GAZETTE

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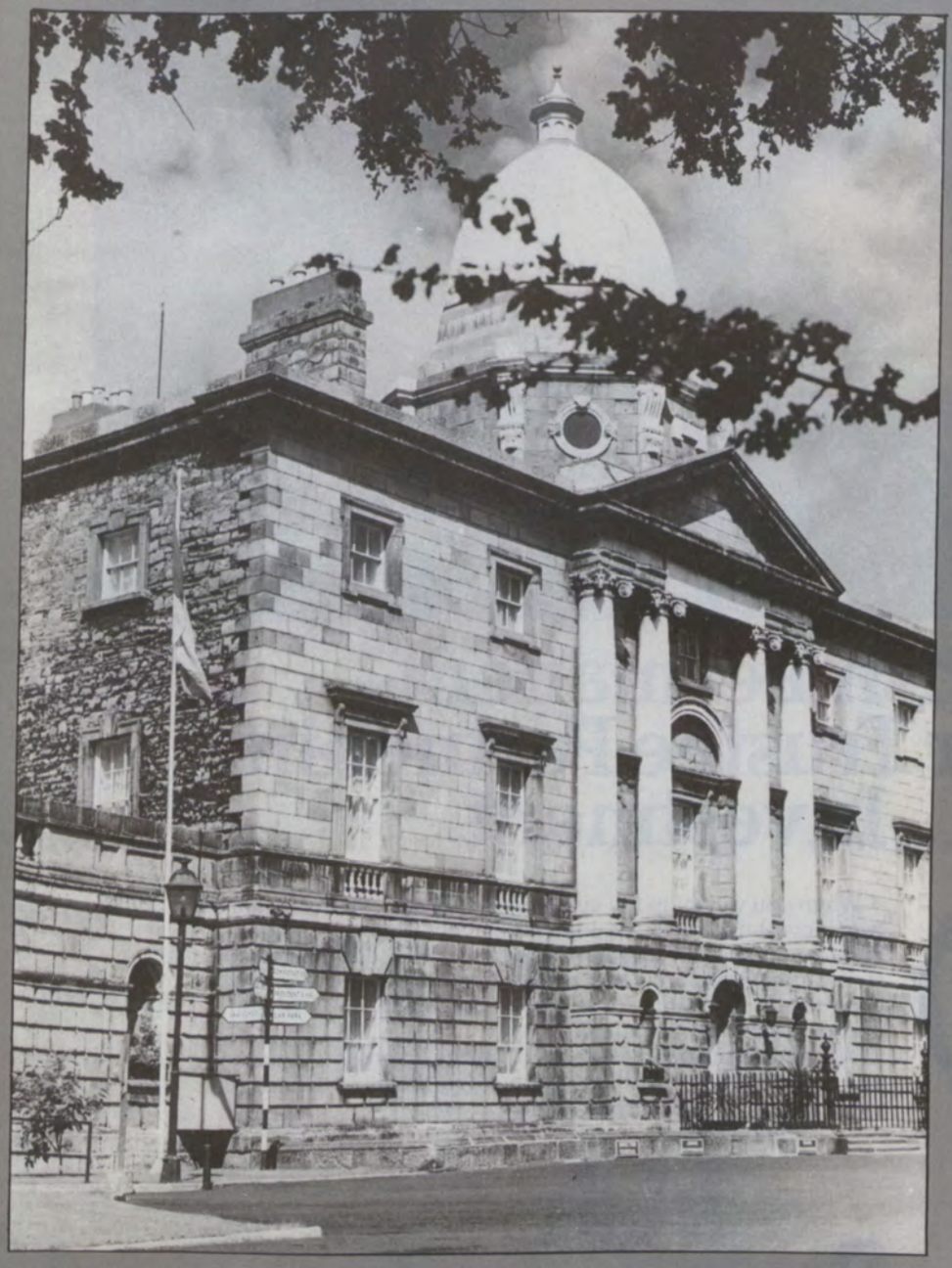

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Compiled by Julitta Clancy B.A., Dip. Archival Studies

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Executive Editor:
Mary Buckley

Editorial Board:
Charles R. M. Meredith, Chairman
John F. Buckley
Gary Byrne
Daire Murphy
Maxwell Sweeney

Advertising:
Liam O hOisin. Telephone: 305236
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Viewpoint

PIRATE RADIOS

Hopefully, the recently introduced Sound Broadcasting Bill and Broadcasting and Wireless Telegraphy Bill will reach the statute book with reasonable promptitude.

The Sound Broadcasting Bill, which provides for the establishment of a system of local radio stations, is not without its defects. The previous government's plans for local radio appear to have foundered on the Labour Party's insistence on RTE having a dominant part in local broadcasting. The present Bill and the Minister's comments on it suggest that he may be about to hoist himself on an equally ill-aimed petard – the complete exclusion of RTE. This would surely be as mistaken as the earlier proposal. RTE has served this country well over the years – it gets tired and middle aged from time to time and needs rejuvenation – but its standards are high and the broadcasters it has trained can hold their own in any company.

In his speech on the second stage of the Sound Broadcasting Bill, the Minister indicated that he proposed to amend a provision of the Bill which had drawn the greatest criticism when first announced, namely that the Minister appeared to be reserving the power to over-ride the views of the Advisory Committee which is to be established to monitor the applications for broadcasting licences. The amendment will provide that the Minister must accept the recommendation of the Advisory Committee.

Unfortunately, the Minister has said nothing about the other major complaint which has been made, namely, that those who have been involved in running pirate radio stations are not to be proscribed from receiving licences.

There is no area of law enforcement in which various governments have been so lax as in the area of pirate broadcasting. It has never been explained clearly what were the great defects in the previous legislation which prevented the authorities from successfully prosecuting operators of pirate radio stations. Neither was it ever made clear why other methods, other than direct prosecution, could not have been used to attack these stations. Not alone that, but there are suggestions that some of these stations may in fact have received grants from local or semi-state sources. It also appears that advertisers may have been able to treat the costs of their advertising as legitimate expenses when compiling their tax returns. If the activity of pirate broadcasting was illegal, then such illegality must surely taint all transactions directly connected with it. It may not be too late for the Revenue authorities to take an appropriate view of such advertisers and act accordingly*.

Only by inserting a provision in the Bill which will prevent the Advisory Committee from considering applications from any persons who were involved in the management and control of pirate radio stations can the Oireachtas regain any credibility from the State in this area.

** Not only PAYE payers, but all tax payers have a grievance here.* □

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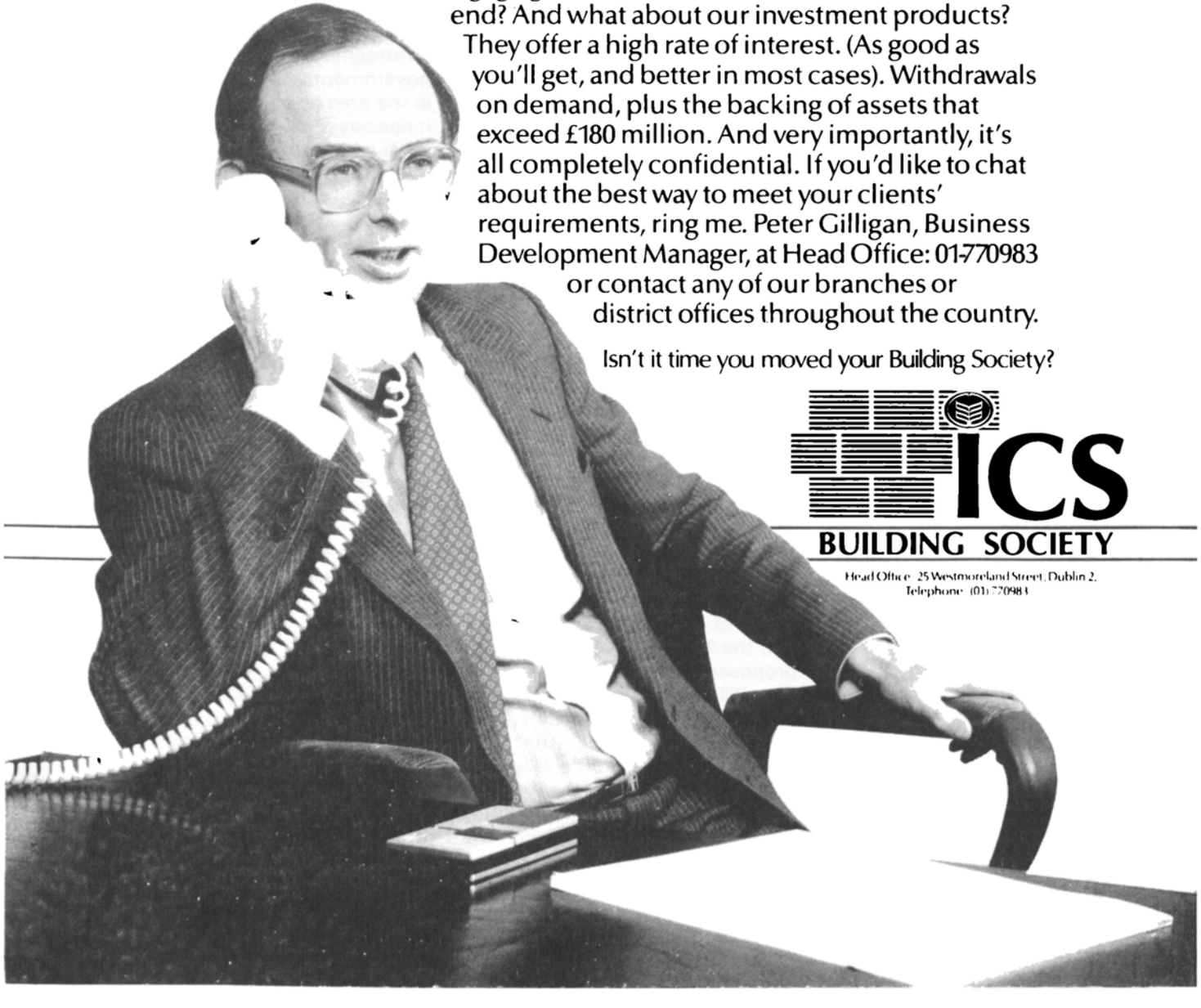

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Inheritance Tax on Discretionary Trusts

Part 2

S.103(1) FA 1986

S.103(1) FA 1986 imposes an annual "inheritance tax" (in reality an annual wealth tax) on property subject on each 5th April to a "chargeable discretionary trust". The annual "inheritance tax" so payable is levied at a flat rate of 1%: s.106.

The expression "chargeable discretionary trust" is defined in s.102 as a discretionary trust in relation to which (a) the "disponer" is dead, and (b) there are no "principal objects". In determining whether a particular trust is a "chargeable discretionary trust" as defined in s.102 on a particular 5th April, one is thus referred back once again to the question who, in relation to the trust, is the "disponer"? A penalty of £1,000 or double the inheritance tax payable, encourages one to arrive at the correct answer: s.108.

A measure of relief is afforded by s.103(4) FA 1986 which provides that the annual "inheritance tax" of 1% payable on each 5th April is not to be levied if property subject to that tax is also subject "on that same date" (i.e. on the 5th April in any particular year) or "within the year prior to that date" to the once-off inheritance tax of 3% payable by reason of s.106(1) FA 1984.

Example (6)

In 1960 A settles property on discretionary trusts for the benefit of his three children, B, C, and D. B attains the age of 25 years in 1974, C in 1976 and D in 1979. On 1st February 1986 A dies and the trust property becomes subject to the once-off inheritance tax of 3% imposed by s.106(1) (b) FA 1984. The additional annual inheritance tax of 1% imposed by s.103(1) FA 1986 will not be payable on 5th April 1986.

Identifying the "disponer"

It will be apparent that the crucial question in relation to both the once-off inheritance tax of 3% imposed by s.106(1) FA 1984 and the annual inheritance tax of 1% imposed by s.103(1) FA 1986 is who is the "disponer" in relation to the discretionary trust in question?" Until this has been answered one cannot determine who the "principal objects" are, whether the disponer is dead, and whether the trust is a "chargeable discretionary trust" as defined in s.102 FA 1986. In order to answer this question two further questions must be asked:-

(A) "Under" (or "in consequence of") which "disposition" did the property become subject to the trust?

by
CHARLES HACCIUS
B.L.

(B) Who "provided" the property "for the purposes of" that "disposition"?

To answer (A) requires all the skill and subtlety of a logician trained in the arts of medieval disputation. In Example (4) above, for instance, it is arguable that the "disposition" "under" which the property (i.e. the 100 shares of £1 in the company hiring out A's services to the film studio) became subject to the trust was the trust instrument itself. On the other hand, one could argue with equal force that the "disposition" "under" which the property became subject to the trust was the "arrangement" of which the trust was merely one constituent element.

Such authority as exists suggests that regard must be had to the *"causa proxima"* rather than to the *"causa remota"*: *A. G -v- Upton* LR 1 Ex 224, 231 per Bramwell B. In *Parr -v- A. - G* [1926] AC 239, for example, property was settled to the use of A for life with remainder to A's first and other sons successively in tail male. A and his eldest son B disentailed and resettled the property upon trust for A for life "by way of restoration and confirmation" of his life interest under the original settlement, with remainder to B for life, with further

Submission of Articles for the Gazette

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

Contributions should be sent to:

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remainders over. It was held that the "disposition" "under" which B became entitled on A's death was not the original settlement but the resettlement.

To answer (B) is less difficult. Once the "disposition" "under" (or "in consequence of") which the property became subject to the trust has been identified, the "disponer" in relation to that "disposition" is usually not hard to find.

In Example (1), for instance, the "disposition" "under" which the property became subject to the trust was undeniably the trust instrument itself, in relation to which A and not B was the "disponer".

In Example (2) the "disposition" "under" which the property (the policy) became subject to the trust was the assignment. The person who "provided" the policy "for the purposes" of this assignment was H and not C.

In Example (3), on the other hand, the "disposition" "under" which the property (i.e. the £30,000 settled on discretionary trusts for the benefit of Mrs. D and her children) became subject to the trust was the deed of family arrangement. One could argue, as the court in fact decided, that the *fons et origo* of the trust property was Mrs. D's claim and it was therefore she and not A who "provided" the property "for the purposes of" the disposition. On the other hand one could argue equally well, on the authority of *A. G -v- Biggs* [1907] 2 IR 400, that B "provided" the property, whatever his motives may have been for entering into the deed, or even that A "provided" the property as the intestate out of whose estate the settlement was made.

In Example (4) the "disponer" could be B or A, depending on whether the "disposition" "under" which the property (the 100 shares of £1 in the company hiring out A's services to the film studio) was the trust instrument itself or the "arrangement" of which the trust was a constituent part.

In *A. G -v- Floyer* 9 HLC 477 Lord Cranworth suggested (489) that when ascertaining the "predecessor" for the purposes of the former succession duty one should inquire "who is the conveying party out of whose estate the interest in question has been derived?" It is submitted that this test is as good as any when determining who "provided" the property "for the purposes of" the "disposition".

More than one "disponer"

S.2(1) CATA 1976 provides that "where more than one person provided the property each shall be deemed to be a disponer to the extent that he so provided the property". This corresponds to s.13 SDA 1853 in the former succession duty legislation, except that the disponers are treated as being such to the extent that each provides the property comprised in the joint disposition instead of "in equal proportions".

The combined effect of s.106(1) FA 1984, s.103(1) FA 1986 and the definition of "disponer" in S.2(1) CATA 1976 would thus appear to be such that the discretionary trust in question is notionally divided into two or more trusts, the property subject to each having a different "disponer". It is difficult to see how effect can be given otherwise to the words referred to above in the definition of "disponer" in s.2(1) CATA 1976.

Example (7)

Property is held upon trust for A, contingently on his surviving to a specified date, and if he does not survive until that date, upon trust for B. A and B jointly settle the property upon discretionary trusts. A and B are both "disponers" in relation to the property subject to the discretionary trust, proportionately to the values of their respective interests under the original settlement, calculated on an actuarial basis: *in re Drake's Settlement Trusts* [1938] Ch. 133.

"Property"

"Property", as used in the CATA 1976, is defined in s.2(1) CATA 1976 to "include" "rights" and "interests" "of any description" but is otherwise undefined. Use of the word "includes" in the definition suggests that its purpose is to expand the meaning of the word beyond its "natural import": *Dilworth -v- C of S* [1889] AC 99, 105 per Lord Watson. The "natural import" of the word "property" is "that which belongs to a person exclusive of others and which can be the subject of a bargain and sale to another": *Potter -v- IRC* 10 Ex. 147, 156 per Pollock CB.

As used in s.106(1) FA 1984 and s.103(1) FA 1986 the word "property" is subject to a further restriction in that neither (a) "interests in expectancy" nor (b) "interests in a policy of assurance upon human life" are to be treated as such: s.106(3) FA 1984 and s.103(1) FA 1986: "Interests in expectancy" are defined in s.2(1) CATA 1976 to "include" an "estate in remainder or reversion and every other future interest, whether vested or contingent". Wide though the definition undoubtedly is, it does not extend to interests which are vested in possession but subject to defeasance. "A distinction has to be drawn between the exercise of a power to terminate a present right to present enjoyment and the exercise of a power which prevents a present right of present enjoyment arising": *Pearson -v- IRC* [1980] STC 318, 325 per Viscount Dilhorne. An interest in property which is vested in possession but subject to defeasance is therefore "property" for the purposes of s.106(1) FA 1984 and s.103(1) FA 1986: *in re Kilpatrick's Polcies Trusts* [1966] Ch.730. An interest in property which is contingent on the attainment of a specified age, on

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the other hand, is an "interest in expectancy" as defined and is accordingly not "property" for the purposes of the once-off inheritance tax of 3% imposed by s.103(1) FA 1986: s.106(3) FA 1984 and s.103(3) FA 1986.

"Policies of assurance upon human life" are not property to which the holder becomes "entitled in possession" until the policy either "matures" or is "surrendered for a consideration in money or money's worth: s.32(1) CATA 1976.

It follows from paras. (a) and (b) of s.106(3) FA 1984 and s.103(3) FA 1986 that when the interests referred to in para. (a) cease to be "interests in expectency" and the policies of assurance upon human life referred to in para. (b) either "mature" or are "surrendered" as mentioned in s.32(1) CATA 1976 they then become "property" for the purposes of s.106(1) and s.103(1). This may well result in an immediate liability to inheritance tax at 3% by reason of s.106(1) (a) FA 1986 if at that point the "disponer" in relation to the discretionary trust is dead and there are no "principal objects" under the age of 25 years (see Example (9) below).

"Discretionary Trusts"

This expression has been amended by s.105 FA 1984 to include not only conventional discretionary trusts, under which trusts or powers relating to the distribution of trust property are vested in trustees or others exercisable at their discretion, but also trusts under which property is held upon trust to accumulate the trust income as an addition to the trust property.

The new definition is not as bizarre as might appear at first glance. In Ireland, where neither the Accummulation Act 1800 nor its modern equivalent s.166(1) Law of Property Act 1925 applies, trust income can normally be accumulated throughout the entire trust period of a life in being and 21 years thereafter. The former definition of "discretionary trust" in s.2(1) CATA 1976 did not extend to an accumulation trust, and such a trust accordingly enabled the vesting in possession of trust property to be postponed until the end of the trust period in the same way as a conventional discretionary trust. The new definition extends the provisions of s.106(1) FA 1984 and s.103(1) FA 1986 to accumulation trusts as well as to conventional discretionary trusts.

Valuation Date

The date upon which property subject to a discretionary trust is to be valued for the purposes of the once-off inheritance tax of 3% payable by reason of s.106(1) FA 1984 is defined in s.107(b) to be the later of:-

(i) the "date of the inheritance", as determined by whichever is appropriate of paras. (a), (b) or (c) of s.106(1) FA 1984, or

(ii) the "valuation date" of the inheritance deemed under s.106(1) FA 1984 to have been taken by the trust itself, ascertained in accordance with s.21 CATA 1976.

In most cases, the appropriate date will be "the date of the inheritance" determined by reference to s.106(1) FA 1986. The operation of s.107(b) is best illustrated by specific examples:-

Example (8)

In 1960 A settles property upon discretionary trusts for the benefit

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of his three children B, C and D. B attains the age of 25 years in 1974, C in 1976 and D in 1979. In 1987 A dies. The date of his death is "the date of the inheritance" and the appropriate valuation date: s.106(1) (b) and s.107(b)(i) FA 1984.

Example (9)

In 1970 H effects a policy on the joint lives of himself and his wife W which he settles on discretionary terms for the benefit of his three children X, Y and Z, all of whom are then over the age of 25 years. H dies in 1980 and W in 1987. The policy does not "mature" as mentioned in s.32(1) CATA 1976 until the death in 1987 of the survivor of H and W, whereupon the proceeds of the policy become "property" for the purposes of the one-off inheritance tax of 3% payable by reason of s.106(1) FA 1984. The "date" of the inheritance" in relation to the proceeds is the date of W's (not H's) death, and this is the appropriate valuation date: s.106(1)(a) and s.107(b)(i) FA 1984.

Example (10)

T dies in 1980 leaving his property by will upon discretionary trusts for the benefit of his three children, A, B and C, of whom C is the only one then under the age of 25 years. The administration of T's estate is concluded on 31st March 1982 and on 1st May 1985 C attains the age of 25 years. The administration of T's estate is concluded on 31st March 1982 and on 1st May 1985 C attains the age of 25 years. The date upon which he does so is "the date of the inheritance" and the appropriate valuation date: s.106(1)(c) and s.107(b)(i) FA 1986.

Example (11)

Facts as in Example (10) above, except that the administration of T's estate is not concluded until 31st March 1987, by which time C has attained the age of 25 years, upon which date the trust is deemed under s.106(1) to have becomed beneficially entitled in possession to the trust property and to have to have taken an inheritance. However, the "delivery payment or other satisfaction or discharge" to the successor (i.e. to the trust: s.106(1) FA 1984) "of the subject matter of the inheritance" does not take place until 31st March 1987: s.21(4)(c) CATA 1976. This date, and not 1st May 1985, is the appropriate valuation date: s.107(b)(ii) FA 1984.

The appropriate valuation date in relation to the inheritance tax of 1% levied annually on each 5th April by reason of s.103(1) FA 1986 is normally that 5th April: s;104(b)(i) FA 1986.[a]

There is provision, based on s.12 Wealth Tax Act 1975, for the valuation of property on a particular 5th April to be agreed with the Revenue, and for the value so agreed to hold good for the 5th April in the next two years following: s.107(1) 1986.

Accountability

In the normal course of events, the party primarily accountable for inheritance tax is the "successor" himself: s.35(1)(a) CATA 1976. In the context of the once-off inheritance tax of 3% imposed by s.106(1) FA 1984 and the annual inheritance tax of 1% imposed by s.103(1) FA 1986 a kind of fiscal Frankenstein monster is deemed to be the successor, made up out of the trust itself together with its trustees.[b] The Irish Parliamentary Draftsman, rightly suspecting that his statutory creation would be as allergic to the payment of inheritance tax as its literary predecessor, wisely provided in s.107(c) FA 1984 and s.104(c) FA 1986 that the trustees at the date of the inheritance[c] were to be primarily accountable for any inheritance tax payable under the abovementioned provisions.

As a precautionary measure, he went on to provide that appointees of the trust property were also to be accountable, if the appointment took place subsequently to the date upon which the tax became payable: s.107(c) FA 1984.

Returns

The trustees are required by s.107(e) FA 1984 and s.104(e) FA 1986 to file a return of the trust property within three months of the appropriate valuation date. In the case of the annual inheritance tax of 1% imposed by s.103(1) FA 1984 they are also required to estimate the inheritance tax payable and to pay the tax so estimated over to the Accountant-General when filing the return: s.104(e)(ii) and (iii) FA 1986.

Payment

The once-off inheritance tax of 3% imposed by s.106(1) FA 1984 normally becomes payable on the valuation date, as defined in s.107(b) FA 1984: s.41(1) CATA 1976, as modified for the purpose of the tax by s.107(f).

The annual inheritance tax of 1% imposed by s.103(1) FA 1986 likewise becomes payable on the valuation date, defined in this context as 5th April in each year in which the tax becomes payable: s.41(1) CATA 1976, as modified for the purposes of the tax by s.104(f) FA 1986 and s.102 FA 1986. As mentioned above, a payment on account of the tax payable is required to be made by the trustees when filing the requisite annual return: s.104(e)(ii) and (iii) FA 1986.

Charge for inheritance tax

The provisions of s.107 FA 1984 and s.104 FA 1986 modify or supplant altogether the normal provisions in s.35(1), s.36(2) (3) (4) and (5) and s.45 CATA 1976 regarding accountability for, returns relating to, and payment of inheritance tax. They do not affect the provisions of s.47 and s.48 CATA 1976, which provide that inheritance tax is to be a charge on property comprised in an inheritance and authorise the Revenue Commissioners to issue a certificate of discharge in relation to such property. The provisions accordingly apply to trust property subject to the once-off inheritance tax of 3% imposed by s.106(1) FA 1984 and to the annual inheritance tax of 1% imposed by s.104(1) FA 1986 in the same way as they apply to inheritance tax payable otherwise than under these sections.

Exemptions

S.108 FA 1984 and s.105 FA 1986 exempt a number of trusts which would otherwise be "discretionary trusts" as defined in s.105 FA 1984 and accordingly subject to the once-off inheritance tax of 3% imposed by s.106(1) FA 1984 and the annual inheritance tax of 1% imposed by s.103(1) FA 1986. The trusts so exempted include charitable trusts, trusts for the upkeep of houses and gardens of national scientific historic or artistic interest and last, but by no means least, trusts for the benefit of individuals incapable of managing

LAW SOCIETY ANNUAL CONFERENCE 5—8 May 1988

This year's Law Society Conference, which will be held in Jury's Hotel, Cork, from May 5 to May 8 inclusive, will have as its centrepiece presentations by David Andrews entitled "Making the Law Office Work" and "Practice Development".

David Andrews is a former Chairman of the International Bar Association's General Practice Section and served as Chairman of the Section's Committee on Law Office Management and Technology. A former Managing Partner of a major London practice, he is currently the principal of the David Andrews Partnership which operates a consultancy in association with the well-known American firm of Altman & Weil.

Further details of the Conference will be circulated to members shortly.

their own affairs by reason of "age or improvidence, or of physical mental or legal incapacity": s.108(d) FA 1984.

S.65 FA 1985 exempts two further categories of trust property. These are (a) trust property subject to a discretionary trust on the termination of which the State will take a gift or an inheritance, and (b) a sum which is the subject matter of an inheritance deemed to be taken by the trustees of a discretionary trust by reason of s.31 CATA 1976.

The first of these is relatively straightforward. An obvious example would be a bequest to the State, subject to a discretionary trust to maintain the testator's widow during her lifetime.

The second is more obscure. It appears to relate to property which, while not being actual trust property, is nevertheless property of which the trustees of a discretionary trust have the "use occupation or enjoyment" otherwise than for "full consideration in money or money's worth" within the meaning of s.31(1) CATA 1976.

In the normal course of events, the trustees of a discretionary trust favoured with such "use occupation or enjoyment" would take no gift or inheritance, neither they nor any of the potential objects of the trust being "beneficially entitled in possession" within the meaning of s.5(1) or s.11(1) CATA 1976.

Why the enactment of s.106(1) FA 1984 and s. 103(1) FA 1986 should affect the position is not clear[d]. The notional "sum" brought into being by s.31(3) CATA 1976 has no real existence and is therefore incapable of becoming "subject to a discretionary trust" within the meaning of s.106(1) FA 1984 and s.103(1) FA 1986. This essential pre-condition being absent, it follows that the "sum" would not be subject either to the once-off inheritance tax of 3% imposed by s.106(1) FA 1984 or to the annual inheritance tax of 1% imposed by s.103(1) FA 1986. If this is so, the exemption in s.65(b) FA 1985 would appear to be unnecessary.

Conclusion

It is always tempting to denounce the iniquities and imperfections of new fiscal legislation. It is a temptation which the writer proposes to resist in the present instance and content himself with pointing out, should such comment be necessary, that the new legislation is a minefield, and doubly[e] so with the introduction of the stringent self-assessment provisions in s.104(e) FA 1986. The case for the careful administration of discretionary trusts, and their regular review against an increasingly hostile fiscal background, is plain for all to see.

FOOTNOTES

(a) To this there is an unimportant exception in s.104(b)(ii). Those interested are referred to the Act.

(b) ". . . as if the trust and the trustees as such for the time being of the trust were together a person . . .": s.106(1) FA 1984 and s.103(1) FA 1986.

(c) Subsequently appointed trustees are likewise primarily accountable: s. 107(1) FA 1984.

(d) At any rate, to the writer, and to those of his colleagues with whom he has discussed the paragraph.

(e) Literally. See s.108(b) FA 1986.

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(Supreme Ct. Office).

Practice Direction Common Law Motions

Where the Court on a motion for judgment in default of Defence in actions claiming unliquidated damages in tort or contract makes an Order on consent or otherwise extending the time for delivery of Defence the applicant may also request the Court to adjourn the motion generally with liberty to re-enter.

If no Defence is delivered within the time fixed (or other further time agreed between the parties) the motion may be brought before the Court on service of Notice of re-entry and lodgment of a copy thereof and of the original Notice and Order in the Central Office without the necessity of complying again with the provisions of Order 27 r. 9(1) and (2) of the Rules of the Superior Courts. □

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LAW SOCIETY SYMPOSIUM

Sports Injuries and the Law

The above Symposium will take place at Blackhall Place, between 7.30—10.00p.m. on WEDNESDAY, 23rd MARCH 1988.

A panel of distinguished speakers is being engaged, and it is hoped that the Symposium will be opened by the Minister for Youth and Sport, Mr. Frank Fahy, T.D.

Members of the Profession who wish to attend this Symposium are asked to write to:
Mr. C. Mahon,
Director Professional Services,
The Law Society, Blackhall Place, Dublin 7.

From the President

Everything must change . . . including this Profession

It seems to me that there are two areas in which not only must we change but in which we must be seen to change.

The first of these is the image of the profession in the eyes of the public, and the second is the improvement of the service which we must give to our clients (to which I will return later).

It is a curious fact that, whereas the individual solicitor is seen in a favourable light by his client, (as has been shown in our surveys), the profession as a whole is seen in an unfavourable light in the eyes of the public.

The most usual areas of dissatisfaction can be expressed as follows:—

"It costs too much."

"It takes too long."

The client rarely appreciates the complexity of a particular transaction, or the delay which can occur through circumstances outside a solicitor's control. Quite clearly, the profession has failed to communicate with our clients in these matters, and that is a very serious fault. I see two questions which should be asked and answered at every initial interview:

(1) "How much is it going to cost?"

(2) "How long will it take?"

The response of the solicitor to these two questions means that the client is going away from the initial interview informed on these two important matters.

Quite apart from this, there must also be a major campaign to give the public information on what a solicitor does and the services we offer to the public. Clearly, the Law Society must give a lead in this matter.

However, in the consumer society in which we now live, the public must realize, through us, that any complaints which they may have are being dealt with in a fair and efficient manner. The public tends to view solicitors dealing with solicitors' matters with suspicion, and the Law Society has already suggested to the Government that it welcomes lay representation on some of our committees, more particularly the Disciplinary Committee. It may even be necessary to appoint someone, like a lay ombudsman in legal affairs, to whom the public could have easy access, as a further means of increasing public confidence in our profession.

As I said at the outset, all this means change. We must accept the challenge which it brings and find the correct answers. Your Council will be considering such matters in the course of the year. It is vitally important, in the future interests of the public and the profession that you, the members, contribute to the debate.

Accordingly, I invite you the members to write to me. This is again an exercise in dialogue and communication which I am more than anxious to improve during my year of office. □

Thomas D. Shaw
President

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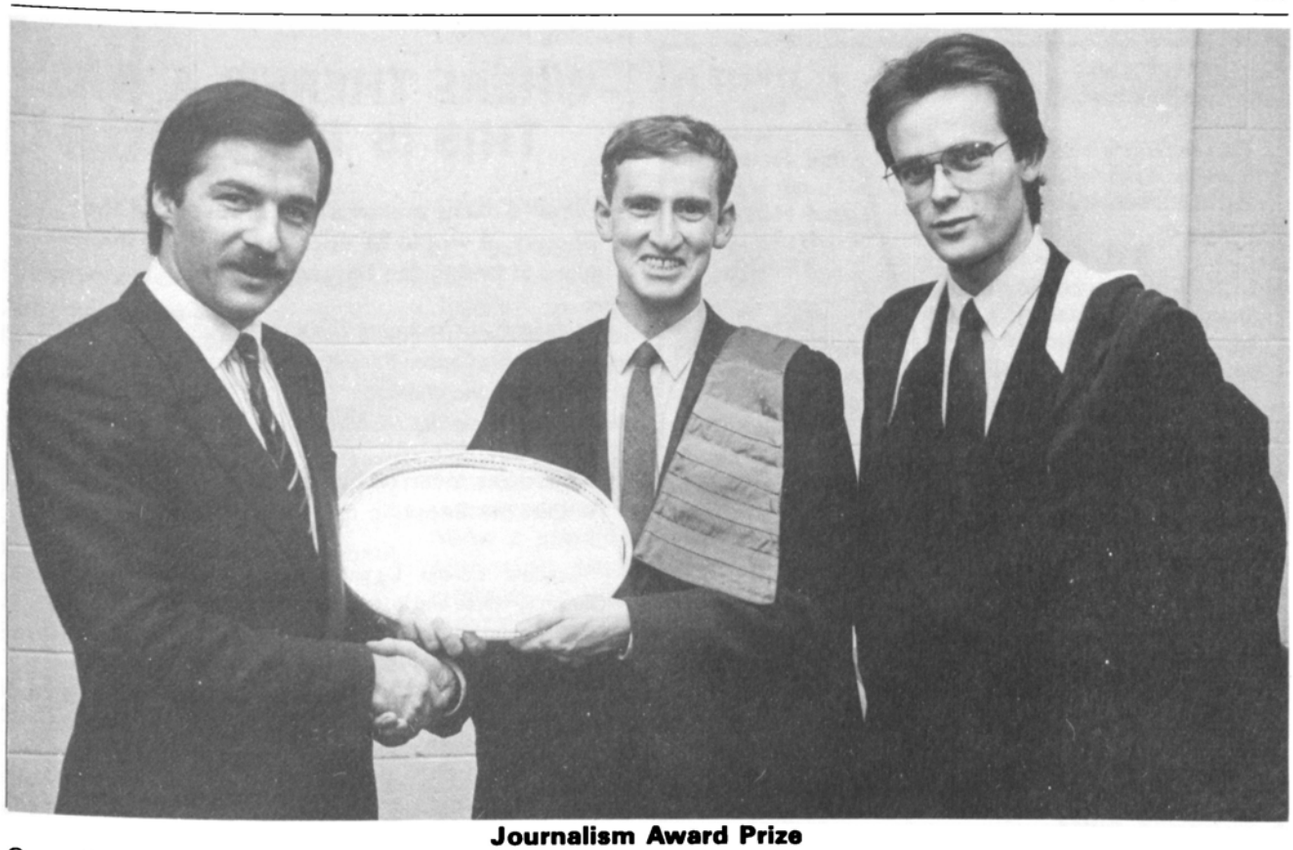

Journalism Award Prize

Gerry Griffin, Law Society; Walter Kilroy, recipient of Award for Best Essay on a legal topic; Raymond Byrne, Lecturer in Law, N.I.H.E., Dublin. Mr. Kilroy's Essay was entitled "DATA PROTECTION LEGISLATION" and was published in the October 1987 Gazette.

(Left to right) Michael Kennedy, Customer Services Executive, A.I.B., Padraig Flynn, T.D., Minister for the Environment, Michael Greene, Director, C.I.F., and Brendan McDonnell, Senior Partner, P. C. Moore & Co., nominated by the Law Society at the seminar arranged by the Construction Industry Federation on "Mortgage Finance — Facilitating the Prospective Buyer".

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Professor Richard Woulfe,
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ARTICLES OF ASSOCIATION PUBLIC LIMITED COMPANIES

The Company Law Committee has drafted a full set of Articles for use by Public Limited Companies only. This is available from the Law Society at a cost of £2.00 inclusive of postage.

It is hoped that a full set of Articles will be available soon for use by Private Limited Companies.

Enquiries should be directed to Anna Hegarty, Secretary of the Company Law Committee.

Dail Debates

Solicitors Acts, 1954–60

Question Time – 10th November 1987

In reply to questions raised by Ms. Quill and Mr. J. Higgins the Minister for Justice (Mr. Collins) said:–

"A review of the Solicitors Acts 1954–60 has been almost finalised in my Department and I hope to be in a position to submit comprehensive proposals for amending legislation to the Government very shortly.

The proposals will take account of the recommendations of the Restrictive Practices Commission in the report of their inquiry into the effects on competition of the restrictions on conveyancing and the restrictions on advertising by solicitors, which was completed in 1982."

In a supplementary question Ms. Harney T.D. asked "Would he (the Minister) agree that the introduction of advertising will greatly reduce fees and is he aware that this is now the norm in the United Kingdom where it has resulted in a decrease of 9 per cent in conveyancing fees during the past 12 months? Would he further agree that if solicitors, accountants and perhaps auctioneers could pool their resources and act jointly together, obviously, in the interest of the client, it would be cheaper, more efficient and better for the companies concerned?"

Mr. Collins replied "I would like to assure the Deputy that all the matters raised by her have been taken into consideration and that my views will be conveyed to the Government. The decision of the Government on the issue in question will be announced as soon as a decision is arrived at."

Other supplementary questions were raised by Mr. McCartan, Mr. McDowell, Mr. Taylor, Mr. J. Burton and Mr. T. Fitzpatrick. In the course of his replies Mr. Collins emphasised that the proposed legislation would be available "very shortly". He went on to say "The review of the Acts has been almost finalised and will be given priority by the Government as soon as I go to them with recommendations."

Civil Legal Aid Scheme

On the same date Mr. Mervyn Taylor asked the Minister for Justice to make a statement regarding the operation of the Civil Legal Aid Scheme indicating whether, in the Minister's opinion, it provided an adequate system to aid people who could not afford recourse to the law from their own resources and, if not, if he would make a statement regarding the extension to the scheme he intended to introduce in 1988 in order that Ireland would fully meet its obligations under the Human Rights Convention.

In his reply the Minister indicated that he was aware that the Legal Aid Board considered that additional law centres were needed but that there was no realistic prospect that the additional resources that would be required for any further expansion of services under the Scheme could be provided at present due to the critical position of the public finances. The estimates allocation for 1988 for Civil Legal Aid had no provision for an expansion of services.

In a supplementary question Mr. Taylor asked what the Government's position was, so far as their responsibilities under the Human Rights Convention were concerned, and in his reply the Minister stated that the European Court in the *Airey* case of 1979 did not decide that Ireland was in contravention of the Convention because the scheme of Civil Legal Aid and Advice was not in existence at the time. Legal aid as such was not the issue and the Court had already ruled that there was no direct right to legal aid by virtue of the provisions of the Convention. The Minister added that he could understand that there was a need for an expansion of the service as everybody in the House accepted, but as of now, having regard to the financial constraints within which he had to operate, there was no possibility in the immediate future of expanding the service. □

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Expert Systems and Communications

A Report on the recent Technology Committee Seminar, held at Tulfarris House, Blessington, Co. Wicklow, on 18—20 September, 1987.

It has been one of the guiding lights for the Technology Committee since its foundation in 1983 to encourage practitioners to invest in and make full use of word processing equipment. The Committee has always followed the axiom, by now widely accepted, that every solicitor's practice no matter how big or how small can benefit from the introduction of word processing. Word processing has now been available for well over a decade and, like most facets of the computer industry, the products have not stood still but have developed.

Starting with straight forward text manipulation and reproduction, word processing systems have developed to include the automatic production of particular documents in sequence at pre-determined intervals (known as word processor based document production). Comprehensive support systems have evolved from document production systems which on the happening of pre-determined events, produce documents, maintain diaries and, where appropriate, maintain financial accounts of transactions. These support systems have become particularly popular in the area of debt collection and are making encroachments in the areas of conveyancing and more general litigation. A number of Irish firms have invested heavily, both in terms of time and money in the development and implementation of these systems.

The Technology Committee reviews a wide range of journals and other sources of news, both from sister Societies in neighbouring jurisdictions and the United States together with a range of computer journals. From this background information we became aware, some time ago, that attempts were being made to introduce so-called (limited intelligence) expert systems both in the field of legal practice and elsewhere. While the underlying programmes which make these systems possible had been freely available for less than a year and therefore a limited amount of work has been done upon them, it was

by
DAVID BEATTIE
Solicitor

felt that it would be useful for the profession (for once) to consider the possible scope of these systems (and attempting to influence their development should we feel them to have any useful application) before the computer companies or software houses produced them as a *fait accompli*. Through close liaison, with Society for Computers and Law which is an internationally spread society based in the UK, the Committee had access to some of the leading European knowledge on this topic. A seminar was organised at Tulfarris House, Blessington, County Wicklow to debate the merits of expert systems and as a secondary topic, although for many people it proved just as interesting, communications between word processors and computers based in different offices. The discussion on expert systems was structured in the form of a debate as opinions are clearly divided about the practicality and usefulness of expert systems both generally and particularly in solicitors' offices.

What is an expert system?

At this point it might be useful to examine what is an expert system and what exactly it attempts to do. The simplest definition of an expert system which was heard during the seminar was that it was a computer programme/system which was pre-programmed with a series of rules concerning a particular area of expertise (in a legal context perhaps a very simple example would be the rules contained in Section 45 of the Land Act, 1965; this of course would not be a practical example because it is a relatively simple set of rules to remember and comprehend). The user of the system answers a series of questions posed by the computer by typing in 'yes' or 'no' or whatever and the computer analyses these answers and by asking further questions comes to a conclusion concerning this sort of system leading to an ability to delegate matters of interpretation of law to junior personnel who would not necessarily have the experience to do this themselves. Expert systems are distinguished from traditional computer systems by a number of characteristics including:—

(i) In an expert system the rules governing and defining the area of expertise are built into the system. In a traditional system a sequence of steps or procedures are built into the system.

(ii) In an expert system it should be possible to work backwards from the system itself in order to establish the

rules upon which it is based. In this way it should be easier to test the correctness of the precepts used by the designer. One may only however test the reasoning of the system by working through a very large number of sample queries. In a traditional system one could not work out the basic rules except in a very simple system.

(iii) An expert system may, indeed should, come up with novel answers to problems (i.e. answers which were not anticipated by the designer) by the use of the system's own logic. A traditional system can only give an answer which has been preprogrammed as a response to a particular combination of factors by the designer.

The Speakers

1. Ms. Delia Venables of the English Law Society. Ms Venables advises English Solicitors firms upon all aspects of technology and computers.
2. Bryan Niblett, Barrister and Computer Scientist. Mr. Niblett is Chairman of the Law Specialist Group and is a Fellow of the British Computer Society. He is a former holder of the Chair of Computer Science in the University of Wales.
3. Nicolas Bellord, Solicitor. Mr. Bellord was Secretary of the Society for Computers in Law from 1975 to 1984 and is a partner with Messrs. Witham Weld, Solicitors in London. He is the author of 'Computers for Lawyers' (Cambridge University Press, 1980) and co-author of 'Computer Science and Law' and 'Intelligence in Legal Information Systems'. Both Mr. Bellord and Mr. Niblett have been UK representatives on the Committee of Experts on legal data processing of the Council of Europe.
4. Nicolas Morris, Chartered Accountant. Mr. Morris is a member of the Technology Committee of the Law Society. Until recently he advised professional practices, largely solicitors, on computerisation. He is engaged in developing an expert system to assist companies in complying with the reporting requirements contained in the Companies (Amendment) Act, 1986 and has recently resigned from professional practice as an accountant in order to further his interest in expert systems.
5. Ms. Sharon Walsh. Ms. Walsh is Systems Administrator with A. & L. Goodbody, Solicitors in Dublin.
6. Patrick Fitzgibbon. Mr. Fitzgibbon is a Solicitor and Partner in Pierce Fitzgibbon & Company, Solicitors of Listowel. Mr. Fitzgibbon has been involved in the development of an automated conveyancing package but has ceased development of the system.
7. Rory O'Donnell, Solicitor. Mr. O'Donnell has been involved in the development and implementation of automated conveyancing systems.

The debate on expert systems

The debate on expert systems commenced on Saturday morning with a review by Ms Delia Venables of the English Law Society of the origins of expert systems and how they have developed from support and document production systems. Ms Venables dealt with some of the jargon particularly associated with expert systems including the terrifying 'knowledge cliff'! Bryan Niblett then proceeded to examine the present state of play in the development of expert systems and to give an insight into where he believes that the future lies. He foresees expert systems being developed on a co-operative basis by all of the interested parties and using as their base of knowledge one of the legal databases (e.g. Lexis). Mr. Niblett made the point that expert systems can only be as good as the experts who devise them and consequently if a number of experts participate then the system should end up with more expertise than each individual expert. With an evolving system over a period of time with new

Submission of Articles for the Gazette

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

Contributions should be sent to:

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experts adding their input and existing experts refining theirs in the light of continuing experience the system could become uniquely valuable. In Mr. Niblett's opinion there are no true expert systems at present although they may evolve from the work being carried on by individuals at the moment. When fully developed they might be used as arbitrators in disputes and might even replace the judiciary!

Nicolas Bellord then addressed the seminar and described some of his pioneering development work in this area. He explained that the systems currently under development only addressed one problem at a time and that the problems we face in practice involve a number of interlocking problems. The answer is to design a system where one defines a goal and the system advises on the best means of reaching the goal. Furthermore, it is still up to the practitioner to separate the grain of truth from the chaff of his instructions and no computer system has been designed which can do this. He concluded (inter alia) that if somebody had a truly expert system at the present it would be in their interest to keep it a closely guarded secret.

Ms. Sharon Walsh then gave us the benefit of her practical experience in this area. She concluded that because of the degree of personal interpretation required in the practice of law combined with local differences in practice, particularly in the area of litigation, that if it is not actually impossible to write a useful expert system, it is so difficult and time consuming as to be not worth while. Having disclosed the fact that he had vested interest, insofar as since being asked to address the seminar he had left a large accountancy practice and joined a company selling skeleton programmes for use in the construction of expert systems, Nick Morris then explained some of the practical steps to be taken in setting up a very small expert system dealing with a discreet area of law. He highlighted the potential advantages of being able to delegate work to junior personnel who would have access, through the computer, to the reasoning powers exhibited by their more experienced colleagues, combined with the fact that an 'audit train' showing each step taken by the expert system in coming to a particular conclusion was available for monitoring the work of junior personnel.

Patrick Fitzgibbon explained the difficulties he had faced when he set about designing a support package for conveyancing and how similar difficulties would arise in the design of expert systems. He suggested one means of avoiding these problems by carefully structuring the system but observed that in legal practice someone would always come up with a problem so impossible that it would fox the system.

Rory O'Donnell, whose firm is using a conveyancing support system, explained how they had evolved in the use of technology to that stage. He highlighted some of the difficulties involved in using support systems and went on to conclude that expert systems would have to be considerably more developed and have more obvious direct application before he would consider committing the necessary investment of time and money to developing or using one.

Following a series of short submissions from the floor the participants formed small groups, each group being joined by a committee member and a speaker in order to formulate further questions and to continue discussion.

Mr. Frank Lanigan who, as Chairman of the Technology Committee, had acted as Chairman of the seminar then summed up and was asked by Mr. Michael Houlihan to address the specific questions which had been raised by the brochure for the seminar. The general feeling seemed to be that expert systems were very interesting but that the practicalities of their introduction and development were such as to require great caution. The Chairman went on to explain that an exhibition of document production, support and expert systems was being held concurrently with the seminar and that these were now available for participants to test their theories. In conclusion, he set the tone for the remainder of the evening by explaining that the management had requested that those who wished to order fine wines should do so early so that they could be arranged for them to be appropriately chilled or chambre'd.

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Communications

On Sunday morning, a series of short lectures was organised about communications between computer systems. Telecom Eireann had arranged for six additional telephone lines to be laid on to Tulfarris House and this, the chairman explained was one of the prime reasons why it had been chosen as a venue. He said that if Telecom Eireann were able to organise telephone lines of reasonable quality to Tulfarris House at Poulaphouca, they could organise them anywhere in the country!

Electronic Mail

Noel Clarke from Telecom Eireann explained to us the mysteries of packet switching and electronic mail. He was followed by Nicolas Bellord who set before us some fascinating statistics concerning the methods of despatch of messages and documents from solicitors' offices which had resulted from a survey carried out in England a couple of years ago.

Apparently, all English solicitors' offices now have telephones! He warned us that electronic mail had been available in the UK for some time and had not caught on. He felt that it was relatively expensive and inconvenient. He explained that the concept of electronic mail was that one purchased a relatively inexpensive modem which one attached to an existing computer or word-processor. One then joined the electronic mail system by paying an annual subscription. This entitled the subscriber to the use of a mail box, which is in reality, a small segment of memory in a central computer maintained in Britain. Other subscribers could, using their computers, send messages of whatever length to the mail box. One had to have the discipline of calling up one's mail box on the computer to see if there was anything in it. Assuming one did this, one could see a list of messages and from whence they had come. One could either read the message on the screen or copy it into the memory of one's own machine for printing later or for use as a basic document. There were huge problems of compatibility and no standards have been set in the United Kingdom which will guarantee that the text can be properly understood by the receiving computer. This often results in all sorts of gibberish with words being lost and consequent lack of understanding by the recipient. He welcomed the fact that the Technology Committee in Ireland were attempting to pre-empt such chaos by devising their own standards.

Frank Lanigan, explained that each of the members of the Technology Committee had joined the Eirmail (Irish Electronic Mail) service and were experimenting with its use. They had used a common supplier of modems and because each member had computer equipment supplied by different manufacturers, he felt they represented a relatively good cross section of the profession as a whole from the point of view of diversity of types of computers. The Committee was attempting to set standards amongst themselves which if adopted should result in the avoidance of the sort of difficulties which had been outlined by Mr. Bellord. He explained that the Committee had only recently started the experiment and still had an open mind on the usefulness of electronic mail.

A representative of ITELIS the Irish Times legal data base service, which is the Irish component of the international legal database Lexis then demonstrated their service. He explained that if one had the equipment necessary for electronic mail, it was simply a matter of paying an annual subscription and usage charges in order to have the benefit of ITELIS. A representative of the supplier, from whom members of the Technology Committee had purchased their modems then explained the practical difficulties which had been met and the requirements for equipment needed to utilise these aspects of technology. Mr. Bradley Brown, the Chairman of the

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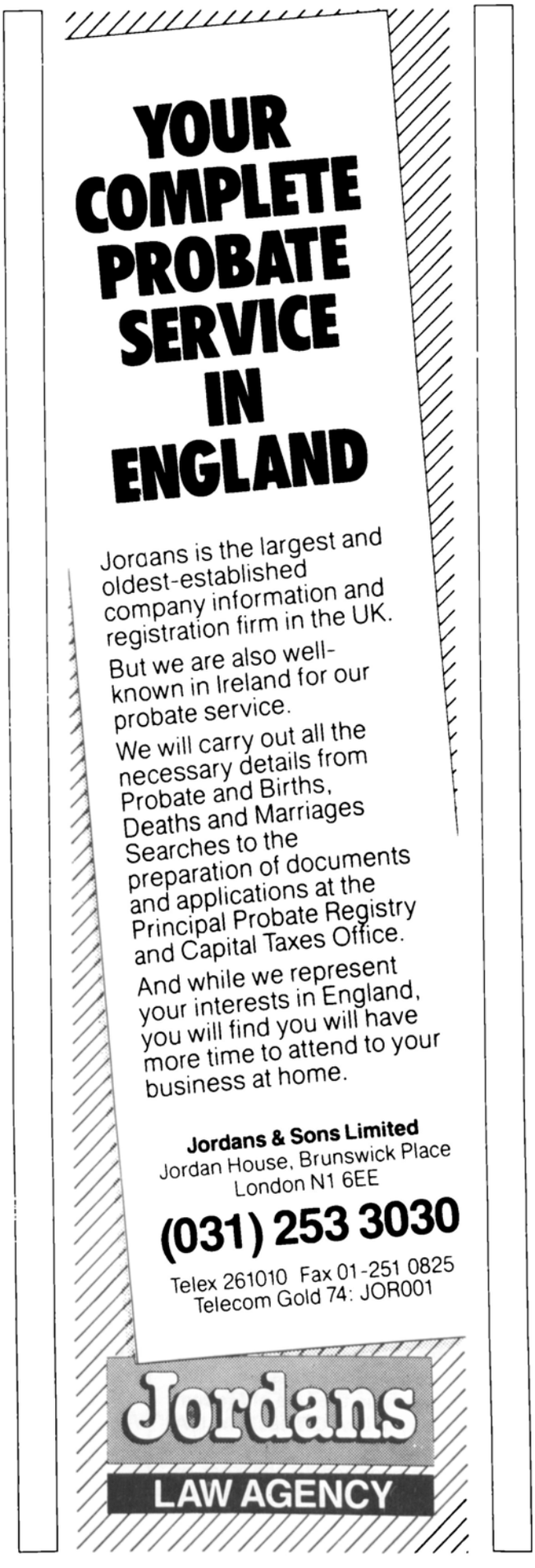
Society for Computers and Law, then addressed the seminar on the general area of communications and explained that largely because of the difficulties in sending long documents, the British Electronic Mail service (Telecom Gold) had deteriorated into a message sending service. In his experience, most of the messages tended to be rather light hearted if not simply defamatory.

Following a summing up by Frank Lanigan, the participants repaired to lunch and the seminar then concluded.

The Technology Committee would like to thank all who contributed to the success of the seminar on expert systems and communications in particular the delegates who came not quite knowing what to expect. The Committee realised beforehand that this seminar was unusual insofar as it was attempting to address issues which, for many at least, appeared to deal with problems and solutions which lie well in the future. The Committee would like to believe that every participant gained both from the formal sessions and from the opportunities to discover the types of research and development being carried on independently in many practices around the country. The Committee feels that there is a real need for members of the profession to keep ahead and to be forearmed in their dealings with the suppliers of technology to the profession. This should enable them to deal on equal terms both financially and from the point of view of information on new products and concepts. The Committee believes we are the first group in this country to formally address this particular area of expertise. It is beneficial to us as a profession to be clearly concerned with new advances and this has positive benefits insofar as our clients can see that we are not rooted in the past and also that we will be better able to influence and guide the development of systems which will in the future be marketed to us.

Finally, we would like to thank those delegates from outside the profession who attended and the exhibiting suppliers who kindly sponsored the programme for spouses and partners attending the seminar. □



International Bar Association

The next biennial meeting of the International Bar Association will be held in Buenos Aires, Argentina between the 25th and 30th September 1988. If you are interested in attending you should give your name to James Ivers at the Law Society, Blackhall Place, phone 01-710711, from whom brochures can be obtained. It is hoped to arrange inclusive tours from Ireland for the Buenos Aires meeting, which may allow visits to other South American countries. Details of these should be available shortly.

Set out below are details of current IBA activities. If you would like further information about these activities, please get in touch with James Ivers or with Joseph Dundon at 101 O'Connell St., Limerick, (061) 48811.

Conferences & Seminars
An African Regional Conference was held in Lusaka in November 1987 while an Eastern Mediterranean Regional Conference is due to be held at the end of February in Jerusalem.

A joint seminar with the Association of Soviet lawyers will be held in Moscow in early June and a meeting for the leaders of the legal profession on Professionalism /The Public Image of Lawyers, will be held in Brussels on the 26th and 27th June 1988.

IBA Activities for Developing Countries
Assistance has been given by a number of IBA member organisations to Bars and Law Societies in developing countries. David Biart, the Co-Chairman of the Section on General Practice, Committee on Law Office Management and Technology will be visiting Zambia, Zimbabwe, Kenya, Lesotho, Nigeria and Ghana in the early summer to give talks to groups of local lawyers and Law Societies / Bar Associations on the Use of Modern Technology in Law Offices. The IBA Educational Trust is making a substantial subvention to the cost of David Biart's visit. The Trust also gave substantial financial assistance to the African Regional Seminar and continues to support the programme for the placing of young lawyers from developing countries in European / North American Law Firms.

Human Rights
The IBA has joined with other lawyer organisations in making representations on behalf of lawyers who have been unlawfully detailed by the Civil Authorities or harassed or impeded in their duty of representing clients. Representations have been made to the authorities in Algeria, Chile, Colombia, Fiji, Indonesia and Singapore. In a number of cases the representations appear to have been influential in achieving the removal or relaxation of the restrictions imposed on the lawyers concerned. □

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Book Review

The Irish Constitution, Supplement to Second Edition, by J. M. Kelly with G. W. Hogan and G. Whyte (Dublin: Jurist Publishing Co. Ltd. 1987, xvi and 211 pp, IR£12.50).

Two Fundamental principles characterise the manner in which we, the people, are governed in this State. Firstly, in general, it is a representative majority who rule after the people have exercised their franchise in the electoral process. Secondly, the governing majority constituting the Executive and the Legislature must act in accordance with law which is interpreted and often in a con-itutional-rights sense made by the judicial arm of government, our judges. The increasing challenge to the manner in which the majorities have governed since the Constitution of 1922 was enacted is reflected in the Supplement to the second edition of Professor Kelly's book *The Irish Constitution.* In the Supplement, Professor Kelly, a pioneering commentator in Constitutional Law and two legal scholars, Gerard Hogan and Gerry Whyte, record approximately 200 Irish decisions with a constitutional dimension in about 3½ years. This represents a phenomenal increase in litigation which reflects, to a certain degree, the politico-legal catch-phrase of recent times – "it must be unconstitutional". It is undoubtedly better that the challenges to the rule of the elected majority be taken in the courts than on the streets, a sentiment expressed recently by Mr. Justice Brian Walsh in one of his many perceptive extra-judicial commentaries.

In its review of the myriad of recent cases, the Supplement illustrates the strength and self-confidence of the judicial power in the State. The authority to strike down a statutory provision as being unconstitutional vests an enormous power in one man or woman, the High Court Judge, subject to review of course, by a panel of five judges in the Supreme Court.

The strength and self-confidence of the judicial power is illustrated in the words of judges condemning action as being "(not) permissible within the Constitutional framework" and in the articulation of the concept that a statutory provision is unreasonable and therefore unconsitutional. The causative factors influencing the decisions of those judges on grave constitutional issues remain complex. Decisions do not blossom unaided in the minds of men. Economic background, social status, cultural allegiances, political considerations, self-perceptions and the sheer power of 'rhetoric' – the process of deliberate and rational discourse excluding personal considerations – all play their parts, consciously or sub-consciously in the blossoming of the decisions of the judges.

The authors of the Supplement have sought, in conjunction with the second edition, to make available on a manageable scale all the law arising from or relevant to the Constitution over the 50 years since the Constitution's enactment. Where the material in the Supplement relates to an existing heading in the second edition, the second edition page-number is indicated in bold type and in square brackets and the existing heading or side note is reproduced. New material is designated by the word (NEW) and there is a reference to the page in the second edition where the new material complements the existing material. This may appear somewhat distracting and a new edition would have been preferable, but would have been more expensive for the reader. In fact, the scheme of the book works well in practice and the Supplement can be read in its entirety as a book without any distractions.

The cover illustration, Sir John Lavery's "The Blessing of the Colours" is fetching. Do the authors consider it as a laconic comment on the current state of constitutional development in this State?

It was almost fashionable some years ago (dare it be mentioned) for some practitioners of all ilks to boast that they knew little of Constitutional law. Today, those boasts have been transferred to the latest legal accretion – the law of the European Communities. *The Irish Constitution* and the Supplement to the second edition may be heartily recommended to practitioner and student alike and deserve to sit on the accessible book shelves of every practitioner and law student.

Eamonn G. Hall.

BOOKS RECEIVED

Law Reform Commission Report, LRC 22—1987. Hague Convention on the Service Abroad of Financial and Extrajudicial Documents in Civil or Commercial Matters (1965).

Scottish Criminal Case Reports, Supplement 1950—1980. Law Society of Scotland, 1987.

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Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.
10th day of February, 1988.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Michael and Ann McCann, (1) both of Aughamaddo, Drumlish, Co. Longford; (2) Michael McCann of Aughnamadoo, Drumlish, Co. Longford; (3) Michael McCann of Aughamadoo, Drumlish, Co. Longford. Folio No.: (1) 552F; (2) 1342; (3) 4243. Lands: (1) Garrowhill; (2) Carrowbeg; (3) Lislea; Area: (1) 15a.0r.11p.; (2) 12a.0r.14p.; (3) 18a.3r.6p. County: **LONGFORD.**

Gerald J. Teahan of Blackfriary, Trim, Co. Meath. Folio No.: 3133F; Lands: Blackfriary; Area: 20.463 acres. County: **MEATH.'**

Peter Kenedy, of Cashel South, Tubbercurry, Co. Sligo. Folio No.: 153; Lands: (1) Cashel South; (2) Cashel South (one undivided thirteenth part); Area: (1) 11a.0r.24p.; (2) 18a.1r.30p.; County: **SLIGO.**

John Dwan of Gorteen, Roscrea. Folio No.: 15910; Lands: (1) Gorteen; (2) Gorteen; Area: (1) 32a.0r.0p.; (2) 4a.2r.14p.; County: **OFFALY.**

Anne and Teresa Crossan, both of Castle Avenue, Buncrana, Lifford, Co. Donegal. Folio No.: 4860F; Lands: (1) Glenmenagh; (2) Glenmenagh; Area: (1) 24.335 acres; (2) 357.956 acres; County: **DONEGAL.**

John Guinan of Aghagoogy, Fivealley, Birr, Co. Offaly. Folio No.: 9752; Lands: Aghagoogy; Area: 80a.0r.30p.; County: **OFFALY (KINGS).**

John H. Bennett & Co. Ltd., The Maltings, Ballinacurra, Co. Cork. Folio No.: 40848; Lands: Ballynacorra East; Area: 64a.3r.34p.; County: **CORK.**

Stephen McGowan, (Susan McGowan and John McGowan, personal representatives), of 15 Lower Kindlestown, Delgany, Co. Wicklow. Folio No.: 10008; County: **WICKLOW.**

LOST TITLE DOCUMENTS

In the matter of the Registration of titles Act 1964 and of the application of Francis Porter in respect of property No. 12, Bow Lane East, County Dublin.

TAKE NOTICE that Francis Porter of 12 Bow Lane East, Dublin 2 has lodged an Application for registration on the Freehold Register free from encumbrances in respect of the above mentioned property.

The original documents of title specified in the Schedule hereto are stated to have been lost or mislaid.

The Application may be inspected at this Registry.

The Application will be proceeded with unless notification is received in the Registry within one calendar month from the date of publication of this Notice that the original documents of Title are in existence.

Any such notification should state the grounds on which the documents of title are held and quote Reference No. 87DN12087. The missing documents are detailed in the schedule hereto.

Dated the 23rd December, 1987.

M. O'NEILL
Examiner of Titles.

SCHEDULE

Deed of Conveyance dated 6th February, 1961 from Richard Frederick Ffulke Martin and Lilian Ethel Martin to Francis Porter.

Lost Wills

O'DOWD, BRIAN (otherwise Bernard), deceased, late of 21 Whitestrand, Lr. Salthill, Galway. Will anyone having knowledge of A Will or a testamentary Disposition executed by the above-named deceased, who died on 11 December, 1987, please contact Michael O'Dowd, Solicitor, The Crescent, Boyle, Co. Roscommon. Tel. (079) 62861.

BARRY, MICHAEL, deceased, late of Castlebank, Ardnacrusha in the County of Clare. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased, who died on 6 October 1977, please contact Messrs. O'Donnell Dundon & Co., Solicitors, 101 O'Connell St., Limerick. Reference MC/TEOD. Tel. (061) 48811.

WALSH, THOMAS, deceased, late of 1 Kincora Park, Clontarf, Dublin 3. Will anyone having knowledge of the whereabouts of the Will of the above-named deceased, who died on 22 September 1987, please contact Noel Smyth & Partners, Solicitors, 22 Fitzwilliam Square, Dublin 2. Ref. COS.

ARMSTRONG, THOMAS, deceased, late of 4 Abbey Street, Ballina, in the County of Mayo, and formerly of Mount Carmel, Devon Park, Galway. Will anyone having knowledge of the whereabouts of the Will of the above-named deceased, who died on 29 December, 1987 please contact Ian Dodd, Solicitor, Abbey Street, Ballina, Co. Mayo. Tel. (096) 21611.

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MR. RONALD J. EGAN, BCL., Solicitor, who carried on business under the firm name of O'Dwyer Boyle Fawsitt Egan & Co., Solicitors, at 4 Upper Mount St., Dublin 2, intimates that, with effect from 31 December, 1987, the partnership between himself and Mr. John M. O'Dwyer has been dissolved. Mr. Ronald J. Egan intimates that he is continuing in practice as a sole practitioner with effect from 1 January, 1988, under the name of Ronald J. Egan & Co., Solicitors, at 58 Fitzwilliam Square, Dublin 2. Tel. (01) 760813.

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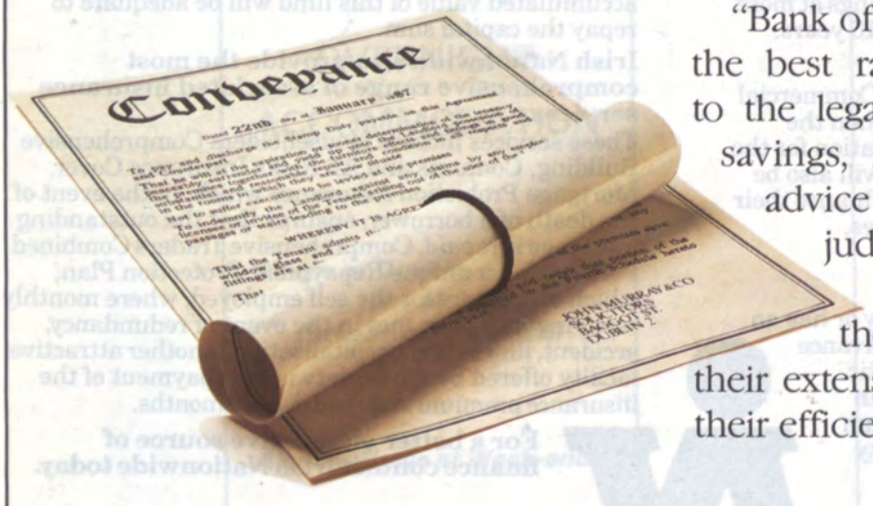

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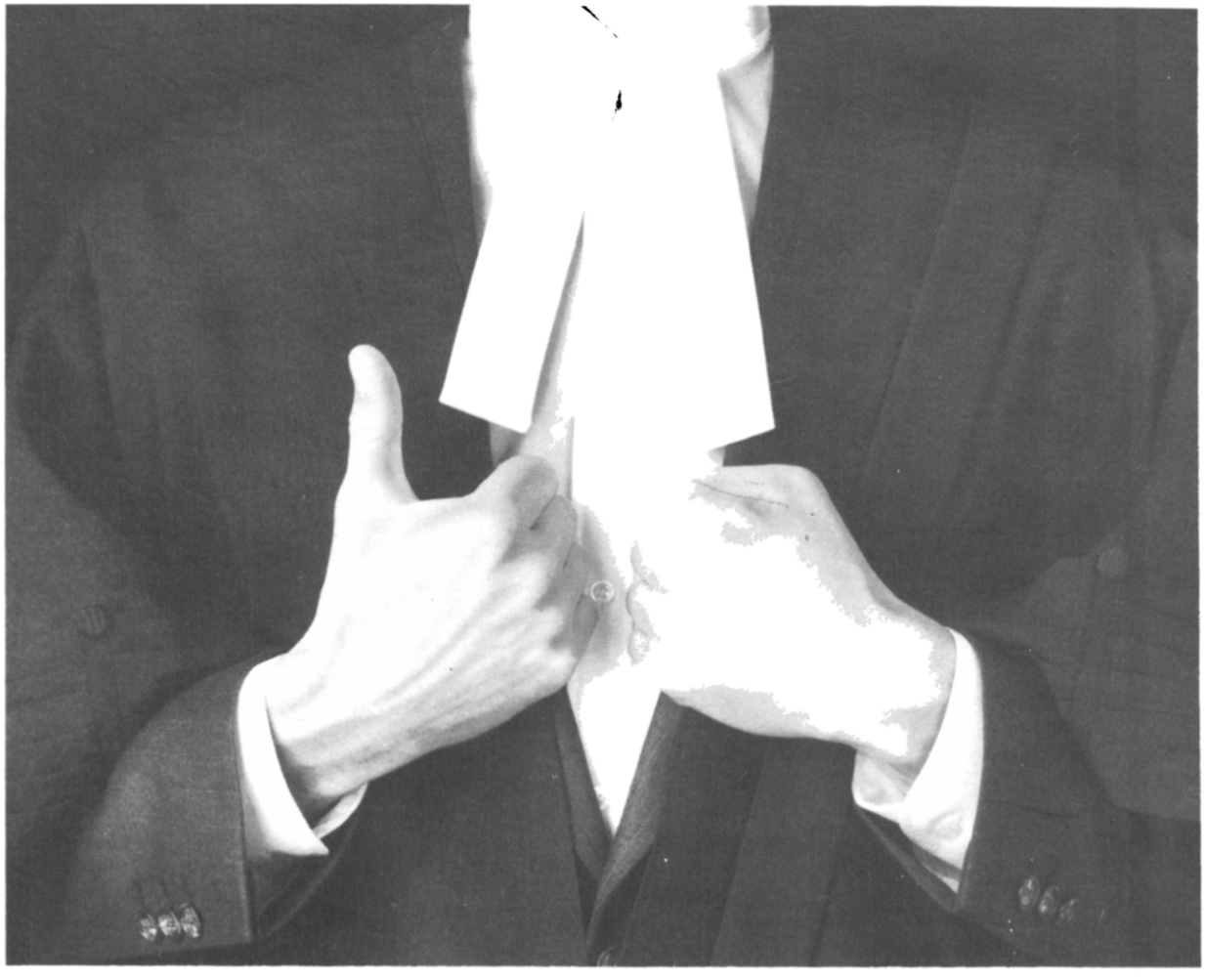
Irish Times Debating Final, Blackhall Place, 5th February, 1988.
Senator David Norris, Chairman of the Debate, with Mr. Don Binchy, Chairman of the Society's Education Committee.

- Tort Reform in the USA and Lessons for Ireland
- Light Work — A Dilemma for Employers



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Vol. 82 No. 2 March 1988

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Viewpoint

Co-operative Chaos

Now that the shareholders of Bailieboro Co-Op have made their choice and hopefully secured a reasonable future for themselves, it is to be hoped that the lessons from the Bailieboro debacle will not be lost on the appropriate authorities. There have been calls by those involved in the establishment of ''Work Co-Operatives'' for the updating of the laws governing co-operatives. It is clear that these laws are in need of modernization but perhaps a more radical look at the structure of these organizations is required.

It may no longer be sensible to apply the same rules to a modest Workers Co-Operative of a dozen people, and to a giant agricultural co-operative with a turnover of many million pounds. Even if there are strong arguments for not requiring major co-operatives to be converted into limited companies, and the case for such conversion is very strong indeed, there may well be an argument for providing the same bifurcation of institutions on the co-operative side as exists on the company side. The division of companies into private and public limited companies is a sensible one, even if the advantages of private companies are not going to be in the future what they have been in the past.

The concept of a Co-Operative Society operating under the Industrial and Provident Societies legislation is not capable of accommodating the multi-million pound trading entities that many agricultural co-operatives in Ireland have become. A Board of Management composed, necessarily, of members of the Co-Op may not always provide the appropriate calibre of people to supervise the executive of the Co-Op. Outside ''directors'' cannot be introduced to fill this vacuum. Whether the scheme used when Kerry Co-Op transformed itself into a public limited company, while at the same time retaining a co-operative control over much of the share holding, is an appropriate solution, must be doubtful. There must be an argument that the co-operative ethos, however appropriate to small and medium sized co-operatives, is inappropriate, even as a means of maintaining share holder power in local hands, for trading grants. □

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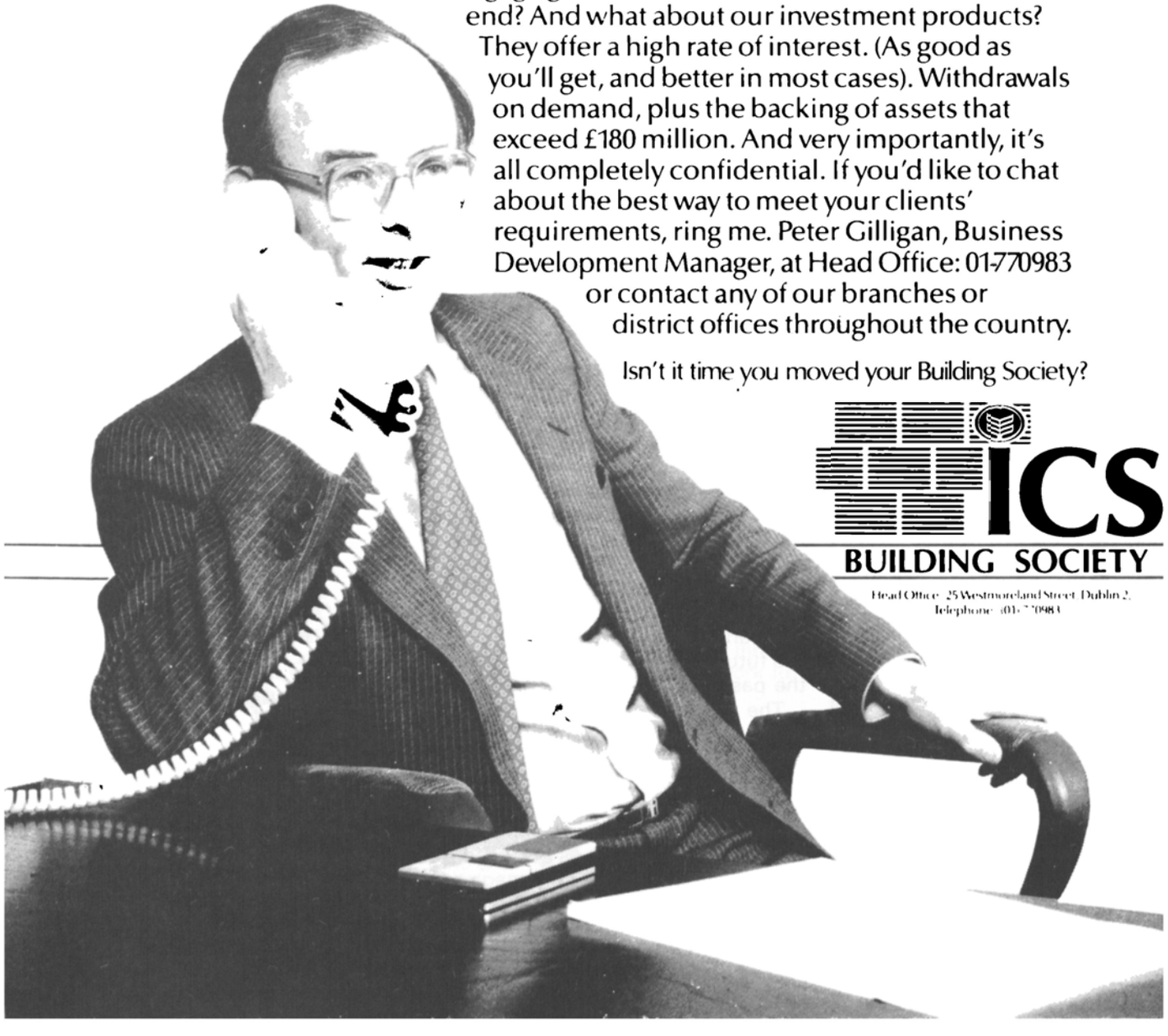

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Tort Reform in the U.S.A. and Lessons for Ireland

The recent clamour for reform in the area of personal injury litigation in this country had been preceded by even more strident calls for reform in the USA in recent years where phrases like "insurance crisis" and "litigation explosion" characterise the debate. There, lobbies with vested interests, trial lawyers and the insurance industry, for example, lock horns in sometimes strident debate. The American Bar Association found itself in the embarrassing situation in 1985 when it did not have an articulated policy on the issues in question. To remedy this the Association set up a committee under the chairmanship of Professor B. McKay to examine the matter and suggest reforms.

by
Professor Bryan McMahon

The McKay Report

A draft report was produced in December 1986 which it was hoped would be unanimous, but just before publication, four members broke ranks and entered a minority report. Generally speaking, the minority felt that the insurance dimension should be taken into account in any examination of proposals for reform in the tort system. The majority claimed that the consideration of the insurance aspects of the problem was outside its remit. After some heated debate within the Association itself, the report was finally adopted at a full meeting of the A.B.A. in February 1987.

The report itself was a thorough one and the recommendations were, in the words of the Chairman, rather modest. Twenty-one proposals for reform were suggested and the major ones are set out hereunder. At present 19 of these have been adopted by the A.B.A. and the other two are still subject to discussion within the Association itself. The principal recommendations of the McKay Committee for tort reform in the U.S.A. were the following:

1. Pain and Suffering Damages

There should be no ceilings on pain and suffering damages, but instead trial and appellate courts should make greater use of the power of *remittitur* or *additur* with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations by setting aside such verdicts unless the affected parties agree to the modification. One or more tort award commissions should be established, which would be empowered to review tort awards during the preceding year, publish information on trends, and suggest guidelines for future trial court reference. Options should be explored to provide more guidance to the jury on the appropriate range of damages to be awarded for pain and suffering in a particular case.

2. Punitive Damages

The scope of punitive damages in cases involving damage to person or property should be narrowed.

3. Joint-and-Several Liability

The doctrine of joint-and-several liability should be modified to recognize that defendants whose responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff are to be held liable for only their equitable share of the plaintiff's full economic loss. A defendant's responsibility should be regarded as "substantially disproportionate", when it is significantly less than any of the other defendants; for example, when one of two defendants is determined to be less than 25% responsible for the plaintiff's injury.

4. Attorneys' Fees

Fee arrangements with each party in tort cases should be set forth in a written agreement that clearly identifies the basis on which the fee is to be calculated.

Courts should prohibit the practice of taking a percentage fee out of the *gross* amount of any judgment or settlement. Contingent fees should be based only on the net amount recovered after litigation disbursements such as filing fees, deposition costs, trial transcripts, travel, expert witness fees, and other expenses necessary to conduct the litigation. Whenever judgment is entered in a tort case, fee arrangements with each party and the fee amount billed should be submitted *in camera* to the court, which should have the authority to disallow, after a hearing, any portion of a fee found to be "plainly excessive" in the light of prevailing rates and practices.

5. Streamlining the Litigation Process: Frivolous Claims and Unnecessary Delay

A "fast track" system should be adopted for the trial of tort cases. In recommending such a system, the Committee endorsed a policy of active judicial management of the pre-trial phases of tort litigation. It anticipated a system that sets up a rigorous pre-trial schedule with a series of deadlines intended to ensure that tort cases are ready to be placed on the trial calendar within a specified time after filing and tried promptly thereafter. The Courts should enforce a firm policy against continuances.

Steps should be taken by the courts of the various states to adopt procedures for the control and limitation of the scope and duration of discovery in tort cases. The courts should consider, among other initiatives: (a) at an early scheduling conference, limiting the number of interrogatories any party may serve, and establishing the number and time of depositions according to a firm schedule. Additional discovery could be allowed upon a showing of good cause; (b) when appropriate, sanctioning attorneys and other persons for abuse of discovery procedures.

Standards should be adopted substantially similar to those set forth in Rule 11 of the Federal Rules of Civil Procedure as a means of discouraging dilatory motions and frivolous claims and defences. Trial judges should carefully examine, on a case-by-case basis, whether liability and damage issues can or should be tried separately. Non-unanimous jury verdicts should be permitted in tort cases, such as verdicts by ten of twelve jurors. Use of the various alternative dispute resolution mechanisms should be encouraged by federal and state legislatures, by federal and state courts, and by all parties who are likely to, or do become involved in tort disputes with others.

6. Injury Prevention/Reduction
Because of the increase in malpractice actions and the effect this has on insurance premiums, greater attention should be paid to the disciplining of licensed professionals through the following measures: (a) a commitment to impose discipline, where warranted, and a substantial increase in the funding of full-time staff for disciplinary authorities. Discipline should be lodged in the hands of a state body, and not controlled by the profession itself, although professionals should have a substantial role in the process; (b) in every case in which a claim of negligence is made against a licensed professional, and a judgment for the plaintiff is entered or a settlement paid to an injured person, the insurance carrier, or in the absence of a carrier, the plaintiff's attorney, should report the fact and the amount of payment to the licensing authority. Any agreement to withhold such information and/or to close the files from the disciplinary authorities should be unenforceable as contrary to public policy.

In addition to the above recommendations the McKay Committee also recommended that three further studies be carried out to complete the picture required for comprehensive tort reform:

1. Insurance Liability System
The Committee recommended that further studies are required, to consider the question of regulating the insurance sector, to examine the effect of high interest rates on liability premiums, to examine the intensive competition that exists between insurance companies and, finally, to examine the anti-trust exemption extended to the insurance industry in the United States.

2. The Problem of Mass Torts
The Committee felt that where Mass Torts occur, such as in the Thalidomide cases, different considerations might apply and different methods of handling these claims ought to be considered.

3. Jury Awards
The Committee felt that there was very little information available on jury awards in the United States and that greater and more detailed studies were required in this matter.

The A.B.A.'s report is but one recent response to the "insurance crisis". At state level there have been several legislative initiatives and most states have, in recent years, adopted some new reforming legislation. This legislation has attempted to cover the following problems in particular:

(a) CAP Statutes
Many states have introduced statutes which put ceilings on the maximum awards which can be given in non-economic losses, (i.e. for pain and suffering), for personal injury cases.

(b) Collateral Benefits
Many states have introduced legislation which obliges the Courts to take into account when awarding the plaintiff damages any collateral benefits which the plaintiff may get, for example, by way of welfare payments, insurance benefits, etc.

(c) Instalment Payments
Some states have introduced provisions which would enable the courts to award the plaintiff instalment payments. This is to circumvent the injustice of the lump sum, once-and-for-all type of payment that characterises the common law tort system.

(d) Lawyers' Fees
Many statutes attempt to limit and control the lawyers' fees in civil litigation and in particular attempt to tackle the contingent fee problem by placing a maximum (e.g. 30%) on the size of the lawyer's fee in these cases.

(e) Limitation Periods
Some states address the problem of limitation periods by insisting that a shorter period should apply in some types of cases especially e.g. in malpractice cases, so that the period of liability would be limited and quantifiable and thereby more amenable to insurance management.

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(f) Concurrent Wrongdoers
It has been argued in several states that the rule which imposes full liability on every concurrent wrongdoer even though a particular concurrent wrongdoer may have only contributed in a small way to the accident, is unjust and should be changed.

In some cases the reforms mentioned above are not of general application but attempt to address specific problems and specific types of liability. For example, some states introduce CAP statutes only in respect of medical malpractice actions. Other states see the necessity to protect public authorities from the extending liability that they have been exposed to in recent years. It is suggested that the increased costs for public authorities has resulted in the closure of playgrounds, swimming pools and other public amenities. Still others propose to limit the liability of tavern keepers who in recent years have found themselves the target of litigation in respect of accidents caused by inebriated customers! In many of these cases the reaction of state legislators to the so-called "insurance crisis" has sometimes been ill-conceived and hasty. Some of the responses have been primarily political responses born from the politicians' need to be seen to be doing something. They are not always very well thought out. They can be seen as a "jump up and down" syndrome which is essentially a political response to reassure the public that something is being done in this area. As might be expected the results have not always been successful from a law reform point of view.

The Constitutionality of the Reforms

Inevitably one supposes, in the American context at least, once these measures began to be introduced their constitutionality began to be scrutinised. The constitutional challenge came, first, at the federal level and later at the state level. Today, one may summarise the outcome of these challenges by stating (i) that there are no significant Federal constitutional restraints on tort reforms in the USA today, but (ii) that at State level very significant constitutional restraints do exist and these certainly inhibit state legislation in this whole area.

At federal level the Supreme Court has rejected arguments which invited interference. Generally speaking it has adopted a "hands off" policy which is the normal policy in regard to economic policies generally in this area. In the area of economic policy the Supreme Court feels that such matters are not its business and that in these cases it is not its function to double guess the executive or the legislature. In particular it has rejected an invitation to examine whether there is in fact an "insurance crisis" in American society. That challenge if successful would have undermined the basis for much of the legislation in question: if no crisis existed then there would be no justification for the legislation in question. Further the U.S. Supreme Court has also refused to be drawn into an examination of whether the legislative policies as expressed in the particular legislation are *appropriate measures* to further the stated policy of managing the "insurance crisis" or whether they

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furthered the stated legislative objectives. Accordingly, whether CAO's, shorter limitation periods, jury screening, limiting the contingent fee, etc., were appropriate and adequate responses by the legislature in response to the so-called insurance crisis would not be scrutinised.

In general, the Supreme Court has adopted the "rational basis" position in regard to reviewing these statutes, that is to say, that it will not review this legislation if there appears to be some semblance of rationality to the legislative measure in question. This "hands off" position is to be contrasted with the Supreme Court's approach to non-economic legislation, for example, relating to fundamental rights where any interference will be looked at by the Court with suspicion. In such cases, there is no presumption of constitutionality. Legislative interferences in this area are suspect from the outset and the State has a heavy onus placed on it to justify the interference. For this reason, some lawyers have attempted to classify the tort reforms as being non-economic in nature, affecting the fundamental rights of the citizen and thereby inviting the Supreme Court to view them with suspicion. This approach has not been successful.

At the State level, however, a very different picture emerges with regard to the constitutionality of some of these Statutes. In particular the arguments which were rejected in the Federal Courts above have found favour in many of the State courts. For example CAP statutes have been struck down as being unconstitutional in eight of the fourteen states where they have been adopted. Again, in seven out of the eleven states which have adopted pre-trial screening of juries in medical malpractice actions the reforming legislation has also been declared unconstitutional. When a state legislative act has been struck down by the state Supreme Court then of course the state legislature has to consider once more how it will respond to the "insurance crisis" problem now back on its agenda. Sometimes it will draft new legislation which will attempt to take into account the judicial objections voiced in respect of the first act, but this new legislation, of course, may, in turn, be subjected to judicial scrutiny and runs the risk of being declared unconstitutional also. And so the process begins once more.

Lessons for the Irish Legal System

It is interesting in view of the above and in view of recent reform in this counry to examine Irish tort law against the check list of reforms suggested in the USA. As will be seen the picture that emerges is somewhat reassuring.

With regard to perceived problems in the US tort system the following comments should be made in the Irish context. Insofar as concern in the US identifies unlimited awards, punitive damages and the contingent fee as major causes for concern, these three factors do not figure as major problems in the Irish scene. We do not have the contingent fee, (and the two Senior rule is about to be modified); punitive damages are available only in rare situations; and in personal injuries a CAP exists for general damages (£150,000 according to *Sinnott -v- Quinnsworth).* Outside of Cork the delay factor does not appear to be inordinate nowadays with most cases getting on within a year or a year and a half from the date of setting down. Moreover, as has been seen in the Stardust Tribunal, a different method of handling mass claims has now been establishhed in Ireland, and presumably sets a precedent for future tragedies of such dimensions. Also the number of interrogatories and the extensive discovery process available in the US is not a feature of the Irish system.

Against the US checklist therefore the problems which we might consider looking at more closely as factors which effect our insurance costs are the following:

(I) the imposition of full liability on a defendant for a small amount of fault under the doctrine of joint-and-several liability. Is this fair?

(ii) greater disciplining of licensed professionals with a review perhaps of the desirability of the self-regulatory system operated by professional bodies themselves.

(iii) the suggestion that juries should be given guidelines as to the appropriate range of damages suitable in personal injury cases.

In addition to these we could also take on board, perhaps, the suggestion that further studies are required on the jury awards, on the "fault" system of liability and on the insurance factor to assess their impact on the whole litigation process.

The major flaws in the USA are not features of our system and perhaps our system of compensating injured persons, while not perfect by any means, should not compel us to adopt hasty piecemeal reforms without taking a full comprehensive overview of the situation. We must avoid "the jump-up-and-down syndrome" which might propel us into a state where our last position is worse than our first. □

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Thomas D. Shaw
President

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Q. "SAKI" was a pseudonym for whom?

Q. What constituency does Michael Bell represent?

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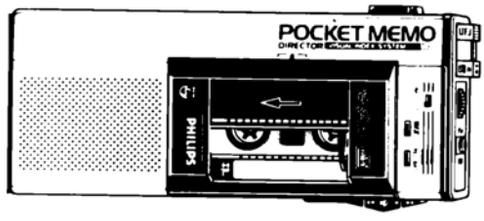

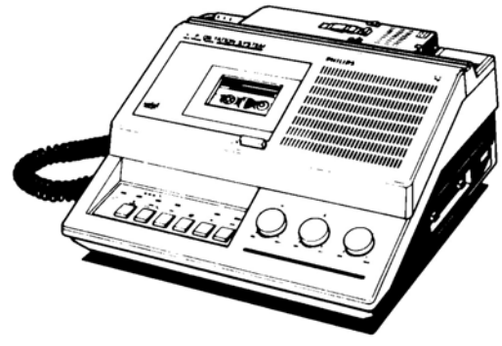

The key VIS system component is a magnetic strip-based on technology developed for NASA — that visually indicates recording time, the beginnings of new messages, and if there are any special remarks or corrections. The VIS strip also shows how much of the mini-cassette has been used and the length of each message. After the cassette has been transcribed, the VIS strip information can be easily erased to enable new information to be recorded.

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These are then displayed as a vertical line below the horizontal line.

So now a secretary can see at a glance the basic story behind each cassette — if it has been used, how long each segment and total recording are, whether to listen for special remarks, and how many messages are carried.

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Philips Forecast Competition,
The Editor, The Gazette of the Incorporated Law Society,
Blackhall Place, Dublin 7.

Latest date for receiving entries is 21st April.

Law Society Annual Conference, Cork, 5—8 May, 1988

The Conference has come around again. To a lot of our members, this is not a statement which up to this had made them reach for their diaries and write in the dates of the Conference as an event which they must attend.

For one reason or another the Annual Conference has not attracted the attention which it should over the past number of years. We now have almost 4,000 members of the Society. Should it not be a feasible proposition to get 200/300 of these to come to the Conference if not for the entire of the event, then at least for some of the lectures or social functions?

We have had recent experience that when a controversial item arises on the Agenda, the Society members waken from their slumbers and become vociferous and take great interest in the subject. This was clearly evidenced by the attendance at the Annual General Meeting in November 1986 when the issues of Advertising and Professional Indemnity were on the Agenda.

This year the Public Relations Committee invited Messrs. Loosemore and Parsons to visit Ireland. As members will be aware they gave a number of lectures which created an enormous amount of interest and indeed excitement amongst the profession. In the course of these lectures, they indicated the need for change on the part of the members in their approach to practice as we near the 21st century.

The Conference this year which is being held in Jury's Hotel, Cork from 5th—8th May, is taking up the same theme. As the highlight of the programme, I am pleased to be able to report that Mr. David Andrews of the David Andrews Partnership Limited who are Management and Training Consultants to the Legal Profession in London, has agreed to address the Conference on Friday morning on "Making the Law Office Work". In the afternoon he will speak on "Practice Development". David Andrews will be dealing with the practical problems which face solicitors in the everyday working of their offices with suggested changes which will improve not only the management of the office but also its profitability. I hope in the next edition of the Gazette that he will be giving members an outline on how he will be approaching his subject (and how important he views the topic).

On Saturday, the Half Yearly Meeting will take place. At the moment I have no notice of any resolution. Assuming that none are forthcoming it is proposed to hold a workshop on "Litigation — The Future". This is very topical in that by now everybody is aware of the changes which are proposed for the abolition of juries. In the workshop we hope to obtain views not only from solicitors and barristers working in Ireland as to the practical realities which this will bring to our profession, but also to obtain views from visiting Presidents as to how the litigation scenario has changed in their country and where they see the trends for the future.

This will cover such areas as contingency fees, litigation procedures and how the courts will tackle the changes which are undoubtedly coming. For anybody interested in litigation this discussion is a *MUST* for your diary.

Enclosed with this Gazette you will find the proposed Conference programme. You will see that there are numerous alternative social events which you and your spouse can enjoy.

The cost of the Conference has sometimes been criticised. This year there is a special inclusive price of £140 per person covering three nights and two days in Jury's Hotel, Cork, with all meals included. This is less than the price for last year's Conference. The facilities at Jury's Hotel include a heated indoor/outdoor swimming pool with whirlpool, saunas, a gymnasium and squash court. In addition through the kind sponsorship of the Bank of Ireland any member who is less than ten years admitted to practice will have half the cost of his wife's inclusive price subsidised by the Bank. This is a unique and generous offer by the Bank to aid the younger members of the profession.

I am therefore making a direct appeal to the members for support for the Conference. As I have said before it is your Society, and your profession and your Conference. Not only do I suggest that you should support it, I am saying very strongly that you must support it. I address this recommendation particularly to our members from Munster.

I am confident that with the help and support of the organisers, this will be not only a most enjoyable weekend but a weekend when you can learn in a way which will beneficially improve your practice and yourself.

I look forward to meeting you personally in Cork.

Thomas D. Shaw

Thomas D. Shaw
President

Jury's Hotel, Cork

CONFERENCE PROGRAMME

Time	Event	Location/ Information
THURSDAY 5th MAY, 1988		
6—9pm	Registration	
9.30pm	Illustrated Talk on Old Cork and its Legal Gentleman by Dr. Sean Pettit	Glandore Room
10.00pm	Jazz	Glandore Room
FRIDAY 6th MAY, 1988		
9.00am	Registration	
9.20am	Welcoming Address by President Southern Law Association	Baltimore Room
9.30am	"Making the Law Office Work" Mr. David Andrews, David Andrews Partnership Ltd. Management and Training Consultants	Baltimore Room
11.15am	Coffee	
11.30am	David Andrews	Baltimore Room
12.45pm	Lunch	
2.30pm	"Practice Development" David Andrews	Baltimore Room
7.30pm	Reception	
8.00pm	Dinner	Baltimore Room or choice of Restaurants
10.00pm	Party and Jazz	Baltimore Room
SATURDAY 7th MAY, 1988		
10.00am	Half Yearly Meeting	Baltimore Room
	Address by Thomas D. Shaw, President Incorporated Law Society of Ireland	
11.15am	Coffee	
11.30am	Workshop "Litigation — The Future". Panel of visiting Presidents, solicitors, barristers and judges.	
1.00pm	Lunch	
SUNDAY 8th MAY, 1988		
a.m.	Brunch and Farewell Reception	Jury's Hotel

ALTERNATIVE/SOCIAL

Time	Event	Location/ Information
10.00am	Guided Tour of Cork by Valerie Fleury (1 hour)	Starts at Jury's Hotel 10.00am Returns 11.30am
11.30am,	Visit to Gardens of Nancy Minchin and Brian Cross	Bus leaves at 11.30am from Jury's
2.30	Visit to Fota Wildlife Park	Bus leaves at 2.30pm
2.30pm	Golf	Cork G.C., Little Island
	Boat to Cobh	Booking at Reception
11.00am	Visit to Blarney Castle and Kiss the Blarney Stone	Buses leave 11.00am Return at 1.00pm
2.00pm	Tennis	Tennis Village
2.00pm	Buses leave for Kinsale	
4.00pm — 5.00pm	Reception and Singsong	Actons Hotel
7.30pm	Reception for members and guests	Jury's Hotel, Glandore Room
8.30pm	Conference Banquet and Dance (Black Tie)	Glandore Room

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SOLICITORS APPRENTICES RUGBY CLUB

SARC -v- THE BAR

For the second year in a row the annual Joseph McGowan Cup Challenge match ended in a draw following a spirited match played at the beginning of December. Although reduced to fourteen men through the failure of some late fitness tests the SARC defended bravely against some fierce opposition up to the end.

Although The Bar tried one of their favourite tricks (the old "try and lull them into a false sense of security by turning up late and appearing disorganised") the Apprentice Solicitors, mindful of the valuable lessons learned on the professional course, took it all in their stride and managed to take an early lead through a penalty skillfully converted by Eoin McNeill. Stung into action by this opening gambit, The Bar hit back and scored a fine try through their International panelist, Noel McCarthy.

Always in trouble in the scrums the SARC were forced to concede a push-over try early in the second half before retorting with a penalty again converted by McNeill. With the score then at 10—6 to The Bar scrum-half Pat Farrelly caught The Bar unaware with a blind side break before feeding to John Shaw (proving the value of sometimes being in the wrong place at the right time) who gratefully grounded the ball in the corner to level the scores. Neither side could improve on this, although it must be said The Bar were unlucky on a couple of occasions not to get the vital touch when they had crossed the try line.

Both sides adjourned to a local hostelry for some light refreshments and in this respect we are most grateful to Mr. Anthony Ensor, our Honorary President, for a very generous contribution towards the expenses of the players. We would also like to thank the various Masters for giving their hard-working Apprentices the day off and finally we thank Mr. David Pigot for coming along to support us — it looks like he has the dubious honour of being our first fan!

Unfortunately it was not possible to organise a match against the Scottish Law Society to coincide with the recent International, but the good news is that the Law Society in England have accepted our invitation to play in March and details of this will be forthcoming shortly.

John Shaw

***The Irish Times* Debating Final** was held at the Law Society, Blackhall Place, Dublin 7. The event was hosted by SADSI and the motion before the house was "That Dublin at 1,000 is both Dirty and Dear". Pictured above is the winning team from the U.C.C. Philosophical Society, Mr. Adrian Hunt and Mr. Tim Murphy with the individual award winner, Mr. Robert Plant, and the President of the Law Society, Thomas D. Shaw.

Photo: Courtesy of *The Irish Times*

KERRY BAR ASSOCIATION ANNUAL DINNER
(Seated: left to right): Mr. John Hume, M.P., Mr. Ernest Margetson, Dublin, Ms. Louise McDonagh, Mr. Donal Browne, President, Mr. Michael J. O'Donnell, Treasurer. (Standing: left to right): Mr. Jim McFarland, Mr. Dick Spring, T.D., the late Louis O'Connell, Mr. James J. Ivers, Director General, The Law Society.

Mr. Laurence K. Shields, Solicitor, Dublin, with his wife, Miss Helen Hackett, on the occasion of their recent marriage.

COUNTY WEXFORD SOLICITORS' ASSOCIATION

The following officers were recently elected:
President: Henry J. Frizelle, Enniscorthy, Co. Wexford.
Chairman: James J. Murphy, Solicitor, 2 Rowe St., Wexford.
Secretary: Michael Cullen, Solicitor, Gorey, Co. Wexford.
Treasurer: Tony Ensor, Solicitor, Enniscorthy, Co. Wexford.

Court Offices, Áras Uí Dhálaigh
The new court offices, situated on Inns Quay, Dublin. For a full list of the various public offices relocated in the building see the November 1987 Gazette, page 295.

VISIT TO ARAS AN UACHTARAIN FRIDAY, 15th JANUARY, 1988

Mr. Thomas D. Shaw, President (second from left), Mr. Maurice Curran, Senior Vice President (third from left), Mr. Rory O'Donnell, Junior Vice President, (left) and Mr. James J. Ivers, Director General, were received by His Excellency President Patrick J. Hillery, President of Ireland at Aras an Uachtarain.

This visit continued the tradition that has been established that the Officers of the Society are received by the President of Ireland in audience.

On arrival at Aras an Uachtarain, the Officers of the Society were met by Captain Michael McGrath, A.D.C. to the President and the visitors' book was signed.

They were then escorted to the Reception room and were joined by the President and the Officers of the Society were introduced by the President of the Law Society to President Hillery.

A most pleasant and interesting conversation took place at which the President of Ireland showed himself to be extremely well versed in the affairs of the Society and expressed keen interest in the work of the Society.

After coffee had been served, the Officers of the Society bade farewell to the President and it was unanimously agreed that the visit was a most enjoyable and refreshing meeting and exchange of views with the President of Ireland.

KILDARE BAR ASSOCIATION

On the 25th January 1988, the Kildare Bar Association held its 50th Annual General Meeting. On that evening the Association elected its first lady President.

She is Ms. H. C. Dawson who practises at Delaney Dawson & Co., Drewsboro Buildings, Newbridge, Co. Kildare and the Secretary of the administration of the Kildare Bar Association is Ms. Sharon Murphy, Allenwood Cross, Allenwood, Naas, Co. Kildare.

The President of the Law Society, Mr. Thomas D. Shaw and Mr. James J. Ivers attended the meeting.

There was favourable reaction to the visit of Messrs. Loosemore and Parsons. Approximately 30% of those attending the meeting had attended the Seminars and all spoke in favour. A follow-up was considered and views were expressed that individual aspects of the Seminar should be brought up at Bar meetings with a view to implementation of the recommendations.

At the instigation of the President a debate took place on advertising. The Plaintiff advised that it was likely that advertising would appear in the Solicitors' Bill if one were to assume that the Restrictive Practices Commission recommendations would be implemented. The meeting was not in favour of Price Advertisement but considered that Corporate Advertisement would be acceptable and that individual advertisement would have to be subject to it being sober and restrained.

The litigation position was considered and it was reported that the Courts in Kildare were working satisfactorily.

The President reported on the position in connection with Professional Indemnity Insurance. The situation was considered to be satisfactory.

Mr. Pat Reidy agreed to make submissions in relation to the scale of fees allowed in the District Court particularly at the lower levels.

Various other topics were raised and discussed and a lively meeting was declared closed by the President, Ms. Helen Dawson at 10.35p.m. whereupon the members retired to toast the health of their new President in the time-honoured tradition.

KILDARE BAR ASSOCIATION OFFICERS
(Left to right) Stephen Maher, Treasurer, Helen C. Dawson, President, and Sharon Murphy, Secretary.

CONTRIBUTIONS WELCOME

Please send news items and photographs for publication in this column to:
"People & Places",
The Gazette, Law Society,
Blackhall Place, Dublin 7.

MAYO BAR ASSOCIATION ANNUAL DINNER DANCE
(Seated: left to right): Mrs. Yvonne Shaw, Ms. Joan Clarke, Ms. Sue Bryson, Ms. Eanya Egan, President, Mayo Bar Association.
(Standing: left to right): Mrs. B. Brennan, District Justice B. Brennan, Thomas D. Shaw, President of the Law Society and the Hon. Mr. Justice Liam Hamilton.

COUNTY GALWAY SOLICITORS BAR ASSOCIATION

Mr. Paddy Daly.

The County Galway Solicitors Bar Association recently held its annual Dinner Dance in the Ardilaun House Hotel, Galway. It proved to be a most lively and relaxed affair, and the 120 or so who attended thoroughly enjoyed themselves.

As always, the emphasis was on a social night out, but great attention was given to the words of wisdom imparted by the Junior Vice President of the Law Society, Mr. Rory O'Donnell, deputising for the unavoidably absent President Tom Shaw.

The President, Paddy Daly introduced the guests of the evening, namely Mr. and Mrs. Rory O'Donnell, Mr. and Mrs. Jim Ivers, Circuit Court Judge John Cassidy and his wife, District Justice John Garavan, County Registrar Sean O'Donnell and his wife, District Court Clerk Patrick Deely, and Chief Superintendent John Mitchell and his wife.

A collection was taken up after the Dinner for the Solicitors Benevolent Association, which yielded a return of over £200.00.

Despite many hours of refreshments, dancing and much later, a little pianoforte music, we are reliably informed that all who attended did get home in darkness!

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Ext. 2910/2920

ASSOCIATION INTERNATIONALE DES JEUNES AVOCATS ("AIJA")

AIJA is organising the following activities which may be of interest:

		Date	Venue
1.	International Seminar Intellectual Property	5th—7th May, 1988	The Hague
2.	Seminar on Arbitration	23rd—26th June, 1988	London
3.	AIJA Congress	4th—9th Sept. 1988	Munich

Anyone interested in any of the above events should contact:—

Michael Irvine,
Matheson Ormsby & Prentice,
20 Upper Merrion Street, Dublin 2.
Telephone: 760981 Fax: 609744

Practice Notes

Fading of Laser and FAX Print
Conventional Deed paper should not be used in laser printers.

The print on Deed paper may fade after a period of time if a laser printer has been used. This is because conventional Deed paper does not have the smooth surface of photocopying quality paper. Accordingly since most laser printers operate in a manner similar to that of a photocopier, fading will occur if conventional Deed paper is used (suppliers state that a smooth surface is required to ensure even electrophotographic toner application). If the surface is uneven the toner character will only affix itself to a portion of the surface area and will be liable to fall off.

FAX messages may suffer fromm the same problem of fading as they are printed out on light-sensitive paper. Practitioners should photocopy all important FAX messages. If FAX messages are left in bright light, sunlight or in contact with plastic covers, the fading process will be accelerated considerably.

Technology Committee

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3) **Continuations of Negative/ Common Searches:** No reduction in the fees charged for a continuation.
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5) **Stamp Duty:** on Memorials increased to £21.00
on Counterpart Memorials £2.00

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The following charges apply to the Library Photocopying Service:

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and

a photocopying rate of 15p per sheet plus £1.00 packing and postage or, in the case of a fax transmission,* a fax rate of £1.00 per page received and sent.

Requests for copies of caselaw, legislation, articles on a particular subject which necessitate the library staff carrying out subject searches in Digests/Indexes will incur an additional £5.00 search fee.

Where members do their own research in the library the only charge will be the self-service photocopying charge of 10p per sheet.

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"Light Work" — A Dilemma for Employers

The question whether an employer is negligent if he employs a person who is not capable of doing the job without risk to his health raises interesting, but difficult, issues of policy in the law of torts. In the present article we will examine some of the main problems.

by
William Binchy,
B.A., B.C.L., LL.M.
Barrister-at-Law

The Rafferty Case

The question arose, but ultimately was not resolved, in the Supreme Court decision of *Rafferty -v- C. A. Parsons of Ireland Ltd.,* [1987] I.L.R.M. 98. There the plaintiff had worked as a storeman for the defendant company. He developed a sore back, and consulted his doctor, who gave him a note for his employer requesting that he be given light work. When the foreman read the note, he told the plaintiff that there was no light work available for him and that if he was not able to do the full work, there would be no work for him. The plaintiff, who required to work in order to maintain his family, went back to work, and later developed further soreness in his back.

The plaintiff sued his employers for negligence. At trial, D'Arcy, J. withdrew the case from the jury. The Supreme Court by a majority of two (Finlay, C. J. and Henchy, J.) to one (McCarthy, J.) affirmed.

The disposition of the appeal was influenced by a number of factors. The plaintiff's pleadings had not clearly disclosed a case based on the argument that the defendants had been negligent in allowing him to attempt to do his normal work when he was known by them to be fit only for light work. There was no satisfactory transcript or note of the evidence at trial. Nor had the doctor's note been adduced in evidence.

The majority, affirming D'Arcy, J.'s withdrawal of the case, was divided as to the grounds for doing so. Finlay, C. J. was satisfied that:

> "it would be a wholly artificial and unreal standard of care to impose on employers who, on the evidence, had adequate staff to assist each other in loading and unloading the vans and in the transporting of the goods, to hold them guilty of negligence on the basis that they reacted to a single application for light work by one of their staff, even if supported with a medical certificate suggesting that he was fit for light work, by simply informing him that they had not got any and then took no further action when he voluntarily resumed his ordinary work and kept at it for significant periods for some years afterwards."

