INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

INDEX TO VOLUME 76 — 1982

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Abbreviations: edl. (editorial/comment); ltr. (letter); pr. (practice note).

2. ALPHABETICAL CASE INDEX:

(i) Cases reported in the *Recent Irish Cases* supplements.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76, No. 1 January/February 1982

Civil Legal Aid ....

.... Measuring the Cost

The approach adopted by the Civil Legal Aid Board to the presentation of its First Report is a refreshing and useful one. Although the Report is described as "Annual Report 1980", it is in fact only the draft accounts and that part of the report dealing with the statistics of cases which are confined to the period ending on 31st December 1980, and much of the substantive part of the Report is actually given over to developments (or rather lack of developments) which took place during 1981. It is a sad tale of proposals for the expansion of the scheme having to be curtailed by the limitation of the Scheme's Grant-in-Aid to £0.95m. from the requested £1.9m. for the year 1981, followed, (after the Board had reduced its intended expansion to further centres in Dublin, Tralee, Athlone and Dundalk) by a ban on recruitment imposed by the Government on the Public Service in July 1981.

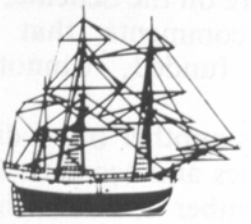
The Report argues strenuously for the planned expansion to be permitted, commenting that its experiment with part-time "clinics" in various locations around the country, (serviced only on one or two days a month by staff from an established centre) is not the ideal way to achieve a proper spread of service.

It might be said that not all informed outside observers will be surprised at this state of affairs. The conflict between the commitment of all the major political parties to provide a legal aid scheme, and the presumed concern of the Department of Finance that the scheme would not prove to be extremely expensive, was resolved, against the recommendations of the Pringle Committee, by opting for a wholly centre-based scheme, operated by full-time staff. While this enabled the purse strings to be tightly controlled, at least in so far as concerned the total expenditure on the Scheme, it is clear from the Board's comments that the Scheme, as presently funded, cannot cope with the demand.

There is another more disturbing aspect of the statistics and accounts for the year ending 31st December 1981 which suggests that the cost of the Scheme, on a case basis is excessive. Each application costs some £215, and if it is to be assumed that the 412 cases where the applicants were found not to be eligible and the 931 cases where advice only was given, took up substantially less time and effort than the 407 cases where the applicant was represented in Court, the cost of each case litigated, some three-quarters of which were in the District Court, must have been very high indeed. It would appear that each District Court case may have cost the Scheme well over £300. Even allowing for the "start-up" costs the Scheme already seems to be operating on a very expensive basis.

The Law Society was accused, when it sought to have private practitioner involvement in the Scheme, of merely trying to line its members' pockets. In fact the Society's recommendations that the Scheme should be partly centre-based and partly private practitioner-based grew out of a fairly clear understanding of the level of cost of the operation of the sort of bureaucracy which was being set up and of the expense of trying to provide a comprehensive service on a national basis. Regretably there is nothing in the Board's first Annual Report which does not bear out the Society's concern in that regard. □

Still top rated



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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76, No. 1 January/February 1982

In this issue

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Comment . . .

. . . keeping in touch

It is appropriate to record tha. the North and East Cork Bar Association has recently prepared and circulated to members a most informative and practical Newsletter.• The topics touched on in this Newsletter included the Malicious Injuries Act, 1981, the Courts Act, 1981, jury trials at Cork, the recent Land Registry Fees Order, family transfers, Practising Certificates, legal education, taxation matters, and the Southern Law Association. This November 1981 Newsletter, is intended to be the precursor of future periodical Newsletters.

Apart from the topical, practical and local information that can be communicated by and to practitioners in this manner, it is clear that the effect of such a local newsletter will be to "bond" the members of the Bar Association more closely together, as it will make the Association more relevant, in the vocational sense – with the socially desirable annual Dinner Dance not necessarily being the high point of the year. The local solicitor with a concern (or "gripe") about some aspect of his professional life would have a convenient means of letting his colleagues know. At present, unfortunately, attendance at ordinary meetings of bar associations – with some notable exceptions – tends to be limited to the ever enthusiastic and well motivated few. If matters of a vocational interest discussed at those meetings were regularly reported to all members by means of a Newsletter, the meetings would rapidly become of more interest and the numbers attending would grow.

It is to be hoped that others may follow the example of the North and East Cork Bar Association. □

Incorporated Law Society of Ireland

IMPORTANT NOTICE

Practising Certificates will not be issued in 1982 or future years unless the Solicitors' Accountants' Certificate is in order, i.e., a clear Certiticate has been lodged within 6 months of the solicitors' accounting date.

Where, on application for a Practising Certificate, an Accounting Certificate is not in order, the Solicitor will be notified in writing that the Practising Certificate cannot issue until the Accountants' Certificate is lodged and that should be done within one month. He will be informed that pending receipt of the Accountants' Certificate his remittance is being held in suspense account and that in the meantime, it is an offence to practice without a Practising Certificate.

After a lapse of one month, the solicitor will be informed that unless the Accountants' Certificate is received within a further month, disciplinary proceedings will be commenced without further notice and that, at the same time, the Bar Association and County Registrar will be notified that the solicitor is practising without a current Practising Certificate.

The situation regarding outstanding Accountants' Certificates is reviewed at each Council meeting.

JAMES J. IVERS,
Director General

Criminal Injury to Property

Impact of New Malicious Injuries Act

by

Professor Richard Woulfe, M.A., LL.B.,
Director of Education, Incorporated Law Society of Ireland

A criminal injury application or malicious damage application is a claim for money compensation brought by the 'owner' of property which has been damaged or destroyed, against the Council of the County or the Corporation of the County Borough in which the damage or destruction occurred. 'Owner' in this context means a person having an insurable interest in property and being responsible for making good that property. 'Property' includes incorporeal hereditaments and wild animals in captivity. The previous law has been amended by and consolidated in the Malicious Injuries Act 1981 which came into force on 6th November, 1981.

Section 5 of the Act reads:-

(1) Where damage, the aggregate amount of which exceeds one hundred pounds, is maliciously caused to property, the person who suffers the damage shall be entitled to obtain compensation from the local authority in accordance with the Act.

(2) For the purpose of subsection (i) damage shall be taken to be maliciously caused only if caused:-

(a) by a wrongful act done intentionally without just cause or excuse, or

(b) wantonly, or

(c) unlawfully by three or more persons unlawfully, riotously or tumultuously assembled together, or

(d) in the course of, whether or not for the purpose of the committing of a crime against the property damaged

(3) Subsection (i) shall extend to damage to property which is within any harbour or within one mile beyond the coastal boundary of a local authority area or which, having been unlawfully taken, is removed from within any harbour or such one mile.

(4) The right to compensation given by this section shall be limited to compensation for the actual damage caused and shall not extend to compensation for any loss consequential on such actual damage and, in particular, shall not extend to compensation for the loss of the use of the property damaged

DAMAGE:

'Damage' includes the total or partial destruction of the property and any injury thereto. Save where the unlawful taking of property during a riot comes within the ambit of section 6, there is no compensation for property stolen and found damaged (*Irwin v Sligo Co. Council* [1957] Irish Jurist Reports). Consequential loss is not compensatable under section 5 (4) which restates the previous law as exemplified in *Mogul of Ireland v. Tipperary Co. Council* [1976] I.R. 260).

MALICE, CRIME, CAUSATION:

Section 5(2)(a) adopts the language of Bayley J. *Bromage v. Prosser*:"Malice, in the common acceptance of the term, means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse".

Kennedy C. J. in the *Artifical Coal Company and Hamon v. Minister for Finance* [1928] I.R. quotes this passage with approval and, at page 242, goes on:

"The applicant is somewhat in the position of a prosecutor. He must prove that a crime has been committed by some person or persons known or unkown, for which the community is to be made liable -that is to say, he must adduce such evidence as will satisfy and convince the mind and conscience of the judge, acting in the capacity of a jury, of the fact of the alleged crime having been committed, though he is not required to bring it home to any particular individual or individuals.... The ratepayers can only be mulcted when crime is established."

Normally the causing of the damage itself constitutes the crime: here the Malicious Damage Act 1861 retains its importance (especially the generic section 51) but section 5(2)(d) of the new Act must be seen as a significant widening of the compensation net.

An intention to cause damage will be presumed if such damage is the natural and probable consequence of the act which a reasonable man ought to have foresee. Compensation can be recovered (a) for the result of the malicious act itself; that is for the damage which flowed from the malicious act either because the wrongdoer directly intended to cause that damage or he is deemed to have intended it in that the damage was a necessary consequence or a probable result of the act, or (b) for loss arising in the course of the commission of a crime against the property even where the damage to that property was not intended (e.g. compensation is payable to the owner of a painting dropped by a thief during his getaway and thus damaged even though the thief's clear intention was to carry off and later dispose of the painting in an undamaged state and indeed the thief was probably as upset by the damage as was the owner).

"Wantonly" caused means that it stems from an act done recklessly without caring whether injury resulted or not and it goes beyond mere negligence. 'Wantonness' is not an easy concept and modern judicial interpretating may well be sought. Holmes L. J. In *O'Dowell v. Dublin Corporation* [1903] I.R. (2) states at page 555 that "wantonly" means recklessly, thoughtlessly or without regard for right or consequences". 'Wantonness' would suggest not only an indifference to consequences but an unrestrained disregard of them.

When damage is caused by three or more persons unlawfully, riotously or tumultuously assembled together, there must be an unlawful act - some fault even if only a civil wrong - by the damage feasor. Subsection (2) (d) of Section 5 brings in compensation for damage caused in the course of, whether or not for the purpose of, committing a crime against the property damaged, and will greatly widen the scope for claims. It would appear to bring in claims where a vehicle is unlawfully taken and later found damaged; such claims were usually unsustained under the previous law because it could not be proved that there was a causal connection betwen the taking of the vehicle and the crashing of it; the crash might have been caused by the driver's negligence or his inexperience or indeed by the negligence of some other road user. The 'taking' of the vehicle does not have to constitute a larceny of the vehicle; it is enough if the taking contravenes section 112 of the Road Traffic Act 1961.

The applicant for compensation must rebut the presumption against crime; he cannot succeed when the damage could have been caused innocently or wrongfully and there is no indication which caused the damage. The applicant should, if possible, produce eye witnesses to the malicious act. If none are available he must produce indirect evidence which can be affirmative or negative.

Affirmative prove a chain of circumstantial evidence inferring guilt against some person or persons unknown; it is in this context that 'malice' in its usual sense comes in

Negative adduce proof to exclude the reasonable probability of damage having arisen innocently; the judge may then draw the inference of malice.

The applicant does not have to exhaust or even pursue his remedies against the wrongdoer before making a criminal injury application but he is likely to get less compensation from the local authority than he would from the wrongdoer (assuming the latter to be a mark and can be found) because the local authority is not liable for the applicant's consequential loss or for exemplary damages.

It is no longer a defence to a claim for compensation to show that the damage was caused by a person of unsound mind or by a child.

In addition to the exclusion of compensation for property stolen, save in the case of a riot, an applicant will not be compensated for consequential loss e.g. the hire of a car while his own damaged car is being repaired.

COSTS

Costs awarded to an applicant will be in accordance with Regulations which section 15 (2) of the Act empowers the Minister for Justice to make. Practitioners will have to acquaint themselves with these Regulations when they are published as they will regulate solicitors' costs and counsels' fees where costs are payable by the local authority. In the relatively few cases where costs will be payable by parties other than the local authority, such costs will be agreed or determined by rules of court and here again practitioners will have to await their publication.

VENUE

The applicant must be careful to bring proceedings against the local authority in whose area the damage occurred or, in the case of property taken unlawfully from one local authority area and found in another against the local authority for the area from which it was removed.

POWER TO SETTLE

Local Authorities may now settle claims and make lodgements as in Civil Cases. The local authority may recoup itself from the damage feasor but it must now pay the compensation without waiting for the award to be included in the estimates for the next financial year and waiting further for the rate for the following year to be levied and collected.

COMPENSATION: EXCLUSIONS AND REDUCTIONS.

No compensation is allowed for damage to or loss of: coins, bank notes, postal/money orders or stamps;

articles of personal ornament including watches or jewellery (kept otherwise than as stock-in-trade).

Nor is compensation allowed for damage to unauthorised structures within the meaning of Planning Acts.

No compensation is payable unless damage exceeds £100 (previous threshold -£5). Where the claim exceeds £100 the court will reduce the award by £100 unless the claim is in respect of the same property damaged within the previous 12 months. The Minister for Justice may, with the consent of the Minister for Finance, by order,

vary the amount specified at £100 in the Act.

Section 12 shuts out compensation where the applicant connived at, assisted in or actively facilitated the causing of the damage or was associated with the damage feasor. Such damage as is attributable to failure of the applicant to minimise his loss is also irrecoverable. Failure by the applicant to take precautions to avoid the damage and his conduct generally allows the court to reduce the amount of compensation.

An Exception to the no-compensation-for-larceny rule arises when more than £100 worth of damage is caused to a building or to property within the curtilage of a building by a group of three or more persons tumultuously and riotously assembled together, and, in the course of the riot, any property is unlawfully taken from the building, the person who suffers the loss of the property taken can claim compensation - (Section 6).

ONUS OF PROOF

The applicant for compensation must prove, on a balance of probabilities, that

(1) property in which he could be described as having an insurable interest and for the making good of which he is responsible has been destroyed or damaged.
(2) the injury to such property was caused in one or more of the ways set out in section 5.
(3) he thereby suffered loss, and
(4) the amount of that loss.

The applicant will normally attempt to agree the amount of loss and/or existence of malice with the respondent local authority and thus dispose of the application on settlement or, at least, thus reduce the issues to be tried by the court.

PROCEDURE

The procedure is that within 14 days after the damage was caused (or the property taken in a riot) the applicant serves a Preliminary Notice in the prescribed form in accordance with section 8 and with the Malicious Injuries (Preliminary Notice) Regulations 1981 (S.I. No. 319 of 1981). The notice is served on the respondent local authority (either the county council or the county borough council) and on the member in charge of the Garda Station – in both cases, for the areas where the damage was caused or the property was taken.

The person who served the Preliminary Notice may then serve an application to the court for compensation. This application is known as Final Notice and will be made in accordance with rules of court.

If the amount claimed is £2500 or less, the application is brought in the District Court in the District Court district in which the damage was caused while if the amount claimed exceeds £2500 the application is brought in the Circuit Court circuit in which the damage was caused.

A Notice may be served personally or by registered post and can be effected by the solicitor or other authorised agent of the applicant; it does not have to be served by a Summons Server.

The Final Notice is served on the local authority on which the Preliminary Notice had been served. This Notice - with proof of service on the local authority - is filed with the County Registrar or the District Court Clerk, as the case may be, and serves to set the application down for hearing.

A claim becomes statute barred three years from the date of service of the Preliminary Notice.

An appeal by way of re-hearing lies at the instance of any party - and it should be remembered that the Act retains the right of a ratepayer to appear in any application-against a decision of the District Court to the Circuit Court and against a decision of the Circuit Court to the High Court. Section 18 introduces a flexible case stated procedure to obtain the opinion of the Supreme Court on any point of law arising during the hearing

EFFECT ON LOCAL AUTHORITIES

The local authorities will welcome;

(a) recognition of what has long been the practice -that claims will now be made only against the County Council or the Corporation and that the smaller local authorities disappear from the picture;
(b) the simplicity of awards being payable by the county at large and not specific localities;
(c) the recognition by statute of the administrative practice by which the Department of the Environment refunded the excess of awards over the yield of twenty pence in the pound from local rates

(d) the repeal of section 140 of the Grand Jury (Ireland) Act 1836 which allowed applicants to claim against the local authorities of several areas where the damage arose within one mile of a county boundary. The disappearance of these 'verge' applications against several local authorities is matched - in section 10 - by the retention of the right of a respondent local authority to join another local authority in the proceedings. It may well do so when the damage feasor resides in the area of another local authority.

The local authorities will be less happy with:

(1) the extension of the definition of damage maliciously caused, which extension reverses the type of court finding typified by *Wexford Timber Co. v. Wexford Corporation* (S.C.) 88 ILTR 137;
(2) the disappearance of all the fine distinctions between types of property and whether the causing of the damage constituted a crime punished on indictment or summarily depending on the application of different sections of the Malicious Damage Act, 1861;
(3) the extension of compensation to cover damage to property within an harbour or within one mile beyond the coastal boundary of the local authority area, and the unlawful taking of property from within an harbour or such one mile.

CAUTIONARY NOTE:
Pending issue of Rules of Court in accordance with Section 14 of the Act, a claim for malicious damage caused on or after 6th November 1981 cannot be brought before the District Court and all the practitioner can do is to serve the Preliminary Notice. Despite the latitude in the framing of the Circuit Court forms allowed by order 59 Rule 5 of the Circuit Court Rules 1950, practitioners will probably defer lodging a Final Notice where the claim exceeds £2,500 and await the new Rules of the Circuit Court. It may be that the Rules of Court will have appeared before this article in which event this cautionary note may be ignored. □

MR. MICHAEL QUINLAN

At its January meeting the Council of the Society, on the proposal of the President, Mr. W. Brendan Allen, unanimously adopted a vote of sympathy to Mrs. Moya Quinlan, President of the Society for the preceding year, 1980/81, on the sudden death of her husband, Michael, on 21 December, 1981. The meeting stood in silence to his memory.

Requisitions on Title – 1981 Edition

1. Printing Error – Requisition 21

The last paragraph of Requisition 21 reads "furnish a Certificate under paragraph 11 (6) of the fourth schedule of the Capital Gains Tax Act 1975".

This should of course have read "furnish a Certificate under Section 48 of the Capital Acquisitions Tax Act 1976".

The Society had not made any alteration to the text of this requisition and the error arose in the printing.

2. Sales on foot of contracts entered into before 1st April 1978

In the 1979 Edition of the Society's Requisitions on Title the following requisition was included at No. 20.

"(a) Where the contract for sale or mortgage was entered into prior to the 1st day of April 1978.
(i) State the name, date of death of any person on the title who died prior to the 1st day of April 1975, and within 12 years of the date of this sale.

(b) Where the contract for sale or mortgage was entered into on or after the 1st day of April 1978.
(i) State the name and date of death of any person on the title who died prior to the 1st day of April 1975, and within 6 years of the date of this sale.

(c) Furnish a Certificate of discharge from estate and succession duties and any other duties which may be a charge on the property on any such death."

In the note drawing the attention of the profession to the revisions in the requisitions we said that Requisitions 20 and 21 of the 1979 Edition of the Requisitions had become obsolete. This may not be entirely correct in so far as Requisition 20 is concerned as the Tax implications still apply in respect of any transactions now going through on foot of contract entered into before the 1st April 1978. It did seem to the Committee to be no longer relevant in standard requisitions as cases in which members would be raising requisitions now on foot of a contract entered into before the 1st April 1978 would be too rare. It has been decided to include this note in the Gazette to draw the attention of the profession to the full position.

Annual Report of Employment Appeals Tribunal

The Thirteenth Annual Report of the Employment Appeals Tribunal describes the activities of the Tribunal during the year ended 31st December 1980.

The Tribunal acts in divisions, each division consisting of either the Chairman or a Vice-Chairman and two ordinary members, one drawn from the Employer's side of the panel and one from the Trade Unions' side. More than one division may sit on the same day. Claims and appeals are heard in public unless the Tribunal, at its discretion, decides that the hearing be private.

Number of Claims and Appeals

The Total number of claims and appeals referred to the Tribunal in 1980 was 2,478 (754 claims under the Unfair Dismissals Act, 676 appeals under the Redundancy Payments Acts and 1,048 appeals under the Minimum Notice and Terms of Employment Act). This total represents an increase of approximately 75% on the 1979 total of 1,410 (402 under the Unfair Dismissals Act, 504 under the Redundancy Payments Acts and 504 under the Minimum Notice and Terms of Employment Act).

Unfair Dismissals Act 1977

Of the 754 claims referred to the Tribunal under the Unfair Dismissals Act, 685 were direct claims to the Tribunal and 69 were appeals from the recommendations of Rights Commissioners. The claimants in 411 of the 682 direct appeals also claimed under either the Redundancy Payments Acts or the Minimum Notice and Terms of Employment Act. 249 of the claimants appealed under the three Acts. Of the 69 appeals against the recommendations of Rights Commissioners, 37 were appeals by employees and 32 by employers. Of the 69 appeals, 36 recommendations were upheld, 10 were rejected, I was varied and 19 appeals were withdrawn before or during hearing. 3 appeals were awaiting a hearing on the 31st December, 1980.

In all 488 claims were disposed of in the year under review. 115 claims were allowed, 185 were dismissed, 81 were withdrawn during hearing and the remaining 107 were disposed of without a Hearing. The Tribunal awarded compensation in 87 cases, amounting to £150,706.00, an average of £1,732.25 per case. Reinstatement was ordered in 21 cases and re-engagement was ordered in one case. No compensation was awarded to six claimants who were found to have been fairly dismissed.

Redundancy Payments Acts

The majority of the 676 appeals referred to the Tribunal under this Act were appeals by employees for redundancy payments on the grounds that they were dismissed by reason of redundancy. 184 appeals were made by employees against the decisions of Deciding Officers on the question of weekly payments, which were abolished under the Redundancy Payments Act, 1979. There were a few appeals from employers from decisions of the Minister for Labour relating to their entitlement to rebate. The remainder related to disputes on questions of continuity of employment, transfers of business, lay-off and short time working, amount of outgoing weekly wage, offers of alternative employment etc.

Minimum Notice and Terms of Employment Act, 1973

The 1,048 appeals referred to the Tribunal under this Act were claims by dismissed employees for compensation for loss sustained by them by reason of their employers' failure to give them the notice required by Section 4 of this Act.

382 appeals were allowed; 192 were dismissed; 50 were withdrawn during hearing and 148 were disposed of without a hearing. In all, 772 appeals were disposed of by the Tribunal.

Number of Tribunal Sittings

In 1980, divisions of the Tribunal sat (sometimes simultaneously) on 244 days at 72 different venues throughout the 26 counties. On 146 of these days, two or more divisions of the Tribunal sat. The total number of sittings was 423, an increase of 14% approximately on the 1979 total of 371. 240 sittings were in Dublin and 183 were in the Provinces. The number of sittings at the different venues varied from one to 240.

Delay in Hearing Appeals

The delay in hearing appeals on the 3lst December, 1980 was approximately eighteen weeks. The increasing delay in hearing appeals was due to the 75% increase in the number of appeals referred to the Tribunal; the time taken to hear appeals under the Unfair Dismissals Act and to some extent to adjournments.

The increasing involvement of the legal profession, which has occurred mainly in claims under the Unfair Dismissals Act, has tended to extend the hearing time of such claims. While the Tribunal normally allows minimum of a half day to each unfair dismissal claim, the duration of the hearing in a number of cases has extended over several days and, in a small number of cases, over more than seven days.

Adjournments

Applications for the adjournment of listed cases are only granted for grave cause and when sought promptly after the notice of hearing has been sent to each party. Nevertheless, in 1980, by reason of adjournments, the Tribunal found itself with no cases

available for hearing on 38 days - 15.6% of the number of sitting days. In a number of instances, adjournments were sought promptly and granted at the request of a party and with the consent of the other party, both parties being legally represented and the listed date for hearing not being found convenient for one of the representatives. The Tribunal is dependent on the co-operation of representatives as well as the public and, in particular, on the co-operation of the legal profession, if its listing procedure is to function smoothly and adjournments are to be minimised. Efforts are in train to devise an improved listing system, which may lessen the delay caused by adjournments.

Representation at Hearings
In the 987 cases which came before the Tribunal under the Redundancy Payments Acts and the Minimum Notice and Terms of Employment Act, 798 employees were represented by a Trade Union or legally and 656 employers were represented by an employers' organisation or legally. In the 402 cases under the Unfair Dismissals Act, 390 employees were represented by a trade union or legally and 378 employers were represented by an employer's organisation or legally.

Information on Tribunal
An information booklet is available free of charge from the Department of Labour. It is issued to all parties to dispute prior to hearing.
The register of Decisions and Determinations is always open for inspection in the Department of Labour.

Insurance Act 1981 and Bank Guarantees

The Insurance Act 1981, which became law on 23rd December 1981 has resolved an uncertainty in statutory interpretation arising from the Insurance (Amendment) Act 1978 ("the 1978 Act").

Section 1 and 2 of the 1978 Act modified the terms of the Insurance Act 1936 to enable persons holding on a banking licence under the Central Bank Act 1971 to enter into bonds or contract of suretyships or guarantees. The Act was originally intended to apply only to the provision of export credit guarantees or construction contract bonds, but in the course of its drafting, upon application from the banks, was extended to cover the guaranteeing by the banks of their customers' obligations to third parties.

2 (1) (a) (ii) (c) of the 1971 Act referred to any contract of suretyship or guarantee which in the course of its banking business was given or entered into by a holder of a licence granted under the Central Bank Act 1971 and was given or made:
"To secure the due payment or repayment by a person on foot of a contract of a sum of money (including interest) which is certain or ascertainable (and whether in the currency of the State or in any other currency) the said payment or repayment being the *sole* (italics added) obligation of the person under the contract".

The use of the word"sole' in the above paragraph caused considerable confusion among practitioners and bankers as it was thought that if a loan agreement contained any other obligation other than the obligation to repay the loan, such as covenants or representations and warranties under which the borrower might become liable, then a guarantee given by a bank of the obligation of a borrower to repay money would be unlawful.

Section 3 of the Insurance Act 1981 amends the paragraph by substituting the word "primary" for "sole" with the effect that ancillary obligations such as liabilities under covenants in a loan agreement will no longer place in question the lawfulness of any guarantee given by a licenced bank to a lender under that Section in respect of financial obligations of a borrower.

A.I.J.A. XIX Congress: Dublin, August 24 - 28, 1981

The 1981 Congress of the Association Internationale des Jeunes Avocats took place in Dublin on August 24 to 28. It was the 19th Congress of the Association, founded in Toulouse, France, in 1962 as a non-political organization dedicated to furthering the interest of young lawyers and of the entire legal profession and to encouraging co-operation among lawyers of all the world.

More than 200 delegates from some 30 countries attended the Congress divided into four working groups, discussing the topics of adoption, medical negligence, the future of the legal profession and anti-trust regulations.

The working group on the future of the legal profession, examining the results of a two-year survey conducted by A.I.J.A., analysed the elements of change of a social, economical and technical nature that would be facing the legal profession over the next 20 years, paying particular attention to areas of society where legal advice is not presently available and looking at the great problems connected with the giving of efficient legal services economically, and at the various ways in which technology (both with regard to the communications and to the computer developments) can assist.

The working group on medical responsibility devoted itself to specific aspects of an otherwise exceptionally wide subject. It emphasised the duty of the doctor to inform the patient before submitting him to a treatment or an operation, in order to obtain from the patient himself an informed consent: this should apply, if at all possible, even in the case when a different ailment is discovered by the doctor in the course of an operation. On the question of the duty of the doctor to prolong the life of the patient at all costs, the working group was of the opinion that no such duty exists when brain activity has stopped or brain damage is irreversible. With regard to the doctor's responsibility for his medical team, it was considered that such responsibility should be directly related to the effective power of control that the doctor can exercise over its members.

The working group on adoption debated the sensitive issues arising from adoption, namely the central one of whether all ties with the natural family should be finally and irrevocably cut off, as well as that of maintaining a distinction, present in many national laws, between a "full" adoption and a "restricted" adoption. Among items discussed were the advisability, in certain limited cases, of "secret" adoption, i.e. adoption that avoids any connection between original and adoptive families; and the exclusion of revocation when full adoption has taken place.

The working group on anti-trust legislation was concerned with comparative analyses of different aspects of this area of law in both the U.S.A. and the E.E.C. Areas covered included Trade Association, distribution and other vertical agreements, monopolisation and the abuse of a dominant position and joint ventures. Investigation and enforcement procedures were also discussed.

The Congress marked the end of the year of office of Spanish lawyer Eduardo Ruiz De Luna Y Brugeés and the accession to office as president of A.I.J.A. of Rolf Meurs-Gerken of Copenhagen. Walter Semple of Glasgow, Scotland, was elected First Vice-President (or President - elect), while Marie-Anne Bastin of Brussels and Klaus Guenther of Köln were confirmed as treasurer and general secretary respectively.

The 20th Congress of A.I.J.A. will be held in Lausanne, Switzerland, from August 22 to 27, 1982.

An Open Letter to the Lawyers of Ireland from The President of the A.I.J.A.

The first euphoria of our congress in Dublin's fair city where the girls are so pretty is over; we are all back at work at the bar, at the desk – it's autumn, rainy, foggy.

But still, we feel enlighted, strengthened to cope with the dark and cold days of winter by the wonderful memories we have of the important work we succeeded in doing during the day and the great fun we had with our Irish hosts during the evenings and nights.

At no AIJA Congress in my experience have thanks been better earned or more deserved than they were at the AIJA Congress in Dublin in August. Thanks have been amply given to those of you who worked extremely hard to make our Congress an outstanding success.

But these thanks alone did not seem to me to be quite sufficient. Not only were thanks due for the vast amount of administration to ensure fruitful working sessions, for the inspiration with which the events to entertain your guests were chosen and for faultless efficiency with which the whole Congress was carried through, but your guests became aware of another dimension. Many of us had heard of the hospitality of the Irish. Your reputation is one thing, but the actual experience of a warm welcome from hosts who were so obviously pleased to see us and who, without fuss or trouble, were so obviously interested in making sure that we felt welcome and enjoyed ourselves in their country, was something we shall never forget.

Of course it is important to work to good effect and that we did with your help, but an atmosphere where friendships can be made and fostered is perhaps just as important and no more so than in an organisation like the A.I.J.A.

I hope that your experience of us has encouraged you to think that the A.I.J.A. and the lawyers of Ireland have much to contribute to each other.

We do hope to see at least some of you at our Congress in Lausanne, August 23rd to 28th, 1982.

On behalf of our Association, our warmest and heartfelt thanks to you all.

P. R. Meurs-Gerken
Amaliegade No. 22,
1256, Copenhagen.

INCORPORATED LAW SOCIETY OF IRELAND

ANNUAL CONFERENCE

to be held in

Ashford Castle, Cong, Co. Mayo

6th — 9th May, 1982

It is hoped to have the programme for the Conference, including the social activities, available by 1st March, 1982.

The charge for the week-end (Thursday night, Friday night and Saturday night) lunch Friday and Saturday, Dinner Friday night and Conference Dinner on Saturday is £124.50 per person on the basis of twin room accommodation. The single room supplement is £4.50.

Further details will be issued as soon as possible.

Conference Committee

The Calling and Conduct of a Creditors Meeting in a Voluntary Winding-Up

by

Nicholas G. Comyn, Solicitor.

When Called?

The voluntary liquidation of a Company is commenced at a General Meeting, which passes the Resolution to wind up (Section 253); in the case of a Creditors' voluntary winding up, the Resolution is an ordinary Resolution, (Section 251 (c)).

Section 266 (1) of the Companies Act, 1963 provides: "the Company shall cause a meeting of the Creditors of the Company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the Resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of Creditors to be sent by post to the Creditors at least ten days before the date of the said meeting of the Company". The relevant periods for the calling of the Creditors' Meeting are therefore two:

(a) at least ten days notice to the Creditors, by post and
(b) to be held the day of or the day after the General Meeting of the Company.

In practice, both meetings are usually held on the same day, the Creditors' Meeting being held immediately after the General Meeting.

Form of Notice

The essential characteristics of the Notice convening the Creditors' Meeting are governed by the Companies Act, 1963 i.e. the meeting is called to discuss (a) the Statement of Affairs, (b) the appointment of a Liquidator and (c) the appointment of the Committee of Inspection. In addition to setting out these facts, the Notice should state where and when the meeting is to be held and, in practice, the Notice will request the Creditor to submit a Statement of the amount due to him by the Company. Every Notice must have attached to it two forms of proxy, a general proxy and a special proxy, as provided for in Rule 77 of Statutory Instrument No. 28 of 1966.

A form of general proxy provides that the proxy appointed may vote at his discretion at the meeting of the Creditors or any adjournment thereof. The form of special proxy provides that the proxy may only vote at the Creditors' Meeting as directed, for or against the specified resolution – this pre-supposes, a matter often overlooked, that the form of special proxy itself should specify the proposals to be put to the Creditors' Meeting and the person to be appointed Liquidator. Included in both the general and special form of proxy is a condition that the proxy when signed be lodged within a time and at an address named by the person convening the meeting at which it is to be used.

Execution of the Proxy

Note (2) to the form of general and special proxy in Statutory Instrument No. 28, 1966 is the kernel and provides that "a firm . . . . . executes by A.B. a partner in the said firm". If the appointer is a corporation, then the form of proxy must be executed under its Common Seal or under the hand of some officer duly authorised in that behalf and the fact that he is so authorised must be so stated. If execution is by an authorised officer, then a copy of the Resolution authorising him should be lodged with the proxy (on a strict interpretation of Rule 75 of the Statutory Instrument No. 28 and of Section 139 (1) (b) of the Companies Act, 1963). Unfortunately, the Rules do not provide what happens if the proxy is not properly executed and it is not clear whether a managing director, in the ordinary course of the Company's business, will have power to sign such a proxy. In general, as it is a normal commercial transaction of a Company, a managing director would seem to have authority to sign a proxy form. Rule 83 (1) provides that the time for the return of the proxies is by four o'clock the day before the Creditors' Meeting.

Solicitor's Role in the preparation of the Statement of Affairs:

The Statement of Affairs, which must be produced at the Creditors' Meeting and which is the responsibility of the Directors (Section 266 (3) (a) of the Companies Act, 1963), is normally the preserve of the Company's accountant or financial controller. However, a Solicitor has a certain role to play, which is to advise that a realistic value is taken of the assets, that proper treatment is made of secured debts, that all preferential debts are provided for, that Hire Purchase Agreements are specified, that any "claim" for reservation of title is noted and finally, in particular, to ensure that a full list of Creditors and the amounts due to them is drawn up. If there is a dispute as to any debt due to any Creditor, then this should be noted, as it has consequences under Rule 69 of Statutory Instrument No. 28.

What of Solicitors' costs in arranging for the winding up of the Company, their Client? There is no doubt that if a Solicitor, being awre that a Company is about to wind up, recovers his **general** costs this would be a fraudulent preference, as recently decided by Mr. Justice Costello in an unreported judgement given on 24th March 1981 *(Frank E. Belton and Liquidator of the Bandon Milling Company Limited .v. Patrick J. O'Driscoll)* and on the principles of fraudulent preference, as laid down in the unreported judgement of Mr. Justice McWilliam of 8th September, 1975 in the case of *Corran Construction Limited (in voluntary liquidation) - v - Bank of Ireland Finance Limited;* a Solicitor may, of course, have a lien on certain documents for his costs (a solictor has a general lien) but this will not be established until after the commencement of liquidation. It is the view of the writer that a Solicitor engaged by a Company for the purpose of the advising on a liquidation is entitled to his costs, if they are paid prior to the winding up. For instance, where a Company is commencing to wind up where it cannot continue its business by reason of its liabilities and the directors have a statutory obligation to prepare a Statement of Affairs and if they pay legal costs, to comply with this statutory obligation, then this is a legitimate payment – see the case of *Barleycorn Limited* [1970] Ch. 465, which related to a similar position concerning payment to the auditors of the Company for preparing a Statement of Affairs in the case of an Offical Receivership in England. Once the winding up resolution has been passed and the liquidator appointed, however, any pre-liquidation costs incurred can not rank as anything other than an unsecured debt in the winding up; the Solicitor's only protection will be whatever lien he may have for his costs on the documents of the Company (other than the Statutory Books).

Admission to the Meeting:

In passing, it is interesting to note that Statutory Instrument No. 28 of 1966 provides that where a Company has its registered office in the County Borough of Dublin or in the County Borough of Cork, every meeting should take place in such County Borough and, in every other case, wherever "in the opinion of the person convening the same is most convenient for the majority of the Creditors or contributories or both". The Solicitors to the Company should ensure that some person is in attendance at the entrance to the Meeting to ensure that the name and address of every person entering, together with details as to who they represent and the amount of the debt due should be recorded.

Persons wishing to attend the Meeting can be loosely categorised as follows: –

(a) **Creditors:** Obviously Creditors who attend on their own behalf are entitled to be admitted. There seems to be no provision in Instrument No. 28 to exclude "advisors" from the Creditors' Meeting, but clearly such persons have no right to vote and the writer considers that they have no entitlement to speak at meetings; a strict interpretation of the Companies Act and of the Statutory Instrument would suggest that, as the meeting is called for the Creditors, presumably Creditors only and their properly appointed proxies should be entitled to attend and speak.

(b) **Proxies:** Proxy forms which are not lodged within the time provided in the notice convening the Meeting (providing) the time limited is in accord with the provisions of Statutory Instrument No. 28) are invalid *Shaw .v. Tati Concessions* [1913] 1 Ch. 292. If the proxy is incorrectly executed, it is invalid. The Chairman of the Meeting has the ultimate decision in this regard but, once the proxy is accepted, the proxy is entitled to vote, even at an adjourned Meeting *(Marx .x. Estates and General Investment Limited* [1976] 1WLR 380).

(c) **Press:** Unless the liquidation is that of a public company, neither members of the press nor the public at large have the right to attend the Creditors' Meeting.

Conduct of the Meeting

A Director of the Company, appointed by his fellow Directors, must preside at the Meeting (Section 266 (4) of the Companies Act, 1963). Normally a chairman of a Creditors' Meeting is elected by the Creditors, as provided in rule 62 Statutory Instrument No. 28, but this rule also specifically excludes its application to Meetings called pursuant to Section 266 so, once the chairman is appointed under Section 266 (4) of the Companies Act, 1963 to preside then he must chair the Meeting to the end and it is doubtful whether he can be removed from such position by the Meeting. Equally, the chariman cannot delegate his duties to some other person, e.g. his solicitor, as it is quite clear that the Companies Act 1963 imposes this duty on the director, as chairman, presiding at the Meeting. Many Creditors' Meetings seem to revolve around the value of the assets (!) rather than the statutory purposes of the meeting; strictly, however, the Creditors' Meeting has three purposes only and they are:

(a) to consider the Statement of Affairs produced at the meeting;
(b) the election of a liquidator;
(c) to nominate creditors to the Committee of Inspection.

A Solicitor advising a company or its directors should have regard to the reasons for calling the Creditors' Meeting and it is important to advise that the Chairman of the Meeting should be prepared to give some explanation as to why the Company became insolvent and to answer any reasonable questions relating directly to the Statement of Affairs. The Chairman is obliged to take and certify minutes of the Meeting (Rule 74 (1) Statutory Instrument No. 28 of 1966) and a Solicitor advising the Chairman should warn the Chairman not to say anything that could incriminate him.

The appointment of a liquidator is always a thorny problem. At the outset of the Meeting the Chairman should point out that the Company is already in liquidation (Sections 251 and 253 of the Companies Act, 1963), that the Company has appointed a liquidator, but that the Creditors have the right to nominate their own liquidator. Section 267 (1) is unequivocal in stating that if "the Creditors and the Company nominate different persons, the person nominated by the Creditors shall be Liquidator and if no person is

nominated by the Creditors, the person, if any, nominated by the Company shall be Liquidator". Sub section (2) of the same section provides that if more than one person is nominated Liquidator, either a director, a member, or a Creditor of the Company may, within fourteen days after the date of the nomination by the Creditors, apply to the Court for an order directing that the person nominated as liquidator by the Company shall be Liquidator instead of or jointly with the person nominated by the Creditors or to appoint some other person as Liquidator. The clear intention of the Section has unfortunatley been eroded by Rule 63 of Statutory Instrument No. 28 of 1966, which provides that any Resolution to be passed at a Creditors' Meeting shall only be deemed to be passed by a majority in number and value of the Creditors present, personally or by proxy. In 1955 when commenting on the same Rule in the English Winding Up Rules (Rule 134), Roxburgh J., stated: "therefore, though I should have thought that there was a crying need for some amendment of this legislation which would make it clear that, in the event of the majority in value being a minority in number their nominee will nonetheless prevail, unless and until some amendment of the law is made I should not be prepared to hold a different principle applied" *Caston Cushioning Limited* [1955] 1 AllER. 508.

The facts of this case are worth considering. On the 16th August, 1954 a resolution for voluntary liquidation was passed by Caston Cushioning Limited and the members nominated a Mr. Barker, a Chartered Accountant, as Liquidator. On the same date Mr. Caston, a director of the Company, took the chair at a Meeting of its Creditors. At that Meeting, one of the Creditors proposed Mr. Lambeth, Chartered Accountant, as Liquidator and the proposal was duly seconded and put to the Meeting. The proposer and another Creditor, together representing proved debts to the value of £4,795.00. voted for the appointment of Mr. Lambeth; and three other Creditors, together representing proved debts to the value of £2,336.00, voted against the Resolution. The Chairman declared the Resolution to be lost and, there being no other nomination for Liquidator, he confirmed the appointment of Mr. Barker. One of the Creditors then applied to the Court, where it was held that Mr. Barker was validly nominated as Liquidator by the Company, but Mr. Lambeth had **not** been validly nominated by the Creditors, because the Creditors' resolution to nominate him had not been supported by a majority in number of the Creditors present and voting at the Meeting, although it had been supported by a majority in value of those Creditors. However, the case had a corollary in that the Court made an order for compulsory winding up of the Company on foot of a petition presented by the Creditor who had proposed Mr. Lambeth and appointed the Official Receiver as Liquidator of the Company (this provision is unknown in the Irish Companies Act but is made possible by Section 239 (d) of the English Companies Act, 1948). The Court further held that Mr. Barker, the Liquidator nominated by the Company, would be entitled to his costs of the hearing, together with all the costs and expenses of the liquidation to the date of the hearing.

If such an application were made to the Irish High Court under Section 267 (2) of the Companies Act, 1963, the Court would have the choice either of nominating as Liquidator the person appointed by the Company to act either on his own or jointly with the person nominated by the Creditors or, in the alternative, of appointing some other person to be Liquidator. Clearly, therefore, the more liquidators that are proposed by the Creditors, the less chance they have of appointing their own Liquidator, as there is rarely an opportunity for the Creditors to obtain a majority in both number and value. If the Creditors propose and second a Liquidator (it is important to take the name of both the proposer and seconder) and if those supporting him are not a majority in number and value of those attending or entitled to vote in person or by proxy then the Company's nominee will automatically be appointed Liquidator.

Voting

(a) Who may vote? – a Creditor is not entitled to vote in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained, or in respect of any debt on or secured by a current Bill of Exchange or Promissory Note, but this does not preclude from voting a Creditor who is due money for services rendered *(Re. Canadian Pacific Corporation* (1891) W. N. 122) or untaxed costs *(Re. Dummelow, Ex-parte Russell* (1873) 8 CH. APP. 997 (C.A.)) or the like provided he can prove or swear to the minimum amount due to him.

(b) Secured votes – It has always been believed that a secured Creditor cannot, unless he surrendered his security, vote at a Creditors' Meeting. Rule 70, Statutory Instrument No. 28 provides that a secured Creditor shall not, unless he surrenders his security, be entitled to vote but, if he gives a statement of his security and deducts this from the amount due to him, then he shall be entitled to vote on any unsecured balance. If "he votes in respect of his whole debt, he

Incorporated Law Society of Ireland

IMPORTANT NOTICE

The Attention of the profession is drawn to a ruling passed at the Council Meeting of the 14th January, 1982.

WHEREAS NO solicitor SHALL practice AS A principal or assistant without a current Practicing Certificate. THE COUNCIL HAS resolved that it is the duty and obligation of the Principal(s) of each office to ensure that each solicitor in the office has a current Practicing Certificate.

The Council has resolved that any breach of this resolution shall be deemed *unprofessional conduct* which may result in disciplinary proceedings. The Council recommends that the cost of taking out a Practicing Certificate for assistant solicitors should be borne by the practice in respect of all solicitors employed in the practice.

The Society requires that each solicitor shall have a Practicing Certificate for each year or part of a year when the said solicitor is practicing whether he or she shall be required to attend to Court work or not.

shall be deemed to surrender his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence". The Court is normally lenient in interpreting this proviso. It will usually make the Creditor pay for the costs of the application, but it is to be noted that a mistake as to value is not "inadvertence" nor can there be any "inadvertence" where there is a deliberate election (*Re. Piers* (1898) (1 QB 627)).

This, however, is not the end of the matter, as Rule 73 of the same Statutory Instrument provides that such a statement (as referred to in Rule 70) does **not** apply to a Meeting of Creditors held pursuant to Section 266, i.e. the first Creditors' Meeting. Therefore it would appear that a secured Creditor **is** entitled to vote. A solicitor claiming a lien for his costs is in a similar situation to a secured Creditor (*Re. Safety Explosives* [1904] 1 Ch. 266).

(c) Rule 82 – No person, either as a general or a special proxy, can vote in favour of any resolution which directly or indirectly places either himself or his partner or employer in a position to receive remuneration out of the assets of the Company otherwise than as a Creditor rateable with the other Creditors of the Company – no further comment is necessory on this Rule.

(d) Poll – There is no provision in Statutory Instrument No. 28 of 1966 entitling a person to call a Poll; Section 137 of the Companies Act, 1963 applies only to General Meetings of the **members** of the Company. If there are only a few people at the meeting, it is possible to count both the numbers and the value but otherwise the voting should be by ballot.

Adjournment.

There are three instances when adjournments may arise:

(a) Under Rule 66 of Statutory Instrument No. 28, the Chairman may with the consent of the Meeting, adjourn it from time to time and from place to place. The adjourned Meeting should be held at the same place as the original Meeting unless the resolution for the adjournment provides otherwise, or unless the Court provides otherwise.

(b) If within fifteen minutes from the time appointed for the Meeting a quorum (at least three Creditors entitled to vote) is not present, then the Meeting is adjourned to the same day in the following week at the same time and place or to such other day or time or place as the Chairman may appoint but so that the day he does appoint cannot be less than seven nor more than twenty one days from the date from which the Meeting was originally adjourned.

(c) Section 266 of the Companies Act, 1963 – Sub-section (5) of this section provides that if the General Meeting of the Company at which the Resolution to wind up is being proposed is adjourned for any reason, then any resolution passed at the subsequent meeting of the Creditors held on the same day or the day after shall have effect as if it had been passed immediately after the passing of the members Resolution to wind up the Company.

Committee of Inspection:

Before the termination of the Creditors' Meeting the Committee of Inspection should be elected. Section 268 (1) provides that the Creditors may, if they think fit, either at this meeting or a later Meeting, appoint a Committee of Inspection consisting of not more than 5 persons. The Company has the right to appoint a maximum of three persons, the appointment to take place either at the Meeting to wind up or at a subsequent general Meeting. The Creditors may resolve, again by a majority in number and value, not to accept the Company's nominees, in which case such nominees are not qualified to sit on the Committee of Inspection unless the Court otherwise orders.

Solicitation:

Attention is drawn to Rule 80 of Statutory Instrument No. 28 of 1966, which provides that if the Court is satisfied that solicitation has been used by or on behalf of a liquidator in obtaining proxies or procuring his own appointment as liquidator, the Court may order that no remuneration be allowed to the person by whom or on whose behalf the solicitation was expressed.

The Liquidator's Solicitor:

It is not easy to decide whether a person who is a Solicitor for the Company should act for a liquidator when appointed. The general view is that he should not, as there may be a conflict of interest if the Directors have to be sued; there may however be exceptions to the general rule.

In conclusion, it seems clear that it is time that Rule 63 was abolished and the true intention be given to Section 267 (2) of the Companies Act, 1963. Also it might be added that the penalties imposed by Section 266 (6) of the Act have, through inflation, become inadequate. A Company need not call a Creditors Meeting, though insolvent and the members can appoint their own liquidator. A creditor has fourteen days within which to object to the Liquidator so appointed but, if he does not do so, then the liquidation is valid even though no Creditors' Meeting was convened. This procedure is called "Centrebinding", being named after an English decision on the same point (*Re. Centrebind Limited* [1966] 3 AllER. 889). The only penalty imposed on the Directors of the Company in this instance is a £100,000 fine. It may be noted that in the United Kingdom, since the coming into effect of the Companies Act 1980, the fines in that regard are, for conviction and indictment, unlimited and for summary conviction, up to £1,000. □

Dealing in Land – A New Risk for Purchaser's Solicitors

Since the coming into operation of the 1981 Finance Act, many transactions which would previously have been regarded as capital transactions may now be regarded as "Dealing in or Developing" land, attracting Income Tax rather than Capital Gains Tax. Unfortunately, because of the wide ranging nature of the legislation, there is a hazard for purchasers of land or buildings which they should guard against.

The new provisions apply to disposals on or after the 6th of April 1981, particularly of land or any property deriving its value from land (e.g. shares in a property holding company) which was acquired for the sole or main object of realising a gain and provided that the "gain" is to be regarded as income for tax purposes.

The provisions are contained in Sections 28 and 29 of the Finance Act 1981, amending Sections 17, 18, 20, 21 and 22 of the Finance (Miscellaneous Provisions) Act 1968 and contain a power in the amended section 21 (2) enabling the Revenue Commissioners, if it appears to them that any person entitled to any consideration or other amount chargeable to tax under Section 20 **is not resident in the State**, to order the deduction of tax at the standard rate from such consideration (by applying Section 434 of the Income Tax Act 1967). Such an order could be directed at the purchaser or purchasers' solicitor.

Apart from a purchaser's basic difficulty in knowing whether his Vendor is a "person chargeable to tax" (as there are circumstances in which some person other than the apparent Vendor could be the person chargeable to tax), the draughtsman, in adapting Section 488 and 489 of the U.K. Taxes Act 1970, which would appear to be the source of the new provisions, has created a further difficulty by ommitting any provision paralleling Sub-Section 11 of Section 488 of the U.K. Act, which enables a person who is about **to dispose of land** to obtain a determination from an Inspector of Taxes within 30 days as to whether the gain is to be chargeable to tax as income.

It has been suggested that on an application being made for a Clearance Certificate under paragraph 11 (6) of the Fourth Schedule to the Capital Gains Tax Act 1975, the Inspector of Taxes is being put on notice of the transaction and that if he does not then issue a direction that Section 434 is to apply to the payment, he would not subsequently be entitled to issue such a direction. However, until such a situation has come before the Courts and the matter has been determined by them, it cannot automatically be assumed that no subsequent direction could be made. Moreover, there would appear to be nothing to prevent the Inspector from issuing the Capital Gains Tax Clearance Certificate without prejudice to his right to treat the gain as income subsequently and issue a direction that Section 434 of the Income Tax Act should apply.

While the legislation provides an exemption for a private residence, it does so by reference to the provisions of Section 25 of the Capital Gains Tax Act. Because of this, it may not be possible for a purchaser to accept a statement by the Vendor that the premises in sale are exempt by reason of their being a private residence.

It would appear therefore that at pre-contract stage it would seem essential for a purchaser's solicitor to make enquiries as to whether the Vendor or some person standing behind the Vendor in the proposed transaction may be a person "chargeable to tax". (This matter has been highlighted by the letter from John F. Condon, published elsewhere in this issue.)

The Law Society is pressing for the introduction of a statutory provision for clearance along the lines of Section 488 Sub-Section 11 of the U.K. Act and, in the meantime, asking that Inspectors of Taxes should, as a matter of practice, on receipt of an application for a Capital Gains Tax Clearance Certificate indicate whether they propose to order the deduction of Income Tax from the consideration.

Land Registration Fees Order

The Land Registration Fees Order 1981 (Statutory Instrument No. 370 of 1981) came into operation on 1 December 1981. The Order increases the whole range of Land Registration charges and introduces a new maximum registration charge of £200, applicable to all transactions having a consideration in excess of £36,000.

The fee payable in the majority of cases of applications for full registration of title has been increased to £12, which sum is also payable upon the registration of a transfer other than a transfer on sale and upon the registration of transmissions on death.

The fee for the issue of a Land Certificate is increased to £5 and for the issue of a certified copy of a Land Registry Map to £4.

The Order itself should be consulted for the full cost of Land Registry fees now chargeable but, for convenience, the scale of registration charges for transfers and burdens under Item 8 of the Schedule to the Order is set out below.

TABLE

Registration of transfers or burdens for which fees are payable under Item 8 of the Schedule to the Order.

Value	Fees	Value	Fees
£	£	£	£
1 – 1000	10.00	19001 – 20000	115.00
1001 – 2000	17.50	20001 – 21000	120.00
2001 – 3000	25.00	21001 – 22000	125.00
3001 – 4000	32.50	22001 – 23000	130.00
4001 – 5000	40.00	23001 – 24000	135.00
5001 – 6000	45.00	24001 – 25000	140.00
6001 – 7000	50.00	25001 – 26000	145.00
7001 – 8000	55.00	26001 – 27000	150.00
8001 – 9000	60.00	27001 – 28000	155.00
9001 – 10000	65.00	28001 – 29000	160.00
10001 – 11000	70.00	29001 – 30000	165.00
11001 – 12000	75.00	30001 – 31000	170.00
12001 – 13000	80.00	31001 – 32000	175.00
13001 – 14000	85.00	32001 – 33000	180.00
14001 – 15000	90.00	33001 – 34000	185.00
15001 – 16000	95.00	34001 – 35000	190.00
16001 – 17000	100.00	35001 – 36000	195.00
17001 – 18000	105.00	36000 -upwards	200.00
18001 – 19000	110.00		

Phone-in Law in Canada

Canadian Dial-a-Law scheme

A novel idea offering over-the-phone legal advice and information on law has been an instant success in the Canadian province of Alberta and has led to similar public service programmes being introduced across Canada. In Ottawa the service is offered in French and English.

Called *Dial-A-Law*, the scheme allows people to dial a toll-free number and get a brief explanation of a law topic of their choice. Once the taped message is complete, callers can stay on the line for more assistance.

On its inaugural day in Alberta the service received 107 calls and enquiries continued at that rate. During the first 10 weeks of the scheme's operation more than 2,700 callers had taken advantage of it.

Dial-A-Law's operation and equipment budget for the first year of operation has been estimated at $C109,000. Funding comes from the Alberta Law Foundation and the Law Society of Alberta.

Dial-A-Law offers almost four dozen pre-recorded information scripts on a wide range of topics. The 4-7 minute scripts cover family law, immigration law, landlord and tenant, real estate, wills and estates, criminal law and the courts.

The scheme is based on a USA programme called *Tel-Law*.

In the view of the scheme organiser, an important aspect of *Dial-A-Law* is that it enables many people, who would otherwise be intimidated, to seek law information.

'The ability to remain anonymous is important so when all you have to do is make a phone call the law is suddenly accessible with ease and with no risk.'

Another valuable element in *Dial-A-Law's* public education role is that it helps callers identify that they do have a law problem.

'Many people do not associate their problem as a legal one, but when they call the tapes aid them in determining their legal status. Another aspect is that the tapes help people figure out if it is worth going to a lawyer.'

The tapes are not designed to be self-help tools. With the exception of a few tapes in areas such as *First Appearance in Provincial Court*, the tapes only give general information and quite often advise callers to see a lawyer.

Dial-A-Law provides other services as well as the over-the-phone tapes. The operators answering the calls have referral information at their finger tips. They can give callers in any area of the province phone numbers for local services such as the family court, student law services, the law society, police departments, emergency services, the human rights commission, and legal aid.

(Reprint: International Bar News)

Acts of the Oireachtas 1981

Number	Title of Act
1 of '81	Social Welfare (Consolidation) Act, 1981
2 of '81	Maternity Protection of Employees Act, 1981
3 of '81	Social Welfare (Amendment) Act, 1981
4 of '81	Restrictive Practices (Confirmation of Order) 1981
5 of '81	Intoxicating Liquor Act, 1981
6 of '81	Night Work (Bakeries) (Amendment) Act, 1981
7 of '81	Restrictive Practices (Confirmation of Order) (No. 2) Act, 1981.
8 of '81	Dumping at Sea Act, 1981
9 of '81	Malicious Injuries Act, 1981
10 of '81	Criminal Law (Rape) Act, 1981
11 of '81	Courts Act, 1981
12 of '81	Nitrigin Eireann Teoranta Act, 1981
13 of '81	Industrial Development Act, 1981
14 of '81	Industrial Development (No.2) Act, 1981
15 of '81	Telecommunications Capital Act, 1981
16 of '81	Finance Act, 1981
17 of '81	Health (Mental Services) Act, 1981
18 of '81	Hallmarking Act, 1981
19 of '81	Employers' Employment Contribution Scheme Act, 1981
20 of '81	Turf Development Act, 1981
21 of '81	Family Law (Protection of Spouses and Children) Act, 1981
22 of '81	Family Law Act, 1981
23 of '81	Transport Act, 1981
24 of '81	Electricity (Supply) (Amendment) Act, 1981
25 of '81	Employment Guarantee Fund (Amendment) Act, 1981
26 of '81	Rent Restrictions (Temporary Provisions) Act, 1981
27 of '81	Irish Telecommunications Investments Limited Act, 1981
28 of '81	Finance (No.2) Act, 1981
29 of '81	Social Welfare (Temporary Provisions) Act, 1981
30 of '81	Fire Services Act, 1981
31 of '81	Courts (No.2) Act, 1981
32 of '81	Youth Employment Agency Act, 1981
33 of '81	Merchant Shipping Act, 1981
34 of '81	Insurance Act, 1981
35 of '81	Rent Restrictions (Temporary Provisions) (Continuance) Act, 1981
36 of '81	Appropriation Act, 1981
37 of '81	Housing Finance Agency Act, 1981

YOUNG MEMBERS COMMITTEE QUESTIONAIRE

Due to the unexpectedly large number of replies to the questionaire, a detailed analysis will take longer than expected, but a full report will be issued as soon as possible.

BOOK REVIEW

A Casebook of Irish Criminal Law: by Mark Findlay and Barry McAuley. Precedent Publications 1981. Pbk. only. 490pp. IR£16.00 + £1.50 post & packing.

This book contains over four hundred pages of excerpts from many of the most important Irish Criminal Law cases. As such it is a very welcome addition to the rather poor selection of books on the topic. In recent years there seems to be a trend towards the publication of different books on various aspects of Irish Law. Gone forever, one hopes, are the days when Irish students were forced to rely on English textbooks and the odd Irish case.

The editors of this book, both Lecturers, have attempted to produce a casebook with a difference. The reader is not given a note of the facts of the case nor a potted introduction to the relevant law - he is expected to extract both of these from the excerpt quoted. Head notes have been excised in all cases. This is a deliberate policy of the editors. In their introduction they cast doubt on the educational value of the traditional casebook - that is where students are presented with highly abridged extracts from leading cases. There argument is that the student is not aware either of the extent to which cases have been cut or the criteria governing editorial decisions. Accordingly, we are here presented with extremely long excerpts and in some cases, in fact, the whole case as reported in the reports.

Whereas I appreciate the point the editors are making I am not convinced that they have been entirely successful in their attempt to overcome these difficulties. Ironically part of the reason for this failure stems from the method of presentation of the cases. As there are no references or headnotes the reader can have no idea, for instance, of the year in which the decision was handed down unless he is prepared to look up the table of contents at the beginning of the book. Then he may be presented with legal argument of Counsel concerning intricate facts (and of course in many cases the facts themselves are in issue) long before these facts are disclosed to him, for example cf. *The People (AG) -v - Heald* (at page 300). Furthermore because the editors are loathe to interfere overmuch with the cases there is much boring and wasteful repetition. In *The Minister for Post and Telegraphs - v -Campbell* (page 19 of the casebook) a full case stated sent up by the District Court is set out in the first page and a half the Judge effectively repeats the facts of the case stated in the next half page and the decision itself takes up less than a page. Similarly in cases where there is more than one Judgement more severe editorial pruning would, I feel, have been in order. Finally I was surprised to see that the list of cases at the beginning of the book did not refer the reader to the pages in the book containing the excerpts.

The editors also claim that this Casebook could be of benefit to the practitioner as it brings together all of the leading cases on Irish Criminal law in a single volume. I cannot agree fully with this claim. The book is of value to the practitioner in that he can read extracts from important cases without having to get out actual reports. There can be no substitute, however, for the actual report when in Court or indeed when preparing a case for Court when it is obvious that certain precedents will be relied upon. It is always possible that some point, which may seem to have little importance at the time but which may be vital at a later stage, may have been ommitted. This is expecially true in the complex and technical field of Criminal Law. To be fair the editors would no doubt be the first to point out this problem. Secondly however the editors do not inform us of the exact manner in which they have interferred with the text. For instance in *The People (AG) - v -Cowan* there are (at page 310 in the Casebook) four lines in italics stuck right in the middle of the extract. This appears to be a comment on the Judgement. Is this a comment of the Editors? Is it a statement that the Judge particularly wanted to emphasis? It would also be interesting to know whether the footnotes (usually references) are those of the Editors or are they part of the actual report. Thirdly, and most regrettably there are a large number of printing errors, and at times references to footnotes, which do not exist. Some printing errors may be expected in 400 closely typed pages, but I feel that they occur too frequently to make the book totally reliable in Court.

Furthermore, I would not agree that the Casebook is completely up to date. It contains only four unreported Judgements (two of which are over ten years old) and very few cases from the nineteen seventies. The Editors claim that developments in Irish Substantive Criminal Law have not kept pace with other jurisidictions. They blame this phenomenon partly on the fact that Courts in small jurisdictions get fewer opportunities to develop the law, and that this is due somewhat, in our case, to "evident reluctance of defence counsel to appeal Criminal cases on other than Constitutional grounds." This last point is rubbish. In my experience, defence lawyers are very willing to draft grounds of appeal involving points of Criminal Law, Evidence and Criminal Procedure as well as Constitutional points, and I do not think I have ever seen a set of grounds of appeal containing only Constitutional points. In any event it is not only through appeals that cases reach the higher courts for decision. Decisions on State Side applications have produced a number of interesting Jugements affecting the Criminal Law, and none of these are reported in the Casebook. "*Ivan Scott*" (1980) is concerned with the definition of Common Law offences. "*James Daly*" (1980) dealt with the vexed question of the scheduling of offences under the Offences Against the State Acts "*George Farrell*" (1977) and "*Jeremiah Walsh*" (1979) dealt with substantive as well as evidential aspects of the same legislation. "*John O'Loughlin*" (1978) ruled on the so called "Claim of Right" in larceny cases. It is interesting to note that this last case was an appeal! Finally, but not exhaustively, "*Carew*" (1979) dealt with the offence of public mischief.

My final criticisms are perhaps unfair. Every Editor of an Anthology is criticised for not including somebody's favourite poem. Similarly an Editor of a Casebook cannot include every case, and thus leaves himself open

to criticism. Having said that, however, I cannot understand why the Editors did not include a *section* on Offences Against The State. Secondly, the case book is one concerned with Criminal Law and accordingly, many cases dealing with evidence and criminal procedure have been omitted. There have been very real developments in both of these fields, so much so that the practise of criminal law has altered considerably in the past ten years. It would, I feel, have been preferable to include a section concerning Burden of Proof and Issues for Judge and Jury, which belong more to the realm of the Law of Evidence. Finally, I would have thought that cases such as "*Oglesby*" (1966) (receiving), "*Murtagh*" (1966) (non-capital murder) and "*Holmes -v - Furlong*" (1967) (Extradition) to name a few, deserved inclusion but I suppose if all the important cases were included the book would have been twice as long.

Having critcised this Casebook it is only fair to say that I think it is a highly worthwhile achievement and I would recommend it to both students and all others interested in the Criminal Law. The questions at the end of each section are interesting though by their very nature, somewhat academic. The additional references to other cases are invaluable. The book has already proved of value to me, and I have no doubt that it will be consulted quite regularly in the future.

MICHAEL STAINES

For Your Diary . .

27 March, 1982. U.C.D. Law Alumni Society.
2nd Saturday Seminar.

"The EEC convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters."

(Speaker: A. V. Gill, Lecturer in Law, U.C.D.).

Venue: Arts/Law/Commerce Building, Belfield, Dublin 4 at 2.30 p.m.

Registration Fee: £10.00 (Full time students £5.00)

Enquiries to:

Paul A. O'Connor, Room D. 414,
Faculty of Law, U.C.D., Belfield, Dublin 4.

Continuing Legal Education
Spring 1982

The following programme of one-day courses will be open to all solicitors.

Course:	Venue:	Date:
Criminal Procedure and Advocacy Garrett Sheehan and Dudley Potter	Blackhall Place	Fri. 26th February
Financial Control of a Solicitor's Practice Esmond A. Reilly	Cork	Mon. 15th March
Conveyanicing: Sale of Flats Michael W. Carrigan and Thomas Hayes	Blackhall Place	Fri. 19th March
Conveyancing: Commercial Leases Ian A. Scott and Colin O. Keane	Blackhall Place	Mon. 29th March

Fee: £37.50 per course to include lunch and course materials.

Further details of these and later courses and application forms from Geraldine M. Pearse, Solicitor, Incorporated Law Society of Ireland, Blackhall Place, Dublin 7. Tel: 710711.

Institute of Arbitrators Inaugural Luncheon

Blackhall Place, 6 January 1982

From left: Mr. Nael Bunni, Hon. Secretary of the Steering Committee; Mr. Gordon Hickmott, Vice-President, Chartered Institute of Arbitrators, London; Mr. Justice Thomas A. Finlay, President of the High Court and Mr. Max W. Abrahamson, Chairman of the Steering Committee.

Mayo Bar Association Dinner Dance

Breaffy House Hotel, Castlebar, 11.12.81.

The President of the Incorporated Law Society, Mr. W. Brendan Allen (right) with Mr. Liam McHale, President of Mayo Bar Association and Mr. Michael C. Davey, Chairman of the Belfast Solicitors Association.

Launch of Garda Siochana Guide, 5th Revised Edition,

Blackhall Place, Dublin, December 1981.

The President of the Incorporated Law Society of Ireland, Mr. W. Brendan Allen (centre) with Mr. Jim Mitchell, T.D. Minister for Justice (left) and Commissioner Patrick McLaughlin.

Kerry Law Dinner 1981

Benners Hotel, Tralee, Co. Kerry.

Back (l. to r.): Donal Browne (President, Kerry Law Society); Louis O'Connell, James J. Ivers (Director General, Law Society); Thomas O'Halloran and Michael Quinlan.
Front (l. to r.): John O'Donnell (Vice-President, Kerry Law Society) Louise McDonough, Moya Quinlan (former President of Inc. Law Society) and David Hodgins.

