ltd. being treated as having made a disposal the chargeable gain accruing in respect of which would have been £ nil. A chargeable gain would, of course, have accrued to A on disposing of his shareholding in B Ltd. but this was not in issue.

The House of Lords unanimously decided that the intermediate disposal of A to B Ltd. was to be ignored for capital gains tax purposes, capital gains tax being levied on the assumption that A had disposed of his shareholding in A Ltd. directly to C, without the intervention of B Ltd. The practical consequence of this approach was to fix A with liability for the capital gains tax payable in respect of a sale by B Ltd. to C, the proceeds of sale of which had factually accrued to B Ltd. Whatever may be the position in the U.K. the constitutionality in Ireland of levying a tax on A in respect of a gain accruing to B is open to question.

Apart altogether from the constitutional issue the decision of *Furniss -v- Dawson* has little to recommend it from any other standpoint. The *Westminster* approach, reaffirmed in that decision and adopted in Ireland in *O'Sullivan -v- P. Ltd.* 3 ITC 355 is at least just in that it requires the Revenue to levy tax in accordance with the legal relations which the taxpayer has created on the person to whom the profit or gain chargeable actually accrues. The *Furniss -v- Dawson* approach on the other hand does neither.

To borrow an example put forward by the late A. P. Herbert, while the State can undoubtedly levy an annual tax on the taxpayer's motor car it is equally open to the taxpayer to say 'I do not wish to pay this tax. Therefore, I will sell my car' and to do so. The *Westminster* approach,

adopted in Ireland by *O'Sullivan -v- P. Ltd.* 3 ITC 355 recognises the taxpayer's action and refrains from taxing him. The *Furniss -v- Dawson* approach, on the other hand, ignores what the taxpayer has done and seeks to levy tax as if the taxpayer still owns the car. An oversimplification? Possibly, but nevertheless one indistinguishable in its practical effect from that of *Furniss -v- Dawson.* Secondly, the *Furniss -v- Dawson* approach is unacceptably vague. Even as now defined it is impossible to predict where the principle therein laid down will end, Lord Scarman expressing the opinion that the determination of the extent of the principle was a "subject suited to development by judicial process". However interesting this development may be to text book writers and academic lawyers generally it will do little to help a taxpayer to know where he stands, and still less his accountant when drawing up accounts reflecting a 'true and fair view' of a company's affairs.

To take a simple example, A Ltd., a company which trades in land, owns a site which it holds as trading stock, and acquired a number of years previously for £100,000. The present market value of the site is £500,000. A Ltd. ceases trading and sells the site to an associated company B. Ltd. which likewise trades in land and has an accumulated loss, carried forward from previous accounting periods, of £400,000. B Ltd. purchases the site from A Ltd. and sells it to an arm's length third party C for £500,000. Construing the relevant legislation according to the *Westminster* approach, A Ltd. would be treated as having disposed of its trading stock to B Ltd. for £100,000: s.62(1) (a) Income Tax Act 1967. The acquisition cost to it of that trading stock being likewise £100,000 A Ltd. would have realised a profit of £ nil. B Ltd. would have realised a profit of £400,000 on the disposal of the site to C, against which it would be entitled to offset its accumulated trading loss of £400,000, thus likewise realising a taxable profit of £ nil.

Under the *Furniss -v- Dawson* approach, on the other hand, A Ltd. must be taxed as if it, and not B Ltd., sold the site to C for £500,000, thus realising a taxable profit of £400,000 against which it would not be entitled to offset B Ltd.'s accumulated trading loss of £400,000. The auditors of A Ltd. in ascertaining whether the accounts of A Ltd. give a 'true and fair view' of its financial position would require that provision be made for the corporation tax payable by A Ltd. in the event of the Revenue applying the *Furniss -v- Dawson* approach and assessing A Ltd. on a notional profit of £400,000. How is the corporation tax so payable to be provided for when A Ltd. has in fact realised no profit and therefore lacks the means of paying the tax assessed on it?

To take a further example, A Ltd. in the above example sells its site as before to B Ltd. for £100,000 (the price at which it purchased the site a number of years ago) B Ltd. in this instance has no accumulated trading loss and realises a taxable profit of £400,000 on its disposal of the site to C upon which it pays corporation tax in the ordinary way. It goes on to declare and pay a dividend out of its tax paid profit of £100,000.

Application of the *Furniss -v- Dawson* approach suggests that A Ltd. is to be taxed as if it, and not B Ltd. realised the profit of £400,000, the intermediate sale by A Ltd. to B Ltd. being "disregarded for fiscal purposes". Bearing in mind that the Revenue "cannot, and does not claim to, have it both ways" does this mean that the declaration and payment by B Ltd. of the dividend of £100,000 is to be disregarded likewise for the purpose of income tax assessable under Schedule F?

Not only does the *Furniss -v- Dawson* approach create an unacceptable degree of uncertainty in a branch of the law which is not especially distinguished by either logic or clarity but it has alarming practical and commercial consequences. Should a prudent conveyancer seek an indemnity from his client's purchaser for the income tax or corporation tax which he may be required to pay as a result of the Revenue applying the *Furniss -v- Dawson* approach? Is it reasonable to expect a purchaser's solicitor to agree to his client giving such an indemnity? These questions are by no means academic. Nowhere in *Furniss -v- Dawson* does the House of Lords suggest that B (by whom the profit or gain has actually been realised and who therefore holds the proceeds of sale) should indemnify A (who is to be treated under the *Furniss -v- Dawson* approach as having realised the profit or gain although he has not actually done so and does not have the wherewithal to pay the tax assessed). Quite apart from the constitutionality of taxing A on a profit realised by B the practical consequences of such a departure from reality hardly bear thinking of.

It is to be hoped, therefore, that the Supreme Court will not follow the unhappy precedent set by the House of Lords and cross the forbidden line referred to by Lord Donovan in *Mangin -v- CIR* [1971] 1 All ER 179, 185 "where interpretation ceases and legislation begins" without giving due consideration to the practical consequences of so doing.

4. Does it apply to trading?

To what extend the *Furniss -v- Dawson* approach applies to income tax or corporation tax assessable under Schedule D Case I is a matter of some doubt. S.105 Income Tax Act 1967 provides specifically that "Tax under Schedule D shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of when tax under that Schedule is in this Act directed to be charged". To what extent, if at all, is it open to the Revenue to disregard a statutory provision as clear and unequivocal as this?

In *Ransom -v- Higgs* 50 TC 1 the Revenue endeavoured to the (then) discredited doctrine of 'the substance'. The Revenue's attempt to do so was decisively rejected by the House of Lords, whose members included Lord Wilberforce (who was subsequently to be a member of the House which decided *Eilbeck -v- Rawling* and *Ramsay -v- CIR* 50 TC 1 therefore carry considerable weight). The facts of the matter, so far as they are relevant, were relatively straightforward. The taxpayer (Mr. Higgs) was the proprietor of a number of limited companies all of which traded in land. In 1961, a partnership was established between Mrs. Higgs (who held a 90% interest therein) and two of Mr. Higgs' companies (which each held a 5% interest therein), to which partnership the various companies sold land at cost. Mrs. Higgs thereupon sold her 90% interest in the partnership to yet another company "Harlox" for £170,000. Neither Mr. nor Mrs. Higgs had ever carried on the trade, personally, of dealing in and developing land, although this was admittedly the activity in which the various companies were engaged. The Revenue sought to assess the taxpayer to overcome tax under Schedule D case I on the proceeds of the sale by his wife of her interest in the partnership.

Lord Wilberforce's reasoning (at 50 TC 90) is

particularly interesting since, while expressly recognising the principle later formulated by Lord Brightman in *Furniss -v- Dawson*, he nevertheless concluded that the taxpayer was not assessable to income tax under Schedule E Case I. "My Lords, I have already said that I am willing for the purposes of those appeals to accept in full the findings of the Commissioners reflected above. Moreover, I accept that it is legitimate to consider 'the scheme as a whole' where there is evidence, as there is here, that each separate step is dependant on the others being carried out."

"But the question remains whether this organisation or control by Mr. Higgs of a complex process, involving possibly or probably trading by others, can possibly constitute trading by himself. . . . How can a man who procures others to do acts which amount to trading by them with their own assets be said to trade within any conception, however wide, one may have of trading? . . . . So wide an extension of the concept of trading, to a set of facts which contains none of the normal ingredients of trade, is one I find unacceptable": 90 per Lord Wilberforce.

In other words, a participant in a scheme for the avoidance of income tax or corporation tax on the profits or gains arising from trading in land can only be taxed under Schedule D Case I if he himself actually trades in land and realises a profit therefrom assessable to income tax and corporation tax under the statutory provisions applicable thereto. The doctrine of 'the substance' has no place in the assessment of income tax or corporation tax under Schedule D Case I.

What if the participants in a tax avoidance scheme are all traders in land to a greater or lesser degree? In such a case *Ransom -v- Higgs* 50 TC 1 is clearly not in point, it being up to the Revenue to assess income tax or corporation tax under Schedule D Case I or each participant to the extent of the profits and gains "received" by it or to which it is "entitled" computed in accordance with the relevant statutory provisions, as directed by s. 105 Income Tax Act 1967.

S.105, by providing in express terms that income tax under Schedule D is to be charged on the person "receiving or entitled to" the income taxable, appears to preclude application of the *Furniss -v- Dawson* principle. Authority for this view is to be found in Lord Wilberforce's dissenting opinion in *Mangin -v- CIR* [1971] 1 All ER 179, 186. The decision turned on express anti-avoidance legislation in New Zealand which provided that an "arrangement" was to be "void" insofar as it had the " purpose or effect" of "relieving" a person from his liability to pay income tax. The majority of the Judicial Committee of the Privy Council held that the legislation applied to an arrangement whereby a farmer had leased certain agricultural land to a discretionary trust, which he then proceeded to farm on behalf of the trustees, accounting to them for the profits realised. These were then distributed by the trustees to the taxpayer's wife and children, in whose hands they were taxed at rates which were substantially lower than the rate which would have been payable had the profits been derived by the taxpayer himself.

Lord Wilberforce, on the other hand, pointed out that the legislation, while providing that an arrangement having the purpose or effect of relieving a person from his liability to pay income tax was void, did not go on to provide who, in consequence, was to be assessable. He referred (on page 191) to the provision in the New Zealand legislation corresponding to s.105 Income Tax Act 1967 which provided that income tax was to be payable on all income "derived" by the taxpayer and pointed out that in this instance the farming profits were "derived" not by the taxpayer himself but by the trustees, and that it was not open to the Revenue to assess the taxpayer on income which he had not "derived". Such an opinion, if expressed in relation to actual legislation would appear to apply *a fortiori* in the case of judge made law such as the approach formulated in *Furniss -v- Dawson.*

Lord Donovan, delivering the majority opinion of the Judicial Committee, referred likewise to the provision requiring the taxpayer to have "derived" the income in respect of which he was assessed, but based his decision (on page 185) on the particular circumstance that the farming profit had passed through the taxpayer's hands en route to the trustees.

Both Lord Donovan and Lord Wilberforce, therefore, recognised the relevance of the provisions in the New Zealand legislation corresponding to s.105 Income Tax Act 1967. It is to be hoped that the Supreme Court will do so likewise.

In *Ransom -v- Higgs* 50 TC 1 Lord Wilberforce pointed out that the scheme then under review by the House would now be dealt with under the specific anti-avoidance legislation in the U.K. equivalent to ss.20, 21 and 22 Finance (Miscellaneous Provisions) Act 1968, as substituted by s.29(3) Finance Act 1981. It is submitted that it is to these provisions, and not to the *Furniss -v- Dawson* approach, that regard must be had by those seeking to avoid income tax and corporation tax on the profits arising from dealing in and developing land.

5. Conclusion

In *Furniss -v- Dawson* Lord Scarman suggested that the principle therein laid down by the House was in no way incompatible with Lord Tomlin's famous vindication (in *CIR -v- Westminster* 19 TC 490, 520) of the taxpayer's right to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be, but merely defined the limits within which the taxpayer was to be so entitled.

It is a pity that Lord Scarman did not see fit to refer at the same time to Lord Tomlin's warning (19 TC 520) against substituting the "incertain and crooked cord of discretion" for "the golden and straight mete wand of the law" (4 Inst. 41). Subsequent members of the House of Lords have been no less forthright in their criticism of the *Furniss -v- Dawson* approach. "Tax avoidance is an evil but it would be the beginning of much greater evils if the courts were to overstretch the language of the statute in order to subject to taxation people of whom they disapproved": *Vesty's Executors -v- CIR* 31 TC 1, 90 per Lord Normand.

So also in *Ransom -v- Higgs* 50 TC 1 referred to above ". . . for the courts to try to stretch the law to meet hard cases (whether the hardship appears to bear on the individual taxpayer or on the general body of taxpayers as represented by the Inland Revenue) is not merely to make bad law but to run the risk of subverting the rule of law itself. Disagreeable as it may seem that some taxpayers should escape what might appear to be their fair share of the general burden of national expenditure, it would be

(Continued on p. 116)

Finance Bill, 1984

Submissions of Law Society's Taxation Committee

1. Certificates of Discharge — Section 109

The Society welcomes the proposal for the issue of Certificates of Discharge to Executors and persons having secondary liability. The proposed sub-section, however, stipulates that the Certificate cannot be issued until a period of two years after the valuation date. This could, therefore, impose a possible delay of three years in winding up Estates — even the smallest Estates — and payments to beneficiaries. It is suggested that the Section should impose no constraints on the Revenue Commissioners relating to the issue of Certificates as and when they think appropriate. The Society is perfectly happy that the Revenue Commissioners will, as always, exercise such discretion fairly and reasonably. If a time limit is removed, it may in fact not merely expedite the completion of administrations and payments to beneficiaries, but it will also indirectly help to expedite the payment and discharge of tax. Accordingly, the Society requests that this time restraint be removed and the matter be left exclusively to the discretion of the Commissioners.

2. Discretionary Trusts — Part V, Chapter 1 — Sections 100-105

The Society does not question the concept of taxing Discretionary Trusts where same are used to avoid or defer payment of Capital Acquisition Tax. There appears, however, to be an unintended consequence of the provisions. For example, an Estate of between £100,000 / £150,000, might be left to Trustees upon Discretionary Trust for a spouse and the inheritances subsequently arising would not attract any Capital Acquisition Tax on the appointment to the beneficiaries. In other words, the purpose of the Discretionary Trust here is simply to give flexibility in the administration of the Testator's Estate and not to avoid or defer tax. Nevertheless, in the example quoted, the beneficiaries would suffer a tax liability of between £3,000/£4,500. The Society believes that this was not intended and to avoid this hardship, submits that the following exemptions should be given:—

(i) The tax should not be charged on a Discretionary Trust if the Trust Funds are distributed or are appointed out of the Trust within two years of the death of the Testator.

(ii) There should be no tax on a Discretionary Trust where the Trust Fund does not exceed £150,000 and the principal objects are as defined in Section 100. It is also submitted that the definition of 'principal objects' in Section 100, should be extended to include persons to whom the Disponer stands in *loco parentis*. There are times when a nephew or niece or other relative being orphans or otherwise not having the benefit of parents (and who cannot for technical reasons perhaps, be adopted), become assimilated into a household and effectively, part of a family. The Society strongly submits that the law should recognise this situation. The Society further submits that the phrase '*in loco parentis*' is sufficiently clear in law not to require any further definition but would not of course oppose any definition to prevent abuse.

3. Aggregation — Section 107

The Society feels that there may be an unintended consequence of the new aggregation rules, which could result in hardship or unfairness, especially to a surviving spouse. For example, under the provisions proposed in the Bill:—

(a) 3rd June, **1982,** — Spouse received gift of £20,000 from her brother or inherited £20,000 from the Estate of a deceased brother. No tax is payable.

(b) 20th June, **1984,** — Spouse received gift of £10,000 from her husband. There is an immediate tax liability of £1,500 (and of £2,000 if it were an inheritance).

This is so notwithstanding that the spouse has not exhausted or used any of her tax free threshold of £150,000 from her spouse. In the long term, this could produce even greater hardship where a benefit taken by a spouse from a parent after 2nd June, 1982, is aggregated with benefits received from the other spouse twenty or more years later, giving rise to a substantial tax liability on perhaps relatively modest provisions made for the surviving spouse.

This is particularly so in the case of retired persons (especially public officials or representatives) who have not accumulated capital or have disposed of their capital on the education of children or otherwise and the main provision for a widow is the family home and a pension. The capitalised value of the pension together with the family home and contents, aggregated to such gifts or inheritances, will frequently give rise to a liability for tax with no liquid assets to pay same.

To overcome this problem, the Society suggests:—

(a) the definition of 'revised class threshold' be omitted from the Section and any necessary amendment be made in Para. 3 to ensure that any allowance for previous tax is calculated using the same class threshold, viz. notional tax.

(b) alternatively, that there should be no aggregation in the case of gifts or inheritances by a spouse to a spouse of earlier gifts or inheritances from unconnected sources.

4. Spouse

The Society again submits that the time has come to review the position of a surviving spouse and to consider either totally exempting gifts and inheritances between spouses, increasing the reliefs or exempting pensions or giving some ease on similar lines. The value of ordinary

residential property, together with furniture and contents nowadays, can absorb such a substantial amount of the threshold that the balance of the tax free threshold does not permit of satisfactory provision for a surviving spouse. Indeed, in some cases, the hardship can be such that the surviving spouse may have to sell 'the family home' and make other arrangements that should not be necessary and would not have occurred under the statutory provisions and the values prevailing when the original legislation was introduced. □

The Uncertain and Crooked Cord of Discretion

— (continued from p. 113)

far more disagreeable to substitute the rule of caprice for that of law. The most famous warning in the history of our fiscal law is constituted by *The Case of Ship Money* (1637) 3 St. Tr. 825. It could be strongly argued that it was contrary to fiscal equity that the financial burden of providing warships (or their money equivalent) for the defence of the whole realm should fall exclusively on the inhabitants of maritime towns and districts, to the exoneration of inland citizens: yet such, it seems, was the law of the land; and the Judges who appear to have stretched the law have not escaped the censure of history": 94 per Lord Simon of Glaisdale.

In the light of these authorities the *Furniss -v- Dawson* approach is highly suspect. The examples referred to earlier in this article indicate the uncertainty and injustice which the approach will create in a branch of the law which even now is not conspicuous for either clarity or abstract justice. The intervention of judge-made law for which there appears to be no constitutional authority will not improve the position.

The Department of Finance is unique among the Departments of State in having annual access to the Legislature, and it has not been slow in requesting anti-avoidance legislation of which the new ss.20, 21 and 22 Finance (Miscellaneous Provisions) Act 1968 as substituted by s.29(3) Finance Act 1981 are but one example. Such legislation, if complex, is at least precise, certainly more so than judge-made law where judicial dicta are merely obiter if not related to the particular matter in issue. Legislation seeking to tax A on a profit accruing to B normally incorporates statutory machinery enabling A to recover from B the tax which he (A) has been required to pay (see for example s.21(1) Finance (Miscellaneous Provisions) Act 1968, as substituted). The *Furniss -v- Dawson* approach, on the other hand, as has already been remarked, is significantly lacking in this respect.

Contrary to what Lord Scarman suggests in *Furniss -v- Dawson* taxation is not an area which lends itself readily to judge-made law. In a branch of the law which is purely statutory with no common law infrastructure the role of the judiciary, as Lord Donovan pointed out in *Mangin -v- CIR* [1971] 1 All ER 179, 185, is to interpret rather than to innovate. To do otherwise is, in the words of Lord Simon of Glaisdale in *Ransom -v- Higgs* 50 TC 1, 94, to substitute the rule of caprice for that of law, a retrograde step which it is to be hoped the Irish judiciary will be slow to take. □

Patrick J. McEllin

An Appreciation

The saying "A lawyer and a gentleman" has been loosely applied and originated long before Paddy's time, but in his professional and personal life it can truly be applied to him. In the forty years which he practised in his home town of Claremorris he earned himself the reputation of loyalty, deep understanding of, and consideration for, his clients and their welfare, whose interests he tirelessly and selflessly worked for, and for whom he made numerous sacrifices, earning for himself the title of "lay confessor". We shall never know the hours of leisure time he foresook, just to attend a distant District Court.

When Paddy died on the morning of the 26th April last it may have been a blessing as his last illness may well have interfered with his ability to communicate, an ability which had been one of his great loves. He would have disliked to be dependent on others.

Paddy had his priorities in order:

- His God and his Church which he served with great piety and devotion without seeking public accolade for such virtues, and in truly making "every man his neighbour".
- His wife, Eileen and his children, to whom he was devoted and for whom he made many personal sacrifices.
- His profession.

Nowhere in Paddy's long career is there a known instance of an exaggerated statement or a mis-stated fact. Any words that came from him had the unmistakable ring of authenticity. Because of this reputation and despite his efforts at self-deprecation, he was chosen annually, unanimously, by his professional colleagues in Connacht to represent them on the Council of the Law Society, on which he served so diligently and so well.

In the practice of the law, although his accomplishments are legend, his strong suit was the common law, particularly negligence cases.

Paddy was a private, quiet man, little given to self-promotion, but within his circle of friends and associates he gained acceptance as a fount of wisdom a mantle he tried to discard with a superb sense of humour.

With Paddy's death the legal profession has lost one of the most kind, courteous, considerate and certainly one of the most courageous people we have ever had the pleasure to know.

> " Farewell dear friend
> That smile, that harmless mirth
> No more shall gladden
> Our domestic hearth."

Sit Tibi Terra Levis.

W.B.A.

Correspondence

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

27th April, 1984

Dear Sir,

Capital Taxes — Estate Duty Division

The Estate Duty division of Capital Taxes Branch has moved from Osmond House, Ship Street, to Exchange House, Exchange Street Upper, Dublin, 2. This is located off Lord Edward Street and is, in effect, opposite the gate of the Upper Yard at Dublin Castle. The telephone number of 01-710277 (extensions 18 or 24).

The Estate Duty division deals only with cases of death prior to 1 April, 1975 in such matters as assessment of Estate Duty on Inland Revenue Affidavits or Accounts and issue of Certificates of Discharge. Cases of deaths from 1 April, 1975 onwards continue to be dealt with by the Capital Acquisitions Tax division in Dublin Castle to whom Inland Revenue Affidavits, Returns, etc., for cases from 1 April, 1975 onwards should be sent. The collection side of Estate Duty is still situate in Dublin Castle under the general collection division of Capital Taxes.

Correspondence in all Estate Duty matters should continue to be addressed to Dublin Castle.

Yours sincerely,
L. Walsh,
Principal Officer,
Capital Taxes Branch,
Dublin Castle.

People

After 20 years of practising law, **Kim Pearman** wanted to sink his teeth into something different. He hit on LawDogs, a food stand serving "liens 'n' franks".

"My legal practice had gotten away from the streets and I missed the contact with people," explained the 44-year-old former deputy district attorney in Hollywood, California. "I wanted something that wasn't too complicated and I got the idea of a hot dog stand with a legal theme."

He opened the first LawDogs stand in Van Nuys in December 1982 and has since branched out to Arleta and Los Angeles, where LawDogs operates in the shadow of the courthouse and city hall. He hopes to have 40 stands by next year, if for no other reason than to provide summer jobs for his friends' children.

On certain nights Pearman or an associate conducts free legal clinics at the hot dog stands, often drawing 50 to 75 people seeking advice. "Many lawyers take themselves too seriously and this atmosphere takes the mystical seriousness out of it. It brings more people into the legal system," said Pearman.

The hot dog stands' legal theme carries over to the menu. It offers the Plaintiff Dog (nothing on it), the Jury Dog (with mustard), the Police Dog (sauerkraut) and the Judge Dog (chili sauce).

LawDogs sells more than 1,200 pounds of wieners each week, the third largest volume in the country, and so far there has been not a single negative ruling, Pearman said. "Even the judges ask me how business is going." If you have a hungry judge presiding, the wiener takes all.

Reprint from the *American Bar Association Journal*, January 1984.

Reprimanded for Cold Court Rooms

Donegal Co. Council Estimates have provided £34,340 for the maintenance of Courts and £16,683 for the holding of Coroners Courts.

When Clr. Harry Blaney observed at the Council's Estimates meeting that this was an increase of £5,500 on last year's revised estimates, he was told by the County Manager that the Council had been reprimanded by the Department of Justice over a complaint by the District Justice, John F. Neilan, who had refused to sit at Raphoe Court on one occasion because of the coldness of the premises.

Clr. Susan McGonagle said it should be up to the Department of Justice to take care of Courts.

(Extract from the 'Donegal Democrat' of Friday, 13th April, 1984.)

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.

Dated 25th day of May, 1984.

J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

1. **REGISTERED OWNER:** Annie Heraty; Folio No.: 20782; Lands: Glenamurra, Glenamurra; Area: 910a.2r.12p; 404a.3r.20p.; County: **MAYO.**
2. **REGISTERED OWNER:** Robert Brady; Folio No.: 3835; Lands: situate in the townland of Rush and barony of Balrothery East, County Dublin; Area: —; County: **DUBLIN.**
3. **REGISTERED OWNER:** Frederick Ormsby, Ballina, County Mayo; Folio No.: 18600; Lands: Carrowcastle; Area: 7a.1r.10p.; County: **MAYO.**
4. **REGISTERED OWNER:** Nora Hynes, Abbey, Loughrea, Co. Galway; Folio No.: 11574; Lands: Barnaboy, and Newtown North; Area: — ; County: **GALWAY.**
5. **REGISTERED OWNER:** Richard Collins; Folio No.: 56779; Lands: Coolanagh; Area: 0a.1r.36p.; County: **CORK.**
6. **REGISTERED OWNER:** Richard Crampton; Folio No.: 2948; Lands: Cloonroosk Little; Area: 48a.1r.1p.; County: **OFFALY.**
7. **REGISTERED OWNER:** David Sheehan; Folio No.: 15214; Lands: Gilcaugh; Area: 120a.2r.9p.; County: **CORK.**
8. **REGISTERED OWNER:** Timothy McCarthy, Alyse McCarthy and Eilish McCarthy; Folio No.: 4443; Lands: Situate in the townland of Broghan, Barony of Castleknock, County Dublin; Area: — ; County: **DUBLIN.**
9. **REGISTERED OWNER:** Anastasia Power; Folio No.: 1949L; Lands: situate in the South Central District and Parish of St. James, City of Dublin; Area: —; County: **DUBLIN.**
10. **REGISTERED OWNER:** John Cleary (deceased) and Frances Cleary; Folio No.: 3128; Lands: Ashfield; Area: 63a.2r.38p.; County: **LAOIS.**
11. **REGISTERED OWNER:** Clive O'Connor and Anne O'Connor; Folio No.: 11493F; Lands: situate in the townland of Kilmacud West in the Barony of Rathdown; Area: — ; County: **DUBLIN.**
12. **REGISTERED OWNER:** Michael McCormack (Bridget McCormack acting as Personal Representative); Folio No.: 3517; Lands: Part of the lands of Knockballymaloogh; Area: 82a.3r.5p. County: **TIPPERARY.**
13. **REGISTERED OWNER:** Colm J. Toner and Siobhan P. Toner, 84 Kenilworth Park, City of Dublin; Folio No.: 3457F; Lands: Doonmore; Area: 0.500 acres; County: **CLARE.**
14. **REGISTERED OWNER:** Patrick Reilly; Folio No.: 7162; Lands: (1) Togher, (2) Clareisland, (3) Moneybeg; Area: (1) 16a.2r.17p., (2) 1a.3r.16p., (3) 0a.2r.0p.; County: **WESTMEATH.**
15. **REGISTERED OWNER:** Barna Buildings Ltd.; Folio No.: 22869; Lands: Moyne Upper; Area: 1a.0r.13p.; County: **WEXFORD.**
16. **REGISTERED OWNER:** Kathleen Shaw and Michael Nolan; Folio No.: 1229F; Lands: Kilbelin; Area: — ; County: **KILDARE.**
17. **REGISTERED OWNER:** Patrick English; Folio No.: 18000; Lands: Garryroan; Area: 29a.0r.36p.; County: **TIPPERARY.**

Lost Wills

GRIFFIN, Joseph Patrick, late of 72 Waterloo Road, Ballsbridge, Dublin, 4. Date of death: 15th April, 1984. Would any person holding a Will on behalf of the above named, please contact Messrs. John Casey & Co., Solicitors, Bindon House, Bindon Street, Ennis, Co. Clare.

GARTLAND, John, deceased, late of 20, Trimleston Gardens, Booterstown, County Dublin. Will any person having knowledge of the whereabouts of any Will of the above named deceased who died on the 9th June, 1983, please contact Messrs. Rory O'Donnell & Co., Solicitors, 16, Fitzwilliam Place, Dublin 2.

Miscellaneous

SOLICITOR with 3 years experience in general practice seeks position in Dublin City. Box No. 079.

GESTETNER FB 12 PHOTOCOPIER for sale. May be inspected and tested here at any time. C. P. Crowley & Co. Solicitors, 9 Eyre Square, Galway. Phone: (091) 65944.

SOLICITOR with 1 or 2 years experience is wanted to set up a general practice in Dublin with a 32 year old apprentice who has several years Conveyancing experience and who qualifies in July. Practice to be general but with emphasis on Criminal Law and Litigation. Replies with Curriculum Vitae to Box No. 080.

EARLY & BALDWIN, SOLICITORS. Town Agency Services for the Profession. Attendance on Court Offices, Stamp Office, etc. daily. For information telephone Valerie Whelan at (01) 333097/332862.

FIRE-PROOF SAFE required. Phone: 718810, 712211.

The Profession

TERENCE LYONS, SOLICITOR, formerly of Allen & Lyons, Solicitors, Morehampton Rd., Dublin 4, has now commenced practice under the style of Terence Lyons & Co., Solicitors, 19 St. Mary's Abbey, Dublin 7.

EMPLOYMENT REGISTER

Members are reminded that the Society maintains an Employment Register for Solicitors. Those seeking employment and those Offices with posts to be filled are invited to contact The Education Officer, Ms. Jean Sheppard, The Law Society, Blackhall Place, Dublin, 7.

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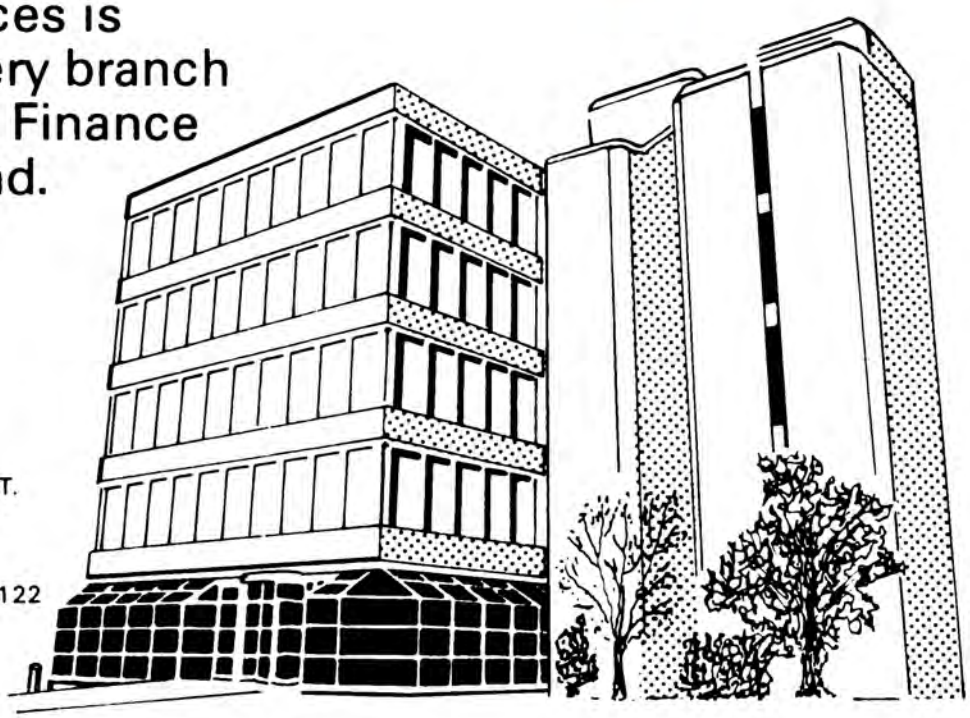

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 5 June 1984

An "Unbalanced" Bill

WHILE our legislators are to be commended for the unusual thoroughness with which the Criminal Justice Bill is currently being debated, the minor amendments which the Minister for Justice has either introduced or accepted still leave the Bill open to considerable criticism. This journal has already expressed grave reservations about the central features of the proposed legislation insofar as it represents a major intrusion on the doctrine of the presumption of innocence and the right to silence. The amendments, welcome though most of them are, have done little to remedy this intrusion.

The Law Society, in its submissions to the Minister on the Bill, drew particular attention to the fact that the powers of detention proposed are capable of applying not merely to cases where genuinely serious offences are being investigated but also to many offences which, although falling within the category bearing the possibility of a sentence of five years imprisonment, would not generally be regarded as serious. Many of these offences are not remotely similar to the kind of crimes, such as mugging, drug-dealing or the stealing of cars, which the proponents of the legislation have argued would be more easily tackled once the Bill became law. It was particularly disappointing to find Professor John Kelly, T.D., apparently failing to appreciate how wide a category of offences would fall within the ambit of the detention provisions.

Access by a solicitor to his client, or, more significantly, access by the client to his solicitor, is still not adequately covered. It will still be possible for a person to be deliberately detained for questioning on a Friday night so as to render more difficult the contacting of a solicitor expeditiously.

In other jurisdictions, panels of solicitors are available to attend, on a rota basis, at police stations or courts where persons are arrested or charged outside normal office hours. A development of this sort may now be necessary in Ireland, certainly in the major population centres. It was encouraging to see Dr. Michael Woods, T.D., putting such a proposal forward and the Minister agreeing to examine it.

It is unfortunate that proponents of the Bill, including the Minister, have continued to put forward the argument that powers of questioning similar to those proposed in the Bill are available to almost all other police forces in Europe. Such powers are not part of the ordinary law in England, being the jurisdiction which shares most closely our legal system. In other European countries where suspects can be questioned, it is not done by police officers but by examining magistrates. While there must always be reservations about the wisdom of introducing procedures from one type of legal system into another, it certainly would be worthy of detailed consideration that, if questioning of suspects in detention is to be allowed, such questioning should be done independently of the Gardai.

Notwithstanding what has so far been written and said on the Bill since it was first introduced, one still ends up asking the question, whether the offered "panacea" will turn out to be worse than the perceived "illness". Why is it that lawyers, a conservative group in the main, have been at the forefront of the criticism of the main provisions of the Bill? Surely lawyers, like everyone else in our society, are not immune from being mugged or burgled or having their cars stolen, and should, therefore, welcome the offer of a "solution"? Perhaps the explanation is that lawyers, by training, rarely see simple answers to complex problems and reject solutions which they perceive as tending to create greater problems.

Our criminal legal system has, up to now, been carefully moulded by judicial decisions and by statute to produce that "balance" (the Minister's adopted word) between the rights of the individual on the one hand and the rights of society (including the Gardai) on the other. To alter radically that "balance", as the Bill proposes to do, may leave us without an effective "scales of justice". At this late stage the Goddess Themis should be asked to remove her blindfold and join in the debate! □

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 5 June 1984

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

THE announcement by the President of the Society at the recent Annual General Meeting of the Mayo Bar Association that he was in the process of establishing a panel of solicitors who would undertake negligence actions against colleagues practising outside their own immediate areas is timely.

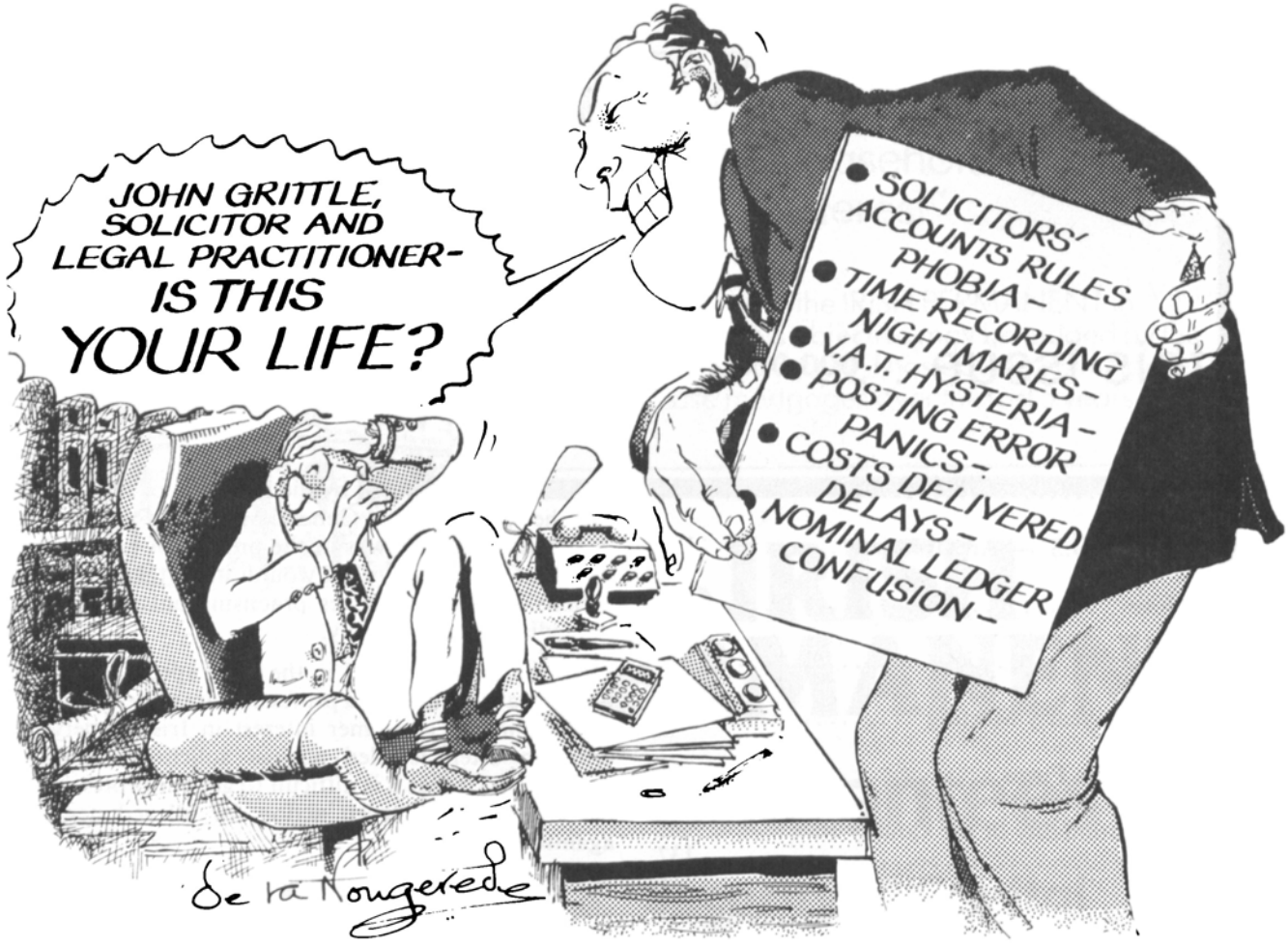
As the President said in the same speech, there is no doubt that solicitors as a profession are under siege by the media and the consumer interest in Irish society. One criticism often levelled against solicitors (and other professions) is that it is difficult to get one professional to become involved in an action for alleged negligence against a colleague.

The "dog doesn't eat dog" attitude while perfectly understandable, may, at times be professionally unsafe; it includes, however, acts of generosity such as not charging a colleague full fees in respect of his own personal transactions as well as refusing to take instructions against him in a negligence action. More often than not, a reluctance to act in such matters is motivated by local considerations and by an attitude of "there but for the Grace of God . . .".

The above attitude is, however, of no consolation to the layman who feels that he has suffered unfairly at the hands of his solicitor and who wishes to seek legal redress. Nor is it even relevant in most cases, because, as the President pointed out, over 80 per cent of solicitors have got Professional Indemnity Insurance.

The panel to be formed by the President will, hopefully, be a first step in ensuring that persons with a genuine legal grievance against a solicitor are neither denied a remedy nor compelled to attempt to represent themselves in seeking one. The notion that a solicitor should not be asked to act against a colleague in the same immediate geographical area will also do away with one of the principal objections to solicitors taking on such cases.

At a time when the administration of all professions is under public scrutiny it is essential that solicitors, more than any other profession, can face that scrutiny with confidence. □



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Litigation in the U.S. — An Overview

by
Gael Mahony, Attorney-at-Law*

(Text of an address given at the Society's Half-yearly meeting, May, 1984)

YOUR former President, Michael Houlihan, invited me last year to attend your Annual Conference and suggested that I might speak to you and the topic he suggested was A Comparison of Law Practice in America with Law Practice in Ireland and the United Kingdom. The more I have thought about the suggestion the more interesting it has become. There is nothing, perhaps, that throws more light on things we take for granted than to examine them through the eyes of someone else. I will be speaking mostly about what is different in American Law Practice from Law Practice here and in the United Kingdom and I will offer some opinions on what underlies the differences in American practice, and what the traditions and attitudes are that have induced these differences.

I am most grateful for the assistance which I received from Professor Denis Driscoll of University College Galway, Peter Sutherland your Attorney General, Professor Robert Prichard and Patrick Curran the Irish Consul in Boston.

Statistical Overview

Before getting into the subject of comparisons, I will give you some statistical highlights on law practice in AMERICA.

- There are approximately 613,000 lawyers in America. Taken against a population of 230,000,000 people, this means there is one lawyer for every 390 people in the country. In IRELAND, by way of contrast, there is one lawyer for every 933 people in the country.
- The density of lawyers is greater in America *by far* than it is in any other country in the world. In JAPAN, for example, there is only one lawyer for every 10,000 people — which has led some wise men to suggest that for every car Japan exports to America we should make them import one American lawyer back to Japan.
- The median age of American lawyers is growing younger every year. This bespeaks a vast influx of young people into the profession. From 1970 to 1980, the lawyer population in America increased by fifty percent. In the same period, the median age of lawyers dropped from 45 years to 40 years; in 1983 it was down to 37 years.
- The percentage of American Lawyers who are women is growing very rapidly, especially in the younger ranks. From 1972 to 1980, the number of women lawyers increased from four percent of the lawyer population to thirteen percent. Virtually all of this growth has occurred in the younger age groups. Today, approximately thirty percent of all American lawyers under the age of thirty are women. And the trend is ever upwards. I am told that more than fifty percent of the freshman class of New York University Law School this year are women.
- What does this vast horde of American lawyers do?
- Approximately seventy percent of them are in private practice. Thirteen percent are government lawyers. Nine percent work for private industry. The remainder teach, or work for public interest organisations, or are retired from active practice.
- Let me add some economic data on American lawyers in private practice. In 1983, the median income of private practitioners in America was $50,000; one-third of them earned more than $75,000; one-fifth of them earned more than $100,000. Their incomes tend to increase according to the size of their law firms. In 1982, the median income of partners in the largest New York law firms — those having 150 lawyers or more — was $232,000. To put that figure in perspective, only three percent of the private practitioners in America work in law firms that have more than 100 lawyers.
- Let me add a qualitative statistic. In a national survey of American lawyers, eighty-nine percent of them said they were happy with their career choice.
- By any objective standard, the profession in America appears to be in remarkably good health. It is growing. It is growing younger. Lawyers like their work. And they are prospering. This is not to say that the picture is uniformly bright. There are many things American lawyers don't do well, and many things they should do but don't do at all. But notwithstanding our shortcomings, the meaning of the statistics is unmistakable. The American bar is strong and vigorous. Lawyers in America have always played an important role in the political and social development of the country — a subject I will return to later. For better or for worse, that condition is certain to continue.

Differences

In looking at law practice in America, and in Ireland and the United Kingdom, perhaps the most striking difference is the absence in the American system of any formal separation between barristers and solicitors.

- This may be due in part to the geography in

America. There is no one central location, where Inns of Court — and the training and traditions of the English system — could take root and grow.

- A more important reason, I think, is the egalitarianism that runs through most American attitudes. A formal separation between the two branches might suggest elitism, and that just goes against the grain.
- Nonetheless, there is a distinct group of lawyers in America who specialise exclusively in trial practice. There are distinct groups of lawyers who specialise exclusively in other fields also — taxation, for example, or trusts and estates, or corporate law. But the differences in expertise are not formally recognised in the way in which the bar is structured. For that reason, the separate functions of solicitor and barrister, that you are accustomed to, are not so clearly defined in American practice.
- Many general practitioners in America, in smaller communities particularly, try cases, including some cases in the major trial courts, as part of a law practice which includes the full range of services furnished by solicitors in this country and the United Kingdom.
- The trial lawyer in America becomes involved in a case at an earlier stage than the barrister does here. As a general rule, the trial lawyer performs all the pretrial preparation, that may be performed in this country and the United Kingdom by the solicitor.

(a) The business arrangements in which trial lawyers engage in practice reflect this absence of any formal distinction between solicitors and barrister.

- Trial lawyers generally practice as members of a partnership of lawyers.
- They are considered specialists in their law firms, but only in the sense that lawyers who concentrate in other fields are also considered to be specialists.

(b) Another significant difference in American practice is the fact that contingent fee agreements are permissible.

- Lawyers representing plaintiffs in civil cases in America are permitted to enter into fee agreements, in which the fee is contingent upon the outcome of the case and typically is measured as a percentage of the plaintiff's recovery. A typical contingent fee in a personal injuries case — an automobile tort case, for example, or a products liability case, or a medical malpractice case — is one-third of the recovery.
- Contingent fee cases are not limited to personal injuries cases. Any case in which the potential damages are high, and in which the plaintiff cannot afford to pay a fee unless he wins the case, is a candidate for a contingent fee arrangement. Antitrust cases — in which the defendants are charged with conspiring together to restrain business competition — or securities fraud cases — in which the defendants are alleged to have sold or purchased shares of stock on the basis of false information — are examples of the types of cases that may be brought on a contingent fee basis.
- One effect of permitting contingent fee agreements is to create a plaintiff's bar. In virtually every city in America there are trial lawyers who specialise in representing plaintiffs in personal injuries cases on a contingent fee basis. In the major metropolitan centres, there are various sub-specialties within the plaintiff's bar. There are plaintiff's lawyers, for example, who specialise in securities fraud cases, or in the so-called toxic-tort products liability cases.
- The argument against contingent fees, of course, is familiar to all of you. There is a danger that a lawyer's professionalism and objectivity will be impaired, if he has a financial interest in the outcome of his client's case. The argument on the other side is that the contingent fee system enables people who have legitimate claims — but cannot afford to hire a lawyer — to be represented by able counsel. Another concern about contingent fees is that the fee percentage may be too high. A fee representing one-third of the recovery, in a particular case, may be far in excess of what the lawyer would receive if he billed on a standard *per diem* or hourly basis. This may seem at first blush to be unfair to the client, who perhaps feels that he is paying his lawyer more than the lawyer is worth. From a larger perspective, however, we must acknowledge that in other cases — in which the lawyer has performed valuable service, but in which there has been *no* recovery — the lawyer receives no fee at all. The contingent fee can be viewed as a form of insurance, by which the risk of failure of a plaintiff's case is spread among the successful plaintiffs, who can afford to pay. Put differently, it is a cost which reflects the fact that skillful trial lawyers are available to represent clients who cannot afford to pay a fee if they lose the case.

(c) Another important difference in American practice is the absence of your rule for the shifting of the costs of litigation.

- Here, the rule is that "costs follow the event". Party and party costs, including attorney's fees, are awarded to the prevailing party. In America — except in certain limited cases — there is no such rule. Each side pays its own attorney's fees, regardless of the outcome of the case.

(d) Now, at this point, I think that some of the major, underlying differences between trial practice in America, and trial practice here are beginning to emerge. Here, the prohibition of contingent fees is a disincentive to litigation. It is true that your cost-shifting rule may be an encouragement to litigation, in the few cases where a favourable outcome is reasonably assured. Those cases, however, are very rare. In the majority of cases, where the outcome of the case is doubtful, the cost-shifting rule is a disincentive to litigation. In America, these disincentives — the prohibition of contingent fees, and the cost-shifting rule — do not exist.

- One might infer from these differences that litigation happens more frequently in America than it does here. Whether this is true or not, I do not know. Accurate comparative data on case filings in relation to population, to my knowledge, have not been assembled. I strongly suspect that litigation happens more frequently in America than it does here, but I do not have proof.

- Where the differences show up clearly — that is, differences in the incentives and disincentives to litigation — is in the types of cases that are brought in American courts. There are many kinds of cases that are brought in America, that are not brought in this country or in the United Kingdom.

(e) A distinguishing feature of law practice in America is the importance of Constitutional litigation.

- The United States Constitution, which is a written document, like the Irish Constitution, contains guarantees of individual rights. This part of the Constitution, the so-called Bill of Rights, is really a prohibition against certain types of government action. It is a definition of what government constitutionally is *not* empowered to do.
- Constitutional rights can be enforced in America by a private action — in which an individual citizen is the plaintiff — brought against the offending government instrumentality.
- Not infrequently these cases raise issues of great public importance. Let me give some examples.
- Until the 1950s, in the Southern states, there were separate systems of public education for white children and black children. The constitutionality of that system of racially separate public schools was challenged — successfully — by court cases brought by the parents of black school-children.
- Another example: Electoral districts in America sometimes have been shaped in such a way as to dilute unfairly the voting power of a particular party. Court cases have been brought — successfully — by members of a disadvantaged party to have electoral districts declared unconstitutional.

- A complete listing of constitutional cases would be very time-consuming. It has been said that every important public issue in America ultimately finds its way into the courts. Indeed, the principal responsibility of the highest court in the land, the United States Supreme Court, is to decide constitutional cases.

(f) Let me move from substance to procedure. An important procedural device that is used in American courts is the *class action.* In a class action, one of the parties acts, not only for himself, but for other persons similarly situated, who are not named separately as parties and are not represented by separate counsel. All members of the class are bound by the final judgment, as fully as if they were named parties.

There are many kinds of cases that can be brought as a class action.

- Claims arising from an airline crash or train wreck, or other major disaster, for example, will likely be brought as a class action. In Kansas City a walkway in a newly constructed hotel collapsed, killing or injuring hundreds of people. As you know, the liability issues in a case like that are enormous. There are claims, or potential claims, against the ownership of the hotel, the management of the hotel, the architect, the engineer, the contractor, and who knows how many subcontractors. And those liability issues are identically the same, for *every person* who was injured or killed by the collapse of the walkway. The class action device permits all of those liability issues to be tried in one case instead of hundreds of cases. The time and effort of only one trial judge and one jury will be required. And on the plaintiff's side, there will be just one group of trial counsel, instead of hundreds. In the case I have just cited — the major disaster case — the damages issues are individual, not common, to the members of the class. They may be disposed of in separate mini-trials after — and if — there has been a plaintiff's verdict on liability in the class action trial. As a practical matter, once liability has been established, the damages claims probably will be settled and mini-trials will not be necessary.
- Any case in which *class* of people have claims arising out of the same fact situation is a candidate for class action treatment. Products liability cases, securities fraud cases, antitrust cases — any type of case that meets the class action requirements can be brought as a class action. This, of course, includes the constitutional cases that I referred to just a moment ago.

(g) A particular feature of American law practice makes class actions feasible, as a practical matter.

- What I refer to is the so-called "common fraud" rule, which is a rule requiring every member of a claimant class to pay his fair share of expenses, including attorney's fees, before receiving any portion of the proceeds of the case. Take, for example, a case in which the claimant class consists of two or three thousand people, each of whom has a claim of two or three hundred dollars. If the case is successful, the recovery for the entire class will be in the hundreds of thousands of dollars. The attorney's fees to accomplish that recovery will run in the ten of thousands, perhaps up to a hundred thousand dollars — far beyond the financial interest in the case of any one member of the class. Unless the person who is contemplating bringing a class action can compel the class members to contribute to his attorney's fees, the class action will never be brought. In America the "common fund" rule permits a class action plaintiff to do this.
- The rule in this country and in the United Kingdom, I understand, is different. In your practice, a class action plaintiff cannot compel class members to contribute to his attorney's fees. Each member of the class is entitled to his full share of the proceeds of the case, without offset for expenses. Under these ground rules, a class action simply is not feasible.
- So, once again, we have a practice in America, which is an incentive to litigation. And we have a different practice here and in the United Kingdom, which is a disincentive to litigation.

(h) Before leaving the subject of procedure, I should comment on the rules for *pretrial discovery* in American practice.

- Discovery in America is extremely liberal, much more so, I believe, than here and in the United Kingdom. The test of discoverability is not the trial standard of admissibility in evidence, but whether the information sought is "reasonably calculated to lead to the discovery of admissible evidence". Methods of discovery include: oral depositions, of parties and of non-party witnesses; production of records; written interrogatories; and medical examinations, in appropriate cases.
- If there is a case to be made, a diligent lawyer in America does not lack means to ferret out the evidence.

(i) One further observation about the legal system in America: legislative bodies in America have a tendency to enact statutes encouraging what are known as "private attorney general" actions. They do this as a means of furthering some perceived public interest.

- Let me cite two examples. The American antitrust laws prohibit "combinations in restraint of trade", by which we mean arrangements that will interfere with free and competitive markets. These statutes give a private right of action to any person who has been injured by a combination in restraint of trade, and provide that his damages will be equal to *three times* his actual loss. This treble damages feature is intended both to penalise the wrongdoer, and to encourage the bringing of antitrust actions by private parties. The legislative scheme relies heavily on private initiatives, to accomplish a public purpose.
- The Securities laws, which require full disclosure of information concerning publicly traded securities, are another example. These statutes give liberal rights of action to private investors injured by false or incomplete disclosures, as a means of furthering the public interest in the integrity of financial markets.

Why The Tendency in America to Encourage Litigation?

At the risk of overstating my case, I have come back repeatedly to this consistent tendency in the American system to encourage litigation. Lest you think that litigation is one of our popular national sports, I hasten to say that this is not so. Lawyers have never stood high in the public esteem in America; and notwithstanding the recent surge of young people into the profession, lawyers do not stand high in the public esteem today. The proliferation of lawyers and lawsuits in America has been vigorously criticised by some of our most influential public figures, including the Chief Justice of the United States, and the president of Harvard University, who, incidentally, is a lawyer and a former dean of the Harvard Law School.

Why then is there this tendency in America to encourage litigation? I will be bold enough to attempt to answer.

Historical Overview

The American tendency to encourage litigation, I believe, goes right back to the very beginnings of the country.

- The colonists who first settled New England were part of the religious and social strife that plunged England into civil war in the seventeenth century. They were impassioned believers, a fervently partisan people. In England, of course, there were two sides to the struggle. By the end of the century, the Monarchy had been restored. Over time, the passion of the Puritans was leavened by the conservatism of the Royalists. But in the American colonies, in New England particularly, there was really just one side. There was no Royalist constituency. The lesson from this struggle that was handed down in America, long after the passion had subsided, was the lesson that had been learned by the Puritans. And it has left its imprint indelibly on American thinking.
- In the Puritan experience, the ultimate protection against persecution by the Crown was the English Common Law.
- The importance of access to the courts, as the safeguard of individual freedom, became so central to the thinking of the American colonists that the Bill of Rights was added to the American Constitution.
- I suspect that there was something in the Puritan character that made them especially prone to litigation. In a recent article comparing the Canadian personality with the American personality, the author made the point that Canadians place a higher value on community interests than Americans do, and that Americans place a higher value on individual rights than Canadians do. I think this is true; and I think this trait in the American personality goes right back to the founding fathers, the early New England Puritans. They were a very self-righteous, self-centred lot. I am sure they were very difficult to live with. People who are concerned with community welfare are willing to overlook personal grievances, at least to some extent. The fiercely independent types, like the Puritans, are much more inclined to be confrontational.
- As history unfolded, the independent streak in the American character was reinforced. To be sure, there were people who came to the colonies who believed in the traditional social order, based on rank and subordination. But then the American Revolution came along. Those people sided with the Crown, and of course they lost. When the Revolution was over, they had to leave the country; and they moved to Canada. The Revolution was followed by the period of the American frontier, which lasted for about a hundred years. For the frontiersman, independence was not just a matter of personal style; it was a matter of survival.
- The end result is that the American ethos contains large doses of independence, egalitarianism, distrust of power and emphasis on individual rights. Combine this mixture with a turbulent history, massive immigration from different parts of Europe, a heterogeneous population and the industrial revolution, and you have a potent recipe for litigation.
- Indeed, a good case can be made for the proposition that the American court system has been one of our most effective tools for shaping the political and social development of the country. □

* *Gael Mahony is current President of the American Association of Trial Lawyers, and is a Partner in the Boston firm of Hill & Barlow.*

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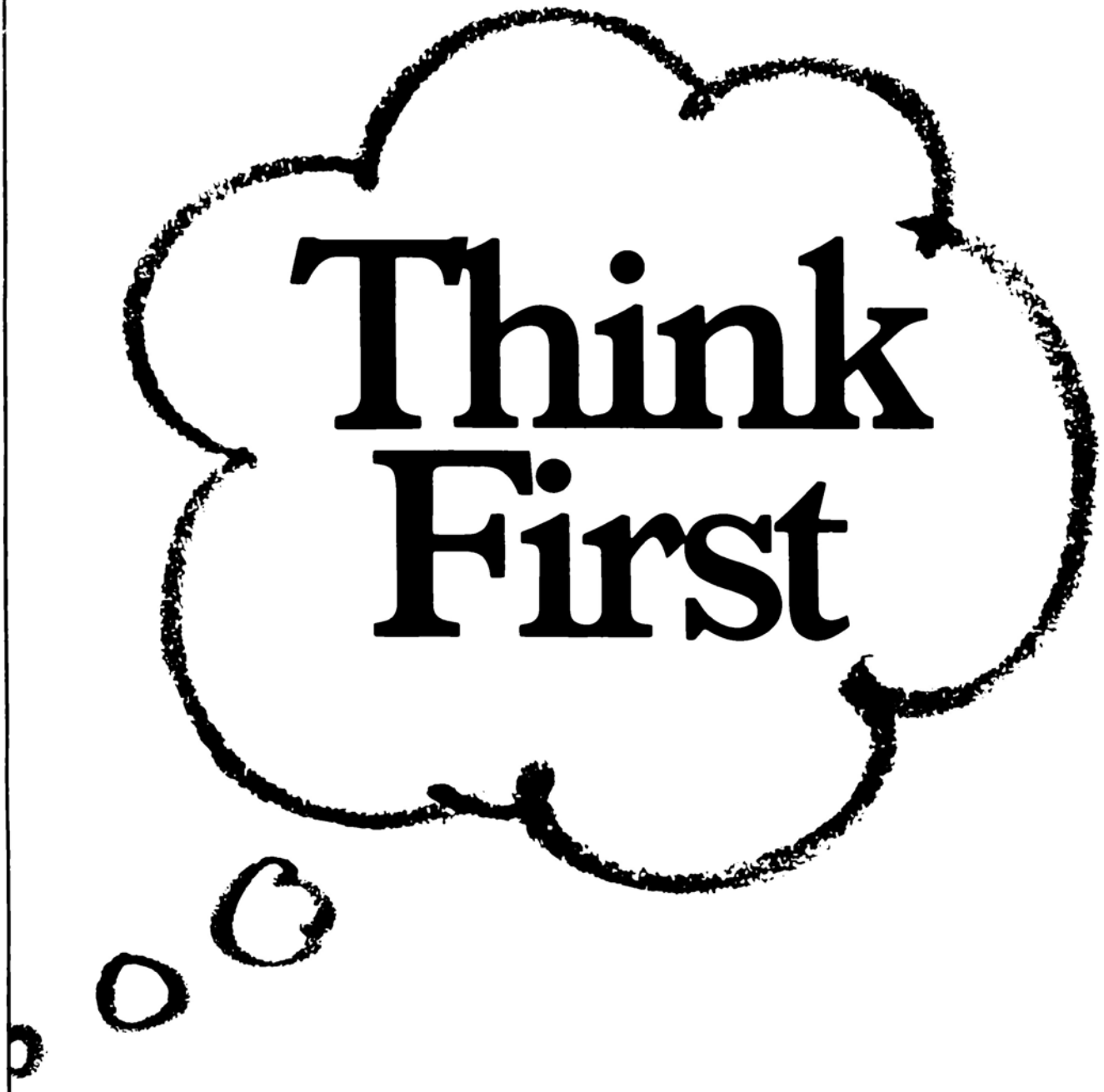

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Practice Notes

Companies Registration Office — New Company File Covers

On about 20 June 1984, this office started to use a new type of company file cover, in A4 size, which will be used for all companies incorporated after the changeover.

Accordingly, when the proposed new cover comes into use, documents of a size larger than A4 will no longer be accepted for registration.

Most documents presented for registration are supplied by this office and will be in A4 format.

This notice, therefore, applies mostly to Memoranda and Articles of Association and copies of resolutions. The co-operation of those preparing such documents will be appreciated. □

Vat — Agricultural Land

Following on correspondence and discussion with the Value Added Tax Branch, Office of the Revenue Commissioners, the following definition has been agreed.

"In the practical administration of the 5 per cent rate of VAT on legal services directly related to agricultural land, the term 'agricultural land' can be taken to mean farm land, parkland, bogland and the like. Farm buildings including glasshouses are excluded. As a general but not invariable rule, residential buildings are excluded unless:—

(i) the buildings have been used exclusively for residential purposes by the owner or occupier of the land; *and*

(ii) the area of the land being disposed of is 10 acres or more.

User at the time of disposal is the main criterion."

The foregoing definition will be operated on a trial basis for a year or so.

The Inspector of Taxes should be consulted in doubtful cases. □

For Your Diary . . .

3/7 September, 1984. **International Bar Association 20th Biennial Conference.** Programmes available from Margaret Byrne at the Law Society, Blackhall Place, Dublin 7 or from the IBA, 2 Harewood Place, London W1R 9HB.

14 September 1984. **Solicitors' Golfing Society.** Captain's Prize, 1984. Dundalk Golf Club.

17/19 September, 1984. **Intensive Course on Planning Law.** Centre for Environmental Studies, Law School, Trinity College, Dublin 2. Course Fee: £150.00 per person. Enquiries to Dr. Yvonne Scannell at 772941 (ext. 1997 or 1125).

EMPLOYMENT REGISTER

Members are reminded that the Society maintains an Employment Register for Solicitors. Those seeking employment and those Offices with posts to be filled are invited to contact The Education Officer, Ms. Jean Sheppard, The Law Society, Blackhall Place, Dublin, 7.

Incorporated Law Society of Ireland

CONTINUING LEGAL EDUCATION SEMINARS

20 July, 1984. **Debt Collection and Enforcement,** Blackhall Place, Dublin 7.

23 July, 1984. **Introductory Company Law.** Blackhall Place, Dublin 7.

30 July, 1984. **Introductory Company Law.** Cork.

24 August, 1984. **Labour Law.** Cork.

31 August, 1984 **Labour Law.** Blackhall Place, Dublin 7.

Further details of all seminars from G. Pearse.
Tel. (01) 710711

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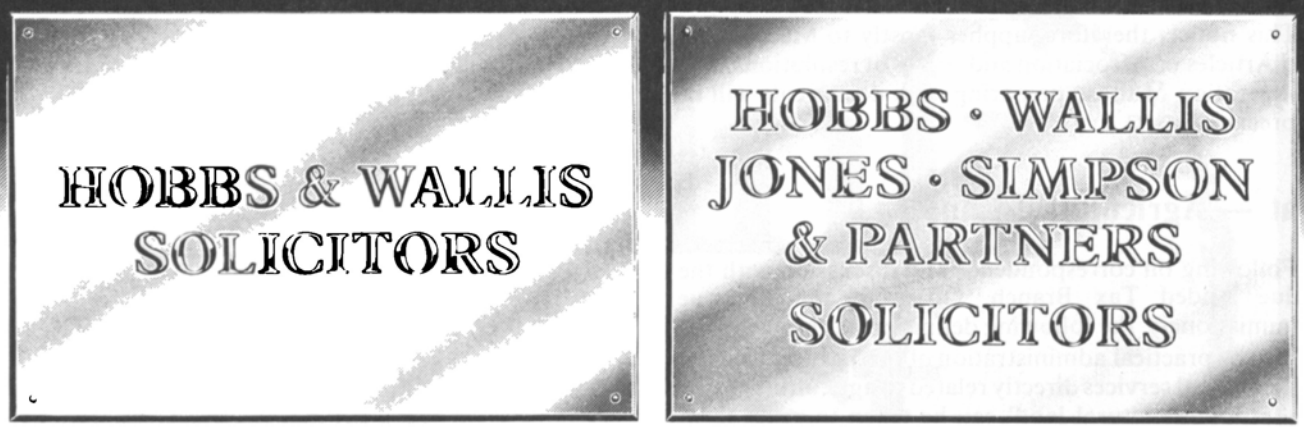

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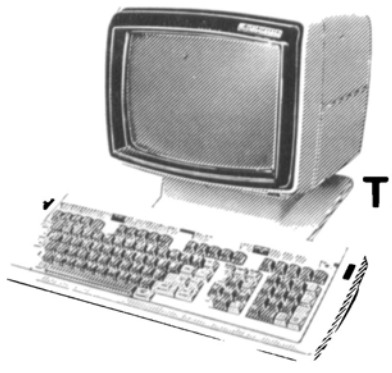

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Many topics at Half-yearly Meeting

THE need for High Court jury trials in Tralee, and for a Court Registrar for the second Circuit Court for criminal cases in Cork were among the points raised at the Incorporated Law Society of Ireland half-yearly general meeting in the Hotel Europe, Killarney, on May 4/5, 1984.

Welcoming the meeting to Killarney, the President of the Kerry Bar Association, Mr. Donal Browne, said that the holding of these meetings at country venues resulted in closer ties between the Council and Administration with country members. Representation of the local Law Society on the council resulted in members at local level getting reports of the Council of the Society and developing an appreciation of its many activities.

Commenting on the situation in Kerry, he said that every location in the country had its own problems; in Kerry there was great scenery, but unfortunately people could not eat it. On the other hand, the land was poor and in many cases not properly transferred for many years. This resulted in a low volume of conveyancing work and, at the same time, a considerable amount of difficulty for solicitors in the area. From the point of view of reflecting the local opinion, the Kerry Law Society found that its active participation in the affairs of the Council was most useful.

Mr. Browne also paid tribute to the President and the Director-General for the work they had undertaken on behalf of the members.

Formal proceedings

The notice convening the meeting was taken as read and adopted.

The Minutes of the Annual General Meeting, held on 18th November, 1983, which were published in the January/February 1984 issue of the *Gazette*, were taken as read and signed by the President.

On the proposition of Mrs. Moya Quinlan, seconded by Mr. D. Binchy, the following were appointed as Scrutineers of the Ballot for the Council for 1984/85:

Messrs. L. Branigan, G. Doyle, J. R. C. Green, E. McCarron, A. J. McDonald, P. C. Moore, P. D. M. Prentice and R. T. Tierney.

President's Tribute

Before making his address to the meeting, the President, Mr. Frank O'Donnell, referred to the death of Mr. Paddy McEllin, of Claremorris, a member of the Council. He paid tribute to the service given by Mr. McEllin to the profession over many years.

The members stood in tribute to Mr. McEllin's memory.

The President thanked Mr. Browne, President of the Kerry Law Society, for his welcome and encouraged other Bar Associations, which were not represented on the Council, to face up to the challenge of having somebody elected. He emphasised the importance of direct liaison between the local Bar Association and the Council of the Law Society.

The President then delivered his address to the meeting. A copy of this address is filed with the Minutes.

Retirement Fund

The Chairman of the Finance Committee, Mr. T. Shaw, reported on the present situation of the Retirement Fund, which was established in 1975. The current value is approximately £3.5m. and the increase in the past year was 30%. The average annual increase in the Fund over the nine year period was 35.6% which was free of tax.

Approximately 63% of the total Fund was invested in Ireland and the major external investments comprise E.E.C. fixed interest bonds, Japanese and U.S. equity investments representing approximately 25% of the entire Fund, with the balance of approximately 12% invested in the U.K. The number of members participating in the Fund had increased over the year, notwithstanding the very young age profile of the profession. Mr. Shaw referred to the tax advantages to be gained from participation in the Fund and recommended that members liaise with their own accountant in determining the maximum level of 'tax free' contributions.

He also drew attention to the Income Continuance Plan organised for the Society by Irish Pensions Trust Ltd.

Audits/Investigations

The Director General referred to a letter dated 11th April, 1984, received from Mr. T. C. G. O'Mahony, Dublin 2, contending that the Society was offending an important safeguard for members of the profession under the Solicitors' Acts 1954-1960, by arbitrarily directing and insisting that its accountant employee carry out audits/investigations of members' books, records and files and with a full disclosure of findings to members and other officials of the Society, such disclosure, including unrelated personal matters contrary to the intention and spirit of the said Acts. Mr. O'Mahony asked that that matter raised be considered at a Special Meeting of the Society to be convened by the Council. The suggestion of calling a Special General Meeting was not supported. It was agreed that Mr. O'Mahony be written to informing him that his proposal did not receive support at the General meeting and that the letter was taken as "Read".

Problem for Kerry

Mr. Louis O'Connell referred to the need for High Court Jury Trials in Tralee. As he saw it, the Cork doctors were going to charge more and more for going to cases in Limerick. He felt strongly that the ordinary person in Kerry was entitled to some consideration of the matter in High Court actions. The President said he was familiar with the lengthy delays in the High Court List in Cork. He understood that at the last sittings, there had been some improvement. The Limerick situation was good but, locally, there was a fear of backlog building up, due to the unsatisfactory situation in Cork. As far as Dublin was concerned, the High Court List was being "eaten up" at a rapid rate. The Society had made representations regarding the provision of a High Court in Tralee, but the most effective way to make representations was probably through An Tanaiste, who was a local T.D.

Other business

Mr. Moloney asked:—

> what was the position regarding the proceedings against the Minister for Justice *et al*?
>
> Since the itemised Schedule II figures were crazy, was it not wrong that the Society's representative on the particular Court Committee should be putting his name to a revision of the fees listed?
>
> Was it a case that contingent fees were going to be tolerated, since in his view, it would bring the profession into disrepute?
>
> Could a section of the *Gazette* be devoted to developments relating to costs?

The President replied that the particular Court case was at the 'discovery' stage. So far, the Society had spent £10,000 on the issue and the Council would now have to sit down to see if the Society was justified in proceeding further. In the matter of the charging of percentage costs, he had gone over the ground with most Bar Associations and the issue had been discussed within the Council. It was clear that the profession was looking for a lead from the Council. In the near future, he hoped it would be possible to issue a guideline which would be fair both to the public and to the profession. In the matter of the Schedule II costs, the question of accepting or otherwise, the increase allowed, had been fully discussed at the Council meeting before the relevant Order had been made, and the concensus was to accept the adjustment.

Cork Circuit Court

Mr. A. Comyn commented that while a second Circuit Judge was about to be assigned to Cork to deal with outstanding criminal cases, the official in the County Registrar's office, who would act as Court Registrar, had retired and he understood from the County Registrar that the person concerned would not be replaced. Mr. Frank Daly said the Southern Law Association was aware of the situation and intended making representations in the matter.

In reply to a query from Mr. Devine, the President explained that when there was reference to making professional indemnity insurance compulsory, this arrangement, if adopted, would have no effect on the Compensation Fund. The Compensation Fund covered fraud by solicitors holding clients' funds whereas, professional indemnity insurance was in respect of professional negligence on the part of a solicitor.

Mr. Doyle drew attention to the difficulty created for the profession by speeches delivered by members of the Council without due regard to the media impact. In this context, he referred to a recent address to members of the Law Students' Society in University College, Galway.

Concluding the discussion, Mr. Ken Murphy drew attention to the undesirability of describing the alternative programme as the 'Ladies Programme' bearing in mind that a significant number of the members of the profession were female. The President said that the point had been noted for future years.

This concluded the business of the meeting and the President declared the meeting closed. □

The Unconstitutionality of the County Rate on Land.

(contd. from p. 143)

> rationalises its decision in terms of the constitutional pattern as a whole. It articulates the character of the constitutional system and indicates the nature of its unity. Along broad lines, the Court is a rationalising and synthetising agency, and in this sense its work has value far beyond individual settlements. The Supreme Court had at least a greater degree of aloofness and a greater opportunity for achieving objectivity, and is has as part of its equipment the tradition of the unity of the law".

Salmond's views conflict with those stated by Friedmann in his "Legal Theory"[20],

> "The great American judges of the present century have looked at the issues and at the statutes before them and they have balanced verbal and grammatical texts against legislative measure and social purposes in varying mixture. This can hardly be otherwise, for statutes differ greatly in scope, purpose, drafting and meaning. It is easy to appreciate the social purpose of a social reform statute; it is far more difficult to distil the social purpose of a broad constitutional provision."

It may well be that the Supreme Court could have considered the constitutionality of the Valuation Acts in more detail, if they had borne in mind the above sentiments expressed by both Swisher and Friedmann.