The Chief Justice regarded the case as one involving "no *prima facie* evidence of negligence against the defendants", without therefore having to address the question whether the defendants' negligence was redeemed by a waiver from a willing plaintiff under section 34(1)(b) of the Civil Liability Act 1961. The reference to the plaintiff's voluntary resumption of his ordinary work is made, not in the context of the *volenti* issue, but rather in relation to its possible ramifications for the defendants so far as their alleged negligence was concerned.

Henchy, J. disposed of the appeal on a far narrower ground. He considered that the evidence fell short of showing that (as the plaintiff alleged on appeal) the defendants had required him to do full work notwithstanding medical certificates supplied to them which showed that light work was all that he was fit for. There was, said Henchy, J., "nothing more than a request by his doctor that he be given light work". Henchy, J., therefore did not have to decide whether it would be negligence for an employer to allow an employee to attempt to do his normal work when known to be fit only for light work. But if this were to be held to be the law, it would have to be specifically pleaded, "so that the defendants could meet that case in evidence and properly raise a plea of contributory negligence and/or a plea of *volenti non fit injuria*".

McCarthy, J., dissenting, took a different view from that of Henchy, J. on the question of notice to the employers:

> "Ordinarily, in my view, a certificate of fitness for light work implies an unfitness for other than light work; if it were not so, such a certificate would scarcely be necessary at all."

In McCarthy, J.'s view the case should have been allowed to be determined by the jury, with an ancillary issue as to voluntary assumption of risk if the defendants so wished.

The Problem Stated

Rafferty thus does not really resolve the general issue touched on by all the judges, though Finlay, C. J. went furthest in determining the question. It may be useful to attempt to address the issue in relation to a hypothetical situation somewhat different from that in *Rafferty.* Let us assume a case where the employee's physical condition becomes such that continued employment in his particular job is likely to lead to damage to his health; let us assume further that the employer is fully informed of this fact, that he says to the employee that he has no safer work available, and that the employee agrees to continue in that employment. Three questions arise: (1) is the employer guilty of negligence in continuing the

employment? (2) Has the employee waived his right to sue, under section 34(1)(b)? (3) Is the employee guilty of contributory negligence?

Some General Principles

A number of general principles of law are well established, and have some bearing on these questions. It is clear, for example, that an employee will not automatically be held to have voluntarily assumed the risk of an unreasonable danger created by his employer merely because it can be shown that he subjected himself to that risk in the knowledge that it was present. Economic necessity and family responsibilities may mean that there was no free waiver in such a case: *Smith -v- Baker,* [1891] A.C. 325, *McIlhagger -v- Belfast Corporation,* [1944] N.I. 37. On the other hand, in the Supreme Court case of *Flynn -v- Irish Sugar Manufacturing Co. Ltd.,* [1928] I.R. 525, at 535, FitzGibbon, J. noted that it had "never been suggested that knowledge is not a circumstance from which acceptance may be inferred, nor that if knowledge be proved the question of acceptance can be withdrawn from the jury". Under section 34 (1)(b), it is also necessary that the acceptance involve some communication between the parties rather than a "one-sided secret determination on the part of the plaintiff to give up his right of action": *O'Hanlon -v- E.S.B.* [1969] I.R. 75, at 92 (Sup. Ct., *per* Walsh, J.); but the issue of the relationship between knowledge and consent continues to require resolution.

Most courts today would surely accept the general principle that an employer who negligently engages in dangerous work practices — such as supplying defective equipment or organising an unsafe system of work — should not be permitted to "buy" the waiver of employees who are constrained by economic necessity either to take that job or face unemployment. This is because the pressure on these employees may be so strong as to render their apparently free choice an unfree one in fact. But if we change the case to one where the employer again engages in an unsafe work practice but there is no question of economic necessity on the part of the employee — who may be a rich young man or woman in search of adventure — is it so obvious that a defence under section 34(1)(b) would *necessarily* fail?

Laissez faire or Paternalism?

This brings us to a central policy question, regarding the extent to which the constriction of the *volenti* defence over the past century reflects the narrow function of protecting economically weak employees, or the broader function of protecting people against exposing themselves to risk. However much the conceptual language of negligence law may disguise it, the fact remains that the issue is ultimately one of policy, with possible solutions ranging from a *laissez faire* approach current many years ago (and experiencing a revival in some quarters today) to a paternalistic approach which perceives law as a useful agent in encouraging people to have regard for their safety. Legislation on seat belts and crash helmets, backed by findings of contributory negligence for non-use (*Hamill -v- Oliver,* [1977] I.R. 73, *Sinnott -v- Quinnsworth Ltd.,* [1984] I.L.R.M. 523, *O'Connell -v- Jackson,* [1972] 1 Q.B. 270) are examples of this latter philosophy.

If we turn to the hypothetical case mentioned above, we will immediately see that it is somewhat different from the situation where an employer is guilty of a negligent work practice. In the hypothetical case the *only* negligence that may be alleged against the employer is that he has employed the employee knowing that, on account of the employee's particular physical condition, he will run the risk of damaging his health where the work he is to do is not likely to cause any problem for the other workers. The question thus is the narrow one as to whether an employer owes a duty to a prospective employee not to employ him where to do so is likely to damage his health on account of his particular frailty.

The "Egg-Shell Skull" Principle

The well-known "egg-shell skull" principle does not answer the question satisfactorily, since it imposes liability for unforeseeable injury attributable to the particular physical condition of the plaintiff only where the defendant was guilty of negligence towards the plaintiff: *Burke -v- John Paul & Co. Ltd.,* [1967] I.R. 277. That principle does not affect the question one way or the other; if the employer in our hypothetical case is guilty of negligence, then of course the "egg-shell skull" principle is capable also of applying in appropriate instances (though there will be no need to invoke it in order to find the employer liable); if, however, the employer is not guilty of negligence, then the plaintiff will not be able to call in his aid the "egg-shell skull" principle.

Negligence

A strong argument can be made that employing a person known to be at particular risk of injury to his health is indeed an act of negligence. If we ignore for a moment the *volenti* issue and examine the question from the standpoint of a third party, the matter may become clearer. A pedestrian who is run over by an unconscious bus driver known by the driver's employers (and the driver himself) to be at risk of a blackout will without any doubt be

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able to sue the employers for their negligence. Why should their conduct cease to be negligence once the question shifts to that of their liability to the driver?

One answer to this question may be that negligence is a concept to be viewed in terms of individual relationships rather than as being of general social import. A person is negligent to A, B, C and so on, rather than to the world at large. This issue was at the heart of the famous decision of *Palsgraf -v- Long Island Railroad Co.,* 162 N.E. 99 (1928), and it also arose, less starkly, in the Supreme Court case of *McComiskey -v- McDermott,* [1974] I.R. 75. See McMahon & Binchy, *Irish Law of Torts,* 162–164 (1981). On this approach it would be possible for a court, quite consistently with logic, to hold that the bus company was guilty of negligence to the pedestrian while not being guilty of any negligence to their driver. The court could hold that, in view of the particular relationship between the employer and employee, both knowing of the employee's propensity to a blackout, the employer's duty of care to that employee was of a constricted nature, just as, in *McComiskey -v- McDermott,* the duty of the rally driver to his navigator was held to be of a different nature from that owed to other road users. The duty to the navigator, said Henchy, J., was "particularised and personalised by the circumstances of the case". It was necessary in every case "to consider who is the person claiming to be owed the duty of care, who is the person it is claimed against, and what are the circumstances".

Walsh, J.'s dissent should also be noted. In his view, it was inappropriate and unconvincing to prescribe differing duties of care towards different road-users; instead a general duty to drive with due care towards all road-users with whom one might come in contact should be recognised and implied.

The implications for negligence law of *McComiskey -v- McDermott* have yet to be addressed by our courts. A broad interpretation of the majority's approach would enable what formerly would be treated exclusively in terms of a *volenti* issue to be restated in terms of a constricted duty of care. The negative implications for plaintiffs of this approach need scarcely be mentioned. If this approach were to be applied to the employment of an employee with a particular susceptibility to illness or injury, where both parties are aware of that susceptibility, it would be open to the court to hold that, in view of the circumstances, the "particularised and personalised" duty was not breached by the mere employment of the employee. On a narrow, and surely more convincing, interpretation of *McComiskey -v- McDermott,* the case may be explained in terms of categorical rather than completely individuated duties. In other words, the rally-driver/navigator relationship would constitute a different category of legal relationship than that of the car driver *vis a vis* other road users in general. Applying the same approach to the employment context, a court might well hold that it should not treat the duty owed by an employer to a physically vulnerable employee any differently than it would the general duty of care owed by employers to employees.

Some Downstream Implications

There is one important policy aspect to the duty issue which is worth highlighting since it may make the courts very reluctant to impose liability in negligence on employers who employ physically vulnerable employees. If the court were to impose liability in negligence in such cases, the almost inevitable result would be to encourage employers, as an act of self-protection, perhaps at the behest of their insurers to fire employees who are not fully fit or who may have certain health problems in the future. It may be argued that, if the continued employment of these employees is to be regarded as negligent, then the discharge of the employees could scarcely be considered to be an unfair dismissal. The broader implications of this development give rise for some concern.

Voluntary Assumption of Risk

Let us turn briefly to the question of voluntary assumption of risk. If we accept for the sake of argument that an employer is guilty of negligence in employing a physically vulnerable employee,

Submission of Articles for the Gazette

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

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what are the prospects of the courts' holding the employee to have assumed the risk? We have already mentioned the factors which would be likely to affect the courts in resolving this question. In view of the fact that the defence of *volenti* has "virtually disappeared" in employers' liabilty cases (*O'Hanlon -v- E.S.B.,* [1969] I.R. 75, at 90 (Sup. Ct., *per* Walsh, J.)), it seems most unlikely that the courts would find that the plaintiff waived his right to sue. Even in a case where the employee was acting without any economic pressure whatsoever to take the job, it is probable that the courts would not find a waiver. Indeed they might go so far as to follow their own policy in relation to cases of breach of statutory duty involving employees (see *O'Hanlon -v- E.S.B., at 90 (per* Walsh, J.)), as well as American authorities in relation to common law negligence (e.g., *Barnette -v- Doyle,* 622 P. 2d 1349 (Wyo. Sup. Ct., 1981)), and hold that the defence of *volenti* can have no application in such cases. (It is worth noting that in *Rafferty -v- C. A. Parsons of Ireland Ltd.*, the appellant conceded that no claim could be made under the *Factories Act 1955,* on the particular facts of the case.)

Contributory Negligence

If we turn to the question of contributory negligence, the position is again unclear. There is a good deal of case-law to the effect that employees who bring a dangerous situation to the attention of their employer should not too readily be held guilty of contributory negligence where they continue in their employment even though their employer does nothing to remove the danger. Thus, in the Supreme Court case of *Deegan -v- Langan,* [1966] I.R. 373, a carpenter injured by a nail of a type which both he and his employer knew to be dangerous was relieved of contributory negligence in using the nail since he had notified his employer earlier of the dangers involved. Walsh, J. considered that:

> "bearing in mind their respective positions . . . it would be unreasonable to hold that there still remained an obligation upon the employee to make further representations about the matter to the employer. In reality the alternatives open to him were either to do the job as he had been instructed to do it or to refuse to do it. He could not be held guilty of contributory negligence because he chose to do the job he was directed to do."

The position of the employee who takes employment knowing that it may harm him on account of his particular state of health is surely weaker than that of the plaintiff in *Deegan -v- Langan.* Here the employer is doing exactly what the employee requests — namely, employing him — in contrast to the employer in *Deegan -v- Langan* who failed to respond to the employee's representations. Of course the employee whose health raises particular employment risks would *wish* to have a job which would involve him in no health risks, but the law will not translate that wish into an obligation on the part of any particular employer to employ him on those terms. The most that it is likely to do is to insist that the employer, *if he chooses to employ him,* should ensure that he is not placed at risk to his health.

Concluding Observations

It is interesting to see how an apparently straightforward issue can raise such a range of legal complexities. Although the relevant principles are easy to state, the problem lies in anticipating how the courts are likely to apply them. The problem is essentially one of judicial policy, touching on important political and philosophical questions relating to freedom, social welfare and the role of the State.

The author is a Research Counsellor with the Law Reform Commission.

This article is written in a personal capacity.

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NI Slander Settlement

A slander action brought against a former President of the Northern Ireland Law Society by an apprentice solicitor, who is also a convicted IRA member, was settled in Belfast's High Court last week.

Mr. Bernard Turkington, a prominent Belfast lawyer, had been sued by Mr. Paul Graham, an apprentice solicitor, for remarks allegedly made by Mr. Turkington at a general meeting of the Law Society last January. The meeting had been called to discuss legal education and the selection of law students by the Society. After a one-day hearing before Mr. Justice Nicholson, counsel for Paul Graham announced that the matter had been settled on terms endorsed on counsel's briefs, and that no further order was required.

On the first day of the hearing, an application by Mr. Graham to have the case heard without a jury was resisted by Mr. Turkington and rejected by Mr. Justice Nicholson. A second application to have the case adjourned because of public feeling in the aftermath of the Enniskillen bombing was also rejected. Paul Graham was originally refused registration as an apprentice solicitor by the NI Law Society in 1984 because of a past conviction on IRA charges. In 1973, aged 19, he was jailed for seven years after being found guilty of IRA membership and possession of IRA documents.

On release from prison he went to university, where he took an Honours degree in Economics and a Masters in Social Science before deciding to become a lawyer. However, the Law Society then refused to register him as an apprentice because of a regulation which was thought to bar anyone with a criminal record from admission. Mr. Graham then appealed to Northern Ireland's Lord Chief Justice, Lord Robert Lowry, for a review of this decision, and in 1985, on the LCJ's direction, he was permitted to register with the Law Society, a decision which caused some comment. □

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Seminars —"Challenge of Change"

Reaction to the seminars "Meeting the Challenge of Change" presented by John Loosemore and Robert Parsons, under the auspices of the Public Relations Committee has been gratifying. The following are excerpts from some of the letters at Blackhall Place.

"Congratulations to you and to the Law Society for providing the 'Challenge of Change' Seminar at Kilkenny.

It was excellent, repeat excellent, and hit the spot. Sincere thanks and kind regards."
Nolan Farrell & Goff,
Waterford. *(Telex)*

"There can be no doubt that the problems and ills of practices large and small were identified by the Lecturers. It is now a question of adapting their experience to the climate and conditions prevailing in each individual practice. While the Lecture was beneficial, its benefit will be lost unless it is followed up by the Law Society at local levels."
Collins Brooks & Associates,
Clonakilty.

"I thought I should just let you know how useful I thought it was and the extent to which I feel it should give ideas to members of the profession.

Messrs. Loosemore & Parsons are undoubtedly good salesmen and their presentation was both lucid and entertaining. Initially I found myself recoiling from an approach which I regarded as more akin to the selling of encyclopaedias. Soon however I began to appreciate what these gentleman were saying and I found the conference both interesting and stimulating."
M. T. Beresford,
A. & L. Goodbody,
Dublin 2.

"I found it extremely interesting and helpful . . . Like everybody else I picked up certain tips thereat. The main theme that came across however was good marketing and public relations with one's present client and with casual clients including those who telephone for costs. I was particularly delighted at the manner in which telephone quotes for costs were dealt with as this is a problem that all of us come across all the time.

All in all, I think it was money well spent by the Law Society on our behalf and for the first year ever I feel that the monies which I paid to the Law Society in January last in the sum of approximately £500 was money well spent."
Jennifer Foley,
Ennis.

"Fourteen of our personnel attended the Limerick seminar on Wednesday of last week, and I have allowed time to elapse before writing to you in order to gauge the reaction both from within our office and also among colleagues whom I met at different courts in the locality . . . I am therefore very pleased to recount that my feelings and initial reactions have been echoed by all concerned, and I feel the Society is owed a considerable debt of thanks and gratitude for financing this very worthwhile exercise for the profession in this country . . . It is my distinct feeling that the considerable moneys expended by the Society will be recouped in savings through the Compensation Fund in due course."
Michael P. Houlihan,
Ignatius M. Houlihan & Son,
Ennis.

"The Seminar has led to an ongoing discussion and we hope to introduce as many ideas as possible over the coming months."
Leahy & O'Sullivan,
Limerick.

"The legal profession in general has been conservative in its approach to marketing its services and I am absolutely convinced that a more assertive marketing approach is necessary . . . our training is geared to making us competent in the knowledge of the legal system but there is a lot to be desired in our training in management of a legal practice.

Bar Associations should play a more assertive role at local level in communicating to the public as a priority rather than communicating between the local Bar Associations and the Law Society."
James Dennison,
Abbeyfeale. □

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Terence Kangley of Hermitage, Moynalty, Kells, Co. Meath. Folio No.: 3360; Lands: Aghnaneane; Area: 42a.2r.24p.; County: **MEATH.**

Anne Gara, Currasallagh, Ballaghaderreen, Co. Roscommon. Folio No.: 6355; Lands: Curraghsallagh; Area: 9a.0r.6p.; County: **ROSCOMMON.**

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John Lyons, 46 Bothar Mobhi, Glasnevin, Dublin 9. Folio No.: 728L; County: **DUBLIN.**

Elizabeth & Dominic Feely, Folio No.: 2876F, Lands: Fortyacres, County: **OFFALY.**

Lost Wills

DELANEY, Patrick, deceased, late of Capdoo, Clane, Co. Kildare. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 2 January 1988, please contact Arthur E. MacMahon, Solicitor, Poplar Sq., Naas, Co. Kildare, Tel. (045) 97936.

MURRAY, Brendan L., deceased, late of 12 Richill Woods, Lisnagry, Co. Limerick. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 4 February 1988, please contact Murray Sweeney, Solicitors, 87 O'Connell Street, Limerick, Tel. (061) 317533.

O'BRIEN, William, late of Bellview, or Ballyphilip, Bruree, Kilmallock, Co. Limerick. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 4 December 1987, please contact Hayes Breen McCarthy, Solicitors, 56 O'Connell St., Limerick. (JPH/TKC 0254).

COGGINS, Hilda, late of 1 Worburton Terrace, Sidmondton Avenue, Bray, Co. Wicklow. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 21 December 1987, please contact Creagh Joy & Co., Solicitors, 8 Eglinton Rd., Bray, Co. Wicklow, Tel. 867228.

HARRIS, Mary, deceased, late of Castle Rd., Monkstown, Co. Cork. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died between 17 and 20 January, 1988, please contact Michael Dunlea, Solicitor, 10 Rochestown Rise, Cork, Tel. (021) 891371.

DUNNE, Patrick, deceased, late of 979 Monasteroris, Edenderry, Co. Offaly. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 6 January 1988, at the General Hospital, Tullamore, Co. Offaly, please contact Gallagher Shatter, Solicitors, 4 Upper Ely Place, Dublin 2. Ref. TOS.

Miscellaneous

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I, VINCENT P. HARRINGTON, solicitor, will be in the New York, Long Island area, U.S.A. from Saturday 16th April, 1988 to Saturday 7th May, 1988, and during that time would be prepared to undertake commissions on behalf of solicitors for that area. Please telephone or write to me, c/o Henry J. Wynne & Co., Solicitors, Boyle, Co. Roscommon, Tel. (079) 62083, Fax No. (079) 62853.

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CORRESPONDENCE

The Editor,
Gazette,
Law Society, Blackhall Place, Dublin 2. 8.2.1988

Dear Sir,
In your edition vol. 18, no. 10 for December 1987, on page 316, I am referred to as having made some observations at the Society's A.G.M. on 12th November last. However I am only quoted in part and the incompleteness takes from the point made by me. To start with, I said the 24% rise in expenditure was for 1986 (the accounting year in question) as against the basis year 1984, and was a rise for a two-year period only and was a rise three times in excess of the national inflation rate for the same period. No reference was made to my statemment that the Society's return on capital employed went from 3.6% in 1984 to 1.7% in 1985 to 0.3% in 1986 and this was an eleven-times decrease for 1986 on the 1984 figure. I stated strongly that this decelerating return coupled with the increasing expenditure at three times the inflation rate represented an alarming financial situation for the Society, and I demanded, as a member of over 12 years, that the 1988 budget should have a targeted 5% reduction in expenditure with pegged membership and registration charges.

I never dealt with the membership subscription revenue at all but I did advert to practising cert. fee revenue in terms of the average per capita charge obtained by dividing the total practising cert. revenue per year by the number of certs. issued. For 1984 this came to £210, for 1985, £230, and for 1986, £250. This represented an increase in this average figure in excess of inflation for each of the two years and without making any allowance for the annually increasing number of certs. issued.

I hope, as a matter of fair play, that you will publish this letter in your next issue to remedy the omissions.

Yours faithfully,
BRENDAN GARVAN,
Solicitor,
36 Wicklow St., Dublin 2.

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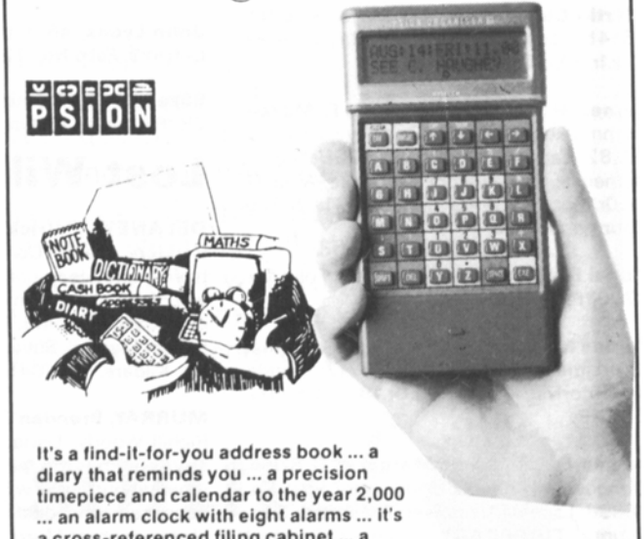

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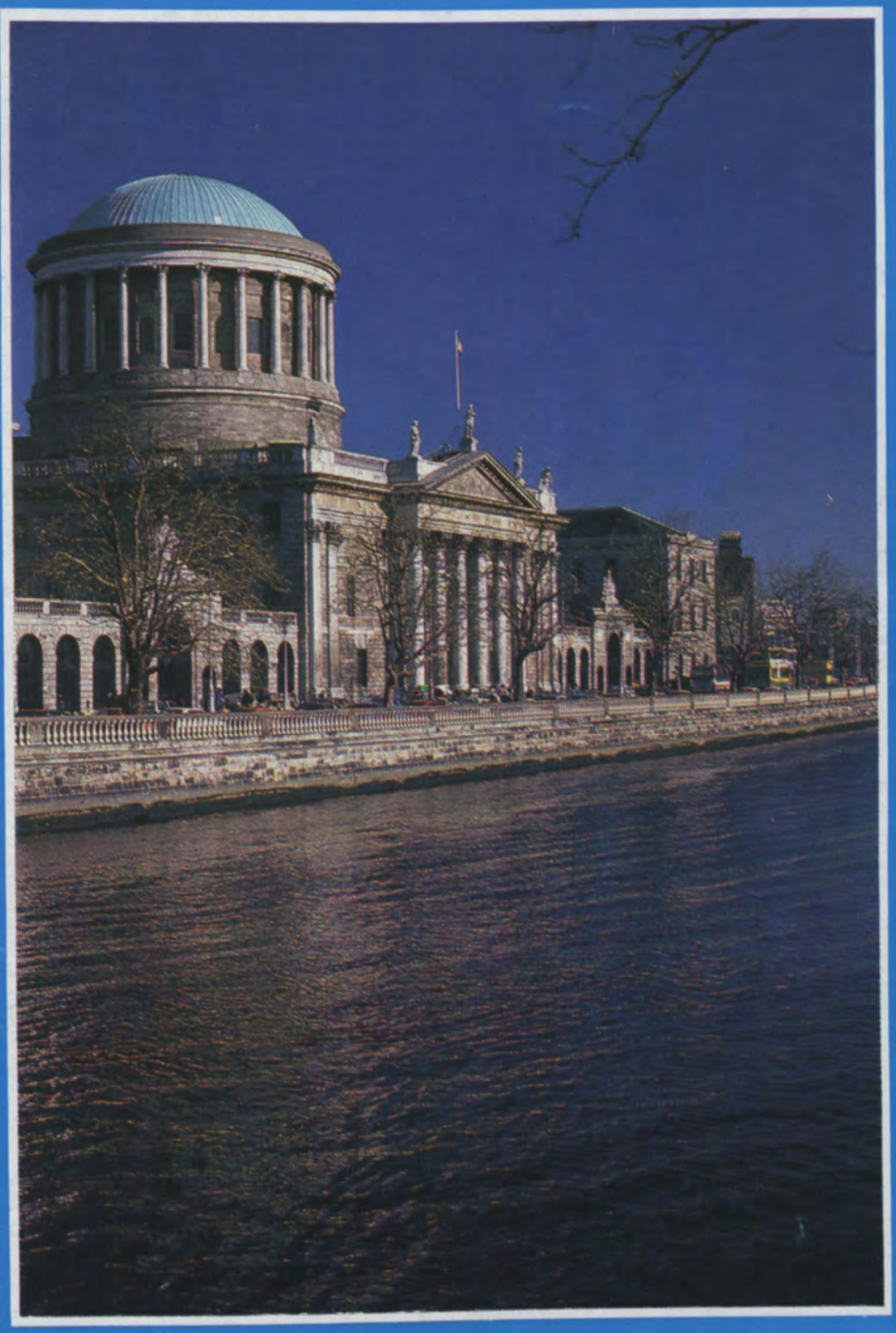
INCORPORATED LAW SOCIETY OF IRELAND

Vol. 82 No. 3 April 1988



The Four Courts, Dublin.
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Executive Editor:
Mary Gaynor

Committee:
Geraldine Clarke, Chairman
Seamus Brennan
John F. Buckley
Gary Byrne
Michael Carrigan
Jim Hickey
Nathaniel Lacy
Frank Lanigan
Charles R. M. Meredith
Desmond Moran
Daire Murphy
John Schutte
Maxwell Sweeney

Advertising:
Liam O hOisin. Telephone: 305236
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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 82 No. 3 April 1988

Viewpoint

Too Many Cooks?

The recent decision of the Bar of Ireland, apparently at the behest of the Minister for State for Trade, to restrict the number of Senior Counsel to be briefed in personal injuries actions in the High Court does have its puzzling aspects. It has always been explained by the Bar Council that the need to brief two Counsel in such cases flowed from the manner in which such actions are listed for hearing in the High Court. Relying on the virtual certainty that a high proportion of cases listed for hearing on any given day will be settled prior to the commencement of the hearing, approximately four times the number of cases that actually could be given a hearing are put into each week's lists. In order to ensure that a Senior Counsel will be available to conduct each case that does go on for hearing it became the practice to brief two Senior Counsel in each case. Such Counsel were not briefed on the basis that they would give exclusive attention to the particular case and not take on any other briefs for the probable dates of the hearing. Accordingly the fees of each Counsel were no more than half what they would have charged as a single Senior giving the case exclusive attention.

It the total of Counsels' fees is to be reduced it would seem that the listing system will have to be changed in order to allow single Seniors to take cases secure in the knowledge that they will be able to conduct the hearing, at fees which would be less than those at present being charged by the two Seniors who are currently being briefed. A change in the listing system whereby dates for hearing are allocated on a fixed basis, such as that operating for non-jury actions must surely lead to a smaller number of cases being disposed of each term. Certainly the experience of other Common Law jurisdictions where fixed-date systems operate is that the time lag between setting down for trial and hearing is excessive.

There is a view which suggests that the real anomaly in the three Counsel system is the requirement to brief Junior Counsel. Junior Counsel plays little or no part in the hearing of the average personal injury action but yet is entitled to be paid two-thirds of the Senior Counsel's brief fee. A justification for this is that Junior Counsel is being belatedly recompensed for the work which he has done at preliminary stages of the case in drafting all the formal documents and indeed on occasion writing the opinion on the basis of which the proceedings have been launched. The fees paid for this work do not compensate Junior Counsel adequately for the time and skill involved. However, to make it up to Junior Counsel by allowing him to collect substantial fees for work which he manifestly does not do is hard to justify. In addition Junior Counsel will come off badly in any case which is settled prior to the issue of briefs to Senior Counsel in that he will only have received the inadequate reward of his earlier fees.

The requirement to instruct Junior Counsel in judicial proceedings was abandoned by the English Bar some 30 years ago without disastrous consequences for the Bar. Far from squeezing Junior Counsel out of the High Court, as might have been feared, they are regularly to be found conducting actions without the benefit of a Senior and have a virtual monopoly of County Court work.

A similar development in this jurisdiction might not only lead to a reduction in fees in personal injury actions but also be to the benefit of the Junior Bar. An extension of the jurisdiction of the Circuit Court would mean that Junior Counsel would have an opportunity of presenting cases of considerable importance which would be a valuable preparation for future work at the Senior Bar.

A later Ministerial pronouncement took the matter further. The Minister for Justice is to be given power to limit the number of Counsel appearing in personal injury cases to one which seems to suggest that Junior Counsel will, in High Court cases, be excluded.

Contd. on page 62.

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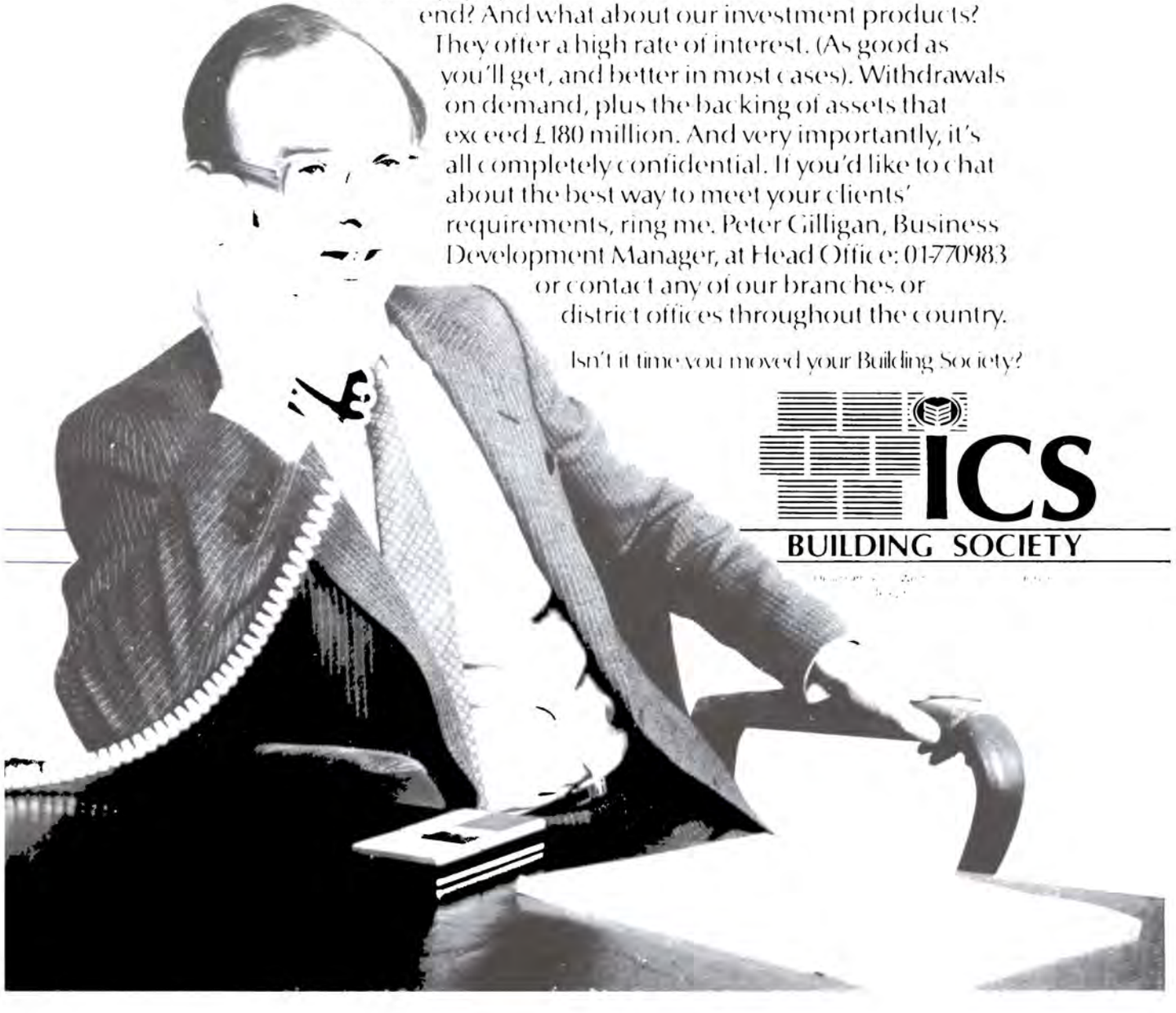

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Advertising

The Great Debate or the Great Mistake!

In 1986, the members of the Law Society voted at their Annual General Meeting not to introduce a limited form of advertising for the profession; it is intended in this article to re-examine the issues and to consider the changes both economic and legislative which have altered the market place and, to suggest that the profession needs to change its attitude towards advertising if it wishes to take an active part in a changed business environment.

By
John M. Bourke
Solicitor

It is generally accepted that solicitors can market their firm provided the marketing is not touting or advertising. There seems to be no generally accepted definition for touting. Advertising is defined as "the paid use of the media".

In 1984 the President of the Law Society circularised all members with a discussion document on advertising and invited submissions on its contents. No serious reservations were expressed to the President and thus the Law Society proceeded to circularise the profession with new draft regulations on advertising for implementation at the beginning of September 1986. In August 1986 a group of solicitors petitioned the Law Society to withdraw the draft regulations and at the meeting in November 1986, the members voted to withdraw the regulation.

The unfortunate aspect of the affair was that the reservations of the members to the new draft regulations were neither aired nor discussed prior to the meeting. The meeting was not the place to debate the issue as most solicitors who attended the meeting had made up their minds prior to travelling to Dublin. The Law Society must therefore accept responsibility for failing to take any steps to have the matter debated prior to the meeting. All the more so as they made no attempt either to support their previously stated position or to make sure these draft regulations were approved and implemented. Their attitude was reminiscent of recent government handling of various government referenda on the Constitution.

The members who supported the introduction of advertising did so in the belief that it would increase the earning power of solicitors and ultimately increase profits. Their position may be summarised as follows:

(a) Competition
Solicitors, particularly those practising in the Dublin area, felt that as a result of market changes in recent times, other professions had expanded their practices into areas normally exclusive to solicitors. Examples given of these areas included accountants advertising their specialities in company work and claims consultants specialising in accidents. The main advantage these people had over solicitors was that they could advertise their services.

(b) Expansion of practice
Too many solicitors (this applies outside Dublin as much as inside Dublin) are suffering financially from hard times because of the economic depression. The introduction of advertising would enable solicitors to market their services more widely and, by advertising, encourage new business into their offices. Not every Irish person has a solicitor but it should be the ambition of our profession to make sure they do.

(c) Expansion of areas of practice
Many solicitors saw the opportunity in advertising to expand their services into new areas, for example commission earning mortgage brokerage which was extremely well illustrated by Loosemore and Parsons at their recent seminars. Furthermore, it was considered that solicitors who are specialists in unusual areas of practice would benefit from being able to advertise their expertise.

The reasons put forward by those members who opposed the introduction of advertising were summarised in a circular sent to most members prior to the meeting in 1986.

(a) No demand from the public
There was no demand from the public for the introduction of advertising for solicitors. It was suggested that the public considered that the independence of the profession would be jeopardised by competition arising from advertising. As an alternative to individual advertising they preferred the introduction of institutional advertising.

(b) Solicitor/client relationship would be damaged
The public would not have a better service available to them from the legal profession as a result of the introduction of advertising. It was stated that the relationship between solicitor and client is not a normal commercial relationship, that it is based on trust, and advertising would jeopardise this relationship.

John M. Bourke, Solicitor, Dublin.

(c) Overheads increased
The financial overheads involved in running a solicitors office would be increased. They stated that in these recessionary times solicitors had suffered a downturn in business with resulting reduction in income but not a corresponding reduction in overheads. They stated that the introduction of advertising would require all solicitors to set aside vast budgets for advertising. This the profession could not afford.

There is absolutely no doubt that the implications and effects of advertising would be completely different in the city and the country. There is a division, but it need not be divisive. A glossy brochure setting out the services offered by a practice would have a completely different impact in Drimnagh, Dublin than in Bunbeg, Co. Donegal.

The members who supported the introduction of advertising stated that it was in the interest of the public that it should be aware of the different services that were available to them in their localities. In June 1987 the *Consumer Choice* magazine (Irish equivalent of *Which?)* published an article on legal advertising. They carried out a survey in March 1987 based on telephone enquiries to a total of 61 solicitors' practices chosen at random in Wexford, Cork, Galway and Dublin. They concluded that advertising would benefit consumers, to quote:

> "Advertising would be good for consumers. It would tell you what services are available and the respective charges . . . And it should encourage more competition and efficiency. In 1982 the Restrictive Practices Commission recommended that the ban on advertising by solicitors should be lifted. The recommendation should be implemented by the government without any further delay."

The one fact that did emerge from the debate in November 1986 was that the introduction of advertising was inevitable. Furthermore a large percentage of solicitors who voted against change did so, not because they disagreed with the new rules out but because the regulations did not contain any practical means of policing and enforcement. They were particularly aggrieved that there was no clear penalty for those solicitors who would act in breach of the new rules. This reservation still exists.

The Law Society has no plans to reintroduce the draft regulations. It is anxious that the regulations will be implemented but feels that it is bound by the decision of the meeting in November 1986. If, as the writer believes, the introduction of advertising is inevitable then it is time that we reopened the debate and started to push for limited deregulation. The following reasons are cited in support:

A. The Restrictive Practices Commission recommended in 1982 that the restriction on advertising should be removed.
B. In 1987 the Restrictive Practices Commission recommended on accountants that their present limited advertising should be extended to include 'price advertising' and 'open touting' for business.
C. It is understood that the Restrictive Practices Commission is about to report on solicitors and that it will recommend similar rules for the legal profession.
D. The government has for some time been drafting legislation to amend the Solicitors Act. It is understood that the draft bill will incorporate the recommendations of the Restrictive Practices Commission.
E. The public are becoming more aware of the advantages of advertising for solicitors as evidenced by the Consumer Association report. Added to this is the increasing awareness of the public of the advantages in removing the conveyancing monopoly.
F. A group of solicitors favouring advertising submitted a case to counsel, an eminent Constitutional Lawyer who advised them in a lengthy opinion that the present restriction on advertising constituted, in his opinion, a breach of their constitutional rights to freedom of expression.

The solicitors who took Counsel's opinion did so because they considered that the future development of their practices would be adversly affected by the decision in November 1986 and because they preferred to control the future development of their profession rather than have it controlled by some outside body such as the Oireachtas. The government, because of its lack of a majority in the Dail, will not wish to introduce contentious legislation during its term of office, may well favour the introduction of a new Solicitors Act which would include price advertising and "touting" for business.

If the aforementioned solicitors were to refer the matter to Court, the action would be extremely divisive for the profession; however the public and the media would love the controversy, and no doubt the issue would make the headlines for the wrong reasons.

Furthermore if the Court was to uphold the right to advertise then members would be allowed advertise without restriction and thus price advertising and touting would be outside our control. If you do not agree with this conclusion then read the decision in *Bates -v- State Bar of Arizona* where the Supreme Court in upholding Mr. Bates constitutional right to advertise, removed the other restrictions on advertising in Arizona and the rest of the United States of America.

The legal profession cannot hold back the tide of change. In every action a solicitor takes, whether it be his performance in the local court (of far greater significance in country practice than city practice), being a member of the local Lions Club, Vincent de Paul, golf club, football club or local pub, he is marketing himself as a solicitor and ultimately advertising his practice. The only method of obtaining, holding and developing business is by marketing one's services. If you support or oppose these views please respond in the next issue of the Gazette so that your views will be considered and the debate will commence.

JOHN M. BOURKE

VIEWPOINT (Contd. from page 59.)

The publication of a book on Quantum of Damages while welcome, will merely mean a wider dissemination of information already available to insurers, Counsel and solicitors engaged in personal injury cases, and which is the key to the huge percentage of claims which are currently settled without a court hearing. It is not at all clear how helpful such a book will be in the small minority of cases which have to be tried because their facts do not permit of simple assessments of damages.

Pre-trial procedures are to be introduced – another seemingly good idea but not without its drawbacks. In other countries they have led to great delays in the processing of claims. It is to be hoped that all these proposals will be examined carefully with a view to ensuring that any changes are made with the aim of achieving speedy, effective and fair compensation for the unfortunate victims. □

Bar Association News

Meeting of the President with the Limerick Bar Association
The President met with the Limerick Bar Association on the 22nd February, 1988. There was an attendance of approximately 40 members under the Chairmanship of Mr. Dermod Morrissey-Murphy. The meeting discussed a number of topics and in particular the Professional Indemnity Insurance Scheme and Bank and Building Society's Certificates of Title. In answer to criticism expressed by the meeting that the Law Society had not consulted the members of the profession about signing Certificates of Title, the President outlined the detailed negotiations which had taken place between the Law Society and the Building Society and Banks resulting in a compromise which is now working fairly well from the members point of view.

Meeting of the President of the Sligo Bar Association
The meeting took place at the Park Hotel, Sligo on the 23rd February, 1988. The Director General also attended. Mr. Brian Armstrong, the recently elected President of the Sligo Bar Association presided at the meeting and there was an attendance of almost eighty five per cent of the solicitors from Sligo. A lengthy discussion took place as to the future role of the profession in Ireland and there was a strong feeling that, in view of the proposed changes in conveyancing practice, solicitors should extend their areas of practice to include insurance matters, estate agency and financial advice.

The President urged all members to attend the C.L.E. Courses which are being run by the Law Society and in particular the self-assessment seminars being run in conjunction with the Office of the Revenue Commissioners.

Advertising by the profession was discussed and views were expressed in favour of institutional advertising with the object of encouraging people to consult their solicitors early in any transaction.

The President's Meeting with the County Laois Bar Association
The President and the Director General attended the meeting at the Killeshin Hotel, Portlaoise on the 24th February, 1988.

Members of the Carlow Bar Association were also invited to attend. The meeting discussed the Loosemore and Parsons Seminars and the members in attendance felt that they were beneficial to the profession. The President outlined the proposed changes in Conveyancing and Litigation and, in particular, the abolition of jurys from the 31st of July, next and the proposed Building Societys Bill. The meeting felt that competition from lending agencies would mean that Solicitors will have to become involved in other areas such as Estate Agency.

In relation to the abolition of Juries the President expressed his view that Solicitors should become more involved in advocacy and in particular should appear more in the Circuit Court. □

EUROPEAN LAWYERS UNION

CONGRESS IN RHODES JUNE 1988

The European Lawyers Union, the recently established organisation of practising Lawyers from the Member States of the EEC, is holding its second Annual Congress on the Greek island of Rhodes from Thursday 16th to Saturday 18th June 1988. The title of the working programme (three half-day sessions) is:

"Undertakings in the EEC
Present Status and Perspectives for 1992"

In this general context there will be a wide range of topics including competition law, financial and taxation aspects of undertakings, agricultural undertakings, social aspects of undertakings, intellectual property rights, the Single European Act etc. The speakers will include Judges of the Court of Justice, officials of the EEC Commission and private lawyers. The social activities should also be worth the trip.

Members and non-members alike are very welcome. For further information (or information generally on the organisation) please contact as soon as possible:

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A View from Vienna

The 16th Annual Conference of Presidents of European Law Societies took place in Vienna between 12th/14th February, 1988. Delegations headed by their respective Presidents attended from all the European countries including those from the Eastern Block and in all 27 countries were represented at the Conference. At the same time, the International Bar Association ran a Seminar on "Multi Disciplinary Partnerships" and the Union International des Avocats ran a Seminar on "Music and the Law".

The importance of attending the Conference was shown to me by the variety of topics which were discussed, but perhaps more importantly, it vividly brought home to me the fact that we are European and must be seen to be European and that our horizons must be broadened outside the shores of our island.

At the Converence, each country read a short report on the present situation of the legal profession in that country, and then subsequently eight papers were prepared based on replies to questionnaires sent to the Law Society of each European country.

By far the most important paper was that on Multi Disciplinary Partnerships or MDPs as they are called. The concept of MDPs is an amalgamation of a number of professionals in one partnership such as a solicitor, an accountant, a tax adviser, a financial consultant and if it is wished to extend it further, an estate agent, a surveyor, and basically any profession which could be doing a job related to the task in hand. Already these are accepted in Germany and Holland and the representatives of Spain, Switzerland and Denmark felt that they were coming in their countries.

The question was posed as to whether the legal profession should join with the other professions in providing a "one stop" source of services or should it remain separate and distinct and deal with its own field of expertise. It was pointed out that in the continental countries, accountants work as auditors represented only 55% of accountancy work and the balance was represented by tax insolvency and company work. The argument against allowing MDPs was based on the independence of the lawyer, which it was felt important to maintain on the grounds that the lawyer was the person who gave the independent advice that most people found to be absolutely necessary in their transactions. Arguments were raised by some delegates that the new system would be less confidential than the existing system and the meeting was generally divided with opinions expressed for and against the envisaged new form of partnership.

The Chairman summed it up by expressing the view that Multi Disciplinary Partnerships would probably come with the legal profession joining with other professions who did similar types of work such as accountants and tax advisers but not with professions doing different types of work such as architects, engineers and surveyors.

It is interesting to note that the problem has been considered by the English Law Society, who have decided to make no decision on the basis that there is not a sufficiently strong consensus of opinion within the profession to support a change of the magnitude envisaged. It feels there is insufficient common ground between professions whose members might enter into partnerships on the terms on which such partnerships might be permitted to operate. Instead they are prepared to allow a system of profit sharing with non-solicitor employees provided a partnership is not thereby formed. They also propose to introduce a code of conduct which would seek to balance the flexibility required to develop solicitors practices in the competitive environment in which they now operate with the maintenance of the independence of the solicitor.

It would seem certain that Ireland is going to have to face similar challenges. Accordingly it seems to me that we must improve the standard of our qualification by devoting more time to education and training particularly in the commercial law area. Secondly we must be able to provide solicitors with specialities in particular fields who are in a position to provide consultant or referral service to the profession and finally, it seems that the trends will once again move towards larger firms particularly in the city relating to commercial law.

Other points which emerged from the Conference are that there is going to be a serious shortage of

(Right) The President, Thomas D. Shaw, with his wife, Yvonne, attending the Jurists Ball at the Hofburg Palace, Vienna.

solicitors in England at least over the next six years. They are finding that the number that graduate each year are not sufficient to meet the demands and they are in particular difficulty in relation to the operation of their legal aid service. I certainly do not want to feel that our Law Society is educating its graduates for export, but I do strongly feel that given the situation which at present exists of an over supply of solicitors in our country, we must make sure that our graduates are as well educated and trained to take their place in the legal world outside of our country as we can and certainly the issue of reciprocity with England must loom large on our Agenda in the next year.

It is also abundantly clear that the continental lawyer is paid at a consistently higher level than his Irish counterpart. For example, a solicitor doing a legal aid case in Austria is paid at an average rate of £340 per case and the Austrian Law Society feels, and points out to the Government, that at that level of fee, he is making a significant contribution to the Social Welfare aspect of the case.

What I have described in this article is all part of the changing scene in the legal profession about which I wrote at the start of my year. I believe that this change is going to continue and possibly at an even faster rate than I had originally envisaged. What is abundantly clear to me is that whatever change comes in, there will always be a need for a good lawyer with access to specialist knowledge and at a charge which is commensurate with the market place.

Let us strive with all our might to attain this goal.

THOMAS D. SHAW
President

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INAUGURATION OF IRISH LEGAL HISTORY SOCIETY

The Irish Legal History Society was inaugurated in the joint presence of the Chief Justice of Ireland, Mr. Justice Finlay, and of the Lord Chief Justice of Northern Ireland, Lord Lowry, at a reception held in Trinity College, Dublin, on Friday 12th February 1988. Included in the attendance were Mr. Justice Henchy and Mr. Justice McCarthy of the Supreme Court, Mr. Justice Barrington and Mr. Justice Blayney of the High Court, Mr. Nial Fennelly, S.C., representing the Chairman of the General Council of the Bar of Ireland, Mr. Michael Lavery, Q.C., Chairman of the Executive Council of the Inn of Court of Northern Ireland, Mr. Michael O'Mahony, representing the President of the Incorporated Law Society of Ireland, other barristers and members of the solicitors' profession, members of the Law Reform Commission and many academic lawyers, historians from the university history departments and archivists, north and south. The Chancellor of Dublin University, Dr. F. J. C. O'Reilly, was also present as was the Provost of Trinity, Dr. W. A. Watts.

In their addresses, the Chief Justice and the Lord Chief Justice welcomed the initiative that had led to the establishment of the new Society and wished it well in the years ahead.

The Chairman of the Society, Mr. Justice Costello, explained the origins of the Society and the Secretary, Professor W. N. Osborough, of the Trinity Law School who also spoke, announced that the Society expected to commence its series of scholarly volumes on Irish legal history topics with the publication in 1989 of a collection of essays on the history of the Irish legal profession.

The Chairman concluded the proceedings by expressing the thanks of the Society to the Provost for his kindness in acting as host on the occasion of what was a memorable and unprecedented event in the Irish legal calendar.

The subscription to the Society costs £30 (or £28 Sterling). Student subscribers pay £15 (or £14 Sterling). Subscriptions may be sent to The Secretary, Professor W. N. Osborough, School of Law, Trinity College, Dublin 2, from whom further particulars may be obtained.

The executive committee, which, pending the adoption of a constitution for the new Society (expected later this year), currently administers the affairs of the Society consists of: Mr. Justice Costello (Chairman); Professor W. N. Osborough (Secretary); Daire Hogan, Esq., Solicitor (Treasurer); Dr. Art Cosgrove, University College Dublin; Dr. David Craig, Public Record Office of Ireland; and Professor D. S. Greer, Queen's University Belfast.

Pictured at the inaugural reception for the Irish Legal History Society held in Trinity College on 12 February 1988 are (from L. to R.): Dr. W. A. Watts, the Provost of Trinity; Mr. Justice Finlay, Chief Justice; Lord Lowry, Lord Chief Justice of Northern Ireland; and professor W. N. Osborough, secretary of the Society.

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Report on the Professional Indemnity Scheme

by
Maurice R. Curran,
Chairman, Solicitors Mutual Defence Fund Limited

At the November 1986 AGM of the Society proposals were accepted for the introduction of compulsory indemnity cover and for the setting up of a mutual scheme by the Society. After discussions and research both in Dublin and London the Council of the Society in 1987 adopted the following proposals:

1. The precedent of the Medical Defence Union Scheme be followed through the establishment of a guarantee company to be called Solicitors Mutual Defence Fund Limited ("the Fund").
2. The Scheme would provide cover for £200,000 in respect of each and every claim.
3. Top up cover above the £200,000 should be sought from the insurance market.
4. Professional indemnity cover should be left optional for the time being.

Initially pro forma Proposal Forms were completed by approximately 90% of practising members of the Society. On the basis of these forms Stop Loss cover in London was negotiated to protect the Fund against unexpected disaster in the first year. An analysis of these Proposal Forms by our Consultant Actuaries led to the conclusion that assuming the information in the Proposal Forms was accurate, the Scheme would be financially sound and the proposed reinsurance and bank facilities sufficient to ensure the stability of the Fund.

Fresh Proposal Forms on the basis of which the cover would actually be granted were sought from the Profession. These were compared with the originals and whilst there were obviously some variations none were found that were significant or that affected the basic structure and funding of the Scheme.

The Board of the Scheme decided on a premium of £1,000 in respect of each solicitor for £200,000 cover in respect of each and every claim.

The Fund set itself a target of 2,000 participants in the first year. At this stage it is a pleasure to report that the Fund has 2,139 participating members representing 1,039 firms. It is expected that a further 47 solicitors representing 25 firms will have joined by 30th April 1988.

The Board is very appreciative of the level of support from members of the Society, without which the Fund could not have succeeded. The members of the Profession will appreciate (though perhaps not to the same degree as the Board) the commercial pressures that were brought to bear by opposing commercial interests which did not wish Solicitors to join together to indemnify themselves against professional negligence claims.

One of the results of this outside pressure was lack of belief in the London Insurance Market that the Fund would actually get off the ground or, if it did, that it would be successful. It is believed that this is one of the reasons that the levels of premium for Top Up cover were not as satisfactory as the Board would have wished. It is the Board's view that the Market has not recognised that what they are being asked to insure is a situation where each solicitor is carrying the first £200,000 of each claim (that is the Fund on behalf of the member is carrying cover up to that level) and all they are being asked to do is to cover above that. On this basis given that so far as is known the highest paid claim in Ireland is £150,000 there is certainly support for our view that the Top Up premiums should be considerably reduced and it is hoped, with more time available, to make this case more effectively to the Market this year. This is a matter that will be given the highest priority. In this connection it is important that all members seeking quotations for Top Up cover return the completed Proposal Forms immediately. Of course all members and new applicants must complete a fresh Proposal Form.

The decision of the Banks and Building Societies during the year to accept Certificates of Title from Purchasers' Solicitors in connection with mortgage transactions, provided that Solicitors had indemnity cover, was certainly a boost to the Fund and enabled us to recruit a number of Solicitors who might not otherwise have taken out cover prior to compulsory cover being introduced.

Although accurate statistics are not yet available, it is believed that about 90% of all Solicitors in practice now have cover against professional negligence which is very encouraging and should enable the profession to move

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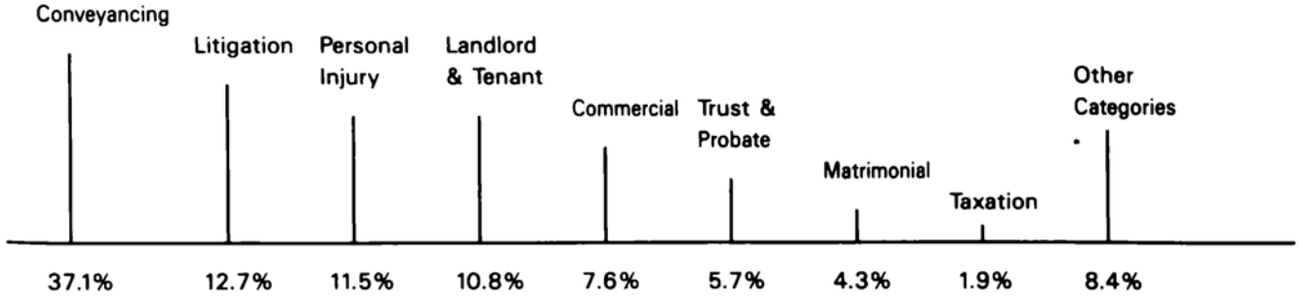

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Words and Phrases Legally defined

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towards compulsory cover in the near future.

Whilst it is very early days in relation to the Fund and experience to date cannot be taken as a guarantee or an expectation for the future, the claims experience at the end of nine months is that there are 27 claims judged as requiring reserves to be made and the amount reserved is well within the Board's level of expectation.

The administrative costs of the Fund have been kept to a minimum as claims are mainly handled through a panel of Solicitors experienced in this type of work. Members with a claim are offered a choice of Solicitor from the panel. It would be the intention of the Board to review the panel from time to time in the light of the number of claims in hand.

The Board intends to promote a programme of risk management to assist members in avoiding unnecessary pitfalls. The experience in England and Wales is illustrated by the Table on page 11.

For the year commencing 1st May 1988, the Board of the Solicitors' Mutual Defence Fund Limited has decided that the subscription per solicitor should be at the rate of £1,100. A loyalty bonus of £100 per solicitor will be allowed where the firm participated in the Fund in its initial year, 1987/88.

When the first year has been completed and the Accounts audited, a full report will be made to members of the Fund which can be discussed at the Annual General Meeting of that company. □

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Thomas D. Shaw

THOMAS D. SHAW
President

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Practice Notes

Consent of Spouses: Personal Representatives

The Committee has received a series of requests for advice as to whether, or in what circumstances, the consent of the personal representative's spouse may be necessary in the sale of residential property which formed part of the deceased's estate, by the personal representative in course of administration of the estate.

In December 1981 the Conveyancing Committee recommended that it was not necessary for a solicitor purchasing a property from a personal representative who is selling qua personal representative to enquire into the position in relation to the Family Home Protection Act in respect of the occupation of the premises by non-conveying beneficiaries. This recommendation did not receive widespread acceptance and the Committee has recently become concerned that it was too simplistic particularly where a personal representative is selling quite a numbers of years after a death.

The matter is not without difficulty and the Committee, having taken Senior Counsel's advice, is satisfied that only guidelines can be given. The facts in each case must ultimately determine the position.

Where there is no evidence to suggest that the personal representative and his or her spouse have resided in the property no consent should be sought, though a Declaration confirming the non-residency should be obtained from the personal representative.

Where there is some evidence that the personal representative or/and his or her spouse may have resided in the property for a short period (e.g. while looking after the deceased during illness or caretaking the property after death) but there is evidence to show that the personal representative's family home is elsewhere, then again no consent should be sought, though a Declaration confirming the location of the personal representative's family home should be obtained from the personal representative. The fact that the personal representative or the spouse may be beneficially entitled to the property under the will or intestacy is of no significance in this situation.

Where the personal representative and his or her spouse have lived in the property and when there is no evidence to suggest that their family home is elsewhere, then it would be reasonable to seek the consent of the spouse. This would particularly apply where the personal representative or his or her spouse are beneficially entitled under the will or intestacy to the property. □

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3. Photocopy of a specified entry in the Register	£1.50	
4. Authentication of a certificate: Cheques, Postal Orders, etc. should be made payable to the "Registrar General".	£1.50	

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The Solicitors' Benevolent Association assists such cases - and many others where the age of dependants of members of the profession ranges from "under 10" to "over eighty". The Committee of the Association meets monthly and its work covers the entire country, north and south. The Committee funds come from annual subscriptions from members of the Law Society of Northern Ireland and The Incorporated Law Society of Ireland, together with additional subscriptions received from Bar Associations, and individual Solicitors or firms of Solicitors. In recent years the calls on the Association's resources have become more numerous and this year the Committee faces a relatively large deficit. It urgently needs extra funds. Subscriptions can be sent to the Secretary, Ms Clare Leonard, The Solicitors' Benevolent Association, 40 Lr. Fitzwilliam Square, Dublin 2, or c/o The Law Society, Blackhall Place, Dublin 7.

THE HIGH COURT

Record No. 35SA 1987

IN THE MATTER of Brendan Gunn a solicitor and in the matter of the Solicitors' Acts 1954 and 1960.

NOTICE is hereby given that by Order of the President of the High Court dated the 1st day of February, 1988, the name of Brendan Gunn, solicitor, formerly practising under the style of Gunn & Co. at 28 Molesworth Street, Dublin 2, has been struck off the Roll of Solicitors.

Dated this 7th day of March, 1988

JAMES J. IVERS
Director General

Apprentices in the District Court

On Thursday morning, the 4th February 1988, Solicitors Apprentices were officially welcomed to the District Court in Dun Laoghaire by Judge Hubert Wine.

The occasion was marked by a Statement from Judge Wine to the press, practitioners and the public who were present in Court. In it he referred to the important part apprentices have to play and how necessary it is for those who are about to be solicitors to have confidence to stand in Court and appear for their clients. It was with great pride that the District Court in Dun Laoghaire had the distinction of being the first Dublin Court to officially and formally recognise the Solicitors' Apprentices in the District Court.

He also referred to the wearing of gowns and was particularly pleased to see young practitioners in his court wearing gowns and expressed the desire that this should be the case henceforth.

Justin McKenna, on behalf of the practitioners, replied to the Judge by referring to the good work carried out by Jim Donegan in Cork in this regard. Mr. Donegan pioneered the introduction to the District Court of apprentices allowing them to appear in uncontested matters. He hoped that the work carried out by Judge Wine in Dun Laoghaire was a further example to the Judges of the District Court practising throughout the land.

The photograph shows, from left to right, Justin McKenna, solicitor, Roslyn Moran, apprentice, Judge Wine, Paul McGuinness, newly qualified solicitor, Gerard I. Lambe, solicitor.

Knocklofty House, Clonmel was the venue on Wednesday 2nd March, for the Regional Meeting of the Irish Auctioneers and Valuers Institute, for members from Limerick, Offaly, Tipperary, Laois, Kilkenny, Waterford, Wexford and Carlow. The members were addressed by the President, Mr. Patrick Quirke, Clonmel, Mr. Donal G. Binchy, Council Member of the Incorporated Law Society on "The Law of Contract" and Mr. David Mackey, Assistant County Manager, Tipperary, on "The Role of the Local Authority". a lively open forum followed each of the well-prepared presentations.

(Photo courtesy of *Clonmel Nationalist*)

"Sports Injuries and the Law" Symposium
Blackhall Place, 23rd March 1988

Speakers (from left): Sean Clancy, General Manager, Church & General Insurance Co.; Gerald Kean, Solicitor; and Dr. Patrick Murray, Consultant, National Medical Rehabilitation Centre, Dun Laoghaire.

WICKLOW BAR ASSOCIATION

The members of the Committee are as follows:

President: William Fallon, Solicitor, 3 Church Buildings, Main Street, Arklow.

Hon. Treasurer: Cathal Louth, Solicitor, Ferry Bank, Arklow.

Hon. Secretary: Joseph F. Maguire, 98 Main Street, Bray, Co. Wicklow.

LAW SOCIETY ANNUAL CONFERENCE, CORK
5th—8th May, 1988

Have you Registered yet?

Visit by Solicitors to European Court and European Parliament

(Left to right): Adrian Burke, Chairman of the Society's Public Relations Committee; His Honour Judge Thomas F. O'Higgins; Ms. Geraldine Clarke, Law Society Council Member; and Mr. Ken Murphy, Law Society Council Member.

VISIT BY SOLICITORS TO EUROPEAN COURT AND EUROPEAN PARLIAMENT

Thirty solicitors drawn from the Younger Members Committee and the E.E.C. and International Affairs Committee of the Law Society and from the Society of Young Solicitors visited the European Court in Brussels and the European Parliament in Strasbourg in January. The visit, which was most informative and interesting, was hosted by Judge Thomas O'Higgins and Mr. David O'Keeffe in Brussels and by Mrs. Mary Banotti, MEP and Mr. John Smith of the Council of Europe in Strasbourg. The delegation attended a sitting of the Court in Brussels following which Judge O'Higgins hosted an excellent luncheon.

Mrs. Banotti arranged for the delegation to attend a session of the European Parliament in Strasbourg, followed by a meeting which was attended by the Commissioner, Peter Sutherland and MEPs Mary Banotti, Eileen Lemass, Chris O'Malley, Paddy Lawless, Gene Fitzgerald and Joe McCartin, and also by some of the British MEPs. Dinner was hosted by Mrs. Mary Banotti who also invited British Conservative MEP Lady Ellis to address the visitors.

The visit was most beneficial in providing an understanding of the functions of the Court and Parliament and into the high level of commitment and the work being done by our representatives in Europe.

DUBLIN SOLICITORS BAR ASSOCIATION ANNUAL DINNER

The D.S.B.A. Annual Dinner was held on the 26th of February, 1988 in the Shelbourne Hotel. It was a most successful function and guests included the President of the High Court, Mr. Justice Liam Hamilton, the President of the Belfast Solicitors Association, Mr. David McFarlane, the Vice President of the Northern Ireland Solicitors Association, Mr. Colin Haddick and the Senior Vice President of the Law Society, Mr. Maurice Curran. It was the first time for many years that the function was held outside Blackhall Place, which added a new and interesting dimension to the evening.

The President Mr. Terence Dixon addressed the function briefly and, in particular, expressed concern about the proposed Building Society's Bill.

Following an excellent dinner members and guests danced to the Earl Gill Orchestra until the early hours.

President of the Dublin Solicitors Bar Association, Mr. Terence Dixon with Ms. Margaret Walsh, Solicitor, Dublin.

CONTRIBUTIONS WELCOME

Please send news items and photographs for publication in this column to:

"People & Places",
The Gazette, Law Society,
Blackhall Place, Dublin 7.

"Dublin Tomorrow — A Living City"
Law Society Symposium 27.2.1988. (Left to right): Mr. Maurice Curran, Senior Vice President; Mr. Sam Stephenson, Speaker, and Mr. Rory O'Donnell, Junior Vice President.

Ms. Elma Lynch, Solicitor, Dublin, assisting a member of the public at the Society's stand at the Brighter Homes Exhibition.

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The Corroboration Requirement in relation to Sexual Complainants: Significance of the 'DNA Test'

Certain categories of witnesses or types of evidence are regarded, for policy reasons by our rules of evidence, to be somehow suspect or unreliable. Corroborative evidence is therefore required, in relation to such evidence, or the testimony of such witnesses.

The testimony of complainants of sexual offences is one such incident where corroboration is required *as a matter of practice* or at least a warning to the jury is required as to the danger of acting on such uncorroborated evidence.[1] Hitherto this corroboration requirement has posed a not inconsiderable obstacle to the prosecution of sexual offences.

by
Caroline Fennell,
B.C.L., (N.U.I.),
LL.M (Osgoode) B.L.,
Lecturer in Law,
University College, Cork.

The reason for the difficulties inherent in the application of the requirement, lies in the definition of what constitutes corroboration. Despite suggestions to the contrary, corroboration does not mean merely confirmatory or supporting evidence.[2] It has, in fact, a much narrower, more technical meaning. This definition of corroboration stems from the decision of *R. -v- Baskerville*[3] to the effect that corroborative evidence constituted:

> ". . . independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular NOT only the evidence that the crime has been committed but also that the prisoner committed it".[4]

Hence in a sexual offence case, evidence of traces of semen found in the victim's body, for example, would not constitute *corroboration* of the incident of sexual intercourse, as although such evidence would confirm the occurrence of an act of sexual intercourse, it would not connect the accused with the act, the subject matter of the alleged offence. However, recent scientific developments now enable the particular accused to be connected with an act of sexual intercourse. This is a significant advance in this area of the law, although further obstacles to prosecution will remain. If the offence charged is one of rape, for example, the issue of consent will have to be addressed. However, the accused will no longer be able to undermine evidence of semen traces, by alleging intercourse with third parties, while denying that he had intercourse with the complainant on the occasion in question. This is due to the development of what is termed 'genetic fingerprinting'. Genetic or DNA fingerprinting refers to the fact that a sequence amongst the genes in each person's DNA repeatedly occurs along the length of the string-like DNA molecules and varies in its size at each location. All these copies of the sequence create a unique pattern in each individual — a DNA fingerprint. Therefore traces of hair, skin, blood or semen found at the scene of the crime, can connect the particular accused with the incident in question.[5]

However, the entire ambit of prosecution of sexual offences is not affected. In the context of rape the accused can still utilise the corroboration requirement to his advantage. By pleading consent on the part of the victim, he effectively forces corroboration on the issue of consent. The DNA fingerprint evidence, in this context, is of far less effect as it corroborates only the incident of sexual intercourse with the accused; it does not go to the issue of consent.

Perhaps it is here then that a case can be made for a modicum of reform, in relation to the corroboration requirement. Advances in modern science, it seems, can ameliorate the worst strictures of the requirement, but they cannot resolve the issue entirely. The rationale of the corroboration requirement in the context of sexual complainants is manifestly archaic. Resting, as it does, on a view of women (who made up by far the greater portion of sexual complainants) as inherently unreliable and hysterical, perhaps the time is ripe for a reassessment of the current validity of the rule.[5a] Traditional justifications such as that of Hale[6] in the context of rape:

> "It is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused though never so innocent."

and Wigmore:[7]

> "The unchaste mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale";

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might be termed outmoded and inadequate. Several routes to reform present themselves.

The courts could choose to modify their definition of what constitutes corroboration. The *"Baskerville"* formula could be abandoned in favour of a definition along the lines of the Supreme Court of Canada's approach in *R. -v- Murphy*[8] viz., that a material particular of the witness' story is what needs to be corroborated and once the story has been confirmed the witness could be believed. There is no requirement that the witness' complete story be corroborated. Thus on the facts of the case, which involved an allegation by a 16-year-old Indian girl that the two defendants had interfered with her and had sexual intercourse with her while she slept on the couch in their apartment; the allegation by one defendant that her distressed condition could only corroborate her account if consent were in issue, and could not corroborate the case against him as he denied intercourse altogether, was unsuccessful.

Under such a modified construction of the requirement the potential of evidence such as the DNA fingerprint would be greatly enhanced. A second possibility would be abolition of the requirement entirely. However, the recent Law Reform Commission Consultation paper on Rape[9] does not indicate any definite impetus to abolish the corroboration requirement in this context. Hence the importance of genetic fingerprinting in these cases will remain, its impact varying, on occasion, with the defence put forward.

Although the Irish courts have yet to be presented with such evidence, in England, evidence of genetic fingerprints have been presented in cases where proof of relationship was an issue in the immigration context.[9a] Furthermore, in *In Re 1 (a minor)*[10] a mother was delayed in attempting to leave the jurisdiction, in order to facilitate a DNA test to establish paternity. More recently, a man was found guilty in the Old Bailey in London of raping his 11-year-old step-daughter, resulting in the birth of a female child. The DNA test established that the man was indeed the father of the child.[11] A further case of *R. -v- Pitchfork*[12] illustrates the probative value of the DNA test, as well as some of the difficulties inherent in obtaining same. Pitchfork was convicted of two counts of murder, rape and indecent assault. He was detected as a result of genetic fingerprint evidence; although he initially evaded the test, and thus detection, with the help of a workmate who 'stood in' for him at the test. The case illustrates the importance of the introduction of a comprehensive scheme for operating and authorising the use of the test. In the English context, the Family Law Reform Act 1987 makes adequate provision for the use of "scientific tests" to determine paternity. This is arguably broad enough to include a DNA test. In the Irish context, provision analogous to that for the taking of traditional fingerprints will have to be introduced to take account of this development.[12a]

Our most recent provision has been in the context of an arrest under s.4 Criminal Justice Act 1984, in relation to which regulations[13] provide that fingerprints, palm prints or photographs shall not be taken of, or swabs or samples taken from, a person in custody except with his written consent.(s.18).

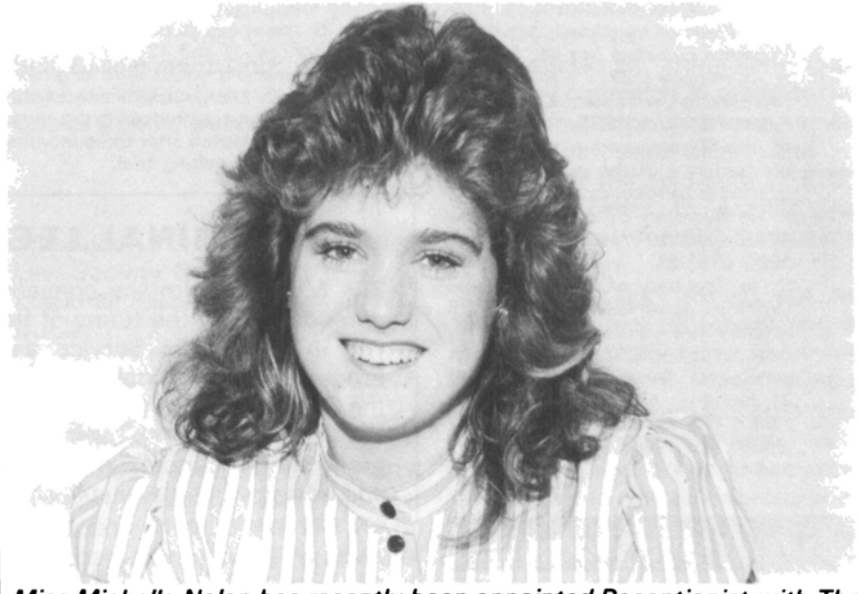
In the context of arrests, not under the Criminal Justice Act 1984, provision is made by the Regulations as to the Measuring and Photography of Prisoners, 1955.[14] This permits an untried person to have fingerprints taken, if he has been informed of his right to object, but does not do so. Without his consent, he may nevertheless be fingerprinted with the Minister's authority *or* upon approval of an application of a Garda not below the rank of Inspector, to a Justice of the District Court *or* in Dublin by a Commissioner or Deputy Commissioner.

Authority in relation to those detained under s.30 Offences Against the State Act, 1939 is provided by s.7(1) Criminal Law Act 1976, which allows fingerprinting and explosive tests (hair and skin swabs *re* same) to be carried out.

As current provision then, is arguably inadequate; provision should be introducd for the authorisation and facilitation of such DNA tests, in addition to adequate testing facilities.

The importance of the test, after all, lies not alone in its ability to conclusively connect the accused with the incident, the subject matter of the alleged crime; but

COMMUNICATING WITH THE LAW SOCIETY



Miss Michelle Nolan has recently been appointed Receptionist with The Law Society. Michelle joined the Society's Staff in 1985, and in her new position is responsible for administering the reception area and dealing with personal callers and telephone queries from members of the profession and the public. Facilities at reception include a telex machine (no. 31219), and a telefax (710704). Law Society publications and stationery forms are available for sale at reception and rooms can be booked by members for consultations and overnight accommodation.

also as illustrated in the *Pitchfork* case, to exonerate a given individual from any connection with the incident in question.[15]

Both from the perspective of the protection of individual rights, and the effective administration of criminal justice, the development is one to be welcomed; and even within the strictures of corroboration as currently defined by our law, will help to ameliorate one of the archaicisms of this rule of evidence.

FOOTNOTES

1. Cross *Evidence* (6th ed.) 1985 at p.207. A rule of practice now accepted as having the effect of a rule of law.
2. Suggestions to this effect were made in House of Lords in *D.P.P. -v- Hester* [1973] A.C. 296.
3. *R. -v- Baskerville* [1916] 2 K.B. 658; [1916–17] All E.R. 38.
4. *Ibid.*, at p. 667 as per Lord Reading L.C.J.
5. See further: Gold, 'DNA Explosion' (1987) *New Law Journal* 1104.

5a. Although other categories of witnesses, most notably accomplices and children, are fixed with a corroboration requirement, the rationale is dissimilar to that put forward in the context of sexual complainants. In the former cases, the justification for the requirement is said to be rooted in the **characteristics** of the witnesses (children inhabit a different time-space/world and have limited powers of observation and recollection; accomplices are morally culpable and can weave a very plausible tale); whereas sexual complainants share in common only the **type** of offence perpetrated on them.

6. Hale, *Pleas of the Crown* 1, p.635.
7. Wigmore *Evidence* 3rd ed., S9249.
8. *R. -v- Murphy* (1977) 2 S.C.R. 603.
9. Law Reform Commission Consultation Paper: *Rape* Oct. 1987. The majority of the Commission recommended maintenance of the present law in relation to corroboration requirement.

9a. *R. -v- Secretary of State for Home Office ex parte Anwar* Q.B.D. 23 June 1987 (ITELIS).
R. -v- Secretary of State for Home Office ex parte Taslim Bi Q.B.D. 29 January 1987 (ITELIS).
See also, 'DNA tests back immigrants' *Sunday Observer* (1988) 31 January.

10. (1987) *The Times*, May 22.
11. (1988) *The Guardian* 23 January.
12. *Ibid.*

12a. See recent call for introduction of genetic fingerprinting and facilities to extend use of same made by Fine Gael's spokesman on Law Reform, Mr. Alan Shatter at Young Fine Gael conference in Galway (reported *The Irish Times* February 6, 1988).

13. Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations. S.I. No. 119 of 1987.
14. S.I. No. 144 of 1955.

14a. Relevant in this context is the Status of Children Act 1987, Part VII of which makes provision for the use of blood tests as evidence in questions of parentage arising in civil proceedings. (The Act was passed in December 1987, and Parts II to IX are to come into force 6 months thereafter or sooner if the Minister so directs).
Section 37 defines "blood tests" as any test carried out with the object of ascertaining inheritable characteristics. According to the Explanatory Memorandum this includes such tests as serological analysis, enzyme analysis, tissue typing and DNA profiling.
Under Section 38 of the Act a court either of its own motion or on an application by any party to the proceedings, can give a direction for the use of blood tests for the purpose of assisting the Court to determine parentage.
Section 39 provides that a blood sample should not be taken from that person except with his consent. However, the court may draw such inferences, if any, from the failure to consent, as appear proper in the circumstances (s.38(1)).
Interestingly s.43 provides for penalties for personation of blood tests. Similar provision for such blood tests, facilitating the use of DNA fingerprinting in the pre-trial criminal process, consequent on arrest, could be introduced therefore by analogy with the above Act.

15. *Supra* fns. 11 and 12.
A 17-year-old youth who originally had been charged with one of the murders, was cleared using the same test and released after three months in custody awaiting trial.

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CRIMINAL LEGAL AID SCHEME

The Minister, with the consent of the Minister for Finance, has agreed to apply the terms of the first phase of the Agreement on Pay in the Public Service associated with the Government's Programme for Natioal Recovery to the existing fees [as set out in the Criminal Justice (Legal Aid) (Amendment) Regulations 1986 (S.I. No. 248 of 1986)], to have effect from a current date. Regulations prescribing the increase of 2½% are in the course of preparation and copies will be available shortly. The new fees to be prescribed are set out below:

- First day in District Court Case (or appeal to Circuit Court) £49.62
- Subsequent appearance in same case £22.07
- Prison visitation fee £25.73

As there has been no increase in the motor mileage rates payable to civil servants since 1985, the rate of 50p per mile payable to solicitors under the criminal legal aid scheme remains unchanged.

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CORRESPONDENCE

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

Dear Sir,

Single European Act

I read with interest (Dec. issue) as regards making a consultative room available on six occasions at a total cost of £72 (to fulfill the Society's neglected duty) on above, that "Mr. Margetson, Chairman of the Finance Committee, commented that it was not the practice of the Society to provide rooms free for any activity".

Presumably therefore, he and his Committee will insist on payment of the cost of providing the Presidents Hall, and extensive other rooms, including generous hospitality to those sponsoring the Irish Times Debate, held in the Law Society premises on 5th February 1988. This will bring in much needed income to the Society in excess of £1,000.

I hope to deal in your next issue with the other matters concerning the above and purported to have been dealt with at the A.G.M.

Yours sincerely,
T. C. GERARD O'MAHONY
Solicitor,
22 Merrion Square,
Dublin 2.

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

Dear Sir/Madam,

Re: Pilot Study for Self Assessment

I would like to bring you up to date on developments in the pilot study. To date well over 200 returns have been received and reports from the participants in the scheme have been very favourable especially in regard to the speed with which such returns are processed.

Because of the encouraging experience to date it has been decided to continue to operate the scheme during 1988. As well as giving more practitioners an opportunity to join the scheme the extension will provide the Branch with more information and experience for evaluating the scheme and for drawing up proposals for statutory self-assessment. If you have already participated in the Pilot Scheme we would like to encourage you to continue. If you have not we would like to urge you to do so.

Three workshops on the completion of self assessment returns have been held in Blackhall Place and four other sessions are planned for Cork, Limerick, Galway and Sligo. These sessions will be advertised by the Law Society in due course. Most solicitors who have attended have found them extremely helpful.

The self assessment team consists of:

Andrew McLaughlin, ext. 2241
Eddie McCarthy, ext. 2247
Lucy Durnin, ext. 2018
Ray Williamson, ext. 2244.

Copies of self assessment forms and instruction booklets can be obtained from Capital Taxes Branch, Dublin Castle, Dublin 2.

Any member of the team will be happy to deal with any problems or enquiries about self assessments.

Yours sincerely,
ANDREW McLAUGHLIN
Assistant Principal Officer,
Self Assessment Unit,
Capital Acquisitions Tax,
Dublin Castle, Dublin 2.

The Editor,
Law Society Gazette,
Blackhall Place,
Dublin 7. 7.4.1988.

Dear Sir,

Re: Corporate Publicity

On Thursday last, the 24th March 1988, the Dublin Solicitors Bar Association held a meeting for its members to which the President of the Law Society, Mr. Thomas Shaw was invited. The meeting was very well attended.

A comprehensive and frank exchange of views took place, particularly on the issue of the proposed new Building Society Bill and the intention of the Minister for the Environment to allow the societies set up their own conveyancing shops.

Most members by now will be aware that this Association has made public its views that this proposal is not in the interest of the consumer as it would give rise to a direct conflict of interest and will not reduce the cost of conveyancing. In the context of the conflict it was the general feeling of the members present that solicitors need to get the message across to the public that we are the source of unfettered and unbiased advice.

To effectively communicate this message it will be necessary for the Incorporated Law Society to undertake a publicity campaign and inevitably involve large financial expenditure. It was discovered that the vast majority of those present at the meeting, in the order of 75%, were in favour of the Law Society seeking budget of £100 per Solicitor to undertake just such a campaign. It was pointed out by Mr. David Walley, Chairman of the Association's Conveyancing Committee that £100.00 would represent only a fraction of the savings achieved by members since the introduction of the Law Society's mutual defence.

In view of the overwhelming numbers in favour of this proposal our association now calls on the Law Society to,

(1) Prepare an immediate publicity campaign to promote the independent services which the profession offers; and
(2) Collect the said sum of £100 per solicitor to provide the necessary funding for such a campaign.

This campaign should not be limited to corporate advertising in the mass media but should involve every solicitor in the country through their offices and with their clients and social contacts.

It is the belief of our Association that a strong public awareness of our independence, as distinguished from other sources of information and advice, is necessary not only in our interest but for the long term benefit of our clients.

Yours faithfully,
DAIRE M. MURPHY,
Hon. Secretary,
Dublin Solicitors Bar Association.

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LAW PERSONNEL invite applications from solicitors who are eager to find employment with law firms in England and Wales. Our clients have a growing need for experienced and qualified staff offering their expertise in company commercial law or other specialist fields such as conveyancing, tax, pensions etc. Those with more general experience will find opportunities with smaller firms in London and elsewhere. As an indication, a solicitor just admitted can expect to earn in excess of £17,000 p.a. with a major London practice.

In order to meet this demand and offer the service our clients are accustomed to, senior consultants who have made a special study of Irish qualifications will be available in Dublin to meet solicitors in private on a one to one basis to discuss career opportunities in England and Wales. The duration of these meetings will be in the order of 60 to 90 minutes and will neither cost nor commit applicants to anything. To avail yourself of this facility, appointments must be made by contacting our London office; we will not be able to see candidates without prior arrangements.

Please telephone, or send a detailed Curriculum Vitae to include the following information:-

- Academic achievements to present with dates
- Considerable details on work experience, before and since qualifying – this cannot be stressed sufficiently.
- Preference as to location of work and size of practice.

Our Modus Operandi: Upon receipt of this information we will prepare a CV on you. This document will not disclose your name nor the name of your present employer. We will bring this document with us and discuss it at length in our meeting with you.

All applications will be treated in the strictest confidence that such matters deserve.

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Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.
15th day of April, 1988.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Martin Kelly, Ballindrumlea, Castlerea, Co. Roscommon. Folio No.: 16763 Lands: (1) Ballindrumlea; (2) Ballindrumlea; Area: (1) 7a.0r.36p.; (2) 9a.2r.7p.; County: **ROSCOMMON.**

Thomas Kiernan of Springlawn, Granard, Co. Longford. Folio No.: 222R and 9459 revised to 1833F. Lands: (a) Carragh; (2) Grassyard; (3) Carragh; (4) Ballynacross; (5) Ballinrad (Glebe); Area: (1) 14.013 acres; (2) 6.188 acres; (3) 4.306 acres; (4) 31.844 acres; (5) 7.031 acres; County: **LONGFORD.**

Tobias Halpin of Kilbaylet, Donard, Co. Wicklow. Folio No.: 4092; Lands: (1) Carrig; (2) Sroughan; Area: (1) 2a.1r.32p.; (2) 31a.2r.2p.; County: **WICKLOW.**

Henry Jennings of Cliffin, Killinkere, Virginia, Co. Cavan. Folio No.: 17025; Lands: Galloncurra; Area: 16a.1r.2p.; County: **CAVAN.**

John P. Healy Rae and Julie Healy Rae, Main St., Kilgarvan, Co. Kerry. Folio No.: 1994; Lands: Gortnaboul; Area: 5a.0r.28p.; County: **KERRY.**

John and Timothy Carey, both of Barna, Dunkerrin, Birr, Co. Offaly. Folio No.: (1) 971; (2) 973; (3) 7898; Lands: (1) Ballyrihy; (2) Ballyrihy; (3) Ballyrihy; Area: (1) 37a.2r.3p.; (2) 11a.3r.10p.; (3) 26a.2r.4p.; (4) 2a.2r.20p.; County: **OFFALY.**

Patrick Reynolds, Muingwore, Corballa, Co. Sligo. Folio No.: 12867; Lands: Muingwore; Area: 32a.2r.14p.; County: **SLIGO.**

Eileen Admans and Bridget Admans of 8 St. Brendans Terrace, Thurles, Co. Tipperary. Folio No.: 1296L; Lands: Thurles/Townparks; County: **TIPPERARY.**

William Dillane of Kilkinlea, Abbeyfeale, Co. Limerick. Folio No.: 1761; Lands: Killinlea; Area: 5a.1r.12p.; County: **LIMERICK.**

Thomas Clarke of 57 St. Clares Rd., Governey Park, Carlow. Folio No.: 709L; Lands: 57 St. Clares Road; County: **CARLOW.**

Patrick Doherty of Corraine, Welchtown, via Lifford, Co. Donegal. Folio No.: 4607; Lands: Corraine (part); Area: 8a.2r.25p.; County: **DONEGAL.**

Edward Cannon, Raherneen, Kiltulla, Athenry, Co. Galway. Folio No.: 36280; Lands: (1) Caherakilleen; (2) Laragh; (3) Raherneen; (4) Skeagharegan; (5) Skeagharegan; (6) Skeagharegan; Area: (1) 41a.0r.32p.; (2) 2a.1r.25p.; (3) 19a.3r.35p.; (4) 3a.1r.34p.; (5) 3a.0r.7p.; (6) 2a.0r.23p.; County: **GALWAY.**

Frederick W. Stillman, Folio No.: 11322; Lands: Gormanstown; Area: 0.486 hectares (1a.0r.32p.); County: **MEATH.**

Dunne, Bernard, Carpenterstown, Castleknock, Co. Dublin. Folio No.: 6441F; County: **DUBLIN.**

Philip Priestly c/o Edmond Hayes, Solicitor, 20 South Mall, Cork. Folio No.: 42061; Lands: Burgatia; Area: 0a.2r.0p.; County: **CORK.**

Marguerite Lane of Inchitotane, Newmarket, Co. Cork. Folio No.: 22840; Lands: Inchantotane; Area: 50a.1r.6p.; County: **CORK.**

Phyllis Blaxland (Sister of Charity), **Frances Heskin** (Sister of Charity), **Mary Barry** (Sister of Charity), **Josephine Garvey** (Sister of Charity), Mount Saint Annes, Milltown, Co. Dublin. Folio No.: 3797; County: **DUBLIN.**

Catherine Theresa Linehan of Killeendaniel, Whitechurch, Co. Cork. Folio No.: 35052; Lands: Killeendaniel; Area: 2a.2r.26p.; County: **CORK.**

Thomas Cullen, Clonkieffy, Oldcastle, Co. Meath. Folio No.: 9078; Lands: Clonkeiffy; Area: 49a.3r.18p.; County: **CAVAN.**

Cornelius Lynch of Gurteen, Bantry, Co. Cork. Folio No.: 2283; Lands: Aghagooheen; Area: 47a.0r.0p.; County: **CORK.**

Elizabeth and Dominic Feely both of Patrick St., Tullamore, Co. Offaly. Folio No.: 2876F; Lands: Fortyacres; County: **OFFALY.**

Richard J. and Mrs. Marian Cannon, both of Flemington, Balbriggan, Co. Dublin. Folio No.: DN.057535F; Lands: (1) Balscadden; (2) Flemingtown; Area: (1) 4.805 hectares; (2) 24a.1r.34p.; County: **DUBLIN.**

Daniel Breen of Clonribbon, Kanturk, Co. Cork. Folio No.: 2845; Lands: Clonrobin; Area: 42a.0r.39p.; County: **CORK.**

Most Rev. Dr. Thomas Morris of The Palace, Thurles, Co. Tipperary, **Very Rev. Francis Ryan,** Thurles, Co. Tipperary; and **Very Rev. Edmond Ryan** of Lattin, Co. Tipperary. Folio No.: 35054; Lands: Deerpark; Area: 2a.2r.17p.; County: **TIPPERARY.**

William Berkerry of Lackabrack, Killoscully, Newport, Co. Tipperary. Folio No.: 33445; Lands: (1) Lackabrack; (2) Lackabrack; Area: (1) 34.904 acres; (2) 9.738 acres;; County: **TIPPERARY.**

Ronald Gibbs of 83 Lakelands Close, Stillorgan, Co. Dublin. Folio No.: 13141L; Lands: Townland of Kilmacud East, Barony of Rathdown; Area: 0.3 hectares; County: **DUBLIN.**

John P. Clarke & Mary Clarke, both of Tullyallen, Drogheda, Co. Louth. Folio No.: 434F; Lands: Donore; Area: 0a.1r.26p.; County: **MEATH.**

John McEnroe of Drumbarry, Kilnaleck, Co. Cavan. Folio No.: 2271; Lands: Drumbarry; Area: 17a.3r.30p.; County: **CAVAN.**

Patrick Joseph O'Donnell, Slattamore, Ruskey, Dromod, Co. Roscommon. Folio No. 395 (Rev.); Lands: Slattaghmore; Area: 29a. 1r. 33p.; County: **ROSCOMMON.**

Lost Title Documents

IN THE MATTER OF the Registration of Titles Act 1964 and of the application of LEO GIBBONS in respect of property 55 Clancy Road, Finglas, Dublin.

TAKE NOTICE that Leo Gibbons of 55 Clancy Road, Finglas, Dublin 11 has lodged an Application for registration on the Freehold Register free from encumbrances in respect of the above mentioned property.

The original documents of title specified in the Schedule hereto are stated to have been lost or mislaid.

The Application 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. 87DN02456. The missing documents are detailed in the schedule hereto.

Dated the 16th February, 1988.
M. O'NEILL

Schedule

Original Deed of Assignment dated 28 May, 1963, Ronald Bailey and others to Leo Gibbons.

Lost Title Deeds

JAMES HIGGINS, deceased. Would any firm of solicitors holding title deeds in the name of James Higgins with respect to Uncle Tom's Cabin, Black Rock, Dundalk, Co. Louth; 61 Melrose St., Belfast; 276 Donegall Avenue, Belfast; Lands at Ligoniel; Cottages at Newcastle or any other properties, please contact Mr. T. Anderson at O'Reilly Stewart, Solicitors, 119 Donegall St., Belfast. Tel. No. Belfast: 322512.

Lost Wills

MOLLOY, Thomas, deceased, late of Moate, Freshford, Co. Kilkenny. Will anyone having knowledge of the whereabouts of a will or testamentary disposition executed by the above-named deceased who died on 7 April 1985, please contact Messrs. Kearney Roche & McGuinn, Solicitors, 9 The Parade, Kilkenny, Tel. (056) 22270.

FOWLER, William, deceased, late of Fancroft, Roscrea, Co. Tipperary. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 20 November 1987, please contact Michael J. Breen & Co., Solicitors, Roscrea, Co. Tipperary.

KEANEY, Patrick Joseph (otherwise Padraig), deceased, late of Gowla, Cashel, Co. Galway, and Millbrook Lawns, Tallaght, Co. Dublin. Will anyone having knowledge of the whereabouts of a will or Testamentary Disposition executed by the above-named deceased who died on 21 November 1987, please contact Michael Martin, Solicitor, 33 Capel St., Dublin. Tel. 727515.

WALSH, Mary, deceased, late of Clohane, Skibbereen, Co. Cork. Will anyone having knowledge of the whereabouts of a will and more particularly of the will dated 15th June 1976, of the above-named deceased who died on 23 November 1985, please contact Wolfe & Co., Solicitors, Market St., Skibbereen, Co. Cork.

McGEE, Bernard Eamon, deceased, late of 42 Newpark Rd., Hollypark, Newtownpark Avenue, Blackrock, Co. Dublin and Ottawa, Ontario, Canada. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 20 January 1984, please contact A. C. Forde & Co., Solicitors, 14 Lansdowne Rd., Dublin 4. Ref. AH.

MOONEY, Una, deceased, late of Currabell, Dunmore in the County of Galway. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 12 January 1988, please contact George Bruen, Solicitor, Castle St., Dunmore, Co. Galway. Tel. (093) 38178.

DONALD, Mary, deceased, late of "Bengorm View", Clifden Rd., Leeane, Co. Galway. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 10 November 1987, please contact her daughter, Honor Winifred Christina Wright, 21 Stand Park Ave., Bootle, Merseyside L30 3SA, England.

MONAGHAN, Nicholas Joseph, deceased, late of 7 Belvedere Avenue, Dublin 1, and formerly of 14 Ashford Place, Harold's Cross, Dublin 6. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 10/11 February 1988, please contact Steen O'Reilly & Co., Solicitors, 33/34 Trimgate St., Navan, Co. Meath. Tel. (046) 21254.

LONG, Mary Pauline, deceased, of 54 Delaney Park, Dublin Hill, Cork. Will anyone having knowledge of the whereabouts of a will of the above named deceased who died on 17 March, 1988, please contact Michael Dunlea, Solicitor, of 10 Rochestown Rise, Cork. Tel. (021) 891371.

"Next of Kin"

ATTENTION CARLOW/KILKENNY SOLICITORS: We are trying to trace the next of kin of **Peter Moloney** (or **Maloney**) or his executor or administrator. The late Mr. Moloney's address was "The Lodge", Oak Park Estate, Carlow. He died at the Sacred Heart Nursing Home, Carlow Town, on the 18 February, 1978. If you can assist us, please write or telephone M. Reilly of Alphonsus Grogan & Co., 33 Lr. Ormond Quay, Dublin 1.

Miscellaneous

WANTED: Solicitors Practice in North Tipperary (Nenagh preferred). Funds immediately available. Details to Box No. 30.

PROPERTY FINANCE IN THE U.K. If any of your clients intend to move to the U.K., we will arrange guaranteed mortgages in advance of purchase. Usual agency fees to solicitors. Nutley Management, 14 Clifford St., London W1X 1RB.

SEVEN DAY PUBLICANS LICENCE required. Details to Mannion Aird & Co., Solicitors, Clifden, Co. Galway. Tel. (095) 21411.

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ENGLISH AGENTS: Agency work undertaken for Irish solicitors in both litigation and non-contentious matters — including legal aid. Fearon & Co., Solicitors, 12 The Broadway, Woking, Surrey GU21 5AU. Telephone Woking (04862) 25807.

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LAW PLACEMENTS. Solicitors or Barristers who are considering a move to the U.K. — or further afield — will be interested to note that Law Placements, Recruitment Consultants to the Legal Profession have now opened an office in Dublin at 15 College Green. Advice will be available to anyone actively seeking a position abroad as well as specific information on career moves. The Dublin office is staffed by two Irish solicitors who are available for confidential interview by appointment.

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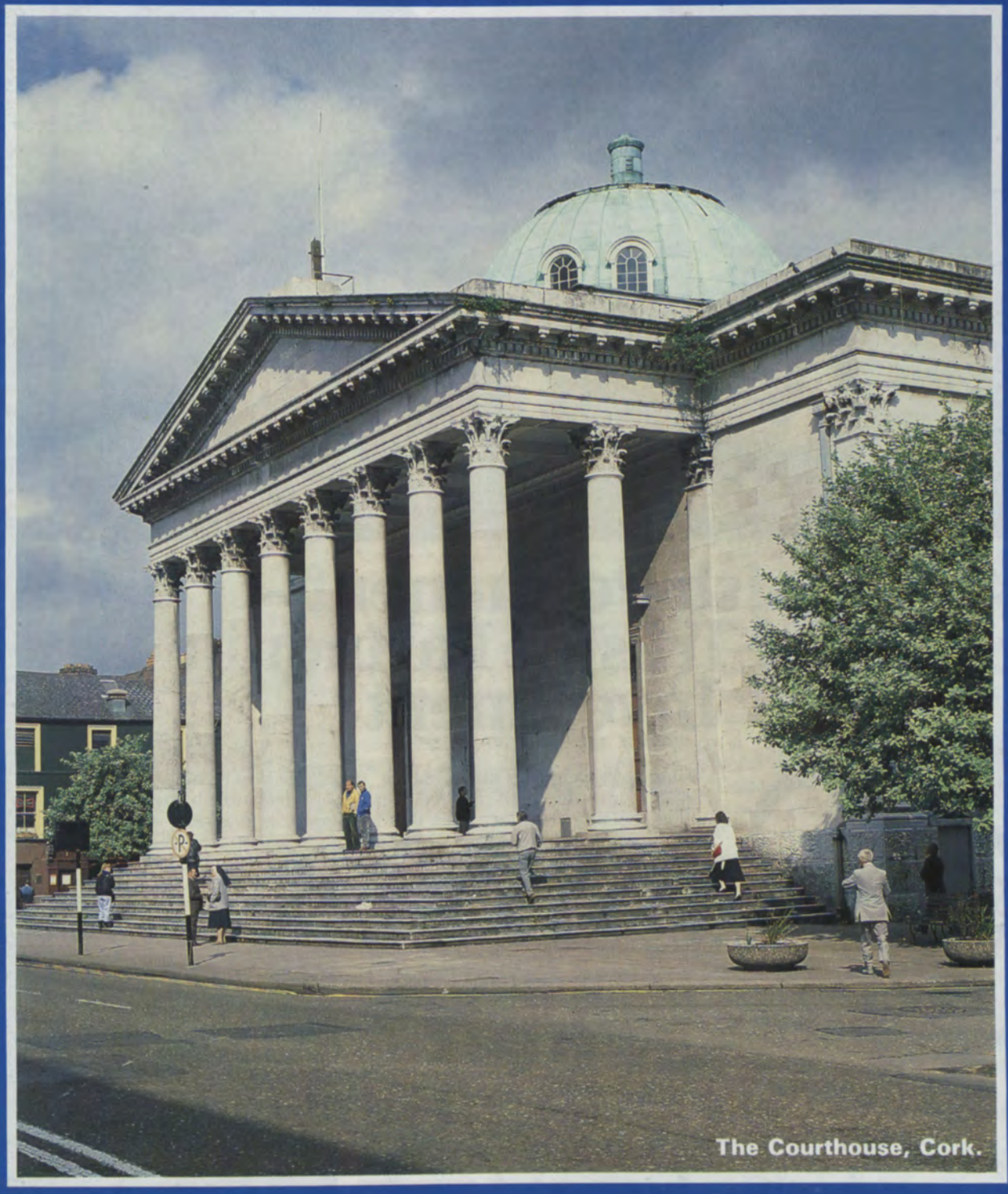
INCORPORATED LAW SOCIETY OF IRELAND

Vol. 82 No. 4 May 1988



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Executive Editor:
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Committee:
Geraldine Clarke, Chairman
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Nathaniel Lacy
Frank Lanigan
Charles R. M. Meredith
Desmond Moran
Daire Murphy
John Schutte
Maxwell Sweeney

Advertising:
Liam O hOisin. Telephone: 305236
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GAZETTE
INCORPORATED LAW SOCIETY OF IRELAND
Vol. 82 No. 4 May 1988

Viewpoint

Lawyers and journalists always seem to end up close together in those polls which place various professions and callings in the order of public esteem — usually pretty near the bottom of the list. Each group gains unpopularity at least partly from carrying out functions in unpopular ways — defending the "guilty", protecting their sources of information — pursuing unpopular, if proper, cases and causes.

What is surprising and disappointing is the continuing element of suspicion which exists between lawyers and journalists. Neither group seems to take sufficient trouble to understand the positions, professional duties and obligations of the other. How many lawyers know of the existence of the NUJ Code of Conduct, let alone what it provides? How many journalists have briefed themselves on the judicial and professional controls which limit the activities of lawyers? Each group lives in a world of continuing change, the rate of which appears to accelerate daily. Today's media differs radically from that of 20 years ago. Today lawyers practise in a different world too. Journalists seem to concentrate on yesterday's world when they look at lawyers' activities. To take but one example, there seems to be little appreciation of the fact that lawyers have taken more avidly to modern technology than the printed media.

The Law Society, conscious that self-regulation of a profession must be seen to be effective, has sought a change in legislation to permit the monitoring of the process by representatives of the public, while at the same time seeking further powers to discipline its members.

It is mildly ironic to find the media, which is trenchantly critical of self-regulation in other professions and trades, less enthusiastic about any other form of control of its standards and conducts. The limited and necessary control by our Courts of contempt and defamation are regarded as oppressive. The fact that there are no adequate civil remedies open to those whose privacy has been unnecessarily invaded or whose deceased relatives have been defamed is overlooked. Letters to the Editor or the Right of Reply offered by one of our newspapers are not adequate solutions.

The media in these islands may be ignoring a ground swell of criticism of their methods of operation which their counterparts in other countries have taken steps to de-fuse. In the USA where the laws of libel provide greater protection to the media than here, over 30 major US newspapers have appointed internal ombudsmen to review their activities. The *Washington Post*'s official is both the front line mediator with outside complainants and its internal conscience, monitoring whether it is effectively performing its duty of reporting events. "Fact Checkers" are now widely used in the US and are to be introduced to BBC Television this year. How many defamation actions would never have been started if the facts had been checked first.

In his recent Fleming Lecture, John Birt, the Deputy Director General of the BBC warned of this ground swell and of the danger that it would lead to control by legislation which could well limit the genuine function of the press.

In calling for an enhanced Press Council with real powers and a Council of the Media to harmonize the approach to editorial policy and ethics as well as media law and journalistic training, he sounded a tocsin which deserves to be heard by those in positions of authority in the Irish media.

If the media are to remedy these perceived deficiencies they can reasonably seek the *quid pro quo* of a Freedom of Information Act, coupled with more sensible Official Secrets Legislation. Freedom of Information Acts exist in the USA,

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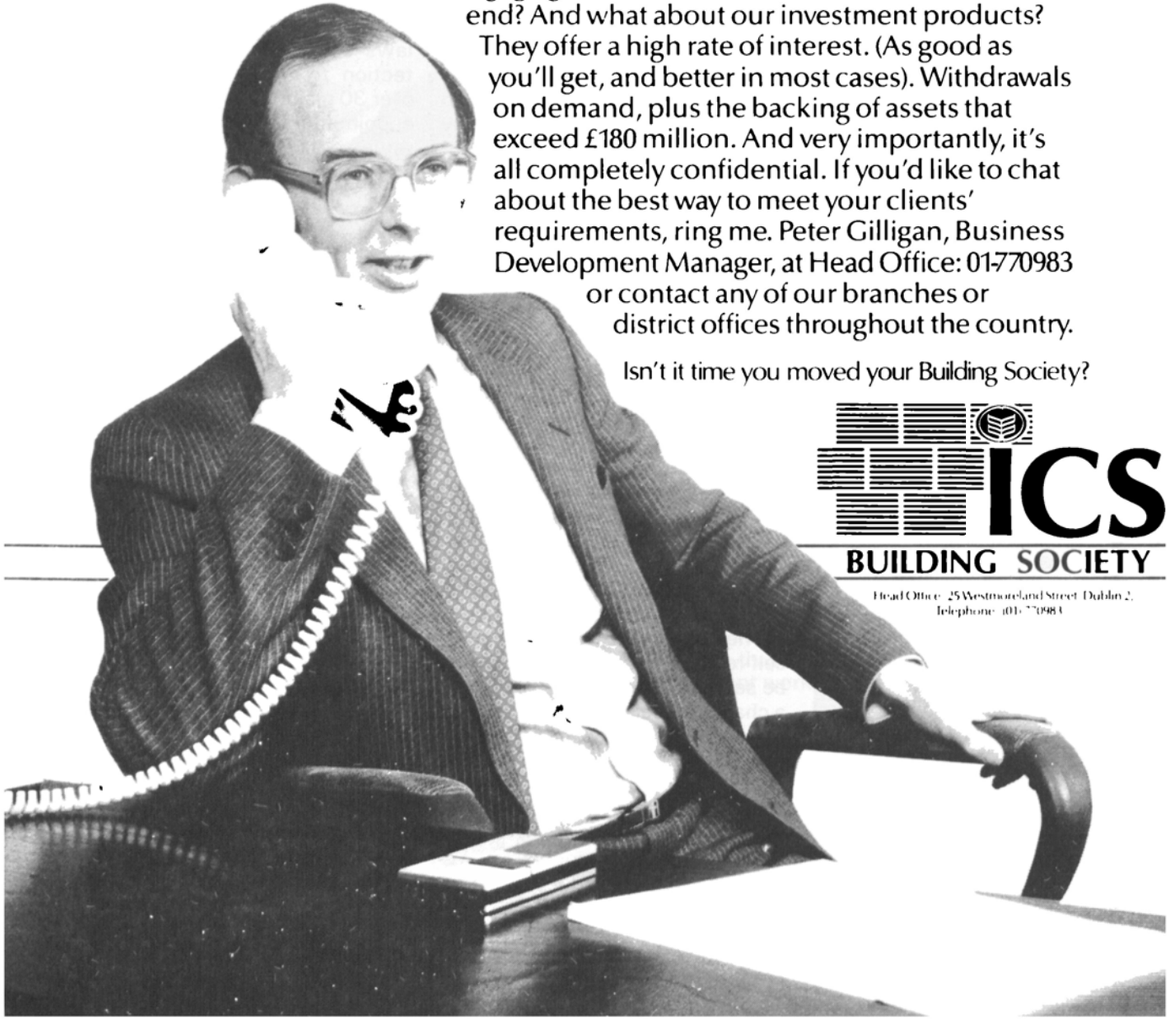

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Self-assessment of Capital Acquisitions Tax

The Capital Taxes Branch of the Revenue Commissioners is currently carrying out a pilot study on the self-assessment of inheritance tax (the study is confined to post March 1984 cases). The results to date have been very encouraging. The benefits for solicitors and their clients include much faster settlement of cases and very significant reductions in correspondence between the Revenue and solicitors.

by
Don Thornhill, Ph.D., M.Sc.(Econ.)
Assistant Secretary, Capital Taxes & VAT Branches Office of the Revenue Commissioners
and
Andrew McLaughlin
B.A., Dip.Eur.Law, Dip. Legal Studies
Assistant Principal, Capital Taxes Branch and Manager, Self-Assessment Unit

Until the end of 1987, participation in the study was largely confined to a volunteer group of solicitors' practices selected by the Incorporated Law Society. We believe that the benefits for solicitors of participation are so significant that we would now like to encourage as wide a participation as possible. In this article we describe the details of the scheme as well as the assurances in relation to claims for potential negligence and exposure to secondary accountability which we are prepared to offer to participating solicitors.

Background

Self-assessment of the direct taxes, including Capital Acquisitions Tax, was one of the most significant recommendations contained in the Fifth Report of the Commission on Taxation. The system works well in the United States and a number of other countries and is very cost effective from both a revenue administration and practitioner viewpoint. The Capital Taxes Branch decided in 1987 to set up a pilot study to explore the viability of a self-assessment system for Capital Acquisitions Tax. The planning and operation of the pilot scheme has involved very close co-operation with the Incorporated Law Society.

Benefits for solicitors

The results to date have shown the following benefits for solicitors from self-assessment —

- Greater efficiency
- Significantly less correspondence and lower compliance costs.
- An assurance of speedy processing of self-assessment returns (over 50% of self-assessed cases are dealt with on the day of receipt in the Capital Taxes Branch); priority has been and will continue to be given to these cases.
- Enhanced understanding of the tax.
- Earlier administration of estates.
- Protection against claims for negligence and assurances in respect of secondary accountability.

An important feature has been the guarantee of a high-speed turn-around service. This includes the handling of all aspects including the issue of certificates of discharge. The Valuation Office has also agreed to process self-assessed cases on a priority basis.