Correspondence

3rd December 1981

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

Re: Assessment on Purchasers for Vendors' Land Dealing Tax

Dear Sir,

I have been trying unsuccessfully since April 1978 to induce the Society to make proper representations in regards to the impossible position in which Solicitors *acting for non-resident Vendors* are placed, by reason of the Revenue interpretation of Section 200 of the Income Tax Act 1967, as applied to Capital Gains Tax (See the March 1978 edition of the Gazette, which publishes a letter from the Revenue indicating that they would use this Section to assess a Solicitor for his client's unpaid Capital Gains Tax).

Now, with the passing of the Finance Act 1981, we have what is potentially a worse problem - where a Solicitor is acting for a client who is *purchasing from a non-resident Vendor*. Section 29 of the Finance Act 1981 substitutes new Sections 20, 21, and 22 to the Finance (Miscellaneous Provisions) Act 1968. Section 21(2), in its substituted form, provides that if it appears to the Revenue Commissioners that a person, entitled to any consideration or other amount chargeable to tax under Section 20, is non-resident, they may direct that Section 434 of the Income Tax Act 1967 will apply to any payment forming part of that amount. *In layman's terms, this means that the purchase of property from a non-resident Vendor could give rise to a charge to tax in the hands of the purchaser of 35% of the price paid.* This puts the client (and his adviser) in an impossible position as:-

1) there is absolutely no provision in the legislation for obtaining an advance clearance that the Section will not apply to the purchaser

2) even worse, the purchaser has no reliable means of finding out if the person chargeable to tax under Section 20 is non-resident. He may be buying from a resident Vendor but, because of some "behind the scenes" transactions, the person chargeable to the tax could be non-resident, and

3) if it transpires that, subsequent to completion, a charge under Section 434 is made against the purchaser he has no obvious means of recovery against the person chargeable to tax. An indemnity has obvious limitations in this type of situation.

Obviously, some limitation has to be put on the pratical operation of the Section or some advance prodecure for clearance will have to be worked out with the Revenue. I am asking the Gazette to publish this letter as a warning to colleagues, and I am at the same time strongly urging the Society (to whom I am sending a copy) to take the matter up with the Revenue immediately and work out some agreed postion as a guide to its members.

On a wider basis, I would urge also that the Society make immediate representations to the Minister for Finance with a view to preventing the introduction of further such items of outrageous legislation.

Yours sincerely

John F. Condon
9/10 Ely Place,
Dublin 2.

(See Note on this subject on page 17.)

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated this 25th day of February, 1982.

W. T. MORAN (Registrar of Titles)

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

1. Registered Owner: John and Bridget Mullaney, Meelick More, Claremorris, Co. Mayo; Folio No: 28946; Lands: (1) Meelick More, (2) Ballykinara; Area: (1) 16a. Ir.. 34p., (2) 8a. Or. 34p; County **MAYO.**

2. Registered Owner: John J. Sheery; Folio No: 9032; Lands: Drumcoo (Brady); Area: 21a. Or. 25p. County: **MONAGHAN.**

3. Registered Owner: Department of Agriculture and Technical Instruction for Ireland; Folio No: 3587; Lands: (1) Oulart, (2) Askinch Lower, (3) Ballyfad, (4) Coolgreany Demesne, (5) Gorteen Upper, (6) Gorteen Lower, (7) Newtown, (8) Newtown; Area: (1) 69a. Ir. 25p; (2) Oa. 3r 10p.; (3) 29a. 2r. 25p.;(4) 17a. 2r.Op.; (5) 30a. 3r. 1p.; (6) 8a. Ir. 4p.; (7) 56a. Or. 21p.; (8) 51a. Or. 21p. County: **WEXFORD.**

4. Registered Owner: Michael Connolly; Folio No. 893; Lands: Drumharriff North; Area: Oa. 4r. Op.; County **MONAGHAN.**

5. Registered Owner: John Diver & Hugh Diver; Folio No.; 587 Lands: Ballyduff South; Area: 21a. Or. 30p. County **WICKLOW.**

6. Registered Owner: Thomas Ryan; Folio No: 7776; Lands: Gorteen;Area: 73a. 3r. 15p.; County: **TIPPERARY.**

7. Registered Owner: Thomas Harrison; Folio No: 12190; Lands: Glen (pts.) E. D. Dawsongrove; Area: 19a. 3r. 3p.; County: **MONAGHAN.**

8. Registered Owner: Edward O'Mahony, (ser'or) and Edward O'Mahony, (Junior); Folio No: 9508; Lands: Farranfore; Area: 109a. 3r. 25p; County: **KERRY.**

9. Registerd Owner: Timothy O'Connor; FolioNo: 8O29F; Lands: (1) Blossomhill, (2) Blossomhill; Area: (1) 8a. Ir. 9p., (2) 14a. Ir. Op.; County: **LIMERICK.**

10. Registered Owner: Patrick O'Callaghan; Folio No: 8422L Lands; Leasehold interest in the property known as No. 4 St. Bridgid's Rd., situate in the Parish of St. Marys, Shandon, City of Cork; Area:-County:**CORK.**

11. Registered Owner: Michael Hanley & Mary Hanley. Folio No: 45219 (This Folio is now closed and the property therein now forms lands Nos. 1,2,3,4, & 5, on Folio 60408. Lands: (1) Eyeries, (2) Eyeries, (3) Eyeries, (4) Eyeries, (5) Eyeries.; Area: (1) 5a. Or. 29p; (2) 6a. 2r. 4p.; (3) 7a.Ir. 25p.; (4) Oa. Or. 6p.; (5) 10a. 3r. 38p.; County **CORK.**

12. Registered Owner: James Nestor, Bridge St., Dunmore, Tuam, Co. Galway. Folio No: 35235; Lands: Plot of ground with houses thereon on the West side of Bridge Street in the Town of Dunmore; Area: Oa. Or. 30½p.; County: **GALWAY.**

13. Registered Owner: William Fewer, Ballinlough, Carrageen (Waterford), Co. Kilkenny; Folio No. 11744; Lands: Granny; Area: Oa. 3r. 10p.; County **KILKENNY.**

14. Registered Owner: Owen Cafferkey, Mulloghroe, Clogher P.O., Ballina, Co. Mayo; Folio No: 38135; Lands: (1) Barranagh East, (2) Barrettsplot West, (3) Barranagh West, (4) Lurgacloy; Area: (1) 18a. Or. 30p.(2) 48a. Or. 24p. (3) 91a. 3r. 15p.(4) 37a. 2r. 10p.; County **MAYO.**

15. Registered Owner: Cecilia O'Toole, Doohula, Ballyconneely, Clifden, Co. Galway; Folio No: 23788: Lands: (1) Errisbeg East, (2) Errisbeg East, (3) Errisbeg West; Area: (1) 13a. Or. Op. (2) 1052a. 3r. 6p. (3) 24Oa. Ir. 36p.; County: **GALWAY.**

16. Registered Owner: John Joseph Coen. Folio No: 3914: Lands: Rathglass; Area; 34a. Ir. Op.; County: **GALWAY.**

17. Registered Owner: Stephen & Mary Frances Collins, Moveen East, Kilkee, Co. Clare; Folio No: 682F, Lands: (1) Moveen East, (2) Moveen East, (3) Carrowmore south, (4) Carrowmore South; Area (1) 69a. 3r. 32p; (2) 174a. 3r. 6p.; (3) 1a. Ir. 2p.; (4) Oa. 3r. 15p. County: **CLARE.**

18. Registered Owner: Michael Blighe, Ballyhard, Glenamaddy, Co. Galway. Folio Nos: 11734, 3159, 3145. Lands: (1) Cloonlara South, (2) Frass, (3) Cloonlara South, (4) Frass. Area: (1) 24a. Or. 21p (2) 3a. Or. 15p. (3) 10a. Or. 22p. (4) 7a. 2r. Op. County **ROSCOMMON.**

19. Registered Owner: Patrick King and Dymphna King. Folio No: 49660L; Lands: Cappagh (Barony of Uppercross); Area: – County: **DUBLIN.**

Lost Wills

Thomas Flanagan, deceased, late of Clarecastle, Co. Clare. (formerly of Lisdeen, Kilkee, Co. Clare). Would any Solicitor having knowledge of any will of the above named deceased who died on 8 October, 1981 kindly communicate with Michael F. Nolan, Solicitor, Kilrush, Co. Clare.

Mary Miley, decased, late of 3 St. Kieran's Terrace, Athlone, Co. Westmeath. Would any Solicitor having knowledge of any will of the above named deceased who died on 10 January, 1971 at 75 Assumption Rd., Athlone, Co. Westmeath, please contact Messrs. Fair & Murtagh, Solicitors, Athlone, Co. Westmeath.

Michael Tyrell, deceased, late of Cottage 237, Painstown, Donadea, Co. Kildare. Would any person having knowlege of a will of the above named deceased who died on 5 December, 1981 please contact Oliver J. Conlon & Co., Solicitors, 93 Upr. Leeson St., Dublin 4.

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The Profession

Gerrard L. McGowan, Solicitors, wish to announce that they have commenced practice at 39 Main St., Swords, Co. Dublin. Mr. John P. Brophy, Solicitor, has joined the firm and will be in attendance at the Swords Office.

Paul N. Beausang & Co., Commissioners for Oaths, wish to announce that they are moving premises and will as and from 4 January, 1982 practice out of 43 Fitzwilliam Place, Dublin 2. Telephone 764208/605666.

Miscellaneous

For Sale - Seven Day Ordinary Licence - Enquiries to C. S. Kelly & Co., Solicitors, Buncrana, Co. Donegal.
Tel. (077) 61332.

For Sale - Seven Day Intoxicating Liquor Licence, Clean all offers considered. Apply Wolfe, Collins, O'Keefe & Partners, Solicitors, Wolfe Tone Square, Bantry, Co. Cork. Ref: Eugene Carey.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76, No. 2 March 1982

Law and Order — or Justice ?

IT is salutary that Mr. Justice Henchy has recently suggested that there are wide areas of our Criminal Law and procedure which are in need of far reaching review. There is a danger that the favourable reception given by many politicians and the media to the arguments of the Commissioner of An Garda Siochana for changes in our criminal procedures may lead to an uncritical acceptance that the Garda proposals are well founded.

Relations between the legal profession and the Gardai have consistently been good, each side recognising, if not always approving, the different concerns which the prosecution and defence have in Criminal matters. It is with the aim of maintaining such good relations that it is suggested that a more critical look at the Commissioner's proposals is desirable, not only in the public interest, but also in the interest of the force itself.

The two principal suggestions for change in criminal procedure are for a restriction on the right to bail and for the removal or weakening of the suspect's right to silence during police questioning. Since the clarification by the Supreme Court of an accused's right to bail, spokesmen for the Gardai have from time to time alleged that crimes are regularly being committed by those who are on bail on other charges. If this is indeed the case, then it would be a strong argument for introducing an additional restriction on the right to bail. Unfortunately, statistical evidence to support the case has been notably absent. If it exists, it is perhaps symptomatic that it has not been produced.

However much lawyers might like to claim that, as is often alleged, skilled lawyers find technical defects in the prosecution's case, thus enabling the guilty to escape, it has to be confessed that on many occasions the cause of "not guilty" verdicts is the failure of the prosecution to marshall the evidence that ought to be at its disposal, rather than the forensic skill of the defence lawyers.

The right to remain silent in the face of police questioning is a protection for the innocent and any general diminution of this right would not be in the public interest. Not everyone who is suspected of a crime is actually guilty of that crime – to permit unsupervised police questioning, without the suspect having the right to remain silent, is to endanger the innocent without, in all probability, having any great effect on the guilty, particularly if they are not used to such questioning might well, on some occasions, not be resisted by police officers. If ing might well, on some occasions, not be resisted by police officer. If there is to be any diminution of the right to remain silent, then it can only be in the context of the presence of persons other than police officers at the questioning. The Scottish legal system and certain continental systems restrict the right to silence where the questioning is either carried on by or in the presence of lawyers who will later be involved in the prosecution process. Consideration might be given to the introduction of such systems, though subject to the usual warning that transplants of practices from one country to another are not always successful.

Other suggestions which have been made for reducing the current level of crime include longer or mandatory prison sentences and an increase in the number of the Gardai. Our prison population is, partly because of subversive crime, at a high level. It is an extremely expensive system – the old jibe that "the law is open to everyone – like the Ritz Hotel" has a new twist when the cost of keeping a prisoner in jail exceeds the cost of staying in a five star hotel – and there is little evidence that our penal system really works. Apart from subversive and other violent criminals, who may have to be kept in detention to protect the public, there is little or no evidence that our prison system does anything to rehabilitate anyone who is unfortunate enough to be committed to prison on more than one occasion. Other European countries (the United Kingdom excluded) have low prison populations and no higher incidence of crime than this country. Solutions other than fines or prison sentencing should be sought and the concept of community service orders, mooted in a White Paper issued by the Department of Justice in June 1981, is clearly a solution worthy of serious consideration.

Are more Gardai the answer? Perhaps it is the generally high integrity which characterises our police force which raises the presumption that its efficiency reaches the same level. It is notorious that only the special demands of "security" which have arisen since 1968 have brought to the Gardai the level of equipment which they themselves had sought for many years, but there are areas in which the force itself has been lacking. The question has to be raised whether exclusive recruitment at school leaving age, even with suitable training and experience, will necessarily provide the level of expertise and skills needed to officer a modern police force. The question cannot readily be answered because there must be considerable doubt as to whether sufficient attention has been made to the advance training of Garda officers. Until very recently no "staff – college" type of training existed at all in the force and while its introduction, even on a limited scale, must be welcomed, it appears to the outside observer that there is an element of "tokenism" about the present level of such training. There is very strong evidence that the level of intelligence and skill involved in criminal activities has increased considerably in recent years and no effort should be spared to ensure that such skill and intelligence is more than matched on the police side. It should be, as it is in our defence forces, a firm rule that promotion to the higher ranks should be limited to those who have successfully passed intensive "staff – college" type courses.

Finally, it has to be said that none of the recommendations eminating from any source will achieve the desired results unless there is considerable support for the police from the general public. We cannot expect to be protected by a police force if we are not at the same time prepared to offer positive assistance to the Gardai. "Not wanting to get involved" is an attitude which is too prevalent in Ireland in general and in our urban areas in particular. The positive commitment of the average citizen to the maintenance of the rule of law must be the best recipe for success in this area. □

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76, No. 2 March 1982

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

. . . The Rent Acts

The recent decision of the Supreme Court declaring the provisions of the Housing (Private Rented Dwellings) Bill 1981 to be unconstitutional is a mixed blessing. While the extension of the uncertainty which both landlords and tenants have faced since the Courts' earlier decision striking down the Rent Restrictions Act is obviously unsatisfactory, the opportunity which now arises to bring in a more satisfactory bill should not be lost.

The temptation for the Government simply to exclude the offending Section 9 of the 1981 Bill from a new measure should be resisted. It must be said in passing that the inclusion of Section 9 in the 1981 Bill was somewhat optimistic since, in the words of the Minister in the Seanad, it provided "an important subsidy for tenants in the initial years of the new tenancy" – a subsidy from the landlords, not from the State; an extension, indeed, of the kind of subsidy which had called the constitutionality of the Rent Acts into question; a subsidy, too, of little benefit for the tenant, being both modest and short-term. The State must now face up to a full subsidy to support such tenants as are unable to pay a market rent, in line with the commitment given in the Seanad by the Minister to "assistance for those people who are in difficulty or on low incomes and who find themselves in financial difficulty as a result of the increase in rents." A number of the provisions of the 1981 Bill will need to be looked at before they are reintroduced.

Section 4 of the 1981 Bill gave the Court the power to fix "the terms of every tenancy" but without giving any guide lines to the Court as to what the terms of a tenancy might be, other than as to rent. Some indication might well be given as to the line which the Courts should take on the liability for repair and insurance of the dwelling.

It is not at all clear whether Section 5 of the 1981 Bill confers a general right on both landlord and tenant to reapply to the Court to vary the terms of a tenancy where they have already been fixed by the Court, as opposed to a right to apply to the Court to have the rent reviewed.

Should not the illegimate offspring of the tenant's spouse (as well as such offspring of the tenant) be included within the meaning of a "member of a family"?

The need for a careful review of the 1981 Bill is highlighted by the comment in the Supreme Court's judgment that some of the provisions are "suprisingly unclear". "The Court drew attention to the omission to re-enact provisions equivalent to those in Sections 33, 34, 35 and 36 of the 1960 Act, which would appear to be essential for the proper operation of any rent control code." It is further hoped that any new Bill will not be rushed through the Dail under the guillotine procedure – as was the 1981 Bill. □

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Value-Added Tax — Property

by

Patrick Fagan, Solicitor

Premliminary

The basic concept of the scheme administered on foot of the Value-Added-Tax legislation has been with us sufficiently long as not to demand (at least in the present context) an analysis of its underlying philosophy. Its particular application in the property field has, however, a number of significant features and connotations, and a brief outline aimed at identifying some of the practical aspects of a fundamentally complicated subject may be of assistance.

Preamble

In the terminology of the V.A.T. enactments, we are here considering "immovable goods", which expression is defined as meaning "land", but can, by and large, be taken to include buildings and fixtures (though not necessarily fittings). Like most Revenue Law we have to grope and research before any kind of picture emerges. The basic charge emanates from Section 2, Value-Added Tax Act, 1972, the relevant part whereof, in its amended form, stipulates that a tax shall be levied and paid: –

> "on the supply of goods and services effected within the State for consideration by a taxable person in the course or furtherance of any business carried on by him and on goods imported into the State".

Criteria

Taking the matter a step further, the general proposition would seem to be that a taxable supply of immovable goods arises under the V.A.T. code where a party: –

(1) having an interest, (being, when created, for a period of at least ten years) in land
(2) which has been developed in whole or in part since 31 October, 1972

or

in relation to which or to the development whereof he became entitled to claim a deduction by way of tax credit

(3) disposes of that interest or an interest derived therefrom
(4) in the course or in furtherance of business

It can be stated with reasonable confidence that, under ordinary circumstances, all the foregoing points must be satisfied before there can be a V.A.T. liability. Exigibility can, however, also arise in other instances, the most notable of which are certain licences, compulsory purchases and transactions which are deemed to be "self-supplies".

Examples

With a view to demonstrating the general principles enunciated examples of a few specific property transactions are given and the outcome thereof in the V.A.T. context considered.

Sales

Builder A, owning a freehold or long-leasehold site, on which he has constructed a dwelling house since 31 October, 1972 will (assuming the application of the foregoing criteria) suffer a V.A.T. charge in respect of the sale of such property. If his purchaser is a non-trader, the tax element will presumably be allowed for and absorbed in the contract price. The property will be regarded as having passed out of the V.A.T. net, and tax will not be chargeable on subsequent transactions, unless an entitlement to a tax credit or deduction arises by reason of further development or otherwise. The case follows on lines similar to a purchase effected in a Department Store by a non-trader.

Landowner B will incur a charge on the disposal by him of sites, which he has had serviced post-31 October, 1972 in circumstances entitling him to a tax credit in respect of the relevant works.

Suppose that the foregoing sites are acquired by Contractor C with a view to constructing houses thereon for resale, the V.A.T. payable by Landowner B on the disposal thereof will probably be invoiced by him to Contractor C, who will be entitled to a credit for same and for the V.A.T. charged to him on building materials and the like. He will, however, suffer tax on the sale of each constructed house as in the case of Builder A (supra).

Taking the last situation a step further, we find Contractor C deciding to use one of the houses as his own private residence (viz. appropriating same for a purpose other than that of his business). This gives rise to a charge on the grounds that the appropriation is deemed to be a "self-supply" – as to which see further hereunder.

Tax will *prima facie* be chargeable in respect of the

surrender by Trader D of his thirty-five year Lease, where the circumstances are such that he became entitled to receive a credit in respect of V.A.T. suffered on the granting to him of such Lease.

Leases

In the context of the legislation a "disposal" of an interest embraces the "creation" of an interest, which, in effect, brings us directly into the realm of Leases, but (bearing in mind the special meaning attributed to the word "interest") we are here, for practical purposes, speaking only of demises of not less than ten years. Provided that the criteria herinbefore mentioned are observed, these will ordinarily attract V.A.T., which will be assessed along the lines referred to below.

Apart from the general situation with regard to Leases, there are a few peculiarities, which could conveniently be noted at this juncture: –

(a) Leases granted for terms of less than ten years are deemed to be "self supplies", and are dealt with separately as such hereunder.

(b) As mentioned above, Leases for not less than ten years (assuming that they otherwise qualify) attract V.A.T. on the granting thereof, but there is an added complication in respect of those within the ten to twenty year bracket. In these cases, tax is exigible not only on the creation of the demise, but also on the reversion, the latter being deemed to be a "self-supply".

(c) Reversions on foot of Leases granted for terms in excess of twenty years are deemed to be valueless, and there is, accordingly, no practical implication of "self-supplies" in their regard.

(d) So far as I have been able to ascertain, a Lease granted for, say, thirty-five years incorporating a right to terminate prematurely (even within ten years) is deemed to operate as a full disposal, the said right being ignored apropos V.A.T. on the creation of the Lease.

(e) A Lease granted ostensibly for a term of less than ten years, but with a contractual (as opposed to a statutory) right to extend such term beyond ten years is apparently treated by the Revenue Commissioners as creating a taxable interest.

Reversions – Disposals

Strictly speaking, it could be said that sales of reversionary interests are outside the scope of V.A.T. legislation, unless (to revert to a theme which has been previously mentioned, and which runs through the entire concept) there has been some circumstance giving rise to the re-incidence of taxation. This is not too likely, but it could conceivably happen if the reversioner were to embark on a further development. In the ordinary situation, Developer E, operating within the V.A.T. code, constructs an Office Block, which he lets on foot of Leases either (i) in excess of twenty years, (ii) in the ten to twenty year bracket, (iii) for less than ten years or (iv) representing a mixture of any two or indeed all three of the said categories. On a subsequent sale of his reversionary interest in the Block, it would appear that there should be no further liability in respect of V.A.T. If the matter falls entirely within (i), the reversion is deemed to be valueless for the purpose of this particular element of taxation. If (ii) applies, the reversion should have been dealt with on a "self-supply" basis following the granting of the relevant Leases, thereby taking same outside the realm of V.A.T., which latter result would also have been achieved on the creation of the demises exemplified at (iii).

The foregoing all assume that the Office Block will have been fully let prior to its proposed disposal. If, however, the sale was made while there was still therein an un-let area capable of being let, and which had not been the subject of a "self-supply", so much of the proceeds as would be attributable to the un-let section would attract V.A.T. As will be appreciated, this aspect of the transaction is, of course, not technically a disposal of a reversion.

"Self-supplies"

These represent a rather unusual and important concept, which, in the main, falls to be dealt with under three heads: –

(A) The type of situation envisaged above where Contractor C – being within the ambit of criteria (1) and (2) – occupied as his own private residence one of the houses, which he had himself constructed.

(B) The granting of Leases for terms of less than ten years in circumstances where the same two criteria apply to the Lessor.

(C) The creation of the reversion on foot of a Lease granted for a term in the ten to twenty year bracket, where the latter falls to be dealt with under the V.A.T. code.

Such cases must be strange intruders to the legal mind. Their V.A.T. entanglement is essentially attributable to the fact that the "disponer" will in some way or another have become entitled to an input credit of deduction, and I dare say that, in this context, (A) may have a certain logic. The reasoning underlying (B) and (C) may not manifest itself so readily. In the case of (C), the Lessor will, on the granting of the relevant Lease, be treated as having theoretically effected two supplies (both taxable), the first to the Lessee of the leasehold interest created, and the second to himself of the reversion thereon.

The V.A.T. payable on a "self-supply" may not be made the subject of a valid tax invoice to another, which, in effect, means that same must be absorbed by the "supplier" – viz. Contractor C in the example at (A) and the respective Lessors at (B) and (C). There could, I believe, be a contractual arrangement whereby the Lessee at (B) would refund to the Lessor an amount equivalent to the V.A.T. suffered by the latter, but I anticipate that the Revenue Commissioners, in dealing with the Lessee's V.A.T. Returns, would not countenance a claim by him for a credit or deduction in respect of the sum so refunded.

A "self-supply" takes the subject matter outside the V.A.T. code. The latter will not apply to a subsequent disposal, unless (in accordance with the axiom previously mentioned) the disponer takes a deduction or credit for tax charged, or unless he has incurred further expenditure on the property, in connection with which such a deduction or credit can be substantiated.

"Self-supplies" regularly present quite serious difficulties in terms of cash flow and profitability, and their significance should not be overlooked.

There seems to be some doubt as to the precise V.A.T. position with regard to certain temporary convenience arrangements. Factor F, having an immediate requirement for 10,000 square feet, but also having an eye to future expansion, takes a thirty-five year Lease of 15,000 square feet for a three year term. He is invoiced for V.A.T. on the granting of the thirty-five year Lease, for which he claims an input credit. I believe that the Revenue Commissioners will deem the short term letting to be a "self-supply" and taxable accordingly, but I know that some of the experts will contend that this is wrong on the basis that the transaction was merely of an incidental nature, and was not effected "in the course of furtherance of" Factor F's business. Alternatively, part of the V.A.T. reclaim may be disallowed on the ground that the surplus area was not occupied, and the question will then arise as to whether it is recoverable at the end of the three year term.

The right to opt for liability to V.A.T. on rents can counteract the adverse effect, which may result from the type of situation envisaged at (B) above. It may, accordingly, be opportune, albeit slightly out of context, to deal at this juncture with the V.A.T. implications of rents *per se*.

Rents

Rental income as such is (subject to certain exceptions) exempted from V.A.T., but the party in receipt of same may voluntarily waive the exemption, provided that his election covers all his rent producing premises. It is notable that the Revenue Commissioners appear to interpret the reservation of a rent on the granting of a term of not less than ten years as part of the consideration for the demise, and therefore covered, so far as V.A.T. legislation is concerned, by the tax chargeable on the granting of the relevant Lease. Seemingly, in the philosophy of V.A.T., such a rent ceases to exist. It is not, accordingly, effected by the exemption aforesaid or an election to waive same. Consequentially, the provisions as to election would seem to be limited to rents reserved by the (B) type Lease. It is expressly enacted that a "self-supply" represented by such a Lease is to be excluded from the V.A.T. levy in circumstances where the party concerned becomes chargeable to tax in respect of the rent thereunder.

A waiver of the exemption in respect of V.A.T. on rents may be cancelled, provided that the tax-payer refunds the excess of tax repaid to him over the tax payments made by him for the period, during which the election operated.

There are other factors which might be relevant in considering a possible waiver of exemption in respect of rental income. A Lessor, who is faced with substantial repairs might contemplate such a course, and it might also merit examination where there would be little inconvenience to his Lessees, as for example, where they, or a majority of them, are V.A.T.-registered.

The right to elect to waive the exemption in respect of rents is vested solely in the Lessor, and may apparently be operated even if the Lease itself contains no provision in such behalf. A Lessee, who is not an accountable party, may therefore find himself having to pay V.A.T. on rent without the right of reimbursement.

Amongst the exceptions to the general exemption applicable to rents are those derived from lettings in the course of carrying on Hotel businesses and from the provision of parking accommodation for vehicles by operators of car-parks.

Mortgages

Business Transfers

The granting of a Mortgage is outside the scope of V.A.T., as also is (save in certain circumstances) the transfer of ownership of property in connection with the disposal of a business or part of a business to another accountable person. However, where the basic criteria apply a mortgagor could be taxed on the loss by him of his equity of redemption.

Building Licences

There is a statutory provision to the effect that where an accountable person disposes of an interest in, or develops, property in circumstances involving the application of the criteria aforesaid, and, in connection with such disposal or development, some other person, who would not otherwise be regarded as an accountable person, disposes of an interest in relation to the property, than that other person shall apropos the disposal by him be deemed to be an accountable person and his disposal shall be deemed to be a supply made in the course of business. Thus a landowner will be regarded as a taxable person where, in consideration of the payment of a site fine by a builder, he permits the latter to construct a house on the site and thereafter assures an

interest in the site to the nominee of the builder. The liability will extend to the fine and to the value of the interest assured.

V.A.T. Chargeable

Perhaps the first point to be remembered under this heading is the fact that the charge is made on a proportion of what might be termed "the relevant figure". This proportion has varied from time to time since the introduction of the legislation, and currently stands at 20%. The balance is deemed to be zero-rated.

An exception to the foregoing arises where there is an election to waive the exemption on rental income. The resultant tax is chargeable on the full rental rather than on a proportion of same.

The means of establishing the relevant figure differs according to the nature of the transaction as will be seen from the following list of examples: –

1. In sales and kindred matters, it is the consideration receivable viz. the capital payment "including all taxes, commissions, costs and charges whatsoever, but not including value-added tax chargeable in respect of the supply".
2. In taxable self deliveries, the relevant figure is the tax-exclusive cost of development plus the cost of the site.
3. In the case of a reversionary interest it is the value thereof ascertained by deducting the value of the interest disposed of from the value of the full interest at the time at which the disposition was made. It will be remembered that where the interest disposed of is not to revert within twenty years, the reversion is deemed to be valueless.
4. In Leases (not ranking as "self-supplies") the relevant figure is the deemed capital value of the rent created, same being ascertained according to whichever of the following methods produces the lowest figure: –
   (x) valuation (open market basis) by a competent Valuer.
   (y) three-quarters of the annual amount of the rent multiplied by the number of complete years, for which the rent has been created.
   (z) by multiplying the initial annual rent by a fraction having 100 as its numerator and, as its denominator, the yield to redemption of the National Loan (redeemable not less that five years from issue) last issued before the creation of the rent.
5. In cases which combine, say, a fine and a rent, the relevant figure will be the aggregate of the amount of the fine and the deemed capital value of the rent.

The following further points should be remembered: –

(a) In establishing the capital value of rents only method (x) above may be utilised, where there is provision for an increase of rent within five years of the grant of the relevant Lease (because, for example, of an intervening review or because the rent is to be calculated to accord with turnover or profits).

(b) After some official vacillation, it seems now to be accepted that the yield on foot of (z) supra is to be that ruling at the issue of the Loan rather than at the date of the Lease.

(c) As matters currently stand, the lower rate (15%) of tax is to be applied to the chargeable element (20%) of the relevant figure, thereby producing an effective rate of 3%.

(d) The last pertinent National Loan is the 14¾% Development Stock 2002/04, which is understood to have had a redemption yield of 16.10% effectively converting the fraction at (z) into a multiplier of 6.21.

(e) Because of the different methods of computation, (some being founded in value and others in cost) the foregoing examples may well produce results, which superficially may appear to be contradictory.

(f) The foregoing examples may (assuming the application of the principle of V.A.T. exigibility) be exemplified by the following figures: –

A Straightforward sale for:	£100,000
Taxable element – 20%:	£20,000
V.A.T. @ 15%:	£3,000
B Self-supply	
Site cost:	£10,000
Development cost (exclusive of V.A.T.):	£90,000
	£100,000
Taxable element – 20%:	£20,000
V.A.T. @ 15%:	£3,000
C Lease – thirty-five years – rent reviews at five yearly intervals – initial yearly rent:	£10,000
Under (x) above a valuation must be obtained, and let us assume that same produces a figure of:	£140,000
Under (y) we get – ¾ × £10,000 × 35 =	£262,500
Under (z) the formula produces – £10,000 × 6.21 =	£62,100
Lowest = (z) =	£62,100
Taxable element – 20% =	£12,420
V.A.T. @ 15% =	£1,863

Fixtures/Furnishings

Where goods of different kinds and attracting tax at two or more rates are supplied under the V.A.T. regime for a consideration, which is referable to the entire and not segregated, there is a provision to the effect that tax is to be chargeable in respect of the whole transaction at the higher or highest of such rates.

Premises are frequently let with fixtures and furnishings already installed, and at a rent which embraces the entire. It is in this area that a very serious problem can arise, particularly, of course, if the intending Lessee

is not registered for V.A.T. purposes, and refuses to accept liability for the amount of the tax chargeable on the granting of the Lease.

The out-and-out fixture does not really present a difficulty in that the Revenue Commissioners are prepared to accept that same is part of the building, and that its supply on foot of the Lease should only attract tax at the lower rate.

An item which is clearly only in the nature of a furnishing will, if it is dealt with under the Lease and is deemed to add to the letting value, activate the foregoing provision, thereby rendering the entire transaction chargeable with the higher rate of tax applicable to it. Realistically, however, such a case should be avoided by dealing with the furnishing item separately from the Lease.

More difficult terrain is met when one is faced with the granting of a Lease for, say, thirty-five years at an initial inclusive yearly rent of £10,000 (reviewable at five year intervals) where the Lessor provides, within the terms of the demise, items which could be deemed to be fixtures (viz. part of the immovable goods) or furnishings – depending, perhaps, on whose behalf you are arguing. If we assume such Lease to have a capital value for V.A.T. purposes of £62,100, then the tax will be £1,863 as per (z) above, provided that it is established that the items in question are fixtures. If not, it would seem that the higher rate of tax will be payable, which is bad enough in itself, but begs the further question as to whether same is to be applied to the full amount of the relevant figure (as the Revenue Commissioners will very likely contend) or to a proportion thereof. Taking the respective higher and lower rates to be 25% and 15%, and assuming the capital value of the rent to remain static at £62,100, the following divergencies could emerge on the granting of the foregoing Lease: –

> If the items are established as fixtures, the taxable element of £12,420 will as heretofore, provide a V.A.T. liability of –
> (£12,420 × 15%) – £1,863
>
> If the higher rate is to be applied to the full capital value, the charge will amount to –
> (£62,100 × 25%) – £15,525
>
> If the higher rate is to be applied to the capital value after allowing for the proportionate reduction therein, the V.A.T. will come to –
> (£12,420 × 25%) – £3,105

From the foregoing figures, it will be seen that, in the V.A.T. context, it can be vital – particularly if you are dealing with a non-registered Lessee – to ensure that any items carried by the Lease are fixtures. The problem areas here usually relate to carpets, sanitary and like fittings and partitions, and, so far as I am aware, the Revenue Commissioners are prepared to concede that these are fixtures, if it can be demonstrated that they are so adhered or attached to the land or building that their removal would damage substantially either the items themselves or the building or structure, to which they have been adhered or attached.

Car-Park Licences

Lettings of areas in, say, a modern office block usually provide the Lessees with the utilisation of car-parking accommodation. This provision is effectively part and parcel of the Lease, and will, under ordinary circumstances, be covered by the V.A.T. charge thereon. There is, however, another type of case, which is now met with increasing frequency in practice – the separate long-term Licence (possibly running coterminously with a Lease) in respect of car spaces, where same is expressed not to confer any estate or like interest and provides only limited exclusivity. So far as I am aware, the official view is that this type of transaction attracts a V.A.T. liability – always, of course, assuming that the relevant criteria apply.

Management

Fees charged for property and/or project management are themselves *prima facie* within the scope of V.A.T. This consideration leads us into the somewhat difficult territory of service charges. Here, leaving the question of fees aside, the main problem pertains to the employment of personnel in the provision of the services. Different theories have been propounded. It is apparently accepted that the element of the charge attributable to wages paid by an owner, who manages his own property, will not attract a V.A.T. charge. However, the opposite position may well obtain with regard to such part of the ultimate charge as reflects payments to employees of an independent manager, particularly where the employment covers work spread over properties in different ownerships. Ordinarily, the constituents of a service charge, apart from those referrable to management fees and personnel engagement, will, I understand, be ignored for V.A.T. purposes, unless the party providing the services enters claims for input credits in their regard.

Registration

I do not propose to deal here on a general basis with the above topic, but it is, perhaps, worth mentioning that registration in respect of specific activities may be available to parties (as, for example, pension funds) who would not otherwise be within the scope of V.A.T. This can be a helpful measure in financing, joint-venture and other similar operations. Indeed in kindred cases there may be a requirement (as opposed to a choice) to register as where, for example, because of the structuring of a project, the involvement of the financing institution is, or equates to, that of owner.

Also in certain types of transactions it may be advantageous to give some thought to the possibility of effecting Group Registrations.

Minor Development

Comparatively minor development may be ignored for V.A.T. purposes, notwithstanding that a tax credit or deduction may have been claimed in respect of the outlay thereon. This concession is applied basically where there is no essential change in the use of the property, and provided that the outlay in question does not exceed 10% of the total amount on which tax would be chargeable if the work (represented by such outlay) were

to be treated as bringing the matter within the scope of V.A.T.

Building Contracts

I am advised that the Revenue Commissioners take the view that in V.A.T. terms, it is inappropriate to invoice for moneys periodically payable on foot of a Building Contract, until the project thereunder has been finalised (until, as contended, the supply of the service has been completed). By way of concession, it is apparently allowed, in the intervening period, that such invoices will be admitted in support of claims for input credits, provided that they have, in effect, first been converted into receipts.

Emphasis

The above may seem to evidence a vast number of complications. There are indeed peculiarities in the application of V.A.T. to property, but these are largely attributable to the particular nature of the latter, and the manner in which the scheme has had to be attuned to adapt to its many and varied facets. Broadly speaking, the system, as thus tempered, is workable. A genuine endeavour should be made to operate same correctly, and to limit, so far as may be possible, the cash-flow pressures, which can result from its administration.

I would, however, like to highlight the following problematical aspects, which tend to present fundamental difficulties warranting research in individual cases: –

1. "Self-supplies".

2. Leases for terms of not less than ten years to unregistered parties.

3. Cases where items (not clearly determinable as being part of the "immovable goods") are supplied under Leases reserving inclusive rents.

4. Arrangements involving the management of property and reimbursement for services.

In the natural order of things, a disponer will wish to recover V.A.T. from his disponee. This (as appropriate) will be done on an invoicing basis, but questions frequently arise between the parties as to the shoulders on which the liability for V.A.T. in respect of any particular transaction should lie. Almost apart from such procedures as have been established in the wake of the legislation, this can be a very contentious area, which can best be handled by prior agreement between the parties.

References

Most of the relevant provisions are to be found in the Value-Added Tax Act, 1972, Value-Added Tax (Amendment) Act, 1978, Finance (No. 2) Act, 1981 and Value Added Tax Regulations, 1979. Of these, perhaps, the most important in the property context are Sections 2, 3, 4, 10, 11 and 17 of the 1972 Act (most of which said Sections have been subjected to some form of amendment, extension or substitution by the other enactments mentioned) and Regulations 4 and 19. The Revenue Commissioners have themselves published (latest edition – July, 1980) a most useful explanatory booklet – "V.A.T. on Property Transactions" – which is almost essential reading.

Additionally, it must be said that the Senior Inspectors of Taxes are aware of the fact that many difficulties are posed by the application of the legislation to property. My own personal experience, which appears to be far from exclusive, is that they are not only understanding and helpful, but also prepared to discuss problems in the abstract.

Postscript

The foregoing is neither a summary nor a guide. It is certainly not an academic treatise. Its objective is merely to pinpoint certain salient features of a practical nature. There are numerous areas in this particular field of activity where consultation with "the experts" will undoubtedly be appropriate. I can only hope that this article will be of some assistance to the profession generally. □

Fiat Justitia

by T. D. McLoughlin, Solicitor

When Chief Justice Burger of the United States Supreme Court made a simple admission recently, as follows:

> "My criticism of Legal Education beginning when I tried to teach law long, long ago, was that it was good on principles and not good about people. The law in its broadest sense is not an end in itself – it is a tool – a means to an end. And that end is justice as nearly as fallible humans can achieve it – for people and their problems." (q.v. Law Society Gazette, March 1978) –

it is more than probable that followers of the doyen of American Supreme Court judges, Chief Justice Oliver Wendell Holmes, raised a dubious eyebrow. The judge, who only retired on reaching his ninetieth year, established a reputation for by-passing the concept of natural law, in its legal sense, rather than for observing it. From a series of biographical articles that were published after his death in 1935, the following is relevant

> "Two things about Justice Oliver Wendell Holmes need reconciliation. He had a very bad philosophy yet he ranks among the greatest men of his time. His philosophy was agnostic, materialistic, hopeless of the attainment of any ultimate truth, meaning or standard of value. As a result, it is fundamentally indistinguishable from the amoral realism of these regimes of force and power that are the scandal of the century . . .

This relation of Holmes to his age is well summarised by Max Lerner who says. "The fact is that Holmes's 'bad man' standard, *his rejection of natural law, and his definition of law as what the courts will in fact do* were all congenial to the mood and quality of a pragmatic American in whose practical business life the realm of fact had elbowed out the norms of reality." (Harold R. McKinnon in 36 American Bar Association's Journal, April 1950). Looking across from west to east one cannot help noting that in the late twenties members of the Aquinas Society heard an address in The Middle Temple, London, given by a Dominican friar (published at Blackfriars, Oxford, May 1929). It contained a profound definition of natural law ascribed to St. Thomas Aquinas and reads as follows:

> "Law, being a rule and measure, can be in a person in two ways; in one way as in him that rules and measures; in another way as in that which is ruled and measured . . . Wherefore since all things subject to divine providence are ruled and measured by the Eternal Law, it is evident that all things partake somewhat of the Eternal Law in so far as, namely, from its being imprinted on them they derive their respective inclinations to their acts and ends. Now among all others the rational creature is subject to divine providence in the most excellent way, insofar as it partakes of a share of providence by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end; and this participation of the Eternal Law in the rational creature is called The Natural Law."
>
> (Summa Theologica. 1 a, II ac. Qu. 91 Art. 2)

A few years after this address was delivered, an appeal from a refusal of a High Court Judge in London to grant an application of *habeas corpus* came before three judges.

The leading counsel in the matter was A.M. Sullivan, K.C., who had been at one time a member of the Irish Bar and had transferred to London to practise his vocation there. From the report of the case, it can safely be assumed that his submissions on behalf of the applicant were inspired by the Middle Temple address in which the definition of the Natural Law had been quoted. Mr. Justice Scrutton and Mr. Justice Slasser granted the appeal. Mr. Justice Green dissented. (*In re Carroll* [1931] 1 KB p, 317).

Returning to the American scene, an interesting development took place about 1946 when, in the Law School of Notre Dame University, Indiana, a Natural Law Institute was established. In 1949 an address was delivered to that Institute by Richard O'Sullivan K.C., Recorder of Derby, on The Natural Law and Common Law. It is a model of juridical erudition. (Published in The Law Review, University of Pitsburg, Summer 1950).

The late Mr. Justice George Gavan Duffy was one of the first to apply natural law concepts, when he contended that Irish citizens should be free to adopt laws that were compatible with the notion of national sovereignty and to reject those that did not.

> "If, before the Treaty, a particular law was administered in a way so repugnant to the common sense of our citizens as to make the law look ridiculous, it is not in the public interest that we should repeat this mistake. Our new High Court must mould its own *cursus curiae*; in so doing, I hold that it is free, indeed bound, to decline to treat any such absurdity in the machinery of administration as having been imposed on it as part of the law of the land; nothing is law here which is inconsistent with derivation from the People." (*Exham v. Beamish* [1939]I.R. p.348)

In another case he upheld the notion of justice for an official of local government when he declared that the law built up over decades could be unfair, as it was, in his view, "a tortuous labyrinth of an unexplored code." (*Devaney v. Dublin Board of Assistance.* 83 I.L.T.R. p.113)

On the need for recognition of natural law, the late Mr. Justice Cecil Lavery, when a member of the Supreme Court, countered an argument by counsel urging the retention of a medieval law by citing the philosopher Edmund Burke's epigram.

> – there is one law we must all obey, the law of change; it is the most important law of our nature and the means, perhaps, of its conservation.

The jurisprudence of British Courts, particularly of the House of Lords, still finds favour with Irish judges, though this operates more in the realm of Criminal Law.

On the issue of change of law, Lord Evershed made the following commendable pronouncement:

> One of the characteristics of our law is that its principles are never finally determined but are capable of extension and development as changing circumstances require, the material subject matter being "tested" and "re-tested" in the law's laboratories, namely The Courts of Justice.
>
> (*Rooke v. Barnard* [1964]Appeal Cases p.1185)

Changes in the legal system to make our criminal law more effective in curbing the growing crime rate are long overdue. Garda Commissioner Patrick MacLaughlin exposed the defects in the system in a paper read to members of the Law Society in 1979 (See Volume 73 of Gazette, pages 111 to 114). He reiterated his criticisms and spelled out the reforms needed in a paper read to the Law Students' Debating Society, reported in the National Press on 21 January 1982.

The Rt. Hon. Lord Denning, Master of The Rolls, in the Preface to his recently published book, The Discipline of Law, expressed, in the clearest of terms, his own thoughts on the subject:

> "my theme is that the principles of law laid down by the Judges in the 19th century – however suited to social conditions of that time – are not suited to the social necessities and social opinion of the 20th Century.

Lawyers in our State might emulate the distinguished author by showing a reluctance to adhere too closely to the maxim *nolemus mutare!* in the hope that not only shall justice be done, but be seen to be done, this living up to the aspirations of the motto of the Law Society – *Veritas Vincet.* □

Incorporated Law Society of Ireland

IMPORTANT NOTICE

Practising Certificates will not be issued in 1982 or future years unless the Solicitors' Accountants' Certificate is in order, i.e., a clear Certiticate has been lodged within 6 months of the solicitors' accounting date.

Where, on application for a Practising Certificate, an Accounting Certificate is not in order, the Solicitor will be notified in writing that the Practising Certificate cannot issue until the Accountants' Certificate is lodged and that should be done within one month. He will be informed that pending receipt of the Accountants' Certificate his remittance is being held in suspense account and that in the meantime, it is an offence to practice without a Practising Certificate.

After a lapse of one month, the solicitor will be informed that unless the Accountants' Certificate is received within a further month, disciplinary proceedings will be commenced without further notice and that, at the same time, the Bar Association and County Registrar will be notified that the solicitor is practising without a current Practising Certificate.

The situation regarding outstanding Accountants Certificates is reviewed at each Council meeting.

JAMES J. IVERS,
Director General

Myths and Myth-conceptions about Word Processing

by Bernard Sternin

TRYING to picture and prepare for the office of the future is serious business for those of us who will have to live there. Particularly in the area of word processing and the utilization of automatic typing equipment, changes are rapid, costs substantial, and the risks and consequences of going off in wrong directions far reaching. In those areas of practice in which paperwork costs are, or are becoming, a substantial part of total costs, the consequences of inaction or inappropriate action could be monumental.

Along with the growing interest in automatic typing equipment has come a plethora of pens racing to tell us what it's all about. People have come from faraway places to offer as insights propositions that have little foundation in reality. We have sometimes had visited upon us a deluge of folklore and fairy tales embraced and disseminated as fact and understanding. Some of these contentions are simply misleading; others are downright untrue. Here are 10 that qualify for the scrap heap.

Myth: Automatic typewriters are best used by the larger law firms.

Reality: Quite the contrary, it's the small firms that are making the most effective use of the equipment. Some of its leading advocates among bar association speakers are solo practitioners or those in firms of under five lawyers. Smaller firms tend to use the equipment heavily for prerecorded applications, larger firms more for text-editing applications. Productivity is *much* greater in the former type of use because keyboarding, the slowest part of word processing, is substantially reduced and sometimes almost entirely eliminated.

Myth: Automatic typewriters are basically symbol-manipulating devices. What you do with them is up to you. Editing text during the drafting of documents is one important use. The use of libraries of prerecorded systems materials is another. There are many other uses for these machines.

Myth: Preprints and automatic typing equipment offer alternative approaches.

Reality: Preprints and automatic typing equipment are *supplementary tools* in systems applications. Preprints can make a valuable contribution in speeding paperwork output if you are working with well-developed prerecorded materials. With planning, automatic typing equipment can be used to give preprints the flexibility they need. For example, you can use a group of prerecorded paragraphs to play out alternate language into a blank area on the form. Also, the equipment can be used to produce the referencing materials, court caption boxes, and the names and addresses of addressees, onto the form.

Myth: One of the reasons for getting automatic typing equipment is to reduce the number of secretaries you need in the office.

Reality: That's looking in exactly the wrong direction. You should be trying to *maximize* the number of secretaries supporting each attorney, and to maximize the number of machines supporting each secretary. The goal is to increase the capacity of each secretary and productivity of our *professional* people. That's what's behind the use of paralegals; that's what should be behind your use of equipment. In some of the most efficient offices each attorney is supported by several secretarial people and by a significant investment in equipment.

Myth: Getting your typing back in the fastest time possible is one of the reasons for using automatic typing equipment.

Reality: First-in-first-out is not the hallmark of a quality support staff. A really good staff examines incoming work and zeros in on what should be done first and what can wait, rather than doing it in the sequence in which it happens to arrive. The fetish of rapid turnaround time works to discourage thinking secretaries who are trying to balance highs and lows. Also, we should be trying to lay a foundation for the printing of as many materials as possible by equipment that feeds paper automatically. That requires a degree of planning that's undercut by placing a premium on fast turnaround time. What it all boils down to is this: Either a word processing facility is given the authority to run its own shop effectively, and in that way turn out everyone's work in ways that are best for the entire organization, or you resign yourself to its responding on a fire department basis to a group of disorganized lawyers who will be served in a sequence determined by politics, favoritism or ability to yell.

Myth: Automatic typewriters are expensive and have to be kept going continuously to justify their cost.

Reality: How much time a machine must go to justify its cost depends on how much the machine costs, how much your labor costs and how much the machine is saving. If an automatic typewriter costs 25 percent of an operator's salary and increases output by a third, you're ahead of the game. You can pick up some excellent reconditioned equipment for a few thousand dollars and, if you use it right, you can significantly increase the productivity of a secretary whose salary and fringe costs are likely to be well into five figures. See my article "How Much Will an Automatic Typewriter Save?"

Myth: You should get ready for "word processing" by examining the documents that are coming into your typing facility to determine what kind of automatic typing equipment will best produce them.

Reality: Later. First let's examine the documents to see if they could be *designed* in some better way. Could this dictated text have been in part prerecorded? Could this name and address have been captured as a byproduct of a prior typing? Could this printed form have been tied into a tab grid? Could the format of this multi-indented, tri-columnar, single-double spaced intermix have been simplified? Could the document have been structured in a way that groups variables in one section and text without variables in another? Could it have been designed so that part of it could have been generated by selecting from among stored paragraphs? Unless documents are examined for better ways of structuring them initially, your work will continue to come into your word processing facility in the same old way. Don't be like the pilot who announces that his plane is making excellent time, but that he's been going in the wrong direction.

Myth: If you can afford the extra cost it's better to have a television screen display on your automatic typewriter so you can see the text being worked on.

Reality: There is more involved here than meets the eye. When you have a TV screen on your typewriter instead of a roller or platen, the typing or "printing" part of the machine has to be designed as a separate unit. Some kinds of work become hard to do if the keyboard is separated from the printer. Think how you'd prepare a manuscript cover, a printed form, an affidavit of service, an envelope, a return receipt post card or a typed check on a television screen. Typewriters using TV displays are excellent tools for *text-editing* applications because you are working with only one kind of paper stock in your printing unit. But when you are working with an intermix of different kinds of paper stock, a stand-alone automatic typewriter that prints directly onto its roller may be more versatile.

Myth: By measuring the quantity of output (lines produced, etc.) you can judge the effectiveness of your word processing staff.

Reality: You can measure only the *quantitative* aspects of your staff's productivity. The *qualitative* aspects can only be *judged*. Word processing jobs are an intermix of both quantitative and qualitative factors, and many of the qualitative ones are in no way reflected by measuring output. These include such abilities as the capacity to resolve ambiguous, illegible or unclear dictation; to make intelligent format decisions; to determine the correct variable information to be added onto prerecorded materials without having to be told; to select the correct paper stock when it has not been indicated, or even when it has been indicated incorrectly; to prepare the customary number of carbon copies even though no copies were called for; to know when to consult a dictionary; to be able to handle basic correspondence on one's own; etc. Above all, we need to have secretarial help that is capable of understanding how automatic typing equipment can be made to do all the jobs it's able to do, and how to design documents and encode magnetic media appropriately. What's really devastating is that the clock watching, line counting, timekeeping efficiency experts with their quantity thinking may, in fact, be screening out of the word processing environment the kind of quality support staff we most need in it.

Myth: The one lawyer/one secretary arrangement is ineffective and must be replaced.

Reality: What's wrong with the one lawyer/one secretary arrangement is that it's unthought about. Under some circumstances it may in fact be extremely effective. Where it is, it should be retained; where it's not, it should be replaced. But what's really important is that you ought to be thinking about alternatives.

What is the ultimate reality? Perhaps it's that there is no one in charge of *methods*. Individual lawyers and secretaries do their thing in their own way. Sometimes well, sometimes poorly, sometimes differently from the time before. Perhaps it's that no one thinks about how each job could have been done better, and no one asks how the best method could be institutionalized. Perhaps it's that no one cares about efficiency. Perhaps we delude ourselves with the belief that we somehow offer a service so unique that its efficient delivery is of no consequence. Perhaps that will some day be seen as the ultimate myth.

Bernard Sternin is a systems analyst and consultant in the fields of word processing and automated typing, particularly as related to law office practice. An attorney, he is a co-author of How to Creat-A-System for the Law Office, *published by the Section of Economics of Law Practice.*

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Practice Notes

Form of Execution Order

The attention of members is drawn to the necessity to provide in Execution Orders for payment of interest at the current rate. Practitioners are warned that some of the printed forms of Execution Order at present in circulation contain no provision for payment of interest. Others provide only for payment of interest at a rate of 4%, whereas interest is now payable at 11%.

Judgment Papers in Circuit Court

The County Registrars Association have confirmed to the Society that they have no objection to the use of the new printed Composite Form of Judgment Papers which embodies all previous forms with the exception of the Execution Order. Members are warned that this view is not binding on all members of the Association, and if there is difficulty, it is recommended that members should raise the matter with their local Bar Association.

For Your Diary . . .

28 - 29 April, 1982. Chartered Institute of Arbitrators (Irish Branch).

2 Day Course in Arbitration.

Jury's Hotel, Dublin.

Course Fee: £90.00.

12 - 31 July, 1982. Centre for Commercial Law Studies. Queen Mary College (University of London).

Commercial Law Summer School, 1982.

Programme and full details available from Centre for Commercial Law Studies.,
339 Mile End Road, London E1 4 NS.
Tel: 031-980 4811

"The Motorist and the Law" Seminar
30th January, 1982, Blackhall Place.

The Attorney General, Mr. Peter Sutherland, S.C. (centre) with Mr. Dermot Ryan (left), Claims Manager, Royal Insurance Group and Mr. Michael P. Houlihan, Senior Vice-President, Incorporated Law Society.

Contractual and Statutory Remedies for Misrepresentation

by

Brenda Hannigan, Lecturer in Law, University College Cardiff, and Alex Schuster, Lecturer in Law, Trinity College, Dublin.

PART V of the Sale of Goods and Supply of Services Act 1980 provides statutory remedies for misrepresentation similar to those enacted in the U.K. Misrepresentation Act 1967.[1]

This article examines the new provisions and makes suggestions for further reform.

"Contract"

Section 43 provides that "contract in this Part means a contract for the sale of goods, a hire purchase agreement, an agreement for the letting of goods or a contract for the supply of a service". There is no equivalent to this section in the English legislation which applies to all contracts. The Irish provision is limited to selected categories of contracts, the most obvious exclusion being contracts relating to land and houses. Whether this is a satisfactory approach to adopt will be considered later. It will be seen that it is precisely in respect of contracts for the sale of land and houses that many of the difficulties have arisen, for example, in relation to misrepresentations made by auctioneers or vendors.

There are, than, two branches of the law of misrepresentation, with certain contracts governed by statute while others remain subject to the common law.

An important consequence of this segregation is in respect of the rule laid down in *Wilde v. Gibson*[2] and *Seddon v. North Eastern Salt Co.*[3] followed here in *Lecky v. Walter*[4]. This rule provided that there could be no rescission for innocent misrepresentation where the contract had been performed. Section 44 (b) purports to abolish the rule, but because its application is restricted by section 43, the rule will continue to apply to contracts for the sale of land and houses.

Removal of certain bars to Rescission

Section 44 (a) provides that where a person has entered into a contract, after a misrepresentation has become a term of that contract, then, if otherwise, he would be entitled to rescind the contract without alleging fraud, he shall be so entitled. This is the equivalent of section 1 (a) of the U.K. Act.

This provision covers the situation where a representation actually becomes a term of the contract. It had been the case that where the representation merged in the subsequent contract, the representee is left only with such rights as may be available under that contract[5]. Section 44 (a) alters this position.

The remedies available for breach of a contractual term depend upon whether that term is a condition or a warranty or an innominate term. Where the term broken is only a warranty, then the injured party is only entitled to damages. However, should he under this provision, elect to treat the term broken as a misrepresentation, he will be entitled to rescind the contract, notwithstanding the fact that the term broken is only a warranty. It should, however, be noted that it is a necessary requirement that the representee "would otherwise be entitled to rescind". Wylie notes that this requires proof that the misrepresentation induced the contract. This, he suggests, may not be possible if the representation has been reproduced in the terms of a contract[6]. See *George Wimpey & Co. v. John* [1967] Ch. 487.

Another possibility is that even if the plaintiff can overcome this hurdle and seeks rescission for what is a breach of warranty under section 44 (a), the court may exercise its discretion under section 45 (2) to award damages in lieu of rescission. So the injured party may be no better off than if he had sued for breach of warranty. That is, of course, unless the measure of damages for breach of warranty and for misrepresentation is different.

While some cases have held that the measure of damages for non fraudulant misrepresentation should be the same as for breach of contract[7], others have taken the view that the yardstick is that for deceit or fraud, being without the limitation as to foreseeability that applies in damages for negligence[8].

The English Law Reform Committee recognised that "some anomalies and much uncertainty result from the distinction between the legal consequences of misrepresentation and of a breach of contract.[9] Section 44 (a) abolished the artificial distinction between the independent misrepresentation (which sometimes enabled the contract to be rescinded) and breach of an identical term in the contract itself (which gave only a right to damages). Although section 44 (a) narrowed the dividing line between a contractual term and an independent misrepresentation, it is submitted that the mischief referred to by the Law Reform Committee will be perpetuated unless the measure of damages applied under section 45 (2) is the same as that in contract.

Section 44 (b) provides that where a person has entered into a contract after a misrepresentation has been made to him and the contract has been performed

then, if otherwise, he would be entitled to rescind the contract without alleging fraud, he shall be so entitled. This section refers to the limitation discussed above in relation to section 43 whereby rescission cannot be obtained for innocent misrepresentation when the contract has been performed. Section 44 (b) seeks to abolish this rule and permit recission for innocent misrepresentation notwithstanding the fact that the contract has been performed, provided the contract is one of those listed in section 43.

This limitation, is in fact in accordance with the recommendations of the Law Reform Committee. The Committee recommended that the rule in *Seddon v. North Eastern Salt Co.* should be abrogated re contracts other than those for the sale of an interest in land, while the rule in *Wilde v. Gibson,* re contract for a sale of an interest in land should be retained, finality in these cases being the predominant consideration[10]. The U.K. provision, section 1 of the 1967 Act, in fact abolished the rule in respect to all contracts.

The U.K. provision, moreover, falls foul of the traditional doctrine of merger[11] which provides that on completion the contract for sale merges in the conveyance and the parties loose the remedies that were available to them under the contract. Instead they must rely on the remedies available for breach of the covenants in the conveyance.

Wylie is critical of the manner in which section 1 ignores the doctrine of merger by permitting recourse to contractual remedies, after the conveyance has been executed, while, as will be seen later, section 2 of the 1967 Act (section 45 (2) of the Irish provision) reasserts the traditional position and excludes the possibility of damages (i.e. a contractual remedy) where the contract has merged with the conveyance[12].

These difficulties are avoided by the Irish provisions, limited as they are to contracts for the sale of goods, hire purchase agreements etc. as per section 43.

As with section 44 (a), 44 (b) is subject to "the provisions of this Part". Thus, if a party were to seek rescission for innocent misrepresentation of an executed contract under section 44 (b), the court may, under section 45 (2), in its discretion award damages in lieu of rescission. One key consideration, in deciding whether or not to declare a contract subsisting and award damages in lieu of rescission, is whether or not *restitutio in integrum* is possible.

Damages for Misrepresentation

Section 45 (1) empowers the court to award damages for non fraudulent, careless or negligent misrepresentation[14]. The equivalent U.K. provision is section 2 (1) of the 1967 Act. Prior to the enactment of the 1980 Act damages for negligent misrepresentation were available only within the confines of the law laid down in Hedley Byrne[15].

This section changes the burden of proof, requiring that the representor prove that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. The representations must also have resulted in the representee entering into a contract.

It seems likely that it will be easier to obtain damages for negligent misrepresentation under section 45 (1) than at common law. Firstly, because of the shift in the burden of proof. Secondly, because there is no need under section 45 (1) to prove that "special relationship" which is required at common law by *Hedley Byrne*[16].

Section 45 (2) gives the court a discretion to award damages in lieu of rescission, if it is of opinion that it would be equitable to do so having regard to the nature of the misrepresentation and the loss that would be caused by it, if the contract were upheld, as well as the loss that rescission would cause to the other party.

A number of factors must be satisfied. The plaintiff must show that he 'would be entitled' to rescind the contract, otherwise the court cannot exercise its discretion to award damages. Wylie notes that this can be very harsh on a purchaser who looses his right to rescind, not because of his own conduct, but because of the intervention of third party rights acquired without notice of his equity[17]. The purchaser in such a situation may find himself without a remedy.

Secondly, the court can exercise its discretion only in "any proceedings arising out of the contract". In the context of the U.K. provisions, this provision seems to reassert the doctrine of merger, excluding the court's discretion to award damages where the contract has in fact merged in the conveyance, after completion. The injured party is then forced, as was the traditional position, to rely on the covenants in the conveyance.

The paradoxical positon that results from the U.K. provisions has been noted above. The Irish provision, by reason of section 43, avoids these complications.

We have already noted some of the situations where the court may exercise its discretion to award damages in lieu of rescission, for example, under section 44 (a) where rescission is sought for a breach of warranty.

No general right to damages for innocent misrepresentation exists. However where the contract has been performed and rescission granted under section 44 (b) then the court may award damages in lieu under section 45 (2). Thus, in this indirect way, damages may be obtained for innocent misrepresentation. In all other cases (i.e. contracts outside the scope of section 43 and 44 (b)) the injured party will have to rely on the common law of indemnity.

This discretion to award damages in lieu of rescission is of most importance in relation to contracts for the sale of land and houses. For example, if a Vendor of a house makes an innocent misrepresentation that the house is "dry and free from damp" [18] it can be extermely embarrassing for him if the Purchaser seeks to rescind the sale after the Vendor has invested the entire proceeds of the sale in a new house and has moved in with his wife and family.

This would have been the ideal situation for the court to exercise its discretion under section 45 (2). However section 43 excludes contracts for the sale of land and houses from the provisions of Part V of the 1980 Act thus rendering section 45 (2) inapplicable in the situation in which it could be most valuable applied.

Therefore, while excluding contracts for the sale of land, helps to avoid the difficulties with the doctrine of merger outlined above, in other situations, it can cause hardship, by depriving a purchaser of a right to damages in lieu of rescission which may be too drastic a remedy. However, in practice, the Incorporated Law Society's General Conditions of Sale will provide house purchasers with a contractual, as distinct from statutory, right to damages while excluding their right to rescind for misrepresentation. The relevant section of Condition 21 (2) reads as follows:

> ". . . any error, omission, or misstatement in the Particulars of these Conditions or in the course of

any representations or negotiations leading up to the sale shall not annul the sale or entitle the Purchaser to be discharged from his purchase but shall entitle the Purchaser or the Vendor (as the case may require) to compensation in respect thereof . . ." [19].

Practical as this may be, the condition does not have the inherent flexibility of section 45 (2) which leaves it to the courts to decide whether damages or rescission is the appropriate remedy in each case.

Section 45 (3) provides that damages may be awarded under section 45 (1) and under section 45 (2). However, these damages are awarded under section 45 (2), i.e. in lieu of rescission, this shall be taken into account in assessing liability for damages under section 45 (1), i.e., a liability for negligent careless or non fraudulent misrepresentation.

The section, however, provides no guidance for the judges as to, for example, whether damages in lieu of rescission for negligent misrepresentation, under section 45 (2) are to be the same or larger or smaller than damages under section 45 (1).

Provisions excluding liability for Misrepresentation

Section 46 provides that:

'if an agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict:

a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made or

b) any remedy available to another party to the contract by reason of such misrepresentation

that provision shall not be enforceable unless it is shown that it is fair and reasonable.'

The 1980 Act only applies to contracts made after the 31 December 1980[20]. An exception is section 46 which applies to any agreement whether made before or after the commencement of the Act. This provision has rather strange consequences. Clauses excluding liability for breaches of contractual terms, in contracts made prior to the 31 December 1980 are not affected by the provisions of the 1980 Act. However, clauses excluding liability for misrepresentation made prior to the operation of the Act are, by reason of section 46, subject to the requirement that they be fair and reasonable. A requirement that could conceivable apply to all contracts made six years prior to the commencement of the 1980 Act[21]. This provision, like section 44 (a), only serves to underline the uneasy relationship within these statutory provisions of misrepresentations and terms. It is also an example, of obscure wording, having a result never contemplated by the legislature. There is no such provision in the English legislation and it has now been removed from the Northern Ireland legislation also[22]. Section 46 should, like the other provisions of the Act, have been limited to contracts made after the commencement date.

The equivalent U.K. provision is section 3 of the 1967 Act which Cheshire and Fifoot suggest is a model to be avoided if legislation is sought to deal with the problem of exemption clauses[23]. The position in England since the decision in *Overbrook Estates Ltd. v. Glencombe Properties*[24] is that it is perfectly easy to avoid section 3 and the same will undoubtedly occur in relation to section 46.

This case concerned the particulars of sale drawn up by an auctioneer which contained the provision that 'neither the auctioneers nor any person in the employment of the auctioneers has any authority to make or give any misrepresentation or warranty'. The defendants alleged misrepresentation, in respect of development plans of a local authority concerning property which the defendants purchased. It was held that even if the defendants could prove their allegations they would be defeated by the clause set out above. The clause did not offend section 3 since it was not an exemption clause but only a limitation on the apparent authority of the auctioneer. Cheshire and Fifoot[25] suggested that had the draftsmen foreseen the decidion in *Overbrook*, he would have proceeded differently. Yet the error is repeated in section 46. This indicates the problems that can arise where legislation is "lifted" straight from the U.K. Act without sufficient regard to subsequent developments.

In any event, Wylie suggests, an agreement could not be taken to apply to "pre contractual statements such as replies to preliminary enquiries or to particulars provided by auctioneers or estate agents."[26] One provision which would, however, seem to fall within the limited ambit of section 46 is Condition 18 of the Law Society's General Conditions of Sale, purporting as it does to exclude or restrict liability for misrepresentation. Condition 21 (1) which entitles a house purchaser to damages for misrepresentation but precludes him from rescinding the contract is unaffected by section 46.