Footnotes

1. [1982] IR 117.
2. Supreme Court, 2 December, 1967, unreported.
3. (1973), 109 ILTR, 1.
4. [1972] I.R. 330 at p. 334.
5. [1972] I.R. 1. at p. 34.
6. [1976] I.R. 38 at p. 50.
7. (1963) E.C.R. at p. 178.
8. [1972] I.R. 1 at p. 13.
10. [1965] I.R. 294.
11. [1980] I.R. 102 at p. 130.
12. [1982] I.R. 241.
13. (1973), 109 ILTR 68.
14. *McGee -v- Attorney-General* [1974] I.R. 284.
15. [1965] I.R. 217 at p. 239.
16. [1965] I.R. 294.
17. (1949) ILTR 113.
18. [1966] I.R. 451.
19. [1934] I.R. 44.
20. 5th edition (1967) at p. 462.

Law Directory 1984 Erratum

The following entry was omitted:

LARKIN, Mary Emer, B.A. (N.U.I.) (Summer 1976). John C. Murphy & Co., Solicitors, The Square, Gort, Co. Galway. Tel. (091) 31022. (Pearts).

A Forum for New Firms

by
John Schutte, B.C.L., Solicitor

While chatting to a colleague over lunch about the mutual problems which we both experienced as a result of having set up in practice I realised that many other young solicitors had set up during the last year or two and that they must all be going through the same "teething problems". As a result of this conversation we decided to contact a number of our friends who had recently established their own firms with a view to setting up a discussion group.

What resulted from these tentative enquiries turned out to be something more exciting and enthusiastic than either of us had ever thought possible. Most of the recently established firms were one or two man practices whose principals had said that they had become very isolated after setting up. Many of the people we contacted had worked as salaried assistants in larger firms and now found themselves cut off from their colleagues. As a result they were excited at the possibility of meeting other solicitors to discuss legal and administrative problems.

Self Help

We decided to call the discussion group "FORUM" as it would be a meeting place for different ideas. The idea of "FORUM" was to allow solicitors to come together on a regular basis and to air their views, exchange ideas and generally help each other with the problems which we all had to face in going into practice, developing our business and providing a better service.

"FORUM" was intended to supplement the services of the Law Society and various Bar Associations which have to look after the interest of the profession as a whole rather than a relatively small section of the profession such as newly established firms.

Hopefully, the experience which we have had in setting up "FORUM" might encourage other groups of young firms to set up similar organisations in their locality around the country as we feel the problems of setting up in practice must be common throughout the country.

After two exploratory meetings of the group to focus attention on problem areas, it became clear that "FORUM" could help us in a number of ways. It could help us improve our service to our clients, our office efficiency, our life style and our bargaining power.

Improved Service

The improved service to clients came from the fact that we set up a Directory of Members. The Directory published the name, address and phone number of each member and also any areas of specialised knowledge presented by that member. It was agreed that members would be free to telephone each other for an informal second opinion on any legal problem. If some members had a specialised knowledge they were expected to share it. This meant that a client coming to one member of "FORUM" would have the benefit of the knowledge and experience of other members in an indirect way. This idea of informal second opinions is very popular in the U.S.A. We also came up with the idea of members sharing their library facilities which would mean greater access to information for each individual member.

Improved Efficiency

Improved office efficiency came partly through sharing facilities such as outdoor clerks, photocopiers and computers. Lectures and discussions have been held on book-keeping, V.A.T., legal fees, and general business development.

Improved Life Style

Members of "FORUM" found that they were working longer hours by being self-employed and that they had difficulty in taking holidays. By developing greater efficiency in administrative matters such as book-keeping and sub-delegating of work to outdoor clerks the long hours could be shortened. We also reached an informal arrangement whereby members who were going on holidays would be able to have "Locums" to supervise their office in their absence.

Many sole practitioners find themselves cut off from their fellow professionals. "FORUM" meetings always incorporate an aspect of socialising and last Christmas a joint office party was organised for "FORUM" members which was a great success.

Improved Bargaining Power

By grouping together as "FORUM" we found that we could obtain discounts and better service from people with whom we did business. Office suppliers were prepared to give 10% to 15% discounts to members. Communication companies offering Pageboy "Bleeps" gave special group discount. Printers offered discounts or free art work to our members. Other areas that come up for discussion, but have not yet been acted on, are negotiating special rates for service and maintenance agreements on office equipment and also perhaps negotiating special rates for professional indemnity insurance and life policies.

Meetings

"FORUM" meetings are held every six to eight weeks. Sometimes a guest lecturer is invited but members are always expected to participate by contributing ideas. The meeting does not try to come to a consensus on any matter that is up for discussion and each member's views must be respected. "FORUM" allows people to air their views and exchange ideas. Each person will probably get something

different from the discussion although frequently a general solution is found for the problem being discussed.

Co-operative Effort

Most of the members of "FORUM" run small offices. Our discussion group is more of a co-operative than anything else and everybody is expected to help out with their time and ability. "FORUM" has helped us overcome our sense of isolation and powerlessness and has encouraged us to set higher standards in the practice of our profession.

If there are readers who would like to know more about setting up a similar discussion group I would be only too happy to discuss the matter with them and to give them any help or advice I can. □

Law Society Half-yearly Meeting May 1984

The President of the Incorporated Law Society of Ireland, Frank O'Donnell (3rd from left) with (left to right) Peter Sutherland, Attorney General, Wallace Riley, President of the American Bar Association, Chris Hewetson, President of the Law Society (England), Alexander McIlwain, President of the Law Society of Scotland and Gael Mahony, President of the American College of Trial Lawyers.

The Unconstitutionality of the County Rate on Land

by
Colum Gavan Duffy, M.A., LL.B.
Lecturer in Law, University College, Galway

ON 23 July 1982, Mr. Justice Barrington, after an extensive hearing of 14 days, delivered a most learned and historic judgment on the constitutional effect of the Valuation Acts from 1852 to 1964, in the case of *Brennan and Others -v- Wexford County Council and Attorney-General.* Briefly, the plaintiffs succeeded in obtaining a declaration of inconsistency with the Constitution in respect of Sections 11 and 34 of the Valuation Act 1852 and a declaration of invalidity in respect of the other impunged statutory provisions, in so far as they related to the Valuation Acts. The Plaintiffs also obtained a declaration of invalidity in respect of the valuation placed on their own lands. The Supreme Court (O'Higgins C.J., Finlay P., Walsh J., Henchy J. and Griffin J.) upheld the High Court decision in a single judgment (per O'Higgins C.J.) on 20th January 1984.

The four plaintiffs, who were all members of the PLV. Action Committee of Co. Wexford farmers, claimed these declarations against Wexford Co. Council and the Attorney General; Wexford Co. Council was allowed to withdraw from the case from the outset.

Under the Valuation Acts and amending Acts, the valuation of the lands and buildings of Ireland, by reference to an estimate of the annual land value, was carried out from 1852 to 1866 by Sir Richard Griffith. In the course of these 14 years, agriculture became more prosperous and rents rose consequently all over Ireland. Griffith prepared "Instructions to Valuation" which gave guidance in analysing the quality of the soil and underlying rock. Section 34 of the 1952 Act contemplated that there could be a general revaluation of all the lands of Ireland from time to time; and revisions were provided for every 14 years, but none in fact were ever undertaken. However, the original land owner, unlike the owner of buildings, had no right of appeal. In 1902, the Royal Commission on Local Taxation stated that the Irish valuation system was completely out of date, but nothing was done and no further revaluations have been carried out to the present day.

The plaintiff, Brennan, had a farm of 64 acres near New Ross, and the other three plaintiffs had farms of from 106 to 150 acres in other parts of Co. Wexford. Each valuation of the plaintiffs' lands represented the original rateable valuation which determined the liability to the State to pay income tax, resource tax and health contributions and the liability to the Wexford County Council to pay rates subject to reliefs. The plaintiffs claimed that their present valuation, as originally assessed, bore no true relationship to the real value of their land, and were wholly inconsistent on the double ground that these valuations were fixed as a result of limited scientific knowledge after the Famine of 1845, and were also fixed in relation to commodity prices prevailing between 1849 and 1851. Because of these factors the plaintiffs contended that these rateable valuations constituted an arbitrary, unjust and inequitable basis for the imposition of taxes; and that, consequently, the Valuation Acts constituted an unjust attack on their property rights contrary to Article 43 of the Constitution. They also claimed that the failure of Parliament to allow them a right of appeal violated the basic right of fairness guaranteed by Article 40 (3) of the Constitution.

The aim of the Valuation Act 1852 was to have one uniform system for the valuation of lands. As stated, Section 34 of that Act (as applied) provided that a County Council could apply to the Minister for Finance every 14 years from the last general valuation for a revaluation, but this had never been done in the Republic. In Northern Ireland, quinquennial valuations were introduced in April 1936. During the course of the High Court hearing evidence was given by the four plaintiffs, by two soil scientists; by the property arbitrator and three auctioneers; and by a farm consultant and a statistician. All the expert witnesses for the plaintiffs conceded that there was a relationship between valuation and the price of farms, because larger farms had a higher selling price than hill farms. A number of examples of the inconsistencies of valuation were given, e.g., the plaintiff, Clancy, farmed 106 acres, and his rateable was £105.50, whereas, his brother who had 32 acres of superior arable land useful for tillage or pasture, had only a valuation of £62.50.

Plaintiffs' Submissions

After full consideration of all the evidence, the High Court was satisfied with the validity of the following submission (as also, on appeal was the Supreme Court):

(1) The existing valuation system did not provide a uniform system for valuing lands.
(2) There was no consistency between one county and another.
(3) The Valuation system had failed to reflect the changing patterns of modern agriculture.
(4) The whole system was shot through with anomalies and inconsistencies.

The plaintiffs relied on the following Articles of the Constitution for relief:— Article 43; Article 40 (1); and Article 40 (3).

As regards Article 43, the Supreme Court decision in *Blake and others -v- Attorney-General*[1] was followed, in which it was stated that Article 43 did not say what the

rights of property were, but only recognised private property as an institution and forbade its abolition; and that the rights in respect of particular items of property were protected by Article 40 (3).

As regards Article 40 (1) the plaintiffs submitted that, because the Valuation Acts failed to provide a rational and fair system of valuing the property of citizens, the Acts failed to hold citizens equal before the law. In the High Court, Barrington J. stated that the concept of equality before the law was the most difficult and elusive concept in the Constitution. As O'Dalaigh C.J. stated in *the State (Hartley) - Governor of Mountjoy Prison*[2] 2)

> "A diversity of arrangements does not affect discimination between citizens and their rights. Their legal rights are the same in the same circumstances."

See, also, Finlay P. in *Landers -v- Attorney-General*[3]. As Kenny J. stated in *Murtagh Properties -v- Cleary*[4]

> "Article 40 (1) is not a guarantee that all citizens shall be treated by the law as equal for all purposes, but it means that they shall, as human persons, be held equal before the law. It relates to their essential attributes as persons."

The learned Judge had already expressed identical views in *Quinn's Supermarket -v- Attorney-General.*[5] See also Pringle J. in *De Burca -v- Attorney-General.*[6] The net result is that Article 40 (1) is not dealing with human beings in the abstract but with human beings in society.

The plaintiffs' basic complaint was that the unit of measurement employed was so outdated and inaccurate that it failed to achieve the legitimate purpose of classifying landholders by reference to the value of their lands which the legislature had in mind, and consequently could not make relevant distinctions. The unintentional effect was that equals were treated unequally and unequals equally. As was stated in *Italy -v- European Commission*[7]

> "discrimination in substance would consist in treating either similar situations differently, or different situations identically."

The High Court held that the Valuation Acts did not respect the plaintiffs' rights to equality before the law in relation to their property rights; but the Supreme Court reversed this finding and held that Article 40 (1) dealt only with the citizen as a human person, and required for each citizen as *a human person* equality before the law; and that, consequently, a system of taxation imposed on occupiers, which had proved to be unfair and arbitrary and even unjust, was not cognizable under Article 40 (1). See judgment of Walsh J. in *Quinn's Supermarket -v- Attorney-General*[8]. The inequality of which the Plaintiffs complained in this case did not concern their treatment as *human persons* but rather concerned the manner in which as *occupiers and owners of land* their property was rated and taxed.

The three submissions made by the Plaintiffs in relation to Article 40 (3) with regard to their property rights, (which were in fact one comprehensive submission, as emphasised in *Re Haughey*[9] (a) were: (i) The existing valuation system constituted an unjust attack on property rights; (ii) One of the unspecified rights of the Constitution protected by Article 40 (3) under the decision in *Gladys Ryan -v- Attorney-General*[10] was the taxpayer's right to a non-arbitrary, rational and consistent tax system; (iii) The Valuation Acts denied to the plaintiffs the fair procedures contemplated by Article 40 (3).

Article 40 (3) (1) reads as follows:

> "The State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen."

Article 40 (3) (2) reads as follows:

> "The State shall, in particular by its laws protect as best it may from unjust attack, and in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

The obligation "to defend" and "to protect" in Article 40 (3) refers primarily to the activities of the State in guarding citizens against the unconstitutional actions of third parties. Consequently these words are limited by the words that follow "as far as practicable" and "as best it may" while the obligation "*to respect*" appears to be absolute. But this obligation "*to vindicate in the case of injustice done*" may arise as much from the wrongful acts of third parties as from the wrongful acts of the State. Kenny J. had already stated in the Supreme Court in *Crowley -v- Ireland and the Minister for Education*[11]

> "The obligations imposed by the State in these subsections is as far as practicable *by its laws* to defend and vindicate the personal rights of the citizen. It is not a general obligation to defend and vindicate those rights. It is a duty *by its laws,* for it is through laws that the State expresses the will of the people who are the ultimate authority."

There has been in fact no revision of the agricultural prices prevailing in 1849-52; yet in the intervening 135 years a total revolution has taken place in agriculture. The introduction of modern drainage and of mechanisation and the use of lime and artificial fertilisers has made valuable lands previously thought to be poor. The old system of valuing lands had not taken into account any of these factors, nor had it taken into account the influential social factors such as the overthrow of landlordism, the system of freehold farming and the revolution in transport as well as in agricultural marketing and prices implied by Ireland's entry into the European Economic Community. It followed that in the High Court Barrington J. held that the Valuation Acts and the consequential property valuations of the plaintiffs' lands did not respect the property rights of the plaintiffs under Article 40 (3). The Supreme Court upheld Barrington J. on this point by stating that the complaints of the plaintiffs that Article 40 (3) had not been observed, were fully justified; that the lack of uniformity, inconsistencies and anomalies were of themselves an unjust attack on the property rights of the plaintiffs in finding themselves with poor land for which they paid more than their neighbours with better land.

A.G.'s Submissions

Consideration should now be given to some of the arguments made by the Attorney-General on behalf of the State, as restated by the Supreme Court. The arguments were as follows:

1. In using the Valuation Acts for assessing rate liability, the State was exercising its true functions

in relation to taxation and fiscal policy. The State had a special obligation in this regard, and the Courts should only interfere with extreme caution. The Courts should not rule a Revenue statute unconstitutional unless it could be reasonably justified — See *Murphy -v- Attorney-General*[12]

2. As regards Article 40 (1), there was no failure to treat citizens equally as human persons in the use of existing valuations. The valuation is concerned with land and does not discriminate between persons.

3. As regards Article 40 (3), the High Court had held with the plaintiffs mainly because of a failure to respect personal rights. The plaintiffs' case should not have been based on discrimination and unequal treatment but rather on an unjust attack on property rights. The fact that one ratepayer was obliged to pay more rates than another under a different valuation system was not an unjust attack on property rights (see *Central Dublin Development Co. -v- Attorney-General*[13] and *McGee -v- Attorney-General*[14].

4. It was not established that the existing anomalies were so widespread as to make the valuation system lack any reasonable basis. The failure to provide means for the revision of valuation could not lead to the conclusion that the system was unconstitutional.

5. In the High Court it was contended that if a pre-constitutional statute, enacted before the Constitution came into force on 29 December 1937 was amended by a post-constitutional statute after 1937, it obtained the benefit of the presumption of constitutionality. In that case, such a statute should not be ruled unconstitutional unless no other construction were reasonably open. (See *McDonald -v- Bord na gCon)*[15]. The valuation system was in existence in 1937 and formed then the basis of local taxation.

In response to these arguments the High Court held that:

(1) The Court should not enter on a consideration of the relative merits of the different forms of taxation, which are primarily matters for the legislature.

(2) Kenny J's views in *Gladys Ryan -v- Attorney-General*[16] about acting with caution and being slow to interfere should be accepted.

(3) One was not dealing with fiscal or revenue matters but only with problems of measurement; and that the Valuation Acts were essentially concerned with measuring the value of lands.

(4) The question whether the Valuation Acts did or did not enjoy the presumption of constitutionality was not important; that it is permissible to look at the state of affairs as it existed in 1937; but that a statute of the British Parliament must be read as having its meaning on the date of its enactment; and that whether the pre-constitutional statute was or was not consistent with the Constitution, it was immaterial whether that statute was carried forward by Article 50 of the Constitution.

Supreme Court Decision

The arguments on appeal were heard by a full Supreme Court in December 1983 and that Court delivered a single judgment on 20th January 1984. The single judgment rule which was added to the Constitution in 1941 under Article 34, (4) (5) prescribes that in relation to the constitutionality of all statutes passed after the date in which the Constitution came into force (i.e. 29th December 1937) — only one single judgment may be given, and no assenting or dissenting judgments should be disclosed.

The judgment of O'Higgins C.J., was based on the constitutionality of Section 11 of the Local Government Act 1946 and it was decided that the collection of the county rate *independently of buildings* propounded in the said Section was invalid having regard to Article 40 (3) of the Constitution. In examining the submissions made, that Court at first acknowledged the full and careful judgment of Barrington J. in the High Court and admitted the necessity to refer to the historical background of local taxation; but then the Supreme Court defined narrowly the Valuation Acts as "so much as is now repealed of the Valuation Act 1852 and of the five amending Acts of 1854, 1860, 1864, 1874, and 1901; and that under the Local Government Act (Ireland) 1898, the administrative and financial functions of the former grand juries were transferred to newly constituted County Councils, and the former cess was merged in the existing poor rate; and that, from then, all sums required to be raised by way of local taxation were raised by means of the poor rate.

The Court then came to the conclusion that it was unnecessary to consider the many changes that had since been made in the machinery of local government; and that it was sufficient to say that the term "Poor Rate" continued to be applied to the method of raising taxation until the Local Government Act 1946. Under this 1946 Act a County Rate was established for County Councils and a Municipal Rate for urban authorities. Section 11 of the 1946 Act obliged County Councils to raise money by means of the "poor rate". This latter phrase, though not defined, is a well-known phrase in Local Government law. Section 11 defined the manner in which the County Rate was to be levied, and Section 12 defined a County Rate. The Court concluded that, in so far as land was concerned, the linking of the County Rate with valuations determined under the Valuation Act 1852 was now to be replaced by Section 11 of the 1946 Act; and that the constitutional challenge raised in this action had necessarily to confront Section 11. Formerly the only possibility for a revision of a land valuation had been prescribed by Section 34 of the Valuation Act 1852; but that while the general intention of Section 34 was to provide a scheme for the periodic updating of land valuations throughout, those powers were in fact never availed of.

The real question, as perceived by the Supreme Court, was whether the use of these valuations accorded with the Constitution, that so far as the Constitution was concerned, there did not appear to be anything of significance in the making of the valuation of land; and that the fact that land was undervalued by an incompetent valuer in no way harmed the land or changed its character. In the same way the overvaluing of poor land did not in any way alter the true value of the land. What was of concern was the use to which the valuation was put by the State or by the local authority. For these reasons, the Court reached what seems to be an

(continued on p. 143)

BOOK REVIEW

Planning and Development Law by The Hon. Mr. Justice Edward M. Walsh. Second Edition by The Hon. Mr. Justice Ronan Keane. The Incorporated Law Society of Ireland. Price £15.00.

Law thrives on tension — up to a point anyway. For the past few years Local Authorities have been writhing in the grip of the Planning Acts, and the struggle has resulted in extensive and substantial changes in the law — so much so that a new edition of the late Judge Walsh's book is entirely justified.

The first edition was published in 1979. Since then, the Planning Acts of 1982 and 1983 have been enacted. Offences against Section 24 of the original Act, which is the ordinary controlling provision directed against unauthorised development, have become indictable offences, and the penalties have been enormously increased. Section 27 of the 1976 Act, which was probably designed for infrequent use in special cases, has been widely and frequently employed and the High Court has shown no reluctance to enforce and develop the new procedure. This is fortunate in so far as it relieves Planning Authorities to a great extent from the problems associated with Enforcement Notices.

There have been other important changes. Withering Planning Permissions have been introduced, significant changes have been made in the planning appeals procedure, planning fees have been imposed, An Bord Pleanala has been totally reconstituted and its powers extended. In addition, there have been a number of important judicial decisions as, for example; *The State (Pine Valley Developments Ltd.) -v- Dublin County Council* [1982] 2 ILRM 169, *O'Neill -v- Clare County Council* [1983] 3 ILRM 141, *Byrne -v- Dublin County Council* [1983] 3 ILRM 213, and many others, (some unreported, but fully noticed in the book under review). In the light of all this, the new edition is timely and welcome.

As one would expect, there are no radical changes. The general format and presentation is similar. The pages are slightly smaller, but there are more of them and the text is clearly printed and well arranged. It is easier to find your way around the new edition. The book benefits greatly from the fact that both the late Author and the Editor share a gift for brief lucid exposition and sensible comment. One gathers that the affection and esteem in which the late Judge Walsh is held, played a part in the obvious care and attention to detail which make the new edition valuable and a worthy tribute to the distinguished and lamented author.

Building Bye-laws and control under the Housing Act, 1969, are now dealt with more naturally in a separate chapter. There is a new section on the Local Government (Water Pollution) Act, 1977. There is a new Chapter entitled "Other methods of securing planning objectives" — which sounds a bit sinister, but lawful methods only are discussed.

A Judge of the High Court in full career must sometimes feel inhibited in discussing current legal matters, and particularly matters which have come under the notice of the Supreme Court as well as of his brethren on the bench. The academic writer can give free expression to his views provided he propounds them with

some colourable show of deference. Judge Keane deals skilfully with this difficulty. While he is always urbane and respectful, it is possible to conclude that he has feelings of unease and reserve about *Frascati Estates -v- Walker* as it is usually understood, *Weir -v- Dun Laoghaire Corporation* (Supreme Court, 20th December, 1982, unreported), and about *Dublin County Council -v- Baily Holdings Ltd.* and *Dublin Corporation -v- Helmsdale Co. Ltd. and Anor.* Many will share his misgivings.

This new edition states the law as at 1st November, 1983 and will answer many of the common questions that arise in the context of Planning. □

William Dundon

The Unconstitutionality of the County Rate on Land (continued from p. 139)

unusual finding — namely that the declarations sought in respect of the Valuation Acts ought not to have been sought, and, having been sought, ought not to have been granted by the High Court. The relief sought by the plaintiffs consisted of a declaration that the Valuation Acts from 1852 to 1864 were repugnant to the Constitution and void, as well as a declaration that various other statutory provisions were unconstitutional, and also relating to consequential decisions affecting the imposition of taxes. The relief sought by the plaintiffs was based on a plea that the rateable valuations constituted an arbitrary, discriminatory and inequitable basis for the imposition upon the plaintiffs of taxes and contributions.

The plaintiffs had succeeded in the High Court in obtaining a declaration of inconsistency with the Constitution in respect of Section 34 of the 1852 Act and a declaration of invalidity in respect of the other impugned statutory provisions in so far as they related to the Valuation Acts. Such use had ceased either by repeal or by administrative action. It followed that the Plaintiffs should apparently have sought a declaration of invalidity under Section 11 of the Local Government Act 1946; that the Griffith valuation was many years out of date, had never been revised, was inconsistent even within the same County, and consequently lacked fairness and uniformity. On this basis the Supreme Court held that Section 11 of the Local Government Act 1946, to the extent that it authorised the collection of the county rate on land independently of buildings, was invalid having regard to Article 40 (3) of the Constitution.

Review of Decision

With great respect, it seems curious that, for the reason that the valuation was not pertinent to the Constitution, the Supreme Court was of opinion that the declaration in respect of the named sections of the Valuation Acts ought not to have been sought in the High Court, and, having been sought, ought not to have been granted. It would seem that the dictum of Gavan Duffy P. in *Devanney -v- Dublin Bord of Assistance*[17] that — "I proffer my solution with all the diffidence of an ill-equipped explorer who penetrates an unknown land as I make my painful way through an unexplored administrative code" — deserved consideration, and that consequently the constitutionality of the vital impunged Sections of the Valuation Acts deserved to be decided separately. This would have had the inestimable advantage that it would have been possible for each Judge of the Supreme Court to have given a separate judgment, instead of the decision being confined to a single judgment. There was nothing to prevent the Court from delivering a separate single judgment on the constitutionality of Section 11 of the Local Government Act 1946 if it wished.

One of the indirect results of this judgment appears to be that historical legal research is hardly to be encouraged, if a modern statute passed since the enactment of the 1937 Constitution can be relied upon to determine the constitutionality of the case. Unless there had been a previous decision of the House of Lords to the same effect, it is hardly conceivable that, if this case had been heard by the House of Lords, one of the Law Lords would not have considered in the greatest detail the meaning to be attached to the expression "poor rate" between 1852 and the present day, if he considered it necessary. The careful and well researched High Court judgment of Barrington J. in this case could well have been decided on the ground of infringement of Natural Law rights, instead of on the constitutionality of the Valuation Acts.

Some examples of legal historical judgments, though not referring to the Constitution, may well be mentioned. Budd J. undertook a deep historical study of the history of the Royal Hospital, in *In Re Royal Hospital, Kilmainham*[18] to determine whether or not that institution was a legal charity. In *Moore -v- Attorney-General*[19] the plaintiffs claimed a several fishery in the tidal waters of the River ERNE. The majority of the Supreme Court (Kennedy C.J. and Murnaghan J.) had upheld the claims of the defendants on the grounds that as no several fishery existed on the River Erne before the death of Henry II, there was consequently no English law in existence at that time in that area. It seems difficult to conclude that such vital evidence would not be admissible if those cases could have been determined in relation to their constitutionality of a statute passed after the Constitution had come into force.

In "American Constitutional Development", 2nd edn. (1954) at p. 820, Swisher states:

> "The American Supreme Court was entangled many times in the intricacies of rate-making for public utilities. The problems involved as much economic theory and practice as law. The conceptions of legally trained Judges as to the reasonableness of highly complicated financial arrangements determined decisions on constitutionality. Although not mentioned in the Constitution, its point of contact was the due process clause of the Fourteenth Amendment. In *Smyth -v- Ames* — 169 U.S. 466 — [1898], the Supreme Court decided that rates fixed by government must allow a fair return upon a fair value of the property. As to the fair value, the Court said that original cost, market value, earning capacity, cost of operation were to be considered in measurement, but it gave no indication as to how these several factors were be be weighed. But, unfortunately, the Supreme Court remained without a scientific approach to the problem and without any definite rules."

It would therefore seem that in concentrating on measurement, Barrington J. was only following the lead given to him by the American Supreme Court.

In this case, the Supreme Court appears to have accepted the definition of positivism propounded by Salmond on Jurisprudence:

> "Law may be defined as the body of principles recognised and applied by the State in the administration of justice. In other words the law consists of the rules recognised and acted on by the Courts of Justice."

In this definition the notion of the Constitution as the fundamental law is rejected.

Professor Swisher's views, expressed in his book, "The American Supreme Court in Modern Role (1958) deserves consideration. He said at p. 65:

> "There is a judicial function that is in itself positive. Whether in the process of stopping Government action or refusing to stop it, the Supreme Court

(continued on p. 134)

Correspondence

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

15th May, 1984

Dear Sir,

Re: A.G.M. 1984

I was very interested to read the letter from Michael O'Malley regarding the Report of the small attendance at the Society's A.G.M., and his purported reason for not being able to attend it.

Perhaps members are not aware, possibly because they do not attend, and may not even read the Reports of A.G.Ms., that the date for the following A.G.M. is always fixed one year in advance.

I quite frankly find that the excuse, which has been made for many years, of the timing of each A.G.M., is facile, and I believe that even if Mr. O'Malley's suggestion were to be followed, members would fail to attend equally as they have in the past.

It seems to be forgotten that an Annual General Meeting of members does have a purpose, and that is for members to voice their opinions on the running of their Society. Over the many years that I have been present at A.G.Ms., the attendance has always been derisory, and is an indication of the apathy of the members.

If members are really interested in what goes on within the Society, they will find no great difficulty in making the effort to attend the A.G.M.

Yours etc.,
Quentin Crivon,
Solicitor,
94 Lr. Baggot St.,
Dublin 2.

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

17th May, 1984

Dear Sir,

Re: A.G.M. 1983

I merely write to add support to the sentiments expressed in Michael O'Malley's letter, the April issue of the *Gazette.*

Yours faithfully,
Bernard Gogarty,
Solicitor,
30 Magdalene Street,
Drogheda.

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

14th May, 1984

Dear Sir,

Re: Section 45 Land Act 1965

I note with interest the reference on page 73 of the *Gazette* for April 1984 on the subject of Statutory Instrument No. 144/1983.

Immediately after the Statutory Instrument came into force we had cause to act for two British citizens in the purchase of a rural property, and as such were obliged to draft the necessary Certificate for the Transfer which was settled in consultation with the Land Commission, the Land Registry and the Building Society's solicitors in question. The following is the form of Certificate:

"AND IT IS HEREBY (FURTHER) CERTIFIED by A.B. and C.D. who become entitled to the entire beneficial interest in the property transferred as follows:

(a) That they are both (British) citizens and as such are each citizens of a Member State of the European Economic Community.

(b) that they both intend to live permanently in Ireland and as such are both exercising their rights of establishment under Article 52 of the Treaty of Rome,

(c) that each of them is self-employed.

and as such are persons not requiring the consent of the Land Commission within the meaning of Section 45 of the Land Act 1965."

From our consultations with the Land Commission it is clear that the Commissioners interpret the Statutory Instrument as clearly requiring permanent residence and, therefore, the question of holiday homes or retirement homes where all parties on Title are not going to be engaged in full-time gainful self-employment while so resident in the premises within the State does not come within the Statutory Instrument.

I trust that this information is of assistance to colleagues.

Yours sincerely,
Brian O'Reilly,
B. P. O'Reilly & Company,
Irish Permanent House,
Main St.,
Tallaght,
Co. Dublin.

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

9th May, 1984

Dear Mr. Ivers,

I refer to your letter of 2 May, 1984 in which you refer to complaints being received from a number of your

Society's members about delays in obtaining capital gains tax clearance certificates.

As you know, the issue of these certificates by inspectors of taxes is provided for in Paragraph 11(6) of Schedule 4 to the Capital Gains Tax Act, 1975, and is designed to enable disponers of certain assets to receive payment without deduction of tax. I am not aware that any undue delay occurs in the issue of such certificates but if you have any specific cases in mind and let me have the details, I will arrange to have them examined.

Your letter seems to be more concerned with the delays which occur in cases that are referred to the Valuation Office for an opinion as to the valuation of property for capital gains tax purposes. We are broadly in agreement with your view that a capital gains tax charge is not likely to arise in many cases where agricultural property owned since 1974 is disposed of at the present time. With this in mind a procedure was initiated about six months ago under which local inspectors of taxes were given discretion to settle at district level and without recourse to the Commissioner of Valuation (through Head Office) certain cases involving disposals, after 5 April, 1982, of agricultural land. This should make a significant contribution towards reducing the volume of work in the Valuation Office.

You will appreciate, however, that some cases of complexity and cases involving pre-1982 disposals may still require to be referred to the Commissioner of Valuation.

Yours sincerely,
S. Pairceir,
(Chairman),
Office of the Revenue Commissioners,
Dublin Castle,
Dublin 2.

* Members who experience difficulty in relation to the above may write to the Taxation Committee.

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.

Dated 25th day of June, 1984.

J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

1. **REGISTERED OWNER:** Hugh Burns; Folio No.: 10116; Lands: Drumcrew; Area: 16a.1r.25p.; County: **MONAGHAN.**
2. **REGISTERED OWNER:** Thomas Callan; Folio No.: 1028; Lands: Bigsland; Area: 18a.2r.24p.; County: **LOUTH.**
3. **REGISTERED OWNER:** Ronald H. H. Franks; Folio No.: 32525; Lands: Kilmichael East; Area: 0a.1r.16p.; County: **CORK.**
4. **REGISTERED OWNER:** Joseph Dunne; Folio No.: 15230; Lands: Clonminan; Area: 0a.2r.39p.; County: **LAOIS.**
5. **REGISTERED OWNER:** Thomas Fitzpatrick; Folio No.: 24073; Lands: Clowney; Area: 3a.2r.18p.; County: **CAVAN.**
6. **REGISTERED OWNER:** Nicholas McBride; Folio No.: 5155; Lands: Gorteenminoge Upper; Area: 7a.3r.20p.; County: **WEXFORD.**
7. **REGISTERED OWNER:** Marie Niland, "Villa Marie", Threadneedle Road, Galway; Folio No.: 9965; Lands: Ballinfoile; Area: — ; County: **GALWAY.**
8. **REGISTERED OWNER:** Brian Cleary; Folio No.: 6292; Lands: Oulartleigh; Area: 29a.2r.24p.; County: **WEXFORD.**
9. **REGISTERED OWNER:** Tony O'Connor; Folio No.: 12652F; Lands: Caherciveen; Area: — ; County: **KERRY.**
10. **REGISTERED OWNER:** McGarvey and Towey Limited; Folio No.: 1452F; Lands: situate in the Townland of Woodfarm and Barony of Uppercross; Area: — ; County: **DUBLIN.**
11. **REGISTERED OWNER:** Frank Towey & Sons Limited; Folio No.: 3982F; Lands: situate in the Townland of Woodfarm and Barony of Uppercross; Area: — ; County: **DUBLIN.**
12. **REGISTERED OWNER:** Daniel F. Walsh; Folio No.: 3240F; Lands: Kilcannon; Area: 1.044 acres; County: **WATERFORD.**
13. **REGISTERED OWNER:** Margaret Boyle; Folio No.: 6113; Lands: Allardstown; Area: 28a.3r.13p.; County: **LOUTH.**
14. **REGISTERED OWNER:** Shannon Free Airport Development Company Limited; Folio No.: 27812; Lands: Tullyvarraga, Tullyvarraga; Area: 21a.0r.36p., 20a.2r.0p.; County: **CLARE.**
15. **REGISTERED OWNER:** Charles Henry Allen Bustard; Folio No.: 2S & 675; Lands: (1) Dunmuckrum, (2) Tully, (4) Ardloughill, (7) Ballyshannon, (8) Carrockboy, (9) Knocknashangan, (F.675) & Finner (F.2S); Area: (1) 28a.3r.34p., (2) 45a.1r.4p., (4) 5a.2r.27p., (7) 7a.1r.29p., (8) 2a.2r.2p., (9) 148a.2r.30p., (F.675) & Finner 729a.3r.16p. (F.2S); County: **DONEGAL.**
16. **REGISTERED OWNER:** Brendan Geraghty, Newtown, Abbeyknockmoy, Tuam, County Galway; Folio No.: 10961 and 34564; Lands: Derreen, Moyne, Tawnaghbaun, Abbert Demesne; Area: 15a.2r.14p., 11a.1r.36p., 0a.2r.18p., 1a.0r.23p., County: **GALWAY.**
17. **REGISTERED OWNER:** Brian O'Reilly, Headford, County Galway; Folio No.: 32622; Lands: Gortnamona; Area: 0a.2r.19p.; County: **GALWAY.**
18. **REGISTERED OWNER:** Brian P. Matthews; Folio No.: 8516F; Lands: situate in the townland of Newtown and Barony of Coolock; Area: — ; County: **DUBLIN.**
19. **REGISTERED OWNER:** William Dooley; Folio No.: 11009; Lands: (1) Rathmore, (2) Rathmore, (3) Rathmore, (4) Rathmore, (5) Rathmore; Area: (1) 8.253 acres, (2) 12.238, (3) 2.713, (4) 5.050, (5) 4.488 acres; County: **LONGFORD.**
20. **REGISTERED OWNER:** James Lumley; Folio No.: (1) 1344, (2) 1812; Lands: (1) situate in the townland of Laurestown and Barony of Nethercross, (2) situate in the townland of Surgalstown South and Barony of Nethercross; Area: (1) 3.645 hectares, (2) 9.677 hectares; County: **DUBLIN.**
21. **REGISTERED OWNER:** Daniel Houston; Folio No.: 25467; Lands: Meenagolan; Area: 31a.3r.35p.; County: **DONEGAL.**
22. **REGISTERED OWNER:** John Buckley; Folio No.: 26957; Lands: Burgesland; Area: 114a.1r.3p.; County: **CORK.**
23. **REGISTERED OWNER:** Augustin Hilty; Folio No.: 4120; Lands; Cullen Lower (part); Area: 7a.0r.22p.; County: **WICKLOW.**
24. **REGISTERED OWNER:** Peter J. Fahy; Folio No.: 12603; Lands: Ballyogan; Area: 8a.0r.22p.; County: **KILKENNY.**
25. **REGISTERED OWNER:** Thomas Gantley; Folio No.: 874 (now closed to 20831); Lands: (1) Curraghglass, (2) Roden; Area: (1) 18a.3r.19p., (2) 14a.3r.15p; County: **TIPPERARY.**

Lost Wills

CAMERON, Roderick, deceased, late of Rathkeale, Co. Limerick. Would anybody knowing of the whereabouts of the Will of the above-named deceased, please contact Messrs. McKeever & Son, 5/6 Foster Place, Dublin 2.

GERAGHTY, Mary Ellen (Maire), deceased, late of 104 Cedar House, Mespil Flats, Sussex Rd., Dublin. Would anybody knowing of the whereabouts of the original Will of the above-named deceased who died on 4 May, 1984, please contact Messrs. Noonan McAllister & O'Connor, Solicitors, 2 Bedford Place, Navan, Co. Meath. Tel. (046) 21146.

PIGGOTT, Irene, deceased, late of Orthopaedic Hospital, Castle Avenue, Clontarf, Dublin 3, and formerly of Crowe St., Gort, Co. Galway. Will anybody knowing of the whereabouts of the Will of the above-named deceased who died on 20 April, 1984, please contact Messrs. Florence G. MacCarthy and Associates, Loughrea, Co. Galway. Tel. (091) 41529.

ROONEY, Lawrence, deceased, late of Belgree, Mulhuddart, Co. Dublin. Would anybody knowing of the whereabouts of the Will of the above-named deceased, who died on 15 September, 1983, please contact Mrs. Augusta ellen Rooney, Belgree, Mulhuddart, Co. Dublin.

WALSH, Catherine, deceased, late of Tinlough, Kilmacow, Co. Waterford, 88 Canon St., Waterford and 98 Lr. Dominic St., Dublin. Would anybody knowing of the whereabouts of the Will of the above-named deceased, who died on 6 November, 1983, please contact Messrs. Pearts, Solicitors, 27 Upr. Ormond Quay, Dublin 7. Tel. (01) 714644.

DALY, Hilary, deceased, late of Knightsbrook, Glasealy, Ballitore, Athy, Co. Kildare. Will any person having knowledge of the whereabouts of an Will of the above-named deceased who died on the 28th day of May, 1984, please contact Mary O'Connor & Co., Solicitors, 9 Eglinton Terrace, Donnybrook, Dublin 4.

Miscellaneous

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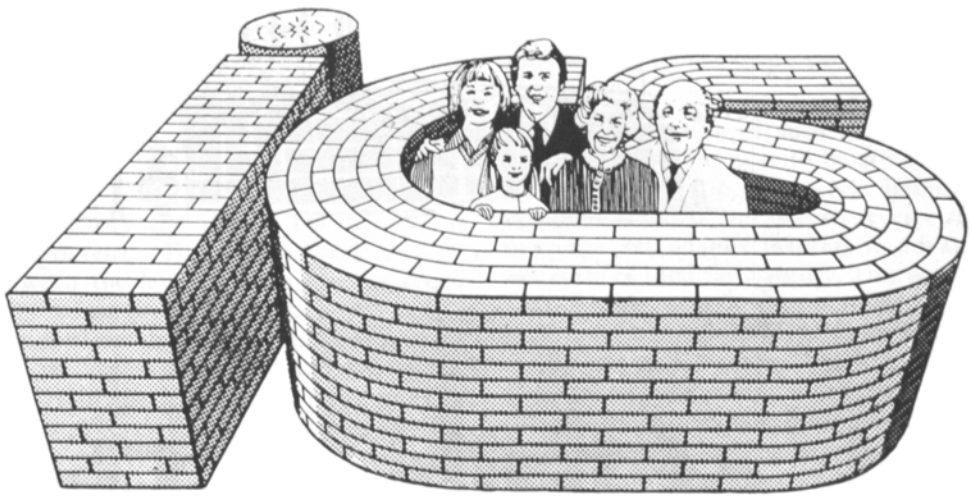

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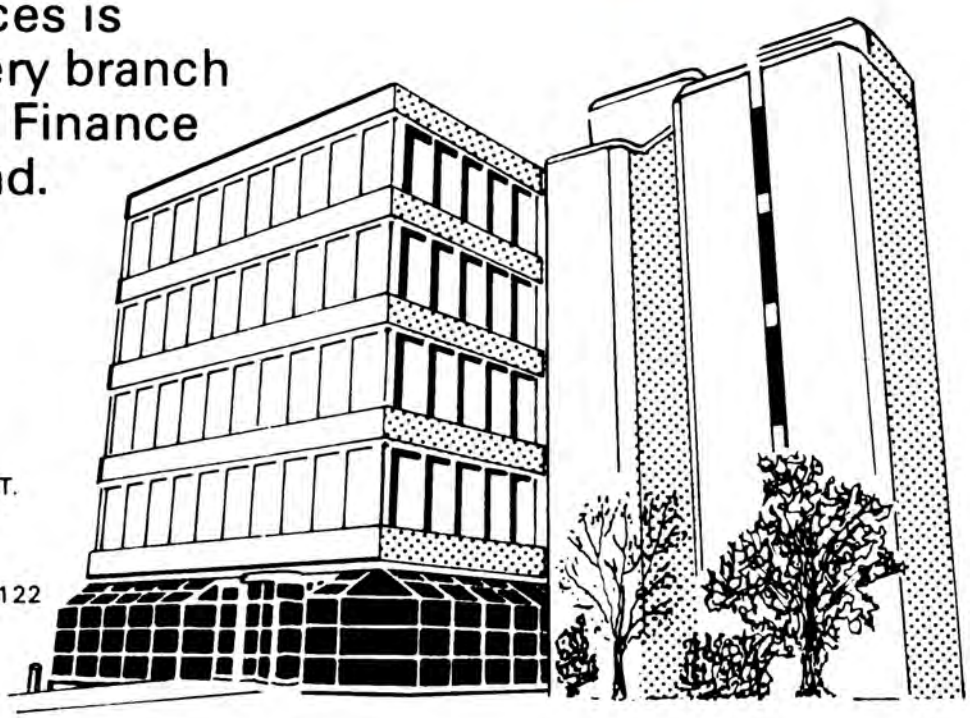

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 6 July/August 1984

Personal Injury Claims

IN a series of recent cases, the Supreme Court has laid down significant new guide lines for use in serious personal injury cases coming before the courts. In paraplegic or quadriplegic cases the Court has cast doubt on the previously sacrosanct assumption that the injured party would have looked forward to continuous employment to retiring age. The question of how the actuary is to view the prospective rate of inflation has also come under scrutiny. In two significant cases, the Supreme Court has made substantial reductions in awards made by High Court juries in paraplegic cases.

The decisions have been criticized on two grounds, firstly, that the Supreme Court should substitute its verdict for that of a jury in relation to damages; and, secondly, that the amounts of these reduced compare unfavourably with recent levels of jury awards for lesser injuries, e.g., the loss of a leg or an arm which have gone unchallenged.

In truth, what the Courts are trying to do is bordering on the impossible. Our legal system, in company with all others in Western Countries, has found no other satisfactory method of compensating people for serious personal injury other than by monetary payments. In the case of those who have been so seriously injured that they will never be able to live a normal life our system awards a sum not merely to compensate them for future loss of earnings but to meet the costs of such special care as they may need for the rest of their lives.

Just how unsatisfactory the system has become is slowly becoming apparent. There has always been an odd contrast between the level of sophisticated talent which is assembled to ensure that the plaintiff's case is won and the amount of the damages maximized and the fact that, following the award, an unsophisticated person with little experience in the handling of large sums of money is, when perhaps severely impaired by his injuries, presented with a large sum of money which he is supposed to invest so as to provide for all his future needs. There is some evidence admittedly anecdotal, which suggests that the recipients of such awards are preyed on by greedy members of their family. A study of the effects of high awards in these cases could usefully be made.

Perhaps we should look at recent trends in the U.S. where there has been a remarkable growth in what are known as structured settlements from some 3,000 in 1979 to over 15,000 in 1983. Structured settlements involve the payment of a series of insurance-based future payments, rather than a lump sum to a successful plaintiff. The payments typically consist of an initial lump sum to cover medical and other pre-trial expenses, followed by a series of annual payments. These arrangements differ from the old workman's compensation-type series of payments, which older readers will recall with no great affection, in that they are not paid out by the defendant's general insurance company but are in the form of annuities purchased by that company from a life assurance company, on the basis of the age and sex and, in some cases, the medical prognosis of the plaintiff. Some protection against inflation can be obtained, perhaps not enough to equal the levels of the actual inflation that has been present in Ireland for the last 10 years, but then what investment would have provided a hedge against such inflation and still generated a reasonable income? Provision can also be made to ensure that the annual payments are guaranteed for a number of years, rather than ceasing on the death of the injured party.

The introduction of such a scheme deserves serious consideration. If it were to be adopted it might create a climate in which, in cases where liability is not in issue, plaintiffs could be entitled to receive regular payments from the defendant's insurers in advance of the determination of their full liability. This would naturally be of considerable benefit to plaintiffs who have incurred substantial losses or debts pending the completion of their claim and would leave the bargaining positions of plaintiff and defendant much more even. Even if such further developments are speculative, it is surely time to give consideration to a more sensible method for the future of compensating people who have suffered serious injuries than our present crude system. □

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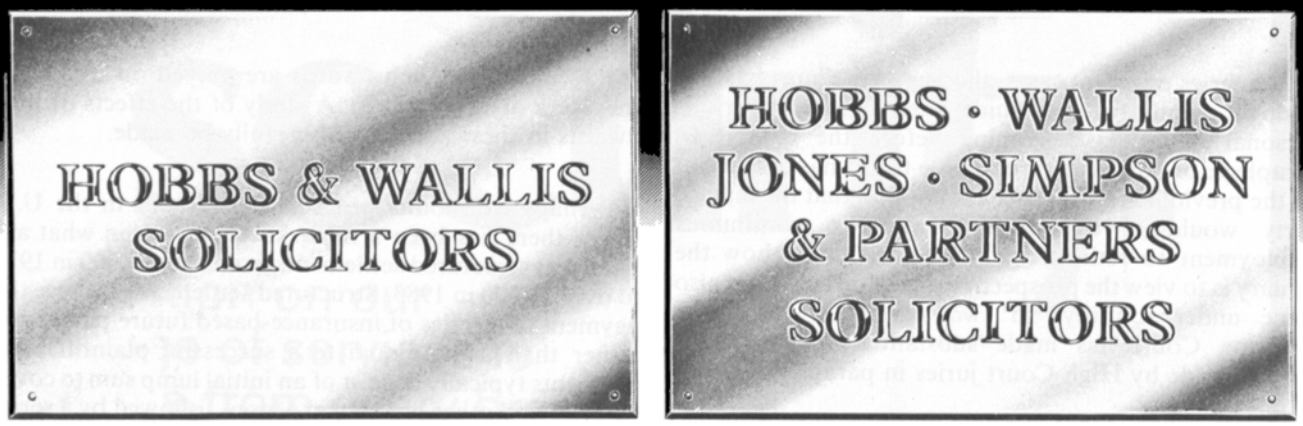

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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In this issue . . .

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Comment . . .

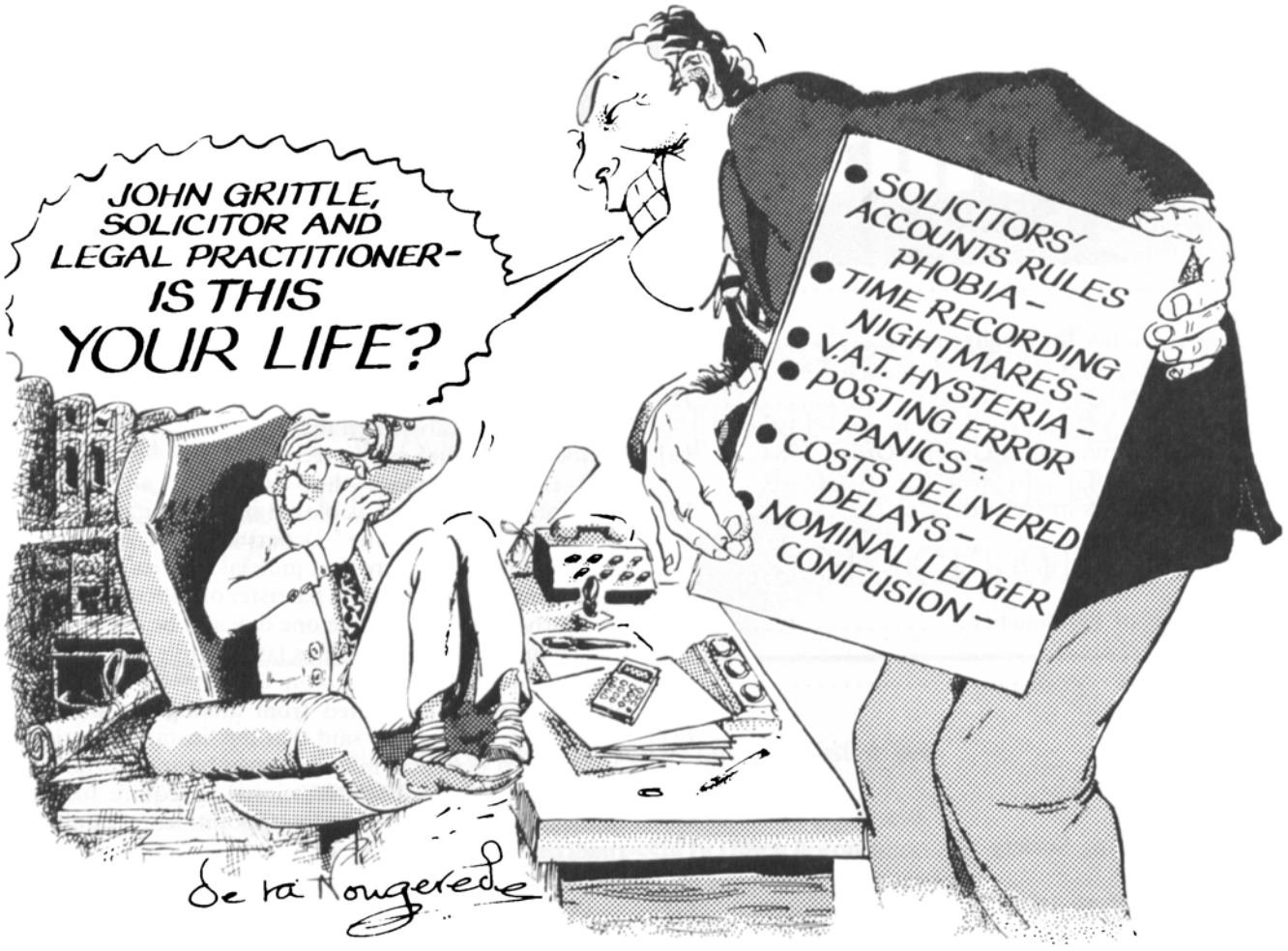
DURING the passage of the Criminal Justice Bill through the Dáil the question of the method of appointment of the Judiciary was raised.

Such discussions normally focus on the danger of political appointments to the Bench but on this occasion some deputies advocated that there should be a training period for judicial appointees.

It is commonplace that Judges at all levels are appointed at the last possible moment, presumably due to the parsimony of the Department of Finance in endeavouring to ensure that judicial salaries are payable for the minimum period. A barrister or solicitor may be in the hurly-burly of practice one day and be sworn in and sitting on the Bench two days later. While it is one of the cornerstones of the Common Law system that Judges should only be appointed from among the practising profession, it has to be said that the 'instant' creation of Judges, if it ever was, may no longer be appropriate. The fact that it has not been traditional to require Judges to undergo any course of pre-appointment training or induction is not of itself a justification for continuing this practice.

Twenty years ago most solicitors, at least, tended to be general practitioners, used to carrying on a certain amount of District Court practice. With the increase in the size of practices and increasing specialisation, partly brought about by the introduction of the Criminal Legal Aid Scheme, an increasing number of solicitors, otherwise well-qualified to be appointed to the Bench, will not have had recent day to day familiarity with District Court practice and, in particular, with the application of the rules of evidence or the strict burden of proof in criminal cases. It may also be the case that a number of such appointees might not have sufficient experience of the Family Law cases which are now dealt with in the District Court.

Other Common Law jurisdictions have found it advisable to require newly appointed Judges to undergo training or induction programmes before they are permitted to take charge of trials. Even at the High Court level, there is increasing use in Britain of Deputy High Court judges, acting on a temporary and part-time basis. Whether in a small legal community such as ours it would be feasible to adopt this practice is doubtful. Even if it is not, it should be possible to arrange that training and induction programmes be made available for newly appointed Judges, with a view to ensuring that the high standards of our judiciary, particularly at the District Court level, are not eroded by the appointment of worthy but not necessarily the most suitably experienced Justices. □



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Schools' Liability for Negligence

Part 1

by
William Binchy, B.A., B.C.L., LL.M., B.L.
Research Counsellor, The Law Reform Commission

THE question of liability of schools in negligence has given rise to much litigation[1]. It is scarcely surprising that from time to time accidents happen in schools. Where children are concerned it is not the case that there is safety in numbers. Wherever children congregate there is the risk that they may be tempted to do many things — to climb a wall, throw a stone, slide down the bannisters— that they would be far less likely to do on their own. School managers know this well. They are faced with the unenviable task of ensuring, as best they may, that children attending school are not injured from lack of supervision or from other sources of danger that may arise during the school day.

When children who are injured at school sue the school authorities, the courts are presented with some difficulties in applying the negligence standard. Too low a standard would clearly leave students open to unwarranted dangers; on the other hand to set the standard of care at a very high level might not be in the interests of school children in the long run. As a Canadian Judge has counselled:

> "It must . . . . be required that one of the most important aims of education is to develop a sense of responsibility on the part of pupils, personal responsibility for their individual actions, and a realisation of the personal consequences of such actions."[2]

A very general guiding principle was expressed by Lord Esher in *Williams -v- Eady*[3] that:

> "the schoolmaster [is] bound to take such care of his boys as a careful father would take of his boys . . . ."

Although this statement has been quoted widely with approval in several decisions in this country[4] and abroad[5], it has been criticised for being "unrealistic, if not unhelpful",[6] especially where the number of pupils is high. The problems of care and control in a school bear *some* resemblance to those confronting a parent in the home but they are far from identical. It is possible that in a future decision an Irish court will drop the reference to the "careful father" (or "careful parent") and stress the fact that it is the standard of the reasonable school teacher or manager which should prevail.

In this article we will consider the liability of schools under six headings:

(1) Negligence in instruction;
(2) Supervision in school playgrounds;
(3) Injuries sustained off the premises;
(4) Supervision outside hours;
(5) Other acts of negligence;
(6) Structural dangers.

(1) Negligence in Instruction

An allegation of negligence may arise where accidents take place during the course of instruction by teachers. Most of the cases have been concerned with injuries suffered during gymnastic and sports training, where the allegations centre around dangerous exercises, inadequate equipment and lack of supervision. As one judge recently pointed out:

> "The potential for danger in these cases can be easily imagined. Young students are apt to try different and more daring manoeuvres than a more mature person would permit."[7]

In the Supreme Court decision of *Mulligan -v- Doherty*[8] in 1966, the plaintiff was a seventeen-year-old girl who was injured when preparing a new gymnastic exercise. The exercise had been demonstrated by the physical training teacher, who had also supervised one girl in repeating the exercise. The teacher then went to another part of the gymnasium to instruct another class. In her absence other girls in the class repeated the exercise without mishap but the plaintiff toppled from the bars and injured her back.

The gymnastic exercise involved a somewhat elaborate descent down wall bars, with the hands changing bars alternately in descending order. The plaintiff did not exactly remember what the teacher had done in the demonstration and released both hands simultaneously, resulting in her fall.

The plaintiff's case in negligence was based on allegations that there had been inadequate instruction and that the teacher had failed to remain with the class until each of the pupils knew the correct sequence of movements for the safe performance of the exercise.

Henchy J. directed the jury to hold that the defendants were not liable and the Supreme Court affirmed. The Supreme Court regarded the exercise as a "routine" one which a seventeen-year-old girl of ordinary intelligence "could not have failed to apprehend . . . ."[10] Chief Justice O Dálaigh considered that no one could reasonably have foreseen that such a girl would fail to understand the safe way of carrying out the exercise, and would substitute her own patently risky mode of descent so as to require that the teacher remain at hand to supervise further:

> "Something might be said for such a view in the case of young children; but a woman over 17 years of age is a person whose conduct in performing a simple gymnastic exercise might reasonably be expected to be intelligent and sensible . . . ."[11]

In the High Court jury case of *Smith -v- Jolly et al.*[12] in May 1984, a 14-year-old school girl sustained serious injury when struck by a 4 kilo shot during a school sports

event. The shot had been thrown by another girl, who was aged 15, in the course of a competitive game of "putting the shot". Four girls were competing in the game which was being held for the purpose of selecting two of them to represent the school. Other events were being run in the school's sporting complex at the same time for the same reason.

After the first round had been completed, the physical education teacher instructed the girls to continue on in order and to mark down their distances with numbered pegs while she went to another part of the field to organise the girls' long jump. She would return some minutes later to take the final measurements.

When the teacher had left, the girls carried on with their throws. While the plaintiff and another girl were measuring the distance of a third girl's throw, the 15-year-old girl took her turn and struck the plaintiff on the head.[13]

The plaintiff sued the physical education teacher and the school management for negligence. In his charge to the jury, Mr. Justice O'Hanlon said the issues in the case boiled down to a lack of supervision or nothing. "Here was an irresponsible action by a child of 15 and should the teacher have foreseen that one of the four children participating in 'putting the shot' would have so behaved?"[14] Two questions were put to the jury: (1) whether the school had been negligent in failing to provide supervision that was adequate to the occasion; and (2) whether the school had been negligent in failing to provide a safe system for the conduct of the event. The jury answered "no" to both questions.

It is useful to look at some English decisions on this general question, bearing in mind the differences that inevitably flow from the absence of juries in some of these cases.

In *Gibbs -v- Barking Corporation*[15] liability was imposed where a boy who was required to vault over a horse landed "in a stumble" and was injured. It appears that the master in charge "did nothing to assist the boy in landing"[16]. In upholding the decree against the school authorities Slesser L.J., in the Court of Appeal, said:

> "The games' master does not seem to have acted with the promptitude which the law requires."[17]

In contrast, in *Wright -v- Cheshire County Council*[18], no liability was imposed where the plaintiff was injured when vaulting because a fellow-student whose task it was to steady him after vaulting ran off when the school bell rang. The Court of Appeal stressed the fact that it was the approved procedure in schools to leave boys who had a little practice themselves to carry out the exercise by themselves, so as to encourage self-reliance. Morris L.J. considered that the school's obligation to take care did not mean:

> "That the adopted system should have to be such that in no foreseeable circumstance or situation could there be any possible or conceivable contingency of some slight mishap. If that were so, the activities of the young would be unduly circumscribed and only inactivity and inanition could be planned."[19]

In *Cahill -v- West Ham Corporation*[20], a master organised a relay race in one of the classrooms. When the plaintiff, who took part in the race, reached the end of the room, his arm went through a glass partition and was severely cut.

The plaintiff's action for negligence was based on the unsuitability of the classroom for races of this kind, since the room was surrounded by glass partitions and the floor was slippery. The school's defence was that the rule of the race was that the boys should touch the master, not the glass partition. The plaintiff denied this, saying that he had been "told to run down the hall, touch what was in front of him, and run back".

The short report of the case states that Mr. Justice Porter, rejecting the claim, said that, even if the facts had been as stated by the plaintiff, he would have held that there was no negligence. "It might have been otherwise if they had been told to touch the glass."[21]

This case may be contrasted with *Ralph -v- L.C.C.*[22] Again a schoolboy was injured by putting his hand through a glass partition when playing an organised game within the school building. The Court of Appeal upheld the imposition of liability at trial. It is only fair to note that, in contrast to *Cahill's* case, the game was of a chasing variety, involving more random movements by the boys, who would be "slipping and sliding about all over the place."[23]

It is interesting to compare the rather harsh decision of *Jones -v- L.C.C.*[24], where no liability was imposed when a child, ordered to play an organised strenuous competitive game called "raider and horses", fell on a floor which had no matting. Mr. Justice Avory, evincing little sympathy for the plaintiff's case, considered that:

> "if there had been matting it would have been said that there ought to have been a mattress; and if there had been a mattress it would have been said there ought to have been a feather-bed; and if there had been a feather bed, that the boys ought to have been wrapped up in cotton wool or rubber."[25]

In Canada the general thrust of the decisions[26] is against imposing too stringent a duty on the school authorities in relation to gymnastic education, but the decision of *Myers -v- Peel County Board of Education*[27] in 1981 shows how difficult it is to predict the outcome of these cases. The plaintiff, a fifteen-year-old boy, was injured when attempting to dismount from rings in a gym class. At the time he was one of a small group of unsupervised students. This was the first time he had attempted the manoeuvre. His friend, who had been allocated the task of steadying him when he came off the ring, had moved away just as he was about to dismount. The plaintiff in his action against the school authorities pleaded that there had been a negligent lack of supervision and that the mats supplied were too thin. He won his action at trial; the Ontario Court of Appeal by a majority reversed but the Supreme Court of Canada unanimously restored the verdict in his favour.

Allegations of negligence in relation to instructions have been made outside the context of sports and gymnastic injuries.

In *James -v- River East School Division*[28], the plaintiff, an eighteen-year-old "above average student", was injured when nitric acid, which she was heating in the course of a laboratory experiment, spattered onto her face. Liability was imposed on the school. The instructions for the experiment had not referred to the necessity of wearing goggles. Deniset J. stated:

> "Goggles were available. None were recommended on this occasion by the teacher . . . His excuse that the students knew about the goggles and that none

> requested them, is not valid. The [local] Minor [Ice] Hockey Association does not recommend the use of helmets when playing league games. You put on a helmet, or you don't play. Students must be told, when necessary, 'wear goggles'."[29]

(2) Supervision in School Playgrounds

It is beyond argument that some degree of supervision is necessary where children are playing in school playgrounds but the courts have been anxious to make it plain that too high a standard of care will not be demanded. As O Dálaigh C.J. said in *Lennon -v- McCarthy*[30]:

> "When normally healthy children are in the playground it is not necessary that they should be under constant supervision."

Similarly, in the English decision of *Rawsthorne -v- Ottley*[31], Hilbery J. expressed the view that:

> "it is not the law, and never has been the law, that a schoolmaster should keep boys under supervision during every moment of their school lives."

The Irish cases present interesting examples of the range of cases that can arise under the general heading of supervision. In *Ryan -v- Madden*[32], the failure of a national school teacher to supervise young pupils, including the plaintiff, aged five, when they were leaving the building at the end of school hours was held to be negligence where the child slid down the bannisters from the upper floor (where the class-room was).

In *O'Gorman -v- Crotty*[33], a ten-year-old pupil, when being chased during play in the school playground, fell over one of the several wooden blocks which were lying in the playground. The blocks were sometimes used to support boards for use as seats, but appear to have served no positive function as play objects. In holding the school manager and principal teacher liable, O'Byrne J. stated:

> "In circumstances such as those in this case careful supervision is essential, and the persons having charge of the school are bound to see that there is supervision of the playground during play intervals. It was the duty of the principal teacher to see that the playground was clear and not a source of danger to boys playing there, who could not be expected to keep their eyes fixed."[34]

The boy was held not to have been guilty of contributory negligence on the basis that "[b]oys naturally run in a playground"[35] and that the accident took place, during a period of recreation, in a place specially set apart for play which the boy "was entitled to assume . . . was reasonably safe for this purpose."[36]

In *Healy -v- Dodd*,[37] an eleven-year-old pupil was injured when he fell while using handcuffs in a game known as "still" — where "police" arrested "poteen makers". The use of handcuffs had been forbidden two years earlier and a pair of handcuffs had been confiscated. In order to keep up the deception of the game imaginary handcuffs were put on by the boys after the real handcuffs were taken by the master.[38] Two days before the accident the handcuffs made their way back to the school — being brought there by the son of the principal teacher, unknown to him.

O'Byrne J. in the High Court dismissed the action. The teacher had been supervising play at the time of the accident and there was "nothing to arouse his suspicion"[39] that the real handcuffs had returned.

The English decision of *Rawsthorne -v- Ottley*[40] in 1937 suggests a degree of leniency towards school masters and managers which would be unlikely to prevail today. A tip-up lorry delivered coke in a school playground while the children were at play. The children crowded on the lorry when the driver had completed the task of unloading. The effect was to make the tipping part suddenly tip up. The children then quickly got on the lorry, so that the tipping part fell back in place, crushing the leg of the plaintiff, a thirteen-year-old boy.

The evidence disclosed that on the day of the accident the headmaster had gone into the playground with the boys, that he had seen them start their games, and "having other duties to attend to,"[41] had gone back into the school building. He knew that it was the practice for coke to be delivered to the playground but did not know that it was being delivered that day since, it seems, he was not particularly concerned as to when it might be delivered.

Hilbery J. held that no action lay against the school.[42] Having stressed[43] that a schoolmaster is not required to keep children under supervision all the time, he said:

> "Having regard to the fact that the schoolmaster did not know that the lorry was there, I find that there is no negligence. It is said that he knew it might have come. I still do not think that he should have stayed [in the playgorund] lest such a possibility should have become an event. Should he have stopped its coming during playtime? I do not think that that is lack of supervision, and it would necessitate exra supervision."[44]

This argument is unconvincing. The evidence makes it plain that the headmaster, although aware that the coke delivery lorry would visit the school yard, did nothing either to prevent it from delivering during periods when the children might be playing or to ensure that, if it came at such a time, adequate supervision of the children would be provided. To suggest that the headmaster was legitimately taken by surprise in such circumstances is implausible.

Hilbery J. also rejected the argument that the vehicle was an allurement or trap:

> "A lorry as such cannot be said to be an allurement to children to-day. As to a tipping lorry, it was not the tipping gear that brought about the accident. No permission was given to the plaintiff to interfere, or to other pupils to interfere. No one in authority anticipatd that the pupils would interfere or were interfering. In my view, this disposes of the case against the headmaster."[45]

This passage is difficult to understand. Contrary to what Hilbery J. says, it *was* the tipping gear that brought about the accident, in the sense that it was part of the attraction to the boys, and was involved in the incident which resulted in injury to the plaintiff. Moreover, the absence of express permission or specific foresight was scarcely a strong factor against the plaintiff's case — especially since the headmaster deprived himself or his subordinates the opportunity to predict (and thus prevent) the incident by leaving the boys play unsupervised in the yard at a time when a delivery was possible.

In *Jackson -v- L.C.C.*[46], a contractor, who was to carry out certain repairs at a private elementary school, left "a quantity of rough stuff"[47] composed of sand and lime in a barrow in a corner of the school playground. The headmaster, considering this to be dangerous, instructed the school's caretaker to have it removed, but this was not done. Two days after the barrel had been left in the

playground, when the boys came out of school at the end of the day, they found the material unguarded. One of the boys threw a portion of it at the plaintiff, who was also attending the school, injuring his eye.

The plaintiff's action succeeded at trial, and the Court of Appeal affirmed. Vaughan Williams L.J. shared Bray J.'s concern that the case was close to the line. He went so far as to say that he "did not know whether the jury were influenced by sentimental sympathy in favour of the boy."[48] Nevertheless, the jury from their answers must have found that the barrel was "a dangerous thing to leave where it was left."[49]

Jackson's case must be contrasted with *Rich -v- L.C.C.*,[50] in 1953. The plaintiff, a schoolboy attending the defendant's school lost his left eye after a piece of coke had been thrown at him in the school playground by another pupil. Owing to difficulties during and after the war in obtaining regular supplies of fuel, it was essential for the school authorities to keep at the school quantities of fuel in hand in excess of the amount that could be stored in the school's storage places. At the time of the accident there was an unfenced heap of coke in the playground amounting to three tons.

The trial judge found that the school was providing adequate supervision at the time of the accident. A teacher was in attendance,[51] accompanied by a helper. The trial judge held the school liable, however, because it had failed to resolve the dilemma presented by the coke, either by removing it from the playground or by taking steps to ensure that it was no longer accessible to the boys.

The Court of Appeal reversed, considering that, once the charge of negligent supervision had been rejected by the trial judge, the plaintiff's case had collapsed. The option of removing the coke from the playground was not a realistic one; neither, in the Court's view, was the option of ensuring that the coke should no longer be accessible to the boys. Hodson L.J. said:

> "The impracticability of keeping children from access to missiles by the erection of physical barriers has only to be stated to be reasonably obvious . . ."[52]

Morris L.J. considered that:

> "It cannot be said that it is the duty of a reasonable, careful and solicitous parent to endeavour to put a child into a straight jacket or to seek to remove from his reach anything that may conceivably be used by him to injudge his mischievous propensity, always provided that reasonable, proper and adequate supervision over the child is exercised."[53]

Finally, it may be noted that in several other cases[54] where a sudden danger arose during playtime which resulted in injury to a child but which was of its nature difficult for the school authorities to foresee or provide against, the courts have not imposed liability.

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

Footnotes

1. See generally B. McMahon & W. Binchy, *Irish Law of Torts*, 184-187 (1981) (and the reference cited at 184, fn. 211), B. McMahon & W. Binchy, *Casebook on the Irish Law of Torts*, 182-184 (1983), Barnes, *Tort Liability of School Bounds to Pupils*, ch. 7 of L. Klar ed., *Studies in Canadian Tort Law* (1977), Vacca, *Teacher Malpractice*, 8 U. Richmond L. Rev. 447 (1974), Seitz, *Tort Liability of Teachers and Administrators for Negligent Conduct Towards Pupils*, 2o Clev. Marshall L. Rev. 551 (1971), Seitz, *Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Toward Pupils*, 15 Hastings L. J. 495 (1964).
2. *Schade -v- School District of Winnipeg No. 1 & Ducharne*, 19 D.L.R. (2nd) 199, at 305 (Manitoba C.A., *per* Schultz J.A., 1959).
3. 10 T.L.R. 14, at 42 (C.A., 1893). See also *Ramsey -v- Larsen*, 111 C.L.R. 16, at 27 (*per* Kitto J., 1964) (". . . . such precautions for his safety on the occasion in question as a reasonable parent would have taken in the circumstances").
4. *Lennon -v- McCarthy*, unreported, Supreme Court, 13 July 1966 (5-1966), *per* O Dálaigh C.J., at p. 2 of the judgment.
5. E.g. *Ricketts -v- Erith Borough Council*, [1943] 2 All E.R. 629, at 631 (K.B. Div., Tucker J.), *Rawsthorne -v- Ottley*, [1937] 3 All E.R. 902, at 904 (Hilbery J.). Canadian decisions applying the principle are cited by Carson, *Note*, 3 Ottawa L. Rev. 359, at 361, fn. 8 (1968).
6. *Beaumont -v- Surrey Co. Co.*, 112 Sol. J. 704, at 704 (*per* Geoffrey Lane J., 1968). See also *Board of Education -v- Higgs*, [1960] S.C.R. 1974, at 180-181 (*per* Ritchie J., 1959), *McKay -v- Bd. of Govan School Unit No. 29*, [1968] S.C.R. 589, at — (*per* Ritchie J.). see also H. Luntz, D. Hambly & R. Hayes, *Torts: Cases and Commentary*, 429 (1983), who consider that the "careful father" test is:

   > "Somewhat unreal in the case of a schoolmaster who has the charge of a school with more than 400 children, or a master who takes a class of 30 or more children. What may be a useful guide applicable to a village or a small country school cannot be of direct assistance in the case of a large city or suburban school with some hundreds of children attending it."