While at first sight self-assessment would appear to increase costs for solicitors and taxpayers because the assessment computation would no longer be done by Revenue, the experience gained from the pilot study clearly suggests that the opposite is the case. The existing system of direct assessment by Revenue on the basis of returns gives rise to an average of ten rounds of correspondence per case. Thirty per cent (30%) of returns submitted result in nil liabilities. These figures indicate a clear need for streamlining the system and for greater efficiency. Self-assessment would appear to be the logical answer. In contrast to direct assessments by Revenue, self-assessment holds out the prospect of settlement of

VIEWPOINT (Contd. from page 87)

Australia and Canada enabling private citizens as well as journalists to have access to a wide range of official information. The introduction of such legislation here would ensure compliance with Article 10 of the European Convention on Human Rights which states that the right to freedom of expression which everyone has includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. An Official Secrets Act limited to those matters which really do affect the security of the State or other vital interests would be more seriously regarded than the present Act.

It will however be difficult to argue too strongly for a Freedom of Information Act unless and until the media, preferably by self-regulation, establish a system to ensure that the information obtained under it will be used fairly and provide proper machinery for those who consider they have been unfairly dealt with to have their complaints properly examined. □

tax liabilities with only minimal correspondence with the Capital Taxes Branch. Self-assessment gives the solicitor much more control and offers the prospect of being able to plan his/her business to a much greater extent. The administration of estates will also be completed earlier.

An additional positive effect of the scheme is the likelihood that solicitors will gain new insights into the operation of the tax. This should result in an enhancement of the tax advice given to clients and in less problems at the payment stage.

Specially designed forms and Instructions

The design of the return form was identified as critical to the success of the pilot study. The intention was to enable the taxpayer and his or her adviser to go through the assessment procedure logically and step-by-step. The design of the form, supported by the instructions, was intended to encapsulate the necessary knowledge to successfully complete a computation.

To the extent that perfection is possible in the real world, *careful adherence to the step-by-step approach outlined in the form should mean that any practitioner completing it will not omit any crucial steps or information required for carrying out a correct computation. Most solicitors participating in the scheme have found this to be the case.* Even difficult issues such as aggregation and apportionment have proven to be tractable using the self-assessment form (in this regard we should mention the invaluable contribution which Mr. John Quinlan, since retired from Revenue, made to the design of the form and the planning of the scheme). The instructions booklet is also a useful primer on Capital Acquisitions Tax, apart altogether from its function in relation to self-assessment.

Assurances for solicitors and executors

Some solicitors have expressed concern that because the pilot scheme is a voluntary one, participation may expose them to potential negligence claims from their clients.

In order to deal with this concern we can offer the following assurances and incentives to participants in the pilot scheme:

- every self-assessed return submitted under the Scheme will be checked by a Revenue official and the participating solicitor will be immediately notified of any discrepancies or errors in his or her computations; in the event of overpayments refunds are, and will continue to be, made immediately with interest;
- if, subsequent to the time of self-assessment and payment, it transpires that it would have been more advantageous from the point of view of the taxpayer to self-assess on a different basis (e.g. by taking a different valuation date which still accords with the facts of the case), the Capital Taxes Branch is prepared to accept a re-assessment and, if necessary, refund any overpayment of tax with interest;
- for the duration of the Pilot Scheme, and in respect of any cases coming within the ambit of the Scheme, the Capital Taxes Branch will not invoke the secondary accountability provisions in the CAT legislation against either a solicitor or executor once tax has been paid on the basis of an agreed computation. This means that if additional information subsequently becomes available which indicates that the original assessment and payment were too low, the Capital Taxes Branch will not seek payment of the tax shortfall from either the solicitor or executor involved.

We hope that these assurances will encourage participation in the scheme.

Progress Report

The first phase of the pilot study, from June to December 1987, involved 186 firms of solicitors. By the end of the year approximately 200 assessments had been received (the number has more than trebled since then). Solicitors using self-assessment were generally very pleased with the scheme and a number of firms are making increased use of self-assessment as the advantages become apparent. The accuracy of the returns submitted so far has been high. While some forms needed a correction of some kind these were mainly insignificant — as can be illustrated by the fact that the net extra amount of tax collected as a result of corrections was less than 1% of total receipts under the scheme.

Seminars/Workshops on self assessment

While the self-assessment form and instructions constitute a fairly complete do-it-yourself package, we appreciate that there is also a need for a supportive educational effort.

A series of one-day workshops has been organised jointly with the Law Society. These are based on the principle of learning by active involvement. Practitioners are given a range of carefully structured problem cases which they complete by self-assessment on the new form. Revenue officials give talks on the more complex aspects and assist in the practical exercises. About two hundred solicitors have now attended the workshops in Dublin and in the main provincial locations.

The response to the seminars has been excellent. There has been a substantial increase in the numbers of self-assessments being submitted to the Branch. The number of corrections necessary has also decreased dramatically. Revenue staff have also gained

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from the seminars. We have now a much better appreciation of some of the practical problems encountered by solicitors in completing returns and further developments will include efforts to deal with these.

The future

So far self-assessment for CAT has been voluntary. Statutory provision for self-assessment is becoming an increasingly more prominent feature of the tax system so there are obvious advantages in having as much advance participation as possible on a voluntary basis.

Other developments also have a bearing on the future course of events. Tax practitioners can now buy commercial computer packages capable of self-assessment. The Capital Taxes Branch is prepared to examine these packages and to check their suitability. We are also prepared to approve and accept computer generated forms and computations as substitutes for the Revenue return form. We also hope to produce in the near future a short version of the Inland Revenue Affidavit for use in simple cases. This should speed up estate administration and the issue of certificates of discharge. Electronic transmission of self-assessed returns is another possibility for the future.

How do you, the solicitor, participate?

You can participate by completing a self-assessment form and forwarding it (with payment, where appropriate) to the Office of the Accountant-General, Revenue Commissioners. Alternatively, if you do not have a taxable case on hands at present you can, by contacting the Self-Assessment Unit, include your name in the list of potential participants. You will then receive any information, circulars etc. which are issued to participants.

Special Unit for self-assessment

A number of officers in the Capital Taxes Branch have been assigned to deal with self-assessment cases. Their names have been given to participating solicitors and are reproduced below. These staff are available to give information and assistance on the completion of self-assessment returns. Solicitors are welcome to telephone members of the self-assessment unit (at 01-792777 Ext. 2247 or 2244) for advice on form completion or to make an appointment with an individual member of the unit who will be happy to assist in completing a form and tax computation.

Finally

We are very grateful for the co-operation and advice which we received from the Tax Committee of the Incorporated Law Society and from individual practitioners. This co-operation was essential to ensure the success of the scheme. Indeed the return form (I.T.38) is in the process of being amended to take account of suggestions already made by participating solicitors. We would stress that at this stage practitioners have the opportunity of influencing the future shape of the system and we will continue to welcome suggestions and comments from the legal profession.

Members of the Self-assessment Unit, Capital Taxes Branch

Tom Boland
Ken Bruton
Lucy Durnin
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	IR£
Capital Employed	22,375,919
Total Assets	445,746,749
Deposits	423,370,830
Advances	256,141,348

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From the President . . .

The proposals of the Minister for the Environment to permit Building Societies and other Financial Institutions to engage in conveyancing has brought a lot of controversy to the profession in recent weeks.

Let me say at the outset that the Council are resolutely against the proposal on the basis that there is no demand for such a revolutionary change and that it is not in the public interest. It is interesting to note that other institutions have expressed opposition to the proposal and that the Lord Chancellor in England has not seen fit to bring in similar sections of English legislation because he is not satisfied that the public interest would be adequately protected.

At the same time, we must consider the service which is being currently given to the public and examine whether this can be improved or not.

In my view, it can. I believe that we must move away from the concept of merely transferring property and move into the realm of being advisers to the client.

Has he accepted the right type of mortgage?

What is the best Insurance Policy to take out for the transaction?

What is his tax position as far as mortgage relief is concerned?

In order to be able to answer these queries the solicitor must be up to date with the legislation and study the relevant provisions. This means, in effect, going back to school.

The Society must urgently consider the appropriate vehicle to provide such information to the practitioner. The practitioner, for his part, must improve his knowledge so as to be able to provide the best advice for his client.

In this way, we will be able to show to our clients that the personal approach with the best of information and advice is a far superior way of doing business than leaving it to a nameless person, who is not aware of any personal circumstances, working for one of the financial supermarkets.

The future is all about giving a good service. □

Thomas D. Shaw

THOMAS D. SHAW
President

EUROPEAN LAWYERS UNION

CONGRESS IN RHODES JUNE 1988

The European Lawyers Union, the recently established organisation of practising Lawyers from the Member States of the EEC, is holding its second Annual Congress on the Greek island of Rhodes from Thursday 16th to Saturday 18th June 1988. The title of the working programme (three half-day sessions) is:

"Undertakings in the EEC
Present Status and Perspectives for 1992"

In this general context there will be a wide range of topics including competition law, financial and taxation aspects of undertakings, agricultural undertakings, social aspects of undertakings, intellectual property rights, the Single European Act etc. The speakers will include Judges of the Court of Justice, officials of the EEC Commission and private lawyers. The social activities should also be worth the trip.

Members and non-members alike are very welcome. For further information (or information generally on the organisation) please contact as soon as possible:

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Practice Notes

Proposed Amendments to M.I.B.I. Agreement Claims against Uninsured Drivers

Changes in the scope of the protection provided to injured parties under the existing M.I.B.I. Agreement introduced in 1964 are likely to be effective as soon as the Department of the Environment introduces the Provisions of the Second E.E.C. Motor Insurance Directive. At the moment cover afforded by the Bureau is limited to claims for personal injury only in respect of Third Party risks compulsorily insurable under the Road Traffic Act and the classes of person who may claim against the vehicle owner or user under Section 65 of the Road Traffic Act, 1961 are restricted. There is no provision for payment for damage to property.

The Litigation Committee of the Law Society has prepared a list of suggested submissions to the Department. The directive covers those suggested in the Committee's submissions but omits cover for pillion passengers on motor cycles and back seat passengers in vans and commercial vehicles.

The proposed improvements which the government will introduce based on the directive are:

1. As and from 31st December 1988 victims of hit and run accidents would be entitled as of right to compensation for all personal injuries from the M.I.B.
2. Property damage caused by uninsured or stolen vehicles:
   (a) As from 31st December 1992 property damage is payable exclusive of the first £1,088.00
   (b) From 31st December 1995 exclusive of the first £363.00 for non-insured vehicle and £181.00 from stolen vehicles.
   (c) From 31st December 1987 minimum property damage under compulsory motor insurance increased from £1,000.00 to £37,000.00
   (d) From 31st December 1990 to £73,000.00.

The time limit for claiming for personal injuries to the Bureau is three (3) years and for property damages one (1) year from date of accident.

The directive also sets out the procedure to be adopted in making claims and for the first time the M.I.B.I. will be given the right to intervene in cases where the Mandate has not been signed and secure copies of pleadings lodged in Court in relation to claims for compensation against drivers of stolen or uninsured vehicles.

The directive is welcomed by the profession as providing a more equitable basis of redress for innocent parties who have suffered loss as a result of the negligence of uninsured drivers.

JOHN P. WARD
Law Society Litigation Committee.

Adjudication of Stamp Duties

The following is an updated version of a practice note, first published in 1981. The text has been revised by Brian Bohan, Solicitor, Chairman of the Society's Taxation Committee.

Adjudication is a very important constituent of the stamp duty code. It is essential for the proper stamping of certain instruments; it is a necessary prerequisite for an appeal against an assessment of the duty and, finally, it authenticates the correctness of the stamp. The fact that in recent years over fifty thousand instruments are adjudicated upon annually reflects that importance. The necessity for and the volume of adjudication demand that, as far as possible, there is no avoidable delay in the processing, assessing and stamping of instruments lodged for that purpose. This article is intended as an aid to the attainment of that objective.

The Stamp Act, 1891, contains two sections only relating to adjudication, dealing respectively with the assessment of duty (Section 12) and with appeals (Section 13). For our present purposes we are concerned solely with the first two subsections of section 12 which indicate the purposes of and the mechanics of adjudication.

"King's Inns: A Dublin Perspective" Exhibition

To mark the Dublin Millennium, the Hon. Society of King's Inns will mount an exhibition throughout the month of June, 1988. The Exhibition will be held in King's Inns Library, Henrietta Street, Dublin 1, and will be open to the public at the following times:-

Mondays:
2.00 p.m. to 5.30 p.m.

Tuesdays to Fridays:
11.00 a.m. to 5.30 p.m.

The Revenue Commissioners may, under subsection (1) "be required by any person to express their opinion with reference to any executed instrument upon the following questions:—

(a) whether it is chargeable with any duty
(b) with what amount of duty it is chargeable".

To that end "the Commissioners may require to be furnished with an abstract of the instrument, and also with such evidence as they may deem necessary, in order to show to their satisfaction whether all the facts and circumstances affecting the liability of the instrument of duty, or the amount of duty chargeable thereon, are fully and truly set forth therein". (Subsection (2)).

The following are the requirements necessary to enable the Revenue Commissioners to carry out their functions under that section:—

(i) the delivery of a copy deed with the original;
(ii) the completion of a "Warrant for Adjudication" which is at once an application for adjudication and an information sheet;
(iii) certain information.

The delivery of the copy deed and the completion of the warrant present no difficulties. Experience has shown that the problems arise under the third head, that relating to information. Cases cannot be finalised where insufficient information is available to enable decisions to be made. The effects of the necessary querying and the resulting delays are cumulative and affect both the case in question and others. Arrears which inhibit and delay the practitioner, his client and the Commissioners occur.

These delays can be reduced considerably if certain steps are taken. Amongst the most important is the necessary relevant documentation such as a valuation, rate demand note, contract for sale, floor area certificate, statutory declaration etc., as the case may be. Next comes information that may not be apparent on the face of the documents and that should be set out in a covering letter, such as the necessity for adjudication if it is a case where the need for adjudication is not readily apparent; the stage of building of a dwelling-house; whether chattels or other property were also included in a sale. The amount of documentation and information necessary will depend upon the nature of the property the subject of the transaction and upon the facts of the case.

The Revenue Commissioners and the Society's Conveyancing Committee have been considering a number of practical problems which, over the years, have become apparent and, for the assistance of practitioners, have prepared particulars of the documentation and information that might be furnished in each of six different transactions. Not all would be required in all cases; on the other hand, there may be unusual circumstances in which further correspondence would be necessary in a minority of cases. However, it can be taken that if the steps outlined therein are reasonably adhered to, the question of raising queries will not arise in the vast majority of instruments that are lodged for adjudication.

1. Conveyancing or Transfer operating as voluntary disposition inter vivos

Where the property is land

Furnish a statement of the market value of the property at the date of the instrument and describe the property.

State the rateable valuation, area of the property and the name of the rated occupier (a Rate Demand Note may be furnished giving this information).

State whether the lands were subject to any charges and, if so, the amount thereof.

If only a fractional share of the property is passing, show how the share arose.

If only a limited interest or reversion in the property is passing, a statement as to how the interest arose (or a copy of the instrument which created it) should be

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Somerset House,
London,
October, 1897

The Stamp Act, 1891

The Solicitor of Inland Revenue desires to bring to the notice of solicitors and others the fact that, in order to meet their convenience, arrangements have been made for extending the official hours within which deeds and other original documents required to be produced for purposes of adjudication or denoting can be lodged at the Chief Office. Such instruments may now be lodged at the Solicitor's Department, Somerset House, between the hours of ten and four (one on Saturdays).

The Solicitor takes this opportunity of calling the attention of solicitors and others tendering instruments for adjudication under sect. 12 of the Stamp Act, 1891, to the great extra trouble and delay which are occasioned both to the public and to this Department by reason of the fact that the parties often fail, in the first instance, to supply, with the abstract, the information that is obviously necessary to enable an assessment to be made. As the work of the adjudication branch has very largely increased and appears to be on the increase, it is thought that the public may be fairly called upon to prevent in future the occurrence of this difficulty.

It is, of course, impossible to particularise all the cases in which the information supplied is commonly defective, but attention is called below to a few of the instances which most frequently occur.

It will be clearly understood that, in requesting that these particulars may be furnished, no ruling whatever is intended as to how a particular case will be adjudicated.

furnished. The date of birth of the life tenant should be stated.

If applicable, the appropriate transaction certificate or relationship certificate should be included in the instrument.

Where the property is quoted stocks, shares or marketable securities

Furnish a statement showing the market value of each item of property.

Where the property is unquoted stocks or shares

Furnish a detailed valuation of the property transferred.

Furnish copies of the balance sheets, trading and profit and loss accounts for the three years prior to the date of the transfer, together with a statement of the market value of the fixed assets of the company.

Where relief is claimed under the Family Home Protection Act, 1976

Furnish a description of the property.

Certify that the property is a family home within the meaning of section 2 of the Act.

2. Conveyance, Transfer of lease of a New House or Flat

Where exemption is claimed under section 49 Finance Act 1969 (as amended by section 48 Finance Act 1976, section 48 Finance Act 1981, section 100, Finance Act 1984)

Furnish a copy of the Certificate of Floor Area, form H.P.3 for a house or form F.P.3 for a flat (forms H.P.4 and F.P.4 do *not* confer exemption).

Certify that the instrument gives effect to the purchase of a house upon the erection thereof.

Certify that the property passing in the instrument is that referred to in the Certificate of Floor Area.

In the case of a flat, state, in addition to the above, whether it has been let or sold prior to the present transaction.

Where it is claimed that duty should be assessed on a site fine and not on the value of a covenant to build

Furnish the Agreement for sale or lease, the Building Contract and any other agreement in connection with the transaction.

State the amount of the site fine (if any).

Furnish a statutory declaration from —

(a) the solicitor for the builder, or
(b) the solicitor for the purchaser, or
(c) an architect

giving precise details of the stage of development of the site as at the date of the Agreement for Sale or Lease.

3. Conveyance or Transfer on Sale

Where the property is land

Furnish the contract for sale.

Confirm that the consideration represents the full market value of the property passing.

State the amount owing in respect of any mortgage or charge where the purchaser undertakes payment thereof.

Furnish a statement as to whether there was an agreement between the parties for the sale of any other property such as chattels etc.

If applicable, the appropriate transaction certificate or relationship certificate should be included in the instrument.

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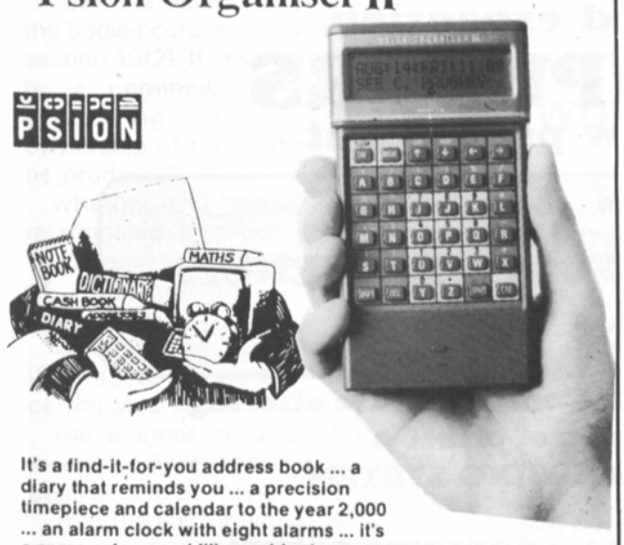

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Confirm that the consideration represents the full market value of the property passing.

4. Conveyance or Transfer between Associated Bodies Corporate

Where relief is claimed under section 19 Finance Act 1952 (section 85 Finance Act, 1980 substituted a new section 19), and section 96, Finance Act, 1982.

Furnish a statutory declaration in pursuance of section 19(5) Finance Act, 1952 as amended. The declaration should set out in full the grounds on which the claim is based stating:—

that the claim is made in respect of the instrument(s), which should be summarised briefly, and that the effect of the instruments is that laid down by section 18(2);

types and particulars of the bodies corporate concerned (date of incorporation, registered number, share capital both nominated and issued);

that the transferor was entitled to the beneficial interest in the relevant property;

that the beneficial interest in the relevant property became vested in the transferee;

how the relationship between the bodies corporate complies with section 19(2). If any shares are held by a nominee, the instrument evidencing the beneficial ownership of those shares should be produced;

whether it is intended that the relationship between the bodies corporate satisfying the provisions of section 19(2) shall be maintained;

whether the consideration for the transfer is shares. If so, share certificates should be furnished;

the manner in which the consideration (if other than shares) has been or is to be found and satisfied;

that the instrument(s) was/were not executed in pursuance of or in connection with such an arrangement as is described in section 19(3).

5. Reconstruction or Amalgamation of Companies

Where relief is claimed under section 31 Finance Act, 1965

Furnish a statutory declaration from a solicitor setting out fully the circumstances of the transaction and the grounds on which it is considered that the relief should apply and stating how much, if any of the consideration consists of cash.

Furnish copies of all documents pertaining to the transaction such as returns of allotment forms, agreement, company minutes and resolutions.

Furnish share certificates relating to new shares issued which form all or part of the consideration paid by the transferee company.

6. Agreement for Sale chargeable under Section 59, Stamp Act, 1891

Where it is claimed that items of property to which the Agreement relates are within the exemptions contained in the section

The consideration should be apportioned between items of property which are exempt and items which are not exempt. For this purpose a form St. 22 may be obtained from the Adjudication Office for completion.

If there is a balance sheet available which supports the values stated, this should also be furnished. □

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Moneylenders:
6/7/88 at Court No. 1 11 a.m.

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The Solicitors Benevolent Association

A.G.M. 25th March 1988

The attendance at the Annual General Meeting of the Association included Mr. Thomas A. Shaw, President of the Law Society, and Mr. James McFarland, President of the Law Society of Northern Ireland. The Chairman of the Association, Mr. John M. O'Connor, proposed the motion to adopt the Report and Accounts for the year to the 30th November 1987 and noted the dramatic growth of the Association's work in the last decade and the all too evident need for the confidential service it provides. In 1977 receipts and distributions were less than £15,000 — last year both figures exceeded £100,000. Present beneficiaries range in age from an infant child of a deserted wife to beneficiaries well over 80 years of age. And present "hard times" indicate that the facilities and assistance provided are likely to be needed more rather than less in 1988.

The Chairman continued:

"The profession has responded most generously to our appeals and your Committee of Directors with its most able lieutenant, Clare Leonard, as Secretary, has carefully reviewed the cases coming before us in regular meetings which took place last year in Dublin, Kilkenny and Belfast. Your Association of course covers the entire country and recently we were glad to welcome as a new Director, Mr. Tom Burgess of Belfast — outgoing President of the Law Society of Northern Ireland. Among others who must be referred to in saying "Thank You" are the Bar Associations, firms and individual solicitors, the Society of Young Solicitors who contribute to our funds, and of course Frank O'Donnell and his manager, Brendan Walsh, whose sponsored Maracycle, Dublin to Belfast and back, brought in the remarkable figure of over £10,000. If any of you are toying with the idea of some really healthy exercise, there is a plan afoot to repeat the project this year. Again our Younger Members Committee have with their Table Quiz events, run in venues as far apart as Waterford and Galway, helped us materially — and not least by publicising the S.B.A. and its needs.

I do not propose to add further to the comments with the Report and Accounts save for one point — legacies (down a little last year) are most welcome and what better final salute can one give to one's profession than a legacy to the Solicitors Benevolent Fund?"

The President of the Law Society, Mr. Shaw, seconded the Resolution which was unanimously adopted by the Meeting and stated he wished on behalf of the profession to express appreciation to the Association's Committee of Directors and Officers for the work they carried out which has the full support of the Society and the Law Society of Northern Ireland. He also stressed the importance of Bar Associations throughout the country who he suggested could review their efforts to assist the S.B.A. both in relation to the raising of funds and the continued liaison necessary where cases known to practitioners in particular areas are referred to the Association. □

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International Bar Association News

As of March 1988 the total individual membership of the International Bar Association has reached 11,263 of whom 114 are Irish. The Bar Association of Liechtenstein has now applied to join the I.B.A. which means that of all Western European countries only Greece and Luxembourg are not represented on the I.B.A. Council.

The Association's 22nd Biennial Conference is due to take place in Buenos Aires between the 25th and 30th September 1988 and any member wishing to attend may obtain details of group travel arrangements from Mr. Alan Benson of Easy Travel, 38 Lr. Stephen Street, Dublin 2. Tel. (01) 772057/716714.

The Conference will have a very full programme including meetings of each section of the Association dealing with matters of interest to practitioners whatever their area of practice or specialisation.

The I.B.A. continues to use its influence and that of its 108 member organisations in support of members of the legal profession who are inhibited in their work or subject to threat or harrassment by reason of their support for human rights and in some cases these representations have been followed by the release of lawyers held without trial.

The Association and its sections are also sponsoring scholarships to assist young lawyers from developing countries in studying in the developed world, and are also assisting young lawyers to attend the Association's conference.

If you are interested in obtaining information about the Association you should contact the Association's Irish Representative, Joseph Dundon, 101 O'Connell Street, Limerick, Tel. (061) 48811, Fax (061) 48392, or the I.B.A.'s London office at 2 Harewood Place, Hanover Sq., London WIR 9HB, who would be happy to provide you with any additional information. □

The Challenge of Change

The Law Society, in consultation with John Loosemore and Robert Parsons of Lawyers' Planning Services, Cardiff, organised six seminars in November/December 1987 at Dublin, Sligo, Ballinasloe, Kilkenny, Cork and Limerick.

In conducting a review of the seminars, the Public Relations Committee were well pleased at the overall attendances, and the general response. Provocative, obvious, simple, thought-provoking, useful, many were the adjectives used, and thankfully there was no condemnation of the actual content, which did reflect basic simple practices and procedures.

The Committee deliberately mounted these seminars to encourage the profession as a whole, and throughout the country, to think and reflect as a single cohesive unit on the purpose and nature of practice, and the need for a system of Corporate/Institutional Advertising to expand and foster the base of Solicitors' Practice and thereby improve the image of that profession.

A written survey of reaction, and further suggestions in the same field, is presently being conducted. We, as Solicitors, ***must*** *respond to this progressive move by the Law Society. Please do respond. Herewith an account of the main points of the seminar as expounded by the speakers.*

ADRIAN P. BOURKE
Chairman P.R. Committee

This whistle stop tour by John Loosemore and Robert Parsons began with nearly 400 sceptical solicitors packed into Blackhall Place, waiting to see whether this really was a seminar that, in the terms of the publicity, "You can't afford to miss".

John Loosemore began by outlining the speed at which changes affecting the legal profession in many jurisdictions have occurred and by posing the question — "In order to survive do we need to steal clients from other solicitors?" He went on to talk about the enormous potential that exists in unmet legal need. He said that many marketing consultants state that the market for legal services is limited. That was obviously not his view. He urged the profession to get back to being "men and women of affairs" to whom clients would turn to at first in any situation. He obviously believed that it was possible actually to create new markets for legal services, as well as recovering work recently lost to others.

John Loosemore went on to ask, "What is the secret of profitability in a solicitor's office?" He said that the anwer lay in how we handled our stock in trade — our time, the written and spoken word, money, technology, our clients and, most important of all, our staff. He explained that the seminar would deal with each of these themes.

Introducing the topic of office systems, he said he hoped he was not teaching us to "suck eggs". He covered basic elements — opening and closing the files, the post room, accounts, records and how to have an efficient reception area. By the looks on many faces it was obvious that, although these were very basic matters, there were lessons that many of us needed to listen to again. He spent time stressing the need for an accurate time recording system and a show of hands in the room proved that very few people actually had a systematic method of recording time. He stressed that the help which time recording is to billing is only one consideration and it was also essential for proper management information as a basis for running a practice. A good time recording system would allow you to assess the profitability of fee earners and various types of work. He went on to link this with organising a budget for the practice. He emphasised that there is often a great deal of resistance from staff to time recording as they see the system as "snooping". He hinted how he had overcome this in his own practice and encouraged us to "start at the top!". This was a fascinating hour as he went through some of the very basic elements of running a practice. Time and time again he stressed that there is no point at all in trying to develop new areas of business unless the practice is on a sound management base.

Robert Parsons gave the next talk and began by stating that he felt that solicitors in Ireland had been

"Meeting the Challenge of Change"
John Loosemoore (left), Robert Parsons and Geraldine Clarke of the Law Society's Public Relations Committee. Blackhall Place, November, 1987.

LAW SOCIETY
COUNCIL DINNER
March 1988

(Left to right): Katherine Casey, Law Society Council Member, Lt.-Gen. Tadh O'Neill, Army Chief of Staff, and Ken Beaton, President of the Irish Stock Exchange.

Moya Quinlan, Law Society Council Member, the Hon. Mr. Justice Anthony Hederman, Mary Harney, T.D., Gerald Hickey, Past President of the Law Society.

The President of the Law Society, Thomas D. Shaw (centre), with (left to right): Rory O'Donnell, Junior Vice President, Edward McGrath, Bradstock, Blunt and Thompson, Alan J. Gibson, President of the Institute of Chartered Accountants in Ireland and Maurice R. Curran, Senior Vice President of the Law Society.

(Left to right): The Hon. Mr. Justice Frank Griffin, Rory O'Donnell, Junior Vice President of the Law Society and Gerard Griffin, Chairman of the Law Society's Litigation Committee.

CONTRIBUTIONS WELCOME

Please send news items and photographs for publication in this column to:

"People & Places",
The Gazette, Law Society,
Blackhall Place, Dublin 7.

Left, Patrick F. Quirke, President of the Irish Auctioneers and Valuers Institute, with Olan F. Allen, President of the Institute of Certified Public Accountants in Ireland.

wiser than in the United Kingdom in that they had spent a great deal of time thinking about these issues and planning for them before the wind of change actually hit. He went on to say that the great malaise in the profession in many jurisdictions at the moment is the inability actually to take decisions. He said that many partners' meetings consist of matters merely being brought forward repeatedly and, although ideas are generated, nothing ever gets done. He urged us at least to take one or two ideas away from the seminar and make some actually happen.

He warned against complacency and the view that the kind of competition which has hit lawyers in the United Kingdom will not touch Ireland. He said that the "friendly" building societies had turned out to be not quite so friendly and were now looking at the legal market with eager eyes. He said that our day too would come and pointed out that already accountants and banks were taking work which was properly ours.

He brought a sobering note to the talk when he said that solicitors in the United Kingdom had decided, when there was no other competition, to practise on themselves and had entered into a destructive price-cutting war. He commended the Irish Law Society because, in its consideration of whether to allow advertising, it had, in any event, set its face against price advertising. He advised the profession in Ireland to stand firm on that issue. He said there was a new breed of client — more sophisticated, more consumer-minded, less loyal and more likely to change solicitor midstream. He said that the task, above everything, was to protect existing clients and to begin to develop from that base.

He went on to take us on a fascinating journey into our dead file rooms and asked us to consider the banks of files wrapped in brown envelopes stacked along the damp walls. He told us that we were making files dead and storing them in that way at the same time as our competitors in the large institutions were striving to get clients' names on their computer data-base in order to keep them alive for ever! He urged us never again to make a file dead but by systems of diary and regular review to keep our existing clients alive and service them regularly.

I am sure that all those who attended the seminar will remember Robert Parsons showing us the "gratitude curve" illustrating the philosophy that you must always bill a client immediately the work is finished. It is simply no use at all waiting for three months to bill. By then clients believe they do not owe you the money at all and then the only way to collect is to write letters which say, "Now we are very, very, very, *very*, cross!" He said you must bill at the peak of the client's gratitude. Somebody asked the question, "What if the client is ungrateful?" Robert Parsons answered "Bill at the top of the *ingratitude* curve — it's not going to get any better!"

John Loosemore began the afternoon wih "Budgeting for Profit" and showed very simply how we should begin to ensure that our practices actually make money! He said that our banking arrangements were a vital part of profitability and yet many firms were losing tens of thousands of pounds a year on their banking deal. He urged us to have a very close look at clearance terms which were agreed with our banks and rates of interest earned and paid on client account. He said that he felt that Irish banks ought to pay interest on current client account moneys, as they do in the United Kingdom — this would save enormous administration and effort on the part of the profession and, even more important, would allow solicitors to see clearly the monies on which they should be receiving interest. He added that banks often "fudged" the issue with regard to interest and charges and most solicitors simply did not know on what basis they were paying.

He went on to talk to us about some standardisation of legal work that has occurred in his own practice by the use of precedent letters and forms, interview sheets and progress sheets. He said that such a system not only helped in efficient training but acted as a useful "aide memoire" to experienced solicitors. It allowed matters to be supervised properly, particularly when a solictor was sick or on holiday. It also ensured that nobody missed either legal or commercial aspects of a transaction and, most important, helped firms avoid negligence claims!

When the speaker turned to computers many feared that they were in for a "hard sell". They were wrong. Mr. Loosemore urged us first to have a manual system which worked effectively before considering computerisation. He said that many computerised conveyancing packages sold in the U.K. were merely "glorified word processing" although some more sophisticated "expert" systems were being developed. He urged the value of a good debt collection package, saying that this could be a fantastic entrée to commercial work as it had been in his own practice.

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His final topic was "Staff and Service to Clients" and he had stressed that these are obviously inter-dependent. He said that the profession in most jurisdictions spends a pitiful amount on training staff and that generally it shows! Today's solicitor needs not only to be a good lawyer but to be able to convey this to the client — training is a vital part of that. Under "Service to Clients" he quoted a very old joke that solicitors used to tell at Law Society dinners — "It would be a super job if it wasn't for the clients!" He said that many firms would have that wish fulfilled unless they took a very close look at both the quality of their work and the degree of care they took in communicating with the clients.

Robert Parsons came on to close the day and showed us how to ensure that we never again lost a telephone quote for costs. In short, he told us never to quote on the telephone. If we did, it was impossible to win — we simply gave the client a figure which somebody else would knock five pounds off! He said that it was necessary to get the client into the office and to win the battle on service. He urged us not to descend to be merely "jobbing conveyancers" but to stress that we are independent advisers who actually save people money — far more than the fifty pounds or so that they are trying to save by getting a low quote. He said that getting the client into the office was only half the battle — the other half was actually "clinching the business". It was a matter of convincing clients that you were the very best person to help them. He urged solicitors to get involved in negotiating the purchase price, arranging the mortgage, and obtaining competitive insurance quotes — in short, to stand out from the competition. He said "It is difficult to be one hundred per cent better than the competition — thank goodness we don't have to be — we only have to be one per cent better in a hundred areas!" He told us that, when he finishes a quote for costs in the office, he always gives clients the opportunity of going to a cheaper solicitor along the road and promised us that without fail they say, "No thanks, we'll stay with you!"

"Which way did I ought to go from here?" said Alice.

"That depends a good deal on where you want to get to," said the cat.

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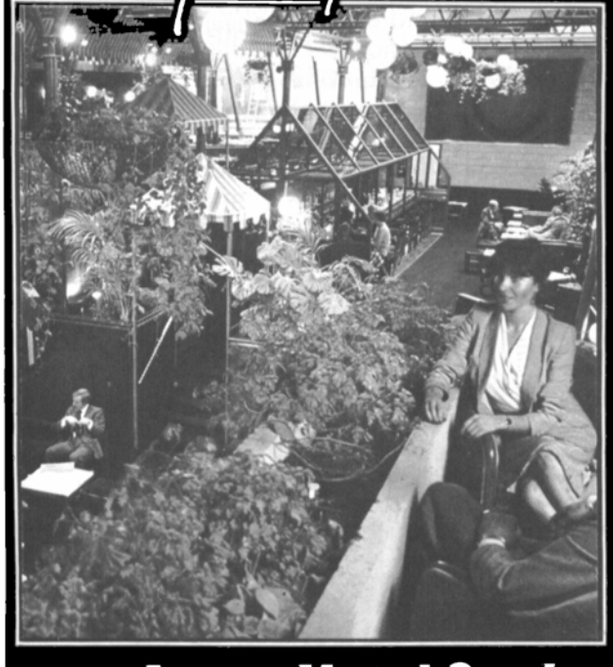

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Robert Parsons said that many solicitors were like that at the moment. They had no idea what image they wanted to portray or where they were going. He said that this contrasted sharply with our competitors who were increasingly promoting an image to the public that they were the people who could help in all situations and should be the first port of call. He urged us to give careful thought to the image we portray and to spend time creating good first impressions and sustaining this throughout the transaction by "going the extra mile" for the client.

John Loosemore and Robert Parsons ended by talking about a corporate advertising campaign and urged the Law Society to consider this. They believed it should have several key elements. First, it would stress that solicitors can give a total service; second, that they can be consulted "whatever the problem" and third, that the client should "see us first".

Before John Loosemore and Robert Parsons began the seminar they assured us that we would, at the very least, come away with one or two good ideas and begin to think some of these issues through before the wind of change hit us with a vengeance. We picked up more than one or two good ideas, we were certainly not bored. The publicity claimed that "this seminar will hold your attention and motivate you to practise expansion". It remains to be seen whether this last promise will be fulfilled. Perhaps that is more in our hands than theirs. It is up to us to take on board the advice we were given and "improve our service to clients and increase our profitability". □

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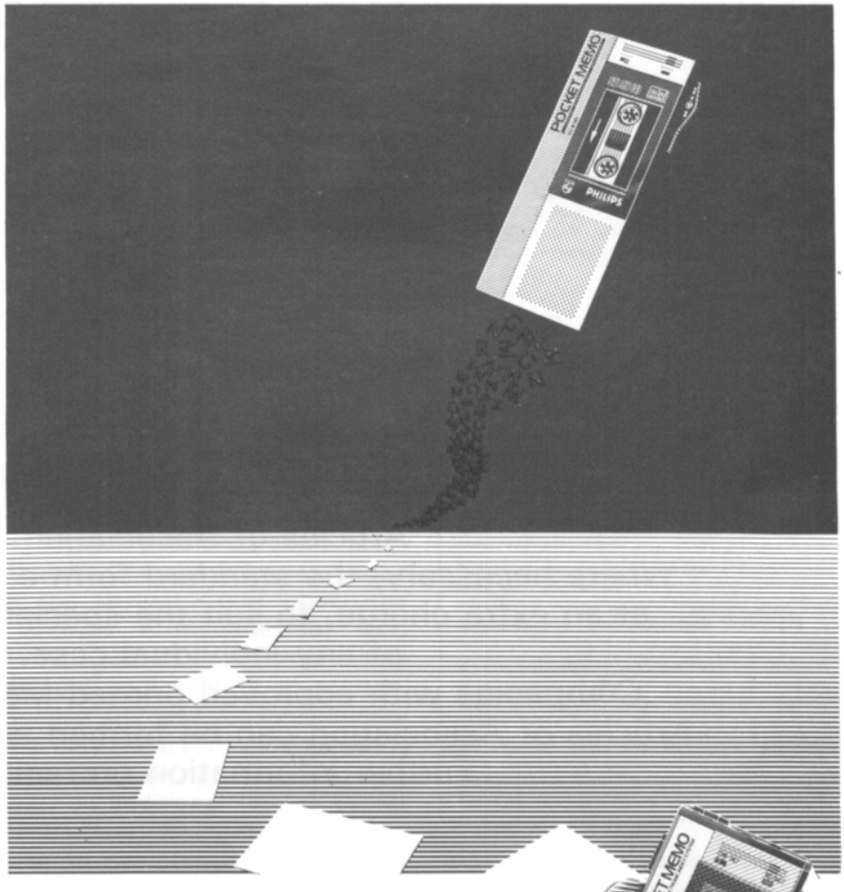

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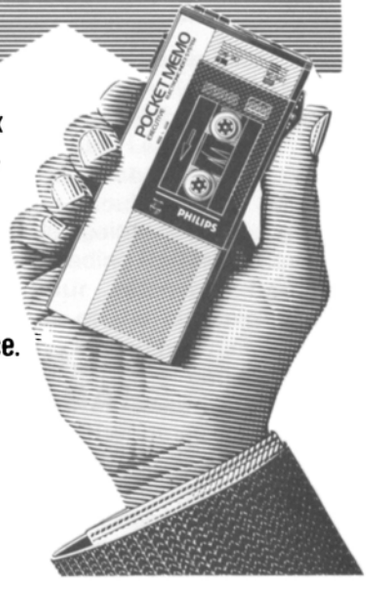

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Book Review

CONSTITUTIONAL LAW IN IRELAND by James Casey [London: Sweet and Maxwell, 1987, xlvii and 578 pp Paperback IR£25.88].

The Constitution of Ireland is a dynamic and vibrant document. Much of the dynamism and vibrancy was activated in the 1960s during a period when a full-blown cultural and economic revolution was gently, but firmly, blowing its way through the land. The lethargy of the 1950s, the post-war economic stagnation and the introverted nature of Irish society were all profoundly affected by a new order. The economic philosophy of Whitaker and Lemass (itself influenced by world economic developments), the new communications medium of television, the growing awareness and acceptability of North American developments, all interacting with one another, influenced judicial thinking in the 1960s, at least at a subconscious level.

In particular, in the constitutional sphere, legal practitioners and judges became more conscious from the 1960s onwards of one unique endowment which has enriched the art of government — the United States written constitution. Reading Professor Casey's book one becomes conscious of the transplantation to Irish law of some of the rich legal heritage developed by towering figures of the United States Supreme Court. Indeed Mr. Justice Brian Walsh in his perceptive foreword to the book acknowledges that Irish constitutionalism owes so much to American constitutionalism.

The dynamism and vibrancy of the Constitution of Ireland is richly illustrated in Professor Casey's book. In schematic terms, the author adopts a thematic approach rather than the annotative method adopted by Professor Kelly. Each chapter is devoted to a theme; there are 19 chapters which include themes such as the Functioning of the Oireachtas, the Government and Central Administration, International Relations, the Courts, Equality, Property Rights, and Freedom of Religion. The first chapter entitled "Historical and General Introduction" traces the pre-1937 constitutional developments. The historical dimension to the 1937 Constitution is often overlooked. Much of the 1937 Constitution is, in Professor Kelly's words, "very largely a rebottling of wine"; a taste of the wine in its former bottles may lead to a greater appreciation of the wine in the new bottles. The chapter with the theme of enumerated and unenumerated rights is of particular importance to practitioners. The sub-headings include a description and the source of the right to privacy, the right to earn a living, the right of access to the Courts, the right to marry and found a family and the fair procedures in decision making.

Professor Casey writes lucidly and not only provides a commentary on the Constitution but poses questions and provides a critical analysis on appropriate developments. Take the case of *O'Sullivan -v- Harnett and the Attorney General* [1983] ILRM 79 which has perplexed some practitioners. The plaintiff was charged in the District Court under the Fisheries (Consolidation) Act, 1959, s.182(2)(a), which prohibits the unlawful capture of salmon. Section 182 provides for summary trial only and a convicted person is liable to a fine not exceeding £25 with an additional fine of £2 for each unlawfully captured fish. The plaintiff was charged in respect of 900 salmon and faced a possible financial penalty of nearly £10,000. The Supreme Court held that this could not constitute a minor offence and that the District Court summonses must be struck out in that Court for want of jurisdiction. Professor Casey correctly observes that as the relevant section provided for summary trial, the fact that the offences as charged were not minor offences meant that no machinery existed for trying the plaintiff in respect of those offences. The author does not stop here but postulates a solution to this procedural quagmire. The author states that retrospective legislation could validly be enacted to cope with this judicial development — by providing that the "non-minor" section 182 offences could be tried on indictment. He argues that such legislation, being purely procedural, would not amount to declaring criminal acts which were not so at the time of their commission, thus such legislation would not violate Article 15.5 (Prohibition of Retroactive Penal Legislation). The author does observe that such legislation should not run counter to the rule against double jeopardy.

When reading Professor Casey's book your reviewer became conscious of the complexity and sensitivity of issues which judges, particularly in the constitutional sphere, are called upon to determine. Oftentimes there are no neat solutions. Perhaps too much is expected of a judge deciding a grave constitutional issue without the assistance of any research team — save the legal team presenting and defending the case. Judges and lawyers interpreting a constitution must express themselves in words. Words, in the language of Learned Hand, a masterful judge, "are utterly inadequate to deal with the fantastically multi-form occasions which come up in human life".

THE SOLICITORS' BENEVOLENT ASSOCIATION

A CASE IN NEED

Mrs. "X" is in her late 40's, she is the widow of a Solicitor, has five children under 21. Her only income is a widow's pension and family allowance. She has to provide for her family and maintain a home. She faces this enormous responsibility alone. Who can she turn to for help? — The Solicitors' Benevolent Fund.

The Solicitors' Benevolent Association assists such cases - and many others where the age of dependants of members of the profession ranges from "under 10" to "over eighty". The Committee of the Association meets monthly and its work covers the entire country, north and south. The Committee funds come from annual subscriptions from members of the Law Society of Northern Ireland and The Incorporated Law Society of Ireland, together with additional subscriptions received from Bar Associations, and individual Solicitors or firms of Solicitors. In recent years the calls on the Association's resources have become more numerous and this year the Committee faces a relatively large deficit. It urgently needs extra funds. Subscriptions can be sent to the Secretary, Ms Clare Leonard, The Solicitors' Benevolent Association, 40 Lr. Fitzwilliam Square, Dublin 2, or c/o The Law Society, Blackhall Place, Dublin 7.

[(1961) N.Y.S.B.J. 419, 423.] Layfolk and lawyers may overlook the effort and the agony that go into the preparation of a judgment. Judge Irvine R. Kaufman of the United States Court of Appeal put the issue succinctly: "There is an agony, no less severe, because it is intellectual rather than physical, in dealing with problems that have no neat resolutions, that defy precision, that mock finality". [(1970) 45 N.Y. U.L. Rev. 716.] It is an agony that the judges cannot pass.

Boswell, in the ardour of ambition for literary fame, regretted to Dr. Johnson that an eminent judge had no literary ability and therefore would leave no perpetual monument of himself to posterity. "Alas, Sir" (said Johnson), "what mass of confusion should we have, if every Bishop and every Judge, every lawyer, physician and Divine, were to write books". Professor Casey is too young for your reviewer to suggest that *Constitutional Law in Ireland* is the author's perpetual monument of himself to posterity. But Professor Casey's book can most usefully be added to the library of any law maker, law declarer, practitioner and law student.

Eamonn G. Hall

"KEEPING HOUSE" AT BLACKHALL PLACE

Residents' Lounge, Blackhall Place.

Top Row (left to right): Mrs. Sheila Stone, Mrs. Josie Graham, Mrs. Susan Graham.
Bottom Row (left to right): Mrs. May Cooke, Mrs. Annie Purdy and Mrs. Dympna O'Reilly.

The Law Society's Headquarters are housed in a building completed in 1783 and built to accommodate the Kings Hospital School. The Society acquired the Premises in 1970 and it has been restored in a manner in keeping with its original character.

Looking after both the interior of the Premises and the domestic needs of members of the profession and the Society's staff is an able team of women who carry out their duties under the supervision of the Society's Housekeeper, Mrs. Dympna O'Reilly.

Overnight facilities for members include six twin-bedded rooms with shower, full bar and lounge facilities, members' T.V. and rest room (see photograph), and parking facilities. The bed and breakfast rate is £15.00 per room, and bookings can be made by telephoning Blackhall Place Reception on Dublin (01) 710711.

Younger Members News

THE YMC QUIZ DRIVE

Of all the Committees of the Council of the Law Society, perhaps the most varied is the Younger Members. Each of the Committees works within defined parameters, except this one. For the Y.M.C. has no boundary, political, geographical or otherwise.

The Committee comprises a dozen or so representatives from the various echelons of the profession, starting with the Professional Course, the Advanced Course, the newly qualified, and then the not-so-newly qualifieds. They come from all the Provinces and once a month, meet in Dublin.

It concerns itself with many issues, one of which is the Emigration Trail. This is close to the hearts of all the Younger Members of the profession, as up to 50 per year are now leaving our shores. Bar Associations in the U.S., U.K. and E.E.C. are springing up and very often the Y.M.C. is their line of communication and home-base.

Communication is vital to the life-blood of the Committee, which has to feel the needs of the Younger Members. Last year, with a view to promoting the Committee, we ran a pilot campaign to generate a bit of interest around the country. We held a series of Table Quizes, which seemed a popular way to get everybody in one room at the same time, and the support we got was encouraging. It need also be said that the work that was put in was enthusiastic, but what was most rewarding, was the result — £5,500.00 for the Benevolent Association.

The culmination of our fund raising was the Dun Laoghaire Quiz, which was attended by 400 people (mainly solicitors). It was a warm and giving host of participants, who tried very hard to answer some awfully difficult questions.

To carry the night, we needed two pillars of the profession. In the course of selection, it was decided that both would be perpendicular but with contrasting styles and, accordingly, we went for an early Corinthian and a more recent Ionian. Moya Quinlan handled the rowdy element, while Gerry Griffin rubbed it in and managed to extract the final shilling from two anonymous bids from Frank O'Riordan and Michael Peart.

The electronic score board was devised, manufactured, erected, controlled and operated by Brian O'Connor, ably assisted by Dan Murphy and it is a mark of their success on the night that not a single score was queried, despite a tense tie-break towards the end.

John Larkin was the floor manager with the inflexible smile, which says "I'm really worried, but I don't show it". He was assisted by Joe Swords, who brought most of his family with him to make sure the boys didn't make a mistake. It's a measure of their efforts that nobody noticed them all night.

There were so many prizes it took most of the evening to give them out. They were borrowed, stolen or bought by Miriam Reynolds and Roddy Bourke. That's Miriam looking at you in the photograph. We'd like you to remember her, because we hope to see Miriam elected to the Council of the Law Society next year. Her presence on the Council will ensure the continuity of the work carried out by the Y.M.C., which must have a Council Member, if it is going to be of any practical use.

There were, of course, many others who gave their unfailing attention to the success of these nights over the year, to whom we are all most grateful.

JUSTIN McKENNA

Younger Members Committee Quiz Night
Royal Marine Hotel, Dun Laoghaire, 7 April 1988
At the microphone, Justin McKenna, (Y.M.C.) with Moya Quinlan, and Gerry Griffin, Quizmasters.

Miriam Reynolds, Solicitor, Member of the Younger Members Committee.

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Dun Laoghaire: 35/36 Lr. George's St. Tel: (01) 800306.
Galway: Ross House, Victoria Place. Tel: (091) 63715.
Limerick: 62 O'Connell Street. Tel: (061) 316122.

A Case for Medical Photography

FOREWORD

This paper is written in the understanding that the jury system for the computation of personal injury awards, has been abolished, and that the judge is now the final arbiter. Should the jury system be in action for some time after the publication of this paper, then one should read "jury" in place of "judge" throughout this text.

A Case for Medical Photography

Whoever said that "a photograph never lies" was quite obviously, not a lawyer. But that is not to say that photographs are a hinderance rather than a help. In fact photographs professionally taken and printed are fast becoming an invaluable aid to the administration of justice. And at the forefront in setting high standards, and levels of professionalism, and integrity, is the "Medical Photographer".

There is a hardly a week goes by without the question being asked "What is a medical photographer?". I have found the easiest way of answering this is to say that medical photographers photograph diseases, injuries, and causes of death, and it is usually at this point that people decide to make a rapid exit from your company, in the firm belief that you must be in need of very serious psychiatric help.

But it is not only lay people who are squeamish about looking at injuries. Solicitors and barristers don't like looking at them either, but by virtue of their professions, a large proportion of them have to do so.

If one addresses one's attention to the purpose of a tort action, it is clear, that if the injured party has to be provided with sufficient compensation to leave him in a position, which in legal terms is THE position he was in if the accident had not happened, full appreciation in court is dependent on the ability to provide true, fair, and convincing medical evidence.

In medico-legal cases it is usual to have "medical experts" as professional witnesses as to the severity, or lack of it, of the plaintiff's injuries. These witnesses are unquestionably the most reliable source of evidence in this regard.

They may on occasions bring with them radiographs to "illustrate" the plaintiffs condition. It is a small wonder to medical illustrators how anyone can make

by
Colin G. Goggin

much sense out of radiographs (X-rays) when they are produced as evidence, especially when one considers that to view them with even a modicum of clarity, it requires the radiograph to be trans-illuminated. To this end, medical illustrators have developed a procedure whereby the radiograph is photographed by passing light through it in two directions, thus increasing the contrast of the image. These photographs can then be viewed easily in a great amount of detail thereby obliterating the need to hold the radiograph in the general direction of a window.

One must give serious thought as to how convincing a verbal account of the plaintiff's injuries are to the judge. If a doctor tells a court that the female plaintiff has severe scarring on the pelvic region of her anatomy and that extensive plastic surgery in the future will at least be partially visible above her bikini line, does this evidence alone enable the judge to pronounce her award with any realistic degree of fairness? Surely medical photographs of her injuries would be of great assistance in arriving at a true and fair assessment.

In the past however, I have come across one or two little problems relating to medical photography in court. In order of popularity these are that photographs play on a judge's emotions; that colour is not accurate and that it is even made more "appealing"; and finally that enlarged photographs make the injury look a great deal worse.

To begin with I suppose we could do away with photographs altogether and personal injury cases would fast become one of the country's biggest spectator sports, with plaintiffs divesting in witness boxes the length and breadth of the country. It would be totally wrong not to let the judge see visibly the plaintiff's injuries and for reasons of medical ethics it is preferable to have lesions portrayed photographically.

In answer to the arguement that the colour in prints is biased, it can only be said that the professional medical photographers have a duty to record as accurately as possible, any medical condition they are asked to photograph. Contrary to the occasional snide accusation made against medical photographers, they do not enhance images of injuries as evidence, for any amount of money. It has yet to be recorded that a professional medical photographer risked his entire profession and the reputation of his Institute by unprofessional conduct. Adhering to the codes of practice of the various institutes and associations governing medical illustration is what allows photographers put the word "professional" after their names.

Photography can be used as an historical recording of the injury.

The point about the reproduction size of photographs is the final obstacle in defence of this profession. All medical photographs are taken to a range of universally accepted reproduction ratios. The most common set of which are the "Westminster Reproduction Ratios for Standard Anatomical Regions", and refer to a final image size on prints no bigger than 5" x 7".

The perspective used to record areas of anatomy are also governed by similar standards. Medical photography works within very tight and rarely flexible parameters.

Photographs of facial injuries are sometimes the subject of debate, when one considers that the plaintiff is present in court and the injury can be seen without the removal of clothing. Where therefore is the need for medical photographs? The answer is one of perspective and lies in the fact that the judge being the arbiter, is often making his visual assessment from a distance and in conditions not conducive to his task.

Some people in the legal profession believe that photography as evidence is one of those unnecessary expenses especially if the case never gets to court. Some have even dismissed photography on the grounds of liability not being an issue. However, the purpose of photography is not to establish liability, but to provide convincing evidence.

Nobody can say with absolute certainty if a case will go to court or not, and if it does, it will more than likely be too late for photographs to be of much benefit, if they are commissioned at this late stage. Surely the legal profession has a duty to its clients to present as good a case as possible, be that in court or to the defence in a settlement situation, and photographs as illustrative evidence are the most true and fair method of doing it.

Taking the point just raised as to the uncertainty of a case actually going for trial or not, it is good acumen to have photographs of injuries taken anyway as this will act as a historical recording of the injury near to the time that it was sustained. Should the case then go on for trial later, then the photographs can be reproduced and their full benefit appreciated.

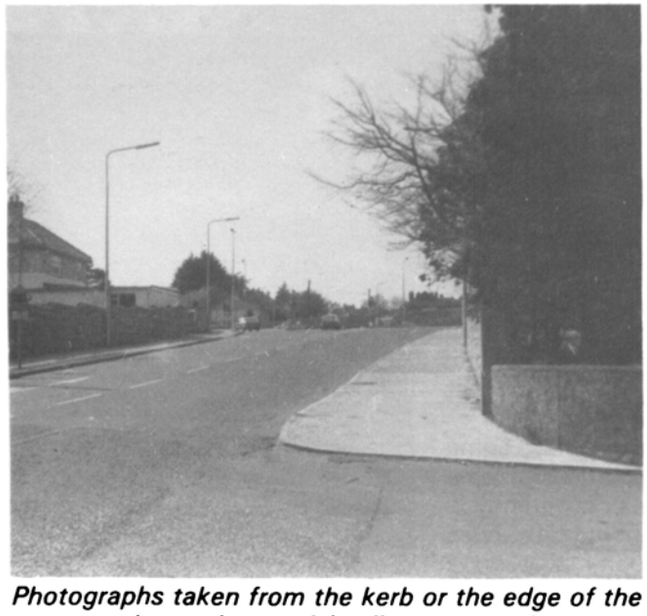
The idea that photography be regarded as an expense is a somewhat Dickensian frugality, especially as it is not expensive at all.

It does not take a medical photographer to tell the legal profession that no proof can be submitted as evidence unless its origin can be proved. This makes one wonder why so many medical photographs presented in court are not contested.

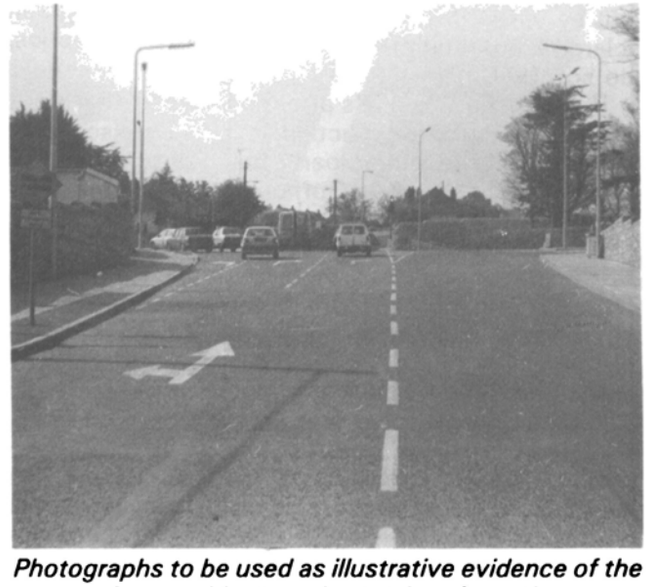
The professional medical photographer who undertakes medico-legal work, will carry out the entire process himself, and this is done for two reasons. On one hand, it ensures that all the photographic evidence presented can be proved, and on the other hand it complies with the codes of practice by which medical photographers work, and that is to say, that total confidentiality of what is part of the plaintiff's confidential clinical records, is guaranteed.

Medical photographers are often asked to photograph the cause or site of an accident as well as the result of it. It is not unusual to find medical photographers walking all four sides of a cross-road photographing dotted lines in every compass direction. They can even be found in pot-holes, down manholes, up scaffolding, entangled in industrial machinery, being pursued by farm animals, and just right there where the nice lady slipped in the shop.

You will find the same methodical and scientific approach will be given to requests for these non-medical photographs. The trained medical photographer for example wouldn't dream of photographing a road from the road edge. It is vital that in order for the correct perspective to be portrayed, and to avoid the effect of a diverging wide scene, photographs should be taken from the centre of the road itself, to a ratio comparable to that as viewed by the naked eye, all irrespective of the danger involved. One must never forget that the medical photographer comes into contact with dangerous and contagious disease in the course of his daily routine, and the prospect of being embedded onto the road surface by a truck, is of little concern.



Photographs taken from the kerb or the edge of the road can give a misleading perspective.



Photographs to be used as illustrative evidence of the scene of an accident are best taken from the centre of the road.

Correspondence

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

14th March 1988

Re: **Irish Permanent Building Society and Grants of Probate**

Dear Sirs,

It has come to our attention in a recent case that the Irish Permanent Building Society has commenced a practice whereby Grants of Probate with account transfer forms are remitted to branch offices with a view to branch staff getting in touch directly with the Personal Representative or Beneficiary as the case may be in order to secure the funds with that Society.

Although there was no difficulty in the case in question with our client, we could easily envisage circumstances whereby a solicitor might have given an undertaking to a Bank to discharge funeral, testamentary and other expenses and be relying on the proceeds of an I.P.B.S. account to discharge the full amount due to the Bank. Clearly under the I.P.B.S. new procedures it might become impossible for a solicitor to comply with such an undertaking.

The Society might possibly take this matter up with the Irish Permanent Building Society. In the meantime we, in the future, will be having all Executors and Administrators sign express authorities requiring that financial institutions return Grant of representation and withdrawal forms/name transfer forms rather than same being passed to the client direct.

Yours sincerely,

HARRY SEXTON
Solicitor
Sexton Keenan & Co.,
138 Walkinstown Avenue,
Dublin 12.

Most medico-legal photographers should be available on a call service, but this is up to the individual photographer. Those with enough experience tend to operate on a "no foal - no fee" basis, as this is the type of market that the medico-legal photographer has to work in. This type of payment condition however is not adopted by all medical illustrators and one should inquire, before any commission is ordered.

Throughout the world, the governing bodies for medical illustrators are greatly concerned that non-qualified people are carrying out medico-legal work. It is not only doing medical photography harm but it could have serious ramifications for those commissioning work from these individuals.

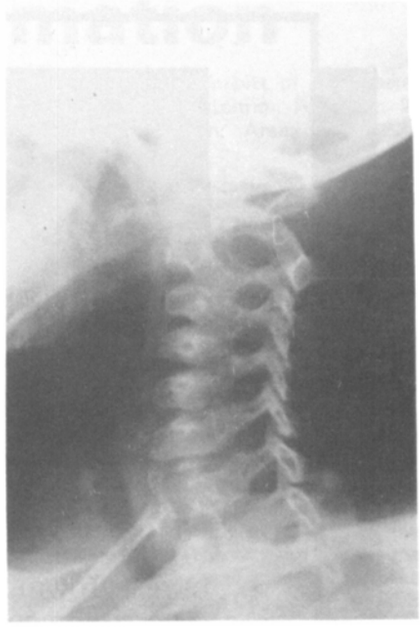
It is most important for medical and ethical reasons that the inclusion of medico-legal illustrations, for use as evidence in court, be produced by those suitably qualified to do it.

What training does a medical photographer have to enable him to carry out his job with efficiency and the utmost professionalism?

We shall assume that a minimum of three years study into physiology and anatomy has been carried out. This still only equips the medical photographer with a basic level of medical knowledge, and it is the foundation of a course of study to last the remainder of his working life. Aside from this there is a concurrent study of chemistry, physics, graphic design, photographic optics, and photography itself, lasting between three and five years.

On top of this, medical photographers are expected to study and certify in television and video production, sound recording and editing, the writing and presentation of reports, and computer studies incorporating computer generated imaging and graphics.

It does seem a trifle disappointing, if not totally exasperating, that after years of edification, people flee from your presence aghast that one should even like looking at injuries let alone photographing them, along with contagions of one form or another. □



X-rays can be turned into black and white photographs for ease of viewing in Court.

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An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.
6th day of May 1988.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Laurence Conroy, Churchquarter, Hollymount, Co. Mayo. Folio No.: 39172; Lands: (1) Kilcommon; (2) Pollnacartan; (3) Robeenard; Area: (1) 13a.1r.11p.; (2) 4a.0r.7p.; (3) 1a.1r.3p.; County: **MAYO.**

Daniel Breen of Clonrobin, Kanturk, Co. Cork. Folio No.: 2861; Lands: Clonrobin (part); Area: 34a.0r.21p. County: **CORK.**

Joseph P. Daly and **Veronica Lilian Daly,** both c/o McCracken & Son, Solicitors, 94 Grafton St., Dublin 2. Folio No.: 485F. County: **WESTMEATH.**

Jeremiah Gallahue, of Anglesborough, Mitchelstown, Co. Cork. Folio No.: 9568; Lands: Anglesborough; Area: 0a.2r.8p.; County: **LIMERICK.**

Patrick Crowe, Kilnoe, Bodyke, Co. Clare. Folio No.: 14044; Lands: (1) Ballynahinch; (2) Kilnoe; (3) Kilroe; Area: (1) 0a.3r.8p.; (2) 10a.2r.32p.; (3) 5a.2r.0p.; County: **CLARE.**

Gerald Joseph Hyland of Ballyshiel, Belmont, Co. Offaly. Folio No.: 15689; Lands: Drishoge or Strawberry Hill; County: **OFFALY.**

Patrick Cassidy of Nafarty, Carrickmacross, Co. Monaghan. Folio No.: 19712 closed to 1588F; Lands: (1) Nafarty; (2) Nafarty; Area: (1) 6a.1r.10p.; (2) 16a.1r.33p.; County: **MONAGHAN.**

Oliver Hegarty of Shore Rd., Buncrana, Co. Donegal. Folio No.: 14068F; Lands: Woodland; Area: 0.440 acres. County: **DONEGAL.**

Incorporated Society for Promoting Protestant Schools in Ireland, c/o 74 Upr. Leeson Street, Dublin 4. Folio No.: 5409; Lands: Athlone; Area: 7a.2r.20p.; County: **WESTMEATH.**

Philip Purcell of Gaulstown, Kilmacow, Co. Kilkenny. Folio No.: 8231; Lands: Gaulstown (part); Area: 99a.3r.4p.; County: **KILKENNY.**

Michael Keohane (½) and **Neil Keohane (½),** both of New Street, Bantry, Co. Cork. Folio No.: 15327F; Lands: (1) Gerahies; (2) Gerahies; (3) Gerahies; (4) Gerahies; Area: (1) 1.027 hectares; (2) 33.687 hectares; (3) 2.751 hectares; (4) 0.672 hectares; County: **CORK.**

Rose Lynch of Drumadooey, Burnfoot, Co. Donegal. Folio No.: 10949; Lands: Elagh Beg; Area: 13.769 acres; County: **DONEGAL.**

Matthew Dempsey (Jnr.) of Griffinrath, Celbridge, Co. Kildare. Folio No.: 1203; Lands: Griffinrath; Area: 211a.0r.18p.; County: **KILDARE.**

Cathal Byrne of 234 Glenwood Estate, Dundalk, Co. Louth. Folio No.: 2491L; Lands: 7 Mary Street North; County: **LOUTH.**

Ballynahinch Castle Incorporated, Folio No.: 30S; Lands: Ballinafad and ors.; County: **GALWAY.**

Owen McGowan, Carntulla, Dowra, Co. Leitrim. Folio No.: 14953; Lands: (1) Drumlahard; (2) Drumbrick; Area: (1) 24a.0r.0p.; (2) 1a.0r.6p.; County: **ROSCOMMON.**

Laois County Council, County Hall, Portlaoise. Folio No.: 2142; Lands: (1) Rathmoyle; (2) Rathmoyle; (3) Graigue; (4) Corraun; (5) Rapla; (6) Rathdowney; (7) Rathdowney; County: **QUEENS.**

Robert J. Gara, Aghacurrean, Ballaghaderreen, Co. Roscommon. Folio No.: 1025; Lands: Aghacurreen; Area: 7a.3r.31p.; County: **ROSCOMMON.**

Patrick Finnerty and Marian Finnerty, both of 223 The Oaks, Ballymanny, Newbridge, Co. Kildare. Folio No.: 13463F; Lands: Blackrath and Athgarvan; Area: 1.981 hectares. County: **KILDARE.**

James and Mary Doyle, whose address for service of notices is c/o Poe, Kiely, Hogan, Solicitors, 21 Patrick Street, Kilkenny. Folio No.: 83L; Lands: Leggetsrath West; Area: 0a.0r.11p.; County: **KILKENNY.**

William Roche, Belcarra, Castlebar, Co. Mayo. Folio No.: 23942; Lands: Ballycarra; Area: 11½ perches. County: **MAYO.**

Mary Moran of Tullahedy, Nenagh, Co. Tipperary. Folio No.: 36744; Lands: Tullahedy; Area: .501 acres. County: **TIPPERARY.**

William and Mary Kingston, both of Tigna-Greine, Allen Square, Bandon, Co. Cork. Folio No.: 7793F; Lands: Coolfadd: Area: 0a.0r.23p.; County: **CORK.**

Cornelius and Maureen Mulvey, both of 333 Bay Estate, Co. Louth. Folio No.: 4258L; Lands: Marshes Lower. County: **LOUTH.**

Patrick Joseph Turbitt of Drumkeelan, Drumshambo, Co. Leitrim. Folio No.: 20; Lands: Drumkeelan; Area: 43a.0r.33p.; County: **LEITRIM.**

Frances Heskin (Sister of Charity), Mary Barry (Sister of Charity), Josephine Garvey (Sister of Charity), Mount Saint Annes, Milltown, Co. Dublin. Folio No.: 3568. County: **DUBLIN.**

Lost Wills

BAMFORD, Molly, late of Cork City, Co. Cork. Date of death — August/September 1985. Moved to Cork from Essex around 1964. Will any solicitor in the Cork area having information of the above-named deceased, please contact the undersigned solicitors, who are acting for the next of kin. Messrs. L. Cubitt and Co., Solicitors, 35/37 High St., Ballymena, Co. Antrim, N. Ireland.

CASSIDY, John (otherwise Sean), deceased, otherwise John Denis Cassidy, late of 7 Bancroft Avenue, Tallaght, Dublin. Will anyone who made a will for the above, please contact Brendan P. McCormack & Son, Solicitors, 56 Lr. O'Connell St., Dublin 1.

GRAHAME, John Archibald Kenneth, deceased. Date of death 21st March 1987, late of 13 Palmerston Park, Dublin 6. Information pertaining to the affairs of the deceased, or the making of a will by the deceased, is sought by the next of kin. If you can supply such information, please contact Eugene F. Collins & Son, Solicitors, 61 Fitzwilliam Square, Dublin 2. Ref: Eugene Murphy. Tel. 761924.

JONES, Matthew, deceased, late of 13 Marie Place, Windmill Road, Cork. Will anyone having knowledge of the whereabouts of a will of the above-named deceased who died on 3rd March, 1988 please contact James Lucey & Sons, Solicitors, Kanturk, Co. Cork. Ref: MS.

Miscellaneous

SEVEN DAY PUBLICAN'S LICENCE required. Details to Daly Galvin, Solicitors, 95 Lr. Baggot St., Dublin 2. Tel. 614655/614906.

SEVEN DAY PUBLICAN'S LICENCE required. Details to Desmond A. Houlihan & Son, Solicitors, Birr, Co. Offaly. Tel. (0509) 20026, (0509) 20398. Fax No. (0509) 21086.

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WALSH, Susannah, Tresmond, Clonsilla, Co. Dublin. Will the solicitors acting for or in relation to the above, please contact Brian Woodcock of Woodcock & Sons, 28 Molesworth St., Dublin 2. Tel. (01) 761948.

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IN THE MATTER OF the Registration of Title Act, 1964 and of the application of DONAL HEFFERNAN, 37 Farney Park, Sandymount, Dublin 4.

TAKE NOTICE that Donal Heffernan, 37 Farney Park, Sandymount, Dublin 4 has lodged an application for his registration on the Freehold Register free from encumbrances in respect of the above mentioned property.

The Original Lease is stated to have been lost or mislaid. The Application may be inspected at this Registry.

The Application will be proceeded with unless notification is received in this Registry within one calendar month from the date of publication of this Notice that the Original Lease is in existence. Any such notification should state the grounds on which the document of title is held and quote Reference No. 85DN15577. The missing document is detailed in the schedule hereto.

Dated this 4th day of May, 1988.

J. B. Fitzgerald,
Registrar

Schedule

Original Lease dated 11th May, 1936 made between James Archer of the one part and Eily Heffernan of the second part.

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 82 No. 5 June 1988

The President of the Law Society, Mr. Thomas D. Shaw, welcomes the Minister for Industry & Commerce, Mr. Albert Reynolds, T.D., to Blackhall Place, for the opening of the Seminar on the Companies (No. 2) Bill, 1987.

- Date of Discoverability Rule and s.11 of the Statute of Limitations
- Civil Liability for Communication of AIDS – a Moot Point
- Personal Injury and Motor Accidents in Spain

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Executive Editor:
Mary Gaynor

Committee:
Geraldine Clarke, Chairman
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Nathaniel Lacy
Frank Lanigan
Charles R. M. Meredith
Desmond Moran
Daire Murphy
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GAZETTE INCORPORATED LAW SOCIETY OF IRELAND
Vol. 82 No. 5 June 1988

Viewpoint

Since the introduction of Value Added Tax it has been the norm for luxuries to be charged at the highest rate of tax. This rate is currently 25%. It is not unreasonable to expect that those who wish to spend their money on luxury goods or the provision of luxury services should pay a higher rate of tax than is levied on necessary goods or services.

The rate of VAT on legal services is 25% — equating them with luxuries. People choose to buy luxuries or to have luxury services provided for them. The legal services they require do not constitute luxury. Buying a home is not a luxury. Bringing a law suit to protect one's rights or to claim compensation for personal injuries is not a luxury. Even less is defending a claim, which may have been unjustly brought against one, a luxury. By establishing both Criminal and Civil Legal Aid Schemes, however inadequately funded the latter may be, the State has recognised that citizens with inadequate means should have access to legal advice and assistance. Neither of these Schemes are luxuries for those who are entitled to avail of them and yet VAT charges are attached to them as if they were.

The Society's former President, David Pigot, drew attention last year to the discriminatory element of VAT on legal services. It is the ordinary man in the street who actually pays VAT. The former President estimated that the cost of access to the Courts for a person registered for VAT was some 20% less than for a non-registered person. This appears to be a clear discrimination against those who are not registered for VAT. The trader or the limited company, large or small who use legal services, will be registered and can recover the VAT charge. The ordinary individual making a Will, taking out a probate to a father's estate or paying the cost of litigation ends up paying the full charge.

The rate of VAT on legal services is the highest in any EEC country. Harmonisation of VAT rates may bring about a reduction, but there should be no need to have to rely on the EEC to right this wrong.

Some clients may believe that it is the solicitor who pays the VAT since it appears on his bill. Of course this is not the case — the solicitor is in the usual position for the profession, that of unpaid collector of taxes or duties for the State. Non-commercial clients have no lobbies working for them precisely because they are ordinary individuals — they have no organisations which can bring pressure to bear on their behalf to lessen this impact.

It behoves the legal profession to continue to speak out on behalf of these citizens and draw attention to the inequity of a system which is so clearly discriminatory.

In the same speech Mr. Pigot drew attention to another iniquitous burden, this time on house buyers, namely, the high level of stamp duty payable on house purchases. The modest concession in the 1988 budget has hardly relieved the position significantly.

The concessions in stamp duty and the grants given to purchasers of new houses have a discriminatory effect. To exclude second hand houses has the inevitable result of driving first time purchasers out to the suburbs of our cities and towns where most new private housing can only be found. The renewal and revival of the older areas of our towns and cities should be assisted by taxation concessions, not made more difficult.

Even in the suburban areas the concessions and grants have a distorting effect on the market. A person who has to sell a second hand house on a housing estate which is still being developed cannot hope to achieve the same price for his or her house as the asking price of the new houses on the estate given the stamp duty savings and grants which are available to buyers of the new houses. If first-time buyers are to be given financial incentives to buy houses then those incentives should apply to all houses and not just new ones. A change to this policy would encourage the purchase and renovation of second hand houses and avoid the distortions of the market in housing estates.

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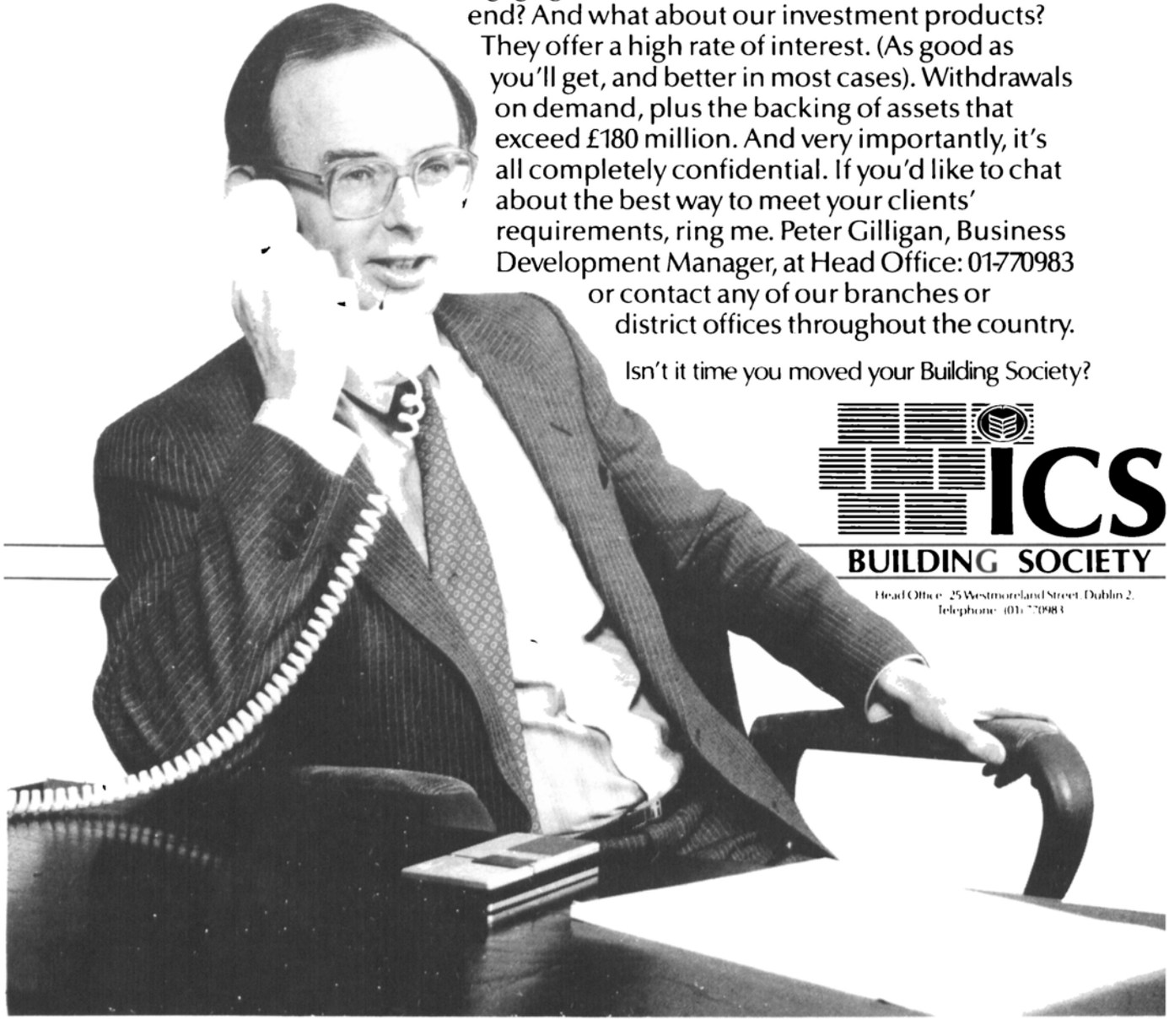

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The Date of Discoverability Rule and S.11 of the 1957 Statute of Limitations

Martin Hayden

"Time is a test of trouble but not a remedy", wrote Emily Dickinson. Lawyers can go further, "Time can extinguish the remedy". S.11 (2)(b) of the Statute of Limitations, 1957, provides as follows:

An action claiming damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, shall not be brought after the expiration of three years from the date on which the cause of action accrued."

by
Martin Hayden
Barrister-at-Law

The problem with this section stems from the various interpretations given to the date "on which the cause of action accrued". Various traditional interpretations have arrived at different conclusions and the present article attempts to review the state of the law as it stands today and makes reference also to the Law Reform Commission's Report on the Statute of Limitations, *Claims in Respect of Latent Personal Injuries* LRC 21 of 1987, and also refers to the recent private member's Bill on the Statute of Limitations introduced by Mr. George Birmingham. It is the writer's view that the only constitutionally valid interpretation of S.11 must be one which includes a date of discoverability rule.

There are at present what would appear to be two conflicting High Court decisions on the matter. *Morgan -v- Park Developments* [1983] ILRM 156 and *Anna Hegarty -v- Francis O'Loughran and Gerald E. Edwards* [1987] ILRM 603.

The facts of Morgan are quite straightforward. The Plaintiffs purchased the house from the Defendant building contractor in 1962. Shortly after moving in cracks appeared which were notified to the Defendants. The Defendants repaired these. A further larger crack appeared subsequently and the Defendants repaired this in 1965. About this time, the Plaintiffs were told by the Defendant's agent that the cracks were merely as a result of the house settling and that this would take some years. In 1975 the Plaintiffs had an extension built. At this stage, the contractor attempted unsuccessfully to repair the crack. In 1979, the Plaintiffs consulted an architect who told them that the house had a major structural fault in that the foundations were insufficient. Remedial work was necessitated; underpinning of the foundations had to be carried out. Proceedings were issued in 1980. The statute was pleaded against the Plaintiff. For the Plaintiff, it was submitted that the date of accrual was when the damage was discovered and that this was postponed by reason of the Defendant's agent's representations.

Carroll J. held that the date of accrual was when the remedial work was completed in 1965. In other words, she applied a date of discoverability rule. In coming to this conclusion, Carroll J. examined a number of English cases and specifically followed the approach of the Court of Appeal in *Sparham-Souter -v- Town and County Developments (Essex) Ltd. and Another* [1976] 2 W.L.R. 493. An interesting point about this is that Sparham was overruled by a reluctant House of Lords in *Pirelli General Cable Works Ltd. -v- Oscar Faber and Partners* [1983] 2 W.L.R. 6, a case which will be dealt with later. Sparham itself involved an action against a public authority for negligence and breach of duty in failing to ensure that the plans and foundations complied with the relevant bye-laws. Cracks had appeared in the brickwork. The authority claimed, *inter alia,* that the cause of action was statute barred.

Lord Denning in that case stated at p.497 that "A cause of action accrues not at the date of the negligent act or omission but at the date of damage sustained by the Plaintiff". He went on to quote Vaughan Williams L. J. in *Thompson -v- Lord Clanmorris* [1900] 1 Ch. 718, where the latter stated "A statute of limitations cannot begin to run unless there are two things present — a party capable of suing and a party capable of being sued". Carroll J. expressly referred to this statement in Morgan and in fact she stated that there cannot be a party capable of suing unless he knows or should know that he has suffered damage. Denning M. R. went on to state that "It would be most unjust that time should run against the Plaintiff when there is no possibility of bringing an action to enforce it". Lord Roskill agreed with Denning M. R.'s approach concerning the existence of a person capable of suing and another person capable of being sued. In fact he quoted from Halsbury's

Laws of England, 2nd ed. Vol. 20, 1936, at p.504 of the judgment: —

"A cause of action cannot accrue unless there be a person in existence capable of suing and another person in existence who can be sued."

Coming to her conclusion on the date of discoverability rule, Carroll J. also referred to the then recent House of Lords case of Pirelli. In that case the House of Lords held, applying *Cartledge -v- E. Jopling and Sons Ltd.* [1963] A.C. 758 that the accrual of a right of action, in actions for negligence in the construction or design of buildings was the date the damage came into existence and not the date when the damage was discovered or could, with reasonable diligence have been discovered. Lord Fraser in *Pirelli* placed considerable emphasis on the *Cartledge* case. The *Cartledge* case itself concerned a condition known as silicosis i.e. the prolonged inhalation of silicone leading to the eventual destruction of the lung. Before examining this case, it should be noted that one of the main reasons Lord Fraser found against the date of discoverability rule was the fact that the English Parliament had, after *Cartledge,* changed the law in relation to the running of time in the case of personal injuries. At p.10 of his judgment Lord Fraser stated that the 1963 Limitations Act extends the time limit for the raising of actions for damages where actual facts of a decisive character were outside the knowledge of the Plaintiff until after the action would normally have been time barred. He goes on to state "It must, therefore, be taken that Parliament deliberately left the law unchanged so far as actions for damages of other sorts are concerned". As a result he found himself bound by statute and reluctantly overruled *Sparham-Souter.* Coming to this conclusion, Lord Fraser was less than happy as can be seen from the following extract at p.14 of the report: —

"I am respectfully in agreement with Lord Reid's view, expressed in *Cartledge -v- Jopling and Sons Ltd.* [1963] A.C. 758, that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it. Postponement of the accrual of the cause of action until the date of discoverability may involve the investigation of acts many years after their occurrence, see for example *Dennis -v- Charnwood Borough Council* [1982] 3 W.L.R. 1064 with possible unfairness to the Defendants, unless a final long stop date is prescribed, as in S.6 and S.7 of the Prescription on Limitation (Scotland) Act, 1980. If there is a question of altering this branch of the law, this is in my opinion, a clear case where any alteration should be made by legislation, not by judicial decision, because this is, in the words of Lord Simon of Glaisdale in *Milinangous -v- George Frank (Textiles) Ltd.* [1976] A.C.443 at p.480: — 'A decision which demands a wider range of review than is available to the courts following our traditional and valuable adversarial system — the sort of review composed by an interdepartmental committee'. I expect the parliament will soon take action to remedy the unsatisfactory state of the law on this subject."

As Carroll J. correctly pointed out, such an abdication of responsibility is not open to the Irish judiciary entrusted as it is with ensuring the protection of Constitutional rights.

There has been considerable debate as to whether or not a right to litigate is a property right within the meaning of Article 40.3.2 or whether it involves the property rights guaranteed by Article 43 of the Constitution. For discussion on the matter see the judgment of O'Higgins C. J. in *Moynihan -v- Greensmyth* [1977] I.R. 55 and also the judgment of Finlay P. in *Cahill -v- Sutton* [1980] I.R. 271 *et seq.*

In any event regardless of which article is involved it is clear that the Constitution guarantees the right of access to the courts. This has been established in a number of cases, in particular, *Macauley -v- Minister for Posts and Telegraphs* [1966] I.R. 345, where Kenny J. held that one of the personal rights guaranteed by Article 40.3 of the Constitution was the right of access to the courts. Costello J. reiterated this in the *State (McEldowney) -v- Kelliher* [1982] ILRM 568. This must be a meaningful access. As such it is submitted that the only possible approach to pass the test of constitutionality is a date of discoverability rule. Carroll J. held such in *Morgan* when, having quoted Lord Pearce and Reid in *Cartledge,* she states at p.160 of the report:-

"It seems to me that no law which could be described as 'harsh and absurd' or which the courts could say was unreasonable and unjustifiable in principle could also be constitutional."

Further support for a holding of unconstitutionality in the event of S.11 allowing only a date of damage interpretation is to be found in the judgment of Henchy J. in the decision in *Cahill -v- Sutton* [1980] I.R. 269.

That case concerned the injuries suffered by the Plaintiff as a result of her gynaecologist prescribing a course of drugs for her at such levels as to cause her severe injury. The case is a leading case governing the principle of when a Plaintiff has the *locus standi* to bring an action. In the instant case, the Plaintiff was found wanting in personal *locus standi* (see p.285 of the judgment). Henchy J. however went on to state at p.287:

"In the result, it is not possible to uphold the conclusion of the President of the High Court with regard to the failure of the Plaintiff's claim that S.11 (2)(b) of the Act of 1957 is unconstitutional; that is due solely to the fact that the Plaintiff will lack the necessary competence to make that claim . . . While in the circumstances of this case

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the Court is unable to rule on the validity of the claims made against the constitutionality of S.11 (2)(b) of the Act of 1957, it is proper to point out that the justice and fairness of attaching to that subsection a saver such as was inserted by the British parliament in S.1 of the Limitations Act, 1963, are so obvious that the enactment by our parliament of a similar provision would merit urgent consideration."

In *Norris -v- A.G.* [1984] I.R. 36 at p.89 McCarthy J. in the Supreme Court in the course of a dissenting judgment stated that it was "fair to infer that the Court (in *Cahill -v- Sutton*) inclined to the view that the relevant subsection of section 11 of the Act of 1957 was constitutionally invalid."

Further support for the contention that, in the absence of a date of discoverability rule, S.11 (2)(b) would be held constitutionally invalid comes from the very case on which Lord Fraser in *Pirelli* placed so much emphasis, namely the *Cartledge* case. That case concerned the damage caused to the lungs of an individual who was susceptible to pneumoconiosis and who inhaled noxious dust over a period of years as a result of his work. Lord Reid, at p.772, quoted by Lord Fraser in *Pirelli,* stated as follows:

> "It appears to me to be unreasonable and unjustifiable in principle that a cause of action would be held to accrue before it is possible to discover an injury, and, therefore, before it is possible to raise any action. If this were a matter governed by Common Law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as would be reasonable in the circumstances. The Common Law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided."

Lord Pearce in the same case was of a similar view when he said that the argument of Counsel for the Plaintiff – "would produce a result according with common sense and would avoid the harshness and absurdity of a limitation that in many cases must bar the Plaintiff's cause of action before he ought to have known that he has one".

Both Law Lords felt bound by statute, a situation remedied soon afterwards by the 1963 English Statute of Limitations. However, if, as Lord Reid stated, the Common Law would insist on a date of discoverability rule, the Irish Constitution would demand it.

An American case directly in point is that of *William T. Urie -v- Guy A. Thompson* (1949) 337 U.S.163. This is a case with facts quite similar to that of *Cartledge.* Here the Plaintiff worked for a considerable number of years and due to his work inhaled silicone particles which led to a condition known as silicosis whereby his lungs were badly damaged. The onset of such an industrial disease is undiscoverable during its early

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and middle stages. It is only when serious damage begins to show that the cause can be identified.

The Plaintiff's claim was for compensation under the Federal Employer's Liability and Boiler Inspection Acts. The U.S. Supreme Court did avert to the concept behind the Statute of Limitations and came down heavily in favour of a date of discoverability rule as can be seen from the following extract from the judgment of Judge Rutledge at p.169:

> "If Urie were held to be barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy.
>
> It would mean that at some past moment in time, unknown and inherently unknowable, even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose, within the applicable statute of limitations, a disease whose symptoms had not yet obtruded on his consciousness, would constitute a waiver of his right to compensation at the ultimate day of discovery and disability . . .
>
> We do not think the humane legislative plan intended such consequences to attract a blameless ignorance nor do we think those consequences can be reconciled with the traditions of the Statute of Limitations which conventionally required the assertion of a claim within a specified period of notice of the invasion of the legal rights."

The American case that took on board the "blameless ignorance" criterion as set out in *Urie* is that of *Quinton -v- United States* 304.S 2d. 234 (1968). There the case involved an action under the Federal Courts Claims Act for medical malpractice. Torle C. J. stated that:

> "The . . . rule . . . that a cause of action for malpractice accrues on the date of the negligent act, even though the injured patient is unaware of his plight, has been subjected to every criticism over the years. It has also uniformly been condemned as an unnecessarily harsh and "unjust rule of law . . .
>
> Since this . . . rule, so far as we can discern, has no significant redeeming virtue, we declined to apply it but rather we think that by far the most sensible and just rule to be applied under that section is that a claim for malpractice accrues against the Government when the claimant discovers or with reasonable diligence should have discovered, the acts constituting the alleged malpractice."

The final American case to be considered is that of the Supreme Court case of the *United States -v- Kubrick* 444 U.S. 111 (1979). In that case Kubrick had been given an antibiotic, Neomycin, by the Veterans Administration Doctors when they were conducting surgery on his right femur. The drug had been negligently administered and caused a ringing sensation and loss of hearing in Kubrick. Although Kubrick lost his action on the grounds of being statute barred, the Court, feeling at the time that he had sufficient information inside the limitation period to put a reasonable person on notice, nonetheless indicated their view for the purposes of the Statute of Limitations. Justice White for the majority stated on p.122 of the report:

> We are unconvinced, for Statute of Limitations purposes, that a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, or available to the plaintiff or at least very difficult to obtain."

The High Court decision that would appear to conflict with the American case is the *Hegarty -v- O'Loughran* case where the facts were as follows:

The Defendants were both surgeons; the first-named of which performed an operation on the Plaintiff's nose in 1973. Soon after the operation the nasal bridge collapsed. A remedial operation was performed in June, 1974, by the second-named Defendant. The second operation was not a success and by 1976 the matter had begun to deteriorate. From then until 1978 the Plaintiff mentioned the matter to a Dr. Browne though not apparently as her doctor. From 1978, the Plaintiff attended Dr. Browne as her General Practitioner. She did not go to him for specific advice about her nose, but did, when attending him for other purposes, indicate that her nose was causing considerable discomfort. His advice was for her to leave her nose alone.

In 1980 the Plaintiff went to London. Whilst there her nose deteriorated even further. She returned home whereupon she had a further successful operation. Proceedings were commenced against both Defendants by the issue of a Summons on 19th December, 1980. The Plaintiff claimed damages for negligence. The Defendants in their defence pleaded *inter alia* that her claim was statute barred by virtue of S.11 (2)(b) of the 1957 Statute.

Throughout the judgment, Barron J. was at pains to point out that no question of the unconstitutionality of S.11 was raised and in fact goes so far as to say that at p.605 of the judgment:

> "Support for this proposition is to be found in *Morgan -v- Park Developments* [1983] ILRM 156. In that case, Carroll J. held that the date of accrual in an action for negligence in the building of a housing estate is the date of discoverability. I agree that this should be the law and for the reasons given. Further, I see no reason why such a proposition, if valid, should not apply to all actions for damages for

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negligence including those involved in personal injuries, though it would seem to me that there should not be an unlimited period based upon discoverability."

Be that as it may, however, Barron J. felt that the historical approach to establishing the accrual of a cause of action for damages for negligence has been regarded as occurring when the act causing the damage is committed. For this proposition, Barron J. cites the Supreme Court authority of *Carroll -v- Kildare Co. Council* [1950] I.R. 258. That case involved an action by a house owner the foundation of whose property was damaged during the laying of a new road. The damage was caused initially by the passing of a steam roller back and forth during the laying of the road. Unfortunately, the cracks indicating such damage did not appear until outside the period of limitation, as it then was. That period was laid down in S.1 of the Public Authorities Protection Act, 1893, which states:

S. 1(a) The action, prosecution, or proceedings shall not lie or be instituted unless it is commenced within six months after the act, neglect, or default, or in case of continuance of injury or damage, within six months next after the ceasing thereof."

This particular Section has had considerable problems in interpretation as can be seen in the judgments of the Supreme Court. The Supreme Court itself disagreed with a 3—2 decision. The majority followed the interpretation given the section by Halsbury L. C. in *Carey -v- Metropolitan Borough of Bermondsey* 67 J.P. 447, stating that time runs from the date of damage. The *Carey* case and subsequent cases involved considerable legal argument on why the parliament had included it (continuance of injury or damage). Black J. in the *Carroll* case felt, however, contrary to the majority's interpretation of S.1, that Halsbury L. C. was not laying down a general date of damage principle but was merely deciding the case on the facts of the instant case.

Whatever view is taken of the *Carroll* decision both it and the *Carey* case are based on a statute enacted prior to the adoption of the 1937 Constitution. Thus the statute does not benefit from the presumption of constitutionality; see Budd J. in *Educational Co. -v- Fitzpatrick (No. 2)* [1961] I.R. 345. The consequences of this are obvious as can be seen from the frustration of Lord Reid who felt, but for the statute, the basic principles of common law would insist on a date of discoverability rule.

Barron J., given that the constitutionality of S.11 was not pleaded, felt bound, however, by the *Carroll* case, but did add the *caveat* that, should such an approach be adopted, S.11 might not weather the storm.

The Law Reform Commission Report

The Law Reform Commission has recently reviewed this area of the law and published a report entitled *The Statute of Limitations; Claims in Respect of Latent Personal Injuries* (LRC 21, 1987). A detailed analysis of this report is beyond the scope of the present article. Suffice it to say that, having reviewed the present law in Ireland, the Commission then went into a detailed analysis of the position in other common law jurisdictions (England, Australia, Canada and the United States). In ch. 4 of the report, the Commission put forward its proposals for reform. Having gone through the options of (a) no time limits; (b) limitation based on the period in which the injury was sustained; (c) a longer limitation period; (d) a shorter limitation provision supplemented by judicial discretion to extend the period, and (e) a discoverability test. The Commission came down heavily in favour of the latter and went so far as to say that "We therefore recommend that the discoverability test should be incorporated explicitly in the legislative provisions".

Dealing with the first option, i.e. no time limit, the Commission felt that the balance of the argument lay against the removal of all time limits. The Commission felt that some form of time limit would provide a useful incentive to the Plaintiffs to take proceedings within a reasonable time. In dealing with the second option, i.e. limitation based on the period of years since the injury was sustained, the Commission rejected this option on the grounds that the Plaintiffs would in certain circumstances lose their right to litigate even before they could reasonably have become aware of their right. Dealing with the third option, i.e. a longer limitation period, the Commission felt that there were two reasons why this option should not be adopted: (a) the same problem as exists with the present three year limitation period will arise in the longer limitation period: individuals could lose their right of action before they realise there is a cause of action, and (b) all the problems of poor quality of evidence arise the longer the limitation period is extended.

The fourth option, i.e. a short limitation period supplemented by broad judicial discretion to extend the period was rejected by the Commission on a number of grounds. The first of these grounds and most obvious is that it would introduce great uncertainty into the law. No potential Defendant could ever "close the books on potential liability". The second objection is that of the inevitable price of judicial discretion, i.e. that the discretion will tend to be exercised differently from Judge to Judge. This will lead to differing outcomes which are impossible to reconcile.

The Commission accepted that the best solution is that provided by a limitation period which runs from the time the Plaintiff could possibly have discovered his injury rather than when he sustained it. They took on board the comments of Carroll J. in *Morgan -v- Park Developments Limited* at p.156 i.e. "whatever hardship there may be to a Defendant in dealing with a claim years afterwards, it must be less than the hardship to a Plaintiff whose action is barred before he knows he has one".

The second argument in favour of this date of discoverability test is that it centres on a largely factual question although ultimately depending on the Court's judgment as to whether the facts render the injury reasonably capable of being discovered. The Commission realised that such a test is not without problems. The question arises: should the test embrace cases where the Plaintiff was at all times aware of his injury but had not discovered its legal implications for years? Should it extend to cover or cater for that ignorance as the result of bad legal advice? Should

time not run until the Plaintiff becomes aware of the Defendants identity? However, in the end it was the view of the Commission that these reservations and possible criticisms would not outweigh the benefit of a discoverability rule. Then the Commission went on to consider the necessary elements of knowledge for such a discoverability test and felt that any such test must contain an objective element otherwise a premium would be put on indolence and carelessness.

The Law Reform Commission in its Report includes a draft Bill setting out its proposed amendments to the Statute of Limitations. Mr. George Birmingham T.D. has introduced a private member's bill entitled "An Act to amend the Statute of Limitations, 1957 and the Civil Liabilities Act, 1961, by providing new periods of limitation in respect of actions for certain personal injuries and other matters connected therewith". Mr. Birmingham's Bill follows in general the scheme set out by the Law Reform Commission. There would appear, however, to be one minor typographical error in Section 2 of the Bill which states:

Section 2:—

"An action claiming damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a Statute or independently of any contract or any such provision), where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consists of or includes damages in respect of personal injuries to any person, shall not be brought from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

As stated, there appears to be a typograpical error in this definition in that for the section to make sense the following words should be added "after the expiration of three years", immediately after the words "shall not be brought". The Bill also adopts the rather full definition of knowledge as set out by the Law Reform Commission draft Bill. Section 4 of Mr. Birmingham's Bill states as follows:

Section 4(1):

"References to a person's date of knowledge are references to the date on which he first had knowledge of the following facts:

(a) that the person alleged to have been injured had been injured;

(b) that the injury in question was significant;

(c) that the injury was attributable either in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;

(d) the identity of the Defendant; and

(e) if it is alleged that the act or omission was that of a person, the additional facts supporting the bringing of an action against the Defendant;

and acknowledge that any acts or omissions did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

4(2):

For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a Defendant who did not dispute liability and was able to satisfy a judgment.

4(3):

For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire — (a) from facts available or ascertainable by him; or (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which is reasonable for him to seek;

but a person shall not be fixed under this sub-section with knowledge —

(i) of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice;

(ii) of a fact that he had failed to acquire as a result of the injury.

Further support for a date of discoverability rule can be seen in Chapter 3 of James Brady and Anthony Kerr's book *The Limitation of Actions in the Republic of Ireland*. There they often suggest an approach along the lines of Judge Carroll in *Morgan*.

In conclusion, it is to be hoped that this private member's Bill does not go the same road as many a previous private member's Bill, i.e. merely gathering dust on the shelves of the Oireachtas. Legislative intervention is necessary in this area considering the confusion that already exists. Let us hope that it is not long in coming as it is already now eight years since Henchy J.'s comments in *Cahill -v- Sutton* [1980]I.R. at 269. □

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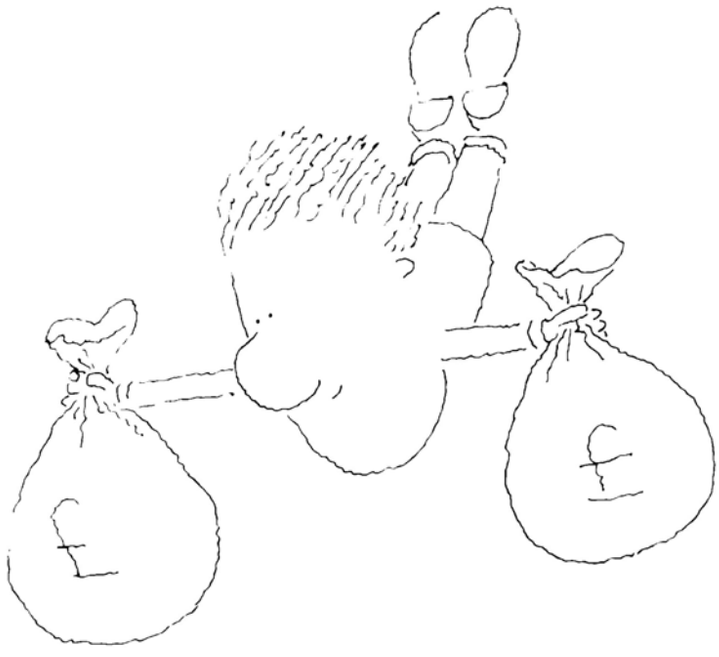

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Mr. James J. Ivers,
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Dear Mr. Ivers,

You will recall writing to me regarding the extension of social insurance to the self-employed. The following are the main features of this extension as contained in the Social Welfare Act which came into force on 30 March 1988.

Under the scheme, which came into effect this month, the self-employed are covered for contributory old age and widow's and orphan's pensions. The old age pension will be payable from age 66 without a retirement condition. Entitlement to this pension may be obtained where a period of at least 10 years' insurance has been completed before pension age. In the case of widow's pension the minimum contribution period for entitlement is 3 years. Provision is made to enable previous insurance as an employed person to be combined with self-employed insurance in cases where this may be necessary to establish entitlement to pension.

The contribution payable will be related to income and the rate will be 3% of reckonable income for the 1988/89 income tax year, 4% for 1989/90 and 5% in 1990/91 – subject to a minimum contribution of £4 per week or £208 per year. Self-employed persons whose incomes are not being regularly assessed for income tax will be subject to a flat-rate contribution of £2 per week.

The income-related contributions will be levied on income assessable to tax, i.e. after expenses and capital allowances have been deducted. The same income ceiling as applies to employees for PRSI purposes, £16,200 for 1988/89, will apply to the self-employed. The new contribution, together with the health contribution and employment levy, will be collected with income tax. Arrangements for the collection of the £2 per week flat-rate contribution for those who are not being regularly assessed for income tax will be announced shortly.

I enclose for your information a copy of the Social Welfare Act as passed.

Yours sincerely,
DR. MICHAEL WOODS T.D.,
Minister for Social Welfare.

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Personal injury and motor accidents in Spain

J. M. de Lorenzo

There is probably a greater difference between the Irish and Spanish laws relating to motor accidents than between those of almost any other countries in western Europe.

It is not just a matter of details; there is a fundamental difference in the general manner in which each country approaches the subject. It is as if each country were looking at the same object but from a completely different angle.

by J. M. de Lorenzo
member of the Barcelona Bar
(practising from London)

Even more importantly, very often neither side realizes that such differences actually exist. Spanish lawyers can be just as ignorant of the fundamental differences that exist between the two countries as many of their Irish colleagues are. In working with these colleagues they readily assume that the Spanish system is exactly the same as the Irish. With no one to point out these differences, let alone to explain them, confusion and misunderstanding are inevitable.

Perhaps the main difference lies in the role of the courts. In Ireland there is a clear distinction between the criminal and the civil jurisdictions. In civil claims the initiative lies with the parties, who deal with them more or less in the manner they wish. The civil court will arbitrate between the parties when called upon to do so.

In Spain the initiative lies with the courts. They completely dominate the process of motor accident claims and the action of the parties is entirely dependent thereon. The courts' function covers three aspects with which the Irish lawyer would not be familiar:

(a) Investigation of both liability and quantum and the collection of evidence under its own initiative.

(b) The protection of the public interest which includes that of the victims. It can take certain actions on behalf of a victim which, as will be seen, can lead to some very unexpected results.

(c) The initiation of the legal process which leads to compensation of the victim. For the victim's lawyer, the claim begins not by initiating the procedure but by joining in and becoming part of the procedure already in existence, as a 'civil party'.

The civil claim under criminal jurisdiction

Whenever a serious motor accident involving personal injury occurs, the police prepare an enquiry report which they will have to send to the court. The same obligation lies with the hospital where the injured parties are treated; the court may be one of two, the *juzgado de instruccion* or *distrito,* depending on the severity of the case. (In practice most accidents involving personal injuries are treated as cases of fault and therefore dealt with within the *juzgado de distrito.*) At that point a file is automatically opened for investigation by the judge who will pursue the investigation and reach a decision as to whether or not the driver has committed any fault for which he should be prosecuted. In the meantime he will also register the details of any parties who are victims of the accident, *e.g.* injured persons or the next of kin of a deceased.

If he decides not to prosecute, the judge will close his investigation. At this point the way is opened for the civil jurisdiction to carry out the action in court. This will mean that a Spanish lawyer should be instructed to pursue the civil claim.

However, if the decision is to prosecute then the judge will invite the interested parties to present their claim as civil parties in the criminal proceedings. This is normally done by letter to residents in Spain. Unfortunately for foreigners they may not receive the notice. It is advisable for them to take the initiative and join in the proceedings without any summons. If a victim constitutes himself as a civil party, the judge will take all the evidence submitted to him and such evidence as he has himself collected and submit it first to the court-appointed doctor for his opinion on the nature of the injuries sustained, and secondly to the public prosecutor or 'fiscal' for his opinion on the value of the claim as guardian of the public interest.

If the victim does not join in the proceedings, the fiscal, in his function as protector of the public interest, may still decide that a claim should be made on his behalf in his absence.

In both cases he then gives judgment and if the defendant is found guilty he can award damages to the victims. In other words, civil damages are awarded within the criminal court. The hearing date comes much sooner and it is also much cheaper than a case dealt with in a civil court. In both cases the recommendations of the fiscal carry considerable weight and in the majority of cases these recommendations are normally followed by the judge.

It is important, then, to keep in mind that civil proceedings cannot be commenced unless:

(a) there has not been a criminal proceeding;
(b) there has been a criminal prosecution but the defendant has been acquitted; or
(c) the plaintiff in the criminal proceedings has expressly reserved his right to pursue his civil claim at a later stage.

Res iudicata

This is the most crucial point to keep in mind as far as the plaintiff is concerned. The importance of following closely the court investigation and the criminal prosecution cannot be emphasised enough. All civil claims should be filed during the criminal prosecution. If this has not been done there is always a danger that the judge may decide to award the victims damages on his own initiative based on such evidence that he has, which may be insufficient. Unfortunately, once the judgment is made it is *res iudicata.* In a case of death, once damages are awarded there is no possibility of obtaining any more.

In certain cases when the two parties (plaintiff and defendant) are Irish residents and the action is brought to this country, it is advisable in order to avoid further problems to file a declaration of renunciation with the Spanish court with the intention of pursuing the claim in the Irish courts. This will at least avoid the possibility of the Spanish judge giving an award on his own initiative which nobody wants.

The foregoing indicates the paramount importance of participating in the Spanish legal proceedings as soon as possible. It can only be done through a nominated *abogado* who should be sought and appointed at the earliest opportunity. Lengthy correspondence with an insurance company could be to the detriment of the claimant as the company will be aware of the case and much will depend on whether you join the proceeding or not in order to pressurise them. Even more importantly, the case could very quickly become statute barred.