Damages and the Failure to Show Title

The right of a purchaser to recover damages for breach of contract by a vendor who fails to show good title in the property in question is governed by the Rule in *Bain v. Fothergill*[27]. This Rule states that, provided the vendor has acted in good faith and not fraudulently, the purchaser can only recover his deposit plus interest and any expenses incurred in investigating title. The purchaser in such circumstances may not recover damages for loss of bargain, contrary to the general rules of damages. The Rule was originally justified by the complexities of investigating title decades ago. Today it is regarded as something of an anomaly but it has yet to be discarded, either here or in the U.K.[28] However the English courts have shown a willingness to restrict the application of the rule, at least where it falls foul of a modern statutory provision, see *Wroth v. Tyler* [1974] 1 Ch. 30 re Matrimonial Homes Act 1967.

More important, in the context of this article, is the case of *Watts v. Spence* [1975] 1 WLR 1039. Here the defendant, contracted to sell his house to the plaintiff, without the consent of his wife who was in fact a joint owner of the property. The wife subsequently refused to join in the sale and the plaintiff sued for specific performance or alternatively damages for misrepresentation. Graham J, refused specific performance and held that the damages to which the plaintiff would be entitled at common law were restricted by the Rule in *Bain v. Fothergill*. However, the defendant had made a false statement, one which he did not believe to be true nor did he have any reasonable grounds for any such belief, which induced the plaintiff to enter the contract. As such the situation was governed by section 2 (1) of the

1967 Act (section 45 (1) of the 1980 Act). Accordingly the plaintiff was entitled to recover, against the defendant, damages for the loss of his bargain. (Note, Treitel disputes the right to recover contractual damages under a provision based on tortious liability and there is confusion as to the actual nature of the damages awarded in *Watts v. Spence* – see Treitel, The Law of Contract 5th ed. pp. 267 et seq.).

In any event, such a use of Part V of the 1980 Act is not open to the Irish courts, limited as it is to contracts for the sale of goods, hire purchase agreements and the supply of services, see section 43.

It remains to be seen whether limiting Part V to such contracts is the correct approach to adopt. It has been seen that the retention of the Rule in *Wilde v. Gibson* is justified by the need for finality in land sales. Problems with the doctrine of merger have also been avoided. However it is equally clear that, by excluding contracts for land, certain house purchasers may be left remediless save for the contractual right to damages under the General Conditions of Sale. Moreover a means of reducing the impact of the Rule in *Bain v. Fothergill* has been lost. On balance two classifications governed by different statutory or common law rules can only add to the confusion that surrounds the law of misrepresentation.

Summation:

There are a number of defects apparent in Part V. Firstly, problems arise from the failure to legislate in positive rather than negative terms, for example, the right to damages for innocent misrepresentation arises only indirectly. Secondly, we have seen the difficulties involved in 'lifting' English provisions, for example in relation to sections 44 (b), 45 (2) and 46. Thirdly, and most importantly, the provisions show the difficulty of trying to legislate for misrepresentation solely in relation to certain categories of contracts. What was required was a separate short Act dealing with the entire area of misrepresentations. Such a uniform approach coupled with knowledge of how the English provisions have worked since 1967 would have been a very valuable addition to the law of contract. As it stands, Part V has little to recommend it.

Footnotes:

1. See also Misrepresentation Act (N.I.) 1967 - discussed in J.C.W. Wylie, Irish Conveyancing Law, s.6.70 et seq.
2. [1948] 1 H of L cas. 605.
3. [1905] 1 Ch. 326.
4. [1914] I.R. 378.
5. See *Pennsylvania Shipping Co. v. Cie Nationale de Navigation* 1936 155 L.T. 294 - see Wylie 6.68.
6. Wylie 6.70.
7. *Gosling v. Anderson* [1972]. C.L.Y. 492, *Jarvis v. Swan Tours* [1973]1 Q.B. 233, Lord Denning at p. 237, *Davis & Co. (Hines) v. Afa Minerva (EMI) Ltd.* [1974] *2 Lloyds Rep. 27.*
8. *Doyle v. Olby (Ironmongers)* [1969] 2 W.L.R. 673, *Watts v. Spence* [1975] 2 W.L.R. 1039, *F & H Entertainments v. Leisure Enterprises Ltd.* [1976]120 Sol. Jo. 331. *Howard Marine & Dredging Co. Ltd. v. Ogden & Sons Ltd.* [1978] 2 W.L.R. 515.
9. Law Reform Committee, 10th Report, Innocent Misrepresentation (Cmnd. 1782) para. 2.
10. N.9 above para. 6-8.
11. See Wylie 19.02.
12. See Wylie 6.71.
13. See Actionable Misrepresentation (Turner ed.) (3rd ed.) 1974 (Butterworth) p. 255.
14. See Turner n.13, Chapter XII, also Wylie 6.71.
15. *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.
16. The Irish Courts have applied Hedley Byrne restrictively - see *Bank of Ireland v. Smith* [1966] I.R. 646 as applied in *Stafford v. Keane Mahony Smith*, 21 March 1980, H. Ct. unreported.
17. See Wylie 6.71.
18. As in *Carbin v. Somerville* [1933] I.R. 276 although that was a case on fraudulent misrepresentation.
19. Incorporated Law Society of Ireland, General Conditions of Sale, condition 21 (2).
20. Sale of Goods and Supply of Services Act 1980, s.4.
21. Statute of Limitations 1957, s.11 (1) (a). This presupposes that the statutory period of limitation of actions for non-fraudulent misrepresentation is the same as for actions for breach of contract.
22. S. 3 of the N.I. Act and the U.K. Act were both replaced by s. 8 of the Unfair Contract Terms Act 1977. Note this new provision refers to contracts and not agreements.
23. 9th ed. at p. 278.
24. [1974] 3 All E.R. 511. Other English cases include *Cremdean Properties v. Nash* [1977] 241 E.G. 837, *Howard Marine and Dredging Co. v. Ogden and Sons* [1978] 2 W.L.R. 515.
25. 9th ed. at p. 278.
26. See Wylie 6.73.
27. (1874) L.R. 7 H.L. 158.
28. See Wylie 12.78 et seq. See also O'Driscoll, [1975] 10 Ir. Jur. 203, where *Bain v. Fothergill* is discussed.

BOOK REVIEW

Arnould's Law of Marine Insurance and Average by **Sir Michael J. Mustill and J.C.B. Gilman**
16th Edition, 1981. Sweet & Maxwell. £95.00 (Sterling)

At first sight there will be many who think that the subject matter is not of interest to Irish Solicitors but we are a maritime nation and there cannot but be occasions on which Lawyers and Insurance Companies will have to deal with claims in this area not to mention on those Commercial interests which have to arrange the Insurance on ships and cargoes which give rise to such claims.

This is the 16th edition of a book of which the first edition appeared in 1848 and which, according to the preface, is a treatise on the principles, to a great extent unchanged since formulated in the 18th and 19th Centuries, of Marine Insurance. The Authors describe the original work as "a Masterpiece, in the forefront of the great writings on Commercial Law in the English language".

The Authors have retained the style, form and content of the original work so far as consistent with bringing the work up to date – 31st of July, 1981. There are 1,359 numbered paragraphs in nearly as many pages, 60 pages of table of cases, a table of Statutes and a comprehensive subject index of 25 pages (referring to paragraph numbers). The entire is divided into 4 parts entitled: –

(i) The nature, formation and subject matter of the Contract of Marine Insurance;

(ii) Matters rendering the Contract of Insurance void or unavailable;

(iii) Losses, and the relations of the assured and underwriter thence arising; and

(iv) Procedure and evidence.

Appendices contain the Marine Insurance Act 1906; Specimen Slip, Institute Clauses and Warranties; the York-Antwerp Rules 1974 and the Rules of Practice of the Association of Average Adjusters.

The book is divided into 2 Volumes of which Volume 1 contains Part I and Volume 2 contains Part II, III and IV and the Appendices. Each Part contains the entire subject index.

The presentation is good. Each Part is divided into Chapters and each Chapter into numbered paragraphs with headings in bold type. The main type is large and clear and the language used equally clear. The text is supported by copious notes also easily legible.

The subject matter is dealt with in a clear logical manner which makes it easy to follow. It is not unnecessarily incumbered by detail. For instance, in dealing with implied warranties, Chapter 20, while making a passing mention of nationality, documentation and legality and where the law on these may be found, confines itself nearly entirely to the warranty of seaworthiness but deals with this in considerable detail.

For any one who has to deal in any way with the drafting, amending, or advising on the contents of a Policy of Marine Insurance; or interpreting such a Policy; or advising, negotiating or processing a claim under such a Policy either in relation to ship or its cargo this book may be regarded as a first class instrument, if not an indispensable one, the use of which should make the user's job so much easier and more efficient. Like any other first class instrument however, or, for that matter, like Insurance itself, the price of £95 sterling (which will probably give rise to a price in Ireland of about £130) may be considered expensive until it is called into use. It should however be a must for legal Libraries and high on the list of priorities for anyone dealing on any regular basis with this aspect of Marine Law.

The Book is one of the British Shipping Laws Series which itself has a very good reputation.

G. J. MOLONEY

Correspondence

February, 1982

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

Dear Sir,

Your Editorial "Comment" – "Tinkering with the Constitution" in the issue of the Gazette of October 1981 is indeed deserving of serious thought and I am sure many other lawyers and citizens would agree with these views.

However, as to the comment re. recognition of foreign decrees of divorce and the suggested alteration of Article 41.3.2 of the Constitution I think that this proposition would not seem necessary nor advisable having regard to recent decisions of the Courts in this area.

In the Judgment of Kenny J. in the High Court in the case of *Bank of Ireland v. Caffin* [1971] I.R. 123, he recognized a foreign decree of divorce where *both parties* had been *domiciled* in a foreign jurisdiction and held in that particular case that the testator's second wife whom he had married in Dublin after the decree nisi was made absolute was his legal spouse for the purposes of the Succession Act 1965.

Having regard to the other provisions of Article 41 in relation to the guarantee of the State for the support and protection of the institutions of Marriage and the Family I think that this interpretation by the High Court sufficiently lays down a guiding principle which would appear to be a workable one and to be effectively in accordance with the principles of private international law in relation to foreign decrees. The same principle was also applied later by Kenny J. in *Counihan v. Counihan* (High Court unreported 27 July 1973) and by the Supreme Court in *Gaffney v. Gaffney* [1975] I.R. 133. Accordingly the fact of domicile of both recognition principle could be applicable within the general provisions of Article 41 in relation to the institutions of Marriage and the Family. (See "Cases and Materials on the Irish Constitution" by James O'Reilly and Mary Redmond at Chapter 18).

In an Article entitled "Foreign divorces obtained on the basis of residence and the doctrine of estoppel" (9 I.R. Jur. 1974 page 59) Mr. William Duncan speculates on the possibility as to whether the Courts would expand the grounds of recognition to residence-based divorces and on the wife's domicile of dependency and suggests recognition of divorces granted by a Court of either party's domicile. But surely would not such a solution of necessity operate with possible serious and unjust results both for the party not domiciled in the particular jurisdiction of the Court Order and of course also the children in particular of such marriage? I think that the case of *Gaffney v. Gaffney* already referred to is a clear illustration of this.

This matter is indeed of great importance in relation to the devolution of property in this country and also to the disposition of property having regard to the Family Home Protection Act 1976.

As to the latter it would appear to me accordingly that a Court Order of this jurisdiction should be called for rather than a Statutory Declaration exhibiting a foreign decree of divorce in cases where it is claimed by a Vendor that a property is not a Family Home within the meaning of the Family Home Protection Act 1976. Precedent No. 5 of Supplement to Gazette of April 1981 "Guide for Students of Law Society Professional Course" does not appear to be sufficient or appropriate therefore in these cases.

The Constitution has indeed served us well as have also the Courts in interpretation and application of same. There is at this stage a whole body of jurisprudence built up around the Constitution which is of inestimable value.

The Constitution has however been under somewhat heavy criticism in recent years by writers and lecturers in the law and this attitude, verging almost on denigration of the supreme law of the State, is unfortunately perhaps not a healthy diet for young students of the law, seeing that it has proved to be a solid basis for the stability of our institutions and to be of good balance. It has constantly been rejuvenated and enriched by way of interpretation by the Courts. Its foundation is the secure objective principles of the Natural Law.

It could be added finally that in Ireland there should be no necessity for apology or embarrassment for its Christian base.

Yours faithfully,
Brendan Fitzgerald, B.A. LL.B.,
Solicitor,
59 Offington Park,
Sutton,
Dublin 13.

Editorial Note:

The case for an alteration in the Constitutional restriction on the recognition of foreign divorce is based partly on the difficulty of establishing the domicile of the parties at the time of the foreign divorce and partly on the fact that in many cases which concern Irish practitioners the complexities of the doctrine of domicile have been increased rather than eased by the abolition in the United Kingdom of the wife's dependent domicile in the United Kingdom under the provisions of the U.K. Domicile & Matrimonial Proceedings Act 1973. See Shatter Family Law in the Republic of Ireland 2nd Edition Pages 152 - 157.

Note from Authors of the Handbook for Students

The authors of Handbook for Students agree that it would be inadvisable to accept a statutory declaration exhibiting a foreign decree of divorce as sufficient without making detailed enquiries as to the likelihood of the foreign decree of divorce being recognised in this jurisdiction. They doubt whether Court Orders declaring such divorces to be valid in the Republic of Ireland would be readily obtainable. There is no obvious procedure available for the obtaining of such Orders. A Vendor and Purchaser Summons could of course be taken out but the complexities involved make the subject an unsuitable one for determination on a Vendor and Purchaser Act Summons.

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated this 25th day of March, 1982.

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

1. REGISTERED OWNER: Peter Howley, Ballymoghany, Corballa, County Sligo; Folio No: 13911; Lands: (1) Ballymoghany, (2) Ballymoghany, (3) Carrownurlar; Area: (1) 21a. 1r. 12., (2) 0a. 3r. 8p., (3) 6a. 1r. 20p; County: **SLIGO.**

2. REGISTERED OWNERS: Patrick and Eva Gaughan, Main St., Ballaghadereen, Co. Roscommon; Folio No: 5927; Lands: Ballaghadereen; Area: 4a. 1r. 6p; County: **ROSCOMMON.**

3. REGISTERED OWNERS: Eugene G. Scanlan and Una Scanlan; Folio No: 1808F; Lands: Lands of Hampton Demesne Barony of Balrothery East; Area: 0a. 3r. 17p; County: **DUBLIN.**

4. REGISTERED OWNER: Christopher Kelly; Folio No: 31929; Lands: Knockroe; Area: 0a. 2r. 9p; County: **GALWAY.**

5. REGISTERED OWNER: Thomas Malley, Ballinew, Ballinrobe, Co. Mayo; Folio No: (1) 4772 and (2) 5981; Lands: (1) Curraboy (Kilmaine) and (2) Curraboy (Kilmaine); Area: (1) 14a. 3r. 28p., (2) 7a. 2r. 5p; County: **MAYO.**

6. REGISTERED OWNERS: Michael Roche and Mary Roche; Folio No: 2075; Lands: Cullenstown; Area: 177a. 0r. 20p; County: **WEXFORD.**

7. REGISTERED OWNER: James Browne, Ballinkin-lettragh, Ballycastle, Co. Mayo; Folio No: 2710; Lands: Ballinglen; Area: 29a. 1r. 20p; County: **MAYO.**

8. REGISTERED OWNER: John Sharkey, Clogher, Monasteraden, Ballaghadereen, County Sligo; Folio No: 1152; Lands: Clogher; Area: 27a. 3r. 12p; County: **SLIGO.**

9 .REGISTERED OWNER: Mollie Kenny, Ballaghaderreen, Co. Roscommon; Folio No: 12428; Lands; Ballaghaderreen; Area: 0a. 0r. 14½p; County: **ROSCOMMON.**

10. REGISTERED OWNER: Edwin Michael Shorts; Folio No: 46389L; Lands of Scholarstownpart; Area: 0a. 0r. 19p; County: **DUBLIN.**

11. REGISTERED OWNER: Michael Wogan; Folio No: 10080; Lands: Bettyville (Part); Area: County: **DUBLIN.**

12. REGISTERED OWNER: Mary Davoren, Kilcorney, Carron, Co. Clare; Folio No: 1435; Lands: Magheraweeleen; Area: 31a. 1r. 16p; County: **CLARE.**

13. REGISTERED OWNER: Patrick Kenny, Kilmore, Ballygar, Co. Galway; Folio No: 1039; Lands: (1) Lisavruggy, (2) Lisavruggy; Area: (1) 6a. 2r. 24p., (2) 2a. 0r. 38p; County: **GALWAY.**

14. REGISTERED OWNER: Michael John O'Connell, Curryroe, Co. Roscommon; Folio No: 1208; Lands: (1) Curryroe, (2) Belrea, (3) Kilmocolmock; Area: (1) 26a. 1r. 23p., (2) 3a. 1r. 39p., (3) 1a. 2r. 2p; County: **ROSCOMMON.**

15. REGISTERED OWNER: Patrick Joseph Daly, Rover Upper, Arigna, Co. Roscommon; Folio No: 2397; Lands: (1) Rover Upper, (2) Kilronan Mountain; Area: (1) 4a. 3r. 21p., (2) 6a. 2r. 23p; County: **ROSCOMMON.**

16. REGISTERED OWNER: Brendan O'Neill; Folio No: 26433; Lands: Lacka East; Area: 3a. 1r. 12p; County: **KERRY.**

17. REGISTERED OWNER: John O'Rourke; Folio No: 19949; Lands: Farnane; Area: 61a. 1r. 31p; County: **LIMERICK.**

18. REGISTERED OWNER: Francis Sweeney, Lisgowel, Breaghwy, Castlebar, Co. Mayo; Folio No: 40849; Lands: Lisgowel; Area: 1a. 0r. 0p; County: **MAYO.**

19. REGISTERED OWNER: John Patrick Gallagher, Barnacahogue, Swinford, Co. Mayo; Folio No: 3369; Lands: Barnacahogue; Area: 23a. 1r. 19p; County: **MAYO.**

Lost Wills

Michael O'Gorman and Margaret O'Gorman, deceased, late of 287, Brandon Road, Drimnagh, Dublin. Will any person having knowledge of the Wills of the either of the above-named deceased, who died on 16th January, 1982 and 6th January, 1982, respectively, please contact Messrs. Damien J. Kelly & Co., Solicitors, 77, Terenure Road North, Dublin 6. Tel. 961644/903008. Ref: DK/CS.

Bernard O'Meara, deceased, late of Ballyknockane Lodge, Ballypatrick, Co. Tipperary. Will any person having knowledge of the will of the above-named deceased who died on 21st December, 19 please contact Messrs. Henry Shannon & Co., Solicitors, 2 Brighto... Place, Clonmel, Co. Tipperary.

Nora Butler, deceased, late of 11 Valentia Parade, North Circular Road, Dublin 7 and formerly of 68, South Lotts Road, Dublin 4. Will any person having knowledge of the will of the above-named deceased who died on 2nd August, 1981, please contact Messrs. Cathal N. Young, O'Reilly & Co., Solicitors, 1 Lr. Leeson Street, Dublin 2.

John P. Jordan (otherwise Sonny Jordan), deceased, late of Claremount, Claremorris, County Mayo, and formerly of Sacred Heart Home, Castlebar, Co. Mayo. Will any person having knowledge of the whereabouts of a Will of the above-named deceased who died on 31st January, 1982, please contact Messrs. Maguire & Brennan, Solicitors, Claremorris, Co. Mayo.

James Geraghty, deceased, late of Wheatfield, Straffan, Co. Kildare. Will any person having knowledge of a Will made subsequent to 22nd October, 1968, by the above-named deceased who died on 10th January, 1982, please communicate with Patrick J. Farrell & Co., Solicitors, Charlotte St., Newbridge, Co. Kildare.

Irene Bolster, deceased, late of 2, Aughrim Villas, Aughrim St., Dublin 7. Will any person having knowledge of a Will of the above-named deceased please communicate with Vincent & Beatty, Solicitors, 67/68, Fitzwilliam Square, Dublin 2. (Ref. CJB(PB.)

Laurence O'Reilly, deceased, late of 34, Upper Mount St., Dublin 2. Will any person having knowledge of any Will of the above-named deceased who died on 28th January, 1982, please contact Messrs. Moore & Co., Solicitors, The Square, Kildare.

James McCann, deceased, late of Water Lodge, Kilcurry, Dundalk, Co. Louth. Will any person knowing the whereabouts of the original Will dated 10th July, 1978 of the above-named deceased who died on 14th October, 1978, please contact Donal McArdle & Co., Solicitors, 90, Clanbrassil Street, Dundalk. Tel. 35384.

Elizabeth Daly, deceased, late of Iremore, Listowel, Co. Kerry. Will any person having knowledge of the original Will bearing date of 27th July, 1970, of the above-named deceased who died on 11th October, 1970, please communicate with P. O'Connor & Son, Solicitors, The Square, Kiltimagh, Co. Mayo.

Christina Ledwidge, deceased, late of St. Annes, Dublin Road, Bray, Co. Wicklow. Will any person having knowledge of the Will of the above-named deceased who died on 17th January, 1980, please contact Messrs, Cullen, Tyrrell & Co., Solicitors, Woodville, Herbert Road, Bray, Co. Wicklow.

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July 5 - August 13	Lecture Hall and Tutorial Rooms	7th Professional Course
March 26 - April 7	Presidents' Hall	Second and Third Law Examinations
April 14 - May 25	Gym, C.L.E. Seminar Room and two other Seminar Rooms	3rd Advanced Course
June 3	Gym	Book-keeping Examination
June 24	Presidents' Hall	Presentation of Parchments
July 8	Presidents' Hall and Gym	First Irish Examination
July 9	Presidents' Hall	Second Irish Examination
July 12 - July 13	C.L.E. Seminar Room	Preliminary Examination
August 13 - August 25	Presidents' Hall	Second and Third Law Examinations
Sept. 14 - Oct. 22 Nov. 1 - Nov. 25 Nov. 30 - Dec. 17	Lecture Hall and Tutorial Rooms	8th Professional Course
October 5	Gym	Book-keeping Examination
Oct. 12 - Nov. 25	Gym, C.L.E. Seminar Room and two other Seminar Rooms	4th Advanced Course
November 18	Presidents' Hall	Presentation of Parchments
Dec. 1 - Dec. 13	Presidents' Hall, Gym and C.L.E. Seminar Room	Final Examination - First Part
December 7	Presidents' Hall and Gym	First Irish Examination
December 9	Presidents' Hall	Second Irish Examination

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76 No. 3 April 1982

Small Claims — No Easy Answer

FURTHER voices have been raised recently calling for the introduction of Small Claims Courts in Ireland. Small Claims Courts, by that name, grew up in the United States as part of their general court system. They vary in format from State to State — some even permitting debt collection agencies to use their procedures. Originally intended to deal with claims for small debts they have expanded their activities, some now including arbitration procedures, others incorporating enforcement procedures while still others provide assistance to litigants in presenting or defending claims. They do not, however, provide a coherent model which can readily be adopted elsewhere.

In arguing for the introduction of small claim courts, much stress has been placed on the difficulties and expense which face people who wish to litigate claims for modest sums of money. The need for some new system is often attributed to the reluctance of lawyers to undertake the kind of work involved, suggestions are made that if only a system without lawyer-advocates or lawyer-judges could be established all would be well.

Doubts have been expressed here as to whether any courts could legitimately be established outside those provided for by the Constitution. There may also be a constitutional difficulty in preventing litigants from engaging the services of lawyers. In passing, it has to be said that some of the provisions of recent consumer legislation are not easy of interpretation, even by lawyers. Not all plaintiffs or defendants will be able to mount their cases without at least the assistance of a person with legal training, whether such person appears as advocate or not.

If a system is established which banishes lawyers from acting as advocates it is hard to see how such a court could operate on the adversary system which is our norm. In order that justice be done it would seem inevitable that the judge would have to act as an inquisitor and not merely as an umpire. Persons appointed to act as judges in such Courts may need not merely some additional training to fit them for their unusual task but also be provided with assistance to enable the Court itself to adduce evidence.

If such Courts are to be concerned with claims over a debt, or landlord and tenant claims, it may be relatively easy to ensure that all the evidence is available to the tribunal. However if the subject matter of the dispute is, as appears increasingly likely to be the case, a claim by a dissatisfied consumer about the quality of goods or services provided to him, the immediate difficulty which arises is that of producing the expert evidence to support such claim. If each party is to be required to produce his own evidence the cost of production of the evidence will soon exceed the amount in dispute. If the Court is to commission an independent report, unless it be provided by a State-sponsored body and either free from cost or at a nominal cost, the expense may still be out of proportion to the amount involved. Whether it is the duty of the State to provide such a subsidised service for consumers is questionable. Equally questionable is whether the litigation of one consumer claim at a cost in excess of the value of the product or services provided, achieves a great deal for the rest of consumers, who may through a State subsidy have largely paid for the exercise.

It is significant that in the United States where the Small Claims Courts have historically had their greatest success, the newer arbitration schemes for consumer claims operated by the American Arbitration Association in association with Better Business Bureaus are now functioning in over 100 cities. These schemes should be studied as should the proposals of the United Kingdom Director of Fair Trading, for conciliation and arbitration schemes, supported or provided by trade associations in co-operation with the Chartered Institute of Arbitrators. Passing the responsibility back to trade or professional associations, with lay involvement, may well provide a better and cheaper answer to the problem than the establishment of further courts whose procedures might require further state subvention. □

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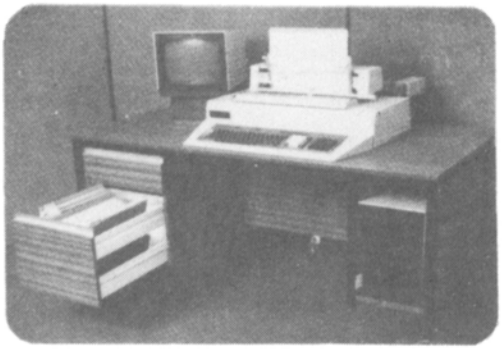

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Comment...

...the Pine Valley Case

THE "knock-on" effects of the recent decision of the Supreme Court in the Pine Valley case may well be far-reaching. It will be recalled that in that case the Court held that a planning permission granted by the Minister for the Environment on an appeal from a refusal of permission by a planning authority, where the development sought constituted a material contravention of a Development Plan, was a nullity. It is believed that there is a large number of ministerial permissions of this nature in existence, some of them affecting very substantial areas of residential housing.

It appears that some planning authorities, in the course of reviewing their Development Plans in accordance with their statutory obligation, had decided to alter the zoning of certain lands, e.g. from agricultural to residential and, on receipt of an application for permission for development for residential purposes of parts of those lands, instead of adopting the procedure provided for under the Planning Acts of advertising their intention of making a variation in the Development Plan in order to enable permission to be granted for the development, they simply refused the permission, believing that the applicant could obtain a permission from the Minister on appeal. It is understood that, in a number of cases, the planning authorities did not actively oppose the applications on appeal which, of course, was perfectly consistent with their intention of altering the zoning.

As a result, it seems likely that there must now be in existence a large number of residential properties constructed under ministerial permissions, which following the Supreme Court's decision, are nullities.

As soon as the judgment became available and the extent of its significance became clear, the Law Society wrote to the Taoiseach and to the Minister for the Environment drawing attention to the widespread effects of the decision and to the particular effect which it would have on the titles of people who had bought houses built under such permissions. The Society is also seeking the introduction of legislation to remedy the situation. While there may be some reservations about the propriety of introducing legislation which will, in effect, nullify a decision of the Supreme Court, it is suggested that in the particular circumstances unreasonable hardship must result from failure to remove the serious "blot" on the titles to properties purchased in good faith by people relying on the apparent validity of ministerial permissions. □

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The Application of the 'Peculiar Knowledge' Principle in Irish Criminal Law

by

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The 'peculiar knowledge' principle being examined in this article is the so-called principle which shifts or might in certain circumstances shift the burden of proof from the prosecution to the defence, where the existence or non-existence of legal authority (e.g. driving licence) for the alleged act or omission complained of rests peculiarly within the knowledge of the defendant.

Woolmington and the Burden of Proof

In *Woolmington v. Director of Public Prosecutions*[1] the House of Lords insisted that it is the task of the prosecution to prove the guilt of an accused beyond all reasonable doubt. There is no onus on an accused to establish his innocence. Once he raises a doubt as to his guilt then the jury are obliged to acquit.[2] This fundamental rule which places the burden of proof on the prosecution has been accepted and applied in this jurisdiction.[3] However, in *Woolmington* a number of exceptions to the rule were recognised. In the case of insanity the onus is placed on the accused to establish this defence. The burden of proof may also be cast on the accused by statute.

Before proceeding to a consideration of the peculiar knowledge principle in this jurisdiction it is desirable to indicate the various meanings which are encompassed by the expression burden of proof. The expression refers to two distinct meanings which have been variously described by different authorities. The first meaning has been referred to as the risk of non-persuasion,[4] the legal burden,[5] and the fixed burden.[6] The second meaning has been described as the duty of producing evidence,[7] the provisional burden[8] and the evidential burden.[9] When the expression burden of proof is used in the context of the first of its meanings it denotes that burden which rests on the prosecution throughout the trial and which can only be satisfied by proof beyond all reasonable doubt. This burden remains fixed and, as has been seen, is only shifted in exceptional cases. The burden of proof as used in its second sense does, however, shift. This result is achieved when a party relies upon a presumption or adduces evidence which is strong enough to establish a prima facie case.

There is a lack of conceptual clarity in many of the decided cases owing to the failure to distinguish between the two senses of the expression burden of proof. This lack of clarity is a source of confusion as judges very often do not indicate the kind of burden they are referring to i.e. whether the burden of proof involved is the legal burden as opposed merely to the evidential burden. This is not to deny that it is often obvious which burden a judge is referring to in the course of his judgment. To avoid any confusion in this discussion on peculiar knowledge the two meanings which are embraced by the expression burden of proof will be referred to as the legal burden and the evidential burden.

The Peculiar Knowledge Principle and Statutes which shift the Burdens of Proof.

The peculiar knowledge principle must be distinguished from statutes which place the onus of proof on the accused.[10] A most important statute affecting the legal burden of proof, in cases of summary jurisdiction, is the County Officers and Courts (Ireland) Act, 1877. Section 78 states:

> "In all cases of summary jurisdiction any exception, exemption, proviso, qualification or excuse, whether it does or does not accompany the description of the offence complained of, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived no proof in relation thereto shall be required from the complainant unless evidence shall be given by the defendant concerning the same."

In addition there are provisions in statutes which affect the evidential burden.[11]

The effect of this provision was considered in *The King (Sheehan) v. Justices of Cork.*[12] Here the accused had been convicted of the illegal use of a gaff. The issue which the Court had to consider was whether the conviction was bad because the prosecution had not negatived those exceptions under the particular statute which made the use of a gaff legal. The difficulty which confronted the Court lay in determining when the prosecution are relieved from the task of negativing an exception. This raised the question, specifically addressed by Gibson J., of how one determines whether a clause in a statute is an exception or part of the offence described. The learned judge formulated the following test:

> "The test, or dividing line appears to be this:- Does the statute make the act described an offence subject to particular exceptions, qualifications etc., which, where applicable, make the *prima facie* offence an innocent act? Or does the statute make an act, *prima facie* innocent, an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter words of exception may constitute the gist of the offence."[13]

It would thus appear, in light of this test, that where the exception does not form part of the offence that the legal burden is shifted to the accused. It is he who must demonstrate the applicability of a particular exception. Where the exception may be said to constitute the essence of the offence then it is incumbent upon the prosecution to establish its case beyond a reasonable doubt. In a subsequent case it was observed that the onus does not lie on the complainant to prove a negative[14]. Section 78 of the County Officers and Courts (Ireland) Act was applied in *The Attorney General v. Duff.*[15] The court held that there was no onus on the prosecution to prove the non-existence or non delivery of a licence which permitted goods, otherwise prohibited, to be exported.[16]

The Peculiar Knowledge Principle

In *Mahony v. W. L. and W. Railway Company*[17] Chief Baron Palles took the opportunity to apply the peculiar knowledge principle. The plaintiff in the case had sued the defendant company in respect of damage done to his goods. There was however a condition in the contract, entered into by the plaintiff and the company, to the effect that the company would only be liable for damage occasioned through the wilful misconduct of its servants. What the court had to consider was whether the onus of proof lay upon the company to prove that the damage to the goods had not occurred on their railway line. In holding that the onus of proof did lie on the company Palles C.B. observed:

> ". . . although it is the general rule of law that it lies upon the plaintiff to prove affirmatively all the facts entitling him to relief, there is a well known exception to such rule in reference to matters which are peculiarly within the knowledge of the defendant. In such cases the onus is shifted."[18]

Though *Mahony* was a civil case there was no suggestion that the peculiar knowledge principle was confined solely to civil cases. The peculiar knowledge principle seems to owe its origin to a dictum of Bayly J. in *R v. Turner.*[19] The dictum is stated thus:

> "I have always understood it to be a general rule, that if a negative averment be made by any one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative."[20]

Despite some judicial disagreement as to the meaning and scope of the principle it has been relied upon in English cases so as to shift the legal burden of proof on to the accused.[21]

In the *Attorney General v. Duff,*[22] a criminal case, the issue was whether the accused had a licence which permitted the export of certain goods. Although this issue was disposed of on the basis of the application of Section 78 of the County Officers and Courts (Ireland) Act, 1877, Maguire J. was nonetheless prepared, in the absence of this statutory provision, to hold that the onus of proving the existence of a licence lay on the defendant because it was a matter peculiarly within his knowledge. The willingness of Maguire J. to accept that the burden of proof had shifted in this manner seemed to promise much scope for the future application of the peculiar knowledge principle. However, subsequent cases have demonstrated a marked reluctance on the part of the judiciary to permit the principle to subvert the fundamental obligation of the prosecution to prove its case beyond all reasonable doubt.

This issue of matter lying peculiarly within the knowledge of an accused arose for consideration in the Supreme Court decision of *The Minister for Industry and Commerce v. Steele.*[23] The case concerned an Emergency Powers Order which sought to control the quality and price of pork sausages. The Order also provided that the pork sausages when offered for sale bear a ticket indicating the description of sausage. An inspector purchased a quantity of pork sausages from the defendant. The defendant was subsequently prosecuted for selling the pork sausages at a price in excess of the legal price and for not having a ticket indicating the description of sausage. The crucial issue was whether the sausages in question were pork sausages which sausages were defined as containing not less than 65% of pork in the meat content. The prosecution were unable to show what proportion of the meat content consisted of pork as it was not possible to determine this question by scientific analysis. Because of this it was argued that the onus of proof rested on the defendant to show that the sausages were not of such a type as defined in the Emergency Powers Order. Defence counsel, on the other hand, argued that the onus of proof rested with the prosecution to prove the percentage of pork in the sausages.

Mr. Justice Murnaghan (Maguire C. J. concurring) applied the reasoning of Salter J. in *R v. Kakelo*[24] which was that the burden of proof in cases can shift and that in considering the amount of evidence necessary to shift the burden of proof the court has regard to the opportunities of knowledge possessed by the respective parties with respect to the fact to be proved.[25] Murnaghan J. concluded that since the prosecution had established a prima facie case against the defendant, which he in no way attempted to rebut, the onus of proof had shifted to him to demonstrate that the sausages were not of such a kind as came within the Emergency Powers Order. O'Byrne J was also of opinion that the burden of proof rested with the

defendant to show what proportion of the meat content was pork. This was because the prosecution had established a prima facie case and because the pork content of the meat was a matter which was peculiarly within the knowledge of the defendant.

In light of the decision in the *Steele* case one can ask which of the burdens of proof — the legal or the evidential — was shifted. It is submitted that it was the legal burden which was cast on the defendant. This is because it fell to the defendant to show that the sausages were other than the variety described in the Emergency Powers Order. However it should be noted that the prosecution did not simply rely on the peculiar knowledge principle. They established a prima facie case in response to which the defendant did not adduce any evidence whatsoever as to the percentage of pork in the sausages. There was a total failure on the part of the defendant to come forward with any rebutting evidence. In these circumstances one wonders whether the result would have been any different even if the prosecution had to meet the legal burden. On the basis of the evidence adduced by the prosecution such legal burden would have been satisfied. Given the failure of the defendant to come forward with any rebutting evidence can it be reasonably doubted that the sausages were other than pork sausages?

The Steele case was considered in *McGowan v. Carville*[26] which is the leading authority in Irish law on the peculiar knowledge principle. The facts of this case are as follows. The complainant, a member of the police force, stopped the defendant and asked him to produce his driving licence. The defendant refused to do so but said he would produce it, at a later date, in a Garda station. He was subsequently charged with driving without a licence in contravention of Section 22 of the Road Traffic Act, 1933. No evidence was given in the District Court as to whether the defendant did in fact produce his driving licence. The charge was dismissed on the ground that the onus was on the complainant to prove that the defendant had no driving licence. A case was stated for the opinion of the High Court in which the District Justice specified, as one of the reasons for reaching the conclusion which he did, that the holding of a driving licence was not a matter peculiarly within the knowledge of the defendant.

In the High Court both Davitt P. and Murnaghan J. stressed that in criminal cases it is the prosecution's task to prove the elements in the offence charged. Mr. Justice Murnaghan insisted that there is no onus on the accused to prove his innocence.[27] However, it was conceded that there are exceptions to this principle. Davitt P. observed that if the principle were invariably adhered to it would in certain cases be impossible to administer justice. He stressed though that exceptions should be as few as possible.[28] Mr. Justice Murnaghan stated that "the Courts should steadfastly refuse to allow any unnecessary exception to the principle . . ." His lordship went on to indicate the approach which the court would take to the peculiar knowledge principle. He wrote:

> "The law in this regard, I think, tries to adopt a realistic and reasonable attitude. It recognises in cases where the non-existence of lawful authority is alleged and the existence or otherwise of such lawful authority is in issue, that it may not always be possible, because of the nature of things, for the prosecution to prove affirmatively and beyond reasonable doubt the fact of the non-existence of such lawful authority. In such cases where sufficient evidence of the fact of non-existence has in the opinion of the judge or justice been given as the nature of the particular case would reasonably require the onus of proving the contrary is then said to shift to the person charged. In considering the amount of evidence necessary to shift the burden of proof in such a case the judge or justice would have regard to the opportunities of knowledge with respect to the fact to be proved which might be possessed by the parties respectively."[29]

The interpretation of the peculiar knowledge principle taken by the High Court in *McGowan* would seem to support the view that the principle does, in a very restricted sense, constitute an exception to the obligation which is normally placed on the prosecution to prove every element in the offence beyond all reasonable doubt. Mr. Justice Davitt cautioned against any general and indiscriminate application of the principle particularly in criminal cases. He agreed with the views expressed in the *Steele* case on the peculiar knowledge principle. The limitations imposed on the principle as a means of shifting the burden of proof, both legal and evidential, may be further illustrated by the remarks of Murnaghan J. According to the learned judge it would not be sufficient simply to allege that requisite legal authority was non-existent in order to have the onus of proof shifted to the person charged of proving that he did have such authority. This view stands in opposition to the views expressed by Maguire J. in *The Attorney General v. Duff*.[30] Murnaghan J, in adverting to this difference of opinion, was content to indicate that the decision in *Duff* was based on Section 78 of the 1877 Act and that it was inconsistent with the later Supreme Court decision in *Steele*. Thus it would appear that in order for peculiar knowledge to bring about a shift in the legal burden of proof the prosecution would, at the very least, have to establish a prima facie case.[31]

The peculiar knowledge principle was applied in *McGowan* in the following way. If a defendant had been stopped and asked to produce his driving licence by a Garda but failed to do so at the time he was stopped or within a reasonable period of that time then, given the knowledge possessed by the parties, the burden of proof would shift to the defendant to show that he had a licence. Since there was no evidence produced by the complainant as to whether the defendant did in fact subsequently produce his licence the onus of proof had not shifted and remained with him.

The case went to the Supreme Court where it was held by the majority (Lavery, Kingsmill-Moore, O'Daly, Maguire JJ. with Maguire C. J. dissenting) that the High Court was correct in its decision. Lavery J. accepted the interpretation of the peculiar knowledge principle put forward in the *Steele* case. His lordship emphasised that it was not for the prosecutor to prove that the person charged is not the holder of a licence but that it is incumbent upon him to give such evidence as would be sufficient, if unrebutted, to justify a finding that the defendant had no licence.[32] Maguire C.J.'s opinion differed from the majority. He insisted, apart altogether from the Road Traffic Act, 1933, that the onus of proving that there is an effective licence is cast upon the defendant because such a matter lies peculiarly within his knowledge. Furthermore, according to Maguire C.J., in order for the burden of proof to be cast on the defendant it is not even necessary for the prosecution to establish a prima facie case.[33] Support for these views was found in the English authority of *John v. Humphreys.*[34] This case established that the onus of proving possession of a licence rests on the defendant. It was accepted in that case that where it is established that the defendant was driving a motor vehicle then, without the prosecution having to adduce any further evidence, the onus of proof rests on the defendant to prove that he is the holder of a driving licence. Lavery J. regarded such a position as extraordinary.

Among the most notable features of the *McGowan* case was the marked reluctance shown, particularly in the High Court, to any extension of the categories of exception to the *Woolmington* rule. It would seem that it is only in the situation where the administration of justice would be frustrated that exceptions to the rule are permissible. Apart altogether from the issue of peculiar knowledge Murnaghan J. lamented what he regarded as a "growing tendency on the part of the executive to promote legislation putting the onus of proving the having of lawful authority, in the shape of a licence, certificate or otherwise, on the person charged."[35]

Davitt P put forward as one of the reasons for refusing to give any but the most restricted meaning to the peculiar knowledge principle that it would otherwise constitute a dangerous weapon in the wrong hands. He observed that "if dangerous weapons are left available they are apt to fall into the wrong hands."[36] Davitt P. seems to have contemplated — as an example of an unrestricted peculiar knowledge principle constituting a dangerous weapon in the wrong hands — a situation where a policeman, without stopping and asking a motorist to produce his licence, would, nonetheless, proceed to prosecute the motorist thus obliging him to prove in court that he had a valid driving licence. The fact that a policeman would be unlikely to prosecute unless he first stopped and asked a driver to produce his licence was not, for Davitt P., the relevant consideration. Rather, it was the fact that such a result was possible which constituted the decisive consideration.

It has already been suggested that the *McGowan* case supports the view, albeit in a highly qualified way, that the peculiar knowledge principle can operate so as to shift not only the evidential burden but the legal burden as well. One will not find in that case any rejection of the view that the peculiar knowledge principle is incapable of occasioning a shift in the legal burden. This of course raises the question of whether it is desirable to permit peculiar knowledge to affect the legal burden of proof by relieving the prosecution from the normal obligation of proving its case beyond all reasonable doubt. This issue will be considered at greater length below.

Cases Decided after McGowan

In *The Attorney General (Comer) v. Shorten*[37] the defendant was charged with having made a declaration stating that his car had not been used by him, or with his consent, knowing it to be false or misleading in order to obtain a driving licence. The declaration of non-user pertained to a certain period of time. The prosecution were able to establish that the car was actually driven during this particular period but they were unable to identify the driver. By way of response to the charge the defendant offered no explanation other than that he believed the declaration to be true. In the District Court the judge refused to dismiss the case at the request of the defendant's solicitor. He did, however, state a case to the High Court asking whether he was correct in holding that once the prosecution had established that the defendant's car was used during the material time the onus had shifted to the defendant to prove that the car in question was not used by him or with his knowledge and consent. Unlike the *McGowan* case there was no statutory provision involved. Hence the case fell to be decided by the principles of the common law.

The prosecution relied on two main arguments. Firstly, it was contended that since the defendant had reasonable means of knowing when, how and by whom the car was used actual knowledge should be imputed to him as to who used the car at the relevant time. This argument was disposed of by Davitt P. on the basis that where knowledge is an essential ingredient in a criminal offence actual knowledge must be proved. Secondly, the peculiar knowledge principle as explicated in *McGowan* was relied upon. The onus of proof had, it was asserted, shifted to the defendant because it was he who knew whether he had driven the car and whether any permission had been given to drive the car.

Davitt P. took the opportunity to voice his concern over the application of the peculiar knowledge principle to criminal cases. His remarks in this regard are the strongest to date of any Irish judge. He made the following trenchant observations.

> "I confess that I do not feel at all happy about the application in criminal cases in what I have referred to in the *McGowan v. Carville* as the "peculiar knowledge" principle, even in the modified form in which it is enunciated in Stephen's Digest; or indeed

about the application of any principle as to the onus of proof other than the presumption of innocence. Some of the cases in the reports and some statements in text books long accepted as authoritative can no longer be so considered since the decision in Woolmington's Case. . . . I find it very hard to regard resorts to the "peculiar knowledge principle" even in its modified form or to any similar principle, as other than attempts to whittle down the presumption of innocence."[38]

The remarks of Davitt P. clearly demonstrate an earnest and robust commitment to the principle that it is the prosecution who must prove an accused's guilt. The attitude adopted by the learned judge to the peculiar knowledge principle is one, it is submitted, which seeks to prevent it from subverting the presumption of innocence. Given this negative judicial approach to the peculiar knowledge principle, in the context of criminal cases, a particular claim that the principle operates to shift the legal burden of proof would be difficult to sustain. When the very application of the principle to criminal cases is subject to such deep-seated judicial criticism a complainant, who argues that the onus of proof is cast on a defendant, because of peculiar knowledge, will have a difficult task in overcoming judicial opposition to such a proposition. It must be noted though that the judgment of Davitt P. falls short of stating that peculiar knowledge is incapable of shifting the legal burden of proof.

Mr. Justice Davitt went on to dispose of the case in light of the rules which affect the burden of proof in cases involving the possession of recently stolen goods. His lordship referred to cases in this area of the law because he was of opinion that the fact situation in the case before him was similar to the fact situations of cases pertaining to the possession of recently stolen goods. One can, however, question the basis for the analogy drawn by Davitt P. and ask wherein lay the similarity between the facts of *Shorten* and the facts in cases involving recently stolen goods. In the latter the prosecution usually establish, (a) that the goods were found in possession of the defendant, and (b) that such goods were recently stolen. In *Shorten* it was established, (a) that the car in question was owned by the defendant, and, (b) that it was seen being driven during a particular period. However the identity of the driver was unknown. Nor was it known whether the car had been used with the defendant's consent. The only basis for the comparison would seem to be that, in the absence of any explanation by a defendant, in these situations, an adverse inference may be drawn.

In relying on a number of authorities[39] dealing with the subject of recently stolen goods Davitt P. was able to take advantage of the rules governing the burden of proof in those cases. The most important rule in this regard is that the onus remains throughout the trial on the prosecution to prove its case beyond all reasonable doubt. Thus the legal burden of proof does not shift.[40] Simply because an accused does not give evidence to suport his contention that his possession of the goods was innocent in no way operates so as to impose the task of discharging the legal burden of proof. The issue at the end of the day is whether the jury believe beyond all reasonable doubt that the possession was not innocent. When a jury reaches this conclusion it necessarily implies that the facts established do "not admit of any reasonable construction which is consistent with the innocence of the accused."[41] Applying these principles Davitt P. concluded that a reasonable tribunal could not honestly and truthfully say that the facts admitted of no other rational construction than that the defendant knew his declaration to be false at the time when he made it. Thus by relying on the rules governing the burden of proof in cases involving the possession of recently stolen goods Davitt P. was able to circumvent the peculiar knowledge principle, and thereby, to insist that the prosecution prove its case beyond all reasonable doubt.

Before passing on to consider developments in England some observations may be made with respect to the case of *Bridgett v. Dowd.*[42] Here the defendants were charged with carrying merchandise in the course of a merchandise and transport business without a merchandise licence contrary to section 9 of the Road Transport Act, 1933. The section provided for an exemption to the effect that it would not be an offence to carry merchandise exclusively within an exempted area or areas. It was established that the defendant's lorry carried merchandise and further that they did not possess a merchandise licence. However at the time the lorry was observed being driven it was in an exempted area. The issue in the case was whether the onus of proof rested on the defendants to show that the lorry had been driven exclusively within an exempted area. These facts made the case one which was fit for the application of section 78 of the County Officers and Courts (Ireland) Act, 1877. Thus, on the basis of the reasoning of Gibson J. in *The King (Sheahan) v. Justices of Cork*[43] it was deemed incumbent on the defendant to demonstrate that he came within the particular exemption specified in section 9 of the 1933 Act.

In addition to holding that section 78 of the 1877 Act was applicable, Davitt P. considered the legal issue in *Bridgett* in light of the decision in *McGowan*. The result of so doing was as follows. Once the prosecution were able to establish that the defendant had no merchandise licence, and that merchandise was in fact transported, then the onus rested on the defendant to show that the case came within one of the exceptions.[44]

Developments in England

The leading modern English authority on the peculiar knowledge principle is *R v. Edwards.*[45] In that case the Court of Appeal reviewed the appellant's conviction for selling liquor without a justice's licence contrary to Section 160 1(a) of the Licensing Act, 1964. The point of law to be considered was the following: is there an obligation on the prosecution to call evidence to prove the the defendant did not hold a justice's licence? The prosecution had failed during the defendant's trial to come forward and prove that he did not hold a justice's licence. Lawton C. J., after reviewing the relevant authorities,[46] held that they had established an exception to the requirement that the prosecution must prove its case beyond all reasonable doubt. His lordship wrote:

"In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in

the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts subject to provisoes, exceptions and the like, then the prosecution can rely on the exception."[47]

This rule constitutes a third exception to the *Woolmington* rule. The others it will be recalled comprise the following situations: (i) where the defence must establish insanity and (ii) where statutes expressly impose the legal burden of proof.

Referring to the statement of Bayly J. in *R v. Turner*[48] Lawton L. J. was of opinion that it did not establish a general rule to the effect that the mere fact that matter lies peculiarly within a party's knowledge is sufficient to cast the onus of proof on that party.[49] If there were such a rule then, in the words of Lawton L.J.:

". . . anyone charged with doing an unlawful act with a specified intent would find himself having to prove his innocence because if there ever was a matter which could be said to be peculiarly within a person's knowledge it is the state of his own mind."[50]

With respect to this third exception to the *Woolmington* rule Lawton L.J. stressed that its application does not depend on whether the defendant has peculiar knowledge which enables him to prove the positive of any negative averment.[51] The holding in the *Edwards* case may be summarised as follows. The exception described by Lawton L.J. is one which is not confined to cases where a party possesses peculiar knowledge but rather is confined to certain enactments which prohibit the doing of an act in those situations which his lordship enumerated. Where such rule is applicable it casts the legal burden of proof on the defendant.

This finding by Lawton L.J. that there is a third exception to the *Woolmington* rule has not gone unchallenged. Zuckerman, writing in the Law Quarterly Review, expressed the view that the rule formulated by Lawton L. J. is historically dubious.[52] Referring to the *dictum* of Bayly J. in *R v. Turner* the writer observed that it did not lay down a general rule which shifted the burden of proof on to the defendant. Rather, the *dictum* "was used as a consideration in statutory interpretation and in weighing evidence."[53]

Apart altogether from historical considerations the rule in *Edwards* has been criticised because it casts the legal burden of proof on the defendant. In this regard it has been stated:

"The effect of casting the legal burden upon the defendant is that a judge must so direct a jury, . . . that if their minds are evenly balanced as to whether or not the defendant is guilty it is their duty to convict. This seems a far cry from *Woolmington v. D.P.P.*[54]

Zuckerman was equally critical of the rule. He pointed out that the cases in which the burden of persuasion (i.e. the legal burden) was placed on the defendant were concerned with minor offences which involved the doing of an act without a licence or without similar qualifications. In such situations it is of little consequence whether it is the defendant or the prosecution who have to satisfy the legal burden of proof. This is because very little evidence is required in order to discharge this burden of proof. For example, it would, according to Zuckerman, be sufficient for the prosecution to show that the defendant failed to produce a licence when asked to do so.[55] This prompted the writer to state:

"It is, therefore, paradoxical that this type of situation, which presents so little difficulty from the prosecution's point of view, should have been seized upon as an opportunity to make a fundamental departure from the rule that the burden of proof in criminal cases lies on the prosecution."[56]

Summary and Conclusion

It emerges from a consideration of the Irish cases which deal with the peculiar knowledge principle that such principle is, despite some judicial reluctance, applicable to criminal cases. The crucial consideration which has to be taken into account in determining whether the legal burden of proof is to be shifted pertains to the requirements of the administration of justice. It is submitted that the obligation imposed on the prosecution to prove its case beyond all reasonable doubt is so fundamental to our system of criminal justice that it should only be departed from for the weightiest of reasons. The requirements of the administration of justice may indeed furnish a basis upon which to formulate an exception to the *Woolmington* rule. However it is difficult to envisage how the possession of peculiar knowledge by a party can in any context, and no matter how qualified, justify the placing of the onus of proof on that party.

Irish case law has to date established that the possession of peculiar knowledge does not relieve the prosecution from establishing a prima facie case. It is submitted that, in addition, such knowledge should not relieve the prosecution from the task of discharging the legal burden of proof. There would seem to be an absence of any compelling reason as to why the situation should be other than this.

The proper function of the peculiar knowledge principle is, it is submitted, this. Once it is established that a defendant does possess such knowledge then, upon the prosecution establishing a prima facie case, the evidential burden should shift to the defendant. Failure to discharge this evidential burden should be sufficient to enable the prosecution to claim that it has satisfied the legal burden of proof. The adoption of this view would not militate against the requirements of justice. In addition the *Woolmington* rule would not only be respected but its central importance in our criminal justice system would be further emphasised and entrenched. □

Footnotes

1. [1935] A.C. 462; [1935] All E.R.1; 25 Cr. App. Rep. 72.
2. Ibid., p. 482. See also *Mancini v. Director of Public Prosecutions* [1942] A.C.1; [1941] 3 All E.R. 272.
3. *The People (Attorney-General)* v. *Berber and Levy* [1944] I.R. 405, 411., *The People (Attorney-General)* v. *Kennedy* [1946] I.R. 517, 521., *The People (Attorney-General)* v. *Byrne* [1974] I.R. 1, 5. In *The People (Attorney-General)* v. *Oglesby* [1966] I.R. 162 Mr. Justice Kenny observed that "the so-called doctrine of recent possession" does not alter the law relating to the onus of proof in criminal cases as it was stated in Woolmington's Case" (at p. 165). See also *The People (A.G.) v. McMahon* [1946] I.R. 368.
4. Wigmore on *Evidence*, 3rd edition, vol. 9, at p. 271.
5. See Julius Stone, Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship, Ltd. v. Imperial Smelting Corporation, Ltd.* 60 L.Q.R. 262 (1944) where the author uses the expression legal burden of proof. Denning, Presumptions and Burdens *61 L.Q.R. 379* (1945) also employs the concept of legal burden of proof. See also Denning's judgments in *Emmanuel v. Emmanuel* (1945) 61 T.L.R. 538, and *Dunn v. Dunn* [1948] 2 All E.R. 822.
6. Nigel Bridge, in *12 M.L.R. 273* (1949), opts for the expression 'fixed burden of proof' (at. p. 274).
7. See Thaver's, *Preliminary Treatise on Evidence at Common Law*, p. 355.
8. This description was used by Lord Denning in his article in *61 L.Q.R. 379.*
9. See Bridge, supra, n.6 at p. 277.
10. A good example of this is to be found in section 24(1) of the Firearms Act, 1964. This subsection provides: "where, in a prosecution for an offence under the Principal Act, the existence or non-existence of a firearms certificate, a licence under section 2 of the Principal Act, a permit under section 3 of this Act or an authorisation under section 13 of this Act is material, it shall not be necessary to prove that the certificate, licence, authorisation or permit does not exist." Subsection 2 of the same section states: "where, in a prosecution for an offence under the Principal Act, possession, use or carriage of a firearm or ammunition by a person is proved, it shall not be necessary to prove that the person was not entitled to have in his possession, use or carry a firearm or ammunition." Included among those statutes which cast the legal burden of proof on the defendant are: Intoxication Liquor (Licensing) Act, 1872, (Section 51(4))., Customs Laws Consolidation Act, 1876, (Section 259)., Prevention of Crime Act, 1871, (Section 17). Gaming and Lotteries Act 1956, (Sections 42 and 43)., Wildlife Act, 1976, (Sections 23 (9) and 71)., Misuse of Drugs Act, 1977, (section 22).
11. For example, section 3(2) of the Offences Against the State (Amd.) Act, 1972.
12. [1907] 2 I.R. 5.
13. Ibid., p.11. Zuckerman, specifically referred to this test of Mr. Justice Gibson's and similar tests propounded by other judges. He argued that it is not possible to distinguish between the definition of an offence and exceptions to it. Where such a distinction is made it is one of form. In making a distinction between the definition of an offence and an exception to it judges are, according to Zuckerman, imposing, for policy reasons, a particular construction on a statute. See Adrian Zuckerman, The Third Exception to the Woolmington Rule, *92 L.Q.R. 402*, at pp. 413-418.
14. *Larkin* v. *Belfast Harbour Commissioners* [1908] 2 I.R. 214. Per Wright J. at p. 229.
15. [1941] I.R. 406.
16. Ibid., p. 413. In *The People (Attorney-General)* v. *Shribman and Samuels* [1946] I.R. 431 Maguire P. observed: "It is well settled that where an offence consists of doing something which persons are not permitted to do unless duly qualified and under special circumstances the onus of disproving the qualification does not rest on the prosecution." at pp. 442-3. The court accepted the test laid down by Gibson J. in *Sheahan.*
17. [1900] 2 I.R. 273.
18. Ibid., p.280. Palles C.B. based this statement of the law on Taylor. The latter stated "that where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption in his favour." See Taylor on *Evidence* 9th edition, 1895 at p.266. However in a subsequent edition of Taylor its editors put forward the view that the exception could not be relied upon to its full extent. The principle, they thought, could be more accurately stated as follows: "That where the facts lie peculiarly within the knowledge of one of the parties *very slight evidence* may be sufficient to discharge the burden resting on the opposite party." (Taylor on *Evidence*, 11th edition at p.285.). In *Elkin v. Janson* (1845) 13 M. & W. 655, Alderson B. thought that the exception was too strongly stated and that the rule referred only to the weight of the evidence. See also *Abrath v. North Eastern Railway Co.* (1883) 1 Q.B.D. 440 at p. 457. Mr Justice Barton observed in *Powell v. McGlynn and Bradlaw* [1902] 2 I.R. 154 that it was a mistake to hold that it is a rule of *nisi prius* that the possession of peculiar knowledge by a party shifts the onus of proof to him (at p. 169). In an earlier case *Curran* v. *Midland and Great Western Railway* [1896] 2 I.R. 183 counsel argued that the onus of proving intentional and wilful misconduct lay on the company's servants because the subject matter of the allegation lay peculiarly within the knowledge of the company. Palles C. B., who gave judgment in the case, did not refer to the peculiar knowledge principle.
19. (1816) 5 M. & S. 206.
20. Ibid., p. 211. Cross, in referring to this dictum, stated that it does not amount to a general rule. It is he says "a rule of statutory interpretation confined to cases in which the affirmative of negative averments is peculiarly within the knowledge of the accused" (Cross on *Evidence*, fifth edition at p.102.).
21. See, for example, *R* v. *Oliver* [1944] K.B. 68, *John* v. *Humphreys* [1955] 1 W.L.R. 325., *R* v. *Ewens* [1967] 1 Q.B. 322 (C.C.A.). Both *Humphreys* and *Oliver* were referred to in *McGowan* v. *Carville* [1960] I.R. 330.
22. Supra, n. 15.
23. [1952] I.R. 304.
24. [1923] 2 K.B. 793; [1923] All E.R. 191. Judgment of the court was read by Sankey J.
25. Ibid., p. 795.
26. [1960] I.R. 330.
27. Ibid., p.345.
28. Ibid., p.336.
29. Ibid., p.346.
30. Supra, n.15.
31. In *Buchanan* v. *Moore* [1963] N.I. 194 Lord McDermott L.C.J. left open the question, in cases involving peculiar knowledge, of whether the burden of proof rests on the defendant *ab initio* or whether it shifts to him upon the prosecution establishing a prima facie case (at p.196).
32. *McGowan v. Carville,* supra, at p.356.
33. Ibid., pp.351-2.
34. [1955] 1 W.L.R. 325. See also *R* v. *Oliver* [1944] K.B. 68. Glanville Williams was critical of the finding in *Oliver.* In that case the appellant was convicted on indictment with supplying sugar without a licence contrary to a specific regulation. The prosecution gave no evidence that the appellant did not possess a licence. It was held that the onus of proof rested on the defendant and, further, that the prosecution were under no obligation to establish a prima facie case that the licence did not exist. (per Viscount Caldecote C.J. at p.75). Williams suggested that the situation prior to *Oliver* was one where the presence of peculiar knowledge did not shift the burden of proof (i.e. the legal burden). See Williams, *Criminal Law, The General Part,* second edition, at pp. 902-3.
35. *McGowan v. Carville*, supra, p. 346.
36. Ibid., p.344.
37. [1961] I.R. 304.
38. Ibid., pp. 309-10.
39. *R* v. *Crowhurst* 1 C. & K. 370., *R* v. *Smith* 2 C. & K. 207., *R* v. *Schama and Abramovitch* 11 Cr. App. R. 45., *The People (Attorney-General)* v. *Berber and Levey* [1944] I.R. 405.
40. See *The People (Attorney-General)* v. *Oglesby* [1966] I.R. 162, at p. 167.
41. *The Attorney-General (Comer) v. Shorten;* supra, at p.311.
42. [1961] I.R. 313.
43. [1907] 2 I.R. 5.
44. *Bridgett* v. *Dowd* [1961] I.R. 313 at pp. 321-2.
45. [1975] Q.B. 27., [1974] 2 All E.R. 1085., [1974] 3 W.L.R. 285.
46. *R* v. *Turner* 5 M. & S. 206., *R* v. *Scott* 86 J. P. 69., *R* v. *Oliver* [1944] K.B. 68., *Nimmo* v. *Alexander Cowen and Sons Ltd.* [1968] A.C. 107., *R* v. *Rutland and Sorrell* [1946] 1 All E.R. 85., *John* v. *Humphreys* [1955] 1 W.L.R. 325., *McGowan* v. *Carville* [1960] I.R. 330 and *Buchanan* v. *Moore* [1963] N.I. 194.
47. *R* v. *Edwards* [1975] Q.B. 27, at pp. 39-40.

48. (1816) 5 M. & S. 206.
49. *R v. Edwards*, supra, at p.35.
50. Ibid., p. 35. Mr. Justice Davitt in *McGowan* v. *Carville* [1960] I.R. 330 expressed similar sentiments when he observed: "The 'peculiar knowledge' principle if applied to criminal cases generally and indiscriminately could have strange results. In many cases it is an essential element of the offence charged that an act was not merely done but that it was done with a particular intent. An intent is a state of mind, and if ever there was a matter which could be said to be peculiarly within a person's knowledge it is the state of his own mind. I have, however, yet to hear of a prosecuting counsel submitting that the onus of disproving a particular intent alleged rested on the defendant" (at p.337).
51. *R v. Edwards*, supra, p.40.
52. Zuckerman, The Third Exception to the Woolmington Rule (1976) *92 L.Q.R. 402*, pp. 403-10.
53. Ibid., p.412.
54. Phipson on *Evidence*, 12th edition, p.112. The Criminal Law Revision *Eleventh Report Evidence (General)* Cmnd. 4991 (1972) strongly recommended in paragraph 140 that burdens on the defence should be evidential only.
55. See Zuckerman, The Third Exception to the Woolmington Rule, supra, p.424.
56. Ibid., p.424.

Law in School Curricula

Condensed from an address by Mrs Eileen Scott, Senior Lecturer, Bolton College of Further Education, to the Law Society's symposium "The Student and the World" at Blackhall Place, Dublin, in March.

The function of the Bolton College of Further Education is to train teachers for the further education service, for the whole range of subjects that may be found in the colleges from craft engineers and builders, or to final professional students and undergraduates in virtually any discipline. My role is principally the training of lawyers and political scientists, most of them graduates but some with a variety of business studies qualifications which are deemed to equip them with the necessary subject matter.

My first concern is not so much the 'what' and 'why' of curriculum innovation, but the 'how' of its implementation. It is in this field that the Law Society in England has concerned itself — in two directions. It has been involved in the publication of some teaching materials intended to be used in the teaching of law in schools by teachers not necessarily themselves trained as teachers of law. Young solicitors through their own organisation and their own committed members have embarked on the dangerous venture of actually going into the schools to talk about the law, or their jobs, or whatever the school particularly asked for. It was here some of them recognised there was more to teaching law to teenagers than they had anticipated.

At this point I met the young solicitors' committee officers and we have run two one-day courses specially designed to help practitioners tackle this rather different situation from their usual working experience. I worked with my own colleagues at Bolton, particularly a psychologist and a sociologist, to describe briefly the intellectual development of the teenager and then secondly how he interacts with his peers, while my task was to examine the range of teaching material available and how to select and use it. One first venture was considered successful enough to be reproduced in London at a sister college there with more specialised staff involved.

Law is only one aspect of a broader spectrum of related subjects and while the teaching force lacks sufficient numbers of suitably experienced teachers to attempt to develop the subject, we shall have to use experienced lawyers on the one hand, hopefully properly prepared for the task and able to do something other than lecture, while we undertake the training of teachers probably experienced in some other social science area of the curriculum who are prepared themselves to become students of law or indeed politics — to equip themselves with sufficient subject matter content to be able to launch themselves with some confidence in this new area.

Any attempt to broaden the curriculum in this way will be doomed to failure in my view unless considerable care is taken to develop appropriate course material, so that teachers and taught can explore the complexities together, and learn through experience. □

Conveyancing Notes

Exchange Control

The Society has been concerned about the extent of the obligations imposed by Section 5 of the Exchange Control Act 1954 on Solicitors acting in the purchase of Irish property from a non-resident.

Section 5 provides as follows:

"Except with the permission of the Minister, a person shall not:-

(a) make, or commit himself to make, any payment to or by the Order of or on behalf of any persons resident outside the scheduled territories,

or

(b) place, or promise to place, any sum to the credit of any person so resident".

The onus for complying with the regulations made under the Exchange Control Act 1954-1978 lies with the Irish resident and the interpretation placed by the Central Bank on this Section is that an Irish resident purchasing property in Ireland from a non-resident vendor is obliged to obtain exchange control consent even if the purchase monies are being paid to a non-resident vendor's Irish solicitors in Irish pounds.