   More generally, see Hanson Hoyano, *The "Prudent Parent": The Elusive Standard of Care*, 18 U. Br. Col. L. Rev. 1 (1984).
7. *Long -v- Gardner*, 144 D.L.R. (3d) 73, at 81 (Ont. High Ct., Smith J., 1983).
8. Unreported, Supreme Court, 17 May 1966 (52-1965).
9. Page 3 of O Dálaigh C.J.'s judgment.
10. *Id.*
11. *Id.*, pp. 3-4.
12. High Ct , O'Hanlon J. with jury, 17-18 May 1984, reported in the 'Irish Times', 18 May 1984, p. 8, cols. 4-5, and 19 May 1984, p. 18, col. 5.
13. 'Irish Times', 18 May 1984, p. 8, cols. 4-5.
14. As reported in the 'Irish Times', 19 May 1984, p. 18, col. 5.
15. [1936] 1 All E.R. 115 (C.A.).
16. Cf. the headnote to the report, *id.*, at 115.
17. *Id.*, at 116.
18. [1952] 2 All E.R. 789 (C.A., 1952).
19. *Id.*, at 796. Cf. Mr. Justice Vaisey's striking assertion in *Suckling -v- Essex Co. Co.*, 'The Times', 27 January 1955 (quoted by Hanson Hoyanao, *supra*, fn. 6, at 22) that:

    > "[I]t is better that a boy should break his neck than allow other people to break his spirit."

20. 81 Sol. J. 630 (K.B. Div., Porter J., 1937).
21. *Id.*, at 630.
22. 63 T.L.R. 546 (C.A., 1947), affirming 63 T.L.R. 239 (K.B. Div., Byrne J., 1947).
23. 63 T.L.R., at 239 (*per* Byrne J.).
24. 48 T.L.R. 368 (K.B. Div., 1932).
25. *Id.*, at 369.
26. Cf. *Boivin -v- Glenavon School District*, [1937] 2 W.W.R. 170 (Sask. C.A.), *Gard -v- Duncan School Trustees*, [1946] 2 D.L.R. 441 (B.C.C.A.), *Thorton -v- S. District No. 57 Bd. of S. Trustees*, [1976] 5 W.W.R. 240, 73 D.L.R. (3d) 35 (B.C.C.A.), varied (sub nom. *Thornton -v- S. District No. 57 Bd. of Trustees)* [1978] 1 W.W.R. 607, 83 D.L.R. (3d) 480 (Sup. Ct. Can.), *Butterworth -v- Colegiate Institute Board of Ottawa*, [1940] 3 D.L.R. 466 (Ont. Sup. Ct., Mackay J.), *Eaton -v- Lasuta*, 75 D.L.R. (3d) 476 (B.C. Sup. CT., Murray J., 1977).
27. 123 D.L.R. (3d) 1 (Sup. Ct. Can., 1981), rev'g 5 C.C.L.T. 271 (Ont. C.A., 1978), restoring 2 C.C.L.T. 269 (Ont. High Ct., O'Driscoll J.). See also *Boese -v- Bd. of Education of St. Paul's Roman Catholic Separate School District No. 20*, 97 D.L.R. (3d) 643 (Sask. Q.B. Sirois J., 1979) (liability imposed where obese and inexperienced 13-year-old was required to make a vertical jump from height of seven feet after he had expressed anxiety over the exercise), *Piszel -v- Board of Education for Etobicoke*, 77 D.L.R. (3d) 52 (Ont. C.A., 1977) (inadequate protection from mats during wrestling class). Cf. *Matheson -v- Governors of Dalhouse College & University*, 25 C.C.L.T. 91 (N.S. Sup. Ct. Trial Div., MacIntosh J., 1983).
28. [1975] 5 W.W.R. 135, 58 D.L.R. (3d) 311 (Man. Q.B.), aff'd [1976] 2 W.W.R. 577, 64 D.L.R. (3d) 338 (Man. C.A. 1975). The Court of Appeal decision was based as well on evidence of negligence other than that of the instructor's failure to tell his students to wear goggles.

(footnotes continued p. 161)

Practice Notes

Credit Vouchers

As and from September next the Land Registry propose to do away with Credit Vouchers and, instead, issue cheques to Solicitors on a monthly basis, i.e., an account will be furnished to the Solicitor, with a schedule of cases, together with one cheque for the excess fees issued to the Solicitor. The Society indicated that this was a very welcome development.

Conveyancing Notes
Exchange Control — Central Bank Consent

In a note published in the *Gazette* in April 1982 the Conveyancing Committee drew attention to the obligations imposed by Section 5 of the Exchange Control Act 1954 on Solicitors acting in the purchase of Irish property for non-residents.

The Central Bank has now advised the Law Society that they are extending to the members of the Law Society a general permission to pay purchase monies on behalf of resident clients to resident Solicitors acting on behalf of non-resident vendors of Irish property. It will therefore not be necessary for Solicitors acting for purchasers in these cases to apply for exchange control permission.

The Solicitors acting for the non-resident vendors of Irish property will of course continue to be obliged to obtain exchange control permission for the transfer of funds to the non-resident client.

The Society welcomes this relaxation of the obligation previously placed on purchasers' Solicitors. □

17th July, 1984

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Solicitors' Remuneration General Order 1984

S.I. No. 155 of 1984

We, the body in that behalf authorised by the Solicitors' Remuneration Act, 1881, as adapted by the Solicitors' Remuneration Act, 1881 (Adaptation) Order, 1946 (S.R. and O. 1946 No. 208) made pursuant to the Adaptation of Enactments Act, 1922, do hereby, in pursuance and execution of the powers given to us by the said Statute as so adapted, and after due compliance with section 3 of the Solicitors' Remuneration Act, 1881, make the following General Order.

1. This Order may be cited as the Solicitors' Remuneration General Order, 1984. The Solicitors' Remuneration General Orders, 1884 to 1982 and this Order shall be read together and may be cited as the Solicitors' Remuneration General Orders 1884 to 1984.

2. The following fees chargeable under Schedule II of the Solicitors' Remuneration General Order 1884, (as amended by the above-mentioned General Orders other than this Order) shall be increased as follows:—

Item:	2.	£0.75	shall be increased to	£0.90
	3.	£0.30	,, ,, ,, ,,	£0.35
	4.	£0.25	,, ,, ,, ,,	£0.30
	5.	£0.15	,, ,, ,, ,,	£0.20
	6.	£0.10	,, ,, ,, ,,	£0.12
	7.	£0.35	,, ,, ,, ,,	£0.40
	8.	£2.50	,, ,, ,, ,,	£3.00
	9.	£0.10	,, ,, ,, ,,	£0.12
		£0.90	,, ,, ,, ,,	£1.10
	10.	£0.10	,, ,, ,, ,,	£0.12
	11.	£0.95	,, ,, ,, ,,	£1.15
	12.	£2.50	,, ,, ,, ,,	£3.00
	13.	£1.90	,, ,, ,, ,,	£2.30
	14.	£2.50	,, ,, ,, ,,	£3.00
	15.	£47.40	,, ,, ,, ,,	£56.90
	16.	£7.55	,, ,, ,, ,,	£9.05
		£47.40	,, ,, ,, ,,	£56.90
	17.	£0.95	,, ,, ,, ,,	£1.15
		£1.25	,, ,, ,, ,,	£1.50
	18.	£0.75	,, ,, ,, ,,	£0.90
		£0.25	,, ,, ,, ,,	£0.30
	19.	£0.30	,, ,, ,, ,,	£0.35
	20.	£8.75	,, ,, ,, ,,	£10.50

This Order shall apply only to business transacted after the 7th day of February, 1984.

Dated this 7th day of February 1984.

THOMAS F. O'HIGGINS, Chief Justice.

BRIAN WALSH, Senior Ordinary Judge of the Supreme Court.

FRANK O'DONNELL, President of the Incorporated Law Society of Ireland.

Explanatory Note

(This note is not part of the instrument and does not purport to be a legal interpretation thereof)

This Order authorises an increase in specified charges in solicitors' costs for non-contentious business. It does not affect the present commission scale fee on sales, purchases, leases, mortgages or settlements.

Under the terms of Section 6 of the Solicitors's Remuneration Act, 1881 and Section 3 of the Houses of the Oireachtas (Laying of Documents) Act, 1966 this Order does not come into effect until it has been laid before each House of the Oireachtas and one month or four sitting weeks (whichever is the longer) has elapsed. This Order (which applies only to business transacted after 7th February, 1984 was so laid on 10th February, 1984, the prerequisite statutory period elapsed on 10th March 1984 and the Order takes effect from 11th March, 1984. □

(continued from p. 157)

29. [1975] 5 W.W.R., at 139, 58 D.L.R. (3d) at 314-15. For an account of decisions in the United States relating to scientific experiments and the use of shop equipment in schools, see Ripps, *The Tort Liability of the Classroom Teacher*, 9 Akron L. Rev. 19, at 26-30 (1975).
30. Unreported, Supreme Court, 13 July 1966 (5-1966) (at p.2 of his judgment). See also *Courtney -v- Masterson*, [1949] Ir. Jur. Rep. 6, at 7 (High Ct., Black J.):

> ".... I should have thought it unheard of that teachers should have to watch all the children at every instant when under their care."

In accord are *Clark -v- Monmouthshire Co. Co.*, 52 L.G.R. 246, at 247-248 (C.A., *per* Denning L.J., 1954), at 250 (*per* Morris L.J.) and at 251 (*per* Evershed M.R.), *Board of Education for City of Toronto & Hunt -v- Hiffs*, 22 D.L.R. (2d) 49, at 55 (Sup. Ct. Can., *per* Ritchie J., 1959).

31. [1937] 3 All E.R. 902, at 905 (K.B.D.). In *Watt -v- Hertforshire Co. Co.*, [1970] 1 All E.R. 535, at 538 (C.A.) Lord Denning M.R. stated:

> "Before the school began the staff were indoors preparing for the day's work. They can't be expected to be in the playground, too."

This seems a poor argument. The problem of staff being in two places at once can be resolved for the simple device of a roster system, or the employment of extra personnel.

32. [1944] I.R. 154 (High Ct., O'Byrne J.).
33. [1946] Ir. Jur. Rep. 34 (High Ct., O'Byrne J.).
34. *Id.*, at 35.
35. *Id.*, at 36.
36. *Id.*
37. [1951] Ir. Jur. Rep. 22 (High Ct., O'Byrne J.).
38. *Id.*, at 23.
39. *Id.*
40. [1937] 3 All E.R. 902 (K.B.D.).
41. *Id.*, at 903.
42. Or the supplies of the coke: cf. *id.*, at 905-906.
43. [1937] 3 All E.R., at 905. See text above fn. 31, *supra*.
44. [1937] 3 All E.R., at 905.
45. *Id.*
46. 28 T.L.R. 359 (C.A., 1912) affirming 28 T.L.R. 66 (K.B. Div; Bray J., with jury 1911). See also *Pook -v- Ernesttown Public School Trustees*, [1944] 4 D.L.R. 268 (Ont. High Ct., Mackay J.) (school grounds littered with "loose stones, brick-bats and other rubble"; liability imposed where child was injured by falling on them).
47. *Id.*, at 359.
48. *Id.*, at 360.
49. *Id.* Cf. *Prince -v- Gregory*, [1959] 1 All E.R. 133, at 136 (C.A., *per* Ormerod L.J., 1958).
50. [1953] 2 All E.R. 376 (C.A.).
51. Cf. *id.*, at 380 (*per* Slade J., at trial).
52. *Id.*, at 381.
53. *Id.*, at 381-382.
54. E.g. *Clark -v- Monmouthshire Co. Co.*, 52 L.G.R. 246 (C.A., 1954) (unintended knife injury during scuffle), *Langham -v- Wellingborough School*, 101 L.J.K.B. 513 (C.A., 1932) (golf shot in playground), *Gow -v- Glasgow Education Authority*, 1922 S.C. 260 (boy unexpectedly jumped on back of another boy at school for blind children), *Chilvers -v- L.C.C.*, 32 T.L.R. 363 (K.B. Div., Bailhache J., with jury, 1916) (child injured eye when fell on movable lance of a toy soldier). See also *Long -v- Gardner*, 144 D.L.R. (3d) 73 (Ont. High Ct., Smith J., 1983) (summer camp not liable for knife injury sustained by boy at camp during an argument with another boy; event held not foreseeable), *Durham -v- Public School Bx. of Township School area of North Oxford*, 23 D.L.R. (2d) 711 (Ont. C.A., 1960) (wire spring flew into boy's eye in playground; school not liable). □

A Guest of Honour at Debating Society Centenary Celebration

A principal Guest of Honour at the Centenary celebrations of the Solicitors Apprentices' Debating Society was the senior surviving ex-Auditor, Mr. John J. Nash. Mr. Nash was auditor of the Society in 1926/27 . Mr. Nash, who practises at Templemore, Co. Tipperary, was President of the Law Society in 1959/60.

Admiralty Courts in Ireland[1]

by
William F. Holohan, B.C.L., LL.B., Solicitor
Auditor 1982-1983

Inaugural Address to The Solicitors' Apprentices Debating Society of Ireland.

Establishment and Jurisdiction

COURTS of Admiralty have existed in the British Isles for ever six hundred years[2] and in other jurisdictions have existed for upwards of two hundred years before they were established in Britain. The earliest known Laws of Admiralty[3] of modern civilisations were those promoted by Eleanor of Aquitaine, later wife of Henry II of England, at the Isle of Oleron in France. Having passed through many forms at different times, the Laws of Admiralty in Ireland[4] were last formulated in "The Court of Admiralty (Ireland) Act, 1867",[5] as amended.[6]

Under Part II of that Act, jurisdiction is conferred upon the Court[7] to decide, *inter alia*, upon the following:

> "Upon all claims whatsoever relating to salvage.[8]
> All claims and demands in a nature of towage.[9]
> Any claims for damage received or done by any ship.[10]
> Any claim for the building, equipping or repairing of any ship.[11]
> Any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs.[12]
> All questions arising between co-owners or any of them touching the title to or ownership, possession, employment and earnings of any ship registered at any port in Ireland.[13]
> any claim by a seaman of a ship for wages earned by him on board the ship.[14]
> Any claim in respect of any mortgage duly registered.[15]"

Under Section 38 of the Act, "the jurisdiction conferred by this Act may be exercised either by proceedings *in rem* or by proceedings *in personam*".[16] The Court was also given powers equal to "Superior Courts of Common Law in Ireland or any Judge thereof to compel either party in any cause or matter to answer interrogatories and to enforce the Production, Inspection and Delivery of copies of any document in his possession or power",[17] "to commit persons to prison",[18] to discharge persons in contempt,[19] and to administer Oaths.[20] Also, powers to allow Affidavits to be made on Oath before persons appointed by the Court for that purpose[21] and to examine witnesses[22] in accordance with the rules of evidence observed in the Superior Courts of Common Law, were granted.[23] Judgments, Decrees and Orders of the Courts of Admiralty were also to have the same effect as Judgments of the Courts of Common law.[24] Powers to order security for costs and arrests were also granted.[25]

Under an amending Act of 1876,[26] the jurisdiction was extended to include power to decide all claims arising out of any agreement as to the use or hire of any ship, or as to the carriage of goods therein and over all claims in tort and in respect of claims regarding goods carried on a ship.[27] The High Court of Admiralty in Ireland, as a separate Court with its own separate system, was short-lived. Under the terms of the Supreme Court of Judicature (Ireland) Act, 1877, on the vacation of office of the existing Admiralty Judge, the Court of Admiralty was united and consolidated with the Supreme Court of Judicature in Ireland, and all jurisdiction of the Judge of the Admiralty Court and all proceedings then pending, were transferred to the High Courts of Justice in Ireland.[28]

Modern Jurisdiction

Jurisdiction in Admiralty matters is now, by virtue of the Courts Acts,[29] vested in the High Court. The Rules of the Superior Courts[30] provide the rules governing actions in Admiralty,[31] which are defined to mean:

(a) Any claim or question in respect of which the former High Court of Admiralty had jurisdiction,
(b) a claim for the sale of a ship or any share therein,
(c) a claim to prohibit any dealing with a ship or any share therein,
(d) a claim in respect of a mortgage or a charge on a ship, or any share thereon,
(e) a claim rising out of bottomry,[32]
(f) a claim for the forfeiture of any ship or her tackle, apparel or furniture, or the restoration thereof after a seizure or for costs and damages in respect of the seizure or detention thereof,
(g) a claim in the nature of or arising out of pilotage,
(h) a claim arising out of a general average act.

Practice and Procedure

Proceedings in Admiralty are heard by a Judge assigned by the President of the High Court.[33] The Judge may appoint assessors if he deems it necessary or if one of the parties to an action insists.[34] He may also obtain the assistance of accountants, merchants, engineers, actuaries and other scientific persons "in such way as (he) the Judge may think fit" [35]

Various other rules govern procedural matters and the form of documents to be used in such actions. These may be found in the Superior Court Rules.[36]

INFERIOR ADMIRALTY COURTS

Local Courts

Under the 1867 Act, the Lord Lieutenant or other Chief Governor or Governors in Ireland in Council, were empowered to declare by Order in Council that the Recorder of any Borough Court or the Chairman of any

Court of Quarter Sessions therein, should have jurisdiction in Admiralty causes and assign the districts of such courts, and the time and places courts should be held.[37]

Jurisdiction

Also, the Local Courts were to have all the like Civil and Maritime Jurisdiction as belonged to the Court of Admiralty,[38] where:

(a) The amount or value of the claim did not exceed £200.00.

(b) If it did exceed £200.00, where the parties agree by written memorandum, that a specified Local Court should have jurisdiction.[39]

Proceedings

The proceedings were to be commenced:

(a) In the Local Court in whose jurisdiction the ship or goods to which the cause related lay at the time of such commencement, or if that rule could not be applied then

(b) in the Local Court in whose District an ordinary Action could or might have been taken, or

(c) in such Local Court as the parties by written memorandum should agree.[40]

If an action was started in the Court of Admiralty which could have been started by a party in a Local Court, then unless the Judge of the Court otherwise directed, such party would not be entitled to receive costs on the higher scale. This did not apply, however, when the action was commenced in the Court of Admiralty pursuant to an agreement between the parties.[41]

Local Courts established

Local Court was defined by the Act "to mean and include the Court of the Recorder of the Borough of Cork, the Court of the Recorder of Belfast, and the Court of any other Recorder or of any Chairman of Quarter Sessions in Ireland to whom jurisdiction in Admiralty (should) be given . . . ."[42]

Powers unexcerised

It appears that the power of the Lord Lieutenant to confer Admiralty Jurisdiction was never exercised.[43] In a case in 1893, *Bull -v- Pile (The Erminia),*[44] Counsel for the Plaintiff was opposing a motion to remit from the High Court to the Court of the Recorder of Dublin[45] and he argued that the power to declare jurisdiction had not been exercised up to that time, and that the Recorder did not derive jurisdication from any other source and his submission was not challenged. (The power to declare jurisdiction was abolished by the Statute Law Revision (No. 2) Act, 1883). Also a Statutory Rule in 1918[46] refers only to the Local Courts at Belfast and Cork as if they were the only Courts existing. Furthermore, a treatise by Gerald Horan K.C.,[47] on the Courts of Justice Act, 1924, (by virtue of which all jurisdiction of Recorders, County Court Judges and Chairman and Courts of Quarter Sessions was transferred to the Circuit Court),[48] refers to the jurisdiction of the Borough Court of Dublin presided over by the Recorder but makes no mention of Admiralty Jurisdiction.

Thus, it would appear that at the time of the Courts of Justice Act 1924, the only Local Court of Admiralty

existing within the State, was the Cork Local Admiralty Court.

The Courts of Justice Act 1924

By Section 51 of the Act it was enacted:

> "There shall be transferred to the Circuit Court all jurisdiction not hereinbefore expressly excepted which at the commencement of this Act, was vested in or capable of being exercised by Recorders, County Court Judges and Chairmen and Courts of Quarter Sessions or any of the same in Saorstat Eireann."

The Section referred to the Circuit Court, which means each and every Circuit and Judge of the Circuit Court, but a question posed at the time was whether the territorial limits which governed the exercise of jurisdiction by the Local Court of Admiralty in Cork, also applied to the Circuit Court. The 1876 Act defined the limits as "the County of Cork with the parts of the sea adjacent thereto, to a distance of three miles from the shore".[49]

The question seems to have been decided by the case of *Grimes -v- S.S. Bangor Bay,*[50] which decided that Admiralty Actions did not come within the jurisdiction of the Circuit Court. In that case an action was brought by Grimes and two other seamen against the owners of the S.S. Bangor Bay for wage bonuses and costs. The action was settled and it was ordered that costs be taxed in default of agreement. The owners objected to costs being taxed on the High Court scale on the grounds that the action could have been taken in the Circuit Court. The question was referred to the Court and Overend J. held that the phrase "any action founded on contract" in section 12(1)(c) of the Courts of Justice Act was wide enough to cover the case and ordered taxation on the Circuit Court Scale. On appeal to the Supreme Court it was held that Section 48 (ii) of the 1924 Act[51] (Contract and tort) was confined to personal actions and having regard to that section and the absence of a specific provision in Section 52 of the same Act as to where an action *in rem* could be brought, the action could not have been brought in the Circuit Court.

While this decision is an authority for the proposition that Admiralty causes could not be taken in the Circuit Court in general, (the case being concerned with the Dublin Circuit Court in particular), it did not deal with the question of whether the Cork Circuit Court could exercise the jurisdiction of the Cork Local Admiralty Court. Later, it seems to have been assumed that it could in so far as the 1961 Act[52] specifically continues the existence of the Cork Local Admiralty Court (although the better opinion[53] now seems to be that the 1961 Act in fact established the Cork Local Admiralty Court as a new Court under that Act, the jurisdiction of which falls to be exercised by the Circuit Court Judge for Cork. This is a question to which we shall revert later).

Rules

Under the 1867 Act, the procedure of the Local Courts of Admiralty was to be governed by Rules[54] to be made by the Lord Chancellor, and such Rules were made in 1877. These Rules[55] were continued in force by the Circuit Court Rules of 1930,[56] with suitable alterations being made in the headings. In 1950, new Circuit Court Rules were introduced, but these contain no provisions similar to those in Order XXXVI of the 1930 Rules, (which was the Rule relating to Admiralty matters). A possible result of this is that, after the coming into force of the 1950 Rules (and until the coming into force of section 23(2)(b) of the Courts (Supplemental Provisions) Act, 1961), the Rules applicable to the ordinary jurisdiction of the Court were also to apply to Admiralty causes.[57] However, this question seems to have been answered by O'Keeffe J. in the *Kinvarra Shipping* case when he confirmed that the Rules which applied to the old Recorder's court were to apply in the absence of any new Rules. This, of course, was merely applying the section. The case is discussed more fully later.

The Courts (Supplemental Provisions) Act 1961

Under the terms of the 1924 Act the jurisdiction of the then Local Court of Admiralty was transferred to the Circuit Court.[58] However, as was mentioned earlier, the exercise of the jurisdiction of the Cork Local Admiralty Court was limited to the area of "the County of Cork with the parts of the sea adjacent thereto to a distance of three miles from the shore".[59] Accordingly, it was questionable whether the jurisdiction of the Local Court could be transferred to the Circuit Court in general. This seems to have been in the minds of the legislature when the 1961 Act was enacted. Section 23 of the Act provides:

(1) "In this section:

"the Cork Circuit" means the Circuit of the Circuit Court consisting of the County and the County Borough of Cork,

"the Circuit Judge" means the Judge of the Circuit Court for the time being assigned to the Cork Circuit.

(2)(a) The Cork Circuit Court Judge shall constitute and hold a local admiralty court (in this section referred to as "the Court") to be called the Cork Local Admiralty Court.

(b) The Court shall, within the Cork Circuit with the parts of the sea adjacent to it and within the outer limits of the territorial seas, within the meaning of the Maritime Jurisdiction Act, 1959,[60] have the jurisdiction in Admiralty Causes which immediately before the commencement of Part II of the Act of 1924[61] was exercisable by the former Recorder of Cork.

(c) The jurisdiction of the Court shall be exercised by the Cork Circuit Court Judge."

Section 27 of the 1961 Act goes on to say:

(1) "The jurisdiction, which is by virtue of this Act, vested in or exercisable by the Circuit Court, the Cork Local Admiralty Court, and the Cork Local Bankruptcy Court respectively, shall be exercised so far as regards pleadings, practice and procedure generally, including liability to costs, in the manner provided by rules of Court and where, as regards the jurisdiction of the Cork Local Admiralty Court . . . there is no such provision in such Rules and so long as there is no rule in reference thereto, it shall be exercised as nearly as possible as it might have been exercised by the former Recorder of Cork.

(2) The rule-making authority for the Circuit Court shall also be the Rule-making authority for the Cork Local Admiralty Court. . . ."

In the case of *The State (Kinvarra Shipping Ltd.) -v- Thomas J. Neylon,*[62] O'Keeffe J., in the High Court, discussed and outlined the jurisdiction of the Cork Local Admiralty Court, of which he said:[63]

> "I think that the effect of section 23 of the Act of 1961[64] was to establish, as a new court, the Cork Local Admiralty Court and that its jurisdiction was to be exercised by the Circuit Court Judge for the time being assigned to the Cork Circuit."

This view of the Court as a separate court is reinforced if one takes account of section 3 of the Courts Act, 1971,[65] which says:

> "The jurisdiction in Admiralty Causes conferred on the Cork Local Admiralty Court by section 23 of the Act of 1961, shall be exercisable by that Court in any case where the claim does not exceed £2,000.00."

Thus, the separate treatment of the Local Court, both with regard to its establishment and with regard to the extension of the monetary limits on its jurisdiction, lends weight to the arguments of O'Keeffe J. (The Courts Act 1981 does not refer to the Local Court in any way).

Jurisdiction of the Local Court

As we saw, by virtue of section 23 of the 1961 Act, the Court is to have like jurisdiction in Admiralty Causes as the Recorder of Cork had before the commencement of the 1924 Act. By virtue of section 80 of the 1867 Act, the Local Courts were to have like jurisdiction as the High Court of Admiralty, subject to the monetary limits on jurisdiction set out therein. These limits must now be taken to be amended by section 3 of the 1971 Act. The range of matters over which the Court has jurisdiction would thus be the same as those over which the former High Court of Admiralty had jurisdiction and which are listed at the beginning of this article. □

Footnotes

1. See Pritchards Digest of Admiralty and Marine Law, 3rd Edition, Volume One, p.684.
2. See 94 I.L.T. & S.J. p.143 for reports of plans to celebrate the sixth centenary.
3. The Laws of Oleron.
4. See Eighteenth Report of Courts of Justice in Ireland (High Court of Admiralty), Session Paper No. 5 (Anno 1829) p.2.
5. The Court of Admiralty (Ireland) Act, 1867, (Cap. 114) "An Act to extend the jurisdiction, alter and amend the procedure and practice, and to regulate the establishment of the Court of Admiralty — 20th of August 1867".
6. Amended by the Court of Admiralty (Ireland) Amendment Act, 1876, (C 28), and the Courts Acts.
7. Section 2: defined as the Court of Admiralty in Ireland.
8. Section 27.
9. Section 28.
10. Section 29.
11. Section 30.
12. Section 31.
13. Section 32.
14. Section 33.
14. Section 34.
15. Section 34. With regard to the question of mortgages, one should note the case of *R.D. Cox Ltd., Staatliche Kreditanstalt Oldenburg-Bremen and Deutsche Schiff-Fahts-Bank Atkien-Gessellschaft -v- The owners of the M.V. "Fritz Raabe"*, a Supreme Court majority decision of the 1st of August 1974, a short note of which appears in the "Recent Irish Cases" section of the I.L.S.I. *Gazette* of December 1974, (Vol. 68, No. 10). That case concerned a German registered and German owned vessel which was subject to German registered mortgages in favour of the co-plaintiff German banks. In 1969, the first co-plaintiff undertook repairs and supplied "necessaries" to the ship and being unpaid, they issued proceeding in August 1969 on foot of which they obtained judgment in January 1970 for £1,053 and costs. Also, without prejudice to any subsequent claims, a lien was granted over the vessel. Waterford Harbour Commissioners also obtained a judgment in respect of harbour dues and in February 1970 on foot of a High Court Order, the ship was sold and £10,500 lodged in court.
Also in February 1970, the German Banks issued Admiralty proceedings *in rem* against the owners of the vessel on foot of their mortgages which had been registered in 1957. When they sought judgment in default, the Irish plaintiffs contended that as the mortgages were not registered in Ireland the German Banks could not institute such proceedings. (As the ship was not an Irish ship, the various mortgages could not be entered in the Irish Registry, and could not therefore rank as registered mortgages in Ireland.) In the High Court, O'Keeffe J. allowed the claims of the Banks and it was agreed that the order of priorities would be (1) The Irish plaintiff's costs; (2) claims for wages; (3) claims of the German Bank mortgagees and (4) claims for necessaries.
The Harbour Commissioners appealed so much of the judgment as declared the Banks as unregistered mortgagees to be entitled to receive payment of their debt in priority to the Commissioner's claim and it was contended that the German Banks were not mortgagees for the purposes of the distribution of the sale proceeds. The net question was whether the High Court could grant relief in an action *in rem* brought by the owner of an unregistered mortgage in an admiralty action.
The Supreme Court (Walsh, Henchy and Griffin J.J. with Henchy dissenting) decided that
(1) The mortgages created valid charges long before the other claims arose.
(2) The other claims, in so far as they constituted a lien, were subsequent in time to the mortgages.
(3) The High Court has jurisdiction to entertain suits in respect of foreign mortgages of moveable property within their jurisdiction and to order the sale of that property.
(4) The Maritime lien did not require possession of the ship, but rested on the basis that the lien travelled with the ship, into whoever's possession it came, and could be realised by proceedings *in rem*.
(5) The Admiralty Court (Ireland) Act 1867 set out in detail the jurisdiction of the Court.
(6) The original jurisdiction of the High Court embraces all justiciable controversies relating to shipping and the High Court was a new court and not simply an extended version of the old Court of Admiralty. Its jurisdiction, of course, embraced all matters over which the former High Court of Admiralty had jurisdiction.
(7) The fact that particular procedures were or were not available in former courts was not relevant and the exclusion of jurisdiction claims in respect of mortgages from the old Court was not applicable to the new Court.
(8) Order 64, Rule 1, of the Superior Court Rules of 1962, defined an "admiralty action" as, *inter alia*, "a claim in respect of a

(footnotes — continued on page 171)

DE MINIMIS NON CURAT LEX

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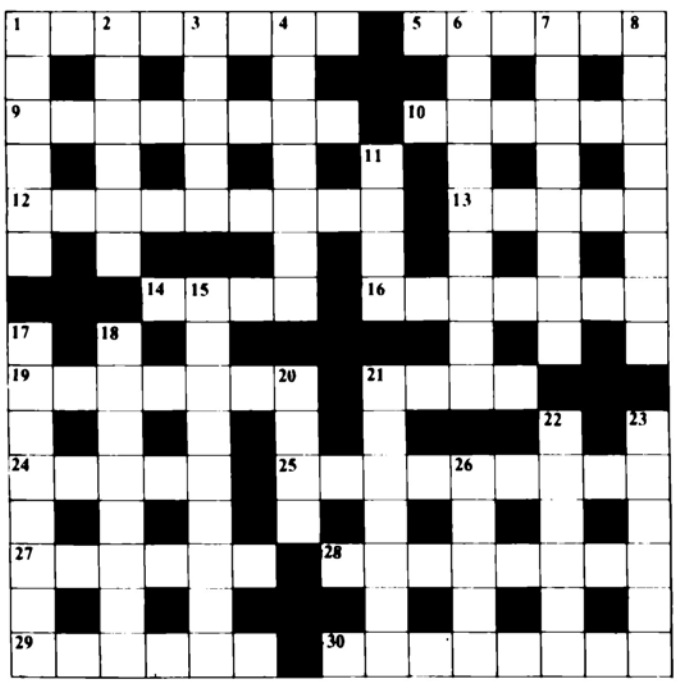
Launch of "The Law of Stamp Duties" 21 June, 1984

The authors, Michael O'Connor, Solicitor, (left) and Patrick S. Cahill, Solicitor, (centre) with Anthony Collins, Senior Vice-President of the Law Society, at the launch of their book on "The Law of Stamp Duties". The book is published by the Institute of Taxation in Ireland, 15 Fitzwilliam Sq., Dublin 2.

CROSSWORD

(solutions on p.175)



Across

1. Hold back or you'll be under tension again. 8
5. An eye for an eye for example. 6.
9. Male appointments resulting in contracts of bailment. 8.
10. Company cuts in decorative plaster. 6.
12. If it fits a side it's OK. 9.
13. Narration of events, fictionally. 5.
14. Give it the once-over. 4.
16. Let rest on a supportive frame. 7.
19. United back east for the recovery action. 7.
21. And Laos as well. 4.
24. Go on and on, like a faulty taper. 5.
25. Tell William to be specific with his payment. 5,4.
27. This expression is singularly baseball. 6.
28. Imputers of guilt over acc. ruses. 8.
29. Just last out, ----- 6.
30. ----- like the hanger-on. 8.

Down

1. Concerning the old writ of right, forget it. 6.
2. The nates 'e sat on in the Upper House. 6.
3. Opens out lots of paper. 5.
4. The brain that is of a peninsula dweller. 7.
6. The thing that cuts us are guilty. 5,4.
7. The little bit no-one consumed is only the beginning. 8.
8. New categories selected for biological replacements. 8.
11. Add it, I hear for that drain of mine. 4.
15. Such a despicable person is out of court. 9.
17. Such control must conform to circumstances. 8.
18. Achieved loss of rights from a felony. 8.
20. God of love for the Greeks. 4.
21. Added, you see inside, to cited evidence. 7.
22. The solo victory that achieves nothing — that's tricky. 6.
23. Where hidden in something close to us. 6.
26. Wake him up. 5.

Incorporated Law Society of Ireland

LUNCH FACILITIES BLACKHALL PLACE

Members of the profession should note that lunch facilities are available in the Members' Lounge in Blackhall Place from 1 p.m. to 2.30 p.m. each day, Monday to Friday.

Reservations for lunch should be made at least 24 hours in advance.

A variety of lunch meals are available ranging from Soup & Rolls through Cold Buffet to a hot three course lunch.

EMPLOYMENT REGISTER

Members are reminded that the Society maintains an Employment Register for Solicitors. Those seeking employment and those Offices with posts to be filled are invited to contact The Education Officer, Ms. Jean Sheppard, The Law Society, Blackhall Place, Dublin, 7.

(Footnotes — contd. from p.167)

mortgage or charge on a ship.
The appeal was accordingly dismissed.

16. The Evangaline 5 Jur.N.S. 108, 137; 2 L.T.N.S. 137.
17. Section 41.
18. Section 42.
19. Section 43.
20. Section 46.
21. Sections 51 & 53.
22. Section 50.
23. Section 49.
24. Section 70.
25. Section 72.
26. The Court of Admiralty (Ireland) Amendment Act, 1876, (c28).
27. Section 16.
28. The Supreme Court of Judicature (Ireland) Act, 1877 (c57), Section 9.
29. Cited as: The Courts (Supplemental Provisions) Acts, 1961-1981.
30. S.I. 72 of 1962, (Pr.6559).
31. Order 64, Rule 1.
32. Bottomry was a type of mortgage or bond executed in cases of necessity by the Master of a ship, say in order to have repairs done urgently when no other money or credit was available. The ship's hull or bottom was mortgaged by a bond given to the lender, hence the term "Bottomry". With modern systems of communication and improved credit transfer systems, the practice has become rare.
33. Order 64 Rule 5.
34. Order 64 Rule 43.
35. Order 64 rule 45.
36. Order 64 Rules 1-62 & Appendix J.
37. The Court of Admiralty (Ireland) Act, 1867, Section 84, later repealed by the Statute Law Revision (No. 2) Act, 1893.
38. Section 80.
39. Section 74.
40. Section 75.
41. Section 79.
42. Section 2.
43. 81 I.L.T. & S.J. p.204. Also *Grimes -v- S.S. Bangor Bay*, 83 I.L.T.R. — O'Byrne J. p.71.
44. *Bull -v- Pile (The Erminia)*, 27 I.L.T.R. 136.
45. 1876 Act, Section 77.
46. Statutory Rule dated the 5th day of July 1918 which increased the costs and charges in local courts.
47. Treatise on the Courts of Justice Act 1924 by Gerald Horan, K.C., published by John Falconer. See 58 I.L.T. & S.J. p.98; 81 I.L.T. & S.J. p.204. See also a series of articles published in 58 I.L.T. & S.J.
48. 1924 Act Section 51.
49. 1876 Act Section 3.
50. *Grimes -v- S.S. Bangor Bay* 83 I.L.T.R. 67.
51. Courts of Justice Act, 1924.
52. Courts (Supplemental Provisions) Act, 1961, Section 23.
53. O'Keeffe J. in the *State (Kinvarra Shipping Ltd.) -v- Thomas Neylon* [1974] I.R. 11 at p.16.
54. 1867 Act, Section 93.
55. See Carleton's *Jurisdiction and Procedure of the County Courts in Ireland*, 2nd Edition (1891) at p.992-1023.
56. Circuit Court Rules 1930 Order XXXVI.
57. Circuit Court Rules 1950, S.I. 179 of 1950.
58. 1924 Act, Section 51.
59. 1867 Act, Section 3.
60. Maritime Jurisdiction Act, 1959, No. 22.
61. Courts of Justice Act, 1924.
62. [1974] I.R. 11.
63. At page 11.
64. Courts (Supplemental Provisions) Act, 1961.
65. The *Kinvarra Shipping* case was decided before the commencement of this Act.

Presentation of Parchments — 19th July, 1984

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Walsh, Christopher B., Tinnahinch, Graiguenamanagh, Co. Kilkenny.
Waters, Emilie, B.A., LL.B. (Hons.), 7 Wood Quay, Galway.

Ian G. Munnelly, Galway.

Edward Dundon, Dublin and Caroline Devlin, winner of the Guinness Mahon Prize.

The President, Mr. Frank O'Donnell, congratulating Ms. Michele Cusack, winner of the Overend Scholarship and the Patrick O'Connor Memorial Prize.

For Your Diary . . .

3/7 September, 1984. **International Bar Association 20th Biennial Conference.** Programmes available from Margaret Byrne at the Law Society, Blackhall Place, Dublin 7 or from the IBA, 2 Harewood Place, London W1R 9HB.

14 September 1984. **Solicitors' Golfing Society.** Captain's Prize, 1984. Dundalk Golf Club.

17/19 September, 1984. **Intensive Course on Planning Law.** Centre for Environmental Studies, Law School, Trinity College, Dublin 2. Course Fee: £150.00 per person. Enquiries to Dr. Yvonne Scannell at 772941 (ext. 1997 or 1125).

19/21 October, 1984. **Society of Young Solicitors Seminar.** Talbot Hotel, Wexford. Details of topics and accommodation arrangements will appear in the next issue.

CROSSWORD SOLUTION

Across

1. Restrain
5. Talion
9. Mandates
10. Stucco
12. Satisfied
13. Story
14. Scan
16. Trestle
19. Detinue
21. Also
24. Prate
25. Order bill
27. Inning
28. Accusers
29. Endure
30. Adherent

Down

1. Remise
2. Senate
3. Reams
4. Iberian
6. Actus reus
7. Inchoate
8. Neotypes
11. Adit
15. Contemnor. (Alt. er)
17. Adaptive
18. Attained
20. Eros
21. Adduced
22. Misere
23. Closet
26. Rouse

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Correspondence

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

26th June, 1984

Dear Sir,

re: Abbeyfield (Dublin) Society Limited

Members may recall that the May issue of the *Gazette*, in its report of the Annual General Meeting of the Solicitors' Benevolent Association, referred to the interest taken by the Association in the Abbeyfield (Dublin) Society Limited.

Those who are interested will be pleased to know that the first Abbeyfield House to be set up in the Republic of Ireland was officially opened by President Hillery on Saturday, 23rd of June.

The house, situate on the Howth Road, accommodates six active elderly people.

It provides a special type of accommodation for elderly people bridging the gap between living in a private house and going into an old persons home.

Residents furnish their own rooms and are independent in every respect but share a common sitting room and dining room and take their two main meals together as a community.

There is a resident housekeeper who is responsible for the day to day running of the house and she is backed up by a House Committee.

The overall running of the Society is the responsibility of the Executive Committee which is drawn from all walks of life. The Chairman is Edward Donelan, Barrister and there are two accountants, two Solicitors and the Rev. Stanley Baird on the Executive Committee.

The house is equipped with the latest smoke and fire detectors and is carefully adapted to meet the special needs of elderly people.

Members will be interested to know that funds for the purchase and conversion of the house have come from a variety of sources including private individuals, the Parish of St. Barnabas and North Strand, Drumcondra, The Presbyterian Association and the Solicitors' Benevolent Association.

By virtue of the sponsorship of the Solicitors' Benevolent Association that Society has the right to nominate two of the residents and a representative on the Executive Committee.

The Society is a voluntary body and has no full time staff other than the housekeeper and her relief housekeeper. It receives no state funds. Once the Society has paid off its debts on the Howth Road House, it hopes to open other houses in Dublin and in other parts of the country. Already there are groups working towards the opening of a house in Navan, Co. Meath, in Sandycove, Co. Dublin and in Mount Merrion, Co. Dublin.

The opening of an Abbeyfield house in Dublin represents an important new departure in providing sensible accommodation for elderly people in Dublin. Abbeyfield is a means by which the community as a whole can help individuals who are alone and vulnerable.

Yours sincerely,
Thelma King,
Solicitor,
15 St. Stephen's Green, N., Dublin 2.

Medico-Legal Society of Ireland

The Annual General Meeting of The Medico-Legal Society of Ireland in the offices of The Irish Medical Organisation, 10 Fitzwilliam Place, Dublin 2 (by kind permission) on Monday the 7th May 1984. The President, Miss Carmel Killeen, Solicitor, took the Chair.

The Officers and Council of the Society elected for the year 1984-1985 are as follows:

Patron:- Professor P.D.J. Holland,
President:- Dr. Sarah Rogers,
Immediate Past President:- Miss Carmel Killeen, Solicitor,
Vice Presidents:- Mr. Brian Murphy, Solicitor, Mr. Leslie Kearon, Solicitor,
Hon. Secretary:- Mr. Eamonn Hall, Solicitor,
Hon. Treasurer:- Miss Cliona O'Tuama, Solicitor,
Hon. Auditor:- Mr. Tony Browne,
Medical:- Dr. Robert Towers, Dr. Liam Daly, Dr. Declan Gilsenan, Dr. J. Harbison, Dr. Seamus Ryan,
Legal:- District Justice Cassidy, Mr. Denis Greene, Solicitor, Mr. Raymond Downey, Solicitor, Miss Thelma King, Solicitor, Miss Mary McMurrough Murphy B.L., Mr. Brendan Garvan, Solicitor,
Forensic Scientists:- Dr. Sheila Willis.

The Society's programme for the year 1984-1985 commencing in October 1984 is being compiled and will be published later. □

Solicitors' Golfing Society

Results of President's Prize Outing to Elm Park Golf Club on 26th June 1984

President's (Frank O'Donnell) Prize and Incorporated Law Society Challenge Cup

Winner	Barry O'Neill (19)	41 pts.
Runner-up	John O'Dwyer (28)	38 pts.
Ryan Cup		
Winner	Brian O'Brien (13)	40 pts.
Runner-up	Finbar Crowley (19)	37 pts. on 2nd nine.
Under 12		
Winner	Owen O'Brien (8)	36 pts. on 2nd nine.
Runner-up	Cyril Coyle (11)	36 pts.
1st nine	Frank Bourke (28)	21 pts. on last 6.
2nd nine	William A. Tormey (17)	19 pts. on last 6.
Over 30 miles	Padraig Gearty (13)	34 pts.
By lot	John R. Lynch (7)	29 pts,
	Gerry Cummiskey (15)	33 pts.
	and Dermot Kilcullen (15)	27 pts.

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.

Dated 8th day of August, 1984.

J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

1. **REGISTERED OWNER:** Patrick Cleary, Cloonulla, Kildysart, County Clare; Folio No.: 7461; Lands: Cloonulla; Area: 38a.1r.4p.; County: **CLARE.**
2. **REGISTERED OWNER:** Peter Moore; Folio No.: 5565; Lands: Darcystown Barony of Balrothery East and County of Dublin; Area: 3r.25p.; County: **DUBLIN.**
3. **REGISTERED OWNER:** Muriel Kelly; Folio No.: 28408F; Lands: Clounglaskan; Area: 30.438 acres; County: **CORK.**
4. **REGISTERED OWNER:** Daniel Callaghan; Folio No.: 4336; Lands: Knockeenatudor; Area: 25a.0r.4p.; County: **CORK.**
5. **REGISTERED OWNER:** Terence McGovern; Folio No.: 3394; Lands: Mully Lower; Area: 34a.0r.20p.; County: **CAVAN.**
6. **REGISTERED OWNER:** Nicholas Forde; Folio No.: 19927F; Lands: Ballinvriskig; Area: 0.572 acres; County: **CORK.**
7. **REGISTERED OWNER:** Paul O'Connell (deceased); Folio No.: 20711; Lands: Kilmaclenine; Area: 43a.2r.5p.; County: **CORK.**
8. **REGISTERED OWNER:** Dominic Matthew O'Neill; Folio No.: 1788; Lands: Castlegaddery; Area: 43a.0r.16p.; County: **WESTMEATH.**
9. **REGISTERED OWNER:** George W. Sherwood; Folio No.: 2250; Lands: Caherlesk; Area: 10a.4r.26p.; County: **KILKENNY.**
10. **REGISTERED OWNER:** Raymond Michael McCaughey & Catherine Anne McCaughey; Folio No.: 35502; Lands: Doon West; Area: 1a.0r.38p.; County: **KERRY.**
11. **REGISTERED OWNER:** James Charles Leahy; Folio No.: 795L; Lands: Known as No. 143 Kimmage Road East. Situate in the District of Terenure, Parish of Rathfarnham and City of **DUBLIN.**
12. **REGISTERED OWNER:** Sarah McDonnell & Annie McDonnell; Folio No.: 26019; Lands: Keeldrum Lower; Area: 6a.0r.32p.; County: **DONEGAL.**
13. **REGISTERED OWNER:** Peter Rogers (deceased); Folio No.: 8066 and 9197; Lands: Ballymakane (1) Ballymakane, (2) Ballymakane; Area: 5a.3r.25p. (F.8066), (1) Ballymakane, (2) Ballymakane (F.9197); County: **MEATH.**
14. **REGISTERED OWNER:** John Bourke, Kilkenny, Castlebar, County Mayo; Folio No.: 13830; Lands: Kilknock; Area: 42a.0r.34p.; County: **MAYO.**
15. **REGISTERED OWNER:** James Austen McNeill; Folio No.: 13592 (now closed to 12700F); Lands: Ballyiriston; Area: 12.768 hectares; County: **DONEGAL.**
16. **REGISTERED OWNER:** Fern Turst Company Limited; Folio No.: 30623; Lands: (1) Muntermellan, (2) Muntermellan; Area: (1) 29a.0r.0p., (2) 27a.0r.20p.; County: **DONEGAL.**
17. **REGISTERED OWNER:** Joseph Alexander Tinney; Folio No.: 15168; Lands: (1) Drumcarn, (2) Drumoghill; Area: (1) 78a.0r.10p., (2) 0a.0r.7p.; County: **DONEGAL.**
18. **REGISTERED OWNER:** Richard Brennan and Joseph Mulhern; Folio No.: 7286; Lands: (1) Kiltamagh, (2) Gortgarve, (3) Gowelboy; Area: (1)1a.3r.21½p., (2) 0a.0r.23¼p., (3) 0a.3r.17p.
19. **REGISTERED OWNER:** Peter Kieran and Aileen Kieran; Folio No.: 3986F; Lands: Burgagery; County: **TIPPERARY.**
20. **REGISTERED OWNER:** Daniel Gorman; Folio No.: 12395F; Lands: Newcastle; County: **LIMERICK.**
21. **REGISTERED OWNER:** Hugh Conway; Folio No.: 19019; Lands: (1) Tully, (2) Tully, (3) Derrygassan Lr.; Area: (1) 17a.2r.24p., (2) 14a.3r.10p., (3) 12a.1r.20p.
22. **REGISTERED OWNER:** Thomas McEnaney and Bridget McEnaney; Folio No.: 4650; Lands: Ballybinaby; Area: 21a.2r.34p.; County: **LOUTH.**
23. **REGISTERED OWNER:** Laurence and Margaret McHugh; Folio No.: 40815; Lands: (1) Carrownagarry, (2) Carrownagarry, (3) Carownagarry; Area: (1) 10a.0r.10p., (2) 5a.2r.23p., (3) 6a.2r.17p.; County: **GALWAY.**
24. **REGISTERED OWNER:** Ian Denis Cecil Smith & Lambertina Maria Smith; Folio No.: 17220; Lands: Aghern West; Area: 211a.3r.38p.; County: **CORK.**
25. **REGISTERED OWNER:** Louise Murphy (F.7066), Abban Murphy (F.924F); Folio No.: 7066, 924F; Lands: Drinagh; Area: 0a.2r.18p. (F.7066), 0a.2r.32p. (F.924F); County: **WEXFORD.**
26. **REGISTERED OWNER:** Charles Dolan (deceased); Folio No.: 7658; Lands: Drumcroman; Area: 13a.1r.22p.; County: **LEITRIM.**
27. **REGISTERED OWNER:** John B. Moriarty & Ellen Moriarty; Folio No.: 19921; Lands: Lackabane; Area: 0a.1r.36p.; County: **KERRY.**
28. **REGISTERED OWNER:** George Gammell; Folio No.: 9415; Lands: Kilcoole; Area: — ; County: **WICKLOW.**
29. **REGISTERED OWNER:** James W. Dukelow; Folio No.: 49951; Lands: Rusheenaniska; Area: 62a.3r.31p.; County: **CORK.**
30. **REGISTERED OWNER:** Cornelius Moynihan; Folio No.: 37757; Lands: Rathduff; Area: 0a.3r.3p.; County: **CORK.**
31. **REGISTERED OWNER:** Padraig and Mary McCarthy; Folio No.: 4231F; Lands: Brittas South; Area: 26a.1r.26p.; County: **CORK.**
32. **REGISTERED OWNER:** Michael J. O'Donnell (Junior); Folio No.: 3641 & 3630 now closed to folio 26340; Lands: (1) Castlequarter, (2) Ballintogher; Area: (1) 25a.2r.16p., (2) 195a.3r.6p.; County: **TIPPERARY.**
33. **REGISTERED OWNER:** John Harte, Cloondaff, Glenhest, Newport, Co. Mayo; Folio No.: 43630; Lands: (1) Cloondaff, (2) Ballyteige; Area: (1) 19a.3r.10p., (2) 2a.3r.16p.; County: **MAYO.**
34. **REGISTERED OWNER:** Thomas Lally, Castlelucas, Ballyglass, County Mayo; Folio No.: 13504; Lands: Castlelucas; Area: 26a.3r.24p.; County: **MAYO.**
35. **REGISTERED OWNER:** John Francis Dolan; Folio No.: 14587; Lands: Drumod Glebe; Area: 12a.3r.4p.; County: **CAVAN.**
36. **REGISTERED OWNER:** Josephine and Helen Ryan; Folio No.: 5436; Lands: Ballyvarra; Area: 3.317 acres; County: **LIMERICK.**
37. **REGISTERED OWNER:** Brendan Bailey and Catherine Bailey; Folio No.: 2818F; Lands: Marshes Lower; Area: — ; County: **LOUTH.**
38. **REGISTERED OWNER:** Henry Baker; Folio No.: 1342F; Lands: (1) Graigue, (2) Graigue; Area: (1) 21a.1r.37p., (2) 9a.2r.12p.; County: **LIMERICK.**
39. **REGISTERED OWNER:** Peter Keenan; Folio No.: (1) 3977 & (2) 337F; Lands: (1) Ballymakellett, (2) a. Ballymakellett, b. Ballymakellett; Area: (1) 6a.2r.35p., (2)a. 2a.0r.20p., b. 5a.3r.5p.; County: **LOUTH.**

Lost Wills

HOWARD, Timothy Patrick, late of Bellmount Mills, Crookstown, Co. Cork, also of 10, Fernside, Summerhill South, Cork. Will any person having knowledge of the whereabouts of any Will of the above named deceased who died on 13 May, 1984, please contact Messrs. Mills, Houlihan & Co., Solicitors, 2, South Mall, Cork.

JUDGE, Reverend John Joseph, deceased, late of 17 South Avenue, Mount Merrion, Dublin and St. John of Gods Home, Stillorgan, Co. Dublin. Would anybody knowing of the whereabouts of the original Will of the above named deceased who died on September 3, 1981, please contact Messrs. James Monahan & Co., Solicitors, 46 Abbey Street, Ennis, Co. Clare. Tel: (065) 28800 and 28612.

KERIN, Lucy (née Guerin), late of St. Agnes Road, Crumlin, Dublin. Would anybody who knows the whereabouts of any Will of the deceased who died in early 1983, please contact Claffey Gannon & Co., Solicitors, Castlerea, Co. Roscommon. Telephone numbers 7 or 522.

MURRAY, Margaret, late of Nazareth House, Sligo (formerly of Ragwood, Gurteen, County Sligo). Date of death — 11th June, 1984. Any person having knowledge of the whereabouts of any Will of the aforesaid deceased, is requested to contact Messrs. Johnson & Johnson, Solicitors, Ballymote, County Sligo. Telephone No. (071) 83304.

McCARTHY, Timothy, late of Ballymacandrick, Cloyne, Co. Cork. Date of death 2nd March, 1984. Any person having knowledge of the existence or the whereabouts of any Will executed by the above named is requested to communicate with Messrs. Eoin C. Daly & Co., Solicitors, 17, South Mall, Cork. Telephone number (021) 25244.

Miscellaneous

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CHURCHTOWN MEETING HOUSE. Will anyone acting for the estate of Charles Going Malone or the estate of Olympia Hutton, the lessor and freeholder respectively of Churchtown Meeting House, please contact McCann FitzGerald Sutton Dudley (Ref. MAP/MK), 30 Pembroke St., Dublin 2, Solicitors for the Lessees, who wish to buy out the ground rent.

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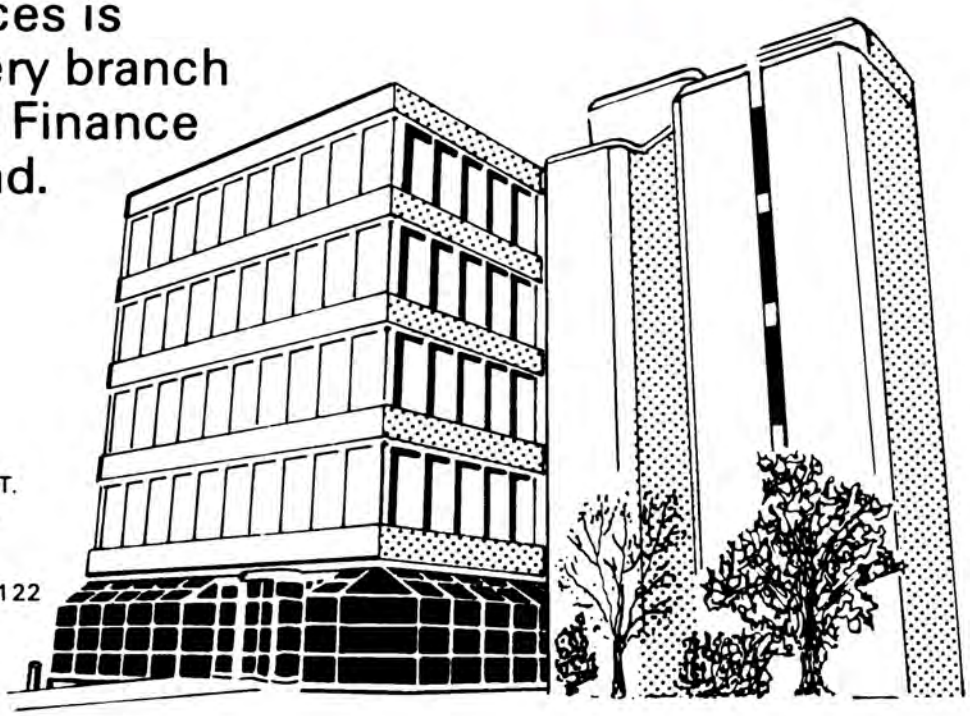

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 7 September 1984

Abolition of Land Commission

THE recent announcement by the Government of its intention to abolish the Land Commission will be received with mixed feelings by the Solicitors' profession. To many the Land Commission is almost an old friend, certainly a familiar institution. To others it will have been an anachronistic nuisance, notable chiefly for spoiling auctions of farming land by the last minute service of Inspection Notices.

In its time, the Land Commission, as successor to the Congested Districts Board, served the Irish community well. The system of land acquisition from big estates and its re-allocation among the local farming community has, in the course of not so many generations, transformed the Irish rural population from almost total serfdom to being independent, land owning, conservative capitalists. With the ever-increasing spread of bureaucracy into our daily lives, the Land Commission became the body charged with responsibility for administering such diverse concepts as the approval of land purchases by non-nationals and the farmer's voluntary retirement scheme.

To date, official explanation of what the dismantling of the Land Commission will involve has, to say the least, been scant. Little or no reference seems to have been made to the setting up of the Inter-Departmental Committee on Land Structure Reform, which delivered its Final Report in May 1978, nor to the Government White Paper "Land Policy" published in December 1980. Interestingly, the Inter-Departmental Committee found that the Land Commission, which was established to deal with the problems of an entirely different era, was not the appropriate body to implement future land policy, and recommended the establishment of a new land agency for the purpose. The White Paper, however, chose to ignore the recommendation and, instead, stated that Government policy was to *strengthen* the powers of the Land Commission by two additional mechanisms, separate but complementary, consisting of fiscal measures and a direct control of the right to purchase land. The White Paper went even further and made a number of strong and fundamental recommendations in the context of the continued utilisation of the Land Commission. In particular, it envisaged a continuing need for compulsory acquisition as long as a substantial acreage of land remained under-utilised in the hands of owners who were not interested in its development — which was in no way an attack on the idle rich, or "hobby farmers". The White Paper stated that over 30 per cent of the land of the country is taken up by farms which have shown no significant growth in recent years. One has only to drive through the Irish countryside to see the number of fields covered in gorse or brambles which could, at little cost, be restored to productivity.

In the face of the 1980 White Paper, the abolition of the Land Commission seems something of a volte face. Socially, it may be argued that the loss of the Land Commission's compulsory powers of acquisition may have the effect of raising the price of land. Against this it can be said that market forces, including the state of the economy and the money supply from time to time, will themselves regulate the price of land. The areas of the country in which very large areas of land will be purchased for very large sums of money are small and are, in the main, areas in which compulsory purchase and re-allocation is not a major factor. In other areas, the absence of the Land Commission as a purchaser of large farms should simply result in those farms being offered for sale in smaller lots, thus, in effect, making land available to more farmers. It is also possible that farmers who have purchased additional land out of their own hard-earned cash would be more concerned to farm it to its best advantage than would the farmer who has the land allocated to him through the Land Commission and who pays for it over 30 years on the "never never".

At least it can be recorded that one key recommendation of both the Inter-Departmental Committee and the White Paper has found favour with the Government, namely, that steps be taken to make more land available to those who need it — existing farmers and intending farmers — through the medium of leasing. While this proposal has a great deal to recommend it, it faces the obstacle of a historically entrenched and entirely understandable "anti landlord" attitude which must be surmounted. It also faces the obstacle of a residual body of old and largely dormant law, passed over the years for the protection of tenants and which both the Inter-Departmental Committee and the White Paper stated should be identified and repealed. The Land Bill, 1984, introduced earlier this year marks the Government's first positive action in this regard, by excluding leases of agricultural land from the application of a number of old enactments and by modifying Section 80 of the Building Societies Act, 1976, so as to provide that the expression "prior mortgage" shall not extend to or include certain charges on agricultural land. The entrenched fear of "Landlordism" may be harder to dispel.

As far as the profession is concerned, it would welcome

(continued on page 187)

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 7 September 1984

In this issue . . .

ABC Membership has been approved pending first audit for the period July to December 1984.

Published at Blackhall Place, Dublin 7.

Comment . . .

. . . Continuing Legal Education

MANDATORY Continuing Legal Education moves closer to Ireland on the 1st August 1985 when the new requirements of the Law Society of England and Wales take effect. Every solicitor who is admitted in that jurisdiction after that date will be required to attend certain post admission courses during their first 3 years in practice. Some of the courses, such as those in office management and efficiency and professional conduct, will be compulsory; others will be optional, a solicitor being required to attend a certain number of courses from a choice of 14 different topics.

An interesting feature of this development is that there is a strong element of "topping up" involved. The new proposals are seen as being complementary to the pre-qualification training programme. It says much for the sense of responsibility of the trainee solicitors that they have apparently seen the proposals as a valuable or necessary addition to their training rather than an additional imposition. The new scheme does, however, beg the important question of how Continuing Legal Education can cope with the frequently perceived problem of the once competent lawyer who has been overtaken by the increasing complexity of our legal system and the pressures of running a practice. It is those in practice for 23, not 3, years who may be most in need.

No topic in the field of Legal Education has given rise to more debate in recent years than Mandatory Continuing Legal Education. A number of States in the United States introduced it but the spread seems to have halted at 13 States. Interestingly enough some of those who are most vehemently opposed to its introduction have been the educators. Far from seeing Mandatory CLE as a golden opportunity for empire building they have argued that the presence at courses of those who are there only because they have to be there will seriously dilute the educational value of the courses. There is no doubt that in any courses of a workshop nature or which otherwise require participation of the audience the presence of people who are there unwillingly would be counter-productive. Nonetheless there is a very real dilemma to be faced. How is the person who rarely if ever participates in any formal or informal Continuing Legal Education but who may be the person most in need of such further education to be persuaded of its necessity?

A further argument raised by those who are opposed to Mandatory CLE is that they believe that Mandatory CLE in specialised subjects is likely to lead to a demand by those who have attended such courses to be entitled to

(continued on page 187)

Schools' Liability for Negligence

Part II

by
William Binchy, B.A., B.C.L., LL.M., B.L.
Research Counsellor, The Law Reform Commission

(Part I of this article was published in the July/August *Gazette* at p.153.)

(3) Injuries Sustained Off the Premises

An allegation of negligence may be made against the school where a child is injured off the premises, on account of lack of supervision or because of an inadequate safety system. In *Hosty -v- McDonagh*[55] in 1973, a 10 year-old child was injured by a car when she came through the school gate at lunch time and ran onto the road. Liability was imposed on the school manager for not having a suitable exit from the school, not having it supervised and allowing the plaintiff onto the road unattended.[56] The judgment of FitzGerald C.J. (for the Court) does not expressly state why the child went onto the road or what she should have been doing at the time.

In the English decision of *Barnes -v- Hampshire County Council*[57] in 1969, the House of Lords imposed liability on a school which released a five-year-old child five minutes earlier than the scheduled time for the end of the school day. The child wandered onto a busy road and was injured. The child's mother, who was on her way to the school, would have collected her at the scheduled time had she not been released prematurely.

The House of Lords rested its decision on the fact that the child was released early rather than on the failure of the school to ensure that each child was "paired off" with a responsible person who was collecting the child. This latter basis of liability had been rejected by the trial Judge and the Court of Appeal and was abandoned by the plaintiff on appeal to the House of Lords. It is interesting to note that Lords Donovan[58] and Pearson[59] would also have rejected this basis of liability, but Viscount Dilhorne

> "doubt[ed] very much whether a system which permits of the release of a five-year-old from school without supervision while looking for a parent, with the risk that the child will try to go home on its own, can be described as satisfactory."[60]

He considered[61] that it should not be assumed that the trial judge's finding was necessarily one which would be followed should such a system again come under consideration.

The liability of a school in this context may extend to injuries sustained by third parties. In *Carmarthenshire County Council -v- Lewis*[62] a four-year-old pupil at a nursery school got out of the classroom when he was not being supervised and ran through an unlocked gate down a lane into a busy highway. He caused a driver of a lorry to make it swerve so that it struck a telegraph pole, as a result of which the driver was killed.

Liability was imposed on the school authorities by the Court of Appeal, on the basis that the lack of supervision by the teacher had been negligent. The House of Lords held that the teacher had not been negligent but still imposed liability on the school authorities because they ought to have anticipated the danger of a child "escaping" in the absence of supervision, whatever the cause of that absence.

(4) Supervision Outside Hours

Clearly it would be wrong to impose on day schools a duty to supervise children day and night: there must be temporal limits to the scope of this duty. Equally clearly, it would seem legalistic and unjust to restrict the duty to the exact limits of school hours. The courts have therefore tried to strike a reasonable balance. In *Ward -v- Hertfordshire County Council*[63], an 8-year-old child was injured when she fell against a wall while racing unsupervised in the playground a few minutes before school classes began at 8.55 a.m. In imposing liability, Hinchcliffe J. said:

> "If it is thought necessary to supervise children at 10.45 a.m., midday and 2.30 p.m., surely it is just as necessary to supervise them between 8.30 a.m. and 8.45 a.m. and 8.55 a.m. . . . In my judgment reasonable supervision was required, not only during the working day, but also when the children were collected together in the playground before the school starts. I do not suggest that there should necessarily be a continuous supervision from 8.15 a.m. onwards, but there should have been supervision from time to time controlling any risky activity of the children having regard to the proximity of this dangerous wall; and really it is not too much to ask that there should be supervision between 8.30 a.m. or 8.45 a.m. and 8.55 a.m. when the supervision might well have been continuous."[64]

The judges of the Court of Appeal, reversing Hinchcliffe J., were more anxious to stress the casual irrelevance of lack of supervision at the time of the accident, on the facts of the case, than to address the issue of when a duty to supervise commenced. Salmon L.J. appeared to concede tentatively that a duty to supervise existed before the beginning of school hours[65], but Lord Denning M.R. seemed unsympathetic to this argument[66]. Cross L.J. did not address the issue.

The High Court of Australia considered the question in far greater detail in *Geyer -v- Downs*[67] in 1977. The case also was concerned with injuries sustained in a playground before school opened but at a time when a significant number of children had already assembled. The evidence disclosed that the headmaster had some time earlier given instructions that the children were not to run about or play games before school opened but were to sit down and read or talk quietly.

The High Court held that in these circumstances, the school was under a duty of care for the period before

school hours — a duty which the jury had already held had been breached. Stephen J. said that:

> "The duty which a schoolmaster owes to his pupil arises from the relationship between them and its temporal ambit will be determined by the circumstances of the relationship on the particular occasion in question."

In an important passage, he stated that:

> "It is for schoolmasters and for those who employ them . . . . to provide facilities whereby the schoolmasterly duty can adequately be discharged during the period for which it is assumed. A schoolmaster's ability or inability to discharge it will determine neither the existence of the duty nor its temporal ambit but only whether or not the duty has been adequately performed. The temporal ambit of the duty will, therefore, depend not at all upon the schoolmaster's ability, however derived, effectively to perform the duty but, rather, upon whether the particular circumstances of the occasion in question reveal that the relationship of schoolmaster and pupil was or was not then in existence. If it was, the duty will apply. It will be for the schoolmaster and those standing behind him to cut their coats according to the cloth, not assuming the relationship when unable to perform the duty which goes with it."

The concept of "assuming the relationship" is not entirely dissimilar to that which is at the base of the *Hedley Byrne* principle: to the man who says that he simply cannot discharge the obligation the riposte of the court is that he should have thought of that before undertaking it in the first place. Applied to the question of the playground supervision before school hours, the lesson of *Geyer -v- Downs* is clear: if a school opens its gates to children before school hours it must supervise them adequately. If it cannot provide the necessary supervision then it must close its gates to the children or risk the consequences. Whether this decision encourages or discourages the prevention of accidents has been questioned[68].

Finally, it is worth noting that in the Canadian decision of *Bourgeault -v- Board of Education, St. Paul's Roman Catholic School. District No. 20*[69], in 1977, a school was held not liable for injuries sustained by a fourteen-year-old pupil who fell off a ladder when hanging decorations in the gymnasium for the Christmas concert. The girl had remained on in the school after classes had been completed and after she had been told to go home. Hughes J. said that he had considered:

> "whether a duty rested with the defendant to have a member of the teaching staff responsible for touring the school premises after dismissal of classes, to be sure that all students left the building before he or she leaves as the last person, other than the caretaker, to depart the premises . . . . While the age and grade of children might prompt different responses as to whether such a duty can be said to exist, I do not believe it can be said any such duty was owed to a student of 14 years of age . . . . and who had received, when possessed with ability to comprehend, instructions to depart for home."[70]

(5) Other Acts of Negligence

Other acts of negligence may occur in the course of a school day. Two examples will suffice: a teacher or other school employee may leave dangerous things, such as phosphorus[71], within access of the pupils, or a pupil may be sent on a risky task that is beyond his or her abilities[72].

(6) Structural Dangers.

A school manager or principal may be liable as occupier of the premises where there is a structural danger[73]. The pupils are sometimes regarded as invitees[74] but the language used on this question is sometimes not exact and criteria more appropriate to a licensor-licensee relationship have been invoked[75]. There is an added complication. In cases involving schools the injured plaintiff will frequently be alleging a twofold breach of duty, arguing that there was a structural danger and that the school authorities did not adequately supervise the children, having regard to this danger. In such circumstances the school authorities' duty as occupiers tends to be clouded with their broader duty in negligence[76].

The language of the occupiers' cases was used in *Courtney -v- Masterson*[77], where it was held that a barbed wire fence did not constitute a "concealed trap" to a ten-year-old boy. The fence was, however, in a field adjoining the school playground, which was out-of-bounds for the pupils. The case is really one involving an issue of supervision rather than occupation duties.

So also in *Lennon -v- McCarthy*[78], the Supreme Court held that the case had rightly been withdrawn from the jury where a nine-year-old pupil playing "tig" in a field adjoining his school playground was struck in the eye by a rebounding hawthorn bush when chasing another pupil. O Dálaigh C.J. rejected the argument that a careful father, looking at the field, would have considered it unsuitable to play in. He stated:

> "I am wholly unable to accept this view. It is unreal. Its effect would be to proscribe the playing of ordinary simple games like 'tig' in the ordinary surroundings of rural Ireland. What happened here was an accident such as is inseparable from life . . . ."[79]

An interesting issue regarding structural dangers arose in the English decision of *Ward -v- Hertfordshire County Council*[80], which has already been mentioned. The plaintiff, an eight-year-old boy, fractured his skull when he tripped and fell against a wall while racing unsupervised in the school playground. The wall was made in part of pieces of flint, "with sharp jagged edges"[81] some of which jutted out nearly an inch. The evidence disclosed that flint was widely used in the village and elsewhere. To have rendered the wall safer would have created difficulties in waterproofing. The plaintiff's sister, aged about seven, had also injured herself when she split the back of her head while she was skipping near the same wall. Three former pupils gave evidence that they had been injured by coming in contact with the wall at different times over the previous thirty-five years.

At trial Mr. Justice Hinchcliffe had "no hesitation at all"[82] in imposing liability on the school authorities. It seemed to him that:

> "if one lets loose young children in a playground of this sort with inherently dangerous walls around it, one is simply asking for trouble."[83]

The school authorities ought to have made the wall safe or put up railings or netting in front of it, or supervised the children properly in the playground.

The Court of Appeal reversed. The Court described the wall as being "of the commonest type",[84] and considered that, because it never occurred to any of the parents before the plaintiff's accident that the wall was dangerous, it would be wrong to hold the school authorities liable[85]. The earlier accidents, said Lord Denning M.R., were "just the ordinary sort of thing which happens in any playground. They do not show that the wall was dangerous".[86]

The Court of Appeal's decision has received some forcibly expressed support[87], but it can be argued that it was unduly lenient. Who could agree with Salmon L.J.'s description of the accident as "the sort of chance which might be described as one in a million"[88]? Perhaps if the children had been consulted as to their view of the wall's safety, this would have been more helpful than asking their parents.

Conclusion

This review of the cases in this country and abroad indicates that "school negligence" is one aspect of negligence law which has remained largely unaffected by the general movement, overt and covert, towards strict liability. It seems that this subject, already under public scrutiny and discussion, may become increasingly controversial as time progresses.* □

* This article is written in a personal capacity.