Strict liability *responsabilidad objetiva*

Compulsory motor insurance and a form of strict liability within the road traffic legislation were introduced for the first time in 1965, law number 122/1965, reformed by a decree in 1968 and again in 1986. A broad translation follows:

"The driver of a motor vehicle which as a result of his driving causes personal injury or material damages will be obliged to repair the damage in accordance with this law.

In the case of personal injuries and up to the limit of damages fixed by law, the driver of a motor vehicle, who in the course of a traffic accident causes damage to persons, will be exempted of blame if it is proved that the cause of these injuries is due solely to the fault or negligence of the victim or to an act of God other than a fault in the functioning of the vehicle. Defects of the vehicle or breakage or failure of some of its parts or mechanisms are not considered as acts of God."

The meaning of this article is this: there exists a presumption of liability against the driver of a vehicle for the damage he causes. Normally this presumption can be rebutted if the driver can show he was not at fault.

However, within the financial limits of compulsory insurance (for which see below), a judge is bound to award damages to the victim if he is unable to satisfy himself not only as to the exclusive fault of the victim but also the total absence of any liability on the part of the driver. In practice, the court applies the principle of strict liability in almost every case.

This law is particularly useful in cases where the driver cannot be convicted on grounds of fault, *e.g.* insufficient case or death of driver. However, the judge still has a role because if he acquits a defendant, he may render a decision on his own initiative invoking the strict liability of the driver and fixing the maximum of the damages which can be obtained under the law within the limits of compulsory insurance. This is quite independent of whether the plaintiff wishes to pursue the case through the civil courts.

Assessment of the general damages

It is important to note that the decision whether to prosecute or not will have great bearing on the civil award. If the driver is found liable on the grounds of fault then damages are awarded in accordance with common law. If the driver is acquitted and the injured party found to be to blame the strict liability will come into action and therefore the awards will be limited to the ceilings of compulsory insurance. However, if the driver is acquitted due to insufficient evidence, in addition to the strict liability coming into force the ordinary civil jurisdiction is open to the plaintiff.

The judge has complete freedom to award whatever he thinks appropriate in each case. This has a very important consequence which is that appeals based on quantum are almost impossible to win. In practice there is an unofficial scale which has been evolved by the judges and forms some sort of approximate guide as to damages, but it is not necessarily followed by the judges.

Factors taken into account by the judge in awards following conviction are as follows:

(a) **Personal injury:** Damages are assessed by taking into consideration on the one hand permanent disability and on the other the *dias de baja.* The first point also takes into account the social position of the plaintiff (scars, for example, have different effects depending on sex, age, job, *etc.*). The second point is difficult to explain, but essentially it is supposed to cover the period during which the plaintiff is subsequently unable to pursue his ordinary activities of day-to-day life. It is supposed to cover loss of salary unless the plaintiff can prove that he earned more on a daily basis than the fixed amount that the judge will allocate. This second point is calculated on the basis of X number of pesetas per day of incapacity and is awarded regardless of whether the plaintiff was in employment or not at the time of the accident. The rate will vary according to the court in question. An average is around 3,000 pesetas per day and is increasing.

(b) **Death:** The judge will award a lump sum which takes into account a number of factors, including grief and bereavement and loss of dependency. However the net

result is quite impossible to decipher mathematically; the judge will award what he thinks fit. There is no fixed amount, but it will certainly be a minimum sum equal to the ceiling of the compulsory insurance limits, currently two million pesetas. Again the award is given as a lump sum without any kind of breakdown and hence the problem with an appeal. On the whole awards for bereavement or moral damages in Spain are higher than in Ireland.

When the defendant is not found guilty the victim can be awarded damages up to the limits of compulsory insurance in force at the time.

(i) On the injury side the current statutory maximum allowable has risen to two million pesetas for incapacities and injuries since Spain joined the EEC. The decree law took effect from 1 January 1987 and will be readjusted in 1988 to come into line with the EEC. Special damages are also considered for medical expenses incurred in Spain in a hospital recognised by the guarantee fund, for which there is no limit. For other medical centres there is a ceiling of 100,000 pesetas.

(ii) Awards in cases of death have doubled to two million pesetas.

It is understood that if the plaintiff wants, in addition to the above, to pursue further damages in accordance with common law he will have to take his action through the civil courts.

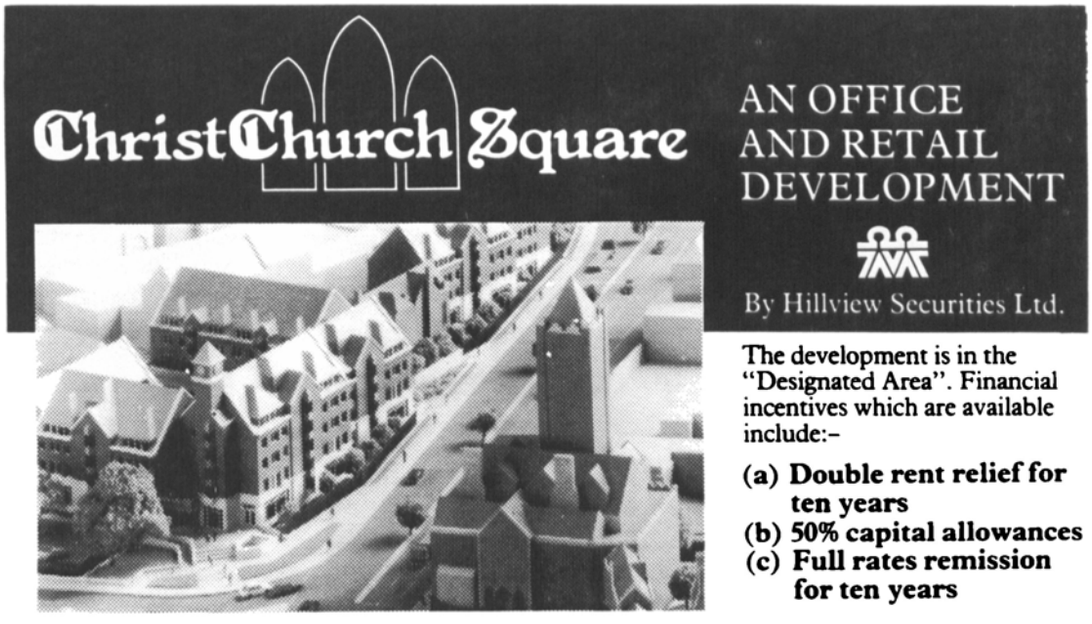
The limitation period

This is a very important point as it is only one year for civil liability cases. It is essential for an Irish solicitor instructed on a case to instruct a Spanish lawyer as soon as he knows about the accident. The limitation varies when there is a criminal file opened as it has been interrupted by the fact that there is a criminal action under consideration. However when the decision has been taken on the criminal side the one-year period starts to run again from this date.

Costs

Despite some exceptions which only affect Spanish lawyers' fees, costs are not recoverable in addition to damages. This can be very important in balancing two aspects of the case when advising clients. There are the heavy initial costs of the excessive formalism of the Spanish procedure which requires all evidence to be written, authenticated by a notary public and translated. There is also the uncertainty of the quantum, making it difficult to value claims in advance. □

This article first appeared in the *Law Society's Gazette*, of 21 October, 1987 and is reprinted with amendments with kind permission.



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(a) Double rent relief for ten years
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(c) Full rates remission for ten years

The buildings are available to lease and to purchase. An illustrated brochure is available on request. A model and plans of the development can be inspected at the offices of the marketing agents.

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LAW SOCIETY
ANNUAL CONFERENCE
Cork, May 1988

Liam Irwin, Cork, registering for the Conference with Audrey Geraghty, Law Society.

Lord Mayor's Reception — at an official Reception at Cork City Hall were (left to right) front row: James D. Donegan, President of the Southern Law Association; the Rt. Hon. the Lord Mayor of Cork Cllr. Tom Brosnan; Thomas D. Shaw, President of the Incorporated Law Society of Ireland. Back row (left to right): Piet Blomme, Dean of the Belgian National Order of Advocates; Gratton d'Esterre Roberts, Solicitor, Cork; James McFarland, President of the Law Society of Northern Ireland; Maurice R. Curran, Senior Vice President of the Incorporated Law Society of Ireland; Jock M. Smith, President of the Law Society of Scotland and Rion Smith; Derek Bradbeer, President of the Law Society of England and Wales and Marnie Bradbeer.

David Andrews, Management and Training Consultant, London, addressing the delegates on Office Administration.

Taking a break during the Conference at Cork Golf Club were (left) Richard Barrett, Clonakilty, with Basil Casserley of the Bank of Ireland.

(Left to right): Rory O'Donnell, Junior Vice President of the Law Society, Teresa Nash and John F. Buckley.

CONTRIBUTIONS WELCOME

Please send news items and photographs for publication in this column to:

"People & Places",
The Gazette, Law Society,
Blackhall Place, Dublin 7.

Lawyers
Moving to London

LAW PERSONNEL invite applications from solicitors who are eager to find employment with law firms in England and Wales. Our clients have a growing need for experienced and qualified staff offering their expertise in company commercial law or other specialist fields such as conveyancing, tax, pensions etc. Those with more general experience will find opportunities with smaller firms in London and elsewhere. As an indication, a solicitor just admitted can expect to earn in excess of £17,000 p.a. with a major London practice.

In order to meet this demand and offer the service our clients are accustomed to, senior consultants who have made a special study of Irish qualifications will be available in Dublin to meet solicitors in private on a one to one basis to discuss career opportunities in England and Wales. The duration of these meetings will be in the order of 60 to 90 minutes and will neither cost nor commit applicants to anything. To avail yourself of this facility, appointments must be made by contacting our London office; we will not be able to see candidates without prior arrangements.

Please telephone, or send a detailed Curriculum Vitae to include the following information:-

- Academic achievements to present with dates
- Considerable details on work experience, before and since qualifying – this cannot be stressed sufficiently.
- Preference as to location of work and size of practice.

Our Modus Operandi: Upon receipt of this information we will prepare a CV on you. This document will not disclose your name nor the name of your present employer. We will bring this document with us and discuss it at length in our meeting with you.

All applications will be treated in the strictest confidence that such matters deserve.

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Practice Notes

Recommmendation — Pre-1964 Developments — Evidence of Compliance with Bye-Laws in Residential Properties

The Convenancing Committee has become aware that it is the practice of some solicitors to request evidence of compliance with bye-laws for pre-Planning Act structures.

It is the case that before the 1963 Planning Act came into force, on the 1st October, 1964, some local authorities had enacted bye-laws applicable to some urban districts pursuant to the Public Health (Ireland) Act, 1878. It has not, however, been the practice to seek evidence of compliance with bye-laws for structures that were erected prior to the 1st October, 1964. It is, therefore, considered unreasonable for a purchaser's or mortgagee's solicitor to request such evidence where the residence was completed prior to the 1st October, 1964. It should also be noted that the Conveyancing Committee has previously recommended that purchasers' and mortgagees' solicitors should only seek Certificates of Compliance with planning permission for houses built on or after the 1st January, 1970.

Roads-in-Charge Certificates

In the September, 1987, *Newsletter* the Conveyancing Committee indicated that Dublin County Council and Dublin Corporation are now charging a £15.00 fee for a Certificate confirming change of address or for a Certificate confirming roads, footpaths and services are in-charge.

The Committee further indicated that it is the current policy of Dublin Corporation and Dublin County Council not to charge members of the public for attending at their offices and inspecting the relevant registers and road maps to satisfy themselves of the position.

The Committee has now ascertained that whilst there is no charge for inspecting records relating to roads, there is normally a charge for inspecting records relating to services.

Incentive to bring tax affairs up to date

In his Budget Statement on 27th January, 1988, the Minister for Finance announced an incentive scheme for the clearance of tax arrears. The purpose of the scheme is to give taxpayers a last opportunity to put their tax affairs in order so as to avoid the rigorous regime for the collection and enforcement of tax now being introduced.

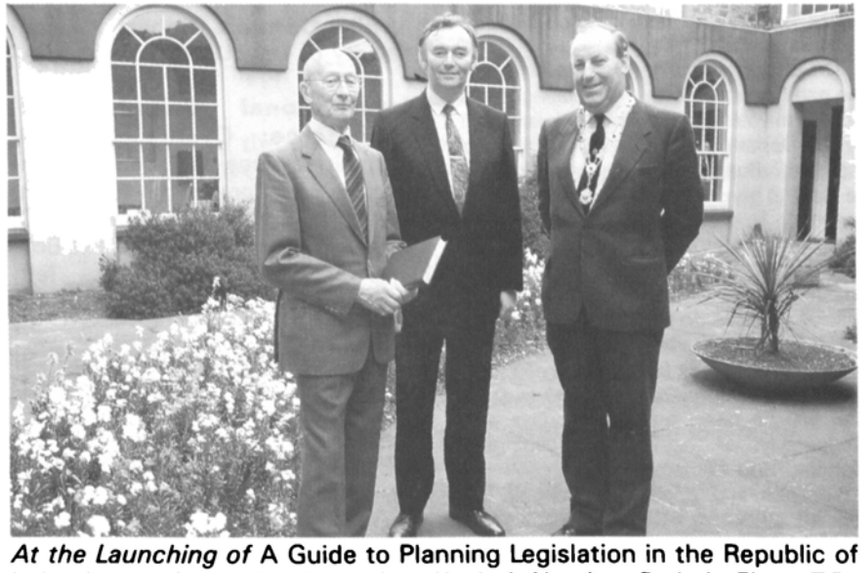
The incentive scheme provides for the waiver of specific unpaid interest and penalties, provided that certain conditions as regards payment of tax are met. To qualify for the interest and penalty waiver a person must have paid on or before 30th September, 1988, all tax, health contributions and levies due for payment. It should be noted, however, that enforcement action will continue in the meantime while any arrears of the amounts in question remain outstanding.

Full details of this can be obtained from the Revenue Commissioners, Dublin Castle.

Launch of new Guide to Planning Legislation

A new book on planning law, *A Guide to Planning Legislation in the Republic of Ireland,* by Kevin I. Nowlan, B.Sc., B.E., Barrister-at-Law, Fellow of the Royal Town Planning Institute, was published by the Law Society on Thursday 12 May.

A Guide to Planning Legislation in the Republic of Ireland is a compendium of the Planning Acts, the Regulations and references to the relevant case law. In compiling the book the author kept in mind the need of practitioners in the planning law area for a quick source of practical guidance. The book is available from the Law Society, Blackhall Place, Dublin 7. Price £27.50 plus £2.10 (packing and postage).



At the Launching of A Guide to Planning Legislation in the Republic of Ireland *were from left: the author, Kevin I. Nowlan, Padraig Flynn T.D., Minister for the Environment who introduced the book at the Launch, and Thomas D. Shaw, President of the Incorporated Law Society.*

Younger Members News

SYS Spring Seminar 1988

Approximately one hundred and eighty young (and some not so young!) solicitors attended the Spring Seminar of the Society of Young Solicitors at the Great Southern Hotel, Galway, from the 15th to 17th April last. As always, the weekend was highly successful both from the social and, more importantly, the educational point of view.

There was great interest among those attending the Seminar in the lectures delivered by each of the distinguished guest speakers. On Saturday morning, Mr. Adrian Glover of Hayes & Sons imparted a useful, and, often witty, lecture on the ''Practical Difficulties in Medical Negligence''. He was followed by Mr. Justice Ronan Keane who gave an excellent account of recent developments in Company Law, with particular emphasis on the implications of the pending Company Law Bill. The Sunday morning spot was reserved for Commissioner Eamonn Doherty, and indeed all present were delighted to have the opportunity of hearing the Commissioner give a most impressive delivery on ''The Garda Síochána and the Law Today''.

On Saturday afternoon a small reception was hosted by the Galway Solicitors Bar Association at Aras Fáilte, Eyre Square, to welcome the SYS to Galway. Those attending the reception included the President of the G.S.B.A., Mr. Ciaran Keys, the Deputy Lord Mayor, Mrs. Bridie O'Flaherty, and the County Registrar, Mr. Sean O'Donnell.

Once again the Saturday Night Banquet proved to be a thoroughly enjoyable affair. The guests of the Society relaxed with pre-dinner drinks in the Roof Top Bar at the Great Southern while the remaining two hundred and twenty or so attendants preferred drinks in one of the two other smart refreshment areas of the hotel. The Banquet itself was run most efficiently and after dinner the Chairman, Mr. Michael Quinlan, welcomed the guests of the Society, namely Mr. and Mrs. Maurice Curran, Mr. and Mrs. Jim Ivers, Mr. and Mrs. O'Reilly, Mr. Christopher Mahon and also, of course, the three Guest Speakers and Mrs. Glover. The Chairman on behalf of the Society, was also delighted to welcome representative Guests from the equivalent of the SYS in Northern Ireland, England, and the Netherlands.

In the course of the evening presentations were made to the Prize Winners of the Tennis Tournament which was held on Saturday afternoon. A collection was also made for the Solicitors Benevolent Fund and this yielded a return of over £240.

After dinner, a marvellous mixture of music was delivered by an excellent local foursome. In keeping with tradition the Banquet continued into the early hours of Sunday morning. We are reliably informed that it was many a weary body that made its way home on Sunday evening after yet another superb SYS weekend.

Sponsorship for the Seminar was provided by the Investment Bank of Ireland, Star Computers, Law Placements and Butterworths/ITELIS.

We understand the SYS are organising a further Seminar, jointly with the Bar, in Kilkenny from November the 4th to the 6th next . . . so don't forget to note this in your diaries!

MIRIAM REYNOLDS

SOCIAL WELFARE LAW COURSE

The Centre for the Study of Family Law and Social Welfare Law is offering a short, intensive 3-week course of lectures on Social Welfare Law, beginning on Monday, 12th September, 1988.

The purpose of the course is to familiarise the participants with the law relating to the income maintenance schemes administered by the Department of Social Welfare and the Health Boards. Particular attention will be paid to the recent extension of social insurance to the self-employed, the legal implications of the EEC Equal Treatment Directive, the Report of the Commission on Social Welfare and the various recent judicial decisions on social welfare matters.

The number of places on the course is limited, and there is a course fee of £40.* Six two-hour lectures, from 7.00 to 9.00 p.m. will be given on the Mondays and Wednesdays of the 3 weeks beginning Monday, 12th September.

Enquiries and applications should be directed to:

Mr. Gerry Whyte,
c/o School of Law,
Trinity College,
Dublin 2.

(* Special rates for the unwaged)

FOR YOUR DIARY

3rd CELIM Conference on Liability in the Information Age: a European Perspective, Brussels 27-28 June, 1988. **Contact** Robert Clarke, Faculty of Law, U.C.D.

International Chamber of Commerce: Cyprus National Committee, one-day Seminar on International Commercial Arbitration in Nicosia, 1 July 1988. **Contact** ICC Cyprus National Committee, P.O. Box 1455, Nicosia, Cyprus. Tel: 449500/462312, Tlx. 2077.

AIJA Congress, Munich 5-9 September, 1988. **Contact** Michael Irvine, Matheson Ormsby & Prentice, 20 Upper Merrion Street, Dublin 2. Tel: (01) 760981, Tlx: 93310/90277, Fax: (01) 609744/760501.

IBA 22nd Biennial Conference, Buenos Aires, Argentina, 25-30 September, 1988. **Contact** the IBA Office at 2 Harewood Place, Hanover Square, London WIR 9HB, and for details of group travel from Ireland, Alan Benson, Easy Travel, 38 Lr. Stephen Street, Dublin 2. Tel: (01) 772057/716714.

UIA Conference, Barcelona, 11-15 October, 1988. **Contact** Congress Secretariat, OTAC S.A. Congress Organization, Sepulveda 45-47, 08015 Barcelona, Spain.

1988 Bar Conference, London, 1-2 October, 1988. **Contact** Conference Organiser: Blair Communications & Marketing, 117 Regents Park Road, London NW1 8UR. Tel. (031) 483 2297, Tlx: 265181, Fax: (031) 586 0639.

European Transport Law, International Maritime Congress on EEC Regulations, Antwerp, 25/26 November, 1988. **Contact** Robert H. Wijffels, Advocaat, Maria-Henriettalei 1, 2018 Antwerp, Belgium.

Companies (No. 2) Bill, 1987 ("the Bill") Seminar 10 May, 1988

A Seminar was arranged by the Society's Company Law Committee on the proposed changes to be brought about by the Bill.

This Seminar, introduced by the Minister for Industry & Commerce, Mr. Reynolds, was open to the public and indicated both the contents and the pitfalls that await those engaging in commerce through a limited liability company.

Each part of the proposed legislation was examined in detail and at the end of the Seminar a summary was given which reflected many of the observations already made on the Bill to the Department by the Committee.

The Committee is concerned about the complexity of the Bill which they believe will add an enormous burden to business and in particular small businesses which are being encouraged in so many other ways.

The Minister in his opening address stated that he is anxious that the Bill be workable and practical and will not "tie up in legal knots the thousands of honest businesspeople in this country". The Committee believe that the Society must attempt to play its role in the simplification of the proposed legislation.

Solicitors should be aware of the increasing role that they can have in the business community through advising on company and other commercial legislation. It is the intention of the Committee to both help the profession in this regard as well as trying to make the commercial bodies aware of the role solicitors should have in this important area of life.

Excellent papers were prepared by the members of the Company Law Committee and it is hoped that these texts will be circulated to the profession in the near future.

Attending the Seminar were, *from left,* Mr. Michael Irvine, (Joint Chairman, Company Law Committee, speaker), Mr. Thomas D. Shaw, President of the Society, Mr. James J. Ivers, Director General, and Mr. David Tomkin, (Joint Chairman, Company Law Committee, speaker).

LADIES SOLICITORS GOLF SOCIETY

The next Outing will be held in Newlands Golf Club on Friday, 5th August. For further details please contact Christine Scott at (01) 764661 (Office) or (01) 805678 (Home).

THE LEGAL OFFICES MILLENNIUM MIXED SOCCER COMPETITION

Will be held during the month of July at the Law Society Playing Field, Blackhall Place. Applications are available from City Law Agency Ltd., 35 Molesworth Street, Dublin 2. Tel. (01) 785122.

CORRECTION

A summary of the decision in the case of *Stephen Flynn* v. *An Post,* Supreme Court, 3 April, 1987, unreported, was published in the May issue of the *Gazette, Recent Irish Cases,* at p.ii. The summary was erroneously based on the assumption that the majority view of the Supreme Court was expressed by Henchy J. and Hederman J. In fact, the majority view was expressed in the judgment of McCarthy J. with whom Finlay C.J. and Walsh J. concurred. Thus, the Supreme Court, by a majority, upheld the third ground of appeal in the case and held that the suspension of the plaintiff became invalid because of the failure of An Post to grant the plaintiff a proper hearing within a reasonable time of his initial suspension.

The Editorial Board regrets that the uncorrected version of the summary was published. A revised summary of the decision in this case will be published in full in the next issue of *Recent Irish Cases.*

NEW FACES IN DUBLIN

Reliance Business Systems Ltd., the Cork based Wang computer dealers, have opened their new Dublin offices at **2 LEESON PARK, RANELAGH, DUBLIN 6.**

Reliance were one of the first computer suppliers to be included in the booklet of *Recommended Suppliers* produced by the Technology Committee of the Law Society back in 1986.

The Dublin office will concentrate exclusively on the legal market, providing legal firms in the Leinster area with the latest in Word Processing, Expert Systems, Computerised Accounting and Time Recording on both PCDOS and XENIX.

Although Wang computer dealers, the emphasis in their Dublin office will be very much on software, and we understand from Bill Kelly the manager of the Dublin office that all Reliance software is available on all IBM compatible computers.

The main software products available from Reliance which may be of interest to the profession are as follows:

Computerised legal accounting and time recording from Optimus Computing of London. The Optimus package meets all the accounting requirements as laid down by the Technology Committee of the Law Society. The Optimus system has been on sale in Ireland for the past five years and is perhaps the most widely sold computerised legal accounting package in the country. Full installation, training and support is provided by Reliance from both their Dublin and Cork offices.

The other major areas of specialisation are word processing and expert systems. Here Reliance combine with Software Laboratories of Bray to provide sophisticated *Expert Systems* geared to the specific needs of individual legal offices.

Reliance also provide the full range of Wang word processing systems.

In an interesting development Reliance, in conjunction with Software Laboratories in Bray and Optimus Computing of London, are providing telephone modem support for their multi-screen clients. Using the telephone modem allows the Reliance support staff to connect directly to the client's computer, across the telephone line.

Apparently all Reliance software packages are available on both the PCDOS and XENIX operating systems, and growth paths exist to allow users transfer from DOS to XENIX.

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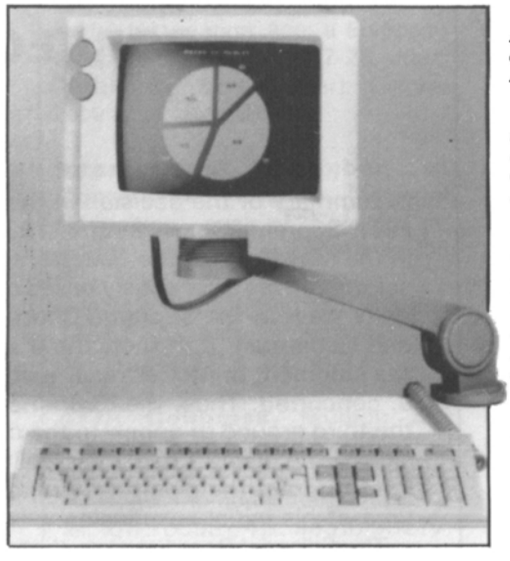

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RELIANCE BUSINESS SYSTEMS

Civil Liability for Communication of AIDS — a Moot Point

The final of the *Observer* National Mooting Competition for 1986/87, organised this year by the Polytechnic of Wales, was held at Cardiff on July 10. The moot, entitled *Alas -v- Alack*, ostensibly an appeal to the Court of Appeal, was heard by Lord Brandon of Oakbrook, who very kindly found the time for the purpose from his duties at the House of Lords. He adjudged the Essex Institute of Higher Education narrow winners over Newcastle Polytechnic. The arguments advanced and Lord Brandon's decision are of considerable interest.

by
Kristin Litton
and
Richard James*

The supposed facts of the case were as follows. Mr. & Mrs. Alas were married in 1976 and had two children. Very early in 1987 Mr. Alas had a brief affair with Miss Alack, a wealthy single woman of 26. Within two months he developed Aids and died of an acute form of meningitis six weeks later. His wife was the executrix of his will and brought proceedings against Miss Alack claiming damages on behalf of her husband's estate under the Law Reform (Miscellaneous Provisions) Act 1934 and on behalf of herself and the children under The Fatal Accidents Act 1976. The quantum of damages of each claim was agreed by the parties and the trial confined to the issue of liability.

Findings of fact

Floodgates J. made the following findings of fact:

1. Alack had had ten sex partners, all single men, in the four years before her affair with Alas. She had not had more than one partner at any one time. She had never undergone any medical test for Aids. Neither had she ever had a blood transfusion or taken drugs by injection. She knew from the start of their relationship that Alas was married.
2. Alas did not know of Alack's previous affairs. She did not inform him of them and he did not enquire. He had had no other extra-marital sexual relations.
3. Alas caught Aids from Alack and his death from meningitis was a consequence. Neither of them knew that she was a carrier of the disease. During their affair she used a contraceptive pill; he did not use a condom.
4. Shortly before Alas and Alack commenced their relationship a government information leaflet on Aids had been sent to every household in the country and, as explained in the leaflet, a more detailed booklet on the disease was obtainable by post from an address supplied. No better information was then available to the general public. The information contained in the booklet included the following:
   (a) Aids was communicable through ordinary sexual intercourse. The risk could be reduced by the use of a condom.
   (b) By the end of October 1986 an estimated 40,000 people in the United Kingdom had been infected with HIV virus. 548 had developed Aids and of these 278 had died.
   (c) The total of 548 Aids victims comprised 490 homosexual or bisexual men, 31 people (including haemophiliacs) infected as a result of blood transfusions, 8 drug misusers and 19 others.
5. The communication of Aids from Alack to Alas as a consequence of their affair was reasonably foreseeable to Alack but not to Alas.

Floodgates J. held Alack liable. She had owed Alas a duty of care under normal negligence principles and had been in breach of that duty. No deduction was made in the damages for contributory negligence. Miss Alack then brought the case to the Court of Appeal.

Before Lord Brandon her first ground of appeal was that the finding that the communication of Aids to Alas was reasonably foreseeable to her was not a proper inference from the evidence. It was argued on her behalf that in view of the DHSS figures quoted in the Aids information booklet, the possibility that she was an Aids carrier was too remote to be regarded as reasonably foreseeable to her; as a woman who had never had a blood transfusion or taken drugs intravenously she was outside the high risk groups. Secondly it was contended that even if the foreseeability test was satisfied the existence of a duty of care should nevertheless be denied. Sexual behaviour was a painfully delicate and private part of life, yet the supposed duty would presumably oblige a person to disclose his or her sexual past to a partner. That would be unreasonably difficult and there could therefore be no such obligation since the duty in negligence was merely to take such care as was reasonable. Furthermore as a matter of policy the law should not require an invasion of privacy of this sort.

Mathematical unlikelihood

However, Lord Brandon was more impressed by the respondent's argument on these points. The mathematical unlikelihood did not necessarily put it beyond the appellant's reasonable foresight that she might be a carrier of the Aids virus. The awful dangers involved — at worst death and at best carriage of the disease for life — were a factor of the utmost importance and that factor was relevant not merely to the nature of the duty of care but also to its creation in the first place. There had been a large-scale governmental campaign to inform and warn the

* *Kristin Litton and Richard James are Lecturers in Law at the Polytechnic of Wales.*

Public and it was difficult for anyone not to deny that she or he knew or should have known of the risks. Moreover there had obviously been a sufficient degree of proximity between Alack and the deceased for a duty of care to exist. The policy arguments put forward on her behalf carried no weight. The law was willing to look closely at sexual relations for other purposes (such as affiliation and divorce) and should certainly not shrink from doing so in the context of a disease as disastrous as Aids. The overriding policy of the law should be to prevent the spread of the virus and that policy was best served by the imposition of liability on those who irresponsibly infected others. Alack had therefore owed the deceased a duty of care.

Counsel for the parties seemed to agree that if a duty existed it would have required full disclosure by the appellant of her sexual history but Lord Brandon decided that she could have discharged the duty rather more simply. She had only to point out to Alas the existence of the risk — a minimal degree of disclosure — and suggest the use of a condom. That would have been sufficient in this instance. However, the deceased had been under a corresponding responsibility. Counsel for the respondent had argued otherwise. Unlike the appellant, Alas had not known of her previous affairs and counsel contended that there should therefore be no reduction in the damages on account of contributory negligence (the third ground of appeal). But Lord Brandon declined to draw any distinction on the basis of actual knowledge. Alas should have realised that Alack, a wealthy, unmarried woman of 26, was likely to have had some previous sexual experience.

Reasonably foreseeable

The possible communication of Aids was reasonably foreseeable to them both and they should both have appreciated the risk. The appellant was in breach of her duty of care and the deceased's failure to use a condom of his own motion amounted to contributory negligence. For apportionment purposes they shared responsibility equally. It could not be said that the behaviour of either had had a greater causative effect than the other's. Nor was it possible to differentiate between them in terms of culpability. That could be a difficult task because it involved a judgment more moral than legal. Here the deceased and the appellant acted together and there was serious fault on both sides. Lord Brandon considered that any more detailed enquiry was not necessary.

Ex turpi causa

Miss Alack's final grounds of appeal were based on the maxims *Volenti non fit injuria* and *Ex turpi causa non oritur actio.* These arguments did not impress Lord Brandon. *Volenti* did not apply except where a plaintiff had actual knowledge of all relevant circumstances and willingly accepted the risk. That was not so here; Alas did not know of Alack's earlier affairs and it had not been established that he had in fact read the DHSS literature on Aids. Neither did *ex turpi causa* assist the appellant's case. This defence was based on public policy, the policy in question being the upholding of public morality. But public morality changes from age to age and the argument that the claim should fail because the deceased was a married man who contracted Aids through an adulterous relationship was not in accordance with today's moral values. To deny damages to someone injured in adultery (as opposed to some criminal activity) would be to apply standards belonging to a by-gone age and not generally accepted today, regrettable though that might be. *Ex turpi causa* was out of date in this context.

The overall result therefore was that the appeal was allowed in part. Miss Alack remained liable to Mrs. Alas but the amount of the damages was reduced by half for contributory negligence on the part of Alas.

Questions of causation were not raised by the moot but in practice they could present a plaintiff with grave difficulties. The possible incubation period of Aids is long and a victim who had had several relationships in that time might simply be unable to establish from whom he contracted the virus. If he cleared this hurdle he would still have to show that he would not have caught the disease if the defendant had discharged the duty of care (though on that point he would derive some assistance from *McGhee -v- NCB* 2/6-[1972] 3 All E.R. 1008). Even where these problems were not present, proceedings might be pointless because of the inability of the proposed defendant to satisfy a judgment. However, the increase in the incidence of the Aids virus seems certain to continue. As it does, it becomes correspondingly more likely that the courts will sooner or later be required to deal with issues of civil liability arising from the spread of the disease.

□

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Book Reviews

CONSTITUTIONAL LAW OF IRELAND by Michael Forde, (Cork and Dublin: The Mercier Press, 1987. 801 pp lii. £60).

In 1987, the fiftieth anniversary of the people's adoption of their Constitution was recorded. Coincidentally the people of the United States celebrated their Constitutional Bicentennial. When the people adopted Bunreacht na hEireann in 1937, the people of the United States were celebrating the sesquicentennial.

In 1937, a constitutional crisis brewed in the United States: President Roosevelt had decided to pack the Supreme Court with his own nominees. In the early years of the twentieth century, there was an obvious growth in the power and prestige of the executive branch of government in the United States. Yet, during this period, the Supreme Court steadfastly invalidated social and economic legislation which was popular with the electorate. President Roosevelt launched his New Deal legislative programme in 1933. Subsequently the Supreme Court invalidated eight out of ten major legislative measures and thus destroyed the essence of the Roosevelt programme. When he won an overwhelming victory in 1936 with the electorate approving the New Deal, President Roosevelt felt confident in presenting Congress with his court-packing Bill which would make sweeping changes in the federal judiciary. In his own words, the President sought to bring into the judicial system "a steady and continuing stream of new and younger blood . . . younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work . . . thus saving [the] National Constitution from hardening of the judicial arteries" [Senate Reports, 75th Cong., 1st Session, Doc. No. 711, pp. 41—45]. Congress failed to approve the court-packing Bill, but the temperament of the Supreme Court appeared to change. By early 1937, the Court had dramatically reversed itself in a series of decisions relating to social and economic issues; a new era in American constitutional development had dawned. Your reviewer, conscious of the continuing influence of the interpreters of the oldest written national constitution on the interpreters of the 1937 Constitution, mentions these issues to illustrate that this State has been fortunate in eschewing a similar constitutional crisis in its first 50 years. The balance between the "judicial activists" and those judges who favour a policy of "judicial self-restraint" has ensured that the delicate tension which exists in this State between the three arms of government and the nexus which exists between the governors and the governed have not been unduly upset.

Neither our Jubilee year of the Constitution nor the American Bicentennial touched the alchemy of either community. Yet the Jubilee did spur legal scholars to action. Professor Kelly (with Gerard Hogan and Gerry Whyte) produced the Supplement to *The Irish Constitution;* Professor Casey wrote his *Constitutional Law in Ireland* and Dr. Forde has published his *Constitutional Law of Ireland.* These scholarly works were followed in early 1988 by the second edition of Mr. B. Doolan's *Constitutional Law and Constitutional Rights in Ireland* and by Mr. F. Litton's (as editor) *The Constitution of Ireland 1937 — 1987.* Students, practitioners and judges have been presented with an abundance of reading material. A newly appointed judge complained at the beginning of the eighteenth century that when he was a law student he could carry a complete law library around in a barrow, now that he was a grown man he needed a wagon. Bus Eireann might need to come to the rescue today; this is a cause for celebration.

Dr. Forde has produced a *magnum opus* of more than 850 pages. Apart from the usual illuminating foreword which we have come to expect from Mr. Justice Walsh, this volume contains the customary table of constitutional provisions, table of statutes, and table of cases. In the 791 pages of text, there are some chapters which appear unexpectedly. Chapter 2 deals fully with the intricacies of "The State and its Citizens". In 40 pages, chapter 3 on the "Judicial Review of Laws" throws new light on such complex matters as the principles of constitutional interpretation and the presumption of constitutionality. Chapter 12 discusses masterfully both the national and international concepts of human and natural rights. Chapter 13 covers fully the problem of "Legality and the Rule of Law", including the concepts of accessible and comprehensible law, retroactive and individualised laws, in a novel way. Chapter 15 on fair procedures is a comprehensive detailed exposé on this vital subject from the point of view of criminal, civil and administrative laws. At least ten chapters are devoted to the fundamental rights contained in Articles 40 to 44 of the Constitution. Chapter 20 concentrates on "Privacy and Personality", where such transcendent matters as confidential information and sexual conduct are fully considered. The 30-page Chapter 23 on "Economic Rights" deals with business and the professions. Chapter 25 on "Social Welfare and Educational Rights" considers matters arising from the Directives of Social Policy contained in Article 45. Chapter 27 contains 40 pages on "State Security and Emergencies" and has detailed shrewd observations of this most sensitive subject. Such procedural remedies as the declaration, compensation and the injunction are dealt with briefly in Chapter 28.

The industry and research of Dr. Forde are illustrated by the innumerable footnotes which concentrate not only on American and European cases, but also on notes relating to American, French, German and Italian textbooks and periodical legal literature and, where necessary, on the text of the American, French and German Constitutions.

Dr. Forde has written a monumental treatise on the Irish Constitution. Hopefully a future paperback edition will make this book more accessible to those who cannot afford the price of this hardback edition. Dr. Forde's book deserves to be read by all who value our fundamental law.

Eamonn G. Hall

LAW REFORM COMMISSION CONSULTATION PAPER ON RAPE

This Consultation Paper, published in October 1987 by the Law Reform Commission, is a most useful report. It sets out the present law on rape and other sexual offences, examines the areas which need reform, looks at the position in other jurisdictions and then sets out the Commission's provisional conclusions. Unfortunately, the Commission found that the information which it obtained from the authorities about the effect of the 1981 Criminal Law (Rape) Act, was so incomplete and inconsistent that it was unable to draw soundly based conclusions from it. The Rape Crisis Centre provided the Commission with its figures and showed that in 1985, for instance, it received 501 calls relating to incidents of rape or sexual assault, compared to the figures taken from the Commissioner of the Garda Siochana which showed that in 1985 the number of rape offences reported to them amounted to only 73. This reluctance on the part of women to report cases of rape to the Gardai must surely be a cause for concern. Let us hope that in the future better records will be kept by the Gardai and the Department of Justice.

> This Review was prepared prior to the publication of the Law Reform Commission's Report on Rape and Allied Offences (LRC 24 - 1988), May 1988. The author will review the Report in a subsequent issue of the *Gazette*.

The Commission does not think that a case has been made for changing the legal definition of rape which is based on vaginal sexual intercourse, "the description given to it over the centuries both by law and the community at large, and which recognises the unique feature of rape as distinguished from other forms of sexual assault, namely, the fact that pregnancy may result from the act". Though some members of the Commission remained unconvinced that this latter argument was entirely logical, they were loath to recommend a change provided that degrading sexual assaults equivalent in gravity to rape were capable of being dealt with in the same manner as rape.

Essentially the Commission saw the question as one of nomenclature and presentation. Of course this means that rape will continue to be a charge which will of necessity always be brought by a female (the victim) against a male (the accused). When I reached this point in the Paper I turned to look at the membership of the Commission. It is made up of five people, four men and one woman. The four male members are legally qualified and the female, Maureen Gaffney, though an eminent psychologist, does not appear to have any legal qualification. In the introductory chapter the Commission talks about balance and mentions that in the past there was a tendency towards scepticism about rape allegations.

I found my attitude became polarised here, because I think it is a great deal more than nomenclature which is involved. I found myself wondering about a rape trial in which, in all probability, the Judge would be male, there would be male prosecuting and defence counsel and, probably, the defence and prosecuting solicitors would be male also. It seemed to me that this must be at least part of the reason for the low rate of reporting rape incidents to the Gardai. It would seem to me that by retaining the traditional definition of rape, an opportunity may be missed whereby polarisation on a male/female basis might have been removed by including penetration of the mouth or anus by the penis or of the anus or vagina by inanimate objects (which assaults are now to be encompassed in a new offence of aggravated sexual assault, which is to be equally applicable to men or women and which would render buggery a superfluous offence). Let me say here that I do believe that we must have a system of criminal justice in which there is a heavy onus on the prosecution to prove its case beyond reasonable doubt and, where doubt remains, it should be resolved in favour of the accused; but if the balance is to be right, the complainant must also feel sufficient confidence in the system to lay the charge in the first place.

The Commission has recommended the creation of two new offences, namely sexual assault and aggravated sexual assault. The first will replace the offence of indecent assault encompassing less serious sexual assaults which would be indictable offences but only prosecutable on indictment at the election of the prosecution. The second, aggravated sexual assault, will encompass the more serious forms of sexual assault, which carry the same maximum sentence as rape, namely, life imprisonment.

Marital Rape

The Commission has looked at the subject of rape within marriage and, although it accepts that there may be difficulty of proof, does not see this as a reason for retaining the exemption and, provisionally, recommends the abolition of the marital rape exemption with the same maximum sentence as rape on the basis that "a rape of a particularly violent and degrading nature perpetrated by a spouse is not necessarily less loathsome than such a rape perpetrated by a stranger". Perhaps we can draw some comfort when we compare this quotation with one taken from Hale, who wrote in the 17th century: "the husband cannot be guilty of a rape committed by himself on his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract".

The Mental Element

A man can only be convicted of rape if he has the *mens rea* at the time he has sexual intercourse with the woman without her consent, i.e. he must know that she does not consent to the intercourse or be reckless as to whether she does or does not consent (see Section 2 of Criminal Law (Rape) Act, 1981). The jury must consider whether a man believed that a woman was consenting to sexual intercourse and the jury addresses the reasonableness (or otherwise) of the grounds for that belief only to the extent that this throws light on the factual question of whether or not the accused had such a belief. Section 2 of the 1981 Act is based on an English Act passed in 1976 following the controversial decision of the House of Lords in the *Morgan*

case, where it was held that the defendant could not be properly convicted if he in fact believed that the woman was consenting, even though that belief was not based on a reasonable ground. The Commission concludes that the view of the House of Lords seems to deny the existence of the necessary *mens rea* in a case where the defendant negligently disregarded the possibility of the woman's not consenting. The Commission provisionally recommends that the offence of rape should continue to be one resting on knowledge of or recklessness as to the woman's lack of consent, rather than the test based in negligence.

The Commission looked in some depth at the right of a defendant to question the complainant on her previous sexual history and here provisionally recommends a change in the law so that a Judge may scrutinise the sexual history of the complainant with the defendant. Section 3 of the 1981 Act deals with restrictions on the introduction of evidence about the sexual experience of a complainant with a person other than the accused. The Commission also recommends retention of the rule that the trial judge should warn the jury of the danger of convicting without corroboration.

There is an interesting recommendation that rape and the new offence of aggravated sexual assault should be tried exclusively in the Central Criminal Court and that that Court should have the sole jurisdiction of sentencing such offenders, even when they plead guilty in the District Court. The Commission also recommends that rape proceedings should be tried otherwise than in public, subject to four exceptions, amongst which is that members of the media should be permitted to attend and report the case.

There are 19 provisional conclusions and recommendations of the Commission and it is very clear from the end of chapter references that substantial research was carried out before they arrived at their recommendations. The Commission requested submissions from interested parties and admitted to finding difficulty in reaching conclusions in some areas because of the lack of information on the operation of the present law. I hope that such submissions were received and I think the inclusion of a glossary of legal terms at the start of the report was an excellent idea.

In a study carried out by the University of Chicago, it was suggested that a change in public attitudes to rape was one of the most important influences in reporting trends. I think that publication of this paper will be an important part of the public debate on the issue. I look forward to reading the final Report and, in particular, to seeing if, as a result of such submissions, the Commission sees fit to make changes in its provisional recommendations.

BARBARA HUSSEY

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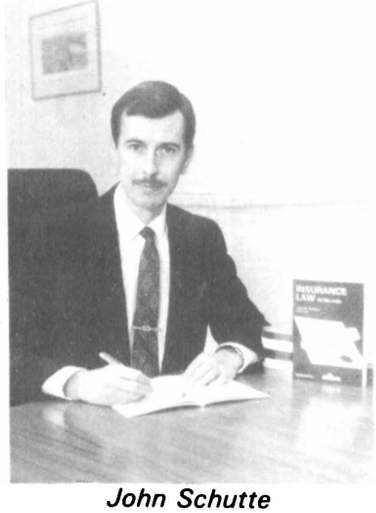

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THE CIRCUITEER AND THE NICE OLD BUFFER

A CIRCUITEER, Recently Elected to the Bar Mess, Determined to Try his Luck at the Assizes. Arriving at the Railway Terminus Rather Late, he Just had Time to Fling himself into a Carriage as the Train Steamed Out. It was Occupied by an Elderly Party, whom the Circuiteer Diagnosed as a Nice Old Buffer. He had a Rug over his Knees and he Wore a Top Hat. He was Smoking an Excellent Cigar. The Nice Old Buffer Appeared to be Rather Surprised at the Circuiteer's Intrusion; but the Latter, being of a Chatty and Affable Disposition, Soon Put him at his Ease. Before Long the Nice Old Buffer had Offered the Circuiteer a Cigar and they were Getting on Like a House on Fire. The Circuiteer Told him about his University Career, his Uncle Thomas, the Man he had Read With in Chambers, and a Lot of Other Things. Turning to the Object of his Travels, he Mentioned to the Nice Old Buffer that he was Going to the Assizes; that Mr. Justice Stuffin was the Presiding Judge; but that the Profession did not Think Much of him. Stuffin said the Circuiteer, would Never have got a Judgeship on his Merits; but he had Married a Woman with a good Deal of Money and had a Safe Tory Seat. He was just Going to Tell the Nice Old Buffer what

THE CIRCUITEER AND THE NICE OLD BUFFER

the Court of Appeal had Said the Other Day about One of Stuffin's Judgments when the Train Arrived at its Destination. There were Javelin-Men and Trumpeters on the Platform, together with the High Sheriff of the County and his Chaplain. They had Come to Meet the Judge. Sick with Horror, the Circuiteer became Aware from the Demeanour towards his Travelling Companion that the Nice Old Buffer was Stuffin, J. He Made up his Mind Then and There that he had Better Adopt Some Other Profession, and Caught the First Train Back to London. He is Now a Stockbroker, and Doing Very Well Indeed in the Industrial Market.

Moral.—*Take Care.*

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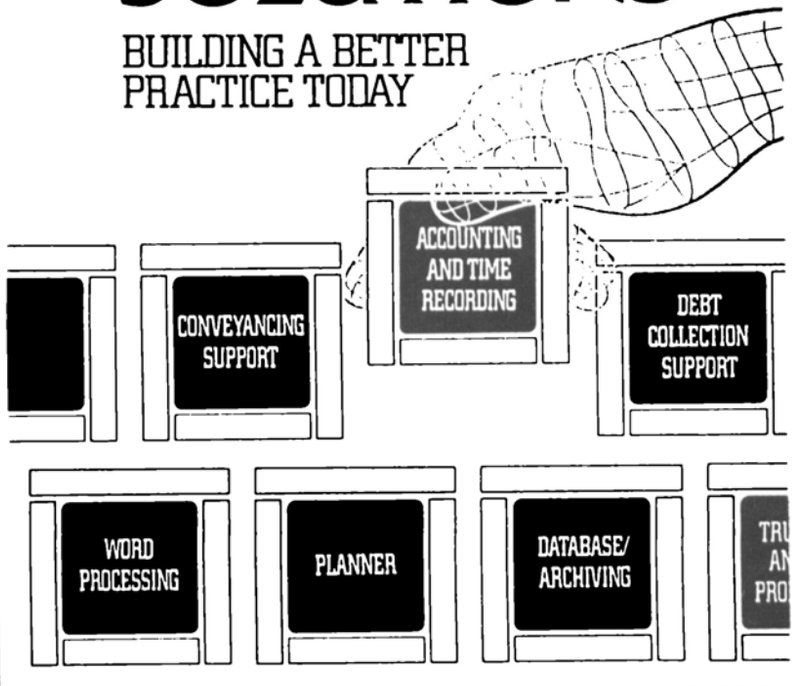

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J. B. Fitzgerald (Registrar of Titles),
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Land Registry,
Chancery Street, Dublin 7.

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Thomas Carroll, Whitestown, Clonmethan, County Dublin. Folio No.: 16539; Lands: The property situate in the Townland of Whitestown and Barony of Balrothery West; County: **DUBLIN.**

Patrick Reilly, Crossreagh, Newbliss, Co. Monaghan. Folio No.: 16318; Lands: Lisnagore; Area: 9a.3r.8p.; County: **MONAGHAN.**

Andrew Hartness, Tyramedon, Ballyboy, Co. Monaghan. Folio No.: 3844; Lands: Kilnacran; Area; 13a.2r.30p.; County: **MONAGHAN.**

Patrick Ryan & Mary Ryan, Tooragh, Templederry, Co. Tipperary. Folio No.: 9349F; Lands: Tooreagh; Area: 1.000 acres; County: **TIPPERARY.**

Eibhlin P. Nic Craith, Killinooria, Ring, Dungarvan, Co. Waterford. Folio No.: 776; Lands: Killinoorin; Area: 8a.2r.38p.; County: **WATERFORD.**

Tipperary N. R. County Council, The Courthouse, Nenagh, Co. Tipperary. Folio No.: 28741; Lands: Tyone; Area: 0a.1r.31p.; County: **TIPPERARY.**

Timothy Finbarr Browne, Ballinvoskig, Douglas, Co. Cork. Folio No.: 29315; Lands: Ballinvoskig; Area: 80.892 acres; County: **CORK.**

Geoffrey Kinnear, Tullynamalra, Creighanroe, Castleblayney, Co. Monaghan. Folio No.: 11505; Lands; Tullynamalra; Area: 36a.2r.26p.; County: **MONAGHAN.**

Eric George Deacon, Main Street, Gorey, Co. Wexford. Folio No.: 20482; Lands: Ballinatray Lower; Area: 0a.1r.25p.; County: **WEXFORD.**

Martin Malone, Church Street, Kingscourt, Co. Cavan. Folio No.: 17756F; Lands: Raloaghan; Area: 1.476 acres; County: **MEATH.**

Michael & Carmel Cannon, Kilcar, Co. Donegal. Folio No.: 18900F; Lands: Letter; Area: 0.300 hectares; County: **DONEGAL.**

Thomas Gilmore, Kingscourt, Co. Cavan. Folio No.: 1132L; Lands: Ganderstown; Area: 0a.1r.3p.; County: **LOUTH.**

Pelham Warren, 27/28 Clare Street, Dublin. Folio No.: 51380; Lands: Aughrus Beg; Area: 0a.3r.20p.; County: **GALWAY.**

John A. Cahill, Folio No.: 25719L; County: **DUBLIN.**

Winifred, John and Dominick Gunning, Ballymore, Co. Galway. Folio No.: 26245; Lands: Carrowgarve; Area: 201a.1r.30p.; County: **ROSCOMMON.**

Mary Newman, Lynn, Mullingar, Co. Westmeath. Folio No.: 172 closed to 12554; Lands: Lynn; Area: 0a.2r.1p.; County: **WESTMEATH.**

Liam Cheasty, Lisduggan, Kilbride, Co. Waterford. Folio No.: 2927F; Lands: Lisduggan; County: **WATERFORD.**

Thomas O'Brien (De La Salle Brother), **Patrick Rice** (De La Salle Brother), **James Fleming** (De La Salle Brother), and **John Kirk** (De La Salle Brother), all of Mount De La Salle Retreat, Castlelawn, County Laois. Folio No.: 6163, 6164, 6278; Lands: *6163* Townland of Ballyfermot Lower and Barony of Uppercross; *6164* South Side of Saint Laurence and North Side of Ballyfermot Road, District of Kilmainham and Parish of St. Jude; *6278* East Side of Lynch's Land, Parish of Ballyfermot, District of Ballyfermot in the City of Dublin; County: **DUBLIN.**

Joseph Toolan, Caul, Scramogue, Co. Roscommon. Folio No.: 460 (REV); Lands: (i)Caul; (ii) Caul (one undivided 13th part); Area: (i) 15a.1r.21p.; (ii) 2a.2r.31p.; County: **ROSCOMMON.**

Josephine Connelly, Kilmalkedar, Ballydavid, Co. Kerry. Folio No.: 14947F; Lands: (i) Kilmalkedar; (ii) Kilmalkedar; Area: (i) 33.453 acres; (ii) 1.038 acres; County: **KERRY.**

Thomas Moroney, Carrowmore, Scarriff, Co. Clare. Folio No.: 7037; Lands: (i) Carrowmore: (ii) one undivided seventh part of island; (iii) one undivided seventh part of four small islands; Area: (i) 11a.0r.14p.; (ii) 0a.0r.32p.; (iii) 0a.2r.10p.; County: **CLARE.**

Hugh Marron of Ian Cottage, Dowdallshill, Dundalk, Co. Louth. Folio No.: 4711; Lands: Dowdallshill (part); Area: 0a.1r.10p.; County: **LOUTH.**

Bryan Barry and Philomena Barry. Folio No.: 25048L, City of Dublin; property situate at 13 Roselawn Avenue, Castleknock, Dublin, County: **DUBLIN.**

The Institute of Industrial Research and Standards of Ballymun Road, Dublin 9. Folio No.: 12759F; Lands: Ballymun; Area: 1.214 hectares; County: **DUBLIN.**

Lost Wills

HEWITT, Annie, late of 52, 3rd Avenue, Seville Place, Dublin, or of 24 St. Joseph's Place, Dublin; O.B. 13th August, 1974; any person knowing of the Will of the deceased might contact Leonard Silke & Company, Solicitors, 43 William St., Galway.

O'SULLIVAN, Katherine, deceased, late of 1 Ardskeagh Villas, Gardiner's Hill, Cork. Will anyone having knowledge of the whereabouts of the Will of the above named deceased who died on the 8th April, 1988, please contact John K. Coakley, Solicitor, 44 South Mall, Cork (Tel. No. 021-273133).

HOLLAND, Julia (Sheila), deceased, late of 14 St. Vincent's Place, Blarney Street, Cork, and also 53 Shandon Street, Cork. Will anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 3rd April, 1988, please contact Collins, Brooks & Associates, Solicitors, 7 Rossa Street, Clonakilty, Co. Cork. Telephone (023) 33332.

BURKE, John, deceased, late of Glengarriff Road, Bantry, Co. Cork. Would any solicitor in the Cork City or County area have any knowledge of the last Will and Testament of the late John Burke late of Glengarriff Road, Bantry, County Cork, who died on the 25th day of April, 1988. He also resided at Whiddy Island, Bantry, Co. Cork, a long time ago, and a Will may possibly be under this address, but he more recently resided at Glengarriff Road, Bantry, Co. Cork. Kindly contact Denis A. O'Donovan and Company, Solicitors, New Street, Bantry, County Cork.

McPARTLAND, Charles, late of 24 Ashbourne Road, Duleek, Co. Meath, who moved from the United States in the early 1970s. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on 5th February, 1988, please contact Walter P. Toolan & Son, Solicitors, Ballinamore, Co. Leitrim.

Miscellaneous

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Estate of Louisa Emily Wilkinson, deceased. Would anyone knowing the whereabouts of James Dowman, Kitty Dowman and Rita Dowman, beneficiaries under the Will of the late Louisa Emily Wilkinson, late of 98 Pembroke Road, Dublin, who died on August 23rd, 1939, please contact Timothy R. O'Sullivan, Solicitor, 37 Molesworth Street, Dublin 2, within 21 days.

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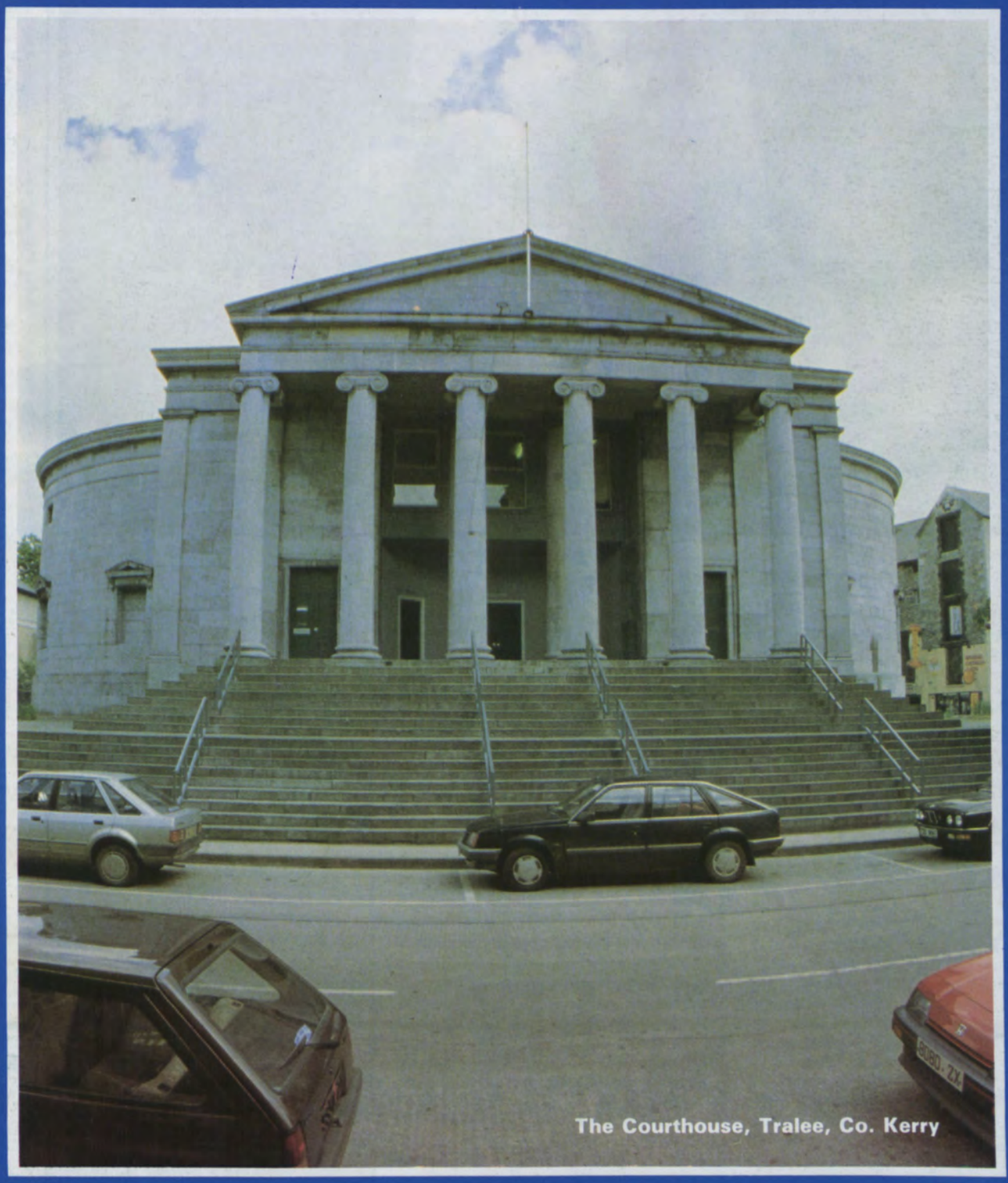
Vol. 82 No. 6 July/August 1988



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GAZETTE
INCORPORATED LAW SOCIETY OF IRELAND
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Viewpoint

The need to up-date legislation concerning limited companies has long been a major debate. How do you stop dishonest business men from closing down one company and starting a new one the very next day? How do you ensure that books of account reflect the true financial circumstances of that limited company?

The harsh economic climate which has been experienced in Ireland has brought these and other topics to a stage where action is being demanded. The Companies (No 2) Bill, 1987, is the Government's response. Will it solve our problems or add to them?

The Company Law Committee of the Society has given serious consideration to the Bill's proposals and has already made two submissions to the Department. No less than 75 different aspects of the Bill have been covered in the submissions. While some of the points are technical there are some very practical issues which are well worth noting.

Much of the Companies (No 2) Bill, 1987, is based on recent United Kingdom legislation which may not be, in all circumstances, suitable for the commercial life of Ireland which is on a completely different scale to the business environment of the United Kingdom and particularly the City of London. The Committee has called for greater simplification of most parts of the Bill so as to ensure that the development of business would be strengthened under a just and practical law and not ensnarled in a maze of never-ending legal procedures.

As drafted, the Bill would penalise a person for being a director of a company which has failed. This would be so whether or not the particular director was in any way at fault. There are many business people who bravely struggle to keep in business but fail. Furthermore there are many professional directors such as accountants and solicitors who are non-executive directors on the Boards of numerous companies but who contribute greatly to those Boards. From time to time such persons may find themselves directors of companies which have failed. The Committee believes that it would be very difficult for any reputable professional person to accept a directorship if this legislation were enacted. The professional person could not afford to risk running the consequences which would arise if the company were to fail.

The Bill also lays down rules for the conduct of company's audits. These new rules are too rigid. Under Section 176 the auditors would be obliged, in order to avoid committing an offence, to accuse the management of a company publicly of committing an offence if they formed the opinion that the standard of bookkeeping infringed the provisions of Section 180 even in a minor way. The Bill makes no distinction between grave and minor infringements of that section. Furthermore it does not give the auditors an opportunity to suggest and monitor improvements in bookkeeping. An additional problem is caused by the fact that no distinction is made between major public companies and small "one man" companies. The fact that the notice must be served and filed with the Registrar of Companies will only increase the embarrassment caused and the damage done. The requirements of the Bill in Section 180 are unrealistically rigid for small companies. Furthermore the requirements are uncertain in their meaning. What does the keeping of books for account on "continuous and consistent basis" mean? How will it be decided whether the books will "at any time" enable the financial position of the company to be ascertained.

Under the Bill, companies may be put under Court protection with a view to saving the company from liquidation. However under the Bill the examiner is not given sufficient power to act in an effective and decisive manner and no provision is made for his payment. The examiner is not to be empowered to carry on the business of the company nor to take effective control of the management of that company pending the consideration of a plan because each time the examiner wishes to exercise managerial functions he must obtain the approval of the Court. These controls and the substantial delays which will ensue may frustrate the examiner in his attempts to preserve the business and the goodwill of the company.

The concept of "shadow directors" is also one about which there are grave reservations. The definition is imprecise and depends to a large extent on the conduct rather than conscious choice. Provisions of this type are disconcerting and damaging to promoting Ireland as having a good legal environment for international business. The onus on a "shadow director" to complete all the particulars prescribed by Section 195 of the 1963 Act as amended by Section 47 of the Bill would be extremely onerous since a person may not be aware that he is a "shadow director".

Despite the problems with the proposed Bill the spirit behind these changes is to be welcomed and encouraged. We hope that many of the proposals made by the Company Law Committee will be accepted and incorporated in amendments to the Bill so as to ensure an effective Act which will improve rather than sabotage commercial life in Ireland.

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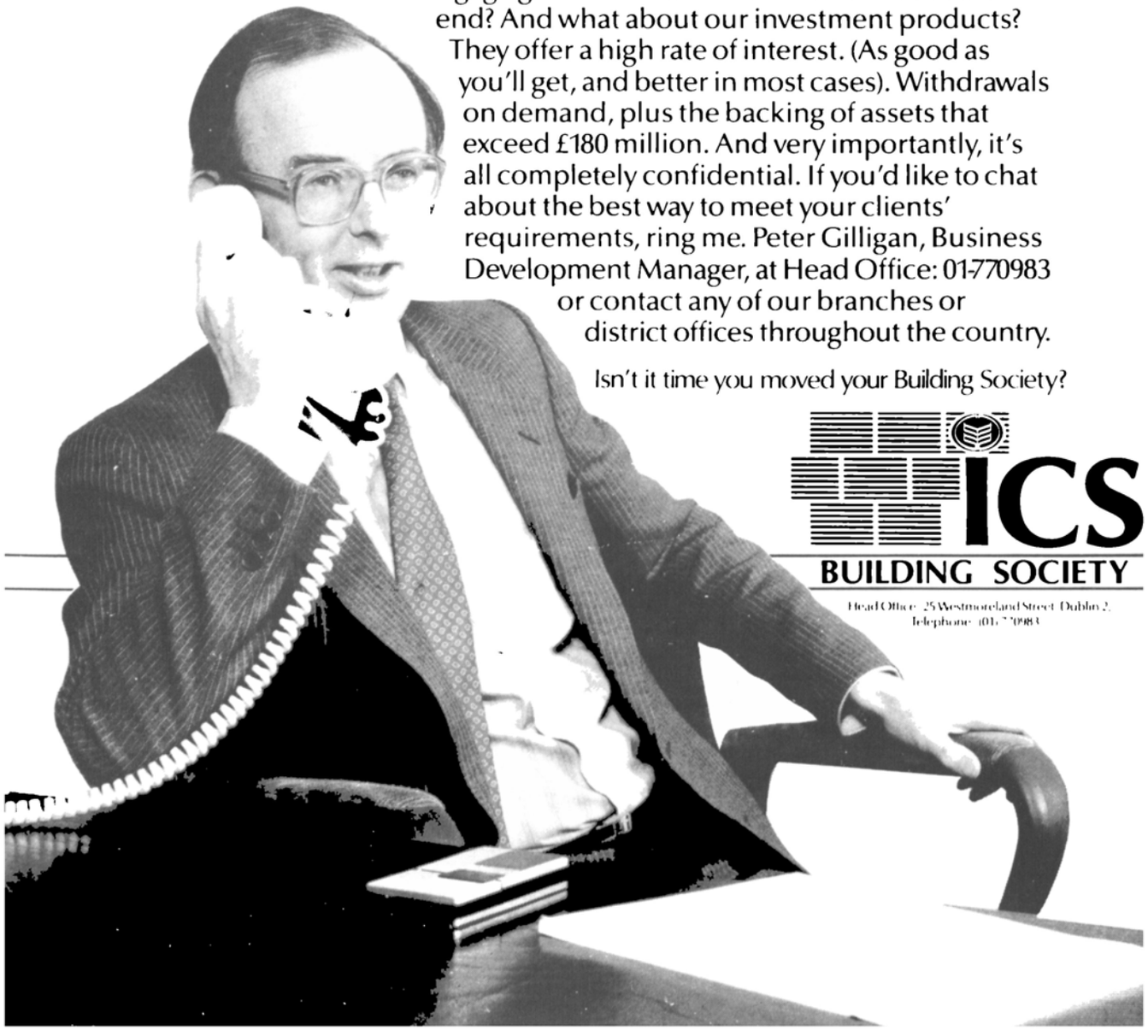

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Immigration to Ireland

Fiona Daly

Emigration, rather than immigration, has been a feature of Irish history since the middle of the last century and, with the exception of a brief period in the 1970s, net yearly emigration of varying extent has occurred. However in recent years there has been interest in immigration to Ireland among persons with Irish roots living in potentially unstable jurisdictions, such as South Africa, who have had cause to consider whether their Irish connection entitles them to Irish citizenship, and hence right of establishment and movement in the EEC. Furthermore there has been a general increase in interest in immigration to Ireland, mainly because of Ireland's position as an English speaking member of the EEC and the country's close proximity to the United Kingdom. This article will consider, in broad terms, entitlement to Irish citizenship and, then, immigration possibilities that may exist for non-EEC nationals.

by
Roderick Bourke,
Solicitor*
and
Fiona Daly BCL*

Irish Citizenship

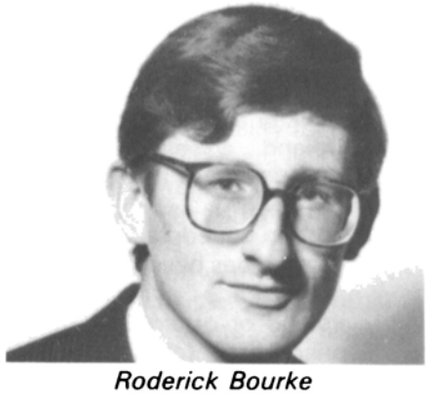
The principal legislation governing Irish citizenship is the Irish Nationality and Citizenship Acts 1956 and 1986 (the Acts) which provide that Irish citizenship may be acquired in five ways as follows:

A. Birth

Every person born in Ireland is an Irish citizen from birth. The only exception to this is where the parents had diplomatic immunity at the time of birth.

B. Descent

Every person born outside Ireland is an Irish citizen if his or her father or mother is an Irish citizen by birth. Furthermore, anyone born outside Ireland who at the time of his or her birth has a parent who is an Irish citizen otherwise than by birth may become an Irish citizen through registration at the Department of Foreign Affairs or at an Irish Embassy or Consulate. A person born outside Ireland having an Irish born grandparent is therefore entitled to Irish citizenship through registration.



Roderick Bourke

Citizenship acquired through registration as an Irish citizen is acquired as from the date of registration. Therefore if a person entitled to register as an Irish citizen wishes to pass on citizenship to his or her child then that person's citizenship must be registered before the child's birth in order for the child to have an entitlement to Irish citizenship. A limited form of retrospection that existed in the 1956 Act has been eliminated by the 1986 Act.

C. Marriage to an Irish Citizen

An alien may become an Irish citizen if he or she marries a person who is, or who after the marriage becomes, an Irish citizen (otherwise than by naturalisation or by virtue of this provision or by virtue of a token of Honorary citizenship bestowed by the President). The applicant should lodge with the Irish Department of Justice a ''Post-Nuptual Form'', which is a Declaration of Acceptance of Irish Citizenship, not earlier than three years from the date of the marriage or, after the Irish partner became Irish, whichever is the later. The marriage must genuinely subsist at the date of lodgment and the couple must be living together as a married couple at that date.

D. Naturalisation

An alien may become an Irish citizen by naturalisation. Naturalisation is granted at the discretion of the Minister for Justice and will almost always be granted if the applicant has:

(i) been in continuous legal residence in Ireland for a period of one year prior to the application

and

(ii) in legal residence in Ireland for four out of the previous eight years prior to that year. The applicant must be of good character, full age and intend in good faith to continue to reside in the State after naturalisation has been granted. The Minister may, in certain cases specified by the Acts, grant naturalisation even where certain of the conditions for naturalisation have not been complied with as e.g. where the applicant is of Irish descent or association or where he or she is a refugee or a stateless person.

E. Token of Honour
The President of Ireland, under Section 12 of the 1956 Act, may confer Irish citizenship on a person as a token of honour. To date this honour has only been bestowed on five persons.

Immigration to Ireland
In considering immigration possibilities to Ireland, persons who are not Irish citizens can be considered under the following three categories:

(i) Persons *born* in Great Britain or Northern Ireland. They are treated to all intents and purposes in exactly the same manner as Irish citizens. They do not require residency permits or work permits of any description and are fully exempt from Aliens Control.

(ii) Nationals (and their dependants) of member states of the European Community. Pursuant to Ireland's obligations under the Treaty of Rome, the rights of free movement and establishment of EEC nationals and their dependants have been provided for in Irish law under a series of regulations, although certain restrictions still exist regarding nationals of the newest member states, namely, Spain and Portugal. Interestingly, the regulations do not apply to persons born in Great Britain or Northern Ireland and, as a result, a serious (and presumably unintended) anomaly exists, insofar as the dependants of persons born in Great Britain or Northern Ireland who were not themselves born in Great Britain or in Northern Ireland and are not EEC nationals cannot avail in Ireland of these regulations. This came to light in a recent case where a British-born woman of Indian extraction came to live and work in Ireland with her two-year-old child. The woman had married an Indian three years previously. The woman applied to the Minister for Justice for Entry Clearance for her husband to be able to come and live in Ireland (he was still living in India having been refused entry into the UK) and relied on the 1977 Regulations (S.I. 393 of 1977) which state generally that a dependant of an EEC national can join his or her spouse in Ireland. However, the Department of Justice referred the applicant woman to the First Schedule of the Regulations which exempt British-born UK citizens and N.I. born citizens from the Regulations thus leaving a UK citizen in a worse off position than if she had been, for example, a French citizen.

(iii) Aliens other than EEC nationals. Persons in this category coming to Ireland for reasons other than employment or to engage in business must register with the Aliens Registration Authority, and obtain a registration certificate, if intending to stay in the State longer than three months. This certificate must be renewed on a yearly basis and will only be renewed if the alien can show that he and his dependants are not a financial burden on the State. Those non-EEC aliens who wish to take up employment or engage in business face very considerable difficulties, commencing with the requirement to register within one week with the Aliens Registration Authority and obtain a Registration Certificate within one month. High unemployment exists in Ireland and the central objective of immigration policy appears to be the prevention of displacement of Irish and EEC workers and businesses by non-EEC nationals.

If an alien in this category wishes to engage in employment or to establish himself in business in the State he must obtain a work permit from the Department of Labour or permission to engage in business from the Department of Labour. To obtain a work permit, application must be made by the prospective employer who must furnish full details of: the proposed employee, particulars of the post, efforts that have been made to recruit an Irish/EEC national for the post including advertising, and whether trade unions have been consulted and the result of such consultation. Any work permit granted must be renewed yearly. With regard to engaging in business, the alien must obtain permission from the Minister to do so and it appears that the Minister regards £150,000 as the minimum investment that would qualify an alien for the necessary permission. There is no legislation governing investment criteria and any decisions are within the Minister's absolute discretion.

Aliens Control at Point of Entry
The Immigration Authorities at points of entry to Ireland have extensive powers to refuse non-EEC aliens leave to land or to attach conditions as to duration of stay. The power of initial admission is generally exercised by the Immigration Officer at the point of entry. He may refuse entry on any of the following grounds:

(1) if an alien is not in a position to support himself or any accompanying dependant;
(2) although intending to take up work or engage in business in Ireland, an alien is not in possession of a valid permit;
(3) an alien is suffering from certain scheduled diseases;
(4) an alien has been convicted of an offence punishable (in Ireland or otherwise) by imprisonment for a maximum period of at least one year;

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(5) an alien is not a citizen of a State listed in the Sixth Schedule of Statutory Instrument No. 128/75 (see below);
(6) an alien is subject to a Deportation Order;
(7) an alien is prohibited from landing in the country by Ministerial Order;
(8) an alien is not in possession of a valid passport or other document establishing nationality;
(9) if the Immigration Officer holds the reasonable belief that an alien intends to travel to Great Britain or Northern Ireland and the Immigration Officer does not think that the alien would qualify for admission there either;
(10) an alien remains in the State after boat or aircraft has already left.

Refusal on any of the above grounds must be informed within a reasonable time to the alien in writing.

General Points

The system of immigration controls in Ireland rests with the Minister for Justice who, subject to the Constitution of Ireland and relevant legislation and delegated legislation, has total discretion in immigration matters. In contrast to the United Kingdom no system of immigration appeals/tribunals *per se* exists in Ireland.

It should be noted that all aliens who intend to land in Ireland and who are citizens of States that are not listed in the Sixth Schedule of Statutory Instrument No. 128/75 (mainly middle Eastern and non-Western States) must obtain a visa before travelling. □

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* *Roderick Bourke practises with Eugene F. Collins & Son; Fiona Daly works with McCartan & Hogan*

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From the President . . .

Having been severely taken to task for referring to everyone in the masculine in the course of my speech in Cork, I am now making amends by addressing this bye-line to the female members of our profession.

You are a most important group. The percentage of female solicitors is now over 50% in each Parchment Presentation Ceremony. Numerically you are very strong and getting stronger. We have four of your number on the Council and one representative from the Dublin Solicitors Bar Association and one from the Southern Law Association all doing excellent work. In some Bar Associations you are coming to the top and taking your rightful positions as President, Secretary and committee members.

However, despite all this, I somehow get the feeling that you are not as much to the forefront in the profession as you might be.

I have to ask myself some questions.

—What percentage of you are partners in firms?

—What percentage of you have management responsibilities in offices?

—How many of you serve as officers or committee members in your Bar Association.

I believe that the answers to these questions will show that a relatively small number will answer ''yes'' to all of the three questions posed.

If this is the case, then you must go on and ask yourselves why.

There are probably diverse reasons, but I think that one of them is that you are less adventurous than your male colleagues. I believe that you are much more likely to be referred clients because of your professional ability and reputation than for any other reason.

I also believe that perhaps you are not forward enough in making sure that you get the credit for the excellence of your work.

I believe that many of you seek security, so hence you are less likely to change jobs and, in particular, you are sometimes reluctant to take on a challenge such as a job in a location outside of Dublin.

If you are married and have a family you have additional responsibilities which can leave you less time for professional practice. You rightly will measure your success by your personal lives as well as your professional accomplishments.

The trends are that in the future there will be more of you qualifying. The success of our profession will in some way be judged by how the male and female members integrate to produce a strong and independent legal profession.

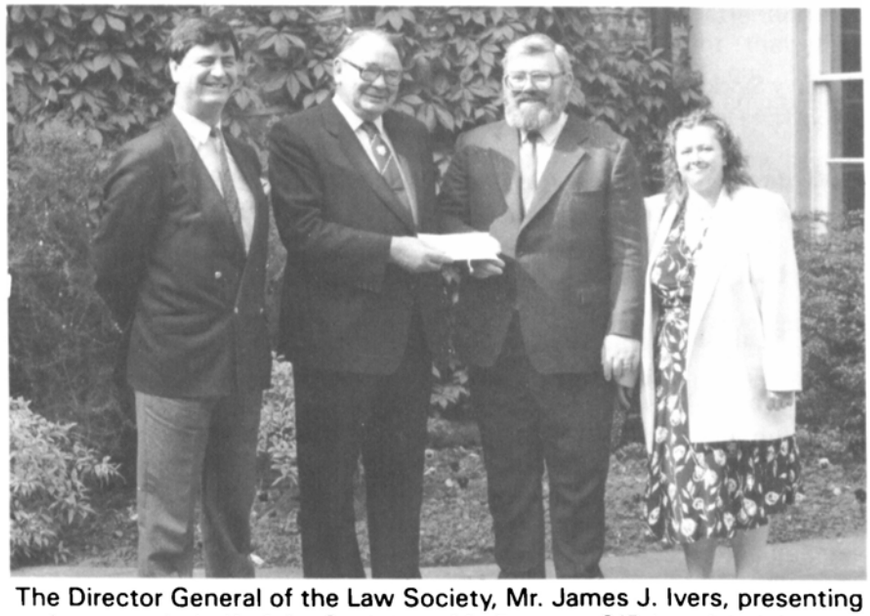
You have an obligation and responsibility to play your part. I know you will do so.

Thomas D. Shaw

THOMAS D. SHAW
President

STONEYBATTER

Stoneybatter, or Bothar na gCloc, which runs northwards from Blackhall Place, through the Dublin village of Stoneybatter, is one of the oldest roads in Ireland, being one of the five great roads running from the Royal seat at Tara. In this Millennium year of the city of Dublin the Stoneybatter Community Council has asked all local organisations and businesses to contribute to the erection of a suitable monument to mark the presence of this historic road.



The Director General of the Law Society, Mr. James J. Ivers, presenting a cheque on behalf of the Society to Mr. Eamonn O'Brien, Administrator of the Stoneybatter Community Council, with Mr. Chris Mahon, Director of Professional Services at the Law Society and Mrs. Ann O'Brien.

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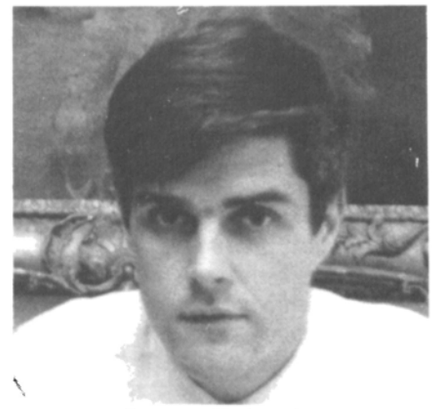
Getting into America — Legally



Ronan Molumby

In view of the increase in recent years of Irish lawyers moving to the United States it would be most useful to them to be aware of how they deal with their immigration status both before they leave Ireland and after they arrive into the U.S. jurisdiction. The most suitable and commonly used visa category to secure work status for lawyers coming from Ireland and Europe to the U.S. is the H—1 category.

by
Ronan Molumby,
Solicitor
Sioris & Molumby,
New York

This article is focussed on the situation of a lawyer either:

(i) securing a firm job offer from some U.S. firm (legal or otherwise) while he or she is still present in Ireland and having the H—1 visa issue from the U.S. Consul in Dublin; or

(ii) arriving to the U.S. as a visitor (B—1 or B—2 status) and then securing a job offer while in the U.S. and adjusting status to eligible worker while remaining in the U.S. jurisdiction.

This writing does not apply to the law student who is coming to the U.S. for summer placement to whom a different visa structure applies, or to the intra company transferee where the Irish or European and U.S. corporations are satisfactorily affiliated.

In general

The H—1 non-immigrant visa category is used by companies and other organizations to temporarily employ non-U.S. nationals who qualify as persons of "distinguished merit and ability" in positions that require such ability. There are two classes of persons considered to be of "distinguished merit and ability":

(i) Professionals, and

(ii) Persons who are pre-eminent in their fields.

It is important to note that the position can be permanent in nature, but the employment relationship with the non-U.S. national must be temporary.

Duration of Stay

The employee/H—1 beneficiary may be admitted to the U.S. for the period of time required by the employer up to a maximum of two years initially. Occasionally this initial period granted is for three years but in either case further extensions of up to a maximum of five years in total are possible. During this intervening period, if the H—1 beneficiary so wishes, he or she can adjust to a permanent resident status ("green card") if the employer agrees on sponsorship.

Eligibility/Basic Requirements

The employee must be a "professional" or otherwise possess "distinguished merit and ability" in his or her field. For a person to be considered a professional two requirements must be met:

(i) the person's field must be one for which a baccalaureate or higher level degree (or its equivalent) is the usual minimum entry requirement, and

(ii) the person must possess qualifications at least matching that minimum requirement.

To come to the U.S. as an Irish or international lawyer and to qualify for H—1 status, the employee must have successfully completed at the minimum a three or four year university degree in legal or legal related subjects, or in the alternative, must be admitted to the Bar or be entered on the Roll as a Solicitor.

In determining whether a position requires a professional level employee the United States Immigration and Naturalization Service will scrutinize the job duties to be performed by the employee. The employer's stated requirement of a bachelors or higher level degree must be accurate and a prerequisite for the proper performance of the job offered. Again attention is brought to the point that the position to be filled can be a permanent one but the employer's intention must initially be to fill that position only temporarily, even though the initial intentions of both employer and employee can later change.

Procedure

The procedure in brief involves the hiring U.S. firm (the "Petitioner") formally petitioning the Immigration and Naturalization Service to classify the employee ("beneficiary") for H—1 work authorization. To discharge the burden of "distinguished merit and ability" the following documents should be submitted along with this Petition to Classify:

(i) Original transcripts in duplicate from the relevant University or College giving

details of each course taken in each year,

(ii) Copies of the actual degree in duplicate,

(iii) Original transcripts from the Incorporated Law Society or the Kings Inns showing all courses taken and qualifications earned,

(iv) A letter of reference from an Irish/European firm, legal or otherwise, indicating the work the employee had previously been involved in, and perhaps indicating certain projects of an international nature that the applicant had worked on. The above would help establish both the practical and theoretical professional expertise on behalf of the individual.

If the H—1 applicant is in Ireland while the application is being processed in the U.S., he or she would attend at the American Consul's office in Dublin to collect the H—1 visa and have it stamped on his or her passport before departure to the U.S.

If the applicant is already in the U.S. and still in status as a visitor (B—1 or B—2 visa), then a petition to adjust status can also be submitted along with the above documents to avoid the expense and inconvenience of a trip back to Ireland if the applicant so preferred at that time.

Issuance

The H—1 visa currently issues within three to six weeks. On occasion I have seen them issue in shorter periods. This visa allows the beneficiary to depart and return to and from the U.S. freely for its duration during which time one can work, file for taxes, invest, etc. in the U.S. It is a most firm basis from which to adjust to permanent residence ("green card") if both employer and employee so agree.

Alternatives

Again one should note that the H—1 visa structure does not apply to the intra company transferee situation which also has many benefits particularly for persons at managerial and executive positions, nor does it apply where the employee is not at the professional level, where his or her temporary employment in the U.S. may be regarded as a period of training, and a trainee visa would be available — J—1 or H—3.

Conclusion

For some the problem of immigration and achieving work status proves to be the most intimidating barrier to coming to the U.S. to practise law. However if the situation is initially assessed correctly and the application processed in accordance with the principles enunciated a visa should issue without any problems. The above is an outline of the H—1 category which is the visa structure which is perhaps the most applicable to members of the legal profession intending to relocate for any substantial period of time to the United States.

FOOTNOTES

(1) *Immigration Procedures,* Austin T. Fragomen, Alfred Del Rey and Steven C. Bell, Clark Boardman Co. Ltd., 1988.

(2) *Permanent Residence Through Employment in the U.S.A.,* Richard Madison, 1981.

(3) *Getting into America,* Howard David Deutsch, Random House Inc., 1984.

Hale and Dorr,
Counsellors at Law,
60 State Street,
Boston, Mass. 02109,
U.S.A.

14th June, 1988

Editor,
GAZETTE,
Law Society.

***Re:* Working as a Foreign Lawyer in the United States**

Dear Sir:

I thought some of your readers might be interested to know that the American Bar Association has an International Legal Exchange Programme in which individual foreign attorneys who wish to receive training with United States law firms or in other legal offices may do so. It can vary in time between three months to eighteen months, and one will be able to obtain a Working Visa for the duration.

I have enclosed the relevant information from the ABA, together with an application form which I presume can be made available by the Law Society to any interested applicant.

I, myself, can be contacted at the above address for any assistance or help I can provide.

Yours sincerely,
Gregory Glynn

(Note: details of the ABA International Legal Exchange Programme are available from the Education Officer at the Law Society.)

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97 Upper Georges Street,
Dun Laoghaire,
Co. Dublin.

The Editor,
The Gazette,
The Law Society,

27th May, 1988

Dear Sir,

Time costing, cross subsidisation etc.

President Tom Shaw's message to the profession in the April issue of the *Gazette* is timely.

I am committed to the discipline of time recording having used it as a management aid since the introduction of the Law Society's pilot scheme launched in the early 70's.

During this period our office has assiduously recorded the time of all fee earners. Our experience leads me to believe that recording is an essential management tool. However, in the absence of informed experience and acceptance by solicitors generally the President's call to it and against cross subsidisation could fail to make any really worthwhile impact.

I believe that one way his message would get through would be by having a national saturation of the profession along the lines of Loosemore and Parsons or otherwise through various Bar Associations so that all would realise how absolutely essential it is that the profession begin to price on a cost plus basis. Such method of pricing would be new only to solicitors. Traders and artisans and others have been pricing in that fashion for centuries.

The reason I suggest such a radical approach is that unless the profession begins to understand where it's cost centres are there will retain huge variations in billings for similar work between one solicitor and another which will ensure that solicitors generally continue to retain their low public image when it comes to charging.

As an example, most practitioners will have had the experience of dealing in lessors' consent cases with tenants' solicitors whose clients are obliged to pay their costs. Eventually they will have been forced to agree fees that would generally be considerably less than the cost to their office of producing the work in the first instance. There would in all probability be resentment on the tenant's solicitor's part that his client has been forced to pay too much and on the landlord's solicitor's part that he has been paid too little and would not be able to recover sufficient (if any) from the client to ensure a profit. Were the latter to try to obtain compensatory payment from the client he would be likely to come in for adverse criticism.

There are other such glaring examples.

My records show that much domestic conveyancing in recent times does not pay on full scale, let alone half scale, and that one does not get anything like the cost on average of producing a carefully drawn Will. There are other similar extractable examples. Unless the entire profession i.e. solicitors on both sides of the transaction, has a satisfactory and acceptable (by consensus) method of costing and therefore of pricing work it, and particularly individual members in localised areas, could be exposed to odium and contempt for charging reasonable cost based fees unless these fees would be seen as a norm. The public is critical of the normal huge price variations for similar work that an inexact science produces.

There is no doubt that in the short term with the adoption of time costing and charging the fee per job in certain types of matters would rise, that many traditional types of work would be seen to be unattractive by solicitors and might possibly risk, except in extremely specialised practices, extinction.

The discipline of time recording for a solicitor need be no more demanding than about 45 minutes a week. The calculation of expense rates because it relates to the extraction of budget information would take some hours but then that need only occur once annually.

It would be up to the expertise of the Council to ordain practice standards and to decide how to combat the possibility of short term adverse publicity that might occur from the hiking of some traditional fees, the lowering of others and the dropping of some types of work that cannot be transacted by solicitors at a reasonable price.

I have no doubt that, in the long run, provided there is universal solicitor acceptance of the cost of time spent as a basis or one of the bases for billing, solicitors' charges will tend to level off and be predictable and give less reason for complaint by the public. As a valuable side effect the issue of solicitor and client charging in litigation cases should become clarified as being normal and above board, party and party costs (if awarded) being merely a none-indemnifying subsidy to the successful litigant.

The abolition of binding scale fees for conveyancing and other types of work and the introduction of a contingency element in successful litigation cases could form part of the scenario but these are political matters. The embarkation of individual firms on advertising to my mind will not help the billings of the profession except marginally. The basic problem of over capacity and under remuneration on the profession will take other solutions to cure. Time costing and charging would make a major impact if accepted and applied.

Yours sincerely,

JOHN HOOPER

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Practice Notes

The Judgments Convention and the Maintenance Orders Act 1974

1. The EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Judgments Convention) is given the force of law in the State by the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 (No. 3 of 1988). The Convention is now in force (since 1 June 1988) between Ireland and Belgium, Denmark, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands and the United Kingdom.
2. Maintenance orders come within the scope of the Convention. Subject to the provisions of the Convention and the transitional provisions contained in Article 34 of the 1978 Accession Convention (see Third Schedule to the 1988 Act) a maintenance order made on or after 1 June 1988 in another Contracting State will be enforceable in Ireland, and *vice-versa*.
3. Under an Agreement between the Irish and British Governments special provisions exist for the reciprocal recognition and enforcement of maintenance orders between Ireland and the United Kingdom. The relevant Irish provisions are contained in the Maintenance Orders Act, 1974. The two Governments have agreed to continue the Agreement in operation after the entry into force of the Judgments Convention for both countries (i.e. 1 June 1988). As a result
   —in a case which comes within the scope of the Maintenance Orders Act, 1974, the provisions of that Act will apply, and
   —in a case which is outside the scope of the Maintenance Orders Act, 1974, but within the scope of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988, the provisions of the 1988 Act will apply.

Law Division,
Department of Justice.

Deeds of Covenant in favour of non-UK Resident Charities

The Policy Division of the United Kingdom Inland Revenue has asked the Revenue Commissioners to advise interested parties of the effect of Clause 35 of the Finance (No. 2) Bill 1988.

The new provisions remove the right which previously was available to deduct tax on payments made out of income prior to 15th March 1988 in respect of deeds of covenant in favour of non-United Kingdom Resident Charities.

An exception applies for covenanted payments in favour of charities established under the laws of the United Kingdom which will continue, as heretofore, to be payable under deduction of tax.

Chief Examiner,
Income Tax Claims Branch,
Office of the
Revenue Commissioners.

CORRESPONDENCE
(continued)

Addison Sons & Madden
Avenue House,
Southgate, Chichester,
West Sussex PO19 1ES

The Editor,
The Gazette,
The Law Society.

29th June, 1988

Dear Sir,

The Lawyers Fishing Club of England and Wales

I am a member of committee of the above named Club and, at a recent meeting, it was considered that it would be very pleasant to have exchange events with our angling professional colleagues in the British Isles.

I was asked to try to make contact with those who might be interested in such events which, we envisage, would take place annually with a venue in Scotland, Ireland, Wales and England, on a rotating basis.

As I understand it, there is no Lawyers Fishing Club, as such, in Eire but it would be kind if you would publish this letter in your Gazete in the hope that at least some of the Irish Lawyers will want to come into our proposed arrangements.

I invite any such ladies or gentlemen to write to me, at the above address, for any further information which they may require, at this stage.

Yours faithfully,
H. C. Frank Wickham-Smith

NOTICE

JURY ACTIONS

The Courts Act, 1988, has abolished the right to trial with a Jury in certain actions claiming damages for personal injuries to a person or the death of a person: the Act will come into operation on 1st August 1988.

Practitioners are requested to inform the Chief Registrar, Four Courts, Dublin 7, of the list numbers of actions which will continue to be entitled to trial with a Jury notwithstanding the provisions of the Courts Act, 1988.

Straying Animals: the Burden of Proof

by: **Gerald J. Needham, B.A., Barrister-at-Law**

Section 2(1) of the Animals Act, 1985, states "So much of the rules of the common law relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take such care as is reasonable to see that damage is not caused by an animal straying on to a public road, is hereby abolished." This section is, I believe, causing problems of interpretation for District Justices in the absence of precedent case law. Prior to its enactment and following the maxim laid down in *Searle -v- Wallbank* [1947] A.C. 341, negligence did not attach to landowners whose animals wandered on to highways and caused damage thereon.

Section 2(1) of the 1985 Act removes this immunity and makes landowners liable for damage caused by their animals straying from their lands on to highways, but grounds that liability in negligence. The Law Reform Commission (Working Paper No. 3 of 1977) recommended the imposition of strict liability on landowners for straying animals; however, the legislature in its wisdom decided not to impose strict liability, but dealt with the matter as set out in the section referred to.

The burden of proof is the obligation upon a party to establish by evidence the facts which are in issue in a particular case. In civil cases the burden lies upon the plaintiff who would seek to affirm a particular issue unless the defendant raises another issue e.g. contributory negligence, when the onus of proving this defence would shift to him the defendant. The burden of adducing evidence rests upon the party who would fail if no evidence at all, or no more evidence, were given. This burden of adducing evidence shifts from the party who affirms to his opponent where a presumption exists or a *prima facie* case has been proved. The presumption of negligence, res ispa loquitur, would therefore shift the burden should it exist in a particular case.

Reliance can be placed on this doctrine in place of further evidence of negligence if a plaintiff suffers damage as a result of something, which is under the exclusive control of the defendant or his servants, getting out of such control. This doctrine was explained by Erle, C . J., in *Scott - v- The London Dock Co.* (1865) 3 H. & C. 596 at 601 ". . . where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care".

The burden would also shift to the defendant where one of the matters to be proved by the plaintiff lies peculiarly within the knowledge of the defendant - that is where, if a negative averment is made by a plaintiff which is peculiarly within the knowledge of the defendant, the burden of rebutting such averment lies upon the defendant. The operation of this "peculiar knowledge" maxim can be seen in *The General Accident Fire & Life Assurance Corporation -v- Robertson* [1909] A.C. 404, where the plaintiff alleged that the defendant Corporation had not registered him as a policyholder before a certain date. The Court held that the onus of proving such registration lay on the defendants, since the matter was one of internal organisation.

In Stephen's *Digest of the Law of Evidence,* 9th ed. (Art. 96), the rule is stated as follows: "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."

In District No. 3, District Justice Patrick J. Brennan sees Section 2(1) of the 1985 Act as creating a *res ipsa loquitur* presumption. He would say that where a plaintiff

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gives evidence of his motor vehicle colliding with animals straying on the highway and is able to identify the owner of the animals, then there is a *prima facie* case to be answered by the landowner to rebut the presumption of negligence on his part. This burden on the landowner is, of course, not one of strict liability, but it would be necessary for him to prove that he had exercised reasonable care, maintained his fences in a stock-proof condition and taken all reasonable steps to ensure that his stock do not stray on to the public highway. Justice Brennan would say that, in the above example, the burden should shift from the plaintiff because of the impossibility in many situations, of the plaintiff ascertaining the condition of the landowner's fences, which knowledge is peculiar to the landowner.

Other District Justices hold that it is necessary in every case for the plaintiff to prove that the landowner's fences were defective, or in some other way that the landowner had not taken reasonable care to ensure that his stock did not cause damage by straying on the public road.

Difficulties in interpretation there may be, but it would be a foolish and inadequately prepared plaintiff who would come to Court without having made at least some efforts to ascertain the location of defendant's lands, and having some evidence in Court as to the condition of the fences, should it be necessary to rebut the defendant's evidence.

Justice Brennan, in a decision in the recent District Court case of *Frank McCaffrey -v- Michael Lundy,* has held that a landowner, in order to take reasonable precautions, should not only bolt the gate on to lands where stock are held, but should also secure the gate with a lock, particularly if the lands are not in the immediate vicinity of defendant's house. □

Note: Copies of Justice Brennan's written judgment may be obtained from the Law Society Library.

□

Irish Solicitors in London Bar Association

On 30 April, 1988, the President and the Director General attended an inaugural reception of the Irish Solicitors in London Bar Association at the offices of the Law Society.

On that date, "Isilba" was born.

Approximately 150 Irish lawyers in London attended the reception which was kindly sponsored by Allied Irish Banks plc.

It was immediately apparent that there are great openings for Irish solicitors in London. Commencing salaries in excess of what would be on offer in Ireland were available. However, it was stressed to the delegates that accommodation is very expensive and as a rule of thumb one could deduct £5,000 from the London salary to arrive at an Irish equivalent.

The great interest of the lawyers was to see whether reciprocity could be obtained.

The President detailed the problems arising out of the compulsory Irish examinations and pointed out that the entire matter was to be considered at the Education Conference to be held in Kinsale commencing on 26 May. The lawyers present laid great stress on the importance of reciprocity which would enable them to qualify on a much easier basis that at present exists. At the moment they have to start from the bottom and get no credit for work or experience which they may have at the date of the commencement of their employment.

It was agreed that the Association in London would keep in touch with Blackhall Place and vice versa to the mutual advantage of all parties.

Cliona M. O'Tuama is the President of the Association and she attended the half yearly Conference of the Society in Cork, in May, and addressed the delegates there.

The Medico-Legal Society of Ireland

The Annual General Meeting of the Medico-Legal Society of Ireland took place in the Boardroom of the City of Dublin Skin and Cancer Hospital, Hume Street, Dublin 2, on 11th May 1988, by kind permission. The following Council was elected for 1988-1989

Patron: Professor P.D.J. Holland
President: District Justice Gillian Hussey
Immediate Past President: Dr. Declan Gilsenan FRCPath
Vice President: Leslie Kearon, Solicitor.
Hon.Secretary: Mary MacMurrough Murphy, Barrister at Law.
Hon.Treasurer: Nora Gallagher, Solicitor.
Hon.Auditor: Dr. Sheila Willis Ph.D.

Legal:
District Justice Cassidy, Raymond Downey, Solicitor, Brendan Garvan, Solicitor, Denis Greene, Solicitor, Eamonn G. Hall, Solicitor, Carmel Killeen, Solicitor, Thelma King, Solicitor, Paula Scully, Solicitor, John Schutte, Solicitor.

Medical
Dr. Desmond McGrath, Professor P. Meenan, Dr. Robert Towers, Dr. Liam Daly, Dr. Jack Harbison, Dr. Sarah Rogers, Dr. Seamus Ryan, Dr. Anne Clancy, Dr. Donal MacSorley.

Mary MacMurrough Murphy
Hon. Secretary.

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Presentation of Parchments

The following newly qualified solicitors were presented with their parchments at a ceremony in the Law Society on 19 May, 1988:

Owen Armstrong, B.C.L., Ballyweelin, Rosses Point, Co. Sligo. **Mark W. Barr, B.C.L.,** 97 Foxrock Park, Foxrock, Dublin 18. **Angela Becker, B.C.L.,** Rathcrogue, Station Road, Shankill, Co. Dublin. **Shane Byrne, B.C.L.,** 14 Oldbridge Road, Templeogue, Dublin 16. **David Casey, B.C.L.,** Cusack Road, Ennis, Co. Clare. **Siobhan Coleman, B.A.,** Athlumney Cottage, Navan, Co. Meath. **Veronica Collins, B.C.L.,** Convent Road, Clonakilty, Co. Cork. **Gerard Corcoran, B.C.L.,** 5 St. Mary's Villas, Ballineen, Co. Cork. **Timothy Mark Cooney, B.Comm.,** Garnafailagh, Athlone, Co. Westmeath. **Caroline Crowley, B.A.,** Laurel Lodge, Brighton Avenue, Monkstown, Co. Dublin. **Margaret Cuddihy, B.C.L.,** 3 O'Brien Street, Tipperary.

Finbarr Devereux, B.C.L., French Church Street, Portarlington, Co. Laois. **Andrew Doyle, B.C.L.,** 9 Grand Parade, Green Lanes, London N4 1JX, England. **Helen Doyle, B.C.L.,** Barrington Tower, Brennanstown Road, Cabinteely, Dublin 18. **Gerard Dunne, B.C.L.,** 18 Hazelbrook Drive, Terenure, Dublin 6. **James Fanning, B.C.L.,** Athgoe, Newcastle, Co. Dublin. **Bridget Rita Fitzgerald, B.C.L.,** Lombardstown, Mallow, Co. Cork. **Jane Fitzgerald, B.C.L.,** 4 Park Avenue, Hollypark, Blackrock, Co. Dublin. **Anne Fitzgibbon, B.C.L.,** "Fairways", Church Road, Ballybrack, Co. Dublin.

Elizabeth Anne Gallagher, B.Comm., Crannard, Grove Avenue, Blackrock, Co. Dublin. **John L. Gardiner, B.C.L.,** 132 Mount Merrion Avenue, Blackrock, Co. Dublin. **Myra Garrett, B.C.L.,** 89 Foster Avenue, Blackrock, Co. Dublin. **Deirdre Giblin, B.A.,** "Avondale", Sorrento Road, Dalkey, Co. Dublin. **Caroline Gill, B.A.,** 4 Florence Terrace, Leeson Park Avenue, Dublin 6. **Patricia Gleeson, B.C.L.,** "Cupertino", Parnell Park, Thurles, Co. Tipperary. **James Grennan, B.A.,** 127A Ballinclea Heights, Killiney, Co. Dublin.

Paul Heffernan, B.C.L., French Furze Road, Kildare Town, Co. Kildare. **Kevin Hoy, B.C.L.,** 43 Offington Drive, Sutton, Dublin 13. **Patrick Jones, B.A., LL.B.,** 4 Rockcross, Farnham Road, Cavan. **Deirdre Keane, B.C.L.,** 10 Butterfield Grove, Rathfarnham, Dublin 14. **Paul Kearney, B.A.,** 45 Green Road, Blackrock, Co. Dublin. **Brian Kelly,** Law Clerk, Skryne, Garlow Cross, Navan, Co. Meath. **John Kinirons, B.A.,** 8 Church Avenue, Rathmines, Dublin 6.

Hilary Molloy, B.A., LL.B., "Gleneagles", 26 Threadneedle Road, Salthill, Galway. **John G. McCarthy, B.C.L.,** 154 Ard-na-Mara, Malahide, Co. Dublin. **Joseph McDonough, B.C.L.,** Kurrajong, Knockroe, Delgany, Co. Wicklow. **Thomas McEvoy, B.C.L.,** 60B Barnhill, Wembley Park, Middlesex, England. **Paul McGennis, B.C.L.,** 67 Greentrees Road, Terenure, Dublin 6. **Jarlath McInerney, B.A., LL.B.,** Church Street, Gort, Co. Galway. **Gerard McKinney, B.C.L.,** 1 Glendown Close, Glendown Estate, Dublin 12.

Monica M. E. Nally, B.A., 28 St. Catherine's Park, Glenageary, Co. Dublin. **John Nolan, B.C.L.,** Carne, Belmullet, Co. Mayo. **Michael O'Brien, Law Clerk,** 157 Ardmore Park, Bray, Co. Wicklow. **Daniel O'Connell, B.C.L.,** 60B Barnhill, Wembley Park, Middlesex, HA9, England. **Catherine O'Connor, B.C.L.,** 4 Rugby Road, Ranelagh, Dublin 6. **Emer O'Flynn, B.A.,** "Ounavarra", St. John's Park, Monkstown, Co. Dublin. **David Power, B.Comm.,** 19 Ardmeen Park, Blackrock, Co. Dublin. **Tracy Price, B.C.L.,** Dublin Road, Naas, Co. Kildare.

Marie Quirke, B.C.L., Ayle, Oola, Co. Tipperary. **John J. Reedy, B.A.,** Johns Mall, Birr, Co. Offaly. **Miriam Reynolds, B.Comm.,** Mount Carmel House, Dublin Road, Longford. **Catherine Rochford, B.S.Sc.,** Kilmannon, Bridgetown, Co. Wexford. **Ultan Stephenson, B.A.,** 8 Sydenham Road, Dundrum, Dublin 14. **Ronan Tierney, B.C.L.,** c/o Frank Lanigan, Court Place, Carlow. **Joseph Traynor, B.A.,** Golf Links Road, Blackrock, Co. Louth. **Martina Walsh, B.C.L.,** 10 Woburn Drive, Bishopstown, Cork. **Stanley G. Watson, B.C.L.,** 2 Albert House, 46 Princes Gate, London SW7 2QA, England.

Catherine Brooks, 1 of 3 recipients of the Patrick Oc'Connor Memorial Prize for best performance in Constitutional Law in the 1987 Final Examination — First Part, receiving her prize from the President, Mr. Tom Shaw.

PEOPLE & PLACES

Mark Cooney, Athlone, who received his Parchment on 19 May, with his parents, Patrick Cooney, T.D., and Brigid Cooney, and the President of the Law Society, Thomas D. Shaw. *(Photo: William Farrell, Longford News)*

Retirement Dinner for his Honour Judge Sean MacD. Fawsitt
Members of the North and East Cork Bar Association who attended the Dinner on 22 April, 1988, with his Honour Judge Sean MacD. Fawsitt, the longest serving Circuit Judge in the country, who has retired.

(Photo: G. O'Meara, Mallow)

*At the launching of the **Irish Centre for European Law** on 9 June, were Senator Mary Robinson, S.C., Director of the Centre, the Hon. Thomas F. O'Higgins, Judge of the Court of Justice of the EC, Chairman of the Board of Directors of the Centre, and Kieran Corrigan, Cooney Corrigan & Co., Chartered Accountants.*

*Attending the Annual Dinner of the **Medico-Legal Society** were (from left) Eamonn G. Hall, Solicitor, Patrick Kelly, Solicitor, Judge Gillian Hussey and Michael McDowell, S.C.*

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***Younger Members' Quiz Night** in Waterford in aid of Solicitors' Benevolent Association. From left: Cormac Aherne, Irish Permanent Building Society (Sponsors), Michael Buggy, Helen Doyle, Martin Crotty, Owen O'Mahony, John Hardiman, I.P.B.S., Michael Lanigan and Tony Teehan, I.P.B.S.*

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In the first instance queries should be directed to Dr. David Tomkin or Mr. Raymond Byrne, Dublin Business School, NIHE, Glasnevin, Dublin 9, (telephone 370077 Ext. 145 or 146), who would be pleased to discuss proposals further with those interested.

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Belfast/Dublin Solicitors' Football Match

A new annual event was inaugurated when the Dublin Solicitors' Bar Association organised a Soccer Match between Dublin solicitors and Belfast solicitors.

David McFarland, Chairman of the Belfast Solicitors' Association, was present and also played on the Team.

We are delighted to report that the Dublin solicitors, captained by Bill Jolley, won by 2 goals to 1, and have already accepted the challenge sent out by the Belfast solicitors for a return match in Belfast next season.

The DSBA Team.