As the residence of a vendor may not be known to a purchaser, the Central Bank's interpretation could place a most unfair burden on purchasers and their solicitors.

In an effort to ease this burden, the Society have made representations to the Central Bank and the Bank have suggested the following practice which in future will be acceptable to them.

Where it is apparent that the Vendor is non-resident, application for Exchange Control approval should be made by the purchaser or the purchaser's solicitor acting on his behalf. Where it is not apparent that the Vendor is non-resident the sale should proceed as if the Vendor were resident.

Deduction of Tax from Payments of Interest

Until the passing of the Finance Act 1974 income tax was deducted at the standard rate from all "yearly" interest paid by one party to another in conveyancing transactions.

The 1974 Finance Act provided that interest being paid by individuals in such circumstances after the 6th April 1974 should be paid gross except in the case of interest paid to a non resident or interest in respect of a period before that date. No change was made in the position with regard to interest paid by companies.

The attention of practitioners is drawn to the distinction between the position of interest paid by individuals, subject to the above exceptions, on the one hand and companies on the other hand. Non yearly or short interest is always payable in full without deduction of tax. The main fact which determines whether interest is yearly or short is the degree of permanence of the loan. If it is either payable in respect of a definite period which is greater than one year or is capable of being payable for a period in excess of one year it is "yearly" interest. If the obligation is for a definite period of less than the year the interest is short interest. It has been held in the case of *Bebb V Bunni* (1854) that interest payable on unpaid purchase money when the completion of the sale is delayed is yearly interest because it is capable of being payable for a period in excess of a year.

The attention of practitioners is drawn to the fact that in such cases where the interest is payable by a company or paid to a non-resident that interest at the standard rate of tax should be deducted. □

Solicitors Accounts Regulations — Recording of Receipts

It has come to the notice of the Society that some members may be under a misapprehension as to the application of the Solicitors Accounts Regulations to the situation where monies are received by a solicitor on behalf of a client and placed directly or by endorsement of a cheque or draft, on deposit or used for the purchase of a deposit receipt.

In these cases the receipt of these funds ought to be entered in the Cash Book which the solicitors are required to keep in compliance with the Solicitors Accounts Regulations, as should the payment of the funds to the bank involved. The receipt of the funds ought also be entered in the Record of Bank Lodgements required by the Regulations.

Failure to comply with these provisions of the Accounts Regulations will be regarded by the Society as a serious breach of the Regulations involving the likelihood of disciplinary proceedings.

Law Society Closes Practice

The following statement was released to the media on 18 April, 1982.

"Irregularities in the accounts of a recently deceased solicitor in Edenderry, Mr. Timothy F. O'Toole, have been discovered by the Law Society and immediate action has been taken.

"One of the Law Society's own accountants has moved in to undertake a comprehensive audit of the accounts to determine the precise situation. If any deficits of clients' money are discovered, these will be met by the Society's Compensation Fund when clients submit their claims.

"The practice has, of course, been closed and its files and documents are being taken into the custody of the Law Society.

"Clients of the late Mr. Timothy F. O'Toole should consult other solicitors to process their cases, and give them written authority to take over their files and documents.

"These will be passed to the solicitors by the Law Society." □

"A year of significant progress"

* **Profits after tax reached IR£1,090,000**
* **Loans under management total IR£191 Million**
* **Strengthened position in Foreign Exchange Markets**

Balance Sheet Features as at 31st December, 1981

	IR£
Capital and Reserves	4,832,040
Total Assets	139,517,023
Deposits	134,100,477
Advances	81,337,667

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The Training of Advocates in the Netherlands

by

B. Th. Moerkoert, Editor of "Advocatenblad" Journal of Law Society of Netherlands

The Netherlands has about 14 million inhabitants of whom almost 4000 are registered as advocates.

Of those 4000, presently about 1200 (approx. 300 women and 900 men) have been practising for less than three years. Within the Netherlands Bar Association (Nederlandse Orde van Advocaten) these young advocates are called "apprentices". As far as clients and the Courts are concerned, from the day of taking the oath at the very start of their apprenticeship they act as completely qualified advocates. At the end of the 3-year practical training period they are deemed capable of exercising the legal practice independently.

In order to be eligible for the Bar it is sufficient to have a university degree in Dutch law. The course requires 4 to 5 years of study and does not (yet) include a separate curriculum for advocates. One has to attend a number of obligatory classes, however, such as civil law, constitutional and administrative law, commercial law and criminal law. After the theoretical university course one could — at least before 1955 — immediately set up shop as an independent advocate. To be refused registration as an advocate was and is highly exceptional. In those days experience was indeed acquired "in actual practice", with all its inherent problems (for advocate and his practice); particularly in those circumstances where the new advocate had failed to obtain a place with an already existing law firm.

In 1955 such problems, and a rather marked increase in the number of advocates, resulted in the so-called Apprenticeship Resolution being passed by the Bar. Its purpose is to guarantee an adequate training and accompaniment of the advocate.

Under the Apprenticeship Resolution every senior advocate is required, as far as it is within his/her power, to co-operate in the training of the (young) advocates.

The new advocate — the apprentice — is required to practice under the supervision of a mentor and — as a general rule — is also required to be employed in the mentor's law firm. An advocate may act as a mentor only if he/she has practised for at least 7 years.

The requirement for the apprentice to be employed at the mentor's law firm cannot be met in all cases. The capacity of the existing law firms, the number of (motivated) mentors available, and the increasing number of apprentices, have all contributed to the emergence of more and more so-called "outside mentorships". This means that the requirement to be employed in the mentor's law firm is waived. From the very beginning the apprentice sets up shop on his own and maintains contact with the mentor by telephone and regular progress talks. It is clear that this method of training should definitely not be encouraged and that is why this option of exemption is being restricted as much as possible.

At the end of the apprenticeship, an official certificate which evidences the completion of the Apprenticeship is handed down by the local District Council of the Bar Association. That is, unless the Council is of the opinion that the apprentice is not yet to be considered capable of practising by himself.

At the end of the apprenticeship period, information on the apprentices abilities is solicited by the Council from the mentor and the apprentice himself, among others. Should there be reason to do so, the apprenticeship period may be extended. This occurs only rarely, however.

During the apprenticeship, the apprentice works under the supervision and the responsibility of the mentor.

This does not mean, however, that the apprentice does not from the beginning take cases independently and also act independently towards clients. Of course this does require the necessary self-discipline and an understanding of one's own as yet limited skills. That is why the mentor sees to it that the activities required are attuned to the apprentice's lack of experience.

In the beginning, the apprentice carries out partial tasks in the mentor's cases. He prepares drafts, letters and briefs, attends meetings together with the mentor, carries out literature and jurisprudence research, etc., etc. Apart from these activities for the mentor, however, the apprentice immediately begins to build up his own practice as well, a practice which in the beginning consists mainly of the so-called Poor Persons' Procedures (Legal Aid), mainly concerning cases in the fields of family law, Rent Acts, labour law and criminal law. From the very beginning, the apprentice may also be nominated an official receiver in bankruptcies. The varied practice is of particular importance as the apprentice — during the apprenticeship — should get acquainted with as many areas of the law as possible.

In most cases, the mentor's practice is specialised one way or another and thus too restricted for "general-purpose" training. In actual practice, the consequence normally is that the training and accompaniment by the mentor are restricted to general abilities which an advocate should possess in order to practise adequately, and a technical training in the specific professional skills of the mentor. For training in general practice, the apprentice will often resort to an older apprentice or employee of the law firm.

Indeed in many cases the mentor may not be sufficiently informed about the latest developments in those fields of law which he does not count among his professional skills anymore. In due course the apprentice — depending on his progress — will start to treat independent cases on request by his mentor or other partners. Also, in due time he will make a choice — depending on his own preferences and the wishes of the law firm — regarding those areas in the general law practice most suitable to him. Thus, at the end of the

apprenticeship (it is to be hoped) the apprentice will have a little experience in a fairly large number of areas and specific experience in a few areas of law.

Furthermore, courses have been set up in co-operation with the universities and in co-operation with the judges and public prosecutors. But those are aimed at more experienced advocates. Naturally these older advocates should also keep their know-how up-to-date and follow the developments in law.

For this category the part-obligatory character of the courses for apprentices does not apply and thus participation is rather casual. This is an additional problem for the Bar Association which for the time being seems insoluble. Anyway the training of the young advocates has the higher priority.

Thus, the training of the apprentice in the Netherlands is still largely founded on the practical training within the law firm. It still shows fairly large gaps, however, which are only being partially patched by the external training facilities, which for the time being are financed from the annual contributions of the advocates. At the moment the Bar is busy finding options to improve the training, both in the form of a separate post-graduate curriculum for advocates and in the form of an improvement of the training facilities package during the apprenticeship period. For this purpose, the co-operation of the government, and particularly that of the universities, is needed. A co-operation which has not been forthcoming until now because of the lack of financial means.

Thus, for the time being the advocates themselves will have to take care of, and to co-operate with, the training of their young colleagues as far as it is financially and practically within their power. □

Court Fees Increased

The following was issued to the media through the Public Relations Committee on 29 March 1982:

"Government charges for starting an action in the Courts were increased today by between 25% and 33%.

"The new Stamp Duty for the issue of a writ to commence an action in the High Court is now £31, compared with £24 a year ago and £19 in March 1980. For a Circuit Court action the initial duty is now £10, increased from £7.50 a year ago and £6 in 1980; the District Court charge will now be £2, double what it was in 1980.

"A Law Society spokesman said today that while the increases may seem comparatively insignificant they are an indication of the increasing costs being imposed by the State on persons exercising their rights in seeking justice through the Courts. He added: "It is vital that the State should ensure that access to the Courts is available to everybody, and this type of annual increase in the cost of initiating an action could be a deterrent."

Matters of concern

Matrimonial problems will be the subject of the next Law Society symposium, "A Matter of Matrimony", to be held at Blackhall Place, Dublin, on May 29. Contributors will be Mrs Kay Begg, Bristol Court Conciliation Services; District Justice Sean Delap; Alan Shatter, Solicitor, and a psychiatrist, Dr Peter Fahy.

Solicitors are invited to attend and participate in the discussions — formal and informal. Because accommodation and catering facilities are limited, members of the profession who plan to attend should advise Miss Ann Kane, Premises Manager, as soon as possible.

In Cork

Useful discussions followed the papers at the recent symposium, "How Safe is your Food", held in Cork. Mr Michael Enright, President, Southern Law Association, and Mr Gerald J. M. Moloney, Solicitor, Cork, acted as chairmen of the sessions. Mr Moloney, in closing th symposium, answered a question about the Law Society's sponsorship of such meetings by pointing out that the profession has a caring role in society and therefore sees it as a duty to provide opportunities for experts to present their views on matters of public concern and the law's relationship to them.

Speakers at the symposium were: Gerard Downey, Senior Research Officer An Foras Taluntais; Denis Greene, Solicitor; Lee Kidney, President, Hotel and Catering Institute; Gerald Buckley, Chief Veterinary Officer, Cork County council, and Mrs Mary Falvey, Senior Health Inspector, Southern Health Board.

The participants included representatives of consumer groups, the food industry, local authorities, UCC and the Munster Institute. □

Practice Note

Issue of Motions for Judgment in Default of Defence

From time to time solicitors for Plaintiffs issue motions for judgment in default of defence, without any communication to the solicitor for the other side prior to the service of the Motion papers. The council of the Society ruled as far back as 1972 that a solicitor should notify his colleagues in advance of the intention to issue the motion. The Society feels that the issue is a matter of professional courtesy between solicitors. □

CORRECTION

"Criminal Injury to Property" Jan/Feb Gazette, 1982 p. 5. The paragraph subheaded "Damage" should read as follows: —

'Damage' includes the total or partial destruction of the property and any injury thereto. Save where the unlawful taking of property during a riot comes within the ambit of section 6, there is no compensation for property merely damaged though there is compensation for property stolen and found damaged. (*Irwin v Sligo Co. Council*) [1957] Irish Jurist Reports.

Gammell v Wilson and Ors. — A Further Commentary

by David R. Pigot, Solicitor

THE decisions of the House of Lords in the cases of *Gammell v Wilson and Ors. and Furness and Anor. v B. & S. Massey Ltd.* (both reported at [1981] 1 All E. R. 578) have aroused feelings on the one hand of concern, and on the other of pleased anticipation, amongst lawyers in this jurisdiction — which depending upon the side they tend normally to find themselves in compensation claims. The purpose of this article is, hopefully, to demonstrate that these decisions will have no application in similar cases in the Irish Courts or, if they have, to suggest in what way the law in the Republic of Ireland could (and should) be amended.

The facts of the two cases are well known but it may be helpful briefly to summarise them once again. The Plaintiffs in these two actions were the parents of two young men killed in accidents as a result of the negligence of the respective Defendants. Both deceaseds died intestate and the Plaintiffs were therefore the Administrators of their estates. Both sets of Plaintiffs claimed damages against the defendants under the Fatal Accidents Act (in the *Gammell* case the Act of 1976 and in the *Furness* case the Acts of 1846 to 1949) on behalf of themselves as dependants, and under the Law Reform (Miscellaneous Provisions) Act, 1934 on behalf of the deceased's estate.

In each case, the damages awarded under the 1934 Act exceeded those awarded under the Fatal Accidents Acts. By reason of the fact that under the Fatal Accidents Acts the Court was required to take into account any benefit accruing to a dependant from a deceased's estate, no award was made in respect of the claims under those Acts.

The damages awarded included, inter alia, damages for the deceaseds' loss of future earnings during the years of life lost to them ("the lost years").

Previously, the Court of Appeal in *Oliver v Ashman* (reported at [1961] 3 All E.R. 323 and [1962] 2 Q.B. 210) had held that such loss of future earnings was irrecoverable. This decision was over-ruled in the case of *Pickett v British Rail Engineering Ltd.* (reported at [1979] 1 All E.R. 774).

Briefly, the House of Lords in the *Pickett* case decided that where a Plaintiff, as a result of a Defendant's negligence, suffered diminution of his life expectancy, such Plaintiff had been deprived of an asset of value which could be assessed in money terms. Accordingly, the House of Lords decided that the damages recoverable by Pickett in his action should include his loss of future earnings for such period as he was likely to have continued at work. Those damages were to be assessed objectively disregarding loss of financial expectations which were too remote or unpredictable and speculative and after deducting the Plaintiff's own living expenses which he would have expended during the "lost years".

There can be little doubt that the House of Lords was very largely influenced in coming to this decision by the fact that Pickett had died before his Appeal (and the Defendant's Cross-Appeal) was disposed of and accordingly, as he had recovered damages for his personal injuries in proceedings brought during his own lifetime; his dependants no longer could bring an action for damages against the same Defendants under the Fatal Accidents Act, 1976.

The *Pickett* decision, coupled with the provisions of Section 1 of the Law Reform (Miscellaneous Provisions) Act 1934, effectively left the House of Lords with no alternative but to decide the *Gammell* and *Furness* cases as they did, although it is respectfully submitted that the method of calculating the damages for the "lost years" was incorrect. The law in England as a result is now clear. It must nevertheless be pointed out that while the House of Lords had no hesitation in deciding what the law of England was, they did not believe that that was what it should be. Lord Diplock stated that he did not think the outcome was "either sensible or just" and that successive judicial decisions had "led into a morass from which I think that only Parliament can extricate us". Lord Fraser found the law "difficult to justify", Lord Russell that "the law has gone astray" and Lord Scarman that "It was a mischief which should be removed from our law". (It is in fact understood that a firm commitment has been made by the English Government to amend the law at the next legislative opportunity to preclude future "Gammell" type decisions). The question which then arises is — "Is what undoubtedly is at the present the law in England also the law in the Republic of Ireland?"

Proponents of the *Gammell* and *Furness* decisions have referred to the earlier Irish case of *Doherty v. Bowaters Irish Wallboard Mills Ltd* [1968] I.R. 277. It certainly appears from the judgment of Mr. Justice Walsh that the Supreme Court took the view that in assessing the damages to which the Plaintiff was entitled for loss of earnings "the length of time by which the expectation of life has been reduced must also be taken into account". A feature of this case, however, is the fact that it was apparently accepted in the High Court that the Plaintiff

was not entitled to damages for his loss of earnings during the "lost years" and furthermore (if the cases referred to by counsel in arguing the Appeal are an accurate guide) that the point was not argued before the Supreme Court. Of all the cases dealing with the right of Plaintiffs to damages for loss of earnings during the "lost years" referred to by the House of Lords in delivering their judgments in the *Gammell* and *Furness* cases, only that of *Oliver v Ashman* was referred to — significantly, it would seem, by the Plaintiff. It will be remembered that in 1968 *Oliver v Ashman* was authority for the proposition that the Plaintiff was not entitled to damages in respect of the "lost years". It is therefore respectfully submitted that this case offers questionable support to the *Gammell* decision.
In any event, the *Doherty* case, if it is a binding authority, can be conclusive only in the case of a Plaintiff who has himself suffered a diminution of his life expectancy as a result of the Defendant's negligence. In considering whether the *Gammell* and *Furness* decisions can assist the Irish Courts in a fatal case, one has to consider in addition whether the relevant provisions of the Irish Civil Liability Act, 1961 correspond with those of the English Law Reform (Miscellaneous Provisions) Act, 1934.

Section 7(2) of the Civil Liability Act, 1961 provides that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include exemplary damages "or damages for any pain or suffering or personal injury or for loss or diminution of expectation of life or happiness". The corresponding Section of the 1934 Act (Section 1(2) (a)) does not include the words in quotations at all, excluding only exemplary damages. What must then be considered is whether the additional words contained in the 1961 Act preclude the personal representative of a deceased in a proper case from recovering damages for loss of future earnings during the "lost years". Reference to one of the judgments in the *Gammell* and *Furness* cases is of assistance in this regard.

Lord Edmund-Davies (at page 584) in the course of considering whether such an action lay at all stated — "It is impossible to distinguish in legal principle between a claim in respect of a shortened expectation of life on the one hand and in respect of shortened expectation of *working* life on the other." If it be correct that there is no distinction to be made between the two, then, as recovery of damages for loss or diminution of expectation of life is precluded by Section 7(2) of the 1961 Act, it is submitted that damages for loss of earnings in the "lost years" is equally precluded.

This submission would seem to get further support from the fact that at the date the Civil Liability Act, 1961 became effective (17th August 1961), English Law countenanced payment of a "conventional sum for loss of expectation of life (*Benham v Gambling*, [1941] 1 All E.R. 7 and [1941] A.C. 157) and that in *Oliver v Ashman* it had just previously been decided that loss of earnings during the lost years was only "an ingredient" of the loss of expectation of life and was not to be valued as an item on its own. As already pointed out, the Civil Liability Act, 1961 expressly excludes recovery of damages for loss of expectation of life.

Moreoever, having regard to the criticisms of the law made by the House of Lords (quoted earlier in this article), it is submitted that the Irish Courts, unless feeling themselves otherwise bound by overriding precedent, should decide that no damages for loss of earnings during the "lost years" should be recoverable.

Finally, it is submitted that the *Pickett* decision, insofar as it decided the only deduction from earnings during the "lost years" should be the Plaintiff's living expenses, should have no application where the injury is a fatal one and should not be followed in such a case.

There is neither logic nor justice in deciding in a fatal case that the only deduction to be made from the future loss of earnings should be the deceased's own "living expenses which he would have expended during the "lost years"." It is submitted that in addition all sums which the deceased had he lived would have paid in support of his dependants should also be first deducted. This approach has the merit of immediately disposing of any question of "double recovery" insofar as that proportion of the deceased's loss of earnings which in the ordinary way he would have paid to his dependants was concerned. The House of Lords in the *Gammell* case expressed ver clearly its disapproval of "double recovery".

The practical effect of this would be that if, in addition to first deducting living expenses, sums which would have been paid to a deceased's dependants be also deducted, where (as is likely to be the position in the majority of cases) the sum of a deceased's living expenses and the amounts paid by him to his dependants effectively exhaust his total net income after tax, the sums which a Plaintiff could recover under the "loss to deceased's estate" claim will be limited to special damages and funeral expenses (and these only to the extent to which they had not already been recovered in a contemporaneous claim by the statutory defendants under Part IV of the Civil Liability Act 1961).

Of course, if there was evidence that the amount expended by the deceased on his own living expenses and in support of his dependants was less than his total net income, the capitalised value of the difference is a measurable loss arguably accruing to his estate, although this argument does ignore the consideration that the deceased had he lived might very well have spent (rathe than saved) such difference in which event no loss would have accrued to the estate at all. Evidence of a pattern of saving would obviously be relevant.

It should also be observed that the decision in the *Gammell* case appears to take no cognisance of the high degree of probability that a young man such as Gammell, dying at an early age, leaving no widow or children, would in the ordinary way have survived his father and mother, with the result that they would have received no benefit whatever from his estate and accordingly would appear to have doubtful entitlement to claim damages for any reduction in or loss of such benefit certainly by reason of any loss of future earnings of the deceased, the calculation thereof taking into account earnings of the deceased at a time when very likely they would in the ordinary course of events be deceased. The dependants' rights it is submitted should be confined to a claim for damages under Part IV of the Civil Liability Act, 1961.

It is further submitted that if, notwithstanding the foregoing, the law in the Republic of Ireland today does

permit a Plaintiff (whether he be the injured party or his personal representative) to recover damages for loss of earnings during the "lost years", the situation calls for urgent consideration and an appropriate amendment of the law by the legislature. If the law is suitably amended, no injustice need be done to the eventual dependants of a living Plaintiff or the dependants of a person who has died as the result of the negligence of another. It is suggested that the consideration of justice for Defendants far outweighs the loss to a deceased's estate of what has been described as "a windfall" and what is in some instances in fact "double recovery" at the expense of a Defendant. This might be done by the enactment of statutory provisions similar in form to Section 2(3) of the Damages (Scotland) Act 1976 which effectively precludes any claim for damages by way of compensation for partimonial loss attributable to any period after the deceased's death. In the course of the Judgments in the House of Lords in the *Gammell* and *Furness* cases it was indeed suggested that English Law should be amended in precisely this fashion.

The legislature might indeed go further and enact legislation which would provide that a Plaintiff who recovers judgment for damages in his own lifetime for injuries which have resulted in a diminution of his expectation of working life should recover damages for future loss of earnings on the basis of his reduced life expectancy only and not for the period for which in the ordinary way he might have been expected to continue working. In lieu of a right to damages for loss of earnings in the "lost years" the legislature might provide that, in addition, at the actual date of his death his then dependants would become entitled, within a limited period (say two years), to claim damages against the original Defendant for the loss of dependency they would henceforth experience, in a similar manner as they could have done had the Plaintiff been killed instantly, under Part IV of the Civil Liability Act, 1961. In cases where the Defendant is insured such a law should not present any problem for a Plaintiff. In the case of an uninsured defendant, he might be required to take out a policy providing the appropriate indemnity on payment of a single premium.

Subject to the dependants establishing that the cause of death was the injury complained of in the earlier proceedings, this new claim would be solely an assessment of the damages to which those dependants were entitled, the determination of liability in the earlier proceedings (including any apportionment of responsibility that might have been made in the earlier case) binding the parties in the new proceedings. If the eventual death resulted from the negligent act of a third party unrelated to the earlier proceedings, the position of the dependants could still be protected by giving them a claim against the new tortfeasor in lieu of that which otherwise they would have had against the first one. If the death occurred in circumstances unrelated to the original injury and for which no other person could be held responsible, and, as a result the dependants had no claim, no injustice would have been done to these dependants in those circumstances.

Such legislation would in fact provide better protection for the eventual dependants of persons whose expectation of working life has been diminished by the negligent act of another than they have under our present law. While if damages for loss of earnings during the "lost years" are recovered theoretically provision is thereby made in the award to a Plaintiff for his future dependants, that provision may prove valueless if the moneys awarded to him are either dissipated by the Plaintiff himself during his lifetime or (subject to such limitations as may be imposed by the Succession Act, 1965) left by him under his Will or even passed by virtue of his intestacy to persons other than the dependants for whom it was notionally intended.

Finally, if the law is to be amended, consideration might in addition perhaps be given to the possibility, instead of awarding a lump sum to cover future loss of earnings (whether including "lost years" or not), of directing satisfaction of that portion of the award to dependants by an appropriate annuity to be suitably adjusted from time to time, which would terminate on the dependants' death. A defendant's liability under Part IV of the Civil Liability Act 1961 might similarly be satisfied, at least in part. Whether the practical and financial problems that such proposals will undoubtedly raise are capable of a satisfactory solution is for those interested and qualified to do so to judge for themselves. □

Incorporated Law Society of Ireland

IMPORTANT NOTICE

Practising Certificates will not be issued in 1982 or future years unless the Solicitors' Accountants' Certificate is in order, i.e., a clear Certificate has been lodged within 6 months of the solicitors' accounting date.

Where, on application for a Practising Certificate, an Accounting Certificate is not in order, the Solicitor will be notified in writing that the Practising Certificate cannot issue until the Accountants' Certificate is lodged and that should be done within one month. He will be informed that pending receipt of the Accountants' Certificate his remittance is being held in suspense account and that in the meantime, it is an offence to practice without a Practising Certificate.

After a lapse of one month, the solicitor will be informed that unless the Accountants' Certificate is received within a further month, disciplinary proceedings will be commenced without further notice and that, at the same time, the Bar Association and County Registrar will be notified that the solicitor is practising without a current Practising Certificate.

The situation regarding outstanding Accountants Certificates is reviewed at each Council meeting.

JAMES J. IVERS,
Director General

BOOK REVIEW

Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice.
Twenty-second Edition. London, Stevens & Sons, 1981 (lix, 565p.) Price £13.50 Sterling.

The principal objects of pleading are to define the issues of fact and questions of law to be decided between the parties; to provide each of them with distinct notice of the case intended to be established by the other and to set out a brief summary of the case of each party. Thereby neither litigant is taken by surprise at the trial and a permanent record becomes available relating to the nature of the claim and defence, and the questions raised and issues decided, so as to prevent future litigation upon matters already determined.

While pleadings are closely related to practice and procedure the art of the pleader is that of the essayist or concise reporter whereas the craft of procedure is that of diagnosis and treatment whereby the matters at issue are isolated and brought before the Court. The former permits of a certain degree of imagination and style whereas the latter is decidedly pragmatic.

The present edition of this well-known legal volume is published ninety years after the first appearance of the book in 1981. It comes at a time of rapid and far-reaching changes in the law of civil procedure in England where the past few years have produced more innovation and reform than at any time since the Indicature Acts of the last century. Consequently the basic text has been extensively revised and much new material has been incorporated by its editors D. B. Casson and I. H. Dennis.

While Irish students and lawyers would be well advised to learn or apply these subjects from a suitable edition of Bullen & Leake's **Precedents of Pleadings** and from the Rules of the Superior Courts 1962, as amended, nevertheless this textbook is invaluable for those who are interested in the history of court procedure and in discovering the reason why the rules of both leading and practice have evolved at common law over the centuries until they have reached the form in which we know them today.

Rules of Court have never been regarded as ornaments of legal literature. The nature of their function is so basic that they may be looked upon as the foundations and walls of the legal edifice or as lines of communication that carry the system until the final execution of the judgement.

It is, accordingly, all the more credit to the editors that they have produced a volume which is not merely readable and complete but to the student or lawyer, with some knowledge at least of the subject, the text has the charm of clarity in which the history and the principles are set out without confusion and in which the editors appear to be at your shoulder telling you what to do and what not to do as you ponder over a procedural problem in a case. Bearing in mind that certain statutory and historical differences do exist between the Rules of Court in England and Wales and those in Ireland nevertheless interested Irish readers will find this a delightful book in which the subject is treated with such humanity and understanding that the static character of adjectival law acquires a certain movement such as the Impressionists gave to the still-life art of France a century ago.

There are ample footnotes relating to the leading cases on the subject. In addition the volume contains a table of cases and statutes while those rules which are of particular interest to students are treated in detail in an appendix to the text. □

GERARD A. LEE

Books received

The following titles have been received:-

C.I.P.A. Guide to The Patents Act, 1977. (3rd Cumulative supplement up to date to September, 1981) by Chartered Institute of Patent Agents. London. Sweet & Maxwell, 1982. Price: £10.75 Sterling.

Companies Act, 1981. Current Law Statutes Reprints, London. Sweet & Maxwell, 1982. Price £7.75 Sterling.

Professional Information

Land Registry —
Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated this 25th day of April, 1982.

W. T. MORAN (Registrar of Titles)

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

1. REGISTERED OWNER: Patrick Christopher Linnane, Murrough, Ballyvaughan, Co. Clare; Folio No: 28122; Lands: (1) Murrooghtoohy North, (2) Murrooghtoohy South; Area: (1) 14a. 2r. 7p., (2) 12a. 3r. 33p.; County: **CLARE.**

2. REGISTERED OWNER: Daniel G. Dempsey; Folio No: 7343L; Lands: Leasehold interest in the property situate in part of the townland of Ballyvolane to the south side of Long Lane in the parish of St. Anne Shandon and Co. Borough of Cork; Area: —; County: **CORK.**

3. REGISTERED OWNER: Edward Joseph Fallon; Folio No: 939L; Lands: Leasehold interest in the property situate in the townland of Rivers in the Barony of Clanwilliam; Area: 0a. 1r. 20p.; County: **LIMERICK.**

4. REGISTERED OWNER: Michael Foley; Folio No: 685 (rev.); Lands: Curragh; Area: 109a. 1r. 0p.; County: **CORK.**

5. REGISTERED OWNER: Patrick O'Brien; Folio No: 25695; Lands: Ballyhahill; Area: 0a. 1r. 0p.; County: **LIMERICK.**

6. REGISTERED OWNER: Neil McNamee; Folio No: 6526; Lands: Convoy Townparks; Area: 20a. 1r. 22p.; County: **DONEGAL.**

7. REGISTERED OWNER: Jerome O'Mahony; Folio No: 18641F; Lands: (1) Adamstown, (2) Adamstown; Area: (1) 0.350 acres, (2) 0.031 acres; County: **CORK.**

8. REGISTERED OWNER: Thomas Grennan, Kilgarrif, Kilmovee, Ballaghaderreen, Co. Mayo; Folio No: 2223; Lands: Barcull; Area: 28a. 1r. 35p.; County: **MAYO.**

9. REGISTERED OWNER: Patrick Cullinan (Junior) and Mary Cullinan, Kilmacduane, Cooraclare, Co. Clare; Folio No: 4528; Lands: (1) Kilmacduane, (2) Aughama; Area: (1) 24a. 0r. 36p., (2) 1a. 0r. 6p.; County: **CLARE.**

10. REGISTERED OWNER: Patrick & Sarah Kelly; Folio No: 15927; Lands: Singlang; Area: 0a. 0r. 33p.; County: **LIMERICK.**

11. REGISTERED OWNER: Raymond Buckley; Folio No: 2652L; Lands: Leasehold interest in the property situate in part of the townland of Ballincollig and barony of Muskerry East; Area: 0a. 0r. 10p.; County: **CORK.**

12. REGISTERED OWNER: Peter Francis Cosgrove; Folio No: 19285; Lands: Ballymagauran; Area: 0a. 3r. 37p.; County: **CAVAN.**

13. REGISTERED OWNER: Joseph Moran, deceased; Folio No: (1) 3963, (2) 3486; Lands: (1) Lands of Athgoe South and Bustyhill in the Barony of Newcastle, (2) Lands of Athgoe South and Bustyhill in the Barony of Newcastle; Area: (1) 28a. 0r. 12p., (2) 14a. 3r. 0p.; County: **DUBLIN.**

14. REGISTERED OWNER: Jeremiah Lynch; Folio No: 176R; Lands: Ballinaspigmore; Area: 83a. 2r. 18p.; County: **DUBLIN.**

15. REGISTERED OWNER: Edward Kenny; Folio No: 15920; Lands: (1) Loughan, (2) Busherstown; Area: (1) 27a. 3r. 1p., (2) 14a. 2r. 35p.; County: **OFFALY.**

16. REGISTERED OWNER: John Carolan; Folio No: 11868; Lands: (1) Lenanauragh, (2) Cornaglare; Area: (1) 41a. 2r. 10p., (2) 1a. 0r. 36p.; County: **CAVAN.**

17. REGISTERED OWNER: Kathleen Flaherty; Folio No: 5225F; Lands: (1) Gorteen, (2) Carrownaginnive, (3) Ballynahowna; Area: (1) 9a. 0r. 24p., (2) 10a. 2r. 18p., (3) 25.644a.; County: **GALWAY.**

18. REGISTERED OWNER: Michael F. Kitt, Lehanagh, Castleblakeney, Ballinasloe, Co. Galway; Folio No: 11050; Lands: (1) Lehanagh, (2) Lehanagh, (3) Ballynahattina, (4) Lehanagh; Area: (1) 20a. 3r. 5p., (2) 3a. 1r. 0p., (3) 6a. 1r. 0p., (4) 0a. 2r. 30p.; County: **GALWAY.**

19. REGISTERED OWNER: Richard McAllister; Folio No: 1980; Lands: Malahide (part); Area: 2a. 0r. 26p.; County: **DUBLIN.**

20. REGISTERED OWNER: Michael Bartley & Ors; Folio No: 9035; Lands: Lands of Turnapin Great; Area: 28.30 acres; County: **DUBLIN.**

21. REGISTERED OWNER: John Palmer; Folio No: 44518L; Lands: Hilltown, Barony of Nethercross; Area: 0a. 0r. 10p.; Cour **DUBLIN.**

22. REGISTERED OWNER: Ronald Thomas B. Robinson; Folio No: 10259; Lands: Porterstown; Area: 0a. 2r. 8p.; County: **DUBLIN.**

23. REGISTERED OWNER: William Byrne (Jnr.); Folio No: 817; Lands: Castleroe East (part); Area: 199a. 0r. 7p; County: **KILDARE.**

24. REGISTERED OWNER: Peter McFeely; Folio No: 4254F; Lands: East side of Ardree — Collon Road in the town of Ardee; Area: —; County: **LOUTH.**

25. REGISTERED OWNERS: Gerald James Noel Murphy, Ballinatray, Courtown Harbour, Co. Wexford; Folio No: 7562; Lands: Ballinatray Upper; Area: 101a. 2r. 23p.; County: **WEXFORD.**

26. REGISTERED OWNER: John Ahearn; Folio No: 8670; Lands: Kilcommon More (South) (part); Area: 184a. 1r. 16p.; County: **TIPPERARY.**

27. REGISTERED OWNER: Kenneth McNiece; Folio No: 12606; Lands: (1) Drollagh (part), (2) Drollagh (other part); Area: (1) 48.406a. (2) 7.000a.; County: **MONAGHAN.**

28. REGISTERED OWNER: John Leahy; Folio No: 9519; Lands: Ballyspillane West (part of); Area: 77a. 2r. 21p.; County: **CORK.**

29. REGISTERED OWNER: Patrick Keating, Quilty, Cross P.O., Co. Clare; Folio No: 1621F; Lands: (1) Cloghaunsavaun, (2) Cloghaunsavaun; Area: (1) 8a. 0r. 6p., (2) 14a. 3r. 16p.; County: **CLARE.**

30. REGISTERED OWNER: Nora McNulty, Bunnacurry, Ac[illegible] Sound, Westport, Co. Mayo; Folio No: 36320; Lands: (1) Cashel (E. Achill), (2) Cashel (E.D. Achill), (3) Cashel (E.D. Achill), (4) Keel West, (5) Slievemore, (6) Doogort East, (7) Doogort West, (8) Bellanasally, (9) Bal of Dookinelly (Calvy), (10) Mweelin, (11) Dookinelly (Thulis), (12) Dookinelly (Calvy), (13) Maumnaman, (14) Keel East, (15) Doogort; Area: (1) 4a. 0r. 5p., (2) 23a. 1r. 18p., (3) 1265a. 0r. 26p., (4) 4251a. 2r. 15p., (5) 2901a. 2r. 2p., (6) 1389a. 1r. 33p., (7) 1659a. 2r. 0p., (8) 378a. 3r. 4p., (9) 89a. 1r. 22p., (10) 996a. 3r. 34p., (11) 732a. 3r. 14p., (12) 1665a. 2r. 34p., (13) 561a. 2r. 8p., (14) 800a. 1r. 36p., (15) 115a. 2r. 20p.; County: **MAYO.**

31. REGISTERED OWNER: Thomas Hughes (full owner as tenant in common of 6 undivided 27th shares); Folio No: 291; Lands: Porterstown (part); Area: 1a. 1r. 27p.; County: **DUBLIN.**

32. REGISTERED OWNER: John Christopher Judge, Carrownedan, Killasser, Swinford, Co. Mayo; Folio No: 1608; Lands: Cullen; Area: 11a. 1r. 4p.; County: **MAYO.**

33. REGISTERED OWNER: Vitamealo Ltd.; Folio No: 9087F; Lands: Ballyphelane; Area: 6a. 2r. 5p. County: **CORK.**

34. REGISTERED OWNER: Christopher Higgins & Margaret Higgins; Folio No. 5881F; Lands: Commons West; Area: 1.988a.; County: **KERRY.**

35. REGISTERED OWNER: John Finucane; Folio No: 1344; Lands: Dromsallagh; Area: 5a. 0r. 26p.; County: **LIMERICK.**

36. REGISTERED OWNER: James Larrissey and Annie Larrissey; Folio No: 1257; Lands: Ballymakaily; Area: 69a. 3r. 10p.; County: **DUBLIN.**

Lost Wills

Patrick (Paddy Jimmy) Cronin, deceased, late of Knockavoureen, Kiskeam, Mallow, Co. Cork. Would any person having knowledge of a will of the above-named deceased who died on 23 May, 1975, at Mallow Hospital, Mallow, Co. Cork, please communicate with Messrs. Downing, Grace & Courtney, Solicitors, New Street, Killarney, Co. Kerry (Ref: C.127) Tel. 064-31061.

Marjorie Edison, deceased, late of 14 Edenvale Road, Ranelagh, Dublin 6. Would any person having knowledge of a will of the above-named deceased who died on 27 December, 1981, please communicate with Messrs. Sean E. McDonnell & Co. Solicitors, 24 Upper Rathmines Road, Rathmines, Dublin 6. Tel. 961351.

Mary Margaret (otherwise Peg) Harmon, deceased, late of 59 Braemor Drive, Balbriggan, Co. Dublin and formerly of 14 Serpentine Terrace, Ballsbridge, Dublin 4. Would any person having knowledge of a will of the above-named deceased who died on 15 January, 1982 please contact Messrs. Hayes & Sons, Solicitors, 15 St. Stephen's Green, Dublin 2. Ref: TM. Tel: 688399.

Agnes Palmer, deceased, late of 3 Newlands Park, Clondalkin, Co. Dublin and 9th Lock Inn, Clondalkin, Co. Dublin. Would any person having knowledge of a will of the above-named deceased, who died on 3 March, 1982, please contact Messrs. Peter J. Cusack & Co., Solicitors, Orchard Road, Clondalkin, Co. Dublin. Tel. 517864.

Bernard Sheridan, deceased, late of Ballinrink, Co. Meath. Would any solicitor having knowledge of any will of the above-named deceased, who died on 4 May, 1971, please communicate with Messrs. George V. Maloney & Co., Solicitors, 6 Farnham St., Cavan.

Employment

Solicitor wanted. At least three years experience. Required to specialise in Conveyancing, Probate and Company Law. Expanding practise in North East. Please reply with full details to Box No: 028.

Solicitor/Taxation Assistant seeks position with challenge, responsibility and remuneration commensurate with the nature of the post. A legal practice preferably located within a 30 mile radius of Dublin will be considered. Tel. (01) 503735.

Apprentice who will qualify in October, 1982 seeks position. Working apprenticeship completed. Excellent conveyancing experience. Interest in Labour Law. Replies to Box No: 029.

Solicitor. 1½ years experience in litigation, conveyancing and probate seeks position. Replies to Box No: 030.

New Zealand Solicitor, recently qualified seeks Conveyancing, Commercial or Industrial/Labour Law position in Irish law firm. Previous office experience. References available. Replies to Box No: 031.

Miscellaneous

Solicitors Practice Wanted. Expanding firm of young solicitors wish to take over small practice. Practitioner to retire or remain as consultant. Confidentiality assured. Box No: 032.

Exchange with Australian Solicitor. Partner of medium practice in rural Vicoria (two hours drive Melbourne) would like to exchange position and residence with Irish solicitor for up to three months between July and November, 1982. Rural or City considered. Reply to P. J. Dowd, Post Office Box One, Shepparton, Victoria, Australia.

Obituaries

Mr. Desmond G. Houston died at his residence, Laburnum Lodge, Newtown, Celbridge, Co. Kildare on 19 December, 1981. Mr. Houston was admitted in Hilary Term, 1948 and practised first at 26 Mary St., Dublin and then went abroad. From 1958 he practised, ultimately as a partner, with his mother, Eugenia Griffin, under the title Eugenia Houston & Co., at 55 Dame St., Dublin.

Mr. Peter O'Connor died in Waterford in November, 1981. Mr. O'Connor was admitted in Easter term, 1931 and practised under the name of Peter O'Connor & Son at 23 O'Connell St., Waterford.

Mr. Richard J. Muldowney died on 29 December, 1981. Mr. Muldowney was admitted in Michaelmas term 1933 and practised as a partner with Mr. Liam J. Egan under the title of Egan & Muldowney at 1A Lower Ormond Quay, Dublin. Mr. Muldowney continued to practise at that address after Mr. Egan had become Secretary to St. Luke's Hospital, Dublin.

Mr. Michael O'Meara of Melrose, Nenagh, Co. Tipperary died on 6 March, 1982. Mr. O'Meara was admitted in Trinity Term, 1982 and practised under the title of Dudley and O'Meara in Nenagh, Co. Tipperary.

Mr. Anthony J. Malone, B.A., L.L.B. died at James Connolly Memorial Hospital, Blanchardstown, on 10 March, 1982. Mr. Malone, who resided at Greenbank, Trim was admitted in Michaelmas Term 1925, and practised at Market St., Trim, Co. Meath. In 1958, he was a partner of Mr. James K. Martin and practised under the title of Malone and Martin at the same address.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76 No. 4 May 1982

Legislate in Haste . . .

NOW that the President has signed the Housing (Private Rented Dwellings) Bill 1982 and a Ministerial Order bringing it into force cannot long be delayed, it may be appropriate to comment on the performance of those charged with the preparation and enactment of legislation in respect of this urgently needed legislation.

It cannot be said that either the initiators or the legislators deserve very much credit. The Supreme Court's decision was given on the 29th June 1981 and the Rent Restrictions (Temporary Provisions) Act 1981, a purely holding measure was introduced and passed with commendable speed. It was not however until the 2nd December 1981 that the ill-fated Housing (P.R.D.) Bill 1981 was introduced. Before this Bill was available to the public through the Stationery Office, Dail Eireann had concluded its second stage Debate, in which only comment on the principles of the legislation is permitted. The Committee Stage, when a Bill is examined section by section, never took place because the Government applied the guillotine procedure so the Bill went straight to the Senate without any consideration of its detailed provisions.

The Senate, to its credit, did its duty as a second chamber and in its four hour Committee Stage Debate attempted to give serious attention to the measure. A number of Senators were, rightly as it turned out, unhappy about the provisions of Section 9 of the Bill but the Minister for State in charge of the Bill appeared to adopt the position that the Bill should be enacted and the Supreme Court could then advise on its constitutionality. This is of course a wrong headed approach. Legislation should be drafted with at least one eye on the Constitution. It did not come as any great surprise to those who had studied the judgment in the Rent Restrictions case that the Supreme Court struck down Section 9 of the Housing (P.R.D.) Bill 1981 and it should not have been seriously offered to the Oireachtas nor passed by them. The Housing (P.R.D.) Bill 1982 fared a bit better at the hands of the legislators in that there was a Committee Stage debate in the Dail. True it contained an outburst by one Deputy whose unworthy criticism of the Supreme Court as showing a bias in favour of landlords showed that he hadn't read the judgment in the Rent Restrictions case; nonetheless there was a full Debate. Unfortunately for the administration the Senate, summoned from its re-election campaigning, actually passed a significant amendment to a vital Section of the Bill, thus necessitating the Bill's return to the Senate which rapidly rejected the amendment. On its return to the Senate the Minister chided the Senators for daring to amend the Bill largely on the grounds that by so doing it had delayed the progress of the legislation. His comments provide a useful insight into the view which Ministers have of the functions of the Upper House.

It is doubly unfortunate that this unsatisfactory series of events related to legislation which directly concerns the homes of so many citizens since it was in relation to the Family Home Protection Act in 1976 that the legislature also failed in its duty to critically examine legislation during its passage. That Act, which was enacted with remarkable speed has led to more litigation within a very short period than any other Act that comes to mind. As drafted it appears as a simplistic version of the Homestead Legislation of some of the Canadian provinces but without the procedures for administering the Act which are enshrined in the Canadian Legislation. If these procedures had been included the lot of house buyers and sellers and their solicitors would have been much eased during the intervening six years.

Our legislative process is clearly not working satisfactorily. Detailed provisions of proposed Bills are kept secret so that the advice and comment of those who may be professionally involved with the application of the law is not available to the initiators. There is a reluctance to advise a Minister to accept technical amendments to a Bill once it has been introduced, perhaps because of the imagined loss of face involved in accepting such amendments. There are no Standing Committees of the Houses of the Oireachtas dealing with proposed legislation and neither are bills regularly referred to specialist committees of the Houses for consideration of their technical aspects. Other Parliamentary democracies seem to find such procedures necessary for their proper operation. The recent history of legislative incompetence in Ireland suggests strongly that we need to adopt such procedures also. □

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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In this issue ....

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Comment . . .

. . . Why Not The Baby, Too?

IN its report on "Domicile and Habitual Residence as Connecting Factors in the Conflicts of Law" (published in September 1981), the Law Reform Commission does not quite come down in favour of abandoning the Doctrine of Domicile as understood in the majority of the common law countries. It expresses the provisional view that it should be replaced by the concept of Habitual Residence, peferring this to the concept of nationality which prevailed in most of continental Europe until recently and asks for submissions to be made to it on that point. It is to be hoped that the submissions it receives will support the abolition of the Doctrine and that, unlike previous reports, legislation to implement the recommendations will be introduced rapidly.

The temptation which may face the Government in introducing legislation simply to abolish the principle of the Wife's Dependant Domicile and to introduce various other changes which the Commission recommend, if the Doctrine of Domicile is to be retained, should be resisted. It is true that the principle of the Wife's Dependant Domicile is one of the most obnoxious aspects of the Doctrine (and, perhaps, an unconstitutional one — see the remarks of Mr. Justice Walsh in *Gaffney v. Gaffney* [1975] I.R. 152, but it would be most unsatisfactory if dealing with this and other defects of the present position were to delay or prevent the abolition of the redundant Doctrine itself.

The defects of the older Doctrine of Domicile and the 19th Century Doctrine of Nationality are becoming more apparent every day and, though there may be problems associated with the concept of Habitual Residence, they are a great deal easier of resolution than the problems of domicile.

It is axiomatic that in many areas of law a case which is litigated to the highest Court will be balanced on a knife-edge and decided, perhaps, by a majority of one among a number of judges who have considered the case at various levels. In suh circumstances, it is not surprising that there is often very determined support, both inside and outside the legal profession, for arguments which did not gain favour with the Court. What distinguishes the law of domicile is that, in many cases where doubt arises as to the domicile of a person, usually one who is deceased, the Court is faced with the choice between two decisions, each of which could readily be described as nonsensical. If there is any area in which the law can truly be said to be an ass, it is in the area of domicile. *(Continued on P. 93)*

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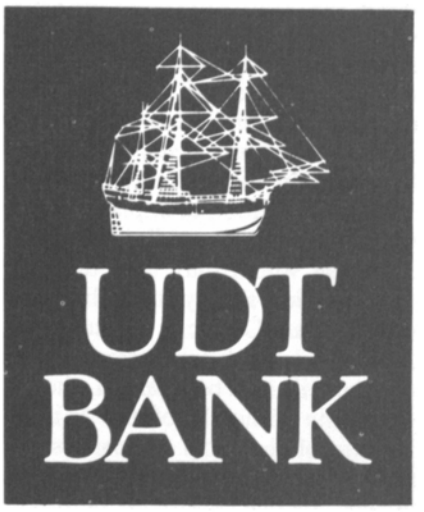

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The Powers of the Police

A Critical Overview[1] (Part 1)

by
Peter Charleton, B.A. (Mod), Barrister-at-Law

"I THINK we are bound to take care that the law relating to the duty of constables shall rest upon broad, plain, intelligible principles." This policy, which was stated in the 1823 case of *R. V. Weir*[2] is, it has been remarked by Professor D. A. Thomas of the London School of Economics[3], remarkable both for its self-evident merit and the consistency with which it has been ignored by later generations of judges and parliamentary draftsmen. The policy itself while of value in England has become of the highest importance in Ireland. No one reading the clear judgment of Costello J. at first instance in *Peope (D.P.P.) V. Shaw*[4] can fail to remark how difficult is the law the police have to administer.

The policeman on the beat and the detective in the investigation of crime each needs to know precisely what he is permitted by law to do. This is so for two reasons, firstly, because at the very least the class of citizens most reasonably expected to be seen observing the law are the police; and, secondly, because in the event of ignorance or deliberate infringement, the efforts of the police to secure evidence against a suspect will be set at nought; for a Court of trial is bound to exclude evidence obtained in breach of an accused's constitutional rights[5].

The nature of the area in which the policeman works is such that in almost every case where the law has not given him specific power to aid his investigation, he will in breaking the law be treading on and infringing the frail and uncertain edifice of the citizen's constitutional rights. No doubt, if the policeman does infringe a person's liberty, bodily integrity or the inviolability of a person's dwelling, he does so not because he wants to but because those are the "trees" which yield the most useful and interesting evidential "fruit", but which also, without express legislative authority, are likely to become the judicially declared "poisoned fruit", useless at the subsequent trial.[6]

The police in performing their duties have, in the common law system, operated under a regime which imposes wide duties but gives them limited powers. They are mere citizens carrying out a crime-prevention and peace-keeping function. Every action they perform which the ordinary citizen could not also perform with impunity (such as talking to someone at his home) is an illegal action and must be justified by the existence and operation of some legal authority.[7] The great case of *Entrick v. Carrington*[8] affirmatively establishes this doctrine, at least with regard to searches and arrests, but the general principle upon which it was based underlies the analysis of all other police powers;[9] But of course the police can do anything which is not illegal,[10] and recently a judicial attitude of ancillary powers servient to police duties has grown up.[11] This latter doctrine, which I submit is totally spurious, contemplates the police being given any powers they reasonably need to carry out their duties provided that in exercising them they act reasonably. I disagree with this development for three reasons. Firstly, it is contrary to all authority and consequently plunges the law into a state of total confusion, whereby neither the citizen will know when he must submit or the constable when and how he can act. Secondly, it is unrealistic to expect the judiciary to be able to interpret either clearly, consistently, or in an unpolitical fashion, the application of this "rule", with more consequent confusion. Thirdly, the absence of a power is never a ground for judicial invention; it is a ground for comment which can then either be ignored or acted upon by the proper legislative authority; and legislation can at least propose and enforce safeguards and conditions which are beyond the scope of the common law. It is the purpose of the remainder of this article to examine specific aspects of the law on police powers and, by way of commentary, to point out possible judicial developments, and to note the absence of necessary police powers and causes for uncertainty in their exercise due to the unsettled state of the law.

A. ARREST

Criminal proceedings are usually initiated by arrest. "Neither a police constable nor anyone else has a general power to arrest for crime. A person making an arrest must act under warrant or bring himself within one of the four corners of the detailed rules authorising arrest without warrant.[12] Arrest has certain legal incidents which are vital to its proper exercise, for in the absence of one of them the arrest will be unlawful, and evidence obtained in police custody consequently inadmissible. Generally, three principles may be broadly stated —

(i) The arrestee must be deprived of his liberty, that is imprisoned, but the extent of the deprivation must not exceed what is reasonably necessary and as a consequence of arrest, no constitutional right other than freedom of movement and association generally may be denied a detained person.

(ii) Arrest is only lawful when its purpose is not for

gathering evidence or is not for any reason other than the initiating of criminal proceedings, and this purpose must be made known to the arrestee.

(iii) The reason for arrest must be communicated to the arrestee.

With regard to the first principle, to arrest someone it is necessary to imprison them. The use of the merest physical force will normally suffice, for example touching their shoulders. In the absence of this force then a clear intention to arrest must be communicated and the arrestee must submit.[13] If he does not submit but runs away the mere speaking words of arrest is insufficient. No citizen is obliged to submit to a wrongful arrest; and to use reasonable force in necessary self defence is not even a common assault.[14] However, that latter proposition is now open to some doubt as in *R. v. Van Purdy.*[15] Roskill L. J. said:

> "... even if this arrest had been unlawful, if, in an effort to rescue the appellant, an affray in which the appellant was involved had occurred or more force was used by him than was reasonable force to resist arrest, then, notwithstanding that the appellant was unlawfully arrested, he would have been guilty of affray and also guilty, though not of assaulting a constable in the execution of his duty, at least of assault occasioning actual bodily harm or of common assault."

While this decision appears eminently reasonable I would question the fairness of any future application of it. Assault cases in the District Court are usually taken by members of the Gardai. I would find it unlikely they would concurrently charge a suspect and a police officer with assault or affray resulting from a mistaken or wrongful arrest and I would also wonder whether the D.P.P. would be supplied by the police with the correct information to enable him to frame charges against both police and suspects; under the Van Purdy decision both are equally guilty but the citizen is more likely to end up punished.

The use of force in arrest:

A police officer may use force in effecting arrest or in subsequent custody where this is necessary. Unfortunately, it further compounds the confusion that results from the continuing distinction between misdemeanours and felonies that force may be used in the latter but not the former.[16] But no more force may be used than is reasonably necessary. Thus, handcuffing is illegal except to prevent escape or to terminate a prisoner's violence.[17] So also it has been recently held in England that a directive which required W.P.C.'s to remove the bra of any female prisoner before leaving her in her cell was unlawful.[18] There the court stated[19] that the duty of a police constable is to ensure that prisoners in his charge did not injure themselves or others or escape or assist others to do so, or destroy evidence or commit further crime; but that the duty had to be exercised with regard to the disposition of each individual prisoner in the circumstances of each individual case. So in this case it was only if the article was to be used as a suicide weapon or an escape implement that that confiscation would be justified.

In dispersing an unlawful assembly the force to be used in its suppression:

> "depends on the nature of each riot, for the force used must always be moderate and proportionate to the circumstances of the case and the end to be attained."[20]

Force can also be used in the four cases in which it is permissible to enter premises without a warrant. Those are (exerciseable both by the police and citizens), to prevent murder, where a felony had been committed and a suspect followed to a house, where a felony was about to be committed unless prevented, and, (by a constable) to apprehend an offender running away from an affray. But here the force has to be reasonable in that doors cannot be broken down unless the constable demanded entry and the occupier refused.[21]

A similar rule to the one for dispersing an unlawful assembly was stated in Canada regarding actual arrest in *R. v. Turner*[22] as enabling the arresting officer to use such force as is reasonably necessary for the purpose, provided the means adopted:

> "are such that a reasonable man placed as he was placed would not consider (it) to be disproportionate to the evil to be prevented";[23]

and this is to be welcomed for, without this gloss, an owner of a car who had had his windscreen smashed by a vandal or a police officer, could be held justified in killing were the vandal unusually strong or very determined to resist arrest.[24]

The rights of the arrested person:

The arrested person loses only his constitutional right to liberty; but he has further the right to legal and medical assistance which would not exist were he not in custody.[25] The right of access to a legal adviser does not extend to having a solicitor present during interrogation[26] but does extend to being able to consult with a solicitor in private[27] and the right is there to be exercised by the suspect himself or by anyone making a 'bona fide' request on his behalf.[27] However, the real significance of this lengthy treatment of the legal rules with regard to force and the rights of a detainee is what emerged from Finlay P. in *Harringtons* case[27] where he said:

> "If (the applicant) was assaulted, that would in law constitute an illegal act making his entire detention unlawful and entitling him to be released from that detention."[27]

This proposition was also stated with regard to the denial of access to a lawyer[28] and where the place of detention was a health hazard[29] and the question immediately begs itself; if more force is used than the law permits does this render the entire detention unlawful with consequent results?

I do not think so; for the original rationale for the doctrine of the continuance of constitutional rights in police custody was stated by O'Higgins C.J. in the *Emergency Powers Bill case*,[25] that in the case of infringement 'habeas corpus' would lie. Later, however, in *State (McDonagh) v. Frawley*[30] the Chief Justice said:

> "The stipulation in Art. 40.1 ... that a citizen may not be deprived of his liberty save "in accordance

with law" does not mean that a convicted person must be released on 'habeas corpus' merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law."

Accordingly, we may be relatively certain that the handcuffing of a prisoner or any other unnecessary force or deprivation will not vitiate a subsequent confession of murder, except in denial of access to lawyers or assault cases. However, it is uncertain whether an act which renders a detention unlawful for evidence purposes is not a lesser act than that required for the High Court to grant an order of 'habeas corpus'. I would believe that the two are the same.

The purpose of arrest:

The last two propositions on the law of arrest may be stated shortly. The fact that the arrest is the beginning of the criminal process means that no one can arrest for the purpose of questioning or indeed for any purpose other than to have that person charged with a criminal offence.[31] Walsh J. in *D.P.P. v. Shaw*[32] further stated that to arrest someone merely for the purpose of questioning such an arrest would constitute a violation of Article 5 of the European Convention of Human Rights & Fundamental Freedoms.[33] In the unreported part of the Judgment in *Dunne v. Clinton*[31] it was further emphasised that an arrested person must be charged as soon as is reasonably possible, and FitzGibbon J. stated:

"... the reasonableness of the duration of the detention is to be measured by the facilities for requisitioning the facilities of a District Justice or Peace Commissioner and not by the exigencies of preparing a good or plausible case against a suspected person. The Peace Commissioner before whom a person who is charged has been brought such as on the mere suspicion of the Garda, has no option but to discharge the prisoner."[31]

Those principles seem strict but they are as strictly enforced in the United Kingdom and are a vital safeguard of the liberty of the citizen.[34]

The last proposition is that the person arrested must be aware of the reason for his arrest and that the arrester is a policeman (if it is a situation where only a policeman has the arrest power), so as to be aware of his rights and to enable him to begin his defence.[35] The failure of the arresting officer to so inform the suspect can render the detention unlawful but this can be cured afterwards.[36]

Statutory Powers of Arrest

In my view, the substantive law of arrest itself is, frankly, in a mess. In the important case of obstruction of a police officer in the course of his duty there is no power of arrest.[37] Further, we still retain the distinction between arrest for felony and arrest on a misdemeanour. In the former there is a power of arrest in all cases; in the latter none save where given by statute. Thus, a policeman could arrest for the theft of a bar of chocolate but would have no power of arrest in a case of obtaining a million pounds by false pretences. Further, certain statutes giving powers of arrest in misdemeanour cases embody crazy distinctions which throw the law into disrepute. Thus the power of arrest is given by Section 11 of the Prevention of Offences Act 1851 to anyone coming upon a person committing an indictable offence, but only if this is at night; the special magic of arrest does not occur during the day. Some statutes give powers of arrest where the policeman actually sees the offence, others when he has a reasonable suspicion of it happening, and still others give a power of arrest only where the constable could not ascertain the the name and address of the offender.

In England, with the Criminal Law Act 1967, Section 2, some attempt has been made to at least partially rectify the situation. By that section the category of felony was abolished in England and is replaced by the concept of an arrestable offence, which is any offence punishable by a possible maximum of five years imprisonment or greater. The power of arrest is then clearly stated as existing in anyone who comes on a person who is, or who the arrestor reasonably believes to be, in the act of an arrestable offence, or who has committed such an offence and the arrestor reasonably believes him to be guilty of it. The policeman's power in England exists in identical circumstances, save that in the case of reasonable suspicion he need only reasonably suspect the commission of an arrestable offence for the power of arrest to exist. The English constable's power further extends to prevention and both categories of power cover arrest on attempt.

The confused state of Irish Law, is demonstrated by the fact that the only authority which exists for the proposition that a policeman may arrest in cases of attempted felony is from (1469) Y.B.[38] and seems to be a case of arresting to prevent a robbery.[39] It would thus seem not to be an authority at all and a policeman coming on the most serious attempt (during the day) is powerless.[40] Further statutes which give policemen powers of arrest on coming on or being present at an offence, are interpreted that the power is exerciseable on the reasonable appearance of a state of affairs[41] whereas others say that this is only where prompt action is called for[42] and the House of Lords says that each statute has to be individually construed.[43] Of course all statutes are different and no one can be expected to carry them all around in his head.[44]

Suggested Changes In The Law Relating To Arrest

The most obvious solution is complete reform. This could be done by giving every policeman a power of arrest on the following statutory lines:[45]

(1) Any constable may arrest without warrant any person who is or who he, with reasonable cause, suspects to be, in the act of committing an offence, or whom he, with reasonable cause, suspects to be guilty of an offence provided:

(a) The offence is one of those offences in [a Schedule which could list serious offences both felonies and misdemeanours]; or,

(b) The person fails to declare his name or address at the request of the constable, or gives a name and address which the constable reasonably suspects to be false; or,

(c) The constable, with reasonable cause, believes that the person, unless arrested, will persist in repeating, or continuing the commission of the offence, or commit a breach of the peace, unless arrested; or,

(d) The constable, with reasonable cause, believes the person will abscond or evade the service of process.

(2) Where a constable arrests a person, he shall tell that person, at the time of the arrest or as soon thereafter as is possible, the act for which he is arrested and the circumstances as specified in section 1 above which justify the arrest.

3. (a) Where a person has been arrested under paragraphs (b) (c) or (d) of section 1 above, that person shall be released from custody:

(i) In the case of a person arrested under paragraph (b), when his name and address have been disclosed to the constable;

(ii) In the case of a person arrested under paragraph (c), when the constable no longer has reasonable cause to believe that the arrested person will persist in repeating or continuing the commission of the offence;

(iii) In the case of a person arrested under paragraph (d), when the constable no longer has reasonable cause to believe that the arrested person will abscond or evade the service of process.

(b) In section 3 (a) the term "constable" shall mean the constable having custody of the arrested person for the time being.

Arrest at Common Law — "on Reasonable Suspicion"

But now we should examine the powers of arrest at common law as they exist apart from statute. The first great power of the constable at common law arises on "reasonable suspicion of a felony having been committed and of the person being guilty of it."[46] Thus, except in conspiracy or common design cases or in a case where, for example, a policeman finds two persons standing over a recent murder victim, only one person may be arrested. Suspicion attaching to several persons does not justify arresting them all. In carrying out the arrest, the policeman need not himself believe in the arrestee's guilt nor need he fear the arrestee's escape in the event of a failure to arrest; it is enough if suspicion sufficient to justify arrest exists. The question of what constitutes reasonable and sufficient suspicion is a question of law and in a civil action for false imprisonment would be a question for the judge.[47] However, in criminal cases it is a question for the jury.[48]

The police need not be certain, nor have enough evidence to convict before arrest, nor enough grounds to make out a 'prima facie' case. However, their suspicion must be reasonable and not based merely on instinct or guesswork[49] but must be founded on some grounds which if subsequently challenged will at least show that at the moment of arrest they acted reasonably. Thus, in the United States at least, the correctness of a 'hunch' leading to arrest will be no defence to subsequent civil proceedings for false imprisonment; and in this jurisdiction, presumably, just because the Gardai have the right hunch and arrest a person does not thereby render that person's detention lawful; and, consequently, any confession made by that person would not be admissible in evidence. So what do the police need in order to show that they acted reasonably?

Firstly, the question of the reasonable suspicion of the police has nothing to do with the technical law of evidence. At the trial within a trial the judge or jury will be entitled to consider matters which the law would not allow a jury to hear on the substantive issue of guilt. Thus in *Hussein v. Chong Fook Kam*[50] the arrestee's lorry had discarded a piece of timber which had killed a passing motorist. The lorry did not stop but the police got its number. The next day the police found the driver who offered them an alibi. They arrested the driver and upon investigation the alibi proved false. Lord Devlin said that the mere circumstance of driving could not furnish grounds for reasonable suspicion as to reckless driving but on the discovery of the false nature of the alibi such suspicion sufficient to justify the arrest was created and cured its bad character from that moment.

Lord Devlin said:

> "Suspicion can take into account matters which could not be put in evidence at all . . . Suspicion can take into account also matters which, though admissable, could not form part of a 'prima facie' case. Thus the fact that the accused has given a false alibi does not obviate the need for 'prima facie' proof of his presence at the scene of the crime; it will become of considerable importance when such proof as there is, is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstances."

In founding a reasonable suspicion a policeman may also rely on hearsay. But normally mere hearsay will probably not be enough. but this depends on the source of that information. According to Hatherly L.C. in *Lister v. Perryman.*[51]

> "Information given by one person of whom the (policeman) knows nothing, would be regarded very differently from information given by one whom he knows to be a sensible and trustworthy person. And the question whether or not a reasonable man would or would not act upon the information must depend to a great degree on the opinion to be formed of the position and circumstances of the informant and of the amount of credit which may be due under those circumstances to the person who thus conveyed the information."

The converse of this is that the police must exercise great care in arresting a person because one party to a crime has implicated another; and suspicion so attaching will normally only be reasonable where there is a corroboration by ascertained facts or the informant has shown himself trustworthy[52]. An anonymous communication is not enough and in the United States it must at least be borne out by some ascertained facts actually implicating the person the police propose to arrest[53]. Double hearsay is obviously a less reasonable ground and in all hearsay cases there exists a rule, probably unknown to the police, that their reasonable suspicion may be destroyed if, at the moment of proposed arrest, the person under suspicion gives a reasonable explanation in circumstances where the policeman cannot contradict it.[54]

In justifying arrest it is proper for the police to consider the record of the suspect. His suspicious behaviour is also relevant but not his refusal to co-operate with the police inquiries, for this is the right of every citizen whatever his duty.[55] A balancing factor in this freedom of the police to rely on seemingly tenuous grounds to justify the reasonableness of their suspicion is their positive duty to be assiduous in protecting the liberty of the citizen. This of course further complicates matters. O'Higgins C. J. in *D.P.P. v. Madden*[6] was forceful in pointing out that as a branch of the executive the duty of the police was to protect and vindicate rights as well as to detect crime. Thus the police should not leap to arrest when further enquiries might establish the innocence of a suspect. The duty was well put by Scott L. J. in *Dumbell v. Roberts*[57] when he said:-

> "(The police) may have to act on the spur of the moment and have no time to reflect, and be bound, therefore, to arrest to prevent escape; but where (there is) no danger of the person, who has 'ex hypothesi' aroused their suspicion that he is probably the "offender", attempting to escape, they should make all presently practicable inquiries from persons present or immediately accessible who are likely to be able to answer their inquiries forthwith. I am not suggesting a duty on the police to try to prove innocence; that is not their function, but they should act on the assumption that their 'prima facie' suspicion may be ill-founded."