Footnotes

55. Unreported, Supreme Court, 29 May 1973 (61/64-1971).
56. Cf. pp. 4-5 of FitzGerald C.J.'s judgment. Liability was also imposed on the teacher in charge, but the basis of liability was not spelt out.
57. [1969] 3 All E.R. 746 (H.L.), reversing 67 L.G.R. 53 (C.A., 1968).
58. [1969] 3 All E.R. at 750.
59. *Id.*, at 752. Lord Reid concurred with Lord Pearson.
60. *Id.*, at 748.
61. *Id.*
62. [1955] A.C. 549 (H.L. (Eng.)).
63. [1970] 1 All E.R. 535 (C.A., 1969), reversing [1969] 2 All E.R. 807 (Hinchcliffe J.). See also *Barnes -v- Hampshire Co. Co.*, [1969] 3 All E.R. 746 (H.L.), reversing 67 L.G.R. 53 (C.A., 1968), discussed *supra.*
64. [1969] 2 All E.R., at 810-811.
65. [1970] 1 All E.R., at 538-539.
66. Cf. *id.*, at 537. See the quotation set out in fn. 86, *infra.*
67. 17 A.L.R. 408 (High Ct. of Australia, 1977).
68. Cf. H. Luntz, D. Hambly & R. Hayes, *Torts: Cases and Commentary*, 431 (1980).
69. 82 D.L.R. (3d) 701 (Sask. Q.B., Hughes J., 1977).
70. *Id.*, at 706. See also *Edmonston -v- Bd. of Trustees for Moose Jaw School District No. 1*, [1920] 3 W.W.R. 979 (Sask. C.A., 1920). Cf. *Boryszko -v- Bd. of Education of City of Toronto and Bennett-Pratt Ltd.*, 33 D.L.R. (2d) 257 (Ont. High Ct., Spence J., 1962).
71. *Williams -v- Eady*, 10 T.L.R. 41 (C.A., 1893).
72. *Smith -v- Martin*, [1911] 2 K.B. 775.
73. Cf. B. McMahon & W. Binchy, *Irish Law of Torts* 187, 245 (1981). See also P. North, *Occupiers' Liability*, 68-70 (1971).
74. Cf. *McKeon -v- Flynn*, 69 I.L.T.R. 61 (Circuit Ct., Judge Sheedy, 1934), *Fryer -v- Salford Corporation*, [1937] 1 All E.R. 617 (C.A.) (especially at 622, *per* Scott L.J.). See also *Morris -v- Carnarvon Co. Co.*, [1910] 1 K.B. 159 (K.B. Div., 1909), aff'd [1910] 1 K.B. 840 (C.A.). In the King's Bench Division, especially *per* Phillimore J., at 167, there was strong emphasis on the fact that the defendants had "invited" the plaintiff to be on the school premises. The Court of Appeal applied a broader general concept of negligence, with less emphasis on the "occupation" element in determining liability.

    In Canada it has been held that the duty of care owed in the school to a pupil is "higher than that ordinarily owing by an invitor to an invitee": *Cropp -v- Potashville School Unit No. 25*, 81 D.L.R. (3d) 115, at 118 (Sask. Q.B., Noble J., 1977) (reversing previous authorities).
75. Cf. *Bohane -v- Driscoll*, [1929] I.R. 428 (Sup. Ct.), *Courtney -v- Masterson*, [1949] Ir. Jur. Rep. 6 (High Ct., Black J.). in *Boryszko -v- Bd. of Education of City of Toronto and Bennett-Pratt Ltd.*, 33 D.L.R. (2d) 257 (Ont. High Ct., Spence J., 1962) where a child returned from home to play in the school playground after having had his evening meal, he was held to be a licensee: cf. *id.*, at 262-263.
76. See, e.g. *Rich -v- L.C.C.*, [1953] 2 All E.R. 376 (C.A.).
77. *Supra*, fn. 3.
78. Unreported, Supreme Court, 13 July 1966 (5-1965).
79. P.3 of O Dálaigh C.J.'s judgment. See also *Portelance -v- Bd. of Trustees of Roman Catholic Separate School for School Section No. 5 in Township of Grantham*, 32 DLR. (2d) 337 (Ont. C. C.A., 1962) a Canadian decision very similar in its facts and legal holding to *Lennon -v- McCarthy.*
80. [1970] 1 All E.R. 535 (C.A., 1969), reversing [1969] 2 All E.R. 807 (Q.B. Div., Hinchley J.).
81. [1969] 2 All E.R., at 810 (*per* Hinchcliffe J.).
82. *Id.*
83. *Id.*
84. [1970] 1 All E.R. 535, at 536 (C.A., *per* Lord Denning M.R., 1969).
85. Cf. *id.*, at 537 (*per* Lord Denning M.R.), at 538 (*per* Salmon L.J.) and at 539 (*per* Cross L.J.).
86. *Id.*, at 537.
87. Cf. T. Weir, *A Casebook on Torts*, 99 (4th ed., 1979):

    > "Things have come to a pretty pass when it can solemnly be argued that a local authority should put a fence round a wall . . . ."

88. [1970] 1 All E.R., at 537.

Comment (continued from page 183)

describe themselves, either within or outside the profession, as specialists in those areas. If such descriptions are to be permitted should mere attendance at courses be a sufficient entitlement for the description of specialist or should there be some form of certification? If there is to be certification does this mean that only those who are certified in a particular area of law should be entitled to practice in it. It will readily be seen that in a small legal community such as ours any enthusiasm for the introduction of Mandatory CLE on a profession-wide basis should be tempered with discretion. □

Abolition of Land Commission

(continued from page 181)

some reduction in the inroads of bureaucracy. One fears, at the same time, that the bureaucracy will remain, merely administered by a different branch of the Department of Lands. The profession may also welcome the abolition of the system of paying professional fees in Land Bonds, although high interest rates have at least lessened the impact of this practice.

The profession would, however, be very much the loser if the Land Commission Records Branch were to be closed or its archive material to be made unavailable. Uncountable title problems, wholly unrelated to current Land Commission activities, have been solved through the Land Commission's archives and the assistance of its ever helpful and patient staff. Let us hope that at least this much can remain. □

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Donatio Mortis Causa: A Review and Update

by
Mary Fenelon, B.C.L., Solicitor
Tutor in Real Property Law, UCD.

THE recent Circuit Court Case of *Tuite -v- Malone*, 15 May 1984, before Neylon J. necessitated a review and update on the law in relation to the doctrine of *Donatio Mortis Causa*. The Plaintiff in this case was successful in establishing a *Donatio Mortis Causa* in respect of two bank accounts and an insurance policy the property of the deceased.

The *Donatio Mortis Causa* is an exception to the rule that equity will not complete an incomplete trust in favour of a volunteer. The *Donatio* is considered a special kind of gift with its own special rules which seem to be a mixture of those relating to gifts *inter vivos* and gifts by will.

There are three essentials to prove a valid *Donatio Mortis Causa*:—

1. The gift must be made in contemplation of the death of the donor.
2. There must be a delivery of the subject matter of the gift to the donee or a transfer of the means of or part of the means of getting at the property.
3. The circumstances must be such as to establish that the gift is to take complete effect upon, but only upon, the death of the donor.

The doctrine applies to most kinds of pure personalty, but does not apply to land, including leasehold property. Provided the above essentials are satisfied, the gift will be enforced on the donor's death despite the incompleteness of the gift prior to his death.

In the recent Circuit Court case of *Tuite -v- Malone* the plaintiff sued the defendant as administratrix of the estate of the deceased donor. The plaintiff claimed a *Donatio* in respect of two bank books and one insurance policy. The plaintiff, a widow, was the deceased's sister-in-law. Since the death of his wife, the deceased had relied on her for help in organising his affairs, cooking for him occasionally and generally keeping an eye on him. She was not aware that he had any relatives. In fact it subsequently transpired on evidence that the deceased and his relatives had not been on talking terms for several years. After the death of his wife, the plaintiff helped the deceased with all the formalities involved in the administration of her estate. He also asked her to arrange for him to see a solicitor to make a Will and they had in fact an appointment for the date in question which was 14 June 1982. When she arrived at his home on that date, the plaintiff found the door open and the deceased at the kitchen sink, with his nose bleeding as the result of falls. The plaintiff helped him into the diningroom and put him on a chair. He asked her for some milk and she had to go to the shops for this. After drinking the milk he said he felt ill and then got sick.

He then said "hand me the box" (a tin box containing all his important documents). He gave the plaintiff two sets of keys to the house and took the two bank books and insurance policy, the subject matter of these proceedings, out of the box. He said "you are to keep these Harriet. I don't want anyone else near them. You know what I want".

In evidence the plaintiff stated that she took this to mean that he wanted her to do what he would have done if he made a Will, which was to put a headstone over the grave of his wife Mary, to give some money to Whitefriar Street Church and to keep the residue for herself.

The plaintiff then got a neighbour's assistance to get him into bed and the doctor came. He was sent to hospital and died that night. Before sending him to hospital the doctor asked him various questions to satisfy himself that the defendant was still lucid.

The deceased died intestate.

After his death, the plaintiff was informed that the deceased had several relatives, the defendant being one of them. The defendant subsequently took out a grant of administration and proceedings were instituted against her in her capacity as administratrix.

In *Tuite -v- Malone*, there was no problem in proving that the gift was made in contemplation of the donor's death. There was no dispute as to the fact that the deceased had died very shortly after making the gift and that he knew himself that he was dying when he made the gift. The doctor who attended him in his last hours was available to give evidence in Court, but was not in fact called.

From the law relating to the first requirement of a *Donatio*, it would seem that it is only necessary that the donor contemplated death at the time of the gift — i.e. the donor's state of mind is important, it does not matter if the donee does not realise that the donor is dying. The donor must not be in a good state of health, according to the decision of *Owens -v- Green* [1932] IR 225, nor contemplating suicide per *Agnew -v- Belfast Banking Company* [1896] 2IR 204.

The question of delivery of the gift is normally the most difficult proof. It must be certain that the donor has parted with actual dominion over the subject matter of the gift but it is not necessary that there be writing accompanying the delivery.

Kiely's "Principles of Equity as applied in Ireland", 1936, states that an imperfect delivery of chattels may be sufficient for effectuating a *Donatio Mortis Causa*. He cites by way of example, the delivery of a key to a box,

which contains chattels, *or* documents of title to chattels (cf *Re Mulory* [1924] 1 IR 98). He also cites examples of what, *inter alia,* has been held capable of being the subject matter of a *Donatio Mortis Causa;* a Post Office savings book (cf *Re Thompson* [1928] IR 606 and *Hearty -v- Colman* [1953-54] Ir. Jur. Reg. 73), a policy of insurance effected on the donor's life (cf *Nelson -v- Prudential Assurance Company Limited* [1929] N.I. 113.)

According to the English Court of Appeal in *Birch -v- Treasury Solicitor* [1950] All ER 1198,

> "where the subject matter of an alleged *Donatio Mortis Causa* consisted of a chose in action, incapable itself of physical delivery, the real test of the validity of the gift is whether the instrument, of which there had been a physical delivery, was the essential *indicia* or evidence of title, possession or production of which entitles the possessor to the money or property purported to be given and it was not essential that every term of the contract out of which the chose in action arose should be stated in the document of title."

There was no real dispute in relation to the capability of the bank books and insurance policy in the case of *Tuite -v- Malone* constituting a *Donatio Mortis Causa per se,* in the light of decided and tested authorities. However, the defendant's case rested on the assumption that the delivery of the gift to the donee before the donor's death had been a delivery of the goods for safe-keeping only and not a gift in the real sense of the word.

In *Re Mulroy* [1924] 1 IR 98 it was decided that the donee permitting the retention by the donor after initial delivery may be sufficient, provided it is clear that the donor's possession remains that of custodian only and no longer that of owner.

However, in *Tuite -v- Malone* the defendant claimed that the deceased's intention from his action suggested that he wanted the plaintiff to look after his possessions whilst he was in hospital. The defendant refused to accept that the wording of the deceased "you know what I want" could be construed in the manner suggested by the plaintiff.

Witnesses appearing on behalf of the defence gave evidence to the effect that the plaintiff had attempted to return the keys of the house to the deceased's relatives when she found out about their existence. The defence also attempted to introduce evidence to the effect that the bank books were with the keys when the plaintiff tried to return them, but this evidence was not supported by the witnesses in course of examination.

In cross-examination the plaintiff admitted that she attempted to return the keys of the house, but only because the deceased had a dog living in the house and she was anxious that somebody would look after it. She lived a considerable distance away from the deceased's house and his relatives lived literally around the corner.

After formal submissions, Neylon J. decided in favour of the plaintiff on the basis that the only reliable evidence came from the plaintiff. It had already been decided in *McGonnell -v- Murray* [1869] IR3EQ 460 that a *Donatio Mortis Causa* might be proved by the evidence of the donee alone, provided such evidence is clear and satisfactory.

Neylon J. considered from the evidence that the deceased had made the plaintiff his confidante and that it was evident that, had he made a Will, he would have left everything to the plaintiff. This had not been done, but he had let her know his intentions in this respect and it was clear that he was seriously ill when he made the gift. The Judge considered that the deceased had been very specific about the gift. He handed the plaintiff the books and made a very specific statement in relation to what he wanted her to do with them. He had handed them over to her, according to the Judge, relying on her as a friend to carry out his wishes. They were not handed over for safe-keeping, but rather the *Donatio Mortis Causa* given in the belief that he could rely on her.

Accordingly judgment was given in favour of the plaintiff in the terms of the endorsement of claim on the Equity Civil Bill. The plaintiff was asked to pay the deceased's funeral expenses as this appeared from the evidence to have been the deceased's intention. Each party was also asked to bear their own costs.

As a consequence of this case, the law in relation to *Donatio Mortis Causa* has once more come before the Courts for review. The case confirms the older and accepted Irish authorities. It confirms that a plaintiff should not be precluded from obtaining relief simply because the plaintiff did not know that he or she was entitled to a *Donatio Mortis Causa* until legal advice was taken.

The case also underlines the more important aspect in any case such as this, where a discretionary remedy is available, that the Judge has to approach each case on its facts and, at the end of the day, it is the Court in exercising its discretion, that concludes whether a valid *Donatio Mortis Causa* has or has not been established. □

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Prospects for the Young Solicitor in the Profession

by
Daire M. Murphy, Solicitor

THAT there is, in today's recessionary times, substantial unemployment among the younger members of the profession appears to be generally assumed by, individual practitioners and students alike. The research carried out by the Law Society in the past twelve months and which indicated that there was not any substantial level of unemployment, appears to have done nothing to dispel this general assumption.

Low salaries to newly qualified Solicitors appear to be the order of the day and are, in general, justified on the basis of this widely held belief.

The belief itself, of a high unemployment ratio among newly qualified Solicitors, appears to be based on everything bar empirical evidence but remains 'obvious' to all concerned. It is obvious either because,

a. the numbers in the profession are growing;

b. times are generally recessionary and there is a high level of general unemployment in the community;

c. the fee-earning areas of solicitors' work are being encroached upon;

d. the low salaries on offer to newly qualified solicitors speak for themselves.

Discussions on all the above areas take place openly and are, justifiably, contentious. What is clear however, is that they are all inter-related matters which require to be dealt with in a positive, consistent and unified fashion.

Generalisations based on rumour are destructive to the stability and self-confidence of the profession. Further, any action taken while the exact objectives are in doubt is more likely to do more harm than good. It therefore appears to me that the first and foremost objective in dealing with this whole area is the gathering of empirical evidence to back a detailed analysis of the true current position and to forecast future trends. The emotive arguments as to reducing numbers of students entering the profession, curtailing the advent of Solicitors setting up their own practices in their early post-qualification years and the salaries to be paid to young assistant Solicitors may well become less contentious in the light of empirically backed practical requirements.

The Younger Members Committee has, in the past, concerned itself largely with the issue of salaries to young assistant Solicitors. It appears clear from the above outline that any minimum wage recommendations are unlikely to have any great effect in the market place so long as the belief of low employment prospects is held by both the potential employer and employee. When reciting the truism that the market finds its own level it must always be remembered that this level is based on the information available to the market at any given point in time.

It is therefore clear that the Younger Members Committee, in concerning itself with the level and quality of employment for younger members of the profession, must concern itself with the wide range of issues that govern the market place.

The headings with which the Committee could concern itself, in any such undertaking might include some or all of the following;

a. Unemployment as against Under-employment

A pure statistical analysis of numbers unemployed cannot give the true and complete picture. Any individual earning less than a full economic salary is under-employed to the extent that that salary is less than that which he/she might expect in circumstances of equal supply and demand. It might indeed be said the employer who pays less than an economic salary, as outlined in the above, will under-employ the assistant in terms of maximising his returns from that employee. By this I mean that he may not consider it necessary to supply the new assistant Solicitor with his own Secretary and full office facilities. This point might best be emphasised by stating that nobody wastes or under-utilises the time of an expensive asset.

b. The pressures imposed on the profession by changing economic and social philosophies

Under this heading might be included issues such as Legal Aid and the attitude of the fee paying client in the ever-growing welfare state.

c. The broad areas of sources of employment and services

It is often said that the Solicitors have allowed their areas of employment to be encroached upon, particularly by accountants. The usually cited areas are Tax Law and Company Law matters. The Profession and the Committee should consider what efforts can be made to re-associate the Solicitor's profession with these areas of Law. In addition we should be actively considering what new areas are arising, e.g., divorce.

Also under this heading can be considered the alternative sources of employment which are or might be open to Solicitors. The ex-President of the Law Society, Mr. Houlihan, apparently instituted discussions with the Garda Siochanna as to their possible employment of Solicitors. In addition Solicitors are now being employed regularly by the larger Accountancy offices and there would appear to be no reason why Solicitors should not enter into general industry in executive capacities. Other professionals such as Accountants and Engineers have for many years had large numbers of members absorbed in employment in this fashion. To advance this issue it may well be necessary to consider the education of Solicitors

and whether this requires to be broadened in administrative subjects.

Also under this heading it must be remembered that certain areas of practice are likely to be lost to the profession in the coming years.

d. Earnings

This issue is extremely general and must cover such aspects as the assessment of fair starting salaries and conditions of employment.

It may well be that the enforcement of minimum conditions in terms of employment would have a benefit to the profession as a whole. Certainly the treatment of newly qualified Solicitors as being no more useful or trustworthy than the Secretary casts no credit on the profession as a whole or the training received as an apprentice and through the Law School. Low salaries put no pressure on the employer to make the fullest utilisation of the asset they have acquired nor does it encourage clients to treat the opinion of such an assistant with any regard. In fact the under utilisation or the demeaning of an assistant reflects no credit on the practice in which he is operating.

Again, under this heading can be considered the abuse being made by certain employers of the widely held belief as to the level of unemployment within the profession. The proposal by some firms of a three year contract at a minuscule salary, made on the basis that they are performing a favour to the employee, is such an abuse. Such treatment is degrading to the individual, immoral on the part of the employer and when, inevitably, members of the public become aware of such arrangements, increases the public image of the profession as being crooked and money-grabbing.

e. Restriction on setting up in private practice

Again, this is an issue which cannot be considered in isolation.

There is a genuine belief on the part of some members of the profession that there should be a restriction prohibiting members of less than three or perhaps five years post qualification experience to commence practice in their own right. However, the argument often used, that this is essential to prevent the advent of numerous negligence and compensation fund claims should not be countenanced without statistical evidence as to the frequency of claims arising from the actions of younger, as against older, members of the profession.

Equally the issue cannot be fairly tackled when the alternative to commencing in sole practice may be, for many, the acceptance of degrading levels of salary and general conditions of employment.

f. Public Relations

Much concern has been expressed by members of Council and individual practitioners as to the public image of the profession as a whole. The marketing and public image of any individual practice begins at the door of that practice and continues, most immediately, through Reception and the members of the firm. So also the whole profession is judged by the public through the experiences that any individual member of that public has had with his or her Solicitor. The young assistant who consults with a client in a cramped corner office and who in social situations criticises his employer as being mean and tight-fisted lowers still further the reputation of the profession.

From what I have said above it should be clear that I feel the elements which make up the full and beneficial employment of a young Solicitor should be to the concern of the profession as a whole and Council of the Law Society, in particular. This is an issue which requires the urgent attention of the Society. □

Editorial Note:

Some useful statistical information which is relevant to some of the points raised by Mr. Murphy is available in the paper "Estimated Supply and Demand for Solicitors in 1986 and 1991", published by the Society in 1978. The tables to this paper show the sudden rise in apprenticeships and subsequently in the numbers of solicitors which commenced in the early 1970's. That this was not simply a function of the increase in the numbers of those reaching Third Level education is shown by the fact that the percentage increase in the numbers of students studying law was substantially higher than the percentage increase in overall student numbers.

The number of solicitors holding practising certificates fluctuated over the 16-year period between 1954 and 1970 between a high of 1374 (in 1955) and a low of 1290 (in 1962 and 1963). By 1974 it had increased to 1550, by 1977 to 1780, by 1978 to 1944 and as of 22 August, 1984, it stands at 2,963.

Mr. Murphy rightly questions the use of the word "unemployment" in relation to newly-qualified solicitors and offers an example of under-employment. There is also some evidence available of an increase in the numbers of solicitors who are setting up practice in one or two-principal firms within their first few years of practice. There is anecdotal evidence that some of these firms may have been set up either because of the scarcity of assistantships in established firms or the lack of opportunity for advancement in such firms. Low salaries being offered by such firms, as suggested by Mr. Murphy, may be a further reason. □

BOOK REVIEW

Constitutional Law and Constitutional Rights in Ireland by Brian Doolan. Published by Gill and Macmillan. 194pp, 1984. Price £9.95 paperback.

In the Preface to his book, the author refers to the general interest in constitutional law and rights which undeniably exists today in Ireland and expresses surprise that, despite the 47 years which have passed since the Constitution was first enacted "there is a noticeable absence of easily understood material on this, our fundamental law". Readers of the *Gazette* may perhaps find this assertion surprising, given those two unquestionably excellent treatises on the subject — "The Irish Constitution" by Professor J. M. Kelly and "Cases & Materials on the Irish Constitution" by O'Reilly and Redmond. These two in-depth works have become established as the standard reference works on the Constitution, for both practitioners and students, and this reviewer certainly finds both works eminently comprehsensible.

The author gives his view that there are at least two ways of studying the Constitution. Firstly, to begin with the Preamble and work in sequence through to Article 50, giving each article attention in turn. He finds this method (which is the one used quite effectively by Professor Kelly) "repetitive and diffuse". He therefore adopts the second method, which is to arrange related articles under subject headings and then to consider each in turn, a method which he claims brings order and "hopefully leads to understanding".

The book (which is softback, with 194 pages) is in three parts. Part One has individual chapters on the Nation, the State, the Oireachtas, the President, the Government, the Courts, etc. Each chapter explains its subject clearly enough, with reference to decided cases, and the author is not averse to the use of criticism where he considers such warranted, although not all may agree with his sentiments.

Part Two of the book deals with Constitutional Rights and contains individual chapters on equality before the law, personal liberty, freedom of association, assembly and expression, family rights and property rights. Again, there is lucid exposition of each topic, and the relevant cases are referred to.

Part Three of the book contains a summary of 101 of the most important Constitutional Law cases. The reports are rather brief, only a few lines in many cases, and give the basic facts and the finding of the Court. Unfortunately these summaries of the leading cases are not sufficiently detailed either for the practitioner or the law student, although they will probably suffice for the lay reader.

Certainly this is a readable and informative book, but it does cover the same ground as the other works already referred to, and not at all in as great depth or detail. In this regard, it must of course be said that this is a much shorter work and therefore does not set out to rival the established works. However, for this reason, it probably will not be much used by either practitioners or students, although it should find ready acceptance among members of the public interested in the Constitution. To that extent, it is a worthwhile endeavour, in that it will bring understanding of the subject to whoever does read it.

The book is well presented, with the usual Tables of Constitutional Articles, Statutes and Cases and with a Glossary to explain legal terms to the lay reader. □

Karl Hayes

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For Your Diary . . .

27 September, 1984. **Continuing Legal Education Seminar. Finance Act, 1984.** Five Counties Hotel, New Ross, Co. Wexford. 7.00 - 9.00 p.m.

6 October, 1984. **Law Society Seminar on "Freedom of Information".** Invitations may be obtained by contacting Chris Mahon, Director of Professional Services, Law Society, Blackhall Place, Dublin 7. Tel. 710711.

12/13 October, 1984. **Mayo Solicitors' Bar Association/ Northern Ireland Law Society.** Seminar on Office Management. (Guest Speaker: Simon Chalton). Downhill Hotel, Ballina. All enquiries to Liam Mac Hale, Solicitor, Ballina. (096) 21321.

12/13 October, 1984. **Office Technology Exhibition, 1984.** Blackhall Place, Dublin 7.

20/21 October, 1984. **Society of Young Solicitors Autumn Seminar.** Talbot Hotel, Wexford. Full details of lectures and speakers are included in the brochure circulated with this issue.

16 November, 1984. **Law Society Annual Dinner Dance.** Blackhall Place, Dublin 7. Tickets £18.00. Application Forms for tickets circulated with this issue.

14 December, 1984. **Mayo Solicitors' Bar Association. Annual Dress Dance.** Breaffy House Hotel, Castlebar. All enquiries to Eanya Egan, Solicitor, Castlebar. (094) 21375.

Medico-Legal Society of Ireland

Patron: Professor P.D.J. Holland, Past President, Royal College of Physicians of Ireland.

President: Dr. Sarah Rogers

1984-1985 LECTURE PROGRAMME

1. **Wednesday, October 31st 1984.** Mr. Richie Ryan, Member of the European Parliament for Dublin on **"Europe and the Medical and Legal Professions".**
2. **Wednesday, November 28th 1984.** His Honour Judge Frank Martin, Judge of the Circuit Court, on **"Whither the Criminal Law?".**
3. **Thursday, January 31st 1985.** Dr. Sarah Rogers, M.Sc., M.R.C.P. (UK)., F.R.C.P.I., Consultant Dermatologist to Hume Street and St. Vincent's Hospitals, President of the Society, on **"Skin Problems — Medicine and the Law"** — an **illustrated** lecture.
4. **Thursday, February 28th 1985.** Dr. John F.A. Harbison, F.R.C. Path., State Pathologist, Lecturer in Medical Jurisprudence in Trinity College, Dublin, on **"Mass Disasters — Medical and Legal Problems"** — an **illustrated** lecture.
5. **Thursday, March 28th 1985.** Dr. J.D.J. Havard, M.A., M.D., LL.B., Secretary of the British Medical Association on **"Can Doctors Influence Legislation?".**

Members are invited to join the Council and the guest speakers for dinner at 6.00 p.m. for 6.30 p.m. on the evening of each lecture.

Members intending to dine should communicate in advance with the **Honorary Secretary,** Mr. Eamonn G. Hall, Solicitor, Donaghmoyne, 22 Belgrove Lawn, Chapelizod, Dublin 20. (Telephone: Office (01) 714444 Ext. 2930).

The meetings will commence at 8.15 p.m. The meetings and the dinner will be held in the **United Service Club,** St. Stephen's Green, Dublin 2, by kind permission.

Persons seeking to become members of the Society should communicate with the Honorary Secretary.

Eamonn G. Hall,
Honorary Secretary.

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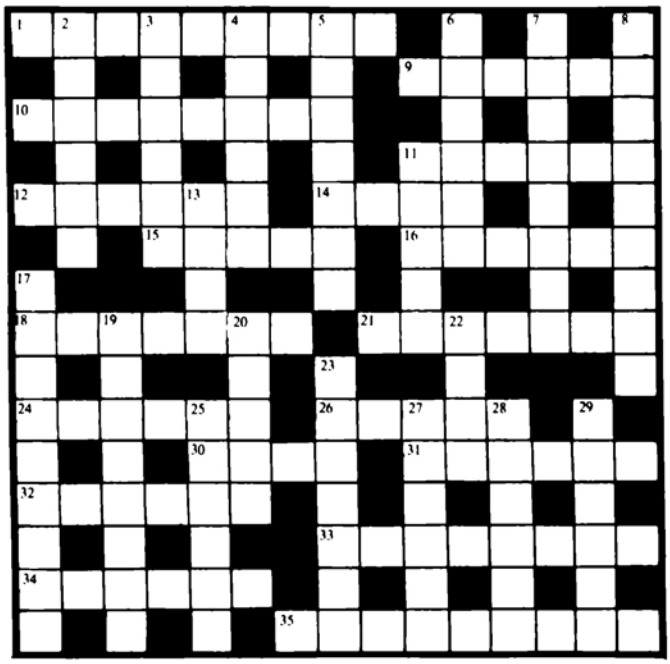

(Solution in October issue.)

Across

1. They get it transferred to them. 9
9. That pineal object comes from the Alps. 6. (Anag)
10. He broke the law with a kiss for the jury? 8
11. Acknowledge the new landlord. 6
12. 'e bounds along with his bride and misses the reception. 6
14. The pledge of an old glove. 4
15. A vestive fact. 5
16. Straying from the accepted norm. 6
18. The right of entry of the main courses. 7
21. Guide the trees up it. 5,2 (Anag)
24. The issue of annual profits of land 6
26. This prefix is backwards. 5
30. I'm sure, it's trickery. 4 (Anag)
31. A light and airy antenna? 6
32. Glean a part in its early development. 6 (Anag)
33. A being is legal. 3,5 **or** Eels sign that a being is legal. (Anag)
34. Gets out of the way, of old. 6
35. He only thinks he's this old. 6,3

Down

2. It appears to be doubtful. 6
3. Let it purr — and so the population increases. 6 (Anag)
4. Free of charge conditions. 2,4
5. Annoyed by a grenade perhaps 7 (Anag)
6. It's retail otherwise otherwise. 6 (Anag)
7. One of the big creatures of the past. 8
8. Put it back again. 9
11. A refined middleman. 5
13. That mixed-up lake is here. 4
17. And so a grated eel was put down. 9 (Anag)
19. 10^{18}. 8.
20. Follow on. 5
22. These justices were itinerant. 4
23. This must go before ----- 7
25. ----- it's earnest and persistent 6
27. Sat up and set the armour for the thigh. 6 (Anag)
28. Such a trial certainly was — before Henry III. 6
29. Going mad, vocally. 6

MICHAELMAS LAW TERM 1984

ANNUAL SERVICES

ALL MEMBERS OF THE LEGAL PROFESSION are invited to attend the MICHAELMAS LAW TERM ANNUAL SERVICES on:—

Monday the 1st day of October, 1984 at
St. Michan's Church,
Halston Street,
Dublin 7.
at 10.00 a.m.

St. Michan's Church,
Church Street,
Dublin 7.
at 10.00 a.m.

Saturday the 29th day of September, 1984 at
The Synagogue,
Adelaide Road,
Dublin 2.
at 9.30 a.m.

The Synagogue,
Rathfarnham Road,
Dublin 14.
at 9.30 a.m.

AND AFTERWARDS are invited by kind invitation of the Benchers of THE HONOURABLE SOCIETY IN KINGS INNS to Coffee at the Inns on the **1st day of October, 1984, at 11.00 o'clock.**

PLEASE NOTE that no written individual invitations are being sent to members.

Practice Notes

Solicitors' Accounts Regulations 1984

Statutory Instrument No. 204 of 1984

Notice is hereby given that the Incorporated Law Society of Ireland, in exercising powers, conferred on it by virtue and in pursuance of Sections 4, 5, 66 and 71 of the Solicitors Act 1954, and of every other power enabling it and with the concurrence of the President of the High Court, has made an order entitled as above. Copies of the order may be purchased from the Government Publications Sale Office, Sun Alliance House, Molesworth Street, Dublin 2 or any bookseller, price £1.25, postage £0.35. The effect of the order is to revoke The Solicitors' Accounts Regulations 1967 as amended and to replace these Regulations with The Solicitors' Accounts Regulations 1984.

The new Regulations will come into force on 1 January, 1985. Prior to that date a Practice Note, currently being agreed with the Institute of Chartered Accountants, will be circulated to members and their Accountants. □

Technology Committee News

The Slot Report

The Committee would like to draw the attention of Practitioners to an interesting report which was issued in November, 1983, from Technology & Law Limited (formerly The National Law Library) in England. This report was based on the National Study of Lawyers and Office Technology (The SLOT Project) which it had conducted in association with Coopers & Lybrand (Associates) Limited. This survey concentrated mainly on small to medium sized solicitors firms (i.e. those between two and eight partners in the U.K.). It is the view of the Committee that this report would certainly be of interest to Practitioners in Ireland. It is very readable and adopts a very practical approach to all forms of Technology in the office including telephone systems, telex, word processors and accounting equipment and for its price is well worth having. The report is available from Rosemary Willson, Administrative Officer, Technology & Law Limited, Conference Secretariat, Jays Mead Road, Hindhead, Surrey GU26 6ST, England and orders should enclose a sterling draft for £25.00 (including P & P) made payable to Technology & Law Limited.

Technology Exhibition

The Committee is hoping to hold a Technology Exhibition in Blackhall Place on the 12th/13th October and members will shortly be circulated with the programme being planned.

Survey of Solicitors

The Committee have received an excellent response to the recent Survey. The results are being carefully studied and are proving to be most helpful in guiding the Committee. □

Mayo Solicitors' Bar Association

The following are the Committee members elected for 1984/85:

Officers

President:	Adrian Bourke
Vice President:	Eanya Egan
Treasurer:	Michael Keane
Secretary:	Deirdre Butler

Ex Officio Members

Pat O'Connor, Michael Browne.

Ordinary Committee Members

Tom Durcan, Liam McHale, John O'Dwyer, Ward McEllin, William O'Keeffe, Denis Molloy. □

THE HIGH COURT

In the matter of Desmond Mullaney a solicitor formerly practising as Desmond T.P. Mullaney & Co. at St. James Court, Malahide, Co. Dublin and in the matter of the Solicitors' Acts 1954 and 1960.

By Order of the President of the High Court made the 25th day of June, 1984 it was ordered that the said Desmond Mullaney be hereby suspended from practice until the 24th day of June, 1985.

James J. Ivers,
Registrar of Solicitors,
The Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

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.

Dated 28th day of September, 1984.

J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

1. **REGISTERED OWNER:** James G. Mackin & Eugene J. Mackin; Folio No.: 17710; Lands: Lisanisky; Area: 5a.3r.36p.; County: **CAVAN.**
2. **REGISTERED OWNER:** Howard Robinson Jeffares (deceased); Folio No.: 4326; Lands: Horetown North; Area: 7a.2r.28p.; County: **WEXFORD.**
3. **REGISTERED OWNER:** Denis O'Brien (deceased); Folio No.: 9491; Lands: Boskill; Area: 29a.0r.25p.; County: **LIMERICK.**
4. **REGISTERED OWNER:** Patrick Butterly and Mary Patricia Butterly; Folio No.: 1894 and 1974; Lands: (1) Port, (2) Port; Area: (1) 39a.3r.30p., (2) 65a.3r.19p.; Conty: **LOUTH.**
5. **REGISTERED OWNER:** James Kilcullen, Barnhill Upper, Carrowmore Lacken, Ballina, Co. Mayo; Folio No.: 20444; Lands: Barnhill Upper; Area: 66a.1r.25p.; County: **MAYO.**
6. **REGISTERED OWNER:** Martin Callaghan, Lisheenfurroor, Doonaha, County Clare; Folio No.: 1414; Lands: Moneen East; Area: 47a.1r.13p.; County: **CLARE.**
7. **REGISTERED OWNER:** John Clarke; Folio No.: 5786; Lands: Blackhills; Area: 18a.1r.2p.; County: **CAVAN.**
8. **REGISTERED OWNER:** John Purcell; Folio No.: 17303L; Lands: situate in the District of Artane West and Parish of Artane; Area: — ; County: **DUBLIN.** **DUBLIN.**
9. **REGISTERED OWNER:** Galway Wools Limited, Portumna, County Galway; Folio No.: 47452; Lands: — ; Area: — ; County: **GALWAY.**
10. **REGISTERED OWNER:** George Thomas Swayne; Folio No.: 1068L; Lands: off Beaumont Road; Area: — ; County: **CITY OF DUBLIN.**
11. **REGISTERED OWNER:** Michael and Nora Hopkins, Liscat, Knock, Ballyhaunis, Co. Mayo; Folio No.: 52073; Lands: (1) Liscat, (2) Liscat; Area: (1) 22a.3r.0p., (2) 12a.2r.33p.; County: **MAYO.**
12. **REGISTERED OWNER:** John McCormack; Folio No.: 7178; Lands: (1) Grangemore, (2) Grangemore; Area: (1) 2a.1r.29p., (2) 45a.0r.36p.; County: **WESTMEATH.**
13. **REGISTERED OWNER:** Patrick Larkin; Folio No.: 6452; Lands: Ballycloven; Area: 13.452 acres; County: **KILKENNY.**
14. **REGISTERED OWNER:** James Roche, Aghalusky, Shraheens, Balla, County Mayo; Folio No.: 46248; Area: 28a.0r.0p.; County: **MAYO.**
15. **REGISTERED OWNER:** Patrick Crosby; Folio No.: 56F; Lands: (1) Kearntown, (2) Clonbarton, (3) Birdhill; Area: (1) 31a.1r.14p., (2) 0a.2r.28p., (3) 19a.3r.36p.; County: **MEATH.**
16. **REGISTERED OWNER:** Maureen Glynn, Williamstown, County Galway; Folio No.: 8069; Lands: (1) Pollaneyster, (2) Coranaff, (3) Carrownderry; Area: (1) 10a.0r.35p., (2) 1a.2r.26p., (3) 0a.3r.21p.; County: **GALWAY.**
17. **REGISTERED OWNER:** Michael Comer, Cashel, Glenamaddy, County Galway; Folio No.: 2705; Lands: Lisheennaheltia; Area: 15a.3r.3p.; County: **GALWAY.**
18. **REGISTERED OWNER:** Patrick Burke and Ann Burke, 12 McHugh Avenue, Mervue, Galway; Folio No.: 2714L; Lands: Ballybaan Beg; Area: — ; County: **GALWAY.**
19. **REGISTERED OWNER:** John and Frances Murphy, Lecarrow, Ballyhaunis, Co. Mayo; Folio No.: 23769; Lands: (1) Holywell Lower, (2) Holywell Lower; Area: (1) 8a.0r.6p., (2) 1a.3r.31p.; County: **MAYO.**
20. **REGISTERED OWNER:** Denis Finucane; Folio No.: 325(R); Lands: Kilcolgan Upper; Area: 83.206 acres; County: **KERRY.**
21. **REGISTERED OWNER:** Frank McDonald; Folio No.: 8888; Lands: Currahoo; Area: 12a.3r.20p.; County: **CORK.**
22. **REGISTERED OWNER:** Mark P. Cooney; Folio No.: 3025 & 1648; Lands: (1) Breanrisk, (2) Cloonellan (F.3025), Freel (F.1648); Area: (1) 74a.1r.36p.; (2) 20a.2r.30½p. (F.3025), 9a.1r.31p. (F.1648); County: **LONGFORD.**
23. **REGISTERED OWNER:** Mary Ellen and Anthony O'Donnell; Folio No.: 12064F; Lands: Site at Kilbarron; Area: —.500 acres; County: **DONEGAL.**
24. **REGISTERED OWNER:** Patrick Phelan; Folio No.: 34870 L; Lands: of Tonlegee, Barony of Coolock; Area: 18 Rathvale Grove, Raheny; County: **CITY OF DUBLIN.**
25. **REGISTERED OWNER:** Kate Stapleton; Folio No.: 15565; Lands: (1) Coolree, (2) Downings North, (3) Downings North, (4) Coolree, (5) Coolree, (6) Graigues; Area: (1) 9a.2r.2p., (2) 0a.3r.0p., (3) 0a.2r.14p., (4) 0a.3r.25p., (5) 9a.1r.12p., (6) 6a.0r.10p.; County: **KILDARE.**

Lost Wills

CORCORAN, Margaret, late of Brackernagh, Ballycanew, Gorey, County Wexford. Widow of John Corcoran. Date of death 27 May, 1981. Will any person holding a Will of the above named deceased please contact Messrs. Edward W. Warren & Son, Solicitors, The Avenue, Gorey, Co. Wexford.

FEENEY, Michael, late of Grogaghgrange, County Sligo or Kiltyclare Grange, County Sligo. Date of death 23 July, 1984, at Sligo General Hospital. Will any person having knowledge of the whereabouts of any Will of the above named deceased please contact Messrs. Argue & Phibbs, Solicitors, Teeling Street, Sligo.

HAHN, Mrs. Anna, late of 8 Inverness Road, Fairview, Dublin 3. Will any person having knowledge of the whereabouts of any Will of the above named deceased who died on 18 July, 1984, please contact Donal M. Gahan & Company, Solicitors, 127 Ranelagh, Dublin 6.

HURLEY, Cornelius, deceased, late of 25 McDermott Avenue, Janesboro, Limerick. Will any person having knowledge of the Will of the above named deceased who died on 7 July, 1984, please contact Messrs. Collins, Brooks & Associates, Solicitors, 7 Rossa Street, Clonakilty, Co. Cork.

KELLEGHER, James, deceased, c/o Terence Sexton, late of Greaghgibney, Stradone, Co. Cavan. Would anybody knowing of the whereabouts or existence of a Will of the above named deceased who died at Lisdarn Hospital, Cavan, on 28 June, 1984, please contact Messrs. George V. Maloney & Co., Solicitors, 6 Farnham Street, Cavan. Telephone (049) 31444.

MONAGHAN, Joseph, deceased, late of 70 Shelbourne Park, Limerick, will any person having knowledge of the whereabouts of the last Will and Testament of the above named deceased who died on 24 July, 1984, please contact Eamon O'Brien, Solicitor, 75 O'Connell Street, Limerick.

POWER, Patrick, otherwise Patrick J. Power, deceased, formerly of 123 Blackhorse Avenue, Dublin 7 and late of 8 Cloyne Terrace, Cobh, Co. Cork, who died on or about 1 September, 1984. Will anybody knowing of the whereabouts of the Will of the above named deceased please contact Messrs. Hogan Lynch & Co., Solicitors, Invenell, Bishopstown Road, Bishopstown, Cork.

REILLY, James, deceased, late of Main Street, Ballyjamesduff, Co. Cavan. Date of death 26th July, 1984. Will anyone knowing of the whereabouts of a Will of the above named deceased please contact Horan, Monahan & Company, Solicitors, O'Connell Street, Sligo, under reference MJH/GM/4.

TIGHE, Timothy, deceased, late of 6 Knapton Terrace, Monkstown, Co. Dublin and formerly of c/o Patrick Jamett, Nassau Street, Dublin 2. Will any person having knowledge of a Will of the above named deceased who died recently please communicate with Messrs. Murray Sweeney & Company, Solicitors, 87 O'Connell Street, Limerick, reference JM. Telephone (061) 317533.

Miscellaneous

FOR SALE — Seven Day Ordinary Licence — Enquiries to C. S. Kelly & Co., Solicitors, Buncrana, Co. Donegal. Tel. (077) 61332.

YOUNG, energetic man, holder of "National Certificate in Legal Studies" from W.R.T.C., also "Junior Typing Certificate" available for immediate employment. C.V. and references obtainable on request. Anything considered. Please contact (055) 26157 after 5 p.m. or Box No. 087.

TRANSFER OF APPRENTICESHIP sought in Dublin area by law student who has already completed the six months Professional Course in Blackhall Place. Contact (01) 745130.

(continued on page 203)

SEMINARS, International Sales of Goods and Law Office Organisation. Salzburg and Waidring (Tirol) ski resort, 26 January - 3 February 1985. McGeorge School of Law, Box 19, A5033 Salzburg, Austria. Telephone (662) 75520, Telex 631064 inlaw.

BLACKHALL PLACE house for sale; 5 apts. freehold, beside Law Society, Four Courts, city centre. Presently consists of 2 self-contained flats. Suitable for conversion to Solicitors' offices. For details phone (01) 303580 (6-9 p.m.).

The Profession

FINNIAN DOYLE, SOLICITOR, practising under the style of F. G. Doyle & Co. Solicitors, have moved offices to 123 Cabra Road, Dublin 7. Telephone No. 382026/7/8.

ANDREW DAVIDSON & CO., SOLICITORS, now in new Offices at "Ely House", 1 Nutgrove Avenue, Rathfarnham, Dublin 14 (near bottom of Grange Road). Telephone 931622 or 964104.

MAURICE R. JOY, SOLICITOR, is pleased to announce that he has acquired the Practice of Patrick J. Creagh, Solicitor, 8 Eglinton Road, Bray, County Wicklow. Telephone 867228. The Practice will be continued under the style of Creagh, Joy & Co., Solicitors, at the above mentioned address and telephone number.

Incorporated Law Society of Ireland

LUNCH FACILITIES BLACKHALL PLACE

Members of the profession should note that lunch facilities are available in the Members' Lounge in Blackhall Place from 1 p.m. to 2.30 p.m. each day, Monday to Friday.

Reservations for lunch should be made at least 24 hours in advance.

A variety of lunch meals are available ranging from Soup & Rolls through Cold Buffet to a hot three course lunch.

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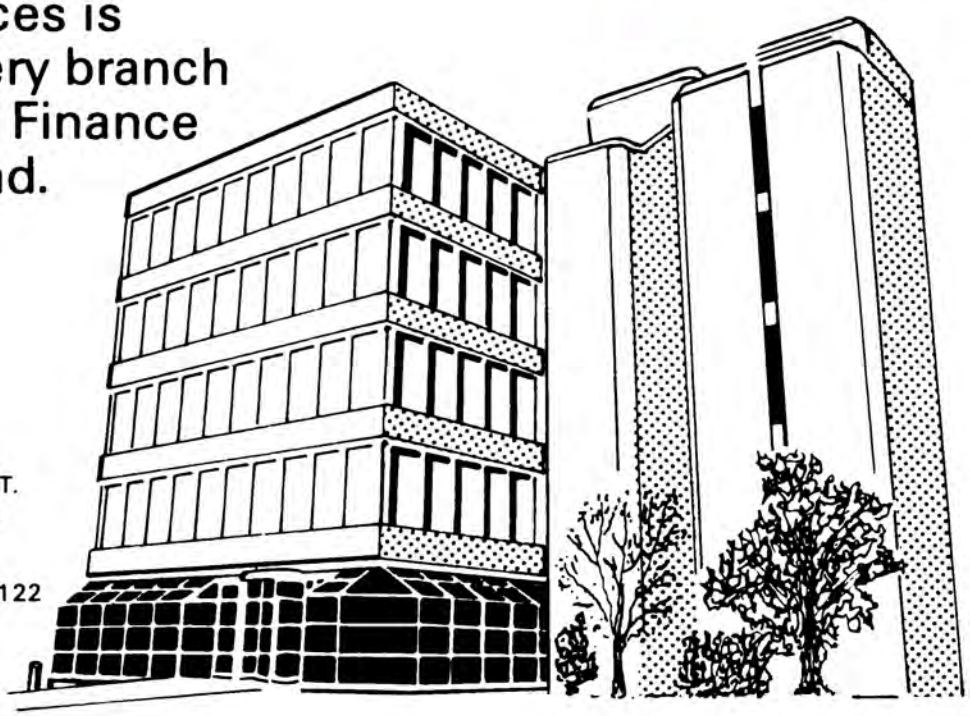

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 8 October 1984

Presentation of the original cartoon of the Evie Hone East Window in the President's Hall by the Irish Auctioneers & Valuers Institute to the Law Society.

Pictured at the Presentation were (l. to r.): Mr. Desmond Scales, President of the Irish Auctioneers & Valuers Institute; Mr. Bruce St.John Blake, Solicitor; Mr. Fintan Doyle, Auctioneer; Mr. Peter Prentice, Solicitor; Mr. Oliver Hone and Mr. Frank O'Donnell, President of the Law Society.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 8 October 1984

In this issue . . .

ABC Membership has been approved pending first audit for the period July to December 1984.

Published at Blackhall Place, Dublin 7.

Comment . . .

THE reports for 1981 and 1982 of the Civil Legal Aid Board have not yet appeared, allegedly because of difficulties with the Comptroller and Auditor General about one aspect of the Board's accounts. It is ironic that this should be the case because when the Board's last report was published in 1981, for the year 1980, we were able to praise the Board for including in that report comments on matters which had actually arisen after the year end. It is most unsatisfactory that the reports have now fallen so much into arrear and that no comprehensive statement of the Board's activities in recent years is available. There is however sufficient evidence from other sources about the working of the scheme to show that all is far from well. It gives us no particular pleasure to say "we told you so" about the scheme. Fears that any scheme based exclusively on law centres would be crippled by financial restraints have proved only too accurate. The scheme, as we said in early 1982, is unbelievably expensive on a cost per case basis. It has been the archetypal Irish public service project. Firstly: ignore the recommendation of the committee which advises on the establishment of a scheme. Secondly: establish a board, apparently representative of all interests but heavily weighted with civil servants. Thirdly: set up an administration staffed largely with civil servants on secondment. Fourthly: buy or rent expensive premises for the central administration so that before a single act takes place, in this case a client walking in the door of a law centre, enormous administration costs have been ensured. The Legal Aid Board has established a network of offices, and incurs substantial travelling expenses in servicing clients who are far from the network. Finally, the Board has been hit by the public service embargo with no replacements being made where one of a two solicitor team resigns.

The fact that the formal establishment of the Scheme on a statutory basis has not yet occurred may provide an opportunity to re-think the Scheme and reduce its operating costs.

The Government should do away with the present scheme and implement the recommendation of the Pringle Committee. The private practitioner should be used. The Scheme's costs can be readily cut by using the services of solicitors whose offices are already established. The operating costs of those practices can be shared by the legal aid clients and the ordinary fee paying clients. The means test procedures should be revised and the contribution arrangements simplified. The voluntary activities of FLAC should be encouraged and supported. Modest sums for organisations such as FLAC will yield far better returns than the expensive formal scheme. There is an opportunity here for the public sector financial commitment to be reduced while providing an improved service to the community. □

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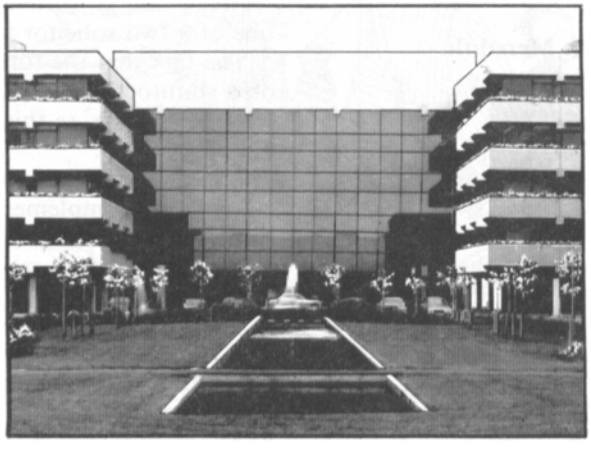

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Combining Business With Pleasure:
The Objective of Many, The Achievement of Few

by
David Andrews*

This article seeks to explain why The International Bar Association has relevance to every practising lawyer.

ALTHOUGH many Irish practitioners in their day to day work deal as a matter of course with Lawyers in the U.K., U.S.A., Australia, Canada or New Zealand, I suspect that they would be surprised to find themselves described as "International Lawyers". That term probably connotes to them some high powered jet-setting individual whose firm has offices scattered throughout the world. Yet the average Irish solicitor perhaps practising in the West of Ireland and struggling to administer a modest estate with next of kin in Coventry, Chicago and Canberra is just as much an International Lawyer as his more glamorous colleague.

The International Bar Association embodies the means of providing every practising lawyer in the world with widened horizons, down to earth assistance with the problems and hurly burly of everyday practice and the stimulation of discussing legal and professional matters with colleagues from enormously varied backgrounds, and working environments. Perhaps most important of all, it provides the opportunity for enhancing the scope of one's practice as well as increasing personal fulfilment and experience which flows naturally from encountering and forging links with professional colleagues from other pars of the world, and even sometimes from one's own part of the world!

In to-day's fast moving and complex society no lawyer should content himself with, or expect to provide an adequate service to his or her clients by ignoring the wider world around us. Clients are travelling more for both business and pleasure and broadening their horizons and personal dealings. Business and Industry, whether national or international can no longer escape the impact of international laws and regulations, and it follows that the competent professional adviser must be prepared to respond in an enlightened manner to these changing circumstances.

As a profession we should realise that we are lucky to have the International Bar Association to serve us, and to help us to serve others better.

Too many of us too lightly deprive ourselves of the advantages it has to offer simply because we do not take the trouble to stop to think and to find out.

What is the International Bar Association? (IBA)

The IBA originated in 1947 as an association of bar associations and law societies with (*inter alia*) the objects as set out below. The idea of individual lawyer membership came at a later date and the first individual members were, perhaps not surprisingly, comprised for the most part of lawyers whose field of practice was predominantly concerned with international business law and whose clients tended to include a predominance of corporations, rather than individual members of the community and their families. The "Section on Business Law" ("SBL") was consequently the first section to be formed (in 1970) for individual members and its activities covered an ever-increasing number of aspects of specialised, international, business law topics.

It was, nevertheless, realised increasingly that there was a large body of the legal professions throughout the world which, whilst concerning itself with traditional fields of practice, served the needs of private individuals across the whole spectrum of law governing the ordered conduct of society generally — that body of lawyers truly carrying on the general practice of the law. They not only originated from the traditional, historical attorney, dating back to the beginning of the civilised community, but they have also always represented, and still do represent, the largest section of the legal professions throughout the world. The concept of a lawyer "specialising" more or less exclusively in business matters is a relatively recent phenomenon.

Consequently the "Section on General Practice" ("SGP") which might well have been formed first, was only established as recently as 1974, aiming to bring the benefits of association to the enormous field of general practitioners of the law everywhere. In 1983, a third section was created as a direct result of the exceptional growth and level of activity of one of the "Committee" of the SBL, the new Section having the title "Section on Energy and Natural Resources Law" ("SERL").

The Objects of the IBA are set out in its Constitution. For present purposes we may confine ourselves to the first three Objects, namely:—

1. To establish and maintain relations and exchanges between Bar Associations and Law Societies and their members throughout the world.
2. To assist such Associations and Societies and members of the legal profession throughout the world to develop and improve the profession's organisation and status.
3. To assist members of the legal profession throughout the world, whether in the field of legal education or otherwise, to develop and improve their legal service to the public.

Perhaps these objects may be usefully paraphrased by saying that the IBA will only be of service to the community, or justify its existence, if it achieves the following:

(i) improvement in the standard of legal services provided to the public client body;

(ii) improvement in the standing and image of the

lawyer and the legal profession in the eye of the public;

(iii) increase in the awareness of lawyers of legal issues, debates and developments of international and national significance and

(iv) improvement in the personal fulfilment of members of the legal professions throughout the world.

The IBA is, thus, organised into "Sections" and the Sections are, in turn, organised into "Committees" or "Divisions". Anyone joining the IBA may join any one, or any number, of the three Sections and, in turn, any number of "Committees" or "Divisions" within the Sections. The term "Committee" or "Division" is used to describe a group of lawyers with a common interest in a particular subject of the law or practice — it is not used in this context in terms of a body to which one must be nominated or elected, nor yet even do any work if one does not wish to.

This Article aims to explain the workings of the IBA and the value and relevance of it primarily to the general practitioner by whom, as already indicated, these things may not immediately or easily be appreciated.

Why should I join the IBA?

There are several important reasons why even single practitioners to-day should derive benefit from membership of the SGP. The following list is by no means exhaustive:

1. The mobility of clients at work and at leisure these days means that everyone is necessarily and unavoidably now affected by international laws and regulations and can need advice involving an international element at any time.

2. Virtually all lawyers have some business clients and to-day most businesses are involved with either buying or selling across national boundaries. Their lawyers must be prepared to advise on the procedures involved in such activities or to advise where sould advice may be obtained — that is one way in which contacts and friends made through the IBA can be so helpful.

3. Most lawyers are seeking (or should be) to improve the scope of their practice and the quality of their work (and their fees!). Involvement in the IBA is a sure way to demonstrate awareness of wider horizons and provides the opportunity often to obtain work through new contact thereby forged.

4. All lawyers should acknowledge a certain responsibility to promote reform of the law where reform becomes necessary in response to changing social conditions. The IBA provides a unique opportunity to discuss issues with lawyers from other jurisdictions and often to gain ideas from the way in which similar problems have been solved elsewhere. This aspect of membership of the IBA is stimulating and rewarding. Problems facing lawyers and the profession as a whole are remarkably similar the world over but ideas for the way in which those problems may be solved can be stimulatingly various.

5. Membership and participation in the activities of an organisation such as the IBA cannot but serve to improve the standing of any lawyer within his immediate professional circles — itself an important component to sound practice development.

6. The practice of the law in a relatively remote town or village can become not only a lonely occupation but also somewhat tedious and pedestrian. Membership of the IBA can provide essential relief and stimulation to those in such circumstances and it will be very few lawyers who do not learn something at an IBA meeting to enable them to improve their own knowledge and experience as well as the quality of service they provide to their clients.

In summary it may be said that membership of the IBA can and should provide the means for all lawyers to add considerably to their job satisfaction, personal fulfilment and status.

The Section on General Practice

The origins of the SGP have already been referred to. Its specific objective is to promote the exchange of information, views and experience between lawyers throughout the world on the widest possible range of legal subjects, practices and procedures. The Section also concerns itself with the development of the profession, practice methods, education and generally with the continuous improvement of professional standards and service.

For most lawyers throughout the world the nature of their day to day practice is such that they have to be prepared to turn their hand to almost any type of problem or need that might arise in the everyday life of the average citizen, be it concerned with business or personal matters. The aim of the SGP is to cater for those lawyers and those needs. By its nature, therefore, most lawyers should be members of the SGP. Details of the range of subjects already regularly featuring in its activities are set out below under the individual division headings. On joining the Section a member may express interest in as many divisions as he or she wishes and participate in the activities of all of them if he or she should so desire.

The Section has it own Bye-laws and is governed by a Council, the principal Officers of which are the Chairman, the Vice-Chairman, the Secretary and the Publications Officers. All Divisions have a Chairman and some also have a Vice-Chairman and a Secretary. The Bye-laws contain provisions regulating the appointment and tenure of office of the Section and Division Officers.

Membership of the SGP may be expected to derive for the most part from the groups listed below:

(i) Private practitioners be they sole practitioners or members of large multi-partner firms who may not specialise exclusively in specific international business law subjects and practices;

(ii) Lawyers in Central or local government service;

(iii) Lawyers employed in corporate law departments;

(iv) Academic lawyers or lawyers engaged in teaching in colleges of law, etc.

SECTION ACTIVITIES

Conferences

The IBA holds major biennial conferences and meetings of all the Committees and Divisions of the

Sections are held during each biennial conference. The 1984 conference held in Vienna in September and the 1986 conference is scheduled to be held in New York.

Section conferences are also held during the intervening years. The SGP held its first such conference in 1981 in Lisbon and the second in Rome in 1983. In 1985, the SGP conference is scheduled to take place in Madrid from 18th to 22nd May.

Seminars

The Section sponsors seminars, quite apart from conferences, in an increasing number of subjects, most of which are organised by the Divisions — often two or more Divisions combining for this purpose. The Council is keen to encourage the holding of seminars and tries to ensure that they take place in as wide a spread of geographical locations as possible.

Regional Meetings

A Regional Meeting is a local or national meeting for members in a particular area or jurisdiction. Regional Meetings are of particular importance and relevance to the SGP because so many potential members of the Section like the opportunity to see something of the IBA and its activities before either joining at all or, at least, before travelling abroad to a seminar or conference. Regional Meetings have become very popular and any member of the Section is welcome to arrange such an event and to invite non-IBA members to attend and thereby to learn something about the association.

Regional Meetings have the advantage that those attending need not normally be away from their office for a long period of time and do not have to travel great distances to attend. Any member attending such a meeting is encouraged to bring a guest who, although eligible, is not already a member of the IBA.

Publications

The Section publishes (in collaboration with Sweet & Maxwell Ltd., law book publishers in London) its own journal, the 'International Legal Practitioner'. The journal is published four times a year. It is distributed free of charge to all Section members.

The journal contains Section and Division news, articles on national or international legal topics, practice management, etc., reports and summaries of Section and Division activities and proceedings of Committee meetings, seminars and conferences.

All members of the Section are welcome to submit material for publication to the Editor at the London headquarters' office and Division Chairmen are asked to produce or procure at least one article each year for publication on their Division's particular field of interest.

In addition to the journal, the Section occasionally produces other "one-off" publications which may be based on a seminar, or produced by a Division, following a series of meetings. Publications are considered to be an important activity of the Section and all suggestions for improving them are most welcome at all times.

There are 17 different divisions with the following terms of reference: Land; Its Uses; Medicine and Law; Wills and Administration of Foreign Estates, Trusts and Trusteeships; Family Law; Estate and Tax Planning; Criminal Law; General Administrative Law; Legal Education and Continuing Legal Education; Sports Law; Professional Development and Technology; Corporate Law Departments; Civil Procedures; Insurance; Business Migration, Immigration and Nationality Law; Administration of Justice; Defamation — Media Law; International Legal Aid.

Additional Divisions

In spite of the wide range of subjects embodied in the above list of 17 existing Divisions, there are other subjects that the Section is aiming to cover in the future. During the 1983 Rome conference the following subjects were identified as being worth developing within the activities of the Section as soon as, in each case, someone can be found to lead a group of interested persons:

(i) Fine Arts
(ii) Employment and Social Security
(iii) Legal Aspects of Human Rights
(iv) Professional Conduct and Malpractice.
(v) Law Relating to Imports/Exports
(vi) Horticulture and Agriculture
(vii) Ecclesiastical Law
(viii) Martial Law.

The Section is, therefore, keen to locate more active workers and organisers. Further ideas from members and others as to topics that it would be worth including in future SGP plans are always most welcome.

Conclusion

It is to be hoped that the objectives and activities referred to in this article will be sufficient in themselves to

encourage those who have not previously done so to give serious consideration to joining the IBA. The next SGP conference, as already mentioned, is to be held in Madrid from 18th-22nd May 1985. The main topic for this conference will be "Maintaining Legal Standards and Services in a World of Change".

Many other subjects will be debated in the numerous Division meetings that take place during the Conference. Why not come along and see whether what has been said above holds good? After all, the proof of the pudding really is in the eating — the fact is that very few people having once joined the IBA have allowed their membership to lapse. Membership currently stands at well over seven thousand individual members and more than eighty bar associations or law societies throughout the world. Further information on all matters concerning the IBA may be obtained from the Headquarters:

International Bar Association,
2 Harewood Place,
Hanover Square,
London W1R 9HB. □

* *Solicitor practising in London. Chairman, Section on General Practice, IBA.*

Practice Note

Statute of Limitations — Deceased owner — Recovery of Land

A member of the Society raised with the Conveyancing Committee the difficulty which arises in relation to the operation of the Statutes of Limitation in respect of land forming part of the estate of a deceased following the judgment of Mr. Justice McMahon in the case of *John Drohan -v- Mary Drohan* given on the 31st July 1980. In his judgment Mr. Justice McMahon held that a personal representative of a deceased was entitled to recover property for the benefit of the estate of the deceased at any time within a period of twelve years from the date on which the right of action accrued, i.e., when adverse possession was taken of the property.

The difficulty arises if the personal representative recovers the property after the expiration of 6 years from the date of death of the deceased. Section 45 (1) of the Statute of Limitations 1957, as amended by Section 126 of the Succession Act 1965, provides that no action in respect of any claim to the estate of the deceased person shall be brought after the expiration of 6 years from the date of the right to receive the share or interest accrued. The date on which the right to receive the share or interest accrued is the date of death. Accordingly under the provisions of Section 45 it would appear that the rights of the beneficiaries to a share in the estate are statute barred after the expiration of 6 years from the date of death. On the face of the legislation it would appear that if the personal representative recovers the property of the deceased from some third party, say a Solicitor, after the expiration of 6 years from the date of death he would be personally entitled to the recovered property but this hardly seems in accordance with the general principles of law in relation to a personal representative namely that a personal representative's duty is to administer the estate for the benefit of the beneficiaries.

The Conveyancing Committee has sought the advice of Senior Counsel who has advised that the questions raised are extremely difficult and can really only be determined by the Courts. The Committee would be interested in hearing from any Solicitors who may be involved in cases in which property has been recovered by a personal representative after the 6 year period and where claims are being pressed by beneficiaries. □

For Your Diary . . .

1 November, 1984. **Irish Society for Labour Law.** "Aspects of the Incorporation of European Social Legislation into Irish Law". (Speaker: Mr. Peter Sutherland, Attorney General). Room 2037, Usher Theatre, Arts Block, Trinity College, Dublin. 5.45 p.m.

1 November 1984. **Trinity College Law School: Law and Social Policy.** "Protecting the Environment: the role of the Law and the rights of the individual". (Speaker: Dr. Yvonne Scannell). Ernest Walton Lecture Theatre, Arts Building, Trinity College. 5.30 p.m.

1 November, 1984. **Continuing Legal Education Seminar.** Labour Law. (repeat) Blackhall Place. 10-5 p.m. Details from G. Pearse, Tel. 710711.

7 November, 1984. **Irish Society for Labour Law.** "Should there be a right to Strike in Essential Services". (Speaker: Lord McCarthy, Nuffield College, Oxford). Room 2041, Jonathan Swift Theatre, Arts Block, Trinity College, Dublin. 5.45 p.m.

8 November, 1984. **Trinity College Law School: Law and Social Policy.** "Protecting the Consumer: Time to take Stock." (Speaker: Mr. Alex Schuster). Ernest Walton Theatre, Arts Building, Trinity College,. 5.30 p.m.

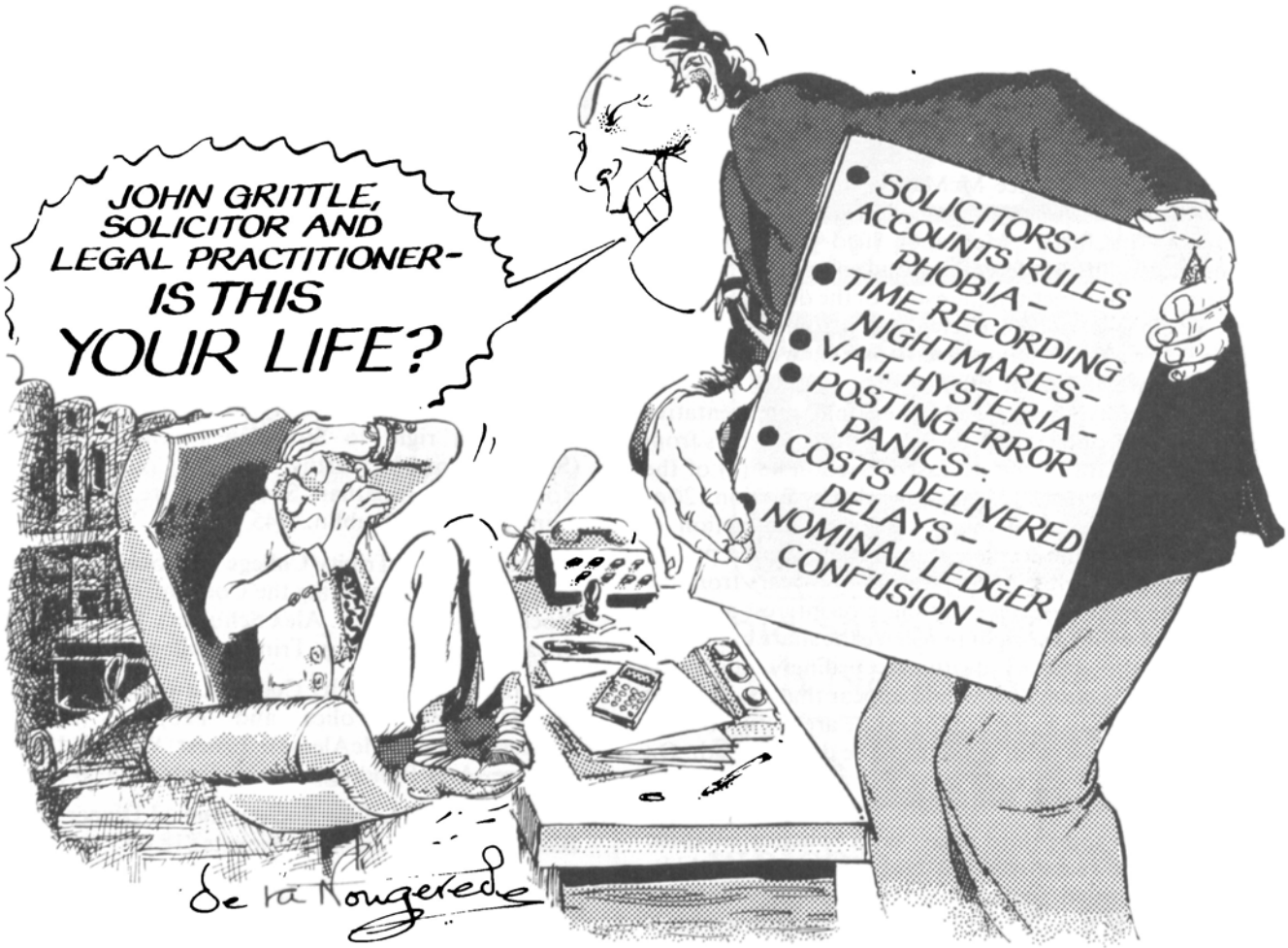
15 November, 1984. **Trinity College Law School: Law and Social Policy.** "Police and People". (Speaker: Professor Mary McAleese). Ernest Walton Lecture Theatre, Arts Building, Trinity College. 5.30 p.m.

16 November, 1984. **Law Society Annual Dinner Dance.** Blackhall Place, Dublin 7. Tickets £18.00.

19 November, 1984. **Continuing Legal Education Seminar.** Compulsory Acquisition. Ryan Hotel, Galway. 10-5 p.m. Details from G. Pearse, Tel. 710711.

22 November, 1984. **Trinity College Law School: Law and Social Policy.** "The Protection of Minorities in Ireland: The Role of National and International Law". (Speaker: Mr. Kadar Asmal). Ernest Walton Lecture Theatre, Arts Building, Trinity College. 5.30 p.m.

28 November, 1984. **Medico-Legal Society of Ireland.** "Whither the Criminal Law?" (Speaker: His Honour Judge Frank Martin, Judge of the Circuit Court). United Service Club, St. Stephen's Green, Dublin 2. 8.15 p.m.



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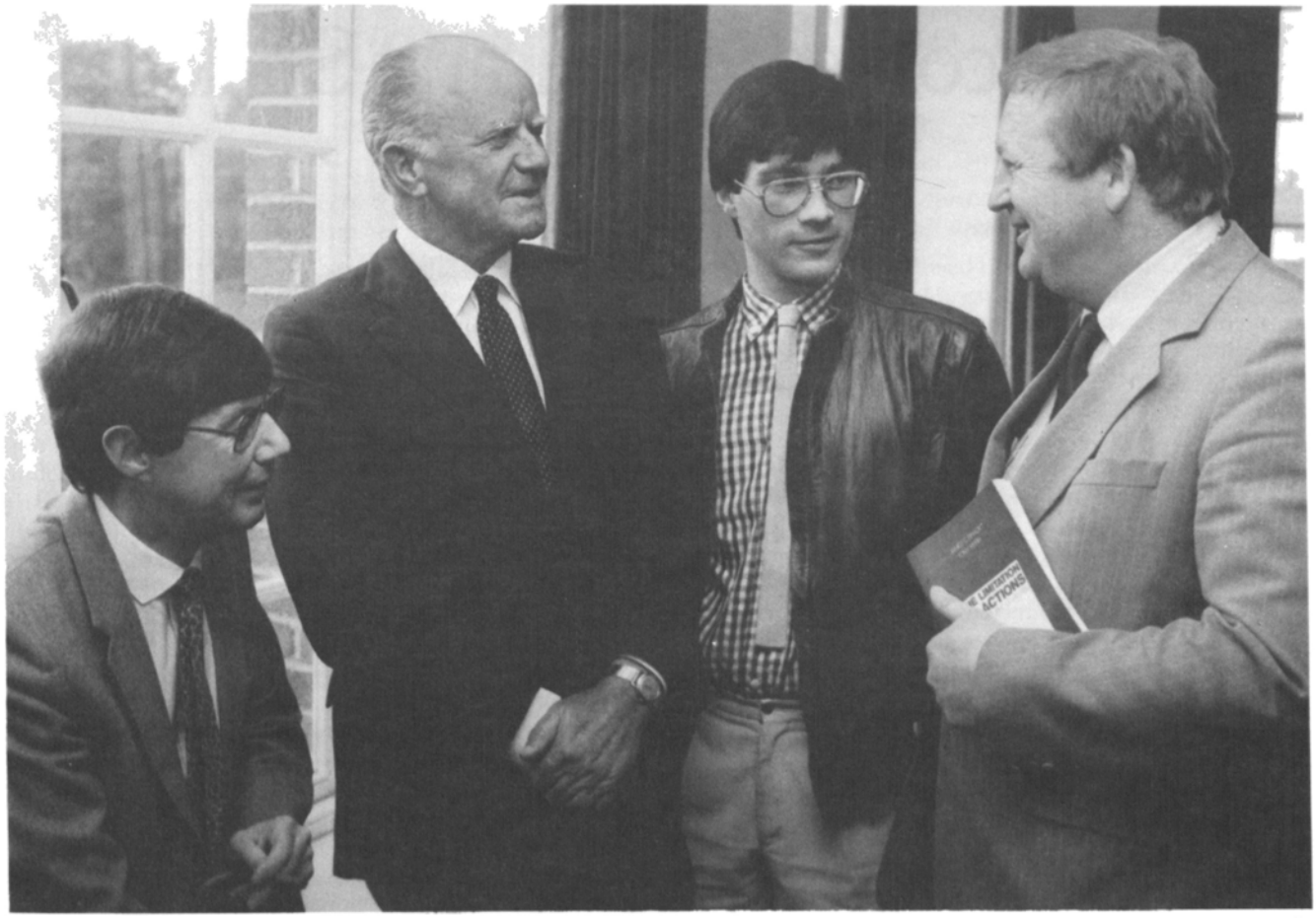


At the launch of "The Limitation of Actions in the Republic of Ireland" at the Society's premises at Blackhall Place were (l. to r.): Professor James C. Brady, U.C.D., The Hon. Mr. Justice Seamus Henchy, Mr. Tony Kerr, U.C.D. and Mr. Frank O'Donnell, President of the Law Society.