Bill Jolley (second from left), Captain of the winning team, being presented with a plate by Michael Gilmartin, Managing Director of Legal & General Printers, with (from left), Terry Dixon, Chairman, Dublin Solicitors' Bar Association, Brian Stewart, Captain of the Belfast Solicitors' team, and David McFarland, Chairman of the Belfast Solicitors' Association.

Golfing News

Solicitors Golfing Society Captains Prize (Cyril Osbourne)

A total of 78 solicitors played in the Spring meeting of the Society held at Carlow Golf Club on Friday 20th May 1988. The results were as follows:

Captains Prize
Winner: Noel O'Mara 41 points (on back nine)
Runnerup: Richard Bennett 41 points
3rd place John O'Donnell 38 points

St. Patricks Plate (12 and under)
Winner: Patrick Caulfield 39 points
Runnerup: John Reidy 38 points

Veterans Cup
Winner: Cyril Coyle 38 points
Runnerup: Patrick O'Doherty 37 points

Prize for Handicaps 13 and over
Winner: Henry Lappin 37 points
Runnerup: Dermot Mahon 35 points (on back nine)

Prize for Players for over 30 miles from Carlow
Winner: David Alexander 37 points (on back nine)
First nine: Dennis McSweeney 22 points
Second nine: Brian Rigney 20 points

The Autumn meeting of the Society for which the Presidents Prize (Tom Shaw) will be played will be held at Mullingar Golf Club on Friday the 9th September 1988.

Richard Bennett
HON. SECRETARY

New Golfing Society

It is hoped to establish a Lawyers Golfing Society for Solicitors practicing in the Province of Connaught and Barristers practicing on the Midland and Western Circuits.

The inaugural Outing of this new Society will be held at Connemara Golf Club on Saturday 1st of October, 1988 and the Tee has been reserved from Noon to 2.30 p.m. Dinner will follow at the Rock Glen Hotel, Clifden.

Solicitors interested in joining the Society should contact either:- William J. Kennedy, Solicitor, Mary Street, Galway. Tel. No.: (091) 62060, Joseph Caulfield, Solicitor, Castlerea, Co. Roscommon. Tel. No.: (0907) 20008, or Michael Keane, Solicitor, Claremorris, Co. Mayo. Tel. No.: (094) 71208.

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Dublin 7.

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COMMITTEE NEWS

The Professional Purposes Committee.

The Professional Purposes or Privileges Committee is set up under the Regulations of the Council and its mandate is described as follows: "The Privileges Committee should report to the Council on matters affecting the duties and rights of solicitors and may in case of urgency take such actions as may appear necessary without reporting to the Council".

Safety Valve

The Committee is basically an essential safety valve for the profession. Solicitors can come to the Professional Purposes Committee and air their differences and grievances as well as their problems (with the clear knowledge that there is no overt disciplinary element involved). The Committee frequently solves delicate problems concerning conduct, ethics, practice, costs, and issues directives and opinions, which are invariably accepted by the solicitors concerned. Members of the Committee are concerned with understanding the problems which confront solicitors while at the same time making a positive contribution to the good government of the profession by maintaining traditionally accepted standards of professional conduct. The Committee is also concerned of course to keep abreast of changes which are taking place in society generally in the age of technology.

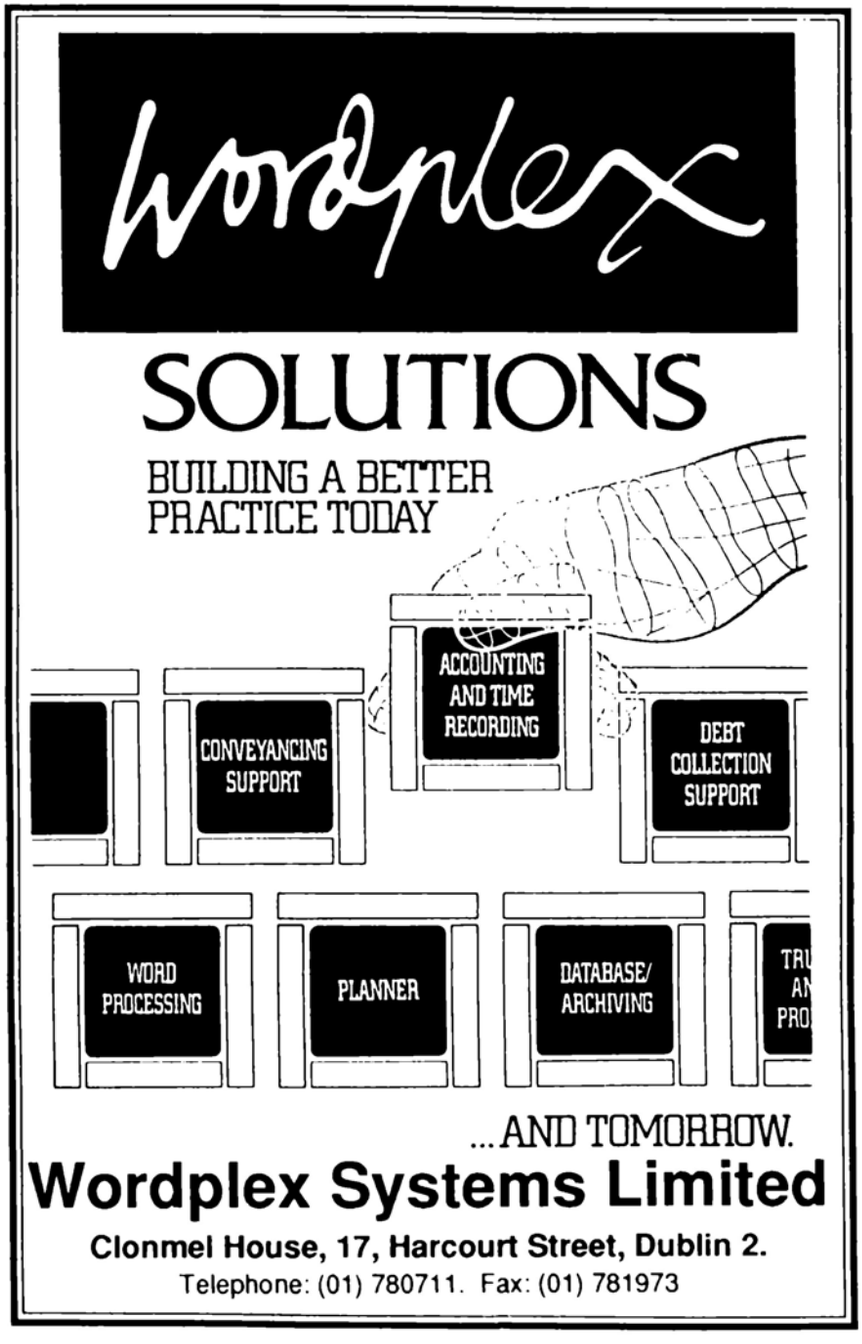
Standards of Conduct

Because of the unique relationship which exists between solicitors and their clients and the wide range of complex subjects covered in this relationship there is a great dependence by members of the public on their solicitors. Basically the client expects the solicitor to "keep him right" in a situation where the solicitor is very much better informed than the client. This imbalance of information and knowledge is corrected to a certain extent by the imposition of a set of standards of conduct and it is the task of the Professional Purposes Committee to ensure that these standards are monitored and maintained throughout the profession for the benefit both of the profession and public.

Work of the Committee

The Committee deals on a regular basis with a wide range of subjects, such as breaches of undertakings, arbitrations, failure to reply to correspondence, failure to hand over files, acrimonious severing of partnerships, activities of unqualified persons, advertising breaches, practitioners' difficulties with Building Societies and Banks, and many other items of intense interest to practitioners in the daily conduct of their business.

The Committee is also concerned that solicitors should be given the tools necessary to maintain high standards of conduct and to this end has been the intitiating Committee in relation to the issue of:-

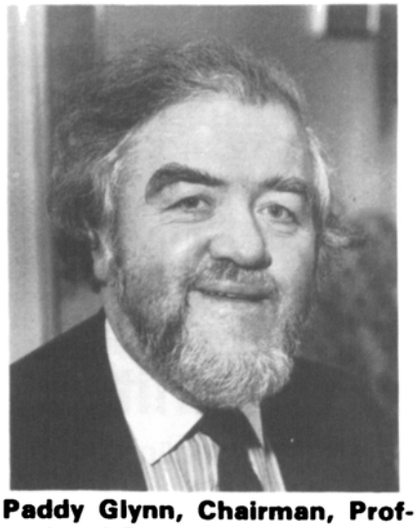


a. A booklet on the Administration of Estates;
b. A Guide to Professional Remuneration;
c. A Code of Conduct for the profession.

In recent years the Committee has prosecuted unqualified persons who pose as solicitors or attempt to act as solicitors. The Committee has also been instrumental in preventing builders from making exclusive arrangements requiring clients of the builder to use the builder's solicitors in return for "free legal services", and has also dealt with a problem where certain Building Society Managers appeared to be diverting business to solicitors of their choice. It has been effective in curtailing the activies of the so called "accident claims consultants" by maintaining regular contact with Hospital Administrators to prevent the advertising of these organisations on hospital bulletin boards, and supporting legal action in cases where these organisations have been demonstrably negligent.

The Committee has recently concluded negotiations with Access and Visa to enable members to avail of credit card facilities for payment of their costs.

Correspondence from Members
The Committee is always happy to receive correspondence from members of the profession about any subject which concerns them in their daily professional life whether that be one of the many items referred to above or some unusual situation which a practitioner has not encountered before and on which he or she requires particular advice.



Paddy Glynn, Chairman, Professional Purposes Committee.

The Members of the Committee under the Chairmanship of Paddy Glynn from Leahy & O'Sullivan in Limerick come from various parts of the country and from large and small practices and, therefore, are in very close contact on a day to day basis with the problems which assail the profession.

The Committee will attempt for the future to continue to be that essential "safety valve" referred to above and members of the profession are earnestly requested to avail of its services at the time that problems actually arise rather than having them resort to a fire brigade action when it is too late. They urge most particularly upon members that the courts should only be used in disputes between them as a last resort, when all other avenues have been explored. This is particularly so in circumstances where acrimony attends a partnership dissolution.

Younger Members Committee

At a recent meeting the Committee decided to review the question of a recommended minimum salary for newly qualified solicitors. In keeping with the Committee's concern for developments in London and abroad the Chairman was happy to report that following on the meeting in Kinsale of the joint legal education committees of the jurisdictions in these islands positive progress was made towards minimising the requirements for qualification as solicitors in the UK. It is hoped that this year's Soccer Blitz will take place on Saturday, 3 September, 1988 at the Law Society, Blackhall Place and we would be delighted for any support you can give in organising this annual event.

Justin McKenna,
Chairman.

Registrar's Committee

Introduction
The Registrar's Committee in response to a request from the President has decided to publish in this and future editions of the *Gazette* items which may be of interest to you, the members of the profession.

Despite the views expressed by some solicitors, we at the Registrars Committee, while endeavouring to deal with genuine complaints made by the public, strive to assist you, our colleagues. I speak for my entire Committee when I say that we are available to give assistance, guidance and direction to any solicitor who may feel he has a problem. Please do contact us either personally or through the Society.

Pat O'Connor.

The Committee
Mr. Pat O'Connor, Chairman of the Committee, practises in the family firm of P. O'Connor & Son at Swinford, Co. Mayo. He qualified in 1974.

Vice Chairman of the Committee, Mr. Edward McEllin, is the principal in the family firm of Patrick J. McEllin & Son, Courthouse Road, Claremorris, Co. Mayo. He qualified in 1977.

Ms. Barbara Dowling, Secretary to the Committee, deals with queries and complaints from the public and members of the profession. Ms. Dowling qualified in 1982 and worked in private practice before joining the Society in 1985.

Ms. Catherine Brennan deals with queries and complaints from the public and members of the profession. Ms. Brennan qualified in 1983 and worked in private practice before joining the Society in 1987.

What happens when a complaint is received by the society
The Complaints Section of the Society receives approximately 10 initial letters of complaint per day from both members of the public and the profession. Any letter which on the face of it discloses a complaint against a solicitor is immediately forwarded to that solicitor with a request that he furnish a report to the Society in the matter, within 10 days. Specific questions arising from the complainants letter are highlighted for reply by the solicitor. A standard letter of acknowledgement is sent to the complainant.

The Society endeavours to identify as soon as possible the

issues of conduct with which it can deal and advises the complainant of the limits on its powers. This is very important as very often complainants become confused between the Society's disciplinary powers and the powers of the courts to award compensation or redress. The complainant often alleges negligence. It can be difficult to assess whether or not negligence arises. However, it is necessary to attempt an assessment in the first instance so that complainants may be advised to consult an independent solicitor.

Upon receipt of the solicitor's report it is examined by one of the Law Society's solicitors and if it is deemed to be satisfactory, a copy is forwarded to the complainant and the appropriate and relevant sections highlighted for the complainant. If it is clear that the complaint is totally without foundation then the complainant is advised accordingly. If the solicitor fails to reply to the initial letter, a reminder is issued. If, after a further seven days has elapsed no response is forthcoming or, alternatively, if the reply received is not satisfactory in that it does not adequately deal with the complaint made, the file is referred to the Registrar's Committee of the Society for further investigation.

When a complaint is referred to the Registrar's Committee, the complainant is automatically notified and a standard letter is sent to the solicitor by registered post requesting him to attend before the Committee for interview.

What happens when a complaint is referred to the Registrar's Committee

When a complaint is referred to the Registrar's Committee it must await the next Meeting before it can be considered. This can cause a time delay of two to eight weeks. Meetings of the Registrar's Committee are held on a monthly basis in Blackhall Place. The agenda is divided into four main headings:-

(a) Items for directions
(b) Items for discussion
(c) Non contentious matters
(d) Solicitors requested to attend

An analysis of each complaint is placed before the Registrar's Committee together with copies of all relevant correspondence from both the complainant and the solicitor. The solicitor is requested to attend before the Committee and is thereby given a further opportunity by the Society to put forward his case and to deal with the allegations that have been made. This also ensures that the Committee does not get bogged down in correspondence. The complainant is not generally required to attend before the Committee. However, in the past the Committee has, when it was deemed necessary, interviewed complainants in cases where there were serious allegations of misconduct and matters of serious public concern.

Pat O'Connor, Chairman, Registrar's Committee.

The Registrar's Committee will not adjourn matters at the request of the solicitor unless he can show good cause. When summoned the solicitor is formally notified that should he fail to attend before the Committee the matter may be dealt with in his absence. This refusal to grant adjournments, unless the solicitor can show good cause, enables complaints to be dealt with more expeditiously and avoids clogging the agenda which would result in the entire procedure becoming slow and cumbersome.

Having considered the correspondence before it and the account put forward by the solicitor, the Committee must decide whether or not the solicitor's conduct in the matter warrants a referral to the Disciplinary Committee of the High Court.

The Registrar's Committee has endeavoured not only to follow the punitive path of referrals to the Disciplinary Committee of the High Court but has attempted to act as a remedial body. In such cases the Committee has proposed immediate solutions and has suggested that solicitors take certain actions to resolve a problem speedily and efficiently. The Committee is at all times conscious that the complainant is not only seeking "justice" but also a practical solution to the difficulties that he has encountered in dealing with his solicitor.

Where the Registrar's Committee is of the opinion that a matter warrants referral to the Disciplinary Committee of the High Court, the solicitor and the complainant will be notified of the decision in writing by the Secretary of the Committee. All further steps in the matter are then taken by the Society's solicitor, Ms. Anna Hegarty, who prepares the society's application for an inquiry into the alleged misconduct of the solicitor.

CARR COMMUNICATIONS COURSE

The Dublin Solicitors' Bar Association has held two very successful courses in Carr Communications, Dundrum, Co. Dublin.

The Association proposes to hold a third course in October of this year. The places on the course are limited to a total of 12. Participation is open to all members of the profession — it is not limited to DSBA members.

The course lasts for 2 days and teaches the participants how to effectively deal with the media.

The cost of the course is £200 per person. Applications for places should be sent to The President, The Dublin Solicitors' Bar Association, c/o 20 Northumberland Road, Dublin 4.

YOUNGER MEMBERS COMMITTEE SOCCER BLITZ MIXED COMPETITION

Venue: **The Law Society, Blackhall Place, Dublin 7.**

Date: **Saturday, 3 September, 1988**

The Soccer Competition will be followed by live music.

If you require further details/application forms, please contact:
Sandra Fisher, The Law Society, Blackhall Place, Dublin 7. Tel. (01) 710711.
or John Larkin, A. & L. Goodbody, Solicitors, 1 Earlsfort Centre, Lr. Hatch Street, Dublin 2. Tel. (01) 613311.

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LAW AGENCY

Training in Advocacy — how it works

by **Dudley Potter, Solicitor**
Joint Course Co-Ordinator

The third residential Advocacy Course run as part of the Society's Continuing Legal Educational Programme will be held from the 23rd to 25th September, 1988, at Bellinter House, Navan. Like the first held in January, 1987, the second course held in September, 1987, was enthusiastically received by the participants whose number increased to 33 from the 24 on the first course.

The teaching team for the third course will be:-

Former High Court Judge Herbert McWilliam
Former District Justice Wm. A. Tormey
Barry Donoghue
Robert J. Egar
Michael E. Hanahoe
John Hay
Garrett Sheehan and
Michael Stains, solicitors, while Professor John Sonsteng of the National Institute of Trial Advocacy in the U.S. will be a guest consultant.

The essential component of the approach adopted are:-

LEARNING BY DOING
INDIVIDUALISED CRITIQUE
VIDEO REVIEW AND CRITIQUE
TEAM TEACHING
LEARNING BY OBSERVING
THE "BUILDING BLOCK" APPROACH

There is little or no lecturing as such. Each phase of the training course is preceded by a five or, at most, ten minutes introduction to a video-taped demonstration of the aspect or technique to be taught, whether it be a bail application, a plea in litigation, examination-in-chief, cross-examination, submission or a complete case. For most of their time participants are engaged, in groups of twelve, in carrying out each of these functions in role-playing situations with three consultants contributing to the diagnosis of their performances and enhancement of their skills. As each participant finishes his role-play — which for most of the course will last only a very few minutes at a time — he is given an objective critique of his performance by the teaching team. In that way every member of the group present gets the benefit of the critique with its component of a demonstration by the consultant of how to do it better. The effect is one of rapid and manifest improvement as the participants have the opportunity for repeated attempts at performance of the different elements that constitute the course. In the later stages the different "building blocks" are put together and the participants conduct complete cases.

Throughout the course each performance is recorded on video by a trained cameraman and there are several opportunities for each participant to see himself in action and to receive a private critique of his performance by one of the consultants. Most participants find this feature particularly helpful and indeed it is difficult for even the most gifted critic to match the impact of seeing oneself in action. These sessions are also reinforced in that participants can see themselves improving as the course progresses.

The Effect

A post-course review of how things worked out in practice, carried out after the September, 1987 course, brought responses from two-thirds of the participants. To a question "Are you performing better in the District Court" over 80% gave a confidential "Yes" and the balance "about the same". In accompanying comment an increase in confidence featured most often. Examples include: "I am not afraid to do District Court work". "I feel confident about tackling anything — I have the basics now — it is just a question of practice".

Asked whether their performance in civil cases had improved as a result of attending the course almost all answered positively. Comments included: "It could only improve as I never had the courage to run a civil case before the course"; "A sense of confidence and having a definite plan of action to approach cases"; Yes — I have won my first full civil case"; "Cross examination no longer terrifies me"; "My skills in court have increased and improved enormously".

It is now clear that the perceived benefits of training in advocacy transfer effectively to the actual arena. Perhaps it is not surprising that four out of five say they have already recommended the course to their colleagues.

These results will make pleasant reading for the consultants preparing for the next residential course to be held in September and should encourage practitioners not to miss this training opportunity, available only once annually.

Technology Committee News

The Technology Committee will be known to you as the Committee which in recent years has:

(a) brought to you an Annual Exhibition to provide you with the opportunity of seeing at first hand the latest technological developments;
(b) provided you with a Hand Book to assist you in the purchase of your own Computer System;
(c) arranged for you, more recently, the purchase of a FAX Machine at £1,000.00 less than the then current market price.

The Committee undertakes many other projects on your behalf. In recent times it attempted to evolve a small project for the third level Institutions in order to get them thinking about technology in the legal world and how it can advance the solicitors office and the State offices (Courts, Registry of Deeds, etc.) that solicitors deal with. We have regular contacts with these State offices, the results of which will become known to the profession when changes come about. These changes may be relatively small and invaluable such as the change in document presentation now permitted in the Registry of Deeds and Probate Offices. Other developments may have much more profound significance such as the discussions going on at present with the Land Registry to assist them in advancing themselves towards full computerisation to enable, *inter alia,* solicitors to get direct on-line access to the Land Registry in a similar fashion to that presently available in the Company's Office.

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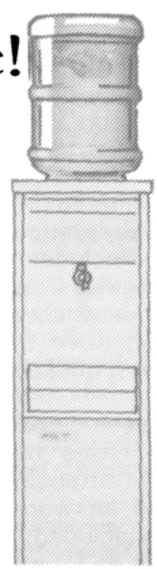

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Book Review

Essays in Memory of Alexis FitzGerald edited by Patrick Lynch and James Meenan. (Dublin: The Incorporated Law Society of Ireland, 1988. x, 249pp. £15.99).

This Book published by the Incorporated Law Society consists of 13 Essays covering a wide range of subjects, which reflect the deep thought, studies, interests and activities of the late Alexis FitzGerald so that the book should appeal not only to the legal profession but to the public generally.

The introductory essay is by Ronan Fanning, Professor of Modern History in U.C.D. His essay is a biographical one, in which he states that the major academic interests of Alexis FitzGerald, apart from economics, were in history, literature and political philosophy which extended in later life into theology and biblical studies. Professor Fanning postulates that if Alexis had been in a position to pursue an academic career it might not have been in law. That may well be true, but I do not think his colleagues would agree that Alexis held the conviction that "the law was no more than a way to make a living". Alexis was a perfectionist and, having qualified as a solicitor he was determined to excel in the field of law which explains why he became a leading, if not, the leading solicitor in Dublin, contributing a series of long articles to the *Irish Jurist* on Company Law. My only criticism of this book of Essays is the absence of an essay on Alexis, as a lawyer, the profession to which he gave the greater part of his life. He had a deep conviction that solicitors should provide a service to all clients, whether profitable or unprofitable.

The late James Meenan, the former Professor of Political Economy, and Patrick Lynch, now Professor Emeritus of Political Economy, University College, Dublin, came to know Alexis while studying economics and they became lifelong friends. Professor Meenan writes of Alexis from their first meeting in 1937 when Alexis had taken his degree in economics and traces the development of Alexis's thought in relation to economics and politics, in which he lectured for 20 years in U.C.D. The essay by Professor Lynch explains the way he and Alexis collaborated in giving a distinctively keynesian flavour to the economic policies of the first Inter-Party Government. This essay is also extremely interesting on the controversial subject of the then Taoiseach, Mr. John Costello's announcement in Ottawa in 1948 of the intention of the Government to declare a Republic.

The late Desmond Williams, the former Professor of Modern History in U.C.D., shows a deep insight into the character of Alexis and makes an accurate analysis and assessment of Alexis's beliefs and thought and their influence over his wide interests and activities and concludes by saying, "he was above all a just man".

There are also interesting contributions by the President of U.C.D, Professor Patrick Masterson, entitled "Arguing from Intelligibility to God" and by Professor Enda McDonagh on politics and christology. Professor McDonagh quotes an amusing quip in a postscript to a letter he received from Alexis FitzGerald in 1981, when acting as adviser to the then Taoiseach, which reads "I am, disgracefully, more interested in the problems of christology than I am in the grave political and economic problems facing our country"!

Of course, he in fact took a very deep interest in our economic problems, but this did not preclude his study of christology.

Dr. Conor Cruise-O'Brien writes on religion and nationalism in his usual readable style.

The former Chief Justice, Mr. Thomas F. O'Higgins, and Judge Declan Costello contribute essays on different aspects of the Constitution, which is nowadays such a controversial document.

In his role as a Senator, Alexis FitzGerald worked tirelessly to achieve the improvement of legislation so that the essay on the Role of the Seanad by Professor James Dooge is an important contribution to this book, as is Professor John Kelly's essay "Political Parties in the Dail".

Also in the politial sphere we have the essay by Dr. Garret FitzGerald on the Anglo-Irish Agreement to which when Taoiseach he gave top priority, while Alexis FitzGerald, he states had somewhat more concern for the economic problems of the country.

Included in the book are two contributions by Alexis FitzGerald himself. One essay on Irish Democracy was published in the *University Review* 1958, and the other on Eamon de Valera, whom he admired in many ways and held in great esteem, was published in *Studies* in 1975. Both essays stand the test of time.

An intimate friend, Judge Gerard Clarke, who I think it is true to say greatly influenced the thought of Alexis FitzGerald on theological, social and moral matters, writes on the Trial of St. Thomas More. Essays on legal trials can be "dull reading" but Judge Clarke who has made such a deep study of the life of this great man, whose trial was in many ways a turning point in the history of England, has written a most readable essay.

These Essays are a fitting tribute to this wonderful Christian personality, scholar, lawyer, and politician and the Law Society is to be congratulated on the publication.

A.D.

RECENT PUBLICATIONS FROM THE LAW SOCIETY

Essays in Memory of Alexis FitzGerald
edited by Patrick Lynch and James Meenan
Price: £15.00
plus £2.10 p. + p.

A Guide to Planning Legislation in the Republic of Ireland
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All replies will be forwarded directly to our client in the strictest confidence and candidates should indicate any firms to whom their applications should not be sent.

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Land Registry – Issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry, within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 25th day of July, 1988.

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

SCHEDULE OF REGISTERED OWNERS

Richard Chadwick, Birr Road, Nenagh, Co. Tipperary. Folio No.: 20685; Lands: (1) Nenagh North; (2) Nenagh North; Area: (1) 2a.0r.27p.; (2) 0a.1r.37p.; County: **TIPPERARY.**

Edward Shine, Folio No.: 2754; Lands: (1) Cloonown; (2) Cloonown; (3) Cloonown; (4) Cloonown; Area: (1) 6.563 acres; (2) 1.875 acres; (3) 12.106 acres; (4) 4.500 acres. County: **ROSCOMMON.**

John Kennedy, Woodbrook, Kilmaganny, Co. Kilkenny. Folio No.: 765 now closed to 7637F; Lands: Kilmaganny; Area: 1.125 hectares; County: **KILKENNY.**

Richard Gaul, Bricana, Gowran, Co. Kilkenny. Folio No.: 8288; Lands: Commons; Area: 7a.2r.31p.; County: **KILKENNY.**

Martin Brophy, Brown Street, Portlaw, Co. Waterford. Folio No.: 357A; Lands: Mountbolton; Area: 1a.3r.20p.; County: **WATERFORD.**

Luke & Anne Gaffney, The Bungalow, Morrisson's Avenue, Waterford; Folio No.: 589F; Lands: Lisduggan Big; Area: 0a.0r.9p.; County: **WATERFORD.**

Stephen McGowan, Kindlestown Lower, Greystones, Co. Wicklow. Folio No.: 10008; Lands: Kindlestown Lower; County: **WICKLOW.**

Quinlan Shea and Annie Shea, Allihies North, Allihies, Co. Cork. Folio No.: 15814; Lands: Allihies; Area: 26a.1r.37p.; County: **CORK.**

Maurice O'Connell, Lisleigh, Ballyclough, Mallow, Co. Cork. Folio No.: 20713; Lands: Lisleagh; Area: 96a.1r.35p.; County: **CORK.**

John Whelan, Sunnymount, O'Connell Ave., Limerick. Folio No.: 1199F; Lands: Cappaduff; Area: 0a.0r.23p.; County: **CLARE.**

Mary Patricia Rachel Greacen, Folio No.: 10958; Lands: Ardnagashel; Area: 21.903 acres; County: **CORK.**

Joseph Connolly, Illaun, Milltown, Tuam, Co. Galway. Folio No.: 775R; Lands: Illaun; Area: 8a.1r.20p.; County: **GALWAY.**

Peter Burke, Roseberry, Newbridge, Co. Kildare. Folio No.: 7875; Lands: (1) Rosberry; (2) Rosberry; (3) Rosberry; (4) Rosberry; Area: (1) 11a.2r.12p.; (2) 2a.0r.5p.; (3) 2a.1r.8p.; (4) 20a.2r.0p.; County: **KILDARE.**

John Grady, Inisheeny, Murrisk, Westport, Co. Mayo. Folio No.: 24199; Lands: (1) Island of Inishneeny; (2) Carrowkeel; Area: (1) 7a.1r.0p.; (2) 0a.1r.10p.; County: **MAYO.**

James Healy, Rathanure, Tullow, Co. Carlow. Folio No.: 7445F; Lands: Rathlyon; Area: 105a.2r.35p.; County: **CARLOW.**

Thomas McGovern (Jones), Bellavalley Upper, Glangevlin, Dowra, Co. Cavan. Folio No.: 2857; Lands: Bellavalley Upper; Area: 29a.0r.22p.; County: **CAVAN.**

Noreen Finn, 58 Lr. Cork Street, Mitchelstownn, Co. Cork. Folio No.: 26121; Lands: Curraheen; Area: 36a.1r.30p.; County: **CORK.**

James Collins, Cappa Castle, Sixmilebridge, Co. Clare. Folio No.: 26227; Lands: (1) Cappaghcastle (part); (2) Newpark; Area: (1) – (2) 9a.2r.0p.; County: **CLARE.**

George & Yvonne Porter, Ballincar, Co. Sligo; Folio No.: 20955; Lands: Ballincar; Area: 0a.1r.4p.; County: **SLIGO.**

William George Shannon, Lissanoohig, Skibbereen, Co. Cork. Folio No.: 1950 Rev.; Lands: Lissanoohig; Area: 76.645 acres; County: **CORK.**

Paul Ryan of Scragh, Killeen, Nenagh, Co. Tipperary. Folio No.: 34401; Lands: Sragh; Area: – ; County: **TIPPERARY.**

Patrick Murphy and Bridget Murphy of Ballygarvan, Gusseranne, Co. Wexford. Folio No.: 20441; Lands: Ballygarvan; Area: 52a.1r.17p.; County **WEXFORD.**

Thomas Davis. Folio No.: 5070; Lands: Derrynalicka; Area: 25a.3r.7p., together with the appurtenant rights of turbary situate at Ballyduneen, one in relation to 1a.2r.8p. and the other in relation to 8a.2r.33p., and a further right of turbary at Derrynalicka containing an area of 3a.0r.3p.; County: **CLARE.**

Bridget Farren of Templemoyle, Culdaff, Co. Donegal. Folio No.: 8395; Lands: Templemoyle; Area: 19a.0r.14p.; County **DONEGAL.**

Mark Holmes of Cornakill, Tullyco, Cootehill, Co. Cavan. Folio No.: 2973; Lands: Tullavally (Part); Area: 19a.1r.30p.; County **CAVAN.**

William Fitzpatrick, Graigue Lodge, Graigue Beg, Clohamon, Ferns, Co. Wexford. Folio No.: 11471; Lands: Knockanure; Area: 160a.0r.30p.; County: **WEXFORD.**

Frank Grieve of Kiltoy, Letterkenny, Co. Donegal. Folio No.: 10407F; Lands: (1) Kiltoy; (2) Kiltoy; Area: (1) 0.550 a; (2) 0.009a; County: **DONEGAL.**

David Daly of Ballynacoska, Castletown-Geoghegan, Co. Westmeath. Folio No.: 2398; Lands: Kippinduff; Area: 4a.0r.0p.; County: **WESTMEATH.**

John Beatty, 52 Seapark Drive, Clontarf. Folio No.: 4236L; Lands: the property situate on the south side of Seapark Drive in the Parish and District of Clontarf; County: **DUBLIN.**

David Hewson of Attyflin, Patrickswell, Co. Limerick. Folio No.: 1326; Lands: Attyflin; Area: 335a.2r.7p.; County: **LIMERICK.**

Denis Fay of Faircross, Newbridge, Co. Kildare. Folio No.: (1) 4107, (2) 18307; Lands: (1) Ballykilleen; (2) Ballykilleen; Ballykilleen; Area: (1) 5a.0r.15p.; (2) 42a.2r.14p.; 109a.2r.27p.; County **OFFALY.**

Timothy & Kathleen McAuliffe of Caherbarnagh, Rathmore, Co. Kerry. Folio No.: 6107; Lands: Caherbarnagh; Area: 20a.0r.0p.; County: **CORK.**

Stephen Gavin of 15 St. Ita's Road, Glasnevin, Dublin 9. Folio No.: 201L; Lands: Property known as 15 St. Ita's Road, in the Parish of St. George and District of Glasnevin; County: **DUBLIN.**

John Francis McNamee of Clomelly, Ballinamuck, Co. Longford. Folio No.: 9343; Lands: (1) Cloomelly, (2) Cloomelly; Area: (1) 19a.1r.13p., (2) 8a.3r.21p.; County: **LONGFORD.**

Martha Carroll of Ballinaslee, Attanagh, Co. Kilkenny. Folio Nos.: (1) 5677, (2) 15549; Lands: (1) Ballynalee, (2) Ballynalee; Area: (1) 4a.2r.9p., (2) –; County: **KILKENNY.**

Damien M. Murphy of 57 Merrion Square, Dublin 2. Folio No.: 11523L; Lands: East side of Hollyhill Road; Area: –; County: **CORK.**

Miscellaneous

SEVEN DAY PUBLICANS LICENCE REQUIRED. Details to Mannion Aird & Co., Solicitors, Clifden, Co. Galway. Tel. (095) 21411, Fax. (095) 21756.

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DUBLIN SOLICITORS wish to amalgamate with or take over practice of solicitor contemplating retirement. Box: No. 61.

Administration of Estates

In the administration of the Estate of Mrs. Jane Doran Letitia Gorman. Any person having any claim or any descendant of the above, please contact Actons, Kingram House, Kingram Place, Dublin 2.

Landlord and Tenant (Ground Rents) Acts 1967—1984

In the matter of the Landlord and Tenant (Ground Rents) Acts 1967—1984, Nancy Irvine, Applicant; Saunders Estate, Respondents.

WHEREAS the Applicant has applied to me for an Order declaring that she is entitled to acquire the Fee Simple Interest in All That and Those the Licensed Premises situate Street, Borrisokane, in the Townland of Shesheraghmore, Barony of Lower Ormond and County of Tipperary, now and for upwards of Forty (40) years last in the occupation of the Applicant and her Predecessors in Title under a Contract of Tenancy from the Saunders Estate and for such further or other Order, as maybe necessary in the matter, I, HEREBY GIVE NOTICE that I will sit in the Courthouse, Nenagh, on the 29th day of September, 1988, at 11.30a.m. to hear said Application and any submissions by any interested Parties in relation thereto.

Signed: PATRICK J. McCORMACK,
County Registrar.

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Change of Address/Practice

PLEASE NOTE that as and from Monday, 6th June, 1988, Michael Reynolds, Solicitor, shall be practising under the new title of Michael Reynolds & Co., Solicitors. Their new address shall be 201 North Circular Road (basement), Dublin 7, Tel. No. 388313.

MR. MICHAEL MARTIN, Solicitor, who carried on business under the firm name of Michael Martin, Solicitors, at St. Andrew's House, 28/30 Exchequer Street, Dublin 2, intimates that with effect from the 31st March, 1988, the partnership between himself, Mr. John Wood and Mr. Gerald Kean, has been dissolved.

Mr. Martin intimates that he is continuing practice as a sole practitioner with effect from the 1st April, 1988 at St. Andrew's House, 28/30 Exchequer Street, Dublin 2, Telephone (01) 715575, and at Main Street, Rathcoole, Co. Dublin, Telephone (01) 580380.

Mr. Kean is continuing as a sole practitioner at St. Andrew's House, 28/30 Exchequer Street, Dublin 2, Telephone (01) 715544 and 715107.

Lost Wills

SHERRY, Kathleen, late of 8 Brownley Street, Chorley, and High Street, Graiguenamanagh, Co. Kilkenny. Will any person having knowledge of a Will for the above deceased please contact Messrs. John M. Foley & Co., Solicitors, Bagenalstown, Co. Carlow.

BROPHY, Maureen, deceased, late of Rosecot, Brennanstown Road, Cabinteely, Co. Dublin. Will anyone knowing of a Will of the above named deceased who died on 25th November, 1987, please contact Augustus Cullen & Son, Solicitors, 7 Wentworth Place, Wicklow. Telephone number (0404) 67412.

MORAN, James P., deceased, late of 46 Lakeshore Drive, Renmore, County Galway. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 24th May, 1988, please contact Timothy J. C. O'Keeffe & Co., Solicitors. Abbey Street, Roscommon, County Roscommon. Telephone (0903) 26239.

McKAY, Geraldine, otherwise Catherine Geraldine, deceased, late of 51 Fassaugh Road, Cabra, Dublin and Holycross, Thurles, Co. Tipperary. Date of death, June, 1988. Information pertaining to the affairs of the deceased, or the making of a Will by the deceased, is sought by the next of kin. Will anyone having such information please contact Anne B. Rowland & Co., 17 Upper Ormond Quay, Dublin 7.

COLE, Josephine, deceased, late of 27 Monck Place, Phibsboro, Dublin 7. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 22nd December, 1987, please contact Messrs. Patrick G. Colfer & Company, Solicitors, Unit 46A, Donaghmede Shopping Centre, Dublin 13.

FLYNN, James (otherwise Patrick James), deceased, late of 3 Duffcarrick, Ardmore, Co. Waterford. Will anyone having knowledge of the whereabouts of the Will of the abovenamed deceased who died on 12th April, 1988, please contact Caroline Bowen Walsh, Solicitor, 19 Washington Street, Cork, Tel. (021) 277330.

State of Bahrain
Ministry of Works, Power & Water

The Ministry of Works, Power & Water, State of Bahrain (Arabian Gulf) is responsible for electricity, water supply, drainage and sewerage, roads and various types of public building projects. A small highly professional team has been established as the Central Planning Unit in the office of the Minister to coordinate plans and to design systems to monitor implementation and associated activities within these areas.
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The successful applicant should hold a good Degree, with between 5 and 10 years experience of a general and commercial nature. Experience in the legal aspects of the Construction Industry and/or public authorities would be an asset.

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INCORPORATED LAW SOCIETY OF IRELAND

Vol. 82 No. 7 September 1988

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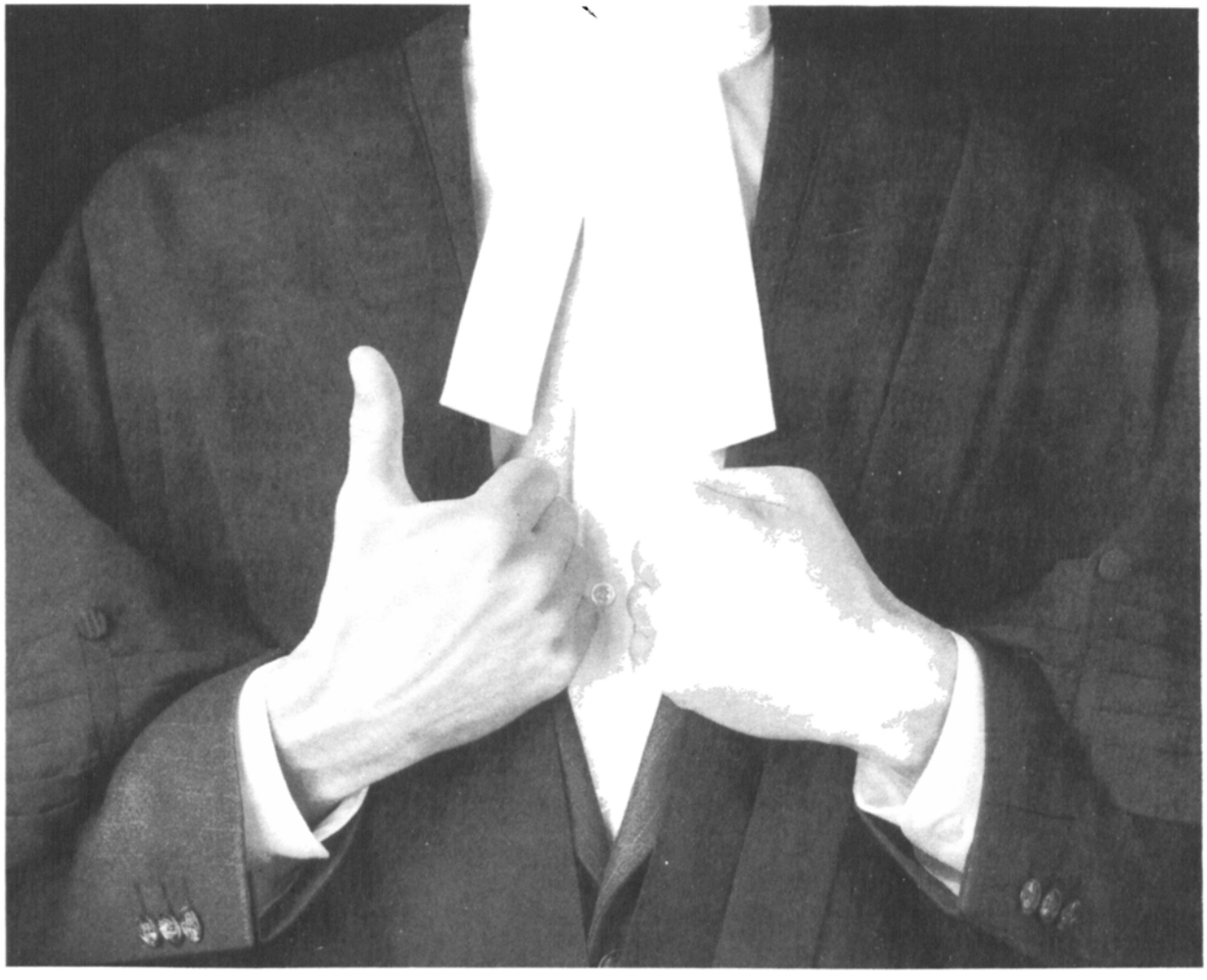
- Taxation Aspects of Forestry Investment
- Housing Finance



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GAZETTE
INCORPORATED LAW SOCIETY OF IRELAND
Vol. 82 No. 7 September 1988

Viewpoint

Civil Legal Aid

The Report of the Civil Legal Aid Board for 1986 makes more than unusually melancholy reading. As in their earlier Reports the Board draws attention to the delay in establishing the scheme on a statutory basis — draft legislation is on the way we are told — to the overwhelming emphasis on family law cases resulting in the virtual exclusion of all other areas of law from the Board's operation and to the problems created by the Public Service embargo.

The most disappointing aspect of the Report is that the planned establishment of Law Centres in Dundalk, Letterkenny, Portlaoise and Castlebar has been postponed following a Government decision to shelve the projects. Each of these sizeable towns is 50 miles or more from the nearest Law Centre and the provision of services on a part-time basis in these towns merely results in an inadequate service to their inhabitants while diluting the service available at other full-time centres.

It is even more worrying to note that the Centres in Tralee, Athlone and Tallaght and the second Cork Centre which have been financed under the Funds of Suitors Acts are not guaranteed to be funded after the end of 1989, by which time their source of funding will have dried up. While the pessimism of the Report is clearly justified, it should not hide the valuable work being done under most unsatisfactory conditions by the Board's dedicated staff. In the year under review, 1,939 cases were taken to Court and there were 9,564 incidents on which advice was given, largely in the difficult and time consuming area of family law. □

Bucking the System

Much has been written about the recent *Hanrahan -v- Merck Sharpe & Dohme* case, much of it portraying the Plaintiff as a David fighting not only the Goliath of the Defendants but also 'the System'. What has received far less publicity — perhaps because it clouds the image of Mr. Hanrahan as an individual fighting against overwhelming odds, or a possible reluctance on the part of the media to portray lawyers as anything other than money-grabbing — is the fact that the case could not have been taken and fought to its successful conclusion if solicitors and counsel for the Plaintiff had not been prepared to undertake the case for him on a largely speculative basis.

In truth 'the system', that is the traditional willingness of lawyers to undertake litigation on behalf of individuals who do not have the resources to pay the cost that will be incurred on the individual's behalf, has been shown to work in this case in the highest degree. The Counsel involved must have passed up many lucrative briefs during the 47 days that the case was at hearing in the High Court while the commitment of time and effort by the firm of solicitors concerned, relatively modest in size by current Dublin standards, must have put considerable strain on its day to day operation.

It is because solicitors and barristers have been prepared to take on litigation for people of modest means, relying largely on the hope of success with consequent payment of costs by the losing Defendant, that the great majority of personal injury cases in particular have been brought to our Courts. In a country which clearly cannot afford a comprehensive Civil Legal Aid Scheme the continuance of this practice is obviously essential.

Concern has been expressed by the Chairman of the Bar Council that the proposed curtailment of the number of Counsel in personal injury cases may make it very

Contd. on page 207.

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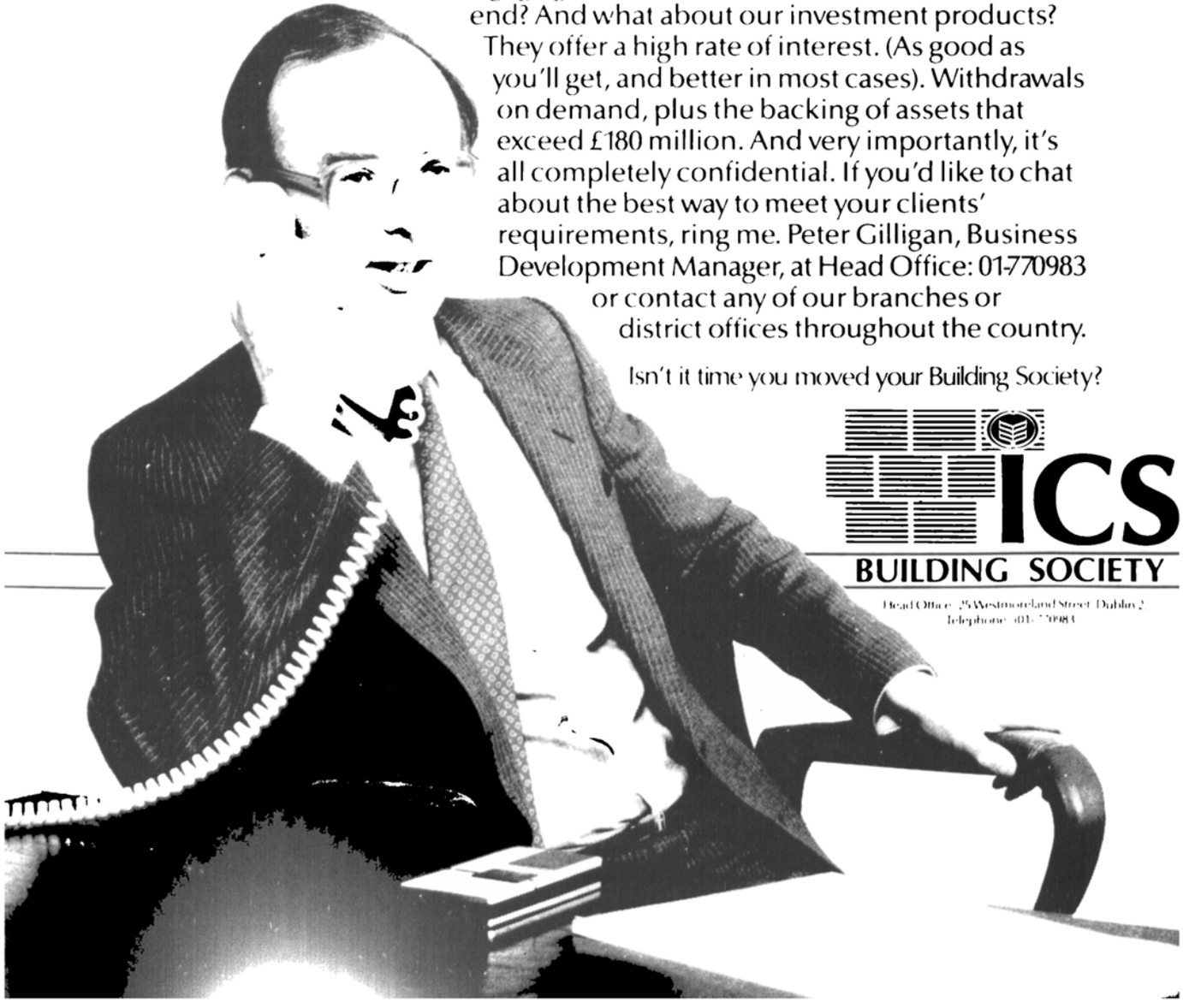

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Taxation Aspects of Forestry Investment

Throughout the greater part of this century, timber has been identified as a strategic resource meriting Government incentives. Ireland suffers a serious shortage of reserves of growing timber with less than 6% of our land area under forest. The average for EEC countries is 20%. In Ireland we produce less than 10% of our timber needs from our own resources. The position in Britain is very similar with, again, 90% of demand being met from imports.

The pattern is repeated, although less dramatically, in the EEC in general which satisfies only half of its timber requirements from its own reserves. Worldwide, industry projections of demand far exceed supply and it is argued that there is a strong case for further investment.

The logic of investing in Irish forestry is particularly compelling. In Scandinavian countries Sitka Spruce can generally achieve growth rates of 4 cubic metres per annum per hectare. In Britain this rises to between 11 and 14 cubic metres, while in Ireland the annual growth rate is a staggering 20 to 24 cubic metres.

In order to encourage investment in Irish forestry, profits from commercially managed woodlands have been exempt from taxes since 1969. There are also significant capital acquisitions tax incentives. In addition, there are very valuable State and EEC grants available to the private forestry developer.[1]

This article discusses the tax planning aspects of an investment in forestry and looks at some particularly tax effective arrangements that can be implemented.

by
Michael F. O'Reilly
Tax Consultant

Investor Profile

The concept of private forestry investment in Ireland is still relatively new as this area has been, predominantly, the exclusive domain of the Forestry and Wildlife Service. Recent years have seen the emergence of a number of private forestry management companies and a growing awareness of the attractiveness of private forestry investment.

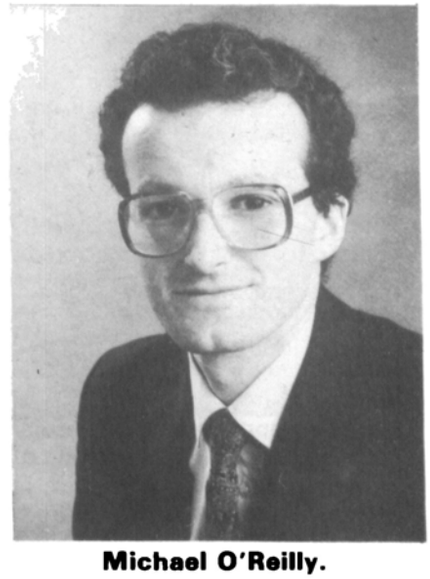
Private investors in forestry range from investment Institutions (such as Irish Life and Allied Irish Investment Bank) to private individuals. It is such private individuals that this article is primarily concerned with. Some may have land of their own which they wish to plant, perhaps to enhance its amenity value, but generally they will see forestry as a long-term stable investment with considerable upside potential. Forestry should be viewed as a long term proposition (a) because of the length of time it takes for the asset to mature (although there are increasing signs of a market in semi-mature forest) and (b) although in the long term returns from forestry are good and have outperformed equities over lengthy periods, they do not compare favourably with the returns that are available from time to time from short-term investments such as Managed Funds, Insurance Linked Bonds, etc. Of course Black Monday may have changed that particular view.

The profile of the typical private individual investor might, therefore, be a self-employed professional who sees forestry either as a means of augmenting his pension arrangements or as a tax effective means of providing for next generation inheritances, or both.

The Tax Exemption

Profits realised from the occupation of woodlands in the State which are managed on a commercial basis, with a view to the realisation of profits, are exempt from income tax.[2] It is questionable, however, whether the exemption provides any real incentive in view of the length of the life cycle of timber. In many ways, the position which obtained prior to 1969 was preferable. Until that year, profits from the occupation of woodland could be assessed either under Schedule B of the income tax code (now abolished) which gave rise to a fairly nominal amount of tax, or the taxpayer could elect to be taxable under the normal rules of Schedule D. If the election was made, the development costs of the forest could be treated as a tax "loss". The present position in the U.K. is the same as that which prevailed in Ireland until 1969, although it will change with effect from this year.

It is important to consider the precise extent of the Income Tax Exemption. This question has been examined in a number of decided cases, the most information of



Michael O'Reilly.

which is *Collins -v- Frazer.*[3] The facts of the case were that the taxpayer carried out seven separate processes which were the felling of trees, trimming off of branches, reducing the trees to lengths varying from 5 to 30 feet, further reducing to 5 ft. lengths, reducing these lengths into planks, converting the planks into thin boards and then, finally, making up the thin boards into boxes. McGarry J. held that profits from the first five processes were taxable as derived from the occupation of woodlands. Conversely, such profits would be exempt from taxation in Ireland.

If there is a lesson to be drawn from the case, it is probably that the occupier of woodlands should do as much as possible at the processing stage in order to maximise the tax exemption. It may even be worthwhile to enter into a joint venture arrangement with a saw-miller or other timber processer in order to ensure that the maximum benefit is gained from the tax exemption.

Forestry as a Trade

The preceding paragraphs looked at the income tax exemption provided by the Finance Act 1969. In 1979, relief for losses incurred "in the occupation of woodlands" was abolished.[4] There are reasons for thinking that the assumptions underlying this legislation are fundamentally wrong and that, in fact, forestry should be treated as a normal business, the expenses of which are allowable in the normal way. In other words, if forestry is a "trade", then forestry losses are normal trading losses which are allowable in the normal way.

Historically, occupation of land was not taxed as a normal business activity. Schedules A and B of the Income Tax Code provided a framework for raising tax on national profits. This was perfectly understandable in the context of the structure of land ownership in the U.K., consisting as it did of vast tenanted estates. In the modern context of owner-occupation and scientific farming methods, which have been applied with particular success to the production of timber, the national basis is distinctly unreal. And, indeed, Schedules A and B were abolished in Ireland by the Finance Act 1969.[5]

The idea still persists, however, that forestry activities do not constitute a trade. The proponents of that argument point to a U.K. case, *Coates -v-. Holker Estates Co.,*[6] in which it was held that an election to be taxable under Schedule D rather than Schedule B did not mean that the activity became a trade. The author suggests that this case can be distinguished under Irish law, on a number of counts, but principally on the grounds that Schedule B does not exist in Ireland and alternative bases of assessment do not exist here as they do in the U.K. Tax Code. Nowhere does the Irish legislation say that commercial forestry activities are not a trade in the technical sense; it is simply assumed that they are not because they were not in the past.

If this argument is correct, and commercial forestry activities are indeed a trade in the normal sense, the position then is that losses can be offset against other income. There would be other consequences for companies, such as availability of group relief and consortium relief.[7] Also, retirement relief for capital gains tax could be claimed if the forestry activity were a trade.[8] A test case is called for.

Creating a Trade

If one concedes, for the sake of argument, that commercial forestry activities are not a trade, one should then consider whether a forestry activity can be structured so as to bring it in some way within the Case 1 assesment rules, thereby making "loss" (development costs) relief available. One possibility might be for the landowner to form a management company and to arrange for the management company to be remunerated by reference to ultimate profits (while being obliged to bear all of the development costs at the outset). If properly structured, an arrangement of this nature should ensure that the company is taxable under Case 1 of Schedule D (in which case losses could be offset against other income of the company or surrendered by way of group relief). Such a company would not be entitled to the ultimate exemption from tax, however, unless the structure had been altered in the meantime so that the profits, when they arise, arise to the "occupier" of the land.

Pension Fund Linked Investment

A more interesting, and more practical, arrangement for private individual investors is a Pension Fund Linked Investment. This is a new concept developed by one of the new generation of forestry management companies, which has been devised with the objective of linking the inherent tax efficiency of pension funding with the tax advantages of forestry.

The arrangement could be described as a Pension Mortgage. On the assumption that the investor does not already have pension arrangements, or his existing arrangements are inadequate, he would enter into a contract for a Retirement Annuity Scheme. These pension plans permit 25% of the value of the fund to be taken as a tax-free lump sum on retirement.[9] The investor would then obtain a long-term loan which would provide for a single repayment, funded by the tax-free lump sum received on maturity of the pension.

The proceeds of the loan would be invested in forestry through a wholly owned private company. The company would lease the property to a forestry management company or, indeed, to another company controlled by the investor. The purpose of the lease is to ensure that the company's income is rental income, liable to tax under Case V of Schedule D. This being the case, income tax relief at full marginal rates will be available to the borrower on all interest payments. The tax analysis of the transaction is then as follows:

(i) The investor obtains a deduction for interest paid during the term of the loan, on the basis that the company is one of which he is a director and the income of which is chargeable to tax under Case V of Schedule D;[10]

(ii) The investor will receive tax relief for the retirement annuity premiums at his marginal income tax rate, up to 15% of his net relevant earnings.[11]

(iii) The company will not be liable to tax on its profits derived from the forestry operations and these profits can be distributed to the shareholders without any liability to tax.[12] A sale of the company, or a sale of the underlying assets, (as opposed to realising a forestry profit) may, however, give rise to a capital gains tax liability in respect of the increase in value over inflation during the period of ownership. Provided that the period of ownership is at least six years, the maximum rate of tax is 30%.

The major advantage of this investment strategy is the ability to offset interest payments against income for tax purposes. The plan provides tax relief on all outgoings, i.e. interest relief (unrestricted) and retirement annuity premiums (up to the normal 15% of net relevant earnings). At the same time, a tax-free lump sum is being accumulated to repay the borrowings and a tax-free investment is accumulating, which also offers significant inheritance tax advantages (see below).

Capital Acquisitions Tax

Woodlands including crops, trees and underwood growing on such land, are qualifying property for agricultural relief purposes. The effect of the relief is that gifts or inheritances of forestry land and woodlands attract relief which consists of the lesser of a deduction of £200,000 and 50% of the market value of the property. It is only the net amount, less a correspondingly reduced proportion of liabilities attaching to the gift or inheritance, that is aggregable for CAT purposes. In other words, the trees as well as the land qualify for relief, even though the value of the former may be many times the value of the latter. Moreover, it is not necessary that the donee or successor should be a "farmer" within the meaning of the CAT legislation in order to qualify for the agricultural relief in so far as the trees, but not the land, are concerned. This is a highly significant extension of the relief and it means that anyone can qualify. Furthermore, the relief, in so far as it relates to harvested trees, is not subject to a clawback as it is in the case of other agricultural property which is sold within a period of six years of the gift or inheritance.

What emerges, therfore, is a long-term estate planning opportunity. It should be remembered that availability of agricultural relief is not subject to the normal rules of aggregation, so that an individual can receive relief of up to £200,000 in respect of gifts or inheritances from any number of sources. When one bears in mind that the recipient need not be a farmer, the opportunity for significant CAT savings becomes evident.

Value Added Tax

Forestry is an exempt activity for Value Added Tax purposes for the simple reason that it is regarded for the purposes of the Value Added Tax legislation as a farming activity.[16] Exemption from Value Added Tax can be a disadvantageous status, however, because it follows that input tax cannot be reclaimed. This is particularly so in the case of forestry when outputs are unlikely to arise until the crop reaches maturity.

The Value Added Tax Exemption may be waived. In the case of a

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forestry activity, the ability to reclaim the value added tax inputs could be an important feature in the commercial viability of the enterprise. The input tax will consist of value added tax charged on equipment purchased or leased as well as fees and costs of management operations, all of which are liable to value added tax, albeit at the low rate in so far as they are agricultural services.[17] In the absence of a waiver of the exemption, the ultimate supply would attract the flat rate addition which is payable to unregistered farmers.[18]

It is apparent, however, that the flat rate addition is under pressure, having been reduced in the 1987 Finance Act, and a further reduction announced in this year's Budget speech. Investors might query the wisdom of relying on it being there in 25 or 30 years time.

Conclusion

It can certainly be argued that the introduction of the exemption for forestry profits in 1969 was a retrogressive step in promoting private forestry investment. For private individual investors it is often much more important that they obtain immediate tax relief for their outlay. Nonetheless, the level of returns shown by forestry in the past, coupled with a tax exemption, make for a particularly attractive form of investment.

The disadvantages of the immediate tax treatment can be overcome through an arrangement such as the pension linked investment method described above. This is a highly tax efficient arrangement, providing for tax relief on all outgoings while still obtaining the ultimate tax exemption on profits.

As capital acquisitions tax becomes progressively more severe, because of the post 1982 aggregation rules, forestry offers an unusual opportunity to significantly reduce taxable values.

FOOTNOTES

1 The grants are as much as 85% of establishment costs for farmers in certain "western package" areas and 70% for non-farmers. This is referred to as the EEC Assisted Western Scheme. See "Investing in Forestry" issued by the Minister for Fisheries and Forestry, 1984.
2 FA 1969, s.18 (2)(c).
3 (1969) 46 TC 143.
4 FA 1979, s.17(a).
5 FA 1969, Part (11).
6 40 TC 75.
7 Corporation Tax Act, 1976, s.116.
8 Capital Gains Tax Act, 1975, ss.26 & 27.
9 Income Tax Act, 1967, ss. 135 &136.
10 Finance Act 1974, s.34 and Finance Act 1978 s.8.
11 Supra.
12 Corporation Tax Act, 1976, s.11(6).
13 Capital Acquisitions Tax Act, 1976, s.19(1).
14 Capital Acquisitions Tax Act, 1976,s.19(7).
15 Capital Acquisitions Tax Act, 1976, s.19(5).
16 Value Added Tax Act, 1972, s.8(3).
17 Value Added Tax Act, 1972, para. v, sched. 5, Pt.1.
18 Value Added Tax Act, 1972, s.12 A.

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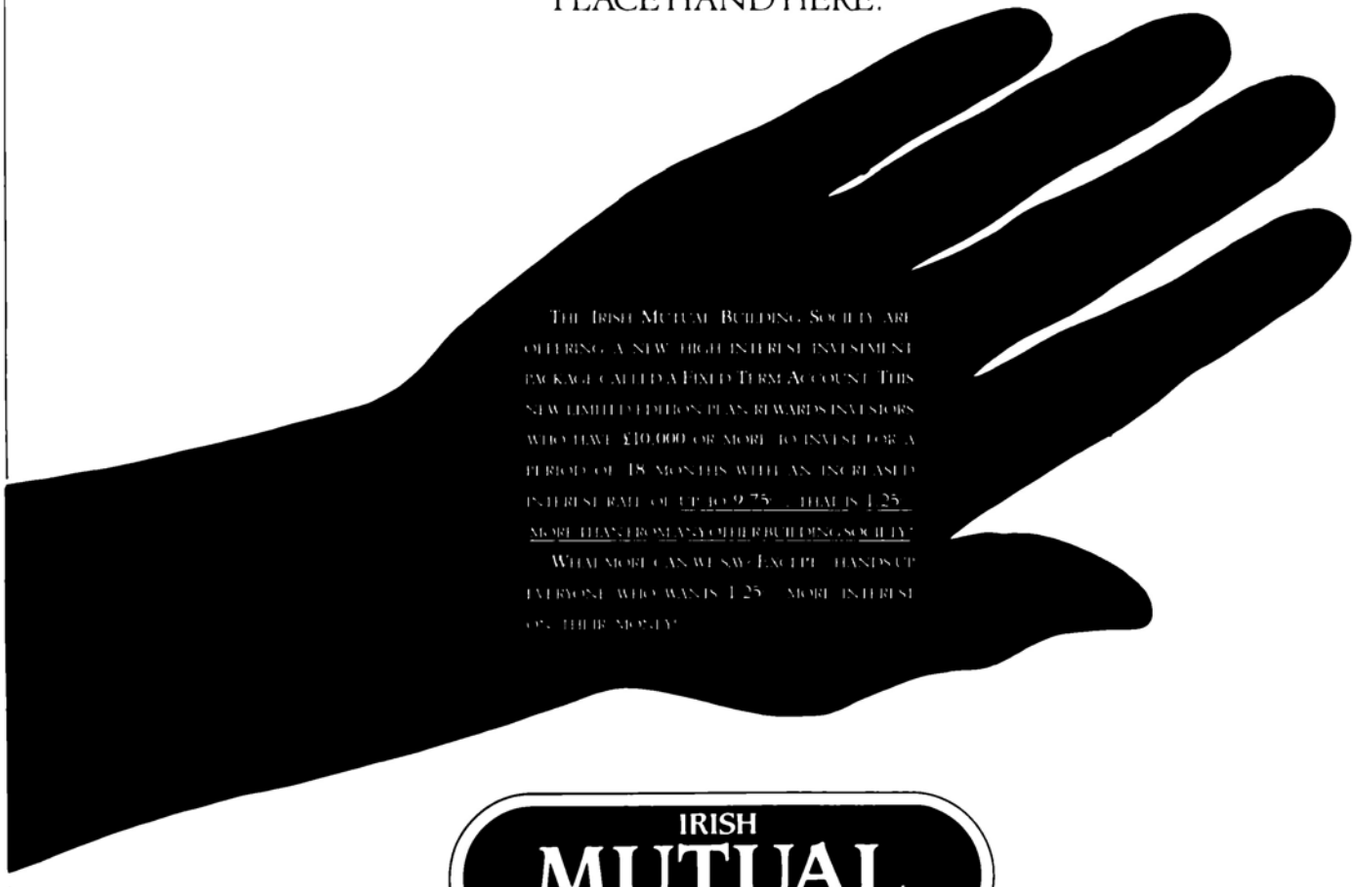

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From the President . . .

I have said in a number of speeches that our object as solicitors must be to provide legal services at a pace, cost and standard acceptable to the public.

The perception of our politicians is that while all three aims are important, the question of cost is paramount.

It is my view that while cost is a very fundamental factor, it is not the overriding one and the challenge facing us is to find a balance between all three requirements while still providing for the practitioner a fair days pay for a fair days work.

Should you cut corners to get a job done in a shorter time scale?

Should you give less time to a client because the fee does not warrant the detailed explanation of what is happening?

The experience in other countries seems to show that the cut price job is as unsatisfactory to the client as it is to the practitioner and is much more likely to give rise to claims at a later stage.

If our politicians are really serious in trying to help us to give a better service, then there are a number of improvements which could be made immediately. The capping of the times for claims under the Family Home Protection Act and Planning Permissions / Bye Law approvals come readily to mind.

All of us suffer the frustration and our clients suffer considerable cost of a lot of largely unnecessary work in sales and purchases to-day. However, with the standard of care set in the case of *Roche -v- Peilow* and the failure to update our legislation, there is little that the practitioner can do to lessen the work.

The Society is making submissions to the relevant Departments as to how the situation may be improved. Whether there is the will in Government to respond remains to be seen. In the meantime, the profession must continue to suffer under the present system which is taking longer and longer to close a simple sale. In fact, when I think about it, there is no longer such a thing as a simple sale!

Thomas D Shaw

THOMAS D. SHAW
President

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Annual Review of Irish Law 1987

Raymond Byrne and William Binchy

With a foreword by Mr Justice Brian Walsh

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From the President . . .

I have said in a number of speeches that our object as solicitors must be to provide legal services at a pace, cost and standard acceptable to the public.

The perception of our politicians is that while all three aims are important, the question of cost is paramount.

It is my view that while cost is a very fundamental factor, it is not the overriding one and the challenge facing us is to find a balance between all three requirements while still providing for the practitioner a fair days pay for a fair days work.

Should you cut corners to get a job done in a shorter time scale?

Should you give less time to a client because the fee does not warrant the detailed explanation of what is happening?

The experience in other countries seems to show that the cut price job is as unsatisfactory to the client as it is to the practitioner and is much more likely to give rise to claims at a later stage.

If our politicians are really serious in trying to help us to give a better service, then there are a number of improvements which could be made immediately. The capping of the times for claims under the Family Home Protection Act and Planning Permissions / Bye Law approvals come readily to mind.

All of us suffer the frustration and our clients suffer considerable cost of a lot of largely unnecessary work in sales and purchases to-day. However, with the standard of care set in the case of *Roche -v- Peilow* and the failure to update our legislation, there is little that the practitioner can do to lessen the work.

The Society is making submissions to the relevant Departments as to how the situation may be improved. Whether there is the will in Government to respond remains to be seen. In the meantime, the profession must continue to suffer under the present system which is taking longer and longer to close a simple sale. In fact, when I think about it, there is no longer such a thing as a simple sale!

Thomas D Shaw

THOMAS D. SHAW
President

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REPORT ON JOINT LEGAL EDUCATION CONFERENCE – KINSALE – MAY 1988.

Reciprocity of qualification was the most important topic at this years Conference of the Education Authorities of the four Law Societies in Great Britain and Ireland.

It is a topic of major interest to the profession, especially to our younger solicitors who wish to seek employment in other jurisdictions. It is of course also a subject being considered by the European Community but this Conference was concerned with the movement between England, Scotland, Ireland and the North of Ireland. There is, currently, a heavy demand for legal personnel in the south of England and many of our young solicitors have taken up legal work there but unfortunately, not as recognised and qualified solicitors in England and Wales.

The good news from the Conference is that the Education Committee of the Law Societies representing these four jurisdictions are all firmly of the view that there should be the maximum ease of movement and recognition of qualifications within these jurisdictions. And with the objective of achieving such ease of movement a special sub-Committee has been established to consider and report on the minimum requirements of each home country for a solicitor moving from any of the other jurisdictions.

It is intended to try and progress this as quickly as possible and independently of the European Community requirements (while bearing these requirements in mind). From the Irish standpoint we will be seeking to remove the major obstacles of (1) the compulsory Irish Examination (2) the statutory requirement for a three year apprenticeship. This will require certain changes in the Solicitors' Acts and, of course, the approval of the Society. The problems in the other jurisdiction are different and do not require Acts of Parliament but will require the approval of their respective Law Societies. Much remains to be done but hopefully a good start has been made.

Mutual Recognition of Qualification

At present solicitors from the Republic moving to the other jurisdictions have varying requirements to meet. The English Law Society gives little recognition to the Irish qualification and requires completion of the academic and vocational stages of education and training although Irish Law graduates are given exemption from certain subjects in the Common Professional Examination. All, however, must undergo a one year full-time course before sitting the Final Examination and serve under Articles of Clerkship – before or after the one year course – for a two year period. The Scottish Law Society on the other hand, applies the same requirements to English and Irish solicitors of three years' standing. They can be admitted immediately after passing the Society's examinations in Conveyancing, Evidence, Scots Private Law and Scots Criminal Law. The Northern Ireland Law Society normally requires service for one year in a solicitor's office in Northern Ireland as well as sitting certain subjects as determined from time to time by that jurisdiction.

What is now sought is agreement on basic examination requirements – not envisaged as extensive – for transfer within the four jurisdictions with little or no service requirement in the new jurisdiction for those of three years' standing. These service requirements are expected to cease in any event after the 1992 European Community Directive comes into force.

The Conference appointed a sub-Committee to advance the reciprocal arrangements under the general terms of promoting ease of movement with the specific tasks of identifying what areas of practice

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were different and recommending the appropriate examination or test along the lines of the aptitude test envisaged in the E.C. Directive.

Among the other topics discussed were :-

Skills Training, where the need for increasing emphasis was noted.

Continuing Legal Education, where the English delegates reported that their mandatory scheme was working well,

Aptitude Testing, where reports on the experiments being carried out in Dublin and Belfast were presented and,

Joint Training with the Bar and Education and Training for Change.

It was foreseen that all training courses would have to introduce modules on computers and computerisation; the use of computers within the education and training programmes would have to be kept in view constantly.

While not addressed at the meeting it should be mentioned that Mr. Maurice Curran, Senior Vice President, in an after-dinner address to the delegates, referred to the Society's desire to improve the employment prospects of law graduates and to upgrade the preparation of solicitors for practice by the proposed requirement to possess either expertise in business methods or fluency in a continental European language. □

Don Binchy
Chairman,
Education Committee

SYS OFFICERS

Annual General Meeting of Society of Young Solicitors Friday 15th July, 1988

The following are the officers duly elected at that Annual General Meeting:

Chairman: Terence McCrann
Vice-Chairman: Katherine Delahunt
Secretary: Colin Sainsbury
Treasurer: James McCourt
Committee: Michael Quinlan, Norman Spendlove, Mary Hayes, Jennifer Blunden, Miriam Reynolds, Kevin O'Donnell, Brian O'Connor, Caroline Crowley.

The Costs Committee

Work of the Committee

The Costs Committee under the chairmanship of Larry Cullen from Wicklow, a former President of the Society, rose from the ashes of "The Remuneration of the Profession Committee". In fact this in its turn was hived off from the Court Offices and Costs Committee as it is described in the Regulations of the Council.

The Costs Committee generally keeps an eye on the way members of the Society are paid for their services. The subject of solicitors' costs borders on the baffling theologies of the East. It is such a heavily regulated area that the profession of Legal Cost Accountants has arisen to cope with its complexity.

The Committee monitors the following areas with a view to ensuring that the Society has the maximum input into all areas affecting solicitors' costs:

a. The various Courts' Rules Committees
b. Legislation
c. Recommendations of the Council on costs
d. Court cases affecting costs
e. Activities of other professional bodies which affect solicitors' bills of costs.

Cost Drawing — the Costs Booklet

Clearly the area of costs is a complex one requiring a knowledge of inter-related subjects. The Costs Committee considered this problem several years ago and decided to attempt to put together a suitable document on the subject of costs which would steer a reasonable line between a definitive annotated text and a practical day to day guide to the art. There were differing views within the Committee and outside it as to how this project should be approached and it was not an easy task for the various Chairmen and Committees who have handled the problem over the last number of years to come up with a solution which would please everybody. However, the Guide to Professional Remuneration has now been produced and is available to the profession in loose leaf form, at a cost of £15 all in, which makes it one of the most cost effective documents in any solicitor's office.

The first addition to the Booklet is expected to issue in September and will carry:

a. The Precedents,
b. The up-dated Supreme Court decisions on interest on costs,
c. A step by step guide on how to deal with a motion to review in the Circuit Court.

Only those who have purchased the Booklet and completed the registration forms will receive up-dates.

The profession is earnestly requested to forward their comments on the Guide in due course and any constructive comments on format or content will be considered by the Costs Committee.

Continuing Problems

The Committee is currently considering, along with the relevant authorities, the following items:

a. Appendix W to the Superior Court Rules,
b. An up-date to the Superior Court Rules,
c. An increase in scheduled items in the Circuit Court,
d. Preparation of precedent bills in the Circuit Court routine cases, costs of registering judgment mortgages, motions for judgment, costs of garnishee, equitable execution and appointment of a receiver.

With the proposed increase in the jurisdiction of the Circuit Court the Committee has in hand the publication of a full set of Circuit Court costs precedents which will also be available in due course on floppy disc.

The Committee can only deal with routine cases. It cannot attempt to advise on complicated costs issues. This area is currently the preserve of the Legal Cost Accountants who work closely with and are of immense help to the Committee. □

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Messrs Samuel McCleery

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VIEWPOINT *(Contd. from page 195).* difficult for Counsel in particular to take on cases on a speculative basis. It would be extremely unfortunate if in what many see as a questionable surrender to the Insurance lobby the effect will be to reduce the chances of persons of modest means who have suffered injury of obtaining the services of the leading members of the Bar. □

* * *

Privatise the Land Registry?

Well perhaps not quite. There is however a strong case to be made for converting it into a Public Corporation on the lines of Telecom Eireann or An Post. In recent years the Land Registry has been seen as a revenue earning activity within the Public Service — the surplus produced by the Land Registry is being siphoned off into the Exchequer. Running the Land Registry at a profit is not of course objectionable in itself so long as the Registry is seen to be providing a satisfactory service to the public. Unfortunately, as the Manager of the Registry recently advised the Society, the Public Service embargo on staff recruitment is still being applied to the Registry. The result is a decline in the level of service to the public.

The significant progress made in the 1970s and early 1980s with regionalisation, the production of file plans and the introduction of computerisation is not being maintained. Twenty-one years after the Registration of Title Act was brought into force providing for a gradual extension of compulsory registration no areas have been added to the original three counties named. The delays in first registration in these counties and other areas suggest that there can be no likelihood of any significant extension of compulsory registration in the foreseeable future.

If there is to be a comprehensive system of registration of title as opposed to registration of deeds, it is essential that it is kept up to date and that it functions efficiently. Transactions must be registered speedily so that the Register as nearly as possible reflects the actual ownership and occupation and identity of the units of property. If our Register is not up to date, all kinds of dealings with property, domestic, commercial or agricultural are unnecessarily slowed down with consequent additional cost to all concerned.

The Land Registry is entitled to have adequate staff to perform its proper function and should need no State subsidy. It can, as it has shown, collect adequate revenue from its customers. It must be particularly frustrating for the Land Registry staff who have already shown by their introduction of computerisation to the Registry that they are interested in providing a modern service to the public, that they are prevented from doing so by the dead hand of the public service embargo. The Land Registry is not one of the areas in which the public service embargo should operate, the simplest solution to the problem is almost certainly to extract the Land Registry from the public service and establish it as an independent public Corporation. □

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WARNING

Practitioners should please note Practice Notes in relation to

Income Tax Self Assessment

and

Tax Amnesty

enclosed with this Gazette.

Brian Bohan,
Chairman,
Taxation Committee.

The Lawyers Desk Diary 1989

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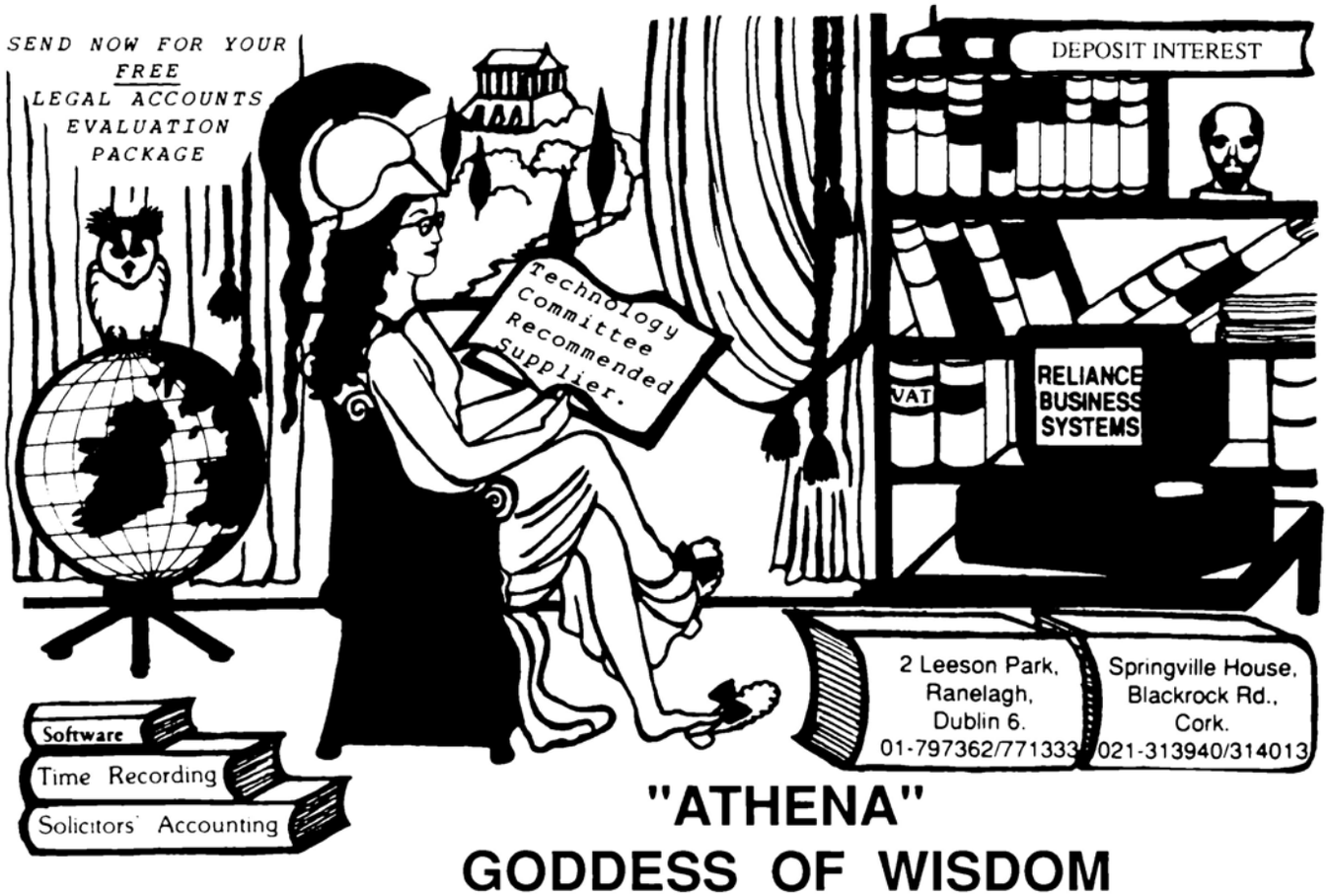

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Medical Research is also an important element of the College's activities. Cancer, Thromboses, Blindness, Blood Pressure, Mental Handicap and Birth Defects are just some of the human ailments which are presently the subject of detailed research.

The College is an independent and private institution which is financed largely through gifts, donations, and endowments. Your assistance would be very much appreciated, and would help to keep the College and Ireland in the forefront of Medical Research and Education.

For tax purposes, the R.C.S.I. is regarded by the Revenue Commissioners as a Charity. Therefore, gifts and donations may qualify the donors for tax relief.

For further information about the College's activities, please contact:

The Registrar, Royal College of Surgeons in Ireland,
St. Stephen's Green, Dublin 2.

WHERE THERE'S A WILL THIS IS THE WAY...

When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

"I devise and bequeath the sum of Pounds to the Irish Cancer Society Limited to be applied by it for any of the charitable objects of the Society, as it, the Society, at its absolute discretion, may decide."

All monies received by the Society are expended within the Republic of Ireland.

"Conquer Cancer Campaign" is a Registered Business Name and is used by the Society for some fund raising purposes. The "Cancer Research Advancement Board" allocates all Research Grants on behalf of the Society.

IRISH CANCER SOCIETY
5 Northumberland Road
Dublin 4
Ireland
Tel: 681855

Practice Notes

Capital Gains Tax

The Revenue Commissioners have recently confirmed to the Society that the guidelines published in the November 1979 *Gazette,* which are re-published below, are still applicable.

Capital Gains Tax

There have been a number of queries to the Conveyancing Committee about the position of a Purchaser where the Vendor argued that a particular property was not liable for Capital Gains Tax by reason of being the Vendor's only or main residence, and declined to furnish a Capital Gains Tax Clearance Certificate.

The legal position is quite clear. The question of whether a particular transaction is or is not liable to Capital Gains Tax is not relevant. A Purchaser is not required to make any enquiries about the Vendor's tax liability nor obliged to consider any information about it that may be given to him. All that is relevant is the amount of the consideration. If it is over £50,000 the Solicitor for the Purchaser must insist on a Capital Gains Tax Clearance Certificate or make the deduction prescribed by the Act from the amount of purchase money paid by him.

A Solicitor should not offer nor accept an undertaking to furnish Capital Gains Tax Clearance Certificate. Solicitors are reminded of the severe sanctions available against them personally if they fail to fulfil the duties imposed upon them by the Statute.

Capital Gains Tax: New Houses

Members will have noted the increasing number of new houses where the total price being paid by Purchasers exceeds £50,000.

Doubts have arisen as to the need for CGT Clearance Certificates in such cases. The following appears to be the position:

(1) Where there is an agreement for the purchase of a site and that agreement is separate from and unconnected with another agreement to erect a building on their site, a CGT Clearance Certificate is not required for the protection of the Purchaser unless the price of the site itself exceeds £50,000.

(2) An Agreement for Sale and Building Agreement which are considered sufficiently unconnected by the Revenue Commissioners to enable the Revenue Commissioners to assess Stamp Duty on the Site Value only, should also satisfy the criteria for CGT purposes.

(3) If the Contracts comprise a combined Building Agreement and Agreement for Lease or if separate contracts are interconnected, then, if the total consideration exceeds £50,000, the Solicitor for the Purchaser must insist on getting a CGT Clearance Certificate, or make the deduction prescribed by the CGT Act 1975.

Courts–Martial (Legal Aid) Regulations, 1988

S.I. No. 125 of 1988

These Regulations provide for increases, with effect from 27 April, 1988, in the legal aid fees payable to solicitors, in respect of certain attendances at courts–martial and visits to prisons, detention barracks and other custodial centres.

The fees payable to a solicitor assigned to a case, under Regulations 12(2)(a) of the Courts–Martial (Legal Aid) Regulations, 1986 to 1988, shall be £99.24 together with, if the hearing lasts for more than one day, £44.14 for each day or part of a day after the first for which the hearing lasts and for which the solicitor attends the hearing.

The fee payable under Regulation 14 in respect of a visit by a solicitor to a prison, detention barrack or other custodial centre, shall be £25.73 for each such visit plus travelling expenses.

Jurisdiction of Courts and Enforcement of Judgments (European Communities Act, 1988).

S.I. 91 of 1988 gives effect to this Act (passed on 5 March, 1988) as and from 1 June, 1988.

The legislation changes the common law rules on the Jurisdiction of Irish Courts in cases involving international aspects and facilitates the recognition of judgments from other E.E.C. states. (See Gazettes Dec., 1985, Jan/Feb., 1986 and June, 1987).

The Act is available from the Goverment Publications Sale Office at a cost of £4.10 plus postage.

The High Court

Practice Direction

The attention of practitioners is drawn to the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 (N. 3 of 1988) which came into operation on 1st June 1988 in accordance with the provisions of Article 2 of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 (Commencement) Order, 1988 (S.I. No. 91 of 1988).

Pending the making of amendments to the Rules of the Superior Courts by the Superior Courts Rules Committee, a summons which is to be served out of the Jurisdiction may be issued without the leave of the High Court, if but only if, it complies with the following conditions:

(a)That each claim made by the summons is one which by virtue of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 the Court has power to hear and determine: and

(b)That the summons is endorsed before it is issued with a statement that the Court has power under the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 to hear and determine the claim, and that no proceedings involving the same cause of action are pending between the parties in another Contracting State.

Contracting State for the purpose of this Practice Direction means Belgium, Demark, France,

The Federal Republic of Germany, Italy, Luxembourg, The Netherlands and the United Kingdom.

The President of the High Court
1st June, 1988.

Air Navigation and Transport Act, 1988.

This Act was signed by the President on 22 June, 1988.

The legislation promotes the enforcement of civil aviation security, incorporates the Protocols which amend the strict liability and limitation of damages system of the Warsaw Convention for International Air Transport and includes miscellaneous provisions for the Government Department and commercial enterprises involved with Civil Aviation.

The Act includes the Protocols in its schedules and is available at the Government Publications Sale Office for £2.20 plus postage. □

Applications to the Master of the High Court in Infant cases for payment out.

To avoid the situation where the expenses allowed on application are not sufficient to cover the applicant's outlays the Litigation Committee recommends that solicitors should bring their outlays to the notice of the Master before costs are fixed.

NOTICE
Jury Actions

The Courts Act 1988 has abolished the right to trial with a Jury in certain actions claiming damages for personal injuries to a person or the death of a person: the Act came into operation on 1st August 1988.

Practitoners are requested to inform the Chief Registrar, Four Courts, Dublin 7 of the list numbers of actions which will continue to be entitled to trial with a Jury having regard to the provisions of the Courts Act, 1988.

Practice Direction

With effect from 1st August 1988, Personal Injuries actions and Fatal Injuries actions which are not entitled to trial with a jury may be set down for trial by a judge alone at any of the following county venues – Cork, Limerick, Galway, Sligo, Dundalk, Kilkenny without prior applications to the Court.

Jury actions may not be set down for trial at the aforementioned venues without an order of the Court.

Personal Injuries Actions and Fatal Injuries Actions already set down for trial with a jury at the aforementioned venues will be tried at the respective venues by a judge alone. □

Court Stamping Machines

The Technology Committee has arranged for a number of franking machines for court stamps to be supplied to the profession, subject to Department of Justice licencing at a price of £750.00 plus Value Added Tax at 25%. There is an additional charge of £125.00 per annum, payable to the Department of Justice for inspection fees.

The maintenance charge is £72.00 per annum, which covers all parts, labour, warranty and free replacement of the machine by the suplier in the event of a total failure.

For futher information please contact Mr. Oliver Flynn, Sales Manager, Pitney Bowes Ireland Limited, Parkmore Industrial Estate, Long Mile Road, Dublin 12 (telephone 502252/562733). □

Payment of Deposits Further Warning

In the aftermath of the Supreme Court decision in the case of *Roche -v- Peilow* the Conveyancing Committee strongly recommended steps that should be taken by a purchaser's solicitor in order to protect the monies (including deposits and stage payments) of a new house buyer against the adverse consequences of the vendor company getting into financial difficulties prior to completion. These steps included the making of a pre-contract Companies Office search against the vendor company and the insistence, where possible, that the purchaser's monies be held by the vendor's solicitor as stakeholder pending completion.

The Committee has now been made aware that a large firm of builders is still insisting that monies paid under the Building Agreement be released to them prior to completion. The Committee recommends that solicitors acting for purchasers of new houses strongly resist this practice and insist that all monies be held by the vendor's solicitor as stakeholder pending completion.

If the vendor company insists on monies being paid directly to it either by way of deposit or stage payment, the purchaser's solicitor must fully advise his client of the possible risks of the monies being lost in the event of the vendor company getting into financial difficulties. If the purchaser is willing to proceed on the basis that monies will be paid to the vendor company directly, the purchaser's solicitor should set out his advices in writing to the purchaser prior to the execution of the contracts and prior to the payment of any monies to the vendor company. □

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TAXATION CONSULTANCY SERVICE

Practitioners are reminded of the existence of the **Consultancy Service in Taxation Law and Practice.**

The service is intended to assist solicitors in dealing with particular taxation problems which affect their clients. The principal areas covered are Capital Acquisitions Tax, Capital Gains Tax and Stamp Duties. With the increasing complexity of tax legislation, tax advice may be required in relation to many aspects of the administration of estates and the transfer of properties whether voluntary or for value. Members are encouraged to make use of the Consultancy Service in any situation in which they are uncertain about the tax implications of a client's proposed course of action.

Terms of the Consultancy Service

1. The client shall remain the client of the referring solicitor unless there is some special arrangement to the contrary. The consultant will not, without the referring solicitor's consent, consult directly with the client.
2. The referring solicitor will be personally responsible for the consultant's fee.
3. Both the consultant and the referring solicitor should ensure that the other is adequately insured against professional negligence.
4. The referring solicitor may charge the consultant's fee either as an item of outlay or absorb such fee and include an equivalent amount in his professional charges to the client.

Consultants

1. In response to a notice in the *Gazette* a number of members volunteered to act as consultants and a list or panel of those consultants is now available at the Society.
2. Members of the panel may restrict their services to particular fields of tax law and practice.
3. A member of the panel may decline to accept a referral in any case without specifying a reason for such refusal.
4. While neither the Taxation Committee nor the Law Society can accept responsibility for the advice given by the consultant the Committee will be monitoring the operation of the scheme and will be anxious to hear of any problems that arise and will endeavour to assist in solving them.
5. The consultant shall undertake that neither he nor any firm of which he is a member will accept instructions from the client in any matter save on a referral basis in the period of two years commencing after the date of conclusion of the consultancy for such client.

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The Farmer and The Law

ONE DAY SEMINAR

15th October 1988

Venue: Law Society Blackhall Place.

Further details:-
Contact A. Geraghty
or C. Mahon: 710711

WHERE ARE THEY NOW?

The Society's Law School has recently completed a comprehensive survey of all solicitors who were admitted to the Roll in the ten year period ending on the 31st December, 1987. The survey succeeded in tracing 94% of the 2,046 people who were enrolled during that period.

The most striking result was that of the 81% of those who were in private practice no less than one in every four were sole practitioners. Sixty-five solicitors were in the State or semi-State employment while forty-five were in industry or commerce and only nine were not working as solicitors. The survey destroyed the myth that there might be substantial numbers, particularly women solicitors, working on a part-time basis. There was a grand total of eight.

Five per cent or 105 were identified as working abroad – 47 in the United Kingdom, 28 in the United States, 7 (!) in Hong Kong, 4 each in Australia and Belgium. The figures for the UK are suspected to be understated since the newly formed Association of Irish solicitors in London has well over 50 members. Indeed, it is clear that the numbers in the UK are increasing steadily as recruitment by UK firms and placement agencies is stepped up and that the figure ascertained by the survey is already out of date.

There are already signs that the exodus to London may be creating a scarcity of newly qualified solicitors in Dublin. London salaries could be matched by few, if any, Dublin practices. The survey does not suggest that there is any significant reservoir of underemployed or unemployed solicitors waiting to fill the gaps which are beginning to appear and the trend of solicitors going to London may be about to cause problems for the profession in Dublin and the rest of the country.

JFB

PEOPLE & PLACES

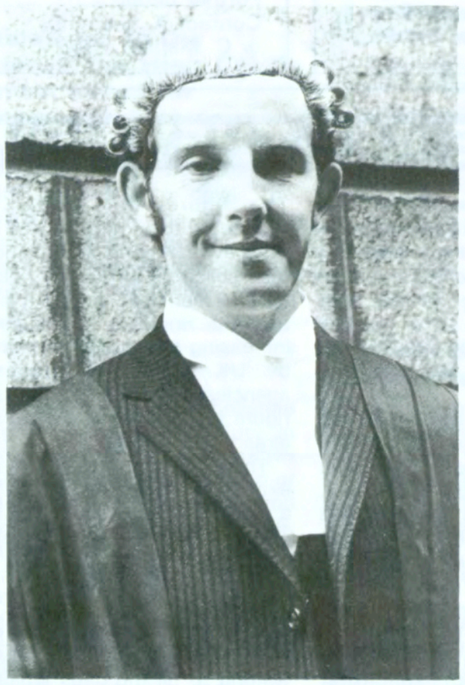
DIRECTORY OF IRISH COMPANY NAMES, 1988

Mr. Paul Farrell (right), Manager of the Companies Registration Office, presenting a copy of the Directory of Irish Company Names, 1988, to Mr. Michael Irvine, Chairman of the Company Law Committee.

SOUTHERN LAW ASSOCIATION LUNCHEON IN HONOUR OF JUDGE SEAN MacD. FAWSITT

On Thursday, 25 July, 1988, The Southern Law Association held a Luncheon to mark the retirement of Judge Sean MacD. Fawsitt. The Luncheon was held at The Imperial Hotel, and was attended by representatives from all the various Solicitors Offices. The Presentation comprised an engraving of the Courthouse, Cork, in silver, with the Cork Coat of Arms on the left and the Fawsitt Coat of Arms on the right, enclosed in a mahogany case. The photograph shows Mr. James Donegan, President of the Southern Law Association, making the presentation to Judge Fawsitt.

JOINT LEGAL EDUCATION MEETING



Judge Matthew F. Deery, recently appointed Judge of the Circuit Court was called to the Bar in 1972, and practised mainly on the Eastern and Northern Circuits.

Delegates who attended the Joint Legal Education Meeting at Actons Hotel, Kinsale, Co. Cork, were:-
Back row (left to right): John Brooke, Professor Laurence Sweeney, Aidan Canavan, Professor Douglas Cusine, Peter Niven.
Middle row (left to right): James Donegan, Michael Davey, James J. Ivers, Malcolm Strang Steel, Anthony Ensor, Justin McKenna, Professor Richard Woulfe, Comgall G. McNally.
Seated: Isobel Browlie, Don Binchy, Mary McAleese.

Michael Byrne, Solicitor, of Hoey & Denning, Tullamore, has recently published a book of photographs entitled "Tullamore Town Album". The book contains about 200 photographs, of the people, events and places of Tullamore over the last 100 years. The book is available in paperback at £3.90, and hardback £7.50, from leading book shops.

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Housing Finance

Up to relatively recently questions with regard to the "best" home loan were often of academic interest. With mortgage finance in short supply few people had the luxury of choice. The cost of the mortgage came second to the problem of getting it. Many people were, or would have been, willing to pay a little extra interest simply to get a loan, but even that choice was not always open since most of the building societies charged the same rate in any case. All that has changed — changed dramatically. The borrower can now shop around — lenders are vying with one another for the business — and in addition to a choice of lender, the borrower has also a choice of loan type, most particularly between the traditional "annuity" mortgage and the "endowment" type mortgage. The market for mortgages has become a buyer's one.

By
Colm Rapple

The would-be borrower has now a lot of choices to make and unfortunately there are no definitive answers. At present building society loans are cheaper than bank loans but will that continue to be the case for the full twenty years or so over which the loan is being repaid? The answer is possibly "yes", but it is impossible to be sure. Will an endowment mortgage work out better than the traditional type. The answer is possibly "yes", if the borrower is paying reasonably high tax and picks the endowment insurance policy with care. But again, it is impossible to be sure. The endowment policy may not perform well, there could be a change in the current tax relief situation.

The best that can be done is to take an educated guess on the basis of the present situation and likely trends in the medium term. That would seem to point to building societies rather than banks. With less certainty endowment mortgages are likely to prove a better bet for people paying tax at above the standard rate. But it is important to choose the endowment policy with care.

Let us have a look at the reasons for those conclusions in some more detail.

The accompanying table shows the declared interest rates, and, more importantly, the repayment rates currently applied by the big-four banks and main building societies. It will be noted that the declared interest rate is not necessarily a good guide to the actual cost of the loan. The new law requiring lenders to declare comparable Annual Percentage Rates (APRs) is still not fully operational with the building societies still disputing what should be included.

Before looking at the initial banks and building societies let us have a look at the broad choice between the traditional "annuity" repayment method and the endowment mortgage. With the traditional mortgages each repayment includes two elements – an interest payment and a payment off the sum borrowed. So the amount owing progressively reduces over the term of the loan. With an endowment mortgage only the interest is paid off the loan but in addition premiums are paid on an endowment insurance policy geared to yield enough at some time in the future to pay off the loan.

With the endowment mortgage the borrower can get tax relief on the interest payments and on half of the premiums and it should remain unchanged for the term of the loan – assuming no changes in interest rates or in the law. With an annuity mortgage the tax relief goes down as the interest portion of repayments reduce but that reduction is not significant during the first ten years or so of a twenty year loan.

But there are some points to watch:

Many endowment loans are sold on the basis that the policy will not only yield enough to pay off the loan but can also provide a surplus lump sum. So they can. But if the borrower also wants to save, it is best done separately. There is less flexibility when savings are tied in to the mortgage repayments

The performance of endowment policies can differ greatly. There is no guarantee that the proceeds will be enough to pay off the loan but the "with profits" policies most commonly used are relatively risk free in that they can not collapse in value and bonuses once added in are usually secured. The unit linked policies used in some cases do promise a chance of higher returns but they are also vulnerable to a downturn in value – another crash?

All the borrower needs is a policy which will pay off the loan. He or she should not be influenced by thoughts of extra lump sums. Any savings decisions are best kept separate. While unit linked policies offer the prospect of higher returns they are riskier than straight forward endowment policies. Of the endowment policies the best performers have been "with profits" policies of the British mutual societies – companies like Standard Life. Norwich Union and Friends' Provident.

Tax relief on life insurance is allowed at 50% of the premiums subject to a maximum of £1,000 premiums per individual. If a person has already got some life insurance, or is taking out a large loan, it not too difficult to go over that limit.

So let us have a look at who is offering what:

BIG FOUR BANKS

All the banks are now very actively promoting home loans.

All but the Bank of Ireland charge an initial arrangement fee of 1½% of which 1% is returned when the security is perfected.

Loans are issued in advance of this on the undertaking of the solicitor thereby dispensing with the need for bridging finance. The banks will normally use the borrowers' solicitor – bonding being required.

Allied Irish Banks: Currently the cheapest of the banks in terms of repayments per £1,000 – see table. Endowment mortgages are given through Allied Irish Finance – the interest rate is quoted at half per centage point higher.

Bank of Ireland: It does not charge an application fee. It offers the option of having 10, 11 or 12 repayments a year so that the borrower can have a month or two free of repayments. It offers endowment mortgages but the policy must be taken out with the Bank's own subsidiary "Lifetime Insurance". They are Managed Fund unit-linked policies with the premium level reviewed every five years to take account of the funds' performance.

National Irish: It is offering a facility whereby there are are no repayments for the first six months. but, of course, interest is clocking up during that time. It is really just another way of increasing the loan – a useful facility for some but not costless. In much the same way Bank of Ireland offers loans of 90% of its valuation plus £1,000. National Irish offers second mortgages at a declared cost of 11½% with it bearing all legal costs etc.

Ulster Bank: Has been active in the home loan business for a long time and offers a lower interest rate than either Bank of Ireland or National Irish – only marginally higher than AIB.

THE MAIN BUILDING SOCIETIES

All the main building societies are now offering endowment mortgages in addition to the traditional type. They will also provide finance for things other than house purchase but, by law, they do require the security of a mortgage on property. A change is proposed in that law but the legislation has yet to be published. The accompanying table gives simply the rates charged on loans for house purchase – higher rates may apply to other loans.

Institution	Declared Rate %	Monthly Repayment Per £1,000 borrowed*
Banks		
Allied Irish Banks	9.375	£9.12
Bank of Ireland	9.5	£9.27
National Irish	9.5	£9.20
Ulster Bank	9.0	£9.129
Building Societies		
Educational	8.25	£8.65
First National	8.25	£8.65
ICS	8.45	£8.77
Irish Nationwide	8.25	£8.65
Irish Permanent	8.25	£8.65

**On a twenty year mortgage*

While tiered rates are now banned by law where they are based on size of the loan, some societies may charge a higher rate where the borrower does not comply with certain requirements – such as being a member with certain minimum savings. This is the case with Irish Nationwide, for instance, but given the competition which currently exists it may well be open to negotiation.

With one exception, all the societies in the table charge the same rate of interest on basic loans. The odd man out is the ICS Building Society – an associate of the Bank of Ireland. Its interest rate and repayment rate are higher than the others although in all cases the societies are cheaper than the banks. The rates shown are those which came into effect for new borrowers from July 1 and are due to take effect for existing borrowers from August 1.

Colm Rapple is group business editor. Irish Press and author of the best selling annual "Family Finance".

It is intended to carry more articles on personal finance topics in the future. If there is a particular area you would like to see covered let us know.

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The objectives of the Association include inter alia the provision of a forum for Financial Controllers/Book-keepers for the sharing of information of mutual benefit, the organisation of Seminars/Discussion Groups and liaison with outside organisations offering services of interest to the profession, including Law Society Committees.

The Association meets quarterly and to date topics have included:-

Address of a firm of Chartered Accountants on the audit of a Solicitor's practice.

Paper by Law Society Accountant on "Inspection of a Solicitor's Practice" and "Interest Regulations".

A visit to Wang factory in Limerick and a presentation by a specialist legal software supplier, BCL Limited on the development of Word Processing/ Computerisation.

Papers by members on "Kalamazoo in a Solicitor's Office" supplemented by documentation supplied by Kalamazoo.

Address by the Financial Controller of a large English practice on "The Role of the Financial Controller".

These meetings also provide valuable opportunities to avail of the knowledge and experience of colleagues in other offices, particularly in the area of new technology and computerisation of records. □

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Wednesday, 19th October, 1988

at 7.00 p.m.

Venue: **President's Hall, Law Society, Blackhall Place, Dublin 7.**

(See insert with this issue of *The Gazette* for details)

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Book Reviews

A GUIDE TO PLANNING LEGISLATION IN THE REPUBLIC OF IRELAND.

By Kevin Ingram Nowlan
B.Sc. B.E., Barrister-at-Law.

Published by the Incorporated Law Society of Ireland.
Price £27.50

This book, though not specifically so described, is for all practical purposes a second edition of Mr. Nolan's *A Guide to the Planning Acts,* which was published in 1978 and is well known to the legal profession here and which, I have no doubt, is found useful also in other disciplines connected with property and planning. Ever since 1978 the original volume has been a convenient, accurate and sensible guide to most planning matters.

The new book includes the texts of all the Acts and all the important Regulations so it is sufficiently comprehensive to cover ordinary requirements. It will provide the answer to many everyday questions about planing and development law and will give useful guidance towards further research in more difficult matters.

The Local Government (Planning and Development) Acts 1963-1983 now comprise four distinct Acts (1963–1967–1982–1983). The principal statutory Regulations were made in 1977 but there are at least eight sets of amending and subsidiary Regulations extending up to S.I. No. 130 of 1985. There has also been in the ten years since the original *Guide* was published a fair number of important decided cases dealing with planning matters. Perhaps one could be forgiven for thinking that the case law has complicated rather than clarified some of the issues.

Mr. Nowlan's book takes the form of a series of annotated statutes and statutory regulations. The case law is briefly referred to in these notes. This treatment is convenient in practice and the annotations are helpful and accurate and about right in terms of length and degree of detail — even if the print is a shade too small for comfort at times. The constant reference to the very words of the Statute and the exposition of the material in the framework and format of the Act helps to familiarise the reader with the outlines and mutual relations of the various elements in what is a fairly tightly organised statutory code and I would see this as an advantage as it involves constant contact with and exposure to the actual operative words. Familiarity with and respect for the enacted words is, surely, an important step towards the understanding and effective operation of legislation of this kind.

The *Guide* of 1978 was a book of about 220 pages. The present volume (in a slightly different format) runs to almost 400 pages. The principal differences are the inclusion of the post-1978 Planning Acts and the printing of the full text of the significant Regulations. The explanatory notes, the most important part of the book, have been revised to take account of the extensive case law in the last ten years, as well as the statutory changes. There were 24 Irish cases cited in 1978, now there are 75 and the number of reported cases is growing all the time. The latest case mentioned in the Addenda in this book is *The State (F.P.H. Properties S.A.) -v- An Bord Pleánala* decided by the Supreme Court in December, 1987, so I would think that the book can be relied upon as stating the law at the end of 1987.

This is essentially a practical work of reference rather than a learned and critical dissertation on planning law. Mr Nowlan usually indicates only the existence and general relevance of the cases cited and those citations frequently indicate the necessity for and direction of further enquiries. In matters of any complexity it will be necessary to refer to the actual judgments and beyond. Mr. Nowlan does not claim to be more than a guide, a resource of first instance, but in its own terms his book is judicious, helpful and up-to-date. The modest, business-like manner of the 1978 book was attractive and the same good qualities are to be found in the current volume.

There is no doubt that the judge-made law has been growing in volume and importance since 1978. Cases like *Grange Developments Ltd. -v- Dublin County Council, Dublin County Council -v- Shortt,* and *the State (Abenglen Properties Ltd.) -v- Dublin Corporation* raise fairly complex questions which do not lend themselves to summary treatment. All things considered however Mr. Nowlan's approach is valid and useful and as a readily accessible source of information and guidance in the planning field his book is highly satisfactory.

The recent recession took some pressure off planning law and practice, but current indications are that pressure is building up again. Significant changes are expected in the matter of planning compensation and perhaps also in relation to the preservation of listed buildings and the burden of paying for such preservation. There could well be an interesting encounter between planning law and the Constitution and some of the issues that were canvassed in the *Central Dublin Development Association case* of 1969 may come to life again. Mr. Nowlan's book does not address these issues but it provides a convenient introduction to what may well becom an urgent and difficult complex of problems.

William Dundon

EQUITY AND THE LAW OF TRUSTS IN IRELAND

By the Hon Mr Justice Ronan Keane.