Arrest at common law — to prevent a breach of the peace:

The second great power of the constable at common law is that to prevent a breach of the peace. A policeman may do any act in lawful assistance of a private person. He will be bound to do such an act, and will consequently be acting in the execution of his duty, if it is necessary to assist in keeping the peace. Thus in *Coffin v. Smith*[58] two police officers were summoned one night to a boys' club by the youth leader to ensure that some people, who included the defendants, left before a disco started. They asked the defendants to leave but they refused and after swearing and moving the defendants returned and hit an officer. The Court of Criminal Appeal held that the actions of the police officers, in the first instance, interfered with nobody's liberty and that, even if they did, they were lawful, for it was reasonable, given the character of the defendants, to anticipate a breach of the peace if the youth leader was to be left on his own to eject the defendants. In the circumstances the policemen were fulfilling their duty to keep the peace and to take all necessary steps to that end. In another recent English case[59] a policeman was held entitled to obstruct a person who jumped a bus queue and to restrain him when he protested until the bus has moved off when only then the defendant had finally become aware that the officious bystander was, in fact, a policeman. According to the Court of Appeal the detention did not amount to arrest; it was a restraint and part of the policeman's inherent power to take reasonable action to keep the peace. So in *Humphries v. Connor*[60] a constable was held justified in removing an orange lily from a lady when the wearing of it was causing some excitement. Hayes J. expressed the origin of the rule thus:

> "A constable, by his very appointment, is charged with the solemn duty of seeing that the peace is preserved. The law has not ventured to lay down what precise measures shall be adopted by him in every state of facts which calls for his interference. But it has done far better; it has announced to him, and to the public over whom he is placed, that he is not only at liberty, but is bound, to see that the peace be preserved, and that he is to do everything that is necessary for that purpose, neither more or less."

Unfortunately, because the law is uncertain, great difficulty has been had in formulating what the policeman cannot do and the law seems to have gone somewhat 'haywire'. In *Coyne v. Tweedy*[61] a lawful meeting in a public church was violently dispersed by the police because of the danger to the public peace between groups supporting rival parish priests; the authority relied on being *O'Kelly v. Harvey*[62] in which Palles C.B. held that a magistrate was justified in dispersing a land league meeting holding it to be an unlawful assembly, because in itself it was likely to produce damage to the peace of the neighbourhood. Palles C.B. expressly declined to decide whether authority existed if the meeting, in itself lawful, was likely to provoke a breach of the peace because of an intemperate invocation to protestants to destroy it. More recently in *Thomas v. Sawkins*[63] the plaintiffs had held meetings under the auspices of the Communist Party to protest against the Incitement to Disaffection Bill. Local constables were wont to attend and sit prominently in the front row. At the last such meeting the speaker in the course of an impassioned address pointed at them and said "If it were not for the presence of those people I could tell you a hell of a lot more!" Uninvited, the constables attended the next meeting and forced entry and, upon being asked to leave and refusing, a slight scuffle ensued. Lord Hewart C. J. sweepingly conferred on constables a right of entry to prevent a crime. Avory and Lawrence J.J. were of the view that a breach of the peace was anticipated

and a right of entry to moderate the speakers' passions and so prevent such a breach was lawful.

What constitutes a breach of the peace has recently been defined as:-

> ". . . . whenever harm is actually done or is likely to be done to a person or, in his presence, to his property, or a person is in fear of being so harmed through an assault, an affray, or riot, unlawful assembly or other disturbance."[64]

Glanville Williams considers that the definition of a breach of the peace must always envisage danger.[65]

Those powers exist only where a breach of the peace is committed in the presence of the person making the arrest; or where the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested, although he has not yet committed any breach; or where a breach has been committed and it is reasonably believed that a renewal of it is threatened.[64] It is also recognised in this jurisdiction that it is lawful to temporarily deprive a citizen of his liberty to prevent an imminent breach of the peace.[66]

Finally, for the power to act to exist, the breach of the peace or anticipation of it must occur in the presence of the constable or someone who directs him to arrest as their agent. In this context present means "perceived through the senses".[67] Thus hearing a blow and screams in the darkness is enough, or even under the American prohibition cases the smell of illegally distilled whiskey or illegally smoked opium.[68]

(Part 2 of this article will appear in the June Gazette).

Footnotes:

1. This article was originally prepared as a paper delivered to a seminar of state solicitors held on 14th November, 1981, under the auspices of the Attorney-General, Peter Sutherland S.C., and the Chief State Solicitor, Louis J. Dockery. Throughout the article, reference is made to "police", "policeman", "police constable" and "constable" as indicative of the common law origins of the powers being discussed. Reference is made to "garda" and "gardai" where the context is specifically Irish.
2. (1823) 107 E.R. 108.
3. At [1966] Crim. L.R. p. 369.
4. 9 February, 1978 — High Court — unreported.
5. *D.P.P. v. Lynch*, 5 February, 1981 — Supreme Court — unreported.
6. See, *Weeks v. U.S.* (1914) 232 U.S. 383.
7. For a discussion on this see; Leigh, *Police Powers*, Butterworths, 1975, Ch 11 et seq.
8. (1765) 19 State Tr. 1029.
9. See judgment of Lord Parker C.J. in *R. v. Waterfield* [1964] 1 Q.B. 164.
10. See Megarry V.C. in *Malone v. M.P.C.* (No. 2) [1979] 2 All E.R. 633, *re* Telephone tapping — probably a breach of the undisclosed general right of privacy here.
11. See *Ghani v. Jones* [1970] 1 Q.B. 693.
12. Glanville Williams, in [1954] Crim. L.R. at p.6.
13. *Grainger v. Hill* (1838) 5 Scott 561 at 575.
14. *R. v. Long* (1836) 7 C. & P. 341.
15. (1974) 60 Cr. App. R at p. 38.
16. See Blackstone Vol. IV, Ch. 21 S.3 p. 386 of Ed. 23; and, Hale 11 82, 83 reformed in England by s.3 (1) of the Criminal Law Act, 1967.
17. *R. v. Lockley* (1864) 4 F.&F. and, *Reed v. Wastie* [1972] Crim L.R. 221.
18. *Lindley v. Rutter* (1981) 72 Cr.App.R. 1.
19. Following *Leigh v. Cole* (1853) 6 Cox C.C. 329.
20. Per Bowen L.J. cited by Hanna J. in *Lynch v. Fitzgerald (No. 2)* [1938] I.R. 382.
21. See *Swales v. Cox* [1981] 1 All E.R. 1115 at 1118.
22. [1962] V.R. 30.
23. See *Leigh*, supra, footnote 7, at pp. 43 & 47 for other cases from the Commonwealth.
24. Malicious Damage Act 1861, Section 61.
25. *Re Emergency Powers Bill* [1977] I.R. 150 at p. 173.
26. As it does in the U.S.; see *Miranda v. Arizona* (1966) 384 U.S. 436, not followed here in *D.P.P. v. Pringle* — July 1981 — C.C.A. unreported.
27. State *(Harrington) v. Garvey* — 14 December 1976 — High Court — unreported.
28. *D.P.P. v. Doyle* [1977] I.R. 353.
29. *State (McCann) v. Herlihy*, Irish Independent — 30 October 1976 — High Court.
30. [1978] I.R. 131.
31. *Dunne v. Clinton* [1930] I.R. 366; *People v. O'Loughlin* [1979] I.R. 85.
32. 17 December 1980 — Supreme Court — unreported.
33. Walsh J. cited *Ireland v. the U.K.* 29 April 1976, Series A. no 25.
34. *R. v. Laemstag* [1977] 2 All E.R.; and, *R. v. Holmes* [1981] 2 All E.R. 615.
35. *In re O'Laighleis* [1960] I.R. 93.
36. *D.P.P. v. Walsh* — 18 January 1980 — Supreme Court — unreported.
37. *See Kenlin v. Gardiner* [1967] 2 Q.B. 510.
38. Bro. Ab. Trespass 184 T.9 E.4 26 b pl 35.
39. In the U.S. the power does exist; see Perkins (1940) 25 Iowa L.Rev at p.230.
40. But see *Russell on Crime*, 12th Ed, 1964, p.444.
41. *Wiltshire v. Barrett* [1965] 2 All E.R. 271, at p. 275, per Lord Denning M.R.
42. *Ledwith v. Roberts* [1937] 1 K.B. 232.
43. *Barnard v. Gorman* [1941] A.C. 378.
44. See Sandes, *Criminal Law and Procedure in Eire*, 3rd Ed (1951), pp 42-49 listing the statutory power of arrest.
45. These proposals are by Professor D. A. Thomas of the London School of Economics, as set forth in a comprehensive article in [1966] Crim. L.R. 639.
46. *Bullen & Leake*, 3rd Ed. (1868) p. 795.
47. *Lister v. Perryman* (1870) L.R. 4H.L. 521.
48. *D.P.P. v. Lynch* — February, 1982 — Supreme Court — unreported.
49. Glanville Williams, [1954] Crim.L.R., p. 416.
50. [1970] A.C. 942. See also *D.P.P. v. Raymond Walsh* — 17 January 1980 — Supreme Court — unreported.
51. (1870) L.R. 4 H.L. 251.
52. *Isaacs v. Brand* (1817) 2 Stark. 167.
53. *People v. Guertins* (1923) 224 Mich.8, 195, N.W. 561.
54. *Hogg v. Ward* (1858) 3 H. and N.417.
55. Glanville Williams, [1954] Crim. L.R. at p.413 thinks otherwise but see *Koechlin v. Waugh and Hamilton* (1957) 118 C.C.C. 24.
56. [1977] I.R. 336 at 346/7.
57. [1944] 1 All E.R. 326.
58. (1980) 71 Cr. App. R. See also *R. v. Hogan* 8 C.&P. 171.
59. *Albert v. Lavin* (1981) 73 Cr. App. R.
60. (1867) 17 Ir. Com. Law Rep. 1.
61. [1898] 2 I.R. 167, 192.
62. 10 L.R.Ir. 285; 14 L.R.Ir. 105.
63. [1935] 2 K.B. 249.
64. Per Watkins L.J. in *R. v. Eroll Howell*, (1981) 71 Cr.App.R. 31 at p. 37.
65. See "Arrest for Breach of the Peace" [1954] Crim.L.R. 578; and, for the Scottish Law, see *Raffaeli v. Heathly* [1949] S.C. (J) 101.
66. See *Connors v. Pearson* [1921] 2 I.R. 51; and John M. Kelly, *The Irish Constitution*, 1980, p.411 et seq.
67. *State v. McAlfee* (1890) 107 N.C. 812, 12 S.E. 435, and *Dilger v. Commonwealth* (1889) 88 Ky. 550, 11 S.W. 651.
68. For statutory breaches of the peace see Dublin Police Act, 1842 (Cap. 24) s. XIV which gives a power of arrest to the police.

The Solicitors' Benevolent Association Annual General Meeting for 1981

The 118th Annual General Meeting of the Association was held at The Law Society, Blackhall Place on 26th March 1982.

In proposing the adoption of the Report and Receipts and Expenditure Accounts (as set out hereunder) the Chairman Mr. Eunan McCarron pointed out that there had been a welcome increase of some £13,900.00. in annual subscriptions the amount of Relief disbursed was also greater by some £10,000.00. £33,771.00. had been paid out to 48 most deserving persons. Mrs Carmel O'Halloran who resigned as a Metropolitan Director during the year had given valued work to the Committee of Management for many years and Ms. Claire Leonard had been co-opted to fill the vacancy.

The Chairman stated that it was hoped where circumstances so warranted that visitation of the old and lonely — especially by the ladies on the Committee — would be encouraged.

It was pointed out that there was an ever increasing demand for assistance and that many appliations disclosed situations of great hardship, poverty and sadness. The Chairman appealed to all Solicitors young and old from the Republic and Northern Ireland and their Bar Associations to subscribe annually.

Finally a Resolution in the following terms was passed:- "That the amount of Annual Subscription be increased to £12.00. or in the case of Solicitors admitted less than three years to £6.00 and that Life Membership be increased to £100.00.".

The Law Society was represented at the Meeting by Mr. W. D. McEvoy, Junior Vice-President.

THE SOLICITORS' BENEVOLENT ASSOCIATION

Receipts and Payments Account for the Year ended 30th November 1981

30/11/80			*Dr.*	*Cr.*
7,422	To	Annual Subscriptions	21,318	
160		Life Subscriptions	55	
4,656		Donations and Legacies	2,260	
—		Deposit Interest	760	
10,610		Dividends	17,790	
2,699		Refund of Income Tax	2,230	
2,061		Proceeds of May Soiree	—	
1,104		Bank Overdraft (30/11/80)	—	
3,171	By	Bank Overdraft (30/11/80)		1,104
21,305		Grants		31,321
2,500		Annuities		2,450
352		Bank Interest and Charges		148
800		Secretary's Salary		974
150		Audit Fee		150
181		Printing, Stationery and Postage		545
171		Income Tax Recovery Fee		91
72		Ground Rent		—
10		Cash on Hands (30/11/80)		—
—		Cash at Bank (20/11/81)		4,870
—		Cash on Deposit		2,760
			£44,413	£44,413

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

28 South Frederick Street,
Dublin 2.

Joseph A. Taaffe
Chartered Accountant

International Bar Association
19th BIENNIAL CONFERENCE

The International Bar Association is holding its 19th Biennial Conference in New Delhi, India from 17 — 23rd October, 1982.

Two major topics will be discussed during the week: (i) The Eighties — the Challenge to the Legal Profession and the Judiciary — the Challenge by Society; its conflicts with established Codes of Ethics; the Profession's Response; and: (ii) Legal Problems of Investment by International Companies in Developing Countries.

The principal speakers on these 2 topics will include the World Bank Vice President and General Counsel, and a past Chairman of the UN Commission on Transnational Corporations.

In addition to the main topics, there will be over 90 meetings of the various committees of the IBA's Section on Business Law and Section on General Practice at which subjects of topical interest will be discussed.

The conference is to be officially opened by the Prime Minister of India, Mrs Indira Gandhi and the Plenary Session is to be addressed by the Lord Chief Justice of England, the Rt Hon. Lord Lane.

The programme of social events is lively and varied and includes elephant processions, regional dancing, hospitality in the homes of Indian lawyers, a polo match, dinner dances etc. Many excursions are being arranged including a flight to mount Everest and a visit to the Red Fort, as well as pre- and post-conference tours to places such as China, Kashmir and Nepal. A full ladies programme will also be available with visits to arts and crafts centres, fashion show and displays of yoga.

Through the Incorporated Law Society of Ireland, Turnbull Gibson Travel are offering a selection of attractive tours to India from Dublin taking advantage of special air fares and hotel rates. They range from a basic tour to Delhi at £695 to an extended trip including Delhi, Hong Kong, Penang and Colombo at £1,135. Space is limited and members are advised to book as soon as possible to avoid disappointment.

Further details and booking forms can be obtained from the Society at Blackhall Place, Dublin 7.

Practice Notes

Opinion Letters

1. The Law Society's Company Law Committee is aware that it has become increasingly common, particularly in international financing transactions, for Irish solicitors to be asked to provide formal written opinions on various matters, including:—

— the legal standing of the client company involved and its power to enter into the transaction;
— the validity and enforceability of the commitments entered into by the client;
— the adequacy of any governmental or other approvals required;
— the stamp duty or other taxation implications of the transaction;
— the validity of a provision choosing a foreign law as the proper law of the contract;
— the ability of the Irish party to submit to the jurisdiction of foreign courts.

2. Views amongst practitioners as to the desirability of this practice differ considerably. The objections of those who consider it an undesirable development may be summarised as follows:—

(a) In the event of a dispute between the parties to the documents to which the opinion relates, the solicitor providing the opinion may be inhibited from contesting, on behalf of his client, the validity or enforceability of any provision contained in those documents. Even if the solicitor felt free to represent his client in such a dispute, a successful outcome might well result in the solicitor becoming liable to the other party on foot of his opinion.

(b) In giving such an opinion, the solicitor concerned will be obliged to make full disclosure of any doubts he may have concerning the validity or enforceability of the documents concerned or concerning any other matter on which he is asked to opine. This may not be in his clients' best interest, since the client will — at this stage of the transaction — be anxious that his solicitor's opinion should be unqualified.

(c) The solicitor concerned may have advised in detail, both orally and in writing, on numerous complex issues during the course of the transaction. It may be difficult for him to draft a single opinion letter (or, more likely, modify one presented to him for approval) which adequately incorporates all the advice he has already given.

(d) There is frequently great pressure on the solicitor concerned to provide the opinion with the least possible delay and expense; this may make it difficult for him to examine the documentation and to research the relevant law in the depth which he would wish.

(e) The scale of transactions where such opinions are required is often very substantial, with the result that the degree of exposure for the solicitor giving the opinion is frequently beyond the levels of insurance cover normally carried or which could be obtained at a reasonable cost.

(f) The giving of the opinion may render the solicitor liable for negligence at the suit of parties other than his own client, to whom he would otherwise have no liability.

3. Those who favour — or at least do not oppose —this practice, advance the following arguments in favour of their views:—

(a) The appearance of a conflict of interest is illusory. It is the normal duty of a solicitor to see that formalities are correctly complied with and that documents are effective to achieve the parties' intentions.

(b) Normally it will be easier for a solicitor familiar with his own client's affairs to give the desired opinion than to satisfy the detailed and often onerous requirements of the other party's solicitors. Thus, the issue of the opinion will save both time and money for all concerned.

(c) The drafting of an opinion (like most drafting) concentrates the mind wonderfully, and it is salutary to have to review an entire transaction carefully and comprehensively just before completion.

(d) If an opinion is clear as to what it covers and the solicitor issuing it has done his work properly, he should not be exposed to any undue risk of liability.

4. While the Company Law Committee does not propose, at this stage, to choose between the foregoing points of view, it suggests that any solicitor who agrees to give an opinion of the type described above should consider the following points:—

(a) He should explain to his client that giving the opinion may restrict his ability to defend the client in the event of a dispute occurring between the parties.

(b) He should state clearly the persons to whom the opinion is addressed, the assumptions on which it is made (e.g. the accuracy of copy documents, the continuing validity of consents, the tax residence of the parties) and the reservations to which it is subject (e.g. that any foreign judgment may, in certain circumstances, be reviewed by the Irish Courts).

(c) He should take great care to limit its terms to matters of Irish Law and to facts within his direct knowledge, as to the correctness of which he has satisfied himself.

(d) He should not include in his opinion phraseology which may be used in other jurisdictions but the meaning of which is unclear in Irish law.

(e) If, as a consequence of issuing the opinion, the number of possible plaintiffs against the solicitor concerned is multiplied, the increased risk can be reflected on the fee charged. □

Latin Notaries in Dublin

Notaries from 15 countries attended the European Section Meetings of the International Union of Latin Notaries (U.I.N.L.) at the Law Society, at the end of April.

The International Union of Latin Notaries is the world-wide representative body of notaries. The notarial system which is firmly established in continental Europe holds an important place in the administration of law, particularly in relation to the transfer of property, the preparation and administration of wills and estates, and the incorporation and registration of companies. The Incorporated Law Society is affiliated to the organisation and takes an active part in its work, especially in connection with matters relating to E.E.C. law.

The Meetings, attended by 56 delegates, were held on 29th and 30th April and 1st May and covered mutual problems concerning the international aspects of the notary's work and the impact of E.E.C. legislation in relation to the various national legal systems and the role of the notary.

The Meetings were chaired by Maitre Ramon Fraguas, of Valencia, Spain, President of the European Affairs Section and by Dr Horst Heiner Hellge of Hamburg, Germany, President of the Common Market Section.

From Left: Maitre Juan Carlos Pons, Vice-President of the Common Market Section, Maitre Mario Froglia, Vice-President (Europe) of the U.I.N.L., Mr Arthur D. S. Moran, Law Society's representative to the U.I.N.L. with the Lord Mayor of Dublin, Alderman Alexis FitzGerald, T.D. at a reception for U.I.N.L. delegates in the Mansion House.
(Photo supplied by courtesy of Dublin Corporation)

The Limits of Lawyer Advertising in America Today

by

R. H. S. Tur

Reprinted, with kind permission, from the Journal of the Law Society of Scotland

'It is a mathematical fact that the casting of this pebble from my hand alters the centre of gravity of the universe' — Thomas Carlyle.

Recently, that is from 1st November 1978, the Council of the Law Society of Scotland has relaxed the Practice Rules relating to advertising, allowing that solicitors may advertise when an established business is taken over by new management, or where an entirely new business is established and, in particular: 'Where any practice unit carries on business or proposes to carry on business or establish an office or branch office in an area which in the opinion of the Council is one in which there is an inadequate supply of legal services or where, in the opinion of the council, the availability of that supply is insufficiently known to the public . . .' (Rule 6). Such businesses established in 'special areas' may advertise their existence and the nature of the legal services offered by way of up to eight separate advertisements in the public Press during a six-month period from the date of the first advertisement. They may be permitted to advertise beyond this 'as the Council may in its sole discretion approve' and 'the content and format of all (Rule 6) advertisements' are subject to prior approval of the Council. Though cautious, this step is to be welcomed.

None the less, the Law Society appears quite unready to contemplate the stronger draught of full-blooded price advertising by lawyers of routine services such as exists in America as a result of the *Bates* case (treated of by your author in 1977 JLSS, 286-292).

That decision called forth much adverse criticism, the gravamen being that it would permit all manner of abuses by lawyers cloaking their crude commercialism and obscuring their obnoxious overreaching with the protection granted to speech, including 'commercial speech', by the First Amendment.

Thus, Chief Justice Burger seeks to balance the public need for information about lawyers, their work and their fees with the protection of the public from 'the unscrupulous, or the incompetent practitioner anxious to prey on the uninformed'. He suggests that the organised legal profession might announce to the public the probable *range* of fees in preference to permitting individual lawyers the freedom to advertise their services and their prices. The Chief Justice believes this latter more likely to undermine than to serve the public interest. Mr Justice Powell is of like mind. He is '. . . apprehensive, despite the Court's expressed intent to proceed cautiously that today's holding will be viewed by tens of thousands of lawyers as an invitation — by the public-spirited and the selfish lawyer alike — to engage in competitive advertising on an escalating basis'. He admits that some members of the public might benefit but believes that the risk is that many others will be victimised by simplistic price advertising of professional services which are so diverse and peculiar as to defy realistic price standardisation. Mr Justice Rehnquist, too, is unhappy with the decision in *Bates*. Apart from the anachronistic view that the First Amendment protects only really important speech, such as the expression of political or religious views and ideals, and not such 'essentially commercial' activities as advertising legal services — an application which demeans the First Amendment — he criticises the decision as offering but 'little guidance' as to the extent or nature of permissible lawyer advertising. The decision is seen as akin to the camel's nose in the tent, the thin edge of the wedge which is a portent of imminent havoc! Indeed, the protection of 'commercial' as well as 'political' speech, an extension of the First Amendment established in *Virginia Pharmacy Board v. Virginia Consumer Council* 425 US 748 (1976) is seen by Rehnquist as the 'first step down the "slippery slope", the image standardly conjured up by those whose feelings outrun their rational arguments!

Thus, a widely canvassed criticism of the *Bates* decision is that it is insufficiently precise. But this criticism sets too high a standard for any landmark decision. No decision can determine an issue in all directions. Frequently a series of decisions is required fully to work out the implementation of a principle such as freedom of speech in its application, first, to commercial speech generally, and second, to lawyers' price advertising. That is the American way. Your author stated it thus, in the article already referred to: 'In the business of sensitive adjustment of interests, of responding to the requirements of different elements of society and in synthesising opposing tendencies the Supreme Court is truly "supreme". It engages in an on-going dialectical law-making enterprise and not in a once and for all determination of the law.' Law is thus developed pragmatically, case by case; empirically, in the light of experience. Consequently, one would expect cases

refining and clarifying the decision in *Bates*. This article concerns itself with two such cases, viz, *Ohralik v. Ohio State Bar Association* and *In Re Primus*, argued together on 16th January 1978 and decided on 30th May 1978.

In *Bates* the Court expressly reserved the question of the permissible scope of regulation of 'in person solicitation of clients — at the hospital room or the accident site, or in any other situation that breeds undue influence'. In *Ohralik* the court held that a state, normally by way of its bar association, may, consistently with the Constitution, discipline a lawyer for soliciting clients in person, for pecuniary gain. But in the case of *In Re Primus* the court distinguishes the activity of a lawyer such as Albert Ohralik and that of lawyers associated with a non-profit organisation, engaging in litigation as a form of political expression, holding that solicitation of prospective litigants is protected by the First Amendment. The facts of the two cases are briefly rehearsed.

Ohralik

Albert Ohralik, then a practising member of the Ohio State Bar, learned in casual conversation with the postmaster's brother as he collected his mail on 13th February 1974, that Carol McClintock, a young woman with whom Ohralik was casually acquainted, had been injured in an automobile accident on 2nd February 1974. Ohralik telephoned the girl's parents, who told him that she was in hospital. He suggested that he might visit her there. Mrs McClintock agreed, on condition that he call in to see the McClintocks before going on to see Carol.

The McClintocks explained, during this visit, that Carol had been involved in an automobile collision in the family car with an uninsured motorist. Both Carol and her passenger, Wanda Lou Holbert, were injured and admitted to hospital as a result. The McClintocks evinced anxiety lest Holbert sue them, but Ohralik indicated that Ohio's guest statute would preclude this. Ohralik suggested, none the less, that the McClintocks hire a lawyer, but they responded that this would be a matter for Carol, who was eighteen years of age.

Ohralik then went to the hospital and interviewed Carol. He said that he would represent her and asked her to sign an agreement. Carol said that she would like to discuss the matter with her parents and asked Ohralik to have them visit her. Despite the absence of an agreement to represent her, Ohralik went to considerable lengths to obtain photographs of Carol, still in traction as a result of the accident. Ohralik also tried to see Holbert but failed, since she had already been discharged.

Ohralik revisited the McClintocks, having photographed the scene of the accident and having concealed a tape-recorder on his person. He studied their insurance policy and discussed the legal issues with them. He discovered that the policy would provide up to $12,500 each for Carol and Holbert, under a clause relating to accidents with uninsured motorists. Mrs McClintock acknowledged that either, indeed both, Carol or Holbert could sue, but stressed that "Wanda swore . . . she would not do it'. Ohralik was also told that Carol had telephoned, saying that he could 'go ahead'. Two days later he returned to the hospital where Carol signed an agreement which provided for Ohralik's receiving one-third of whatever sum might be recovered.

Ohralik also discovered Holbert's address by representing to the McClintocks that he required to question her about the accident. He then visited her at home, quite uninvited. Again, he covertly tape-recorded much of the conversation. He told her that he had a 'little tip', namely, that the McClintocks' insurance policy contained a clause which might provide her with up to $12,500. He asked her if she wished to file a claim. Wanda Lou, eighteen, and not yet a high school graduate, said that she did not understand, but when Ohralik offered to represent her, also on the basis of a one-third contingent fee, she said, 'OK', apparently at Ohralik's suggestion that this would suffice to indicate assent.

The following day, Mrs Holbert sought to repudiate this oral assent, stating that neither she nor Wanda Lou wanted to sue anyone, nor did they want legal representation and, if they did, they would consult their family lawyer. Ohralik insisted that Wanda Lou had entered into a binding contract. One month later, Wanda Lou, herself, wrote saying, again, that she did not want to sue anyone and did not wish to be represented by Ohralik. She requested that he intimate to the insurance company that he was not representing her. Actually, the insurance company were willing to pay up but were unready to do so as long as Ohralik claimed and Wanda Lou denied that he represented her. Before he would 'disavow further interest and claim' he insisted that Wanda Lou first pay him about $2,500, being one-third of his 'conservative' estimate of her claim, and he even initiated court action for recovery of this sum. Carol McClintock also sought to discharge Ohralik. Another lawyer represented her and concluded a settlement of $12,500 with the insurance company. Ohralik successfully sued for his third of this sum, that is, for $4,166.66. Incidentally, the fees for the other lawyer who acted for Carol amounted to only $900.

Hardly surprisingly, both young ladies filed complaints against Ohralik with the appropriate County Bar Association. The Association filed formal complaints with the Board of Commissioners on Grievance and Discipline of the Supreme Court of Ohio. The Board determined that Ohralik had violated Disciplinary Rules of the Ohio Code of Professional Responsibility, primarily those directed towards discouraging lawyers from suggesting that a non-lawyer take legal action and, should *that* happen, from recommending themselves or their close associates. The Board imposed a public reprimand. On the Constitutional question, the Supreme Court of Ohio held that Ohralik's 'commercial speech' did not fall within First Amendment protection and increased the sanction to indefinite suspension. On appeal, the US Supreme Court affirmed this interpretation of the First Amendment.

Whatever this case teaches about advertising — and one might properly feel that it is concerned solely with the quite distinct question of solicitation — the lawyer on this side of the Atlantic is bound to regard it as providing compelling evidence (as if any were necessary) that a contingent fee system of litigation is wholly detrimental to the interests of clients and to the image of the profession.

Primus

Edna Smith Primus is a practising lawyer in South Carolina. At the relevant time she was (*a*) associated with the 'Carolina Community Law Firm', an expense-sharing arrangement with each attorney keeping his own fees, which subsequently changed its name to 'Bohl, Smith and Bagby'; (*b*) an officer and an unpaid co-operating lawyer with the Columbia branch of the American Civil Liberties Union (ACLU); and (*c*) a legal consultant, paid a retainer, for the South Carolina Council on Human Relations.

As can be imagined, reports that pregnant mothers in receipt of public assistance were being sterilised or threatened with sterilisation as a condition of receipt of medical assistance gave rise to disquiet. A call was made to the Council to send a representative to speak to women who had been sterilised. The Council sent Primus, who addressed a meeting advising those present, including one Mary Etta Williams who had been sterilised by Dr Clovis H. Pierce after the birth of her third child, of their legal rights and of the possibility of a law suit. This was in July 1973.

In August 1973 the ACLU informed Primus that it was willing, in furtherance of its role as a national non-partisan organisation defending the Bill of Rights for all without distinction or compromise, to provide representation for sterilised mothers. Primus, having been informed by the organisers of the July meeting that Williams wished to sue Dr Pierce, wrote informing Williams of the ACLU's offer of free legal representation. Not long after receiving that letter, Williams visited Dr Pierce regarding an illness of her third child. At the doctor's office she met his lawyer, who asked her to sign a release of liability for Dr Pierce. Williams showed that lawyer and Dr Pierce the letter from Primus. They retained a copy. She telephoned and stated that she did not intend to sue. This concluded the communication between Williams and Primus.

The Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina filed a formal complaint charging Primus with 'solicitation in violation of Canons and Ethics'. Primus denied the charge, founding among other things upon the First Amendment. A panel of the Board determined that Primus was guilty of solicitation contrary to Disciplinary Rules. The panel accepted that the evidence was inconclusive as regards solicitation by Primus on her own behalf, but it took the view that she did solicit Williams on behalf of the ACLU. The panel thus interpreted the Disciplinary Rules as prohibiting solicitation of a client for a non-profit organisation. The full Board approved the panel report and administered the private reprimand which the report had recommended. The Supreme Court of South Carolina adopted the panel report and increased the sanction to a public reprimand. Primus appealed. The US Supreme Court reversed.

The crucial distinction between the two cases is to be found in the nature of the ACLU, whose sponsorhip is not motivated by pursuit of pecuniary gain but rather by its widely recognised objective of vindicating civil liberties. That circumstance brings the issue under the decision in *NAACP v. Button* [371 US 415 (1963)] which determined that it is unconstitutional for a state (in the event, Virginia) to prohibit, under its quite legitimate powers to regulate the legal profession, the solicitation of prospective litigants for the purpose of furthering civil rights because such solicitation falls within the right to engage in association for the advancement of beliefs and ideas.

One should never forget that instruments such as the American Constitution, whatever their tenor, and however uncompromisingly expressed, simply are not absolute in operation. Thus, even, after *Bates*, which extends First Amendment protection to price advertising by lawyers, states retained the power to regulate lawyer advertising and the legal profession. The states retain a broad power to regulate the practice of professions within their boundaries. Indeed, 'the interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts" ' (*Goldfarb v. Virginia State Bar,* 421 US 773, 792 (1975)). *Ohralik* demonstrates that the states' powers may quite properly restrict what lawyers may say and do, even where 'speech', including 'commercial speech', is normally protected by the First Amendment so that state laws restricting it risk declaration of unconstitutionality. But *Primus* raises a countervailing value, namely, political association for the advancement of beliefs and ideas. And that places limits on what a state properly can do. Even if a state is entitled to regulate its legal profession, it cannot enact such regulations as cut excessively into associated rights of beliefs and ideas. Ultimately, in the language of American constitutional law, the difference between *Ohralik* and *Primus* is a difference in the appropriate level of judicial scrutiny.

But determining the *appropriate* level of judicial scrutiny is more art than science; more politics than law, and men of good will and good sense can differ. Even American Supreme Court Justices can differ radically on this question. In so far as it is ever meaningful to catch a man within a label, Mr Justice Marshall is a 'liberal' and Mr Justice Rehnquist is not. They differ; and their difference is instructive.

Thus, Rehnquist aptly observes, 'the Court tells its own tale of two lawyers: one tale ends happily for the lawyer and one does not'. Rehnquist, dissenting, takes the view that both tales should end unhappily. 'We can,' he observes, implying that we ought not to, 'develop a jurisprudence of epithets and slogans . . . in which "ambulance chasers" suffer one fate and "civil liberties lawyers" another.' This would be wrong, Rehnquist believes, because there is no principled difference between the two cases and it is only by way of '. . . the latitude of novelists in deciding between happy and unhappy endings for the heroes and villains of their tales' that the court can reach different judgments in the two cases.

Rehnquist accuses the court of missing the 'common thread' between the two cases. He interprets the *Primus* decision as stating 'that South Carolina may not constitutionally discipline a member of its Bar for *badgering* a lay citizen to take part in "collective activity" which she *never* desired to join' (author's italics). But (as the italicised words indicate) this is a mis-description of the facts of *Primus*. He treats as 'entirely reasonable' a rule to the effect that 'a lawyer *employed* by the ACLU . . . may *never* give unsolicited advice to a lay person that he or she retain the organisation's free services' (author's italics). But *Primus* was not *employed* by ACLU and an absolute prohibition is simply inconsistent with the *style* of American Constitutional adjudication. Rehnquist 'cannot share the Court's confidence that the danger of such [harmful] consequences [ie, drawing an unsophisticated layman into litigation contrary to his own best interests] is minimized simply because a lawyer proceeds from political conviction rather than for pecuniary gain'. Alas, your author 'cannot share' Rehnquist's inability to see a distinction between *Ohralik* and *Primus* and, whereas past 'fan' mail suggests that at least one reader of this *Journal* will side with Rehnquist, your author follows Mr Justice Marshall and the court in distinguishing the two cases.

Marshall stresses the extremely 'disparate factual settings'. Ohralik provides 'classic example of "ambulance chasing", fraught with obvious potential for misrepresentation and overreaching'. He notes that the girls were very young and that Ohralik was 'an experienced lawyer in practice for over 25 years'. He continues, 'Any lawyer of ordinary prudence should have carefully considered whether the person was in an appropriate condition to make a decision about legal counsel.' Marshall writes of Ohralik having 'foisted' himself, in 'gross disregard' of the privacy of Carol McClintock, Mr and Mrs McClintock and Wanda Lou Holbert. He is particularly caustic about Ohralik's 'covertly recording' conversations — 'completely inconsistent with an attorney's fiduciary obligation fairly and fully to disclose to clients his activities affecting their interests'. And Ohlarik's 'unethical conduct was further compounded by his pursuing Wanda Lou Holbert, when her interests were clearly in potential conflict with those of his prior-related client, Carol McClintock'. All in all, Marshall concludes, it is not so much soliciting business for himself that makes Ohralik's conduct objectionable, 'but rather the circumstances in which he performed that solicitation and the means by which he accomplished it'.

For Marshall, *Primus* is a fish from an entirely different kettle. That case reveals 'a "solicitation" of employment in accordance with the highest standards of the legal profession'. He writes of the obligation of all lawyers to help the disadvantaged. Lawyers ought not to be discouraged from such activities when already, he believes, too many 'find time to work only for those clients who can pay fees'. Marshall, therefore, is wholly supportive of the proposition that 'a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights' (*NAACP v. Button* 371 US 415, 439 (1963)) and insists, as against Rehnquist, that the two cases 'deal only with situations at opposite poles of the problem of attorney solicitation'. And the court distinguishes in like manner.

In so doing, the court flirts dangerously adjacent to the old distinction between ideal 'political' and crude 'commercial' speech, discredited in *Virginia Pharmacy*, in order to sustain the proposition that First Amendment protection of speech does not exclude all forms of regulation, especially where important state interests are involved. First Amendment protection is not absolute and a state does not lose power to regulate commercial activity deemed harmful to the public simply because speech is a component of that activity. The recognition that First Amendment protection is not absolute presents the question of when the presumption in favour of free speech is to be upheld and when departed from. In the two cases cited, the court seeks to draw a distinction between permitted forms of communication and illegitimate activities. It seeks to refine *Bates* by drawing a line between constitutionally permitted communication and constitutionally prohibited solicitation.

That distinction, fine as it is, shares the basic philosophy of the Law Society of Scotland's new rules. In both jurisdictions, lawyer advertising is permitted, provided one can point to some greater social good or public interest transcending the narrow personal benefit or private profit of the individual lawyer. And differences between the two jurisdictions do not so much reflect a difference in basic philosophy as a difference in the conception of the social good or public interest. *Bates* decided that American lawyers may advertise the price of routine services in the popular press, on the ground that the free flow of such vital information contributes significantly to the common good. As Mr Justice Blackman put it in *Bates*, '. . .the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day'.

And the question remains as to why the solicitor in Scotland ought to be prohibited from routinely advertising his expertise and the normal costs of his services. Much of the opposition seems to flow from a perverse readiness to

attribute to advertising all the ills of solicitation, of barratry, champerty, and maintenance. Your author would insist that the difference between advertising and solicitation is as clear and as morally defensible as that between *Ohralik* and *Primus* (as glossed by Mr Justice Marshall), but that is simple testimony (of his moral vision) and not proof (of its independent truth).

One distinction between *Primus* and *Ohralik* not previously treated of is that in the former, but not in the latter, there was a written communication. The reader of a letter, or of an advertisement, can effectively avoid further bombardment; the victim of solicitation frequently cannot. Unlike solicitation, advertising is open to public scrutiny, gives rise to no special difficulties of proof and is readily susceptible of regulation (as witness, even the Law Society of Scotland's Solicitors' (Scotland) Practice Rules, 1977 and 1978). Again, lay persons are more vulnerable to solicitation than to advertising given that lawyers are normally professionals trained, or at least experienced, in the art of persuasion. Advertising simply provides information, leaving an individual free to act on it or otherwise; solicitation involves pressures, not least of all in the apparent need for an instant answer without time to take stock.

The justification of extending constitutional protection to lawyer advertising, and that means, in effect, prohibiting states prohibiting lawyers, turns upon the concept of 'informed and reliable decision making' (Bates *v. State Bar of Arizona*, 433 US 350, 364). Above all, the dissemination of information as to the availability, nature and prices of legal services was seen as essential to the consumer of legal services making a rational choice about his life and about the selection of a lawyer. In Scotland, despite its being of the private sector, the provision of legal services is not a field of competition. The doctrines of Adam Smith have never informed the political economy of the provision of legal services. Prices are centrally determined, not of course by government, but by the legal profession's own governing body. So alien are the twin doctrines of price competition and advertising that few lawyers would even entertain offering a discount for prompt payment of fees, out of a justifiable apprehension that such offends the rules of the Law Society.

It is rather easy to construct a convincing case against the legal profession relating to monopolies, restrictive practices and even the closed shop. The competition and openness normally associated with the private sector is absent. Further liberalising of the advertising rules together with modest and regulated price competition (and therefore advertising) might provide a much-needed boost for a profession under attack and rather too defensive and unsure of itself for its own good or for the good of those it serves. The legal profession has much to gain and little to lose, both internally, and as against external predators, by adopting a regulated but increasingly aggressive marketing policy.

R. H. S. TUR

Ruling of Settled Jury Actions

The following Practice Direction has been received from Mr. J. K. Waldron, the High Court registrar:

Jury Actions set down for trial in any venue outside Dublin may be ruled on a Monday in Dublin. In the case of infant or fatal settlements, the ruling must be with papers lodged beforehand as a listed ruling. In any other case, the application should be made as an ex-parte application to the Judge dealing with Ex-Parte applications on a Monday morning. In every such case, however, it is essential that with the papers must be lodged a note of the list number of the case and the venue for which it is listed. This is necessary in order to permit of the realistic up-dating of lists awaiting trial at these venues.

With regard to infant and fatal cases (to be ruled on a Monday) which have been set down for Dublin a similar requirement arises.

23rd April 1982

Lady Solicitors' Golfing Society

The 3rd of December last saw a gathering of adventurous ladies beating their way through the purple heather at the Heath Golf Club, Portlaoise. Wrapped in Aran sweaters, shielded by waterproofs and insulated with thermal woolies, some twenty ladies teed off — and thereby marked the inauguration of the Lady Solicitors' Golfing Society. Hours later, the first of the expedition returned to the Clubhouse and, with tails to the fire and "hot toddies" in hand, began to recount the inevitable tales of the putt that wouldn't drop.

The outing was organised when Mrs Moya Quinlan, then President of the Law Society, graciously offered to present a perpetual trophy to the ladies. Players travelled from Kilkenny, Dublin, Tullamore and Portlaoise to compete for the prized trophy and for the miscellaneous hampers for the runners up. We were delighted by the number of guests who participated and they brought with them a heartening relief from "requisitions on title" and "Motions for Judgement".

After we had quenched the flames from the burning plum pudding, Mrs. Quinlan presented the Quinlan Perpetual Cup to Elaine Anthony (Terence Doyle & Co., Dublin) who brought in a tremendous score of 51 nett. Other prize winners were:— 2nd nett: Mary Molloy, Kilkenny. Best gross: Maeve Laningan, Kilkenny. **Visitors:** 1st nett: Mrs. Jean Crawford. Best gross: Mrs. Monica Culliton.

The 1982 Committee was elected and they are as follows: Captain, Mary Meagher, Portlaoise; Secretary, Elaine Anthony, Dublin; Treasurer, Maeve Lannigan, Kilkenny; Hon. Member, Mrs. Moya Quinlan.

This year's outing will be held at Newland's Golf Club on Monday 26th July and those interested in participating should contact any of the members of the Committee. □

Correspondence

The Editor,
Gazette of the Incorporated Law Society,
Plackhall Place,
Dublin 7. 22/4/82

Re: Change of Christian Name by Deed Poll.

Dear Sir,

Colleagues may be interested in an important development with regard to changes of name by Deed Poll. Many Solicitors will recall their inability to assist those clients expressing a desire to change their christian name (often in conjuntion with a change of surname) arising out of the refusal of the officials in the Central Office of the High Court to accept Deed Polls in respect of change of christian name on the grounds that the christian name cannot be changed.

This Firm was recently engaged in such an application and the matter was referred to the President of the High Court, the Honourable Mr. Justice Finlay, and as a result thereof the President has made the following practice direction which he has permitted to be circulated to colleagues for their benefit:

"Having considered submissions made on behalf of an applicant for the registration of a Deed Poll involving a change of surname and christian name as well, I have come to the conclusion that the practice heretofore in force prohibiting the change of christian name should be discontinued.

It will therefore be permissible for persons by Deed Poll to change both christian name and surname provided that the other requirements already in force concerning such changes are complied with."

The direction was made on the 1st. April 1982 and is undoubtedly an important clarification of the law on this matter.

Yours faithfully,
Brian J. Matthews,
Matthews & Co.,
Shamrock House,
Dundrum,
Dublin 14.

The Editor,
Gazette of the Incorporated Law Society,
Blackhall Place, 30/4/82
Dublin 7.

Dear Sir,

I refer to my letter published in the Gazette of March 1982 and in particular to the "Editorial Note" at foot of same.

It may be of further interest that two further cases have come to my notice since publication of my letter, one an English one and another Irish one in relation to the matter of domicile.

(1) The English case is *Inland Revenue Commissioners v. Duchess of Portland* [1982] 1 A11 ER 784, which hinged on the Domicile and Matrimonial Proceedings Act 1973. While this was a Revenue Case it is of further interest. It was held that the tax payer had not on the facts abandoned her English domicile of choice.

(2) The Irish case was that of *M. T. T. v. N. T.* a judgment of the Supreme Court delivered on 1st April 1982 when the point for consideration was whether a U.K. decree of divorce obtained by the husband who lived and worked in Ireland for two years was recognizable in our Courts depended on whether his domicile was Irish or British. His domicile of origin was British and it was held that his residence in Ireland while employed there was not sufficient to rebut the presumption that his domicile of origin was British. The U.K. decree of divorce accordingly qualified for recognition in our Courts following the decision in *Gaffney v. Gaffney* [1975] I.R. 133.

It appears that the husband had applied to the Cork District Court for a variation of an existing maintenance order under the Family Law (Maintenance of Spouses and Children) Act *1976*, (the year *1964* is quoted erroneously in the Judgment it seems), contending that the absolute decree of divorce absolved him from any liability to continue to make payments to the wife. The District Justice accepted that proposition.

The situation of the wife and the four children of the marriage is indeed an invidious one on the facts of this particular case, which must be considered as another example of the evil which divorce really is. The wisdom of the public policy of this State is illustrated in rejecting divorce as inimical to the welfare of spouses, the children, the family and society itself.

Yours sincerely,
Brendan Fitzgerald,
59 Offington Park,
Sutton,
Dublin 13.

The Editor,
Gazette,
Blackhall Place, 1/4/82
Dublin 7.

re: Judgment Papers in Circuit Court.

Dear Sir,

I refer to the note on p.39 of the Gazette for March 1982, which may require clarification.

As I understand it, the composite form in which the form of Judgment by Default appears as a seperate document, with the full title of the Court and Action set out, is acceptable. The composite form where the Judgment appears as an addendum to the Cetificate of No Appearance and where the title to the action is set out only on the first page, in the Affidavit of debt, is not. There is no objection to several documents being bound together, or even printed on the same sheet of paper, but the Judgment, being an Order of the Court, must be capable of standing on its own when abstracted from the other documents contained in the form. This is the rule followed in this

office, and I understood it to be the decision of the Association of County Registrars.

Yours sincerely,
F. Briain O'Gadhra,
Limerick County Registrar,
Courthouse,
Limerick.

Comment....

(Continued from P. 75)

Historically, it must be suspected that the strength of the doctrine in Britain and Ireland during the 19th Century and the greater part of the present century derives from the fact that, in their different ways, both countries were emigrant countries. In the case of Ireland, people left involuntarily, seeking a decent living abroad with the hope of returning to Ireland with their fortunes made, while in the U.K. many left to serve, either in a military or civilian capacity, in outposts of the far flung empire, confidently expecting to return to Britain at the end of their tours of duty.

The attraction of the Doctrine of Domicile as a link with the home country for such persons was clearly great, but the changes which have taken place in the world during the past 40 years have much reduced the desirability for maintaining the Doctrine. □

Practice Note

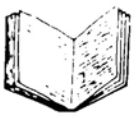
Land Registry Ground Rents Purchase Scheme — Expiry of Procedure

The attention of practitioners is drawn to the fact that, unless a statutory extension is granted, the procedure provided under Part III of the Landlord & Tenant (Ground Rents)(No. 2) Act of 1978 for the vesting of the fee simple in dwellinghouses through the Land Registry will expire on the 31st July 1983.

Section 18 of the Act provides that the procedure shall have effect only in relation to applications made under it during the period of 5 years beginning on the 1st August 1978.

Practitioners should ensure, in any case where clients who would be entitled to avail of the procedure have discussed the possible purchase of the fee simple with their solicitors, that such clients are advised of the expiry date. □

BOOK REVIEW



Salmond and Heuston on the Law of Torts, 18th Edition (1981), Sweet & Maxwell Ltd. £15.50 (Sterling)

McMahon and Binchy, Irish Law of Torts, 1st Edition (1981), Professional Books Ltd. IR£34.00

For legal practitioners (solicitors and barristers) and law students alike, 1981 should be remembered as the year when the first comprehensive book on the Irish Law of Torts was published and when Salmond on the Law of Torts became, in its 18th edition, 'Salmond and Heuston' on the Law of Torts.

For many years, it was a matter for some reflected pride for all of us in Ireland that a book (I almost say "institution") as famous as Salmond was being edited, updated and, in effect over time, almost totally re-written by Professor Robert Heuston of Trinity College, Dublin. Salmond is, like Cheshire and Fifoot (Contract), Megarry (Real Property) and Snell (Equity), "part-of-what-we-are" as lawyers. It is only fitting that Professor Heuston is now joined in the title of the book; I think "Salmond and Heuston" has a nice ring to it and will, undoubtedly, give Heuston the posterity he richly deserves.

Dr. Bryan McMahon (Solicitor and Professor of Law at University College, Cork) and Mr. William Binchy (Barrister-at-Law and Research Counsellor in the Law Reform Commission) with their new book on the Irish Law of Torts, have filled a void which Salmond could not reasonably have been expected to fill, namely the exhaustive citing of all Irish cases on the subject, both reported and unreported. The principal effect of this mammoth task will very soon be felt, as is highlighted by Mr. Justice Brian Walsh in the Foreword to the book — as advocates and judges place greater reliance on the now more readily available body of Irish decisions in tort cases. The Bar Library, with its own unique personal-recall "precedent bank" — a necessary but fallible substitute in the past for an effective case-reporting system, will now have something concrete to rely on in this area of the law, which Mr. Justice Walsh describes as "one of the main supports of the Irish Bar".

The synthesis of Salmond and Heuston with McMahon and Binhy produces a complete up-to-date presentation of this most important subject — suitable both for the 'bread-and-butter' practising lawyer and the academic student. Particularly interesting and helpful for the student is the different format of both books, but with each covering all the traditional topics. McMahon and Binchy present their treatment of the subject in five main parts, Introduction, Parties, Injuries to the Person (physical and non-physical), Injuries to property (real property and chattels), and, General Matters. This gives rise, for example, to occupiers' liability being dealt with as a chapter in Part III on Injuries to the Person (sub-category, physical), whereas liability for animals is in a much later chapter in Part IV on Injuries to Property (sub-category, Real Property). In contrast, Salmond and Heuston set out the

topics in the more usual way and, for example, deal with in sequence the general principles of negligence moving to breach of statutory duties, to dangerous premises, to defective products, to *Rylands v. Fletcher*, to liability for animals. Both formats are perfectly logical and understandable. When the student has studied one book and then read the other, the different approach to the same topics will certainly guarantee a greater understanding, removing the student from the shackles of word-bound layout-type of knowledge, with which examiners are, regrettably, all too familiar. Both books are, without doubt, in the "highly recommended" category.

M. V. O'MAHONY

Licensing Applications

The attention of practitioners is drawn to the Provisions of Section 24 of the Fire Services Act, 1981 which came into force on the 1st day of April, 1982.

The Section reads as follows:—

The Applicant for —

(a) a certificate for the grant or renewal of a licence (other than an off-licence) under the Licensing Acts, 1833 to 1981,

(b) the grant or renewal of a certificate of registration under the Registration of Clubs Acts 1904 to 1981,

(c) a licence in respect of premises under —
  (i) the Public Dance Halls Act, 1935, or
  (ii) Part IV of the Public Health Acts Amendment Act 1890 or

(d) a certificate in respect of premises under the Gaming and Lotteries Acts 1956 to 1979,

shall give one month's notice in writing (or such shorter period of notice as the fire authority may in the special circumstances of the case agree to accept) of the application to the fire authority in the functional area of which the premises are situated, and the fire authority may appear, be heard and adduce evidence in respect of the application on the hearing thereof.

NOTE:—

Part (IV) of the Public Health Act Amendment Act 1890 relates to premises in respect of which Music and Singing Licenses are required.

Professional Information

Land Registry —

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated this 25th day of May, 1982.

W. T. MORAN (Registrar of Titles)

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

1. REGISTERED OWNER: Edward Fitzsimons; Folio No: 20195; Lands: Corratober; Area: 31a. 0r. 3p.; County: **CAVAN.**

2. REGISTERED OWNER: Matthew Crinion; Folio No: 7146; Lands: Rushwee (part); Area: 33a. 0r. 30p.; County: **MEATH.**

3. REGISTERED OWNERS: Charles Moriarty and Bridget Moriarty; Folio No: 8814F; Lands: Loughaskerry; Area: 1.325 acres; County: **DONEGAL.**

4. REGISTERED OWNERS: Edward John Harte and Margaret P. Harte, Timicat, Glenamaddy, Co. Galway; Folio No: 25626; Lands: Barna; Area: 1a. 0r. 26p.; County: **GALWAY.**

5. REGISTERED OWNER: Caille Investments; Folio No: 47471L; Lands: Kilmacud West (part); Area: Plan 2p. edged purple on the Registry map (o.s. Supply map K to O.A. 22/12); County: **DUBLIN.**

6. REGISTERED OWNER: Sylvester Mulvey; Folio No: 4123 Revised; Lands: Glencullen; Area: 0a. 0r. 16p.; County: **DUBLIN.**

7. REGISTERED OWNER: Joseph Andrews (Junior); Folio No: 2548; Lands: Lands of Roscall (part); Area: 8a. 1r. 17p. County: **DUBLIN.**

8. REGISTERED OWNER: Patrick Cosgrove, tenant in common; Folio No: 5584; Lands: Lands of Rush; Area: 0a. 2r. 8p.; County: **DUBLIN.**

9. REGISTERED OWNER: Michael Blighe, Ballyhand, Glenamaddy, Co. Galway; Folio Nos: (1) 11734, (2) 3159, (3) 3145; Lands: (1) Cloonlara South, (2) Frass, (3) Cloonlara South, (4) Frass; Area: (1) 23a. 0r. 21p., (2) 3a. 0r. 15p., (3) 10a. 0r. 22p., (4) 7a. 2r. 0p.; County: **GALWAY.**

10. REGISTERED OWNER: Ellen Perry, Corroy, Ballina, Co. Mayo; Folio No: 27843; Lands: (1) Corroy, (2) Corroy, (3) Corroy; Area: (1) 3a. 3r. 13p., (2) 4a. 1r. 30p., (3) 13a. 3r. 16p.; County: **MAYO.**

11. REGISTERED OWNER: Thomas and Catherine Morris, Bingarra, Athenry, Co. Galway; Folio No: 7614; Lands: (1) Bingarra, (2) Tisaxon; Area: (1) 37a. 3r. 18p. (2) 4a. 3r. 29p.; County: **GALWAY.**

12. REGISTERED OWNER: Brendan Leen; Folio No: (1) 1263F, (2) 1264F; Lands: (1) Cloonalour (situate to the west side of the Tralee to Listowel Rd. in the Urban district of Tralee), (2) Cloonalour (situate to the west side of the Tralee to Listowel Rd. in the Urban District of Tralee); Area: (1) 0a. 0r. 15p., (2) 0a. 0r. 14p.; County: **KERRY.**

13. REGISTERED OWNER: Mary Catherine Hogan; Folio No: 31188; Lands: Oldcastle; Area: 3a. 1r. 12p.; County: **MAYO.**

14. REGISTERED OWNER: Jeremiah Lynch; Folio No: 176R; Lands: Ballinaspigmore. Area: 83a. 2r. 18p. County: **CORK.**

Lost Wills

Brennan, Thomas, deceased, late of 17/19 Bath St., Irishtown. Will any person having knowledge of the whereabouts of the last will and testament of the above-named deceased, please contct Peter J. Cusack & Co., Solicitors, Orchard Rd., Clondalkin, Co. Dublin. Tel: 517864.

Cantillon, Michael, deceased, late of Lower Main St., Rathkeale, Co. Limerick and formerly of Valencia Island, Co. Kerry. Radio Officer (retired). Will any person having knowledge of the will of the above-named deceased who died on 5 February, 1982, please contact Messrs. Maurice F. Noonan & Son, Solicitors, Rathkeale, Co. Limerick.

Greensmyth, Patrick, deceased, late of 12B Arbour Hill, Dubllin 7. Will any person who knows the whereabouts of the original will dated 9 August 1960 of the above-named deceased, who died on 2 July, 1978 please contact R. T. Ringrose, Solicitor, 3 Chancery Place, Dublin 7.

Healy, Joseph, deceased, late of Cough, Rathmullen, Ballymote, Co. Sligo. Farmer and factory worker. Will any person having knowledge of a will of the above-named deceased who died 24 April, 1982, please contact Messrs. Johnson & Tighe, Solicitors, Ballymote, Co. Sligo.

Wiley, Michael, deceased, late of Clonmoher, Bodyre, Co. Clare. Will any person having knowledge of the will dated 3 June 1960 of the above-named deceased who died on 6 December, 1962 please contact Brian D. Casey & Co., Solicitors, Thomond House, High St., Ennis, Co. Clare.

Ronald Ryan, deceased, late of 89 Tyrconnell Park, Inchicore, Dublin. Would any person having knowledge of a will of the above named deceased who died on 3 March, 1982 please contact McGinley, Solicitors, 3 Inns Quay, Chancery Place, Dublin.

Miscellaneous

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76 No. 5 June 1982

LAW SOCIETY SYMPOSIUM

"A Matter of Matrimony"

From left: District Justice Sean Delap, Mr Frank O'Donnell, Solicitor, Mrs Kay Begg, Conciliator from the Bristol Courts Family Conciliation Service, Dr Peter Fahy, Psychiatrist and Mr Michael V. O'Mahony, Solicitor.

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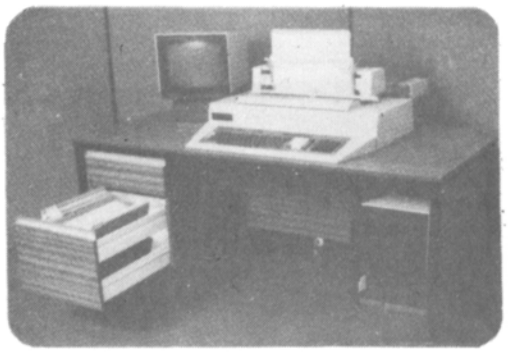

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76 No. 5 June 1982

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . . .

. . . Family Conciliation

IT IS probably fair to say that there are very few solicitors who find themselves involved in Family Law cases who would not prefer to be doing some other type of work. This is so, particularly, because of the demanding and very stressful responsibility of having to deal with people (wives or husbands) who are at their most emotional — with anger, bitterness, retribution and self-pity unfortunately a common ingredient of almost every case. If the emotional factor were absent, solicitors would be happy enough to deal with the purely legal aspects of the consequences of the separation of married couples.

It is in this context that a look at the functions of the Bristol Courts Family Conciliation Service is worthwhile. The Law Society was fortunate to have at its recent Symposium (entitled "A Matter of Matrimony") a very experienced Conciliator from that Service and an outline of what that Service provides is contained elsewhere in this issue. Those who, quite rightly, call for the implementation of the ideal of a properly constituted Family Court, independent of the other Courts, with exclusive jurisdiction in all family law matters and with qualified welfare support staff, would do well to look at the Bristol experiment. Progress towards the ideal has to start somewhere and where better to start than by recognising that the involvement of lawyers in family law cases, operating the existing accusatorial system, has to be the wrong way to resolve such disputes because, apart from the strain on the lawyers concerned, the long-term emotional effects on the parties themselves and the children involved, generated by a system which necessarily involves charge and countercharge, is immeasurable. Lawyers try their best within the professional constraint of acting in the perceived interest of only one party, to bring about settlements, sometimes despite their clients' transient wishes, particularly where the unfortunate children, represented by no-one, are the pawns in the parties' bloodletting!

How much more humane and satisfactory it would be if there was a conciliation service available, staffed by qualified social workers and marriage guidance councillors, allied to some knowledge of the law, to help the parties themselves to come to terms with the realities of separation and the desirability of coming to terms as amicably as possible on the issues of custody of and access to children, maintenance and division of property. How much more efficient that form of conciliation than the pressurised 'con-

(Continued on P. 105)

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The Powers of the Police

A Critical Overview (Part 2)

by
Peter Charleton, B.A. (Mod), Barrister-at-Law

POWERS OF POLICE OVER ARRESTED PERSONS

Having successfully negotiated the labryinth of arrest we now come to consider what powers the policeman has over the arrested person. One could reasonably expect that having come to the stage where an officer was entitled, at least temporarily, to deprive a person of his liberty, other deprivations less serious should follow in consequence; for example, the power to bring the person about to the scene of the crime and to places where material evidence could be or was found; the power to place the prisoner on an identification parade, photograph and fingerprint him; the power to gather evidence in his possession or in his house; and, above all, the power to ask him relevant questions. In point of fact and law the policeman should merely leave the prisoner in his cell and set the prosecution in motion. However, several recent decisions in England have sought to give the police some of those powers under the doctrine of reasonableness.

Moving the arrested person and searching his dwelling

Firstly, an accused person cannot be brought to the scene of the crime or anywhere else save to the arresting officer's station.[69] But Lord Denning M.R. in *Dallison v. Caffrey*[70] stated:-

> "When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there; else it may be removed and valuable evidence lost. He can take the person suspected to the place where he says he was working for there he may find persons to confirm or refute his alibi. The constable can put him on an identification parade to see if he is picked out by witnesses."

His Lordship cited no authority in support of those propositions, but he justified them by saying:[70]

> "So long as such measures are taken reasonably, they are an important adjunct to the administration of justice. By which I mean, of course, justice not only to the man himself but to the community at large. The measures however must be reasonable."

Diplock L.J. in the same case[70] said the law was not "fossilized" and he appealed to reason and further placed on the police a duty to seek to recover the proceeds of theft and for that purpose to search the house of the suspected person as soon as possible.

With respect to those learned judges, whether it is reasonable that a police officer has a power or not is for the legislature to decide and was never a ground for the judicial invention of a legal rule.[71] A further judicial invention of like nature occurred in *Jeffrey v. Black.*[72] Black was arrested for stealing a sandwich from a public house. The police officers who arrested him searched his lodgings. They found cannabis and he was charged accordingly. Widgery L.C.J. was of the opinion that this was wrongful on the ground apparently that there was no nexus between the theft of a sandwich and the search of a person's lodgings. However, he seems to have stated that where a search of a premises bears a reasonable relation to the offence charged or arrested upon, in the sense that evidence may be found there to support the charge, then the police have power so to search.[73] I respectfully disagree. There was no authority cited for this decision. The traditional method of searching an arrested person's premises has always been by warrant. If the legislature considers the nature of a crime serious enough to allow this invasion of privacy they should provide for it; 'a fortiori' a summary search, where a search pursuant to a warrant could be made, must be condemned as usurping the supervision properly given to the judiciary.[74]

Fingerprinting an Accused:

I think there is no authority, apart from Section 30(5) of the Offences Against the State Act, 1939, for fingerprinting anyone.[75] This seems clearly so because there does exist an express power in regulations made in 1955 by the Minister for Justice pursuant to powers conferred by the Penal Servitude Act 1891,[76] that "a convicted prisoner may be photographed and measured and his finger and palm prints may be taken at any time during his imprisonment" (Regulation 3) whereas in the same Regulations (Regulation 4) it is provided that:-

> "an untried prisoner shall not, while in prison, be measured or photographed nor shall his finger or palm prints be taken except with the authority of the Minister for Justice or upon the application in writing of a member of the Garda Siochana of not lower rank than Inspector approved by a Justice of the District Court, or, in the Dublin Metropolitan

> District, by the Commissioner or a Deputy Commissioner of the Garda Siochana."

The same Regulation 4 does, however, provide that if a prisoner "on being informed of his right to object, does not do so, his height may be measured, and his photograph, finger and palm prints taken, on the application in writing of a member of the Garda Siochana of not lower rank than Inspector."

The "untried prisoner" of course refers to the accused person who is remanded in custody by the Court.

Given the 1966 decision in *People v. Roger O'Callaghan*[77] specifying the limited grounds on which bail may be refused to an accused awaiting trial, few accused persons are in fact ever in that position (i.e. "untried prisoner") to so facilitate the police. Regulation 5 of the same Regulations provides that

> "Where, in the case of an untried prisoner not previously convicted of any crime, photographs, prints or measurements have been taken under these regulations, all such photographs (both negatives and copies), print impressions and records of measurements so taken shall, upon his discharge or acquittal, be forthwith destroyed or handed over to him."

A person not remanded, and therefore not in prison, can competently consent to fingerprints being taken and this is so even though he is not informed of his right to refuse[78] but consent in that context must not be coerced or obtained by a trick.[79] In England, magistrates have power to order the taking of fingerprints on the application of an Inspector in relation to a person in custody or a person summonsed before them.[80] No such power exists here and in *People v. O'Brien and McGrath*[81], Davitt P. doubted that the power to fingerprint under the 'Regulations as to the Measuring and Photographing of Prisoners, 1955', existed at all, pointing out that the Regulations were made under the Penal Servitude Act 1891, Section 8, which gave the Minister power to make regulations for the measuring and photographing of prisoners; that a fingerprint is not a photograph, nor is it a measurement, and that therefore the Regulations were, ultra vires the powers provided by the 1891 Act; but in the case the fingerprints so obtained were, notwithstanding, held to be admissible in evidence.

Nobody has thought fit to give our police any proper finger-printing power nor has even this defect been remedied. At common law, in Scotland and America, the Courts have held that the police have power to fingerprint on arrest.[83] In Scotland, the analogy with police powers of search incidental to arrest was taken even further in *Hay v. H.M. Advocate*[83] where the Court asserted a power to forcibly make a dental impression to aid a murder investigation. No such decision has been made here. However, such a change would be welcome. Fingerprints are a vital aid in the detection of crime. Where records are kept of a convicted prisoners' prints such procedure may deter crime.[84] Certainly a modern police force with almost no power to fingerprint is severely disabled. It would be unsatisfactory to leave it to the judiciary to follow foreign common law. They would have no power to regulate what would be done with the fingerprints of persons who are later found innocent. Nor would they be able to provide, as an act undoubtedly would, that a warrant be required and thus place the police exercise of this power under independent supervision to require it to be exercised in a responsible manner.