Book Launch

"Limitation of Actions"

On Tuesday, 25 September, 1984, at Blackhall Place, Mr. Justice Seamus Henchy of the Supreme Court launched the Society's most recent publication "The Limitation of Actions in the Republic of Ireland" by Professor James C. Brady, Professor of the Law of Property and Equity, U.C.D., and Mr. Tony Kerr, Lecturer in Law, U.C.D.

This is the 15th book published by the Society since the first publication in 1972.

Time Recording and Time Costing

by
A. S. Weatherhead, Solicitor, Glasgow.

This is an edited version of a lecture given to the Dundee Faculty of Solicitors on 25th April. It was published in the Journal of the Law Society of Scotland, and is reprinted here with kind permission.

WHEN considering how to present this subject I have some difficulty in knowing how I should treat it. It is a very big subject and I have been operating one form or other of time costing system in my firm since about 1970. Should I presume that you have all read the Law Society booklet entitled *Time costing and Time Recording* published in 1982 (price £1.00) but perhaps do not understand it? Do you think time costing is a panacea for all ills and want some practical guidance about how to go about it? I have decided to follow a middle course which will give something to those who do not know anything about the subject and may be of interest to those who are already into it. I shall try and indicate why I think time recording and time costing are important; just what they are; how you go about doing them; and what their relationship is to fees. There will I am afraid inevitably be many gaps but these will perhaps provoke discussion.

I do not entirely agree with everything in the Law Society booklet and I would therefore like to make two preliminary points. First, what I have to say may not be entirely the gospel according to the Law Society; and, second, there is more than one way of implementing a time recording and time costing system. Having said this, however, I believe that time recording and time costing have become essential for all practices in Scotland — whether that practice is a court practice whose fees are restricted by out-of-date forms of Table; a conveyancing and executry practice which has relied on the Society's Table of Fees and in particular the scale fee or percentage fee; or a commercial practice where the fees may require to be negotiated with a client with clout.

Competition tends to squeeze margins and whether we like it or not we are going to have greater competition both within the profession and from outside. With inflation we have already experienced pressures on profit margins in practice. These will not get less and therefore the proper management of our practices becomes essential. It is vital for the proper management of our practices that we have the information to manage them effectively — each of us needs to know not only what it costs to run our practice but also what it costs us to deal with each case, matter or transaction and the relationship of that cost to the chargeable fee. Time recording and time costing are the best-known management tools to do this for us.

It is, however, important to be clear that time costing is different from fee charging, although the first can help the latter and with sophisticated time costing systems it is possible to build in figures which in many cases will produce a draft fee note. I shall refer briefly later to fee charging, but fundamentally time costing is a system which endeavours on some scientific basis to ascertain what it *costs* a particular firm to do a specific job. It is basically a management tool.

As I have mentioned, I have some reservations about the Law Society method of taking cost/expenditure figures from different firms and using averages to recommend hourly rates for charging across Scotland. They have I think confused time costing with the standardisation of solicitors' charges. I believe, first, that the cost of any particular transaction carried out by Firm A is unique to that firm although it may be similar to the cost of a similar transaction by another firm and, second, that the fee to be charged for a particular transaction is, in the words of an eminent English judge, 'an exercise in assessment, an exercise in balanced judgment, not an arithmetical calculation'.

May I now briefly develop further time costing as an aid to management, before describing how to set up a system.

It is inevitable that in doing this I shall have to touch on what is involved in the management of a practice and this is a large subject in itself — a subject which we probably do not pay nearly enough attention to. It is something we know that commerce and industry have to work at but not our professional practices. Needless to say I do not agree.

If work in our offices is to be carried out as cost effectively as possible it is essential to delegate work to the lowest level of competence possible. Partners should not be doing what could be done perfectly competently by unqualified but skilled assistants. I know that this is not easy to arrange, but our clients cannot afford to have a Rolls-Royce when all they need is a good Ford.

Many of us have managed our firms — that is, taken certain policy decisions on intuitive guesses, and some people are good guessers or perhaps just lucky and some are not good guessers. It is much better surely to have some facts on which to make decisions about where you are going or how you should go.

If you know what a job has cost, you will know whether the fee will produce a profit or a loss. If there is a loss you may decide that the people doing the work have been inefficient, idle or so overworked that they are in a guddle; or that some of the work could be done just as well by an unqualified person at a lower salary and therefore at a lower cost. You may decide to try to expand your work in an area or discourage it in another. Time costing will produce the factual framework for these decisions.

Work in progress is usually something which is ignored by those solicitors who account on a cash or fees rendered basis and which is calculated by those who have it in their accounts only so far as they need it to satisfy the Inland Revenue. And yet without realistic work in progress figures from time to time it is very difficult to know whether a firm is really growing or whether it may be contracting. A mere increase in fees rendered or cash received cannot of itself give a fair picture. For a full appreciation of a firm's financial position and of the parts of it, it is important to know the extent and value of the work in progress at least at the start and end of the financial year and preferably from month to month. Time costing can provide this information.

There will always be good reasons why some work should be done at a reduced fee or even at a loss — you may be spreading your bread on the waters! It is, however, important to know what the subsidy is. Time costing will tell this.

Perhaps you complain about the level of fees fixed by third parties. With a proper time costing system you could provide information which would help the Law Society Professional Remuneration Committee who have to persuade those who fix tables for court fees and legal aid fees, etc., that the fees currently chargeable are not realistic in relation to actual costs or a reasonable return to the partners — although I do not personally believe such tables of fees can ever be fair and reasonable to solicitor and client in individual cases.

Before I try to define time costing I should say that the handling of the time records and the time costing operation can be carried out manually or electronically — it is more laborious manually and because of labour costs it is unlikely that a manual system would be able to give you the more sophisticated management information that will be available in a computerised system. With the relative cost of computers coming down and more time recording packages being available for lawyers, I would recommend a computer system but I cannot within this article discuss the merits of different computer systems. The Society for Computers and Law of which I am presently the Chairman, from time to time runs Workshop Seminars on the use of computers in the office, including their use for time costing. The systems which I am to describe do not require computers but the characteristics of what I am to describe must be in any system that you might decide to put in.

Time recording

The basis of time costing is of course time recording. Without well kept and accurate records of the time spent on a matter you cannot fix the time cost.

For time recording I think that there are two basic essentials. The first is that you must provide a means whereby the solicitor or other fee earner can record all the time he has spent on chargeable work for clients. Normally he completes a form as he goes along, although there are on the market electronic methods of doing this. The form can be a daily time sheet or a weekly sheet. I prefer a daily time sheet as I believe that it is easier to keep and process the records on a daily basis.

The second essential is that the time recorded on a daily time sheet in respect of each matter should be transferred regularly to a time ledger for that matter so that at any point of time you can tell how much time has been spent on that matter and by whom.

However, when you get down to making a time recording system work, there are a number of questions that have to be answered and I shall try to look at some of them. For example:

1 What do we do with time that is not chargeable? I believe that all time must be recorded — basically because I do not believe that you can record all your chargeable time properly unless you also record other time. It may also be relevant to know how much time someone is spending in your office on administration, business development, that favourite charity, that Law Society committee, etc.

2 Who should keep time records? All fee earners — that is, partners and members of the staff who perform legal work directly chargeable to specific clients — normally not typists, cashiers or receptionists, although a good secretary or personal assistant might well be operating in such a way that some of his or her time would be chargeable and therefore he or she should record his or her time.

3 What should be the unit of time? In other words, do you record your time in units of 1 minute, 5 minutes, 15 minutes or half an hour? The nature of the lawyer's practice is such that he tends to deal with a large number of different items for different clients in the course of a day and therefore the shorter the minimum period is the better. The ideal is probably 1 minute, that is the time recorded for any event is to the nearest minute. Five minutes or 6 minutes is probably more practicable. Experience has shown that if a letter has to be done by a fee earner the minimum time that he will take is probably about 5 minutes if you include, for example, time spent looking at the letter to be replied to, thinking time, dictating time and eventually reading and signing time — if it takes less time he probably should not be doing it.

4 Do we need to record what has been done in the time? It is not essential for time costing as such but probably some record of what has been done is desirable. This can be done simply by a series of activity codes such as L for letter, A for attendance at a meeting, IT for incoming telephone call, R for research, RD for revising drafts, etc. You may also want to have a record of what was said or agreed on the telephone or at a meeting, but that will probably best be recorded separately and placed on the file — although there are systems which enable you to do both.

5 How do you identify matters? It is probably essential that you have an integrated filing, time recording and financial accounting system so that each matter has a unique number used at every point. Provided you have a handy list of the numbers for the various client matters you are dealing with it is easy to identify the client matter on your daily time sheet by its number which can be either alpha-numeric or simply numeric — if not, a description of the matter may be sufficient.

6 Do you record time spent on researching the law? Yes. It is of course a fallacy that we know all the law, and anyway the purpose of the exercise is to find out the cost of carrying out a particular piece of work and if that involves time poring over books, etc., record it. Similarly, you must record time spent picking your trainee's brains about the current law, time spent travelling to and from a client's office, etc.

7 Does it take long to keep time records? The answer must be 'no' provided you have set up a well-planned system which cuts to a minimum the extent of the entries which have to be made by the fee earners. Time recording requires discipline, and like all discipline it is initially painful, but a well-planned system makes the acquiring of the discipline easier. The real secret of keeping good time records is to record as you go along but also to spend about two minutes four times a day at equally spaced intervals balancing the books so that, for example, at about 10.30 you check the time so far recorded, decide how the balance of time has been spent and then record it. The same exercise should be done before lunch, in the middle of the afternoon and before you leave at night. I know from long experience that this is the only way to do it properly. In other words, if you do it as you go along and have these periodic checks the time taken by a fee earner is minimal. The time recorded will of course have to be processed either manually or by being put into a computer, but this is not fee earner time.

8 How do we deal with time outside normal office hours? It must all be recorded against specific matters as the object

is to record all the time spent on a matter whenever it may have been done. You may want to have some method of recording that the work was done in unsocial hours, but you will want to differentiate between doing work over a weekend because a client specially required it and doing it because you spent part of the previous week sick in bed or on the golf course and had to catch up or simply because you are a workaholic. It is really only when you come to the charging that you might want to reflect that certain work was done at the instigation of the client outside normal office hours and it is only such work that I would say is one in 'overtime'.

I am sure that there are other questions, but the important thing is that for your firm you work out your own answers and that there is a consistency of approach so that everyone within your firm records his or her time on the same basis.

Time costing

As I have indicated, time costing is the process which converts time which has been recorded against a particular matter into pounds and pence so that when we know we have spent, say 6¼ hours on a court case or 14½ hours on a complicated matter we know that the cost of the court case is £206 and the cost of the complicated matter is £652.

Again there are a number of ways of going about this — one way is set out in the Law Society booklet entitled *The Expense of Time*, but even here there are some variations. What you want to arrive at is an hourly cost rate in pounds for each fee earner in your office which if applied to the chargeable hours recorded over a year will produce an annual gross income equivalent to the cost of running your practice. The hourly cost rate may be so constructed that it will also cover the target income of the partners or a proportion of it.

Whatever formula is used you have to work out on a realistic basis (1) what you estimate will be your expense in the coming year, i.e., your costs on books, cleaning, electricity, insurance, rates, rents, telephones, post, photocopying, etc., and salaries and (2) how many hours are worked by each fee earner in the year, or more importantly the number of hours spent working for clients (i.e., chargeable time).

The realistic assessment of your expenditure is really the preparation of a careful budget taking into account expected increases in certain costs during the year ahead. If you have a good time recording system you will know the number of hours spent by each of your fee earners on work for clients, but if you do not yet have this, as a guide 1,000 hours a partner and 1,100 hours for a qualified assistant might be adopted — but a partner heavily involved in office administration will probably not be able to produce 1,000 chargeable hours.

Let us look at a three-partner firm with two qualified assistants, three unqualified assistants and one trainee and say that the budget expenditure for 1984/85 is £180,000 including fee earners' salaries of £38,000 but not any payment to partners. There is some argument how you should deal with partners' income in the formula. Some people say that as we are doing a costing exercise we shoud give partners a notional salary equivalent to a well-paid assistant and add on an appropriate amount to cover pension purchase and interest on working capital. Some differentiate between different categories of partner reflecting experience or expertise or speciality. Others say that the notional salary should be the minimum return the partner expects to receive at the end of the year. Some argue that in fixing budget figures we should not take the target income for partners but take a sum equivalent to an assistant's salary as a notional salary for a partner in working out the formula. I think some of these approaches are not consistent with a costing operation and can lead to confusion. However, without arguing the issue further let us use a figure of £23,000 for each partner for both budget income and notional salary (including pension provision and interest on working capital) — a total of £69,000. This makes the minimum gross fee income required to cover expenditure (including partner income) £249,000.

We now have the essential information to put in the formula to calculate the hourly cost rate for each partner, qualified assistant, unqualified assistant and trainee — the estimated expenditure, the chargeable hours and the actual or notional salaries.

The simplest formula would simply be to divide the total expenditure (£249,000) by the sum of the chargeable hours for all the fee earners. If the total chargeable hours amount to 10,150 the hourly cost rate is £24.50 for each fee earner, but this does not reflect the different salaries paid to each fee earner and fixes the cost for the trainee at the same as the partner. It is therefore normal to calculate the hourly cost rate taking into account the different actual or notional salaries. The formula can be structured to relate the total expenditure to each fee earner either according to his chargeable hours and actual or notional salary or partly on that basis and partly on a *per capita* basis.

The Law Society booklet uses a formula which calculates hourly cost rates partly *per capita* and partly according to salary (actual or notional). On this basis and using the above figures (see the calculation below) the partner rate rounded off is £46.00 per hour, the first qualified assistant is £23.00, etc. With the time recording system and these figures for 1984/85 our three-partner firm can calculate what it has cost them to do any particular piece of work. They should also be able to ascertain at each stage how much the work has so far cost.

Calculation of hourly cost rates (HCR), 1984/85

Budgeted expenditure, 1984/85

Fee earners' salaries	£ 38,000	
Other expenditure	142,000	(x) (½x = £71,000)
	£180,000	
Notional salaries, etc.	69,000	
Total expenditure	£249,000	Total salaries £107,000 (*S*)

Calculation

	Hrs	*Salary (s) (1)*	*½x ÷ 9 (2)*	*½x ÷ S/s (3)*	*Total cost (1)+(2)+(3)*	*HCR*
Mr. D	1,000	23,000	7,889	15,263	46,152	46
Mr. B	1,000	23,000	7,889	15,263	46,152	46
Mr. L	1,000	23,000	7,889	15,263	46,152	46
Q A 1	1,250	9,000	7,889	5,972	22,861	18
Q A 2	1,250	8,500	7,889	5,641	22,030	18
U A 1	1,250	6,000	7,889	3,982	17,871	14
U A 2	1,250	5,000	7,889	3,318	16,207	13
U A 3	1,250	5,000	7,889	3,318	16,207	13
Tr	900	4,500	7,889	2,986	15,375	17
9	10,150	107,000	71,000	71,000	249,000	

Inevitably there are a number of variations that can be introduced into the calculations — some arising from differences in philosophy and some being fine tuning to produce more accurate costs.

Please remember, however, that each firm's hourly cost rates are unique to it and indeed the hourly cost rate for each fee earner is unique to him or her. This does not mean, however, that one would not expect to find similarities in rates among firms similar in size, location and methods of operating.

I have said that the hourly cost rate if applied to the chargeable hours should produce a gross fee income equivalent to the budget costs/expenditure according to how this has been defined. But I am sure you will have realised that this may not be the result. There are certain premises underlying the theory. The result will be attained only:

1. If there is sufficient volume of business.
2. If the firm is able to charge and recover the full value of the chargeable hours.
3. If the costs are contained within the budget figures.
4. If the expected chargeable hours for fee earners are in fact worked.
5. If the partners promptly render fees and are diligent in recovering them.

Because, as I explain later, time cost is normally only part of a fee charged the total gross fee income of a firm should be greater than the product of the total chargeable hours at the firm's hourly cost rates — the 'surplus' depending on the extent to which the foregoing hypotheses are met and the way in which the firm has determined its hourly cost rates.

It is, however, a management function to monitor all these matters and a good time costing system will help you do this and where appropriate you may have to adjust your figures to reflect changes in chargeable hours, expenditure, cash flow, etc. Indeed you should re-calculate your hourly cost rates if there is any significant change in any of the costs or other variables in the formula.

The fee

I now move to the last part of this article — how to get from time recording and time costing to the fee.

First of all, as I have said, the assessment of the correct fee except where it is determined by court tables is a matter of judgment as to what is fair and reasonable in the circumstances — it cannot be an entirely scientific calculation and it cannot be predetermined by some table which is all things to all men. Having said this, however, we should have all the relevant facts before us when we make our judgment, and one of the most relevant facts in most cases will be the time spent on the job and the cost of it. If may be that when we look at the time cost we may say that it is too high because the job has been badly handled or we may say that the job was done very quickly because the person who dealt with it had become an expert on the matter which he was dealing with or we may say that in assessing the fee the time spent is only a minor factor and that the fee will be related much more to other factors.

I believe, however, that in every case we should start with the time cost and then having considered the relevant factors in its make-up and made what adjustments we think appropriate, we should decide what should be what I will call the chargeable or adjusted time cost — the time cost figure that can be validly used in assessing the fee.

Various expressions are used to describe the parts of what is the final fee. The adjusted time cost is sometimes called the base factor of the A factor and the other factors are sometimes called the B factor or the supplementary factor so that the fee is A plus B or the base factor plus the supplementary factor. I should perhaps say that I do not think that the unit in the Law Society General Table is really a valid time cost — it is of course meant to be a charging rate and probably includes some element of a B

factor. It is, however, really an attempt to standardise fees which I think is of doubtful validity.

The B factor or the supplementary factor is arrived at by taking into account such matters as the importance of the matter to the client, the amount or value of any money or property involved, the complexity of the matter or the difficulty or novelty of the question raised, the skill, labour, specialised knowledge and responsibility involved, etc., insofar as these have not already been taken into account in the time cost. You will recognise these as being the factors along with time which are to be taken into account in fixing a fee 'according to circumstances', and in this connection I would refer you to paragraphs 4 and 5 of the Law Society's General Table of Fees.

You may decide that these other factors can best be reflected by a mark-up on the adjusted time cost — for example, by adding, say, 50 per cent or 125 per cent. Or you may decide that these can best be reflected by adding to the adjusted time cost a figure geared to the value of the property involved — for example, the table suggests 0.5 per cent of the price up to £250,000 and regressively thereafter. I am inclined to think that the limit of £250,000 may be rather low for some matters, but this is a personal judgment reflecting my own experience.

The final decision as to the fee is one of judgment and this will probably take into account such matters as what the market will bear. I would, however, suggest that if your costs are such that the market cannot bear them you should look very seriously at your costs and how you carry on your operations. In other words, when you have fixed your fee see how it relates to the time cost and consider whether there are any lessons to be learned about your practice or how it is operated.

Before I finish I would like to consider how one provides an estimate of fees for a matter when there are no scale fees and you are using a time costing system which appears to be geared to historical records. The answer must be your own experience of the time the matter might be expected to take. First of all it is important to find out exacely what you are being asked to quote for — is it the purchase of a house on a well-known builder's estate or the ground floor of a detached villa which is being divided; is it a simple undefended divorce or a complex reparation case? Each firm, however, will have its own time cost figures and you will have to prepare your own guidelines from your records of how long certain types of transactions or cases take, who in the office does what parts of the job and what return you want to get or can get.

You may find that the purchase of a new house on a well-known estate including missives takes about three hours — half the work being done by a partner and half by an assistant and so estimate the time cost to be £102. If the value is £30,000 you might quote a fee of £250 — or you might hedge your bets and quote a range between, say, £250 and £300 in case there are some unexpected problems. On the other hand, a sale of a property being divided up in a registration county may well involve much more time and more of the time would probably be partner time with a higher time cost.

You will build up your sets of tables which will be amended as costs change and which will of course reflect what the market will bear.

The example I have given is in the field of residential conveyancing but once you have established your time recording and costing system you will have records of the time cost of a variety of matters which can be the basis for an estimate of any fee. You might alternatively simply agree a rate per hour which you would charge your client.

I hope what I have written will not have disappointed you too much — it will of course depend on what you were expecting. If you thought time costing was a new way of fixing fees you may have been disappointed. If you expected to have what seemed a complex subject revealed in all its simplicity you may have been disappointed. If, however, you were just curious perhaps you have not been too disappointed. I have tried to explain that time costing is all about a new philosophy in the way we organise our businesses to provide our professional services at a price which we and our clients can afford. At least I hope you have found some of what I have said interesting. □

Chargeable Hours

The following article is by Mr. Eric Hiley, Solicitor, Senior Assistant Secretary, Contentious Business Department, The Law Society (of England and Wales). It first appeared in The Law Society's Gazette *of 18th April 1984 and it is reproduced with the permission of the editor.*

CHARGEABLE hours are defined as the hours a solicitor or a fee earner in a solicitor's practice works during the course of a normal working week in respect of which it is reasonable and practicable to render a bill to a client. The question of how many chargeable hours one normally works is not an academic one. Those who operate time recording systems will know from experience that a great deal of a normal working week is spent on non-chargeable time. This may be time spent on office administration, further education, sickness, or undertaking the many other tasks within the office for which a bill cannot be rendered to a client.

It is normally accepted that allowing for statutory holidays and a certain amount of other time away from the office, there are about 220 working days in a year. A seven-hour working day produces a possible 1,540 hours in a year. A 7¼ hour day will produce 1,650 hours. How much of that time is normally spent on work for which a bill can be rendered to a client?

The reason why this question is important is that in order to calculate an accurate hourly expense rate one needs to divide the annual expense of a particular fee earner by his annual chargeable hours. The information is also essential to achieve proper billing forecasts in a budget.

An important reason why the Special Committee of the Council of the Law Society on Remuneration wishes to obtain evidence of chargeable hours is because it plays a substantial part in the apportionment of expense to hourly criminal legal aid rates.

Those familiar with the subject will know that in the case of *R -v- Wilkinson* [1980] 1 All ER 597, the Remuneration Committee produced evidence from Centre-File Ltd. to the effect that on the basis of records kept for 125 firms the average annual chargeable hours recorded by full-time fee earners (including partners) was 1,005 and for partners alone 970. These figures included recorded overtime. In the same case the Remuneration Committee also produced the evidence of the Law Society's 1976 Remuneration Survey which showed that the average chargeable hours of the very large firms which kept time records by computer were for partners between 985 and 1,080, for assistant solicitors and legal advisers between 1,044 and 1,100 and for articled clerks between 783 and 930. A survey carried out by the Holborn Law Society in 1980 showed average chargeable hours for senior partners of 947, junior partners 1,229, senior assistant solicitors 1,064, junior assistant solicitors 1,085, legal executives 1,081 and articled clerks 740. This evidence has been considered unreliable by the Lord Chancellor's Department because it is said to be based on too small a sample. The Remuneration Committee therefore commissioned a further survey in the second half of 1983 in order to provide additional evidence. Messrs. Peat, Marwick, Mitchell & Co. were consulted and it was decided to direct the survey to those firms which were known to maintain computerised time recording systems. 131 completed questionnaires were returned and these gave information concerning the chargeable hours of 3,345 fee earners. The following table sets out the results of the survey in the case of full-time fee earners and again the figures included recorded overtime.

Grade	Convey-ancing	Other non-conten-tious	Litigation Civil	Litigation Criminal	*All
Senior Partner	993	1,051	1,106	1,219	1,046
Junior Partner	1,042	1,188	1,179	1,218	1,142
Senior Assistant Solicitor	985	1,060	1,146	1,075	1,055
Junior Assistant Solicitor	943	995	1,060	1,025	1,006
Articled Clerk	599	795	667	717	674
Legal Executive	980	883	989	1,078	959
Junior Clerk	672	664	751	845	699
Average of all Fee earners	969	1,004	1,054	1,110	997

The following table gives the number of fee earners in each category.

Grade	Convey-ancing	Other non-conten-tious	Litigation Civil	Litigation Criminal	*All
Senior Partner	258	367	182	23	977
Junior Partner	118	126	124	16	429
Senior Assistant Solicitor	155	108	124	15	432
Junior Assistant Solicitor	108	118	157	8	449
Articled Clerk	20	47	32	4	278
Legal Executive	204	209	198	13	655
Junior Clerk	38	34	39	1	125
Average of all Fee earners	901	1,009	856	80	3,345

*The 'All Classes' figures include 499 fee earners who could not be categorised because their work was too mixed.

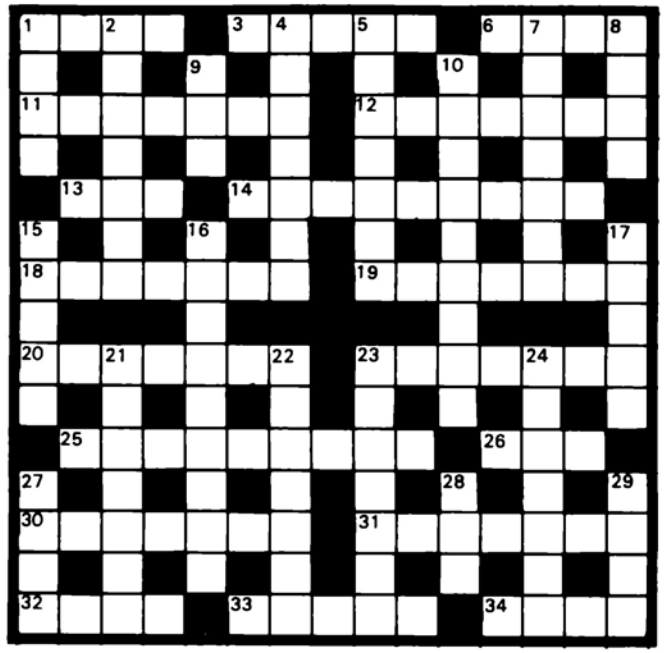
The results of this survey are a valuable addition to the information which had already been obtained and the survey does appear to confirm the figures obtained by other surveys. The Law Society has for many years asserted that the average number of chargeable hours which a fee earner can reasonably be expected to record is in the region of 1,000, although it is recognised that there will be variations around this figure which are related either to the type of work undertaken or the type of fee earner undertaking the work. Such variations can be seen in the tables printed above.

It is well known that the Lord Chancellor's Department has used the assumption of 1,300 chargeable hours in respect of criminal legal aid work. The present survey may not go very far to change this supposition inasmuch as the number of fee earners involved in criminal litigation in the survey was not considerable. In spite of this, however, the survey throws considerable doubt on the figure of 1,300

chargeable hours and such a figure runs counter to not only the results of the present survey but also to the earlier surveys.

The Remuneration Committee is very grateful to the practitioners who took part in the survey and the firms which sent in returns have been supplied with a full copy of the survey report. Inevitably, further surveys will be necessary, but the present survey does not change the views of the Remuneration Committee that figures in excess of 1,000 chargeable hours can only be achieved by a heavy and unwarrantable amount of overtime being undertaken. □

CROSSWORD



Across

1. It expresses consent in an impressive way. 4
3. Selected a personal chattel. 5
6. Set going without restrictions. 4
11. Simply a legal wrong. 7
12. Change to round booming voice. 7
13. The limit of ambition. 3
14. Does he arrange remission of sin? 9
18. Hilary, perhaps. 7
19. Game-y and pulpy. 7
20. They take too much interest in their profession. 7
23. The legislative act of extent. 7
25. Four in the curate's remedies. 9
26. Consumed food in a catering establishment. 3
30. A quiet beat as the celestial bodies approach. 7
31. Ruin the CIA in open court. 2,5
32. That's the end, musically speaking. 4
33. A proverb of the AD period. 5
34. Right on the borderline. 4

Down

1. An error in the agreed terms of a marine policy? 4
2. An incidental, added on. 7
4. Listening to a trial? 7
5. He got engaged. 7
7. Sullen looking pigeons. 7
8. Swelling, on a graph perhaps. 4
9. An attempt to score one? 3
10. Just the thing for Cyclops. 9
15. The discharge of parties who are at it. 5
16. The skinflint who can be cheerful? Obviously not. 9
17. Lots of bits for the computer. 5
21. I hear you prudes have been taken over. 7
22. This will buy some pints Ed for the curate. 7
23. Encountering an assembly. 7
24. Spoke out and made it public. 7
27. It has nothing to do with the clergy. 4
28. Perform a deed, in law? 3
29. It cloaks a writ in "Real" actions? 4

(Solution — see page 227)

CROSSWORD SOLUTION

(September issue)

Across	Down
1. Assignees	2. Semble
9. Alpine	3. Irrupt
10. Embracer	4. No cost
11. Attorn	5. Enraged
12. Elopes	6. Aliter
14. Gage	7. Dinosaur
15. Title	8. Reinstate
16. Errant	11. Agent
18. Entrees	13. Eire
21. Steer it	17. Relegated
24. Exitus	19. Trillion
26. Retro	20. Ensue
30. Ruse	22. Eyre
31. Aerial	23. Precede
32. Anlage	25. Urgent
33. Ens legis	27. Tasset
34. Eloins	28. Ordeal
35. Mental age	29. Raving

Institut Européen des Avocats

The Institut Européen des Avocats has been established in Copenhagen by the Consultative Commission of the Bars and Law Societies of the European Community (CCBE).

The Institute has been established to promote comparative research on matters affecting lawyers' professional practice within the CCBE member states, particularly in the context of cross-border provision of services.

Scholarships of 6 months duration will be offered to practising lawyers to work at the Institute. The terms of the scholarship require that half the period be spent on research topics suggested by the CCBE and the other half on an aspect of European Law of the scholar's choice.

To mark the opening of the Institute, the Danish Bar is offering two six-month scholarships to commence in January, 1985. Applications, including curriculum vitae and a recommendation from the applicant's National Bar or Law Society should be sent before 1 December 1984 to the

Conseil d'Administration de l'Institut Européen
des Avocats,
Det Danske Advokatsamfund,
Advokaternes Hus,
Kronprinsessegade 28,
1306 KOBENHAVN K,
DENMARK.

Full details regarding the Institute and the scholarships may be obtained from Margaret Byrne at the Law Society, Blackhall Place, Dublin 7. □

DOCUMENT EXAMINATION

LEGAL AID CASES UNDERTAKEN

M. Ansell, M.A.,
98 The Broadway,
Herne Bay, Kent CT6 8EY,
England.
Tel. (02273) 67929 (24 hours)

EMPLOYMENT REGISTER

Members are reminded that the Society maintains an Employment Register for Solicitors. Those seeking employment and those Offices with posts to be filled are invited to contact The Education Officer, Ms. Jean Sheppard, The Law Society, Blackhall Place, Dublin, 7.

Fifty Years in Practice

Alan Donnelly, Solicitor, Navan, Co. Meath, recently celebrated fifty years in practice. To mark the occasion he was presented with a Silver Salver by the Meath Solicitors Bar Association.

Our picture, taken at a recent dinner of the Association, shows Mr. Donnelly's son, Andrew, President of the Association, receiving the silver salver from Mr. Patrick Noonan on behalf of his father who was indisposed.

Solicitors' Golfing Society

Results of Outing to Dundalk Golf Club

Golfing Society Challenge Cup and Captain (Frank Johnston) Prize: Philip Meagher (17) 40 pts (on second nine). Runner up: Tom Shaw (5) 38 pts (on second nine).

St. Patrick's Plate: Brian O'Brien Kenny (8) 40 pts. Runner-up: Brian O'Brien (12) 37 pts.

Veterans' Cup: Frank Johnston (12) 38 pts. Runner-up: Andy Smyth (9) 35 pts.

Over 13: Kevin Smith (19) 38 pts. Runner-up: David Dillon (15) 37 pts.

1st nine: Cyril Osbourne (13) 19 pts. 2nd nine: Gerard Charlton (14) 22 pts (on last 6).

Over 30 miles: Dermot Fullam (7) 36 pts. By lot: Sean Kennedy (11) 34pts (on last 6). James Martin (22) 33 pts. Gerard Walsh (10) 30 pts.

Officers for 1984/5

President:	President Incorporated Law Society.
Captain:	Padraig Gearty.
Hon. Treasurer:	Paul W. Keogh.
Hon. Secretary:	John R. Lynch.
Committee:	Henry N. Robinson, Gerard Doyle and David Bell.

At the Annual General Meeting held at Dundalk Golf Club on the 14th of September, 1984, the following motion was passed:

> "That the qualifying age for the Veterans' Cup be increased to fifty-five years of age."

CROSSWORD SOLUTION

Across

1. Seal
3. Chose
6. Open
11. Injuria
12. Orotund
13. End
14. Missioner
18. Sitting
19. Squashy
20. Usurers
23. Measure
25. Curatives
26. Ate
30. Appulse
31. In curia
32. Coda
33. Adage
34. Edge

Down

1. Slip
2. Adjunct
4. Hearing
5. Sponsus
7. Pouters
8. Node
9. Try
10. Monocular
15. Issue
16. Miserable
17. Bytes
21. Usurped
22. Stipend
23. Meeting
24. Uttered
27. Laic
28. Act
29. Cape

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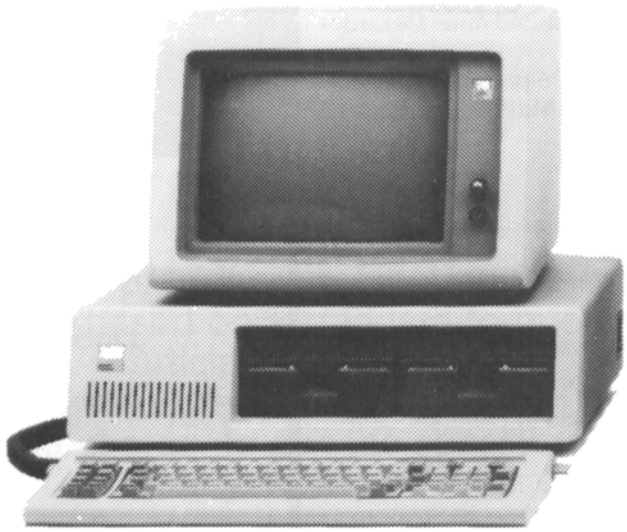

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BOOK REVIEW

A Source-Book on Planning Law in Ireland by Philip O'Sullivan, S.C. and Katherine Shepherd, B.L. Professional Books Limited, 1984. Price £30.00.

The keynote here is usefulness and convenience, not glamour. The book tries to assemble all the raw materials necessary to reach an informed opinion on any question now arising on the Planning Laws of this jurisdiction. It can be said to succeed in this difficult but worthwhile undertaking.

Most of the book consists of verbatim extracts from the relevant statutes and Statutory Instruments together with copious extracts from, or complete texts of, the Judgments, reported and unreported, of the Superior Courts in planning cases. The judgments fully reported or extracted range from *Readymix -v- Dublin County Council* which was in the High Court in August, 1970, to *Fitzgerald -v- An Bord Pleanala* when Carroll J. gave judgment as recently as November, 1983. Many other reported cases, Irish and English, are referred to in the footnotes and editorial material.

The selection has been made with knowledge and judgment. The arrangement is good, the editorial material is brief but accurate and very much to the point. The treatment of the enforcement of Planning Control in Chapter 5 is particularly effective.

Being a Handbook or Source-Book, this is compiled rather than written. You would not read it for pleasure, not even to obtain a bird's eye view of the planning scene — if you can imagine a bird being interested. It takes a little while to become familiar with the arrangement, and to find you way around, but having achieved some degree of familiarity, the arrangement is clear and logical and the printing and presentation exceptionally good.

The treatment of the subject, relying so heavily on recent judicial exposition, naturally reflects the matters which have arisen in practice before the Courts. Overwhelmingly the cases have been concerned with planning permissions and their precise terms and effect, appeals and development control. There is relatively little about compensation or purchase notices, and nothing at all on the interesting topic of the relationship of Section 4 of the City and County Management (Amendment) Act, 1955, to the planning process, other than a reference to the treatment of this matter by Judge Keane in his book on Local Government.

It looks as if development control in the future will rely very much on Section 27 of the 1976 Act for enforcement. We are unlikely to see many Enforcement Notices under the 1963 Act which have proved difficult to operate and have given rise to numerous technical problems and much room for argument. The High Court can now order a defendant to pay a monetary contribution properly due to a Planning Authority under the terms of a planning permission despite the fact that the contribution condition does not in itself create a debt.

As an appendix, there is a detailed and useful memorandum on Development Control from the Department of the Environment which is well worth study. The Department is to be congratulated on its avoidance of planning jargon in this helpful and enlightened document.

Chapter 3 is headed 'The Need for Planning Permission', but covers in addition procedure, duration, contents, conditions, interpretation and the revocation of Planning Permissions.

The policy of quoting the relevant Judgments with a minimum of comment, which is an entirely appropriate policy in the circumstances, obliges the reader to use his own head and to treat the book as providing the raw materials for sound conclusions, rather than ready-made answers. A case like *Movie News Ltd. -v- Galway Co. Council* has to be handled with care and understood in the context of its special circumstances. I was particularly interested in *Dublin Corporation -v- McGrath* (High Court — McMahon J. 17th November, 1978, unreported), a useful decision on estoppel and *McKone Estates Ltd. -v- Kildare Co. Council*, a decision of O'Hanlon J. on 24th June, 1983. This is one of the few decisions on compensation, and there is a valuable examination of the highly significant provisions of Sections 23 and 24 of the 1878 Public Health Act about drainage rights.

This is a book of about six hundred pages. There is an adequate Index and an exceptionally detailed table of Statutes and Statutory Instruments. If you can only rise to one book on Planning, you might very well decide to buy this one, especially as there is a promise that it will be kept up to date. □

William Dundon

Professional Information

Land Registry —

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate 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.

Dated 22nd day of October, 1984.

J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

1. **REGISTERED OWNER:** Christopher and Mary Glennon; Folio No.: 1343L; Lands: Ashgrove Park; Area: 0a.0r.17p.; County **KILDARE.**
2. **REGISTERED OWNER:** James Thomas Walsh, Carrowkelly, Ballysokeery, Ballina, Co. Mayo; Folio No.: 9898; Lands: Carrowkelly; Area: 23a.2r.28p.; County: **MAYO.**
3. **REGISTERED OWNER:** Peter McNamee; Folio No.: 1364; Lands: Altadusk; Area: 117a.2r.13p.; County: **DONEGAL.**
4. **REGISTERED OWNER:** Joseph O'Connor (deceased); Folio No.: 14002; Lands: (1) Evishabreedy, (2) Evishabreedy; Area: (1) 11.847 acres, (2) 114.733 acres. County: **DONEGAL.**
5. **REGISTERED OWNER:** Eleanor Jane Dolan; Folio No.: 13145; Lands: Rathmore West; Area: — ; County: **KILDARE.**
6. **REGISTERED OWNER:** Gerard Patrick Hurley; Folio No.: 335L; Lands: Courtbrack Avenue; Area: — ; County: **LIMERICK.**
7. **REGISTERED OWNER:** Cornelscourt Shopping Centre Limited (Formerly Dunnes Shopping Centre Limited); Folio No.: 11225 County Dublin; Lands: of Cornelscourt in the Barony of Rathdown and County of Dublin; Area: 6.007 hectares; County: **DUBLIN.**
8. **REGISTERED OWNER:** Peter Harrison; Folio No.: 5549L; Lands: Situate in Townland of Kilbogget, Barony of Rathdown; Area: 0a.0r.25p.; County: **DUBLIN.**
9. **REGISTERED OWNER:** Cathal Keaveney; Folio No.: 551 (now closed to 3015F); Lands: Tullycorra; Area: 16a.0r.10p.; County: **LEITRIM.**
10. **REGISTERED OWNER:** Martin Long (deceased); Folio No.: 912; Lands: Coolmeen; Area: 170a.2r.37p.; County: **KILKENNY.**
11. **REGISTERED OWNER:** William Barrett; Folio No.: 1519 (now closed to 49147); Lands: Knockdromaclogh; Area: 40a.1r.8p.; County: **CORK.**
12. **REGISTERED OWNER:** Warren Hastings; Folio No.: 3921; Lands: Clarkestown; Area: 79a.3r.16p.; County: **MEATH.**
13. **REGISTERED OWNER:** Timothy O'Regan; Folio No.: 149; Lands: Killorath; Area: 75a.3r.9p.; County: **LIMERICK.**

Lost Wills

NEWLAND, Frances, deceased, late of 54 Henry Street, Galway (formerly known as 20 Henry Street, Galway). Would anybody knowing of the whereabouts of the Will of the above named deceased, who died on the 17th April, 1984, please contact Messrs. Kieran Murphy & Co., Solicitors, 9 The Crescent, Galway. Reference 239.84/FM.

Miscellaneous

ENGLISH AGENT. Agency/referral work undertaken for Irish Solicitors in England/Wales in High Court personal injury cases and all types of County Court cases. Also conveyancing, probate and landlord/tenant matters. Fearon & Co., Solicitors, 12 The Broadway, Woking, Surrey, GU21 5AU.

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SEMINARS, International Sales of Goods and Law Office Organisation, Salzburg and Waidring (Tirol) ski resort, 26 January - 3 February 1985. McGeorge School of Law, Box 19, A5033 Salzburg, Austria. Telephone (662) 75520, Telex 631063 inlaw.

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PARTNERSHIP: Owen J. Binchy, Brian A. Cartlan, Michael A. O'Hanrahan, Vincent P. Beirne, Francis P. Mulvey, John A. Caldwell, formerly practising as Fitzpatricks, Solicitors, are pleased to announce that Hugh O'Neill, Francis X. Friel and James McNulty have joined them as Partners and that as and from 1 October, 1984, the new Partnership will practice as Binchy & Partners at 37-39 Fitzwilliam Square, Dublin 2 and 28 South Mall, Cork.

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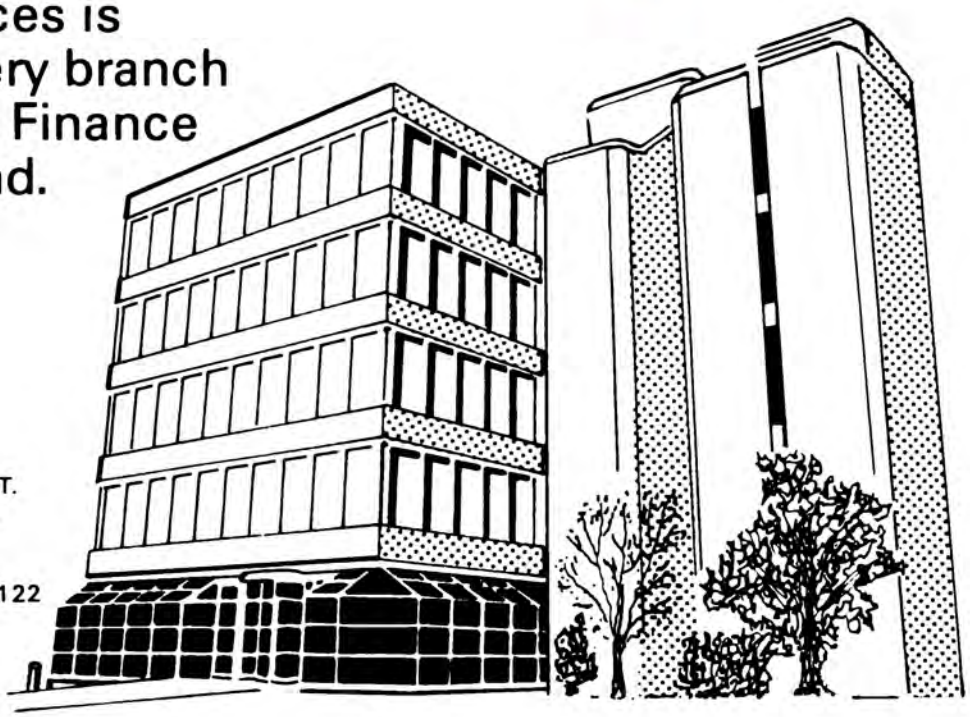

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 9 November 1984

Presentation of Parchments Ceremony
President's Hall, Blackhall Place,
15 November, 1984.

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GAZETTE

Vol. 78 No. 9 November 1984

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

. . . Company Law — the abuse of Limited Liability

DURING the debate on the Bill which became the Limited Liability Act, 1855 the *Law Times*, in a most hostile article, described the Bill as a "rogues' charter". Other adverse comment at the time referred to the Bill as being "subversive of the high moral responsibility which has . . . . distinguished our partnership law".

All a bit excessive, no doubt. In general, in the intervening 129 years the concept of limited liability has served its purpose of enabling "men with small capitals" to promote and establish businesses through companies with a separate legal existence. Other businessmen and the public at large have been more or less aware of the potential risks in dealing with a limited liability company; it might be argued that dealing with sole traders or partnerships, not so protected, has not shown itself to be a more profitable or secure endeavour for creditors if such businesses go bankrupt.

Nor is there any great novelty in the phenomenon of the unscrupulous businessman rising 'phoenix-like' from the ashes of a failed company to promote a new one with a similar name and similar business. What is changing, however, is the attitude of the public in this regard. Programmes such as *Checkpoint* on BBC Radio 4 and *Public Account* on RTE have raised public awareness of the fact that limited liability has moved from being a legitimate protection to the fledgling entrepreneur to becoming, on occasion, a shield for the scoundrel or recklessly careless businessman.

As has been recently pointed out in the press, the ability of a liquidator to commence proceedings against former directors of a liquidated company for fraudulent trading under Section 297 Companies Act 1963 (under which section directors may be made personally liable without limit for the debts of an insolvent company) is limited by the high degree of proof involved in establishing intent under the Section. We urgently need a more flexible and generally applicable law so that, firstly, directors of a company which has gone into insolvent liquidation may in appropriate circumstances be debarred from promoting or being directors of other companies for a specified period; secondly, that the degree of "real moral blame" necessary for directors' personal liability under Section 297 should be widened to include reckless and/or chronic disregard for the interest of creditors; thirdly, that these protections for creditors should be extended to cover other interested parties, such as employees of a company.

No case could be made for the abolition of limited liability. However, the case is clear, that those who abuse limited liability should be denied its protection. □

Notes on Recent Legislation

by
Gerard F. Griffin, Solicitor

Misuse of Drugs Act 1984

THE Misuse of Drugs Act 1984 amends and extends the law relating to the misuse of certain dangerous or other harmful drugs, and is intended to facilitate easier enforcement of the Misuse of Drugs Act 1977 ("the Principal Act"). With the exception of Sections 3 and 4, the Act came into force on the 3rd August 1984 and Sections 3 and 4 came into force on the 1st October 1984.

The Act must be read in conjunction with the Principal Act. The main thrust of the Act is the substantial increase in penalty, both monetary and custodial, for offences under the Principal Act.

The Act also increases the powers of the Minister for Health in the investigation and control of medical practitioners whom the Minister believes have been prescribing, administering or supplying a controlled drug in an irresponsible manner. The Act substantially increases the power of the Gardai in relation to the search and detention of persons or premises, where the Gardai believe an offence under the Principal Act has been committed.

The Act also introduces a number of new sections which are of importance to the practitioner and are summarised below.

Section 2 introduces new, more comprehensive definitions of "cannabis" and "opium poppy" and extends considerably the definition of "cannabis" to include, mature stalks, fibre or seed of any such plant.

Sections 3 and 4 are new sections and are in substitution for Sections 8 and 9 of the Principal Act and substantially increase the powers of the Minister for Health to investigate cases where the Minister believes that a medical, dental or veterinary practitioner is or has been prescribing, administering, supplying or authorising the administration or supply of any controlled drug in an irresponsible manner.

The Minister is empowered to establish a committee of enquiry for investigation and the Committee shall report to the Minister on its investigation and make such recommendations to the Minister as it shall see fit. Under the Principal Act this power was vested in the registration authority of the practitioner concerned.

The Minister is empowered to make a "special direction" prohibiting the practitioner from prescribing, administering or supplying or authorising the administration or supply of such controlled drugs as may be specified in the direction.

The Minister is also empowered to make a "temporary direction" pending the outcome of an investigation under Section 8. Such temporary direction would remain in force for twenty-eight days as he sees fit. The reference to "practitioner" includes registered dentists, registered medical practitioners, and registered veterinary surgeons. In all cases where the Minister makes a special or temporary direction the Minister shall notify the Dental Board, the Medical Council or the Veterinary Council as the case may be.

Section 5 creates new offences such as printing, publishing, causing or procuring to be printed or published, selling or exposing or offering or keeping for sale, distributing or offering or keeping for distribution any book, periodical or other publication which advocates or encourages the use of any controlled drug or contains any advertisement for any utensil in connection with the use of a controlled drug.

Section 6 contains the main thrust of the Act in that it substantially increases penalties for offences contained in the Principal Act and is in substitution for Section 27 of the Principal Act. The increase in monetary penalties range from the increase of a fine of £50.00 to £300.00 for the first offence of possession of cannabis to an increase of a fine of £250.00 to £1,000 for a summary disposal of possession of controlled drug for the purposes of selling to others.

Terms of imprisonment have also been substantially increased ranging from twelve months to imprisonment for life. For the more serious offences this Section empowers the Court, on conviction on indictment, to impose a fine of such amount as the Court considers appropriate, and this is an interesting divergence from the normal practice of fixing maximum monetary penalties.

It clearly gives the go-ahead to the Courts to look at the assets, means, life-styles and employment, if any, of persons convicted before the Court on serious drug offences and to impose heavy monetary penalties.

Section 7 introduces penalties for offences under the Customs Acts relating to the importation of controlled drugs and again the penalties are stiff ranging from a fine of £300.00 up to seven years imprisonment together with the option to fine such amount as the Court considers appropriate.

Section 9 empowers the Court, in cases of the importation of controlled drugs, having regard to the quantity of the controlled drug which the person imported and such other matters as the Court considers relevant, to presume that the controlled drug was not intended for the immediate personal use of the person. This is a departure from the Principal Act which did not contain such a presumption.

Section 10 authorises the production in evidence of certificates signed by an officer of the Forensic Science Laboratory containing the results of analyses of controlled drugs and until the contrary is proved, be evidence of any fact contained therein without proof of

any signature, or that the signature is that of the officer. The provisions of this Section are similar to the provisions of the Road Traffic (Amendment) Act 1978 whereby the Certificate of the examining doctor and the analysis of the Medical Bureau of Road Safety may be proved in evidence by the mere production of the statutory forms of certificate. The validity of these certificates have been well tested in the Courts and it is likely that the same principles will apply to certificates furnished under Section 10.

Section 12 considerably increases the power of the Gardai to search and detain persons whom the Gardai suspect are in possession of a controlled drug and to detain any vehicle, vessel or aircraft for the purposes of a search.

In summary, the Act considerably increases the powers of the Gardai to detect offences relating to controlled drugs and eases somewhat the burden of proof required to obtain a conviction. The increase in penalties reflects the public demand for more effective policing of the current drug epidemic and for more severe fines and maximum sentences for persons convicted of drug offences. □

Road Traffic (Amendment) Act 1983

PRACTITIONERS should note the introduction of the Road Traffic (Amendment) Act 1983 which came into effect on 18th July 1984. The main purpose of the Act is to substantially increase penalties for offences under the Road Traffic Acts 1961 to 1978. The increases relate mainly to the maximum monetary penalties applying to Road Traffic offences and the additional matters contained in the Act consist of a number of new custodial penalties for offences connected with heavy goods vehicles, the taking of a vehicle without authority and unauthorised interference with the mechanism of the vehicle.

The increases in monetary penalties contained in the Act fall into three categories:

1. **Serious offences**
   The maximum fine for most serious road traffic offences has been increased to £1,000. This new maximum applies to offences connected with uninsured, drunk and dangerous driving and the taking of a vehicle without authority. On indictment, the taking of a vehicle without authority is punishable by a fine of up to £2,000 and/or five years imprisonment. On indictment, dangerous driving is punishable by a fine of up to £3,000.
2. **Moderately serious offences**
   The maximum fine for moderately serious offences has been increased from £50 to £350.00. This new maximum will apply to careless driving, dangerous parking, driving a defective vehicle, unauthorised interference with the mechanism of a vehicle and to certain offences involving heavy goods vehicles.
3. **General Penalty**
   The maximum fine relating to the general penalty under the Road Traffic Acts has been increased from £20.00 to £150.00 in the case of a first offence and from £50.00 to £350.00 for certain second and subsequent offences. These new fines apply to all road traffic offences not covered by another specific penalty including excess speeding, non wearing of seat belt and most traffic and parking violations.

The Act also provides for an extension from six months to one year of the minimum period of mandatory disqualification for a second or subsequent motor insurance offence within any period of three years. A convenient ready reckoner of the former penalties and the increased penalties is contained in the Explanatory Memorandum to the Act but the following is a note of the increased penalties for the more common offences.

ROAD TRAFFIC ACT 1961

Section	Offence	Increased Maximum Penalty
38	No Driving Licence Driving while disqualified	Fine of £1,000 and/or 6 months imprisonment.
49	Drunk Driving	Fine of £1,000 and/or 6 months imprisonment.
50	Drunk in Charge	Fine of £350 and/or 3 months imprisonment.
52	Driving without due care and attention (careless driving)	Fine of £350 and/or 6 months imprisonment.
53	Dangerous driving	Fine of £1,000 and/or 6 months imprisonment.
	Dangerous driving causing serious injury or death	Fine £3,000 and/or 5 years imprison. ment (on indictment)
56	No Insurance	Fine of £1,000 and/or 6 months.
106	"Hit and Run" offences	Fine of £1,000 and/or 6 months.
112	Unauthorised taking of a Vehicle.	Fine of £1,000 and/or 6 months.
	Unauthorised taking of a Vehicle (On indictment).	Fine of £2,000 and/or 5 years.
	Allowing self to be carried.	Fine of £1,000 and/or 6 months

ROAD TRAFFIC ACT 1961

Section	Offence	Increased Maximum Penalty
	Allowing self to be carried (on indictment).	Fine of £2,000 and/or 5 years
113	Interfering with the mechanism of a vehicle **or** attempting to get into a vehicle	Fine of £350.00 and/or 3 months.

ROAD TRAFFIC (AMENDMENT) ACT 1978

Section	Offence	Penalty
12	Refusal or failure to provide a breath specimen	Fine of £1,000 and/or 6 months.
13	Refusal or failure to provide a specimen of urine or blood for a designated registered medical practitioner. □	Fine of £1,000 and/or 6 months.

Practice Notes

Trap for Solicitors in Rent Review Clauses

Every Rent Review Clause must include some formula on which the parties or an arbitrator may base their calculations as to what is the market rent of a hypothetical letting of the property leased. Most rent review clauses attempt to define in great detail the exact basis of the hypothetical letting. It is normal to provide that certain matters are to be disregarded such as the goodwill of the lessee's business or genuine improvements made by the lessee. Some rent review clauses however include a provision that in assessing the market rent upon a review the existence of the provision for the review of the rent at intervals shall be disregarded. The letting value of property to be leased for a term of 20 years or upwards would almost certainly be substantially greater if in assessing that rent the provisions for a review of rent were to be ignored. It is generally agreed by valuers and lawyers practising in this area that such provisions are not appropriate. The hypothetical lease for which the letting value is to be calculated should be identical in terms to the existing lease so that the rent will be calculated on the same basis as that of the existing lease.

The Committee advises solicitors acting for clients taking lettings of property or purchasing property held under rack rent leases to be on guard against the existence of such a provision. Solicitors should make absolutely sure that any client who elects to proceed despite the existence of such a provision in the rent review clause has been made aware of the full implications of their position. Such advice should be either given or recorded in writing.

The question of how the Courts would interpret such a clause has not arisen in Ireland yet as far as the Committee can ascertain. It has arisen in the U.K., in a case of *Pugh & Ors. -v- Smiths Industries Ltd., & Ors.* 264 E.G. 823 where Mr. Justice Goulding interpreted the provisions literally. The case was fully fought and argued and in a full and reasoned judgment he considered the arguments that the Court should not take into account the provision requiring the existence of a rent review provision to be ignored, very carefully before making his decision. The decision is, of course, quite logical and it seems likely that it would be followed in our Courts. □

Combined Drainage Agreements A Charge on Property

Combined Drainage Agreements occasionally turn up on titles or as acts on Searches affecting properties in the Dublin area.

Such Agreements arose in order to avoid expense of connecting each house on the Estate directly to the main drain or sewer, by the Corporation allowing the Builder or Contractor to make an agreed connection, but indemnifying the Corporation against any cost or expense arising out of such Consent, because of the liability of the Corporation to maintain such drains or sewers, and further, the Contractor or Builder agreed to charge the houses on the Estate with such cost and expenses.

However, since Section 11 of the Local Government (Sanitary Services) Act, 1948, all combined drains were deemed to be drains not sewers, for the purpose of The Sanitary Services Acts, and since that enactment, these agreements have become obsolete, as the liability for the maintenance of all householders' drains, whether combined or single private drains, devolves on the owners. There is, therefore, no further liability on the Corporation to maintain householders' drains which connect into the main drain or sewer.

Notwithstanding that such agreements have now become obsolete, they still appear on the Title, and will remain on the Title until such time as a formal Deed of Release is executed by the Corporation. Such Deeds of Charge could be deemed prior Charges and so this creates a dilemma in so far as the Building Society is concerned, by reason of Section 80 of The Building Societies Act, 1976, which prohibits the Society making an Advance where there is a prior Charge, unless such prior Charge is in favour of the Society.

The Conveyancing Committee has looked at the position, as has the Joint Committee and, while it is felt, there should be a formal Release, the procedure should be adopted that such Deeds be ignored, because they are of no further relevance, and are now un-enforceable.

Accordingly, solicitors acting for Builders or Developers should, in the case of Unregistered Title, have the Title registered in the Land Registry, and there is no

doubt but that the client will appreciate the resulting advantages. □

Pre-Contract Search by Purchasers

Practitioners are reminded of the necessity of reminding clients that a check should be made before Contract to see if the property is affected to any extent by any Local Authority road plans or schemes. It is possible to have such searches carried out by the firms of Law Searchers but to get reliable results from them one needs fairly clear instructions together with an accurate map identifying the property. The latter in particular is not always available. The Conveyancing Committee feels that Solicitors should in general not undertake the actual searches themselves except in special circumstances. In the absence of an accurate map and clear instructions the best person to make the search is the purchaser. Staff in the Local Authority offices are normally very helpful to persons checking such matters.

In addition to reminding clients of the need to take such precautions the Solicitors should also make a note on their file of the fact that they have done so and the response. □

For Your Diary . . .

29 November 1984. **Continuing Legal Education Evening Seminar.** "Bankruptcy". Blackhall Place, Dublin 7. 7.00-9.00 p.m. Details from G. Pearse. Tel. 710711.

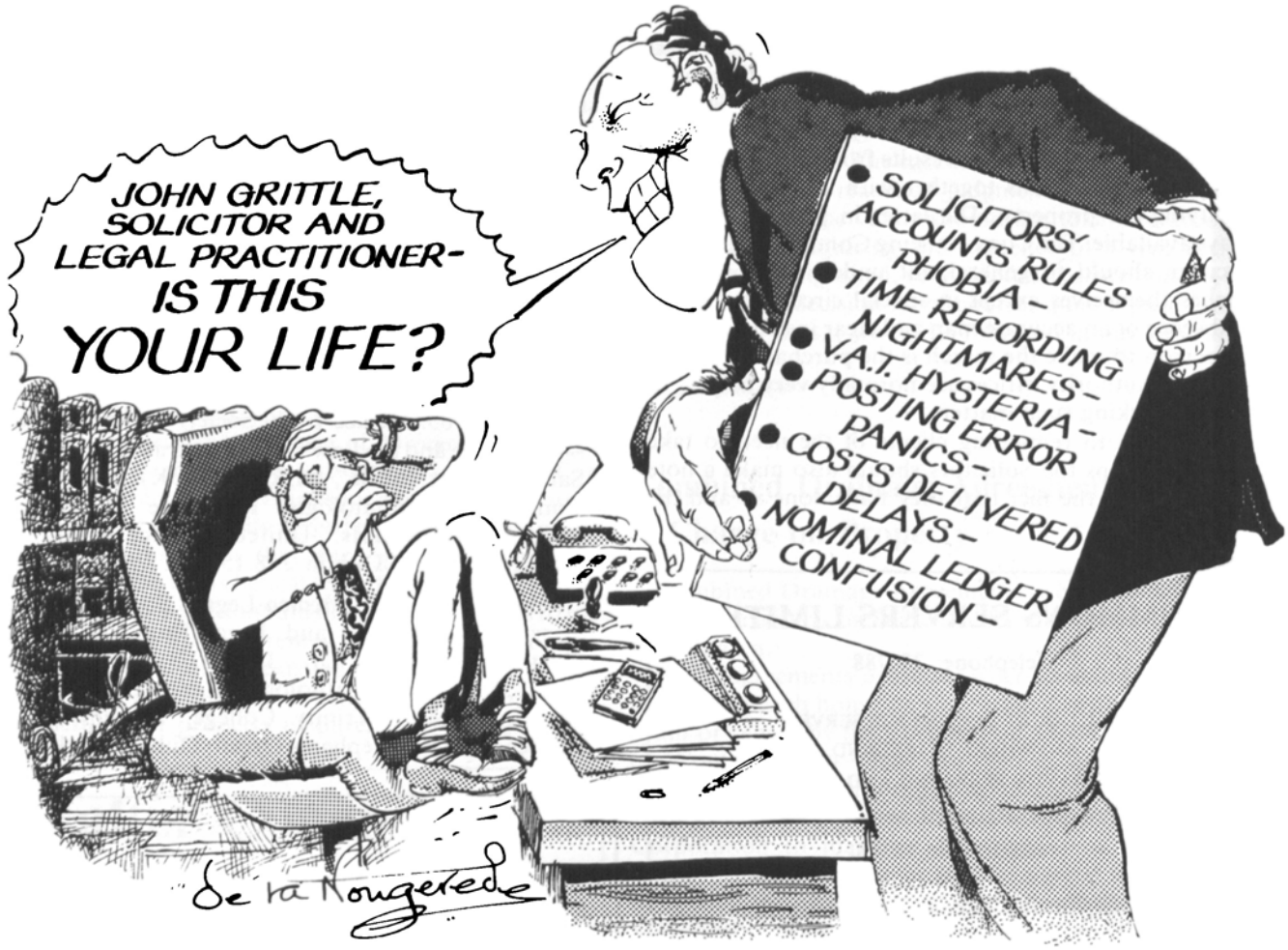
6 December 1984. **Trinity College School of Law.** "International Social Policy: Its impact on Irish Legal Practice." (Speaker: Professor Paul O'Higgins. Ernest Walton Lecture Theatre, T.C.D., Dublin 2. 5.30 p.m.

6 December 1984. **Continuing Legal Education Evening Seminar.** "Negotiation and Drafting of Separation Agreements". Blackhall Place, Dublin 7. 7.00-9.00 p.m. For details contact G. Pearse, Tel. 710711.

14 December, 1984. **Mayo Solicitors' Bar Association. Annual Dress Dance.** Breaffy House Hotel, Castlebar. All enquiries to Eanya Egan, Solicitor, Castlebar. (094) 21375.

31 January, 1985. **Medico-Legal Society.** "Skin problems — Medicine and the Law" — an illustrated lecture. Dr. Sarah Rogers, M.Sc., M.R.C.P. (UK)., F.R.C.P.I., Consultant Dermatologist to Hume St. and St. Vincent's Hospitals. United Service Club, St. Stephen's Green, Dublin 2. 8.15 p.m.

28 February, 1985. **Medico-Legal Society.** "Mass disasters — Medical and Legal Problems" — an illustrated lecture. Dr. John F. A. Harbison, F.R.C.Path., State Pathologist, Lecturer in Medical Jurisprudence in Trinity College, Dublin. United Service Club, St. Stephen's Green, Dublin 2. 8.15 p.m.



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S.A.D.S.I. News

The Annual General Meeting of the Solicitors Apprentices Debating Society of Ireland was held on the 4th October, 1984.

Miss Aislinn O'Farrell, outgoing Auditor, thanked her Committee for their help during the year and said that the centenary celebrations had put SADSI "back on the map".

Mr. Terence McCrann, was elected Auditor for the 1984/85 Session.

Mr. McCrann hopes that all Apprentices will get involved in the Society's activities. He also intends holding at least one SADSI Debate outside of Dublin to cater for Apprentices from the Country. □

Society of Young Solicitors

OFFICERS 1984/85

Chairman: Carol Fawsitt,
(Binchy, Fagan, Fawsitt & Co.)

Treasurer: Peter Morrissey
(P.C. Moore & Co.)

Secretary: Claire Callanan
(Gerrard, Scallan & O'Brien)

The next SYS Seminar will be in the Spring of 1985, in Cork. If readers have any suggestions for topics they should write to Claire Callanan, Binchy, Fagan, Fawsitt & Co., 72 Merrion Square, Dublin 2 or Phil McCarthy, Ronan Daly Jermyn & Co., 12 South Mall, Cork. Readers might like to note that next year is the 20th anniversary of the Society, and it is hoped that both the Spring and Autumn Seminars will be as successful and as well attended as usual. □

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 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.

Solicitors' Golfing Society

Match -v- Northern Ireland Solicitors

The Solicitors' Golfing Society regained "the Enterprise Trophy" in a most sporting and close fought match with our colleagues from Northern Ireland at Baltray Golf Club on Thursday, 27th September. The Southern Team was lead from the rere by the President of the Solicitors' Golfing Society, Mr. Frank O'Donnell, who appeared to take much pleasure in taking the £1.00 and the Trophy from his opposite number, Mr. Harry Coll, President of the Northern Ireland Law Society. Both Presidents attended dinner and "the afters" in the Clubhouse. For the record the results were as follows, (Solicitors' Golfing Society names first):

B. O'Brien and A. McNulty	Halved with	R. McShane and S. Connolly.	
C. Coyle and P. O'Doherty	Beat	E. Daly and D. Kearney.	1 up
F. Johnston and D. Fullam	Beat	P. Conlon and P. Gilmore.	1 up
C. Breen and P. McGonagle	Lost to	S. O'Neill and B. Turtle.	2/1
J. Lynch and D. Alexander	Beat	S. Mills and J. McLoughlin.	1 up
J. Feran and J. Reidy	Beat	S. McGrath and J. Sally.	4/3
J. McKnight and B. Rigney	Beat	N. Connolly and M. Gilfeather.	1 up
S. Kennedy and T. Ensor	Lost to	J. Cauldwell and L. Cotton.	1 down
F. O'Donnell and M. O'Mahony	Beat	H. Coll and J. Morris.	1 up

The inaugural Golf Outing for the Solicitors' Golfing Society Perpetual Trophy took place at Newlands Golf Club (by kind permission) on Thursday, 25th October.

The outing took the form of a mixed scramble and all the participants, both winners and non winners, appeared to enjoy the day and evening thoroughly.

For the record, the winning team comprised Elaine Anthony (18), Philip Sheil (12) and Johnny Bourke (13) who had a net 66 winning on the second nine from the Lady Captain Mary Molloy (18), Sheila O'Gorman (35), Barbara Ceillier (36) and Gerry Walsh (10). □

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Tree Planting Ceremony
4 October, 1984

The President, Mr. Frank O'Donnell, planting a tree in the garden at Blackhall place, to commemorate his year in office. Assisting him is Mr. Tom Barnes, gardener.

Law Society Council Election 1984/85

Valid Poll: 1713 (Total Poll: 1744)

	Candidates Elected	Total Votes
1.	Moya Quinlan	1062
2.	Frank O'Donnell	1000
3.	John F. Buckley	984
4.	Donal G. Binchy	954
5.	Anthony H. Ensor	954
6.	Michael P. Houlihan	951
7.	Adrian P. Bourke	904
8.	Michael V. O'Mahony	902
9.	Rory O'Donnell	892
10.	Patrick O'Connor	850
11.	Thomas D. Shaw	846
12.	Laurence Cullen	823
13.	Laurence K. Shields	808
14.	Ernest J. Margetson	777
15.	Francis D. Daly	775
16.	Andrew F. Smyth	746
17.	Maurice R. Curran	728
18.	Carmel Killeen	723
19.	David R. Pigot	718
20.	Ken Murphy	716
21.	John C. Reidy	702
22.	Raymond T. Monahan	700
23.	John M. Schutte	692
24.	Joseph R. Sweeney	685
25.	Patrick J. Daly	681
26.	Donal P. O'Hagan	675
27.	Vincent Crowley	675
28.	Patrick A. Glynn	674
29.	Gerald Y. Goldberg	670
30.	Andrew J. O. Donnelly	645

	Candidates not Elected	Total Votes
31.	Donal Kelliher	641
32.	John R. Lynch	625
33.	Geraldine M. Clarke	620
34.	Grattan d'Esterre Roberts	585
35.	Patrick H. O'Doherty	468
36.	Anne Horgan	358
37.	Seamus P. O'Carroll	293
38.	Anthony Murphy	189

Obituary
Gerald J. McMahon

Gerald J. McMahon died at his home in Scarsdale, New York on July 25th, 1984. He had been associated with the International Bar Association since its foundation in 1947. He served the Association as Secretary General from 1956 to 1976 and was, in recognition of his service, elected an Honorary Life Member of the Council of the Association.

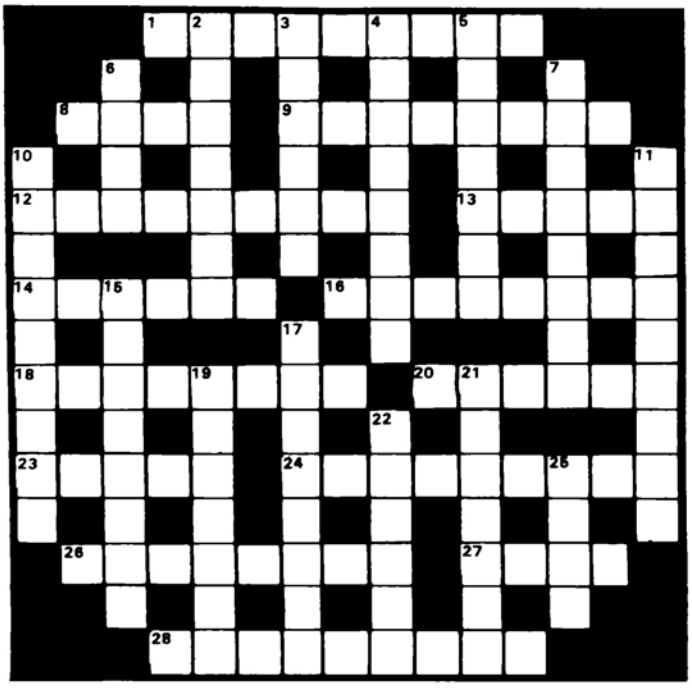
During his period as Secretary General the Association had not yet gained its present healthy stature and it was due to the selfless toil of Gerald McMahon that the Association owed its survival through that arduous period. He, without any compensation other than his love for the I.B.A. and what it stood for, devoted his time and energy to its activities, arranging for its Meetings and Conferences including the memorable Conference in Dublin in 1968. All those who came in contact with him during these years can testify to his warmth and charm.

During his seventy-four years he had a distinguished career in law from 1933 to 1983 interrupted by his service during World War II, when he served in the American Army rising to the rank of Lieutenant Colonel. He was ever ready to give generously of his time to all who called on it whether in worldwide organisations or in his home village of Scarsdale. He will be sadly missed by his wife Jane, and their children and by all who were privileged to know him. Ar dheis Dé go raibh a ainm.

J. Dundon

CROSSWORD NO. 1

The *Gazette* is pleased to announce that Hickson Holidays will sponsor the Crossword commencing with this issue and running up to and including November, 1985. The prize for the winner of the competition each month will be a Hickson Holiday Voucher to the value of £100, which will be valid as part-payment against any of the apartment holidays outlined in the Hickson Holidays 1985 brochure.