Published by Butterworths,
Price £32.50

When your reviewer retired from practice he gave his precious copy of Kiely, *Principles of Equity,* to his solicitor son, who no doubt regarded it as a family heirloom rather than a useful professional tool. Over fifty years have passed since the late T.O'Neill Kiely published his work. In almost two generations the principles of equity have developed on a broad front to meet the changing times. A new book was well overdue. Practitioners and students are most fortunate that an author of Judge Ronan Keane's distinction and erudition should have filled the lacuna. Both branches of the profession are already indebted to the learned Judge for sharing with us his vast knowledge of Local Government, Planning and Company Law. Most

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busy men would then have rested on their laurels without tackling a treatise on the complex subject of equity with all its ramifications.

The author tells us that "Equity is a well defined body of doctrines and remedies found largely in the decisions of judges who have moulded its development since it first emerged in the middle ages". The legislature rarely intervened, the Judicature Act being a notable exception, and even that Act did not alter equitable principles, it just extended them to the Common Law.

The insignificant amount of statute law means that the principles of equity as administered by the Irish Courts are very much in line with the principles governing English Law and also adopted by the Courts of the British Commonwealth countries. There are many examples in the book of cases where the Irish Courts have found "compelling" reasons to follow English decisions where equitable principles were updated by the judiciary, and in particular by Lord Denning, as Master of the Rolls.

The author also refers to a number of English decisions on issues yet to come before the Irish Courts, and indicates whether or not he thinks an Irish Court would adopt the *ratio decidendi*. The provisions of our Constitution would be the main reason inhibiting the following of all English decisions. The author also quotes freely from cases heard in Australia and Canada.

The Law of Trusts is an area where the author, in his capacity as President of the Law Reform Commission, might persuade the legislature to amend the Trustee Act, 1893, before its centenary. Some thirty years ago, your reviewer and a colleague prepared a report, at the request of the Law Society, suggesting a number of amendments to the 1893 Act. Nothing came of it, but the author mentions a number of those matters which could be tidied up and improved. The rule in *Shelley's Case* is now over 400 years old and serves no useful purpose, but there are other helpful provisions which could be introduced into our law.

The most helpful chapters in the book for the practitioner are those dealing with resulting and constructive trusts and the newer remedies such as the Mareva Injunction and the Anton Pillar Order. The most interesting, at least to your reviewer, were those dealing with promissory estoppel *(The High Trees Case)* and abuse of confidence *(The Spycatcher Case et al)*.

The proof-reader must be superstitious because he or she skipped Chapter 13 where there are 24 clerical errors. The description (p.327) of Lord Denning as "Master off the Rolls" would no doubt bring a twinkle to the eyes of that remarkable old man. There will, without doubt, be further editions of this excellent book, when the blemishes can be eradicated.

Keane's Equity has succeeded and surpassed Kiely's Equity and is here to stay for at least as long, and is unreservedly recommended to students, practitioners and, may one add, to the author's brethren.

Robert W. R. Johnston

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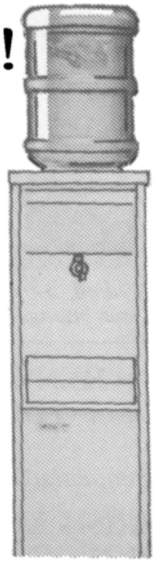

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busy men would then have rested on their laurels without tackling a treatise on the complex subject of equity with all its ramifications.

The author tells us that "Equity is a well defined body of doctrines and remedies found largely in the decisions of judges who have moulded its development since it first emerged in the middle ages". The legislature rarely intervened, the Judicature Act being a notable exception, and even that Act did not alter equitable principles, it just extended them to the Common Law.

The insignificant amount of statute law means that the principles of equity as administered by the Irish Courts are very much in line with the principles governing English Law and also adopted by the Courts of the British Commonwealth countries. There are many examples in the book of cases where the Irish Courts have found "compelling" reasons to follow English decisions where equitable principles were updated by the judiciary, and in particular by Lord Denning, as Master of the Rolls.

The author also refers to a number of English decisions on issues yet to come before the Irish Courts, and indicates whether or not he thinks an Irish Court would adopt the *ratio decidendi*. The provisions of our Constitution would be the main reason inhibiting the following of all English decisions. The author also quotes freely from cases heard in Australia and Canada.

The Law of Trusts is an area where the author, in his capacity as President of the Law Reform Commission, might persuade the legislature to amend the Trustee Act, 1893, before its centenary. Some thirty years ago, your reviewer and a colleague prepared a report, at the request of the Law Society, suggesting a number of amendments to the 1893 Act. Nothing came of it, but the author mentions a number of those matters which could be tidied up and improved. The rule in *Shelley's Case* is now over 400 years old and serves no useful purpose, but there are other helpful provisions which could be introduced into our law.

The most helpful chapters in the book for the practitioner are those dealing with resulting and constructive trusts and the newer remedies such as the Mareva Injunction and the Anton Pillar Order. The most interesting, at least to your reviewer, were those dealing with promissory estoppel *(The High Trees Case)* and abuse of confidence *(The Spycatcher Case et al).*

The proof-reader must be superstitious because he or she skipped Chapter 13 where there are 24 clerical errors. The description (p.327) of Lord Denning as "Master off the Rolls" would no doubt bring a twinkle to the eyes of that remarkable old man. There will, without doubt, be further editions of this excellent book, when the blemishes can be eradicated.

Keane's Equity has succeeded and surpassed Kiely's Equity and is here to stay for at least as long, and is unreservedly recommended to students, practitioners and, may one add, to the author's brethren.

Robert W. R. Johnston

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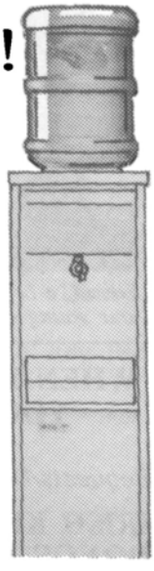

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Office of The Chief Inspector
of Taxes
1st Floor, Setanta Centre,
Nassau Street,
Dublin 2.

8 March, 1988

Mr. Brian Bohan,
C/o Incorporated Law Society
of Ireland

Re: Chapter 111, Finance Act 1987
Withholding Tax

Dear Mr. Bohan,
I refer to our meeting held on Friday, 4 March 1988, at which we discussed the operation of withholding tax as it applies to solicitors.

I can now confirm that amounts in respect of the following items may be excluded from the charge to withholding tax, where they are paid by the specified person (that is, the solicitor) –

(a) Stamp Duty.
(b) Land Registry Fees.
(c) Court Fees.
(d) Registry of Deeds Fees.
(e) Company Office Fees.

Payments by solicitors to law searchers may *not* be excluded from the charge to tax even though the payments include amounts in respect of the above items. Likewise, payments by solicitors to Commissioners for Oaths and Notaries Public may *not* be excluded from the charge to tax.

Yours faithfully
PAUL RECK
for Chief Inspector of Taxes

Land Registry, Central Office
Chancery Street
Dublin 7

21 June, 1988

Mr. J. Ivers,
Director General
The Law Society.

Land Registry Delays

Dear Mr. Ivers,
I am to acknowledge receipt of your letter of the 17th June.

I cannot deny that the delays in some categories of work in the Registry are significant, but the policy we operate of giving priority to hardship or urgent cases, is equitable.

The intake of registration work in both the Registry of Deeds and Land Registry for the first five months of this year shows an increase in excess of 10% over the level of intake for the corresponding period last year.

In the circumstances, we have done very well to cope and our arrears situation is at about the same level as last year. However, we are losing staff without replacement at a steady rate and with the holiday season upon us the situation will deteriorate.

We will continue, however, to give priority to cases where grounds for urgency are furnished.

Yours sincerely
B. CORMAC
Manager

Mason House,
48 Castle Street,
Liverpool, L2 7LQ.

16th May 1988

Incorporated Law Society of Ireland,
Dublin 7.

Dear Sir,

Re:
Pleading Practice & Procedure

I have been asked by the English publishers, Sweet & Maxwell, to be the General Editor of the following books:

a) Bullen Leake & Jacob's Precedents of Pleadings
(It will be the 13th Edition), and
b) Jacob's System of Pleadings
(To be a new volume of about 450 pages – in Sweet & Maxwell's "Litigation Library" series).

Bullen & Leake has been going for about 150 years – and is perceived as being the primary source book, for practitioners, with regard to precedents/forms of pleadings.

Jacob's System of Pleadings is the development of a text for which Sir Jack Jacob was responsible in 1975 – and is intended to be the authoritative text book on the principles of pleading in English law.

With the de-regulation in the Common Market in 1992 – I anticipate it being appropriate to deal in both of these books with problems/issues/questions which may arise in the context of pleading after 1992, when the individual European jurisdictions will begin to lose their judicial exclusivity and independence.

Taking these matters into account, I wonder if you would be in a position to assist me with regard to the following:

a) What would you like to see in either or both of these text books – which may be of assistance to you in your jurisdiction?
b) Is there any particular topic which you would like to see covered – and if yes, how?
c) In a legal context – and speaking more generally – how do you see 1992 affecting yourselves (for example, to what extent would you be seeking to establish yourselves in an English jurisdiction – or alternatively, to what extent would you anticipate English lawyers seeking to establish themselves in your jurisiction)?

I appreciate how frustrating sometimes it is to receive a letter like this, which requires a little time to sit down and answer. I hope it does not appear rude of me to impose upon you – and if you were able to answer it, I would of course, be more than grateful.

Yours sincerely,
IAIN S. GOLDREIN
(Barrister, England, Northern Circuit)

Office of the
Revenue Commissioners
Dublin Castle
Dublin 2

14 July 1988

Ms. Anna Hegarty,
Solicitor,
The Law Society

Dear Ms. Hegarty,

VAT visits to solicitors

This letter was issued by the Revenue Commissioners in response to a query raised by the Taxation Committee as to the policy of the Revenue Commissioners on VAT visits.

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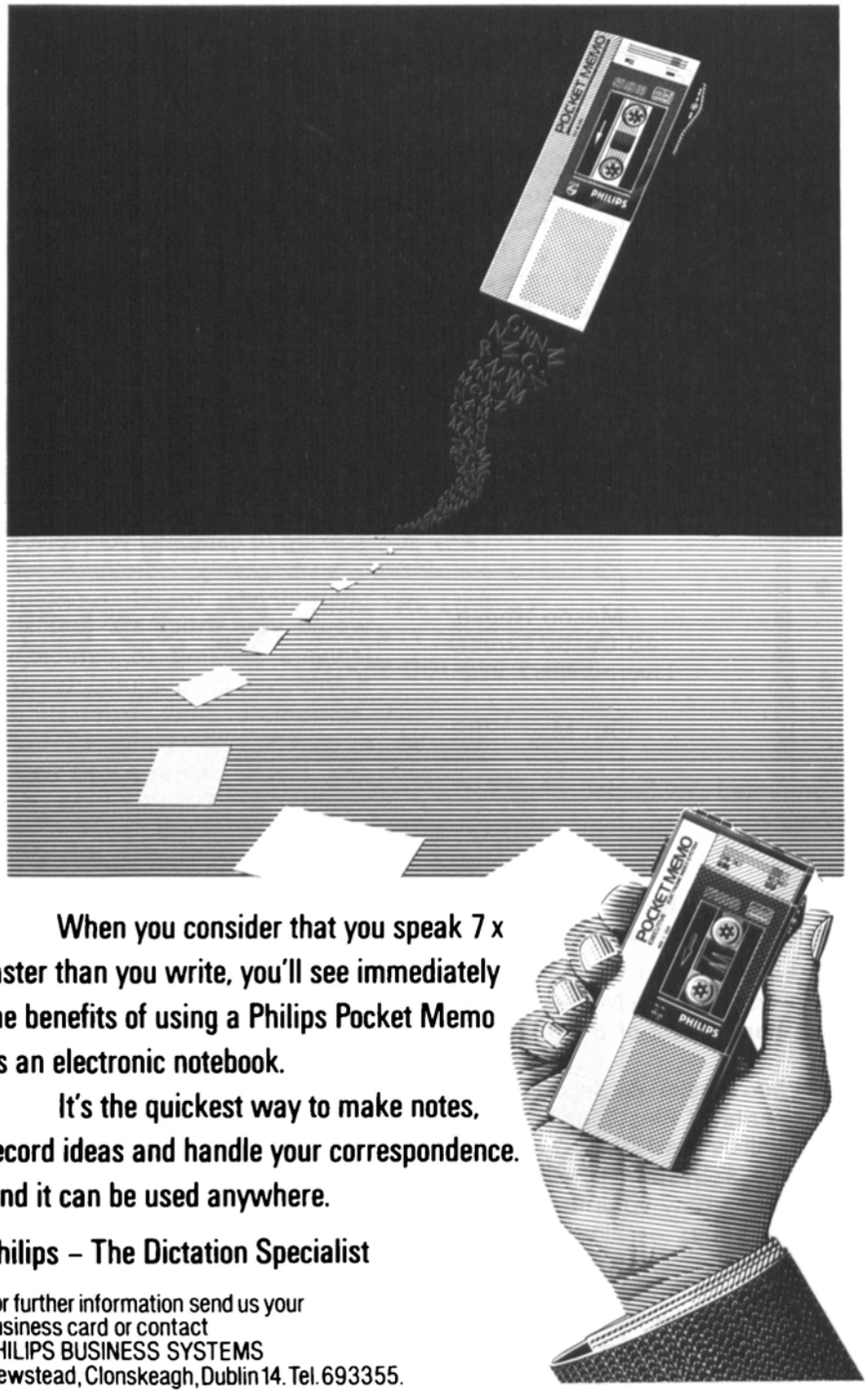

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I refer to your letter of 16 June, 1988, concerning VAT visits. This may be an opportune occasion to put on record for the information of the Society and its members the general policy in relation to these visits.

For normal visits involving an examination of business records, the usual notice is approximately two weeks. In cases where the registered person fails repeatedly to co-operate by being on hand to produce the records and answer questions, the Inspector reserves the right to call without notice.

Persons who apply for registration can expect a visit from an Inspector to verify the accuracy and authenticity of their application for registration. In these cases inspection of records does not arise (in many cases records do not exist) and the purpose of the visit is merely to verify that the taxable person exists and to obtain some basic information about the business. It is not considered necessary to give two weeks notice of such calls and in any event to do so could give rise to undue delay in cases where registration is required urgently.

Visits are also made to cross check invoices issued by one taxable person to another. These checks usually involve only one or two invoices and they normally take approximately fifteen minutes. It is not possible to give notice of these calls since the checks relate to the authenticity of the invoice(s) issued by the first taxable person. On arrival the Inspector should indicate that she/he wishes to verify a limited number of invoices and is not carrying out a comprehensive check of business records. If such a call is made at an inconvenient time, Inspectors are under instructions to make an appointment if requested to do so by the taxpayer. In these cases the opportunity is usually taken at the agreed date to carry out a full audit of the business so that visiting resources are used efficiently.

I hope that this explains both the general position as well as the background to the particular case which you brought to my notice.

Yours sincerely,
D. J. THORNHILL,
Assistant Secretary,
VAT & Capital Taxes.

MARACYCLE 1988

John Coffey.

MARACYCLE 1988

A group of Solicitors recently completed the Dublin/Belfast Maracycle in aid of the Solicitors' Benevolent Association. These photographs were taken at the start, at Dublin Airport. A full report of the cycle will appear in the October Gazette.

John Larkin (left) and Esmond Reilly.

Brian Mahon.

Frank O'Donnell (left) and Gerry Griffin.

Gerry Griffin.
(Photos: Courtesy of Frank Lanigan)

MILLENNIUM OPEN WEEK AT BLACKHALL PLACE

The Law Society's premises at Blackhall Place were opened to the public for one week from 25-31 July. The Open Week was jointly organised by the Law Society and the Irish Architectural Archive. Half-hourly conducted tours of the Building were led by past pupils of the King's Hospital School, and an Exhibition was held in the President's Hall.

The Lord Mayor of Dublin, Alderman Ben Briscoe, T.D., with Mr. Tom Shaw, President of the Law Society and Mrs. Yvonne Shaw.

(Left to right): Mr. Laurence Cullen, Mrs. Ruth Margetson, Mr. Ernest Margetson, Senator Mary Robinson, Mr. Adrian Bourke, Mrs. Ruth Bourke and Mr. Nicholas Robinson.

PROFESSIONAL INFORMATION

(Contd. from page 229)

which the applicant is informed are held under the said Indenture of Lease of 1st April, 1911.

WHEREAS the Applicant (2) had acquired and is now entitled to the lands comprised in a certain Indenture of Lease dated the 18th day of November, 1909 and made between Austin Samuel Cooper of the One Part, and Richard Maher of the Other Part for the term of 99 years from the 1st May, 1907 at the yearly rent of £12.00 (twelve pounds). The said Lease is a Lease to which Part (ii) of the Landlord and Tenant (Ground Rents) No. 2 Act, 1978 applies.

The Lands demised by the said Lease are therein described as "All that and those the Dwellinghouse, Yard and Premises situate lying and being in John Street, City of Cashel, Parish of St. John the Baptist, Barony of Middlethird and County of Tipperary.

AND whereas the said Violet Cooper is the person now and at all relevant times entitled to the next superior interest in the lands which the applicant is informed are held under the said Indenture of Lease of 18th November, 1909.

WHEREAS the Applicant (3) had acquired and is now entitled to the lands comprised in a certain Indenture of Lease dated the 1st Day of April, 1911 and made between Austin Samuel Cooper of the One Part, and Richard Maher of the Other Part for the term of 99 years from the 1st Day of May, 1907 at the yearly rent of £8.00 (eight pounds). The said Lease is a Lease to which Part (ii) of the Landlord and Tenant (Ground Rents) No. 2 Act, 1978 applies.

The Lands demised by the said Lease are therein described as "All that the Dwellinghouse, Yard and Premises situate lying and being in John Street, Cashel Parish of St. John-Baptist, Barony of Middlethird and County of Tipperary.

AND whereas the said Violet Cooper is the person now and at all relevant times entitled to the next superior interest in the lands which the applicant is informed are held under the said Indenture of Lease of 1st April, 1911.

AND whereas on the 18th Day of July, 1988 the Applicant being the person entitled under Sections 9 and 10 of the Landlord and Tenant (Ground Rents) (No.2 Act, 1978) to purchase the Fee Simple interest in the said Demise Premises served upon the said Violet Cooper at her address at Kilmoney, Carrigaline in the County of Cork by Registered Post a Notice of Intention to acquire the Fee Simple Interest on the above Acts and on the same date did serve on the said Violet Cooper in a similar manner a Notice requiring information from a Lessor under Section 7(i) of the Landlord and Tenant (Ground Rents) Act 1967.

AND whereas despite communication since service of the above Notice, the Applicants Solicitors have received no written or verbal communication from either the said Violet Cooper or her Solicitor as to who is entitled to the superior interest.

TAKE NOTICE that on the 12th day of October 1988 at the hour of 11.30a.m. or the first opportunity thereafter Application will be made to the County Registrar at Court House, Clonmel sitting at his Offices at Court House, Clonmel, Co. Tipperary, for an order:

1. Confirming that the Applicant is entitled to acquire the Fee Simple Interest in the said lands.
2. Determining the purchase price payable in respect of the said Acquisition.
3. Appointing a person to execute the Conveyance to the Applicant of the interest of the said Violet Cooper in the said Lands for and in the name of Violet Cooper, if necessary.
4. Determining the persons entitled to receive the said Purchase money and the amount thereof each is to receive.
5. As to the Costs payable by the Parties in respect of this Hearing.
6. For any further or other relief as may be necessary in the circumstances of the case.

Dated the 19th day of August 1988.
Signed: M/s. Kieran T. Flynn & Co.,
Solicitors, St. Michael St., Tipperary.
To: County Registrar,
Court House, Clonmel,
Co. Tipperary.
Violet Cooper. □

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Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry, within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 16th day of September, 1988.

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

SCHEDULE OF REGISTERED OWNERS

Margaret Ryan, 18 Farranlea Grove, Victoria Cross, Cork. Folio No.: 19378F; Lands: Shanagarry North; Area: 1.156 acres. County: **CORK.**

Peter McGeough, Main Street, Blackrock, Dundalk, Co. Louth; Folio No.: 659L; Lands: Situate on the South Side of the Long Avenue. Area: 0a.0r.18p.; County: **LOUTH.**

William Doyle, Ballyvorheen, Murroe, Co. Limerick. Folio No.: 5043. Lands: Ballyvorheen; Area: 23a.2r.10p.; County: **LIMERICK.**

Roderic Mulcahy, Friar's Walk, Abbyside, Dungarvan, Co. Waterford. Folio No.: 8390; Lands: Abbeyside; Area: 0a.1r.13p.; County: **WATERFORD.**

Thomas Quinn, Ballyglass, Ballygowan, Claremorris, Co. Mayo. Folio No.: 6053; Lands: Ballyglass; Area: 42a.3r.20p.; County: **MAYO.**

Patrick Baldwin, Curraghduff, Carrick-on-Suir, Co. Waterford. Folio No.: 452; Lands: Curraghduff; Area: 100a.2r.12p.; County: **WATERFORD.**

Thomas Hayes, c/o Kennedy Frewen & Co., Tipperary; **Michael Hayes,** Cahervillahow, Golden, Co. Tipperary; **Catherine Hayes,** Cahervillahow, Golden, Co. Tipperary. Folio Nos.: (1) 4045; (2) 17683; (3) 19344; Lands: (1) Cahervillahowe; (2) Usanteen (part); (3) Ballinaclogh; Area: (1) 83a.3r.0p.; (2) 9a.0r.10p.; (3) 43a.2r.10p.; County: **TIPPERARY.**

Thomas O'Connor, Ummeraboy, Knocknagree, Co. Cork. Folio No.: 24702; Lands: Ummerboy; Area: 82a.0r.5p.; County: **CORK.**

Louth County Council, County Offices, Crowe Street, Dundalk, Co. Louth. Folio No.: 521; Lands: Hill of Rath; Area: 15a.1r.7p.; County: **LOUTH.**

John McCarthy, Rathnaveen, Tipperary, Co. Tipperary. Folio No.: (1) 12393; (2) 1776F; Lands: (1) Rathneaveen (Ormond); (2) Rathnaveen; Area: (1) 17a.1r.25p.; (2) 5.262 acres; County: **TIPPERARY.**

Samuel Bailey, Ballygunnertemple, Halfway House, Co. Waterford. Folio No.: 136; Lands: (1) Ballygunnertemple; (2) Ballymaclode; Area: 73a.0r.21p.; (2) 42a.2r.13p.; County: **WATERFORD.**

Frederic Ozanam Trust (Incorporated), Nicholas Street, Dublin 8. Folio No.: 129F; Lands: Rathnapish; Area: 1a.2r.25p.; County: **CARLOW.**

Christopher Palmer, Gurranes, Bonane, Kenmare, Co. Kerry. Folio No.: 7894; Lands: Garranes; Area: 79a.1r.38p.; County: **KERRY.**

William Dolan, Haggardstown, Dundalk, Co. Louth. Folio No.: (1) 11727; (2) 12243; Lands: Haggardstown; Area: (1) 0a.2r.2p.; (2) 0a.0r.10p.; County: **LOUTH.**

Joseph Neary, Lissaniska, Ballyvary, Castlebar, Co. Mayo. Folio No.: 6818; Lands: Lissaniska; Area: 31a.0r.18p; County: **MAYO.**

Della Donoghue, Knockcroghery, Co. Roscommon. Folio No.: 7678; Lands: Knockcroghery; Area: 5a.1r.25p.; County: **ROSCOMMON.**

Hugh Barry, Kylespiddogue, Stradbally, Leix. Folio No.: (1) 13264; (2) 8105; (3) 566; (4) 618; Lands: (1) Balladding; (2) Graigavern; (3) and (4) Ballythomas; Area: (1) 32a.3r.10p. & 1a.3r.26p.; (2) 26a.0r.11p; (3) 5a.1r.1p.; (4) 17a.0r.27p.; County: **QUEENS.**

Bridie O'Brien and **Marianne O'Brien,** Folio No. 1766L.; Lands: the property known as 16 Belmont Park, situate on the south side of said park in the parish of Donnybrook and district of Pembroke; County: **DUBLIN.**

Bernard Manly, "Rosber", South Avenue, Mount Merrion, Dublin. Folio No.: 18939; Lands: property situate in the townland of Blanchardstown and Barony of Castleknock; County: **DUBLIN.**

Stuart Cameron Keys of Dunmore Lodge, Carrigans, Co. Donegal. Folio No.: 3307F; Lands: Dunmore; Area: 3a.3r.36p.; County: **DONEGAL.**

William Gallagher of Ballymagan, Buncrana, Co. Donegal. Folio No.: 26588; Lands: Ballymagan Upper and Lower Clonblosk; Area: 28.081 acres; County: **DONEGAL.**

Lost Wills

KENNEDY, Thomas, deceased, late of 18 Upr. Rathmines Road in the city of Dublin. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 8th day of February, 1988, please contact Eamonn Greene & Company, Solicitors, 7 Northumberland Road, Ballsbridge, Dublin 4, Telephone No. 682355.

In the Estate of THOMAS MURRAY, deceased, late of Thomas Street, Castlebar, County Mayo, ob. 5th May 1984, any person knowing of the Will of the deceased might contact Messrs. Grvey, Smith & Flanagan, Solicitors, Ellison Street, Castlebar.

McMANUS, Bridget, deceased, late of Cottage No. 19, Rinbane, Ballinacarrow, Ballymote, Co. Sligo. Date of death - 3rd June, 1988. Will anyone having knowledge of the relations or next-of-kin of the aforesaid person please contact Johnson & Johnson, Solicitors, Ballymote, Co. Sligo. Reference KJ. Telephone No. (071) 83304.

BYRNE, Patrick, deceased, otherwise known as Patrick O'Byrne, of 21 Brian Road, Marino, Dublin 3, who died on 26th October, 1957. Will anyone having knowledge of the whereabouts of the original Will, dated 14th July, 1954, made in the offices of Kelly & Malone, now Marren & Co., 3 O'Connell Street, Dublin 1, kindly contact James A. O'Donohoe & Co., Solicitors, 8 Marino Mart, Fairview, Dublin 3.

Re: Estate of Mary Ann (otherwise Maura) CARROLL, deceased, late of St. Clare's Convent, Harold's Cross Road, Dublin 6. Would any person holding a Will belonging to the late Mary Ann Carroll of the above address who died on the 14th July, 1988 please contact Joseph H. Dixon & Company, Solicitors, 8 Parnell Square, Dublin 1.

O'CONNELL, Siobhan, (otherwise Josie, otherwise Josephine, otherwise Johanna), deceased, late of 10 Elm Court Flats, Merrion Road, Dublin 4, formerly of 9 Leinster Road, Rathmines and formerly of Flat Number 2, Lansdowne Court, Shelbourne Road, Ballsbridge, Dublin 4. Will any solicitor having information pertaining to the affairs of the above named deceased please contact McGlinn & Co., Solicitors, 49 Upr. Georges Street, Dun Laoghaire, Co. Dublin. Telephone (01) 841435/841340.

KILFEATHER, Kathleen, deceased, late of "St. Helens", Ballincur, Co. Sligo, formerly of The Haight, St. Fintan's Road, Sutton, Co. Dublin. Will any person having knowledge of a Will of the above named deceased who died on the 23rd day of June 1988 please contact Messrs. Florence G. MacCarthy and Associates, Solicitors, Loughrea, Co. Galway. Telephone (091) 41529/41841.

McLOUGHLIN, Reverend Desmond Canon, deceased, late of Strokestown, County Roscommon. Will any person having knowledge of a Will of the above named deceased please contact Messrs. John J. Carlos & Co., Solicitors, Strokestown, Co. Roscommon.

BLACK, Evelyn, deceased, late of Sheegys, Ballyshannon, County Donegal. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died between the 9th and 13th May, 1987 please contact Messrs. Reid & Sweeney, Solicitors, Ballyshannon, Co. Donegal. Tel. No. (072) 51132.

GAVIN, Michael, deceased, late of Cloonslanor, Strokestown, Co. Roscommon, formerly of Rhue, Kilmore, Carrick-on-Shannon, Co. Roscommon. Will anyone with information regarding a Will of the above named deceased please contact John J. Carlos & Co., Solicitors, Strokestown, Co. Roscommon.

REILLY, John, deceased, late of 21 Gardiner Place, Dublin 1, and also Kells, Co. Meath. Will anyone who knows of the whereabouts of a Will of the above-named deceased, who died on 13th August, 1988, please contact Tom Collins & Co., Solicitors, 5 Charlemont St., Dublin 2.

RYAN, George, late of 3 Swanville Place, Rathmines, Dublin 6. Would any solicitor knowing the whereabouts of a Will and title documents of the above-named deceased who died in December, 1984, please contact Sean E. McDonnell & Co., Solicitors, 24 Upr. Rathmines Rd., Dublin 6.

HOWELL, Frederick, deceased, late of Drumpeak, Kingscourt in the county of Cavan. Will anyone having knowledge of the whereabouts of a Will or testamentary disposition executed by the above-named deceased who died on 27th July, 1988, please contact F. N. Murtagh & Co., Solicitors, Kingscourt, Co. Cavan. Tel. (042) 67429.

ELBERRY, Jack, otherwise John, otherwise Jacob, late of 141 Charnwood Estate, Bray, Co. Wicklow, and formerly of 111 Brondesbury Rd., Queens Park, London NW6, England. Will any person having knowledge of a Will of the above deceased, please contact Messrs. Vincent & Beatty, Solicitors, 67/68 Fitzwilliam Square, Dublin 2.

BUCKLEY, Conor, deceased, late of 70 Wellington Road, Ballsbridge, Dublin 4. Will anyone having knowledge of the whereabouts of a will of the above named deceased who died on 31 May, 1988, please contact Patrick Cahill & Co., Solicitors, The Hill, Stillorgan, Co. Dublin. Tel. 832333.

Administration of Estates

Estate of WILLIAM JOSEPH GORDON, deceased, late of 153 Plantation Road, Bleary, County Down, and formerly of Bleary, Portadown. Date of death, 16th April, 1988. Would any solicitor who acted for the late Mr. Gordon please contact Messrs. Heron & Dobson, Solicitors, 6 Bridge Street, Banbridge, Co. Down.

Miscellaneous

WANTED: Solicitors' Practice in Dublin City by a young partnership with funds readily available. Matters such as consultancy, etc. open to negotiation. Any reply will be treated in the strictest of confidence. Box No. 70.

EMPLOYMENT FORUM

The next Employment Forum will be held in the President's Hall, Blackhall Place, Dublin 7 at 6.00p.m. on Thursday 27th October, 1988.

The employment situation in Ireland will be reviewed.

There will be speakers from a leading legal Employment Agency with offices in London and Dublin, from an Officer of the Irish Solicitors in London Bar Association and from an Irish solicitor familiar with the legal employment scene in New York.

Some information will be available on the proposed Directive on Mutual Recognition of Higher Education Diplomas — including legal qualifications — throughout the countries of the European Community.

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South Eastern Circuit
County of Tipperary

IN THE MATTER OF The Landlord and Tenant (Ground Rents) Acts, 1967 to 1984, Section 8, **(1) Teresa Fahy,** *Applicant;* **(2) Thomas Devitt,** *Applicant;* **(3) Patrick J. Spillane,** *Applicant;* **Violet Cooper** *Respondent,* WHEREAS the Applicant (1) had acquired and is now entitled to the lands comprised in a certain Indenture of Lease dated the 1st Day of April, 1911 and made between Austin Samuel Cooper of the One Part, and Richard Maher of the Other Part for the term of 99 years from the 30th day of October, 1908 at the yearly rent of £12.00 (twelve pounds). The said Lease is a Lease to which Part (ii) of the Landlord and Tenant (Ground Rents) No. 2 Act, 1978 applies.

The Lands demised by the said Lease are therein described as "All that the Dwelling-house, Yard and Premises situate lying and being in John Street, City of Cashel, Parish of St. John-Baptist, Barony of Middlethird and County of Tipperary lately in the occupation of Mrs. Wilson".

AND whereas the said Violet Cooper is the person now and at all relevant times entitled to the next superior interest in the lands

(contd. on p. 227)

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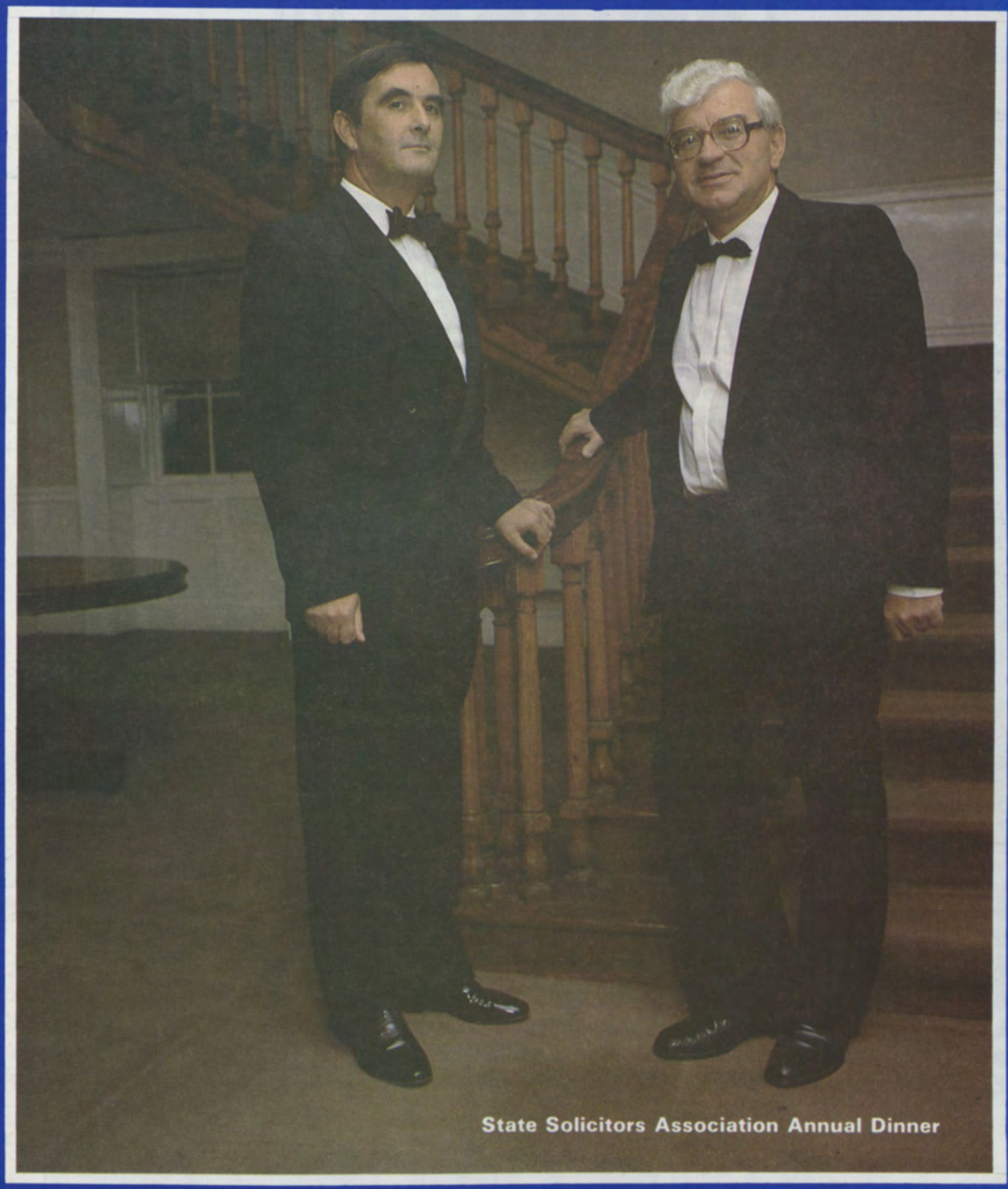

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Viewpoint

It was back in 1975 that the need was expressed for action to be taken to protect consumers against unfair commercial practices in relation to doorstep selling. Two years later the Commission of the E.C. put forward a proposal for a Council Directive, the scope of which covered not only contracts concluded at the doorstep, but also any other form of contract initiated by a trader with a consumer away from the business premises of the trader. The Proposed Directive, the subject of much critical examination in the intervening nine years, was finally adopted "albeit in a much modified form" on 20 December, 1985 and is known as the Council Directive to Protect the Consumer in respect of Contracts Negotiated Away from Business Premises.

The Directive was adopted with a view to ensuring that a minimum degree of protection will be afforded to a consumer in circumstances where he concludes a contract or enters into a unilateral engagement with a trader.

The Directive operates on the premise that a consumer who concludes a contract or enters into a unilateral engagement with a trader away from the business premises of the latter occupies an inferior bargaining position to that of the trader and, as a consequence, is deserving of some degree of protection. The reasoning is that a contract or unilateral engagement of the above mentioned nature will, more often than not, have emanated from negotiations initiated by the trader. The element of surprise sprung upon the consumer by the trader's approach (the trader being in the position to pick the time and place), the consumer's inexperience in sales techniques, the lack of opportunity afforded to the consumer to compare the quality of the goods or service on offer with those on offer in the premises of that particular trader or any other trader, or to discuss or deliberate over the appropriateness of entering into the contract with the trader concerned, are frequently pointed to as illustrations of the unbalanced negotiating position of the consumer vis-a-vis the trader. The Directive goes some way towards rectifying this by providing the consumer with a right to cancel, within a specified period, a contract concluded away from the business premises of the trader.

Ireland, along with the other Member States of the E.C., was to have passed the measures necessary to comply with the Directive by 23 December, 1987. Whilst the Minister for Industry & Commerce is empowered, pursuant to Section 50 of the Sale of Goods and Supply of Services Act 1980, to make an order providing for the observance of a cooling off period in prescribed situations (during which time a consumer shall be entitled to withdraw his acceptance of the contract concerned), this power has never been invoked nor indeed have any measures necessary to comply with the Directive been adopted to-date. It is hoped that 1988 will be the year in which the Minister will, albeit belatedly, make an order with a view to ensuring full compliance with the requirements of the Directive, and properly protecting the consumer. □

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(left) *John L. Murray, Attorney General with Eamonn M. Barnes, Director of Public Prosecutions.*

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Time limits and judicial review applications

The introduction of the new judicial review procedure prescribed by 0.84 of the Rules of the Superior Courts, 1986, has so far proceeded without too much difficulty.[1] Certainly, the Irish courts have thus far shown no inclination to follow the example of the House of Lords in *O'Reilly -v- Mackman,*[2] which held that, subject to such exceptions as might be judicially created on a case by case basis,[3] the (equivalent) provisions of Ord. 53 of the English Rules of the Supreme Court, 1977,[4] prescribed an exclusive procedure by which the validity of any administrative decision could be challenged.

This meant that the applicants in that case – who were prisoners challenging the validity of certain disciplinary punishments – could not proceed by plenary summons in the usual manner. They were required to challenge this decision by way of judicial review, as otherwise they could by-pass the in-built safeguards (the requirement to seek leave,[5] the six months time[6] limit and the obligation to put one's case on affidavit[7] when commencing proceedings). The House of Lords proceeded to strike out the proceedings as an abuse of process. While it is impossible to take issue with the internal logic of Lord Diplock's judgment,[8] this decision has wreaked havoc ever since. The whole object of these reforms – both in Ireland and in Britain – was to ease the path of the public law litigant, and to ensure that a meritorious application was not lost by reason of the wrong choice of remedy. However, in Britain very many litigants have found that their applications for judicial review have been struck out by reason of the wrong choice of remedy in the wake of *O'Reilly -v- Mackman* than ever occurred *prior* to 1977 when the procedural reforms, designed to avoid precisely this result, came into force. As a result, many British commentators have wondered whether the cure has been worse than the disease.[9]

The Irish Courts have, very sensibly, shown no inclination to follow this line of authority. Yet there are some decisions at High Court level on the issue of time limits and applications for judicial review which may well inexorably

By
Gerard Hogan,
Lecturer in Law*

lead to decisions such as *O'Reilly -v- Mackman.* Order 84, rule 21(1) provides as follows:

> "An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari,* unless the Court considers that there is good reason for extending the period within which the application shall be made."

It is to be noted that this represents a change from the 1962 Rules, 0.84, r.10 of which provided:

> "No order of *certiorari* shall be made to remove any judgment, order, conviction or other proceeding had or made by or before any justice of the District Court or judge of the Circuit Court unless such order of *certiorari* be applied for within six calendar months next after such judgment, order, conviction or other proceedings shall be so had or made."

The Courts, however, did not appear to insist on this strict time limit in criminal cases.[10] There was no fixed time limit in any other case, so that *certiorari* lay in the discretion of the Court. In one notable case, *The State (Furey) -v- Minister for Defence,*[11] the Supreme Court quashed a decision to dismiss the applicant from the Defence Forces, even though the application was made some four years after the date of dismissal. *Furey* re-established the fundamental principle that a person prejudiced by *ultra vires* administrative action was entitled to relief *ex debito justitiae,* unless he was precluded by his own conduct from doing so, or where this would be unfair to other parties. In *The State (Cussen) -v- Brennan,*[12] for example, the applicant was denied *certiorari* to quash an appointment to a university chair on the grounds of delay. Although the delay in this case was a mere four months, the Supreme Court held that the applicant had by his conduct led the other parties to believe that he accepted the validity of the original decision. They had altered their positions as a result, so that it would now be unfair to them to grant the relief sought by the applicant.[13]

LAW REFORM COMMISSION RECOMMENDATIONS

It was with this case-law in mind, therefore, that the Law Reform Commission recommended in their 1979 Working Paper, *Judicial Review of Administrative Action: The Problem of Remedies,*[14] that there should be no strict time-limits on the presentation of an application for review, but that the "doctrine of laches (i.e. acquiescence, negligence or undue delay) should continue to apply". The 1986 Rules run somewhat counter to the spirit of these recom-

mendations in prescribing a fairly strict time-limit in the new judicial review procedure. There are two fundamental difficulties with such a strict time-limit. First, it is out of line with the spirit of the *Furey* decision and the whole object of the new reforms. It was never the intention of the Supreme Court in that case, or of Law Reform Commission, that an applicant for judicial review with a meritorious case should find himself shut out by reason of strict new time limits. The new Rules were designed to help – not to hinder – access to the courts as far as applications for judicial review were concerned. The second reason raises the spectre of *O'Reilly -v- Mackman.* If, for example, a litigant seeks declaratory relief by way of judicial review and finds that his application is out of time, what would be to stop him proceeding by way of plenary summons? He has six years to commence his action (subject always to the doctrine of laches where his delay is prejudicial to the defendants in the proceedings), nor does he have to comply with the requirements as to seeking leave or putting his case on affidavit. But if he can by-pass these requirements with impunity, is he not undermining the safeguards in the judicial review process? And in that case would there not be much to be said for the *O'Reilly -v- Mackman* approach and ordering that the proceedings be struck out as an abuse of process? In other words, if the 0.84 requirements as to time-limits, leave and so on become so restrictive as to encourage litigants to by-pass them by issuing plenary proceedings, then this will inexorably lead to the adaptation by the Irish Courts of *O'Reilly -v- Mackman* principles in order to stop this circumvention of the 0.84 procedures. This is way decisions on the 0.84 time-limits are of such immediate interest.

RECENT CASE LAW

In *Director of Public Prosecutions -v- Macklin*[15] the accused, Ellen Whelehan and James Whelehan, pleaded guilty to several betting offences. The respondent District Justice agreed – despite protests from the solicitor for the Director of Public Prosecutions – to deal with the matter by finding each of the accused guilty on one summons and by taking the remainder into account. This occured in March 1987, but it was only some six months later that the Director moved for an application for judical review.

Lardner J. agreed that the respondent District Justice had erred in law in adopting the course that he did. The Supreme Court had held in the *Director of Public Prosecutions -v- Grey*[16] that the general words of s.8 of the Criminal Justice Act 1951 (which allows the District Justice to take other offences into account where the accused pleads guilty to such offences) could not apply to excise and betting penalities, as a special code for such offences had been prescribed by the Excise Management Act 1827. It followed, therefore, that the order made by the District Justice would, in the ordinary course of events, be liable to be quashed.

However, Lardner J. was of the opinion that the Director had delayed unduly and refused the relief sought. The Director had, in effect, sought an order of *mandamus* in addition to *certiorari* against the District Justice but the judge found that:

> "The application was made outside the three month period provided for in 0.84, r.21(1) and that it was not made promptly. I also find that there is no evidence before me of any good reason for extending this period . . . I am (also) not disposed to make an order for *certiorari* which would quash the orders of the District Justice as this would not advance the cause of justice. In all the circumstances, the application for *certiorari* fails because it was made promptly. There is no explanation why it was not made promptly after the 20 March 1987 and long before 9 September 1987."[17]

Here we see the change which the 0.84 time-limits seem to have brought about. The Director is precluded in this case from obtaining orders quashing an admittedly *ultra vires* decision because he did not apply promptly, even though there is no suggestion that this delay was, as such, prejudical to the notice parties. It is also worth noting that the Director had applied – in case of the *certiorari* application – *with* the six month time-limit.[18] This may be contrasted with the approach of the O'Hanlon J. in *The State (Director of Public Prosecutions) -v- Ó hUadaigh.*[19] In that case the respondent District Justice had convicted the accused of certain indictable offences which were capable of being tried summarily. However, the Director had not given his consent to summary trial under the Criminal Justice Act 1951, and O'Hanlon J. had little difficulty in concluding that the convictions were in excess of jurisdiction. The notice party, however, contended that *certiorari* should not issue as he had now served several months of his sentence and that he was prejudiced by a delay of more than four months on the part of the Director. While the Director in that case admittedly sought to explain the delay (unlike the *Macklin* case) the fact remains that O'Hanlon J. was not prepared to allow a plea of delay to defeat an application to quash orders which were manifestly without jurisdiction. Moreover, the notice party in that case was clearly affected by the delay in that he had served a substantial part of his sentence. The notice parties in *Macklin* suffered no such prejudice, yet were able to resist, the application for judicial review by reason of the fact that the Director had not moved promptly.

D.P.P. -v- SOLAN

The judgment of Barr J. in *Solan -v- Director of Public Prosecutions*[20] is along similar lines. Here the applicant sought to quash a

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decision of a District Court clerk some eighteen months previously to issue a summons under s. 10(4) of the Petty Sessions (Ireland) Act, 1851. The applicant had been convicted of assault, but his appeal was pending in the Circuit Court. While Barr J. did not, as such, deal with the point, he did indicate that the applicant would almost certainly be able to establish the invalidity of the summons before the Circuit Court.[21] Barr J. was, however, required to deal with a preliminary point. The applicant was clearly out of time, but were there "good reasons" within the meaning of 0.84, r. 21(1) justifying an extension of the six months time-limit within which to apply for *certiorari*?

The applicants relied on the principles to be found in *The State (Furey) -v- Minister for Defence* and argued that he was, despite his delay entitled to an order of *certiorari* to quash the decision *ex debito justitiae*. Barr J. concluded that there were three features to the present case which rendered inapplicable the reasoning in *Furey*. First, unlike the applicant in *Furey*, Mr. Solan had provided no explanation for the delay. Accordingly, there was no material before the court which could guide it in the exercise of its discretion. Secondly, the applicant in *Solan* sought to take refuge in a technical point, a factor which weighed heavily against the exercise of a discretion in his favour. Finally, Furey had no alternate remedy, whereas in the present case the applicant could apeal *de novo* to the Circuit Court. In the circumstances, Barr J. considered there were no good reasons for extending time under 0.84, r.21(1). Nor could he accept that the mere fact that Johnson J. had granted leave to apply for judical review was sufficient to dispose of the delay argument. Although he had no way of knowing the extent of the argument on this issue at the granting of leave stage, the fact remained that he had the benefit of a much fuller argument and of hearing both sides. In the circumstances, Johnson J.'s order should be regarded as being in the nature of interim relief to enable all aspects of the case to be opened, and not as having conclusively settled the issue of delay.

The manner in which *Furey* was distinguished by Barr J. is, perhaps, open to question. It is true that Furey provided a detailed explanation for his delay, but this does not appear to have been an essential feature of the decision. As McCarthy J. said in a crucial passage at the conclusion of his judgment:

> "I see no logical reason why delay, however long, should, of itself, disentitle to *certiorari* any applicant for that remedy who can demonstrate that a public wrong has been done to him – that, for instance, a conviction was obtained without jurisdiction or that, otherwise, the State has wronged him and that the wrong continues to mark or mar his life."[22]

The applicant in this case had sought to quash a conviction which was almost certainly given without jurisdiction. Is he to be shut out in these circumstances by reason of

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his unexplained delay? Barr J. also laid some stress on the fact that the defect was a technical one. That fact cannot be gainsaid, but it is also true that the quality of the defect has never played an important part of our criminal law. If the applicant could point to an excess of jurisdiction, this has traditionally been enough fatally to flaw a conviction, irrespective of whether the defect could be considered to be a pure technicality or not.[23] And if the Courts take the technical nature of the flaw into account, then one might ask, why did the Supreme Court not exercise its discretion to refuse, prohibition in – to take but one topical example – *Rainey -v- Delap,*[24] one of the cases where the existence of this technical flaw in the issuing of such summonses was first established? Yet in that case it was never even suggested that the Court would be entitled to exercise its discretion against the applicant on that ground.

CHANGES IN JUDICIAL REVIEW PRACTICE

When taken cumulatively, the decisions in *Macklin* and *Solan* seems to effect a small but perceptible shift in judicial review practice. Applications for judicial review must be made promptly and relief may be refused where this requirement of 0.84, r.21(1) has not been complied with, even where this delay has not prejudiced the respondents. Furthermore, any applicant who is out of time should provide an explanation for such delay, at least where this issue is raised by the respondents. This, of course is more stringent than the pre-1986 Rules practice which held that a person aggrieved by an *ultra vires* administrative act was entitled to relief *ex debito justitiae.* In this respect one can only wonder how cases such as *M. -v- An Bord Uchtála*[25] would now be decided. In this case the plaintiffs sought a declaration to the effect that An Board Uchtála had not complied with the consent requirements of the Adoption Act 1952 prior to making adoption orders. The declaratory proceedings were commenced some four years *after* the adoption order was first made, yet a majority of the Supreme Court held that they were not shut out from obtaining declaratory relief because of such delay and despite the fact that such an order would clearly prejudice the private rights of the adoptive parents, if not the child itself.[26] The judgment of O'Higgins C.J. is instructive:

> "On the (plaintiffs) first return to Ireland in 1973 they consulted their solicitors, and a preliminary letter was written on their behalf to the adoption society on the 28 June 1973. One can well understand that, following this preliminary step, many enquiries and investigations were necessary. In particular, the plaintiffs were entitled to have the benefit of legal advice as to whether the provisions of the Act of 1952 had been observed and to know what their rights were before and action of this nature was launched. In fact, this action was commenced in May, 1974. I cannot accept that in the circumstances there was any unreasonable delay."[27]

Such is also the lot of many prospective applicants for judicial review. The points of law which are raised on such applications are often technical and complex. Yet they are now required to move promptly – which, as *Macklin's* case illustrates, may mean a period of less than three months – or they may find themselves shut out from applying, even where such a short delay has not caused prejudice to the respondent. In these circumstances, such an applicant might be tempted to seek declaratory relief by way of plenary summons, where no such stringent time limits apply. It is true that he may lose his case through acquiescence or laches even if he is not formally statute-barred, but that is for the defendent to establish and it will not suffice for him to show merely that the plaintiff has not moved promtly. This is where *O'Reilly -v- Mackman* may have a possible relevence. If a plaintiff can attack an administrative decision without having to observe the 0.84 time-limits, might there not be a case for saying that such a plenary action should be struck out as an abuse of process?. This, however, runs contrary to the purpose of new Rules. As we have seen, these reforms were not designed to provide extra safeguards for the administrative authorities, but rather to enhance the accessibility of the Courts to the individual litigant and to ensure that a good case was not lost because of the wrong choice of remedy. And quite apart from the inherent unfairness in compelling applicants to adhere strictly to such short time limits, this is yet another reason why the 0.84 time-limits should be liberally construed.

* *Gerard Hogan, Lecturer in Law, Trinity College, Dublin, Barrister.*

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FOOTNOTES

1. For an account of these new rules, see Hogan and Morgan, *Administrative Law* (1986) at pp. 331-362.
2. [1983] 2 A.C. 237.
3. Thus, the Ord. 53 procedure does not apply if, for example the plaintiff is required to challenge a public law decision as a condition precedent to establish a private law right: *Cocks -v- Thanet District Council* [1983] 2 A.C. 286. Nor is it applicable to a pure claim for damages *(Davy -v- Spelthorne B.C.* [1984] A.C. 262) or where the alleged invalidity of an administrative decision is raised by way of defence: *Wandsworth L.B.C. -v- Winder* [1985] A.C. 461.
4. The Ord. 53 procedure has now been put on a statutory basis by s.31 of the (English) Supreme Court Act, 1981. It may be questioned whether it was *intra vires* the Superior Court Rules Committee to prescribe what is in effect a limitation period (save that time may be extended for "good reason") for judicial review applications in the absence of specific statutory authorisation.
5. This requirement is contained in 0.84. r.20 of the 1986 Rules.
6. o.84, r.21. The time limit is as short as three months where relief other than *certiorari* is sought (e.g., *mandamus*; 0.84, r.21(1).
7. 0.84, r.20(2)(b). This is contrast to plenary proceedings, where a plaintiff can impeach the validity of an administrative decision by simply alleging the existence of the facts necessary to support his claim.
8. Sir William Wade described Lord Diplock's judgment as an opinion "of notable range and synthesising power": "Procedure and Prerogative in Public Law" (1985) 101 *L.Q.R.* 180, 186.
9. Professor Jolowicz described *O'Reilly -v- Mackman* as a "singularly unfortunate step back to the technicalities of a byegone age": "The Forms of Action Disinterred" (1983) *C.L.J.* 15, 18.
10. *The State (Kelly) -v- District Justice for Bandon* [1947] I.R. 258 and the dicta approving of *Kelly* in *The State (Walsh) -v- Maguire* [1979] I.R. 372; *The State (Coveney) -v- Special Criminal Court* [1982] I.L.R.M. 284 and *The State (Furey) -v- Minister for Defence* [1988] I.L.R.M. 89.
11. [1988] I.L.R.M. 89. This important case was decided in 1984 (i.e., pre-1986 Rules) but was not reported until this year.
12. [1981] I.R. 181. See Horgan, "Natural and Constitutional Justice: *Adieu* to *Laissez-Faire*" (1984) 19 *Ir.Jur.* 309.
13. But as McCarthy J. correctly observed in *Furey* ([1988] I.L.R.M. at 99-100), the all important distinction between the two cases is that: "*Cussen's* case was, essentially, a proceeding between private parties. This case is not such a proceeding – this case is a claim by the citizen that the State should render him constitutional justice . . Clearly, a distinction is to be drawn in cases where the private rights of third parties have been effected either directly or indirectly by the order or instrument sought to be quashed, as in *Cussen's* case, and where no such event has taken place, as in this case where the private citizen is seeking redress from the executive organ of government, and, failing in that, turning to the judicial organ for remedy."
14. Working Paper No. 9. 1979.
15. High Court. 2 November 1987.
16. [1986] I.R. 317.
17. At pp. 4-5 of the judgment.
18. The decision of Lord Denning in *R. -v- Herrod. ex p. Leeds D.C.* [1976] Q.B. 540 is often cited as an authority for the proposition that an applicant for judical review may lose on the ground of delay *even* where he has applied *within* the prescribed time-limit. But this seems to overlook the fact that Lord Denning's reasoning was, in effect, rejected by the House of Lords on appeal: see [1978] A.C. 403.
19. High Court, 30 January 1984.
20. High Court, 21 July 1988. Note also that in *Connors -v- Delap,* High Court, 27 November 1987, Lynch J. referred to the fact that the applicant had delayed some fifteen months before moving the Court for judicial review to challenge his conviction and cited this as a further ground for exercising his discretion against the applicant. However, the Courts will sometimes not be strictly bound by the time-limit and in *Byrne -v- Grey,* High Court, 9 October 1987, Hamilton P. was content to extend time in the context of a challenge to the validity of a search warrant where the applicant was a mere thirteen days out of time.
21. In *Rainey -v- Delap,* Supreme Court, 6 March 1988, Finlay C.J. held that the power conferred on a District Court clerk to issue summonses under s.10(4) of the Petty Sessions (Ireland) Act, 1851 by Rules 29 and 30 of the District Court Rules, 1948, was *ultra vires* the District Court Rules Committee Section 10(4) had confined the power to receive a complaint and to issue a summons to a Justice of the Peace. The functions of the Justice of the Peace were transferred to the District Justice by the Courts of Justice Act 1924. It was not therefore competent for the Committee to purport to confer these powers on a District Court clerk. The Supreme Court had earlier ruled in *Director of Public Prosecutions (Nagle) -v- Flynn,* 10 December 1987, that the validity of any particular summons could be raised on an appeal to the Circuit Court, as such appeals were heard *de novo.*
22. [1988] I.L.R.M. at 100.
23. *The People (Director of Public Prosecutions) -v- Parrell* [1978] I.R. 13 is just one example among many of where a conviction was quashed by reason of a technical irregularity. Here the Court of Criminal Appeal held the prosecution had failed to prove that the appellent was in lawful custody at the time an extension order was served on him under s.30 of the Offences against the State Act 1939 by a Garda Superintendent. The power to extend a period of detention under s.30 be exercised by such an officer but only if he has been authorised in that behalf by a Chief Superintendent under s.3 of the 1939 Act. Here the Superintendent had exhibited a standard form circular (which he had filled in) and which merely recited that he had received authority from a Chief Superintendent for that purpose. O'Higgins C.J. held that this did not suffice and concluded that the appellant was in unlawful custody at the time he made an incriminating statement, which was the only evidence against him. As this evidence was excluded by reason of a breach of his constitutional right to liberty, the conviction was accordingly quashed. But cf. the views expressed by Lynch J. in the *Connors* case, where he said that if an order of *certiorari* was to issue quashing the conviction by reason of a technical flaw it would "clearly deprive the people of Ireland of the retribution to which they are entitled by reason of the crime committed by the applicant."
24. Supreme Court, 8 March 1988.
25. [1977] I.R. 287.
26. Henchy J. dissented on this ground. He concluded that it would now be unfair to the adoptive parents and the child if the adoption order was now to be declared *ultra vires.*
27. [1977] I.R. at 296.

□

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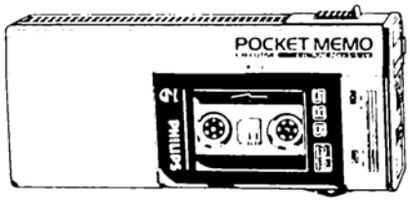

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Practice Notes

Companies (Amendment) Act 1986 Section 17

This Section of the Act was designed to enable subsidiaries of parent companies within the EEC to avoid the necessessity of filing accounts with the Annual Return. The Section sets out the procedures which must be followed if a subsidiary of an EEC parent company wishes to avail of this exemption.

However, the actual wording of the Section has caused considerable uncertainty both in the accountancy and the legal profession.

Practitioners have raised queries as to the nature and enforceability of the guarantee required by the legislation, the timing and the wording of such guarantee.

A sub-committee of the Company Law Committee have had a meeting with a sub-committee of the Institute of Chartered Accountants concerning this matter and submissions to the Minister for Industry and Commerce are being considered.

In such submissions it is intended to raise, *inter alia,* the following points:-

1. The unsatisfactory position and in particular, the enforceability of the guarantee given;
2. The time at which the guarantee should be granted; and
3. The actual wording of the guarantee.

As soon as further information is to hand a further note will be published in the *Gazette.*

In the meantime, all solicitors should exercise caution in the preparation of such guarantees.

The Company Law Committee

Company Law/Publicly Quoted Companies

Practitioners acting on behalf of Public Limited Companies which have a quote on one of the markets should be aware of the following:-

1. The Stock Exchange guidelines in regard to the disapplication of shareholders pre-emptive rights.
2. The Irish Insurance Federation guidelines (as equity investors) on profit sharing and share option incentive schemes.

Copies of these guidelines, if required, can be obtained from the appropriate bodies.

The Company Law Committee

Housing (Rent Tribunal) Regulations

The Minister for the Environment has made regulations under the Housing (Private Rented Dwellings) Act, 1982 amending the provisions in the Housing (Rent Tribunal) Regulations, 1983, regarding the awarding of costs and expenses by the Rent Tribunal.

The Rent Tribunal was established in August, 1983 under Section 2 of the Housing (Private Rented Dwellings) (Amendment) Act, 1983 to replace the District Court as the arbitrating body for determining terms of tenancy of dwellings which were formerly controlled under the Rent Restrictions Acts.

The new regulations, known as the Housing (Rent Tribunal) Regulations, 1983, (Amendment) Regulations, 1988, came into force on 1st July 1988 and will apply to applications received by the Tribunal on or after that date. The main provision of the regulations allows the Rent Tribunal to make awards in cases where applications are determined without an oral hearing. Formerly, costs could be awarded only in respect of oral hearings. Also, the Rent Tribunal will have more discretion in making awards in any case. The new provisions will ensure a more balanced and equitable treatment of parties in written cases where, very often, costs similar to those in oral cases are incurred.

Social Welfare — Oral Hearings

The standard payment made to solicitors who attend at oral hearings will be increased to £30.00 from 1 October, 1988.

Status of Children Act, 1987

This Act was passed on 14 December, 1987, and Part V of the Act came into operation on 14 June, 1988. The main effect of this Part is to apply to the Succession Act, 1965 (Section 30) and to wills and other dispositions (Section 27) the general principle that relationships between persons are to be determined without regard to whether any person's parents were or have been married to each other.

The Land Registry would appreciate that in drafting affidavits for Land Registration applications care should be taken by practitioners to ensure that the provisions of Part V of the Act are complied with.

Local Government (Multi Storey Buildings) Act 1988

This Act has been passed by both houses of the Oireachtas and is most likely to become law in the near future. It will become law when the Minister for the Environment makes a Commencement Order.

It is understood that the Commencement Order will be made as soon as the necessary Regulations have been drafted.

This Act affects all multi storey buildings which were not completed on or before the 1st January, 1950. "Multi Storey Building" means a building comprising five or more storeys, a basement being regarded

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as a storey. The Act applies to all such buildings whether residential apartments, office blocks, hotels etc. The Act will also apply to any multi storey buildings in the course of construction or to be built in the future.

The Act will require Local Authorities to list all buildings of five storeys or more built since the relevant date. They must establish the ownership, notify the owners and require them to submit a Certificate from a chartered engineer (with a specified type of experience) stating whether the building is constructed fully or partly in any of the following forms:

- precast concrete floors and masonry walls;
- precast concrete floors and precast concrete columns;
- precast concrete floors and precast concrete panels.

If a chartered engineer's Certificate is furnished confirming that the building is not constructed in any of the forms mentioned above, then there is no need for any further action by the Owner. If however, a building is built in one of the above forms then the building must be assessed by a chartered engineer.

Buildings which are identified as being in one or other of these categories will require to be assessed in respect of their robustness when compared to a number of codes of building practice. Alternatively, assessments are to be made of the possible risk of accidental damage to the buildings (principally from gas explosion) and to remove the cause of the risk where possible.

The obligation to furnish the Certificate does not arise until the owner is served with a notice by the Local Authority requiring the Certificate to be furnished.

The Act sets out various confirmations which the Certificate should contain. In layman's terms the main point intended to be covered by the Certificate is confirmation that the building has been constructed in such a way so as to ensure that in the event of an accident the resulting damage is not disproportionate to its cause.

The definition of "owner" in the Act is very wide in that it includes a Lessee of a building or any part of the building who occupies the building or part of it under a repairing Lease. Most commercial lettings are on a full repairing basis. Also included in the definition is any person, who either alone or with others, manages any part of a building.

The penalty under the Act for failing to furnish a Certificate is a fine of up to £1,000. The penalties for furnishing a false or misleading Certificate range from a fine of up to £1,000 and/or imprisonment for up to twelve months or a fine of up to £10,000 and/or a term of imprisonment for up to three years, depending on the nature and seriousness of the offence.

Regulations have to be made for the Act to operate and these are presently being prepared by the Department of the Environment.

The main implications of this Act are extremely serious and we see them as follows:

1. **Impasse with chartered engineers**
   The Association of Consulting Engineers has not been able to agree a form of Certificate for use in connection with this proposed legislation and has advised their members not to co-operate unless a form of certificate which is satisfactory to them can be agreed. No other class of professionals are permitted to give Certificates. Unless the engineers break ranks in order to accommodate their clients the legislation will be unworkable. Both engineers and architects we have spoken to are severely critical of the Act and the assumptions upon which it is based.
2. **Properties will become unsaleable**
   Solicitors are already advising clients not to buy apartments in blocks of five stories until this has been resolved. Difficulties might also arise in connection with borrowing on the security of such properties. Anyone trying to dispose of the entire or part of a multi-storey building of five stories and upwards will undoubtedly be confronted by a prospective purchaser making a preliminary enquiry as to whether the Act has been complied with or not.
3. **Substantial expense for apartment owners**
   The normal system for the sale of flats adopted by developers in Ireland is to transfer the common areas to a management company, control of which is handed over to the apartment owners in the development. In this way the people most concerned have control of their own destiny. These management companies (if the problems with engineers can be resolved) are now going to be faced with substantial expense which for many would represent a large capital burden. It is hard to see that such owners would have any redress against the original developers.
4. **Difficulties in getting lessees to undertake obligations to repair**
   A person or company who has taken an ordinary rack rent lease of all or part of an office building to which the Bill applies which makes him or it responsible for repairs may find themselves in the same position as apartment owners. Solicitors are advising clients taking leases in any building which may be affected by the provisions of the Act to think again. □

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Tax Relief for Borrowings by Partners

Section 36, Finance Act 1974

This article has been reprinted from the "Irish Tax Review", Feb. 1988, at the request of the Society's Taxation Committee.

The Insitute of Taxation in Ireland wishes to express its thanks to the Consultative Committee of Accountancy Bodies – Ireland for permission to publish the following agreed note of arrangement between that body and the Chief Inspector of Taxes.

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1 The Revenue have indicated to the Taxation Committee the terms on which claims in respect of interest under Section 36, Finance Act 1974, are being dealt with. These are attached as an Appendix to this note.

2 Discussions have taken place between the Chief Inspector of Taxes and the Taxation Committee on the operation of the new terms. The purpose of this note is to inform members of the outcome of these discussions. Paragraph references are to the Appendix.

3 **Paragraph (a)**
The Revenue reiterated that concessional treatment will be continued for borrowings deemed to qualify up to 30 November 1985 only where tax relief in respect of the interest is not available under some other provisions of the Income Tax Acts. However, the Revenue will not insist on a claim under Section 496 if the loan has been used to purchase a principal private residence and there is an established claim under Section 36. Switching between a Section 496 claim and a Section 36 claim will not be permitted and if a Section 496 claim has been made in respect of the loan or any part of the loan, this will have to be continued. Section 36 relief will not be available in respect of excess interest unallowed under Section 496, because of the limits imposed by that Section, unless a claim under Section 36 has already been established.

4 **Paragraph (b)**
The Revenue do not accept that overdrafts are loans for the purposes of Section 36. However, borrowings in the form of overdrafts at 30 November 1985 will, to the extent that they have not since been repaid, continue to qualify if by 31 January 1988 they are converted to term loans. Tax relief will continue on these term loans for a maximum of five years.

Subject to verification, where necessary, the overdraft figure at 30 November 1985 may be adjusted to take account of cheques drawn but not presented at that date.

Where an overdraft has been reduced since 30 November 1985, interest on the reduced amount only can qualify for tax relief on conversion to a term loan. Thus, where an overdraft has been repaid since 30 November 1985, it cannot be reinstated now and qualify for relief. However, when an overdraft is substantially permanent, save for short periods in credit to avoid a bank surcharge, the Revenue would consider whether, having regard to the source of the funds used to bring the account into credit, a balance of the overdraft equivalent to the 30 November 1985 balance (or where the overdraft has been reduced, the reduced balance) can now be converted to a term loan of up to five years and qualify for relief under Section 36.

Relief in respect of interest on the overdraft between 30 November 1985 and 31 January 1988 will be restricted by reference to the level of the overdraft (adjusted as above) at 30 November 1985.

Interest on borrowings at 30 November 1985 will have to be adjusted for subsequent withdrawals of capital.

5 **Paragraph (d)**
In response to a query from the accountants, the Revenue said "abuse" would have to be interpreted in the light of the Oireachtas Debates on the 1974 Finance Bill. The accountants mentioned concern at the possibility of a subjective approach to "abuse" by the Revenue and said a clearer indication would be most desirable. The Revenue considered a claim for relief for interest on borrowings for luxuries, speculation or tax avoidance etc. to be an "abuse" of the concessional treatment.

6 **Paragraph (f)**
The Revenue indicated the new rules would operate on specific loans, the funds from which are directly invested in the partnership. The new rules cannot accommodate overdrafts.

7 **Paragraph (h)**
The accountants submitted that the "2-year rule" which applies to this paragraph (See note at end of Appendix) should operate on the basis of first-in first-out, i.e. drawings in any year should be set against the earliest undrawn profits. Revenue's approach is that drawings consist firstly of current profits. They are prepared to accept, however, that the profits of the year before the preceding year are drawn next and finally profits of the preceding year. Thus, drawings are to be set off against undrawn profits on a "3-1-2" basis where year 3 is the year under review, year 2 is the preceding year and year 1 is the year before the preceding year.

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PF 5

8 **Hardship**
The Revenue indicated that their general approach to the implementation of the terms for borrowings up to 30 November 1985 will be reasonable, taking into account all the circumstances. Hardship cases will be looked at by reference to the date of the borrowing and the purpose for which used.

9 **General**
The acountants mentioned they were anxious to reach a workable arrangement on Section 36. However, it had to be understood that individual taxpayers would have come to their own decision on whether the new rules should be challenged through the appeal procedures.

Technical Department
November 26, 1987

Appendix

Partnerships: relief in respect of interest Section 36, Finance Act 1974

Borrowings up to 30 November, 1985

(a) It must be clear that relief for the interest on these borrowings cannot be obtained under any other provision, e.g. under Section 81, ITA 1967.

(b) Except in the case of loans in excess of £10,000, the purpose for which the borrowings were obtained need not be indicated but all loans must be identified to the Inspector and a statement showing the principal outstanding at 30 November 1985 and the balance of the repayment period remaining must be furnished.

(c) There must be no departure from or variation in the terms on which the original loan was made.

(d) The Inspector will retain the right to view any case where it is considered that the concessional relief has been abused.

Borrowings after 30 November 1985

(e) Borrowings after this date must comply with the requirements of Section 36, Finance Act 1974.

(f) The proceeds of the borrowings must be introduced into the partnership either by way of loan or contribution of capital.

(g) The money must be used wholly and exclusively for the purposes of the partnership's trade or profession, and

(h) Any recovery of capital from the partnership must be used to repay the loan, if relief is not to be restricted.

In determining whether the conditions at (e) and (f) are met, the Inspector will have regard to the following:-

(i) The loan(s) must be identified (amount, lender and term)

(ii) It must be clear that the proceeds have been introduced into the partnership business and used for business purposes only.

(iii) A loan(s) to finance drawings, directly or indirectly, will be regarded as used for the purposes of the partnership's trade or profession.

Note
In deciding whether there is a recovery of capital as envisaged at (h), any undrawn profits at the end of an accounting period will not be regarded as forming part of the capital of the partnership unless they remain undrawn for a period of more than two years from the end of the accounting period. □

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Establishment of Valuation Tribunal and Appointment of Commissioner of Valuation

The Minister for Finance on 25th July 1988 announced the establishment by Ministerial Order of the Valuation Tribunal provided for under the Valuation Act 1988.

The main purpose of the Tribunal is to hear appeals against the decisions of the Commissioner of Valuation in relation to the rateable valuation of property. The Tribunal replaces the Circuit Court hearings in relation to these appeals.

The members of the Tribunal are: *Chairman:* Mr. Hugh O'Flaherty S.C., Dublin; *Vice-Chairman:* Ms. Mary Devins, Solicitor, Sligo; *Vice-Chairman:* Mr. Paul Butler BL., Dublin; *Member:* Mr. Brian O'Farrell, Dublin. Further appointments to the Tribunal will be made at a later date.

Apart from cases already appealed to the Circuit Court, appeals against the Commissioner's determinations will henceforth be lodged with the Tribunal and not with the Circuit Court (1988 Act, Section 3(5)). The Notice of Appeal must go direct to the Tribunal and not through the local authority.

A fee in accordance with the scale below must be paid in respect of each appeal to the Tribunal. It will no longer be necesary to enter into a recognisance.

Each rating authority is required by section 21 of the Valuation (Ireland) Act 1852 to give public notice of the receipt of the appeal decisions of the availability of Valuation Lists for inspection. The relevant notices should have been published during the period 27-29 July in the newspapers circulating in your area.

The appeal fee, which should be made payable to the Registrar, Valuation Tribunal, is as follows:

Valuation of property as determined by Commissioner of Valuation (1)	**Appeal Fee (2)**
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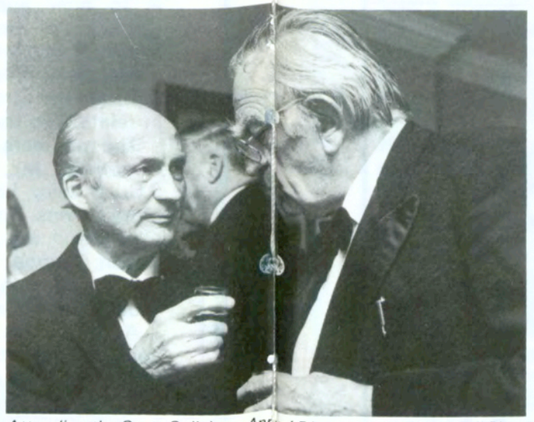
Technology: (Jury's Hotel)			
Conveyancing Support Packages	Frank Lanigan James Heney	Tues. 15th Nov.	3.00-3.45pm
How to use your PC	Michael Browne Sharon Walsh	Tues. 15th Nov.	6.00-6.45pm
Introducing Word Processing	John M. Bourke Mary Grace Blake	Wed. 16th Nov.	3.00-3.45pm
Accounts	David Beattie David Gardiner	Wed. 16th Nov.	6.00-6.45pm
Conduct of Meetings	Anthony E. Collins	Thurs. 24th Nov.	6.00-7.00pm
Compulsory Acquisition	Enda Gearty Prof. Richard Woulfe Sean McDermott, Property Arbitrator	Mon. 28th Nov.	9.30am-5.30pm

Seminars will be held in Blackhall Place unless otherwise stated.

For further details and application forms see brochure circulated with September *Gazette* or contact Geraldine Pearse, Phone 710711.

PEOPLE & PLACES

State Solicitors Annual Dinner
(Left to right) Mrs. Elaine McElhinney (Kilmallock), Mr. Maurice Power (Kilmallock), Mrs. Anne Loughlane (Dublin), Mr. Barry Galvin (Cork) and Mrs. Eimer Galvin (Cork).



Attending the State Solicitors Annual Dinner held at Blackhall Place were (left) Mr. John Griffin, Dundalk and Mr. Kevin P. Wallace, Mullingar.

1st A.G.M. of Solicitors' Mutual Defence Fund. 1st Sept. 1988
Mr. Dick Lane, Coopers & Lybrand; Mr. Maurice Curran, Chairman of the Board – S.M.D.F.; Mr. John O'Connor, Solicitor to Board.

Mr. Henry Comerford, Solicitor, Chairman of the Judging Panel, inspecting a competitor's tray of oysters during the Irish Oyster-Opening Championships held in McDonagh's Seafood Bar, Quay Street, as part of the Galway Oyster Festival. (Photograph: Joe Shaughnessy).

Attending the Irish Centre for European Law Conference on Financial Services at Blackhall Place, were, Barbara Joyce (Anglo-Irish Bank), Deirdre McDermott (Denis I. Fin & Co., Solicitors) and Linda Lawless (Smurfit Finance).

Mr. Michael Keating (right), Managing Director of Castletown Press, presenting a copy of the new Short Term Business Letting Agreement to Mr. Terence Dixon, President of the Dublin Solicitors' Bar Association, and Mr. David Walley, Solicitor.

(Right) Mr. Bernard Slowey, Manager, Dictation Systems, Dictaphone, presenting the Phillips Pocket Memo "Director" 896 and Desk Transcription Machine to Mr. John Schutte, Solicitor. Mr. Schutte correctly forecast the score in the Millennium Match between Ireland and England in the Phillips Competition published in the March 1988 Gazette.

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Younger Members News

Salary increase for newly qualified solicitors

The Younger Members Committee is pleased to report that the Motion proposed by the Committee for an increase in the recommended salary payable to newly qualified solicitors to £10,000 – £11,000 was adopted unanimously by the Council of the Law Society on 8th September, 1988.

Huge progress in move to enter UK market

The YMC has been pressing for an open door to London and our Council has endorsed the following proposal submitted by a Joint Working Party of the home jurisdictions (Northern Ireland, UK, Scotland, Wales, Ireland):

> "that a solicitor qualified as such in any one of the jurisdictions can qualify in another of those jurisdictions without undergoing an examination or aptitude test but in turn that the migrating solicitor would have a restricted Practising Certificate for a period of not less than two and not more than three years during which time he would carry out in the host jurisdiction work of a type normally carried out by a solicitor in that jurisdiction. The restriction in his Practising Certificate would be to the effect that he could not carry on business as a sole practitioner nor could he carry on business as a partner in a solicitor's firm unless his partner or one of his partners was qualified and in practice for three years or longer in the host jurisdiction."

Younger Members Committee "Millennium" Soccer Blitz

Saturday, 3rd September, 1988

Despite the fact that the number of teams was down on last year's, the Younger Members Committee ran another successful fund raising event for the Solicitors' Benevolent Association. The teams involved in this year's event were:

Arthur Cox & Co./Matheson Ormsby & Prentice;
John P. Carroll & Company;
Croskerrys (the holders);
The Chairmans Team (i.e. the extended family of Justin McKenna);
Ivor Fitzpatrick & Co.;
Michael Fitzsimons & Co.;
Wm. Fry & Sons;
McCann Fitzgerald Sutton Dudley;
Wicklow.

Even though the scoreboard keeper, Brian O'Connor, slept it out, was late with the whistles and forgot the balls, the first games kicked off at around 1.30p.m.

We split the teams into two groups so that for the semi-finals the winner of one group would play the runner-up of the other. After a splendid display of soccer skills, which demonstrated already how the creditable Irish performance in the European Championships had influenced those "young" enthusiasts, the semi-finalists emerged. These were:

Wicklow -v- John P. Carroll & Co.
Croskerry -v- Arthur Cox & Co./Matheson Ormsby & Prentice

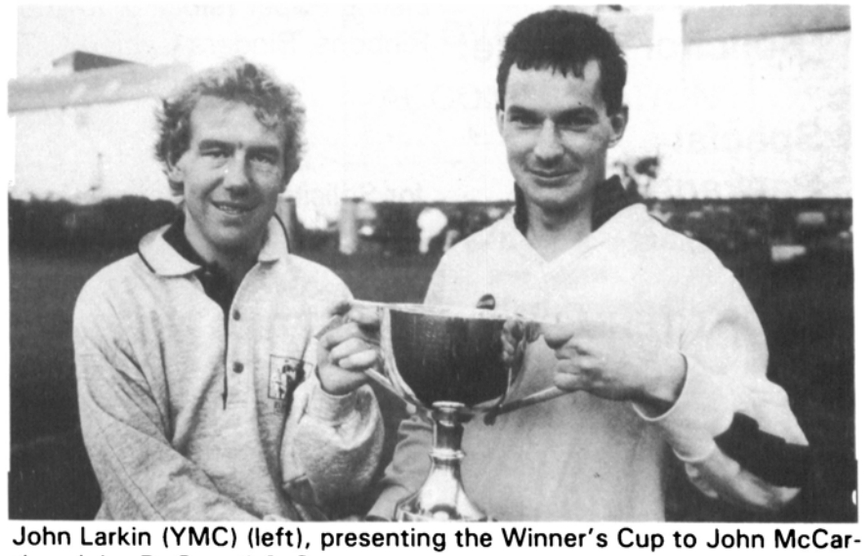
John P. Carroll & Company were the narrow winnners of their semi-final while, after penalties, the combined forces of Arthur Cox & Co./Matheson Ormsby & Prentice went down to Croskerrys.

As the final progressed it became apparent that either the day's strenuous activity had taken its toll on weary limbs or that some players had spent too long in the bar (discussing tactics). Even after extra time the sides were level. It was down to penalties. The three girls on each team would take penalties against the opposition goalkeeper. After the first round of penalties the score remained tied at 2-2 . . . more penalties 4-4 . . . more penalties . . . 7-7 . . . more . . . the match officials were running out of fingers on which to count. Referee J. J. Cummins, offered to take off his boots and one of the unfortunate girls had a penalty saved by a desperate lunging dive from J. P. Carroll & Company's goalkeeper, who once togged out beside J. J. after a match and was very familiar with what was inside his boots! ! !

The match and the competition was won 17-16 by John P. Carroll & Co.

The day's sporting endeavour was rounded off by a disco in the members lounge at which the winning captain, John McCarthy, bought drinks for all present (Bill is to send his tab on to him). The day raised a net total of £500.00 approximately for the Solicitors' Benevolent Association. Thanks to all who played in the competition and particularly to YMC members who helped organise the event – Miriam Reynolds, Patricia Boyd, Dan Murphy, Brian O'Connor and Chairman, Justin McKenna.

JOHN LARKIN



John Larkin (YMC) (left), presenting the Winner's Cup to John McCarthy, John P. Carroll & Co.

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BADMINTON

Now that the Law Society Badminton Club has been firmly established with some notable successes, from the Law Society team already under its belt, we are looking for students for the 1988-89 badminton season.

The Law Society Badminton Club began life in January 1988 with generous sponsorship from the Finance Committee of the Law Society, Kings Inns and Corrigan & Corrigan, Solicitors. The club, which combines the talents of students from both Blackhall Place and Kings Inns, entered a team in the Badminton Intervarsities in Limerick.

The team, with the talents of Junior International Aileen Donnelly and former interprovincial players Paudie O'Mahoney, Ciaran Walker and Nichola Hayden performed with distinction. Excellent results were achieved against UCC and Jordanstown University and the highlight was in drawing with the eventual winners of the event, UCD.

This season the Badminton Intervarsities will be held in Belfast, and we hope that with the necessary support, we will bring back the cup to Dublin.

Anyone interested in joining the Law Society Badminton Club should contact Ciaran Walker at 888268.

Some members of the Law Society Badminton team. Back — left to right: Paudie O'Mahoney, Martin Hayden, Ciaran Walker and Michael Corrigan. Front: Conleth O'Reilly, Nicola Hayden and Aileen Donnelly.

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Community Lawyers right to practise within the E.C.

Two recent decisions of the European Court of Justice

In two [1 & 2] important decisions earlier this year the European Court of Justice explored the question of lawyers from one E.C. country practising in another Member State by way of 'establishment' or provision of legal services. In particular the Court considered the terms of Directive 77/249[3] to facilitate the effective exercise by lawyers of freedom to provide services (hereinafter referred to as "The Directive") in both cases and Article 52 of the Treaty of Rome (hereinafter referred to as "The Treaty") in the first case.

Given the momentum that has been generated in relation to the proposed completion of the Internal Market by 1992 both decisions will be of interest to Irish lawyers considering commencing or indeed expanding activities in the U.K. and on the Continent.

Article 1 of the Directive states:

1. This Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services.

   Notwithstanding anything contained in this Directive, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land.

Article 4 stipulates:

1. Activities relating to the representation of a client in legal proceedngs or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established within that State with the exception of any conditions requiring residence, or registration with a professional organisation, in that State.
2. A lawyer pursuing these activities shall observe the Rules of professional conduct of the host Member State without prejudice to his obligations in the Member State from which he comes.
3. When these activities are pursued in the United Kingdom, "Rules of professional conduct of the host Member State", means the Rules of professional conduct applicable to Solicitors, where such activities are not reserved for Barristers and Advocates. Otherwise the Rules of professional conduct applicable to the latter shall apply. However, Barristers from Ireland shall always be subject to the Rules of professional conduct applicable in the United Kingdom to Barristers and Advocates.

by
Cathal T. O Conaill, B.C.L.,
Solicitor

When these activities are pursued in Ireland "Rules of professional conduct of the host Member State" means, insofar as they govern the oral presentation of a case in Court, the Rules of professional conduct applicable to Barristers. In all other cases, the Rules of professional conduct applicable to Solicitors shall apply. However, Barristers and Advocates from the United Kingdom shall always be subject to the rules of professional conduct applicable in Ireland to Barristers.

Article 5 states as follows:

For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State shall require a lawyer to whom Article 1 applies:

- To be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State;
- To work *in conjunction* (emphasis added) with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that Authority, or with an *avoue* or *procuratore* practising before it.

(A) (GULLUNG) -v- CONSEILS DES ORDRES DES AVOCATS DES BARREAUX DE COLMAR ET DE SAVERNE AND OTHERS: Judgment 19th January, 1988.

This case (hereinafter referred to as *Gullung*) was a reference under Article 177 of the Treaty from a French Court to the European Court for a preliminary ruling. The facts of *Gullung* were a little unusual. Mr. Claude Gullung, who was a lawyer holding both French and German nationality, had practised as a Notary at Hirsingue, France, from 1947 to 1966 when he had resigned following disciplinary measures taken against him by the Disciplinary Board for Notaries of the Department of Haut-Rhin.

Subsequently he had first sought to be registered on the list of conseils juridiques (legel advisers) of Marseille and later to be admitted as an avocat of the

Cathal T. O'Conaill.

Mulhouse Bar. Each of those applications was rejected on the basis that he did not reach the standard of good character required of an avocat, which was the same as the standard required by French legislation for persons registered as conseils juridiques.

Following his registration as Rechtsanwalt at the Bar of Offenburg – Federal Republic of Germany, Mr. Gullung, who had at the same time opened an office as juris consulte (legal consultant) in Mulhouse, was informed of a decision of the Mulhouse Bar Council prohibiting any avocat of that Bar from providing his assistance under the relevant conditions of French and Community law to any avocat who did not fulfil the necessary requirement as to character and, in particular, to Mr. Gullung. Identical decisions had been adopted by the Bar Councils of Colmar and of Saverne, following which Mr. Gullung appeared at a hearing of the Criminal Division of the Cour d'Appel (Court of Appeal) of Colmar, acting as adviser to a civil party in conjunction with an avocat who practised before that Court.

The main proceedings concerned the actions which Mr. Gullung had brought against those two decisions. The Cour d'Appel of Colmar, which was dealing with both cases, stayed its proceedings and referred two questions to the Court of Justice for a preliminary ruling.

(1) Provision of Services

The first question sought in particular to determine whether the provisions of the Directive might be relied upon by a lawyer established in one Member State in order to pursue his activities as a provider of services in another Member State where in the latter State he had been prohibited access to the profession of avocat for reasons relating to dignity, honour and integrity. The Directive, said the Court, required Member States to recognise as a lawyer any person established as such in another Member State under one of the designations contained in Article 1(2) of the Directive, including that of rechtsanwalt in the Federal Republic of Germany.

It followed from the provisions of Article 4 of the Directive that lawyers providing services were bound to observe the Rules of professional conduct in force in a host Member State.

That interpretation was supported by the wording of Article 7(2) of the Directive which provided that in the event of "non-compliance with the obligations in force in the host Member State", the competent authority of the latter should determine the consequences of such non-compliance "in accordance with its own rules and procedures".

By imposing the rules of professional practice of the host Member State, the Directive assumed that the provider of services had the capacity to observe those rules. If the competent authority of the Member State had previously found that a person lacked that capacity and that the person concerned had been prohibited access to the profession concerned for that reason, it was to be considered that he did *not* (emhasis added) fulfil the conditions which the Directive imposed for the freedom to provide services.

(2) Right of Establishment

The second question submitted by the French Court related to the interpretation of Article 52 of the Treaty. It concerned in particular the question whether the establishment of a lawyer on the territory of another Member State, pursuant to that Article, required the registration of that lawyer at a Bar of the host Member State where such a registration was required by the legislation of that Member State.

The Court considered that, according to its own wording, the question submitted was limited to a case where a lawyer, who was a member of a legal profession as defined by the legislation of the Member State where he was established, intended to establish himself in another Member State as a member of a legal profession within the meaning of the legislation of the latter State.

According to the second paragraph of Article 52, freedom of establishment included access to activities as a self employed person and their exercise "under the conditions laid down for its own nationals by the law of the country where such establishment is effected".

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It followed from the rule that, as the Court had held in its judgment in *Ordre des Avocats au Barreau de Paris -v- Klopp* [1984] ECR 2971, 2989, "in the absence of specific community rules in the matter each Member State is free to regulate the exercise of the legal profession in its territory".

The obligation of registration of lawyers at a Bar, imposed by certain Member States, was to be considered lawful under Community law on condition that such registration was open to nationals of all Member States without discrimination. The purpose of such an obligation was to guarantee integrity and the observance of the principles of professional conduct, as well as disciplinary control of the activities of lawyers. It therefore pursued an objective worthy of protection.

It followed that Member States whose legislation imposed the requirement of registration at a Bar upon those who wished to establish themselves in the territory of that State as a member of the legal profession as defined by his national legislation, might impose the same requirement upon lawyers from other Member States who relied upon the right of establishment laid down by the Treaty in order to avail themselves of that same capacity.

(3) Double Nationality

Given the peculiar circumstances of this case, the Court considered

the question of double nationality. It is not clear from the Report of the case whether this aspect was part of the reference or if the Court (including the Advocate General) took it upon itself to consider the matter.

The problem raised by double nationality was whether a national of two Member States, who had been admitted as a Member of the legal profession in one of those States, might rely on the provisions of the Directive on the territory of the other Member State.

The free movement of persons, the freedom of establishment and the freedom to provide services, which were fundamental to the Community system, would not be fully realised if a Member State might refuse the benefit of the provisions of Community law to those of its nationals who, while established in another Member State whose nationality they also held, made use of the facilities granted by Community Law in order to exercise their activities in the territory of the first State.

The thrust of the Court's ruling in *Gullung* is that lawyers of one Community country can provide legal services in another Member State once the provisions of the Directive are complied with, and may establish themselves subject to registration at the Bar of the host State.

In relation to the right of establishment under Article 52 of the Treaty it may well be that the Court will be called upon in future to clarify the exact extent of this freedom with reference to particular facts.

(B) COMMISSION OF THE EUROPEAN COMMUNITIES -v- FEDERAL REPUBLIC OF GERMANY,
Judgment 25th February, 1988.

This matter (hereinafter referred to as *the German case)* arose out of proceedings brought by the European Commission against the Federal Republic of Germany under Article 169 of the Treaty.

Substance of Case

The Commission sought a declaration that the Federal Republic of Germany had failed in regard to the exercise by lawyers of freedom to provide services to fulfil its obligations under the Treaty and under the Directive to facilitate the effective exercise by lawyers of freedom to provide such services.

The Commission directed its complaints against the manner in which Germany had given effect to Article 5 of the Directive as regards the duty of "co-operation" imposed on a lawyer from another Member State who pursued activities in Germany by way of provision of legal services.

There were three separate matters at issue:

(1) Extent of the co-operation with the German lawyer,
(2) Detailed rules of co-operation, and
(3) Territorial limits on representation.

(1) Extent of Co-operation with German lawyers:

According to the 1980 German legislation purporting to transpose the Directive, the obligation to work with a lawyer established in

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Germany arose when a non-German lawyer providing services proposed to "represent or defend a client" in legal proceedings or certain administrative proceedings.

The Commission argued that this was too broad an interpretation of the 'co-operation' concept contained in Article 5 of the Directive. It embraced not only activities in judicial proceedings but *also* activities before administrative authorities and contact with persons in custody. It was further contended by the Commission that in cases where representation by a German lawyer was not mandatory in judicial proceedings (i.e., where a party could conduct his/her own case or engage another lay person to do so), a non-German lawyer acting should not have to work in 'conjunction' with a German lawyer.

The Court accepted this argument. There were no considerations of general interest which could, in relation to those judicial proceedings where representation by a lawyer is not mandatory, justify the obligation imposed on a lawyer enrolled in another Member State and providing his professional services in Germany to work in conjunction with a German lawyer.

The German law of 1980, by extending such an obligation to legal proceedings, was contrary to the Directive and Articles 59 and 60 of the Treaty, the aim of which is to enable a person wishing to provide services to pursue his activities in the host State without discrimination in favour of nationals of that State.

(2) Detailed Rules of Co-operation:

The Commission argued that the definition of co-operation contained in the German law exceeded the limits set by the Directive and Articles 59 and 60 of the Treaty.

In particular, the Commission felt that the requirement relating to

(i) Evidence of co-operation,
(ii) The role assigned to the German lawyer with whom there must be co-operation, and
(iii) Contacts between the lawyer providing services and persons in custody,

exceeded the terms of the Directive.

The Court decided that the German law imposed on the German and non-German lawyer required to work together obligations which went beyond what was necessary to achieve the aim of the duty of co-operation.

Neither the continuous presence of a German lawyer in Court nor the requirement that the latter must himself be the representative or counsel for the defence, nor the detailed provisions concerning proof of co-operation were generally indispensable or even useful in giving the necessary support to the lawyer providing services.

In an interesting statement, the Court referred to the notion of "answerability" of a German lawyer and considered that the foreign lawyer was answerable to the Court before which the proceedings had been issued and not to the client. The question of the non-German lawyer's *knowledge* of German law *was* a matter between him and his client.

The Court did, however accept the submission of the German Government that there might be over-riding considerations which it was for the Member State to appraise, which might induce that State to regulate the contact between lawyers and the person in custody. However, the restrictions imposed by German law went further than was necessary.

(3) Territorial limits on representation

Under German law, lawyers have to be admitted separately to appear before different types of Courts. Where representation by a lawyer is mandatory before a Court, the lawyer must therefore be admitted to practise before the Court concerned. If not admitted, he can only appear with the assistance of an admitted lawyer.

The Commission took the view that Article 5 of the Directive only required that the lawyer providing his services must work in conjunction with a lawyer admitted to practise before the Court. However, it maintained that this did "not allow those services to be limited to explanations in the course of the oral procedure, made with the assistance of the lawyer admitted to practise before the Court as is laid down by the German legislation in respect of all civil proceedings above a given level of magnitude". The question the Commission addressed to the Court was whether Germany was entitled to

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subject lawyers providing services to the same system it applied to German lawyers who were not admitted to practise before a given Court.

In order to consider this submission, the Court felt it necessary to look outside the strict terms of the Directive. The Court had regard to Articles 59 and 60 of the Treaty.

The Court held that the 'Rule of territorial exclusivity' may not be applied to temporary activities pursued by lawyers established in other Member States since, for those, their legal and practical circumstances cannot legitimately be compared with those applicable to lawyers established in Germany.

(C) The Implementation of the Directive in the State

The Directive has been transposed into Irish law by Statutory Instrument No. 58 of 1979, European Communities (Freedom to provide services) (Lawyers) Regulations, 1979,[4] hereinafter referred to as the "Regulations".

Unlike the German law, the Regulations follow closely the terms of the Directive and in many respects are a faithful transcription of same.

Section 3(1) of the Regulations states:

> Subject to the provisions of these Regulations, a visiting lawyer shall be recognised as a lawyer for the purpose of pursuing activities in the State by way of provision of legal services and without prejudice to the generality of the foregoing —
>
> (a) as regards activities relating to the representation of a client in legal proceedings or before public authorities, he shall have the same right of audience as a lawyer established in the State, and
>
> (b) references in any enactment or statutory instrument to a barrister or to a solicitor shall be construed accordingly.

This is far wider than the restrictive German Law and complies fully with the Directive and the German case.

Section 5(1) is equally general.

> Activities relating to the representation of a client in legal proceedings or before Public Authorities shall be pursued in the State by a visiting lawyer under the conditions laid down for lawyers established in the State, save that he cannot be required to be resident or registered with a professional organisation, in the State, or to hold a practising Certificate within the meaning of the Solicitors Acts 1954 and 1960.

Section 6 of the Instrument transposes the crucial Article 5 combined together with the effect of Article 7 of the Directive stating:

> When a visiting lawyer is pursuing activities in the State relating to the representation of a client in legal proceedings, he shall work *in conjunction* (emphasis added) with a lawyer who is entitled to practise before the judicial authority in question and who would where necessary be answerable to that authority.

(D) Comments

It is clear from *Gullung* and the *German case* that Member States are entitled to treat differently lawyers from other Community countries wishing to provide legal services on their territory from those who wish to *establish* themselves in the country.

While the freedom to provide services has been legislated upon in the Directive, the right of establishment springs directly from the Treaty and has not been specifically codified.

As stated by the Court in *Ordre des Avocats au Barreau de Paris,* quoted above in the context of establishment, it is up to Member States, in the absence of Community rules, to regulate the legal profession on their territory. Indeed the preamble to the Directive states that "more detailed measures will be necessary to facilitate the effective exercise of the right of establishment".

For Irish lawyers the right to provide legal services in other Member States will, in the opinion of the writer, be of more immediate importance than the right to establish within the Community. While Irish lawyers may wish to appear occasionally, for instance, before United Kingdom Courts, they may not see it useful to establish a permanent office there.

Of course, there are always invisible barriers to mobility within the Community such as language

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and differences in substantive and procedural law. However, for those lawyers wishing to avail of the new opportunities created by the proposed completion of the Internal Market, the decisions in *Gullung* and the *German case* will be considered very helpful.

An eminent U.K. lawyer/journalist writing recently in relation to the *German case* stated (perhaps optimistically)[5] "Businessmen will find this decision of the European Court reasonable. Lawyers will think it very bold. If foreign lawyers are enterprising enough to make use of it and appear in the High Court, the Court of Appeal and the House of Lords, they will drive a coach and horses through the rules of the Bar and of the Law Society. It could certainly open up the lawyers' world".

FOOTNOTES

1 Case 294/86 Gullung -v- Conseils des Ordres des Avocats des Barreaux de Colmar et de Saverne and Others, 19th January, 1988, The Times 20th January, 1988; [1988]. 2 C.M.L.R. 57.
2 Case 427/85. Commission of the European Communities -v- the Federal Republic of Germany, 25th February, 1988.
3 O. J. 78/17, 26/3/77. Council Directive 77/249 EEC to facilitate the effective exercise by lawyers of freedom to provide services.
4 S.I. No. 58 of 1979, as amended by S.I. No. 197 of 1981 (Greek lawyers).
5 A. H. Herman. "Lawyers without Frontiers". Financial Times, 10th March, 1987.

EMPLOYMENT FORUM

The next EMPLOYMENT FORUM will be held in the President's Hall, Blackhall Place, Dublin 7, at 6.00p.m. on Thursday, 27 October, 1988.

Admission is free and all interested solicitors and solicitors' apprentices are welcome.

Book Review

THE CONSTITUTION OF IRELAND

By Frank Litton (editor). Special Issue of **Administration,** volume 35 No. 4, 1987.
Institute of Public Administration, 1988, 255 pp. £6).

Frank Litton, the editor, in a perceptive but short introduction to this Festchrift on the fiftieth anniversary of the people's adoption of the Constitution, rightly pronounces that "Constitution-making requires that the cunning of a Machiavellian prince be joined to the wisdom of a philosopher king". Constitutional interpretation demands similar qualities.

Some of our modern Irish legal philosophers and interpreters of our Constitution contribute essays in the form of analyses and critiques of the Constitution. The most lengthy of the contributions was written by Dr. Dermot Keogh who documents the often painstaking processes involved in the drafting of the Constitution and Article 44 in particular. Dr. Keogh recounts the various pilgrimages to the Vatican seeking approval for the articles on religion which ended with the Pope's immortal words: "Ni approvo ni non disapprovo; taceremo". ("I do not approve, neither do I not disapprove; we shall maintain silence"). Dr. Enda McDonough, Professor of Moral Theology at St. Patrick's College, Maynooth, describes the reaction of De Valera to the Pope's negative attitude to the draft Constitution: "Pius XI was a tough northerner. I have had to deal all my life with tough northerners like Sean McEntee and Frank Aiken so I knew I would have to fight". Despite the friendship De Valera shared with Dr. John Charles McQuaid, ecclesiological differences separated them on certain issues. Yet Dr. McQuaid must have been pleased with his endeavours.

Walsh J. writes on constitutional rights. Incidentally, Barrington J. recollects Tommy Conolly, S.C. describing Brian Walsh in the 1960s as the person who was "writing the constitutional law of this country". Professor John Kelly, who had the opportunity of reading the contributions, described Walsh J's essay as being "full of material provoking either challenge or applause". Walsh J. in a wide-ranging essay considers the natural law and the nature of fundamental rights in the Constitution.

The courts and the Constitution are considered by Barrington J. The learned judge describes the expanding influence of the Constitution from its early days to the present time. He describes how the judges were fearful in the early days of the State, lest any form of judicial activism in interpreting the Constitution would involve them in political, social and economic issues in which the judges had no special competence. Those days are gone forever. Barrington J. makes many interesting observations but of particular interest is his description of Tommy Conolly, S.C. as the father of modern Irish Constitutional law.

Keane J., judge, prolific jurist and President of the Law Reform Commission, in a masterly essay considers issues relating to Administrative and Planning Law in the context of the Constitution. He reflects on the immense growth in the public service and the dominant role it plays in Irish life and he notes that challenges to actions of the executive meet with a more sympathetic and less sceptical response in present times than in former times.

Anthony Coughlan, a senior lecturer in Trinity College, Dublin, writes on the Constitution and

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social policy. Constitutional theory and political practice are the themes selected by Brian Farrell. Dr. Enda McDonagh, Professor of Moral Theology at St. Patrick's College, Maynooth, offers philosophical and theological reflections on the Constitution.

The issue of the interpretation of the Constitution is dealt with by Gerard Hogan, barrister, lecturer in Trinity College, Dublin and one of our foremost legal writers. Quoting Hughes J. of the United States Supreme Court, "the Constitution is what the judges say it is", Gerard Hogan rightly emphasises that one of the important political developments of the last twenty years has been the growing signficance of the courts in interpretating the Constitution. The jurisprudence of original intention has always intrigued your reviewer. Gerard Hogan does not refer to this concept in these terms but deals with this issue in a skillful manner under the heading of the historical approach. The other approaches to natural law and other extra-constitutional principles together with the issue of the literal versus harmonious interpretational approaches are also dealt with. These issues are of enormous practical significance.

Professor John Kelly in the concluding section of the book with the intriguing title "The Constitution: Law and Manifestor" demonstrates his remarkable fondness for the 1922 Constitution. In a classic statement he argues that something in the Irish character "recoils from plainness, from simplicity, from minimums, from the unequivocal, from the bare, undecorated truth". He argues that much in the Constitution was conceived as a manifesto rather than as a bare law and thus has given rise to considerable difficulties since the enactment of the Constitution.

The Constitution of Ireland 1937-1987 is a remarkable book; it is not a standard textbook in the accepted sense of that term, nor does it purport to be such. The perceptives offered in the book are of considerable interest and deserve to be read by those who cherish our fundamental law.

Eamonn G. Hall

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CORRESPONDENCE

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

30th August 1988

Dear Sir,

I am to refer to your enquiry relating to discharges of mortgages or charges under Section 18(2) of the Housing Act, 1988.

I am to confirm that, instead of a formal release the Land Registry will accept, as evidence of the release of a charge, a receipt as in the case of a Building Society receipt if it is endorsed on the original counterpart, or certified copy, of the charge.

If it is not so endorsed but clearly refers to the charge and identifies the registered lands charged it will also be accepted.

In all other cases evidence on affidavit will be required.

Provision is also made in Section 18 of the Housing Act, 1988, for the vacate of a mortgage of unregistered land registered in the Registry of Deeds. The requisite fee applicable at present to vacates of Building Society mortgages will apply to vacates of other mortgages pursuant to Section 18 of the Housing Act, 1988.

Yours faithfully,
B. McCormac, Manager,
Land Registry,
Central Office,
Chancery St.,
Dublin 7.

Professional Information

Contd. from page 267

McKEE, Edward Joseph, late of 24 Clontarf Road, Dublin 3. Anyone having knowledge of the whereabouts of a Will of the above named deceased please contact King & Company, Solicitors, 38/39 Parliament Street, Dublin 2. Phone 01-792500.

FITZGERALD, Thomas Walter, deceased, late of Glenbower, Woodstown, County Waterford. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on the 5th July, 1988, please contact Messrs. Kenny, Stephenson & Chapman, Solicitors, Newtown, Waterford. Telephone No. 051-75855.

McCARTHY, Patrick, (known as Pappy McCarthy), late of Gleninagh, Ballyvaughan, County Clare, farmer and bachelor. Any person holding or knowing of the existence or whereabouts of a Will made by the above named deceased please contact Justin Sadleir, Solicitor, Crow Street, Gort, Co. Galway.

FLAHERTY, Patrick, (otherwise O'Flaherty), deceased, late of Lisdoonvarna, Co. Clare. Obit. 6th November, 1987. Any person knowing of a Will of the deceased might contact James Monahan & Co., Solicitors, 46 Abbey Street, Ennis, Co. Clare.

NYHAN, Garrett J., deceased, late of Grinan Nursing Home (lately Brownswood Nursing Home), Enniscorthy, Co. Wexford. Will anyone having knowledge of the whereabouts of the Will of the above named deceased who died on the 28th September, 1988, please contact Michael Bourke & Co., Solicitors, 1 Washington Street, Cork. Tel. 021-275729.

O'CONNOR, George, deceased, late of Mere Bank, North Circular Road, Limerick. Will anybody having knowledge of the whereabouts of a Will of the above named deceased please contact Leahy & O'Sullivan, Solicitors, 71 O'Connell Street, Limerick.

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Dated this 17th day of October, 1988.