Identification Parades:

Lastly, in this section dealing with the powers of the police over arrested persons mention must be made of identification parades. Apart from the statement in *Dallison v. Caffrey*[85], there is no authority that a prisoner must undergo an identification parade. In the United States, such procedures have always been compulsory, as have been reasonable incidents of them, such as the wearing particular clothing[86] or speaking particular words.[87] The only sanction our police have for a prisoner's refusal to co-operate is that which happened in *People v. Martin*[88] where an accused refused to enter an identification parade and later got little judicial sympathy when he objected to the unsatisfactory nature of the actual identification.

In conclusion (on this section of the article), it seems to me that properly considered, there can be little reason for denying the granting to the police of the powers over arrested persons proposed above, subject of course to proper safeguards and judicial review. Once there is an arrest then the deprivation of liberty of movement should at least provide for co-operation in ways in which the police could not be tempted to invent evidence of guilt (as in the case of verbal admissions). There is the risk that the tendency may be to arrest and hope to use those proposed powers to dig up the proper grounds for reasonable suspicion, but that is surely not as serious a danger as it would be on giving automatic search powers on arrest. An adequate safeguard would be a provision that, in each case, before exercising the power, an application would have to be made to Court giving good grounds, and making it a requirement that the police at that time justify the reasonable nature of their suspicion.[89]

Police Questioning

The issue of police questioning was fully dealt with in the O'Brian Committee Report[90] and it is not proposed to reconsider the matter here. As all will know the Report's recommendations have never been acted upon by the Government, since the Report was presented in April 1978.

Power to Gather Evidence

The final set of police powers that must be considered is in relation to the gathering of evidence.

Search prior to arrest

There are some powers of search before arresting. Under the Dublin Metropolitan Police Act 1842, section 29:-

> "a constable may stop, search and detain any vessel, coach, cart or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having conveyed in any manner any thing stolen or unlawfully obtained."

In those circumstances such a detention will be short of arrest as the policeman will have no intention at the moment of arrest of initiating the criminal process.

In all cases in exercising his power under this section the policeman must inform the suspect of the reason for his (the policeman's) actions. As reasonable a suspicion must exist here as in an ordinary arrest[91] and this is viewed not just from the point of view of the arresting constable but in the light of the circumstances as a whole.[92] Thus it has been held unreasonable for two shabbily dressed constables to arrest a citizen bringing his coat to the dry cleaners who proposed to board a bus in disregard of their inquiries of him.[93] But where a person makes as if to flee[94] or starts to make concealing movements[95] the powers are properly exercised.[96]

Further, the suspected person need not have stolen anything but could merely have it in transit innocently; but it must be in transit not just sitting on someone's property;[97] and once there exists a reason for the detention aspect of the power, the purpose of exercising it can contemplate questioning. Thus in *Daniel v. Morrison*[98] it was held lawful for a constable, who seeing a car without a tax disc and on questioning the owner and getting the cheeky answer that the car was stolen, to detain the suspect for further questions when he attempted to walk away.

There seems no reason why such a power should not be used. As Glanville Williams points out,[99] the section is to the benefit of the citizen. Rather than arrest and then search a person one would assume that an innocent citizen would prefer, in circumstances where reasonable suspicion could fall on him, to be stopped, questioned and searched on the spot and then released if the suspicion is discovered to be unfounded. But there is the obvious danger of abuse, and such powers should only be given where public policy or order clearly requires the risk of innocent citizens suffering such indignity. More recently, those powers have been given in like form to the police in drugs cases,[100] although in drugs cases arrest would be better, as a search to be useful must be absolutely thorough; also in firearms cases;[101] and extensive powers to stop and search vehicles have been given under Section 8 of the Criminal Law Act 1976. Those powers can arise where a Garda, with reasonable cause, suspects that offences under the Section have been, will be, or are being, committed. He may stop any vehicle without cause, and, without cause, search it. If, before or after such search, he has reasonable cause to suspect the occupants are criminals, whether intended, or past, or in the act, or where they have evidence related to the commission or intended commission of the offence, he may search them also. The only limit on the power to stop and search a vehicle is that the purpose must be to discover criminals or evidence related to their crimes, actual or intended. The category of crime includes murder, robbery, and all firearms cases, none of which need be subversive in character. Whether those powers should exist in all those cases is essentially a political matter. They were passed at a time of great political concern for the safety of the State and they do make vast inroads into the liberty and privacy of the citizen.[102]

Search and seizure upon arrest:

The second police power to gather evidence arises as a consequence of a valid arrest. Any evidence found on or in the possession of an arrestee which is material evidence on the charge for which he is arrested, or a charge in the contemplation of the arresting officer, or appears, on reasonable cause, to be stolen property or property in the unlawful possession of the arrestee, may be retained by the police for use at the trial of the person arrested, or at the trial of any other person or persons on any criminal charge in which the property is to be used as evidence. In that manner is the rule stated in *Jennings v. Quinn.*[103] The rule seems quite reasonable, but two questions of controversy arise: what is possession, and, whether the property of an innocent third party can be seized or retained by the police for use against an accused?

In *Jennings v. Quinn*[103] this former question was not considered by the Supreme Court. There, the police on a backed extradition arrest warrant thoroughly searched the applicant's house and seized anything of conceivable relevance and subsequently obtained other property from a garage owner in Cappoquin. In terms of the strict theory of the common law such action was illegal but in *Dillon v. O'Brien & Davis*[104] Palles C.B. was prepared to admit that rent books and documents in the same room as the accused were in his "possession" and under his control; and so also in *Agnello v. U.S.*,[105] cocaine seized from the pockets and from the room where the arrest of the applicant took place was lawful, and thus admissible in evidence under the rule in *Weeks v. U.S.*[106] However, the federal agents then went to the bedroom of his house four blocks away and found a can of cocaine. On appeal, the Supreme Court held the second seizure contrary to common law, the goods being out of Agnello's possession at the time of arrest, and quashed his conviction. What the concept of "possession" on arrest embraced was further elucidated in 1969 by the U.S. Supreme Court in *Ted Chimel v. California.*[107] This was a case where the applicant, arrested under a coinage offence in his own house, had that house searched from top to bottom by the police. There Mr Justice Stewart stated the common law rule extended only:-

> "To search the person arrested in order to remove any weapons that the latter might use to resist arrest or effect his escape. Otherwise the officers' safety might well be endangered and the arrest itself frustrated. In addition it is entirely reasonable for the arresting officers to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon, or evidentiary items, must, of course, be governed by a like rule . . . . There is ample justification therefore for a search of the arrestee's person and the area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

As regards the second question, in *Dillon v. O'Brien & Davis,*[104] Palles C.B. considered that the police were not entitled to seize evidence in the possession of a third party, because a legal mechanism, by way of subpoena 'duces tecum', already existed to compel its production. However, in *Elias v. Pasmore,*[108] illegal serches bearing the fruit of valuable evidence were justified on the grounds of State necessity. This latter decision was used in

England very recently by Lord Denning to justify even greater inroads on the liberty of the citizen and the inviolability of his dwelling.

It is to those decisions that we must now finally turn in considering the last aspect of police powers — the power to search under warrant. But in considering this I would submit that the rules just outlined, and normal searches and warrant powers, are correct in law and that no departure from them is warranted. It is dangerous to leave to the police a discretion to exercise vast powers of search upon arrest. The concepts of search and of arrest are entirely separate and should remain so. While it is reasonable that the police should seize property immediately possessed by an arrested person, it is not so reasonable that either the extent of their search shall extend to his house if he is arrested there; or, as in *Jeffrey v. Black*,[109] where he is arrested elsewhere, that they should be allowed to return to their prisoner's dwelling to search it. It is enough that on a reasonable suspicion existing a man should be made subject to charge and arrested. If, however, the suspicion of the police also extends to the existence of evidence in a private place, then that power can and should be exercised independently and even before an arrest. The traditional view of the law is that if State necessity justifies an action then legislation should be the child of that need and the proper course should be an Act that would provide for search warrant powers. Thus a magistrate can independently assess the need for the invasion of a citizen's rights; but a judicial invention, which gives unlimited search powers, presents the police with a temptation too great for them to resist. If it is to be the case that a policeman, upon arrest, can also, without supervision, search as he wills then the object of arrest will become, I fear, not the initiation of a criminal process but an invidious form of inquisition.

Search warrant powers and judicial developments:

The search warrant is the only correct procedure known to our system for the exploration of premises for the purpose of finding evidence. The 4th Amendment to the United States Constitution provides that warrants must specify the property to be searched and the nature of the goods to be sought and have to be issued under the hand of a magistrate.[110] Our system is not under this limitation. Thus under Section 16 of the Crimes Act 1871 a chief officer of police may issue a warrant to search for stolen goods where the occupier of the premises has been convicted of dishonesty. All other search warrants are however issuable under authority of a magistrate. The statutes giving search warrant powers invariably require an information on oath before the Justice that the appropriate evidence is reasonably suspected to be found in a certain place and thereupon the warrant will issue.[111] A justice will not be within his jurisdiction unless such evidence is given and the warrant could be quashed by certiorari.[112]

The extent of the powers of warrant and its duration are a matter of construction of the statute.[113] As a general rule it is not difficult to get a search warrant and they are a vital investigative aid to the police. The common law rules concerning the power of the police under them were clear. The police could search only premises specified in the warrant and no other. Persons found on the premises could only be searched if the statute authorising search contained that power and the face of the warrant specified its exercise by the holder.[114] An actionable trespass is committed if a policeman in searching seizes goods which are not specified in the warrant or are outside that class of goods.[115] The only development in those strictures which the common law had contemplated was that goods not specified in a warrant could be seized along with the goods so specified, if those had been likely to furnish evidence of the identity of the goods stolen.[116] Those rules went to the wall in *Ghani v. Jones*[117] where in a case involving the police seizing the passports of a Pakistani family during a warrantless search Lord Denning said:-

> "I would start by considering the law where a police officer enters a man's house by virtue of a warrant, or arrests a man lawfully, with or without a warrant, for a serious offence. I take it to be settled law without citing any cases, that the officers are entitled to take any goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter. If in the course of a search they come upon any other goods which show him to be implicated in some other crime, they may take them provided they act reasonably and detain them no longer than necessary."

I must dispute this statement. Firstly, because his Lordship declines to cite cases; secondly, because he apparently declines to follow pre-existing law; thirdly, because he fails to see any distinction between arrests and searches and equates a right to search a house with the right to arrest; fourthly, because he fails to distinguish between a right of entry or search under a warrant and the right to seize; and, lastly, because the taking of goods is not justified by a legal rule, but by a subsequent judicial analysis of the correctness of police behaviour.

The rest of the judgment uses specific instances to justify the creation of a new legal rule:[117]

> ".... the great train robbers .... used a saucer belonging to the farmer to give the cat its milk. When seeking for the gang, before they were caught, the police officer took the saucer so as to examine it for fingerprints. Could the farmer have said to them 'No, it is mine, you shall not have it'. Clearly not. His conduct might well lead them to think he was trying to shield the gang. At any rate it would have been quite unreasonable."

On this basis, Lord Denning then went on to decide that the police had power to seize anything from anyone if they have reasonable grounds for believing a serious offence has been committed, and similarly believe an article either to be the fruit of a crime or to be material evidence and the person in possession could not reasonably refuse to hand it over, they can take it for as long as is necessary. This decision led, in *Garfinkle v. Metropolitan Police Commissioner*[118] to the sanctioning of the seizure, pursuant to a search on warrant, of goods relevant to another crime altogether.[119] In *Frank Truman Export v. Metropolitan Police Commissioner*[120] the police were held entitled to seize documents specified in a forgery warrant together with anything which could assist their

prosecution and 79 documents in the hands of the plaintiff's solicitors which were privileged. The Court further held that even had they decided otherwise they would not grant an order restraining the police from perusing the documents for information or making use of that information since it would be impossible to enforce.

The judiciary in England also seem to justify the seizure and retention of goods on the most tenuous grounds. In *Malone v. Commissioner of Police (No. 1)*,[121] £11,000 was seized by the police in the course of a search. When the plaintiff applied to get it back to pay for his lawyers in a subsequent trial the Court of Appeal held it to be a necessary part of evidence against him on a charge of conspiracy to handle stolen goods. Stephenson L.J. held that merely proving the discovery of £11,000 was not enough and that it would be necessary to prove the notes themselves, given "how unpredictable is the course of a criminal trial".[122] He further seemed to believe that if the accused could later invent a story that the police had planted the money on him then the production of the money itself could somehow rebut this.

My purpose is not to unduly criticise those learned gentlemen but to show how, through judicial rule-making, the law on this has become impossibly confused. It would not seem possible to say with certainty whether or not the police were acting within their powers, except upon argument on loosely constructed criteria and the focussing of minds of Appeal Court Judges. This is surely not satisfactory.

In conclusion, I should say that I have not covered every aspect of police powers. In so far as I have gone I have had some difficulty in stating what the law is. This should not be the case. It is a matter of some urgency that reform take place. This should state the law in a clear fashion in such a manner as to be easily understood by citizens and police alike and difficult for the judiciary to alter. □

69. See Lord Porter in *Lewis v. Times* [1952] A.C. 676 at 691.
70. [1965] 1 Q.B. 348 at 367.
71. See Leigh, *Police Powers* op. cit., footnote 7, p. 55.
72. (1978) 66 Crim. App. R. 81.
73. at p.85, citing Lord Denning M.R. in *Ghani v. Jones* [1970] 1 Q.B. 693.
74. See generally on search warrants and powers of search, Sandes, *Criminal Law and Procedure in Eire*, 3rd ed. (1951) pp. 49-51.
75. See Criminal Law Act, 1976, Section 7.
76. Statutory Instrument No. 114 of 1955, entitled "Regulations as to the measuring and photographing of Prisoners, 1955."
77. [1966] I.R. 501.
78. *D.P.P. v. Walsh* — 17 January, 1980 — Supreme Court — unreported.
79. *Dumbell v. Roberts* [1944] 1 All E.R. 326 at 330.
80. Magistrates Courts Act, 1952, Section 40; and Section 8 of the Childrens' Act 1969 and *R. v. Jones* [1978] 3 All E.R. 1098.
81. (1965) 99 I.L.T.R. 59.
82. *Adam v. McGarry* [1933] S.L.T. 482, and *U.S. v. Laub Baking Co.* 283 F. Supp. 217 (1968).
83. [1968] S.L.R. 334.
84. Leigh, *Police Powers*, op. cit. footnote 7, p. 198.
85. [1964] 2 All E.R. 610.
86. *Holt v. U.S.* 218 U.S. 245 (1910).
87. *U.S. v. Wade* 338 U.S. 218 (1967).
88. [1956] I.R. 22.
89. For the duty of a District Justice in that circumstance see O'Loughlin J. in *Dunne v. Clinton* [1930] I.R. 366.
90. Report of the Committee to Recommend Certain Safeguards for Persons in custody and for members of An Garda Siochana (Prl 7158) (April 1978).
91. Glanville Williams, [1960] Crim.L.R. 598 at p.606.
92. See *King v. Gardner* (1980) 71 Cr.App.R. 13.
93. *Ludlow v. Shelton*, The Times, Feb. 3/4, 1938.
94. *Hamshere v. Bower* [1955] Crim.L.R.25.
95. *Willey v. Peace* [1951] 1 K.B. 94.
96. In the U.K. the power is section 666 of the Metropolitan Police Act, 1833.
97. *Hadley v. Perks* (1866) L.R. 1 Q.B. 444.
98. (1980) 70 Crim.App.R. at p. 148.
99. Op. cit., footnote 91, pp. 605/606.
100. Section 23 of the Misuse of Drugs Act, 1977.
101. Firearms Act, 1925, ss. 21-24, though without a general power except under the Criminal Law Act, 1976, section 15.
102. They are exerciseable also by the Defence Forces under command of a Garda Superintendent; see Section 5, Criminal Law Act, 1976.
103. [1968] I.R. 305 at p.309.
104. (1887) 20 L.R. Ir. 300; 16 Cox C.C. 245.
105. 269 U.S. 19 (1925).
106. Supra, footnote 6.
107. 23 L. Ed. 2d, 685 at 694.
108. [1934] 2 K.B. 164.
109. (1978) 66 Cr.App.R. 81.
110. See Agnello v. U.S., supra, footnote 105, per Butler J.
116. *Crozier v. Cundy* (1827) 2 B.&C. 232.
117. [1970] 1 Q.B. 693.
118. The Times, 4 Sept., 1971.
119. See Leigh, *Police Powers*, p. 183 et seq.
120. [1977] 2 All E.R. 431.
121. [1979] 1 All E.R. 256.
122. [1979] 1 All E.R. at p.262.

Comment . . .

ciliation' that takes place at the door of the Court, where the parties, motivated primarily by the fear of the imminent Court hearing, usually grudgingly and hastily reach a level of agreement which may not be the best that could have been achieved. No one would disagree that the terms of a settlement arrived at by professional conciliation (with the lawyers in the background to do what they are really trained to do — putting the terms of settlement into legal form) would be far more likely to be honoured in spirit and in fact than would either, 'hammered' out of warring couples immediately before, or imposed by a Court after, a mutually recriminating hearing. Let us all recognise a good idea when we see it. □

The President, Mr Brendan Allen, was received by Uachtaran na hEireann on Thursday, 10 June, 1982. The President was accompanied by Mr Michael P. Houlihan, Senior Vice-President, Mr Desmond McEvoy, Junior Vice-President, and Mr James Ivers, Director General.

Association Internationale des Jeunes Avocats. 1982 Congress.

The XX Congress of AIJA will take place in Lausanne, Switzerland from 23rd to 27th August, 1982. The 1981 Congress was held in Dublin and it is hoped that many of those who participated in the Dublin Congress will be in Lausanne.

The Working Sessions will be as follows:-

Commission 1.	Children before the criminal and civil law.
Commission 2.	The Retention of Title Clause.
Commission 3.	The Professional Secrecy of the Lawyer
Commission 4.	Subject concerning one or more international organisations in Geneva.
Seminar	Swiss Banking Secrecy.

A comprehensive guest programme has been prepared for those not attending the Working Sessions.

Further details can be obtained from:

Michael W. Carrigan, Solicitor,
61 Fitzwilliam Square, Dublin 2.

Incorporated Law Society of Ireland

IMPORTANT NOTICE

Practising Certificates will not be issued in 1982 or future years unless the Solicitors' Accountants' Certificate is in order, i.e., a clear Certificate has been lodged within 6 months of the solicitors' accounting date.

Where, on application for a Practising Certificate, an Accounting Certificate is not in order, the Solicitor will be notified in writing that the Practising Certificate cannot issue until the Accountants' Certificate is lodged and that should be done within one month. He will be informed that pending receipt of the Accountants' Certificate his remittance is being held in suspense account and that in the meantime, it is an offence to practice without a Practising Certificate.

After a lapse of one month, the solicitor will be informed that unless the Accountants' Certificate is received within a further month, disciplinary proceedings will be commenced without further notice and that, at the same time, the Bar Association and County Registrar will be notified that the solicitor is practising without a current Practising Certificate.

The situation regarding outstanding Accountants Certificates is reviewed at each Council meeting.

JAMES J. IVERS,
Director General

Architects' Certificates

Recommendation of the Joint Committee of Building Societies' Solicitors and the Law Society

In 1978 the Law Society agreed with the Legal Institute of Architects of Ireland on a form of Certificate of Compliance with Planning Permission for use in speculative Housing Developments, where the Architect does not supervise the building on a regular basis. The text of this Certificate was published in the Gazette in November 1978. The Institute of Architects circulated the form of Certificate to their members.

In November 1980, arising out of certain difficulties in practice that arose in the Dublin area, the Joint Committee recommended a variation in this Certificate by the addition of a new paragraph.

Members of the Institute of Architects declined to issue Certificates containing the proposed new paragraph until the variation had been agreed by their own Council.

Discussions took place between representatives of the Joint Committee and representatives of the Architects. A revised form of Certificate has now been agreed with the Institute and the text of this is set out below.

The new paragraph is that printed in italics. The Joint Committee is satisfied that this Certificate is a reasonable one for a Solicitor for a purchaser or a Lending Institution to accept. The Committee became aware, in the course of their discussions with the Institute of Architects, that Architects were under the impression that their Certificates also certified compliance with conditions for payment of financial contributions or entering into bonds for security for satisfactory completion or cash deposits in lieu thereof. The Joint Committee's representatives were of the opinion that Solicitors had, as a matter of practice always sought verification from the Planning Authority in respect of conditions for financial contribution or security deposit, and that it was not reasonable to expect Architects to accept responsibility for such matters. Practitioners will note that the current Certificate specifically excludes responsibility for compliance with conditions for payment of financial contributions or the giving of security for satisfactory completion.

I am an Architect retained by:

And I Certify That:

1. I visited the office of the Planning Authority and there inspected the house plans, estate layout plan, specification and other drawings and documents which were represented by the Planning Authority as those on foot of which the Permission/Approval mentioned at Paragraph 2 & 3 hereunder were granted.

2. The Notification of Grant of Permission/Approval

   Decision Order No. and Date:
   Register Reference No.:
   Planning Control No.:
   Dated:

   related to the erection of houses on inter-alia sites: (both inclusive) as detailed on the said estate layout plan.

3. The Building Bye-Laws Approval Notice:

   Register No.:
   Order No.:
   Planning Control No.:

   relates to inter-alia sites
   on the said estate layout plan. (both inclusive as detailed.

I Further Certify that I have inspected the house that has been built on site and that, in my opinion, this house has been erected in substantial compliance with the Notification of Grant of Permission mentioned at Paragraph 2 above and the Building Bye-Laws Approval Notice mentioned at Paragraph 3 above and that the position of the house and site is in substantial compliance with the estate layout plan mentioned at paragraph I above in so far as the estate has been completed.

I Also Certify that the general conditions on the Planning Permission relating to the estate of which this house forms part (excluding any conditions for payment of financial contributions or the giving of Security for satisfactory completion) have been substantially complied with in so far as is reasonably possible at this stage of the development.

I Am Of The Opinion that if the house and site have not been built and/or laid out exactly in accordance with the Planning Permission and Bye Law Approval, the differences are unlikely to affect the planning and development of the area as envisaged by the Planning Authority and expressed through the above mentioned approvals.

It Should Be Noted that I did not supervise the erection of this house in the course of its construction. Thus the inspection was a superficial one only and could take no account of work covered up. The comparison of the site layout with the estate layout plan was visual only.

SIGNED .....

Feeding the Estoppel.

Recommendation of Joint Committee of Building Societies' Solicitors and the Law Society.

Section 84(2) of the Building Societies Act provides that a receipt endorsed on a mortgage under that Act shall operate to vacate the mortgage and shall, without any reconveyance, vest the legal estate in the person entitled. The legal profession has been crying out for years to have

this simple procedure adopted for all releases and reconveyances of mortgages, but to no avail. A full Deed of Release or Reconveyance must be entered into in the case of all mortgages with any person or institution other than a Building Society. This includes Local Authorities, Insurance Companies, Banks, etc. The Joint Committee has been asked to consider the problem which arises most frequently in connection with such releases, which arises where the Deed of Release of Mortgage is dated subsequent to the Deed of Assignment of the property to the purchaser. Some Solicitors felt that a Deed of Rectification was essential in such circumstances, in order to set in an outstanding legal estate, and insisted upon this being done.

This view is clearly held by a substantial majority of conveyancing practitioners and leading conveyancing counsel that the doctrine of Feeding the Estoppel applies to such circumstances and that no Deed of Rectification is necessary. The Joint Committee considered the point and is unanimously of the opinion that no Deed of Rectification is required and that the doctrine of Feeding the Estoppel operates effectively to vest the entire legal interest in the purchaser as soon as the Deed of Release is completed (subject, of course, to whatever necessity there may be for Land Act consent). □

Guide to the Planning Acts
Kevin I. Nowlan

The following list of Corrections relate to the text of the Statutes as printed in the above book, published by the Society in 1978.

Corrigenda — Statutes

Page 14 line 4 append suffix "7" to word "regulations"

Page 38 line 4 delete (c) and substitute "(e)"

Page 56 In line 8 of section 34 (1) delete "then" and substitute "than"

Page 74 In line 3 of paragraph (b) for comma substitute semi colon.

Page 89 In line 3 of section 63 delete "18" and substitute "48".

Page 106 Delete comma at end of paragraph (5)(a) and substitute a full stop.

Page 115 In first line of s.s.(5) insert a comma after "and".

Page 147 Subsection 3 of section 12 has been omitted. Insert: "(3) A person who is for the time being a member of a local authority shall, while holding office as such member, be disqualified from becoming an employee of the Board".

Page 164 In last line delete the full stop and substitute a comma.

Page 170 In line 16 delete the full stop and substitute a comma.

REPRINT OF ACTS OF THE OIREACHTAS 1922-76

Pictured at the signing of the Contract to reprint the English version only of the Acts of the Oireachtas, 1922-76 are from left, Mr Brian Stokes, Confidential Report Printing, Mr Michael V. O'Mahony, Chairman of Publications Committee, Mr James J. Ivers, Director General and Mr Chris O'Kelly, Confidential Report Printing.

"Wills Week"

by

Frank O'Donnell, Solicitor

WITH the avowed intention of increasing public awareness of the importance of having a proper Will, up to date and professionally drawn, it is proposed to hold a well publicised "Wills Week", in November of this year.

The Law Society intends preceding "Wills Week" with a series of articles and advertisements, culminating in a Press Conference intended to promote discussion and articles in the media on the necessity and desirability of making a Will. The campaign will be directed not only at older people, but also at the young and the newly weds. It will be emphasised that, in these days, very few people are exempt from considerations of whom should inherit their property. Even those who do not own a house, but who do possess a car or other personal belongings will almost certainly wish their assets to benefit certain relations or friends rather than others chosen arbitrarily by the rules of Intestate Succession.

It is generally recognised that the taking of instructions and the making of Wills is not a profitable aspect of the Solicitor's practice. A properly drawn Will can, however, be very valuable to the ordinary Testator and his family, and can avoid many headaches for Solicitors in the administration of estates. The home-made Will, whether in holograph or on a commercial printed Form, is still used surprisingly often. The difficulties arising on the administration of such Wills, may prove lucrative for Solicitors, but can be unnecessarily expensive for the beneficiaries. With the normal "do-it-yourself" job, the main loser, if things go wrong, is the well-meaning amateur himself. With a defective home-made Will it is different; the perpetrator escapes scot free, and it is his nearest and dearest who suffer.

It is surprising that in a community where there is approximately 70% house ownership and approximately 50% car ownership, there is still a very high percentage of people who die without making a Will. The most recent figures indicate that of all Grants issued by the Probate Office, there are approximately 50 — 55 per cent intestacies, which would seem to suggest that over 50 per cent of people, who should do so, never make a Will. Some of these people may have surviving spouses, others may have no estate. The failure to make a Will means that their assets may be disposed of in a manner they never intended, with some or all of their property passing to people, who, although they are "nearest" in kind, may not have been the "dearest" to the deceased.

It has now been decided that "Wills Week" will commence on Monday 15th November 1982. The Society of Young Solicitors are devoting a large part of their Autumn Seminar to certain aspects of Wills and the Administration of Estates which will have the effect of preparing the profession for the practical aspects of "Wills Week".

One of the recurring queries that will arise in relation to the making of a Will, is its cost. The cost of making a straightforward Will can vary in different parts of the country, and, indeed from practice to practice, within the same area. It is intended to emphasise the reasonable cost of making such a Will and the benefits to be derived therefrom, in ensuring that the Testator's wishes are carried out, as opposed to the possible expense and hardship which might otherwise result.

The success of "Wills Week" will depend on every member of the profession making himself available during that particular week to take instructions, to advise the public as to the planning of their affairs, and to preparing their Wills for execution. It will equally depend on the Law Society's efforts to acquaint the community of the campaign that is being undertaken, and to encourage them to consult a Solicitor. The Law Society will provide names of Solicitors practising in the area to any enquirer. Our united advice to the public should be "having intended to do so don't put it off any longer — make your Will now!"

"Wills Week" should also provide a stimulus for the profession to review the needs of their clients and their own forms of Wills. It will afford them an opportunity to up-date their own knowledge of the law in relation to Inheritance Taxes, and into the actual administration of estates. It is intended to devote the issue of the Gazette published immediately prior to "Wills Week" to different aspects of the administration of estates and the drafting of Wills, and to circulate a number of precedent Wills which will be of undoubted benefit and assistance to the profession. □

Practice Note

Delay in Default Judgements

A matter of considerable concern to the profession over the past few months has been the considerable delay in the issuance of Default Judgments from the Central Office. The Law Society has been doing its utmost to achieve an improvement in the situation. The Law Society is informed that the situation should improve materially over the next few months when it is expected additional overtime will be done. Furthermore, the extended jurisdiction of the Circuit Court is expected to alleviate the position further.

The Law Society however is informed that a large factor contributing to the delay is the number of documents that have to be returned by reason of errors in the Judgment sets.

The Law Society is informed that the following errors are recurring and if avoided would help greatly to reduce the backlog at present existing in this area viz:-

(a) Description of Deponent not given in Affidavits of Debt and service.
(b) Incorrect date of issue, Record No. or Year of Issue quoted on Affidavit of Service.
(c) Judgment form certificate and Praecipe not signed by Solicitor.
(d) Addresses and descriptions of parties to the Action not recorded on Judgment form.
(e) Defective Jurats in Affidavits viz "sworn at Street in the County of". The clause "and I know the Deponent" omitted.
(f) Incomplete forms of execution and registration.
(g) Various errors or omissions on Summary Summons; viz.
    (i) where Plaintiff is a Limited Company, address shown on Summons may read "place of residence at" in lieu of "regd. office at",
    (ii) inaccuracies in computation of addition and subtraction, miscalculation of interest amounts in Bank claims,
    (iii) insufficient or superfluous particulars in the indorsement of claim (no advertance to forms of Special Indorsement of Claim in Appendix B Part III of the Rules). For example, in goods sold and delivered claims the clause "at the request of the Defendant" omitted. □

Minutes of the Half-Yearly General Meeting

THE Half-Yearly General Meeting of the Society was held in Ashford Castle, Cong, Co. Mayo, on Friday, 7th May, 1982, at 10.00 a.m.

Having called the Meeting to order, the President called on Mr Liam McHale, President of the Mayo Bar Association, to address the Meeting. In his address, Mr McHale emphasised the pleasure it was for him and for his colleagues in the Mayo Bar Association to have the opportunity of welcoming the Members of the Profession to a Meeting in Mayo. He was particularly pleased that for the occasion, the Meeting should be presided over by a President of the Law Society, who practised in the neighbouring county, within the Province of Connaught. Concluding, he wished the Meeting every success.

The President then extended a welcome to the Presidents and Secretaries of the neighbouring Law Societies, Mr Denis Marshall, President, and Mr John Bowron, Secretary-General, the Law Society, London, Prof. Philip Love, President, and Mr Kenneth Pritchard, Secretary, The Law Society of Scotland and Mr Roderick Campbell, President, and Mr Sydney Lomas, Secretary, The Incorporated Law Society of Northern Ireland.

Notice

The adoption of the notice convening the Meeting was proposed by Mrs Quinlan, seconded by Mr F. O'Donnell, and agreed. The attendance at the Meeting was recorded in the Attendance Book. 70 Members attended.

Minutes

On the proposition of Mr Pigot, seconded by Mr Margetson, the Minutes of the Annual General Meeting, held in Blackhall Place, on 20th November, 1981, were taken as read, and signed by the President.

Appointment of Scrutineers

It was proposed by Mr Hickey and seconded by Mr Curran that the following be appointed as Scrutineers of the Ballot for Council, for the year 1982/83:-

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

Their appointments were agreed. The President expressed the Society's appreciation to the Scrutineers for their help to the Society.

President's Address

The President then addressed the Meeting. A copy of his address is filed with the Minutes.

Retirement Annuity Fund and Income Continuance Plan

Mr Curran, Chairman of the Finance Committee, presented a report on the Society's Retirement Annuity Fund and Income Continuance Plan. He reported that membership of the Fund had increased and that by the end of May, the Funds being managed would be in the region of £2m. As with other Funds, performance in the past year had not been as good as in previous years, due to the world recession, resulting in very depressed investment market conditions. During the year, the small percentage of the Fund in equities had been reduced further and nearly 50% of the Fund was now placed outside Ireland as a hedge against a possible devaluation of the £IR and also against the very high level of inflation obtaining in the country. The unit value as at 1st March, 1982, showed an annual average gain, equivalent on cost price at inception, of some 23% per annum. This gain was effectively free of Tax. In the case of the I.P.T. Income Continuance Plan, Mr Curran reported that a 7½% discount on rates which would apply to existing members of the Plan and new entrants, had been negotiated. Negotiations were proceeding with the Underwriters on increases in Medical Limits for the Plan and the result of these negotiations would be announced to members in due course. Mr Curran urged all members to take out this particular cover as soon as they could afford to pay the premium involved, since nobody had a guarantee of continuing good health.

Mr Brown, Westport, commended Mr Curran on the report on the Fund, and on the financial details which had been circulated to the Meeting. He asked that the question of providing borrow back facilities under the Fund, be considered and Mr Curran undertook to look into the matter.

As there was no further business to discuss, the President declared the Meeting closed. □

Telex Charges

In response to a number of enquiries to the Law Society, there is printed below the current scale of Telex Charges from 1st April, 1982, as published by the Department of Posts and Telegraphs.

(I) RENTALS (Per quarter)

Basic Rental for a standard installation (i.e. excluding automatic transmission facilities) within 60 kilometres of Dublin Telex Exchange	£166.00
Additional Rental for standard installation at distances greater than 60 kilometres from Dublin Telex Exchange	67p per km up to 90 km and 48p per km thereafter up to 115 km from Dublin Telex Exchange.
Maximum Rental for standard installation	£200.00
Additional Rental for electronic teleprinters	£ 32.00
Additional Rental for automatic transmission facilities	£ 67.00

(II) CONNECTION CHARGE: A connection charge of £190.00 is payable in respect of each telex line.

(III) CALL CHARGES: National and U.K.

	Calls selected automatically by subscriber: Seconds for 16.2p	Operator controlled calls: (per 3 mins minimum)
Calls within the State	180	16.2p
Calls to Northern Ireland	90	32.4p*
Calls to Britain, the Isle of Man and the Channel Islands	45	64.8p*

*Charges per minute or part of a minute in excess of 3 minutes are one-third of the rate shown.

(IV) INTERNATIONAL CALL CHARGES

Destination	Selected automatically by subscriber: Charge per minute £	Selected automatically by subscriber: Seconds per 5p	Operator controlled (per 3 mins minimum) £
BAND I			
Andorra, Belgium, Denmark, France, Germany (F.R.) Greece, Luxembourg, Italy, Monaco, Netherlands, Switzerland (including Liechtenstein), Vatican City	–	8.33	1.08
BAND II			
Algeria, Austria, Azores, Bulgaria, Cyprus, Czechoslovakia, Finland, Germany (D.R.), Hungary, Iceland, Madeira, Norway, Poland, Portugal, Roumania, Spain (including Balearic and Canary Is.) Sweden, U.S.S.R., Yugoslavia	–	6.67	1.35
Egypt, Faroe Is., Gibraltar, Israel, Lebanon, Libya, Malta, Morocco, Syria, Tunisia, Turkey	0.45	–	1.35
BAND III			
Canada and U.S.A.	–	2.02	4.47
BAND IV			
All other countries	2.07	–	6.21

For operator controlled calls, charges for a minute or part of a minute in excess of three minutes are one-third of the rate shown. Report charges, where applicable, shall be £0.60 per call.

(V) ACCOUNTS: Telex accounts are issued quarterly covering a quarter's rental in advance and charges for calls made during the previous quarter.

"A Matter of Matrimony"

Law Society Symposium, 29 May 1982

BY COMMON consent of those attending (solicitors and social workers, in the main) the Law Society's Symposium entitled "A Matter of Matrimony" held at Blackhall Place on 29 May 1982 was regarded as an outstanding success. The speakers were:

Alan Shatter, Solicitor
Dr Peter Fahy, Psychiatrist
District Justice Sean Delap
Mrs Kay Begg, Conciliator from the Bristol Courts Family Conciliation Service.

Each of the speakers (who spoke in the above order) succeeded in interacting with and complementing each other perfectly, building up to the presentation by our cross-Channel speaker, Mrs Begg. Mrs Begg is a Conciliator with the Bristol Courts Family Conciliation Service, a widely acclaimed pioneering experiment set up some four years ago by a group of lawyers, social workers and others, who were particularly concerned about the increase in the divorce rate and the corresponding increase in the number of children involved in proceedings. Mrs Begg, in her address, pointed out that it was established as an experimental scheme and as the first attempt in the United Kingdom to provide a conciliation scheme on the lines of those attached to Family Courts in Australia and parts of Canada and the U.S.A. Essentially, as Mrs Begg described it, the Service provided an opportunity in a neutral, informal and non-judgmental setting for separating couples to explore the possibilities of reaching agreements over matters which would otherwise, in all probability, be contested in Court. She explained that the aim of the Service was to resolve actual or incipient disputes, especially where children are involved, to promote parental co-operation and to help the couple concerned to disengage from a broken marriage with less bitterness and hostility. Mrs Begg emphasised that conciliation should not be confused with reconciliation, i.e. re-uniting an estranged couple. She said, however, that the Bristol Service did not exclude the possibility of a reconciliation taking place and, if the likelihood of such developed during discussions, the couple were encouraged to seek further counselling help elsewhere.

Mrs Begg explained that most of the work of the Service was with couples whose marriages had broken down irretrievably, and at the outset of the Scheme, most referrals were by the solicitors acting for the parties, although at this time, because of the considerable publicity it has attracted, a large number of people approached the Service direct and without the intervention of a solicitor. Mrs Begg said that generally the procedure would be for a 'Conciliator' (as she was), who would be a qualified Social Worker with training in Marriage Guidance Counselling, to meet with, first, one party and then the other and then meet them together, preferably involving no more than perhaps three one-hour sessions. She described how, with the trained help of the Conciliator, a couple was helped to work out acceptable arrangements with the minimum anger, disagreement and distress, on such matters as custody of and access to the children, occupation of the family home and, in conjunction with the solicitor for each party, provisions for maintenance and the division of property. Mrs Begg stressed that confidentiality was considered to be very important, as people might otherwise be inhibited by fears of prejudicial information being disclosed to a Court. She pointed out that the Bristol Service was not linked to any Court and that the Courts had no power to order conciliation and that the Service did not investigate and report to a Court or to any other agency. She said that the Service would not involve itself in conciliation unless both parties agreed.

Mrs Begg described the success rate of the Service over its first four years as being extremely encouraging, in that in some 81% of cases where conciliation had taken place, agreement on the issues in dispute had been achieved. She said that the normal procedure at the conclusion of a successful conciliation was for the Conciliator concerned to write a carefully balanced non-controversial letter, summarising the terms of agreement, to the solicitors for both parties; the solicitors would then formalise that agreement, either in the form of an inter-parties written agreement or, more usually, in the form of a Consent Order in the context of divorce proceedings.

Mrs Begg explained that the Bristol Service had become a registered charity, funded for an experimental three-year period (1979 to 1982) principally by the Nuffield Foundation, aided by some payments from the Legal Aid Fund. She said that there was no charge to the parties participating in the Service, although clients could make voluntary contributions. She pointed out that at present there was an inter-departmental committee preparing a Report for presenting to the U.K. Parliament in October 1982, when a decision was to be made as to how this experimental Service was to continue and how it was to be funded on a permanent basis. □

Society's award to young journalists

The Law Society's Award for the best article on a legal topic submitted by a 2nd Year Student at the School of Journalism, Dublin College of Commerce has been awarded to Brenda Power, Ballynooney, Mullinavat, Co. Kilkenny, whose article on "Rape Cases — A Trial Within a Trial" will appear in the next issue of the "Gazette".

Articles were considered from 16 students and covered a wide range of subjects from the facetious to an examination of the power of the President to refer a Bill to the Supreme Court, the Law on squatters, rape trials and proposals to extend the powers of the Gardai.

The Award was introduced, on the recommendation of the Public Relations Committee, to stimulate the interest of young people graduating into professional journalism in the Law Society and to extend their knowledge of legal business.

The adjudicators were David Rice, Director of the Journalism Course; Michael V. O'Mahony, Solicitor, and Maxwell Sweeney, public relations consultant.

After considering the entries it was decided to award two special prizes of £25 each for Very Highly Commended submissions from Ann O'Loughlin, Ballymaley, Galway Road, Ennis, and Bernard Purcell, 59 Abbey park, Baldoyle, Dublin 3 for articles on the Children's Court and Legal Aid respectively. □

Law and Order . . .

Some crime proposals are substantive and some are procedural. Among substantive proposals, we all can agree to larger and better-trained police and prosecutorial forces. We can support better correctional facilities to educate prisoners and equip them to pursue useful careers. These proposals can reduce repetitive crime far beyond our present system of warehousing prisoners in what may be described as training schools in crime. We perhaps can agree that in appropriate cases forms of sentencing that are alternatives to incarceration may lead to better use of overcrowded prison facilities and more effective rehabilitation. But these substantive proposals often lack popular appeal, they are not the quick fix the public is seeking, and they cost money.

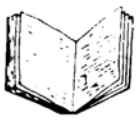
By contrast, procedural changes sometimes appear to afford instant solutions and they cost little money. It is therefore popular to suggest that we can curb crime by detaining without bail those accused of violent crimes or by restricting the right of accused persons to exclude illegally obtained evidence. The instances of new crimes committed by those free on bail are dramatic and widely reported. Those cases in which it is reported that guilty persons are freed because the evidence against them could not be used due to technicalities capture public attention. But there is little reliable data to prove that we can predict accurately the dangerousness of accused persons. Studies show that overall there are few cases of crime in which prosecutions are thwarted because of the plea that evidence was wrongfully obtained.

But if any guilty persons are going free, why do we not lock them instantly behind prison doors? Under our Constitution every defendant is presumed innocent until proved guilty and must have opportunity for an adequate defence. The constitutional rights we all enjoy protect us, the innocent, from unwarranted police action, invasions of privacy, false accusations, and unjustified detention. It is our Constitution, enforced by courts and lawyers, that prevents this country from becoming a police state. It is easy to say: "It can't happen here". But that is what the citizens of many countries — most recently Poland — said just before they lost their rights.

It costs nothing to lay the blame for crime at the door of laws, courts, and lawyers. It costs a great deal to provide more judges, police, and prosecutors, and better prisoner training and correctional facilities.

The above is an extract from the President's Page of the American Bar Association Journal for 1982.

BOOK REVIEW



Lawyers Law Books —

D. Raistrick — Second (Cumulative) Supplement 1982 — Professional Books Ltd. £7.50 (Sterling)

The appearance of a second cumulative supplement to Lawyers Law Books first published in 1977 shows commendable dedication. The work itself, together with its supplements, is a most useful index of law books and other major publications, primarily of United Kingdom legal literature, but also including many references to allied subjects and to related legal systems. It is not, perhaps, a book which all practices might regard as essential, but it is certainly one which practitioners should bear in mind when faced with the need to brief themselves rapidly on some legal topic previously outside their ken.

It is all too easy to pick holes in any publication of this sort, but the writer was somewhat nettled to find no reference to O'Reilly & Redmond: Cases & Materials of the Irish Constitution in the section headed Republic of Ireland, which did contain J. M. Kelly: The Irish Constitution and O'Casey J. P. (Sic) "Office of the Attorney General in Ireland" and "Local Government in the Republic of Ireland. 1978 (Sic)". The feeling turned to amusement when it was realised that neither Wylie: Irish Conveyancing Law nor Wylie: Irish Land Law, Second Edition published by Professional Books itself were included in the supplement.

John F. Buckley

Capital Acquisitions Tax

By Norman Bale and John Condon. Published by the Institute of Taxation in Ireland. PP 244, 1982.

It is a pleasure to welcome this excellent Book on Capital Acquisitions Tax, the first of its kind.

The work is directed mainly towards students but also will be extremely useful to the Practitioner. The structure of the text is a commentary on a Section-by-Section (and sub-section-by-sub-section) basis and, where the matter is sufficiently complex to warrant it, an enlarged commentary by way of overview. Where appropriate, references are given to relevant cases and the cross-referencing throughout the text to other relevant Sections is extremely valuable when one is seeking to research some point.

It is the inevitable fate of writers on tax matters to find that their work is obsolescent by the time it leaves the Printing Press and in this respect the Authors appear to have been no more fortunate than their predecessors. As their book went to press it was announced that substantial alterations in C.A.T. would be made in their forthcoming Finance Bill. The Finance Bill has now been introduced, and provides for a radical curtailment of the existing exempt thresholds.

It seems to the writer that, where the Parliamentary draftsman does not have the awful precedent before him of an English Finance Act, he makes a much better fist of coherent draftsmanship.

The Capital Acquisitions Tax Act is considered by many to be one of the best drafted fiscal statutes to have been enacted in this jurisdiction. Certainly the general view of practitioners in this area is that it is extremely tightly drawn. The Revenue no doubt would respond to this comment by stating that they do not consider discretionary trusts appropriately taxed. In fact there are many disadvantages to leaving property indefinitely in a discretionary trust, amongst which are that, with inflation and no increase in thresholds since 1975, (in fact with the threatened substantial reduction in such thresholds by limiting any donee to £150,000 for gifts or inheritance from whatever source) the eventual cost of extracting property from a discretionary trust may be greatly magnified. The Capital Gains Tax implications of holding property in a discretionary trust must also be considered and if there is income accumulating in the discretionary trust, there may be an income tax problem and/or a problem of income being treated as capital when paid out to the Beneficiaries. A better view of discretionary trusts is to regard them as useful vehicles for a holding operation, particularly in the case of a young family, until trustees can decide how best to appropriate the property. The question of the taxation of such trusts has now been referred to the Commission on taxation and it will be interesting to see their proposals.

The text opens with a short dictionary of legal terms, which brings home to one the problems faced by Accountants and others not well versed in the Law of Property and Trusts in seeking to grapple with a tax of this nature. Thereafter, having gone through the Act Chapter by Chapter and Section by Section, there are a series of Appendices setting out the forms and a list of securities available for payment of Inheritance Tax by way of transfer of securities (Gift Tax cannot so be paid) and the rates of Capital Acquisition Tax.

One of the great attractions throughout the text is the Authors' constant use of working examples, by way of explanation and elucidation of the legal phraseology in the Statute.

The Authors are to be commended on their industry and erudition and it is hoped that they will not be too discouraged by changes in the law to produce a revised edition speedily.

M. R. Curran

Correspondence

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

12-5-'82

Dear Sir,

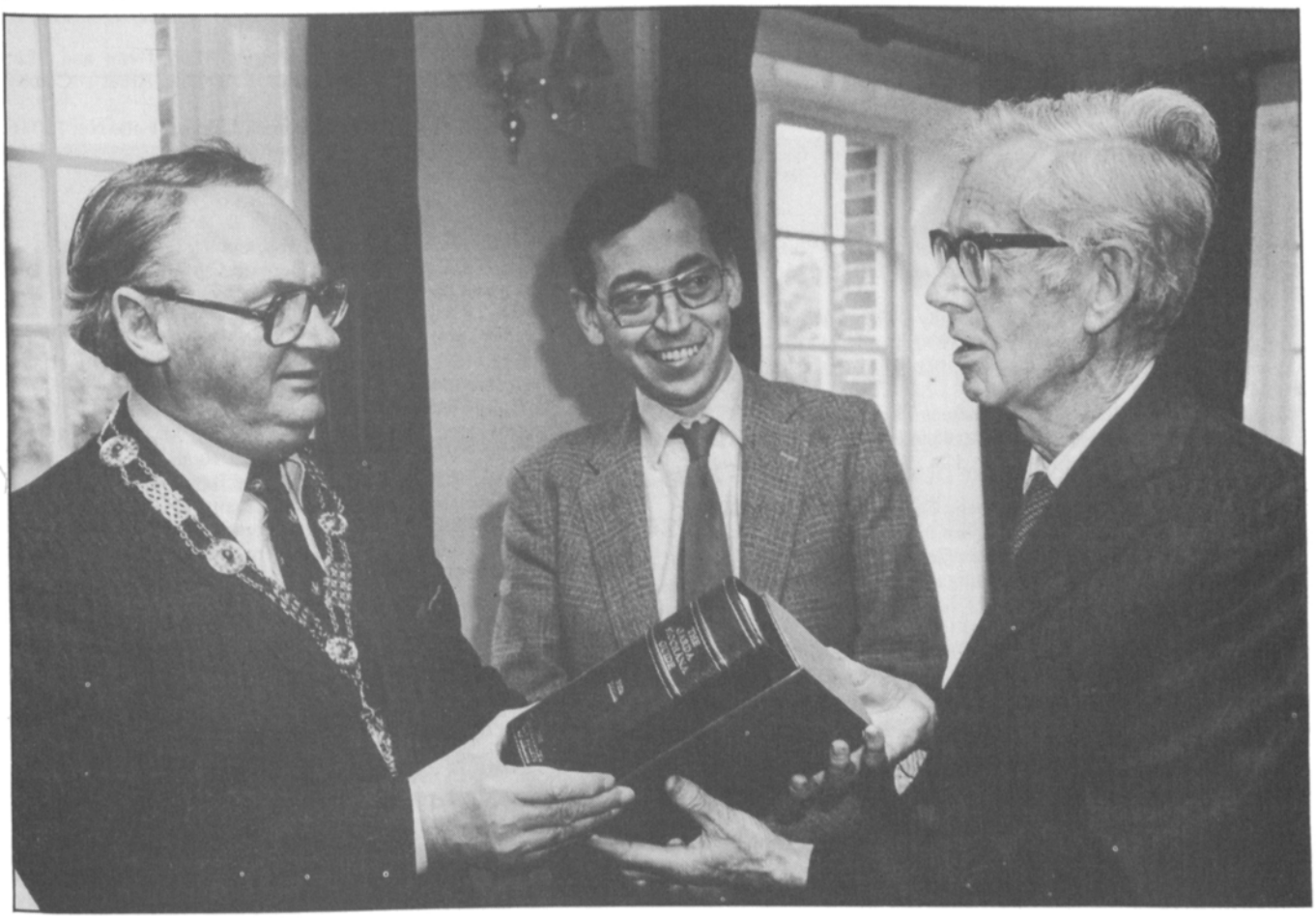
The current debate on Garda demands for increased rights of arrest, restriction of bail and curtailment of an accused's right to silence should highlight what I believe to be a significant deficiency in our Criminal Law. I refer to the lack, (in the United Kingdom as well as in this country) of any legal process for the investigation of crime as distinct from the prosecution of offenders.

In a recent B.B.C. radio programme, a police representative justified the powers of arrest and detention under the Prevention of Terrorism Act in the U.K. (in spite of the low percentage of those arrested who were later prosecuted) on the grounds that invaluable information was obtained from persons interrogated and against whom no cause for further proceedings was found. In other words, persons were being arrested, not on suspicion of having committed crimes but on suspicion of having knowledge of crime, and assuming that such persons would of choice be unco-operative with police inquiries, this was the only method of interrogation available to the authorities.

On the other hand, in the United States through the Grand Jury, and in continental countries through the Examining Magistrate, a process is available for the judicial investigation of crime before any person is charged. I am not advocating either system, but am urging that the current debate should be widened to include possible systems of investigation which will avoid the traps of self-incrimination or of putting the onus of proving innocence on an accused person.

On the question of bail, would it not be reasonable to require an accused person to furnish security for his good behaviour while on bail? It would certainly be less objectionable than refusing bail, as at present proposed.

F. B. Geary,
5 Verona Villas,
O'Connell Avenue,
Limerick.



Presentation of Leather Bound copy of THE GARDA SIOCHANA GUIDE, 5th edition to Mr Desmond Moran, Solicitor.

Mr W. Brendan Allen, President of the Law Society (on left) presents a leather bound copy of the Garda Siochana Guide to Mr Desmond Moran, Solicitor and member of the Publications Committee, on whose initiation the 5th revised edition of the Guide was prepared. Also pictured is Mr Michael V. O'Mahony, Chairman of the Publications Committee.

Professional Information

Land Registry —
Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated this 25th day of June 1982.

W. T. MORAN (Registrar of Titles)

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

1. REGISTERED OWNER: John Francis Spollen; Folio No: 5304L; Lands: West side of Grange Rd.; Area: 0a. 0r. 10p. County: **DUBLIN.**

2. REGISTERED OWNER: Mary M. Smith and John Frederick Smith, 15 Sycamore Drive, Highfield Park, Galway. Folio No: 3835F; Lands: Dargan Upper (part of the townland); Area: — County: **GALWAY.**

3. REGISTERED OWNER: Frank Fahey and Ethelle Fahey, Rakerin, Gort, Co. Galway. Folio No: 8512L; Lands: Rakerin; Area: (part of townland); County: **GALWAY.**

4. REGISTERED OWNER: Michael Roarke, Patrick Cunningham, John Fetherston, William Brandon and Michael White. Folio No: 12377R; Lands: (1) Creggs, (2) Funshin; Area: (1) 0a. 1r. 16p.; (2) 3a. 0r. 38p. County: **GALWAY.**

5. REGISTERED OWNER: Timothy O'Brien, Moyne, Ballaghaderreen, Co. Roscommon. Folio No: 25990; Lands: (1) Brackloon, (2) Kilcorkey; Area: (1) 15a. 2r. 0p.; (2) 11a. 0r. 24p.; County: **ROSCOMMON.**

6. REGISTERED OWNER: Thomas Tinnelly. Folio No: 23296; Lands: (1) Ardagh, (2) Meath Hill, (3) Ardagh, (4) Ardagh; Area: (1) 16a. 2r. 0p.; (2) 10a. 0r. 5p.; (3) 8a. 2r. 12p.; (4) 0a. 0r. 19p.; County: **MEATH.**

7. REGISTERED OWNER: Delia Donoghue. Folio No: 22597; Lands: (1) Carrontarriff, (2) Garrynagran, (3) Bredagh; Area: (1) 5a. 2r. 22p.; (2) 10a. 3r. 11p.; (3) 7a. 1r. 30p.; County: **ROSCOMMON.**

8. REGISTERED OWNER: Margaret Tarpey, Keel, Achill, Co. Mayo. Folio No: 32332. Lands: (1) Keel East, (2) Keel East, (3) Inishgalloon (one undivided 76th part) (4) Cashel, (5) Keel West, (6) Slievemore, (7) Doogort East, (8) Doogort West, (9) Bellanasally, (10) Bal of Dookinelly (Calvey), (11) Nweelin, (12) Dookinelly (Thurlis), (13) Dokinelly (Calvey), (14) Maumnaman, (15) Keel East, (16) Doogort; Area: (1) 21a. 1r. 26p, (2) 9a. 1r. 30p, (3) 13a. 2r. 39p, (4) 1267a. 3r. 27p, (5) 4251a. 2r. 15p. (6) 2901a. 2r. 2p, (7) 1389a. 1r. 33p, (8) 1659a. 2r. 0p, (9) 378a. 3r. 4p, (10) 89a. 1r. 22p, (11) 996a. 3r. 34p, (12) 732a. 3r. 14p, (13) 1667a. 3r. 16p, (14) 561a. 2r. 8p, (15) 800a. 1r. 36p, (16) 117a. 3r. 18p.; County **MAYO.**

9. REGISTERED OWNER: John V. Clancy. Folio No: 26443. Lands: (1) Ahascragh West, (2) Ahascragh West. Area: (1) 0a. 0r. 16p., (2) 0.150 acres. County: **GALWAY.**

10. REGISTERED OWNER: Catherine Staunton. Folio No: 3938L. Lands: Part of the lands of Commons, Barony of Uppercross, known as 22 Bigger Road, Walkinstown. Area: — County: **DUBLIN.**

11. REGISTERED OWNER: Bernard J. Walsh; Folio No: 34942; Lands: Inishturk; Area: 0a. 2r. 39p. County: **GALWAY.**

12. REGISTERED OWNER: John Joseph Cunningham, Ardmullan, Curraghboy, Athlone, Co. Roscommon. Folio No: 23412. lands: (1) Srahauns, (2) Ardmullan, (3) Castlesampson. Area: (1) 15a. 2r. 31p. (2) 20a. 1r. 11p. (3) 1a. 2r. 18p. County: **ROSCOMMON.**

13. REGISTERED OWNER: Michael Thomas McNamara, Main Street, Boyle, Co. Roscommon. Folio No: 28687. Lands: Demesne. Area: 0a. 1r. 5p. County: **ROSCOMMON.**

14. REGISTERED OWNER: Patrick Brennan. Folio No: 13227R. Lands: (1) Derryherk, (2) Derryherk, which does not include any portion of the bed and soil of Lough Melvin. (3) Lareen. Area: (1) 6a. 3r. 29p. (2) 10a. 0r. 0p. (3) 1a. 0r. 14p. County: **LEITRIM.**

15. REGISTERED OWNER: Patrick O'Keeffe. Folio No: 16017. Lands: Ahane Upper. Area: 38a. 1r. 1p. County: **CORK.**

16. REGISTERED OWNER: Robert Hegan. Folio No: 280R. Lands: Tatty Brack. Area: 22a. 1r. 28p. County: **MONAGHAN.**

17. REGISGERED OWNER: Catherine Roddy. Folio No: 254LSD. Lands: 10 St. Vincent St., North. Area: — County: **CITY OF DUBLIN.**

18. REGISTERED OWNER: James Quinn. Folio No: 12935. lands: (1) Tullyroe, (2) Killeroran. Area: (1) 3a. 3r. 39p., (2) 3a. 0r. 26p. County: **GALWAY.**

19. REGISTERED OWNER: Francis Loftus Augustine. Folio No: 3221F. Lands: Tankardstown. Area: 285.537 acres. County: **MEATH.**

20. REGISTERED OWNER: John Gorman (Jnr). Folio No: 14388. Lands: (1) Clogher, (2) Tullynahinera. Area: (1) 15a. 3r. 9p., (2) 7a. 2r. 22p. County: **MONAGHAN.**

21. REGISTERED OWNER: Patrick Mary Denn and Mary Christina Denn. Folio No: 10364. Lands: Ballinkina. Area: — County: **WATERFORD.**

22. REGISTERED OWNER: Patrick J. Boner. Folio No: 7104F. Lands: Part of the townland of Clogherdillure situate in the Barony of Boylagh shown as plan 54 edged red on the Registry Map of the townland. (o.s. 48/4). Area: — County: **DONEGAL.**

23. REGISTERED OWNER: Mary Mackey. Folio No: 11961. Lands: Ballynastockan. Area: 0a. 1r. 28p. County: **WICKLOW.**

24. REGISTERED OWNER: Bernard Curran. Folio No: 3206. Lands: Aghamore Lower. Area: 25a. 2r. 9p. County: **LONGFORD.**

25. REGISTERED OWNER: Michael Hegarty. Folio No: 32231. Lands: Derreeny. Area: 23a. 0r. 26p. County: **CORK.**

26. REGISTERED OWNER: Judy O'Leary. Folio No: 10346. Lands: Ballydribeen. Area: 1a. 1r. 1p. County: **KERRY.**

27. REGISTERED OWNER: Pauline Hughes. Folio No: 2963F. Lands: Corrantaghart. Area: 0.238 acres. County: **MONAGHAN.**

28. REGISTERED OWNER: Michael Ryan and Helen Ryan. Folio No: 17682L. Lands: Townland of Old Bawn, Barony of Uppercross, town of Tallaght. Area: 0a. 0r. 6p. County: **DUBLIN.**

29. REGISTERED OWNER: Thomas L'Estrange (deceased). Folio No: 3047L. Lands: 81 Orwell Gardens, Rathgar. Area: — County: **CITY OF DUBLIN.**

Lost Wills

Denis Kelleher, deceased, late of Clooniff, Moycullen, County Galway and formerly of Cormacks Hotel, Killenaule, County Tipperary, and Prior Park House, Clonmel, Co. Tipperary. Would any person having knowledge of the Will of the above named deceased, who died on the 6th January, 1981 at Galway please communicate with Messrs. Geraghty & Co., Solicitors, 1 Rosemary Avenue, Eyre Square, Galway.

Helen Frances Kevany, deceased, late of 1 Milltown Grove, Dundrum Road, Dublin 14 formerly of Trudder Grange, Newtownmountkennedy, Co. Wicklow. Would any person having knowledge of a Will of the above named deceased who died on 17th February 1982 please communicate with McCann FitzGerald Roche & Dudley, Solicitors, 28/32 Upper Pembroke Street, Dublin 2. Ref: PHQ (Tel: 765881).

James Lavers, deceased, late of Kilbarry Road, Dunmanway in the County of Cork. Would any person having knowledge of a Will of the above named deceased, who died on the 6th day of June 1982 at Kilbarry, Dunmanway in the County of Cork, please communicate with Messrs Coakley, Moloney & Flynn, Solicitors, 44 & 49 South Mall,

Cork. (Ref: EG.) Telephone (021) 21297.
John Ryan (Bawn), late of Reafadda, Hollyford, Co. Tipperary, bachelor & farmer aged 78 years deceased. Will any person having knowledge of a Will of the above named deceased who died on the 11th May 1982 please contact James O'Brien & Co., Solicitors, 24 Castle Street, Nenagh, County Tipperary.
Thomas Smith, deceased, late of Booth Road, Clondalkin in the County of Dublin. Would any person having knowledge of a Will of the above named deceased who died on the 14th day of April, 1982 please communicate with F. J. O'Mahony & Co. Solicitors, New Road, Clondalkin, County Dublin. (Ref. M.K.)

Miscellaneous

Secretaries intensively trained in legal secretarial, administrative and clerical functions and duties and capable of working on own initiative immediately available for full time, part time or holiday relief employment. Tel: 789313/789234.
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Professional Information

John J. Coffey, Solicitor, wishes to announce that he has commenced practice under the style of John J. Coffey & Co. Solicitors, at 97 Lr Baggot St., Dublin 2. Tel: 760812.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76 No. 6 July/August 1982

If in Doubt — Notify

IN an age in which the public is increasingly — and rightly — aware of its right of redress, professional indemnity insurance is all the more imperative a protection, for both practitioner and public alike.

Practitioners may not all be aware of a significant difference which exists, under certain professional indemnity insurance policies, between the obligation to notify insurers immediately of possible claims which come to the notice of the insured during the currency of the operation of the policy and the obligation to notify such possible claims on the *annual renewal* of the policy.

The wording of at least one of the policies marketed in Ireland imposes an obligation on the insured, during the currency of the annual cover, to give immediate notice to the insurer of any circumstance of which the insured shall become aware which seems *likely to give rise* to a claim.

Policy cover under professional indemnity insurance policies is not continuous and a duty is imposed on every insured to disclose to an insurer all material facts relating to any insurance each time a professional firm applies for renewal of its professional indemnity cover.

One of the usual questions asked by insurers, when inviting renewal of the annual insurance, enquires whether any principal or partner, after enquiry, is aware of any matter involving any circumstance which has resulted in a claim or *which may give rise* to a claim against the firm or their predecessors in business or any of the present or former partners, in respect of liabilities to be covered by the proposed insurance.

It will be noted that the words "may give rise to a claim" used on the occasion of the annual renewal are less precise than the words "likely to give rise to a claim" which are relevant during the currency of some policies. The reason for the distinction is that it has been held that *every* circumstance is material which would influence the judgment of a prudent insurer in fixing a premium or determining whether he will take the risk and that insurers need to weigh up the value of claims they may have to meet before they assess the premium appropriate for the wide policy cover which is given.

For this reason, a high degree of care must be exercised on the occasion of the completion of the proposal for the renewal of a policy.

An equal degree of care must be exercised during the currency of certain policies in recognising potential difficulties in cases which are likely to give rise to a claim. There is a natural tendency to defer notifying an insurer of circumstances which may ultimately be cured and in which no claim may, in fact, arise but insurers are well used to being notified of incidents where no claim at all is eventually made and the cardinal principle at all times should be "if in any doubt, notify".

The sanctions which the insurers are entitled to impose in the event of non-notification on renewal include the exclusion of a particular claim from cover, or even the total withdrawal of cover, not merely for the claim when notified, but in respect of any claims arising during the appropriate annual period, even where these may have been notified at the time of renewal.

It should, in particular, be appreciated that failure to disclose circumstances which may give rise to a claim may wholly invalidate the contract of insurance for the next, or any succeeding, period of insurance.

The cover offered varies considerably between the several insurers active in the field of professional indemnity and care should be taken to ensure that the best and most appropriate cover is obtained.

Consideration of such matters raises the further important but probably insufficiently appreciated question of the liability of practitioners whose name appears on a firm's letterhead but who are not, in fact, full proprietorial partners. Understandably, getting one's name "on the notepaper" has long been regarded by the younger solicitor as being a significant and most desirable step up the professional ladder; it is seen as an expression of confidence that the firm or principal is prepared to hold out the individual's presence as an inducement to existing or prospective clients. But such a compliment has, inevitably, its drawbacks. All too few solicitors, anxious to see their names in print on their firm's notepaper, consider the practicalities involved. Apart from the obvious necessity of procuring from the principals of the firm a proper indemnity in respect of the firm's liabilities, the non-proprietorial "partner" should consider carefully what may be the consequences of such publicity upon any professional indemnity insurance he may require in his own right later in his career.

A non-proprietorial partner, engaged in a firm at a time when a claim arises against that firm in respect of alleged professional negligence, but who subsequently sets up in

continued on p. 127

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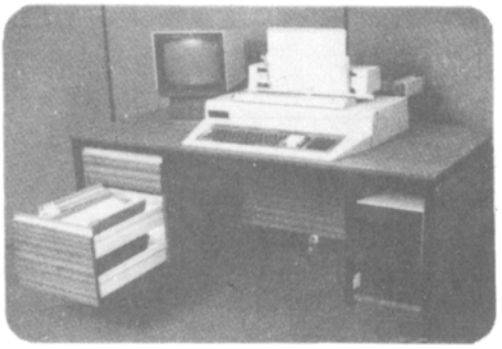

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76 No. 6 July/August 1982

In this issue...

Published at Blackhall Place, Dublin 7.

Comment... Gallagher Bonds

A NEW difficulty for house owners and builders or buyers of new houses on building estates owned by or developed under Licence from Gallagher Group Companies has now emerged, in that there may be no funds available to secure the satisfactory completion and maintenance of the roads, footpaths and services on such estates. It has been the practice in certain areas and in Dublin City and County in particular, for Planning Authorities to insert conditions in planning permissions requiring the developer to lodge with the Planning Authority "a cash deposit, a bond of an insurance company, or other security to secure the satisfactory completion and maintenance of roads and services until taken in charge by the Local Authority". The practice has been for bonds to be provided by insurance companies or, more frequently, by the Construction Industry Federation. This system appears to have worked reasonably well, apart from complaints that inflation has eroded the value of the security.