Across

1. This gets one's grips on a *res nullius*. 9
8. The right to hold — even the Nile? — as ------ 4
9. -----, that creditors' asset. 8
12. Sets aside with superior power. 9
13. That judicial examination of issues. 5
14. Is outstandingly proficient. 6
16. Such likeness must have been depicted faithfully. 8
18. Transfer ownership to another, and make him hostile? 8
20. That German responsible for the Water Music. 6
23. Those categories that are similar. 5
24. The Willingness to withhold a portion of the legacy? 9
26. Bring the session to an end but don't dissolve it. 8
27. Status in the right priority. 4
28. Made one's mark, on wax perhaps? 9

Down

2. The positioning of the Main Criminal Court? 7
3. The top, unless inverted. 6
4. Right of ownership, under Roman Law, to additions to property. 8
5. Guardian to a person, in a museum? 7
6. A financial judgement—excellent. 4
7. The Dior Star keeps the carpet still. 5,3
10. Financial agreements indeed. 9
11. Only a youngster, with feathers. 9
15. Cutters, once on the tea run to China. 8
17. He is neither party nor privy to it. 8
19. Patently a quack medicine. 7
21. Spread false rumours. 7
22. Rested? Discourages by means of doubt. 6
25. Hostelries, reserved for Chancery or Court? 4

Crossword entries must be returned to:
Editor, Law Society Gazette, Blackhall Place, Dublin 7.
Closing Date: 19 December, 1984.

NAME .....

ADDRESS .....

PHONE NO. .....

BOOK REVIEW

Index to Irish Superior Court written Judgment 1976-1982 published by Irish Association of Law Teachers, pp. 160 IR£10.00.

The Irish Association of Law Teachers has produced an excellent soft cover A4 sized book of 160 pages covering all written Judgments of the Superior Courts in the Republic of Ireland from January 1976 to December 1982, inclusive. The book is in two parts, the first being an alphabetical index of all the cases giving details of the basic subject matter, the Court, date of Judgment and reference in the second part of the book which consists of a subject matter index. This latter part of the book consolidates all the entries in the pink pages as published in the *Gazette*. This consolidation of the pink pages is very useful to practitioners and the combination of the two indices will save much time and effort in seeking basic information about cases.

While the case summaries in the subject matter index are those used in the original pink pages even the best organised Solicitor who has kept his pink pages carefully and chronologically will find this consolidation extremely useful. The subject matter index also consolidates the supplemental index prepared by Anthony Kerr and published by the Incorporated Law Society with the *Gazette*. There are approximately a thousand cases covered in the book and at a price of IR£10.00 is excellent value. It is immensely useful to be able to find all leading cases on the one subject listed together.

This book has been compiled by Jennefer Aston, Sub-Librarian of the Four Courts Law Library with assistance from Maeve Doyle, Sub-Librarian, U.C.G., under the supervision of the Publications Sub-Committee of the Irish Association of Law Teachers and also with the co-operation of the Incorporated Council of Law Reporting for Ireland.

The book is available through the publications Sub-Committee of the Irish Association of Law Teachers Faculty of Law U.C.G. I am not aware if the book is available elsewhere. Those writing to U.C.G. for copies of the book should note that postage and packing is £1.50 extra per copy. □

Gary Byrne

ANNUAL REPORT OF THE COUNCIL
1983-84

ERRATUM

It is regretted that Mr. Gerard M. Doyle's name was inadvertently omitted from the membership list of the Disciplinary Committee.

LAW LIBRARY FACSIMILE

The Law Library is considering the installation of facsimile equipment. We would be interested to know how many Solicitors use such equipment at present, and if the installation of facsimile equipment in the Law Library would be considered of benefit.

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Rent Restrictions: An Ongoing Problem

by
Sophia Carey

This article by a student on the Journalism Course at the College of Commerce, Rathmines, Dublin, has been selected for the Law Society's Journalism Award 1984.

Students are required to write an article for a newspaper or periodical on some matter of legal interest. The Award is made by a Committee representative of the Law Society and the Director of the Journalism Course.

THE longstanding landlord/tenant conflict has erupted into the Dail and the courts with increasing regularity over the last three years.

Since the removal of any form of rent control in 1981 "hard luck stories" from both sides have proliferated. For landlords, restricted rent was an intolerable injustice which prevented them from making any form of profit, and which forced them to allow their premises to run into disrepair. For tenants, it could mean the difference between an adequate lifestyle and bare subsistence.

A 1981 Supreme Court decision, declaring the 1960 Rent Restrictions Act to be unconstitutional, was the catalyst which launched the debate to the forefront of public attention, and put landlord and tenant at loggerheads in various messy court cases.

The 1960 Act was one of a number of revisions to a 1923 Act which froze the rents of around 40,000 "rent-controlled dwellings" at a post First World War level. It was originally intended to keep rents at the same level as when the troops left for the front.

By the 1980's, however, not only was rent restriction still in existence, but rents had been kept at a level judged fair almost 60 years before. In some cases, this could be as low as £1 a week.

By making the Act a permanent feature of our legislation, governments were relieving themselves of the necessity of providing cheap accommodation from their own funds. "Renewing the Act was a useful thing for government to do" says Mr. Patrick Madigan, who successfully challenged the constitutionality of the 1960 Act. "It cost them no money, and threw housing over onto the private sector." In effect, they were forcing landlords to subsidise tenants.

The problems facing the present government spring largely from their predecessors' failure to make any allowances for the injustices facing landlords. For his part, Mr. Madigan says that had government made an effort to allow landlords a reasonable return on their premises he would never have taken his action. He had, for example, asked them to include a section allowing reasonable rents under the Grounds Rent Bill, but had met with refusal.

Mrs. Sarah Murphy of the Private Tenants Action Group is in agreement with Mr. Madigan on this point. If the government had acted many years earlier, the problems which tenants are facing would not be as acute.

"The low rents were not the fault of the tenant," she said. "The rents were controlled by decree, and no-one is disputing their lowness. It is the sudden massive increase which tenants object to." The removal of any form of rent control meant that landlords were now free to charge whatever rent they wished, and tenants could face increases of over 300% overnight.

The government was forced to take action to protect tenants who had, as Mr. Madigan puts it, "planted apple trees in the garden". How could they deal with a tenant who had expected to live out their lives in a £1 a week home?

So far, their attempts to impose order on the situation have resulted in failure of one sort or another. Temporary

measures to restrict rent while they pondered the knotty problem were found to be unconstitutional, as was their first Bill, presented to the Supreme Court by President Hillery in early 1982. Finally, on July 26th 1982, the Housing (Private Rented Dwellings) Act came into operation.

The Act may have been expected to satisfy both tenant and landlord. It went some way towards satisfying landlords' demands by allowing them both a fairer rent, and the prospect of regaining possession by the year 2001. It also provided a degree of protection to the tenant by creating "rent courts" to decide a fair rent in the local District Court.

Unfortunately, neither landlord nor tenant was satisfied with the workings of the Act. Not only is Mr. Madigan bringing a further action contesting the constitutionality of the Act, but tenants' complaints about the inadequacy of the rent courts have led to the formation of the Rent Tribunal.

These tribunals have become a further bone of contention between landlords and tenants. Mr. Madigan sees no justification for their creation. "The District Courts were interpreting the Act in a fair and reasonable manner," he said.

He believes that the formation of the Tribunal was a result of political pressure, that the nominees on the Tribunal are political appointments, and that their brief is to slow down the workings of the Act and to keep rents at a reduced level. He feels that they are inherently biased in favour of the tenant.

Tenants, on the other hand, are to date relatively pleased with the workings of the Tribunal, in operation since August 2. While landlords had acquiesced reluctantly to the original rent courts, tenants had found themselves increasingly displeased.

They believed that the courts had a tendency to decide in favour of the landlords. They gave increases of over £30 a week in many cases, and while the government provided a subsidy for some, Mrs. Murphy points out that those just above the cut off level for aid could find their standard of living cut by a third. "It's all very well if you agree to pay a third of your income in rent and know exactly how much you will be left with," she said, "but this sudden enormous increase found people totally unprepared".

A Judge may have no idea of the varying types of houses around the city, she said, and often assumed the house was in perfect repair. Where conflict between the tenant's and the landlord's valuers arose, she points out that the Judge often merely split the difference between the two amounts.

A major factor in the creation of tribunals was the tenants' claim that many people found the District Court highly intimidating. "You'd be afraid to look crooked," she said. Many tenants had never been in court in their lives, had no idea of their rights, and often refused to believe that the landlord was responsible for costs.

Mr. Madigan believes that there was a lot of "scare-mongering" in relation to the workings of the District Court. He points out that not only were tenants represented by their own solicitor and valuer, but that the costs of this were met by the landlord. For landlords a court case could cost up to £1,000.

He remains dissatisfied with this and many other aspects of the 1982 Act. He feels that since the means of both the tenant and landlord are taken into account, landlords are still not getting a fair market rent. In addition, their ability to get possession of their premises is still restricted, as longstanding tenants may retain tenancy for either their lifetime, or the next twenty years, whichever comes first.

For Mrs. Murphy, the Rent Tribunal, though not perfect, is preferable to the rent courts. For Mr. Madigan the opposite is true. Neither tenant nor landlord is completely satisfied, and some three years after the removal of rent restriction the matter is still being contested.

The due process of law is necessarily a complex matter, since justice is not a tangible thing, and in some cases there is no clearcut "villian of the piece". Mr. Madigan speaks of the problem of reconciling private ownership with the public good, and points to the rights of private property enshrined in the Constitution. Family rights are also enshrined in the Constitution, says Mrs. Murphy, and points out that a decent place to live is a basic family requirement. At present, both rights conflict, and the path to reconciliation remains unclear. □

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Correspondence

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

5th October, 1984

Dear Mr. Ivers,

I am directed by the Minister for Justice to refer to your letter dated 3 November, 1983 and to subsequent correspondence concerning the annual review of certain fees payable to solicitors under the Criminal Legal Aid Scheme.

In accordance with a recommendation contained in the First Interim Report of the Review Committee on Criminal Legal Aid, the Minister has carried out a review of the fees payable to solicitors for legal aid work in the District Court (and appeals to the Circuit Court) in respect of the period 1 November, 1982 to 30 October, 1983. In the light of this review, and as already indicated to you at a recent meeting with the Department, the Minister, with the consent of the Minister for Finance, is prepared to apply an 8% increase in the appropriate fees with effect from 1 September, 1984. The effect of this increase on the current level of fees is as follows:

One day hearing in the District Court

£39.43 — current rate increasing to
£42.58 — w.e.f. 1.9.84.

Subsequent appearance on same case

£17.53 — current rate increasing to
£18.93 — w.e.f. 1.9.84.

Prison visitation fee

£20.44 — current rate increasing to
£22.08 — w.e.f. 1.9.84.

In addition, it is proposed to increase the motor mileage rate payable to solicitors under the Criminal Legal Aid Scheme from 41p to 46p per mile, also to take effect from 1 September, 1984.

Regulations prescribing these increases are in the course of preparation and copies will be forwarded to you for information as soon as they are available.

Yours sincerely,

V. O'Donnell,
Dept. of Justice,
72 St. Stephen's Green,
Dublin 2.

Professional Information

Land Registry —

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated 3rd day of December, 1984.

J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

1. **REGISTERED OWNER:** George T. Frost; Folio No.: 12312; Lands: Garrynageragh East; Area: 3a.2r.20p.; County: **WATERFORD.**
2. **REGISTERED OWNER:** Aidan Domigan; Folio No.: 15486; Lands: situate in the Townland of Newtown and Barony of Balrothery East, Co. Dublin; Area: (Hectares) 25.568; County: **DUBLIN.**
3. **REGISTERED OWNER:** Patrick J. Burke and Patricia Burke; Folio No.: 2791F; Lands: (1) Brutonstown, (2) Ballyhaw; Area: (2) 4.625 acres; County: **WESTMEATH.**
4. **REGISTERED OWNER:** Eamonn Curtis; Folio No.: 11372; Lands: Richardstown; Area: 2.261 acres; County: **LOUTH.**
5. **REGISTERED OWNER:** Aidan Markey; Folio No.: 1607L; Lands: Long Avenue; Area: — ; County: **LOUTH.**
6. **REGISTERED OWNER:** Elizabeth Malone; Folio No.: 7305; Lands: Ballynerrin Lower; Area: 0a.1r.37p.; County: **WICKLOW.**
7. **REGISTERED OWNER:** John James Logue; Folio No.: 2625; Lands: Aught; Area: 64a.3r.15p.; County: **DONEGAL.**
8. **REGISTERED OWNER:** (1) Mary Casey and (2) Christopher John Costello; Folio No.: 15991; Lands: Guileen; Area: 0a.1r.39p.; County: **LAOISE.**
9. **REGISTERED OWNER:** John Meaney; Folio No.: 15392; Lands: Ballyveloge; Area: 54a.2r.13p. County: **LIMERICK.**
10. **REGISTERED OWNER:** Daphne Holmes; Folio No.: 3949F; Lands: Part of the Townland of Oldtown in the Barony of Raphoe; Area: — ; County: **DONEGAL.**
11. **REGISTERED OWNER:** Denis and Mary O'Shea; Folio No.: 16572F; Lands: Lackenacumeen; Area: 0.381 acres; County: **CORK.**
12. **REGISTERED OWNER:** Thomas Early (deceased); Folio No.: 491; Lands: Kilnagross; Area: 11a.2r.18p.; County: **LEITRIM.**
13. **REGISTERED OWNER:** Denis O'Connor; Folio No.: 20598; Lands: (1) Gurteenavallig, (2) Glensillagh; Area: (1) 18a.1r.30p., (2) 30a.1r.38p.; County: **KERRY.**
14. **REGISTERED OWNER:** Francis Keenan; Folio No.: 18562; Lands: Carnacrew; Area: 9a.3r.30p.; County: **MONAGHAN.**
15. **REGISTERED OWNER:** Edward Clohessy; Folio No.: 5543F; Lands: Kilcullen; Area: 0a.1r.37p.; County: **LIMERICK.**
16. **REGISTERED OWNER:** Timothy Hugh Edon Travers and Heather Elizabeth Shepheard Travers; Folio No.: 24691F; Lands: Ardmore; Area: 0.644 acres; County: **CORK.**
17. **REGISTERED OWNER:** Michael Finbarr Oakley and Mary Oakley, 34 Brookhaven Rise, Blanchardstown; Folio No.: 2524F; Lands: Corduff Barony of Castleknock and County of Dublin; Area: — ; County: **DUBLIN.**
18. **REGISTERED OWNER:** Andrew Busby; Folio No.: 18449; Lands: Derry; Area: 22a.0r.28p.; County: **MONAGHAN.**
19. **REGISTERED OWNER:** Donegal Peat Development Company Ltd.; Folio No.: 36854 and 36855; Lands: Montymeene (F.36854), (1) Montymeene, (2) Montymeene, (3) Montymeene, (4) Montymeene, (5) Montymeene (an undivided Moiety), (6) Montymeene (an undivided moiety), (7) Montymeene; Area: 5a.0r.0p. (F.36854), (1) 15a.2r.0p., (2) 18a.0r.0p., (3) 25a.2r.0p., (4) 82a.2r.0p., (5) 6a.3r.0p., (6) 6a.3r.0p., (7) 18a.2r.0p. (F.36855); County: **DONEGAL.**
20. **REGISTERED OWNER:** Joseph Day; Folio No.: 327; Lands: Gransha Lower; Area: 6a.3r.37p.; County: **KERRY.**
21. **REGISTERED OWNER:** Patrick Brady; Folio No.: 3477F; Lands: Carrowntrasna; Area: 0a.1r.9p.; County: **MAYO.**
22. **REGISTERED OWNER:** Thomas Morrin, Killimor, The Neale, Co. Mayo; Folio No.: 22634; Lands: (1) Caherloughlin, (2) Caherloughlin, (3) Caherloughlin (one undivided, fourth part), (4) Killimor; Area: (1) 3a.2r.34p., (2) 13.064 acres, (3) 8a.1r.33p., (4) 7a.1r.5p.; County: **MAYO.**
23. **REGISTERED OWNER:** Martin Conroy, Castletown, Neale, Claremorris, Co. Mayo; Folio No.: 6839; Lands: Castletown; Area: 27a.1r.11p.; County: **MAYO.**

Lost Wills

CAREY, Anne late of Peamount Hospital, Newcastle, Dublin, Spinster. Date of Death — 21st of September 1984. Will any person having knowledge of the whereabouts of an Will of the above named deceased please contact Messrs. Michael Tynan & Co., Solicitors, 16 William Street, Limerick.

CLIFFORD, James late of Tobernea, Kilmallock, County Limerick. Would any person having knowledge of any Will made by the above named deceased who died on the 7th day of October 1984 please communicate with Messrs. James Binchy & Son, Solicitors, Charleville, Co. Cork.

GERAGHTY, John, deceased, late of Binghamstown, Ballina, Co. Mayo. Will any Solicitor who acted for the above-named deceased, who died on 22 September, 1983, or any Solicitor acting for his family, please contact Northern Bank Trust Corporation Ltd., Griffin House, 7/8 Wilton Terrace, Dublin 2. Tel. 785066.

GLYNN, Julia late of 125 Errigal Road, Crumlin, Dublin. Date of death the 24th of February 1984. Will any person having knowledge of the whereabouts of the Will or who has any information regarding the above named deceased, please contact Cornelius Sheehan and Co., Solicitors, 11 Anglesea Street, Dublin 2.

KEANE, John Anthony, deceased, late of "Dorus", 36 Devon Park, Salthill, Galway. Will any person having any knowledge of any Will of the above-named who died on 16th October, 1984 please contact Martin J. Kearns & Co., Solicitors, 6 Saint Francis Street, Galway. Telephone 091-63094 or 091-61907.

O'BRIEN, Richard, late of 1 Bluebell Road, Inchicore, Dublin 12. Died on the 14th day of January 1983. Would any person having any knowledge of the whereabouts of a Will dated 1976 contact Messrs. Desmond P. Flynn & Co., Solicitors of Main Street, Tallaght, County Dublin, Telephone No. 523166/523619.

WHITE, William, deceased, late of 146 Ballyfermot Crescent, Dublin 10. Date of death 26th December 1982 at St. James's Hospital. Will any person having knowledge of the whereabouts of any Will of the above named deceased please contact Thomas Quigley & Co., Solicitors, 302 Ballyfermot Road, Dublin 10. Telephone 266472.

Miscellaneous

ENGLISH AGENT. Agency/referral work undertaken for Irish Solicitors in England/Wales in High Court personal injury cases and all types of County Court cases. Also conveyancing, probate and landlord/tenant matters. Fearon & Co., Solicitors, 12 The Broadway, Woking, Surrey, GU21 5AU. Tel. Woking (04862) 26272, Telex 296500.

AGENCY REFERRAL work undertaken for Irish Solicitors in England and Wales in general, civil and commercial fields, close to High Court and commercial centre. Contact Fox-Robinson & Co., Solicitors, 31 Sackville St., London W1X 1DB. Tel. (031) 4394321, Telex 22391 Fox-Law.

POST-GRADUATE STUDENT at TCD seeks legal translation (French-into-English) or related work such as a clerkship on a flexible basis. Experiences in translation, interpretation, and commercial work at American and International law firms in Paris. Contact Sean Johnson, 20 Ranelagh Road, Dublin 6. Tel: 965116.

FOR SALE — Seven Day Ordinary Licence — Enquiries to H. C. O'Doherty & Co., Solicitors, Buncrana, Co. Donegal. Tel. (077) 61286.

ENGLISH SOLICITORS acting for the British Debendox Action Group would like to make contact with any Irish firms that have been instructed to take proceedings against the manufacturers of the morning sickness drug, Debendox. Please contact Sheridan & Co., Solicitors, 198A London Road, Kingston upon Thames, Surrey, KT2 6QP, England.

SEMINARS, International Sales of Goods and Law Office Organization, Salzburg and Waidring (Tirol) ski resort, 26 January - 3 February 1985. McGeorge School of Law, Box 19, A5033 Salzburg, Austria. Telephone (662) 75520, Telex 631064 inlaw.

LAW GRADUATES: US Law Internships in Diploma or LLM Program. McGeorge School of Law, Box 19, A5033 Salzburg, Austria. Telephone (662) 75520, Telex 631064 inlaw.

FOR SALE 7 DAY ORDINARY Publican's Licence. Contact Gerard O'Keeffe & Co., Solicitors, Kanturk, Co. Cork. Phone (029) 50154.

SEVEN DAY ORDINARY PUBLICAN'S LICENCE for sale. Enquiries to Cornelius Sheehan & Co., Solicitors, 11 Anglesea Street, Dublin 2. Telephone: 770025.

WANTED TO PURCHASE — quantity of 2nd hand Twinlock Lateral 'D' files; for information, phone (072) 55302.

The Profession

EDNA M. ENGLISH is pleased to announce that she has commenced practice under the style of ENGLISH & ASSOCIATES, Solicitors, at 29 Patrick Street, Fermoy, County Cork, telephone 025-32262.

EMPLOYMENT REGISTER

Members are reminded that the Society maintains an Employment Register for Solicitors. Those seeking employment and those Offices with posts to be filled are invited to contact The Education Officer, Mr. Albert Power, The Law Society, Blackhall Place, Dublin, 7.

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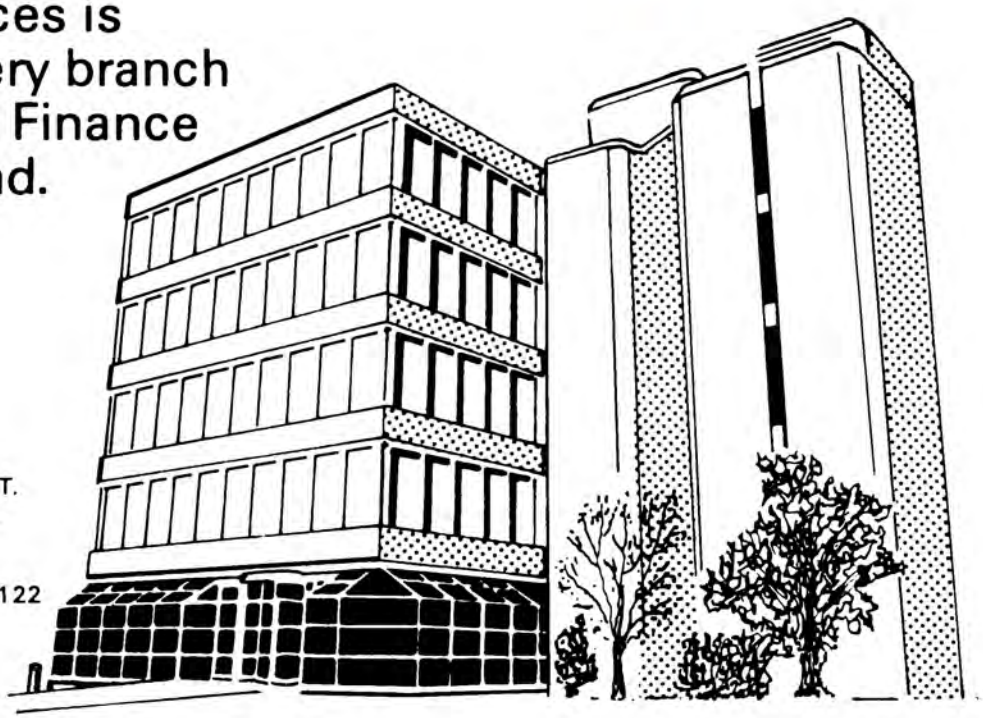

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JOURNAL OF THE LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 10 December 1984

The President 1984/85

Anthony E. Collins, the newly elected President, is Senior Partner in the firm of Eugene F. Collins & Son, Solicitors, 61, Fitzwilliam Square, Dublin and is a son of the late Desmond J. Collins.

He was at school at Xavier's, St. Gerard's and Downside and obtained the degrees of B.A. and B.Comm. at Trinity College, Dublin in 1961. He was admitted as a Solicitor in 1964 and has been a member of the Council since 1970. He has served on many of the Society's Committees and is a former Chairman of the Professional Purposes, E.E.C. and International Affairs and Premises Committees.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 78 No. 10 December 1984

In this issue . . .

ABC Membership has been approved pending first audit for the period July to December 1984.

Published at Blackhall Place, Dublin 7.

Comment . . .

. . . Legal Information — A New Era

AT the recent launching of the new Irish Current Law Statutes Annotated by Sweet & Maxwell, our colleague, Mervyn Taylor, T.D., remarked upon the greatly increased number of texts on Irish Law available today as contrasted with his own student days when Kiely's *Equity* was virtually the only text on Irish Law available.

In the past 10 years the change has been dramatic largely through the efforts of the Law Society and Professional Books Ltd., and through the patronage of the Arthur Cox Foundation. Scarcely any but the most arcane legal subject has escaped the attention of writers on Irish Law.

Equally important is the fact that, now that the market for Irish Law text has been established, the two major UK legal publishers, Sweet & Maxwell and Butterworths, are again showing an interest in producing Irish texts. Nor has this new found interest resulted simply in "Irish Supplements" to established English texts; publications dedicated to Irish Law are now in the pipeline.

The launching of ITELIS through the partnership of EUROLEX and the *Irish Times* brings computer-based legal information retrieval to this country for the first time (although there are a couple of experimental systems in existence using an Irish Database). It remains to be seen how widely used ITELIS will be; the US and UK experience shows, however, that after something of a boom start followed by the almost inevitable slump systems of this kind find a permanent and important place in the provision of legal information to the practitioner.

In retrospect, it is easy to take the view that this growth in the production of Irish text and legal information was inevitable given the accelerated divergence in UK and Irish Statute Law in recent years and the consequent increasing unreliability of English texts for the Irish practitioner. It is nonetheless a fact that it is the present generation of Irish Lawyers which will most clearly be its beneficiaries. □

Wide-ranging Discussions at Society's A.G.M.

DISCUSSIONS ranging from computerisation to the need for greater support for the Solicitors' Benevolent Society engaged the concern of members of the Incorporated Law Society of Ireland at the Society's annual general meeting at Blackhall Place, Dublin on Friday, November 16, 1984.

The President, Mr. Frank O'Donnell, took the Chair and after the formalities and the Minutes of the half-yearly general meeting (published in the *Gazette*, June, 1984) were agreed the Minutes were signed. A record of the attendance at the A.G.M. is recorded in the Attendance Book.

Accounts & Balance Sheet

The adoption of the audited accounts and balance sheet for the year ended 31st December, 1983, was proposed by Mrs. M. Quinlan and seconded by Mr. W. Beatty. In reply to Mr. V. Crowley, Mr. T. Shaw (Chairman, Finance Committee) explained that the increase in the depreciation figure in the Law School accounts was due to the accelerated write-off of the capital expenditure on the Society's computer.

In response to Mr. T.C.G. O'Mahony, Mr. Shaw explained that the amount written-off in total on the computer was £23,000 and in addition, a sum of £27,000 was spent on upgrading the computer. He added that before upgrading the computer, the Society had sought detailed advice as to what should be done. Again in response to Mr. O'Mahony, Mr. J. Sweeney, Chairman, Technology Committee, made the point that the Society required that more of its work be computerised rather than the amount of computerisation be reduced. Mr. Shaw indicated that he would be quite prepared to give further information on any matter relating to the accounts on a written question.

The accounts were formally adopted.

The President thanked Messrs Coopers & Lybrand for their assistance during the year and asked Mr. Dick Lane to convey the Society's thanks to his partners. Coopers & Lybrand were re-appointed Auditors on the proposition of Mr. T.S. Shaw, seconded by Mr. J. Maher.

Ballot for Council 1984/85

The report of the Scrutineers on the election for Council for 1984/85 was presented and the Scrutineers were thanked by the President for the expeditious manner in which they completed the election count. At the President's request Mr. Tierney explained that votes had been spoiled in the course of the election through members not reading carefully the instructions on the ballot paper.

Details of the ballot were published in the November *Gazette*.

Council's Report 1983/84

Adoption of the Council's Report for the year 1983/84 was proposed by Mr. Maurice Curran, seconded by Mr. Frank Daly.

The President then presented his Report and the Reports of the Committees for discussion. It was noted that the name of Mr. Gerard Doyle had been omitted from the membership of the Disciplinary Committee.

President's Report

In response to a query from Mr. T.C.G. O'Mahony, the President explained the developments which had taken place regarding amendment of the Solicitors' Acts. He made it clear that at this stage, he was not free to disclose to members generally the progress which had been made in discussions with the Department of Justice. Mr. O'Mahony contended that the profession as a whole should be brought in to the Council's confidence and that the matter should be dealt by way of a Special General Meeting. Mr. Quentin Crivon said he felt that the Council was adopting a high-handed approach. There should have been advance consultation with members on a matter as fundamental as the amendment of the Solicitors' Acts. Mr. M. Curran explained that until the Society had completed its discussions with the Department of Justice, and agreement in principle was reached, it would not be possible for the Council to take the profession into its confidence.

Mr. John Schutte said the problem of secrecy in the conduct of the Society's affairs was important. In his experience, members felt a bit isolated from the workings of the Council and on that account, in the coming year, he would like to see more openness.

Concluding the discussion, the President pointed out that in his meetings with various Bar Associations throughout the country, he had given them a broad outline as to the approach the Society would be adopting. He intimated that the Council had decided to seek lay participation in the operation of the Disciplinary Committee. Also, the Council had adopted revised Solicitors' Accounts Regulations on 3rd October, 1984. Mr. Connolly explained that the effect of the revised Regulations was to put the onus on the solicitor to reconcile clients' accounts twice a year.

On the question of establishing a panel of solicitors to act in cases of negligence, the President commented that it was quite clear that in the public mind, there was a criticism of the profession in this matter. In rural areas, there was a considerable reluctance on the part of a solicitor to sue a colleague. Hence, he thought it well to formalise, insofar as possible, the *ad-hoc* arrangements which had existed. On the Restrictive Practices Commission, Mr. T.C.G. O'Mahony commented that since the Report on the Conveyancing Monopoly was a fundamental matter for the profession, he felt the Council and the Committees concerned should press the matter harder than they appeared to have done with a view to an early publication of the Report.

The meeting noted with concern that, as yet, no progress had been made with the Irish Medical Organisation in the matter of their unilateral increase in fees for reports and court attendances.

Compensation Fund

Mr. G. Doyle said he would like to think the Fund

sacrosanct, but he accepted that the Society had the right to charge the Fund in respect of administration expenses. However, he thought that a 16% charge was somewhat out of line. Mr. F. Daly made the point that while the expenses might be high, the Fund had the services of high powered people in the Investigating Accountants and such people had to be paid the going rate. Mr. T.C.G. O'Mahony commended the Society for organising the Practice Advisory Service, but objected to the lack of confidentiality in the investigating of accounts in that the Investigating Accountant reported to the Compensation Fund Committee in detail. He would like to have the extent to which the Investigating Accountants reported tightly specified. Mr. A. Collins pointed out that the purpose of the Compensation Fund Committee was to protect the Compensation Fund. Solicitors generally should welcome investigations particularly as they could draw attention to minor shortcomings in the operation of solicitors' accounts.

Finance

Mr. T. Shaw detailed the charges proposed in respect of membership, the Compensation Fund and the Practising Certificate in the coming year. He then proposed the following Resolution regarding the membership subscription which had been amended to take account of Mr. Doyle's suggestion that a reduced subscription be provided for in the case of solicitors who were on the Roll of Solicitors for 40 years or more:

> 'That Bye Law 3 of the Society be revoked and that the following Bye Law be submitted:
>
> The Annual Membership Subscription shall be:
>
> (a) Practising Members admitted to the Roll of Solicitors
>
> | | |
> |---|---|
> | (i) for 3 years or upwards | £50 |
> | (ii) for less than 3 years | £25 |
> | (iii) for first year of practice | £ 1 |
> | (iv) for 40 years or upwards | £25 |
>
> (b) Practising Members admitted to the Roll of Solicitors
>
> | | |
> |---|---|
> | (i) under 65 years of age | £25 |
> | (ii) over 65 years of age | £12 |
>
> of such sum or sums as the Society in general meeting may from time to time determine, and shall be payable in advance of 6th January each year or on acceptance as a member provided that a new member accepted and joining the Society for the first time after the 1st July in any year shall be required to pay only half the appropriate subscription to the following 5th January and such new member shall be entitled to vote at the then ensuing election for the Council provided that he shall have been a member at least the week before the date of the election.'

The resolution was formally proposed by Mr. Thomas D. Shaw and seconded by Mr. Ernest J. Margetson and was adopted.

Benevolent Association

Speaking on the work of the Solicitors' Benevolent Association, Mr. Eunan McCarron (Chairman) said that at the close of the current year, the overdraft of the Association would stand at £20,000. This was due to the level of claims. At a subscription of £20, which had been proposed, the subscription income would be about £50,000, against payments amounting to £60,000. This posed a question for the Association as to whether it should sell its investments. Demands were increasing steadily and the monthly meetings of the Committee now take three and four hours since they deal with approximately 50 applications at each meeting. Almost every one of the applicants for assistance was on State support.

Mr. McCarron hoped that members appreciated the gravity of the situation and would impress it on their colleagues. He thanked the President for his help during the year, particularly on his visits to the Bar Associations. Mr. Crivon said the report was a reflection of what was happening in the profession, and a lot of practitioners were in difficulty.

Referring to the financial reports, in particular those of the Law School, he asked if the increase in expenditure was justified. Mr. Shaw pointed out that the reports as presented by the Auditors showed figures for an 8-month period in one instance and a 12-month period in the other. This gave rise to distortion. He assured Mr. Crivon that insofar as the Finance Committee was concerned, it operated the Association's financial programme on a very tight rein. Mr. P. Prentice suggested that the Benevolent Association might publish its accounts with the Society's Annual Report. This would bring the present difficult situation more clearly to the members.

Professional Purposes

Mr. T.C.G. O'Mahony commented that he had not seen

the draft Code of Ethics referred to in the Report. Mr. P. O'Connor explained that the draft was now before the Council of the Society. Once cleared by the Council, it was his intention to bring it before the next meeting of Presidents & Secretaries of Bar Associations. He did not anticipate bringing the Code before the members of the Society in draft form.

Mr. Crivon felt the members should be consulted on such an important document and considered that a summary of the proposals contained in the Code should be circulated before it was adopted.

The Society's move on the arbitration of disputes was commended by Mr. O'Mahony.

Mr. Crivon raised the delay with a query of his in relation to the inspection of wages books by the Department of Labour. The Director General (Mr. J. Ivers) explained that the issues raised by Mr. Crivon had been discussed at a meeting of the Law Clerks JLC on 13th November 1984. As a result, it had been decided to deal by way of note on the Table of Wages with the question of previous service. The Committee considered that the question of inspection of wages books was a matter for the Department of Labour and the issue was being referred to that Department.

Mr. V. Crowley raised the question of responsibility for foreign lawyers' fees which, in his experience, were at a very high level. Would it be possible to have an arbitration arrangement to deal with problems in this area? Mr. Crivon asked if it would be possible to furnish the profession with comparative Irish/UK costs for the various situations which arose. The President suggested that the most practical approach was to agree fees on the commencement of the particular case. However, he felt the matter should be looked at by the Professional Purposes Committee.

Public Relations

The President thanked the various members who

addressed the media on behalf of the Society during the year. Mr. Schutte asked for a greater budget allocation to the Public Relations Committee. Mr. Shaw explained that the Finance Committee did not adopt a tight fisted approach towards expenditure on public relations. The allocation of finance was made each year on the basis of the projects put forward by the Public Relations Committee.

Premises

Referring to the comment about the restriction in the use of the premises with a view to minimising wear and tear, Mr. T.C.G. O'Mahony asked if the Society had a white elephant in Blackhall Place. He wondered if it would be better to go back to the smaller set-up both as to accommodation and staffing, which had previously obtained in the Four Courts. Mr. McCarthy asked if it would be possible to organise a roundabout for car traffic at the rear of the premises with a view to minimising congestion on the occasion of functions. He also asked if it would be possible for the Society to make representations with a view to having the right turn at Ushers' Island bridge restored with a view to facilitating quick access to Blackhall Place.

Litigation

Mr. V. Crowley drew the meeting's attention to the dangers for solicitors in the provisions of the Criminal Justice Bill, when enacted. He asked for the holding of seminars on the subject.

Younger Members

Replying to a query regarding the running of symposia/seminars for young solicitors setting up in practice on their own account, the President said that proposals to this effect had been put forward by the Accountants participating in the Practice Advisory Service. It was intended to look at the situation in the coming year.

Professional Remuneration

Mr. L. Cullen, replying to a question, reported on the present position regarding the Society's action against the Minister for Justice, the Minister for Industry, Commerce, Trade & Tourism and the Attorney General. Mr. Crivon commented that there had been no increase in the level of statutory fees allowed for many years and, as a result, the position of the solicitor was getting worse year after year. Mr. Crowley commented that he assessed his own costs and in two recent High Court cases, they had taxed at 10% and 8% overall. He also commented adversely on the very high fees which were charged in respect of engineers' and medical reports. Mr. T.C.G. O'Mahony endorsed the comments of Mr. Crivon and Mr. Crowley.

Mr. Murphy referred to the delay in the payment of costs on the Criminal Legal Aid Scheme and also referred to the motion on solicitor and client costs which was before the Council. The Director General explained that as soon as the Order revising the payments under the Criminal Legal Aid Scheme was made, and it had been submitted for signature, the outstanding District Court costs would be paid. The President explained that the matter of solicitor and client costs was still under consideration by the Council. Mr. Crowley paid tribute to

(continued on page 282)

Practice Notes

In The Matter of The Companies (Amendment) Act, 1983

It should be noted that the transitional period for the re-registration of all existing Public Companies as Public Limited Companies pursuant to Section 12 of the above Act expires on the 11th of January 1985. Failure to be registered in accordance with the provisions of Section 12 or as another form of company will result in prosecution. A resolution of the Directors of a Company passed by virtue of Section 12(3)(A) must also be filed.

Sean Dorgan
Registrar of Companies □

Minimum Salary for Newly Qualified Solicitors

At its meeting on 13 November, 1984, the Council of the Society adopted a resolution in the following terms:

> "that the Council of the Law Society recommends that solicitors in the first year of their employment, should be paid a minimum salry of £7,500."

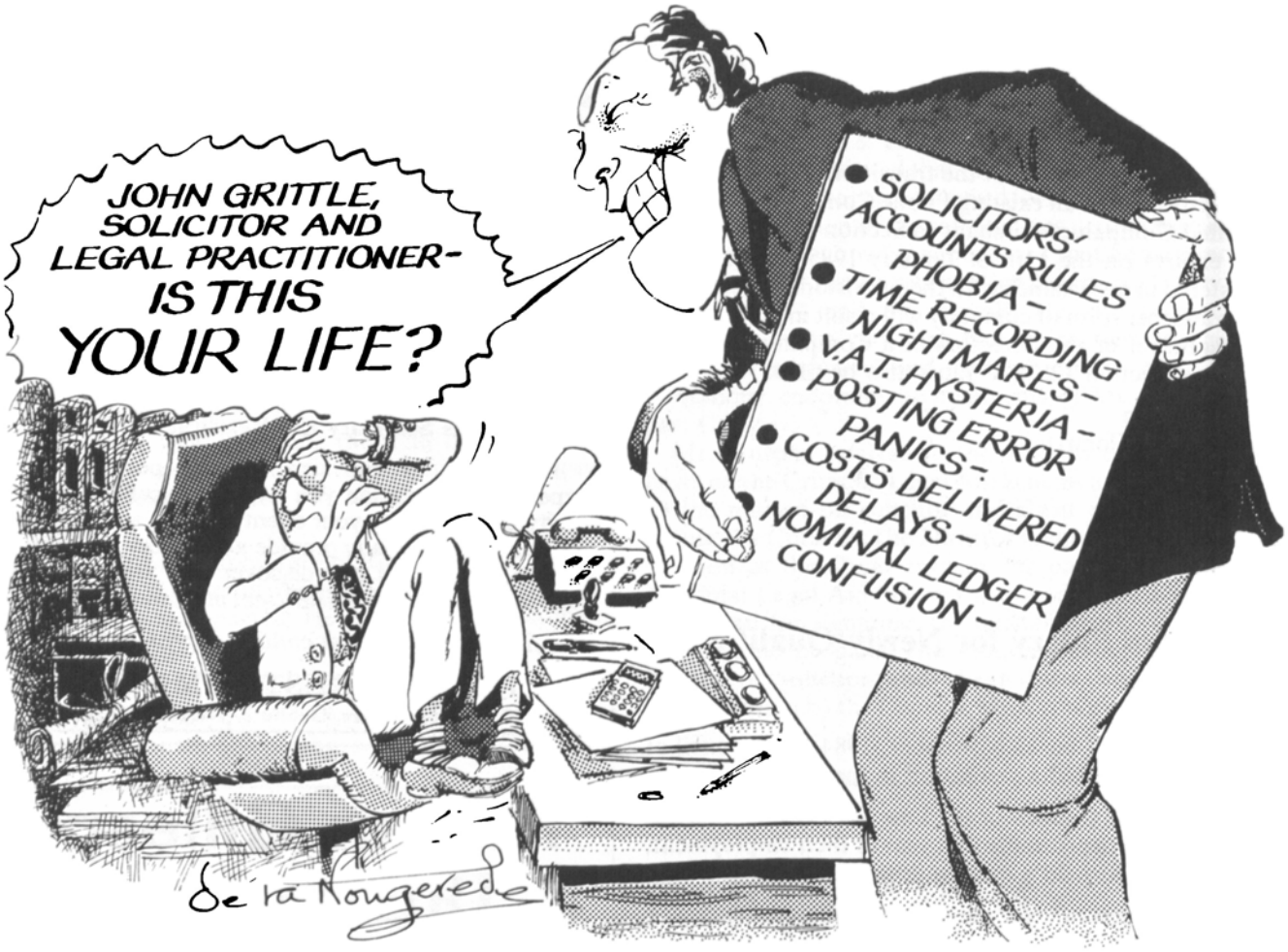
At the request of some members, the Council wishes to clarify that it was not the intention that the recommendation for a minimum salary would apply where newly qualified solicitors are retained on a temporary basis by their masters, following the expiry of their indentures, while such solicitors are seeking employment elsewhere. □

Law Clerks Joint Labour Committee

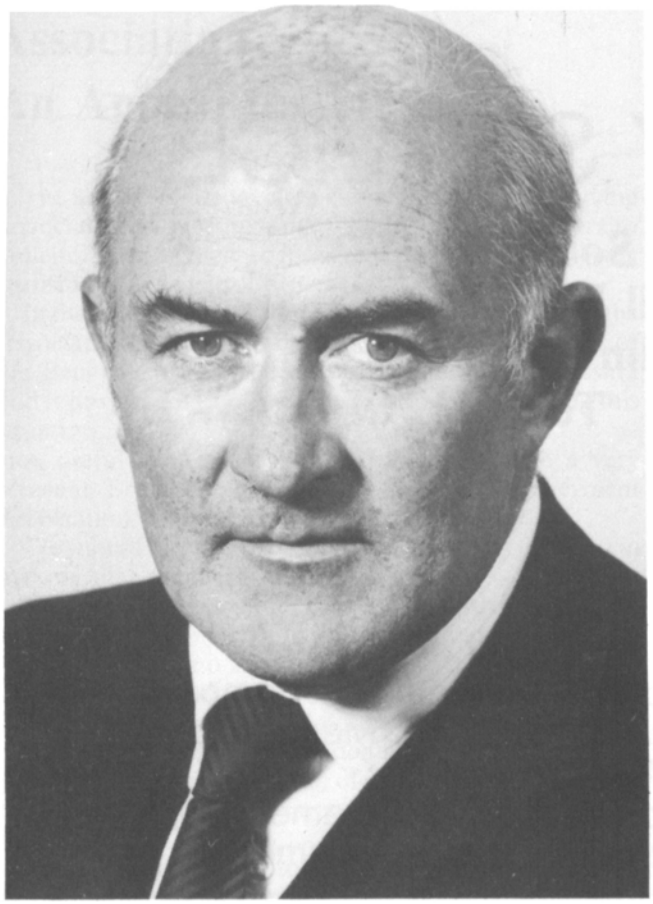
At the same meeting the Council had before it a report to the effect that the Law Clerks Joint Labour Committee had agreed, on a majority vote, to adjust the minimum wage scale payable to law clerks and other staff in solicitors offices by;

4% with effect as from the date of Order
4% with effect as from 1st February, 1985.

Because of the protracted negotiations leading up to the decision by the Joint Labour Committee, the Employees' Side asked that, as a gesture of good will, employers be asked to pay the first 4% increase with effect as from 1st September, 1984. The Council agreed that this request should be conveyed to the members of the Society. □



Vice Presidents 1984/85



Laurence Cullen
Senior Vice President

Laurence Cullen, the newly elected Senior Vice President, is senior partner in Augustus Cullen & Son, Solicitors, Wicklow. Son of the late Augustus Cullen, a former Council member, he was educated at De La Salle School, Wicklow, Presentation College, Bray and Castleknock College, Dublin. He qualified in 1957 and has been a member of the Council since 1971. He is presently Chairman of the Professional Remuneration Committee.

Donal G. Binchy
Junior Vice President

Donal G. Binchy is Senior Partner in the firm of O'Brien & Binchy, Solicitors, Clonmel, and is son of the late James A. Binchy, Solicitor.

He was educated at Christian Brothers, Clonmel and at Clongowes Wood College. He qualified and was admitted as Solicitor in 1951 and was awarded the Society's Silver Medal in his final Law examination. He was President of the County Tipperary Bar Association in the year 1980/81. He has been a member of the Council since 1975. He has served terms as Chairman of the Society's Parliamentary and Taxation Committees and has been one of the Consultants on the Society's Advanced Taxation Course.

Solicitors' Benevolent Association — An Appeal for Help

The Solicitors' Benevolent Association has been giving financial assistance now over a long number of years to Solicitors and their dependants who are suffering hardship and financial distress.

In the very recent past the number of applications to the Association for relief has greatly increased. The funds of the Benevolent Association have come under pressure and it has been necessary to seek ways of improving this situation.

A useful sum was raised last June, through a very pleasant Soirée in aid of the Solicitors' Benevolent Association held in Blackhall Place.

We should like to thank everybody who was involved in making that evening such a great success.

We are most of us under pressure for cash in these hard times, but the Association sees cases involving some of our colleagues who are in dire straits. It is likely, in the very near future, that the funds available to the Benevolent Association will not be able to meet the needs of some very deserving individuals. If any member of the profession can think of ways of attracting further funds, the Directors of the Association would be grateful for any ideas.

Meanwhile, the Directors of the Association are very anxious that existing commitments should continue to be met. In view also of the likelihood of new calls for help, it seems inevitable that members will be asked to increase their very willing support in the form of subscriptions. □

Law Society

Annual Dinner Dance 1984

John O'Brien, Solicitor, Dublin and Ms. Noelle O'Higgins, Dublin.

Maurice Curran, Solicitor, Dublin, Mrs. Elaine Woulfe, Richard Woulfe (Law Society), and Mrs. Noelle Ann Curran.

(l. to r.) Roderick Fitzpatrick, Mrs. Maureen Fitzpatrick, Mrs. Clare Connellan, Solicitor and Murrough Connellan.

The President of the Law Society, Frank O'Donnell (left) with the Hon. Lord Justice O'Donnell, (Northern Ireland) (centre) and Mr. Desmond Scales, President of the Irish Auctioneers and Valuers Institute.

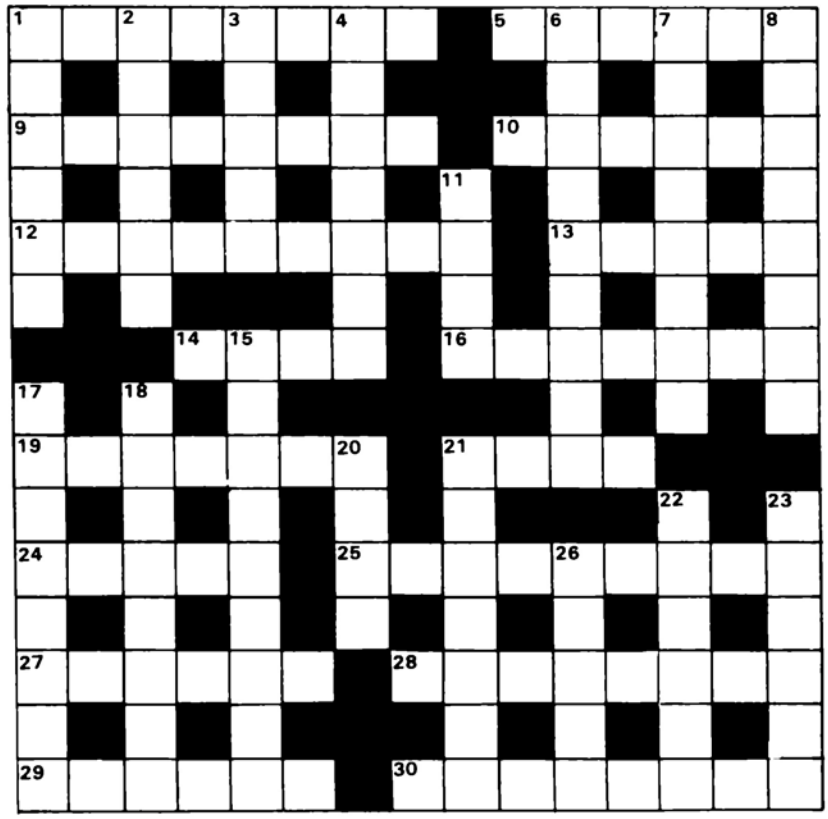
(l.to r.): Paddy Daly, Solicitor, Galway, Mrs. Eva Daly, Pat O'Connor, Solicitor, Swinford and Mrs. Gillian O'Connor.

CROSSWORD NO. 2

The prize for the winner of the competition each month will be a Hickson Holiday Voucher to the value of £100, which will be valid as part-payment against any of the apartment holidays outlined in the Hickson Holidays 1985 brochure.

The winner of Crossword No. 1, as published in the November issue is:—

Maire R. Whelan,
F.L.A.C.,
49 Sth. William St.,
Dublin 2.



Across

1. Grass. 8
5. Can Mee produce threat of injury ... 6. (Anag)
9. - - - - - by menaces. 3,5
10. An angry reply. 6
12. Undercover broadcasting system. 9
13. Publicise a forgery. 5
14. A renewal of lease premium. 4
16. The chief item. 4,3
19. It's time Ted, so put the currency into circulation. 7. (Anag)
21. James and his sealed contract. 4
24. Go on and occupy the land. 5
25. Con mended and judicially sentenced. 9. (Anag)
27. Scandinavian turnips. 6
28. Recognised by authority. 8
29. These could be actual or constructive if total. 6
30. Under emotional tension. 8

Down

1. Challenge as false. 6
2. Suitable for conventional ceremony. 6
3. Lift up a sire. 5 (Anag)
4. Thus, he's avoiding the issue. 7
6. The completion of a judgment. 9
7. The choice and following of a plan. 8
8. Importunely demanded. 8
11. A time for judicial business. 4
15. Meddlesomely intervene. 9
17. R reveals the change of a judicial mind. 8. (Anag)
18. Taking it pending satisfaction for tort. 8
20. Considered by the prisoner to be not much of a haven. 4
21. The advantage of doubt? 7
22. Unites? No — quite the opposite. 6. (Anag)
23. Muddled and rotten. 6
26. Those exclusive ones. 5

SOLUTION: CROSSWORD NO. 1

Across

1. Occupancy.
8. Lien.
9. Security.
12. Overrides.
13. Trial.
14. Excels.
16. Mirrored.
18. Alienate.
20. Handel.
23. Types.
24. Ademption.
26. Prorogue.
27. Rank.
28. Impressed.

Down

2. Central.
3. Upside.
4. Accessio.
5. Curator.
6. Fine.
7. Stair rod.
10. Covenants.
11. Fledgling.
15. Clippers.
17. Stranger.
19. Nostrum.
21. Asperse.
22. Deters.
25. Inns.

CROSSWORD NO. 2

Entries must be returned to:
Editor, Law Society Gazette,
Blackhall Place, Dublin 7.

Closing date: 31 January, 1985

NAME .....

ADDRESS .....

PHONE NO. .....

Change and Reform

by
Sir John Donaldson, MR.*

SURPRISINGLY, since by the nature of our training we should be both rational and articulate, we seem to be failing as communicators. We all accept the old adage that a lawyer who acts for himself has a fool for a client. But the profession as a whole should be able to act for itself, without anyone concluding that it has a fool for an advocate. We really must do better and the starting point must be a realisation of the strengths and weaknesses of our position.

Weaknesses . . .

Let me start with the weaknesses. There still seem to be lawyers who expect automatically to be loved. Forget it. The phrase 'beloved physician' would not look out of place on a tombstone. The phrase 'beloved lawyer' would attract more than passing interest.

The reason is simple. When a patient is afflicted with illness, he regards himself as having suffered a misfortune, for which no one is to blame. The doctor who cures him or alleviates his pain or suffering is a natural object of gratitude. By way of exception the minority of doctors who are concerned with preventive medicine, do not do so well, because the more successful they are, the less they have to show for their efforts.

When it comes to lawyers, the position is quite different. A very large part of their work is preventive in nature. Most non-contentious business certainly is. So the lawyers have little to show for their efforts and fees. And when they are concerned to pursue or defend claims, which does produce results which are apparent, neither the claimant nor the defendant regards himself as a victim of misfortune. He blames his opponent for not conceding the claim or, as the case may be, making it and deeply resents any time or money spent on legal assistance. As a profession we lose out both ways.

. . . and Strengths

I mention this not as a matter of complaint, but as a fact of life of which account must be taken in informing the public. So what are our strengths? What is the social purpose that we serve?

We are living in times when it is all too clear that, in a complex society, life without rules which are accepted and enforced by that society would be wholly intolerable. It is the duty of parliament and not of the legal profession to make the appropriate rules. As I have often pointed out, 'The law is the nation's rule-book'. The duty of the legal professions is to take it from there, if asked to do so by their clients.

The vast majority of the public wish to abide by the rules, but in some cases they have very real difficulty in knowing what the rules are. The first social purpose of lawyers is to assist the public in doing what they want to do, namely to comply with the law. The second social purpose consists of assisting the public to make sensible choices within the wide area of free choice left by the law. 'Sensible' in this context means a choice which will reduce or eliminate the chances of disputes arising thereafter. Furthermore, since lawyers, and in particular members of your branch of the profession, are not only learned in the law, but are, by training and the practice of the profession, experienced men of affairs, it means a choice which will better achieve the object of the particular member of the public concerned.

The third social purpose, and it is the one with which I have been primarily concerned throughout my professional life, is to assist in the settlement of disputes. Some disputes are wholly inevitable. The lawyer's purpose is to see that they are resolved as quickly and as economically as possible and with the minimum of abrasion. This is not only a service to the disputants, it is a service to the community as a whole.

If I had to sum up the social purpose of the legal professions in a single sentence, I should say that they stand in the same relation to society — the body politic — as do doctors to their patients — the body individual.

Now let us be clear and let the public be clear as to the manner in which we approach this task. It is not as mere technicians. It is as members of a learned profession. And what difference, the public will ask, does that make? We all know the answer, but for far too long we have failed to give it. One of the essential differences between the technician and the professional can be summed up in one old-fashioned word — 'dedication'. The doctor has it and the public knows it. So too has the lawyer. The public should know that too.

Independence

Our calling requires us to accept standards of integrity, impartiality and skill, which the public needs and which it will obtain from no-one else operating in the same field. It also requires us to maintain the highest possible degree of independence of thought and action. This independence can only be maintained if we, at whatever price to ourselves, steadfastly refuse to allow ourselves to be put in a position where there is a conflict of interest between different clients. It can only be maintained if we, as a profession, again at whatever price to ourselves, maintain our independence of all authorities, whether national or local. The only conflict which can be accepted, and that solely because it must be, is a conflict between the lawyer's personal inclinations and even his interests and his professional duty. That is inescapable and it is the hallmark of the professional that he always places his professional duty first.

The public has a free choice, in the case of the lawyer as with the doctor, to go to the professionals or to seek assistance from others. For my part I have no doubt that if the public once appreciates the realities of the choice, it will consult the professionals. But even if it does not, or does not do so to the extent that we all would wish, dedication and self-respect require that we stick to our standards.

Today, more than for many years past, we are being pressed to make changes in the profession. And make no mistake about it, we should do so and we want to do so. We should remove the mystique which is one of the reasons why the public hesitates to consult us. We should

supply a better and wider service using all the aids now becoming available to us through modern technology. But we must be careful not to allow this pressure, and even a personal desire for change, to allow us in any way to dilute our professional standards or diminish our dedication.

Advertising

Take advertising. My whole theme is the need for the public to know the service which the profession offers. Advertising must therefore be desirable. Received truth at the moment is that competition breeds efficiency. In fact there has always been acute competition within the profession, both in price and in services, but let that pass. Outside the profession advertising has always been one of the sharpest of competitive weapons. It must therefore follow, so it is said, that advertising within the profession is doubly desirable, both in order to inform and to stimulate still further competition.

But is it? Experience from across the Atlantic, where it has been held that the First Amendment gives lawyers an unlimited constitutional right to advertise, suggests caution. Only last August the Chief Justice of the United States in a speech in Chicago condemned those American lawyers who marketed their professional services on television, radio and in the newspapers as if they were selling motor cars, dog foods, cosmetics or hair tonic. Advertising is not necessarily incompatible with the maintenance of professional standards, but it very easily can be. The public has a need to know who is and who is not a qualified solicitor and where he carries on his profession. It has a need to know what expense will be involved in using his professional services. It has a need to know in what branches of law he is experienced. Disseminating this information — informational advertising — is clearly unobjectionable.

But in the field of commerce, advertising is not only or even mainly informational — it is promotional. It involves proclaiming the excellence of the advertiser's wares and, expressly or by implication, making an adverse comparison with competing products. Promotional advertising — touting — is wholly inconsistent with the standards of any true profession. And professional standards stand or fall together. Once allow them to be eroded in one respect and they will crumble in others.

Inter-Professional Partnerships and Fee-Sharing

This is only one tiny corner of the changes which are being made at the present time. I would only refer to one of them — the practicality and propriety of inter-professional partnership and fee-sharing. If this will provide a better service to the public, as well it might, and if it can be achieved without risk to our own professional standards, I do not see why it should not be permitted and indeed encouraged. It would only reflect, and might complement, similar developments in the financial and banking sectors of the City of London.

But the solicitors involved would have to ensure that the existing standards concerning the avoidance of conflict of interest were maintained and, in relation to an inter-professional partnership, they would have to accept personal responsibility that the conduct of their non-solicitor partners conformed with the rules of the solicitors' profession and not only with those of the partners' own profession. It would be understandable if the other profession imposed a similar requirement and that could only be for the public good, since clients of the partnership would enjoy the benefit of the strictest of each profession's standards.

Affording Civil Justice

So let me look at the roots of a few sacred cows. The first is that every citizen has a right to civil justice and that therefore the public purse should provide it virtually free of charge. This is a complete *non sequitur.* Every citizen has the right to food and shelter, but no-one suggests that the public purse should provide it, unless the citizen is unable to do so himself. The criminal courts are, of course, in a special position. They exist solely for the benefit of the public at large and no-one uses them voluntarily. *Prima facie,* therefore, they should be paid for by the public, although those who render their existence necessary, and could afford it, might be required not only to pay for the prosecution costs, but also to contribute to the overhead expenses of the court. This in an addition to any fines.

The true view is surely that civil justice should be available to every citizen at a price which he can reasonably afford. On that basis, the present system is generous to a fault. Take a simple High Court action. The daily cost has been estimated at about £1,400, of which £800 represents the cost of publicly provided services and £600 the costs of the parties. Why do we meet the public costs in full, but make no contribution towards private costs, other than through legal aid? Why do we not put the whole of the costs on to the litigants and apply legal aid to the public as well as to the private costs? The result of the present system in one particular case was that the public purse subsidised two major oil companies to the tune of

£50,000 when they litigated their rights to £3 million for 60 days. Would it not have been better to have charged them the full economic cost, or indeed a commercial rate, which would have been much higher, and used the money to supplement the legal aid fund? The solution is to charge everyone the full economic or, better still, a commercial rate for the services of the court, including the judges, and to apply an improved and more just legal aid system to these true court cases as well as to the parties' costs.

Legal Aid

Recently, in response to a request for suggestions for improvement, I threatened to reply on these lines. Let us divide all litigants into two groups. The first group would consist of the 'Baddies'. These are those who put forward unjustified claims or resist valid claims. They should be, and usually are, the losers in the litigation. The other group would consist of the 'Goodies'. They put forward valid claims. They should be, and usually are, the successful parties in the litigation. Let us, I would have suggested, make out-and-out grants from public funds to the Baddies and let us make loans to the Goodies, such loans to be repaid out of anything which they may recover. The Baddies would be sitting pretty. The Goodies would end up in much the same position as if they had borrowed the money to litigate from their maiden aunts. I refrained from doing so, lest I be removed from office for mental illness. But, as you all know, if I had done so and if my suggestion had been accepted, there would have been scarcely any need to change the legal aid scheme, because that is more or less how it operates today.

Surely we have to evolve a system whereby those who really do have legal rights to enforce or protect receive better treatment. And whereby those who do not — those who are unsuccessful in litigation — have rather more at stake. Not only would this be more just, but it would promote rational settlements which is in the public interest. Why should we not make legal aid partly a matter of grant and partly a matter of loan for *both* parties? It may be objected that the contribution which is at present required of the assisted person is, by definition, all that he can afford. But this is just not true. The contribution takes account of immediately available capital and immediately available income. But future income is largely ignored. The unassisted litigant, in an appropriate case, would, without doubt, consider raising a loan and repaying it out of future income over a long period. He does so without hesitation when he buys a consumer durable, or a car. Why should the assisted person be in any different position in relation to litigation.

There are other nonsenses about legal aid. In real life, individuals will, quite rightly commit more of their resources to a venture which they expect to confer large benefits than to one where, at best, the rewards will be small. Not so with legal aid. The assisted person makes the same contribution, however much or little is at stake. But that is almost a detail.

Legal Expenses Insurance

During the last few years, some people have been insuring against the cost of litigation. It is something which did not exist, when legal aid came into existence. This should be encouraged. Legal aid must be modified to take account of this new ability of a litigant to assist himself. Those who insure against legal costs should thereby acquire a preferential right to legal aid. It might, for example, take the form of a proportional reduction in the resources taken into account in determining his entitlement to legal assistance. Where a person was both insured and legally aided, legal aid would take over if and when the assited person's rights under the policy had been exhausted. Such a modification would help the State discharge its duty of making justice available to any citizen at a price which he can reasonably afford.

The Courts in Civil Disputes

I have looked at two sacred cows — virtually free access to the courts and legal aid. Now let me look at a third. This is that the extent to which the courts become and remain involved in civil disputes and, in particular, the speed with which disputes are determined, is entirely a matter for the parties, subject only to the ability of the courts to play their part.

This has all the hallmarks of a truly sacred cow. It is rooted in history and is seldom, if ever, questioned. It made complete sense some centuries ago. In those days I fancy that little attention was paid to such an abstraction as the right to civil justice. The interest of the State was simply to ensure that citizens did not resolve their disputes by force, thereby weakening the military strength of the nation. The courts were purely a safety valve. If and to the extent that citizens could tolerate the dispute remaining unresolved, the courts had no interest.

I hope and believe that things have changed. We do now accept that, as a matter of principle, legal rights should be protected and enforced and that this should be done speedily and efficiently. There are two consequences. The first is that the courts should not lightly be involved in disputes. Protecting real rights is one thing. Being brought in casually as a bargaining counter is quite another. Second, where the courts are involved, they should be able to insist upon the parties co-operating to produce a speedy solution.

That leaves the extent to which the court should be able to require litigants to make progress with litigation, once they have invoked the court's assistance. With one or two exceptions, this has never seriously been considered in the past for two reasons. The first is that the courts have no machinery capable of monitoring the progress of the great mass of cases. The advent of the computer has removed this objection. The second is that the parties are thought to be the best judges of their own interests and that if they display no passionate interest in resolving a dispute, there is no public interest in doing so. This is superficially attractive, but will not, I think, bear examination. In real life it is rare that neither party wants the dispute settled quickly. In the vast majority of cases one party or both want a speedy solution and blame the courts for not providing it. Yet the cause of the delay is really either that their lawyers (from both branches of the profession) have taken on more work than they can do within a reasonable time, or that one party or the other is not co-operating, or both. Practical experience shows that leaving it to the parties to persuade their lawyers to apply to the court for orders designed to speed up the process simply does not work. The court should take the initiative and it should be for the parties and their legal advisers to explain why there is any delay.

Arbitration

This brings me, I hope logically, to question yet another

assumption, namely, that it is the duty of the State to provide enough courts and enough judges to determine all disputes brought before them. I think that the duty is rather different. It is to ensure that means exist for the settlement or determination of civil disputes in accordance with the rule of law and that such means are adequate in quality, quantity and accessibility. Courts and judges are not the only available means of determining civil disputes. Indeed, as is recognised, they are not always the best means. Hence the network of specialist statutory tribunals which has grown up. However, even then it seems to be assumed that lawyers must be involved, at least as chairmen. And it is the shortage of suitable lawyers which is one of the main problems. So I would also challenge the assumption that lawyers are a necessary part of the process. It is a challenge which can be very easily sustained, for there is a wide range of disputes in which justice is in fact done and the disputes determined by experienced arbitrators who are not lawyers.

There are very many disputes which turn on issues of fact or very basic or limited issues of law. In such cases, what is required of the disputes settler is not a wide knowledge of the law, but common sense, a judicial approach and, sometimes, knowledge of that corner of the law which is relevant to that type of dispute. This is, of course, actually what is required of justices of the peace in the field of criminal justice. Ought we not to be considering enlisting the assistance of laymen as arbitrators or civil justices of the peace to supplement the work of the courts and the judges?

Any scheme for using laymen could and should be coupled with a review of the way in which we use the skills of our judges. You have only to look, even superficially, at the work being done by the High Court, to see that a large proportion could be done by county courts more cheaply and, if some of the county court work was taken over by arbitrators, more quickly. The present system, which in essence allocates work to different courts by reference to the sum in dispute, just does not work. It should be replaced by a system whereby the appropriateness of the case to a particular type of court is assessed by the parties, the court issuing guide-lines which can be changed from time to time and retaining the power to order trail before a tribunal other than that selected by the parties. This system already operates in relation to the Commercial Court. It works well and should become universal.

Procedural Reforms

There are many procedural reforms which can be made. Do we need pleadings, should we not limit the amount of paper which modern litigation generates, do we need opening speeches by counsel and so on? I only want to refer to one matter, which is never mentioned and is worthy of consideration. In quite a large number of actions, the real issue is not whether the claimant is entitled to damages, bu the amount of the damages. Each party has an exaggerated view which becomes more exaggerated the more he thinks about it. The legal advisers on each side attempt valiantly to narrow the gap and the procedure for paying into court or making offers assists. However, in the context of industrial wage-bargaining, the Japanese have come up with a novel idea which has, I believe, been accepted by one of their UK factories. It is worthy of consideration in other contexts. It is known as the 'flip flop' decision.

It works this way. Each party has to state the amount which he expects to be awarded or, as the case may be, be ordered to pay. This should be, but, of course, is not by any means the same as the amount which the claimant is claiming or that which the respondent is prepared to concede. The court is unaware of the parties' forecasts until it has decided what is the appropriate figure to award. It announces this figure and then gives judgment not for that sum, but for the sum forecast by one of the parties which is nearest the court's figure. The practical result of such a system would be that the parties' forecasts would be highly realistic and very near to each other. And the result of that would be a spate of settlements. It is worth more than a passing thought.

May I end by wishing you success with your deliberations. □

* *This article is an edited version of an address given to the Law Society of England and Wales' National Conference at Bournemouth. The full text of the address is published in the Law Society's GAZETTE of 31 October, 1984 at p. 2985. It is reprinted here with kind permission of the author and publisher.*

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cara
The Computer People

(continued from page 268)

Mrs. Quinlan and Mr. Ivers for their work in securing increases in fees payable under the Criminal Legal Aid Scheme.

Joint Labour Committee

The Director General reported that at the meeting of the Joint Labour Committee on 13 November, 1984, the increase of 4% from the date of the Order and 4% from 1st February, had been confirmed. He also reported that the Employees' Side, referring to the very long period under which the increase had been negotiated, had asked that as a gesture of good will, the Employers' Side might pay the first instalment from 1st September, 1984. Mr. Crowley emphasised the need for solicitors to pay the minimum rates specified in the Order since the present situation, judging by the Department of Labour report, was far from satisfactory.

The report of the President and Council was then formally adopted.

Prize Bond Draw

Mr. Connolly read the result of the Prize Bond Draw which had taken place at the Finance Committee Meeting earlier in the day as follows:

1st Prize: 4 x £1,000

(1) 1219
(2) 2121 Thomas A. Morrow
(3) 1843 Aidan O'Donnell
(4) 1883 John C. Reidy & Patrick J. Reidy

2nd Prize: 7 x £500

(1) 2015 Michael E. Hanahoe, Snr.
(2) 1325 Maurice Curran
(3) 2271 Laurence P. Kirwan
(4) 1993 William McGuire
(5) 1952 Michael Moran & Patrick J. Moran
(6) 1322 Conal Clancy
(7) 1237 Ernest Margetson

3rd Prize: 6 x £250

(1) 2231 John C. Kieran & Robert Kieran
(2) 2274 Andrew Donnelly
(3) 2225 John C. Kieran & Robert Kieran
(4) 1021 John Casey
(5) 1642 Leo Loftus & Kevin Loftus
(6) 2253 Richard R. Whelehan

4th Prize: 5 x £100

(1) 1732 Michael Cussen
(2) 1785 Michael Foy
(3) 1450 Hugh O'Donnell
(4) 1759 John Hooper
(5) 1510 Joseph J. Grace

A.G.M. Date

Miss A. Neary asked that the Annual General Meeting should be held at a more convenient time for solicitors in practice. Her suggestion was supported by Mr. Smyth and it was agreed that the fixing of the date and time of the Annual General Meeting, 1985, be adjourned to the Half-Yearly General Meeting. In the meantime, the position would be examined.

Vote of Thanks

The Chair was then taken by Mr. Anthony E. Collins, Senior Vice President, and a vote of thanks to the outgoing president was proposed by Mr. Donal Kelliher. He commented that in his year of office, the President had been dedicated and hard working. He had handled in a most effective way, matters relating to the media and had made it clear that he welcomed non-lawyers on to the Disciplinary Committee since the profession had nothing to hide. In addition, he had succeeded in formalising the arrangement for processing negligence claims. Concluding, Mr. Kelliher remarked that the Society was most indebted to Mr. O'Donnell and also to his wife, Maeve, who with him, had hosted the Annual Conference and had participated in various other functions of the Society. The vote of thanks was seconded by Mr. Charles Meredith and carried with exclamation.

This terminated the business of the meeting.

Ballot Results

The result of the Ballot for the Council 1984/85 was published in the November *Gazette*. □

Presentation of Parchments — November 1984

1. Ahern-Millar, Bernadette, (B.C.L.), "Glencree", Western Road, Cork.
2. Brophy, Kevin, (LL.B. (Hons)), 14 Greenmount Road, Terenure, Dublin.
3. Brophy, Patricia, (B.A., LL.B), 26 Tirellan Heights, Headford Rd., Galway.
3a. Buckley, Cliona, (B.C.L.), 24 Cambridge Road, Dublin.
4. Cahill, Mairead, 60 Dartmouth Square, Dublin.
5. Carroll, John (B.C.L.), 12 Kenilworth Square, Rathgar, Dublin.
6. Christie, Cedric R.S., (B.A. (Mod.)), 1 St. Catherine's Road, Glenageary, Dublin.
7. Clinch, Richard, (B.Comm), "Trouville", Scholarstown Road, Rathfarnham, Dublin.
8. Cosgrave, Terence, (B.A., H.D.E.), 76 Northumberland Road, Ballsbridge, Dublin.
9. Cotter, Kevin, (B.C.L.), Monorone, Bandon, Co. Cork.
10. Courtenay, Niall, (B.A. (Mod.)), 33 Malahide Road, Artane, Dublin.
11. Cronin, John, (B.A. (Mod.)), 2 Gracefield Avenue, Artane, Dublin.
12. Cullen, Shea, 44 Dromartin Park, Dublin.
13. Curtin, Pauline M., The Hermitage, Ballyedmonduff, Dublin.
14. Curtis, Deirdre, 201, Swords Road, Dublin.
15. Dooley, Kieran, (B.A., LL.B), 62 Ardilaun Road, Newcastle, Galway.
16. Dowling, Vincent J., (B. Juris., B.L.), 74 Brighton Road, Rathgar, Dublin.
17. Doyle, Miriam, (B.A.), Ballyhogue, Enniscorthy, Wexford.
18. Finn, Orla M., (B.C.L.), 53 Eglinton Road, Donnybrook, Dublin.
19. Fitzmaurice, Robert J., "West Park", Ballygall Road East, Glasnevin, Dublin.
20. Flanagan, Maria, (B.A. (Hons)), "Woodlands", Tullamore Road, Birr, Co. Offaly.
21. Gallagher, Michael E., (B.Comm.), Tubbercurry, Sligo.
22. Galvin, David, (B.C.L.), Dromin, Nenagh, Co. Tipperary.
23. Galvin, Gerard, (B.A. (Mod.)), 10 Cherbury Court, Booterstown Ave., Blackrock, Co. Dublin.
24. Given, James, (B.C.L.), Cahirdown, Listowel, Co. Kerry.
25. Hannon, Brian, (B.A.), "Waldean", Bird Avenue, Clonskeagh, Dublin.
26. Hayes, Declan C. (B.Comm.), 12 Eglinton Park, Donnybrook, Dublin.
27. Holohan, Martina G., (B.C.L.), Kilkishen, Ennis, Co. Clare.
28. Hutchinson, Brian, (B.C.L.), "Elba", Portarlington, Co. Laois.
29. Joyce, Barbara, (B.C.L.), 29 Linden Grove, Blackrock, Co. Dublin.
30. Keane, Annmarie, (B.A. (Mod.)), 2 Shielmartin Drive, Sutton, Co. Dublin.
31. Keane, Frank, (B.A.), 2 Shielmartin Drive, Sutton, Co. Dublin.
32. Kelly, Jacqueline, (B.C.L.), Barrack Street, Bailieborough, Cavan.
33. Kenny, Sean M., 55 Hollybank Road, Drumcondra, Dublin.
34. Larkin, John D., (B.C.L.), 25 Main Street, Arklow, Co. Wicklow.
35. Larney, David, (B.C.L.), 71 Butterfield Park, Rathfarnham, Dublin.
36. Liston, Nuala, (B.C.L.), Ballyroe, Tralee, Co. Kerry.
37. Lynch, Brian M., 80 Foxfield Grove, Raheny, Dublin.
38. Mee, Walter, 21 Gray Street, Dublin.
39. Meyler, Gary, (B.C.L.), 10 Victoria Road, Rathgar, Dublin.
40. Molumby, Ronan, J. (B.C.L.), "Dualla", Marlfield, Gorey, Co. Wexford.
41. Morris, Mary, (B.A.), 61 The Dunes, Portmarnock, Dublin.
42. Mullan, Teresa, (B.A.), Threecastles, Kilkenny.
43. Mullaney, Michael, (B.C.L.), Thomas Street, Sligo.
44. Myles, Thomas, (B.Soc.Sc.), 28 Glaslough Street, Monaghan, Co. Monaghan.
45. McCarthy, Ann P., (B.C.L.), 9 Emmet Square, Clonakilty, Co. Cork.
46. McDonough, Louis, (B.C.L.), Cleveragh, Listowel, Co. Kerry.
47. McGarry, Joseph P., (B.Comm.), Milltown, Tuam, Co. Galway.
48. MacGreevy, Conor, (B.C.L.), "Moylurg", Stillorgan Road, Donnybrook, Dublin.
49. McGuire, Brid, (B.A., Dip. L.S.), Esker P.O., Ballinalee, Longford.
50. McMahon, Katherine, (B.A. (Mod)), 40 Herberton Road, Crumlin, Dublin.