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

SCHEDULE OF REGISTERED OWNERS

Martin Hartford, Kennetstown, Bellewstown, Co. Meath. Folio No.: 6849F; Lands: (1) Legganhall; (2) Collierstown; (3) Legganhall; (4) Legganhall; Area: (1) 12.944 acres; (2) 6.875 acres; (3) 24.525 acres; (4) 53.613 acres; County: **MEATH.**

Theodore J. Harris, Folio No.: 17729; Lands: Townland of Drumartin and Barony of Rathdown. County: **DUBLIN.**

John Elliot Maxwell, Ballincard, Fiveally, Birr, Co. Offaly. Folio No.: 4649; Lands: Clontaglass; Area: 27a.2r.10p.; County: **KINGS.**

Thomas Ward, Folio No.: 4745F; Lands: Drumcar; Area: 0.300 acres; County: **LOUTH.**

William Ryan, Folio No.: 1120; Lands: Ballyhistbeg; Area: 29a.3r.21p.; County: **TIPPERARY.**

James Phelan, Kildermody, Kilmacthomas, Co. Waterford. Folio No.: 1652; Lands: Kildermody; Area: 206a.0r.39p.; County: **WATERFORD.**

Rosaline Kelly, 7 Lakeview Rd., Wicklow. Folio No.: 2433L; Lands: Bungalow Seven, St. Laurence's Park; County: **WICKLOW.**

James Barry, Folio No.: 20197F; Lands: Killeagh; Area: 0.422 acres; County: **CORK.**

Kathleen and Donal Kelliher, Folio No.: 33898; Lands: Cahereen West; Area: 0a.1r.2p.; County: **KERRY.**

John Kirby; Folio No.: 31081; Lands: Gortroe; Area: 0a.1r.0p.; County: **KERRY.**

Lackagh Development Company Ltd., Folio No.: (1) 29627; (2) 1907F; (3) 2959F; (4) 2960F; (5) 4362F; Lands: (1) Lackagh Beg; (2) Cahernashilleeny; (3) Cahernashilleeny; (4) Cahernashilleeny; (5) Lackagh Beg; Area: (1) 2a.0r.5p.; (2) 0a.1r.33p.; (3) 0a.1r.38p.; (4) 0a.1r.38p.; (5) 1a.0r.27p.; County: **GALWAY.**

Werner Lehrell, Folio No.: 29058; Lands: Killinardrish; Area: 26a.0r.19p.; County: **CORK.**

Patrick Joseph Sexton, Ardee Road, Collon, Co. Louth. Folio No.: 1352; Lands: Collon; Area: 17a.1r.34p.; County: **LOUTH.**

Udaras na Gaeltachta; Folio No.: 51571; Lands: Dooros; Area: 1.038 acres; County: **GALWAY.**

Crosspan Developments Limited, Folio No.: 2309; County: **DUBLIN.**

Brendan J. Matthews, Stafford Lodge, Carrickmines, Co. Dublin is full owner of 1 undivided ½ share. Folio No.: 1286F; Lands: Property situate in the Townland of Robinhood and Barony of Uppercross; County: **DUBLIN.**

Mannix Holdings (Unlimited Liability Company), 7 Gardiner Row, Dublin 1. Folio No.: 1994; Lands: the property situate in the townland of Yellow Walls (part), Barony of Coolock; Area: 4.40 acres; County: **DUBLIN.**

Bernard Boyle, Friary, Barnesmore, Co. Donegal. Folio No.: 25289; Lands: Friary; Area: 7a.2r.15p.; County: **DONEGAL.**

George C. Lonergan, Kilmoylan Upper, Doon, Co. Limerick. Folio No.: 15598; Lands: Kilmoylan Upper; Area: 28a.2r.6p.; County: **LIMERICK.**

Michael Richardson, Folio No.: 11614F; Lands: Ballysheedy East; Area: 0.5 acres; County: **LIMERICK.**

Michael Fitzgerald; Folio No.: 1166; Lands: Ballyvallikin (part); Area: 170a.3r.35p.; County: **WATERFORD.**

Joan Doherty, Magheraroarty, Gortahork, Letterkenny P.O., Co. Donegal; Folio No.: 19844F; Lands: Magheraroarty; County: **DONEGAL.**

Dundalk Urban District Council; Folio No.: 4766; Lands: Marshes Upper; Area: 21a.3r.3p.; County: **LOUTH.**

Patrick Whyte of Bodington, Clonalvey, Co. Meath; Folio No.: 3928; Lands: Part of the lands of Bodington situate in the electoral division of Stamullin, Barony of Duleek Upper and County of Meath; Area: 85a.3r.31p.; County: **MEATH.**

THE LANDLORD & TENANT (GROUND RENTS) ACT 1967 TO 1987
In the Matter of the Landlord & Tenant (Ground Rents) Acts 1967 to 1987, Thomas Maher, Applicant; Property at Ladyswell Street, Cashel, Co. Tipperary.

WHEREAS the Applicant has applied to me for an order declaring that he is entitled to acquire the Fee Simple interest in All That and Those the licensed premises situate at Ladyswell Street, Cashel in the Parish of St. John The Baptist, Barony of Middlethird and County of Tipperary, now and for upwards of Eighty (80) years last in the occupation of the applicant and his predecessors in Title and for such further or other Order as may be necessary in the matter, I, HEREBY GIVE NOTICE that I will sit at the Courthouse, Clonmel on the 16th day of November 1988 at 2.30p.m. to hear said application and any submissions by any interested Parties in relation thereto.

SIGNED: Patrick J. McCormack,
County Registrar.

Miscellaneous

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Lost Wills

LEYDEN, Emily, deceased, late of Greenlands Villas, Rosses Point, County Sligo, (maiden name: Emily Daly, a native of Magheran Earla, Eyre Court, Ballinasloe, Co. Galway). Will anyone having knowledge of the existence or whereabouts of a Will, or information re the Estate of the above named deceased who died on the 2nd day of January 1988 at Sligo General Hospital, aged 71, please contact Colette M. McMahon, Solicitor, 39 Celtic Park Avenue, Dublin 9. Tel. (01) 310574.

O'SULLIVAN, Michael, (otherwise Michael Joseph), late of 32 Crab Lane, Chadsmoor, Cannock, in the County of Stafford, England, and formerly of Reentrisk, Allihies, Bantry, Co. Cork. Will anyone having knowledge of a Will for the above named deceased please contact Messrs. Wolfe & Co., Solicitors, Wolfe Tone Square, Bantry, Co. Cork. Ref. 1884.

KING, Michael J., bachelor, retired commercial traveller with no permanent address. Will anyone having knowledge of a Will for the above named deceased please contact Messrs. Henry J. Wynne & Company, Solicitors, Boyle, Co. Roscommon.

McNAMARA, Arthur, late of Mountrivers, Doonbeg, Co. Clare. Ob. 19th July, 1988. Will any persons having knowledge of a Will made by Arthur McNamara late of Mountrivers, Doonbeg, Kilrush, Co. Clare, please advise McMahon & Williams, Solicitors, Kilrush, Co. Clare, reference BF/P525.

Contd. on page 266

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When the average person hears RAM or MEGABYTES, or HERCULES, usually they keep quiet and agree with whoever knows the biggest word. It is however important to note that a computer is quite a stupid device in its own right. It's you who will make the computer intelligent by feeding it every day with its food, i.e. data.

DATA is anything that you need to store on your computer, e.g. names, addresses, phone no., etc. Your computer will store all these items nice and neatly on your hard disk, a devce we will come back to later. But before we go further, it should be stated that the most important item with regard to a computer system is the software.

SOFTWARE is the program which will be loaded onto your computer. Some people think that all you do is buy your computer, turn it on and start typing. Unfortunately this is not the case as you will need a SOFTWARE PACKAGE to store your data correctly in order for you to retrieve it properly. It is like a bridge across a divide, without which communication cannot be made. Once the software is loaded you can start your data entry all of which will be stored on your hard disk.

The HARD DISK is the device where both your programs, data, and maybe a few games will be stored. This is fixed to the machine and cannot be handled by the owner. It usually comes in a 20 Megabytes size but can be larger. This term 'MEGABYTES' means millions, so you have 20 million bytes of storage space on your hard disk. The easy way to describe a BYTE is, that ever character would need one byte of space to store it. Thus 20 Megabytes would store 20 million letter ''A''s. Easy, no!! You will also have what is called a FLOPPY DRIVE, where you will place floppy disks.

The FLOPPY DISK can be handled by the owner but this must be done carefully. FLOPPY DRIVES can store a variety of amounts, from 360,000 bytes to 1.44 Megabytes of data. The floppy drive would be used to load your programs on to the hard disk. But most importantly they are used to make security copies of your highly confidential data stored on your hard disk. Some people are under the illusion that a hard disk is indestructable — a mistake that has been made by many a novice and even some veterans in the computer industry. I warn you now and don't say you were never told, *"Do your backups"*.

RAM does not mean to run somebody down. This is where your programs reside temporarily after loading them from the hard disk. When power is switched off you will lose everything that is in memory or RAM unless you have saved it to your hard disk. So don't think you can just switch your computer off when you feel like it. Exit your programs properly.

Data, as you may have gathered by now, must be entered through the keyboard which is almost identical to a typewriter keyboard. All activity is displayed to you on your monitor, either monochrome (black and white) or colour.

O.K., so you come in tomorrow bright and early. Put the coffee on and read *The Times*. Now it's computer time so you throw the power switch on. The first thing that happens is the screen lights up and some data is displayed. This first piece of data is of no concern to you. The computer will run some internal diagnostics for a while and will then access the Hard Disk and then show the 'C' prompt on the screen. This means that your hard disk has booted successfully and it's name is C. At this point you will enter your program name, which you should already know, and Hey Presto, your computer springs into action. Your floppy drive, by the way, would be referred to as 'A'.

With your program displayed on the screen the options are yours. You will probably want to add data or retrieve and edit existing data.

After all this trauma you might like to get a hard copy of some files or even send a letter. The PRINTER usually has two leads attached to it. One for the power, the other connects directly to the computer and your data is transmitted along this. You will probably have created some documents on your computer by now, so go to the print options and select print. Your printer springs into action and spits out your finished document.

This was a very general description of what your computer does and what some of the jargon means. I hope you will have found it of some benefit.

Good luck for the technical future.

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Vol. 82 No. 9 November 1988

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Executive Editor:
Mary Gaynor

Committee:
Geraldine Clarke, Chairman
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John F. Buckley
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Frank Lanigan
Charles R. M. Meredith
Desmond Moran
Daire Murphy
John Schutte
Maxwell Sweeney

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GAZETTE
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Viewpoint

No aspect of our planning legislation has given rise to as much controversy as the provisions relating to Compensation. The fact that relatively small amounts of Compensation have actually been paid out by planning authorities has gone almost un-noticed in the sustained media campaign which has highlighted the ''millions of pounds'' of compensation which have either been claimed or which planning authorities fear will be claimed if they refuse certain sensitive applications.

Once there is control of the development of property whether on an individual basis or by zoning particular areas there follow two inevitable results. The land of some owners will become more valuable while that of others will decline or at least be forever fixed to its present use value.

Two doctrines evolved to try to balance out the inevitable inequities. ''Betterment'' as it was sometimes called, provided that where the value of land had been significantly increased either as a result of zoning or the carrying out of services which make its development easier, a share of the increased value should be recovered from the owner. The other Compensation provided that, where a restriction was placed on the development of land, the owner should be compensated for his inability to develop that land in the way in which the owners of other land were being permitted to develop theirs. The concept is generally analogous to that of compensation for the compulsory purchase of lands. Where the common good required that certain lands be acquired for public purposes the land owner was required to dispose of those lands but was entitled to be compensated for his loss. Equally if a land owner was to be prevented, for the common good, from developing his lands he ought to be compensated.

''Betterment'' has long since been abandoned as an unworkable system and it has been recognised that the windfall profits from grants of planning permission are perhaps dealt with by means of Capital Gains or other forms of taxation.

It is claimed that Compensation has become a great millstone round the neck of planning authorities. Apart from the argument that vast sums of money have been paid out to ''speculators'', which appears to be a considerable exaggeration, the argument is strongly made that authorities have yielded to ''blackmail'' from developers who have threatened to pursue claims for vast sums of compensation if certain permissions are not granted to them.

It is unfortunate that in one of the most significant cases the *X J S* case in which a substantial, though not the horrendous figure claimed by the claimants, was awarded the compensation became payable as a result of the failure of An Bord Pleanala to word its refusal of permission properly.

It has to be said however that the ''out'' offered by the 1963 Act whereby a planning authority could, in order to defeat a compensation claim, offer a permission for an alternative development has proved to be unworkable and probably unlawful.

The Local Government (Planning & Development) (No. 2) Bill of 1988 is the Minister's response to the clamour to ''plug the compensation loophole''. It has been much criticised for being a half measure but perhaps it is none the worse for that. If the anti-compensation lobby had had its way, property owners whose land had been effectively sterilised by the decisions of planners which might have had the most tenuous connection with the common good, would have been without a remedy. Whether the Bill will achieve its aim of ensuring that

Contd. on page 277

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Family mediation — a solution to unhappy differences?

The family mediation service set up under the auspices of the Department of Justice opened its doors to its first clients on 1st September 1986. Now that the service has been operating for some two years it is possible for those practising in family law both to have some understanding of its operation and to assess to some extent its impact on marital breakdown and separation. Of course the State Family Mediation Service is not the only source of marital mediation: there is for instance the well established Marriage and Family Institute and there are other private groups as well as individual mediators.

by Catherine McGuinness, Barrister-at-Law

For some years before the State mediation service was set up there had been growing public interest in mediation or conciliation as a means of dealing with the problems of separating couples. Examples of such services in other countries were cited, in particular that of the Bristol Conciliation Service in Britain. There was a growing belief that the mediation/conciliation method was more successful than the "adverserial" legal system in enabling separating couples to come to reasonable agreements. This trend culminated in the recommendations of the Joint Committee of the Oireachtas on marriage breakdown which devoted a chapter of its Report to a reasonably detailed discussion on mediation. This included sections on the purposes, scope and structure of mediation services, on their finances and staffing and on methods of referral to them. The Committee came down in favour of an independent out-of-court service with voluntary participation of the parties. It rejected the idea of a compulsory referral to mediation as a concomitant or preliminary to court proceedings. This was clearly right as to force an unwilling couple to go to mediation merely makes them go through a futile exercise with little or no hope of success.

The Oireachtas Joint Committee reported on 27th March 1985, in the same month the then Minister of State for family law reform, Mrs. Nuala Fennell, set up a voluntary steering committee which eventually led to the establishment of the Family Mediation Service in September 1986. It is perhaps rather ironic that the establishment of a State service which acknowledged the urgent reality of marriage breakdown should have followed less than two months after the country had firmly closed its eyes to that very same reality in the divorce referendum.

In consideration of mediation or conciliation the principle is that it is not the same thing as marriage counselling or reconciliation. It was because of the easy confusion between conciliation and reconciliation that the term mediation has become the norm in this country. Mediation was defined by the steering committee as follows:

"Mediation is the means or process whereby a couple whose marriage has broken down and who have the specific intention to separate may reduce any areas of conflict, by discussing with each other together with a mediator, voluntarily and confidentially, such matters which need to be dealt with as a result of their separation and reach such agreements with each other as are in the balanced interest and long term benefit to themselves and their family".

There was clearly a wide public demand for such a service. In the first year some 470 requests for initial appointments were received by the service. Of these 124 received advice and information only, as their request was unsupported by the other spouse. The

VIEWPOINT — contd. from page 275

"genuine" owners have a right to compensation while "speculators" cannot benefit from its provisions remains to be seen. The replacement of the "Undertaking to Grant Permission" by a notice from the planning authority stating that the land should be capable of other development is an interesting alternative to the unworkable Undertaking. It remains to be seen if it will prove any more useful either to the plannners or the developers than the previous arrangement.

Twenty-five years after the introduction of our basic planning legislation, is it not time for a comprehensive review of how well this legislation has served us. There are strong indications that the attempt to control the development, including change of use of every square metre of urban property is excessively restrictive and that greater freedom should be given to the owners of property to use it as they see fit subject only to such use or development not being offensive or injurious. Our legislation seems to be born of a "little boxes" approach to planning which may need to be abandoned. □

supported by the other spouse. The remaining 247 couples were given appointments and moved toward mediation. Of the couples dealt with over 50% referred themselves, 14.5% were referred by solicitors, about 2% by Judges and 1% by general practitioners. My own impression is that as time goes on more couples are being referred though solicitors and certainly Judges in family law cases increasingly encourage couples to use mediation and are virtually always willing to adjourn proceedings to allow mediation to be tried. This is done from the best of motives but can have its disadvantages as an unscrupulous party can succeed in unduly prolonging proceedings and delaying essential reliefs to his or her spouse by seeking adjournments on the excuse of going to mediation in situations where there is not the slightest hope of mediation succeeding.

Family Mediation Service

The Family Mediation Service in February 1988 published a useful booklet giving the text of papers presented to a conference organised by the service to mark the first anniversary of its setting up. This booklet is most helpful in promoting understanding of the way in which mediation works and the claims that it makes. I would suggest that some of the advocates of mediation tend to over theorise and to make some over enthusiastic claims, although by and large the booklet is a balanced one. Advocacy of mediation is too often coupled with customary references to the "adverserial" court system and overt or implicit denigration of lawyers as persons who encourage bitterness and conflict between their family law clients. In common with most family lawyers I resent this blanket condemnation. The experienced family law solicitor will make every effort to encourage a negotiated separation agreement and emphatically does not encourage his or her clients to take court proceedings except as a last resort. Even where proceedings are taken, both solicitors and barristers spend much time and effort in trying to settle cases and in the majority of cases they are successful in achieving such a settlement. No matter what system is used there will always be a number of cases where all efforts at an agreed settlement fail and there is need for a decision making tribunal. However, the Joint Oireachtas Committee in their report rightly pointed out that when considering statistics of success or failure in mediation one must remember that almost any approach will work most of the time when dealing with marriage disputes. It is in the really difficult cases that both settlement and mediation can fail.

Separation

When a couple separate there are a number of areas where disputes may arise — the major areas being custody of and access to children, financial maintenance of the economically weaker spouse and children, and the provision of a reasonable place to live for both parties and their children. Mediation can be successful in all these areas but my own impression is that it is most successful in the custody/access area in helping separating couples to have a positive attitude to continuing joint parenting of their children. Even here however, both lawyer and mediator must avoid the trap of accepting an agreement that is more about what the parents want than about the welfare of the child. The term "joint custody" is often used as a sort of "flavour of the month" but joint custody is not always the best answer. I have seen a mediated joint custody agreement between spouses who had diametrically opposed views on education and upbringing which provided for a young child attending school three days a week and missing school on the other two days each week for education at home in a different language and in accordance with a totally different education philosophy. Now that agreement provided a mediated compromise between the wishes of the parents but one can hardly be surprised that before very long the child began to show clear signs of damage. In the legal system any custody/access decision must be made within the ambit of the welfare principle of the Guardianship of Infants Act, 1964. This situation cannot clearly apply in mediation because the very nature of the system is that the mediator is not an adviser, is not judgmental and aims to empower the couple to make their own decisions which may or may not be beneficial to the child.

Maintenance

As far as maintenance and property are concerned it seems to be crucial that couples make mediated decisions and agreements within the framework of knowing what their legal rights are, so that, if they give up some of those rights, they do so both voluntarily and in an informed way. Cases do arise where mediated agreements have been made and parties later realise that they have unknowingly divested themselves of important rights, become totally dissatisfied and abandon the agreement. "Mediation", writes Maura Wail-Murphy of the Family Mediation Service "is based on a completely different set of assumptions from the adverserial methods of resolving conflict where all moral claims are translated into rights language". Enda

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McDonagh explores this idea of going "beyond rights", "the attempt to translate all morality into the language of rights could constitute an enormous impoverishment of morality in the Christian and in the wider human condition. Where would that leave friendship, hope, love and forgiveness values which are incorporated into the spirit of mediation". These are very worthy sentiments but the sense of fairness, justice and rights is very deeply embedded in humanity. Even small children have a strong view of what is "not fair". Separating couples both in mediation and in ordinary settlements voluntarily accept a diminution of their rights but they must do so knowingly.

Experience of the working of the mediation service shows up both advantages and problems but few family lawyers would not accept that mediation in its best sense provides a valuable service. Mediation has been successful for a large number of the couples who have operated the system.

Costs

As in the case of the legal system the awkward question of costs must arise. The Department of Justice Family Mediation Service is free to clients but private services must charge fees and I have seen fees charged by private mediators at times which are at least as high if not higher than any fees charged by solicitors. There is a clear need for an expansion of the free family mediation service, in particular outside the Dublin area, as at present the only mediation centre is in Dublin. In the present atmosphere of cutbacks in State services one cannot be very optimistic that this will be achieved. One can only hope that the present service at least will not follow the path of the legal aid scheme set up under the Legal Aid Board which started off with high hopes but over the past few years has seen itself underfinanced and understaffed and unable even with its best efforts to cope with the enormous demand made on it.

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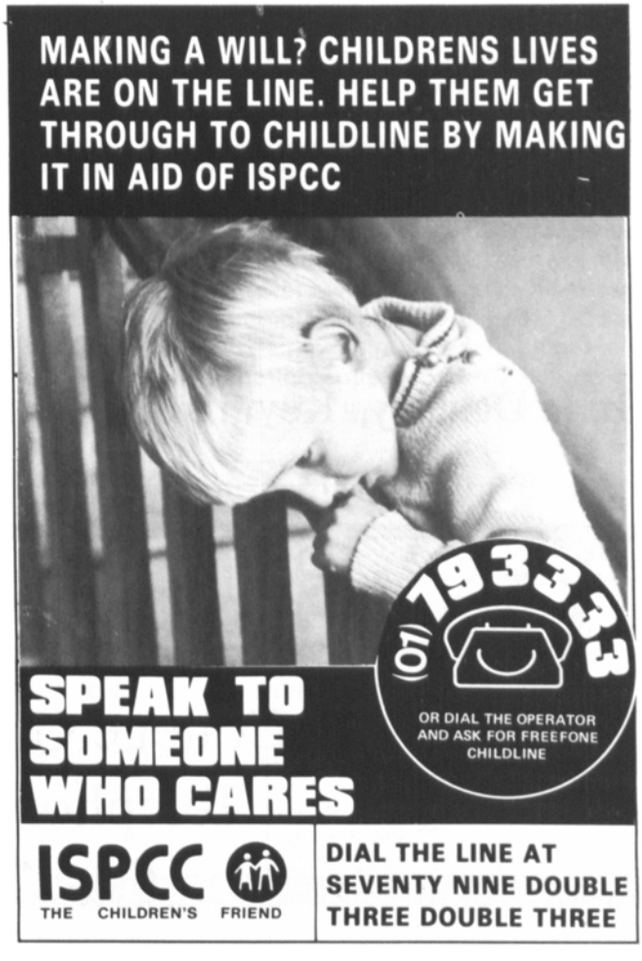

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It seems to me that the next goal should be greater co-operation and understanding between mediators and family lawyers. It is no accident that one of the best articles in the booklet by the Family Mediation Service is by Mary Lloyd who is not only a mediator but also a solicitor. In her articles she points out that the success of mediation may be dependent upon the very existence of the courts and the potential for litigation. Mediation works best when guidelines exist as to how the law would be applied to resolve the dispute. Lawyers need to make an effort to educate themselves as to how mediation works; thus they can understand where mediation is useful and what couples are best to refer to the mediation service. Dare I suggest that mediators too should educate themselves to avoid blanket condemnations of lawyers and to understand how normal family lawyers and experienced general solicitors work in the context of marriage breakdown. The Law Society has made a beginning by providing speakers on mediation at some of its seminars but there is a need for more small groups to meet face to face for in depth discussions of our common problems. □

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Practice Note

Registered Mail / Registration of Valuable Documents

Some concern has been expressed by practitioners in recent months about the low level of compensation available from the Post Office where registered letters or parcels are lost. The normal registered fee is 95p but only allows compensation up to a maximum of £20. However, many practitioners may not be aware that there is in fact a rising scale of charges running from 95p at the lower end of the scale to £1.95 at the top end of the scale attracting compensation betweeen £20 and £1,000.

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£1.95	£1,000

Clearly if documents are valued at more than £1,000 they can be split up into separate packages and franked up to the maximum value required.

It may be that some practices are sending high value items through the mail on a regular basis and in that situation they are advised to consider whether they should take out a separate practice insurance policy to cover any losses which might arise. Because registered mail is subject to close supervision and is signed for at each step of its journey, insurance companies are more inclined to offer very reasonable terms for insurance.

Practitioners should also note that An Post operates an express mail system exactly the same as the various courier firms, where each individual item up to a maximum two kilos in weight is insured for £5,000 actual loss, £10,000 consequential loss. Items send by express mail are guaranteed next day delivery. It is worth noting that the commercial couriers will only cover parcels for £100 actual loss.

It may be that practitioners are experiencing current difficulties with the registered mail or express system and if this is the case the Society would be glad to file these complaints with An Post. In the meantime it is hoped that the information supplied above will be of practical use to practitioners. □

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From the President . . .

Reflections

I cannot believe that almost a year has passed since I first wrote this column in the *Gazette* and that I have now completed the end of my term as President.

So much has happened that it has only emphasised to me the extent of the change which is happening in our system.

This change has given us a challenge which has been answered by the profession in the past 12 months. We have shown that we are prepared to self improve, to change our systems and to provide the services which the public require us to give. I have noted in my travels throughout the countryside a growing optimism that the profession is coming out of a recessionary period and that solicitors can see a future for themselves in our country.

For this mood to continue to grow, it is necessary that the relationship of the Law Society to its members must grow closer and develop. The work of the Society must ensure that the solicitor is provided with all the services he needs to develop his office. The President and Council of the Society must not be afraid to lead the profession perhaps into areas which may offend the natural conservative instincts of some solicitors. The members must not be apathetic or afraid to express their views either at local or general meetings. The debate engendered by the advertising issue is, in my view, very healthy for the profession.

During my year, I have tried to improve communication with you, the members. I have always believed in the adage — "Know the person on the other side of the notepaper". You the members must know and be informed as to what is happening in your profession.

Now that I am finishing I am leaving you in good hands. By the time you read this, my successor, who will be (subject to electoral process) Maurice Curran will be in office. During the year we have had very close co-operation so that there will be a continuity in all aspects of policy which were started this year.

I wish him every success and I know that he will be an excellent President and that he will appreciate as I did, the support of each and everyone of the members.

It has been a signal honour to me to have served as your President. It is a year that Yvonne and I will remember for all our lives. It took a lot of time and effort (in my view approximately 70% of my time). It is well worth it to serve the profession of which I am proud to be a member.

Goodbye and thank you.

Thomas A. Shaw

DELAYS IN THE LAND REGISTRY

The Society received the following communication from the Department of Justice regarding delays in the Land Registry:

"The extent of the delay in the registration of transfers of part varies from section to section depending upon the availability of staff resources. The overall average delay at present is 12.6 months." □

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Company/Commercial Referral Service

1. History and Nature

The Council established a consultancy service in Company/Commercial Law in April, 1983.

Since that date the Council has established a consultancy service in Taxation Law and Practice and in order to ensure that the consultancy services established by the Society operate on a similar basis there has been a review of the terms and basis of the Company/Commercial Referral Service.

Practitioners should be reminded that the service is intended to assist solicitors in dealing with particular Company Law/Commercial problems which affect their clients.

2. Terms of Consultancy Service

(1) The principle upon which the consultancy service will work is that the consulting firm will not accept from the client within two years of the completion of the Consultancy Assignment, any work of the type which, at the time when the consulting firm was first retained in relation to that client's affairs, was being carried out by the referring firm, without the approval of the referring firm.

This will not however, be an absolute rule as obviously circumstances can arise, such as the death of a sole practitioner, in a practice where the client would insist on going elsewhere anyway.

(2) The client shall remain the client of the referring solicitor unless there is some special arrangement to the contrary. The consultant will not, without the referring solicitor's consent, consult directly with the client. Again, however, this cannot be an absolute rule as in certain circumstances it would not be right for the consultant to be in a situation where the facts in which they were being asked to advise were limited only to those which the referring firm gave them or if the advice was being conveyed at secondhand to the client.

(3) The referring solicitor would be personally responsible for the consultant's fee.

(4) The referring solicitor may charge the consultant's fee either as an item of outlay or absorb such fee and include an equivalent amount in his professional charges to the client.

(5) It is not envisaged that a fee would be payable to the referring firm by the consultancy firm.

3. Consultants

(1) A list of the firms prepared to participate in this service is now available from the Society. Contact Anne Hegarty, Solicitor, The Law Society, Tel.710711.

(2) A member of the panel may decline to accept a referral in any case without specifying a reason for such refusal.

(3) While neither the Company Law Committee nor the Law Society can accept responsibility for the advice given by the consultant the Committee will be monitoring the operation of the scheme and will be anxious to hear of any problems that arise and will endeavour to assist in solving them.

□

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Younger Members News

SYS Autumn Seminar

Once again the Society of Young Solicitors (SYS) may be credited with a superb Autumn Seminar which took place between the 4th – 6th of November last at Hotel Kilkenny and attracted a record attendance of over 300 people. The seminar was a joint seminar with the Bar.

On Saturday morning Mr. Vivion Gill imparted a most comprehensive lecture on the Jurisdiction of Courts and Enforcement of Judgements (European Communities) Act 1988, a subject that we are all beginning to hear more about. (A copy of the lecture is available from Norman Spendlove at the "Good Value" price of £6.00.)

Mr. Gill was followed by an open forum discussion between the Bar and Solicitors, presided over by a prestigious panel comprising Mr. Thomas Shaw, Mrs. Mary Collins, Solr., Mr. Peter Shanley, S.C., Mr. Colm Allen, B.L., and chaired by the Attorney General, Mr. John Murray, S.C. The discussion covered a wide range of topics such as fusion of the professions, the "Chambers" system, the independance of the two education systems and the arguments in favour of their amalgamation. The debate was a rather lively one and there was no shortage of speakers from the floor.

After lunch those who were interested attended a very helpful lecture and question/answer session with Mr. Brian Forrester of the Bank of Ireland. Mr. Forrester dealt with a substantial number of issues relating to the financing of a solicitors practice and the increasing number of bank products available which are relevant to a solicitors or barristers practice.

On a lighter note, the "organised" social activities began on Saturday afternoon with a Treasure Hunt in or about a number of public houses within a ten-mile radius of Kilkenny City, organised by Brian O'Connor.

The previous evening at Hotel Kilkenny is also worthy of a mention as many confused night-porters in the hotel wandered around with trays of alcoholic beverage destined for the occupants of various hotel rooms whose identity changed after each round!!!

As always, the Saturday evening banquet was an enormous success with live music until 2.00a.m. and "other" music until 4.00a.m. approximately. The banquet was enjoyed by all and the guests who attended were the Attorney General and Mrs. Murray; Mr. Jim Cody and Mr. Brian Desmond, both of the Bank of Ireland; Mr. and Mrs. John Lanigan; Mr. Michael V. O'Mahony; Mr. Kevin Feeney, B.L., and Mr. Colm Allen, B.L.

Sunday morning produced a very lively and well attended session on Defamation presided over by a panel of well-known figures in this area, namely Vincent Browne, Michael V. O'Mahony, Conor Brady, Niall Fennelly, S.C. and chaired by Charles Meenan, B.L. Subjects covered included an analysis of the US law of defamation and a comparison with the Irish framework, a review of the home system and the ways in which it could be improved within the existing legal framework.

All in all, many congratulations to the SYS and the Bar, in particular Terence McCrann, Chairman of the SYS and Charles Meenan, B.L.

The Seminar was sponsored by the Bank of Ireland (generously!) and Butterworths.

The next SYS Seminar will take place in Limerick from the 21st to the 23rd of April next – take note! □

***(Left to right):* Terence McCrann, SYS, Brian Forrester (guest speaker) Marketing Manager, Bank of Ireland and Charles Meenan, Barrister.**

CAPTION CONTEST WINNER

The winner of the caption contest published in the September *Gazette* was:

Andrew Dillon,
Solicitor,
Timoleague,
Co. Cork.

The winning entry is published opposite.

The photograph was taken at the E.G.M. of the Law Society on 5 June, 1988, and includes (left to right) Maurice Curran, Senior Vice President, Tom Shaw, President, and James J. Ivers, Director General.

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Cross Bar Co-operation

by Frank O'Donnell
Solicitor

The south bound road
to my abode
cursing last night's booze
if I see Dromore
once bloody more
I'll blow a fecking fuse

Brendan Walsh

Newry Hill, on the return journey from Belfast, is the pain-barrier of the Mara-Cycle. Tom Flood, sporting a polka dot cycling top inscribed with the words "King of the Mountains" was observed walking the Newry Hill by the hoards of crowds gathered to cheer us on. One of the assembled brethern was heard to shout "You're some king of the bloody mountains".

That was the spur that Esmond (Easie the Eagle) Reilly needed. Complete with silk tie and matching hankie, he was about to dismount to join his partner but feared the retribution of the crowd and continued without setting foot to ground. So he swears.

All our participants in the great trek North made it there and back. Frank Lanigan was the lucky one to come out alive. I expected an ambush in the Cooley Hills, north of Dundalk. As I cycled along, beside two reoslute cyclists from somewhere in the midlands, one grunted to the other "They're not too particular who they let into this".

"Why's that" sais his equally phlegmatic companion.

"If I'm not mistaken, that's the Revenue Sheriff from Carlow up ahead" came the reply. "That's the so and so who lifted cattle from my aunt."

"Ah" responded the other as they both upped the revs per minute. There was nothing really to worry about as the Sheriff pulled away from the posse.

"Making piles for the S.B.A." was the inscription on the back of Frank Lanigan's cycle top. When Frank explained what it meant to some inquisitive member of the public, guffaws of laughter erupted at the idea of there being members of the solicitors profession who were in need of anyone's benevolence.

Lunch had been arranged at the Carrick Dale Hotel just south of Newry. It was not possible to give a definite time of arrival but I allowed a three hour spread. Everyone made it well within this time. There was however, concern expressed for Gerry Griffin's whereabouts. Rumours abounded, some sugesting that he was already in Belfast. Definite sightings had been made. Suddenly a pack appeared over the hill and there Gerry was in the middle of it being dragged along in a vacuum. He waved, shouted that now he had gotten into his stride he wasn't going to stop. Disbelief descended on an otherwise concerned gathering, when suddenly the pack spurted ahead leaving our Gerry weaving to his left, onto a green patch of grass where both he and the bike parted company and Gerry fell motionless and prostrate. Oxygen was applied but it was not until a bright and alert member of our profession produced a lighted fag that Gerry eventually came round. The look on his face is not possible to describe when he realised he had just reached the half way stage. Gerry sported the logo "Blazing Saddles" on the front of his singlet. He was heard to mutter towards the end of the evening "Bleedin' Saddle".

Waterford sent four trusty representatives along and proportionately they were the most representative of any Bar Association. They were Frank Heffernan, Elizabeth Dowling, Gillian Kiersey and Brian Chesser.

Brian O'Mahony was the sole representative from the North-West. I had just arrived back in Dublin when I heard his wife Daphne was boasting around Ballybofey that such was his haste to return to her that he had knocked two hours off his return journey to Dublin. I do not know how long it took him going to Belfast.

Tony Ensor, sole representative from the Southern Counties, sportsman, tennis player, marksman, once again proved his versatility and conviviality by entertaining the Bacon Sisters in the pub in Belfast shortly after our

Frank O'Donnell — on the road . . .

arrival. They bore, with the graciousness one would expect, Tony's tales of far flung conquest on the fields of friendly endeavour. Their father, that veteran cyclist, Tom Bacon, kept a strict eye on matters by limiting the range of Tony's imagination. Tony was not only the first person to readily accept the challenge, when I requested him to undertake the mara-cycle at a late and vulnerable hour, but was also the first to break the "no alcohol" ban by ordering "G & T, ices and slices" in Dundalk on the return journey.

Vivian Matthews has rubber legs, as I can attest to, from my attempts to keep up with him as we entered Belfast.

Michael Maguire was the first of 25 solicitors from various Bar Associations to arrive in Belfast, in just five hours. John Coffey, the glamour boy of the trip, made it back in five hours approximately. Michael Irvine also made it back, having been delayed on the way up owning to leakage from his "chambre d'air". It took a mechanical engineer to repair the puncture. Business delayed David Clarke, injunctions were his priority, but he caught up with us and was back in Dublin on his bicycle with everyone else. A & L Goodbody assigned two persons to undertake the task in Ian Moore and John Larkin. Those of us who have had the pleasure of dealing with A & L Goodbody know that there are at least always two on the other side. Vincent Harrington, from Boyle, carried the flag for Harry Wynne (pronounced Winey locally). Brian McMahon fresh from his cycling tour in France, looked like a defrocked parish priest. Why? you may well ask? He looked satisfied and had been through it all before.

Brendan Walsh, the other veteran in our midst, almost fully recovered from his crash into the rere of a parked motor vehicle in France the previous summer, frost bite on his big toe from a climb of Mont Blanc later in the autumn and a pulmonary embolism around Christmas time, took it all in his stride. So relaxed was he that he took an hour's snooze on the side of the road in the blazing sunshine, somewhere between Dromore and Belfast, and hence his foray into doggerel.

In Belfast, we were joined for dinner by two of the directors of the Benevolent Fund, Brian Garrett and Tom Burgess, both of whom organised their own fund raising for the Benevolent Association. When it came to paying the bill, our northern colleagues had ensured that the vino had flowed freely in every sense of the word. To them a special thank you.

Maurice Cassidy brought along his own personal minder in the form of David Tarrant. All activities were recorded on video by David, unexpurgated copies of which are available at a cost of £1,000. Edited versions are also available at £25 and contributions will be donated to the Solicitors' Benevolent Association.

For the record, £30,000 was raised for the Solicitors Benevolent Fund. Members of the legal profession and indeed others from outside the profession contributed most generously. I got a great deal of satisfaction out of organising the trip but most of all the fund benefitted. I want to take this opportunity to thank those who responded to the call and who partook in our cycle. To those fund raisers from every Bar Association who raised the money, and lastly, those members of our profession who donated so generously. Ours is a good, generous and caring profession and one we should all be proud to be members of. □

GAZETTE

Submission of material

The Gazette Editorial Board welcomes the submission of short articles (800-1,500 words) on topics of popular interest. Articles should be typed on A4 paper, double spaced and should be addressed to:

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

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Pictured above (from left): Tom Shaw, President, Incorporated Law Society; Frank Monaghan, Managing Director, Orchard Business Software Centre Ltd., suppliers of IBM equipment; Maurice Curran, President of the Law Society and the Minister for Justice, Mr. Gerry Collins, T.D., at the opening of the Solicitors and Legal Office Exhibition in Jury's Hotel yesterday (14th November, 1988).

Orchard Business Software Centre Ltd. were recently recommended by the Technology Committee of the Incorporated Law Society as 'preferred' suppliers of IBM equipment to the legal profession. The Technology Committee evaluated numerous suppliers before making their recommendations.

Lawyers Desk Diary — 1989

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Word Processing

by
Michael G. Ryan
Solicitor, Galway.

It has been said that the law is an ass. Without agreeing or disagreeing with that comment I would say that any lawyer who does not have a word processor is an ass.

Such has been the development of the computer industry in the last thirty years that if one were to compare it to the aircraft industry a plane should now cost IR£300 and be capable of circling the earth in twenty minutes using only twenty litres of fuel. In comparison consider that there is not really a great deal of difference between the basics of an old Remington manual typewriter and a modern electric typewriter. However, the only thing in common between a typewriter and a word processor is that the end result is a typed document of some kind. The speed, quality and cost in whatever order you consider most important differs enormously.

Word processing is essentially one of the many functions a computer can perform whether it be a main frame, mini or a micro computer. Computers are considered by many of us to be complicated pieces of technology, way beyond our comprehension, but the concept of word processing is quite simple. It has been said about computers that if you understand something today then by definition it must be obsolete but that statement is not true about the feature of computers that is word processing.

The words themselves are self-explanatory. The computer processes words. Your computer will use either a hard disc or a floppy disc and this disc retains all the information that your computer requires in order to perform the word processing function. You will have all your standard conveyancing, litigation, probate and other forms stored on these discs and you can call them up to use them as appropriate.

In my opinion it is a waste of money paying extra for software with a legal package. Consider that in the ordinary course of events you have to type each Deed, document or form individually. All the legal package does, effectively, is pre-type these documents for you. However you will find that several of the precedents used by the package manufacturers differ enormously from the type of precedent you use and you will spend a lot of time amending them. In this regard I would be of the opinion that you should create your own set of precedents by storing each document as you use it for future use. It is possible to collate all your various forms and documents into the various different categories, e.g. litigation, conveyancing, etc.

When you have all these documents in memory they can be printed to suit whatever situation in a matter of a few seconds to a few minutes depending on whether you want a Notice of Application to the Probate Office or a Commercial Lease. While longer documents are being automatically printed your secretary can be dealing with your mail, making a telephone call, photocopying or attending to whatever other tasks need doing at a particular time.

If you have been unsure in your dictation or would like to change a paragraph, sentence or a word your secretary can amend the document before it is printed or, having printed it, can call it back up on screen and change or correct the matter and reprint the document almost at the touch of a button. In particular I find this procedure operates very well in relation to daily post. The day's work is kept in memory until signed and if anything needs correction only the correction need be retyped and then the letter or document can be printed in a few seconds. Needless to say the same document can be printed as many times as required and by using the facility known as "mail-merge" or "mail-shot" several different people can be written to, for example in relation to outstanding fees. You programme in all the names and addresses you require into the computer and merge each one with your standard letter or statement. This can be done while your office is closed for lunch. We all receive many windowed envelopes containing statements every month.

Obviously there are some pit-falls. In the first instance you have to have somebody capable of operating the machine and you must consider the question of a replacement operator in the case of holidays or illness, particularly if you operate as a sole practitioner as I do.

In relation to breakdown you should ensure that you have an adequate service agreement and one that will, if possible, let you have replacement machinery within a short period. The most difficult decision you will have to make will be in relation to the type of machine you are going to purchase. Salesmen will bamboozle you with the usual salesman's chat in relation to their particular machine. Obviously you will have to get a machine to suit your own needs. You can literally spend as much as you like. Why buy a Rolls Royce when a Mini will do. □

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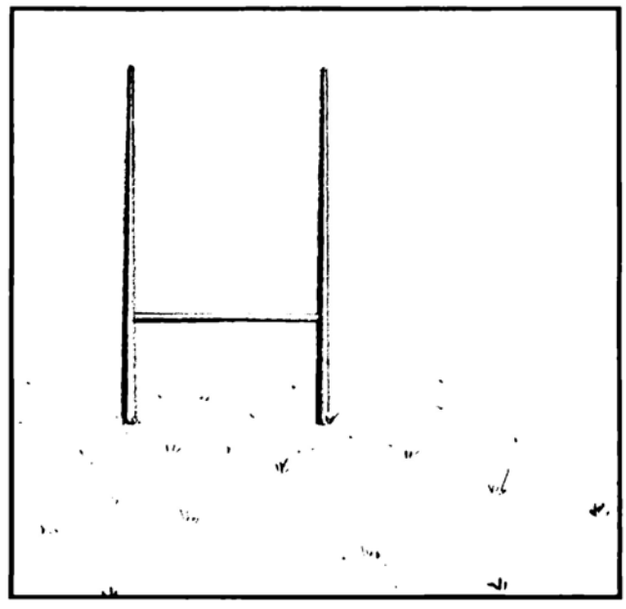

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Pictured at the inauguration of the WangNet system in the Four Courts are left to right: Mr. Malachy Smith managing director Wang Ireland, The Minister for Justice Mr. Gerard Collins TD and The Chief Justice Mr. Justice Finlay.

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PEOPLE & PLACES

Dr. A. J. F. O'Reilly (left) presenting a cheque for £100,000 to the Incorporated Law Society for the provision of a bursary in honour of his late father, John P. O'Reilly. Receiving the cheque is Tom Shaw, President of the Society (right), with Maurice Curran, Senior Vice President.

Frank Lanigan, Solicitor, Carlow (left), advising a member of the public at The Law Society's Stand at the National Ploughing Championship, held in Oakpark, Research Centre, An Foras Taluntais, Carlow.

Martin Sawyer of Sabre Business Systems with Ernest Margetson, Chairman of the Finance Committee signing the computer contract to upgrade the Law Society's Alpha Micro to 140 megabytes of disk storage.

Wedding of Mr. Simon Murphy, Solicitor of Barry M. O'Meara & Sons, 18 South Mall, Cork, on 19th August 1988 to Miss Joan Barry, Clonmel. Reception was held in Kilcoran Lodge, Cahir, Co. Tipperary.

*Launch of "**A Guide to Professional Conduct of Solicitors in Ireland**"*

The President of the Society, Tom Shaw, with (left to right), Pat O'Connor, Chairman of the Registrars Committee, Chris Mahon, Director, Professional Services and Patrick Glynn, Chairman of the Professional Purposes Committee. A copy of the Guide has been sent to each practice. Aditional copies may be purchased from the Society at a cost of £10.00 each, inclusive of post and packing.

SADSI "Growth" Seminar

Speakers at the recent SADSI Growth Seminar were (left to right), Rory Brady, B.L., Maurice Curran, Senior Vice President of the Law Society, Senator Mary Robinson, and Geraldine Clarke, Solicitor.

The Lawyers Desk Diary 1989

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Reduce your tax bill by increasing tourism.

Experts predict that the potential for growth in Irish tourism is enormous. To help optimise this opportunity, special legislation has been introduced to allow substantial tax relief on investments in qualified tourism projects, up to 1991. Particularly for those in the higher tax brackets, this is a unique opportunity to benefit both themselves and the country. You can enjoy tax relief up to £25,000 per annum in each tax year for the duration of the scheme. Relief is available at your highest rate of income tax. If you can't get tax relief for all your investment in a year of assessment, either because your investment exceeds the maximum £25,000 or because your income in that year is insufficient to absorb all of it, you can carry forward the unrelieved amount into subsequent years, up to 1990-91.

Contact Bord Failte for an explanatory booklet.

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Tourism and the Business Expansion Scheme

How would you like to invest £25,000 in a business at a net cost to you of only £10,500? That type of question would usually make you a little suspicious of the asker. It sounds like a good opening for a con-man, perhaps a little too good. Too good to be true. But it is a legitimate question and such opportunities do exist thanks to a very generous tax concession which has recently been extended to the tourism area. That puts it within the reach of a far greater number of people than heretofore.

by

Colm Rapple

Previously the concession was only available for investment in manufacturing and certain international traded service projects. such projects were difficult to set up which meant that those making use of the concession had usually to invest in someone else's project. And the number of those around was limited. It was also true that many investors did not like the idea of taking minority stakes in relatively small ventures into which they could be locked at the mercy of the promoters.

But those drawbacks have been effectively removed. There are now great opportunities for a family group, or a group of individuals, to get together to set up their own project in the tourism area and benefit from the very attractive tax relief in the process. It is that tax relief which can enable an individual to put £25,000 into such a project at a net cost of only £10,500.

The concession is available under the Business Expansion Scheme which was initially introduced to promote investment in manufacturing industries. The early scheme was limited by the type of project it covered and by strict rules which required that investors be at arms length remove from the project. That effectively prevented those actively involved in a project from making use of the concession. But that is no longer the case. The scheme has been eased in other ways too. First it was extended to include internationally traded services and more recently to include tourism ventures aimed at bringing revenue from overseas.

From the beginning funds were set up providing investors with an opportunity to spread the risk over a number of qualifying projects and a number of companies had public issues of shares which qualified for the relief. These included the Strongbow film company and the Equitas funds.

While providing an opportunity to make use of the tax relief, all these funds and companies effectively diluted the benefit because of set-up charges, management fees and special built-in concessions for the promoters. Of course, promoters can be expected to claim a better return than sleeping investors. But how much better if the investor and promoter can be one and the same. That was always possible but then projects in manufacturing and traded services were hard to find. That is not the case with tourism.

There are, of course, rules and regulations to comply with, but they are far from onerous. It is possible to keep a company in family control and a wide range of tourism projects will qualify: the provision of accommodation, boats, cruisers, caravans, equestrian centres, sailing, marina facilities, heritage houses, game fisheries, international conference centres, tourism guide agencies, tour coaches etc.

The project must be approved by Bord Failte who require that a three year marketing and development plan be submitted. There are upper limits on the proportion of the funds raised which may be invested in buildings and land – up to 75% in the case of cottages, apartments or hostels with lower proportions in other cases – and at least 8% of the money must be spent on promoting the undertaking overseas.

It is necessary to set up a company since the qualifying investment must be in ordinary shares. The investor may not hold more than 30% of the ordinary shares but he or she can be a director or employee and there is no restriction on a husband owning 30% and his wife another 30% with other family members holding the other 40%. The company does not have to be a new one either but the project does have to be either new or an expansion which is going to create or maintain employment. A project which will expand existing sales can qualify.

Tax relief is available on an investment, or investments, of up to £25,000 in any one tax year, but unused relief can be carried forward to a subsequent year – up to and including 1990/91 under present legislation. It may, or may not, be extended. So if the gross investment is greater than £25,000 the unused proportion can be carried forward, or if the investor's income is not able to absorb the full relief, any unused can equally be carried forward. The relief will be given right away in the case of an established company while a new company has to be trading for at least four months.

The shares have to be held for at least five years to get the full tax relief. They may be sold before that, but some, or all, of the relief is likely to be withdrawn. Profit on the sale of shares may be liable to capital gains tax in the normal way but the purchase price is taken to be the full gross amount paid for them i.e. without taking account of the tax relief.

So, how do you go about making use of the relief. The first step, of course, is to identify your project. That is up to you. The next step is to draw up your development and

marketing plans. Any entrepreneur worth his salt would do that in any case. Bord Failte will supply you with information on the type of criteria they use in assessing the plans together with an outline of the type of information they are looking for. For a start you should get a copy of their little booklet "Tourism and the Business Expansion Scheme" which is available free. Ring them at (01) 765871 or write to them at Baggot Street, Dublin 2.

After that it is a matter of setting up the company, if there is not already one in existence, and rounding up the investors. The opportunities are immense given the undoubted commitment on the part of the Government to promote rapid growth in tourism. The tax relief is more than generous and gives the lie to claims that the Irish tax system is a disincentive to enterprise. In this case it should act as a very positive incentive.

□

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Lectures take place at 8.30p.m. at the United Service Club, St. Stephen's Green, Dublin 2, by kind permission.

Our lecture programme for 1988/89 is as follows:—

Wednesday 30th November 1988
Dr. Bartley Sheehan, Coronor for County Dublin
Inquests

Thursday 26th January 1989
District Justice Gillian M. Hussey, President of the Society
Alternatives to Custody

Thursday 23rd February 1989
Dr. Peter Skrabanek, Department of Community Health, Trinity College, Dublin
The Pros and Cons of Screening for Women

Thursday 30th March 1989
Dr. Maureen Smyth, Ph.D., Forensic Scientist, Department of Justice
DNA Profiles — the Identikit of the Future

Members of the Irish group who attended the recent International Bar Association Conference in Buenos Aires.

The Incorporated Law Society of Ireland

COUNCIL ELECTION 1988/89 – Ordinary Members

	Candidates Elected	Total Votes
1.	SHAW, Thomas D.	1152
2.	QUINLAN, Moya	1122
3.	ENSOR, Anthony H.	1074
4.	BINCHY, Donal G.	1061
5.	O'DONNELL, Rory	1030
6.	O'MAHONY, Michael V.	962
7.	O'DONNELL, P. Frank	961
8.	MARGETSON, Ernest J.	930
9.	O'CONNOR, Patrick	926
10.	CLARKE, Geraldine M.	917
11.	BOURKE, Adrian P.	917
12.	COLLINS, Anthony Eugene	876
13.	DALY, Patrick J.	867
14.	McMAHON, Brian M.	856
15.	MAHON, Brian J.	852
16.	SMYTH, Andrew F.	852
17.	REYNOLDS, Miriam	844
18.	PIGOT, David R.	836
19.	MONAHAN, Raymond T.	835
20.	SHIELDS, Laurence K.	832
21.	GLYNN, Patrick A.	823
22.	LYNCH, Elma	820
23.	DALY, Francis D.	818
24.	GRIFFIN, Gerard F.	791
25.	MURPHY, Ken	746
26.	McKENNA, Justin	729
27.	O'BRIEN, Liam M.	724
28.	MATTHEWS, Vivian C.	724
29.	HARTE, John B.	720
30.	DONEGAN, James D.	690

Candidate Not Elected

31.	IRVINE, Michael Glynn	685

Note:
Under Bye Law 29A the Senior Vice President (Mr. Maurice R. Cullen) is deemed to be elected.

Provincial Delegates

Connaught –	McELLIN, Edward M.
Leinster –	LANIGAN, Frank
Munster –	O'CONNELL, Michael G.
Ulster –	MURPHY, Peter F. R.

Legal audit

Are the customary audit procedures, as carried out by auditors and certified by them, sufficient for the protection of shareholders and others dealing with limited liability companies? Mr. Neil Frish Thompson, in a paper prepared for the C.C.B.E. (Council of the Bars and Law Societies of the European Community) proposes that an extra tier of investigation be included in annual audit procedures involving the legal as well as the accountancy profession.

by Neil Frish Thompson

Preamble

The approach of the accounting profession to audit is one that is directed primarily to verifying the accounting records of the company and to expressing a view as to the annual Balance Sheet and Profit and Loss Account.

Insofar as the subject matter of the business for which accounts are being prepared falls readily into an annual cycle this presents no problem; the farmer and the retailer by and large operate over definable (although not definitive) seasons. However, in relation to industry where, for example, the life of a product from its inception in research and development through its launch, to the establishment of market share and then decline through obsolescence, the audit system runs into difficulty. The problems are compounded by auditors, in practice, being selected and dismissed at the volition of the directors and not of the shareholders for whom the auditors are supposed to be watch-dogs. At the present time the situation has become even more confused because only about half the remuneration of auditors derives from audit. The rest comes from being entrusted by the Board or senior management with further work on behalf of the company. In order to avoid conflicts of interest within accountancy firms, some firms even erect "Chinese Walls" round their audit departments in order to ensure that audit partners are not aware of what their collleagues may be advising the company. Another problem to be considered is the introduction of accounting standards, including current cost accounting, which itself depends on going concern assumptions which may or may not be valid in terms of the company's contracts and ownership.

Increasingly auditors are asking that the solicitors to the company confirm the whereabouts of the company's title deeds, even, in some cases, asking what, if any, transactions have taken or are taking place in relation to them. Auditors now enquire (in varying depth) as to the disputes and litigation in which a company is or may be engaged. These tasks are not made any easier because it may be extremely difficult to identify which firms of solicitors may be involved.

Legal Audit

This article proposes that, in the light of problems, of which company fraud is perhaps only the tip of the iceberg, the audit process should not be left to accountants alone. In the first instance, the company's solicitors should be registered; that is to say, the company should keep a record of the solicitors it instructs. Once so appointed, a company solicitor would be answerable to the auditors and under a duty at the time of audit to give a report, from the date of the last audit report, of each job undertaken on behalf of the company and the result, indicating what, if any, financial reserves it would be prudent to make. Solicitors with such a duty, as officers of the Court, could be relied upon not to cover up activities. Similarly, in relation to company assets, the solicitor employed on the original acquisition or last dealing would at audit time be required to report as to whether the asset was still held and the state of it. Local land charge searches and the usual enquiries would be made to check if there had been developments or changes which added or sub-tracted to the information on which its value was based.

As to company contracts, it would be the duty of the company solicitor to peruse these (or at least those important to the business of the company) whether formal or made informally by letter, to see if these would justify assumptions about the state of the company's business and its expectations. In the course of such perusal, solicitors would be expected to report whether renewals were due or required and whether supporting agreements for supplies or services were in place, as well as appropriate contracts with competent executives and employees.

Much of this work is done in practice when a company is to be the subject of quotation on the Stock Exchange, or some similar major transaction but, and this goes to the root of the problem, there is no systematic legal annual review and this, in turn, leaves broad areas for misunderstandings or outright deception. More important still is that the necessity for such a review would make boards and senior management conscious of problem areas which they would not otherwise have to consider, as well as making commerce and industry as a whole much more scrupulous in arranging and documenting their affairs.

If legal audit became obligatory, then systems to limit its costs could be developed.

As a preliminary paper on the subject, detailed consideration of the various heads for audit have

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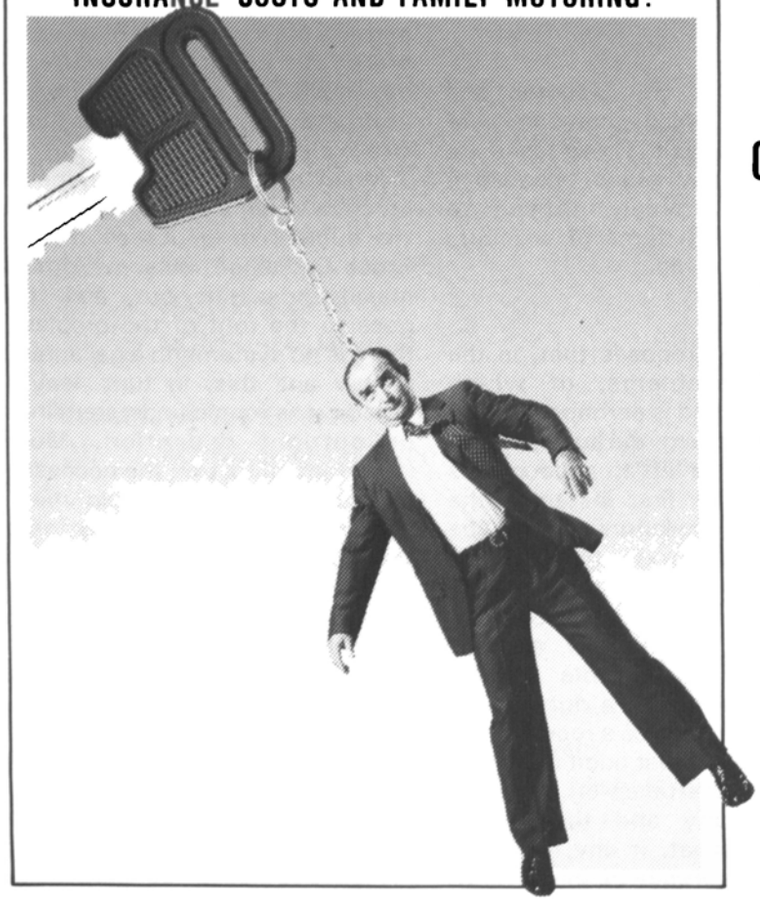

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not been developed in depth. The primary consideration here has been to direct attention to what seems a lacuna in management direction and supervision which must be dealt with. Failure so to do is to encourage undesirable commercial practices and to facilitate fraud. As Professor Gower has been compelled to recognise, there are no easy solutions for investor protection with supervision of market practices and dealings. Equally, if there are to be supervisory agencies, the importance of legal audit supplementary to accounting audit cannot be understated.

The company solicitors, to no small extent, would have to take a stand independent of the convenience of the Board and management. Once that role was recognised, there should be no need of duplication of company solicitors to check on company solicitors. A solicitor has to take personal responsibility for the correctness of his reports and conduct so that the report system would itself be a discipline. The legal reports would obviously be considered by the accounting auditors in finalising their report on the accounts, as well as being considered, presumably at the same time, by the Board, which might want to take steps to remedy any deficiencies or manage any crises disclosed prior to the publication of results to shareholders. The legal reports as such would not, in the ordinary way, be available to shareholders; they might well contain very sensitive material which, in the shareholders' own interest in the continued wellbeing of the company, should not be disclosed to customers, suppliers or competitors. On the other hand, such legal reports could well bring about adjustments, qualifications and initiatives that might otherwise be overlooked. The legal reports would be available to inspectors, the Official Receiver and the like.

Submission

The development of compulsory legal audit and the disciplines which this would involve can only improve the standards of corporate life. It should serve to protect the position not only of shareholders but of employees, as a means of supervising management, monitoring accounting and rectitude. Accounting audit, with its emphasis on standards which depend on assumptions by accountants, without expert legal support, must be unsatisfactory and inadequate in isolation. This is underlined by the growth of the practice of requiring auditors to tender for audit work. □

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Obituary - Thomas Valentine O'Connor

By the death last week of Thomas Valentine O'Connor, the West of Ireland and Mayo in particular has lost one of its most well known personages and the legal profession one of its most respected and brilliant lawyers.

Val, as he was known to everyone, practised as a Solicitor in Swinford and Kiltimagh for over fifty years.

His father Patrick O'Connor founded the firm which became known as P. O'Connor & Son and built up a fine practice acting also as Coroner for the eastern part of the County of Mayo amd became father of the then Mayo Sessional Bar.

Val, was educated at Blackrock College, Dublin, obtained his degree at University College Dublin and qualified as a Solicitor.

He then returned to Swinford and joined his father in the family practice.

Val soon established himself in his own right in the practice and extended and enhanced it. He followed his father as Coroner in East Mayo.

While he gained much himself out of law Val also put much back into it, for sixteen years he served as an elected member of the Council of the Incorporated Law Society of Ireland and in the year 1972 had the honour of being elected President of the Society – the first President of the Law Society from County Mayo. He served this office with great distinction and with great personal effort of travelling long distances from County Mayo.

Sadly over the last few years Val's health slowly deteriorated but he kept on practising as long as possible, always with the devoted care and help of his wife Kay.

All Val's four sons have followed in his footsteps and have qualified as Solicitors. Two have practised in Swinford with him and two in Dublin so the tradition carries on in even greater strength but those of us who stood at the graveside and paid our last respects to "Pop" as his little granddaughter called him in prayer in the Church felt we were parting from an unusual man, greatly learned in the law and of great integrity and our sympathy goes out to Kay and their four sons and their families.

P.P.

The Future

by Thomas D. Shaw President

Having travelled extensively during the past twelve months, I have been interested to try and identify the trends of how solicitors will operate their practices in the future.

The advent of the technological age has brought firstly, dictaphones and subsequently word processors together with time billing and litigation support and reminder systems.

Undoubtedly in my view the next step will be a personal computer on every solicitors desk.

This personal computer will be in a position to supply the solicitor with all the information which he would want to enable him to carry on his practice.

So if the lawyer wants to research a particular legal point, he will be able to look at the authorities on that point without having to send the case to Counsel.

Every conceivable precedent will be available to the practising solicitor and he will be able to adapt the precedent to suit his needs.

The software will store legal forms in the computer so that the lawyer can call them up on his computer screen as he needs them.

It will be possible to have available all financial information which a lawyer would need such as the rates of interest payable by the Banks, the different interest rates charged by the respective Building Societies, the Stock Market Report and all facilities so that he is in a position to advise his client.

The data base for the computer will have to be supplied principally from the Law Society, but from other institutions such as banks, building societies, publishers as well.

The basic idea is that the lawyer can practise his law at his desk without having to spend time outside his office other than when it is absolutely necessary.

In America, the average firm of lawyers has between 1.3—1.7 lawyers per secretary whereas where the computer system is fully operative the firms using the system have 2.75 lawyers per secretary. The position in Ireland appears to be almost the exact reverse.

Other interesting statistics have emerged from America.

Statistics show that the average gross receipts per lawyer in 1987 in America were about $180,000.

This represented a 114% increase over the last ten years but it was also disclosed that overheads excluding associate salaries increased 153% over the same period.

The big pressure in America is that overheads and salaries are cutting very deeply into gross receipts.

Approximately 65% of gross receipts are taken up with overheads and this is an increasing rather than a decreasing figure.

In an effort to increase their take, lawyers in America are going away from time costing alone and are prefering a system of value billing against which they check their time records.

In this country, this has long been practised and invariably results in the solicitor and the client agreeing what is a fair fee for the case. The problem of time costing alone is that in a small case in which there is a lot of time and effort expended the fee very often antagonises the client.

Whatever the future holds, there is no doubt that all the technology in the world is no substitute for hard work but it is equally clear that the lawyer owes it to himself and his staff to provide whatever modern equipment he can afford for the improvement of his office and thereby of the service which gives to the public. □

NEW YORK STATE BAR EXAMINATION

The Association of the Bar of the City of New York has recently issued a Report which will be of interest to Irish solicitors planning to sit the New York State Bar Examination. If the Report's proposals are implemented, Irish applicants will first have to complete 24 credits at an approved U.S. Law School (in U.S. Constitutional Law, Civil Procedure, and Professional Responsibility) before being permitted to take the Exam. A copy of the Report is available from:

Education Officer,
Law Society,
Blackhall Place,
Dublin 7.

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Out of London
MULTIPLE ADVANCE

John Matthews B.A. (Law), Solicitor

The change in character amongst the estate agents in my area has been quite startling. Until 1986, there was a range of independent agencies of all sizes, some very long established, others quite recent in origin. Towards the end of 1986, one of the newer firms with a marked aggressive quality in its sales policy and with a large number of branch offices, was acquired by a national firm of estate agents.

In January 1987 the Prudential Assurance Co. acquired the largest firm of estate agents (established in 1786). Even the old firm name was dropped. As a consequence, two other firms next in size and both long established, amalgamated and promoted a definite image including the word 'Homeshop' in their sales literature.

The amalgamated firm, however, was acquired in January 1988 by the Nationwide Anglia Building Society. At the same time another medium sized firm was taken over by the Abbey National Building Society. Whilst the firm names in these two examples have been retained, the name of the respective building society is given as much prominence. Yet another agency, largely specialist in its clientele, split in two; the agricultural part remaining independent, the residential sales part acquired by the General Accident Group.

The end result of all this is quite bizarre. A sole practitioner, unqualified except by his experience, now finds himself with three far flung small offices, the largest independent in the area. There has already been a large increase in work for independent surveyors for the other building societies do not want their mortgage surveys conducted by agencies controlled by one of their rivals.

There are merits in remaining independent as the small agents are now finding. Clients who want independent advice without feeling they have to contribute to national profit margins, will remain faithful to the independent agency. There are even repercussions within the new multiples. Some former partners, now local directors, have resigned or been retired. The remaining local directors are finding they have to measure up to profit margins set down by people in London with no idea of local conditions. The upshot is that some of those local directors, particularly those who are surveyors, may leave their present situations and set up on their own as independents once more.

How does the local law society view what has happened to the major estate agents? Is there a chill of fear that the same acquisition process will affect solicitors' firms if the statutory restraints are removed? Is there the fear that the multiples will add conveyancing to their services and be able to undercut conveyancing charges of solicitors by making conveyancing a loss leader?

So far the local law society is adopting an optimistic approach, believing that the new multiples will not provide a sufficiently skilled service, if they attempt conveyancing at all.

A 'wait and see' attitude has been adopted towards the possibility of solicitors selling property. The experience of a small solicitor estate agency so far is not very encouraging. So far, solicitors have held back not wishing to incur the wrath of estate agents. Now that these are mostly controlled by multiples, this restraint has been removed.

The writer remains at present unconvinced that solicitors should venture into property sales, a field in which they have no expertise at all. It is little use competing with estate agents, if the competition provided is not expert.

The writer believes that the quality of independence is still one to be prized even today. It is even more important in times when control of sales of land is rapidly becoming vested in the hands of a few remote corporations.

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SOLICITORS GOLFING SOCIETY

International (Tom Shaw) Prize
The Presidents Prize was played at Mullingar Golf Club on the 9th September 1988, the following are the results:
Winner: Patrick Tracy 15-44 pts.
Runner up: John O'Donnell 13-41 pts.
Third: Gerry Sheehan 17-40 pts.

Ryan Cup (Handicap 13 over)
Winner: Denis McDowall 14-40 pts.
Runner up: Tom Duffy 13-39 pts.

Director Generals Cup
Eamonn Carolan 9-34 pts.
Winner: (Handicap 12 and under)
Noel O'Mara 12-40 pts.
Runner up:
Brian O'Sullivan 6-39 pts.

First Nine:
Eugene Cush 9-22 pts.
Second Nine:
David Dillon 14-21 pts.

(Last Six) Best score 30 miles and over:
Brendan Duke 9-38 pts.

Three Cards drawn by Lot:
Patrick Carolan

Ninety-three players competed.

International Match
Solicitors Golfing Society
-v-
Law Society Golf Club

The annual match between the Golfing Society and the Law Society Golf Club (England and Wales) took place on the 12th & 13th September at Alwoodley and Fulford Golf Clubs in Yorkshire.

The Irish team was royally entertained and, no doubt, as a result emerged victorious by a single point taking home to these shores the Perpetual Trophy donated to the event last year by Brian Petifor.

The teams representing both countries were:

Ireland: Cyril Osbourne *(Captain),* Gerry Walsh, Cyril Coyle, Richard Bennett, Bernard Jordan, Owen O'Brien, Bill Jolley, Brian O'Brien, David Walsh, Tommy O'Reilly, Padraig Gearty, John Bourke.

England: Eric Auckland, David Barker, Alan Bull, John Jenkins, Craig Mitchell, Andrew Rudkin, Michael Harvey, Pat Hill, Ian Newton, Henry Marshall, Brian Petifor, Bev Charles, Nick Stones.

Richard Bennett
Secretary

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Correspondence

12 October 1988

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

POWER OF ATTACHMENT
FINANCE ACT 1988

Dear Mr. Ivers,
I wish to refer again to your further letter of 27 July last and reminder of 9 September in relation to the power of attachment provided for in the Finance Act, 198.

I can confirm that monies received by a solicitor for a client and held by him in a client account prior to paying the net proceeds to a financial institution on foot of a prior undertaking to the institution (as part of, and in accordance with, the normal arrangements under which the transaction giving rise to such monies is being effected) will not be deemed by the Revenue Commissioners as a debt due by the solicitor for attachment purposes and the Revenue Commissioners will not seek to attach such monies.

I hope that this clarifies the position for you: the delay in replying, due to pressure of official business, is regretted.

Yours sincerely,
Ray MacSharry T.D.
Minister for Finance,
Dublin 2.

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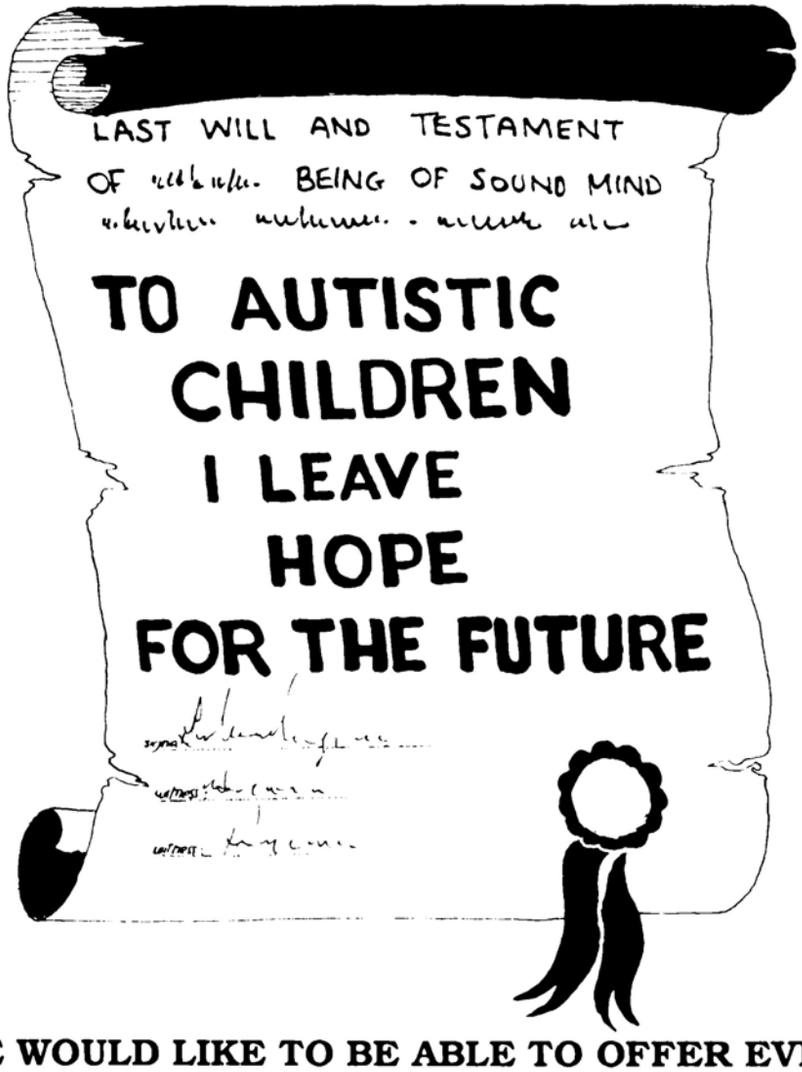

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Medical Research is also an important element of the College's activities. Cancer, Thromboses, Blindness, Blood Pressure, Mental Handicap and Birth Defects are just some of the human ailments which are presently the subject of detailed research.

The College is an independent and private institution which is financed largely through gifts, donations, and endowments. Your assistance would be very much appreciated, and would help to keep the College and Ireland in the forefront of Medical Research and Education.

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For further information about the College's activities, please contact:

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Book Review

LEGAL PROBLEMS OF CREDIT AND SECURITY, by Professor R. M. Goode, London: Sweet & Maxwell/Centre for Commercial Law Studies, 1981 x 218pp.

This is a second edition of Professor Goode's original title published in 1982. It has been revised and expanded to address developments in commercial law in the intervening period. Areas of the law on securities specifically treated in the book include — attachment and perfection of a security interest, fixed and floating charges, security over book debts and other receivables, set-off and guarantees.

One of the first controversial questions examined by Goode relates to set-off. Can a bank take a recognised security interest over the credit balance on the account of its customer to secure the obligations of that customer on foot of a separate obligation to the bank? Professor Goode examines the question and confesses to having now bowed to the negative view having, for some time, been unconvinced that it was not legally possible. The issue enables Professor Goode to refer for the first time — but by no means the last — to the decision in *Re Charge Card Services Ltd.* [1986] 3 All E.R. 289, now generally regarded as the authority on the matter. Later, at page 128, he examines the decision in *Re Jeavons, ex parte MacKay* (1873) 9 CH. App 127, which supported the concept but which was not cited in the *Charge Card* case or in the judgment, leaving the question open to some doubt in the case of a bank account. Notwithstanding reservations expressed by other legal academics — which have been effective at least to influence the practice in H. M. Companies Office — Goode considers that Charge Card and an earlier Australian case of *Broad -v- Commissioner of Stamp Duties* (1980) 2 N.S.W. L.R. 40 were both correctly decided and would not be affected by the old judgment in *MacKay's* case.

Professor Goode analyses the juridical nature of the negative pledge and evaluates its effectiveness in protecting the lender's interest. He also considers the merits of the automatic charge — the conveyancer's device to prevent breaches of negative pledges.

The question of the efficacy of provisions in debentures which purport to create fixed charges on future book debts has received considerable attention by the Courts in recent years. Having referred to the early recognition given to the concept of a fixed charge on after-acquired property in *Re Holroyd -v- Marshall* (1862) 10 H.L. Cas 191, Professor Goode makes the decision in *Siebe Gorman & Co. Ltd. -v- Barclays Bank Ltd.* [1979] 2 Lloyd's Rep. 142, his benchmark as regards the modern law on fixed charges on book debts and other debts. He examines the decisions in both *Re Brightlife Ltd.* [1986] 3 All E.R. 673 and *Re Armagh Shoes Ltd.* [1982] N.I. 59 and explains why the fixed charges were struck down in the two latter cases. It was surprising to find no reference to the leading Irish authority of *Re Keenan Bros. Ltd.* (1986) ILT 49 in which the Supreme Court, (reversing the earlier decision of the High Court) upheld a fixed charge on book debts and indicated the appropriate tests to be applied in reaching such a conclusion. Goode sounds a note of caution for those creditors who, in perfection of a fixed charge, would assume such a degree of control over the charged assets as to amount to their exercising a management function over the borrower company's undertaking and business, with the consequence which that could have under Company law for such creditors.

Lawyers, whose work involves drafting instruments used in connection with raising loan capital or long term debt will find Goode's treatment of subordination provisions most informative. Such provisions purport to alter the ordinary rule governing the order of priority of payments (or distributions in the event of winding-up) as between creditors and ultimately the stockholders and shareholders. Apart from a brief comment on this subject in Wood's Law and Practice of International Finance ((Sweet & Maxwell) this is the first time I have found the legal position, on the legality and effectiveness of subordination provisions, fully debated in a recognised text book.

Securitisation of financial assets of companies — the current international vogue among banks and financial institutions — is explained and examined. This is a process by which balance sheets are slimmed down through selling off certain kinds of financial assets. This is usually with the object of addressing stringent capital adequacy requirements imposed by regulators. The book offers good advice on the legal and practical implications of such transactions.

Goode examines the concept of 'automatic crystallisation', i.e. crystallisation of floating charges without any positive intervention by the debenture holder and concludes that such provisions can be validly incorporated in security documents and will be effective as between the borrower and the debenture holder. But what is the position as regards third parties dealing with the borrower without notice of automatic crystallisation? Goode offers his views.

The penultimate chapter, which deals with set-off, is invaluable for its treatment and attempt at simplification of this difficult area. Goode penetrates the rarified atmosphere of international finance to deal with cross border and cross currency set-offs, back to back loans, parallel loans and currency swaps. The final chapter which deals with guarantees and suretyship gives a clear and uncomplicated account of the law on this subject. The Irish reader must be careful not to assume that all the material is entirely applicable to the Irish situation.

Professor Goode's unusual approach and style makes his book compulsive reading from the first chapter. This, I believe, has much to do with the fact that most of his material first saw light in the form of a script for his many public lectures on various aspects of commercial law. This book carries my strong endorsement.

E. R. O'Connor

□

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.

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

SCHEDULE OF REGISTERED OWNERS

Robert Bennett and **Anne Bennett,** Cullinagh, Courtmacsherry, Co. Cork. Folio No.: 24049; Lands: Cullenagh; Area: 8a.2r.36p. County: **CORK.**

Sarah Licken, 54 Mulvey Park, Dundrum, Dublin 14. Folio No.: 14722; Lands: The property situate to the East side of Dundrum Road in the village of Dundrum, Townland of Farranboley and Barony of Rathdown. County: **DUBLIN.**

Teresa Shine Avesani & Adelino Avesani, Black Moore, Baltinglass, Co. Wicklow. Folio No.: 2510F; Lands: Rathmoon. County: **WICKLOW.**

Michael Anthony O'Riordan, Site 142 Castletown Estate, Leixlip, Co. Kildare. Folio No.: 575L; Lands: Leixlip; Area: 0a.0r.10p. County: **KILDARE.**

James Francis Fallon, Carrowndurly, Dysart, Co. Roscommon. Folio No.: (1) 15826; (2) 29930; Lands: Derryfadda; Area: 3a.0r.12p. County: **(1) ROSCOMMON, (2) GALWAY.**

Martin J. Murphy, 111 Tirellan Heights, Headford Rd., Galway. Folio No.: 12311F; Lands: Ballinfoile. County: **GALWAY.**

Philomena Coffey, 60 Willow Park Grove, Glasnevin, North, Dublin / 60 Willow Park Grove, Drumcondra, Dublin 9 the full owner as tenant in common of one undivided half share. Folio No.: 6927L; Lands: The property situate to the North side of the Dublin-Howth Road in the Parish of Kilbarrack, District of Howth. County: **DUBLIN.**

Louis Gallagher, Moness Speenogue P.O. Via Lifford, Co. Donegal. Folio No.: 8096; Lands: Bunnamayne; Area: 35a.0r.0p. County: **DONEGAL.**

Christopher Fennessy, Cloghera, Kilmore, Co. Clare. Folio No.: 15209; Lands: (1) Blackwater; (2) Blackwater; (3) Blackwater; Area: (1) 15a.3r.0p.; (2) 3a.3r.16p.; (3) 0a.0r.7p. County: **CLARE.**

James C. Ward, Glassagh, Cloghan, Co. Donegal. Folio No.: 1482; Lands: Glashagh More (part); Area: 23a.0r.32p. County: **DONEGAL.**

Thomas Flynn, Moyglass, Kylebrack, Loughrea, Co. Galway. Folio No.: (1) 20179; Lands: (1) Moyglass (part); (2) Moyglass (part); Area: (1) 39a.3r.39p.; (2) 129.964 Hect. County: **GALWAY.**

John James Gilmartin, Newbrook, Kilclare P.A., Carrick-on-Shannon, Co. Leitrim. Folio No.: 17000 closed to 4070F; Lands: Newbrook; Area: 4a.3r.0p. County: **LEITRIM.**

Mary Mortell, Killalane, Claremorris Ave., Limerick. Folio No.: 26727; Lands: Killeeley Road; Area: 0a.2r.38p. County: **LIMERICK.**

James Gaffney, 1 Malone Gardens, Dublin. Folio No.: 46618L; Lands: The property known as 1 Malone Gardens situate in the Parish of Donnybrook, District of Pembroke. County: **DUBLIN.**

Edward M. Walsh, Johnstown, Kiltiernan, Co. Dublin. Folio No.: 2572; Lands: The property situate in the Townland of Ballycorus (part), Barony of Rathdown. County: **DUBLIN.**

Dermot Seberry, 2 Grace Park Avenue, Drumcondra, Dublin. Folio No.: 2975; Lands: Brownstown; Area: 1a.1r.24p. County: **LOUTH.**

Margaret Murphy, Cloneyburn, Bunclody, Co. Wexford. Folio No.: 7023; Lands: Clonyburn; Area: 73a.1r.19p. County: **WEXFORD.**

Denis Dorney, Kilnaglory, Ballincollig, Co. Cork. Folio No.: 10490F; Lands: Kilnaglory. County: **CORK.**

Lost Wills

CHANDLER, Eileen, deceased, otherwise Eileen Wightman Chandler, late of 189, Broadway, Walsall and Kilcoleman, Mallow, Co. Cork. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 17th day of June, 1988, contact Colm Burke & Co., Solicitors, Washington House, 33 Washington Street, Cork, Telephone (021) 272242.

BENSON DEVINE, Ellen (Helen), deceased, late of 106 Cosy Lodge, Rathmines, Dublin 6, and Ryevale Nursing Home, Leixlip, Co. Kildare. Will any person having knowledge of the whereabouts of a Will or testamentary disposition executed by the above-named deceased, who died on 8th September, 1988, please contact Alphonsus Grogan & Co., Solicitors, 33 Lower Ormond Quay, Dublin 1.

HARRIS, Esther, deceased, formerly of 54 Mary Street, Drogheda, Co. Dublin. Any person who made a Will for the above please contact Francis G. Costello & Co., Solicitors, 51 Donnybrook Road, Dublin 4.

HENNESSY, James, deceased, late of Strawhill, Carlow, Co. Carlow. Will anyone having knowledge of the whereabouts of the original Will of the above named deceased made on the 27th day of January, 1988 or on any later date please contact the undersigned Solicitors who are acting for the next of kin. John J. Duggan & Co., Solicitors, College Street, Carlow. Ref. David B. Boyle, Tel. No. (0503) 31848/31124.

McINERNEY, Mary, deceased, late of Cragg, Belvoir, Sixmilebridge, Co. Clare. Will anyone having knowledge of the whereabouts of the Will of the above named deceased who died on the 19th day of October, 1988, please contact Colman Sherry, Solicitor, The Square, Gort, Co. Galway.

EDWARDS, Walter, bachelor, late of Whitestown, Stratford-on-Slaney, Baltinglass, Co. Wicklow. Will any persons having knowledge of the existence or whereabouts of a Will of the above named deceased who died on the 28th of April, 1988, please contact Noel W. Houlden, Solicitor, 17/18 Nassau Street, Dublin 2. Tel. 01-793279.

CLARKE, Kathleen, deceased, late of 5 Arran Quay Terrace, Dublin 7. Will anyone having knowledge of a Will for the above named deceased please contact Francis X. Downes & Co., Solicitors, 16 Parnell Square, Dublin 1. Tel. 749257/8, 743821.

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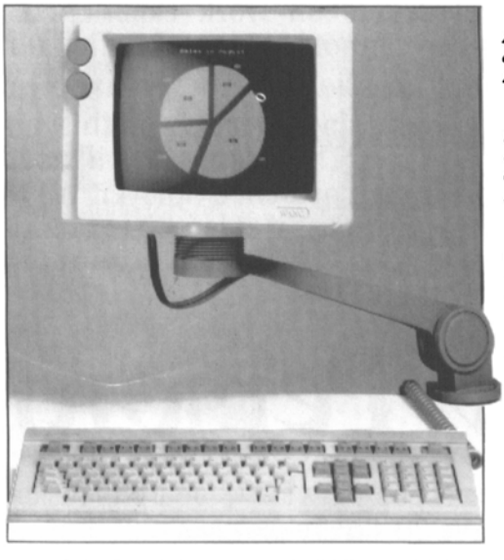

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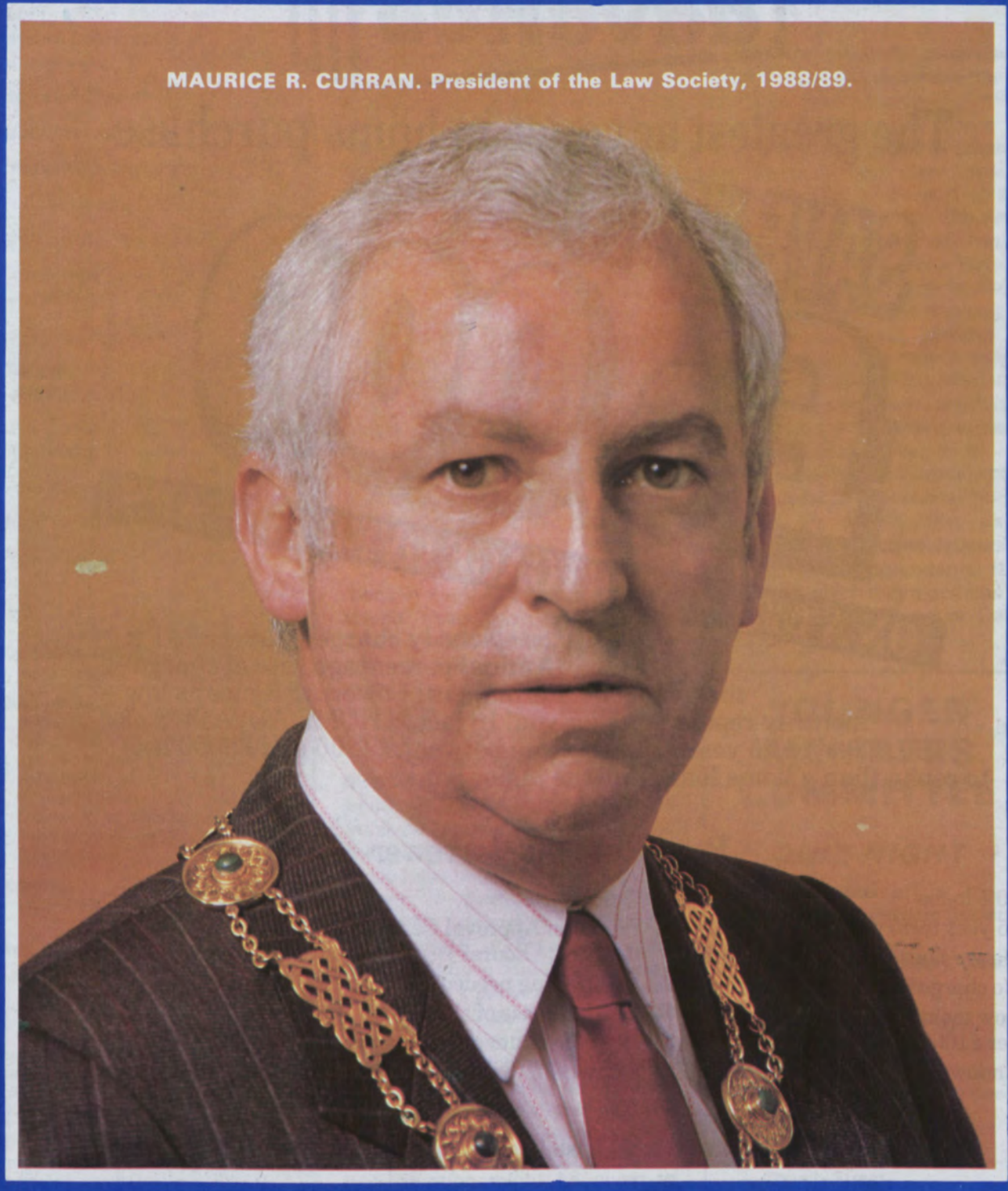

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Viewpoint

The announcement by the Attorney General at the launch of the National Newspapers of Ireland Report on Press Freedom and Libel that he is referring the Law of Defamation to the Law Reform Commission for examination is welcome. So too is the Report itself, which appears at a time when libel claims, particularly in the United Kingdom, have reached new heights. It is difficult to avoid the conclusion that the ''Sun'' newspaper regards its payment of over a million pounds damages to Elton John almost as if it were giving him the first prize in the Bingo competition. Certainly it seems to have generated as much publicity for itself out of the settlement as if it had run such a competition.

The point is already being made in the U.K. that the amounts which have been awarded by juries in defamation actions are incompatible with the levels of awards by judges in personal injury actions and a call is being made for the removal of these actions from juries. It seems fairly clear that if these awards by juries have been exceptionally high it is because there is an element of the punitive in them, in that the juries have considered not just the extent of the damage to the plaintiff's reputation but also the recklessness of the newspapers in publishing uncorroborated allegations against the plaintiffs.

It may well be that instead of removing the defamation actions from juries, which must be difficult to defend, since the jury is surely the best representative of the persons in whose eyes the plaintiff claims to have been defamed, consideration might be given to restricting the rights of ''public persons'' to bring such actions along the lines of the *New York Times -v- Sullivan* case.

Irish juries, under the supervision of the Supreme Court, have not by and large been excessive in their awards. Nonetheless there is disquiet both on the part of persons who feel they have been unfairly treated by the media and of the media itself that the law and practice on defamation needs updating and this the Law Reform Commission will soon be tackling. There is, however, one anomaly in the Rules of Court relating to defamation actions which might well be amended. In no other tort action is a defendant precluded from making a lodgment without admission of liability. It is not obvious why this distinction should apply in defamation actions. It does nothing to assist the early settlement of cases and appears to be unfair to the defendants. It is something which might perhaps be considered by the Superior Court Rules Committee. □

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The rights of an agent to reimbursement and indemnity

Agents have both rights and duties. In broad terms, agents have rights of remuneration, lien, set-off, reimbursement and indemnity. This article is a detailed study of the agent's rights of reimbursement and indemnity.

by
Vincent J.G. Power
B.C.L. (N.U.I.), LL.M. (Cantab.), B.L. (King's Inns).
Lecturer in Law, University College Cork.

Introduction

In general an agent has a right to be reimbursed[1] and indemnified[2] by the principal for all expenses or liabilities incurred while acting within the authority conferred by the principal.[3] In essence, this right consists of three separate but connected rights: first, a right to be reimbursed for all reasonable expenses: secondly, a right to be indemnified against all liabilities incurred in the reasonable performance of the agency;[4] and thirdly, a right to set off the amount of any expenses, losses or other liabilities where the principal sues the agent (unless the money due to the principal is held on trust[5]).[6] This article concentrates on the rights of reimbursement and indemnity. These rights are of importance to all agents be they partners, stockholders,[7] solicitors, company directors, estate agents, stockbrokers or whatever. As the rules on both rights are similar the two rights will be considered simultaneously.

Preliminary considerations

In commercial life, the existence of the rights of reimbursement and indemnity are of the utmost importance. Few people would be willing to act as agents unless they had an enforceable right to reimbursement and indemnity. As Best C. J. said: "auctioneers, brokers, factors, and agents . . would indeed be surprised, if having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrongdoers, and could not recover compensation from him who had induced them to do the wrong."[8]

The *contents* of the underlying agency agreement is of vital significance. Its terms can dictate the existence and extent of the agent's rights to reimbursement and indemnity.[9]

The *nature* of the underlying agency agreement may also prove to be of considerable significance. If it is a contractual agreement then the rights[10] can be implied into the agreement. If it is not a contractual agreement then the law of restitution (or, as it is more traditionally known, *quasi-contract* must be taken into consideration.

In some circumstances, the right to reimbursement may be dovetailed into the right to remuneration. Thus, for example, an agent might decide against seeking to enforce a separate right to reimbursement where (s)he has been remunerated by the principal. Estate agents are a good example. Very often, an estate agent who manages to secure a buyer or seller will not seek reimbursement of expenses separately from the right to remuneration. Again, if the estate agent fails to secure a buyer or seller then the estate agent will very often not seek reimbursement of expenses, rather just treat the expenses (of advertising, introducing potential clients, etc.) as write-offs.[11]

Sources of the rights

The existence and extent of the rights to reimbursement and indemnity depend on the agency agreement concluded by the principal and the agent.[12] A great deal turns on whether the agency is contractual or not, for example, if the agency is contractual then the agent is entitled to full indemnity but this is not so in a non-contractual agency. If the rights to reimbursement and indemnity exist then they exist irrespective of whether the agent is acting gratuitously or for remuneration. The rights may be either expressly or impliedly[13] stated in the agency agreement.

In a contractual agency (the most common type of agency in the commercial world), the right to indemnity arises from an express or implied[14] term in the contractual agreement. The parties may expressly exclude the possibility that the agent is to be indemnified.[15] If the parties have not excluded such a possibility then the courts are normally willing to imply a right to indemnity into a commercial agency agreement so as to give the contract business efficacy.

In a non-contractual agency,[16] there may still be rights to reimbursement and indemnity. They may arise from two principal sources. First, there may be a separate contract to reimburse and indemnify the agent.[17] Secondly, there may be a restitutionary or quasi-contractual claim on the part of the agent.[18] As Markesinis and Munday observe: "unless the agent is acting as a trustee[19](in which case equity will afford him remedies against the principal), his right to an indemnity will be founded on quasi-contract and he can claim for all the expenses and losses which he has been compelled to incur by acting for the benefit of the principal, provided that the principal himself would otherwise have incurred those selfsame liabilities."[20]The agent has a right only to the "payments made . . . under compulsion, in respect of which the ultimate liability is on the principal, and the benefit of which the principal obtains."[21]

Circumstances

There are a number of circumstances in which the rights arise.

The principal is normally under a duty to reimburse and indemnify the agent for all liabilities incurred while acting within the scope of the authority conferred by the principal.[22]

The expenses and liabilities must have been *actually* arisen.[23]

The principal does not have to indemnify the agent against imaginary liabilities.

The principal must reimburse and indemnify the agent notwithstanding the fact that the principal could not be made personally liable for the expenses or liabilities.[24]

The agent does not have to be *legally* obliged to meet the expenses and liabilities.[25] A principal is obliged to indemnify and remunerate an agent not only for expenses legally incurred but also for some expenses which the agent was morally *(but not legally)* obliged to incur. *Rhodes -v- Fielder, Jones and Harrison*[26] is a case in point. The client instructed his solicitors not to pay counsel's fees. Counsel would not have been entitled to sue for the fees but it would have been a matter of professional misconduct for the solicitors not to have paid the fees. Lush J. held that the principal (the client) was obliged to indemnify the agent (the solicitors) for the fees which it paid to the third party (the counsel) notwithstanding that it was not *legally* obliged to do so.

The agent's normal rights to reimbursement and indemnity may be extended and enlarged by a custom existing in the particular trade in which that agent operates. If it can be established that there is a custom that agents are reimbursed and indemnified in that particular trade in a way which is not normal in other trades and that custom is reasonable then the agent is entitled to the rights which are customary in that trade.[27] If such a custom can be established but it is found to be an unreasonable custom then the principal will only be entitled to reimburse and indemnify the agent where the principal knew of the custom.[28] An agent is entitled to be reimbursed for expenses or indemnified for liabilities incurred while acting within the scope of implied authority.

Decided case law supports the proposition that an agent who mistakenly (but reasonably) makes a payment to a third party is entitled to reimbursement and indemnity.[29]

If an agent is entitled to be indemnified in respect of the expenses of litigation then the scale of reimbursement is that of cost on a common fund basis and not simply party and party.[30]

Restrictions

(a) Agents

Agents generally have the rights of reimbursement and indemnity but *del credere* agents do not have these rights.

(b) Situations

In general, an agent is entitled to be both reimbursed and indemnified but there are situations where the agent can lose these rights.

An agent has no rights to reimbursement or indemnity where the agency agreement expressly or impliedly excludes it.[31]

An agent is not contractually entitled to reimbursement or indemnity in respect of breaches of duty[32] unless the principal ratifies the breaches. Such an agent may be able to maintain an action in restitution. *Lage -v- Siemens Bros. & Co. Ltd*[33] is an example of where an agent was held not to be entitled to reimbursement or indemnity where it was in breach of its duties to the principal. McKinnon J. held that because the agents had been in breach of their duties to the principal they were not entitled to their right to indemnity.

An agent is not contractually entitled to reimbursement or indemnity insofar as s/he exceeds authority or acts without any authority at all[34] (unless the principal ratifies the agent's actions).

On the basis of agency law, an agent is not entitled to reimbursement or indemnity in respect of an act contrary to the criminal law.[35] There are a number of cases which hold that an agent can claim indemnity where s/he cannot demonstrate that s/he was aware of the illegality and that the act was not manifestly illegal.[36]

While the agent is not entitled to reimbursement or indemnity in respect of criminal acts, the position with respect to civil wrongs is not so clear-cut.

The agent is not entitled to reimbursement or indemnity in respect of gaming and wagering transactions. More generally, it has been held that an agent is not entitled to remuneration or indemnity where the transaction is contrary to public policy.[37]

It is submitted that an agent is not entitled to reimbursement or indemnity for a loss if it is due to the agent's own default or negligence, even if the loss is incurred while acting for the principal.[38] In *Lewis -v- Samuel*[39] the agents (solicitors) were held not to be entitled to enforce their claim for indemnity from the principal (the client) for work done (drafting documents) because it was done negligently.

Stoljar recalls an important restriction: "[an agent] cannot claim an indemnity if and where he acts merely officiously. For example, where a broker contracts on behalf of [the principal] but [the principal] withdraws, the broker cannot by a purely voluntary payment make himself [the principal's] creditor; in fact, to be entitled to an indemnity, the agent must show some sort of compulsion, such as a usage on the Stock Exchange."[40]

Enforcement

(a) Action

The agent may enforce the rights of reimbursement and indemnity by way of action for the amount owing by the principal.

(b) Lien

The agent may enforce the rights of reimbursement and indemnity by exercising his or her lien[41] on goods which the agent lawfully acquired. A possessor lien may be defined as the legal right of one person (such as a creditor) to retain lawful possession of the property of another person (such as a debtor) until a claim (such as a debt) by the person in possession against the owner is satisfied. Liens are very important in the area of agency. Silvertown has written:

> Where the relationship of principal and agent exists, the agent will have a valid lien on the moveable property including money in respect of all valid claims he may have in his capacity of agent for earnings and commission, or *money advanced or liabilities properly incurred arising during the course of his agency,* provided:
>
> (i) there is no term of a contract between the principal and agent which is inconsistent with the right of lien; and
>
> (ii) that the moveable property or money was not delivered to the agent with express stipulations inconsistent with the right of lien.[42]

(c) Set-off

Where the agent is sued by the principal (or anyone claiming through the principal then the agent may enforce the rights of reimbursement and indemnity by was of set-off.[43]

The author wishes to express his gratitude to Robert A. Pearce and Irene Lynch, of the Law Faculty at University College Cork for their helpful comments and suggestions in respect of an earlier draft of this article.

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FOOTNOTES

1. See *Merryweather -v- Nixan* (1799) 8 TR 186; *Wilson -v- Milner* (1810) 2 Camp 452; *Betts -v- Gibbins* (1834) 2 A & E 57.
2. See *Moore -v- Moore* (1611) 1 Bulst. 169; *Thacker -v- Hardy (1878) 4 QBD 685.*
3. *See Moore -v- Moore* (1611) 1 Bulst. 169; *Adamson -v-Jarvis* (1827) 4 Bing 66; *Frixione -v-Taglaiafero & Sons* (1856) 10 Moo PCC 175.
4. See *Adams -v-Jarvis* (1827) 4 Bing 66; *Thacker -v-Hardy* (1878) 4 QBD 685; *Adamson -v-Morgan & Co.* [1924] 1 KB 751; *Hichens, Harrison, Woolston & Co. -v- Jackson & Sons* [1943] 1 A11 ER 128; *Anglo Overseas Transport Ltd. -v- Titan Industrial Corporation (United Kingdom) Ltd.* [1959] 2 Lloyd's Rep. 152.
5. This does not operate where the money due to the principal is held on trust: see *Stumore -v- Campbell & Co.* [1892] 1 QB 314; *Re Mid-Kent Fruit Factory* [1896] 1 Ch 567.
6. *Re Mid-Kent Fruit Factory* [1896] 1 Ch. 567.
7. See *Crean -v- Deane* [1959] IR 347.
8. *Adamson -v- Jarvis* (1827) 4 Bing 66 at 72.
9. See *Henehan -v-Courtney* (1967) 101 ILTR 25; *Murphy, Buckley, Keogh -v- Pye (Ireland) Ltd.* [1971] IR 57; *O'Toole -v- Palmer* [1943] Ir. Jur. Rep. 59.
10. At least the rights of reimbursement and indemnity.
11. Estate agents may be entitled to seek reimbursement of expenses notwithstanding a failure to bring about contracts between their clients (principals) and third parties: but this depends on the particular agency agreements: *Bernard Thorpe & Partners -v- Flannery* (1977) 244 EG 129.

COMPANY SERVICE

The Law Society,
Blackhall Place,
Dublin 7.

Telephone 710711
ext. 224

Telex 31219 1LAW E1
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12. *Adams -v- Morgan & Co.* [1924] 1 KB 751.
13. Cf. *Brittain -v- Lloyd* (1845) 14 M & W 762; *Adams -v- Morgan & Co.* [1924] 1 KB 751.
14. Cf. *Toplis -v- Grane* (1839) 5 Bing N.C. 636; *Moore -v- Moore* (1611) 1 Bults. 169.
15. E.g. *del credere* agents: see *Morris -v- Cleasby* (1816) 4 M & S 566; *Hopper -v- Treffry* (1847) 1 Exch. 17.
16. A non-contractual agency can arise in a number of circumstances, such as a lack of capacity or a failure to comply with formalities: *Craven-Ellis -v- Canons Ltd.* [1936] 2 KB 403.
17. *Sheffield Corporation -v- Barclay.*
18. *Brook's Wharf -v- Goodman,* Fridman and McLeod, *Restitution* (1982) chs. 11 and 16.
19. *Ed.* see *Hardoon -v- Belilos* [1901] AC 118. The position may also be similar where the agent is acting as surety.
20. *An Outline of the Law of Agency,* (2nd ed., 1986), p.105.
21. Reynolds, *Bowstead on Agency* (15th ed., 1985) pp. 247-248 (footnote omitted).
22. *Chappell -v- Bray* (1860) 6 H&N 145.
23. *Lacey -v- Hill, Crowley's Claim* (1874) LR 18 Eq 182; *Williams -v- Lister & Co.* (1913) 109 LT 699; *Halbronn -v- International Horse Agency and Exchange Ltd.* [1903] 1 KB 270; *Tomlinson -v- Scottish Amalgamated Silks Ltd. (Liquidators)* 1935 SC (HL) 1.
24. *Brittain -v- Lloyd* (1845) 14 M & W 762; *Adams -v- Morgan & Co. Ltd.* [1924] 1.
25. *Rhodes -v- Fielder, Jones and Harrison* (1919) 89 LJKB 15.
26. (1919) 89 LJKB 15.
27. *Anglo Overseas Transport Ltd. -v- Titan Industrial Corpn. (UK) Ltd.* [1959] 2 Lloyd's Rep. 152.
28. *Bayliffe -v- Butterworth* (1847) 1 Exch 425.
29. Cf. *Pettman -v- Keble* (1850) 9 CB 701. See also *Broom -v- Hall* (1859) 7 CB (NS) 503; *The Millwall* [1905] P 155; *Wallersteiner -v- Moir* (No. 2) [1975] QB 373.
30. *The James Seldon* (1866) LR 1 A & E 62; *Williams -v- Lister & Co.* (1913) 109 LT 699; *Simpson and Miller -v- British Industries Trust Ltd.* (1923) 39 TLR 286.
31. Cf. *Re Hollebone's Agreement* [1959] 2 All ER 152; *Perishable Transport Co. Ltd. -v- Spyropoulos (London) Ltd.* [1964] 2 Lloyd's Rep. 379; *Fraser -v- Equitorial Shipping Co. Ltd. and Equitorial Lines* [1979] 1 Lloyd's Rep. 103.
32. *Capp -v- Topham* (1805) 6 East 392; *Hurst -v- Holding* (1810) 3 Taunt 32; *Barron -v- Fitzgerald* (1840) 6 Bing. NC 201; *Davison -v- Fernandes* (1889) 6 TLR 73; *Ellis -v- Pond* [1898] 1 QB 426 (breached duty of obedience); *Thomas -v- Atherton* (1878) 10 CHD185; *Solloway -v- McLaughlin* [1938] AC 247.
33. (1932) 42 Lloyd's Rep. 252.
34. *Warwick -v- Slade* (1811) 3 Camp 127 (where authority had been validly revoked before the act was done by the agent); *Bowlby -v- Bell* (1846) 3 CB 284.
35. *Ex p. Mather* (1979) 3 Ves. 373.
36. *Adamson -v- Jarvis* (1827) 4 Bing 66; *Pidgeon -v- Burslem* (1849) 3 Ex 465; *Smith -v- Lindo* (1858) 5 CB (NS) 587; *Scott -v- Jackson* (1865) 19 CBNS 134.
37. *Herman -v- Jeuchner* (1885) 15 QBD 561.
38. *Barron -v- Fitzgerald* (1840) 6 Bing NC 201.
39. (1846) 8 QB 685.
40. *Op. cit.,* pp. 304-305 (footnote omitted).
41. Cf. *The Borag* [1980] 1 Lloyd's Rep. 111 (appeal; [1981] 1 WLR 274). Cf. *Re Morris* [1908] 1 KB 473; *Sweet -v- Pym* (1800) 1 East 4; *Earl Bristol -v- Wilsmore* (1823) 1 B & C 514.
42. *Law of Lien* (1988), p. 95 (emphasis added.)
43. *Curtis -v- Bridge* (1885) 14 QBD 460.

FOR YOUR DIARY

20 January, 1989
Irish Planning Institute. One Day Conference. *Planning Compensation.* Gresham Hotel, Dublin. For further details Tel. 892119.

25 January, 1989
CLE Seminar. *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988.* Consultant: David J. Clarke, Solicitor. 2.30-6.00pm. Blackhall Place, Dublin 7.

26 January, 1989
Medico-Legal Society of Ireland. *Alternatives to Custody.* Speaker: District Justice Gillian M. Hussey. United Service Club, St. Stephen's Green, Dublin 2. 8.30pm.

27 January 1989
CLE Seminar. *Book-Keeping.* (For Solicitors' Book-keepers). 2.30pm - 6.00pm. Blackhall Place, Dublin 7.

31 January, 1989
CLE Seminar. *Holidays and Carriage by Air.* Consultants: Tony O'Connor, Solicitor, Eugene Stuart, Deputy Director of Consumer Affairs. 4.00pm-6.00pm. Blackhall Place, Dublin 7.

31 January 1989
CLE Seminar. *Carriage of Goods by Road and Sea.* Consultants: Petria McDonnell, Solicitor and Bryan J. Strahan, Solicitor. 7.00pm-9.00pm. Blackhall Place, Dublin 7.

1 February, 1989
Criminal Lawyers Association Seminar. *Forensic Medicine — new developments.* Chairman: Dr. John Harbison, State Pathologist. Proposed Speakers: Dr. Maureen Smith, Forensic Scientist, Dept. of Justice; Dr. Sheila Willis, Forensic Scientist, Dept. of Justice and Mr. Ron Yaxley, Sales and Marketing Manager, I.C.I. Cellmark. 7.30pm-9.30pm, President's Hall, Blackhall Place, Dublin 7.

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

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

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

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

Practice Notes

"LLOYD'S UNDERWRITERS

There is no need to apply for leave to serve outside the jurisdiction in cases involving Lloyd's Underwriters. Raymond P. McGovern, Lloyd's Underwriters Sole General Representative in Ireland of W. G. Bradley & Sons, 52 Fitzwilliam Square, Dublin 2, is obliged to accept service of proceedings in this jurisdiction on behalf of Lloyd's Underwriters at his address.

Also, Mr. McGovern may be named as Defendant in the proceedings as follows: 'Raymond P. McGovern for and on behalf of certain underwriters at Lloyd's subscribing to Policy No. . . . ☐

MEDICAL NEGLIGENCE CASES – PANELS OF EXPERT WITNESSES

In 1986, with the co-operation of the Irish Medical Organisation, Panels of Medical Consultants who were willing to assist Plaintiffs in medical negligence cases were established. The Litigation Committee is anxious to ascertain what the experience of the use of these panels has been.

Members who have made use of the panel system are asked to write to Anna Hegarty, Secretary to the Litigation Committee, the Law Society, Blackhall Place, setting out their experiences of the system. ☐

NEGATIVE SEARCHES AND BUILDERS

The Conveyancing Committee was asked to review the practice of Builder's Solicitors providing negative searches.

The Committee made enquiries of the Registry of Deeds and understands that the Registry still operates the system whereby negative searches may be lodged, written-up, taken out and then re-lodged for updating. The Committee is of the view that the obligation lies on the Solicitor acting for the Builder to provide each Purchaser's Solicitor with an up-to-date negative search.