In the case of certain Gallagher Group estates, it appears that Dublin County Council, in particular, has accepted as security the deposit of monies with Merchant Banking Limited, a company within the Gallagher Group, now in liquidation. It is understood that Merchant Banking Limited is seriously insolvent and that the value of any deposit receipts issued by that Bank is extremely dubious.

Many innocent house owners and builders, operating under licence from Gallagher Group Companies, now find their houses difficult to sell.

It has been suggested that the Local Authority was negligent in permitting the deposit to be made by a Gallagher Group Company with a Bank which was also a member of the Group of Companies; it has even been supposed that persons who relied on letters issued by the Planning Authority confirming the existence of such a deposit as compliance with the appropriate condition in a Planning Permission may have an action for negligence against the Local Authority in respect of any loss which they may suffer, under the "*Hedley Byrne v Heller and Partners*" doctrine, recently extended to Local Authorities by the High Court of Australia in the "*Shaddock and City of Parramatta*" Case (High Court of Australia 28 October 1981, unreported). It is to be hoped that it will not be necessary for this to be tested in the Irish Courts.

There must be a very strong argument for requiring Local Authorities to meet the necessary costs of completing the roads and services on such estates, on the ground that they represented to all enquiring parties that the appropriate condition in the Planning Permission had been complied with. In some cases, this may put a very

(continued on p. 133)

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District Court and the Press

by

District Justice Bernard Carroll

(The following is the text of an address to a Symposium of Provincial Newspaper Editors (held under the auspices of the Law Society on Friday, 12 March, 1982).

CASES dealt with in the District Court may be divided into two categories (1) Civil cases and (ii) Offence cases.

Civil Cases are generally originated by means of a Civil Process commonly referred to as a Civil Bill. In the Civil Bill the Plaintiff either by himself or through his solicitor briefly sets out the nature of his claim against the Defendant i.e. amount due for goods sold and delivered, amount due for services rendered etc. A copy of the Civil Bill is served on the Defendant generally by registered post at least 21 days before the hearing but in some areas where there is still a summons server he can effect service. The Original Civil Bill is filed with the District Court Clerk together with a Declaration of Service and it is this Civil Bill which is the document before the Court when the case comes on for hearing. If the defendant intends to contest the claim he must send a note of his intention to do so both to the Plaintiff and the Court Clerk prior to the date of hearing. This notice does not have to set out the grounds of his Defence.

In offence cases be they Criminal Offences i.e. Larceny, Malicious Damage, Entering premises etc. or those known as summary offences which are either of a non criminal or quasi criminal nature i.e. driving with excess alcohol, dangerous driving etc. such prosecutions may be originated (a) by way of summons or (b) by way of a Charge Sheet. If the proceedings are commenced by way of a summons details of the offence are set out in the summons and a copy of the summons is served on the Defendant at least seven days before the date of the Court hearing to which the Defendant is summonsed to appear. The original summons with the appropriate declaration of service endorsed on it, is lodged with the District Court Clerk and this document is before the Court in the Court hearing.

If proceedings are commenced by way of Charge Sheet the Offence(s) is/are set out in detail in the Charge Sheet then read over to the Defendant by the Officer making the charge and the Defendant is at the same time given a copy of the charge(s) as contained in the Charge Sheet. The Original Charge Sheet is lodged with the District Court Clerk and is before the Court in the hearing of the charge. This Original Charge Sheet is the only record of the charges which are heard in Court and remains the only record in the custody of the District Court Clerk after the hearing of the case in Court.

In the case of Civil Bills and summonses which are lodged with the District Court Clerk for Court hearings, particulars of the contents thereof are entered (i) in the case of Civil Bills in a book kept by the Court Clerk and which is known as the Civil Process Book and (ii) in the case of summonses in a similar type book known as the Justice Minute Book. When the Justice pronounces his decision a note of that decision is entered in the appropriate column of the Civil Process Book or Minute Book as the case may be and if a formal Order is required it is later drawn up by the District Court Clerk from this record and signed by the Justice. A person having a bona fide interest in a matter which came before the District Court can, on payment of the prescribed fee obtain from the District Court Clerk a certified copy of the conviction and order of the Court. Where offence cases are brought before the Court by way of Charge Sheet the Justice makes a note of his decision on the space provided on the Charge Sheet and the formal order when required can be drawn up by reference to the Justice's note on the Charge Sheet. A Charge Sheet is generally used where the defendant is arrested and taken to a Garda Station whereas a summons is generally issued in cases where no arrest has been made i.e. Road Traffic cases.

The records of the District Court for the purposes of this paper and to all intents and purposes comprise the original summons, the Charge Sheets, the Civil Processes and the Minute Books. These records remain in the custody of the District Court Clerk who is an officer of the Court and would be subject to the direction of the Court in relation to such records.

There is no provision in law whereby such records should be made available as of right for inspection by either representatives of the Press or members of the public. My own experience however is that members of the press are always facilitated in the matter of access to Court-Records in the course of and following court hearings for the purpose of checking the details and accuracy of decisions and orders made by the Court prior to submitting their reports to their news editors. It is naturally in the public interest, that this should be so in the interest of accurate reporting of such proceedings.

The other topic which naturally concerns the members of the Press is their right of access and their right to be present in Court during the hearing of Court-Proceedings.

Article 34 of the Constitution provides that, save in such special and limited cases as may be prescribed by law, justice shall be administered in public. Again, the District Court rules provides that in all cases of summary jurisdiction the place in which the Justice shall sit and hear and determine any complaint shall be deemed an open

court to which the public generally may have access in so far as, the premises can conveniently contain them. Under the existing Law the Court *may* exclude members of the public (a) in Criminal proceedings for an offence which in the opinion of the Court is of an indecent or obscure nature (S. 20 Criminal Justice Act 1951) and (b) where a preliminary hearing for an indictable offence is being conducted to consider if sufficient evidence exists to put the accused on trial before a Jury (S. 16 Criminal Procedure Act 1967). Both these Acts specifically provide, that bona fide members of the press cannot be excluded under the provisions thereof. The only matters heard in private in the District Court are Family Law matters and proceedings under the Illegitimate Children (Affiliation Orders) Act 1930.

In so far as the Press is concerned bona fide members have always the right of access to Court sittings. Even though the public might be excluded in the exceptional circumstances which I have outlined, the representatives of the Press are never excluded nor are the Courts empowered to exclude them. The representatives of the Press are entitled, to be present at all sittings of the District Court *other than* Family Law and Affiliation matters.

Sittings of the District Court are regulated by Statutory Order of the Minister for Justice and the days of the month time and place of all such sittings are set out in the Statutory Order. These sittings are known as Scheduled sittings. All proceedings in the District Court must be initiated or commenced at a scheduled sitting of the Court. The Justice may adjourn any matter to a non-scheduled sitting but any such sitting would of course be governed by the same provisions as regards rights of attendance for the public and press as scheduled sittings. Since all matters which come before the Court begin at a scheduled sitting and the days, place and times of such sittings are set out in the relevant Statutory Order the rights of the Press to follow through all cases coming before the District Court from commencement to conclusion appear to be fully protected by existing law.

Juvenile Courts

The Children's Act 1908 makes special provision for the hearing of charges involving children (a person under fifteen years) and young persons (between fifteen and seventeen years) at what are known as Juvenile Courts. These Courts are held separately from the ordinary Courts. No person other than the members and officers of the Court and the parties to the case, their solicitors and counsel and other persons directly concerned in the case shall, except by leave of the Court be allowed to attend. Again, however, Section III of the Act specifically provides that Bona Fide representatives of a newspaper or news agency shall not be excluded from such Courts.

There does not appear to be any legal restriction on the publication of the names and addresses of persons charged in a Juvenile's Court, although in practice such details are not published.

Preliminary Hearings of Indictable Offences

While the Criminal Procedure Act 1967 (s.16) specifically provides that bona fide representatives of the press cannot be excluded from preliminary hearings of indictable offences Section 17 of the Act states that 'No person shall publish or cause to publish any information as to any particular preliminary examination other than a statement of the fact that such examination in relation to a named person on a specified charge has been held and of the decision thereon.

The section goes on to provide that the restriction shall not apply to the publication of such information as the Justice permits to be published at the request of the accused.

General (All Courts)

Section 45 of the Courts (Supplemental Provisions) Act 1961 provides as follows:

Justice may be administered otherwise than in public in the following cases:

(a) applications of an urgent nature for relief by way of habeus corpus, bail, prohibition or injunction.
(b) matrimonial causes and matters.
(c) lunacy and minor matters.
(d) proceedings involving the disclosure of a secret manufacturing process.

Adoption Act

Section 20 of the Adoption Act 1952 provides that questions of law referred by the Adoption Board to the High Court may subject to rules of court be heard in camera.

Affiliation Proceedings

The Illegitimate Children's (Affiliation Orders) Act 1930 Section 3(5) as inserted by Section 28 Family Law (Maintenance of Spouses and Children) Act 1976 provides that 'Proceedings under this Act shall be conducted otherwise than in public' while Section 3(6) also inserted provides that 'It shall not be lawful to print or publish or cause to be printed or published any material relating to proceedings under this Act which would tend to identify the parties to the proceedings.'

Income Tax

Section 30 of the Finance Act 1949 provides for the hearing in camera of appeals and cases stated in Income Tax assessments.

Official Secrets Act 1963 (Section 12)

If in the course of certain proceedings as set out in the Act application is made by the prosecution, on the ground that the publication of any evidence or statement to be given or made during any part of the hearing would be prejudicial to the safety or preservation of the State, that that part of the hearing should be in camera the Court shall make an order to that effect but the verdict and sentence (if any) shall be announced in public.

Criminal Law (Rape) Act 1981

Section 7 and 8 of the above Act make provisions for preserving the anonymity of both a complainant and an accused in rape cases.

Section 7 provides that after a person is charged with a rape offence no matter likely to lead members of the public to identify a woman as the complainant in relation to that charge shall be published in a written publication available

to the public or be broadcast except as authorised by a direction given in pursuance of the section.

The section also provides that a person, against whom a complainant may be expected to give evidence at a trial, may apply to a Judge for a direction which would have the effect of lifting the restriction where it is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses and the conduct of the defence is likely to be adversely affected if the direction is not given.

The section also empowers a Judge to lift the restriction where the effect would impose substantial and unreasonable restriction on the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction — so much of the restriction as is specified in the direction shall be lifted.

Section 8 provides that after a person is charged with a rape offence no matter likely to lead members of the public to identify him as the person against whom the charge is made shall be published in a written publication available to the public or be broadcast except

(a) as authorised by a direction given by the court or
(b) after he has been convicted of the offence

The section makes provision for the giving of a direction lifting the restriction in somewhat similar circumstances as in the case of a complainant.

It is to be noted that while there is no time limit on the duration of the restriction in the case of a complainant the restriction in the case of a person charged ceases after he has been convicted of the offence.

Defamation

(a) Newspaper reports of Court Proceedings.

Section 18(1) of the Defamation Act 1961 provides as follows:

> 'A fair and accurate report published in any newspaper or broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station within the State or in Northern Ireland of proceedings publicly heard before any court established by law and exercising judicial authority within the State or in Northern Ireland shall, if published or broadcast contemporaneously with such proceedings, be privileged.'

Section 18(2) provides that nothing in subsection 1 shall authorise the publication or broadcasting of any blasphemous or obscene matter.

The report need not be a verbatim report provided it is fair and accurate. The privilege attaching to such reports once they are made contemporaneously with such proceedings is regarded as being what is known as absolute privilege and accordingly no action will lie for defamatory statements contained in such a report even though the proprietor or editor of the newspaper published the report with actual malice towards the person defamed in the report.

(b) Newspaper comment on Court Proceedings

Privilege attaches also to newspaper comment by way of letters to the Editor or otherwise on Court proceedings but the privilege in such instances is qualified privilege. The due administration of justice is undoubtedly a matter of public interest and therefore fair matter for public comment. In such cases it is of course important that what is published is comment or opinion as opposed to fact and that the comment is fair in the sense of being honest. It is important that the purpose of making the comment is the public interest rather than malice or ill will towards a particular person. The comment should not be made until after the trial is over. It would also be important to ensure that the comment would not extend to what might amount to contempt of Court. □

If in doubt — Notify

(Continued from P. 121)

practice elsewhere as a principal — either alone or in another partnership — may find serious restrictions in cover imposed on him by his insurers. Such restrictions could include, at best, delay in obtaining cover; more serious would be an exclusion of retro-active cover in respect of his period with his former firm; the imposition of especially onerous conditions or rates of premium, or even a total refusal to accept the risk. He may also find himself, long after he has commenced practice as a principal in his own right, named as a defendant in negligence proceedings against his former firm. If he is not protected by a comprehensive and effective indemnity from that firm, the potential consequences are obvious. If he is protected by an indemnity, he is still faced, at least, with the very considerable embarrassment and worry — and even innuendo — which must inevitably result from defending an action for professional negligence, even though he may have had nothing whatever to do with the case which gave rise to the claim. He may even be faced with the appalling discovery that the firm has maintained no, or insufficient, professional indemnity insurance cover and that the principal or principals cannot meet the liability.

Among the various conclusions to be drawn from a consideration of this problem, several are of such fundamental importance that they merit restatement. The first is that, at the first faint whiff of a claim on foot of a professional indemnity policy, the insurer should be notified. The second, and more general, conclusion is that no practitioner should either seek or accept a non-proprietorial "partnership" position without considering very carefully the consequences of such a step upon his future career. Thirdly, notwithstanding the most fervent verbal assurances of protection against all that might befall, no such non-proprietorial status should ever be accepted without ensuring that the firm maintains at all times an adequate level of professional indemnity insurance cover and without procuring a comprehensive and continuing indemnity from the principal or principals of the firm involved. □

Local Authorities and the Press

**Professor Richard Woulfe, Director of Education,
Incorporated Law Society of Ireland.**

ANY examination of the rights of accredited representatives of the media — in their relationship with local authorities in the Republic of Ireland — involves as a corollary an examination of the duties of local authorities towards members of the press. Local Authorities are legal persons and enjoy rights which it is the duty of the press to observe.

The press must continuously watch for and guard against infringements of the law by it in the areas of contempt of court, breach of privilege, official secrets and (less likely) blasphemy or obscenity — all seen as breaches of public rights — and in the areas of defamation and copyright — seen as breaches of private rights.

The vexed problem of the disclosure or protection of Journalists' sources bridges the gap between these general areas and the specific area of the entitlement of journalists to information stemming from or in the hands of local authorities.

What then are the rights of a journalist to:-

(a) inspect documents of local authorities, and
(b) attend and report meetings of local authorities?

In respect of the first, it would appear that the journalist is in no different position from any other member of the public and, further, that there is no general right to inspect documents of local authorities. Specific statutes and pieces of delegated legislation confer such rights in restricted spheres which will be touched on shortly but the very conferring of such rights of inspection by individual pieces of legislation supports the view that there is no general right of inspection.

In the sphere of Government, it has always been regarded as important that expenditure and revenue should be subjected to public scrutiny. Whether or not this right of public scrutiny in the local authority area goes beyond fiscal matters or is confined to such matters hinges to a large extent on the interpretation of Article 19(4) of the Local Government (Application of Enactments) Order, 1898. Clause 4 of this article reads:-

> "Every Local Government Elector in a County or County District may, at all reasonable times, without payment, inspect and take copies of and Extracts from all Books, Accounts and Documents belonging to or under the control of the Council of a County or District."

Taken in isolation, this clause would confer on those members of the public whose names appear on the Local Government Register of Electors an un-limited right to inspect and take copies of documents in the possession of a Local Authority; there are, however indications which suggest that this right is not un-limited, but is confined to those Books, Accounts and Documents relating to the Audit of the Local Authority's accounts and associated matters.

The Enabling Statute for the Application of Enactments Order, 1898 is the Local Government (Ireland) Act, 1898, Section 104. This Section enabled the Lord Lieutenant by Order in Council to apply to Ireland the English and Scottish Statutes specified in the Fourth Schedule to the 1898 Act and to make the necessary adaptations to those Statutes. Section 104(1) sets out Fifteen subjects or headings in respect of which the English and Scottish statutes might be applied.

The seventh subject in the list is entitled:-

> "Accounts, Audit and Annual Budget."

The 1898 Order takes these subjects heading by heading in the same order as they appear in the Act and Articles 19 to 21 inclusive appear under the heading:-

> "Accounts, Audit and Annual Budget."

The side-note, while admittedly not a part of the Order, reads:-

> "Making up and Audit of Accounts under the Act of County and District Councils and Inspection of Accounts."

The English Act applied by Clause 19 is the Local Government Act, 1894, of which section 58 was applied almost word for word by Article 19 and contains similar wording to Clause 4 of Article 19. There does not appear to be any reported Irish decision on the interpretation of Article 19(4) nor on the equivalent provision in the English Act of 1894.

Apart from the indications to be drawn directly from the wording of the Local Government Acts 1894 and 1898 and the Order of 1898 to the effect that the right of inspection should be treated as a restricted one, other indications exist. A whole series of statutes confer on members of the public or upon certain members of the public rights to inspect specific documents in the hands of Local Authorities. These powers, given by individual Acts, would not be necessary if a general right of inspection existed. One brings to mind the inspection of Valuation Lists, Annual Estimates and Acounts, Electoral Registers, Rate Books, Minutes of Council proceedings under the Municipal Corporations Act, 1840 (S. 92), List of Advances under the Small Dwellings Acquisition Act, Inspection of the Regis-

ter kept by the Local Authority under Section 8(3) and (4) of the Local Government (Planning and Development) Act 1963, the Appeal documents submitted to an Board Pleanala under article 39 of the Planning and Development Regulations 1977 (confined to parties to the Appeal) and the Register kept pursuant to Section 3(8) of the Sanitary Services Act, 1964. A particularly persuasive indication on the right of inspection is contained in Section 27 of the County Management Act, 1940. This list is illustrative rather than exhaustive.

It is a canon of interpretation of Statutes that they be interpreted in a manner best calculated to serve the public interest and it is not necessarily true that the public interest would be served by an indiscriminate examination of the documents of Local Authorities by members of the public; indeed, the wholesale exercise of such a right might well bring Local Government to a virtual standstill.

The Supreme Court in *Re Fitzgerald* [1925] 1 I.R. 39 held that the Register of Lands was a public document of which there was a right of inspection and this decision is in accord with the public interest in land transactions. As a corollary, only those documents in the hands of a Local Authority which would be described as public documents ought to be available for inspection and Statutes have clearly prescribed specific documents in the custody of a Local Authority as being public documents and available for inspection. Routine files in the care of a Local Authority could scarcely be regarded as such.

To sum up, the internal indication contained in the Application of Enactments Order, 1898, the Enabling Act and the English Act of 1894 applied by the Order, coupled with the existence of a series of Statutes passed both prior and subsequent to the 1898 legislation conferring rights to inspect specific documents only and all read in the light of the public interest test, constitute a persuasive argument that Article 19(4) of the 1898 Order does not confer on the public a general right to inspect documents of Local Authorities but confers such a right in fiscal matters only and that, accordingly the right of the public to inspect such documents must be ascertained by consulting specific Statutes and Statutory Orders relating to specific spheres of Local Administration.

Reporting on Meetings

Attendance of the press at meetings of Local Authorities is regulated under the:

(a) Local Government (Ireland) Act 1902, section 15:
(b) Order dated 9th February 1903 of the Local Government Board for Ireland.
(c) Standing Orders of individual Local Authorities:

Section 15 of the 1902 Act reads as follows:-

"No resolution of any council, board or commissioners to exclude from its meetings representatives of the press shall be valid unless sanctioned by the Local Government Board in pursuance of byelaws, which the Local Government Board are hereby empowered to frame, regulating the admission of the representatives of the press to such meetings."

The L. G.B. order of 9th February 1903 appears in the appendix to this paper.

The power conferred by section 61 of the Local Government Act 1955 on the Minister for the Environment to make regulations in relation to meetings has not been operated because the section has not been brought into force.

Journalists are, therefore, entitled to be present at a meeting of a Local Authority on production of written credentials from the editor unless there exists a resolution of that Local Authority, sanctioned by the Minister for the Environment, to exclude them. If attendance of the press at meetings is likely to be an issue editors might consider writing to their Local Authorities stating that their reporters will attend and asking if there exists a resolution of the Local Authority to exclude representatives of the press which resolution has been properly sanctioned by the Minister for the Environment or his predecessors. It must be doubtful if sanction for any such resolution newly sought at this time would be forthcoming from the Minister.

It is the right of a Local Authority to go into committee that is the nub of the problem. If members of a Local Authority wish to discuss matters in the absence of the press, their proper course is to refer them to a committee. If a decision of the full Council is necessary, the committee's recommendation will have to be brought back to the Council and become the subject of a resolution which will appear on the agenda. The press does not have a right to attend meetings of committees.

The not infrequent practice of a Council to resolve to go into committee, immediately to discuss the matter or specific item which they do not want the press to report and then return to an open forum situation is of questionable legality as a method of setting aside the journalists' right to be present and to report the proceedings. In fact, of course, the elected representatives and the press rub along happily in this matter of not reporting sensitive items because all perceive that the public interest is best served by not reporting the matter in the press — certainly not in detail with individual councillors named.

If a newspaper adopts a "publish and be damned" stance on a matter discussed by a full local assembly on an occasion where its members had resolved to go into committee the question of qualified privilege is underscored and could become of critical importance to the newspaper: further, the editor must know that he may shatter the existing relationship and throw both press and Local Authority into adopting strict legal positions.

Standing Orders of each Local Authority must be studied by the editor and his reporters. Standing Orders vary but those of Dublin Corporation must not be seen as restrictive of the press, a fact which can be seen from the following extracts:

14. "A copy of every Report to be submitted to the Council shall, before the submission of the Report, be transmitted at the same time to every Member of the Council, and to the editor of every Daily, Evening and Sunday newspaper published in Dublin, and also to the radio and television authorities."

46. "Unless when the Council, by Resolution, otherwise determines, visitors and representatives of the Press

may be present at Meetings of the Council in the Galleries and other parts of the Chamber from time to time allotted to their use, and they are at liberty to report and publish the proceedings of the Council."

60. "Representatives of the Press, Radio and Television may be present at meetings of Standing Committees and Committee of the Whole House provided that when confidential matters are under discussion these Committees may decide to exclude such representatives for the relevant portion of the meeting."

79. "Every Committee is authorised to furnish to the Press reports of any of its proceedings."

Standing Orders must stand up to the tests facing all subordinate legislation, notably the ultra vires rule.

The position of the press in England in relation to attendance at meetings ought to be clearer than in Ireland because they have a number of regulatory statutes; the upshot is, however, that they have statutory grey areas where we have practical grey areas.

The Local Authority (Admission of the Press to Meetings) Act 1908 — which did not apply to Ireland — allowed the press into full Council meetings and those of Education Committees. The Act arose from the decision of the High Court in *Tenby Corporation v. Mason* [1908] 1 Ch. 457 where a newspaper editor was held not entitled to attend meetings of the Local Council either as a journalist or as a ratepayer.

The 1908 Act allowed the press to be excluded if a majority of the members voted that this would be in the public interest. Dis-satisfaction with the provision lead a Tory back-bencher — one Margaret Thatcher — to introduce what become the Public Bodies (Admission to Meetings) Act 1960 which gave both the press and the public a right to attend meetings of local authorities and other specified public bodies. The Local Government Act 1972 extended these admission rights to local authority committees. Under the 1960 Act, a meeting of a committee of a public body, if the committee included all members of that body would be treated as if it were a meeting of the body itself. The 1960 Act, however, restricts the right of admission to meetings; section 1 (2) commences "A body may, by resolution, exclude the public from a meeting (whether during the whole or part of the proceedings) whenever publicity would be prejudicial to the public interest by reason of the confidential nature of the business to be transacted, or for any other special reasons stated in the resolution and arising from the nature of that business or of the proceedings ...."

In England, therefore, the right of the press to attend meetings of local authorities whether such meetings be in full or in committee can be curtailed by resolution of the local authority using its own subjective standard of the public interest within the parameters of section 1 (2) of the 1960 Act, while in the Republic the press has no right under the law as presently interpreted to attend meetings of any committee of a local authority but has a right to attend meetings of the full local authority unless (a) that local authority has the sanction of the Minister for the Environment to

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IMPORTANT NOTICE

Practising Certificates will not be issued in 1982 or future years unless the Solicitors' Accountants' Certificate is in order, i.e., a clear Certificate has been lodged within 6 months of the solicitors' accounting date.

Where, on application for a Practising Certificate, an Accounting Certificate is not in order, the Solicitor will be notified in writing that the Practising Certificate cannot issue until the Accountants' Certificate is lodged and that should be done within one month. He will be informed that pending receipt of the Accountants' Certificate his remittance is being held in suspense account and that in the meantime, it is an offence to practice without a Practising Certificate.

After a lapse of one month, the solicitor will be informed that unless the Accountants' Certificate is received within a further month, disciplinary proceedings will be commenced without further notice and that, at the same time, the Bar Association and County Registrar will be notified that the solicitor is practising without a current Practising Certificate.

The situation regarding outstanding Accountants Certificates is reviewed at each Council meeting.

JAMES J. IVERS,
Director General

exclude the press or (b) the local authority by resolution refers a designated item or designated items to a committee and adopts the procedure laid down in its own standing orders.

The propriety of procedure (b) is — in the circumstances outlined earlier in this paper — open to question and it remains to be seen if a journalist becomes sufficiently worked up about it to take the matter before the courts or if the media generally considers the matter to be sufficiently important as to press for legislation. If the legislation followed the English pattern the last state of the journalist would be no better than the first.

The last area to be examined is the right of the public to attend meetings of local authorities. We start with the proposition that the public has no general or absolute right to attend meetings of local authorities. The law as enunciated in *Tenby Corporation v. Mason* continues to apply in this jurisdiction. The Local Government (Procedure in Councils) Order 1899 indicated that estimates meetings should be open to the public but Street, in his compendious book on local government suggests that the Order (at least in this respect) is now obsolete. The 1899 Order was, in fact, revoked by the Public Bodies Order 1923. The legal position was reviewed by District Justice Delap in January 1973 in his unreported findings in *A. G. V. Eugene Keogh and Aifan Griffin*; the finding is set out in the Law Society Gazette of July/August 1973 at page 163 and arises out of the conduct of two members of the Dun Laoghaire Housing Action Group at a meeting of Dun Laoghaire Borough Council. Here again the standing orders of individual local authorities need to be studied.

Standing Order no. 49 of Limerick Corporation for example, reads simply:

> "The public, in so far as space permits, may be present at meetings of the Council in that portion of the Chamber from time to time allotted to their use."

The limitation of attendance of members of the public by habitually offering too little space for the public would be seen by the courts as a ploy — see *R. V Liverpool City Council* (The Times, December 7th, 1974) — but such a ploy has not evidenced itself in this jurisdiction. Local Government officials, while concerned about the effects — especially on the elected representatives — of attendance by members of the public who are really pressure groups and can be numerous and noisy, are conscious of the benefits to democracy which spring from scrutiny of the activities of local government by the press and the public and generally maintain a co-operative rather than an obstructive stance. □

Appendix

Local Government Board for Ireland

To the County Council *of each Administrative County in Ireland; the* District Council *of each Urban and Rural District in Ireland; the* Town Commissioners *of each Town having Commissioners under the Towns Improvement (Ireland) Act, 1854, but which is not an Urban District; and the* Guardians *of the* Poor *of each Union in Ireland; And to all others whom it may concern.*

[Order dated 9th February, 1903.]

Whereas it is provided by section 15 of the Local Government (Ireland) Act, 1902(*a*), that no resolution of any council, board, or commissioners to exclude from its meetings representatives of the press shall be valid unless sanctioned by the Local Government Board for Ireland in pursuance of bye-laws which the said Local Government Board are thereby empowered to frame regulating the admission of the representatives of the press to such meetings:

Now, therefore, We, the Local Government Board for Ireland, in exercise of the powers vested in us by the said section and of all other powers enabling us in this behalf, do hereby order and direct that the following provisions shall take effect as bye-laws for regulating the admission of the representatives of the press to meetings of councils, boards, and commissioners:

1. Subject as is hereinafter mentioned any person who desires to attend a meeting of any council, board, or commissioners as a representative of the press, and

(continued opposite)

Bench "Commandments" — US style

Twenty-one years ago Edward J. Devitt, Chief Judge of the US District Court for Minnesota, published "Ten Commandments for the New Judge" in the "American Bar Association Journal". They were aimed at 73 newly-appointed Federal Judges; recently 152 new Federal Judgeships were created and Judge Devitt considered it appropriate to revise the "Commandments", the following is a summary from the ABA Journal presentation of April 1979.

I Be Kind. If judges could possess but one attribute, it should be a kind and understanding heart.

II Be Patient. Viscount Kilmuir, a former Lord Chancellor of England, once said: "There is much to be said for the view that a kindly and patient man who is not a profound lawyer will make a far better judge . . . than an ill-tempered genius." Judge Tebbit adds: ". . . judges owe it to lawyers to let them make their points. It may well be that they can change our minds. At least they are entitled to try".

III Be dignified. Don't go around putting on airs, but possess an appreciation of the great prestige of the judicial office and of the respect accorded it and its occupant.

IV Don't take yourself too seriously. A spouse who periodically observes "Don't get so 'judgey' " is recommended, and Judge Devitt quotes Judge Harold R. Medina: "We cannot deny the fact that a judge is almost of necessity surrounded by people who keep telling him what a wonderful fellow he is. If he once begins to believe it, he is a lost soul."

V A lazy judge is a poor judge. The road to success on the bench is the same as in any other field of human endeavour. It must be characterised by hard work. Some people, and many lawyers, think that a judgeship is a sinecure — a form of retirement for the hard-working practitioner. This is not the case. The truth is that you must learn to be a judge. It takes study and time.

VI Don't fear reversal. Reversal by a superior court now and then keeps judges on their toes. It teaches them to be careful and industrious; it curbs impetuosity and nurtures judicial-mindedness. Do not keep a record of reversals. Record keeping may make one too cautious — so sensitive to committing error that it deprives one of the intellectual courage that should be the hallmark of a good trial judge".

VII There are no unimportant cases. "You must give the same conscientious attention to every matter that comes before you. We may think cases can be classed as important and unimportant, but litigants do not feel that way. Their case is very important to them, and it must be to us. We must not let ennui overcome us. The work of judges is too important and the results of their action too far reaching".

VIII Be prompt. Perfection is a laudable aspiration, but for a trial judge it is not necessarily a virtue if it causes undue delay. It is not necessary to write a law review type of exposition on each issue presented. "Brevity is a commendable brother virtue of promptness".

IX Common sense. One of the principal tools of a good judge. "You might be able to get by as a judge if you don't know much law, but you just can't make it without common sense".

X Pray for divine guidance. If you believe in a Supreme Being, you should pray to Him for guidance. Judges need that help more than anybody else. □

Local Authorities and the Press

(continued from P. 132)

who is not otherwise entitled to admission, shall be admitted to such meeting upon producing a document which is signed by the proprietor or editor of the newspaper or journal which he claims to represent, stating that he, the said person so desiring admission, is the representative of such newspaper or journal.

2. A resolution of a council, board, or commissioners to exclude from its meetings representatives of the press, if sanctioned by us, the Local Government Board for Ireland, shall, from and after the date at which such sanction shall be given, be valid and take effect in the manner and to the extent therein mentioned.

Given under our seal of office this ninth day of February, in the year of our Lord one thousand nine hundred and three.

(Signed),

George Wyndham.
H. A. Robinson

Comment — continued from p. 123

large burden on the Local Authority and the Local Authority may, in turn, reasonably ask for the Central Bank or the Government to stand behind the deposit receipts issued by Merchant Banking Limited. There is precedent in the Irish Trust Bank case for the State protecting depositors and there is a strong argument for saying that, where there is strict control on the monitoring of banks and the taking of deposits, the natural corollary is that either the banking system or the State should stand behind any licensed bank which fails. An early assurance, either from the Local Authority that it will carry out the outstanding works on these estates at no cost to the owners or builders, or from the Government that the State will honour the deposits concerned, is urgently needed. □

Law Society's award to young Journalists.

The Law Society's Award for the best article on a legal topic submitted by a 2nd Year Student at the School of Journalism, Dublin College of Commerce, has been awarded to Brenda Power (Centre), Ballynooney, Mullinvat, Co. Kilkenny, whose article on "Rape Cases — a Trial within a Trial" is published opposite.

Articles were considered from 16 students and covered a wide range of subjects from the facetious to an examination of the power of the President to refer a Bill to the Supreme Court, the Law on squatters, rape trials and proposals to extend the powers of the Gardai. The Award was introduced, on the recommendation of the Public Relations Committee, to stimulate the interest of young people graduating into professional journalism in the Law Society and to extend their knowledge of legal business.

The adjudicators were David Rice, Director of the Journalism Course; Michael V. O'Mahony, Solicitor, and Maxwell Sweeney, public relations consultant. Picture includes Mr. W. Brendan Allen, President of the Incorporated Law Society (left) and Mr David Rice, Director, School of Journalism, College of Commerce, Rathmines.

Rape Cases — A Trial Within A Trial?

by

Brenda Power

Christina is afraid of the dark. The glare of an orange street light turns the old window bars to beaten gold and, inside the third-floor flat, the gentle, greasy flicker of an old oil-lamp keeps the night away. The electric light is much too strong for sleeping by.

She pulls the curtains across, and smiles nervously, but it doesn't reach her eyes. She is wary, and it shows.

"I should feel strange talking about it, but it's easier now. I suppose I need to. Don't use my name."

The noise of cars passing in the street fills the room sometimes, making conversation difficult. But even in the silent intervals, Christina talks in a hesitant, almost breathless manner. She is 21, tall and slim, with dark blonde hair cut short. She smokes as she talks, holding the cigarettes between long, red-tipped fingers.

I wanted to be a nurse and work in a hospital in the town." She loved the lazy peace of the large rural town she was born in, and never planned to leave it. Yet on a wet Thursday evening four years ago, she caught the late train to Dublin, and has not gone home since then.

I'm still afraid to go out late — I hate the dark. Most evenings I just stay in and read. I leave the light on all night." Winter is the worst time for Christina. Darkness comes down quickly, and traps her before she gets home from work.

She smiles again, easier, and stubs out the half-smoked cigarette, resolved. She wants to talk, but where to begin? I cannot help her — is this how a priest feels, in a confessional? Helpful, yet helpless.

She begins.

"I suppose I was always a bit wild, but I swear it wasn't my fault. Don't make them think it was my fault." Any absolution will do. Even from me.

Christina's father died when she was thirteen. Her mother, with whom she never really got on, subconsciously blamed her for his death, and her impotent revenge took the guise of indifference. Christina began to drink and smoke, hanging around with a rough crowd who were known around the town. Her mother never seemed to know, or care.

"We were just young, and silly. I can't blame her, but I didn't know any better. They were my friends."

Walking home from a dance one night, Christina noticed a car pass her, then stop and turn around, nosing along beside her as she walked separated from her friends.

"After a while I heard footsteps behind me. They sounded odd, because it's a lonely road." She began to run, and the footfalls quickened, too. She turned around in a bright patch of the road, and recognised a man she knew vaguely from the town. Older than her, he was married with one child, and rich.

He caught up with her, dragged her into a nearby field, and raped and beat her.

"I didn't go home at all that night. It was summer, and I lay in the field for. . . . I don't know how long. Then I went to the Garda Station."

Not surprisingly, the dice were heavily loaded against Christina. The man was well known in the town, a member of all the right clubs and societies.

"I was well-known, too, but for all the wrong reasons!" Her treatment at the Garda Station should have been fair warning. One of the Gardai even went as far as to suggest she had led him on. Why if she had not spent the night with him, did she not report the attack straight away?

"The court case was a nightmare. I wish I had never pressed charges." Christina stops talking now, sitting rigidly and staring into space. She looks at me, almost virulently, and begins again, slower, quieter.

A trial within a trial. A travesty of justice. The accused was allowed to cross-examine the complainant. The judge decided that it would have been "unfair" if he was not allowed to bring up evidence, referring to Christina's past.

"They made it all much worse, and he twisted everything I said. He was educated, I wasn't. He was rich. Who do you think they believed?"

The man was acquitted, and Christina left the town shortly afterwards.

"I couldn't stay then. I was worse than a whore. No, I never want to go home again. I'd still see him around."

The law relating to rape, and indecent assault in the Republic of Ireland dates back to the Offences Against the Person Act, 1861. In 1981 the Criminal Law (Rape) Bill was passed to amend the act.

The main purpose of the amendment was to restrict the admissibility in proceedings for rape offences of evidence of any sexual experiences of the complainant with men other than the accused. Yet this amendment is largely ineffectual, because, by their intrinsic nature, rape trials immediately cast shadows of suspicion on the victim of the attack. Evidence about a woman's past is just a red herring which distracts the jury from evaluating the real evidence about the crime itself. If there is a jury. In Christina's case, the legal proceedings involved nothing more than a summary trial in a District Court.

The 1981 amending Act does not alter the legal position on rape within marriage. In the eyes of the law of the Republic of Ireland, it does not exist. And assault on a woman with some foreign body, a bottle for example, is not even classed as rape.

It seems wrong that the onus should be on the woman to

prove that she did not consent to intercourse, rather than on the man to prove that she did. Yet that is how it is.

Only an estimated fifty percent of all rape cases are reported, and it is not difficult to understand why. All rape cases, even those in which the accused is convicted, leave the unfortunate victim with an indelible stain on her character. And sometimes with a fear of the dark. □

Chief Registrar to High Court

Mr. Eamonn G. Mongey, Assistant Probate Officer and Probate Consultant to the Law Society's Law School, has been appointed Chief Registrar to the High Court, with effect from Monday, 28 June, 1982.

Council of Europe

EUROPEAN HUMAN RIGHTS PRIZE

The Department of Foreign Affairs has invited the Society to nominate a candidate for the Council of Europe "European Human Rights Prize" which will be awarded for the second time in 1983. The Prize was instituted by the Council of Europe in 1980. It is honorary in character. Its purpose is to reward individual or group activities which have made an exceptional contribution to the cause of human rights. Accordingly, any individual or group of persons, institution or non-governmental organisation whose activities have made an outstanding contribution to the protection or promotion of human rights in accordance with the principles of individual freedom, political liberty and the rule of law, shall be eligible for consideration. The first Prize was awarded to the International Commission of Jurists.

Any member or group of members who wish to be nominated by the Society for the Prize should apply to

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

and enclose documents attesting their merits in the field of human rights.

Closing date for receipt of applications: Friday, 3 December, 1982.

PRESENTATION OF PARCHMENTS

JUNE 1982

1. **Browne, Niall,** "San Antoine", Cross Avenue, Blackrock, Dublin.
2. **Buckley, John J.** 41 Seacrest, Bray, Co. Wicklow.
3. **Byrne, Ken J.** 16 Mount Merrion Avenue, Blackrock, Dublin.
4. **Cannon, John I.** Cashel, Gortahork, Letterkenny, Co. Donegal.
5. **Crowley, Gillian,** 83 Wellington Road, Ballsbridge, Dublin 4.
6. **Dalton, Timothy C.** 93 Templeville Drive, Templeogue, Dublin 6.
7. **Daly, Anne P. M.,** Oyster Haven Lodge, Belgooly, Cork.
8. **Davis, William J.** Ballyloughane, Renmore, Co. Galway.
9. **Donovan, St. John.** 224 Wheatfield, Clondalkin, Co. Dublin.
10. **Doyle, Mark E.** Hudson House, Terenure Road East, Dublin.
11. **Ferris, Elizabeth,** Parkmore, Castleknock, Dublin.
12. **Flood, Thomas,** 42 Bellevue Road, Glenageary, Co. Dublin.
13. **Fox, John B.** 15 Rostrevor Road, Rathgar, Dublin 6.
14. **Furlong, Alan,** Coosan Point, Athlone, Co. Westmeath.
15. **Geraghty, Kevin,** "Galmon", Taylor's Hill, Galway.
16. **Gordon, Anita,** Carrownedin House, Enniscrone, Co. Sligo.
17. **Halpin, Richard J.** 1 St Joseph's Terrace, Kilrush Road, Ennis, Co. Clare.
18. **Higgins, Peter,** Castlepollard, Westmeath.
19. **Hogan, Felicity,** 6 Monkstown Avenue, Monkstown, Dublin.
20. **Kearns, Martin J.** Rockbarton Park Hotel, Salthill, Galway.
21. **Kennedy, Patrick J.** Tudor House, Roses Avenue, Limerick.
22. **Kennedy, Thomas,** 54 Auburn Road, Killiney, Co. Dublin.
23. **Meenan, Frances M. P.** 28 Fitzwilliam Square, Dublin 2.
24. **Morris, Barbara M. F.** 20 Dartry Park, Dartry, Dublin 6.
25. **McEvoy, Mel,** 92 Arnold Park, Glenageary, Dublin.
26. **McGlinn, Noel A.** Monread, Marine Parade, Sandycove, Dublin.
27. **McGrath, Joseph,** St James' Court, Malahide, Dublin.
28. **Ni Craith, Maire,** Cnocan an Phaoraigh, Rinn O gCuanach, Waterford.
28. **O'Brien, Michael A.** Castle Street, Carrick-on-Suir, Tipperary.
29. **O'Doherty, Adrian,** Drumully, Emyvale, Monaghan.
30. **O'Neill, Mary,** 155 Merrion Road, Ballsbridge, Dublin.
31. **O'Sullivan, Michael A.** 4 South Lodge, Douglas, Cork.
32. **Ruttledge, William J.** "Glencrest", Greenhill Road, Wicklow.
33. **Ryan, James Gregory,** 32 St Brigid's Road, Clondalkin, Dublin.
34. **Ryan, Philip,** Piperhill, Hollyford Village, Tipperary.
35. **Sheridan, Noel P.,** 15 Windsor Terrace, Dublin.
36. **Smyth, Paul R.** "The Spinney", Piltown, Drogheda, Co. Meath.
37. **Sullivan, Clifford G. E.,** 24 Butterfield Park, Rathfarnham, Dublin 16.

Welcome for New Book on Local Government Law

Mr. Justice Ronan Keane's new book "The Law of Local Government in the Republic of Ireland" was launched recently at the Law Society's Headquarters. The Minister for the Environment was unfortunately unable to perform the launching ceremony being detained by a series of important divisions in the Dail. In a speech read for him by the Secretary of his Department, Mr. G. A. Meagher, he congratulated the author on a remarkable achievement and expressed the view that the work would quickly establish itself as a standard reference work and would prove a tremendous guide to all involved in Local Government. He also commented that the author was particularly well fitted for his task. He has established himself in his professional career so as to be a recognised authority in the field and indeed it could be said that he grew up within the Local Government System. His father, the late John P. Keane, had the distinction of achieving the highest post in the Local Government Service, that of Dublin City Manager and Town Clerk.

The book was the 9th book published by the Society's Publications Committee and may be obtained from the Society at £17.50 per copy plus £1.55 postage. ☐

"The Law of Local Government in the Republic of Ireland."
At the launch were (from left) the Hon. Mr Justice Ronan Keane, Author, the Hon. Mr. Justice T. A. Finlay, President of the High Court, and Mr. W. Brendan Allen, President of The Incorporated Law Society.

BOOK REVIEW

Matrimonial Proceedings in Magistrates Courts by W. A. W. Strachan. Sweet and Maxwell 1982.

The purpose of Mr Strachan's book is to provide a guide to the Domestic Proceedings and Magistrates' Courts Act 1978 the main provisions of which came into force in England and Wales in February, 1981.

One of the primary purposes of the Domestic Proceedings and Magistrates' Courts Act, 1978, was to commence the process towards uniformity between the law applicable in Magistrates' Courts and the law applicable in the County Court and High Court. It is interesting to observe that this purpose is in direct contrast to the rationale behind the Courts Act, 1981 and the Family Law (Protection of Spouses and Children) Act, 1981, which attempt to oust the Jurisdiction of the High Court in family law matters in this Jurisdiction. In the Preface to his book Mr Strachan states that since the enactment of the Divorce Reform Act, 1969, there was an irreconcilable dichotomy in the matrimonial law applied in Magistrates' Courts as distinct from the High Court and County Court. Matrimonial Law in the High Court and County Court is governed primarily by the Matrimonial Causes Act, 1973, whereas the law in Magistrates' Courts was until recently governed by the Matrimonial Proceedings (Magistrates' Courts) Act, 1960.

Pursuant to the Domestic Proceedings and Magistrates' Courts Act, 1978, the Magistrates' Court now has Jurisdiction to make Protection Orders and Exclusion Orders in favour of applicant spouses. The applicant spouse however must prove that the defending spouse has been guilty of violence and unlike the Family Law (Protection of Spouses and Children) Act, 1981, which applies to this Jurisdiction, it is not sufficient for her to establish that it is in the interests of her welfare or the welfare of her children to have the defendant spouse prohibited from living in the family home. Unlike the injunction relief available in the County Court and High Court the Exclusion Order and Protection Order can only be granted to husbands or wives.

Pursuant to the aforementioned Act Magistrates' Courts can make Orders relating to Maintenance (including lump sum payments up to £500), Affiliation Orders, Custody Orders, Access Orders, Child Care Orders and limited Orders relating to Adoption. Remedies such as Divorce, Judicial Separation, and Orders relating to matrimonial property are still reserved to the County Court and High Court.

Magistrates' Courts constituted to hear and determine domestic proceedings are now known as "Domestic Courts" and the Magistrates' Courts Act, 1980, provides that such a Court must be composed of not more than three Justices of the Peace including as far as practicable both a man and a woman. It is interesting to note that a Justice of the Peace is only competent to sit in such a Court if he is a member of a Domestic Court Panel specially appointed to deal with domestic proceedings (there are however certain specified exceptions when these requirements need not be observed).

The Lord Chancellor has directed that a Magistrate on being appointed to the Domestic Court Panel will undertake a course of instruction to be completed within a year of appointment to the Panel. Basic training is designed to enable the Magistrate to appreciate the place of the Domestic Court in the judicial system, to understand the background of the parties before the Court, to learn about the nature, extent and effect of decisions to be made, including the consequences and various procedures open to the Court.

Unlike the situation in this Jurisdiction members of the press are allowed attend and report quite extensively on domestic proceedings. Members of the public can also attend. However Magistrates' Courts still have powers to hear proceedings *in camera*.

An interesting feature of the Domestic Proceedings and Magistrates' Court Act, 1978, is that Consent Orders can not be made (unless relating to variation or enforcement of Maintenance) without evidence being given which in effect re-enforces the supervisory role of the Magistrates' Court.

It is interesting to note that once again unlike the law in this Jurisdication the Magistrates' Court before deciding whether to exercise its power shall consider whether there is any possibility of reconciliation between the parties and if it appears to the Court that there is a reasonable possibility of such a reconciliation the Court may adjourn the proceedings and request a Probation Officer or any other person to attempt to effect a reconciliation.

Pursuant to the Magistrates' Courts Act, 1980, the Magistrates' Courts must briefly record in writing the matters in dispute and the reasons which lead to their decision.

This book is obviously not going to attract very many legal practitioners in this country because it deals with the law and procedures of another Jurisdiction. The book however is reasonably well written and presented. Since there are many interesting features of the matrimonial law applicable in Magistrates' Courts I would strongly recommend it to everyone interested in reform in this area of the law in this country.

Eugene Davy

Correspondence

The Editor, 10 June, 1982
Incorporated Law Society of Ireland Gazette.

Dear Sir,

The Law Society in 1980 played a cricket match against visiting Australian lawyers. Inquiry has been made if matches could be arranged with the Law Society of Scotland and/or the Bar. As a ground would have to be "borrowed" such matches would be played on days other than Saturday, Sunday or a Bank Holiday during the summer.

The acceptance of fixtures for the future whether on a "once off" or regular basis obviously is dependant on the extent of interest on the part of members of the Law Society. The Law Society would therefore very much appreciate it if persons who are interested in playing cricket on Law Society teams would so inform either myself or the Director General, Mr James Ivers.

It need not be the case that all matches must be played in Dublin. At the same time the practicality of playing matches elsewhere is at least to some extent dependant on local interest.

It would therefore be helpful if Solicitors or Apprentices writing to state that they are interested in playing for the Law Society would indicate the Club (if any) of which they are a member and whether they would be willing to travel outside their own immediate area to play if requested so to do.

Thank you for your help in this connection.

Yours sincerely,
David R. Pigot,
42-45 St Stephen's Green,
Dublin 2.

1 July, 1982

Mr James J. Ivers,
Director General,
The Incorporated Law Society
of Ireland.

Dear Mr Ivers,

The Taoiseach, Mr Charles Haughey has asked me to refer further to your recent letter concerning the circulation of Bills by the Stationery Office and the availability of items of legislation in the Government Publications Sale Office.

The Taoiseach has been in touch with the Minister for Finance, who has responsibility for the Stationery Office, about the matter. The Minister has informed the Taoiseach that the circulation of Bills to subscribers is made by the staff of Publications Section at Beggar's Bush. The staff have standing instructions to supply subscribers from the first allocation of Bills received from the printer and to despatch Bills not later than the day following the date of receipt of these. While every effort is made to ensure that these instructions are strictly adhered to, occasionally delays in despatch may occur due to pressure of work or delay in the receipt of Bills. Where a number of Bills are delivered within days of each other, several issues may be despatched in the one wrapper.

For instance, in the case of the Housing (Private Rented Dwellings) Bill 1982, copies of the Bill as initiated were received in the Stationery Office on 29 March and of the memorandum on 30 March; copies of the Bill as passed were received on 2 April. All were posted to subscribers on 2 April. Efforts are being made to speed up the system as far as possible.

Regarding the availability of Statutory Instruments, all Instruments are placed on sale (in stencil form) in the Government Publications Sale Office immediately the official release notice is received from the Oireachtas Library. In the case of the District Court (Malicious Injuries Act 1982) (Costs and Fees) Regulations 1982, the release note dated 16 April 1982, was not received in the Stationery Office until 21 April. The copies were delivered to the Sale Office on 23 April. (The notice appeared in Iris Oifigiuil on 20 April.

The Minister for Finance is having the delay in this case investigated and steps are being taken to ensure that Statutory Instruments will be available on the date the relevant notice is published in Iris Oifigiuil.

Yours sincerely,
Sean Aylward
Private Secretary
to the Taoiseach.

29 June, 1982

The Editor,
Incorporated Law Society of Ireland Gazette.

Dear Sir,

In my recent article *"Gammel v. Wilson* — a further commentary"(Gazette April 1982) I made reference to the law proposed to be passed in England to remedy the situation.

It may be of interest to practitioners that in a further article on the subject published on 26th May in the United Kingdom "Guardian Gazette" it is stated that the Administration of Justice Bill makes substantial changes in this area. It is stated the three main effects of the bill are:

1. Where a claim is being brought under the Fatal Accidents Act 1976 the wife or husband of a deceased and where the deceased is an unmarried minor, his parents (or mother if he is illegitimate) may claim damages for bereavement of £3,500 (a sum which can be varied by the Lord Chancellor by statutory instrument in the future).

2. No damages are to be awarded for loss of expectation of life, but if a person's expectation of life is reduced by injuries the court in assessing damages shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced..

3. In a claim under the Law Reform Act 1934 damages for loss of income in respect of any period after that person's death are excluded.

It should be added however that the Act will apply only to causes of action accruing on or after the date of commencement of the Act.

Yours faithfully,
David R. Pigot, Solicitor,
42-45 St. Stephen's Green, Dublin 2.

Land Registry — Mapping

Members will have noted the gradual introduction of the new filed plan system in the Land Registry. Each Folio has attached to it a copy of a map on the largest ordnance survey scale for that area showing the property contained therein edged red. When a copy of a map or of a folio which has a filed plan is bespoken, a photocopy of the Land Registry's map is issued. These photocopies are made on a special photocopier which is designed to give minimum distortion in the course of copying. The red line on the map attached to the original Folio of course comes out on the copy as a thick black line. Most solicitors require Land Registry maps to check identification rather than boundaries or areas and find the maps furnished perfectly adequate for their purposes. The main advantage of the filed plan system is the speed with which the map issues.

It occasionally happens that property in a Folio is subject to or has an appurtenant right e.g. a right of way and of course the copying process will not show the yellow markings indicating the right of way. A special application has to be made for maps to have rights of way or such like marked. While the Land Registry will do everything in their power to provide an efficient service in cases the subject of special applications it should be appreciated that it will take longer to get a map specially marked and in future they are likely to cost more. Any application for a special map should be addressed to Mr. F. Slattery, Chief Superintendent (Mapping), Land Registry, Chancery Street, Dublin 7. In relation to Land Registry practice generally we would make the following recommendations:

1. Remember that if lodging a dealing where rights appurtenant to the property transferred are being granted, a special application must be included in the Form 17 if you wish to have these appurtenant rights noted on the folio.

2. Also remember that, if making an application for a copy map, rights of way affecting property or appurtenant rights registered in favour thereof will not be shown on the map unless specifically requested.
3. Do not apply for a special map unless you really need it. □

I.B.A. Conference, New Delhi.

Latest date for booking Law Society Tour is Wednesday, 25 August, 1982.

Details in May Gazette.

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 3rd day of August 1982.

W. T. MORAN (Registrar of Titles)

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

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1. REGISTERED OWNER: Edward Kelly; Folio No: 16867; Lands: (1) Rahillakeen, (2) Rahillakeen (1 undivided 4th part). Area: (1) 56a. 1r. 2p., (2) 1a. 1r. 34p., County: **KILKENNY.**

2. REGISTERED OWNER: Barry Flannery; Folio No: 22167F; Lands: Site 78 Carysfort Downs, Stillorgan. County: **DUBLIN.**

3. REGISTERED OWNER: Joseph Crehan, Racecourse Road, Roscommon; Folio No: 31903; Lands: Carrownabrickna (Plot of ground at Carrownabrickna with cottage thereon). Area: 10a. 2r. 10p. County: **ROSCOMMON.**

4. REGISTERED OWNER: Patrick Goss; Folio No: 12296 closed to 2556F; Lands: (1) Carrickcarnan, (2) Carrickcarnan; Area: (1) 12.544 acres, (2) 5.116 acres. County: **ROSCOMMON.**

5. REGISTERED OWNER: John Kevin Tyrie Llewellyn Nash; Folio No: 53848; Lands: (1) Derryinver, (2) Derryinver; Area: (1) 0a. 2r. 0p. (2) 0a. 0r. 26p. County: **GALWAY.**

6. REGISTERED OWNER: Frederick John Patterson; Folio No: 1157; Lands: Meenlougher (part); Area: 50a. 3r. 36p. County: **DONEGAL.**

7. REGISTERED OWNER: Peter Masterson; Folio No: 9591; Lands: lands of West side of College St., Baldoyle, City of Dublin. **CITY OF DUBLIN.**

8. REGISTERED OWNER: Charles B. Robinson. Folio No: 368L; Lands: South East of the Letterkenny-Ramelton Road. County: **DONEGAL.**

9. REGISTERED OWNER: James O'Connor & Karen Elizabeth O'Connor. Folio No: 3340F; Lands: Grange Beg; Area: 1a. 0r. 0p. County: **TIPPERARY.**

10. REGISTERED OWNER: Bernard J. Walsh; Folio No: 34942; Lands: Inishturk; Area: 0a. 2r. 39p. County: **GALWAY.**

11. REGISTERED OWNER: Colette Connolly; Folio No: 4043L; Lands: 110 Sycamore Road, Ballymun; **CITY OF DUBLIN.**

12. REGISTERED OWNER: Joseph Grady, Shroove, Monastraden, Co. Sligo. Folio No: 255; Lands: Shroove; Area: 13a. 0r. 30p. County: **SLIGO.**

13. REGISTERED OWNER: Eugene G. Scanlan and Una Scanlan; Folio No: 1808F; Lands: Lands of Hamton Demesne Barony of Balrothery East, Co. Dublin. Area: (1) 0a. 3r. 17p. (2) 1a. 2r. 23p., (3) 4a. 0r. 29p. County: **DUBLIN.**

14. REGISTERED OWNER: John Lucey; Folio No: 33839; Lands: Coolroe; Area: 1a. 0r. 0p. County: **CORK.**

15. Dealing No. R. 11828/80. Take Notice that Eileen Mary Crangle, Tenerife, Glenalua, Killiney, Co. Dublin has lodged an application to be registered on the Leasehold Register in respect of property at Killiney formerly known as "the New Take", and the property formerly known as "the Glen" all of which is now known as Tenerife, Glenalua Road., Killiney, Co. Dublin. The original sub-lease dated 15th May, 1954 from Francis J. McNamara to John McKenna and stated to be for 295 years from 1st July 1951 at the yearly rent of £17.50 is stated to be lost or destroyed. The application will be proceeded with unless notification is received in this Registry within 28 days from the date of publication of this notice that the original sub-lease is in existence and in the custody of some person other than the applicant.

Lost Wills

Bergin, Bridget, deceased, late of 195 Tyrconnell Road, Inchicore, Dublin 8. Will any person having knowledge of a Will of the above named deceased who died on 2 June, 1981, please contact McCann Fitzgerald Roche & Dudley, Solicitors, 28/32 Upr. Pembroke St., Dublin 2. Tel. 765888. Ref: BD.

O'Brien, Michael, deceased, late of Goughane Barra, Abbey St., Cork and formerly of 21 Red Abbey St. Cork. Will any person having knowledge of a Will of the above named deceased who died on the 28th June, 1982, please contact J. W. O'Donovan & Co., Solicitors, 53 South Mall, Cork. (Ref: EH/5522).

O'Connor, Daniel, deceased, late of 10 Bridge Street, Tralee, Co. Kerry. Will any person having knowledge of the original Will of the above named deceased (who died on 17th October, 1981) which he made on the 27th October, 1978 or any other Will made by him, please contact Donal Kelliher, Solicitor, Castleisland, Co. Kerry.

Miscellaneous

The following books are for sale. They may be purchased in lots only.

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B. Reports only — 1920-1932 inclusive Cloth Bound.
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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76. No. 7 September 1982

Don't Litigate — Arbitrate

THE President of the High Court, Mr. Justice Finlay, recently added his name to the list of leading members of the legal profession and judiciary in many countries who have called for an increased use of arbitration in the resolution of disputes. His remarks were made at the launching of the Irish Branch of the Institute of Arbitrators. A few weeks later, Chief Justice Burger of the United States Supreme Court, addressing the American Bar Association, criticised the neglect of the use of private binding arbitration and urged the advantages of private arbitration, particularly for large and complex commercial disputes.

Each of the distinguished jurists is faced with a serious problem of backlog in Court lists. Even by the use of drachonian methods, such backlogs are notoriously difficult to clear. The mere existence of a two- or three-year wait for a trial, of itself, lessens the chance of justice being done. Even if the economic pressures on the parties are not noteably uneven (which is rarely the case), the passage of time dims memories and renders the absence of key witnesses more likely.

There are two major areas in which arbitration may seem to be of particular relevance — in the complex commercial disputes referred to by the US Chief Justice and, at the other end of the scale, in the resolution of minor disputes, particularly of consumer claims.

The case for arbitration under Codes of Conduct established by trade associations has already been argued in these pages. Between 1974 and 1980, 19 Codes of Practice of Trade Associations were launched in Britain, of which 13 provided for arbitration in the event of the failure of the conciliation procedures normally established by such codes of practice. In the US, the activities of the American Arbitration Association include among its community dispute services the resolution of Landlord & Tenant conflicts, as well as ordinary consumer claims.

While the case for the State providing a system of Courts as a forum for the ordinary citizen to obtain redress against other citizens of the State is unarguable, it is less clear that this obligation should extend to the provision, virtually without charge to the parties, of a forum for the resolution of disputes between commercial organisations. Although the spread of arbitration clauses in commercial contracts and other agreements is a welcome development, its progress is still far too slow.

The advantages of arbitration procedures include the ability to select the arbitrator, thus taking into account the special experience and knowledge required for the determination of the particular dispute, the ability of the arbitrator to conduct proceedings in private, thus protecting commercial organisations from adverse publicity or loss of confidentiality and the ability of the arbitrator to impose particular procedures most suitable for the resolution of a given dispute.

One of the stipulations which Mr. Justice Finlay made, in welcoming the extension of the number of cases going to arbitration, was that there should be an expertise and special qualification in the arbitrators employed. To that end, the launch of the Irish Branch of the Institute of Arbitrators and the promotion by it of seminars for prospective arbitrators is to be welcomed. Members of the profession are increasingly likely to be asked to act as arbitrators in the resolution of disputes and are urged to take advantage of training courses where possible and, when suitably qualified, to apply for membership of the Institute.

While it is a matter of some pride that a member of our profession, Max Abrahamson, has gained an international reputation in the field of arbitration, particularly in relation to civil engineering contracts, it cannot be said that his achievements have spurred his colleagues in the profession to follow his star, even at a more pedestrian level! □

INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76 No. 7 September 1982

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

. . . High Court on Circuit — A Permanent feature?

THE recent experiment of having High Court Jury Sittings in Trim and Naas, in an effort to reduce the backlog of cases awaiting hearing in the Dublin Jury List, has, by all accounts been successful as far as it went. It seems that sufficient numbers of the Common Law Bar were willing and able to attend, and medical and other specialist witnesses were also able to attend without undue difficulty.

In recent years the Cork Jury Sessions have to an extent overlapped with the Dublin Jury Sittings and that has not resulted in a void of competent Senior Counsel or specialist witnesses at either venue.

Is it not, therefore, time to consider seriously the establishment of a High Court on Circuit which would continuously sit not only in the various traditional locations outside Dublin — Cork, Galway, Limerick, Tipperary, Waterford, Kilkenny, Sligo, Dundalk but in any others where adequate court facilities are available — to deal in time, not only with clearing the current arrears of pending Jury Actions, but also with non-Jury Actions? It is obvious that more regular High Court Sessions at those locations would diminish the arrears very quickly and, more importantly, in the longer term, it would bring the administration of justice in the High Court nearer to the people concerned, that being the principal objective of the recent big increases in the jurisdictions of the Circuit and District Courts.

Granted, the existence of a High Court continuously on Circuit would give rise to some inconvenience and dislocation for the members of the High Court, all of whom reside in Dublin, but an equitable rotation of the task would mitigate that, as would also the appointment of a greater number of High Court Judges. It would require that Common Law Barristers, particularly Senior Counsel, would have to rationalise their practices, none having been as yet bestowed with the divine gift of bilocation! However, even now such rationalisation is taking place in that some Common Law Senior Counsel have let it be known that they are confining themselves to attending particular High Court Sittings at venues outside Dublin. If the times of the more regular Sittings in the various Circuit venues were firmly established and the actual listing of cases for hearing on each Sitting Day made more certain by an early call-over procedure (such as is now working successfully in the

(Continued on P. 157)

"Make A Will Week"

It should be emphasised that the aim of the campaign is not to generate business for solicitors, but to ensure that a far higher percentage of the people who ought to make wills do so.

One of the advertisements, which will be featured in National and Local Newspapers, is printed on p. 156. In addition, there will be a major programme of television and radio advertising directed at encouraging people to make wills.

The Law Society, concerned at the high number of intestacies in Ireland, is to mount a major campaign in November 1982 to encourage people to make wills.

Recent figures show that over 42% of grants issued by the Probate Offices are in intestate cases. That so high a percentage of people who had sufficient assets to justify the taking out of a grant to administer their estates had not made a will is remarkable.

The particular aim of the "Make a Will Week" campaign will be to encourage married couples, particularly those with young children, to make wills. The co-operation of members of the profession in making themselves available to take instructions from members of the public who take the advice which will be given in the campaign is essential to the success of the campaign.

Employee Information and Consultation Procedures — The Community Proposal

by

Edwina Dunn M.A. LL.B. DIP. ICEI (Amsterdam)
Solicitor

THE subjection of sizeable undertakings operating in the European Community to different rights and duties in relation to employee information and consultation procedures, due to divergences in the national legislation of the Member States concerned, may be deemed to constitute an obstacle hindering the realisation of a single Community market. At present, even where employees have a right to be informed or consulted on certain issues, the extent of these rights depends on the scope of the individual laws of the Member States. More often than not the employee is only informed or consulted on matters which relate to the individual establishment or subsidiary where he works, as distinct from matters relating to the undertaking's overall operations in that state, or in the various states in which it is established, where a transnational undertaking is involved. Thus it was that in February 1975 the European Trade Union Federation (ETUC) called for the passing of legislation to require the creation of an institution for the information and consultation of a group's employees at group level, repeating its call in June 1977. The European Commission acknowledged this view and stated that what was required was the "creation of legal systems which recognise the reality of group situations and permit groups to operate according to centrally co-ordinated policy, but subject to rules which safeguard the legitimate interests of those concerned, in particular minority shareholders, creditors and employees".

The Commission presented its conclusions to the Council in October 1980 in the form of a "Proposal for a Council directive on procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings:[1] Article 100 of the EEC Treaty was deemed to be the appropriate legal basis for the proposed directive. The obligation that Member States have, to ensure that information and consultation procedures are observed with regard to employees, in the event of a collective redundancy[2] and on a transfer of all or parts of the enterprise[3] will be extended even further if the Proposal is adopted.

Wide Scope of Obligations

The controversial nature of the Proposal lies in the fact that it envisages the creation of a legal framework wherein employees will be entitled to receive specified information and will be given an opportunity to express opinions on major decisions proposed by management[4]. The Proposal not only applies to an undertaking which has one or more establishments and/or one or more subsidiaries within a given Member State, and whose decision-making centre is located in that same Member State, but also to an undertaking which controls one or more subsidiaries and/or one or more establishments in a Member State, and which has its decision-making centre in another Member State, or in a State which is not a member of the European Community. The Proposal therefore aims to subject both nationally based undertakings and transnational undertakings, to equivalent treatment, whether or not the decision-making centres of the latter are situate within or outside the Community — the main question is whether the undertaking *operates* within the EEC. The Proposal has been criticised by the Commission on the grounds that it does not cover enterprises having a single establishment, that it does not legislate in favour of persons employed where the enterprise has its decision-making centre, but more importantly because it operates to discriminate between multinationals operating within the EEC and those operating outside of it. The Commission on the other hand argues that many multinational firms based outside the EEC adhere to the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the objectives of both instruments being similar to those pursued by the Commission in its Proposal. The latter has pledged itself to work closely with the OECD and the ILO in this regard, in particular with a view to ensuring that multinationals will be subject to similar obligations whether they operate within the EEC or outside of it[5]. Whereas adherence to these international Codes is voluntary in nature, non-adherence to the procedures laid down by the Directive will entitle employee representatives to have recourse to legal action in the national courts and will result in the imposition of sanctions on the enterprises concerned.