51. Ni Aodha, Maire, 81a Monkstown Road, Monkstown, Co. Dublin.
52. O'Callaghan, Mary E., (B.A., B.C.L.), Carrigdhoun, Bishopstown Road, Bishopstown, Cork.
53. O'Connell, Michael, 11 North Circular Road, Dublin.
54. O'Donnell, Dudley, M.A., (B.C.L.), 71 Glasnevin Ave., Dublin.
55. O'Higgins, Derval, (B.A.), 30 Palmerston Road, Rathmines, Dublin.
56. O'Mahony, Edward P., (B.C.L.), 11 Wyattville Park, Ballybrack, Co. Dublin.
57. O'Meara, Joseph A., (B.A. (Mod)), Caherelly, Grange, Kilmallock, Co. Limerick.
58. O'Neill, Fiona, (B.A. (Mod), 1 Friarsland Ave., Roebuck, Co. Dublin.
59. O'Shaughnessy, Robert, (B.C.L.), "Navarone", Brennanstown Road, Dublin.
60. O'Shea, Christopher, (B.C.L., LL.B), 9 North Mall, Cork.
61. Pasley, Lynne, 7 Woodlawn Crescent, Churchtown, Dublin.
62. Plunkett, Oliver Randall, (B.A.), 25 Emorville Ave., Dublin.
63. Quigley, Michael, 27 Seapoint Court, Bray, Co. Wicklow.
64. Ryan, Martin, "Roseville", Lourdes Road, Roscrea, Co. Tipperary.
65. Sainsbury, Colin, (B.A. (Mod)), 82 Rathdown Park, Terenure, Dublin.
66. Shanahan, Raymond, (B.C.L., LL.B., A.I.T.I.), West Cedar, Hillsboro, Model Farm Road, Cork.
67. Sheedy, Brid F., (B.C.L.), 6 Vereker Gardens, Ennis Road, Limerick.
68. Shields, Stephen L., Knockanima, Loughrea, Galway.
69. Silvester, Peter, (B.C.L.), 2 Hempenstall Terrace, Sandymount, Dublin.
70. Smith, Patrick J. (B.C.L.), 95 Bridge Street, Cootehill, Cavan.
71. Swords, Joseph M., (B.C.L.), 10 Hillcourt Road, Glenageary, Dublin.
72. Timmons, Veronica, 55 Herberton Drive, Rialto, Dublin.
73. Twomey, David L., (B.A.), St. Ciarans, Castleisland, Co. Kerry.
74. Walsh-Breen, Fionnuala, (B.A.), 5 Croaghtamore Gardens, Upper Pouladuff Road, Cork. □

The President, Mr. Frank O'Donnell, with Mr. Terence Cosgrave, who received his parchment, and Professor Richard Woulfe (left), Director of Education and Professor Laurence Sweeney, Director of Training.

EMPLOYMENT REGISTER

Members are reminded that the Society maintains an Employment Register for Solicitors. Those seeking employment and those Offices with posts to be filled are invited to contact The Education Officer, Mr. Albert Power, The Law Society, Blackhall Place, Dublin, 7.

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.

Dated 11th day of January, 1985.

J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

1. **REGISTERED OWNER:** Charles Lynch, Annaghvane, Bealadangan, County Galway; Folio No.: 36061; Lands: (1) Lettermore, (2) Lettermore, (3) Garvoge Island and Adjacent Islands; Area: (1) 7a.2r.0p., (2) 239a.3r.9p., (3) 0a.1r.19p.; County: **GALWAY.**
2. **REGISTERED OWNER:** Thomas Jenkinson; Folio No.: 18544; Lands: Johnstown and Irishtown; Area: — ; County: **DUBLIN.**
3. **REGISTERED OWNER:** Patrick Browne (deceased); Folio No.: 6296; Lands: Ballinrea; Area: 16a.0r.6p.; County: **LIMERICK.**
4. **REGISTERED OWNER:** John Declan Wixted; Folio No.: 10462; Lands: Tiknock; Area: 0a.0r.25p.; County: **WICKLOW.**
5. **REGISTERED OWNER:** John Joseph O'Keeffe; Folio No.: 10900; Lands: Knocknaseed; Area: 66a.2r.0p.; County: **KERRY.**
6. **REGISTERED OWNER:** Michael Reidy; Folio No.: 2454F; Lands: Ballynahallia; Area: 2a.1r.0p.; County: **KERRY.**
7. **REGISTERED OWNER:** Denis Ryan and Patrick Joseph Ryan; Folio No.: 1157; Lands: Goulyduff; Area: 141a.0r.29p.; County: **KILDARE.**
8. **REGISTERED OWNER:** Richard Mansfield Wagner & Anne Wagner; Folio No.: 19627F; Lands: Moneygurney in the Barony of Cork; Area: — ; County: **CORK.**
9. **REGISTERED OWNER:** John Kenny; Folio No.: 29528; Lands: (1) Kilshannig, (2) Kilshannig; Area: (1) 4a.1r.1p., (2) 1a.2r.19p.; County: **KERRY.**
10. **REGISTERED OWNER:** Joseph Byrne; Folio No.: 8328 now closed to 4730F; Lands: Johnstown; Area: 0a.1r.20p.; County: **CARLOW.**
11. **REGISTERED OWNER:** Comhar Cumann Forbartha Chorca Dhuibhne Teo; Folio No.: 32382 & 32254; Lands: Cloontios (F.32254), Cantra (F.32382); Area: 0a.1r.4p. (F.32254), 0a.1r.8p. (F.32382); County: **KERRY.**
12. **REGISTERED OWNER:**Thomas Twomley; Folio No.: 851; Lands: Rosnastraw; Area: 55a.3r.37p.; County: **WICKLOW.**
13. **REGISTERED OWNER:** Michael Byrne, The Most Reverend Doctor Donald J. Herlihy and James Curtis; Folio No.: 1576F; Lands: Bree; Area: 0a.0r.39p.; County: **WEXFORD.**
14. **REGISTERED OWNER:** Aidan Harford; Folio No.: 27498F; Lands: Whitestown; Area: — ; County: **DUBLIN.**
15. **REGISTERED OWNER:** Mary O'Connell and Thomas Fitzgerald, Sixmilebridge, County Clare; Folio No.: 10367 and 26355; Lands: (1) Ieverstown, (2) Mountievers, (3) Sooreeny; Area: (1) 10a.0r.0p., (2) 59a.3r.38p., (3) 0a.1r.25p.; County: **CLARE.**
16. **REGISTERED OWNER:** Joseph Butler; Folio No.: 2232; Lands: Clashafree; Area: 40a.1r.16p.; County: **CORK.**
17. **REGISTERED OWNER:** Margaret Hunt; Folio No.: 1580F & 1581F; Lands: Cratlagh, Cratlagh; Area: 0a.2r.2p. (F.1580F), 0a.3r.8p. (F.1581F); County: **DONEGAL.**
18. **REGISTERED OWNER:** Liam Lynch, Lissane, Clarecastle, County Clare; Folio No.: 16098; Lands: Lissan West; Area: 20a.1r.30p.; County: **CLARE.**
19. **REGISTERED OWNER:** Malachy McAllister; Folio No.: 1693F; Lands: Ballygoly; Area: 0a.2r.4p.; County: **LOUTH.**
20. **REGISTERED OWNER:** Patrick and Briege Rooney; Folio No.: 1834L; Lands: Urban District of Dundalk; Area: 0a.0r.28p.; County: **LOUTH.**
21. **REGISTERED OWNER:** Mary Gibbons, 39 Millstream Park, Tuam, County Galway; Folio No.: 4651F; Lands: Ballycorey Dulick; Area: — ; County: **CLARE.**
22. **REGISTERED OWNER:** Thomas Spillane (deceased); Folio No.: 1921R; Lands: (1) Shean More, (2) Tober; Area: (1) 53a.3r.12p., (2) 7a.0r.33p.; County: **WATERFORD.**
23. **REGISTERED OWNER:** Patrick Farrell; Folio No.: 15626; Lands: situate in the Townland of Matt and Barony of Balrothery East; Area: — ; County: **DUBLIN.**
24. **REGISTERED OWNER:** Edward Lawlor; Folio No.: 599F; Lands: (1) Mullycagh Upper, (2) Mullycagh Upper; Area: (1) 41a.1r.6p., (2) 14a.0r.16p.; County: **WICKLOW.**
25. **REGISTERED OWNER:** Michael Kelly; Folio No.: 18640; Lands: Erry (Armstrong); Area: 16a.1r.37p.; County: **KINGS.**
26. **REGISTERED OWNER:** Patrick Fox; Folio No.: 3351; Lands: Cartronnagilta; Area: 13a.2r.26p. County: **CAVAN.**

Lost Wills

LENNON, Sean, deceased, late of 41 Dublin Street, Carlow and St. Brigid's Hospital, Carlow. The above named died at St. Brigid's Hospital, Carlow on the 2nd October 1984. Will any Solicitor or other person having a Will or knowledge of a Will of the deceased please contact Messrs. Frank Lanigan Malcomson & Law, Solicitors, Court Place, Carlow (Ref. M269/4).

McEVOY, Brigid, deceased, late of 11 Finsbury House, Pembroke Road, Dublin. Would any person having or knowing of a Will more recent than 26th February, 1980, please contact Messrs. Hussey & O'Higgins, Solicitors, 17, Northumberland Road, Dublin 4.

WALSH, Maria of 41 Cabra Drive, Phibsboro, Dublin, deceased. Would any person knowing of the whereabouts of the original Will of the above named deceased, who died in 1980, please contact R. F. Gallagher Shatter & Company, Solicitors, 4, Upper Ely Place, Dublin 2 (Ref.: MR).

GROGAN, John, late of 24 North Circular Road, Dublin 7, formerly of Coolgart Bansha, Co. Tipperary, who died on the 29th November 1984. Would any person knowing of the whereabouts of the original Will of the above named deceased please contact Purcell & Cullen, Solicitors, 21 Parnell Street, Waterford (Ref. W/C/164).

KENNEDY, Denis, formerly of Banogue, Croom, Co. Limerick, who died on 25 September, 1984 at 62 Dursley Rd., Evelyn Estate, Kilbrooke, London SE 3. Would anyone knowing of the whereabouts of a Will of the above named deceased, please contact Plunkett Hayes Breen & Co., 56 O'Connell St., Limerick. Tel. 316933.

Lost Deed

41 CABRA DRIVE, PHIBSBORO. Would any person knowing the whereabouts of the original title deeds of the above property please contact Messrs. R. F. Gallagher Shatter & Company, Solicitors, 4, Upper Ely Place, Dublin 2 (Ref. MR).

Miscellaneous

BOUND STATUTES 1838-1921, 1922-1962 in very good condition. Also **IRISH LAW TIMES** 1946-1962 (bound), 1963-1980 (loose). Inspection invited. Box No. 088.

SEMINARS, International Sales of Goods and Law Office Organisation, Salzburg and Waidring (Tirol) ski resort, 26 January - 3 February 1985. McGeorge School of Law, Box 19, A5033 Salzburg, Austria, Telephone (662) 75520, Telex 631064 inlaw.

LAW GRADUATES: US Law Internships in Diploma or LLM Program. McGeorge School of Law, Box 19, A5033 Salzburg, Austria, Telephone (662) 75520, Telex 631064 inlaw.

SUMMER SEMINARS for Law students and Lawyers: Edinburgh Institute in International Business Transactions (30 June - 21 July 1985), Salzburg Institute in International Legal Studies (6-27 July 1985), Budapest/Vienna Institute in East/West Law and Relations (24 July - 3 August 1985). McGeorge School of Law, Box 19, A5033 Salzburg, Austria, Telephone (662) 75520, Telex 631064 inlaw.

ENGLISH AGENTS. Agency work undertaken for Irish Solicitors in England/Wales in High Court personal injury cases and all types of County Court cases. Also conveyancing, probate and landlord/tenant matters. Legal Aid work undertaken including preparing and submitting the appropriate application form(s) to the Law Society. Fearon & Co., Solicitors, 12 The Broadway, Woking, Surrey, GU21 5AU. Telephone Woking (04862) 26272. Telex 296500.

AGENCY REFERRAL work undertaken for Irish Solicitors in England and Wales in general, civil and commercial fields, close to High Court and commercial centre. Contact Fox-Robinson & Co., Solicitors, 31 Sackville St., London W1X 1DB. Tel. (031) 4394321. Telex 22391 Fox-Law.

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FOR SALE — Six-Day Ordinary Publican's Licence — late opening. Enquiries and offers to James M. Nash & Co., Solicitors, Scariff, Co. Clare. Telephone Scariff 23.

FOR SALE — 7 Day Licence at Main Street, Skibbereen, Co. Cork. Contact Messrs. R. Neville & Co., Solicitors, Bandon, Co. Cork. Telephone 023/41040.

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The Profession

JAMES MARTIN NASH is pleased to announce that he has commenced practice under the title of James Martin Nash & Co., (Incorporating Daniel O'Healy) Solicitors, Main Street, Scariff, Co. Clare. Tel. Scariff 23.

THOMAS G. MYLES, B.Soc.Sc., Solicitor, wishes to advise that he has commenced practice under the style of Myles & Co., Solicitors, 28 Glaslough Street, Monaghan. Telephone 047/83005.

IAN J. LONG, B.C.L., Solicitor, wishes to announce that, as and from Monday the 17th December, 1984, he will practise at the following address — 22 Merrion Square, Dublin 2 (Tel: 763263/767404).

P. O'Connor & Son, Solicitors, Swinford, Co. Mayo, are pleased to advise that **TERENCE D. SWEENEY** is now a Partner. New Telephone numbers are (094) 51333, (094) 51414, (094) 51107. Telex 25748.

P.D. SCULLY & CO., SOLICITORS. Kindly note our New address and telephone number effective from Monday, 10 December, 1984: 37 College Green, Dublin 2. 773065 (10 lines).

DOROTHY TYNAN, Solicitor, is pleased to announce that as and from Monday, 10 December, she will commence practice at 1st Floor, 78 O'Connell St., Limerick. Tel. 314948.

JOSEPH T. DEANE, Solicitor, announces his retirement from partnership in John S. O'Connor & Co., from November 30th, 1984, and the commencement of his practice with Julie O'Connor, Solicitor, as associate from 1 December, 1984, under the style and title: Joseph T. Deane & Associates, St. Andrew's House, 28/30 Exchequer St., Dublin 2. Tel. 712869 and Longford. Tel. (043) 46328.

As a service to the profession the *Gazette* proposes to re-publish announcements placed by practitioners in newspapers when they come to the notice of the editor. This service will not purport to be exhaustive. Any practitioner who wishes such a notice to be published in the *Gazette* should contact the editor.

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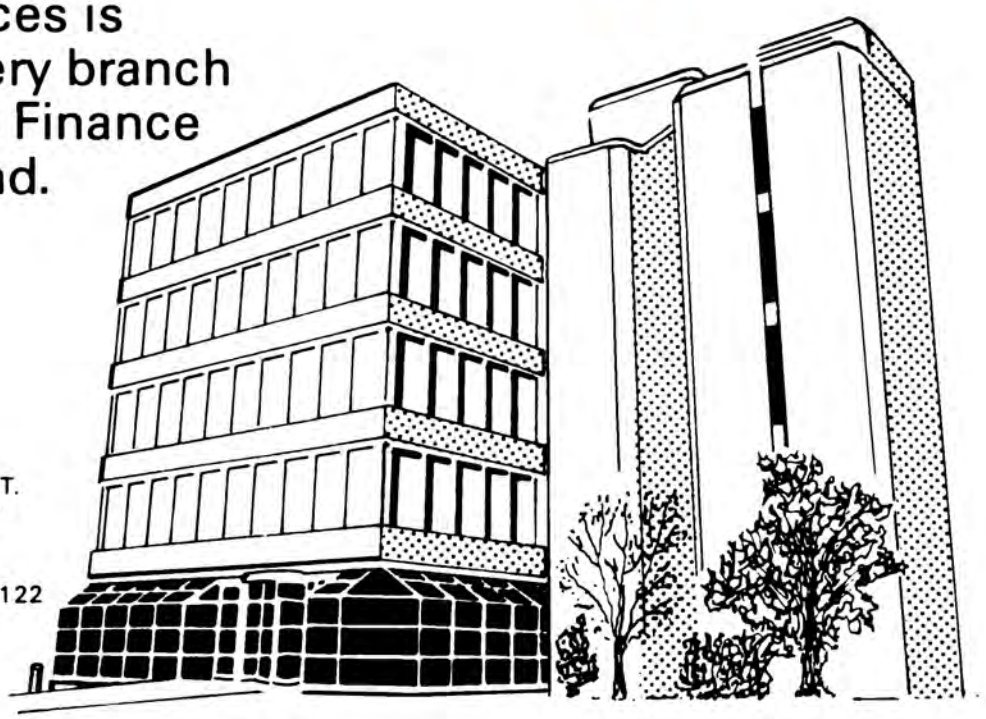

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Transfer of a Business and Protection of Employees' Rights

by

Gary Byrne, Solicitor

(This article first appeared in the June 1983 Gazette, p.129, where due to a printing error a page of manuscript was omitted from the section on "UK Industrial Tribunal Cases". The article is here reprinted in full.)

Transfer of a Business and Protection of Employees' Rights

by
Gary Byrne, Solicitor

IN the event of a change in ownership of a business, an employee who remains in employment with the transferee retains his or her rights under the Redundancy Payments Acts 1967 to 1979, by virtue of the protections afforded by Section 20 of the 1967 Act, as amended, and the provisions of paragraphs 4 to 6 of the Third Schedule to that Act. Similar protection is afforded under the Unfair Dismissals Act 1977 and Minimum Notice and Terms of Employment Act 1973 by virtue of the provisions of the first Schedule to the 1973 Act, as amended by Section 20 of the 1977 Act. Apart from employment rights deriving from this legislation, there are a large number of other terms and conditions of employment covered by contract law. These rights were not specifically protected by law until the enactment of Statutory Instrument No. 306 of 1980, The European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980. The purpose of this article is to outline the principle features of that Statutory Instrument. The Regulations were made for the purpose of giving effect to E.E.C. Council Directive No. 77/187/EEC of 14th February, 1977 and took effect in Ireland on 3rd November, 1980.

The Statutory Instrument is unfortunately very badly worded and, in some instances, incapable of precise interpretation. Some of the more difficult provisions are capable of interpretation by reference to the Directive itself but, in some instances, the Directive is also unfortunately and imprecisely worded.

The first thing to note is that the Regulations are expressed to apply to a transfer of a business. The expression "transfer", however, is not defined in the Regulations. The Council Directive states that it shall apply to the transfer of an undertaking, business, or part of a business to another employer as a result of a legal transfer or merger.

There is no elaboration on this to explain what type of legal transfer or merger it is proposed to cover. The preamble to the Directive does state that it is necessary to provide for the protection of employees' rights in the event of a *change of employer.* In the explanatory memorandum to the Regulations, the Department of Labour stated, in November 1980, that the Regulations are aimed at safeguarding the rights of employees in the event of the transfer of ownership of undertakings which entailed a change of employer. This point is further reinforced by the fact that Ireland inserted a statement in the Council Minutes of 31st January, 1977, when the draft Directive was discussed, to the effect that the Irish Delegation was seriously concerned that the Directive, designed to safeguard the acquired rights of employees in the cases of mergers and take-overs, had failed to make provision in relation to mergers involving changes in control over undertakings. It appears clear, therefore, that the Regulations apply only to a legal transfer or merger which involves a change in identity of the employer. Share mergers by means of which one company acquires control of another without any change in identity of the employer company would, therefore, be excluded from the scope of the Regulations. As this is the most important and most common type of change of ownership in our system of company law, the Regulations might appear to have little effect in this country. There remain, however, a number of situations where a transfer is effected by asset merger, including between members of a group of companies. In the event of such mergers the Regulations would apply.

The Regulations to some extent aim at protecting certain statutory rights which are already protected by our domestic legislation, as stated above, but go further to protect various contractual rights which would not normally be protected in the absence of express agreement between the parties. This automatic protection takes a number of forms.

Paragraph 3 of the Regulations simply states that the rights and obligations of a transferor arising from contracts of employment, or employment relationships existing on the date of a transfer, shall, by reason of such transfer, be transferred to the transferee. There is, therefore, an automatic transfer of all contractual obligations. The Regulations do not totally prohibit the termination or variation of contracts of employment consequent on, or preceding, a transfer, subject to the provisions of paragraph 5, below.

Paragraph 4(1) states that a transferee shall continue to observe terms and conditions of any collective agreement until the termination of such agreement. There is nothing in this to prevent a transferee or a transferor negotiating a new collective agreement, either prior to the transfer or subsequent to the transfer. This would be an essential requirement for most employers who are taking over a business, if they were not satisfied with the provisions of an existing collective agreement. Re-negotiation of the collective agreement prior to the date of transfer would be unaffected by the provisions of these Regulations.

Regulation 4(2) purports to deal with the difficult

problem of employees' rights to old age, invalidity, or survivors' benefits under supplementary Company or inter-Company pension schemes outside the Social Welfare Acts 1952 to 1979 (now the Social Welfare Consolidation Act 1981). This sub-paragraph is most unfortunately worded, but the poor draftsmanship cannot be laid totally at the door of the Irish draftsman, as a reference to the provisions of the Directive itself will show that the wording is identical to our Regulations. The wording concerned states "Regulation 3 of these Regulations and paragraph (1) above of this regulation shall not apply in relation to employees' rights to old age, invalidity, or survivors benefits under supplementary company or inter-company pension schemes outside the Social Welfare Acts 1952 to 1979, but the transferee shall ensure that the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefit including survivor's benefits under such supplementary company pension schemes are protected". The net effect of this Regulation would appear to be that employees' and former employees' rights existing on the date of transfer are effectively frozen. The transferee is under an obligation to ensure that rights existing on the date of transfer are capable of being fully honoured. There would seem to be no obligation on the transferee to continue whatever arrangement was in existence prior to the date of transfer. It must be the duty therefore, of the transferee fully to investigate the nature and extent of such rights as exist on the date of transfer and to satisfy himself that such rights are capable of being honoured; therefore he would seem to be free to consider whatever future arrangement he considers appropriate. This view is borne out by the Commission's amended proposal for the Council Directive dated 25th July 1975, which states that it is not possible to lay down specific community rules in the Directive as to employees' acquired and future rights arising out of company, or inter-company schemes and, for this reason, the proposed Directive confined itself to requiring member states to ensure that employees do not lose accrued rights. There remains, however, a possibility that this sub-paragraph could be interpreted to oblige the transferee to continue such schemes. The interpretation by various countries of the community, in their domestic enforcement of the Directive, bears out the view that employees' rights are frozen as at the time of transfer and that the new employer is not obliged to continue the old pension arrangements. This is specifically provided in the British and Danish Regulations. The German Regulations do not deal with former employee's rights, but do make specific provisions to protect and maintain (continue) the rights of existing employees. The Department of Labour's explanatory memorandum simply states that protection of employees' and former employees' rights to .... benefits .... must be ensured by the new owner. Despite repeated requests to the Department, they have not elaborated on this statement.

Paragraph 5 of the Regulations provides that the transfer of an undertaking cannot in itself constitute grounds for dismissal. This would obviously also be the case under the Unfair Dismissals Act, 1977. The Regulation, however, goes on to state that nothing in the Regulation shall be construed as prohibiting dismissals for "economic, technical, or organisational reasons entailing changes in the workforce". This allows for redundancies to be effected, consequent on a transfer, as would comply with the provisions of our Redundancy Payments Acts. The Regulations, therefore, would have no effect on redundancies. This Regulation further provides that, if a contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee concerned, the employer concerned shall be regarded as having been responsible for termination of the contract of employment. It would appear, therefore, that an employee who suffers a substantial change, not coming within the statutory definition of redundancy, is in a position to claim unfair dismissal against the party responsible for initiating the change. This Regulation could allow an employee who is unsure as to the source or reason for the substantial change to claim under the Unfair Dismissals Act, 1977, against both transferor and transferee on the basis that they could be jointly and severally liable. Reasons for changes can be requested by the employee pursuant to Regulation 7, below.

Regulation 6 protects the status and function of employee representatives following a transfer. This Regulation should be of considerable interest in Ireland, in view of the many and varied agreements that exist between employers and trade unions on the right to recognition and negotiation. This regulation preserves the trade union's position after the date of transfer in the same position it was prior to the date of transfer.

Regulation 7 provides that the transferor and transferee concerned must inform the representatives of their employees affected by the transfer or, if there are no representatives, the employees themselves, of the following:

(a) the reasons for the transfer

(b) the legal, economic and social implications of the transfer for the employees and

(c) the measures envisaged in relation to the employees.

The Regulations do not specify the exact extent, nature or detail of such information and appear to leave it to the parties to agree. In the event of no agreement being reached or in the event of no such information being furnished, it would appear that employees or their representatives are in a position to apply for injunctive relief to prevent the transfer being effected until the transferor and transferee have complied with this regulation.

The Regulation further requires that this information shall be given by the transferor in good time before the transfer is carried out and by the transferee "in good time" and, in any event, before the employees are directly affected by the transfer. There is a further requirement that if the transferor or transferee "envisage measures in relation to the employees" they shall consult in good time on such measures with a view to seeking agreement. In the event of there not being employee representatives, it is a requirement of the Regulation that a statement in writing containing the required information be given to individual employees and that notices containing these particulars be displayed prominently at positions in the work-places of employees, where they can be read conveniently by the employees.

Regulation 8 empowers an Officer of the Minister, where he is of the opinion that a transaction constitutes a

transfer, to request such information as he may reasonably require and to inspect such books and documents as he specifies. The parties to the transfer are obliged to furnish such information and to make available for inspection any books or documents as may be required and to permit the officer to inspect, copy and take extracts from such books and documents. The Regulations further empower the Minister's officer, at all reasonable times, to enter any place where there are kept books or documents to which a request by him relates. The Minister's officer is empowered to act under this regulation by way of a certificate issued by the Minister, such certificate to be produced on request to any person affected.

Regulation 9 provides that a person who contravenes any provisions of the regulations, other than regulation 8, shall be guilty of an offence and liable on summary conviction to a fine not exceeding £500. A person who contravenes regulation 8 shall be liable on summary conviction to a fine not exceeding £300. Proceedings for any offence under the Regulations may be instituted within 12 months from the date of the offence.

Regulation 10 provides that where an offence is committed by a body corporate or a person purporting to act on behalf of a body corporate or an un-incorporated body or person and the offence is proved to have been committed with the consent or approval of, or to have been facilitated by any neglect on the part of any person who is a director, member of the committee of management or other controlling authority of the body concerned, or the manager, secretary or other officer of the body at the time the offence was committed, shall also be deemed to have committed the offence and may be proceeded against under the Regulations.

English Regulations

As can be seen from the foregoing, the Regulations are going to cause problems in their interpretation. In the U.K., the enabling legislation for the implementation of the Acquired Rights Directive is the Transfer of Undertakings (Protection of Employment) Regulations 1981, which came into force on 1st February, 1981. The *Sunday Times* of 31st January, 1982, reported on a possible take-over by Burmah Oil of Croda International. Clive Jenkins, of the ASTMS, on hearing of the potential take-over, contacted the chairmen of both companies seeking satisfactory information about the bid, relying on the provisions of the regulations. The companies were informed that the ASTMS would, if necessary, apply for an injunction to have the take-over blocked if such information was not forthcoming. ASTMS suspected that Burmah intended to sell off large portions of Croda's business which would, of course, affect their members and they maintained that under the new regulations they had the right to know what Burmah's plans were.

The *Sunday Times* described the regulations as "an obscure new employment law". As it turned out, the take-over bid did not go ahead and nothing more was heard of the ASTMS threat. Considerable controversy surrounded the enactment of the regulations in the U.K., as it appears that few politicians appreciated the extent and effect of the regulations. The Conservative party were apparently against the enactment of the regulations, but Parliament was powerless as they were required by E.E.C. law to enforce the Directive. The regulations were passed by Parliament at a midnight session with only six Tory backbenchers at the Commons debate. Answering a question in Parliament subsequent to the enactment of the regulations, the Employment Under Secretary, David Waddington, stated that he did not expect the law to have a significant effect on business take-overs, because most transfers in the U.K. are by way of share transactions.

Irish EAT Cases

As stated previously, existing employment protection legislation in certain situations guarantees continuity of employment in the event of a transfer of a business. There have, to date, been a number of cases before the Employment Appeals Tribunal on the question of what is or is not a transfer of business and these presumably will be of considerable assistance, should the interpretation of the Acquired Rights Regulations be at issue. In the case of *Cunningham -v- Tracey Enterprises (Dundrum) Ltd.*, Case no. 133/80, the claimant was employed by Company A in a yard off the Naas Road. Company A moved their business out of the yard and permission was given to Company B to move into the yard temporarily. The claimant did not move with Company A, but stayed in the yard and worked with Company B until they moved out of the yard some months later. The claimant was offered a job with Company B in County Wicklow but declined the offer. The claimant claimed a redundancy payment from Company B. The Tribunal held that as Company B did not take-over any goodwill or purchase any assets of Company A and as the businesses were totally different, the only connection being the use of the yard temporarily with no assignment of conveyance of title or interest, together with the use of certain machinery left behind by Company A, there was no transfer of a business as defined by the various provisions of the Redundancy Payments Acts, being Section 20 of the 1967 Act, as amended by Section 5 of the 1971 Act and paragraph 6 of Schedule 3 of the 1967 Act, as amended by the Schedule to the 1971 Act.

In *O'Shea, O'Sullivan & Cotter -v- McInerney Civil Engineering Limited*, Case nos. 627, 629 and 639/1980, the claimants were employed by Public Works Limited in the carrying out of a contract with Cork County Council at Bantry. A receiver was appointed to manage the affairs of the company and it could not fulfil its obligations under the contract with the County Council. The Council then negotiated with the respondents for completion of the works concerned in the contract. This was a new contract and not an uncompleted portion of an existing contract. The company in receivership was not a party to the contract between the Council and the respondents, nor did any consideration pass from the respondents to the company in receivership in respect of any money matter other than the purchase of an earth moving machine from the receiver and the purchase of some other earth moving machines from the Finance Company, which hired the machines originally to the company in receivership. The claimants claimed that they had continuity of service in respect of their employment with the company in receivership and the respondent company. The Tribunal held that the work the subject matter of the contract between Public Works Limited and the County Council did constitute a "business" as defined in Section 2 of the Redundancy Payments Act, 1967. They held further that the company in receivership did not transfer any portion of its business to the respondent and that the respondent

negotiated a separate contract with Cork County Council. The business of the company in receivership did not exist in relation to the contract work at Bantry when the respondent contracted to complete the outstanding work and there could not, therefore, be a transfer or change of ownership of a business or part of a business. The Tribunal held that the service of each of the claimants with the company in receivership could not be added to their service with the respondents and, as they did not, therefore, have the minimum service with the respondents necessary to qualify for a redundancy payment their claims were dismissed. Cases of this sort should be of help in interpreting the scope and applicability of the Acquired Rights Regulations, keeping in mind the added proviso that, under the Regulations, there must be a change in employer.

Coughlan v. Keane

It is believed the Regulations have only been raised once with the Employment Appeals Tribunal in this country, in the case of *Coughlan -v- Keane, T/A Keaneland Hotel,* Case no. M373 UD256/1982. The claimant was employed as a receptionist at the respondent's hotel from 25th July, 1980, to 16th October, 1981. The hotel closed on 7th October, 1981, and the staff were paid up to 9th October, 1981. The claimant maintained that she was informed on 7th October that the hotel was being sold. On 16th October she was sent home and, when she returned on 27th October, was informed by the hotel proprietor that the new owner would speak to her later about her job. On 3rd November, 1981, the hotel re-opened. The new owner offered the claimant a job on 6th November, 1981, but she refused the offer because the conditions of employment were radically different from what she had done previously. The claimant relied on the 1980 Regulations and maintained that she was unfairly dismissed. After considering the evidence, the Tribunal found that the Regulations did not apply in the case, as there was a break in service, the contract of employment ending when the hotel closed. The Tribunal held that there was a redundancy situation and, under the provisions of Section 6(4)(c) of the Unfair Dismissals Act, 1977, dismissal due to redundancy was deemed not to be unfair and the claimant's claim was dismissed. It should be noted that the claimant was not legally represented and it would appear that the Regulations were not opened to the Tribunal in full. The Tribunal appears to have accepted that the transferor of the hotel terminated the claimant's employment. It would appear in that event that the transferor must justify such termination on the grounds of economic, technical or organisational reasons entailing changes in the work force, as required by regulation 5 of the Regulations. This does not appear to have been done in this case.

UK Industrial Tribunal Cases

A number of decisions have been given by Industrial Tribunals in the U.K. touching on the regulations. In *Bachelor -v- Premier Motors (Romford) Ltd. and Petropolis Limited,* COIT 13 59/181, the claimant was the manager of a petrol station. On 5th April, 1982, his employers, the first named respondents, entered into an agreement for the sale of the petrol station to the second named respondents. Completion of the sale took place on 1st June, 1982, and this included the sale of the premises, fixtures and fittings and other minor pieces of equipment and stock.

It was expected that customers would continue to use the petrol station after the sale. Premier Motors were prohibited from meeting with Petropolis Limited after the sale. Mr. Bachelor was not taken on by the new owners and claimed unfair dismissal and redundancy payment. The Tribunal held that the regulations were applicable as the sale was the transfer of a business involving a change in employer. The relevant factors in their mind being: (a) although the sale agreement referred only to the sale of the lands and buildings there was an effective transfer of the business; (b) although there was no express assignment of goodwill, goodwill was effectively transferred because Premier had agreed not to sell petrol on adjoining lands so depriving themselves of the power to compete; (c) it was likely that Petropolis Limited would continue to trade with the same customers as Premier and (d) Petropolis Limited intended to carry on exactly the same business as Premier had carried on. Mr. Bachelor was, therefore, able to sustain a claim of unfair dismissal against Petropolis Limited.

A somewhat similar case was that of *Walker and Others -v- Masters and Milburn and Smiths Prompt Service Depot* COIT 13 66/98. Smiths ran a car sale and repair business, selling both new and old cars with the franchise from B.L. The business was owned by Mr. Smith, but he had little to do with the actual running of it as he was in full-time employment elsewhere. Trade was poor and Mr. Smith decided to sell the business. M. & M. were interested and discussions about the proposed sale began. M. & M. were not interested in selling the used cars but otherwise wished to carry on the same sort of business as Smith had done. Agreement was reached that M. & M. should purchase the premises and all the equipment, furniture, fixtures and fittings. Mr. Smith disposed of a number of used cars. There were also new cars but these were held under the B.L. franchise. It was accepted that there would be no difficulty in M. & M. obtaining the franchise. Other stock was also transferred. Mr. Smith did not intend to carry on a similar business elsewhere after the transfer but there was no clause in the agreement prohibiting him from competing. M. & M. went into occupation of the premises on 1st June, 1982 and a formal sale agreement was completed about a month later at which time M. & M. also obtained the B.L. franchise.

During the first month of occupation there was some disruption while M. & M. carried out various building operations and waited for the transfer of a British Leyland franchise. The Tribunal considered the following facts as relevant:

(a) after the sale Mr. Smith did not intend to set up a business elsewhere and it was unlikely that Mr. Smith would ever compete with M. & M., particularly as he had given up the B.L. franchise;

(b) apart from used cars, all assets were transferred;

(c) some of the employees were kept on after the transfer by M. & M.;

(d) although no goodwill had been transferred, this was because it had no monetary value and so was not included in the agreement.

M. & M. argued that the business was in such poor financial state when they took over that there was effectively no business to transfer and that they had simply acquired the premises with a view to starting afresh. The Tribunal, however, held that the state of the business was not relevant and that there was a transfer of a business. The Tribunal concluded that the transfer was a transfer as envisaged by the Acquired Rights Regulations and continuity of employment should be preserved for the two employees who were retained by M. & M. and that the two employees who were not kept on could claim unfair

dismissal compensation from M. & M.

In *Pengelly -v- Norm Cable Ltd.*, COIT 13 45/57, Ms. Pengelly worked as an assistant head waitress in a restaurant. Her employer sold the restaurant to new owners and the completion date was 1st June, 1982. On that date, Ms. Pengelly was handed a letter of dismissal by her former employer, to take effect immediately. Ms. Pengelly continued to work for the new owners and some time later was dismissed. The question raised was whether or not the transfer of business and her dismissal by her former employers broke continuity of employment. If it did, Ms. Pengelly would not have had the necessary 52 weeks continuous employment to qualify for unfair dismissal protection.

The Tribunal held that under the regulations Ms. Pengelly's employment was not terminated by the transfer itself. Since completion took place on 1st June, 1982 and on that date Ms. Pengelly became employed by the new owners, the purported dismissal by her former employer was ineffective because by 1st June, 1982, she was no longer working for them. It was held that Ms. Pengelly was not dismissed on 1st June, 1982 and should have been treated as having being employed by the new owners throughout under the provisions of the regulations. Continuity was preserved and she was entitled to proceed with her unfair dismissal claim.

In *Skilling -v- Reed*, COIT 1345/1, Mrs. Skilling worked as a shop assistant in a small business which was sold to Mr. and Mrs. Reed. It was known that the business would be run by Mr. & Mrs. Reed as partners and that Mrs. Skilling would not be required. Mr. Reed gave Mrs. Skilling her pay in lieu of notice and she subsequently claimed unfair dismissal and a redundancy payment. The Tribunal held that the reason for dismissal was economic and/or organisational, as Mr. & Mrs. Reed had made a careful appraisal of the requirements of the business and come to the conclusion that Mrs. Skilling's work could be spread between them. The dismissal was not automatically unfair under the terms of the regulations and, as there were substantial grounds justifying the dismissal, the Tribunal considered the dismissal to be fair. The Tribunal, however, held that the reason for termination came within the definitionof redundancy and awarded Mrs. Skilling a redundancy payment.

Shipp -v- D. J. Catering Limited & Anor., COIT 1348/49, Mrs. Shipp worked for a small family company, D. J. Catering Limited, as a barmaid in a wine bar. The business was not successful and the wine bar was sold. The new owner decided the only way the business could succeed was for manning levels to be reduced and he made it quite clear to D. J. Catering Limited that he would not require any of the existing staff. D. J. Catering Limited wrote to Mrs. Shipp terminating her employment. The Tribunal held that the reason for dismissal was an economic one, the business being in a deteriorating financial position and that the dismissal was not, therefore, automatically unfair under the terms of the regulations.

The remaining question, however, was whether or not Mrs. Shipp had been fairly dismissed under the normal unfair dismissal provisions and, on this point, the Tribunal held that since all employees had been dismissed, there was no unfair discrimination against any one and, as there had been sufficient warning and consultation with Mrs. Shipp, her dismissal was found to be fair.

All of these cases deal with termination of employment consequent on a transfer. It should also be kept in mind that the regulations cover situations where employees remain in employment and where the regulations effectively preserve their contractual rights, be they expressed, implied, contained in a collective agreement, or arise by custom or practice. The provisions relating to pensions are also of considerable importance.

In relation to the termination of employment of employees consequent on or otherwise linked with the transfer of a business, there are three questions to be answered:

(1) **Has there been a transfer of a business?** In *Kenmir -v- Frizzel*, [1968] 1WLR 329, Widgery J. stated that a transfer of a business only occurs if the effect of the transaction is to put the transferee into possession of a going-concern, the activities of which he would carry on without interruption and that the question of whether or not there was a transfer is one of substance rather than form, consideration being given to the whole of the circumstances by weighing *pro* and *contra* the transfer of a business. In *Evendon -v- Guildford City Association Football Club*, [1975] QB 917, Lord Denning stated that transfer of a business means "that on the transfer, the whole complex of activity must be transferred from the old owner to the new owner; or a separate and severable part of them. It is not sufficient that the premises alone or the physical assets alone are transferred". A case of particular importance is *Port Talbot Engineering Company Limited -v- Passmore*, [1975] ICR 234. In that case, a Steel Plant was maintained by a series of contractors. The maintenance contracts each lasted for a 12 month period and a successful contractor had to re-tender at the end of each such period. The Court held that there was no transfer of the business of maintaining the plant when one contractor was replaced by another. There was nothing for the outgoing contractor to transfer. He had simply lost the contract to another contractor as a result of a competitive tender.

Mrs. Justice Griffiths stated that the relevant test to be applied was that found in the judgment of Widgery J. in *Kenmair Limited -v- Frizzell & Others* and held that, in applying this test, the question must be asked what evidence was there that the employer, when they obtained the contract, were put in possession of a going concern previously owned by the outgoing contractor? The answer was that there was no such evidence and there was, therefore, held not to be a transfer of a business.

(2) **Has there been a change of employer?** This would seem to be the simplest question to answer. If the identity of the employer remains unchanged, the fact of the change in the controlling interest of the employer appears to be immaterial.

(3) **Is the termination justified by one of the allowable reasons in Regulation 5?** This, again, is a question of fact and would appear to come within the nornal definitions of redundancy. The termination coming within the definitions of redundancy would appear to satisfactorily meet the requirements of Regulation 5, otherwise there would appear to be a sustainable claim of unfair dismissal. □

Recent Irish Cases

Edited by
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CRIMINAL LAW

Whether a Justice, having accepted jurisdiction in a matter, and having entered on the evidence can subsequently decline summary jurisdiction of the matter, on hearing evidence that the alleged offences had been committed while the accused was on Bail in relation to similar offences.

On the morning of 8 March, 1982, the Prosecutor, Gerard O'Hagan, appeared before the Respondent, District Justice Sean Delap, charged with two offences one of common assault and one of indecent assault, contrary to Section 62, Offences against the Person Act, allegedly committed on 27 Feburary, 1982. The Respondent accepted jurisdiction, the State having no objection to the charges being dealt with summarily. The accused was remanded to the afternoon of the same day.

On the afternoon of 8 March, 1982, the Prosecutor appeared before the Respondent in relation to a charge of indecent assault allegedly committed on 14 February, 1982. On an earlier occasion he had pleaded guilty and had been remanded to this date for the purposes of sentencing. While addressing the Respondent in relation to this earlier charge, the Prosecutor's Solicitor indicated that the Prosecutor wished to change the plea in relation to the charges allegedly committed on 27 February, 1982, whereupon the Respondent informed the Prosecutor's Solicitor that he was no longer accepting summary jurisdiction in relation to these latter offences on the basis that they had been committed while the Respondent was on Bail in respect of the earlier charges. He remanded the Prosecutor in custody to 22 March, 1982. On that date the Respondent made an Order returning the Prosecutor for Trail to the Dublin Circuit Court on a plea of not guilty.

A Conditional Order of Certiorari quashing the Return for Trail Order was made on 9 June, 1982, on the following grounds:—

(1) That the Respondent, having initially accepted jurisdiction in respect of the said offences, was not entitled to decline it subsequently; and,

(2) that he was not entitled to decline jurisdiction for reasons having reference to the character of the accused person, and that he had done so on the occasion in question.

Showing Cause why the Order should not be made absolute the Respondent relied on the fact that it came to his knowledge in the course of the said hearings that the offences with which the Prosecutor was secondly charged were alleged to have been committed while he was on Bail. On this basis he was entitled to decline jurisdiction.

In deciding whether the Conditional Order of Certiorari should be made absolute or the cause shown against it should be allowed the High Court considered two matters:—

(1) Whether the Respondent was precluded form declining summary jurisdiction having previously accepted jurisdiction and fixed a date for dealing with them.

(2) Whether he was entitled to base the decision to decline jurisdiction on the circumstance that it came to his notice that the latter offences were alleged to have been committed while the Prosecutor was out on Bail pending the imposition of sentence for a similar charge in relation to which he had pleaded guilty.

In the present case, the Court, citing Section 2(2)(a) of the Criminal Justice Act 1951 which provides:

"The District Court may try summarily a person charged with a scheduled offence if:

(i) The Court is of the opinion that the facts proved or alleged constitute a minor offence fit to be so tried," held, in relation to the first point that despite the fact that a District Justice has previously formed an opinion in relation to jurisdiction, he is entitled to subsequently decline jurisdiction and discontinue the summary Trial. Furthermore, in a case where a Trial has never commenced a Justice will not be precluded from taking the same course by reason of the fact that he had previously indicated an intention to allow the matter be dealt with summarily and had actually fixed a date for those proceedings.

In relation to whether a Justice is entitled to decline jurisdiction on the basis that the accused man was on Bail on a similar charge when the latter offence was alleged to have been committed, the Court held that such a circumstance could be taken into consideration by a District Justice because where such a situation arose a sentencing Court would be entitled to regard the second offence as a more serious offence and this fact would have a material bearing on the severity of sentence which a Court would impose. In the present case, the Court cited the relevant Statutory Provisions in relation to penalty, Section 62 of the Offences against the Person Act, 1861, which provides for a maximum penalty of ten years penal servitude or alternatively a sentence of two years imprisonment for the misdemeanour of indecent assault on any male person by a Court trying the charge on indictment while the maximum sentence the District Court could impose would be one of 12 months imprisonment. It concluded that the Respondent took the view that a situation had arisen where the Court imposing sentence should not be circumscribed by the limited sentencing powers of the District Court, and therefore it was not a fit case to be tried summarily. In the opinion of the Court, the Respondent was entitled to decline jurisdiction in this case and therefore it allowed the cause shown against the making absolute of the Conditional Order of Certiorari already granted.

The State (at the Prosecution of Gerard O'Hagan) and District Justice Delap, High Court (per O'Hanlon, J.), 18 October, 1982 - unreported.

Felicity Hogan

SALE BY PERSONAL REPRESENTATIVE — Personal representative — trust for sale — power of sale — delay — purchaser on enquiry — Section 51, Succession Act, 1965.

A Contract for the sale of property was entered into on 7 August, 1979. The leasehold interest in the property was vested in Maud Robb at the date of her death on 15 May, 1946. Under her Will, she bequeathed this interest to her Executor and trustee, upon trust for sale and to hold the proceeds of sale in trust for himself and her two daughters in specified proportions. The executor obtained a Grant of Probate on 11 July, 1946, and himself died on 11 August, 1979. A Grant of Administration *de bonis non* was taken out by the Testatrix's daughters in 1981.

The only evidence given as to the reason for the delay in selling the property was a letter dated 11 June, 1980, suggesting that the administration of the estate was deliberately postponed by the Executor with the consent of the beneficiaries. However, the letter also showed that the rents received from the property were being divided between the persons entitled under the Will trust, which *prima facie* suggested that the trust for sale was being operated.

The Purchaser refused to accept title from the administratrices *de bonis non*, contending:

(1) that no power of sale had been shown to subsist because no reason for the dealy of 33 years in the exercise of such power by the personal representative had been given, relying on the decision in *In Re Molyneux and White* 13 L.R.I. 382 that a lapse of at least 20 years from the date of death creates a presumption that all the Testator's debts have been paid and puts the purchaser on enquiry as to the purpose of the sale;
(2) that the delay was such that an assent to the establishment of the Will trust should be inferred.

Against this, the Vendor argued that an Executor is always entitled to sell for the purpose of distribution of assets amongst beneficiaries, relying on *In Re Norwood and Blake's Contract* [1917] 1 I.R. 472. He further submitted that a purchaser would in any event be protected by the provisions of section 51 of the Succession Act, 1965. This section provides that a purchaser from personal representatives of any property, forming part of the estate of a deceased person, shall be entitled to hold that property freed and discharged from any debts and liabilities of the deceased, except such as are charged other than by the Will, and from all claims of persons entitled to any share of the estate.

HELD:

(1) It was not the executor's duty to sell the property in order to distribute the assets amongst the beneficiaries; rather, his duty was to transfer the assets to the will trustee (albeit himself) and in that capacity to distribute the assets. Accordingly, there was no ground for the exercise of a power of sale by the personal representatives on that basis.
(2) There is nothing in section 51 of the Succession Act, 1965, to contradict the usual rule that a purchaser is fixed with constructive notice or suggest that he is never to be put upon enquiry and thus nothing to negative the rule in *Molyneux's* case. This means that the Vendor, selling as Personal Representative, must satisfy the Purchaser, who is put upon enquiry, that he has the power to sell as such. Having regard both to the delay since the death of the Testatrix and to the resume of facts contained in the letter dated 11 June, 1980, it seems reasonable to infer that an assent was given to the establishment of the Will trust. Moreover, even if this inference is wrong, there is sufficient doubt to make it unreasonable to require the purchaser to accept the title.

Finbarr Crowley -v- John Flynn – High Court (per Barron, J.), 13 May, 1983 – unreported.

Sarah Cox

PATENTS — Application for extension of Letters Patent, Section 27 Patents Act, 1964.

The patent related to two drugs used in veterinary medicine for the treatment of parasitic worm infestations in (i) cattle, sheep, pigs and (ii) horses. Section 27 of the Patents Act, 1964, provides that the term of a patent may be extended if it can be demonstrated that the patentee had been inadequately remunerated by his patent. The Petitioners, the Patentees, alleged that the lack of remuneration in the case of one drug (Parbendazole), was partly due to the suspicion that the drug was teratogenic and partly due to the failure of the regulatory authorities in the United Kingdom (there being no separate regulatory authority in this country) to approve its use in lactating cattle. In the case of the other drug (Oxibendazole) the Petitioners said that the lack of remuneration was due to the "slow realisation of the full potential of the invention and to attendant delays in getting regulatory approval for it".

HELD: The fact that the patentee fails to make a profit from his patent is not itself a reason for extending its life and that Section 27 s.s.5 provides that the Court must have regard to the nature and merits of the inventions in relation to the public, to the profits made by the patentee as such and to all the circumstances of the case. It is necessary to demonstrate, as grounds for an extension, that the invention is one of more than ordinary utility, that is has not been adequately remunerated, and that the absence of remuneration is not due to any fault on the part of the patentee referring to the English case of *Flemings Patent* 36 RPc 55,70. The onus of proving same is on the Petitioner.

Having looked at the reasons for the disappointing levels of sales in the case of parbendazole, the losses were directly attributable to the Petitioner's own actions and consequently, their inability to sell the drug in Ireland for the treatment of dairy cattle arising from the failure of the Veterinary Products Committee ("the VPC") to licence its use for that purpose. The Petitioners had failed to show that the VPC had acted with excessive caution and therefore unreasonably, in limiting the Petitioners licence in the way it did. Another relevant factor in explaining lack of sales in the last three years of life of the patent was the introduction by the Petitioners to the Irish market of an improved drug which could be administered to dairy cattle. In the case of the other drug, Oxibendazole, on the evidence the major contributing factors in the lack of remuneration was due to the Petitioners' own decisions not to develop it until late in the life of the patent and that it too was superseded by a drug introduced by the Petitioners. The result of tests carried out by a patentee late in the life of a patent which establish unexpected qualities cannot be relied upon to support a claim of "inadequate remuneration". The application for extension was therefore turned down.

In the matter of the Patents Act 1964 and in the matter of Letters Patent No. 30666 dated 19 December, 1966, of Smithkline Beckman Corporation and in the matter of a petition under Section 27 of the Patents Act 1964 for the extension of term of the said Patent – High Court (per Costello J.), 8 March, 1983 – unreported.

Emer Crowley

TORTS — PASSING OFF— Sports goods — distinctive mark or get up — stripes of identical width and colour — whether Respondents use of three coloured stripes on its goods amounted to passing off.

The Appelants ("Adidas") began manufacturing sportswear in Germany about 1948 and now manufacture and sell internationally all kinds of sports equipment. Prior to 1967, it confined its activities to sports footwear which was manufactured and marketed with three diagonal stripes on the instep and outer side of each boot or shoe. That three-stripe design became well known through extensive international advertising and through television coverage of international sporting events in which the competitors used Adidas footwear. From the late 1960's small quantities of Adidas footwear were imported into Ireland.

Since 1967, Adidas has manufactured and sold sportswear generally including shorts, singlets, track suits, anoraks, most of which carried the design of three coloured stripes, straight (not diagonal) down the side of arms and legs of the goods where that was possible, and as in the case of Adidas footwear, the three stripe design became well known. Adidas acquired a world-wide recognition of the exclusiveness and distinctiveness of their design and styling. From 1971 Adidas sportswear was imported into Ireland, in 1975 it registered a trade mark consisting of a trefoil with three horizontal stripes (which mark was in no way associated with stripes on garments) and in 1976 Adidas commenced manufacturing goods in Ireland.

The Respondents ("O'Neill"), an Irish company, was formed in 1918 and commenced the manufacture of footballs, football shorts and jersies. In 1965, O'Neill began putting stripes on its textile products, and the number of stripes varied from one to three, depending on the order. In 1967, O'Neill began the manufacture of track suits, initially with a varying number of stripes and by 1976 O'Neill products generally had three stripes down the side of the legs and arms of jerseys shorts and track suits and their products were extensively used by supporters of the three football codes in Ireland.

Adidas claimed in the proceedings that

O'Neill had been passing off shorts, jerseys and track suits as the products of Adidas by the imitation of the general appearance or "get up" of Adidas products characterised by three stripes so as to confuse and mislead the public.

Noted sports personalities gave evidence as to the degree to which they associated the three stripe motif with Adidas products. (Mr. J. Magee: "I associated Adidas with three stripes, but I do not necessarily associate three stripes with Adidas").

HELD: That the public mind to be considered is the public mind in this country and confusion which is resultant is the confusion of probable customers here. If the claim were to succeed, Adidas would have to establish the exclusive association of the three stripe design with the goods of Adidas in Ireland. On the facts, O'Neill had commenced experimenting with stripes on its textile products in the late sixties (and in that respect was not alone in doing so as other firms had commenced using stripes on their products).

O'Neill products had always been delivered in clearly marked boxes or packages and each garment bore the O'Neill name and sign. It is to be assumed in relation to the possibility of confusion that customers will look fairly at the goods on display and that such goods will be shown fairly without the distinguishing features being concealed.

Up to 1976 few Adidas products were imported here, notwithstanding their international reputation and an awareness in Ireland of this, and by the time Adidas commenced manufacturing in Ireland in 1976, O'Neill products with a three stripe design were well established and well known. Had Adidas succeeded in registering a three stripe design in Ireland, different considerations might apply and had the complaint been that the name "Adidas" had been used in association with O'Neill goods although no Adidas products were on sale in Ireland, a goodwill and a potential in relation to customers would have been established and protection given.

Adidas had not established in this country an exclusive association of the three stripe design with their garments. The trial Judge's finding that the use of stripes on sports gear was a fashion in the trade and that O'Neill had done no more than adopt this fashion and had not attempted to deceive or pass off would not be disturbed.

(C. & A. Modes and C. & A. (Ireland) -v- C. & A. Waterford and Others ([1976] IR 198 distinguished).

Adidas Sportschufabriken Adi Dassler K.G. -v- Charles O'Neill and Company Limited - Supreme Court (per O'Higgins G.J. and Hederman J. Henchy J. dissenting). [1983] ILRM 112.

Daire Hogan

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACT, 1973

A strike took place in the company's premises in February, 1980 and lasted until July, 1980. The terms of the settlement included an arrangement whereby employees who wished to be made redundant by the company would be "laid-off" and after four weeks they could avail of the provisions of Section 12 of the Redundancy Payments Act, 1967 and apply to be made redundant.

The statutory 'lay-off' procedures are contained in Sections 11 to 13 of the 1967 Act. Section 11 provides that where an employee's employment ceases because his employer can no longer provide him with work, that employee may be "laid-off" if the employer has a reasonable belief that the cessation in employment will not be permanent and notice to that effect is given to the employee prior to the cessation. Section 12 of the Act allows an employee who has been laid-off for more than 4 weeks to serve either notice of intention to claim redundancy payment, or a notice terminating the contract of employment. If the latter notice is served it is deemed to be the former. If a Section 12 notice is served, the employer may respond with a counter-notice under Section 13. This counter-notice may be served if the employer has a reasonable expectation that within 4 week of the Section 12 notice being served he can provide the employee with employment for not less than 13 weeks.

In this case the employees who were "laid-off" served notice of intention to claim redundancy payments and they received those payments. They did not give notice of termination. The question before the Court was whether they were entitled to receive payment in lieu of notice under the 1973 Act. They could only receive this if their employment was terminated by their employer.

The Court held that an employer is only allowed to avail of the statutory lay-off procedures where it is reasonable in the circumstances for him to believe that the cessation in employment will not be permanent. In this case it had been determined by the Employment Appeals Tribunal that the employer could not reasonably have held that belief and so he could not avail of Section 11 procedures. The Court in considering the claim on appeal stated that:

(1) If the contract of employment does not allow for the suspension of the operation of the contract then by ceasing to employ an employee and refusing to pay him wages the employer has been guilty of a serious breach of contract amounting to a repudiation of it.
(2) At common law that repudiation would not automatically bring the contract of employment to an end: the employee is free to accept that the repudiation has terminated the contract or not to do so.
(3) If the employee accepts the repudiation there has been a constructive dismissal of the employee at common law and the contract has been terminated by the employer.
(4) If the employee responds to the lay-off notice and adopts the lay-off procedures and it is shown that the conditions for their intention did not exist, then the employee is entitled to treat the repudiation of contract as having terminated it.
(5) The company in this case terminated the contract of employment without proper notice and so was in breach of their obligations under the 1973 Act.
(6) The agreement between the company and the union to adopt the procedures proposed, an acceptance of a four week lay-off situation, followed by a claim for redundancy payment, did not amount to a waiver of rights under the 1973 Act, since the alleged waiver was neither clear nor unambiguous.
(7) That the fact that the employees served a notice of intention to claim redundancy in which they specifically stated that they had been laid-off did not estop them from averring that their employer terminated their contracts and dismissed them. Just as they were not waiving any of their legal rights so also they were making no representation to their employer that they would not enforce them.

The Court therefore held that the employees were entitled to payment in lieu of notice.

Industrial Yarns Ltd. -v- Leo Creene and others - High Court (per Costello J.), 2nd February, 1983 - unreported.

Gary Byrne

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Recent Irish Cases

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Gary Byrne, Solicitor

CONTRACT

Breach of Contract — derogation from grant — specific performance — assessment of damages — interest.

The Plaintiff agreed to purchase a five acre site from the Defendant with Outline Planning Permission for five houses in May 1973. The site formed part of the Defendant's land. Access to the site was over a private laneway through the lands of a neighbouring convent and then through the Defendant's lands, past the site in question onto the Defendant's residence. The site was bounded on one side by the River Boyne. The Defendant led the Plaintiff to believe that the laneway would be taken in charge by the County Council.

The Plaintiff obtained full planning permission in July 1973, Condition No. 1 specifying "that the water supply be taken from the convent side and not across the Boyne". The Defendant refused to complete the sale. The Plaintiff sought an Order for specific performance. A compromise was reached in November 1975 establishing the May 1973 Agreement with variations. Again the Defendant refused to complete the sale. In January 1977 the Defendant placed gates across the laneway to prevent uninterrupted access to the site and prevent development and erected a notice to the effect that the gates were to be kept closed; later the Defendant told the Plaintiff that he would not allow a water main to the site over his land. In further proceedings the Defendant was again ordered to complete the sale and the Plaintiff also obtained on Order directing the gates to be kept open and declaring that the Plaintiff be entitled to have water brought to the site. At the same time as an unsuccessful appeal against this decision by the Defendant to the Supreme Court, in February 1979, the County Council indicated that they could not take in charge a laneway with obstructions. The Defendant then erected a concrete wall across the laneway. In March 1979, the Plaintiff's Solicitors threatened further proceedings unless all obstructions were removed from the laneway. Proceedings were not issued until December 1979, the Plaintiff claiming *inter alia* (1) injunctions to restrain the Defendant from obstructing the laneway and derogating from his grant, (2) damages and (3) interest. The Defendant raised two basic defences (1) lawful behaviour and the fact that the Plaintiff did have limited access and (2) that the restriction being sought should have been reserved by the Plaintiff in the Contract. These defences failed.

The doctrine of derogation of grant imposes implied obligations on parties to a Contract. It can impose on a Grantor, where he has sold part of his land, restrictions on the user of the land retained by him but the doctrine is limited to the presumed intention of the parties and cannot cover situations not anticipated.

It was held following the test laid down in *Browne -v- Flower* [1911] 1Ch. 219 which was subsequently approved by the English Court of Appeal that the Defendant clearly derogated from his grant and was in breach of implied obligations imposed on him by the Contract for Sale in that

1. the site granted by the Defendant to the Plaintiff had been rendered materially less fit for the particular purpose for which it was acquired. The site had been acquired for the commercial development of five houses. If the Council would not take the laneway in charge the site may still be capable of development, but not along the commercial lines originally intended.
2. By reason of the knowledge imputed to the Defendant he should have anticipated the result of his conduct. The Defendant knew the site was acquired for development and he knew the importance of having the laneway taken in charge.

As damages the Plaintiff claimed the profits which he would have earned if he had been able to develop the site without delay.

HELD: by reason of the Plaintiff now being in the same position as he would have been but for the actions of the Defendant damages would be assessed taking into account the loss to the Plaintiff of the cost of financing (1) the purchase of the site for the period he was unable to use same and (2) the limited development of the site.

As to interest it was held that there had been unnecessary delay between March 1979 and December 1979 in issuing proceedings and though the Defence had been delivered in July 1980 the reply was not delivered until October 1980 and the matter was not set down until July 1981. This was calculated as being a delay of at least one year and the allowance of interest was restricted accordingly.

Anthony Connell -v- Thomas Joseph O'Malley - High Court (per Barron J.) 28 July, 1983 - unreported.

John P. O'Malley

CONVEYANCING

Partition Acts — jurisdiction of the court to order partition — effect of the Family Home Protection Act 1976.

The marriage between the Plaintiff and the Defendant had run into difficulties and the Plaintiff instituted proceedings in the Circuit Court claiming a sale of the family home in lieu of partition pursuant to the Partition Acts 1868-1876. The President of the Circuit Court did not order a sale nor dispense with the Defendants consent in the event of a sale taking place. Instead he made an Order of Partition and adjourned the balance of the proceedings with liberty to re-enter.

The Plaintiff appealed to the High Court and it was argued on his behalf that as a joint tenant he was entitled as a right to a decree for partition or that in any event it was a suit where in the words of Section 4 of the Partition Act 1868 — "A decree for Partition might have been made". That being so, then as the Plaintiff was entitled to an interest in the property to the extent of one moiety he was entitled as of right to the sale of the property unless the Court saw good reason to the contrary.

The Court noted that joint tenants and tenants in common did not have the right at Common Law to compel a partition and that the right of the joint tenant to compel partition was conferred by a 1542 Statute entitled "An Act for Joint Tenants". Prior to the passing of the 1868 Partition Act the Courts did not have jurisdiction to direct a sale of property held in tenancy in common and the only remedy was one of partition.

The Court further noted that there was authority for the proposition that the granting of a decree of partition was not an absolute right of the parties nor a mere formality of the Courts but that the making of the Order required the Court to be satisfied by evidence that it was a proper case to make the particular order sought.

The Court held that as no evidence was produced before the Court — and no enquiry sought or directed — it would be inappropriate to make an absolute order for partition and on that ground alone it would set aside the Order of the President of the Circuit Court.

The Court, however, noted that the matter was more complex. The Plaintiff had relied on the 1542 Act which in fact was repealed by the Statute Law Revision (Pre-Union Irish Statutes) Act, 1962. Counsel for the Plaintiff had argued that the jurisdiction to decree partition — as opposed to a sale in lieu of partition — was now exerciseable in accordance with the principles established in the decided

cases in respect of the practice of the Court of Chancery.

The Court indicated that it had some hesitation in accepting that principles which evolved as to the manner in which a statutory jurisdiction might be exercised could survive the repeal of that Statute. Assuming, though not accepting, that such jurisdiction did exist it was necessarily subject in its exercise to the proper discretion of the Court. The Court held that the granting of an Order of Partition on the basis of the evidence available would be wholly inappropriate.

Noting that the Plaintiff was in fact seeking an Order for sale in lieu of partition the Court stated that such an order will not be made until the Court sees good reason to the contrary. In the view of the Court good reason at the present time would properly have regard to the rights of the parties under the Family Home Protection Act, 1976. It had been argued that the FHP Act did not repeal the Partition Acts or any of them and it was contended therefore that if an Order for Partition was granted this dispensed with the necessity for procuring the consent of a spouse under that Act.

The Court did not agree that this argument was well founded and held that the loss of the Statutory veto created by the Family Home Protection Act represented good reasons within the meaning of Section 4 of the Partition Act, 1868 and accordingly refused the application for an Order for sale in lieu of partition.

O'D -v- O'D – High Court (per Murphy J.), 18 November, 1983 – unreported.

John Buckley

CONTRACT/CONVEYANCING

Contract for Sale of Land — delay in completion — purchaser serves notice under Clause 28 of General Conditions — vendor fails to complete in accordance with same — application to determine whether contract validly rescinded.

A Contract for the sale of three parcels of land was exempted dated 3 April, 1981. The Contract was in the standard Law Society form for Sale by Private Treaty. The acreage of each parcel was given in the Particulars and, if added together, comprised 51 acres 3 roods. In the final section of the Particulars however it was stated "the total acreage being sold under this Contract is believed to contain 54.2 acres statute measure or thereabouts".

The Contract contained a Special Condition stating that no requisition or objection could be raised as to the accuracy of the area in sale.

Although the Contract was dated 3 April, 1981 and the Contract was sent to the Vendor's Solicitor together with a cheque for the deposit on 8 April, 1981, it was not returned to the Purchaser until after the stated closing date of 1 May, 1981. At that time the Vendor's Solicitors disclosed that one parcel of the land was still registered in the name of a person who had died in 1929. The Vendors stated that they would be attending to the rectification of the title to this parcel in the Land Registry. The Purchaser's reaction was that this would take some time. The Purchaser suggested that they proceed to complete the purchase of the other two parcels of land apportioning the purchase price. This offer was not taken up at the time by the Vendor's Solicitors.

By letter of 15 July, 1981, the Purchaser's Solicitors complained that the acreage was not 54.2 acres as stated in the Particulars in the Contract. On 21 August, 1981, the Vendor's Solicitors replied drawing attention to the Special Condition in relation to area. Also, at some time during that Summer the Purchaser entered on the lands to save hay which he cut and baled and put into barns on the land.

In September, 1981, the Purchaser's Solicitors wrote a letter invoking the provisions of Clause 28 of the General Conditions and calling on the Vendor to complete the sale on or before 19 October, 1981. In the same letter the Purchaser's Solicitors stated that the Purchaser was insisting that he be transferred 54.2 acres as stated in the Contract.

When the Vendor failed to complete due to the fact that he was not able to show title to one parcel of the lands the Purchaser's Solicitors wrote a further letter on 20 October, 1981, requesting a return of the deposit.

The instant proceedings were brought under the Vendor and Purchaser Act 1874 claiming a declaration that the Agreement for Sale had been validly rescinded. The Court HELD

(a) The Purchaser was precluded from relying in any way upon the small discrepancy in the area of the lands as the Purchaser, by adding together the acreage of the three parcels, would have arrived at the correct acreage and the Vendor could also rely on the Special Conditions.

(b) The notice served on behalf of the Purchaser under Clause 28 of the Agreement for Sale was not a valid notice. Under Clause 28 of the General Conditions the party serving the notice must be then "able, ready and willing to complete the sale". The Purchaser was not so "able, ready and willing to complete the sale" in accordance with his obligations under the Contract as in the letter purporting to invoke the provisions of Clause 28 he stated he would insist upon being transferred the full of 54.2 acres.

(c) The notice under Clause 28 was also invalid because it was not expressed in "a clear and unequivocal manner". In the letter serving the notice the Purchaser's Solicitor had purported to reserve to the Purchaser the right to repudiate the Contract in full since there had been unreasonable delay on the part of the Vendor.

(d) The Court also rejected the Defendant's claim that, once the Purchaser had served a notice under Clause 28, he could only succeed in his claim that the Contract was rescinded if the notice under Clause 28 had been validly served. Reference was made to *Wood and Others -v- Mackenzie Hill Limited* [1975] 2 All ER 170. Nevertheless the Court held that the rather casual approach adopted by both parties to the time for closing did not therefore amount to such an unreasonable delay on the part of the Vendor to justify the Purchaser rescinding on those grounds. Also, that the Purchaser's offer to complete the purchase of two out of the three parcels of land had never been withdrawn and therefore was open to acceptance by the Vendor after service of the purported notice under Clause 28 of the Contract.

Martin A. Commane -v- Johanna Walsh – High Court (per O'Hanlon J.), 2 May, 1983 – unreported.

Colin Keane

LICENSING

Bona fide sale of licensed premises — where applicant for transfer of licence is a limited liability company, there is no obligation to record on the licence a conviction recorded against persons who are directors and shareholders of the company when acting as owners and managers of different licensed business.

At the annual licensing District Court in Dublin in September 1982, the President stated a case to the High Court in relation to an application by Hesketh Investments Limited, a limited liability company, for a Certificate of Transfer of the Publican's On License attaching to the Ivy Leaf Bar, Old County Road, Crumlin. An interim transfer of the licence had already been granted to the company on 10 March 1982.

Hesketh Investments Limited was incorporated in November, 1980 and its only shareholders and directors were Paul Ryan and Terence Dunleavy. The company's objects were altered by special resolution in December, 1981, to enable it to carry on the business of licensed vintner and publican. The company, in fact, had never traded. Messrs. Ryan and Dunleavy had previously carried on the business of publicans at the Countess Bar in Townsend Street, Dublin and had been joint holders of the intoxicating liquor on licence attaching to that business. In July 1981, they were convicted and fined £20.00 for permitting persons to be on the premises during prohibited hours contrary to Section 2 of the Intoxicating Liquor Act, 1927. Again in November, 1981, they were convicted and fined £40.00 for permitting persons to be on the premises during prohibited hours and they were convicted and fined £40.00 for permitting consumption of intoxicating liquor on the same occasion, this

conviction not to be recorded on the licence.

At the hearing of the application for a certificate of transfer, in relation to the new premises the Superintendent suggested to the President that the conviction recorded against Messrs. Ryan and Dunleavy in November 1981 in respect of the Countess Bar "must" under the provisions of S.30(2) of the Intoxicating Liquor Act, 1927, be recorded on the licence to be held by the company in respect of the Ivy Leaf Bar.