The Builder's Solicitor should lodge the search before the commencement of the development and provide each purchaser with a copy of the search. On the completion of the development the search should be lodged by the Builder's Solicitor for up-dating and a certified copy with all acts explained/discharged sent to each Purchaser's Solicitor. Solicitors acting for purchasers of new houses, should obtain an undertaking to the above effect from the Builder's Solicitor on closing. ☐

DATA PROTECTION ACT 1988

This Act is concerned with personal information kept on computers. It gives individuals a right of access to computerised information relating to them and a right to have it rectified or, where appropriate, erased. It also creates obligations for those who keep and process such information, including an obligation on some of them to register.

Among those who are required to register are persons and bodies who keep personal data relating to racial origin, political opinions, religious or other beliefs, physical or mental health (other than health data kept and used only for personnel purposes), sexual life or criminal convictions. Accordingly, *any solicitors* who keep such sensitive data (e.g. health, criminal convictions) on computer will need to register.

The registration requirements, where they apply, extend to personal data whether kept on mainframes, minicomputers, microcomputers (personal computers) or word processors.

The regulations necessary for bringing the registration provisions of the Act into operation will be made within the next few weeks and registration will commence early in January 1989.

It will be an offence for any person or body who is required to register not to do so on or before the closing date for registration, which is expected to be not later than mid-April 1989.

If any of the members of the Law Society need further information or assistance please contact
DONAL C. LINEHAN,
Data Protection Commissioner,
72-76 St. Stephen's Green,
Dublin 2.
Tel. 787911 Ext. 367.

EXCHANGE CONTROL

A change in the exchange controls on transactions in foreign securities will come into effect on **1 January 1989.**

From that date Irish residents will be permitted to purchase, using Irish pounds,

(a) shares; and
(b) medium- and long-term securities

issued by residents of the European Communities or of other countries.

The purchase of short-term foreign securities, i.e., negotiable securities with a maturity of less than two years at date of issue, will continue to be restricted.

All transactions by Irish residents in foreign securities, including settlements, must continue to be routed through Irish Approved Agents.

N.B. EXCHANGE CONTROLS IN OTHER AREAS ARE UNCHANGED AND SHOULD BE STRICTLY ADHERED TO.

A further communication setting out full details of this relaxation of the exchange controls will be sent to Authorised Dealers and other interested parties before the implementation date of 1 January, 1989. ☐

Solicitors – how public are your private conversations?

The problem of private consultations being overheard by those in waiting areas is quite a common one, particularly when the areas is close to the consulting room. Now there is an inexpensive electronic solution to this problem that is easy to install and requires no structural alteration! With Soundmasking, conversations are kept private and confidential – a benefit for both lawyers and their clients. For further particulars contact:

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From the President . . .

When you are elected Senior Vice President of the Law Society, most people seem to think that you become President Elect but this is not so. However you do receive exemption from having to be elected to the Council in the following year.

On the day that the first Council meets in November, Ballot Papers are circulated for the election on one paper of the President and the Senior Vice President and on the other paper of the Junior Vice President. On the first Ballot Paper there is listed in order of seniority of service on the Council all Past Presidents who are still serving as elected members of Council together with all persons who have served as Senior Vice President or as Junior Vice President. The year in which the Past Presidents served as President is set out opposite their names. This is to help the incoming Council Members realise that they are supposed to vote for the first name opposite which a year of service as President does not appear! Fortunately once again this year the "democratic system" worked so that on the 18th November, 1988 the outgoing President, Tom Shaw put the chain of office around my neck thereby investing me as President.

Taking over from Tom Shaw, who was a marvellous President, is a tough task and I can only hope that with the support of the profession and my colleagues on the Council that I will be able to manage it.

It is difficult in advance to anticipate what events will break during any particular year but some of the following would seem likely candidates:

(i) A Building Societies Bill.
(ii) A Solicitors' Bill.
(iii) Implementation of the new Advertising Regulations which were made at Council on Thursday, 9th December, 1988 and which have been circulated to the Profession.
(iv) The question of Solicitors involvement in property sales in a more extensive manner.
(v) Possible abolition of Scale Fees.
(vi) Conflict of Interest Regulations.
(vii) Limitation of Liability for Professional Indemnity claim and the possible incorporation of legal practices.
(viii) Multi Disciplinary Practices – are the Bar and the Solicitors Professions to be kept separate whilst maybe we join with Accountants / Estate Agents?
(ix) Protection of Compensation Fund and speedier prosecutions for fraud of Solicitors who have been struck off the Roll.
(x) Preparation of the Profession for 1992.
(xi) Developing financial service packages for Solicitors.

During the year I would hope to deal with some of these topics in detail. In the meantime I look forward to all the challenges ahead, to travelling the length and breadth of the country, meeting old friends and hopefully making new ones in this great profession that we share.

MAURICE R. CURRAN
President

MAURICE R. CURRAN

has been elected as President of the Society for the year 1988/89. He was educated at Blackrock College and UCD where he took the degrees of BCL and LLB. He qualified as a solicitor in 1961 winning the Overend & Findlater Scholarships. He joined the firm of Walker Son & Mason, now Mason Hayes & Curran where he specialises in Commercial Matters and has been for many years Managing Partner. He was elected to the Council in 1973 and has served as Chairman of the Education, Registrars, Finance and Compensation Fund Committees. He was one of the architects of the New Practical Training Course for Apprentices introduced in 1978.

Mr. Curran was one of the founders of the Solicitors Mutual Defence Fund Ltd., which gives indemnity against professional negligence and is presently Chairman of the Board. He is also a Notary Public, director of a number of private companies and a member of the Irish Arbitration Committee of the International Chamber of Commerce. He has served on the Leinster Society of Published Accounts Awards Committee for a number of years. He is married to Noelle Anne Curran and they have four daughters.

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WIGG, GOWAN and MULLARKEY . . . are now allowed by law to advertise. This is our first ad. First of all we would like to tell you what we can't tell you:

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WE CANNOT tell you that other solicitors are no good.
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WE CANNOT tell you how much business we do.
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WE CANNOT tell you who we act for.
WE CANNOT tell you what we do.
WE CANNOT bring you out to dinner.
WE CANNOT tell you whether we win or lose our cases.
WE CANNOT tell lies.
WE CANNOT use bad language.
WE CANNOT tell you anything our colleagues would not like.

CALL SOON AND WE'LL TELL YOU WHAT
WE CANNOT TELL YOU

LAW SOCIETY COUNCIL 1988/89 — NEWLY ELECTED MEMBERS
(Left to right): Justin McKenna, Miriam Reynolds and Liam O'Brien.

CRIMINAL LAWYERS ASSOCIATION

SEMINAR

Wednesday, 1st February, 1989

Blackhall Place
(President's Hall)

7.30 p.m. to 9.30 p.m.

TOPIC: Forensic Medicine — new developments.

CHAIRMAN: Doctor John Harbison, State Pathologist.

PROPOSED SPEAKERS: Dr. Maureen Smith, Forensic Scientist, Department of Justice.
Dr. Sheila Willis, Forensic Scientist, Department of Justice.
Mr. Ron Yaxley, Sales and Marketing Manager, I.C.I. Cellmark, who are marketing the new technique of D.N.A. Fingerprinting.

Please note that the Annual General Meeting of the Criminal Lawyers Association will be held at Blackhall Place at 6.30 p.m. on the same day, Wednesday, 1st February, 1989.

Please put both of these dates in your diary.

Solicitors and VAT

THE HIGH COURT
REVENUE

Between:

J. J. Bourke, Inspector of Taxes, *Appellant*
W. G. Bradley & Sons, Solicitors, *Respondent*

Note of **Judgment** delivered the 28th day of July 1988 by Mr. Justice Lardner.

The question which arises for decision in this case is one which is raised in a Case Stated by a learned Circuit Court Judge in relation to fees charged and received by Messrs. W. G. Bradley & Sons as Solicitors in the particular circumstances which have been found by the learned Circuit Court Judge which are referred to in the Case Stated.

Messrs. Bradleys carry on practice as Solicitors in Dublin and in the course of that practice the learned Circuit Court Judge has found that they were taxable persons for the purposes of Value Added Tax. There is no doubt that they performed their obligations in paying tax in respect of those parts of their professional practice which were concerned with acting for Irish clients. Those facts are so found in the Case Stated.

The particular facts which gave rise to this case were in relation to business which they undertook for Lloyd's Underwriters as their clients. Messrs. Bradleys were retained by Lloyd's Underwriters who had entered into contracts of indemnity with Irish clients and Bradleys were retained by Lloyd's in respect of these policies of insurance to provide Solicitors' services.

Lloyd's have no place of establishment in this country but they have an establishment in the United Kingdom. It was in respect of business carried out in a number of cases for Lloyd's that estimated assessments were raised by the Revenue Commissioners upon Bradleys. These assessments were upheld by the Appeal Commissioner. Messrs. Bradleys appealed the decision to the Circuit Court and the learned Circuit Court Judge found that Messrs. Bradleys were not liable for VAT.

I think that the crucial findings of facts which the learned Circuit Court Judge made are contained at paragraphs 6(e) and (f) in the Case Stated. The learned Circuit Court Judge found as follows:

> "6. On the basis of the foregoing oral and documentary evidence I found that the following matters to be proved or admitted in the course of the hearing:
>
> (e) The amounts of the estimated assessments which were the subject of the Appeal were attributable entirely to services supplied by the Respondents in advising and representing the said Underwriting Syndicates at Lloyd's which the Respondents had treated as not constituting services supplied within the State but services which were deemed to be supplied where the Syndicates in question had their establishment elsewhere in the community, that is to say, in London.
>
> (f) The services in question were services supplied by the Respondents as Solicitors in the course of acting on the instructions of Underwriting Syndicates as aforesaid in relation to litigation in which the named Defendant was indemnified under an Insurance Policy issued by a Lloyd's Syndicate.

The learned Circuit Court Judge proceeds then to find certain other ancillary findings of fact which are also set out in paragraph 6 of the Case Stated.

I think that those findings of fact were not challenged at any time before me and it seems to me that the documentary evidence amply supports the findings of fact arrived at by the learned Circuit Court Judge.

The question which arises in this case is whether in those circumstances the conclusions of the learned Circuit Court Judge were correct?

The charge to Value Added Tax is set forth in Section 2 of the Value Added Tax Act 1972:

> "2 - (I) With effect as and from the specified day a tax, to be called Value Added Tax, shall, subject to this Act and Regulations, be charged, levied and paid –
>
> (a) on the delivery of goods and the rendering of services delivered or rendered by an accountable person in the course of business . . . "

Mr. Cooke on behalf of Messrs. Bradleys, the taxpayer, has submitted that Value Added Tax is a tax that falls to be charged on consideration paid for services rendered in furtherance of any commercial transaction. I think that is a correct understanding of the charged tax.

The question then arises, what was the business for which services were rendered by Messrs. Bradleys? I think that on the facts found by the learned Circuit Court Judge, I would have reached the same conclusion, i.e. that the services were supplied by Messrs. Bradleys in advising and representing Lloyd's Underwriters. I think that there was a retainer of Messrs. Bradleys to render certain services as Solicitors.

In essence, the contract was to render those services to the Lloyd's Syndicates. It is true that the services were to represent, advise and defend persons in Irish litigation insured by Lloyd's in Ireland. But it is clear from the Policies of Insurance in question that the insurers remained in sole control of the proceedings for all practical purposes. There are some exceptional circumstances but it is not submitted that those considerations arose in any of the cases under consideration at this hearing.

Messrs. Bradley's services were rendered to Lloyds and Lloyds were thereby enabled to fulfill their obligations to the insured persons under their insurance policies. It seems to me therefore that the commercial transaction for which the services were rendered was the

transaction between Lloyd's and Messrs. Bradleys. In these circumstances the Act determines the basis of liability. Section 5(5) is headed "Place of supply – general rule" which I need not have regard to because the Section is prefaced by "Subject to sub-Sections (6) and (7)". It is sub-Section 6(e)(ii) which is applicable in this case. This Section provides:

"(e) The place of supply of services of any of the descriptions specified in the Fourth Schedule shall be deemed for the purposes of this Act to be:

(ii) in case they are received by a person who has no establishment in the country in which, but for this sub-paragraph, the services would be deemed to be supplied and are so received for the purposes of any business carried on by him, the place where he has his establishment or (if more than one) the establishment of his at which or for the purposes of which the services are most directly used or to be used or (if he has no establishment anywhere) the place where he usually resides."

As I have already stated, my view is that the primary commercial transaction in this case was the supply of services as Solicitors to Lloyd's Underwriters who have their established offices within the European Community in London and that, therefore, London is the place where the services are deemed to be rendered by virtue of Section 5(6)(e)(ii). This leads me to the conclusion that the learned Circuit Court Judge was correct in the conclusion he arrived at in this Case Stated and that the question posed in the Case Stated as follows:

"12. The question of Law for the decision of the High Court is whether I was correct in holding that the services supplied by the Respondents were supplied to and received by the Underwriting Syndicate and not by the policy holder."
should be answered in the affirmative.

I will allow the Respondents the costs of the Appeal. □

Parliamentary Question for WRITTEN answer on Tuesday 22nd November 1988

To ask the Minister for Finance if he intends to take steps to correct the anomalous position arising out of the decision of the High Court in a case (details supplied) regarding the liability for VAT of solicitors; and if he will make a statement on the matter.

–Patrick M. Cooney

[Mr. J. J. Bourke (Insp. of Taxes) V. W. G. Bradley & Sons, Solrs.]

Reply

The High Court decision referred to does not affect the VAT liability of solicitors as such but alters the interpretation of contract law as it affects solicitors, insurance companies and policyholders. Prior to the decision, services supplied by a solicitor acting on the instructions of an insurance underwriter in representing an insured defendant in litigation were regarded for VAT purposes as being supplied to the insured person. The High Court found that such services should be regarded as being supplied to the insurance underwriter.

The implications of the decision are being studied in detail at present both within my own Department and in the Office of the Revenue Commissioners. When these studies are completed I will consider what measures, if any, are appropriate. □

WEST CORK BAR ASSOCIATION

(Left to right): James J. Ivers, Director General of The Law Society; Edward O'Driscoll, Solicitor and outgoing President; Tony Neville, incoming President and Virgil Horgan, Secretary.

PHILLIPS "LIMERICK" COMPETITION

The winner of the *Phillips "Limerick" Competition* is: **Bill Holohan,** Solicitor of Hughes & McEvilly, The Coach House, 12 Emmet Place, Cork.

The prize is a Phillips 596 Pocket Memo and Carry Case.

Mr. Holohan's "Limerick" was as follows:–

There was a young lawyer named Paul,
A memory he had not at all,
But a Phillips machine
Has changed all that scene,
Now there's nothing he does not recall!

AIDS in the workplace

by
Nicholas J. Kearns
Barrister-at-Law

Against a background medical prediction of ten million cases of HIV infection world-wide by the end of this decade, the International Bar Association meeting last month in Buenos Aires addressed itself in its section 'Medicine and Law' to some of the legal issues already apparent, including AIDS related problems in the workplace.

While most people have come to realise that there is no risk of transmission of the AIDS virus in ordinary social or workplace settings, a recent survey in Philadelphia brought home the importance of a proper approach by employers to the problem. The survey showed the 10% of company officials would fire an HIV infected worker, 16% would refuse to work with such an employee, and 38% would try to restrict contact between the infected person and other employees, despite the illegality of such behaviour in the U.S. Less than 30% of companies there have in place a policy or set of guidelines for dealing with AIDS in the workplace, although AIDS has been identified as the number one socio-economic concern of employees, above the federal budget deficit, drug and alcohol abuse, and job security.

In terms of the appropriate legal response, it is instructive to look at what has happened in the U.S. Significant steps have been taken at State and Federal level to outlaw discriminatory practices against people with HIV. The approach has been to treat AIDS and any related condition as a 'disability' or 'handicap' within existing anti-handicap discrimination legislation. The Vocational Rehabilitation Act of 1973 prohibits discrimination by institutions or contractors who receive federal funding against a disabled person simply because he has a physical handicap, providing that person is otherwise qualified and capable of working and does not pose a direct threat to the health or safety of others.

In a milestone decision in March, 1987, the U.S. Supreme Court, in a case which dealt specifically with tuberculosis as a handicap (but which was also considered applicable to those with AIDS) held that persons with contagious diseases were protected under the Act. Congress subsequently codified this ruling in the Civil Rights Restoration Act passed in March of this year.

Parallel with this development, a significant number of States have passed or extended their anti-discrimination laws to protect persons with HIV infection. A typical example can be seen in legislation enacted in Rhode Island in July which prohibits discrimination against HIV positive personnel or those perceived to be infected in housing, employment, public accommodation, granting of credit and delivery of services. As in other States, the measure also prohibits HIV testing as a condition of employment, except where infection would "constitute a clear and present danger" of transmission to others. Many statutes also require reasonable workplace accommodation of handicapped individuals. Both presidential candidates in the recent U.S. election were committed to supporting the Americans with a Disability Bill, also sponsored by Teddy Kennedy, which would extend anti-discrimination measures right across the private sector and which, when enacted, will ensure that every U.S. citizen is adequately protected under the law.

The EC, in its Communication on the fight against AIDS in February, 1987, stressed the need for Community action in relation to equal access to employment. In this respect, it is perhaps surprising to discover that there is no anti-handicap discrimination legislation in Ireland. In May of this year, the Department of Finance issued a policy document on AIDS in the public service which provides that employees who are HIV positive or who suffer from AIDS will be retained in their job for as long as they can perform their duties to an acceptable standard. The I.C.T.U. has also issued guidelines to trade unions to help with practical issues that may arise. This leaves a very big gap where some form of legislation is required to comply with EC requirements and to bring Ireland even partially into line with the US position. It is likely that the Employment Equality Act, 1977 could be recast so as to extend its protection and procedures to persons with HIV infection, subject to the provision that the person be fit to carry out the duties of the job and is not a source of danger to himself or others. Also, the list of persons deemed to have been unfairly dismissed under the Unfair Dismissals Act could readily be enlarged to include a dismissal wholly or mainly resulting from the employee's status as a person with HIV infection. It cannot be stressed often enough that a person with HIV infection may be totally asymptomatic and remain so for many years.

In Buenos Aires the meeting of the Committee on Medicine and the Law passed a resolution which has now been sent forward for consideration by the Council of the I.B.A. and which provided as follows:-

1. That all member States bring forward effective legal measures to ensure equal access to employment for persons with HIV.
2. That the I.B.A. recognises AIDS and HIV infection as a disability or handicap in respect of which legislation can be introduced to prohibit discrimination against HIV positive persons in housing, employment, public accommodation, granting of credit and delivery of services.
3. HIV testing as a condition of employment should be prohibited except where the absence of AIDS or HIV infection is a bona fide requirement of the job.
4. Employers should be encouraged to make reasonable workplace accommodation for persons with HIV infection.
5. Employers should be encouraged to put in place guidelines and educational programmes for dealing with AIDS in the workplace. □

Computers – where to start

The "P.C. DEAL", details of which have been circulated to the profession recently is a good place to start. It is possible to get a good wordprocessor and a laser printer for about £3,500.00 (about half the current retail price). Later you can expand on the uses of the machine to encompass accounts or other software packages, but it is a good idea to start with wordprocessing because it is simple.

Start-up
There are start-up problems and you have got to organise yourself for them. The more preparation done before the computer is installed the smoother its introduction will be for all. Decide what will be done on the wordprocessor initially and set that work aside so that the typist can understand what is expected of her when she makes the transition to wordprocessor operator. Discuss with your supplier what you expect of the wordprocessor and ask him to tailor the training accordingly. Training is not cheap (£100/£150 per day) but it is vital to have at least three days training to get the best use out of your wordprocessor.

Ask a colleague
Most people appreciate the advantages of wordprocessing at this stage even though they may not have a wordprocessor. If you do not, the best way to find out is to discuss it with a colleague who is currently using wordprocessing. He or she will tell you about the increased turnaround time and the quantum increase in productivity as well as the initial problems setting the thing up, and the day the printer would not work when a lease had to be re-drafted urgently.

Expansion possibilities
It is important to become familiar with your computer and to come to grips with words like "operating system", "storage" and "memory" before moving on from wordprocessing to software, which will do other functions such as accounting and time recording.

Printers
I would advise that Solicitors should opt for laser printing despite the fact that Lasers are about twice the cost of the traditional Dot Matrix and Daisywheel printers – they have the advantage of being faster, quieter and less accident prone than the others. This is important in that we have found that at least 50% of our breakdowns or computer problems are printer related. A good laser should last for at least four years.

Handbook
The Technology Committee handbook is an essential tool when looking for information. A copy of the handbook was sent to all practices and it has chapters on contracts, requirements of a Solicitors practice, how to purchase a computer, pitfalls and warnings and it also contains a recommended list of suppliers with a thumbnail sketch of each. The handbook is easy to read and is written in English (not jargon).

The "Deal"
Finally, I would like to recommend the computer deal to you. The members of the Technology Committee have examined the hardware and software and are satisfied that the computer, printer and wordprocessing package are of a good and robust standard and the computer has the capacity of expansion if more screens are to be added at a later stage. Do not wait around for a better offer – there may not be one.

COLMAN P. CURRAN
Solicitor

THE SOLICITORS' BENEVOLENT ASSOCIATION

A CASE IN NEED

Mrs. "X" is in her late 40's, she is the widow of a Solicitor, has five children under 21. Her only income is a widow's pension and family allowance. She has to provide for her family and maintain a home. She faces this enormous responsibility alone. Who can she turn to for help? – The Solicitors' Benevolent Fund.

The Solicitors' Benevolent Association assists such cases - and many others where the age of dependants of members of the profession ranges from "under 10" to "over eighty". The Committee of the Association meets monthly and its work covers the entire country, north and south. The Committee funds come from annual subscriptions from members of the Law Society of Northern Ireland and The Incorporated Law Society of Ireland, together with additional subscriptions received from Bar Associations, and individual Solicitors or firms of Solicitors. In recent years the calls on the Association's resources have become more numerous and this year the Committee faces a relatively large deficit. It urgently needs extra funds. Subscriptions can be sent to the Secretary, Ms Clare Leonard, The Solicitors' Benevolent Association, 40 Lr. Fitzwilliam Square, Dublin 2, or c/o The Law Society, Blackhall Place, Dublin 7.

KWS

Dr Keith W Snape
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In the Dail

Chun an Aire Dli agus Cirt :
To the Minister for Justice

Question: To ask the Minister for Justice if the Land Registry is showing a financial surplus on its operation; and if he will consider converting the Land Registry into an autonomous public corporation.

–Patrick M. Cooney

For ORAL answer on Tuesday, 15th November, 1988.

Answer: The Land Registry fees were last increased with effect from 1st March 1984. The table below sets out the income and expenditure of the Land Registry together with the difference in the years since that increase.

As the Deputy is no doubt aware, the Land Registry is required by law to be self-supporting. The relevant legislative provision is section 14(2) of the Registration of Title Act 1964. Perhaps I ought to add that the figures for "expenditure" shown in the table above do not include any provision for the costs incurred on the Vote for the Office of the Minister for Justice in the administration of the Land Registry. Neither do they include any element for accommodation in the Four Courts Complex. These would, of course, have to be estimates. Were they to be included the result would be that deficits rather than surpluses would have been incurred in some of the years listed.

I have no plans for converting the Land Registry into an autonomous public corporation.

Year	Income £	Expenditure £	Difference £
1984	6,846,468	6,184,488	+ 661,980
1985	7,092,046	6,759,955	+ 332,091
1986	7,219,920	6,706,191	+ 513,729
1987	7,295,172	7,137,946	+ 157,226
1988-Projected	7,100,000	7,250,000	– 150,000

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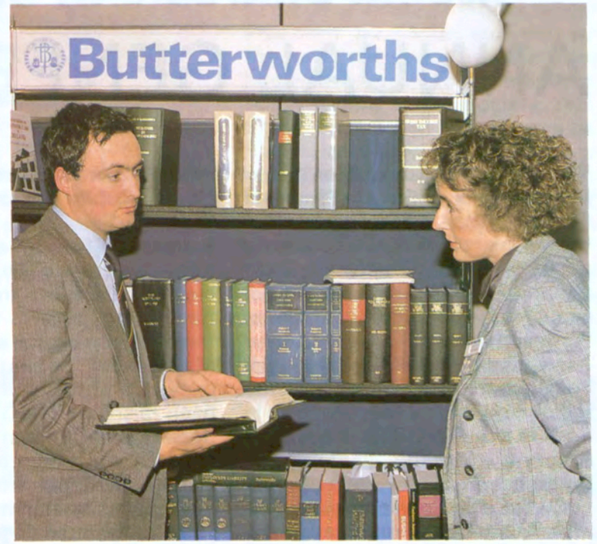
LEGAL OFFICES & TECHNOLOGY EXHIBITION 1988

James J. Ivers, Director General of the Incorporated Law Society of Ireland, and Martin Sawyer, Sabre Business Systems Limited, at the Solicitors' & Legal Office Exhibition, Jury's Hotel, 15th + 16th November.

Frank Lanigan, conducting a Seminar on the Star Computer (Ireland) Ltd. Stand.

After lecture on Conveyancing Support Package, from left, Jim Heaney, Coleman Curran, Frank Lanigan.



Owen O'Sullivan, Solicitor; Fiona O'Sullivan, Butterworth (Ireland) Ltd.

Ciaran Feighery - Blanchardstown, Rick Deegan - Managing Director - Business Computing & Law, Ray Monaghan - Horan Monaghan.

Padraig Gibbons - John Rochford & Co., Bairbre Beighan - Irish Document Exchange, Ken Mills - Irish Document Exchange, John Rochford - John Rochford & Co., Coleman Curran.

INCORPORATED LAW SOCIETY OF IRELAND

ANNUAL GENERAL MEETING

The Annual General Meeting of the Incorporated Law Society of Ireland was held at Blackhall Place, Dublin 7, on Thursday, 17 November, 1988.

Before the formal business opened the President, Mr. Thomas D. Shaw welcomed the members and, especially Mr. John Jennings, President-elect of the Canadian Bar Association, and Mrs. Jennings. Having signed the Minutes of the Half-Yearly General Meeting, held in Cork on May 7th, 1988, the audited accounts for the year ended December 31st last were reviewed.

Mr. Brendan Garvan was alarmed with the results as reflected in the Income & Expenditure Account. The actual outcome for the year was a deficit of £15,167, compared with a surplus of £29,633 for the previous year. He objected to the inclusion of the "Write Back of Reserve" £36,058, which gave a surplus of £20,891, thereby disguising the real deficit. He added, however, that the Society's Reserves in the Balance Sheet appeared adequate.

In the light of the activities for the year ended December 31st, 1987, the Society would have to think seriously about where it was going, having regard to inflation, as the figures continue to be above the general level. The return on capital employed was going down year by year culminating in a negative return for the current year. At the same time, the cost of the Practising Certificate was increasing at a rate beyond the rate of inflation and the Society's continuing rising costs would give rise to further increases in Practising Certificate fees. Mr. Garvan urged a cost reduction exercise immediately and the reduction of overheads by 5%.

Committee Chairman's Reply

The Chairman of the Finance Committee, Mr. Ernest J. Margetson, replying to points raised by Mr. Garvan, said that there had been increased outlay on extra staff for key areas, greater commitment in the communications area, and in the institutional advertising project. Dealing with the return on capital employed, Mr. Margetson questioned the relevance of this point, which had been raised by Mr. Garvan, as the Society is not a commercial trading concern and operates within the income available from fees and miscellaneous activities.

On the matter of the Practising Certificate fee level, Mr. Margetson referred to the table of fees payable over recent years which shows an increase in the total contribution level from £486 in 1984 to £545 in 1988, 12% in four years. Every effort is made to control expense and he cited the present budget review as a case in point; every item of income and expenditure is examined in detail for justification.

A point raised by Mr. Garvan on "Write Back of Reserve" in the Income and Expenditure Account is being given a written reply as the answer involves a previous year's accounts.

The President expressed his support for the statements made by Mr. Margetson and assured the Meeting that, from his first hand experience, particularly during this year, the finance of the Society is being properly and efficiently managed. The adoption of the Accounts was agreed unanimously on the proposal of Mr. Patrick O'Connor and Mr. Raymond Monahan.

Appointment of Messrs. Cooper and Lybrand as Auditors was unanimously agreed on the motion of Mr. Ernest Margetson, seconded by Mr. Frank Daly. Mr. Margetson welcomed Mr. R. Lane and Mr. K. Byrne of Cooper & Lybrand and thanked them for their services to the Society, especially in settling the tax position which was under query for several years.

Advertising Ballot

The ballot on Advertising by Solicitors showed a total valid poll of 1,976 (with 54 spoiled votes) and the following results:

Solicitors should be entitled to advertise.....	1,013
Solicitors should not be entitled to advertise.....	963

Reports from Committees

Dealing with the Report of the Council the President expressed thanks on behalf of the members to the Professional Purposes Committee for their work in producing the Guide to Professional Conduct of Solicitors in Ireland.

On the Report of the Education Committee Mr. Brendan Garvan referred to the threat from University Professors to the effect that they would withdraw their services from the conduct of Law Society examinations. In his view the Society should be completely independent of the Universities in the running of the Law School.

When discussing the Report of the Younger Members' Committee, the President welcomed Ms. Miriam Reynolds, and congratulated her on her Election to the Council. He congratulated Mr. Cullen and the Costs Committee on the publication of the Costs Book, which would be of considerable value to practitioners. It represented a tremendous voluntary effort on the part of Mr. Cullen and his Committee colleagues which had been commenced when Mr. Cullen was President of the Society some three years earlier. The President's remarks were received with applause.

The adoption of the Council Report was proposed by Mr. D. R. Pigot, seconded by Mr. Stephen Maher and agreed unanimously.

The New Council

The Scrutineers of the Ballot for election to the Council made the following report:

Elected		Total Votes
1.	Shaw, Thomas D.	1,152
2.	Quinlan, Moya	1,122
3.	Ensor, Anthony H.	1,074
4.	Binchy, Donal G.	1,061
5.	O'Donnell, Rory	1,030
6.	O'Mahony, Michael V.	962
7.	O'Donnell, P. Frank	961
8.	Margetson, Ernest J.	930
9.	O'Connor, Patrick	926
10.	Clarke, Geraldine M.	917
11.	Bourke, Adrian P.	917
12.	Collins, Anthony E.	876
13.	Daly, Patrick J.	867
14.	McMahon, Brian M.	856
15.	Mahon, Brian J.	852
16.	Smyth, Andrew F.	852
17.	Reynolds, Miriam	844
18.	Pigot, David R.	836
19.	Monahan, Raymond T.	835
20.	Shields, Laurence K.	832
21.	Glynn, Patrick A.	823
22.	Lynch, Elma	820
23.	Daly, Francis D.	818
24.	Griffin, Gerard F.	791
25.	Murphy, Ken	746
26.	McKenna, Justin	729
27.	O'Brien, Liam M.	724
28.	Matthews, Vivian C.	724
29.	Harte, John B.	720
30.	Donegan, James D.	690

Not Elected

31. Irvine, Michael G. 685

Under Bye Law 29A the Senior Vice-President (Mr. Maurice Curran) is deemed to be elected.

Provincial Delegates:

Connaught- McEllin, Edward M.; *Leinster*-Lanigan, Frank; *Munster*-O'Connell, Michael G.; *Ulster*-Murphy, Peter F. R.

The date of the next Annual General Meeting was provisionally fixed for Thursday 16th November, 1989.

Prize Bond Draw

The Director General (Mr. J. J. Ivers) reported that at the Prize Bond Draw earlier in the day, the following prize-winners were drawn:

£1,000 Bond	£500 Bond	£250 Bond
1762 Anon.	1168 Anon.	1996 William J. McGuire
1360 Michael J. O'Donnell	2297 Denis McDowell	1634 Oliver P. Morahan
1665 Oliver D. McArdle	1642 Anon.	1432 Anon.
1736 Anon.	1758 Robert M. Flynn	1911 Norbert P. Colbert
	1627 Cornelius J. Noonan	2023 Sean T. Kennedy

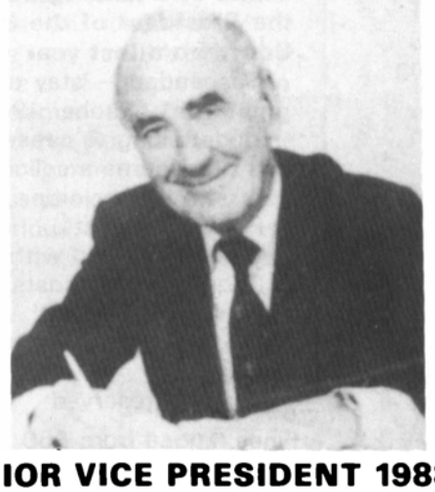
Tribute to President

The Chair was taken by the Senior Vice-President, Mr. Maurice Curran, who called on Mr. Desmond Moran to propose a vote of thanks to the President. Mr. Moran said that as the senior member present, it gave him great pleasure to pay tribute to the President of the Society, Tom Shaw. Over the past two years he had crossed swords with him on a few occasions and had to admit that he learned a lot. The President had undertaken a tough job, not only in visiting Bar Associations throughout the country but also in representing the Society at meetings abroad. He represented the country well and he wished to thank the President for all that he had done on behalf of the members of the Society.

Mr. Moran's remarks were received with applause.

After being seconded by Mr. George Crawford, who described Mr. Shaw as ''a terrific President who had been most helpful to the ordinary member'', the motion was carried unanimously and Mr. Shaw was given a standing ovation.

The Senior Vice-President then formally declared the meeting closed. □



SENIOR VICE PRESIDENT 1988/89

Ernest J. Margetson

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

JUNIOR VICE PRESIDENT 1988/89

Michael V. O'Mahony

Michael O'Mahony was educated at Belvedere College, Dublin, U.C.D. (B.C.L., 1962 and LL.B., 1963) and University of California, Berkeley (LL.M., 1966). He qualified as a Solicitor in 1964 and was a Silver Medal, Findlater and Overend Prize Winner. He is a partner in the Dublin firm of McCann Fitzgerald Sutton Dudley. Elected to the Council in 1975 he has served on the Public Relations, Parliamentary EEC and International Affair, and Publications Committees, and as a member of the *Gazette* Board.

The Disciplinary Committee – Annual Report

COMMITTEE:
Walter Beatty, *Chairman*
W. B. Allen
Gerald Hickey
Michael Hogan
Donal Kelleher
Elma Lynch
William Osborne
Moya Quinlan
Grattan d'Esterre Roberts
Andrew F. Smyth

Between the 3rd September, 1987 and the 31st August, 1988 the Disciplinary Committee met on 35 occasions.

The following applications were considered by the Committee during this period:

New Applications	**51**
Law Society	
Prima facie cases found	24
No prima facie found	1
Awaiting prima facie decision	15
Private	
Prima facie cases found	2
No prima facie cases found	8
Awaiting prima facie decision	1
At Hearing	**26**
Law Society	
Misconduct	11
No misconduct	2
Adjourned generally	1
Adjourned	5
Awaiting hearing	3
Leave to withdraw after inquiry directed	1
Postponed	1
Private	
No evidence to support complaint	1
Leave to withdraw after inquiry directed	1
Applications from previous year	**31**
At hearing	
Law Society	
Misconduct	15
No misconduct	6
Adjourned generally	4
Adjourned	5
Private	
Adjourned	1

Subject matters of complaints

Conveyancing	11
Civil Claims	5
Probate	2
Solicitors Accounts Regulations	8

Principal grounds on which the Committee found misconduct

Failed to	
– reply to correspondence	
– comply with directions of the Law Society's Registrar's Committee	
– attend meetings of the Registrar's Committee	14
Breaches of Solicitors' Accounts Regulations	7
Delayed in completing a conveyancing transaction	1
Deducted monies from client's settlement cheque without consent	1
Delayed/failed in performing undertakings	6
Delayed in processing personal injury claims	2
Failed to discharge client's medical expenses until matter listed for hearing before this Committee	1
Failed to acocunt to the complainant or his solicitor in regard to monies received or to hand over papers and deeds when so authorised	1
Failed to protect his client's interests	1
Failed to properly represent his clients	1
Serious delay in completing administration	1
Delayed in perfection of the complainants title	1
Failed to produce accounts and vouch payments in regard to the administration of an estate	1

Cases presented to the High Court between the 3rd September, 1987 and the 31st August 1988	**18**
Struck off the Roll of Solicitors	1
Undertaking not to practice	1
Censured – Suspended – stay on order until 1/10/1988	1
Censured with costs	2
Censured, fined and costs	2
Fined with costs	1
Adjourned	7
Dismissed	2
Petition struck out on solicitor's undertaking to contribute £50 to the Solicitors' Benevolent Association	1
Awaiting presentation to the High Court	**11**
Cases outstanding before the President of the High Court from last year	**27**
Suspended – stay on order until 1 October 1988	7
Undertaking to cease practice as a solicitor until further order	2
Fined with costs	2
Censured, fined with costs	1
Censured with costs	2
Petition Dismissed/ Struck Out	4
Adjourned	2
Decision reserved	7

Fines ranged from £50 to £1,000.

The Disciplinary Committee is an independent statutory committee, wholly independent of The Law Society, appointed by the President of the High Court to investigate allegations of misconduct made against solicitors. Its procedures are regulated by the Solicitors' Acts 1954 and 1960 and by the rules made thereunder.

Any person or body may make a direct application to the Disciplinary Committee for an inquiry into the conduct of a solicitor on the grounds of alleged misconduct.

The Disciplinary Committee is a fact finding body. After an inquiry should the Committee find misconduct it must report its findings to the President of the High Court.

The Disciplinary Committee has no power to impose any penalty or sanction on a solicitor but may recommend that a solicitor be struck off the Roll of Solicitors, suspended, or the imposition of a fine, payment of expenses or other appropriate sanction to the President of the High Court. The function to accept any such recommendation is vested only in the President of the High Court.

The President of the High Court will consider the report received from the Disciplinary Committee and may strike the name of a solicitor off the Roll of Solicitors or make any ancillary order as the Court may think fit.

This year the Committee noted with concern that the basis of the majority of complaints was the failure of solicitor-respondents to reply to correspondence from complainants and the Society, or to attend meetings of the Registrar's Committee of the Law Society when requested to do so. I would like to take this opportunity to emphasise to solicitors the importance of replying to correspondence and attending meetings of the Registrar's Committee. This Committee views and will continue to view these failures as very serious and as sufficient grounds for misconduct and in the absence of an adequate explanation will report such findings to the President of the High Court accordingly.

Mr. Michael Hogan was appointed to the Committee in October 1987 for a period of five years.

I would like to express my thanks to the members of the Committee for all their hard work and assistance during the year. Not alone do the members give up many valuable hours attending Committee hearings, but are also involved in reading the papers relating to each case, which sometimes run into hundreds of pages.

A special word of thanks is due to Ms. Mary Lynch, the Clerk to the Committee, whose invaluable assistance and dedication to the work of the Committee during the past year is greatly appreciated. □

SOLICITORS BENEVOLENT ASSOCIATION

The *Solicitors Benevolent Association* is pleased to announce that Mr. Thomas A. Menton of O'Keeffe & Lynch, Solicitors, Dublin, and Miss Rosemary Kearon of Ulster Bank Limited, Legal Department, have been appointed Metropolitan Directors and Mr. Niall Kennedy of Kennedy Frewen & Co., Tipperary, has been appointed Provincial Director of the Association. □

NOTICE

NOTICE IS HEREBY GIVEN that the One Hundred and Twenty-Fifth Annual General Meeting of the SOLICITORS BENEVOLENT ASSOCIATION will be held at the Incorporated Law Society's Building, Blackhall Place, Dublin, on Thursday, the 9th of March, 1989, at 12 noon:

1. To consider the annual Report and Accounts for the year ended 30th November, 1988.
2. To elect Directors.
3. To deal with other matters appropriate to a General Meeting.

Clare Leonard,
Secretary.

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LAW AGENCY

Submissions of the Incorporated Law Society of Ireland on the 1989 Budget

The following is the text of the Law Society's submission on the 1989 Budget prepared by the Taxation Committee.

1. Simplification of the Tax System

The greatest advantage a tax system can have is its simplicity and its simplicity is the greatest encouragement to compliance. In general everything possible should be done to simplify the Tax Code with a view to boosting the Revenue yield and at the same time to enhance economic activity. A particular emphasis should be placed on compliance with a view to minimising compliance costs, both for the Revenue and for the taxpayer.

2. C.A.T.

The current high level of the top rates yields very little tax while at the same time those high rates serve to make the country unattractive to capital, both domestic and foreign. The psychological negative impact of the current top rates is far out of proportion to the yield from those rates.

Because of the level of U.K. taxation, currently the maximum rate is 40%, it is essential that this country takes measures to improve its position. Ideally, our top rates should be below the British rate with a view to making this country attractive to free floating capital from such locations as South Africa and Hong Kong.

Consequently, it is submitted and recommended that the flat rate be 35% with more generous personal allowances. This recommendation would leave most normal estates in the country unaffected to a large extent insofar as their payments to the Revenue are concerned.

In addition to the reduction in rate to 35%, it is submitted that the following specific changes be considered with a view to relieving hardship and, in some areas, for the sake of consistency.

(a) At present, there is no time limit put on the period over which aggregation takes place. This puts a heavy burden on the Revenue and the taxpayer as full records must be kept, *ad infinitum,* either manually or on computer. Neither method is suitable for keeping records over an indefinite period. It is submitted that an aggregation period of seven years would be sufficient for this tax.

(b) It is submitted that gifts between spouses should be exempt from Gift Tax. This would make the tax consistent as it affects spouses.

(c) It is submitted that, in the interest of Equity, thresholds be index linked and the new thresholds be announced each Budget Day by the Minister for Finance. This is the position in the U.K.

(d) The small gift exemption of £500 has remained unchanged since 1978. It is submitted that this exemption be increased to £1,000 and be applied to inheritances, as well. This would relieve Personal Representatives from making in-depth enquiries into trivial cases.

(e) Nephews and nieces are given favourable treatment in certain circumstances under the provisions of Par. 9, Second Schedule – First Part of the Capital Acquisitions Tax Act, 1976. In the circumstances set out there, they will be treated as children for tax purposes. Grandchildren are of closer relationship, both in terms of blood and in terms of affection and are likely to be working in the circumstances set out in that Paragraph. It is submitted that grandchildren be given the same favourable treatment as the nephew or niece in the same circumstances.

(f) Agricultural property is rightly given special treatment in Sect. 19 of the Act which relieves the burden of tax on such property. Non-agricultural business is not so relieved although an employer in that type of business probably employs more people than the farmer. Such business could be run, either personally or through the medium of a company. It is submitted that non-agricultural business be given the same relief as Agricultural Property.

(g) A basic principle of taxation is that it should be fair. In the Act, the Oireachtas accepted that acquisitions from close family members would be given more relief than acquisitions from more distant relationships.

Other matters which should be taken into account are:

(i) the degree of hardship inflicted by the tax;

(ii) that the individuals and their families be encouraged to support themselves out of their own resources, where possible, and the State should not deprive individuals of assets given or saved to provide support during decrepitude or old age, particularly if the effect is to make such person a candidate for State assistance

This type of hardship can take a number of forms:

(i) Frequently a house is shared by two or more single or widowed relatives and there is a relationship of mutual dependence going back many years. In most cases there is no other wealth other than the house. The succession of one (or more) of them to the house can cause severe financial hardship and force the survivor(s) to sell the house.

(ii) Frequently relatives take on the obligation of looking after an elderly, handicapped or incapacitated person and devote so much time to the care of that relative that they are incapable of earning a living. In the event of the relative making a gift or bequeathing property to the person caring for him or her, the receiver would find it difficult to pay the tax on the property received, property which the giver thought would be some reward for the care and devotion shown.

(iii) Elderly persons who looked after relatives, not necessarily children, and who assumed a duty of care to the younger person would be penalised and would be unable to make satisfactory provision for him or her.

It is submitted that some form of relief be given in such circumstances – Sec. 44 is not sufficient and is rarely, if ever, used.

3. Stamp Duty

(a) Despite the introduction of the 5% rate in the 1988 Budget, the level of Stamp Duty is much higher than in the U.K. The high level of this duty is the greatest single obstacle to the freeing of the housing market, particularly in the low cost area. Any concession in the low cost area, in respect of Stamp Duty, will help to overcome distortion in the housing market due to the former high level of housing subsidies. It is submitted that there be a two-tier rate of Stamp Duty on secondhand houses of 3% up to £40,000 and of 4% thereafter. It is visualised that sales of plots of land could attract Stamp Duty at the higher rate. The potential loss arising out of the introduction of these lower rates could be overcome by buoyancy in the property market, resulting in increased income.

If a *quid pro quo* is necessary, then it is suggested that a new (1%) low rate on new housing be introduced with an exemption for the "Inner City".

The practical advantage of such an arrangement from the Revenue point of view will be that many of the problems of adjudication on new houses would be removed, such as the question of whether roofs are on or off or whether there is a single contract covering the site and the building or two separate contracts.

In general, provided it was at a low level, Stamp Duty on new houses would lower the compliance costs as far as the Revenue are concerned and it would make building-work and the programming of it easier for developers and builders. In addition agents would need to spend less time devising suitable marketing packages.

(d) The State is putting itself forward as a suitable location for companies supplying Financial Services. A serious obstacle is the present rate of stamp duty on transfers of shares (1%) in comparison with ½% in th U.K. and Capital Duty of 1% in comparison to the U.K. rate of Nil. The U.K. rates should be, at least, matched. The lost return in revenue because of the relaxation suggested would be replaced by increased income tax and other taxes.

(d) It is submitted that the relief provided by Sec. 93 F.A. 1982 and since withdrawn be re-introduced so as to encourage elderly farmers to retire and pass the land on to the next generation.

(d) It is submitted that the Stamp Duty bands be index-linked in the same way as submitted for C.A.T.

4. V.A.T.

Services which formerly might have been provided by Irish Solicitors are not now sought in view of the disparity between the U.K. (15%) rate and the Irish (25%) rate.

In addition, legal services are a necessity which attach the same rate of VAT as luxuries.

As a step in the preparation for harmonisation in 1992, it is submitted that the rate of VAT on services be reduced from 25% to 15%.

5. Income Tax

(a) Apart from higher wages, one of the great incentives attracting younger people to the U.K. and U.S.A. is the lower rate of income tax which ensures that they have more spendable income. The high rates of Irish Income Tax are notorious and may constitute an incentive for tax evasion. It is submitted that, as a first step towards the harmonisation of taxes, the rates of Income Tax should be reduced to 30%, 40% and 50% with further reductions in subsequent years until we match, if not better, our nearest neighbour. Such reductions would have a beneficial effect on employment and increase the tax yield in other areas.

(b) Bearing in mind that the majority of self-employed professional persons in non-pensionable employment do not start to provide for retirement until they are over 40, it is submitted that the limit on Retirement Relief, 15%, be increased and structured according to the age of the taxpayer. This would have the added advantage to the Exchequer that the taxpayer would be unlikely to require State assistance for any reason, in later years.

(c) Consistent with the special position of the Family under the Constitution and in order to assist parents with children, it is submitted that Children's Allowances be re-introduced at a realistic figure.

6. Income Tax/Corporation Tax

The Government, some years ago, stated that they would issue a Government Fund to persuade export companies to keep accumulated reserves in Ireland. It is submitted that this proposal be now implemented and a new ECU Bond be issued, the income of

which will be exempt to corporate manufacturers provided the Bond is held for a stated period, e.g. five years. Such a bond would be a necessity if the U.K. interest rates remain above Irish rates for any appreciable length of time.

Self Assessment
C.A.T.
The voluntary self assessment arrangement for C.A.T. is working well. There has been a good professional response to the sugestion from the Revenue and the training system provided by the Revenue has developed the notion of co-operation between Revenue and the Profession. The arrangements have given greater professional satisfaction to those of the Profession engaged in Capital Taxes work and from the Revenue point of view, it is felt that the "Policeman's Mentality" which might have been present in the past, is being eliminated and this is to be encouraged.

Income Tax
Reference is made to the detailed submissions already made by the Society and by the Institute of Taxation in Ireland in relation to self-assessment, but the following two points must be highlighted and emphasised:-

(a) Bearing in mind that an Inspector making an assessment is not required to indicate where or why he has departed from the figures in a Return, the taxpayer should *not* be required on Appeal to specify (as required by Section 16(4) F.A., 1988) "the grounds, in detail, of his appeal as respects each such amount or matter". It should be sufficient for the tax payer to indicate the amounts in dispute. This undermines the informal nature of the Appeal Commissioners hearing.

(b) Selection of cases for examination should be done centrally by the Revenue based on objective criteria so as to ensure impartiality, and should be subject to a time-limit of *three* years.

8. Custom House Dock Area
In order to promote the Area as the most effective Financial Centre in the world, it is submitted that all conveyances and leases of property within the Area be exempt from Stamp Duty and all services provided for, and goods supplied to, institutions within the Area be exempt from VAT. □

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Professor Richard Woulfe,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

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For further information about the College's activities, please contact:

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Correspondence

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

Dear Mr. Ivers,
You may recall that in 1986 we amended our procedures to ensure that our Guarantee Certificate (Form HG6) was available well in advance of the closing of sales. This change was to ensure that the warranty was in place before a purchaser completed the agreement with the builder. In general, this has worked satisfactorily but we are becoming a little concerned at the extent to which persons who borrow from some financial institutions are able to obtain finance without any great check being made on whether or not the house is registered.

We have gone to the trouble in recent months of briefing all of the major financial institutions who are involved in the home loans market to bring to their attention the necessity for them to be alert at the time when they are considering applications for mortgages to ensure that the house is registered with us and to look for the registration certificate.

I feel that the Law Society could help us in this area by sending out some advice to practitioners, particularly with regard to ensuring that certificates are in the possession of purchasers before sales are closed.

I would appreciate your view on this matter and in particular whether or not you consider it is an area which the Society can assist.

Yours sincerely,
MICHAEL GREENE
National House Building
Guarantee Scheme,
Canal Road,
Dublin 6.

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

Mapping/Registration of Title

Dear Sir,

Members of the Law Society may not be aware that the Ordnance Survey Office has field staff working on a full time basis in most parts of the country. We are prepared to offer the services of this staff to carry out the mapping for registration of individual titles on behalf of the legal profession. The fee involved would be in the region of £50 per survey irrespective of the geographical location of the site. However, this would only be viable if the Ordnance Survey were to obtain a reasonable proportion of the survey relating to registration of title. In the case of multiple registrations on the same site the fee could be negotiated. We would appreciate if your members were made aware of this service and depending on the volume of work, it could be introduced almost immediately on a trial basis. We are also prepared to negotiate with regard to the production of maps for the registration of title where extensive survey is required.

If any further information is requested I would be obliged if you would contact Tony Preston or myself.

Yours sincerely,
M. C. WALSH
Assistant Director,
Ordnance Survey Office,
Dublin 7.

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GAZETTE

Submission of material

The Gazette Editorial Board welcomes the submission of short articles (800-1,500 words) on topics of popular interest. Articles should be typed on A4 paper, double spaced and should be addressed to:

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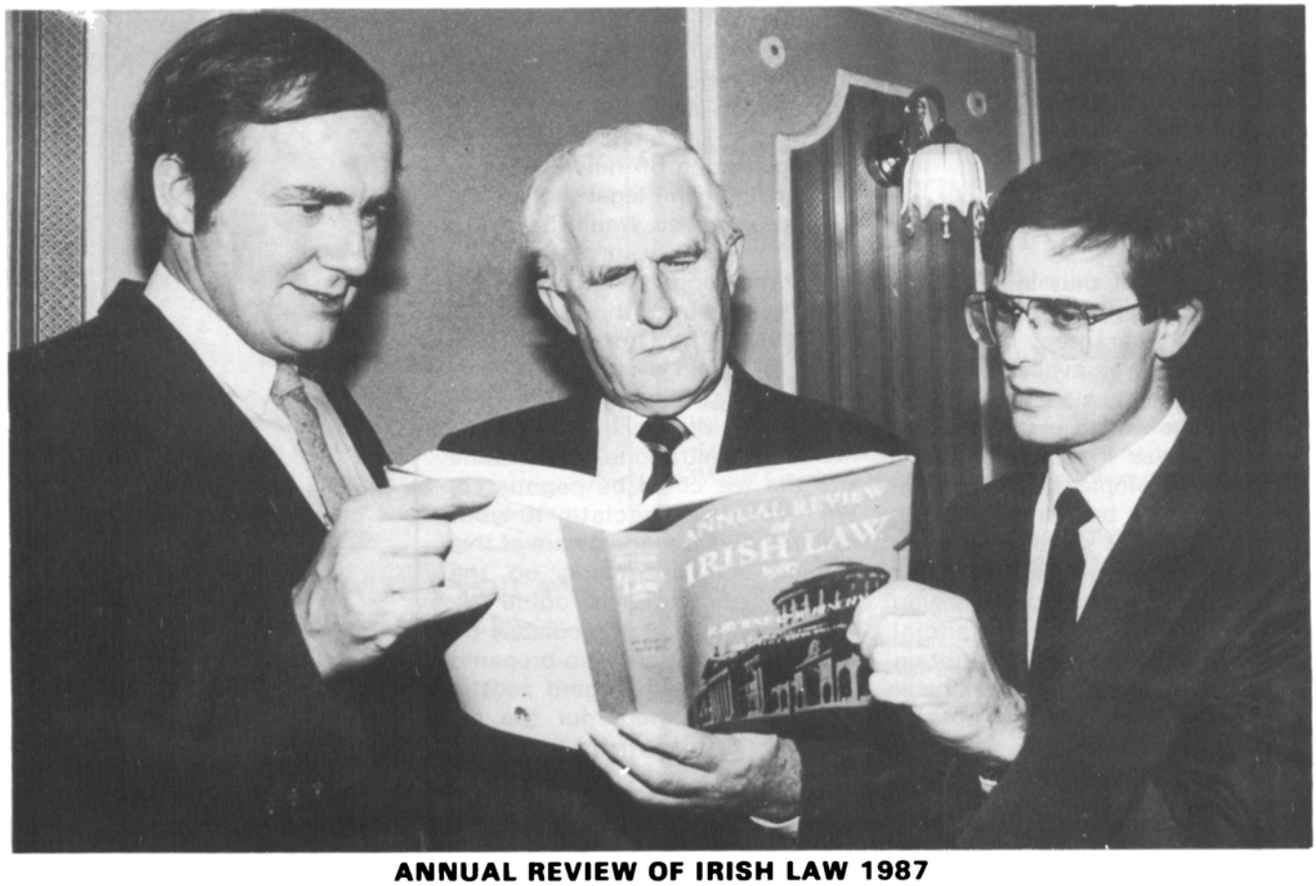
Law Society Gazette,
Blackhall Place,
Dublin 7.



ANNUAL REVIEW OF IRISH LAW 1987

The authors, William Binchy (left) and Raymond Byrne (right) with Mr. Justice Brian Walsh who launched the book. *(See review opposite).*

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Book Review

ANNUAL REVIEW OF IRISH LAW 1987. By Raymond Byrne and William Binchy, (Dublin: The Round Hall Press, 1988, xliv and 365 pp, £55).

A remarkable development over the last decade has been the fruitfulness of our legal writers: textbooks on various branches of our law are enlightening and indeed enlivening subjects hitherto the preserve of foreign academics. That great judicial pathfinder, Judge Cardozo, remarked in *The Growth of the Law* (1924) that "more and more so, we are looking to the scholar in his study, to the jurist rather than to the judge or lawyer, for inspiration and guidance". Those sentiments could not have been applied to this jurisdiction until the last 10 years. Legal writing may well often be confined to the scholar in his study, but the Irish legal scholar of today may well be an academic, a jurist, a judge, a practising lawyer or combine many of these roles in the one person. Writers need publishers; the Round Hall Press, Butterworth (Ireland) Ltd., Sweet and Maxwell, the Jurist Publishing Company, Mercier Press, Gill and Macmillan, the Law Reporting Council and the Law Society all deserve praise for encouraging Irish legal writers and finding niches in the Irish and international legal marketplaces.

The literary and legal fashion of our times is the cumulative supplement. Lawyers need to know the latest outputs from the springs of the legal process — the legislative and judicial organs of government. Raymond Byrne, a barrister and lecturer in the Dublin Business School at the National Institute for Higher Education and William Binchy, a Research Counsellor with the Law Reform Commission, with remarkable industry and style have produced a comprehensive review and analysis of decisions of the courts, legislative developments, and the legal literature including proposals for reform from the Law Reform Commission during 1987. The areas under review have been divided into 26 chapters. Among the topics considered in the Review are Administrative Law with a generous section on Judicial Review; Commercial Law, including consideration of the *Restrictive Practices (Amendment) Act 1987* which represents a major change in domestic competition and fair trade law; Company Law; and Conflicts of Law including consideration of marriage-related issues. The major topics in our fast developing constitutional jurisprudence in 1987 including the issuing of District Court summonses, liberty of expression, international relations, privacy and property rights are all covered under the heading of Constitutional law. Criminal law receives extensive consideration; Equitable Remedies, European Communities, Family law, Labour law, Land law, Telecommunications and Torts are also considered in some detail. The readers are helpfully referred to the various textbooks and to the periodical legal literature for further reference.

Reading the 1987 Review, your reviewer became increasingly conscious of how prolific Irish case law is. Mr. Justice Brian Walsh in his foreword notes that about three hundred judgments of the Supreme Court and High Court are now reserved each year and appear in written form. The authors of this Review classify the volume of judicial decisions and legislation as "a flood". The authors modestly remark in their preface that it has become very difficult for legal practitioners and students to keep up with every legal development. We are in a state of perpetual flux. Some lawyers may feel tempted to echo the words of one legal commentator: "Nothing is stable. Nothing absolute. All is fluid and changeable". Let us never forget common sense. Rhadamanthus in his character sketches of Irish judges in *Our Judges* (1890) paints a delightful picture of the Right Hon. Michael Baron Morris, Lord Chief Justice of Ireland, whose judgments may have lacked legal content but abounded in common sense. Rhadamanthus tells us that Lord Chief Justice Morris ignored law reports when he could, yielded to them only when he was forced to do so and then "with a manifest scorn for the judges whose judgments are recorded, for the reporters who perpetuated them, and for the industrious advocate who unearthed them and quoted them to the point". The views of Lord Chief Justice Morris are not being extolled by your reviewer but with the proliferation of decisions from our courts of record, many of them unreported, the respect for precedent may dwindle and lawyers and judges may rightly be forced merely to have resort to general principles.

The opinion of the judges embalmed in the law reports and the words of the parliamentary draftsmen when cemented in legislation are increasingly attracting the scrutiny of legal writers. The judges and the parliamentary draftsmen must, on occasion, consider that a class of professional detective — the legal writer — is on their tracks, ever ready to expose mistakes. However, Walsh J. in his foreword to this Review notes that contrary to popular belief, judges do not resent criticisms of their opinions. In fact, Walsh J. almost encourages the authors in future editions "to wield a critical bludgeon or a rapier". Implicit criticisms of judges' opinions are expressed in this Review, but they are polite criticisms. Your reviewer can sympathise with a judge who overlooks a material judgment; too much is often expected of a single judge who must prepare an opinion without the aid of research assistants or computerised legal databases.

In a relatively short time-frame, Raymond Byrne and William Binchy have examined an avalanche of judicial opinions and legislative enactments, have succeeded in separating the gold from the alloy in the coinage of the law in 1987 and have admirably distilled the notable features of that law within the confines of their Annual Review. Legislators, judges, practitioners of all hues and students will benefit from reading this Review. The Round Hall Press, the publishers, expect the 1987 Review to be the first of a series: a new Irish institution has been inaugurated.

Eamonn G. Hall

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Registration of Title Act, 1964
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5th day of January, 1988.
J. B. Fitzgerald (Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Patrick Ryan, Peake, Claregalway. Folio No.: 8668; Lands: Claregalway; Area: 59a.0r.32p. County: **GALWAY.**

John J. Byrne & Hazel Byrne, Monadreen, Thurles, Co. Tipperary. Folio No.: 40217; Lands (1) Clongower; (2) Clongower; Area: (1) 0a.0r.8p.; (2) 0a.0r.17p. County: **TIPPERARY.**

Eamonn Duffy, Friary View, Athlone, Co. Westmeath. Folio No.: 8422; Lands: Creaghduff (Part); Area: 3a.1r.17p. County: **WESTMEATH.**

Mary Ita Bernadette Costello and John Costello, The Square, Glin, Co. Limerick. Folio No.: 17026; Land: Abbeyfeale West; Area: 0a.1r.2p. County: **LIMERICK.**

James Duffy, Knocktemple, Virginia, Co. Cavan. Folio No.: 7499; Lands: Murmod; Area: 21a.1r.4p. County: **CAVAN.**

Byrne Taverns, Athenry, Co. Galway. Folio No.: 2647F; Lands: Athenry (Part); Area: 30¼ perches. County: **GALWAY.**

James Kelly & Minnie Kelly, Railway Street, Cahirciveen, Co. Kerry. Folio No.: 16153; Lands: Cahirciveen; Area: 0a.0r.6p. County: **KERRY.**

Joseph Byrne, Johnstown, Benekerry, Carlow. Folio: 11764F; Lands: Larah; Area: 27.260 hectares. County: **CARLOW.**

Mary Feeney, Park Middle, Spiddal, Co. Galway. Folio No.: 28610; Lands: (1) Loughaunbeg; (2) Loughaunbeg (one undivided fifth part); (3) Loughaunbeg (one undivided third part); (4) Loughaunbeg (one undivided fifty-ninth part); Area: (1) 4.238 acres; (2) 1.069 acres; (3) 0.369 acres; (4) 963.00 acres. County: **GALWAY.**

Martin Folan, Teach-Mor, Inverin, Co. Galway. Folio No: 28614; Lands: (1) Laughaunbeg; (2) Laughaunbeg (one undivided fourteenth part); (3) Loughaunbeg (one undivided fifth-ninth part); Area: (1) 11a.2r.16p.; (2) 0a.3r.10p.; (3) 963a.0r.0p. County: **GALWAY.**

James G. O'Halloran, Castlequarter, Cratloe, Co. Clare. Folio No.: 615; Lands: Castlequarter; Area: 30a.3r.17p. County: **CLARE.**

George Wiggins, Corderlis, Ballybay, Co. Monaghan. Folio No.: (1) 232; (2) 2388; Lands: (1) Corderlis; (2) Corderlis; Area: (1) 20a.1r.34p.; (2) 10a.2r.24p. County: **MONAGHAN.**

Francis Moore, Tobeen, Garristown, Co. Dublin. Folio No.: 982; Lands: (1) situated in the Townland of Tobeen and Barony of Balrothery East; (2) situated in the Townland of Baldwinstown and Barony of Balrothery East. County: **DUBLIN.**

Big J. Limited, Landscape House, Landscape Road, Churchtown, Co. Dublin. Folio No. 71086L; Lands: The property situate to the north of Tandy's Lane in the town of Lucan. County: **DUBLIN.**

James and Elizabeth Reilly, Forest Part, Athy, Co. Kildare. Folio No.: (1) 10569F; (2) 10570F; (3) 10571F; Lands: (1) Rathstewart; (2) Rathstewart; (3) Rathstewart. County: **KILDARE.**

Philip O'Sullivan, c/o Henry Street Garda Station, Henry Street, Limerick. Folio No.: 10357F; Lands: Briskea Beg; Area: 0.400 acres. County: **LIMERICK.**

Kevin O'Byrne, 6 Blackthorn Drive, Caherdavin, Co. Limerick. Folio No.: 2016L; Lands: Shaunabooly; Area: 0a.0r.10p. County: **LIMERICK.**

Kerry County Council, County Hall, Tralee, Co. Kerry. Folio No.: 6709; Lands: Kilfelin Trughanancy, Ballymacdonnell Trughancorry & Others. County: **KERRY.**

James Carroll, Folio No. 15553; Lands: Tinnacarrick; Area: 6a.0r.0p. County: **WEXFORD.**

Thomas Smith of Brideswell Commons, Clondalkin, Co. Dublin. Folio No.: 4152; Lands: The property situate in the Townland of Brideswell Commons and Barony of Uppercross. County: **DUBLIN.**

Katherine Kenny of South Strand, Skerries, Co. Dublin. Folio No.: 10768F; Lands: Part of the Townland of Mornington, Barony of Duleek Lower. County: **MEATH.**

Lost Deeds

Trident Development Ltd. – Title to property at Curra and Faha, Glenbeigh, Co. Kerry including Land Cert. Folio 22243, Co. Kerry. Any person having knowledge of the said Deeds please contact Marcus A. Lynch & Sons, Solicitors, 12 Lr. Ormond Quay, Dublin 1. (Ref. BL/19015).

Lost Wills

MULVEY, John Augustine, late of c/o Mrs. P. Frizzele, Aughnagrange, Boyle, Co. Roscommon and formerly of Garvagh, Keshcarrigan, County Leitrim and previously of Ardcame, Boyle, Co. Roscommon and Lackagh, Drumfin, Co. Sligo; retired teacher. Will anybody having knowledge of the whereabouts of a Will of the above named deceased please contact Patrick J. Groarke & Son, Solicitors, Longford.

CHERRY, James, late of Woodcock Hill, Meelick, Co. Clare, farmer, deceased. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on 5th October, 1988 please contact Tynan, Murphy, Yelverton & Co., Solicitors, 16 William St., Limerick.

O'REILLY, Hubert, deceased, widower, date of death: 17 March 1987 and **O'REILLY, Margaret,** deceased, date of death: 10 January, 1985, both of 12 John Street, Sligo. Will anyone knowing of the whereabouts of the Wills of the above named deceased please contact Damien Tansey, Solicitor, Law Chambers, 3 Wine Street, Sligo. Tel. (071) 62608.

CONNELL, John (Martin), deceased, late of Kiniska, Claregalway, Co. Galway. Will any person having knowledge of the whereabouts of a Will of Testamentary Disposition executed by the above mentioned deceased, who died on the 23rd day of March, 1978, please contact MacDermot & Allen, Solicitors, 10 St. Francis Street, Galway. Tel. (091) 67071.

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

Miscellaneous

SEVEN DAY PUBLICANS LICENCE FOR SALE: details from Collins Brooks & Associates, Solicitors, 7 Rossa Street, Clonakilty, Co. Cork. Tel. (023) 33332 (Ref. FMcC).

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DAMAGES

Tort and Constitution — Children of an injured person are not entitled to damages, either at Common Law or under the Constitution, against the wrong-doer who caused the injuries, for damage to their relationship with their injured parent.

Eugene Hosford, father of the present Plaintiffs, suffered a severe electrical shock whilst working for the Defendants in their factory. The accident was caused by negligence on the part of the Defendants, his employers, and resulted in Mr. Hosford sustaining irreversible brain damage. As a result of the accident, he was permanently hospitalised and was unable to communicate. He was made a Ward of Court and proceedings were taken on his behalf against the Defendants. The proceedings were settled with the approval of the President of the High Court for £420,000.

The Plaintiffs are the five children of Mr. Hosford, whose ages at the date of the accident ranged from four to 12 years. Each of the Plaintiffs, it was claimed, was a member of a family unit of which Mr. Hosford was father and head, and each was entitled to the benefits of a moral, intellectual, religious and educational nature, being the benefits which flow from the love and affection, the guidance and example which the father of a family bestows on his children. The Plaintiffs claimed that they were deprived of these benefits as a result of the injuries their father had sustained.

The Plaintiffs made their claim firstly in tort, alleging that the Defendants owed a duty of care not only to Mr. Hosford but also to his children, and secondly under the Constitution, claiming that the negligence of the Defendants amounted to an infringement of the rights conferred by Article 41 and Article 42 of the Constitution.

Held: as to the claim in tort, that the harm which the Plaintiffs allege they suffered is not of a kind for which compensation will be awarded. Although damages for nervous shock are recoverable at Common Law, damages for grief and sorrow are not, and thus damages for the type of harm claimed by the plaintiffs are also irrecoverable. It would require an enactment of the legislature to permit damages to be recovered by the members of the family of an injured person "in respect of damage to the continuity, stability and quality of the relationship with the injured person".

Held: as to the claim for alleged infringement of the Plaintiffs' rights under the Constitution, Articles 41 and 42 impose duties on the State vis-a-vis the family, but in this case the alleged infringer is not the State, but a private company. The rights conferred are:—

(a) the right to protection from legislation which attacks or impairs the Constitution or authority of the family, and
(b) the right to protection from the deliberate acts of State officials which attack or impair the Constitution or authority of the family. A private person (or company) whose negligent acts injure the head of a family does not infringe any constitutional right enjoyed by members of the affected family.

Accordingly, the Defendants were not guilty of any breach of a constitutional duty imposed on them. No duty of care was owed by the Defendants to the Plaintiffs by virtue of the Constitution.

Philip Hosford and Others -v- John Murphy and Sons Ltd. — High Court (per Costello J.) — 24 July 1987 — unreported.

Karl Hayes

STATUTE OF LIMITATIONS

Need for *Animus Possidendi* — Grazing of Cattle held sufficient use to support adverse possession.

The Defendant had leased two fields, together with some other lands from his sister for the purpose of grazing cattle for a number of years up to 1971. In that year she sold the two fields. The purchaser, who was the plaintiff's predecessor in title purchased the fields with the intention of building two factories on them. A factory was built on the larger field but nothing was ever built on the smaller field. Notwithstanding the sale the Defendant continued to use the smaller field as before. In addition he created a post and wire fence over portion of the boundary fence between the two fields where such was necessary to prevent his cattle from straying onto the factory premises.

The Plaintiffs on purchasing the property instituted ejectment proceedings against the Defendant who raised the defence that the Plaintiffs claim was statute barred by reason of the adverse possession of the Defendant of the smaller field since 1971. The Plaintiff claimed that the possession by the Defendant was not adverse possession for the purpose of the Statute of Limitations because it was not inconsistent with the purpose for which the owner of the land intended to use it.

The Plaintiff relied on *Leigh -v- Jack* 5 Ex. D.264 where Cockburn L. C. said "I do not think that any of the Defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The Defendant simply used the land until the time should come for carrying out the object originally contemplated. If a man does not use his land, either by himself or by some person claiming through him, he does not necessarily discontinue his possession of it. I think that the title of the Plaintiff is not barred by the Statute of Limitations."

Bramwell L. J. said: "In order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it."

The Court noted that in *Leigh -v- Jack* it was common case that the land concerned was intended for a street and that until such use was made of it it would remain idle. Having referred to *Littledale -v- Liverpool College* [1901] Ch.190 and *Convey -v- Regan* [1952] I.R. 56 the Court noted that the decision of Black J. in *Convey -v- Regan* was based not upon non-interference with the purposes to which the owner intended to put the lands but on the absence of *animus possidendi.*

The Court referred then to the recent Irish case of *Cork Corporation -v- Lynch* (26 July 1985, unreported) in which Egan J. had cited with approval a passage from *Wallis's Cayton Bay Holiday Camp Ltd. -v- Shell Mex & BP Ltd.,* [1974] 3 All E.R. 575, where Denning M. R. had said "Where the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials". The Court also referred to *Murphy -v- Murphy* [1980] I.R. 183 where Kenny J. had made the point that the question of adverse possession was a question of fact in each case.

The Court took the view that adverse possession depended on the existence of *animus possidendi* and it is the presence or absence of this state of mind which must be determined. Where no use was being made of the land and the claimant knows that the owner intends to use it for a specific purpose in future, this was a fact to be taken into account. The principle has relevance only in so far as when that factor was present it was easier to hold an absence of *animus possidendi.* The Court noted that it could find nothing in the facts to show that the Defendant intended to use the land upon a temporary basis merely to prevent it lying idle until the owner was in a position to use it for a purpose of which he was aware. The Defendant had made full use of the land to graze cattle which supported the necessary adverse possession.

Seamus Durack Manufacturing Ltd. -v- Considine — High Court (per Barron J.) — 27 May 1987 — unreported.

John F. Buckley

EMPLOYMENT

Minimum Notice and Terms of Employment Act 1973 complied with provided the minimum period of statutory notice is included in notice of termination — Notice may be renewed.

In 1984, Bolands Limited was in financial difficulties; a Receiver was appointed who decided to continue trading in the hope he could sell the business as a going concern. Having informed the unions, he served notice on 380 employees; notice was given

on 10 August 1984. Notice was given in writing to each employee with their employment terminating on a specific date. Section 4 of the Act provides that every employee who has been in the continuous service of an employer for a period of 13 weeks or more is entitled to a minimum period of notice varying from one to eight weeks according to the length of service. Accordingly, employees' notice of termination expired on different dates. This notice was extended, in writing, each week up to and including 4 October 1984. There were full consultations with the unions at all times; the unions accepted such extensions. The Receiver did not find a buyer and the company closed on 12 October 1984.

Subsequent to dismissal, the employees maintained that they did not receive the requisite notice because they considered that prior to termination they received only one week's notice of the specific termination date of employment. The employees referred their complaint of inadequate notice to the Employment Appeals Tribunal under the Act. The Tribunal held, (by majority), that each employee received only one week's notice and thus was entitled to compensation for the balance weeks of their statutory notice entitlement. The Tribunal's reasoning was that notice of termination must have a specific termination date; in this case the notice given by the Receiver had expired when the employees' employment did not terminate as originally notified.

This determination was appealed by the Receiver to the High Court on point of law under section 11(2) of the Act. The High Court dismissed the appeal. The Receiver then appealed to the Supreme Court.

The Receiver maintained that such extensions were for the benefit of the company and also to save employment.

The respondents, whilst accepting that the Receiver acted in good faith, argued that notice of termination to satisfy the Act must be specific. They conceded that the first notice issued on 10 August did comply with the Act. If the Receiver had acted on such notice he would not have been in breach of the Act. Further, the Receiver should not be able to rely on the cumulative periods created by the extensions of the original notices, and that he should have served a fresh full length notice instead of each extended notice.

Held: The Receiver complied with the Minimum Notice and Terms of Employment Act, 1973 as the notices satisfied the requirements of the Act, and none of the respondents were entitled to compensation. The reasoning is as follows:

The Act is silent as to the form of notice of termination i.e. it does not have to be in writing. The Act is concerned only with the period referred to in the notice. If the notice is actually given — whether orally or in writing, in one document or in a number of documents — and conveys to the employee that at the end of the period expressly or impliedly referred to in the notice or notices, it is proposed to terminate his or her employment, the only question normally arising under the Act would be whether the period of notice is less than the statutory minimum.

From the time the first notice was given, the employees knew that they were under notice and that they were benefitting from repeated extensions of the period of notice. There was no degree of uncertainty.

Each employee was advised by skilled and experienced union officials, and they signed a form acknowledging that the dismissals were valid and there was no money due in lieu of notice.

However, the legal position would be different if a number of notices were issued to mislead an employee or to subvert the proper operation of the Act.

Bolands Limited (in receivership) -v- Josephine Ward and Ors. — Supreme Court (per McCarthy J., nem. diss.) — 30 October 1987 — unreported.

Frances Meenan

EMPLOYMENT

Whether power to suspend can be delegated — Whether suspension became invalid because of failure to act within a reasonable time.

The Plaintiff was a postman. He was initially employed by the Department of Posts and Telegraphs. Under the terms of the Postal and Telecommunications Act, 1983, he transferred into the employment of An Post. Section 45 of the Act guaranteed that his conditions of service with An Post would be no less beneficial than those he had enjoyed prior to the transfer. Under his previous conditions of service, he was liable to suspension by a Suspending Officer in circumstances specified in S.13 of the Civil Service Regulation Act, 1956. In January 1984, the Chief Executive of An Post purported to give similar powers of suspension to holders of certain designated offices. One of the principal matters argued by the Plaintiff was that this delegation of the power of suspension was *ultra vires*.

On 9 May 1984 the Plaintiff was suspended without pay for alleged dishonesty. An investigation into the allegation was commenced. The Plaintiff's solicitor demanded his reinstatement on the basis that the suspension was *ultra vires*. A High Court action challenging the suspension on this and other grounds was commenced.

Soon afterwards, An Post's solicitor indicated that the disciplinary proceedings would not be taken pending the outcome of criminal proceedings against the Plaintiff. In November 1985, the Plaintiff was tried on indictment and was acquitted on all counts. An Post continued to refuse to reinstate the Plaintiff, however, and this refusal was supported by the Supreme Court (Henchy J. with Hederman J. concurring) which considered that:

> "The disposition of the charges against the Plaintiff by findings of not guilty did not preempt or otherwise trench on the due exercise by An Post of its statutory right to suspend or dismiss in respect of the same conduct when treated as breaches of discipline."

An Post decided not to proceed with the prospective dismissal of the Plaintiff until his High Court proceedings were concluded. In July 1986 the High Court denied the Plaintiff the reliefs he sought and dismissed his claim. He appealed to the Supreme Court on three main grounds:

(1) That the suspension was void *ab initio* because there was no jurisdiction vested in either the Board or the Chief Executive of an Post to delegate the power of suspension.

The Supreme Court dismissed this ground of appeal on the basis that the transfer effected by the 1983 Act subject to the same conditions of employment as previously applied carried with it by necessary implication the then existing rights of suspension, *mutatis mutandis*.

(2) The second main ground of appeal was that the suspension was void *ab initio* because the Plaintiff was not informed adequately of the reasons for his suspension.

On this point, the Supreme Court accepted that the Plaintiff was entitled to an adequate statement of the reasons for suspension but it pojnted out that the High Court had found as a fact that the Plaintiff had been made aware of why he was being suspended. The Supreme Court could not disturb that finding of fact.

(3) The third main ground of appeal was that the suspension was invalid because An Post failed to act within a reasonable time on foot of it.

The Supreme Court accepted that "the fundamental requirements of justice meant that the uncertainty and the hardship of suspension without pay be brought to a conclusion one way or the other as soon as was reasonably practicable."

In assessing when it was "reasonably practicable" to do so, the Court considered that the claims of both parties had to be assessed. The complicated series of the legal proceedings which surrounded the suspension made the question of whether An Post should have proceeded with the internal inquiry a difficult one. The Court noted that if the internal inquiry had gone ahead and led to the conclusion that the Plaintiff should be dismissed, the exercise of that power would have been impractical given the High Court proceedings. Furthermore, the Court took the view that to hold the inquiry would have been undesirable as the issues which would have necessarily arisen could not have been segregated from the issues raised in the High Court proceedings. Thus, the Supreme Court concluded by a majority (McCarthy J. dissenting) that it was reasonable and proper to postpone the inquiry.

The appeal was dismissed.

Stephen Flynn -v- An Post — Supreme Court (Henchy J.) — 3 April 1987 — unreported.

Declan Madden

EMPLOYMENT

Employment Equality Act 1977 — discrimination — Whether the imposition of an age limit was indirectly discriminatory against married women — Nature and processing of appeals.

The Plaintiff worked for the Sligo County Council as a Clerical Officer for 12 years up to December 1967 when she was married. Under the then existing regulations, she had to resign on marriage. In 1980, the North Western Health Board advertised a vacancy for a Grade IV clerical position which provided *inter alia* that candidates "must not be more than 27 years of age on 1 July, 1980". The Plaintiff's application for the position was refused on the grounds that she was more than 27 years of age on the relevant date. She contended that the age

limit was in breach of Section 2(c) of the Employment Equality Act, 1977. This contention was upheld by the Equality Officer who carried out the initial investigation under the procedures for complaint laid down by the 1977 Act. The finding was upheld by the Labour Court but the determination of the Labour Court was set aside by the High Court on a point of law. The Plaintiff appealed to the Supreme Court.

The Supreme Court noted that the conclusions of fact reached by the Equality Officer at the initial hearing were not subsequently challenged in the proceedings before the Labour Court and the High Court. It noted that in his judgment in the High Court, Barron J. had considered that he had to determine the issues before him "on the basis of the assumptions of fact which have been made by the Equality Officer and inferentially accepted by the (Labour) Court". Thus the Supreme Court took the view that the assumptions of fact made by the Equality Officer could not now be challenged by the Health Board particularly having regard to the fact that it had failed to accept the opportunity offered by the High Court to have the matter remitted to the Labour Court to make specific findings of fact.

The Supreme Court thus took the view that in this case one had to assume that main arguments made by the plaintiff were true, i.e. (a) that the upper age limit of 27 operated to the detriment principally of those persons over 27 who are attempting to embark on or re-launch a career, and (b) that it was self-evident that a significantly higher proportion of married women aged over 27 than of either single women aged over 27, or of men of either marital status aged over 27 find themselves attempting to embark on or re-launch their careers.

On the basis that these arguments were true, the Court considered that the finding of indirect discrimination would appear to be justified, since the imposition of the age limit, itself reflecting neither sex nor marital status discrimination, has, on the facts the effect that a significantly higher proportion of married women aged over 27 are excluded. Thus the appeal was allowed.

The Court emphasised that the decision of the Labour Court should not be taken as a precedent upon which a conclusion could safely be based that relatively low age limits can or do constitute indirect discrimination within the meaning of the 1977 Act. The Court advised that the nature of the Equality Officer and Labour Court proceedings should be revised so as to ensure that unequivocal findings of fact made referable to the evidence upon which they have been founded are stated in their recommendations and determinations.

North Western Health Board -v- Catherine Martyn — Supreme Court (per Finlay C. J., Hederman and McCarthy J. J.) — 21 December 1987 — unreported.

Declan Madden

NEGLIGENCE

Roof of Defendant's premises designed by third party — Infant Plaintiff injured in fall from roof — Defendant aware of Plaintiff's presence — Nexus of cause and effect from any negligence in design destroyed — Third party not liable.

The Plaintiff who was then 16 years of age fell from an unprotected roof of the Defendant's Bank premises and injured himself. The premises had been extended or renovated. There were two roofs: one gave access to the residential portion of the Bank premises which was reached by a concrete stairway from the garden at the rear thereof; the second, which was lower in height than the other and immediately beyond it, contained no fence or parapet around it other than a small 4½ inch coping stone. There was no direct access to it nor did it appear from the evidence to have been designed as a roof to which access would be gained otherwise than for maintenance or repair purposes. Access could, however, easily be obtained to it by a person ascending the stone staircase to the upper roof, who climbed over a relatively low wall and on to it. Access could also be easily obtained to it by a person climbing over the parapet wall of the upper roof and dropping down to the lower roof. On the date of the accident the evidence given showed that the Plaintiff was playing with other boys on the lower unprotected roof. On catching a ball thrown to him by one of his companions he turned and fell over the coping stone down to the ground. He suffered extremely severe injuries.

The architects responsible for the extension or renovation were named as Third Parties in the High Court proceedings. It was decided that the Plaintiff's action against the Defendant would be heard before a Judge and Jury and the Defendant's action against the third party would be heard before the same Judge without a Jury. The Jury found the Defendant 91% and the Plaintiff 9% liable in this case. The High Court held that the third party was 30% liable in this case. The High Court considered that the third party should have ensured that an appropriate retaining wall or a railing around the roof to which it was intended persons would have access, be erected. The Defendants settled with the Plaintiff without the prior approval or consent of the third party.

On Appeal the third party, *inter alia*, contended:

(1) Applying the principles laid down in the case *Conole -v- The Redbank Oyster Company* [1976] I.R. 191 that even if one assumed that the architects were negligent in failing to provide in their plans for protection of the lower roof that the finding by the Jury that the Defendants, their servants or agents were aware that boys, including the Plaintiff, were liable to play on this roof before the date on which the accident happened, constituted their consequential negligence as a *novus actus interveniens* and that it was not open to the Court to hold that there was any nexus between the negligence of the architects and the happening of the accident.

(2) In the alternative a proper consideration of the degrees of fault as between the Defendants and the third party and the Plaintiff, even if the third party were properly to be held a concurrent wrongdoer with the Defendants was such that the default of the third party was minimal and not such as would support any finding of contribution against them.

(3) The Defendants in the form of settlement reached by them with the Plaintiff had failed to bar the injured party's claim against the third party and that was a condition precedent, having regard to the provisions of Section 22(1) of the Civil Liability Act 1961, to the Defendant's claim against the third party and that it, therefore, failed.

The Supreme Court in allowing the appeal held: it was not open to the High Court to hold that a sufficient nexus or connection existed between any negligence or default on the part of the third party and the happening of this accident so as to constitute the third party a concurrent wrongdoer with the defendants and, therefore, liable to make contribution or indemnity. It could not reasonably have been foreseen by the third party that the boys would be permitted by the Defendant to play energetic games upon the unguarded roof. The Court followed the decision in *Conole -v- The Redbank Oyster Company* [1976] I.R. 191 and in particular the dicta of Henchy J. at page 196 of the report:

"If the defect becomes patent to the person ultimately injured and he chooses to ignore it or to an intermediate handler who ignores it and subjects the person ultimately injured to that known risk, the person who originally put forward the article is not liable to the injured person. In such circumstances the nexus of cause and effect in terms of the law of tort has been sundered as far as the injured person is concerned."

The Defendant was completely aware of the danger of permitting boys to play on the unguarded roof and negligent in permitting the continuance of the playing by the boys on the roof.

Having reached that decision the Court found it unnecessary to express a view on issues which arose in the case concerning in particular the provisions of Sections 21, 22 and 29 of the Civil Liabilty Act 1961.

Brian Crowley -v- Allied Irish Banks Limited and O'Flynn, Greene, Buchan & Pratners — Supreme Court (per Finlay C. J., nem diss.) — 4 November 1987 — [1988] ILRM 225.

Franklin O'Sullivan

INSURANCE

Contract — Breach of Contract and Negligence — Claim for Indemnity — Professional Indemnity Policy — Public Liability Policy.

The Plaintiffs had agreed to construct a tank for the storage of molasses in Limerick. When constructed the tank proved to be "for all practical purposes useless for the storage of molasses". Following a claim for breach of contract and negligence the Plaintiffs agreed to pay £150,000 and costs in settlement.

Plaintiffs had a professional indemnity policy (PI policy) and a public liability policy with the Defendants and claimed indemnity from the Defendants against the £150,000 plus costs, together with interest under either or both policies.

The Defendants alleged that the claim fell outside the scope of the policy as it was a mixed claim of negligence and breach of

contract in the manner in which the works were constructed. The High Court held that the defendants were not obliged to indemnify the Plaintiffs.

The Supreme Court held: It is well settled that in constructing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The Court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at, and not merely a particular clause. See Ivamy on Insurance Law, 5th ed. (1986) at p.333/334.

In their defence the Defendants relied upon the judgment of Devlin J in *West Wake Price & Co. -v- Ching* [1957]1 W.L.R. 45, where a firm of accountants had a PI policy to cover loss against any claim "in respect of any act of neglect, default or error arising out of the conduct of their business as accountants". In that case a clerk fraudulently converted clients money to his own use. It was held that the claim on the policy failed as the claim was a mixed one of fraud and negligence.

Griffin J. though did not see how an act amounting to both a tort and a breach of contract could enable the insurers to avoid liability under a PI policy on the basis that it was a mixed claim — "if that were the true legal position, such a policy would be of little avail to a professional man, such as solicitor, accountant, architect, engineer, doctor, dentist etc., as the same act of negligence causing damage to the client is almost invariably a breach of contract also — see for example, *Finlay -v- Murtagh,* Supreme Court, 21 November, 1978.

The Public Liability Policy provided that the Defendants would indemnify the insured "in respect of accidents happening". The Court had reservations as to whether what occurred was an accident but considered it unnecessary to express any concluded view on the matter.

The Court considered that (1) the intention of the parties must prevail in the construction of the Public Liability Policy, (2) the intention of the parties clearly appeared to be that cover was intended for what the ordinary reasonable man would understand by an "accident" occurring, and (3) the intention of the parties was not that this policy should apply to the events which occurred.

The appeal was allowed to the extent that the Plaintiffs were held to be entitled to be indemnified by the Defendants in respect of the PI policy.

Rohan Construction Limited and Rohan Group plc -v- Insurance Corporation of Ireland plc — Supreme Court (per Griffin J.) — 10 April 1987 — unreported.

William Johnston

Recent Irish Cases

Edited by
Gary Byrne

INJUNCTION

In an application for an injunction against the State, in consideration where the balance of convenience lies, the fact that the injunction may postpone trial for criminal offences is a factor to be considered but is not a bar to the granting of an injunction.

Fishing licences issued by the State to allow long-line fishing in territorial waters contain conditions requiring a certain percentage of the crew of each fishing vessel to be Irish nationals. These conditions have caused difficulty. In an earlier case of *Pesca Valentia -v- The Minister for Fisheries,* the High Court found that the evidence established overwhelmingly that Irish fishermen are not prepared to crew on vessels which are more than a day or two out of port.

In the *Pesca Valentia case,* the issues were referred to the European Court of Justice for a preliminary opinion, and the decision of that Court is awaited.

The instant case involved similar issues. The Plaintiff company sought an injunction to restrain the State from enforcing the conditions of the licence, thus allowing it to employ Spanish fishermen who were prepared to crew the vessels.

If the injunction was not granted, the Plaintiff would face serious financial consequences, perhaps ruin. If the Plaintiff had to cease fishing because of inability to get crews in accordance with the conditions of the licence, and ultimately succeeded in the action, it would not be possible to recover damages, as a suit for damages would not lie against the Minister acting within his power. If the Plaintiff continued to fish in breach of the condition, it would be liable on conviction to substantial fines and forfeiture.

As far as the Defendants were concerned, the balance of the convenience had two aspects – upholding the criminal law until the European Court of Justice holds to the contrary, and ensuring that the economic benefits from the Hake quota allotted to Ireland are directed into the Irish economy.

Held following the judgement in the *Pesca Valentia* case, that the current approach is to treat the postponement of trial for criminal offences due to breach of the condition in the licence, as a factor to be considered in weighing the balance of convenience, and not as a bar to the granting of an injunction. In relation to the Irish economy, if the injunction were not granted, the Plaintiff would probably have to cease operating either because of heavy fines or the inability to get crew, in which event the benefit to the economy from the landing of catches in Ireland would be lost.

Weighing all the factors, the balance of convenience lies with the Plaintiff, at least until the European Court of Justice have handed down their judgement in the reference. The Court granted the injunction restraining the Minister from enforcing the condition in the licence until further order, with liberty to apply when the judgement of the European Court of Justice had been obtained. The Court noted that its injunction would not make the act legal if it is ultimately held that the Minister was acting within his powers. It merely postponed any enforcement of the law.

Beara Fisheries and Shipping Ltd -v- The Minister for the Marine, Ireland and the Attorney General. High Court (per Carroll J.) 31 July 1987 – [1988] ILRM 221.

KARL HAYES

WARDSHIP

Application to make a Person a Ward of Court. Whether necessary such person should have or be entitled to property requiring management and/or protection.

The Respondent female was mentally retarded since birth. As a day pupil, she attended a school for mentally retarded children maintained by the Midland Health Board (the Board) until she was 18 years of age. Thereafter, still residing at home, she attended an adult training centre maintained by the Board which was associated with the school. Prior to March 1987 persons employed by the Board, who were concerned with the care and training of the Respondent, came to the conclusion, for reasons stated by them in affidavits before the Court, that the Respondent's welfare was at risk of serious harm should she continue to reside at home. On 10 March 1987 she was admitted to a residential institution suitable for mentally retarded persons maintained by the Board. In August 1987 the Respondent's parents applied to the High Court for an Order of *Habeas Corpus* naming as Respondents the Board and certain other persons. An Order was made pursuant to article 40(4)(2) of the Constitution directing the Respondents to produce the body of the Respondent before the Court and to certify in writing the grounds of her detention.

On the hearing of that return before the President of the High Court the Board sought an adjournment to permit it to lodge a Petition in Wardship and that was granted. The *Habeas Corpus* application was adjourned.

Following legal submissions on the hearing of the Petition, the President concluded as a matter of law that it was a condition precedent to the exercise by him of his jurisdiction to bring persons of unsound mind into his wardship that they be entitled to property which required management and/or protection. He also concluded that the Respondent was entitled to have her welfare protected by the Courts if that was proved to be necessary and for that purpose he directed that she should be represented by a Guardian *ad litem* who should be heard on the adjourned hearing or the application under article 40(4)(2) of the Constitution.

In the hearing before him the President made no determination as to whether the evidence adduced established an unsoundness of mind in the Respondent within the meaning of the phrase in the lunacy code. Neither did he determine that the evidence established a necessity for the protection of the person of the Respondent. These points were not in issue in the subsequent appeal to the Supreme Court.

The Board appealed to the Supreme Court against the President's decision that as a matter of law it was a condition precedent to the exercise by him of his jurisdiction to bring persons of unsound mind into his wardship that they be entitled to property which required management and/or protection.

In the Supreme Court the legal argument centred on the effect of the Lunacy Regulations (Ireland) Act 1871 and section 9 of the Courts (Supplemental Provisions) Act 1961 on the jurisdiction of the High Court in lunacy matters.

Held by the Chief Justice delivering the judgement of the Supreme Court allowing the appeal, that there is vested in the High Court jurisdiction where necessary and appropriate to take into its wardship a person of unsound mind whose person requires protection and management but who is not entitled to any property which requires protection or management. In substitution for the order made in the High Court, the Supreme Court made an Order permitting the Petition filed in the case to be deemed as an application for an enquiry as to the unsoundness of mind of the Respondent and as an application for admission into wardship of the Court.

Acknowledging that the point did not arise for decision in the case before the Court, the Chief Justice expressed a view that on a hearing of an application pursuant to article 49(4)(2) of the Constitution the High Court must reach a single decision, namely, whether the detention of the person concerned is or is not in accordance with law. If it is, then the application must be refused. If it is not, the person must be discharged from the custody in which he is. This procedure did not appear to the Chief Justice to admit of any supervision or monitoring of the interests of the person concerned, even allowing for a condition of mental retardation or other want of capacity.

In the Matter of an Application by the Midland Health Board Supreme Court (per Finley C.J. nem.diss) [1988] ILRM 251.

DENIS GREENE

ADOPTION

Whether consent of mother to the placement by the Adoption Society of her illegitimate child was free and fully informed – principles applicable in relation to appeal from High Court to Supreme Court.

The adoption society's social worker met the mother who stated she was expecting a child and wanted to have the child placed for adoption. After the child was born the

mother informed the social worker that she had decided to have the child adopted. The child was put into a children's home pending placement. The adoption society later placed the child with adoptive parents but without informing the mother in advance. Later the mother sought to repudiate any consent. The trial judge in the High Court ruled in favour of the mother. The adoption society appealed to the Supreme Court.

Henchy J., in the majority judgement in the Supreme Court, considered that the issue was whether when the mother signed the form expressing her consent to the placement by the adoption society of her illegitimate child, her consent was free and fully informed. For the purpose of an appeal from a judgement of the High Court to the Supreme Court, facts may be divided into two categories. Firstly, there were the primary or basic facts which were determinations of fact depending on the assessment by the judge of the credibility and quality of the witnesses. Henchy J. stated that it was only when the findings of the primary fact cannot in all reason be held to be supported by the evidence that the Supreme Court will reject them; see *Northern Bank Finance -v- Charlton* [1979] IR 149. The second category of facts relates to the secondary or inferred facts. Henchy J. stated these are facts which do not follow directly from an assessment or evaluation of the credibility of the witnesses or the weight to be attached to their evidence but derive from inferences drawn from the primary facts. The Supreme Court would feel free to draw its own inference if it considered that the inferences drawn by the judge of the High Court were not correct; see *Northern Bank Finance -v- Charlton* and *Whitehouse -v- Jordan* [1981] 1 A11 ER 207.

Held in allowing the appeal

1. The mother freely and fully gave her consent to the placement of the child for Adoption;
2. As the child was now seven years old and fully integrated into the family of the adopters, an order would be made under s. 3 of the *Adoption Act 1974,* authorising the Adoption Board to dispense with the mother's consent to the adoption on the grounds that it was in the best interests of the child that what was an adoption in fact should also become an adoption in law.

J.M. and G.M. -v- An Bord Uchtala, Supreme Court, (per Henchy J. with Griffin and Hederman J. J. concurring, McCarthy J. and Gannon J. dissenting) 31 July 1987, [1988] ILRM 203.

EAMONN G. HALL

The following case was first reported in the May 1988 Gazette, where a printing error appeared in the final paragraph. The report is here reprinted in full.

EMPLOYMENT

Whether power to suspend can be delegated – Whether suspension became invalid because of failure to act within a reasonable time.

The Plaintiff was a postman. He was initially employed by the Department of Posts and Telegraphs. Under the terms of the Postal and Telecommunications Act, 1983, he transferred into the employment of An Post. Section 45 of the Act guaranteed that his conditions of service with An Post would be no less beneficial than those he had enjoyed prior to the transfer. Under the previous conditions of service, he was liable to suspension by a Suspending Officer in circumstances specified in s.13 of the Civil Service Regulations Act, 1956. In January 1984, the Chief Executive of An Post purported to give similar powers of suspension to holders of certain designated officers. One of the principal matters argued by the Plaintiff was that this delegation of the power of suspension was *ultra vires.*

On 9 May 1984 the Plaintiff was suspended without pay for alleged dishonesty. An investigation into the allegation was commenced. The Plaintiff's solicitor demanded his reinstatement on the basis that the suspension was *ultra vires.* A High Court action challenging the suspension on this and other grounds was commenced.

Soon afterwards, An Post's solicitor indicated tht the disciplinary proceedings would not be taken pending the outcome of criminal proceedings against the Plaintiff. In November 1985, the Plaintiff was tried on indictment and was acquitted on all counts. An Post continued to refuse to reinstate the Plaintiff, however, and this refusal was supported by the Supreme Court (Henchy J. with Hederman J. concurring) which considered that:

> "The disposition of the charges against the Plaintiff by findings of not guilty did not preempt or otherwise trench on the due exercise by An Post of its statutory right to suspend or dismiss in respect of the same conduct when treated as breaches of discipline."

An Post decided not to proceed with the prospective dismissal of the Plaintiff until his High Court proceedings were concluded. In July 1986 the High Court denied the Plaintiff the reliefs he sought and dismissed his claim. He appealed to the Supreme Court on three main grounds.

(1) That the suspension was void *ab initio* because there was no jurisdiction vested in either the Board or the Chief Executive of an Post to delegate the power of suspension.

The Supreme Court dismissed this ground of appeal on the basis tht the transfer effected by the 1983 Act subject to the same conditions of employment as previously applied carried with it by necessary implication the then existing rights of suspension, *mutatis mutandis.*

(2) The second main ground of appeal was that the suspension was void *ab initio* because the Plaintiff was not informed adequately of the reasons for his suspension.

On this point, the Supreme court accepted that the Plaintiff was entitled to an adequate statement of the reasons for suspension but if pointed out the the High Court had found as a fact that the Plaintiff had made aware of why he was being suspended. The Supreme Court could not disturb that finding of fact.

(3) The third main ground of appeal was that the suspension was invalid because An Post failed to act within a reasonable time on foot of it.

The Supreme Court accepted that "the fundamental requirements of justice meant that the uncertainty and the hardship of suspension without pay be brought to a conclusion one way or the other as soon as was reasonably practicable"

The majority view of the Court, as expressed by McCarthy J, with Finlay C.J. and Walsh J. concurring, was that the continuing suspension of the Plaintiff and the postponement of the investigation pending the outcome of the criminal prosecution, could not be justified once the Plaintiff expressed his wish to have the matter dealt with without delay. The majority accepted that "there may be circumstances in which it would be proper to postpone an investigation pending a criminal trial" but it was "unable to prescribe them in a case where an employee is suspended without pay and wants the investigation to proceed." Therefore, the majority took the view that the suspension of the employee without pay for a period of eighteen months was not a reasonable construction of the power of suspension contained in Section 13 of the 1956 Act. The minority view (Henchy J. with Hederman J. concurring) was that to hold the inquiry would have been undesirable as the issues which would have necessarily arisen could not have been segregated from the issues raised in the High Court proceedings.

The appeal was allowed.

Stephen Flynn -v- An Post. – Supreme Court – 3 April, 1987 – [1987] I.R. 68

DECLAN MADDEN

EMPLOYMENT

Dismissal for misconduct – All the reasons not stated – Therefore not prepared to hold that dismissal was wholly or mainly for reasons given: Dismissal unfair.

The applicant was employed as an Ambulance Driver with the Southern Health Board. He was dismissed from his employment for alleged misconduct on 2 September 1985. He had previously been dismissed in February 1985, but following a hearing before a Rights Commissioner it was recommended that he should be re-employed with the Board and that the period between the dismissal and the re-employment should be treated as a period of suspension. The respondents agreed to accept the Recommendation and take the applicant back into employment without recriminations.

When the applicant was taken back he was rostered as a relief driver rather than a permanent driver at Tralee as he had been previously. He challenged this change in working arrangements. He was alleged to have verbally abused his Supervisor about the change. An investigation ensued but before it was completed another matter arose. This was a complaint by the Matron of Listowel Hospital that the applicant had engaged in unprofessional conduct in that he had put his hand on the shoulder of a nurse on two separate occasions and had put his arm around another nurse in the hospital corridor. Both nurses had complained of the incidents.

The applicant was suspended from duty. An investigation was carried out and the applicant was dismissed at its conclusion. The Court noted that the first investigation into the complaints by the Supervisor would not have resulted in action in the nature of a suspension.

The Board's case for dismissal was that the applicant was lucky to have been re-instated after his dismissal in February and that following the incident with his Supervisor and the complaints from the nurses his dismissal was automatic, particularly having regard to the warning about future conduct which he received when he was re-instated in March.

The Court considered that the reasons for the dismissal were more complex than those stated by the respondents. It took the view that the clash between the applicant and his Supervisor had a significant bearing on the dismissal.

Held That the dismissal of the applicant was not wholly for the misconduct alleged by the Board; that when such matters were not relied upon to justify the dimissal or tested to establish whether reliance upon any of them was justified the Court was not prepared to hold that the misconduct alleged was the whole or main reason for the dismissal as is required by section 6(1) of the Unfair Dismissals Act 1977; that the dismissal of the aplicant was consequently unfair.

Locke -v- Southern Health Board (per Barron J) 5 November 1987 – Unreported

DECLAN MADDEN

LOCAL GOVERNMENT (PLANNING & DEVELOPMENT) ACT 1963 – 1983 RIGHT OF OBJECTOR TO RECEIVE INFORMATION FROM AN BORD PLEANALA

Monarch Properties Ltd. applied for planning permission for housing at Carriglea Park, Dun Laoghaire adjoining the Sefton Estates. Their plans envisaged a roadway from Carriglea Estate through Sefton Estates and on to Rochestown Avenue. The application by Monarch was opposed by the Sefton Residents Association, of which the prosecutrix was Chairwoman. On 26 September 1985 Dublin County Council refused the application.

Monarch appealed the decision of the Planning Authority to An Bord Pleanala on 22 October 1985. By letter dated 19 November 1985 they set out 'the detailed grounds of the appeal'. That letter was not circulated to the Sefton Residents Association but they became aware of the appeal and a Planning Consultant retained by the Association, Mr. Brian Meehan, applied to the Board for a copy of the grounds and was furnished with them. In a lengthy memorandum to the Board dated 19th December 1985 Mr. Meehan commented in detail on what he described as 'the brief grounds of appeal' submitted by Monarch and contended that those grounds of appeal 'represent a rather simplistic and inaccurate interpretation of the planning situation which pertains to this particular area'. By letter dated 13 February 1986 Monarch made additional submissions in relation to the grounds of appeal and again that letter was not circulated by the Board to the Sefton Residents Association nor did they become aware of its contents until after the determination of the appeal. The Association did receive a copy of a letter dated 13 April 1986 written on behalf of the Residents of Ardmore Park Dun Laoghaire who were supporting the appeal by Monarch Properties Limited and Mr. Meehan made a short and he said, inadequate response, by letter to the Board. In an affidavit Mr. Meehan set out the lengthy submission which he would have made in response to the additional submissions made on behalf of Monarch had he been aware of them. On 7 May 1986 An Bord Pleanala granted permission for the development of the Carriglea Estate.

The prosecutrix obtained a conditional Order of Certiorari to quash the decision of 7 May 1986 on the grounds that the Board had purported to adjudicate on the appeal without (a) furnishing all submissions made on behalf of Monarch to the prosecutrix so as to enable her to make submissions in relation thereto and (b) in purporting to adjudicate on the appeal brought by Monarch without first ensuring that all interested parties had an opportunity of making submissions and representations relevant to their considerations including prosecutrix. The Court reviewed the obligations of the Board under paragraph 38 of the Local Government (Planning & Development) Regulations 1977 and noted that on the face of it an objector whose objection had been upheld and accordingly had no cause to appeal did not fall within the definition of 'a party to an appeal' withing the meaning of paragraph 35(2) and accordingly was not a person who was entitled under paragraph 40 to be given copies of observations made in writing to the Board by persons who were parties to the appeal. The Court noted that the contention that there was no right to object in advance to the granting of a planning permission and that the only right was to appeal a decision was rejected by the Supreme Court in the case of the *State (Stanford & Ors) -v- Dun Laoghaire Corporation & Others* (unreported, 20 February 1981) and that the argument that a successful objector had no *locus standi* to challenge a planning permission granted contrary to the principles of Constitution and natural justice was rejected in *Law -v- the Minister for Local Government and Traditional Homes Ltd.* High Court (per Deale J., 30 May 1974 unreported.) The Court took the view that if an objector had a right to maintain a case in the Civil courts that objector should have an equal right in justice to be heard as a respondent or notice party in the case of an appeal to an Bord Pleanala and referred to the case of the *State (Coras Iompair Eireann) and An Bord Pleanala* (Supreme Court, 12 December 1984) where the Court appeared to take the view that a successful objector would be entitled to be a party to an appeal to An Bord Pleanala. The Court noted that Coras Iompair Eireann were in a special position because Article 65 of the 1977 Regulations designated them as a 'public authority' for the purpose of Section 5 of the Local Government (Planning & Development) Act 1976 and that the Board were bound to maintain as the Supreme Court held 'an informed liaison' with Coras Iompair Eireann. The Court noted that there was a lacuna in the procedure dealing with appeals since Section 18 of the Local Government (Planning & Development) Act 1983 conferred on An Bord Pleanala the right where they are of opinion that any document particulars or other information is necessary for the purpose of enabling it to determine an appeal to serve notice 'on any person who is a party to the appeal or to any other person who has made submissions or observations to the Board as regards the Appeal'. The 1977 Regulations did not deal with the category of persons who had made submissions or observations to the Board as regards that Appeal but who were not 'parties to the Appeal'. The Court took the view that this additional category of persons did have rights and entitled to an appropriate degree of protection in accordance with fair procedures guaranteed by the Constitution. The Court then reviewed the facts of the present case and noted that the presecutrix had received the Notice of Appeal and 'the detailed grounds for appeal' and was able to arrange for the Planning Consultants to make detailed observations on the submissions already made. In addition the Planning Consultant had submitted further observations arising out of the submission made by the Ardmore Park Residents and that the real complaint was that neither the prosecutrix nor her experts had an opportunity of commenting on the reply or further submission by the Developer of 13 February 1986. The Court held that the essence of natural justice was that it required the application of broad principles of commonsense and fair play to a given set of circumstances in which a person is acting judicially.

What would be required must vary with the circumstances of the case. At one end of the spectrum it would be sufficient to afford a party the right to make informal observations and at the other constitutional justice might dictate that a party concerned should have the right to be provided with legal aid and to cross examine witnesses supporting against him. The Court had no doubt that on an appeal to the Planning Board – that the requirements of natural justice fell within the rights of the objector rather as distinct from a developer exercising property rights, and that this flowed from the nature of the interest which was being protected, the number of possible objectors, the nature of the function exercised by the Planning Board and the limited criteria by which appeals are required to be judged and the practical fact that in any proceedings whether oral or otherwise there must be finality. The Court held that the real substance of the objectors case was before An Bord Pleanala and duly considered by it. The Court went on to say that it did not accept any general proposition that An Bord Pleanala could discharge its obligation to an interested party by delivering part only of the Applicants submissions to any person entitled to receive the same, but that in the present case the requirements of natural justice had been met.

The State (Paula Haverty) -v- An Bord Pleanala. High Court (per Murphy J.) 17 July 1987 – [1988] ILRM 545.

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