Subsection 1 and 2 of Section 30 of the 1927 Act read:

"1. Whenever on an application for a certificate for the transfer of a licence for the sale of intoxicating liquor by retail, the applicant at the time of such application satisfies the court that the transfer is desired for the purpose of giving effect to a *bona fide* sale for money or moneys worth of such licence of the premises to which the same is attached, the court shall if it grants such certificate, direct in and by such certificate that all (if any) offences then recorded on such licence under this part of this Act shall at the time of such transfer cease to be so recorded, and whenever such direction is so given every such offence shall at the time of the transfer of such licence pursuant to such certificate cease to be recorded on such licence and such licence shall be so transferred freed and discharged from the records of such offences and shall thereafter have effect for all purposes as if such offences had never been recorded thereon.

2. Whenever a licence (hereinafter called the first licence) is transferred freed and discharged under the foregoing subsection from the record of an offence and the person who was the holder of such licence immediately before such transfer (hereinafter called the first transfer) applies (whether in the same or another licensing area) within 5 years after such transfer for a Certificate for the Transfer (hereinafter called the second transfer) to him of the same or another licence (hereinafter called the second licence) the Court if it grants such certificate shall in and by such certificate direct that all offences which immediately before the first transfer were recorded under this part of this Act on the first licence shall on the second transfer be recorded on the second licence and whenever such direction is so given every such offence shall on the second transfer be recorded on the second licence, and such record shall from and after the second transfer have effect as if the same had been made on the second licence at the time when it was made on the first licence save that for the purposes of calculating the duration under this Act of such record the period between the first transfer and the second transfer shall be omitted."

The President of the District Court had accepted that the present transaction was a *bona fide* transfer within the meaning of sub-section 1 of Section 30. The court was not therefore concerned with a device to evade the provisions of the Intoxicating Liquor Act. The question therefore submitted by the President in the case stated was whether, in granting the application and on the facts disclosed, it should be directed that the recorded conviction in November, 1981, be recorded on the licence of the company.

The Court HELD: The applicant company was an incorporated entity and therefore a different person from Mr. Ryan or Mr. Dunleavy. Section 30(2) of the Act of 1927 did not have any direct application to the circumstances of the application. The suggestion that there should be recorded on the licence, not the recorded convictions of the transferors of the publicans' business, but the recorded convictions of private individuals who are now shareholders and directors of the company misses the fact that the parties involved are different legal entities. Dicta of Chief Baron Palles and Johnston J. in *King (Cottingham) -v- Justices of the Court* [1906] 2 IR pp 419 and 426, and which were expressly approved by Kenny J. in *State (John Hennessy and Chariot Inns Limited) -v- Superintendent J. Commons* [1976] IR 238 and by Barrington J. in *Bernard McMahon -v- Murtagh Properties Limited* [1982] 2 ILRM 342 were followed.

As the transaction was a *bona fide* sale, the answer to the question posed in the case stated should be "No".

In Re Hesketh Investment Limited – High Court (per Barrington J.) – 17 May, 1983 – unreported.

Joseph B. Mannix

HABEAS CORPUS

Infant removed to this jurisdiction by Respondent ordered to be returned to the care of Kent County Council which must deal with the matter in accordance with the determination of the English courts.

The Applicants sought an order for the return by the Respondent, C.S. of the Infant, S.S. to their custody. The application was treated as an application for an enquiry as to the legality of the detention of the Infant by the Respondent under Article 40 of the Constitution. The Respondent, now aged 47 years, resided in England since 1956 and was an Irish citizen. Before going to England he married in Dublin and thereafter lived and worked in England. There were five children all of whom were now grown up. His then wife sought and obtained a decree of divorce. He then lived for some years with a married lady, Mrs. W. as she then was, and on his own evidence had three children by her. He ceased to reside with her in 1975 and she had since remarried and was now known as Mrs. S.

In September, 1979, the Respondent entered into another marriage, then being 43 years of age and his then wife being just over 16 years of age. Of that marriage the Infant in this case was born on September 2, 1980. The Respondent alleged that his wife was erratic and unstable in her behaviour, even prior to the birth of the Infant and became more so afterwards, claiming that she neglected the Infant and that he was much involved in its upbringing and welfare.

The Infant's mother left the Respondent in June, 1981, two weeks prior to which the Respondent had placed the Infant in the household of and under the care of Mrs. S. with whom he had formerly lived.

The Respondent brought divorce proceedings against the infant's mother before the High Court in England in January, 1983 and an order was made granting a decree of divorce nisi and directing that the Infant should remain in the care of Kent County Council with leave to place the child with its mother for staying access. The access was to be supervised and the child was not to be removed from England and Wales without leave of the court until he was 18. The Respondent sought to appeal and it was agreed by the Solicitors and the parties that without the necessity for returning to court, a stay would be put into operation and the child was left in the care and custody of Mrs. S. The Respondent did not appeal and in March, 1983, he took the child to Dublin to the house of his parents.

The Court HELD: that having regard to the facts and the fundamental importance of the appropriate forum for the determination of the future welfare of the child being the Courts in the country in which it was born and intended to be brought up, there was no question of a deprivation of any of the constitutional rights relied upon by the Respondent which should prevent the Court from applying the principle considered to be appropriate in relation to the comity between courts and in making an order for the return of the child to the care of the Applicant who must only deal with it in accordance with the determination of the English Courts to which the Respondent, who had originally invoked their jurisdiction, had full access. *Northampton Co. Council -v- ABF and MBF* (2 November, 1981, High Court per Hamilton, J. [1983] GILSI ii.) — distinguished.

In the Matter of Article 40 of the constitution and In the Matter of S.S. and Infant Kent County Council -v- C.S. – High Court (per Finaly, P.) – 9 June, 1983– unreported.

Damian McHugh

Copies of judgments in the above cases are available on request from the Society's Library. The photocopying rate is 10p per page. (Students — 5p per page.)

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Recent Irish Cases

Edited by
Gary Byrne, Solicitor

SUCCESSION ACT

Illegitimate child not "issue" of his or her parent for the purposes of Section 67 of the Succession Act, 1965 and accordingly takes no share in the Estate on intestacy — neither Section 67 or 69 of the Succession Act are invalid having regard to the provisions of the Constitution.

The deceased died a bachelor and intestate on 5 March, 1975. He was survived by four sisters and one brother and one illegitimate daughter. The Plaintiff was one of the sisters and the Defendant was the illegitimate daughter. On 5 September, 1975 the Plaintiff applied to the Principal Probate Office for Letters of Administration Intestate to the estate of the Deceased and on 7 October a caveat to the Plaintiff's Application was entered by the Defendant.

Proceedings were issued by way of Plenary Summons, seeking an order setting aside the caveat and for an order granting liberty to the Plaintiff to proceed with the application for a grant of administration to the estate. The Defendant in her defence claimed a declaration that she was "the issue" of the deceased, and as such the person entitled to the estate, there being no spouse. The substantive claim in the case was that the Defendant was entitled to succeed under Section 67 of the Succession Act (which in subsection (3) thereof provides that if an intestate dies leaving issue and no spouse, his estate shall be distributed among the issue) or, alternatively, that by reason of being illegitimate and therefore not being entitled to succeed under Section 67, a claim that Sections 67 and 69 of the Succession Act were invalid having regard to the provisions of the Constitution. In view of this attack on the provisions of the Act, the Attorney General was added as a party to the action and the main issue in the case was between the Defendant and the Attorney General on the validity of the two Sections of the Act.

In the High Court, Mr. Justice D'Arcy held that the Defendant was not entitled to succeed on intestacy, not being issue within the meaning of Section 67 and found also that Sections 67 and 69 of the Act were not invalid. The Defendant appealed to the Supreme Court.

The Court first examined the meaning of the word "issue" as used in the Succession Act, and concluded that it did not include an illegitimate child of a deceased person. The Act does not define the term "issue". Having regard to the long-established acceptance in the law of succession that the word "issue" referred only to issue born within marriage and to the fact that the Oireachtas in no way qualified or defined the term and to the fact that it did make express provision in section 110 of the Act for children born outside marriage having the right in certain cases to succeed, it appeared to the Court that the only reasonable construction to put upon the word "issue" in Sections 67 and 69 of the Act was tht it referred solely to issue born within marriage.

It therefore became necessary to consider whether such statutory discrimination between children born inside and those born outside marriage in the law relating to intestate succession was invalid under the Constitution. The Defendant attacked the statutory provisions under Article 43 Section 1 subsection 2 of the Constitution (the right to the private ownership of property), under Article 40 Section 3 (property rights) and under Article 40 Section 1 (all citizens shall, as human persons, be held equal before the law). The Court quickly dismissed the arguments under the first two Articles referred to, but considered at length the argument under Article 40 Section 1, which was the Article principally relied upon by the Defendant.

Following an exhaustive review of the authorities, the Court found that the Succession Act was designed to strengthen the protection of the family as required by the Constitution and for that purpose to place members of the family based upon marriage in a more favourable position, than other persons in relation to succession to property whether by testamentary dispositions or intestate succession. In doing so it provided that in the event of intestate succession children of the deceased born outside marriage would not stand in the line of succession, although they could succeed to property by bequest, subject to the particular provisions for the benefit of the spouse of the deceased or his children born within marriage. Having regard to the constitutional guarantees relating to the family, the Court held that the differences created by the Succession Act were not unreasonable, unjust or arbitrary.

The Defendant having failed to establish that Sections 67 and 69 of the Succession Act were invalid having regard to the provisions of the Constitution, the Appeal was dismissed.

In the Goods of William Walker Deceased, Florence O'Brien, Plaintiff/Respondent and MS Defendant/Appellant and the Attorney General, Supreme Court (per Walsh J.) 20 January, 1984 - unreported.

Karl Hayes

CONTRACT

Contract — Mareva Injunction — Jurisdiction — Balance of Convenience — Principle in *Lister -v- Stubbs* applied.

Application brought for an interlocutory injunction to restrain Defendants from disposing of or dealing with the assets of the first named Defendant ("Ranks") and for an Order giving the Plaintiffs liberty to inspect the books and records of Ranks so as to ascertain what funds are available to satisfy the Plaintiffs' claim in the action. In 1978, Agreement was reached between Ranks and the ITGWU covering redundancy compensation. A subsequent letter by the second named Defendant on behalf of Ranks stated that Ranks would not discontinue the 1978 Redundancy Scheme "unless it could be shown to the mutual satisfaction of the parties that such payments were financially unsustainable." The Plaintiffs refused to accept redundancy proposals following an announcement of the mills' closure in 1983. The Plaintiffs occupied one of the mills. Accounts were furnished by Ranks purporting to show that the terms of the 1978 Agreement were now financially unsustainable but such accounts were not accepted by the Plaintiffs as establishing this.

The Court HELD — that there are serious questions to be decided in the proceedings and that there is definitely a case to be made on behalf of the Plaintiffs. The case made for granting the injunction was that the association of Ranks with its subsidiary companies and its parent company was likely to enable Ranks to dispose of its assets so that any judgment obtained by the Plaintiffs would be of no value.

The case made on behalf of the Defendants was that there was no actual evidence that Ranks were trying to get rid of their property or were likely to do so, that the Company is an Irish Company with no record of defaulting on its commitments, that an injunction in the terms sought by the Plaintiffs would not make the Plaintiffs secured creditors and that the balance of convenience was all in favour of refusing to grant an injunction, particularly having regard to the admitted perishable nature of the wheat and flour which must be disposed of, and that the Court should take account of the behaviour of the Plaintiffs in refusing to permit these commodities to be properly preserved. The injunction sought is known as a Mareva injunction (first

considered and granted in *Mareva Compania S.A. -v- International Bulk Carriers S.A.* [1980] 1 All E.R. 213). Prior to that case the principle generally applicable was that "you cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property" — *Lister -v- Stubbs* [1890] 45 Ch.D. The jurisdiction to grant Mareva injunctions in England was based on provisions similar to those contained in Section 28(8) of the Judicature (Ireland) Act, 1877, the relevant part of which states, "an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order shall be made". There is jurisdiction to grant such an injunction and the cases in which it may be granted are not confined to cases in which a defendant is resident outside the State. There must be a real risk of the removal or disposal of the defendant's assets, there must be a danger of default by the defendant, the plaintiff must show that he has a good arguable case, and, weighing the considerations for and against the grant of an injunction, the balance of convenience must be in favour of granting it — *Barclay-Johnson -v- Yuill* [1980] I W.L.R. 1259. If damages were to be awarded to the Plaintiffs on the basis of their claims, there would be a danger of default by Ranks through inability to pay the amounts of the awards. But to justify such an injunction, the anticipated disposal of a defendant's assets must be for the purpose of preventing a plaintiff from recovering damages and not merely for the purpose of carrying on a business or discharging lawful debts. On the question of the balance of convenience, there can be very little question about the advantage of disposing of the wheat and flour which is perishable. If the Defendants were to be successful in the action, no undertaking as to damages given by the Plaintiffs would be of any value. The Court accepted as correct the statement of Sir Robert Megarry V.C. in the *Barclay-Johnson* case, where he said "I would regard the Lister principle as remaining the rule, and that Mareva doctrine as constituting a limited exception to it." "The Lister Rule" (*Lister -v- Stubbs*) is that the Court will not grant an injunction to restrain a defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. Application refused.

Harry Fleming & Ors. -v- Ranks (Ireland) Limited and Donal O'Donoghue - High Court (per McWilliam J.) 16 March, 1983- [1983] ILRM 541.

William Johnston

ROAD TRAFFIC ACTS

Obligation on prosecuting Authority to supply a copy of the Certificate if they become aware that a person charged under Section 49 of R.T.A. 61 has not received one.

The prosecutor was convicted on 25 January, 1983, in the District Court of an offence contrary to Section 49 (2) of the Road Traffic Act, 1961, as amended by Section 10 of the Road Traffic (Amendment) Act, 1978. He was arrested on 28 August, 1982, under Section 49 (6) of the Road Traffic Act, 1961, and gave, voluntarily, a specimen of his blood and received a corresponding specimen. He was informed of the purpose of the specimen and advised that a copy of a certificate of the analysis would be sent to him. He gave an address in Cork to which he wished the Cert to be sent at which he was known but, he permanently resided at his parents address in Dublin which he also gave to the Gardai.

The copy Certificate was sent by the Bureau to his Cork address by registered post prior to 4 September, 1982, upon which date it was returned with a note on the envelope "no such person at this address". On 9 September, the Garda Station at Rathfarnham was notified of the return to them of the registered envelope pursuant to Section 22 (3) of the 1978 Act. Between that date and 25 January, 1983, the Certificate and the copy thereof remained in the possession of the Gardai and no steps were taken to furnish a copy to the Prosecutor. Sometime in October, 1982, a summons was issued by the Gardai at Rathfarnham for an offence to which the Certificate related and service of the summons was effected towards the end of October to the Dublin address. The case came before the District Court on 21 December, 1982, when the prosecuting Guard informed the district Court that the copy Certificate of the Medical Bureau had not been received by the prosecutor whereupon an Application for an adjournment at the request of the prosecuting Guard was granted. Counsel applied to have the charge dismissed for want of delivery of the copy Certificate but the adjournment was granted. On 25 January, 1983, the prosecuting Guard handed a copy of the Certificate of the Medical Bureau to the Prosecutor prior to the commencement of the Hearing. At this Hearing Counsel again applied for a dismiss of the charge on the grounds that a copy of the Certificate had not been forwarded by the Medical Bureau to the prosecutor "as soon as practicable" after making the analysis of the blood specimen and determing the concentration of alcohol in it. The District Justice ruled against the submission having considered all the evidence and convicted the prosecutor. On 14 March, 1983, the prosecutor obtained in the High Court a Conditional Order of Certiorari directed to the District Justice to send forward the Order of 25 January 1983 to be quashed unless cause be shown to the contrary.

HELD: making absolute the Conditional Order that the Gardai and the State Solicitor were aware that the copy Certificate required by Statute to be forwarded to the prosecutor had in fact been forwarded but had not in fact reached him and in that knowledge the proceedings were commenced for the conviction of an offence under Section 49 of the Road Traffic Act, 1961, as amended in respect of which the contents of the Certificate was an essential proof. The Gardai had retained the copy certificate intended for the prosecutor up to the return date of the summons which had been served during the period of the adjournment despite issue having been taken upon its absence. The following passage from the judgment of the President of the High Court in *The State (Walshe) -v- Murphy* [1981] I.R. 275 was cited.

". . . . I am satisfied that there is an obligation on the prosecuting authorities in a charge under Section 49 of the Road Traffic Act, 1961, where they become specifically aware that the person charged has not received a copy of the Certificate and requires one, to supply him with one in such good time as to provide him with a realistic opportunity to have the specimen which he has retained analysed and to contest the validity or correctness of the Certificate which was issued."

The State (Patrick O'Regan) -v- District Justice Plunkett - High Court (per Gannon J. 29 July, 1983 - unreported.

Daniel F. Murphy

CERTIORARI

Where a Garda prosecutes in his own name, the D.P.P. does not have authority either to take over, or to withdraw such prosecution without the Garda's consent.

Subsequent to an incident which occurred on 20 Setpember 1981, Garda O'Brien filed a report at the Superintendent's office in Cork, requesting that a summons be issued against Michael Collins for alleged disorderly conduct. The summons was issued, and eventually came on for hearing on 4 June 1982. In the meantime, Collins had, through his solicitor, made a complaint against Garda O'Brien. This complaint was duly investigated, and Collins' Solicitors received notification from the Director of Public Prosecutions that the summons against his client was to be withdrawn, and that Garda O'Brien was himself to be summoned. This further summons was returnable for 4 June 1982, and on that date, both summonses were adjourned for hearing to 17 June 1982. It would appear that the D.P.P. did not indicate to the Court on 2 June that he would be applying to have the summons against Collins withdrawn. On 17 June, the State

Solicitor, on behalf of the D.P.P. applied to have the summons against Collins withdrawn. This application was opposed by Garda O'Brien's Solicitor. The District Justice refused the application, convicted Collins, and then dismissed the charge against Garda O'Brien. Both Collins and the D.P.P. sought and were granted conditional Orders of Certiorari. The applications to make the conditional Orders absolute were heard together. The main point at issue was whether a District Justice had jurisdiction to hear a Summons brought by and in the name of a Garda at State expense after the D.P.P. had requested that such summons be withdrawn.

HELD: that the District Justice had such jurisdiction. The evidence indicated that Garda O'Brien had never been instructed to withdraw the complaint. Furthermore, it appeared that in relation to this summons, the matters of investigation, report, decision to prosecute, the making of the complaint to the District Justice, the issuing of and service of the summons and the assembly and presentation of the evidence in the District Court were all matters dealt with by the Garda Siochana in a manner which did not require nor in fact involve any reference to the D.P.P. Finally, the evidence did not show that the D.P.P. had done anything which could be identified as "taking over" the conduct of the case. A Garda is entitled to make and prosecute in his own name as common informer, a complaint alleging a minor offence in the District Court. The mere fact that he is a Garda and thus acting at State expense does not automatically give the D.P.P. the right to intervene at any stage and withdraw the complaint. In making the complaint as common informer, a Garda, like any other common informer, is exercising a common law right of access to the Courts. Such right of access to the Courts ought not to be interfered with in the absence of a clear statutory mandate. The fact that the Garda may be an "official" as opposed to an "unofficial" common informer is irrelevant. The conditional Orders were discharged.

The State (Michael Collins) -v- District Justice Ruane and The State (D.P.P.) -v- District Justice Ruane - High Court (Gannon, J.), 8 July, 1983 - unreported.

Michael Staines

EXTRADITION

Warrant — Extradition Act 1965 Section 50 (2) — the mere fact that offences such as robbery and unlawful possession of fire arms are carried out by paramilitary groups claiming political objectives does not of itself provide sufficient cogent evidence to constitute those offences political offences or offences connected with political offences and in the case of offences not of their nature political the onus rests on the person named in the warrant to satisfy the Court that the offence is a political offence or an offence connected with a political offence.

On 31 March, 1983, the District Court made an Order under Section 47 of the Extradition Act 1965 for the delivery of the Plaintiff to the custody of the R.U.C. on foot of a warrant issued in Northern Ireland, the offence specified being his escape from custody while awaiting trial on a criminal charge in March 1975. The proceedings, the subject of this decision, commenced by Special Summons in the High Court on 14 April, 1983 and the Plaintiff sought an Order of Habeas Corpus and in the alternative an Order for his release under Section 50 of the 1965 Act. The Plaintiff's Affidavits established he was tried at Belfast City Commission before a Judge and Jury in 1973 on four counts of robbery and unlawful possession of a fire arm and was found guilty and received eight years imprisonment and three years imprisonment for contempt of Court. While in Long Kesh Prison he unsuccessfully attempted to escape and was subsequently charged with attempting to escape from lawful custody. Pursuant to that charge he was brought to the Courthouse at Trevor Hill, Newry, on 10 March, 1975 and while there escaped with 11 others. The warrant referred to in these proceedings related to this escape. Affidavits further stated that the robbery of which he was found guilty was carried out by order of the Irish Republican Army (of which he was then a member) to raise funds for the campaign for the liberation of Northern Ireland from British Rule and in Long Kesh he was confined to the area in the prison set aside for I.R.A. members convicted of political offences and offences connected therewith. His escape from custody at Newry was to enable him to continue the struggle for liberation of the Six Counties. It was submitted that the offence to which the warrant related being the escape from Newry Courthouse was a political offence within the meaning of Section 50(2)(a)(i) of the 1965 Act and that there were substantial reasons for believing that the Plaintiff, if extradited, would be prosecuted for a political offence or an offence connected with a political offence, i.e., attempted escape from lawful custody in Long Kesh prison and detained for political offences, i.e., robbery and unlawful possession of a fire arm and the Defendants submitted that there was not sufficient evidence for the Court to so find.

HELD in dismissing the claim:

(a) Section 50 is a mandatory provision and if the opinion is formed referred to in sub-section 2 the person named in the warrant must be released (*Bourke -v- A.G.* [1972] I.R. 36).

(b) "Political Offence" in the Section is to be equated with the expression "Offence of a Political Character" in Section 3 of the Extradition Act 1870 and accordingly the authorities here and elsewhere are relevant.

(c) "Offence connected with a political offence" within the meaning of Section 50(2) need not itself be an "offence of a political character" or a "political offence".

(d) It is clear that the Courts here and in Britain have been careful to avoid attempting an exhaustive definition of the expression "offence of a political character" in the Act of 1870 and "political offence" in the Act of 1965.

(e) The distinction between "purely" political offences which of their very nature are political, e.g., treason, espionage and "relative" political offences, e.g., murder committed in the course of rebellion as enunciated by O'Dalaigh C.J. in *Bourke's* case page 61 was accepted and the offences in the present case were deemed "relative" political offences and as such the onus is placed on the person named in the warrant to satisfy the Court that the offence is either "a political offence" or "an offence connected with a political offence" (*McGlinchey -v- Wren* [1983] ILRM 169 at page 172).

(f) The mere fact that offences such as robbery and unlawful possession of firearms were carried out by paramilitary groups claiming to have political objectives is not sufficient of itself to render them political in character. There must be clear and cogent evidence to support such a conclusion which was absent in this case. The Court in considering whether a particular offence is a political offence must have regard to the circumstances existing at the time that expression falls to be considered. There was nothing in the Affidavits to indicate that the Deponent himself believed that such activities would in fact bring about the claimed political objectives of the organisation of which he was then a member although the motive of a perpetrator of an allegedly political crime must always be of importance in determining whether the crime was in fact political in its nature.

(g) The offences which gave rise to the Plaintiff's imprisonment were committed over ten years ago, whilst there was nothing to suggest inaction on the part of the authorities, even if there were, this in itself would not be a ground on which a Court would order release (see *O'Hanlon -v- Cleming* [1982] ILRM 69).

Philip James McMahon -v- Governor of Mountjoy prison and David Leary - High Court (per Keane J.), 19 August, 1983 - unreported.

Kenneth Morris

RATEABLE VALUATION

Section 11 of the Local Government Act, 1946 to the extent that it authorises the collection of rates on land independently of buildings is invalid having regard to the provisions of Article 40.3 of the Constitution.

The Plaintiffs, farmers in County Wexford, instituted High Court proceedings seeking declarations that certain sections of the Valuation Acts insofar as they provide for the valuation for rating purposes of agricultural land were unconstitutional. Ancillary declarations were sought in relation to other statutes which depended upon the rateable valuation system of agricultural land for the purposes of assessing tax or other liability or of determining grant or other entitlements.

After a full hearing in the High Court, Mr. Justice Barrington granted the declarations sought including a declaration that the valuations placed on the Plaintiffs' own lands were invalid. Against these orders the Attorney General appealed to the Supreme Court.

Certain conclusions or findings arising out of the evidence adduced in the High Court could not be upset on appeal and accordingly, were accepted by the Supreme Court. These conclusions were as follows:

1. The existing valuation system does not provide a uniform system for valuing lands throughout the state.
2. There is no consistency between county and county or within counties.
3. The valuation system has failed to effect changing patterns of agriculture with the result that land which modern agriculturalists would regard as good land often carries a low valuation, while land which they would regard as inferior often carries a higher valuation.
4. The whole system is shot through with unnecessary anomalies and inconsistencies.

In the course of the hearing of the appeal, the Supreme Court by consent allowed an amendment of the Plaintiffs' statement of claim to include a claim that Section 11 of the Local Government Act, 1946 insofar as it provides for the raising of money by means of the poor rate on land, independently of buildings, is invalid having regard to the provisions of the constitution.

HELD:

1. What is of concern to those whose property or land has been valued in an improper manner is the use to which that valuation is put by the State or Local Authority and the extent to which that use affects them in the enjoyment of their property or other rights. Accordingly, that portion of the High Court Order declaring named sections of the Valuation Acts invalid is set aside.
2. Section 11 of the Local Government Act, 1946 is the existing statutory authority directing the assessment of liability to local taxation on land by means of the valuation prepared under the Valuation Acts.
3. Article 40.1 of the Constitution deals and deals only with the citizen as a human person and requires for each citizen as a human person, equality before the law citing in support of this the dictum of Walsh J. in *Quinn's Supermarket -v- A.G.* [1972] IR at p.13. Because the tax is related not to the person but to the land which irrespective of who he may be, he occupies, Article 40.1 has no application.
4. Section 11 of the Local Government Act, 1946 is contrary to the provisions of Article 40.3 of the Constitution in so far as it authorises the collection of rates on land independently of buildings. Continuing the use of the valuation system as a basis for agricultural rates long after the lack of uniformity, inconsistencies and anomalies had been established and, long after methods of agricultural production had drastically changed is in itself an unjust attack on property rights. The state failed to protect the property rights of those adversely affected by the system from further unjust attack.

Brennan and Others -v- Attorney General and Wexford County Council - Supreme Court (per O'Higgins C.J. rem. diss.), 20 January, 1984 - unreported.

Joseph B. Mannix

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Recent Irish Cases

Edited by
Gary Byrne, Solicitor

ROAD TRAFFIC / RES JUDICATA

Dismissal of Appeal from Circuit Court — no affirmation of Circuit Court Order — matter not Res Judicata in relation to High Court proceedings — payment of Circuit Court Decree without admission of liability no bar to High Court Action.

On 24 April, 1979, Mr. Cassidy, a motor cyclist, was very seriously injured in a road traffic accident when he collided with a motor car, the property of Mr. O'Rourke. On 28 September, 1979, O'Rourke's Solicitor issued a Civil Bill claiming damages against Cassidy. On 9 July, 1980, Cassidy's Solicitor issued a High Court Plenary Summons claiming damages for personal injuries against O'Rourke.

At the hearing of the Circuit Court proceedings on 5 November, 1980, the Court found Cassidy 100% negligent and gave a Decree to the Plaintiff for £422.72p. Mindful of the effect of the Judgment, Cassidy's Solicitor immediately appealed to the High Court. This Appeal was not supported by Cassidy's insurers who through their representative were negotiating directly with O'Rourke's Solicitors. Because of a threat by O'Rourke's Solicitors of High Court proceedings against them the insurance company issued a supplement cheque for £422.72p. The covering letter stated—

> "We have received your letter of 30 June, and we now attach cheque for £422.72p in favour of Mr. O'Rourke being the amount of the Decree".

At a later stage the letter says:

> "We await hearing from you and in the meantime we draw your attention to the fact that our payment of £422.72p is made without admission of liability."

O'Rourke's Solicitor replied to this letter on 26 July, 1981, saying:

> "We note the contents of your letter of 20 July last."

Subsequently the matter of the costs of O'Rourke's Solicitor was disposed of.

On 22 October, 1981, Cassidy's Appeal to the High Court on Circuit came before Gannon J. O'Rourke's Solicitor opposed an adjournment and evidence was given by him and by Cassidy's Solicitor. Gannon J. dealt with the case and in his Judgment he said:

> "The position is that the Plaintiff has a good award as regards the Circuit Court proceedings. The Circuit Judge has determined the issue and evaluated the damage. Satisfaction of this Judgment was offered. Therefore my decision is that the Plaintiff has a Judgment in the Circuit Court which has been satisfied. I therefore dismiss his Appeal and as no costs are looked for by the Plaintiff, I make no Order in this respect."

The Order of Gannon J. states:

> ". . . that the appeal do stand dismissed and the Court doth affirm the Circuit Court Order and makes no Order as to the costs of the said Appeal."

Cassidy's High Court Action for damages for personal injuries against O'Rourke then came on for hearing. Before the substantive issue was heard, the matter came before Carroll J. in the High Court, on a preliminary issue as to whether, in the light of what transpired in the Circuit Court proceedings, Cassidy's claim in the High Court proceedings was *Res Judicata.* Cassidy's Solicitor in evidence before Carroll J. stated that at the hearing of the Appeal in the High Court on Circuit, he only produced correspondence and was asked one question. There was no attendance by the insurance company who had authorised payment of the Circuit Court claim. The Court found as follows:

1. The letters of 20 July, 1981, from the insurance company to O'Rourke's Solicitor and 26 July, 1981, from O'Rourke's Solicitor in reply were not before the High Court on Circuit as they would not have been in the possession of Cassidy's Solicitor.
2. The Order of the High Court on Circuit in dismissing the Appeal was incorrectly drawn up. Gannon J. dismissed the Appeal but he did not affirm the Circuit Court Judgment because to do so, would have decreed Cassidy by High Court Order for a sum of £422.72p in respect of a Judgment already satisfied. Therefore, only the Circuit Court Judgment was left standing upon which O'Rourke could make a claim of *Res Judicata* there being no High Court Decree against Cassidy.
3. In view of the fact that the cheque for £422.72p which was sent without admission of liability, was accepted by O'Rourke or on his behalf without further comment he cannot now set up the payment as a bar to High Court proceedings. In this Carroll J. applied the principle of Estoppel similar to that applied by the Supreme Court in *Doran -v- Thompson Limited* [1978] I.R. at p.223.

HELD: The Order of the High Court on Circuit was only a dismissal of the Circuit Court Appeal without further Order thus leaving the Circuit Court Order as the only Order on which there was a finding on the issues. In the circumstances O'Rourke having accepted the payment on the basis that there was no admission of liability is estopped from relying on the Circuit Court Order and is not entitled to enter a plea of *Res Judicata* to the High Court proceedings.

Henry Cassidy -v- Charles Noel O'Rourke - High Court (per Carroll J.), 18 May, 1983, - unreported.

George Bruen

COMMERCIAL

Banking — Documentary Credits — Time at which Documentary Credit ought to be opened or established — contract — implied term — consensus ad idem — Section 4 of Sale of Goods Act 1893.

The Supreme Court heard an appeal brought by the Defendants (I.G.B.) against the judgment given against them in the High Court in an action brought by the Plaintiffs (Tradax) for breach of contract. The amount of damages awarded in the High Court was £215,000 which amount was not disputed by I.G.B. on appeal in the event of their liability being proved.

Tradax alleged that I.G.B. had entered into a binding oral contract on 23 March 1978 to sell to it two lots of grain: (1) 20,000 metric tonnes at £99.50 per tonne delivered f.o.b. for shipment from New Ross subject to a minimum loading rate of 800 tonnes per weather working day and (2) 5,000 metric tonnes to be delivered ex-store, either from Mullingar or Edenderry, at £96.50 per tonne. Each lot was to be paid for by letter of credit maturing for payment on 1 May 1978. Tradax alleged that the contract, whilst in the course of performance, was wrongfully cancelled and repudiated by I.G.B. by way of a letter addressed from the latter to Tradax dated 21 April 1978.

I.G.B. in the High Court and on this appeal disputed Tradax's claim on the following three grounds (1) that no contract was concluded on 23 March 1978, there being no *consensus ad idem* between the two contracting parties; (2) that even if an oral contract or contracts were entered into on such date that the same were unenforceable for non-compliance with Section 4 of the Sale of Goods Act 1893; (3) that the failure of Tradax to open a letter of credit for the price agreed prior to 21 April 1978 entitled I.G.B. to repudiate the contract and to refuse further performance thereof as from that date.

HELD: (1) (McCarthy J. dissenting) that there was sufficient evidence on which Gannon J. in the High Court could have concluded that there existed agreement between the contracting

parties as to essential elements of the alleged contract or contracts; (2) that it was true to say that the contract or contracts in issue would not be enforceable by action unless, for the purposes of Section 4 of the Sale of Goods Act 1893, Tradax had accepted part of the goods sold and actually received the same, or there existed a sufficient note or memorandum in writing of the alleged contract or contracts signed by I.G.B. or their agent on their behalf. Gannon J. in the High Court had drawn attention to a letter of 21 April 1978 written by the Secretary of the I.G.B., who is also the Solicitor of the latter, to Tradax purporting to repudiate the alleged contract or contracts. The Secretary had in the first paragraph of this letter referred to the telex from Tradax to I.G.B. dated 24 March 1978 "confirming the agreed terms of the above-mentioned two contracts for 20,000 tonnes and 5,000 tonnes respectively of Irish Feeding Barley and which provided for payment by letter of credit maturing on 1 May 1978". Gannon J. had concluded that this letter coupled with the telex of 24 March 1978 constituted a sufficient note or memorandum of the contract(s) made on 23 March 1978. The majority of the Supreme Court held that Gannon J. had been correct in so holding. Griffin J. and Henchy J. noted, furthermore, that even if no sufficient note or memorandum had come into existence the requirements of the above-mentioned Section 4 had been complied with because Tradax had accepted and received part of the goods amounting to 1,871 tonnes to the value of £180,560; (3) that (McCarthy J. dissenting) the contention put forward by I.G.B. that the letter or letters of credit ought to have been opened or established at the latest, by the first day of the contractual delivery period, (which in this case was 1 April 1978), and that failure on the part of Tradax in this regard resulted in a breach of a fundamental term of the contract entitling I.G.B. to repudiate same, was to be rejected. O'Higgins C.J. summarised the position thus:

> "Although the persons negotiating the terms of the contract were not familiar with all the technicalities of documentary credit, they were of one mind that payment for the barley purchased was to be by a letter of credit for each lot, maturing on 1 May 1978. *This date was specified notwithstanding that the shipping period for the shipments from New Ross was to run from 1 April 1978 until 30 June 1978.* This case is therefore to be distinguished from the run of cases of sales based on payment by documentary credit, where the furnishing by the buyer of the documentary credit is a precondition of the shipping or delivery of the goods by the seller."

The cases that had been cited by I.G.B. in support of their argument were the English cases of *Pavia and Company S.P.A. -v- Thurman-Neilsen* [1952] Q.B. 84; *Sinason-Feicher Inter-American Grain Corporation -v- Oilcakes and Oilseeds Trading Co.* [1954] I.W.L.R. and *Ian Stach Ltd. -v- Baker Bosely Ltd.* [1958] I All ER 542. O'Higgins C.J. opined that the facts of the latter mentioned cases were distinguishable from those of the present case in that they all involved transactions relating to international trade and envisaged a payment machinery operating over the whole of a shipping period. The machinery for payment in the present case, by way of contrast, operated "on a single day with a single payment and it is specifically recognised that it cannot operate for the first month of the delivery or shipping period". The majority of the Supreme Court (McCarthy J. dissenting) were not prepared to imply a term that the letter of credit of the kind actually opened by Tradax on 24 April 1978 ought to have been opened by 1 April (the commencement of the drawing period). Not only would it be impracticable for the parties to have agreed to such a term but the subsequent actions and conduct of I.G.B. and Tradax belied the existence of a common intention that such a term would implicitly form part of the contractual arrangement which they had entered into. The absence of such a term did not, in any event, affect the business efficacy of the transaction. (*The Moorcock Case* [1889] 14 P.D. 64, *Shirlaw -v- Southern Foundries* [1939] 2 All ER 124, *Reigate -v- Union Manufacturing Company (Ramsbottom)* [1918] I.K.B. 592, and *Ward -v- Spivack Ltd.* [1957] L.R. 40 considered) Higgins C.J. concluded that all that could be implied into the contractual arrangement entered into in the present case was that Mr. Fitzpatrick, the Managing Director of Tradax, "on behalf of his company should take reasonable and proper steps to finance the opening of a letter of credit which would mature for payment of £2.4 million on 1 May. If he had been dilatory in securing the transfer of funds to his own company or otherwise acted as if the contractual obligation would not be honoured, there might have been grounds for complaint by the Defendants".

I.G.B. were accordingly not justified in cancelling their contract with Tradax on 21 April 1978.

McCarthy J., in his dissenting judgment, considered that the crucial factor in the circumstances was not May 1, the date of actual payment, but rather that I.G.B. could look forward to such payment on that date. If it were the situation that the letter of credit was merely to be opened on that date, and opening requires notification to the drawer, then this would mean that the documentary credit could not in theory have been drawn upon at the start of banking hours on that day. McCarthy J., consequently considered that, to the extent that it be accepted that a valid contract was entered into on 23 March 1978, a term necessarily implied therein was that a letter of credit or letters of credit . . . would be opened at a bank in Ireland before the 1st day of drawing down fromthe Edenderry Store or not less than five days before the date of arrival of a ship at New Ross for the f.o.b. transaction, whichever date be the earlier. McCarthy J. thus reached the conclusion that as Tradax had failed to comply with the above mentioned term which he considered to be fundamental to the contract, I.G.B. had been justified in sending a letter on 21 April 1978 repudiating the earlier contract of 23 March 1978.

Tradax Ireland Limited -v- Irish Grain Board Limited - Supreme Court, 18 November 1983 [*1984*] *ILRM 471.*

Edwina Dunn

PLANNING/PRESCRIPTIVE RIGHTS/NUISANCE SUMMARY OF DECISION

No intention to deliberately flout the Planning Law in the erection of a galvanised shed — no mandatory injunction granted for the removal of the structure — bona fide effort made by Defendant to eliminate nuisance — Plaintiff entitled to damages for nuisance by noise and dust.

The Plaintiff was an elderly lady living on her own in an attractive residence in Navan. Her next-door-neighbour set about erecting a structure along the line of the dividing wall of the two back gardens and within hours a massive corrugated iron workshop was obscuring the landscape at the back of her house. The Plaintiff sought interlocutory relief and by Order of the High Court, dated 8 October, 1979, an undertaking on the part of the second-named Defendant, Patrick Reilly, was given whereby he undertook not to do any further building work and not to use any of the new buildings and premises for his joinery business but remaining at liberty to use the old buildings for such joinery business. When proceedings were commenced against him he applied for permission to build and this Application was rejected by the Local Urban District Council but, on Appeal to An Bord Pleanala, permission was granted subject to conditions requiring the Defendant to reduce the length of the building by 15½ feet so as to set it back some distance from the Plaintiff's premises and also requiring steps to be taken to suppress the level of dust and noise emanating from the structure. One of the most effective ways of complying with the requirements of An Bord Pleanala with regard to noise and dust was to substitute or superimpose blockwork in place of or over the

galvanised sheeting which formed the original shell of the structure. This work could not be completed satisfactorily without gaining access to the Plaintiff's back garden for part of the work. Reilly completed such of the work as could be done without such access. Further, he built a loft area within the building so that the activities of the joinery workshop could be carried out on two different levels and again ran into trouble with the planning authorities.

The Court held it could not find any intention to deliberately flout the provisions of the Planning Acts. The Defendant's family had carried on a joinery workshop business on the site at the rere of the house for a very long time past, extending back into the latter half of the 19th Century. The original premises were somewhat lower but otherwise comparable in size with the structure which was the subject matter of the proceedings. The Court would not grant a Mandatory Injunction to remove the structure. Part of the reason why the conditions of An Bord Pleanala had not been complied with was attributable to an unreasonable refusal on the part of the Plaintiff to help the Defendant in any way in making good his previous defaults.

(*Thomas J. Morris -v- Peter Garvey* [1982] ILRM 177 Distinguished).

The Court further had evidence given that an Application was made to the Local Urban District Council for permission regarding the altering of the internal layout and permission by default was obtained and no communication had been received from the Planning Authority. The Court was prepared to overlook the default of the Defendant in failing to comply with the Undertaking made to the High Court and felt that the Defendant was a man who was trying to keep an old established business in operation and coping at the same time with the hostility of his neighbours, the wear and tear of proceedings in three different Courts and the intervention of the Planning Authorities.

The Court held with respect to diminution of light the 1954 Ordnance Survey Map shows almost complete coverage of the site to the rere of the Defendant's premises to a much greater extent than was now achieved by the present workshop in its reconstructed form. The Court felt that the testimony of persons affected by alleged diminution of light is generally regarded in this type of case as carrying as much weight as, if not more weight than, the testimony of experts who attempt to measure diminution of light in mathematical terms. On considering all the evidence no significant diminution of light was felt to have taken place.

The Court held that in respect of the nuisance by dust that that would be eliminated when the extraction system was installed which, the Defendant said in evidence, it was his intention to provide for the benefit of his staff. With respect to nuisance by noise the Court held that the Plaintiff had to endure an unreasonable amount of noise over a long period of time between 1979 and 1983, but with the Defendant's professed intention to close off the remaining gaps and openings in the building whenever he could do so with the co-operation of the Plaintiff that this situation would be remedied in full by the Defendant. With respect to nuisance by flooding evidence was given that water poured from a gutter on the new galvanised structure which, in the early stages, caused flooding right into the Plaintiff's kitchen, but when the building was reduced in size by 15½ feet the water now falls into the Plaintiff's back garden which is less of a nuisance.

The Court, in awarding £1,000.00 damages to the Plaintiff pointed out that the nuisances could have been minimised and, perhaps, terminated altogether had she not taken up an entrenched position in relation to her complaints against the Defendant. The question of costs was reserved for a further hearing.

May Leech -v- Rose Reilly and Patrick Reilly – High Court (per O'Hanlon J.), 26 April, 1983 – unreported.

Daniel F. Murphy

FAMILY HOME PROTECTION ACT

Failure to pay mortgage instalments, whether conduct leading to loss of interest in the family home.

The Plaintiff and the Defendant were married in May 1974. Their family home and 8 acres were purchased by the husband for £45,000 in 1979 of which £15,000 was borrowed from his mother and the remaining £30,000 from the Building Society, the second named Defendant. The husband executed a mortgage in favour of the Building Society and the wife endorsed her consent thereon. No repayments of the mortgage were ever made by the husband. The Plaintiff and the husband separated in March 1980 when the Plaintiff left the family home and went to live in Dublin in a house owned by her brother. Proceedings were commenced against the husband only in November 1980 and claims were made for the custody of the children, for maintenance, for a barring order against the husband and for a declaration that the Plaintiff was entitled to the beneficial ownership of the entire of the family home or of such percentage as the Court might determine and for an Order for the sale of the family home. In May 1981, the parties entered into a consent which was received and filed in Court and the action was adjourned generally with liberty to re-enter. One of the terms of the consent was that the husband would expedite the sale of the family home and pay the balance of the purchase price remaining, after the discharge of the amount due to the Building Society, to the Plaintiff's solicitor to be invested in a house for the use of the Plaintiff and her children during her lifetime with remainder to the children absolutely.

As no repayments were made on foot of the mortgage and the premises were not sold by the husband the Building Society issued proceedings against him by Summons in July of 1982. An Order for Possession was made in those proceedings on 26 July 1982 and the premises were subsequently sold for £48,000 being less than the sum then due to the Building Society so that there was no surplus to be applied for the purchase of a house by the Plaintiff. There was some confusion at the hearing of the application for the Order for Possession; and the Plaintiff was represented before the Master of the High Court and an objection to an Order was made on her behalf although the husband consented to the Order being made. When the matter came into the Judge's list it was heard at the end of a very long list and in the absence of the Solicitor for the Plaintiff an Order was made with the consent of the husband.

In September 1982 the Plaintiff had the Building Society joined as a Defendant in these proceedings and an interim injunction was granted restraining the Building Society from selling the family home. The Plaintiff sought liberty to amend the Special Summons by including a claim under Section 5 of The Family Home Protection Act, 1976, for the protection of the family home, requiring the husband to discharge all arrears due on foot of the mortgage, joining the Building Society as a Defendant and preventing the Building Society from taking any steps on foot of the Order for Possession obtained by the Society 26 July 1982. In September 1982, the application for an Order restraining the Building Society from selling the family home was refused and the other matters were adjourned. Following further applications made on behalf of the Plaintiff the Summons was amended to include a claim against the husband under the provisions of the Act of 1976 for compensation for loss of the family home, a claim against both defendants for damages for the sale of the family home and a Declaration that the Order of 26 July 1982 was obtained collusively by the Defendants in breach of the Plaintiff's rights and thus was null and void and of no effect. The following arguments were put forward on behalf of the Plaintiff:

1. The Plaintiff's consent to the mortgage was invalid, apparently based on the fact that the husband was an Agent for the Building Society and on an allegation that the Plaintiff gave her consent to the mortgage in his office and signed it a

year before it was dated and after it had been signed by him.
2. The Order for Possession was obtained by collusion.
3. An Agreement of 4 May 1981 to the compromise of the proceedings was entered into by the Plaintiff because of a misrepresentation by the husband as to the value of the property.
4. The husband's failure to pay the instalments when they became due and his failure to sell the property promptly deprived the Plaintiff of the difference between the amount of the loan and the value of the family home.

Counsel on behalf of the Building Society submitted that under Section 3 of the 1976 Act a purported Conveyance by a spouse is expressed to be void only if the prior consent of the other spouse is not obtained, that there could be no conveyance until delivery of the Deed and that delivery of the mortgage in this case was not effected until after the consent of the Plaintiff had been obtained. The Court was of opinion that that submission was correct but indicated that even if it were not it would be very slow to hold that a spouse could contest the validity of a mortgage after entering into a settlement with the advantage of legal advice, in which she clearly acknowledged its validity.

The Court did not accept that the allegation of collusion was sustainable. As the husband had no defence to the proceeding the only right given to the Plaintiff was under Section 7 of the 1976 Act whereby the Court may decide that if the Plaintiff were capable of paying the arrears due and the future payments it would be just and equitable to return the proceedings, presumably to enable the Plaintiff to discharge the payments due and to become due. It had not been suggested that the Plaintiff was in a position to pay the arrears so that if her legal advisers had been in Court when the Order was sought no grounds could have been advanced for opposing it.

The Court was satisfied from the evidence of the Solicitor for the husband that the Deed could not have been executed until January 1980.

Accordingly the Court dismissed the Plaintiff's claim against the Building Society at the close of the Plaintiff's case.

The Court had evidence that the value of the family home would have been somewhere between £46,000-£59,000 at the time of its purchase. It was clear that the parties considered that there would be a considerable balance to enable the Plaintiff to purchase a house for herself and her children after discharge of the mortgage debt out of the proceeds of sale. Although it was not being contested that the husband represented the value of the home to be £70,000 the Court did not accept that the Plaintiff had a good ground for a claim of £40,000 being the amount she estimated would have been available for the new house had the husband's valuation been correct and he had sold the property expeditiously. The Plaintiff was represented at the settlement and it was clear that it was appreciated that money was due on the mortgage. It is not suggested there was any misrepresentation of the amount due on foot of the mortgage. No claim was being made for breach of the Agreement contained in the consent and there was no claim to have the Agreement set aside on the ground of fraud and misrepresentation. The claims made before the Court were made in particular under the provisions of Section 5 sub-section 2 of the 1976 Act. It was agreed on behalf of the husband that no claim could lie where the spouse had left the family home and while the Court did not accept this argument it was not a view which was necessary to be decided at the present application.

The argument on behalf of the Plaintiff appeared to be that misrepresentation by the husband as to the value of the family home deprived the Plaintiff and children of a home which would have been purchased with the surplus of the sale price remaining after the discharge of the mortgage and that the misrepresentation constituted conduct depriving the Plaintiff of her residence in the family home within the meaning of the sub-Section.

The Court, firstly, indicated there was only one family home in the case, namely the one sold on foot of the mortgage. Secondly, once the mortgage was validly created the conduct of the husband relied on must consist of his failure to pay the instalments. Thirdly, although there is no reference in the sub-section to "an intention to deprive the spouse of her residence in the family home" the Court was of the opinion that failure to pay instalments due on a mortgage would not be conduct resulting in the loss of an interest in the family home unless it were established that the other spouse was financially able to pay the instalments. The only figures before the Court indicated that the husband did not have an income to meet the instalments.

Finally, the Court HELD that as the amount due on foot of the mortgage at the time of the compromise was dealt with under the terms of the consent it could not now be made the basis of a claim under sub-section 2.

A.D. -v- D.D. & Irish Nationwide Building Society – High Court (per McWilliam J.), 8 June, 1983 – unreported.

John F. Buckley

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Recent Irish Cases

Edited by
Gary Byrne, Solicitor

INJUNCTION

Where it is found that a Plaintiff with a *prima facie* case has reasonable grounds to fear that a Defendant will charge or dispose of his assets in order to prevent recovery on foot of any award which might subsequently be obtained a Court may grant an interlocutory injunction.

The Defendants were directors of the companies comprising the Gallagher Group and, as part of a transaction concerning certain property at St. Stephen's Green, jointly and severally guaranteed the repayment to the Plaintiff by Lambert Jones Estates Limited on or before 27 April, 1982, of the sum of £500,000 lent by the Plaintiff to that company, together with interest.

When no part of this sum was repaid on the date in question, the Plaintiffs issued a Plenary Summons on 12 May, 1982, to recover the loan, together with interest, amounting to a total sum of £588,046.97. This injunction was in the instant case sought to be continued pending the hearing of the action.

Affidavits filed on behalf of the Plaintiff stated the deponent's belief that the Defendants owned substantial amounts of property and were involved in transactions whereby they were charging, or proposing to charge, their personal assets so that certain of the Defendants' other creditors would be preferred to the Plaintiff.

It was further stated in the Affidavits that it was apprehended that the Defendants would charge or dispose of some or all of their property and that money or chattel property might be removed out of the jurisdiction and so defeat the prospect of the Plaintiff executing on a Judgment.

In opposing this interlocutory application it was argued on behalf of the Defendants that a "Mareva" type injunction of this sort can only be granted where a Defendant outside the jurisdiction has property inside the jurisdiction, or where it is shown that a Defendant, because of his foreign nationality or domicile or otherwise, is likely to take his property out of the jurisdiction, and that it is not to be confused with fraudulent preference in a bankruptcy matter.

HELD: Approval was expressed for the judgment of Sir Robert Megarry, V.C., in *Barclay-Johnson -v- Yuill* [1980] 1 W.L.R. 1259. Here it was pointed out that there were two lines of authority with regard to such injunctions. The older, which he called the *Lister -v- Stubbs* line established the general proposition that a Plaintiff cannot prevent a Defendant from disposing of his assets *pendente lite* merely because he fears that by the time he obtains judgment in his favour the Defendant will have no assets against which the judgment can be enforced. The newer, called the *Mareva* line, established that such an injunction may be granted where it is just and reasonable to do so. The Vice-Chancellor appeared to discard any distinction between foreigners and citizens and went on to say that "the Mareva prohibition against disposition of the assets within the country is a normal ancillary of the prohibition against removing the assets from the country, ..."

The progress of the Mareva lines of cases seems to lead to the conclusion that the injunction may be granted where it appears to the Court that dispositions are likely to be made for the purpose of preventing a Plaintiff from recovering the amount of his award, as distinct from conducting the normal business or personal affairs of the Defendant.

In the present case, from the reluctance of the Defendants to disclose their assets and their dispositions and proposed dispositions of them combined with the fact that their businesses were not personal but were conducted by a group of companies, it appeared to the Court that the Defendants were probably mainly interested to deprive the Plaintiff of the opportunity of recovering. Accordingly, the injunction was continued.

Powerscourt Estates -v- Patrick Gallagher and Paul Gallagher – High Court (per McWilliam J.), 18 May, 1982 [1984] ILRM 123.

Ken Murphy

ROAD TRAFFIC ACTS

Section 13 Road Traffic (Amendment) Act, 1973, does not require proof of the time of driving or attempting to drive a mechanically propelled vehicle.

On 23 March, 1980, Garda John Costello went to the scene of a traffic accident in Dublin which involved three motor vehicles, one of which was driven by the Defendant. The Defendant admitted driving the vehicle. The Garda got a strong smell of intoxicating liquor from the Defendant's breath and noticed that his speech was slurred and very indistinct. When he got out of his car he stumbled and almost fell and was unsteady on his feet. His eyes were bloodshot and bleary. The Guard formed the opinion that the Defendant was unfit to drive a mechanically propelled vehicle due to the consumption of intoxicating liquor and arrested him under Section 49 (6) of the Road Traffic Act, 1961, as inserted by Section 10 of the Road Traffic (Amendment) Act, 1978, and then conveyed the Defendant to Finglas Garda Station. He was handed over to the Sergeant who asked the Defendant if he was aware that he had been arrested for driving his car while drunk and being involved in the accident and the Defendant said that he was so aware. The Sergeant told the Defendant that he was sending for a registered medical practitioner so that a specimen of blood or urine could be taken from the Defendant. He asked the Defendant if he would like to have his own Doctor present and he said that he would not. The Doctor arrived and the Defendant was told that under the Road Traffic Acts when a person is arrested for drunken driving he is obliged to supply a specimen of either blood or urine to the designated registered medical practitioner. The Sergeant requested the Defendant to supply either a specimen of blood or urine to the Doctor and explained the consequences of a refusal to do so. The Defendant said he understood. The Sergeant again asked which specimen he would wish to give and the Defendant then said that he was refusing to give any type of specimen. The Sergeant asked him if he understood the possible consequences of his refusal and the Defendant said that he did. The Defendant was allowed to leave the Station a short time later and took a taxi home.

No evidence was given on behalf of the Defendant but it was submitted by his Solicitor that the Defendant should be acquitted as there was no case to meet on the grounds that there was no evidence of the time when it was alleged that the Defendant was driving or attempting to drive a mechanically propelled vehicle while under the influence of drink or drugs in contravention of Section 49 (6) of the Road Traffic Act, 1961, as amended by Section 10 of the Road Traffic (Amendment) Act, 1978. Before giving a ruling on the submissions the District Justice stated a case asking the following questions namely:—

1. In a prosecution under Section 13(3) of the Road Traffic (Amendment) Act, 1978, is it necessary to prove that the requirement to provide a sample was made of the Defendant within three hours of his driving his vehicle?
2. Is it necessary that the requisition be made within three hours of driving, attempting to drive or being in charge? Would he, the District Justice, be correct in dismissing the charge in the absence of evidence of time?
3. In a prosecution under Section 13(3) is proof of the time of driving a necessary proof for any reason?

In the course of argument in the High Court Counsel for the Defendant and the Director of Public Prosecutions agreed that an affirmative or negative reply to question No. 3 would meet the requirements of the case stated.

In *The Commissioner of Police of the Metropolis -v- Curran* [1976] 1 All E.R. 162; the House of Lords was requested to consider a point of law arising out of a similar Section of the English Road Traffic Act, 1972, and held that a person could be convicted of an offence under Section 9(3) of that 1972 Act without the fact being established that he had been driving or attempting to drive or being in charge of a mechanically propelled vehicle on a road or other public place.

The Court HELD as follows:—

1. Because of the very close resemblance between the objectives and modes of expression in relation to the same subject matter in the English Road Traffic Act, 1972, and the Irish Act, as amended in 1978, the Oireachtas intended no more and no less than what the words of the Sections enacted to say whether or not they may merit condemnation of the nature cast upon the English Act of 1972 in the House of Lords in *Curran's* case.

2. Section 13 of the 1978 Act applies only to a person who has been brought to a Garda Station having been arrested without warrant by a member of the Garda Siochana who was of the opinion that such person was committing or had committed an offence created by Section 49 of the Road Traffic Act, 1961, as amended by Section 10 of the 1978 Act. Section 49 creates three offences one of which does not involve any time factor as an element of proof to sustain a conviction. Section 13 does not require the arresting member of the Garda Siochana to identify which of the three offences created by Section 9 he was of opinion was being or had been committed. The Section provides the Garda with an opportunity of obtaining from the person arrested evidence which might or might not support his suspicions of the commission of one or other of the Section 49 offences. The Garda may exercise his discretion as to what form of test or tests the arrested person should be subjected to and the onus is cast by Section 13 on such person to comply with the optional requirement. Refusal or failure upon being given the option constitutes the commission by the arrested person of an offence under Section 13. There is nothing in the wording of Section 13 as expressed, nor in the apparent purpose of Section 13, which requires proof of the time of driving or of attempting to drive a mechanically propelled vehicle. Accordingly, the answer to the third question submitted by the District Justice was no. As this question and answer appeared to embrace all that was comprehended in questions 1 and 2 it was not necessary to answer those two questions.

The Director of Public Prosecutions -v- Patrick Clinton - High Court (per Gannon J.), 13 June, 1983 - [1984] ILRM 127.

Daniel F. Murphy

PROCEDURE

Validity of Summons signed by Assistant District Court Clerk — whether District Court Clerk was "assigned" to area — Courts Officers Act, 1926, Ss. 46(1) and (2) and 48(1) — District Court Rules 1948, Rule 91(2).

The Respondent came before the District Court in Naas on 13 January, 1982, pursuant to a complaint made against him under Section 49(3) and (4) of the Road Traffic Act, 1961, as inserted by Section 10 Road Traffic (Amendment) Act, 1978, and in respect of a further complaint under Section 53(1) and (2)(b) R.T.A., 1961. The Summonses were issued by John A. Healy, a person who had been appointed by the Minister for Justice as a District Court Clerk and who was attached to the Naas District Court Office to assist the District Court Clerk assigned to the area, Mr. Delahunty.

At the conclusion of the evidence it was contended on behalf of the Respondent that the complaints should be dismissed on the grounds that Mr. Healy had no authority to issue the Summonses. The District Justice adjourned the matter and gave the Defence liberty to call evidence in support of their contention. At the adjourned hearing Mr. Padraig O Murchu, who holds the position of Chief Examiner of the District Court Section, Department of Justice, was called on behalf of the Respondent and gave evidence to the effect that only one person was assigned as a District Court Clerk to the Naas District and that was Mr. Delahunty. Mr. Healy was, along with other officers, appointed by the Minister for Justice as a District Court Clerk and was attached with these others to assist Mr. Delahunty. On 4 August, 1981, the date the Summonses were issued, Mr. Delahunty was on holiday and no formal assignment of Mr. Healy as a District Court Clerk to the Naas area had been made by or on behalf of the Minister for Justice. It was further stated by Mr. O Murchu that the Department does not regard as "assigned" under Section 48(1) of the Courts Officers Act, 1926, District Court Clerks attached to an office other than one District Court Clerk who is in charge of it and who is assigned to it. It was Departmental practice where the one "assigned Clerk" is absent to have the most senior of the other Clerks formally assigned by or on behalf of the Minister. The learned District Justice thereupon accepted the submission of the Defendant/Respondent and struck out the summonses for want of jurisdiction.

On the written application of the D.P.P. the District Justice stated a case for determination by the High Court. The law applicable, which is contained in the Courts Officers Act, 1926, Ss. 46(1) and (2) and 48(1) and in the District Court Rules, 1948, Rule 91(2), was reviewed by the Court in dealing with the Appeal.

Section 46(1) of the Courts Officers Act, 1926, provides that there shall be attached to the District Court such and so many District Court Clerks as the Minister (For Justice) shall, with the sanction of the Minister for Finance, from time to time direct.

Section 46(2) of the same Act provides that every District Court Clerk shall be appointed by the Minister and shall (unless he is a pensionable officer) hold office at the will of and may be removed by the Minister.

Section 48(1) of the same Act provides that every District Court Clerk shall be assigned to such one or more District Court Areas as the Minister shall from time to time direct and shall have and exercise all such powers and authorities and perform and fulfil all such duties and functions in relation to the District Court in such District Court area or areas as shall from time to time be conferred or imposed on him by statute or rule of the Court.

Rule 91(2) of the District Court Rules, 1948, provides that where more than one Clerk is assigned to a Court Area then the Principal Clerk in such Court area or, in the Metropolitan District, the Chief Clerk, may make such division of duties among the Clerks assigned to such Court area or to the said District respectively as he thinks proper.

The Appellant contended as follows:—

1. It was a matter for the District Justice to make a finding as to whether, on Mr. O Murchu's evidence, Mr. Healy was a District Court Clerk assigned to the District Court Area of Naas. This was not something which could be determined by the expressed opinion of Mr. O Murchu.
2. Section 48(1) of the 1926 Act placed a mandatory obligation on the Minister for Justice to assign each person appointed by him as a District Court Clerk to at least one District Court area. There is no concept known to the law of mere "attachment" of a District Court Clerk to an area.
3. The only legal interpretation, therefore, of the position of Mr. Healy was that he, being admittedly a duly appointed District Court Clerk, had been assigned by the Minister to the District Court Area of Naas.

The Respondent contended:—

1. The provisions of Section 48(1) were not mandatory and the Minister had no obligation to assign each District Court Clerk to a specific area. A District Court Clerk, duly

appointed, could be used to assist under an assigned District Court Clerk.

2. The learned District Justice had no option but to find that Mr. Healy, as a matter of fact and law, was not "assigned" once the Chief Examiner of the Department of Justice so stated on evidence.

Accepting the contention made on behalf of the Appellant, Finlay P. expressed the opinion that the scheme of the 1926 Act and the appropriate District Court Rule was that each and every peson appointed as District Court Clerk must be assigned to at least one District. The practical consequences of the concept of "attachment" would create absurd anomalies. Persons holding the rank and office of District Court Clerk and involved in many of the duties, powers, functions and responsibilities imposed by statute on District Court Clerks would be acting without authority. Therefore, once uncontradicted evidence was placed before the learned District Justice that Mr. Healy was attached to and working in the District Court Area of Naas at the date on which he issued the Summonses, the proper legal interpretaiton was that he was "an assigned District Court Clerk".

HELD: There was no invalidity in the Summons by reason of its having been signed by Mr. Healy and the District Justice erred in law in striking out the Summons on the basis that he had no jurisdiction to hear it. Proceedings should be re-entered before the learned District Justice for continuances.

The Director of Public Prosecutions -v- Kevin O'Rourke – High Court (per Finlay P.), 25 July, 1983 – unreported.

George Bruen

FAMILY LAW

Claim by wife for share in family home.

After being transferred from Dublin to Cork in 1972, the husband sold the family home, realising £5,000, out of which £3,200 was paid in discharge of the mortgage on the house. There was a balance over of £1,800, and it was agreed that because the wife contributed one-third of the purchase price of the house, she was entitled to £600. She never received the money and allowed her husband use it.

The husband purchased a family home costing £9,000 in Cork and succeeded in getting his employers to take a mortgage for the full amount of the purchase money, thereby leaving the husband to pay the instalments due under the mortgage. He did not have to lay out any part of the purchase money. The £1,800 balance from the first home was used by the husband in furnishing and fitting the new home. The marriage later broke down. The wife claimed an interest in the family home. The High Court held that because the wife was entitled to one-third of the £1,800, she became entitled to one-third share in the furniture and fittings (including carpets) in the home.

The wife appealed. She claimed that the proper conclusion to be drawn from the use of her money in the home was that it gave her a one-third share in the house itself.

Henchy J. (Griffin J. and Hederman J. concurring) referred to the judgment of Kenny J. in *C. -v- C.* [1976] I.R. 254, and said that since that decision it had been judicially accepted that where the matrimonial home had been purchased in the name of the husband, and the wife had, either directly or indirectly, made contributions towards the purchase price or the discharge of mortgage instalments, the husband would be held to be a trustee for the wife of a share in the house roughly corresponding with the proportion of the purchase money represented by the wife's total contribution. Such a trust would be inferred when the wife's contribution was of such a size and kind as would justify the conclusion that the acquisition of the house was achieved by the joint efforts of the spouse.

When the wife's contribution had been indirect (such as by contributing, by means of her earnings, to a general family fund) the Courts would, in the absence of any express or implied agreement to the contrary, infer a trust in favour of the wife, on the ground that she had to that extent relieved the husband of the financial burden he incurred in purchasing the house.

Henchy J. was unable to accede to the proposition that the wife's £600 went into a family fund and that to that extent it eased the financial liability incurred by the husband in purchasing the house.

HELD: the wife's £600 was in no way applied to the purchase of the house. The true position was that found by Costello J., namely that the £600 was applied by the husband, not in acquiring the house, but as part of the £1,800 he spent on furniture and fittings. The expenditure by the husband of the £600 could not be said to have given the wife any beneficial interest in the house.

Dismissing the appeal, the Court held that the wife got a one-third share in the furniture and fittings (including carpets).

McC. -v- McC. – Supreme Court (per Henchy J., Griffin and Hederman J.), 29 March, 1984 – unreported.

Damian McHugh

CRIMINAL INJURIES — STATUTE OF LIMITATIONS

Delay in service of application to Circuit Court for compensation — Power of Circuit Court to extend the time prescribed by statute for making such application — Whether or not within the powers of the Circuit Court to extend the time when extension of same would be in contravention of the provisions of the Statute of Limitations Act, 1957

An application was made pursuant to the Local Government (Ireland) Act, 1898 and the Damage to Property Compensation Act, 1923, by Woodrow Packaging Limited for goods destroyed when a warehouse was destroyed by fire on 21 May, 1974. The Applicants were not the owners of the warehouse but had goods in the premises when it was destroyed and accordingly a preliminary notice of intention to apply for compensation was served in accordance with Order 52 of the Rules of the Circuit Court, 1950.

The Applicant decided to withhold proceeding with its claim pending determination of the application which had been made by the owners of the building. Ultimately a decree was granted in favour of the owners for compensation for the damage in Dublin Circuit Court on 5 December, 1980.

Once these matters had been determined the applicant applied on 31 January, 1982 to the Dublin Circuit Court by way of Notice of Motion claiming:—

A. An Order pursuant to Section 21(2) of the Damage to Property (Compensation) Act, 1923 and pursuant to Order 59 Rule 10 of the Rules of the Circuit Court extending the time within which the Applicant can apply to the Circuit Court for compensation for criminal injuries committed on 21 May, 1974.
B. An Order for the costs of the Motion.

The Judge extended the time as sought in the Notice of Motion to 31 January, 1983 and an appeal against that Order was made by the Respondent.

It is clear that it was the intention of the Applicant when serving its Notice of Motion to seek leave of the Court to extend the time prescribed by the Statute of Limitations, 1957 as the Rules of the Circuit Court only provide that the Preliminary Notice has to be served within seven days from the date of the commission of a criminal injury and do not apply any time limits for bringing an application to the Court for compensation for the criminal injury. The only rules of Court that apply in relation to such a Notice of Application are that it should be served at least 15 days before the date upon which the application is intended to be made in the case of applications in the Dublin Circuit Court area.

Section 11(1)(e) of the Statute of Limitations 1957 imposes a time limit of six years in relation to any cause of action accrued to actions to recover sums recoverable by virtue of any enactment (with exceptions which are not relevant to this case).

It was clear therefore that Section 11 of the Statute of Limitations required an application for compensation for criminal injury within six years unless that time could be extended by the Circuit Court.

The Applicants relied upon Section 21 of the Damage to Property (Compensation) Act, 1923 in support of their argument for an extension of time. That section repealed Section 137 of The Grand Jury (Ireland) Act, 1836 as and from 23 December, 1920.

Sub section 2 of section 21 provided

> "The powers of the Court or Judge under any rules of Court made whether before or after the passing of the Act in pursuance of Sub section (7) of the Section 5 of the Local Government (Ireland) Act, 1898 shall include and be deemed to have included as and from the 23rd December, 1920 power to extend or vary the time prescribed by any Statute or Statutory Rules for making an application for compensation for criminal injuries or for serving any Notice or for doing any other act or taking any proceedings in relation to the application in any cse where it appears to the Court or Judge that such extension or variation is just and reasonable for any cause whatsoever."

The power conferred by that Sub section is imported into the Circuit Court Rules by Order 52 Rule 10.

The Applicants in their arguments contended that under Section 21(2) of the Act of 1923 and Order 52 Rule 10 of the Rules of the Circuit Court the time limit of six years under Section 11 of Statute of Limitaitons 1957 could be extended by the Circuit Court Judge if he considered it just and reasonable for any cause whatsoever to do so.

In arriving at its decision the Court HELD:

A. The Applicants' contentions could only succeed if Section 21(2) of the Act of 1923 and Order 52 Rule 10 of the Circuit Court Rules were construed as giving power to extend the time prescribed by Statute subsequent in date to that Act or those Rules.

B. The Act of 1923 cannot be read as extending to Statutes which might be enacted in the future. The Court is satisfied that there was no reason why the legislature in 1923 would have concerned itself with powers to extend time limits which might be contained in future Statutes.

The Court therefore is satisfied that the power in the Act of 1923 applied only to extend the time prescribed in Statutes existing at the date of that Act. Similarly the power in Order 52 Rule 10 to extend the time limited by Statute is confined to Statutes pre-dating the Act of 1923 since that is the only Act enabling the Rule making Committee to make a rule under which the time fixed by Statute could be extended by the Court.

In view of the foregoing the Applicants' right to the claim for compensation for criminal injury became statute barred by the Statute of Limitations of 1957 after the expiration of six years from the date of the criminal injury and the application to the Circuit Court to extend the time was made outside that time limit and it was not within the powers of Court to extend the time for bringing an application for compensation so as to defeat the bar under the Statute of Limitations Act, 1957.

In The Matter of The Local Government (Ireland) Act, 1898 and In The Matter of the Damage to Property (Compensation) Act, 1923.

Woodrow Packaging Limited -v- Dublin Corporation - High Court (per McMahon J.), 26 July, 1983 - unreported.

Peter M. Lennon

LANDLORD AND TENANT

Section 35 Arbitration Act, 1954 — Special Case — 15 year rent reviews — "Loading" determined.

In 1967, the Claimants leased the office block 72-76 St. Stephen's Green, Dublin, to the Respondents for a term of 75 years with an annual rent of £70,000.00 for the first 15 years. The Rent Review Clause in the Lease commenced:—

> ". . . And it is hereby agreed and declared that on each fifteenth anniversary at the commencement of the term hereby granted the yearly rent hereby reserved shall be reviewed and that as and from the expiration of each such fifteen years the said yearly rent shall be the greater of the following, i.e. (I) the said sum of seventy thousand pounds or (II) the market rent having regard to the rental values then current for similar property let with vacant possession without a premium by a willing lessor to a willing lessee and subject to the provisions of this Lease".

The Clause continued with the usual provision for the appointment of an Arbitrator if agreement could not be reached between the parties.

An Arbitrator was appointed when the first Rent Review fell to be made in January 1982. At the request of the parties the Arbitrator stated a Special Case for the determination of the High Court pursuant to Section 35 of the 1954 Arbitration Act. Prior to the Arbitration the Valuers on each side had agreed that the sum of £570,187.00 represented the market rent which would be fixed for a letting of this office block as of January 1982.

However, the Claimants contended:

(a) That the Rent Review Clause required that the rent to be fixed as of January 1982 be fixed by reference to the market rent which would be payable as between a willing Lessor and a willing Lessee of similar properties let with vacant possession without a premium subject to the provisions of the said Lease and that, for a period in excess of five years between Rent Review Dates a willing Landlord would demand and a willing Lessee would be willing to pay a rent greater than that which would be fixed for a five year period.

(b) That the Clause both required and permitted the fixing of a rent in excess of this sum so as to reflect the willingness of a Lessor and Lessee to postpone a Rent Review from 5 to 15 years.

The Respondents contended that:

(a) Upon a correct interpretation of the Clause the only rent which could be fixed was such sum as represented the market rent for the said office block in January 1982, namely, £570,187.00, and

(b) That the Clause did not permit the incorporation of any device or mechanism which would bring about indirectly a review of the rent more frequently than 15 years or otherwise increase the sum to be fixed for the yearly rent beyond that which would otherwise be the market rent for the property.

The Arbitrator's question of law for the opinion of the Court was worded:

> ". . . am I legally entitled upon a correct construction of the Rent Review Clause contained in the said Lease, to increase the said sum of £570,187.00 so as to endeavour insofar as may be possible upon any evidence which may be adduced to me, to take into account and reflect the fact that the Lease provides for Rent Reviews every 15 years as opposed to every 5 years?"

The Court answered as follows:—

> "Yes, but on the assumption that the said sum would be increased by the presence of a Clause providing for Rent Reviews every 15 years as opposed to a Clause providing for such Reviews at some lesser interval than 15 years".

Colmstock Properties Limited -v- The Commissioners of Public Works in Ireland - High Court (per Keane J.), 18 November, 1983 - unreported.

Leo McCarthy

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