The Directive requires the management of undertakings falling within the scope of its provisions, to inform and consult with employees' representatives. The Proposal does not seek to impose new industrial relations machinery regarding representative institutions on top of those already existing in the Member States. The employee representatives, for the purposes of the Proposal, will be those recognised as such by the laws or practice of the Member States. Special provisions will be required where employees are represented at the group or international level.

Information and Consultation Procedures in Irish Law.

Under Irish law companies are not obliged to disclose information to any great extent to employees. The latter are of course entitled to see those documents of the company available for public inspection in the Companies Office. The Fourth Council Directive of 25 July 1978 on the Annual Accounts of Certain Types of Companies[6], the provisions of which must be fully operational in Irish law by 15 February 1982, require all limited companies (subject to a few exceptions), whether public or private, to publish their Annual Accounts and the Auditors' Report in accordance with the publication requirements of the First Council Directive of 9 March 1968[7]. Member States are permitted to prescribe less detailed disclosure requirements for small or medium sized companies. Whereas the Fourth Council Directive deals with the annual accounts of individual companies the Proposed Seventh Council Directive concerning Group Accounts[8] is intended to be its complement — requiring the consolidation of the individual accounts of all the companies belonging to the same group. Council Directive of 15 February 1982 requires companies the shares of which have been admitted to official Stock-Exchange listing, to publish half yearly reports, to be inserted in the newspapers or in the national gazette or otherwise made available to members of the public[9]. Member States are obliged to bring into force the measures necessary to comply with this Directive not later than 30 June 1983, although the application of such measures may be postponed until 30 June 1986. Apart from the right of inspection accorded to him as an ordinary member of the public the employee under Irish Law has rights to receive information only in relation to matters of health and safety, collective redundancy and transfer of ownership of a business or part thereof.

Health and Safety

Section 39 of the Safety in Industry Act 1980 requires occupiers of factories and other specified premises in which ten or more persons are employed, to prepare and circulate a written safety statement specifying the manner in which the safety and health of persons employed in the premises will be secured, the arrangements for safeguarding the safety and health of such persons, the co-operation required from such persons as regards safety and health, the duties of safety officers (if any), any safety training facilities which are available and the measures to be taken in relation to dangers so specified arising in relation to the premises or in relation to risks of such danger. Section 35 of the 1980 Act entitles employees working in factories or other specified premises (with a work-force of under 20 persons) to appoint a safety representative who can represent them in consultations with the occupier on safety, health and welfare issues. The occupier is obliged to hold consultations with the representative for the purpose of ensuring co-operation in the premises in relation to the provisions of the 1955 and 1980 Acts, statutory regulations or other enactments. The occuper is obliged to consider any representations made to him by the representative on any matter affecting the health, safety and welfare of persons employed. Section 36 of the 1980 Act provides for the creation of a safety committee and for the appointment of a safety delegate. The safety committee is entitled to make representations to the occupier on health, safety and welfare matters and he must consider these. A reciprocal obligation to consider representations made by the occupier is placed on the committee. In addition, the occupier must hold consultations with the committee, if the latter so requests, with a view to reaching agreement on facilities for holding meetings of the committee, and the duration, frequency and times of such meetings. Where for a period of six months neither a safety representative nor a safety committee stands appointed under Section 35 or 36 the occupier himself must appoint a safety representative (if no more than 20 persons are employed in the factory or other premises) or a safety committee and safety delegate, pursuant to Section 37 of the 1980 Act. Paragraph 2 of the latter Section however requires the occupier, before he makes the appointment, to afford to the persons employed in the relevant factory or other premises an opportunity for consultation regarding the appointment.

Collective Redundancies

Section 9 of the Protection of Employment Act 1977 requires an employer who proposes to create collective redundancies to initiate consultations with representatives representing the employees affected by the proposed redundancies, with a view to reaching an agreement. The consultations are required to be initiated at the earliest opportunity and in any event at least 30 days before the first dismissal, and to include the following matters — (a) the possibility of avoiding the proposed redundancies, reducing the number of employees affected by them or otherwise mitigating their consequences, (b) the basis on which it will be decided which particular employees will be made redundant. The employees' representatives are entitled to receive all relevant information relating to the proposed redundancies for the purpose of consultations and in particular to receive written details on — (a) the reasons for the proposed redundancies, (b) the number and descriptions or categories of employees whom it is proposed to make redundant, (c) the number of employees normally employed, and (d) the period during which it is proposed to effect the proposed redundancies.

Transfers of Undertakings

The European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 (S.I 306 of 1980) provides that employees affected by a transfer of an undertaking or business, or part thereof shall be informed of (a) the reasons for the transfer, (b) the legal, economic and social implications of the transfer for the employees, and (c) the measures envisaged in relation to the employees (Section 7(1)). The information must be given by the transferor to the representatives of his employees in good time before the transfer is carried out, and by the transferee, to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment. Special provisions exist for the situation where no employee representatives exist in the undertaking or business concerned. Where the transferor or transferee concerned in the transfer envisage measures in relation to his employees, he must consult the representatives of his employees in good time on such measures with a view to seeking agreement. The 1980 Regulations proved to be innovatory in a number of ways. Prior to the implementation of the said Regulations an employee, on the transfer of ownership of the business in which he was employed, would generally only receive from his employer (the 'transferor') a notice terminating his contract of em-

ployment and a statement to the effect that the new owner (the "transferee") would, in the near future, be making an offer to renew his contract of employment or to re-engage him under a new contract of employment. The employee was left in the dark as to the reasons for the transfer and the possible long-term implications resulting therefrom. The "Acquired Rights" Directive took cognisance of this and prescribed, as duly implemented by Regulation 7(1) and 7(3) of the 1980 Regulations, that employees on a transfer, whether they be the employees of the transferor or the transferee and whether they be represented by employees' representatives in the firm or not, receive minimum items of information. There is in addition an obligation to consult with the employees' representatives, if any, in the event of there being any measures envisaged in relation to the employees consequent on the transfer. While the obligations to inform and consult in a collective redundancy situation are only intended to operate where employees' representatives exist in the business, the 1980 Regulations make special provision for the communication of information where no such representatives exist.

Inadequacy of existing arrangements

Present information and consultation procedures have been criticised[10] on the grounds that when information is given it is often out of date, incomplete or insufficient, that the procedures only apply to particular situations (health and safety and welfare in factories and other specified premises, redundancy and transfer of a business) and finally that where information is supplied to employees it only relates to the affairs of the local business entity so that employees do not get a clear picture of the corporate activities as a whole.

The Proposal aims to give employees as complete a picture of the company's activities and performance as possible, and where a company has transnational operations, this will include information on all its activities in the various countries in which it is established. It has been suggested that increased information will help to clarify issues for collective bargaining purposes[11] and may indeed provide a more appropriate method for employee participation in the enterprise rather than having recourse to methods of employee participation on boards of companies.

Disclosure of Information under the Proposal

The Proposal requires, in the transnational context, the management of a dominant undertaking whose decision making centre is situate in a Member State of the EEC and which has one or more subsidiaries in at least one other Member State, to disclose, via the management of those subsidiaries, information to employees' representatives in all subsidiaries employing at least 100 employees in the EEC, and to consult with them on specified issues (Article 4). The management of an undertaking whose decision-making centre is located in a Member State of the EEC and which has one or more establishments in at least one other Member State shall have similar obligations in relation to information and consultation procedures towards the employees' representatives in all of its establishments in the EEC employing at least 100 employees (Article 9). Similar obligations apply *mutatis mutandis* (leaving aside Article 8 for example) to the management of a dominant undertaking which has one or more subsidiaries in the **same** Member State (and to the management of the undertaking which has one or more establishments in the same Member State). The Commission proposed that an undertaking be regarded as dominant in relation to all the undertakings it controls (i.e. subsidiaries) where the former (a) holds the majority of votes relating to the shares issued by the latter, or (b) it has the power to appoint at least half of the members of the administrative, management or supervisory bodies of the latter where these members hold the majority of the voting rights. The explanatory memorandum to the Proposed Directive however makes it clear that the existence of (a) or (b) only give rise to a presumption of dominance, so that important share holdings (even if they do not constitute majority holdings) may be taken into account for the purposes of establishing whether *de facto* control exists or not. This might give rise to difficulty in practice unless some agreement is reached on what constitutes *de facto* control. What criteria should be adopted to determine whether a shareholding of less than 50% should amount to *de facto* control? It is widely accepted that a block holding of say 30% of the shares in the company may constitute *de facto* control over that company where the other holdings are widely dispersed. For the purposes of the Mergers, Takeovers and Monopolies (Control) Act 1978 enterprises are deemed to be under common control where one of the enterprises has more than 30% of the voting rights in the shares of the other, or where it has the right to appoint or remove a majority of the Board or Committee of Management of the other. It could also be argued that a shareholder has *de facto* control over a company when he has more than a 26% shareholding in that company, having in effect, the power to block the carrying of a special resolution. There has been much discussion but as yet little agreement on the Commission's proposed definition of what should constitute "dominant undertaking". It will be interesting to see what definition will be eventually agreed upon.

Control outside the EEC

The Proposed Directive furthermore provides that the management of a dominant undertaking which controls one or more subsidiaries in the EEC (or where control is exercised over one or more establishments in the EEC, the management of the undertaking concerned) and which does not have its decision-making centre within the EEC, must ensure that there is at least one person within the Community who is capable of fulfilling the requisite disclosure and consultation obligations. In the absence of the management so providing, the Proposed Directive states that the management of the subsidiary that employs the largest number of employees within the E.E.C. (or in the case of establishments, the establishment employing the largest number of employees within the E.E.C.) will be responsible for fulfilling the said obligations.

The information that central management must relay to the national management of its subsidiaries or establishments, in the context of transnational undertakings or that management must relay to each of its subsidiaries or establishments, in the case of complex structures whose decision making centre is located in the country in which the employees work, must comprise of relevant information giving a clear picture of the activities of the undertaking and its subsidiaries or establishments taken as a whole. The man-

agement of each subsidiary or establishment is required to communicate the information without delay to the employees' representatives in each subsidiary or establishment. The information must be forwarded at least every six months and must relate in particular to: (a) structure and manning; (b) the economic and financial situation; (c) the situation and probable development of the business and of production and sales; (d) the employment situation and probable trends; (e) production and investment programmes; (f) rationalisation plans; (g) manufacturing and working methods, in particular the introduction of new working methods; (h) all procedures and plans liable to have a substantial effect on employees' interests[12]. In the event of the management of the subsidiaries or establishments being unable to communicate the said information to employees' representatives, the management of the dominant undertaking itself (or where the undertaking has one or more establishments in a member state as distinct from one or more subsidiaries, the management of the undertaking) must communicate the information to any employees' representatives who have requested it to do so.

Criticisms

Various criticisms have been levelled against the information requirements prescribed by the Proposed Directive. Leaving aside the question of the confidentiality of information, which will be discussed later, it has been suggested that the Directive does not make it clear in relation to the six monthly reports, as to the time limit within which information is to be prepared and forwarded and the extent of the detail of the contents required. From the employees' point of view, information forwarded by management is bound to have a 'management' slant so that it is imperative for the employees to have persons trained from their ranks who will be able to analyse documents and monitor statements issued by management. Just as shareholders do not have to rely totally on management's interpretation of the company's performance, by virtue of the appointment of an auditor who can examine any original company document and make an independent assessment of the company's financial state of affairs, so also it has been suggested that employees should have some kind of independent assessor appointed on their behalf, whose job it would be to ensure that whatever information is released by the management is clear and complete. Furthermore it has been argued that the increased disclosure requirements may lead to friction between and within unions — what will be the reactions of workers in one plant on hearing their unit is to be closed so that a plant in another town may survive? The employers, on the other hand, oppose the proposed information procedures not only on practical grounds (that the information required to be forwarded is not available, that it would in any event be too costly to compile given its value, and that many of the items required to be disclosed exceed the needs of employees in relation to collective bargaining), but also on the grounds that it will increase trade union bargaining power *vis a vis* management and that it will in effect entitle employees to receive more information than the shareholders of the company[13].

Information and Consultation

The Directive specifies proposals to make decisions concerning the whole or major part of an undertaking or of one of its subsidiaries or establishments which are liable to have a substantial effect on the interests of its employees. These decisions are stated to relate to: (a) the closure or transfer of an establishment or major parts thereof; (b) restrictions, extensions or substantial modifications to the activities of the undertaking; (c) major modifications with regard to organisation; (d) introduction of long-term co-operation with other undertakings or the cessation of such co-operation.

The Directive proposes that in these circumstances precise information would be forwarded to the management of each subsidiary or establishment not later than 40 days before adopting the decision, giving details of (a) the grounds for the proposed decision; (b) the legal, economic and social consequences of such decision for the employees' concerned; (c) the measures planned in respect of these employees. The management of each subsidiary or establishment would be obliged in turn to transmit this information without delay to its employees' representatives and to request the latter to state their opinion within 30 days. Furthermore, if, in the opinion of the employees' representatives the proposed decision would be likely to have a direct effect on employees' terms of employment or working conditions, the management of the subsidiary or establishment would be obliged to hold consultations with them with a view to reaching agreement on the measures planned in respect of such employees[14]. Where the management of the subsidiary or establishment fails to convey the details of information mentioned above or to hold the requisite consultations the employees' representatives will be authorised to open consultations, through authorised delegates, with the central management or management (as the case may be) of the undertaking with a view to obtaining such information, and, where appropriate, to reaching agreement on the measures planned with regard to the employees concerned. The obligation to negotiate lies primarily on local management in the transnational context. The above provisions, allowing employees' representatives recourse to central management, will not lead to the undermining of the authority of local management in view of the fact that recourse is only permitted in exceptional circumstances.

Further Criticisms

The information and consultation procedures outlined above have been the subject of much criticism. It has first of all been argued that the text of the proposed Directive is ambiguous. When the management of the dominant undertaking (or undertaking where establishments are concerned) contemplates taking a decision which may have a substantial effect on the interests of its employees, the Directive does not make it clear whether the information and consultation procedures must be pursued with the employees' representatives of **all** the subsidiaries (or establishments) in the group or only with the employees' representatives of those subsidiaries (or establishments) which have in their employ workers whose interests will be substantially affected. The Economic and Social Committee has recently issued an opinion in favour of the latter interpretation[15]. Secondly it has been argued that the 40 day notice period will slow down the decision making process of the undertaking and will prevent the undertaking from reacting quickly and effectively to changes in market conditions. It has been suggested that there should be some provision which allows an undertaking to by-pass this requirement when urgent and prompt measures are required to be taken.

Another suggestion has been that when consultations are held they should not be required to be held with a view to reaching agreement. It should be noted however that management's power to take economic decisions, in the last resort, remains unhampered, since once consultations are held management is free to adopt whatever decision it likes. The workers have no power of veto as such.

Confidentiality

The third and final criticism relates to the issue of confidentiality of information. The management has no right to withhold any information on grounds of confidentiality or secrecy. Members and former members of bodies representing employees and delegates authorised by them are, on the other hand, required to maintain discretion relating to information of a confidential nature. In communicating information to third parties they are obliged to take account of the interests of the undertaking and not divulge secrets regarding the undertaking or its business. The Directive provides that Member States should provide for the imposition of penalties for breach of the secrecy requirement, and in addition empower a tribunal or other national body to settle disputes concerning the confidentiality of certain information. Employers, however, argue that the provision in question should be amended to take into account the situation where non-disclosure on grounds of confidentiality is required to prevent substantial injury resulting to the undertaking[16]. The difficulty lies in the interpretation of "substantial injury" — could it for instance include potential loss of competitive advantage or possible stock market reaction to the disclosure? Information disclosed about an undertaking's products, its investment and marketing strategy and its research and development plans may indeed prove to be potentially injurious to the undertaking. Certain commercial tenders may require that the terms contained therein be kept secret to ensure that subsequent bids be made independently. As to products incapable of protection under intellectual property laws, secrecy as to the composition or nature of the product may be essential if it is to be successfully launched on a market without fear of poaching by other competitors. Furthermore information required to be divulged about a hostile takeover bid will make the takeover more difficult and more expensive, and indeed, the disclosure of price sensitive information in a pending takeover situation may conflict with the requirements of the Stock Exchange Regulations and the City Code on Takeovers and Mergers. A blanket provision in the Directive which requires full disclosure could justifiably be regarded as unacceptable by employers.

Penalties

Member States are required not only to lay down penalties for failure to comply with the disclosure requirements and the information and consultation procedures outlined in the Directive, but also to ensure that employees' representatives, affected by the decision adopted in contravention of the consultation requirements, have a right of appeal to tribunals or other competent national authorities for measures to be adopted to safeguard their interests, in so far as these are directly threatened. The Commission, in its explanatory memorandum to the Directive[17], stated that such measures could include the refusal to authorise collective redundancies, suspension of the rights of the majority shareholder (i.e. the dominant undertaking) in the subsidiary and the imposition of a periodic penalty payment for each day's delay in fulfilling the obligations in relation to disclosure of information and consultation. It is unclear whether the penalties imposed are such as to compensate employees for loss suffered (damages awarded to the employees or to their representative institutions), as seen for example in Section 103 of the Factories Act 1955 as amended by Section 56(i) of the Safety in Industry Act 1980, or to punish management for bad industrial relations (fines payable to the State).

Future Trends:

The Proposed Directive is at present being discussed by the European Parliament and is unlikely to be adopted by the Council in the absence of substantial amendments to the text. The eventual adoption will necessitate an amendment of the Companies Act 1963 (as amended) to ensure disclosure of information to employees at half yearly intervals, and the enactment of further legislation necessary to implement the provisions of the said Directive □

FOOTNOTES

(1) OJ C 297 of 15-11-1980.
(2) The Protection of Employment Act 1977.
(3) European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980. S.I. No. 306 of 1980 ("the Acquired Rights" Regulations).
(4) Defined in Article 2(c) as being "the place where the management of an undertaking actually performs its functions".
(5) Bull. of the E.C. Supplement 3/80 at p.6. The United Nations is also in the process of formulating a comprehensive code for transnational corporations — the full scope of the obligations contained therein will probably not be known until 1985. The ILO Tripartite Declaration will form the basis for the Employment Section of the Code.
(6) OJ No. L 222/11 of 14-8-78.
(7) OJ No. L 65 of 14-3-68.
(8) OJ No. L 222 of 14-8-78.
(9) OJ No. L 48 of 20-2-82. Article 7.
(10) Howard Gospel, "Disclosure of Information to Trade Unions" ILJ Vol. 5. 1976. p. 223.
(11) Department of Labour Discussion Paper, "Worker Participation" PRL 8803 (1980).
(12) This list is the same as that put forward by the Commission in its amended proposal for a regulation establishing a Statute for European companies. Supplement 4/75 — Bull. of the E.C. Article 120 (for example).
(13) Group I (Employers) of the Economic and Social Committee expressed the opinion that the Proposed Directive did not tie in with other Community Company Law proposals relating to information to be conveyed to shareholders. It considered that companies would be burdened with the task of preparing one set of information for their shareholders and another for their employees, and in addition be obliged to provide some information at six monthly intervals and other information at annual intervals. See OJ. C. 77 of 29-3-82 at page 13.
(14) See Section 9 of the Protection of Employment Act 1977 and paragraph 7(2) of the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 both of which refer to consultation procedures with a view to seeking agreement.
(15) 27 January 1982, OJ. C. 77 of 29-3-82 page 6 at page 10.
(16) The Employer-Labour Conference Sub-Committee document on works councils (1980) recommended that economic information should be made available subject to the criteria that the disclosure would not be detrimental to the organisation's well being. The Sub-Committee also recommended that where partners disagreed about interpretation a referral could be made to the Employer Labour Conference. Discussion Paper ibid footnote (11).
(17) Ibid footnote (3) at page 9.

"LEGAL DATA BASE NOW ON TEST"

A research project of the Department of Library and Information Studies in U.C.D., aimed at establishing the feasibility of establishing an automated data base of Irish Legal Information, is now available for test. The project, funded by the National Board for Science and Technology, has produced a small data base in the subject area of Constitutional Law.

One of the difficulties which faced those organising the project in considering the choice of a suitable subject area was the non-exclusivity of the Irish Legal Data Base. In many areas of law, U.K. statutes still apply and United Kingdom case law is of significant persuasive authority, even where the bulk of it is no longer of binding authority. While one of the reasons for choosing Constitutional Law as the test subject was because of its general interest to people outside the legal profession, it must also have been in the minds of those making the choice that Constitutional Law provided an area of reasonable exclusivity. The system, called "Aidlaw", is a full text information retrieval system, enabling every word of the original text to be searched; the data base available is (1) The Constitution of Ireland, (2) The Text Book — The Irish Constitution by J. M. Kelly (3) Decided cases relating to Articles 1 to 15 and 40 to 45 of the Constitution. The data base includes full reports of some of the more important cases but, in most cases, only head notes and abstracts have been included.

There are ten different indices to the material in the data base, which enable searches to be made not only through the text but also for the decisions of a particular judge, or the name of a particular book or the name of a particular article. The organisers of the project are anxious to arrange for as wide as possible a test of the system to be made by potential users, primarily with a view to ascertaining whether there is a sufficient demand for a computerised legal information retrieval system in Ireland.

The service may be accessed directly by potential users through their own computer terminals, or be searched by an intermediary. There is no charge for the use of the service during the test period. Demonstrations or sample searches can be made by contacting one of the following: Aideen Cantwell, U.C.D. Tel. 693244, ext 8354. Jenny Aston, Law Library, Tel. 720368. Margaret Byrne, Law Society. Tel. 710711.

This project has been carried out at a time when a major battle between competing commercial interests is being fought in the U.K., where two legal information retrieval systems are available, one being Lexis, which is being marketed in the U.K. by Butterworths and the other, Eurolex, which is being marketed by the Thompson Organisation. The merits and de-merits of the rival systems have recently been the subject of debate in the columns of the New Law Journal. Reservations are being expressed whether the data bases, as presently established, are of particular interest to the ordinary practising solicitor comprising, as they do, largely statutory material and reports of cases. The view has been expressed that the inclusion of what are called "secondary materials", such as text books, commentaries and articles in legal journals and books of precedents, would be of far greater value to the ordinary practitioner than the wealth of information already in the Data Base.

For Ireland, the problem is that of a small jurisdiction whose statutory and case law is inextricably mixed up with that of the United Kingdom, so that the establishment of an "Irish Legal Data Base" would necessarily involve the inclusion of substantial amounts of U.K. material. It is understood that the major cost of a Legal Data Base arises in the original inputting of the material into the system. If this is the case, it would seem difficult to justify on any economic basis the establishment of a separate and comprehensive Irish legal Data Base, since it would involve the inclusion of much material already included in one or other of the existing U.K. Data Bases. This, no doubt, will be one of the points to be raised at a seminar which is to be promoted by the National Board for Science and Technology to consider the results of the project. □

Computerisation of Companies Registration Office

The Minister for Trade, Commerce and Tourism, Mr. Desmond O'Malley, T.D., has announced plans for modernisation of the Companies Registration Office.

Following a survey aimed at determining the main items of information about companies required by users of the Office facilities, arrangements are in train for recording on a computer information under the headings of: nature of business; names and addresses of directors and secretary; shareholdings; situation of registered office; charges and satisfactions; the date of the latest annual return filed and of any important document subsequently registered. Visual Display Units affording access by the public to the data stored in the computer are envisaged as a feature of the scheme. This mechanisation programme is being pushed ahead with all possible speed.

It may be feasible later on to extend the system to include other desirable facilities and the Minister has arranged that regard should be had to the possibility of such further developments when equipment is being acquired. However, any proposed additional facility will have to be considered on a cost/benefit basis.

These arrangements, coupled with the new procedures provided for in the Companies (Amendment) Act, 1982 which came into operation on 3rd August, 1982, should result in a substantial improvement in the amount, quality and availability of information about companies at the Companies Registration Office □

MICHAELMAS LAW TERM
Annual Services

All members of the legal profession are invited to attend the Michaelmas Law Term Annual Services on:

Saturday 2nd October, 1982, at
The Synagogue, Adelaide Rd., Dublin,
at 9.30 a.m.
and on Monday 4th October, 1982, at:
St Michan's Church, Halston Street, Dublin,
at 10.00 a.m.

St. Michan's Church, Church Street, Dublin,
at 10.15 a.m.

and afterwards (Monday, 4th October) are invited, by kind invitation of the Benchers of the Honourable Society, in Kings Inns, to coffee at the Inns at 11.00 a.m.

GAZETTE BINDERS

Binders which will hold 20 issues are available from the Society.

Price: £5.14 (incl. VAT) + 87p postage.

Publicity for 'Make a Will Week'
November 15th.—19th.

You have a family.
A house. A life policy.

You really should make a Will.

Making a Will is as simple as writing a letter when you have the advice of a solicitor.

It's very much in your family's interest that you have a proper, legal Will that sets down your wishes clearly.

Such a Will can save your wife and children much anxiety and stress, and protect your assets from unnecessary administration costs.

To make it as easy as possible for everyone to have a Will, November 15th - 19th has been chosen as 'Make a Will' Week.

Decide to make a Will today, then arrange an appointment with a solicitor for next week. You will not regret it.

'Make a Will' Week November 15th - 19th

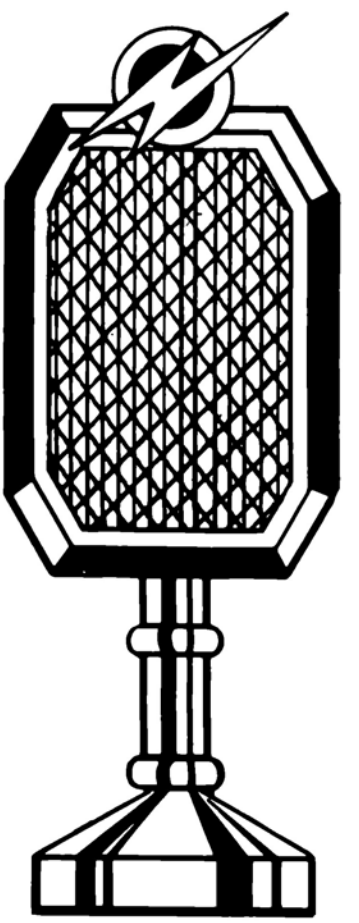
ISSUED BY
THE LAW SOCIETY
BLACKHALL PLACE, DUBLIN 7

Press

The press campaign will consist of 12" x 4 cols advertisements appearing in 3 Sunday newspapers, 3 Morning newspapers, 1 Evening newspaper, Community Free-Sheets and the Irish Farmers Journal. Also planned are Special Notices advertisements which will appear during the Wills Week. A total of 11 display advertisements are planned to announce the Wills Week.

Radio

The radio campaign will consist of 25 x 15 second commercials transmitted over a period of twelve days. Commercials will be heard on RTE Radio 1 and 2.



ASSOCIATION OF CRIMINAL LAWYERS

The launching of the Association of Criminal Lawyers at a reception at the Society's offices at Blackhall Place, Dublin, on Thursday, July 22, was marked by the address of the President of the High Court, Mr. Justice Thomas A. Finlay, in which he called for reform in the manner in which criminal trials are conducted.

The President of the Incorporated Law Society, Mr. Brendan Allen described the formation of the Association as an understandable and highly desirable development.

Mr. Justice Finlay noted that the Association had already had its sea trials and acknowledged the assistance he had received from it with regard to change he proposed for the Central Criminal Court. Greatly welcoming its formation, he said it was probable that in 50 or 100 years time, the quality of law in society was unlikely to be tested by an evaluation of its Chancery law or the complexity of its tax laws, but by the efficiency and fairness of its criminal law. The formation of a body which would lead to an exchange of ideas and the maintenance of standards was greatly to be welcomed.

The President had prefaced his remarks by stating that there were likely to be changes in the criminal law, but these would be matters of political debate and it would be inappropriate for him to enter into a discussion on them. However, there was an aspect of the criminal law which was outside political controversy which he would like those present to consider and he believed that the average modern criminal trial was far too long; the procedures and proofs necessary were more likely to confuse and obscure the real issues for the jury, than enlighten them.

Mr Brendan Allen, said he was pleased to have been afforded the opportunity during his term of office of welcoming the formation of an Association of Criminal Lawyers.

Already, he said, the Law Society recognised special interest groups amongst its members in the areas of Conveyancing, Litigation, Company Law and Taxation Law. It was an understandable and highly desirable development that those Lawyers who were participating to a greater than average degree in the area of Criminal Law should come together to promote their own special interest group. Since the average age of the profession was now quite young and that this was reflected amongst Criminal Lawyers, it was a good thing, in his view, that there be an Association available to them for guidance and as a standard-setting body in an area of Law which is extremely complex and has a very great sense of immediacy, and public responsibility.

Looking at the work of special interest groups and particularly of the Association of Criminal Lawyers, in the wider context of the Society's role as a commentator on legislative proposals or other developments, Mr Allen wished to make it clear, however, that at all times, the Society, through its Council, must reserve its position and may, on occasion, not necessarily agree with the sentiments of the particular interest group. In the case of the Association of Criminal Lawyers, it was important that this be clearly understood at the present time, when legislative proposals in relation to Criminal Law are in contemplation. The Society would make its views known in the context of an overall national view.

Mr Allen continued, on behalf of the Education Committee and of the staff of the Society's Law School, to express particular gratitude and appreciation to those members of the Association who had given very much of their time towards the provision of training and refresher courses in the area of Criminal Law □

Society of Young Solicitors Officers, 1983/83

Chairman: Petria McDonnell
Secretary: Carol Fawsitt
Treasurer: John Lynch.

Medico Legal Society Of Ireland

Patron: Professor Dermot Holland
President Royal College of Physicians

OFFICERS OF SOCIETY

President: Carmel Killeen, Solicitor
Secretary: Brendan Garvan, Solicitor
Treasurer: Alan Woods, Solicitor
Council: District Justice A. B. Cassidy
Doctors: Liam Daly, Robert Towers,
Declan Gilsenan, Sarah Rogers.
Solicitors: Thelma King, Mary Dolan, Cliona O Tuama,
Denis Greene, Eamonn Hall, Brian Murphy.
Eamonn Hall, Brian Murphy.
Barristers: Matthew Russell.
Immediate Past President:
Dr John Harbison, State Pathologist

Comment . . .

(Continued from p. 147)

Dublin High Court non-Jury List) a "Bar" servicing each venue would very quickly form and Solicitors could more readily organise the attendance of necessary medical and other specialist witnesses.

In fact, one of the less obvious advantages that might result from more High Court Sittings away from the convenient locations (for doctors) of Dublin and Cork is that solicitors and Counsel for both parties might begin to think more seriously of agreeing the medical evidence in the not-so-serious cases.

Unless lawyers (i.e. Solicitors, Barristers and Judges) constantly look at ways to improve and expedite the administration of Justice, they are failing the public, whom it is their intended objective to serve. □

The Solicitor as Advocate

by

Eamonn G Hall, B.A., LL.B., H.D.E., Solicitor

THE INCREASE in jurisdiction of the District and Circuit Courts and the proliferation of tribunals present, more so than ever before, opportunities for the Solicitor Advocate. This article hopes to cover some of the ground rules and problems associated with advocacy. Arguably, such an article should have been written by one of the great advocates of our time. Such advocates have, perhaps, been too busy exercising their talents in a milieu of tradition and precedent that has changed little over the decades.

Disposition

First, there is the disposition of the advocate. Many shy away from advocacy, leaving it to Barristers and feeling that one must be a born advocate before one enters the fray. There are no magical formulae for success. Practice and, even more so, experience, are primary ingredients. Many advocates experience difficulty in addressing a court or tribunal. A well known Judge[1] summed up the feeling of many an advocate:

> "I was no good at first. I was too shy; also too nervous. Others are different . . . At (University), I joined the (debating) Union but never spoke there . . . One thing that you will never be able to avoid — the nervousness before the case starts. Every advocate knows it. In a way it helps, so long as it is not too much. That is where I used sometimes to fail . . . I was anxious to win — and so tense — that my voice became too high pitched . . . I never quite got over it . . . No longer, now that I am a Judge. The tension is gone. The anxiety — to do right — remains."

Professor Heuston of Trinity College in his book 'Lives of the Lord Chancellors 1885-1940' tells the story of Lord Halsbury's first case in the High Court. It was before Lord Campbell, then Chief Justice. The future Lord Halsbury became the victim of an attack of extreme nervousness, hesitation and stammering. The Chief Justice — not known for his patience — leaned from the Bench and stated "For God's sake, get on young man". The future Lord Halsbury had been cured. Others have been less fortunate. But time and experience help.

Speaking For Others

One thing the advocate must appreciate is that it is not easy for a person to speak for himself in forums which are foreign to him. Edward Majoribanks, in his biography of Sir Edward Marshall Hall, puts it well:

> "Now it is difficult for any man, however wise or eloquent to speak for himself, when fortune, reputation, happiness, life itself are in jeopardy and rest on the decision of strangers sworn before God to find an impartial verdict from the evidence brought before them. Hence has arisen the honourable and necessary profession of the advocate; it is indeed a high and responsible calling; for into his keeping are entrusted the dearest interests of other men."

Self-Advocates

In passing, I refer to two persons who have advocated for themselves — rarely with final success. Maurice Healy in 'The Old Munster Circuit' tells an anecdote about a Miss Anthony who advocated her own causes. She was a litigant in his father's time and 'plagued' the Courts. At first she used to be represented, in the ordinary way, by Solicitors and Counsel but 'soon grew impressed by her own abilities' and decided to argue her cases herself:

> "One day she was being very troublesome to a Court presided over by the Lord Chief Baron, who at length said to her; 'Miss Anthony, I see your Counsel sitting behind you; would you not be wise to leave the argument of your case in his hands?' 'Ah my Lord', replied the lady, 'that's not my counsel at all; he's only the young man I hire to bring down the books from the Law Library for me'."

Maurice Healy stated that it was the business of junior counsel engaged in cases to carry books for their senior counsel to Court. Such is still the way today.

Another self-advocate was Paul Singer, who conducted his own criminal defence at his first trial in Green Street Courthouse, Dublin, before Mr. Justice Haugh and a jury. Seamus Brady, in his book 'Doctor of Millions', describes Singer's oration in Court as the 'most extraordinary exhibition of egotism, picaresque erudition and the forensic arts ever delivered in Green Street Courthouse'. In his closing speech, which lasted for four days, Singer explained why he was not calling evidence or going into the witness box himself:

> "There is very little evidence to give, as most of the facts in this case are not in dispute. My case is based solely on reason, logic and justice."

Memorable words for an advocate. Singer was, however, found guilty. He successfully appealed — but a new trial was ordered.

At Singer's second trial before Mr. Justice Walsh, Mr. Sean MacBride, S.C., with Mr. Paul Callan, then Junior Counsel, instructed by Mr. Gerard Charlton, Solicitor, put Singer's case.

After Mr. Justice Walsh had directed the jury to record a verdict of 'not guilty', Singer held a news conference. He said that he had read law while in prison. Singer told how

he had two cells, one for sleeping in and the other for use as an office and library. He stated that he had nearly five hundred law books and had about half a ton of correspondence in the cell. He also stated that he had educated quite a few of the prisoners on their legal rights — some of whom successfully won their freedom as a result.

There will always be such persons with us. Few succeed at the end of the day. Most people in difficulty need someone else to advocate their causes.

Adversary System

One thing the advocate will have to get used to is our adversary system. There is, more often than not, an opposing party and a conflict on the facts. Generally, only one side can win. Richard Du Cann, in his book 'The Art of the Advocate', sets the scene for the advocate in this way:

> "In every quarrel there are at least two sides, but in every adjudication there can only be one successful party. Few men have the breadth of vision of Lynch who, after being condemned to death for treason, wrote of Carson, who had prosecuted him to conviction: 'He had done his part in condemning me to death, but these are not things that induce bad blood among men of understanding'. Fully half of those who resort to the Courts come away dissatisfied . . ."

The adversary system thus puts stress on both advocate and client. The advocate must never underestimate the stress his client is under. Whether it be a civil or criminal matter, the client approaches the Court or tribunal under stress. Samuel Johnson summed it up:

> "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."

Few advocates will be called upon to defend clients who could be hanged, but it is true that those who seek the help of the advocate generally come with their minds 'concentrated wonderfully'. Advocates owe it to their clients to have their own minds concentrated on the case.

Qualities And Duties

It would be difficult, if not impossible, to list definitively the qualities of the advocate. This is particularly so as there are so many different forms of advocacy practised before diverse Courts and tribunals. Majoribanks, in 'The Life of Sir Edward Marshall Hall', lists some of his qualities:

> "The advocate must have a quick mind, an understanding heart and charm of personality. For he has often to understand another man's life story at a moment's notice, and catch up overnight a client's or a witness's lifelong experience in another profession; moreoever, he must have the power of expressing himself clearly and attractively to people so that they will listen to him and understand him. He, must then be histrionic, crafty, courageous, eloquent, quick-minded, charming and great hearted."

Hugh O'Flaherty, B.L., as he then was, writing in Justice (1965) refers to one essential attribute of the advocate which does, indeed, tower over all the other qualities;

> "In every case there is one essential attribute which he must possess; he must be a man of honour. His word must always be his bond. After this, most else can be added."

Indeed, in this context, one is mindful of the answer of Mrs Moya Quinlan, former President of the Incorporated Law Society when asked[2] what were the major requirements for someone entering the profession:

> "Patience and absolute tact. These, I think, are the basic and most important requirements."

The Duty

What is the duty of the advocate? One writer[3] has declared that the duty of the advocate is fivefold — a duty to his client, a duty to one's opponent, a duty to the Court, a duty to oneself and a duty to the State. It is not easy to fulfill all five duties at the one time.

Without a client, there would be no advocate. Therefore, in the context of the advocate's other duties, the advocate must primarily have attention to, and consideration for, the many needs of his client. I referred earlier to the difficulties experienced by persons in speaking for themselves and the stress placed on clients in our adversary system.

The advocate is taking part in the process of the administration of justice. In criminal cases, the prosecuting advocate has a duty to see that there is a fair trial. He must prosecute not persecute. The case against the defendant should be 'pursued relentlessly — but with scrupulous fairness'. The defending advocate has a duty to see that his client 'has the advantages of all the rights which the law gives him and that his case is put in the best possible way[4]'.

John Clitheroe, in 'A Guide to Conducting a Criminal Defence', sums up the defending Solicitor's task:

> "The defending Solicitor's task is to take every proper point in a defendant's favour. Therefore, the precise wording of the charge must be checked and the section of the Act under which it is brought considered, to see if the allegation is properly framed. This may seem pedantic but it is the defence lawyer's duty to represent his client 'properly'; 'properly' includes taking any point for the defence which the lawyer's additional knowledge provides and which the defendant will not know himself."

Know The Forum

Never go 'cold' into the 'arena'. Some knowledge of the personalities in the forum always helps. If the advocate is not familiar with a particular court or tribunal, speak to someone who practises before such a court or tribunal. It is a fact of life that Justices and Judges differ in their attitude to the same matter. Find out from officials or others who know the forum what attitude is taken to long cases and particular offences. There may also be other questions, such as the order of the day's business.

Instructions

It is vital that the Solicitor Advocate takes proper instructions. A check list for civil and criminal cases is useful and helps to identify the immediate problem. A check list should ensure that vital matters are not forgotten. Dates are then entered into the office diary.

Locus In Quo

Should the advocate visit the *'locus in quo'* in civil or criminal cases? One Senior Counsel I know always inspects the physical location. He was thus able to tell a mapping draughtsman that his map did not accord with reality. Other Counsel will never visit the site location — feeling that they might be compromising themselves. There is much to be said for visiting the 'locus in quo' in particular cases. Many items do not appear on a plan but may be critical to the case. In road traffic accidents, the line of the buildings, trees and hedges, street furniture and the flow of traffic could be vital to the case. Thus, in Court, such details as the name of the street and width of the road are cemented in your mind when you are examining or cross-examining witnesses.

Law Of Evidence

It is almost trite to say that the advocate should be aware of the rules of evidence. At the examination-in-chief stage, it has been argued that it is helpful for both sides to allow the witness to be asked leading questions on formal uncontested matters — until contested matters are reached. Mr. Justice Finlay, in his lecture on Advocacy to the Society of Young Solicitors, submits that it is a fundamental and cardinal rule in the direct examination of a witness, particularly of your client, that you give him time to 'play himself in'. Thus at the start, questions should be asked, the replies to which he knows he can confidently answer.

Clitheroe, again, in 'A Guide to Conducting a Criminal Defence', states a truism by stating that ignorance of the rules of evidence can lead to embarrassment for advocate and client. He continues:

> 'The most common breach (of rules) of evidence in (criminal) Courts is the witness who, without realising the significance, blurts out what someone else has said concerning the incident. In ordinary life, the description of an event often includes reported speech, but it has no place in evidence, though once given, its effect upon (the Court) is incalculable.'

Then there is the cross-examination. Edward Cox, Sergeant-at-Law, in 'The Advocate', defines three objects of cross-examination as being:

> "to destroy or weaken the force of the evidence the witness has given against you; to elicit some fact in your favour which has not already been stated, or to discredit the witness . . . to show that he is unworthy of belief."

There is an art in cross-examination and experience is probably the best teacher. There are no set rules to cover all situations, but one cannot but heed the words of Josh Billings (see "The Art of Cross-examination" by F. L. Wellman 4th edition, Collier Macmillan, p.15) on cross-examination:

> "When you strike oil, stop boring; many a man has bored clean through and let the oil run out of the bottom."

Thus, if an admission is obtained in cross-examination, never repeat the question; you are unlikely to get the same answer.

Never cross-examine for the sake of having something to say. In some cases, you may be relying on a submission seeking a direction and cross-examination may be inadvisable. There is also an appropriate time to stop cross-examination. This, too, will only come with experience. An example illustrating when it is right to stop cross examination may be gleaned from the narrative of a case in R. Barry O'Brien's book 'Lord Russell of Killowen.' Charles Russell, then a Junior Counsel, appeared in a cause célèbre, *Saurin v Starr*. The plaintiff, a Mercy nun who had refused to obey the rules, was reported to her ecclesiastical authorities and then expelled. She took an action against the Mother Superior. Coleridge led for the plaintiff before Lord Justice Cockburn. Coleridge's case was that the breaches of discipline were trivial. He pressed the Mistress of Novices on the point, asking what the plaintiff had done. The Mistress of Novices stated, as an example, that the plaintiff 'had eaten strawberries'. 'Eaten strawberries', exlaimed Coleridge; 'What harm was there in that?' 'It was forbidden, Sir', replied the Mistress of Novices. 'But', retorted Coleridge 'What trouble was likely to come from eating strawberries?' 'Well Sir' replied the Mistress of Novices, 'You might ask what trouble was likely to come from eating an apple, yet we know what trouble did come from it'. The answer floored Coleridge. There was no point in further cross-examination. He threw himself back in his seat and laughed. The Judge laughed. The whole Court laughed.

Care should be taken not to ask a witness questions which will enable him to correct a failure to prove a vital element in his evidence-in-chief. If, for example, a prosecution witness does not come up to his proof in respect of an essential ingredient necessary in the case, leave him alone and rely upon a submission that the case has not been properly proved.

Clitheroe, again, gives advice on cross-examination relating to disputed facts;

> "Where facts are disputed, cross-examine on them; do not merely put the defendant's version. 'I put it to you, Mr. X that my client will say so and so. What do you say to that?' is not cross-examination, but merely giving the witness the chance to repeat his original evidence, thus reinforcing its effect upon the mind of the tribunal. Approach the witness on the basis of the client's account, first testing the witness on the areas peripheral to the essential facts. If doubt can be sown, either in his mind or the mind of the Court, as to the accuracy of his recollection on peripheral facts, it will make more effective the suggestion that his account of the central issue may also be mistaken."

Mr. Justice Finlay, in the same lecture on Advocacy, suggests that the advocate should not follow any sequence in cross examination. He argues that the more logical, consequential or chronological the cross-examination is, the more likely an untruthful witness will be able to anticipate the reasons for the questions and thus be in a position to fabricate the answers.

In submissions on law, unnecessary quotation from authority should be avoided. But be prepared to elaborate if necessary. In final submissions, a claim for good character should never be made if it is patently untrue.

There is a golden rule for the advocate — he is never allowed to mislead the Court. In this context, one Judge[5] gave advice to Counsel, and, indeed, the same advice applies to all advocates. The advocate 'should stick up to the Judge. It is one of his duties to be courageous on behalf of his client using all proper weapons, but no improper weapons'.

After the final submission, the matter is in the hands of the Court or tribunal. Johnson has advice for the advocate at this stage;

> "A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the Judge."

In this context, Mr. Justice Finlay, in the first issue of the (Irish) Criminal Law Review, stresses that the function of the lawyer is not to decide the guilt or innocence of his client. 'He is one cog only in a machine provided for that purpose'. Thus, Mr. Justice Finlay argues that it is 'perfectly possible and correct for the advocate to take part in a trial, notwithstanding a very strong belief, almost amounting to a certainty that his client is guilty.'

Succinctness

There is much to be said for the advocate being short and to the point, both on paper and on his feet. This is particularly so in addressing the Court or tribunal when advancing submissions. Clitheroe, again, in his book 'A Guide to Conducting a Criminal Defence' gives good advice on addressing the Court or tribunal, particularly when making the final submission (speech);

> "To be most effective the speech should be succinct; a wearisome meander through the evidence would only bore and irritate the Court. The human mind accepts and retains a limited number of suggestions in a brief period . . . watch the Bench for signs of wandering attention and, if it occurs, move quickly to some fresh idea which may reawaken interest."

Mr. Justice Finlay, in his lecture on Advocacy to the Society of Young Solicitors, makes the same point:

> "Indeed, across the whole gambit of the craft of advocacy, I think a cardinal principle must be 'Keep your eye on the Judge'."

Mr. Justice Finlay argued that, wherever possible, the advocate should always have at least two alternative arguments, either on law or on the facts to submit to a Court — in case you find yourself on 'the single branch which is lopped off'.

On the question of succinctness, Lord Hailsham, the Lord Chancellor, in the case of *R. V. Lawrence* [1981], 1 All ER 974, referred to the fact that part of the delay in bringing cases to trial was due to:

> "the increasing prolixity in the conduct of cases when they actually come to be heard. It cannot be too often stressed that verbose justice is not necessarily good justice. There is virtue both from the point of view of the prosecution and from the point of view of the defence in incisiveness, decisiveness and conciseness; not only in addressing examination and cross-examination of witnesses, the submission of legal argument, and in summing up. A long trial is not necessarily a better one, if a shorter trial would have sufficed."

In this context, a contributor[6] to The Solicitors' Journal, commenting on Lord Hailsham's remarks in the above case, summed up the practitioner's dilemma;

> "The practitioner, however, knows full well that the argument that prevails with Judge 1 may be rejected by Judge 2, whose mind hovers between arguments 3 and 4. He knows that one Judge will complain if he refers to more than one case, and another Judge will complain if he fails to draw the Court's attention to a particular authority . . . No one intends to be prolix. No one seeks to refer to more authorities than he considers necessary, bearing in mind the not infrequent need to draw attention to adverse decisions. Every barrister is modest enough to know that he is explicit and always to the point, and is astute enough to perceive that it is his opponent who is long-winded and addicted to irrelevance. Such features (or blemishes) are endemic in the legal profession and will probably never change. There will always be those who have the instinct of knowing what are the right arguments that will attract a particular Judge and the ability to make the right noises and there will always be others who . . ."

Richard Du Cann, in 'The Art of the Advocate', argues that prolixity is practically the handmaid of the lawyer. He tells the story of a Judge in past times who had the ledges in front of counsels' seats at the Old Bailey cut away so that they had nowhere to rest their papers:

> "By this simple expedient, the length of speeches was always 'exceedingly small'."

Lord Denning in 'The Family Story' poses the question how do you stop the advocate who goes on too long?

> "The best method is to sit quiet and say nothing. Let him run down. Show no interest in what he is saying. Once you show any interest, he will start off again. Other methods have their uses. Take a few hints from Touchstone. There is the Retort Courteous: 'I think we have that point Mr. Smith' . . . There is the Reply Churlish: 'You must give us credit for a little intelligence, Mr. Smith'. To which you may get the answer 'That was the mistake I made in the Court below'. Next there is the Reproof Valiant: When the advocate said 'I am sorry to be taking up so much of your Lordship's time' — 'Time, Mr. Smith?' said the Master of the Rolls, 'You've exhausted time and trespassed upon eternity'. Next there is the Countercheck Quarrelsome: 'You've said that three times already'. Finally, the Lie Circumstantial and the Lie Direct; 'We cannot listen to you any longer. We will give judgment now' against him."

Delay

Advocates should be conscious of not delaying in bringing matters to a hearing. Judges in the Supreme Court have stressed this recently. Lord Hailsham put it forcibly in the case of *R. V. Lawrence* [1981], I All ER, 974;

> "It is a truism to say that justice delayed is justice denied. But it is not merely the anxiety and uncertainty in the life of the accused, whether on bail or remand, which are affected. Where there is delay, the whole quality of justice deteriorates. Our system depends on the recollection of witnesses, conveyed to a jury by oral testimony. As the months pass, this recollection necessarily dims and juries, who are correctly directed not to convict unless thay are assured of the reliability of the evidence for the prosecution, necessarily tend to acquit as this becomes less precise and sometimes less reliable. This may also affect defence witnesses on the opposite side."

The causes of delay in bringing cases before courts and tribunals are complex and the remedies are not always simple. However, the advocate should always try to ensure an early hearing.

Style

Lawyers talk of the 'style' of an advocate or 'styles of advocacy'. Style is a nebulous quality. Much has been written about style, particularly in the past. Arguably, you recognise style when you hear it — or see it — but sometimes cannot define what the style is, or perhaps ought to be. The writer[7] put it succinctly:

> "Style is the dress of thought; a modest dress,
> Neat but not gaudy, will true critics please."

Sir Walter Scott, himself a lawyer, gave advice to lawyers. Referring to books of history and literature:

> "These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

There is no distinct style in vogue today. Indeed, a particular style may be a distinct handicap for the advocate. Again, Richard Du Cann, in 'The Art of the Advocate', argues that style is not adaptable — and adaptability is everything for the advocate called upon the cross-examine people in every walk of life.

Law School

Advocacy plays an important part in the Law Society's Professional and Advanced Courses for solicitors' Apprentices. Some of the remarks made in this article have already been made to such students. Role playing and mock court situations in both civil and criminal law cases do help in the training of the advocate.

Important Role

The lot of the legal advocate is becoming increasingly complex. His subject matter was aptly described in the Laureate's lines[8] — when he spoke of:

> "The lawless science of our law —
> That codeless myriad of precedent,
> That wilderness of single instances"

The advocate's role and functions are as important and vital today as they ever were. □

Footnotes:

1. Lord Denning in *The Discipline of Law* (Butterworths, 1979).
2. Interview in Evening Press — March 25, 1981.
3. Lord Macmillan, a Lord Advocate-General in Scotland and a member of the Judicial committee of the House of Lords. See DuCann. *The Art of the Advocate* p. 32
4. Lord Justice Lawton in foreword to John Clitheroe's *A Guide to Conducting a Criminal Defence*
5. Lord Denning in *The Family Story* (Butterworths, 1981).
6. Jack Hames Q.C. The Solicitors' Journal, Vol. 125, page 818. (Dec 4, 1981).
7. Samuel Wesley in "An Epistle to a friend concerning Poetry" referred to by Lord Denning in *The Family Story* (Butterworths, 1981) p. 216.
8. Referred to by V. T. H. Delaney in his biography, *Christopher Palles*, (Dublin: Allen & Figgis, 1960) at p. 163.

Incorporated Law Society of Ireland
New Employment Register for Law Clerks

The Society has now established a register of persons seeking employment as Law Clerks — either experienced Clerks or Trainees — Solicitors, existing Law Clerks and those seeking to train as Law Clerks are invited to put their names on the new register by writing to Ms Jean Sheppard, Education Department, Law Society, Blackhall Place, Dublin 7.

Incorporated Law Society of Ireland
Solicitors Employment Register

The Society has on its employment register a number of solicitors, mainly qualified within the past two years, who are seeking employment — both in Dublin and elsewhere in the country. Experience varies from extensive to relatively little. Will any solicitors seeking an assistant pleast contact: Ms Jean Sheppard, Education Department, Law Society, Blackhall Place, Dublin 7.

Century Bridged as High Court Comes to Trim

Reprinted from The Meath Chronicle, with kind permission of The Editor.

Trim has received a major commercial boost with the holding of sittings of the High Court in the local Courthouse after a lapse of almost a century.

On Monday morning, the first day of the two-week long sittings, the town was extremely busy, with cars stretching around the streets adjoining the Courthouse.

The car park at King John's Castle was unexpectedly full on Monday morning, as jurors, barristers, senior counsel and solicitors made their way to the Court sittings.

The chairman of the local Urban Council, Mr Noel Dempsey, who first mooted the idea of holding High Court sittings in the town, called on the powers that be to use Trim as a permanent venue for the Court.

Regular

"I hope there will be more sittings and that it will become a regular feature," Mr Dempsey said, promising that the Urban Council would give every co-operation.

Both Trim and Naas were selected for special sittings of the High Court because of their proximity to Dublin. The decision was taken in a bid to reduce the backlog of cases in Dublin.

Mr Dempsey, resplendent in his chain of office, and Mrs Mary McGuinness, President, Trim Chamber of Commerce, welcomed Mr Justice McMahon and Mr Justice O'Hanlon of the High Court on Monday.

Century

Almost a century previously, on 16th November, 1892, in the precincts of the same Courthouse, Mr Justice O'Brien, otherwise Lord O'Brien of Killinora, later to be known irreverently as "Peter the Packer", and Mr Justice Andrews, were similarly welcomed on the commencement of the trial of the south Meath Parnellite election petition.

In 1892 the Justices travelled by train from the Broadstone station in Dublin to Trim where they were met by an honorary escort of mounted constabulary.

An indication of the mood of the time was that on the same train, in the custody of the governor of Kilmainham jail, was Rev. Fr Fay, P.P., Summerhill, an important witness in the case.

Subsequently, a Judge of the High Court of first instance did not preside in Trim until last Monday.

Many of the leading members of the Irish Bar are engaged in the various proceedings, at present, including Mr Michael O'Kennedy, T.D., S.C., former European Commissioner and Minister for Foreign Affairs and Finance; distinguished Kerry lawyer, Mr Hugh J. O'Flaherty; Mr Peter Sutherland, former Attorney-General to Dr Garret FitzGerald, T.D.; Mrs Valdi McMahon, daughter of short story writer, Mary Lavin, Bective, and Mr John O. Sweetman, a descendent of the strongly nationalist Co. Meath family.

In addition to the historical significance of these hearings, commercial benefit to the town of Trim has been very considerable, according to Mrs McGuinness.

A reception organised by Trim Urban Council and Trim Chamber of Commerce to mark the historic occasion of the sitting of the High Court in the town will be held in the local Wellington Court Hotel, tomorrow (Friday) at 4.30 p.m.

The guests of honour will be Mr Justice McMahon, S.C. and Mr Justice O'Hanlon, S.C., and members of the Irish Bar.

Solicitors' Golfing Society

Captains (David Bell) Prize Milltown Golf Club
1st July 1982

Captains Prize and Golfing Society challenge cup.
Winner: B. Whittaker (4) 38 Pts on 2nd nine.
Runner up: R. Lynam (15) 38 Pts.

Ryan Cup.
Winner: J. McKnight (18) 38 Pts on last 6.
Runner up: A. Grogan (15) 37 Pts.

Under 12.
Winner: T. Shaw (5) 37 Pts.
Runner up: D. Lynch (9) 36 Pts.

1st Nine P. Kearns (10) 22 Pts.
2nd Nine J. McGowan (13) 20 Pts.

More than 30 miles J. Bolger (15) 36 Pts.
Lot C. Coyle (8) 32 Pts.
O. O'Brien (6) 32 Pts.

Left to Right: Mr Noel Dempsey, Chairman Trim Urban District Council, Mr. Justice O'Hanlon, Mrs Mary McGuinness, President, Trim Chamber of Commerce and Mr. Justice McMahon.

Correspondence

22 July, 1982

Mr. J. J. Ivers,
Director General,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

Dear Mr. Ivers,

I am directed by the Minister for Justice to refer to the Solicitors' Remuneration General Order, 1982 which was made by the Statutory Body under the Solicitors' Remuneration Act, 1881 on 1 July, 1982.

It has come to the Department's notice that there are instances where this Order is being interpreted as increasing the fees prescribed therein with effect from 1 July, 1982 i.e. the date the order was signed by the Committee. The Department is anxious to clarify that this is *not* the position.

Under the terms of section 6 of the Solicitors' Remuneration Act, 1881 and section 3 of the Houses of the Oireachtas (Laying of Documents) Act, 1966 such an Order does not come into effect until it has been laid before each House of the Oireachtas and one month or four sitting weeks (whichever is the longer) has elapsed.

The Order was so laid on 5 July, 1982. Two sitting weeks of the Dáil were completed when the House rose on 16 July. At the end of this week — when the Seanad is expected to rise — almost three sitting weeks of that House will have passed. It will be seen, therefore, that the Solicitors' Remuneration General Order, 1982 will not come into effect until the prerequisite statutory period has elapsed following the resumption of the Dáil and Seanad in the autumn.

Your sincerely,

V. O'Donnell,
Department of Justice,
72-76 St. Stephen's Green,
Dublin 2.

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

11 August 1982

Dear Sir,

F.L.A.C. has been offered $5,000 from the Ireland Fund in New York, on the condition that we can match that sum with our own resources. At present, we need to raise approximately £2,000, before December 31st, in order to achieve that. We would be grateful if, through the medium of your publication, we could appeal to solicitors throughout the country for contributions. Whilst realising that it is such a short time since our last appeal, which, thanks to the goodwill of the Legal Profession was most successful, we hope that your readers will realise the worthiness of the cause for which we work.

A contribution of as little as £5.00 from only half the profession would more than cover our present needs and the balance would be put to very good use.

Yours sincerely,

Imelda Reynolds,
Chairperson F.L.A.C.,
3 North Earl St.,
Dublin 1.

The Editor,
Incorporated law Society Gazette,
Blackhall Place,
Dublin 7.

10 August 1982

Dear Sirs,

Your letter in the May 1982 issue from Brendan Fitzgerald deserves comment. He referred to the fact that a decision in a Family Law case in Cork District Court (MTT v NT) had resulted in an invidious situation for the wife and four children and, by some mental process, he managed to blame divorce on that outcome.

Is it not a silly state of legal affairs that divorce legislation in other countries can result in hardship to people in this jurisdiction? Rather than bewailing the state of those victimised by the state of Irish Law, it remains in our power to change the law so as to prevent a recurrence.

The mutual enforcement of maintenance and alimony payments between Britain and Ireland has been a serious problem over a long period of time and this case is just one more example. The matter has arisen in the context of EEC legislation and it appears that no bilateral arrangement is possible, due to the fact that Britain insists on the enforcement of maintenence payments arising out of divorce proceedings, while Ireland argues that this would be contrary to our public policy as a State which does not allow divorce.

The introduction of civil divorce in this country would solve the problem Mr Fitzgerald illustrates, together with most of the other legal problems which beset those involved in marital breakdown.

Yours faithfully,

John O'Connor (Law Student)
14 Merton Road,
Rathmines,
Dublin 6.

Some Old Law Firms

The Gazette of the English Law Society published, in its edition of 23rd June 1982, an article by Mr. Henry G. Button under the above title.

The firms mentioned by Mr. Button, include some of very rare antiquity, including a Hitchin, Hertfordshire firm which was in existence in 1591 and he mentions an "even older" firm in Tonbridge, Kent.

Mr. Button has now extended his research to the Republic of Ireland and has invited members to let him have any available information concerning the older firms in this country.

Any interesting or potentially useful information should be sent to Mr Button at 7 Anderson Court, Grange Road, Cambridge CB3 9BH □

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 20th September 1982

W. T. MORAN (Registrar of Titles)

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

---

1. REGISTERED OWNER: Derek W. Drew and Gwyneth Drew; Folio No: 2227F; Lands: Lands of Sheepmoor in the Barony of Castleknock; Area: — — —; County: **DUBLIN.**
2. REGISTERED OWNER: Florence McCarthy, Kilbeacanty, Gort, Co. Galway; Folio No: 6833F; Lands: (1) Kilbeacanty, (2) Kilbeacanty; Area: (1) 1a. 0r. 0p., (2) 0a. 3r. 29p; County: **GALWAY.**
3. REGISTERED OWNER: Edward Redmond; Folio No: 1321; Lands: Knocknavey; Area: 14a. 1r. 2p.; County: **WEXFORD.**
4. REGISTERED OWNER: Thomas John Wilson & Others; Folio No: 145; Lands: Monygorbet; Area: 9a. 1r. 20p.; County: **MONAGHAN.**
5. REGISTERED OWNER: Eileen Jackman; Folio No: 7334; Lands: (1) Knockboy, (2) Knockboy; Area: (1) 5a. 2r. 5p., (2) 35a. 3r. 0p.; County: **WATERFORD.**
6. REGISTERED OWNER: William McAuley; Folio No: 2835F; Lands: Manorcunningham; Area: 4a. 2r. 34p.; County: **DONEGAL.**
7. REGISTERED OWNER: James Peter Cox. Folio No: 7232L; Lands: townland of Ballincollig and Barony of Muskerry East; Area: ——; County: **CORK.**
8. REGISTERED OWNER: Bernard Carroll and Bernadette Carroll; Folio No: 18596; Lands: "The Stables", Springfield Farm, Carrickmines, Co. Dublin; Area: ———; County: **DUBLIN.**
9. REGISTERED OWNER: Bridget O'Donnell; Folio No: 9762; Lands: Ballykinerd; Area: 33a. 1r. 12p. County: **DONEGAL.**
10. REGISTERED OWNER: Peter Barnes; Folio No: 10963; Lands: Rogerstown; Area: 85a. 0r. 33p.; County: **MEATH.**
11. REGISTERED OWNER: John Kelly (otherwise known as John P. O'Kelly); Folio No: 11816, now closed to 9360F; Lands: (1) Rosskagh West, (2) Rosskagh West. Area: (1) 74.250a. (2) 76.500a. County: **LIMERICK.**
12. REGISTERED OWNER: Leo McGinley; Folio No: 21299; Lands: (1) Ballyconnell, (2) Ballyconnell; Area: (1) 0a. 1r. 14p., (2) 5a. 1r. 14p.; County: **DONEGAL.**
13. REGISTERED OWNER: Kathleen Kelly; Folio No: 2718; Lands: Greaghnafarna; Area: 58a. 2r. 0p.; County: **LEITRIM.**
14. REGISTERED OWNER: John Cullen; Folio No: 16309; Lands: Srah; Area: 0a. 0r. 39p. County: **OFFALY.**
15. REGISTERED OWNER: James Doherty; Folio No: 8090; Lands: Bohullion Lower; Area: 61a. 2r. 0p.; County: **DONEGAL.**
16. REGISTERED OWNER: Lucy Rourke. Folio No. 6076. Lands: Graigue. Area: 0a. 0r. 32p. County: **QUEENS.**
17. REGISTERED OWNER: Michael Casey, Gortmore, Inch, Co. Clare. Folio No. 12418. Lands: (1) Gortmore (part); (2) Gortmore (one undivided twelfth part of the other part). Area: (1) 24a. 2r. 37p.; (2) 0a. 1r. 38p. County: **CLARE.**
18. REGISTERED OWNER: Sean Lane (deceased). Folio No. 56831. Lands: Ardmore. Area: 0a. 2r. 0p. County: **CORK.**
19. REGISTERED OWNER: Patrick Goss. Folio No. 12296 closed to 2556F. Lands: (1) Carrickcarnan; (2) Carrickcarnan. Area: (1) 12.544 acres; (2) 5.116 acres. County: **LOUTH.**

Lost Wills

Mitchell, G. Constance F., deceased. Will anybody knowing the whereabouts of the original will, dated 12 August, 1977, of the above named deceased, please contact immediately Messrs. F. F. Callinan & Co., Solicitors, 6 Bindon Street, Ennis, Co. Clare.

Employment

Solicitor seeks challenging position. Served good working apprenticeship and excellent 19 months post-qualification experience in most aspects of the law. C.V. and references available. Phone (055) 21887.

Solicitor (aged 34) in sole practice since 1973 seeks position/partnership, Dublin or Country. Reply to M. O'Shea, A.C.A., 70 Upper Georges St., Dun Laoghaire, Co. Dublin.

Retired Lady. 30 years experience Legal Department. Will do 4/6 hours typing per week. Clontarf area. Has own electric typewriter an phone. Reasonable fee. Box No: 039.

Miscellaneous

For Sale Adler T20 visible record computer with programmes for Solicitors' Accounting. Please contact Post Office Box 19, Galway.

Professional Information

CHANGE OF ADDRESS

MESSRS. SEAN O'hUADHAIGH & SON, Solicitors, have moved from 5 South Leinster Street to 20 Eden Quay, Dublin 1. Tel 745454/5/6.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76. No.8 October 1982

Where There's a Will . . .

WHEN the Law Society was considering following the example of two quite similar countries, Scotland and New Zealand, where campaigns had been mounted by the legal profession to encourage more people to make wills, it was spurred on by statistics for the Republic of Ireland furnished by the Probate Office. The Society was shocked to find that over 42% of grants, for the most recent year for which figures are available, were issued in cases of intestacy. While it might be argued that, in the absence of any requirement to register wills, there may well have been untraced wills in cases where intestate grants were issued, any such untraced wills may conceiveably have been matched by the number of cases where people died testate but without sufficient assets to require a grant to be taken out. The important feature of the statistic is that, of all cases in which a grant was actually required, 42% were intestacies.

While there may be some people who delay in making wills because they cannot make up their minds on the precise distribution of their assets, this can hardly explain the high percentage of defaulters. The inescapable conclusion is that, for too many people, the making of one's will involves an element of "signing one's death warrant". It is clearly the duty of the legal profession to disabuse clients of this feeling and to endeavour to ensure that the client looks after his affairs in the best way possible.

It cannot be likely that many people would like their assets distributed in exactly the way prescribed by the Succession Act for intestacies. It is certain that few childless couples would be happy to see the "in-laws" get all of one party's assets in the event of the couple dying intestate, one after the other — perhaps as a result of a road accident.

If a person has a particular obligation, such as looking after or maintaining a handicapped child, or aged or infirm relatives, or if there is a problem member of a family who cannot be trusted to manage things wisely, a well drawn will can, in most cases, ensure that, so far as available assets permit, proper provision can be made for the protection of the problem member. In such circumstances an intestacy would be a disaster. In passing, it must be hoped that whatever taxation levels may be imposed on discretionary trusts will not result in their ceasing to be available to cope with the handicapped child or the problem member of the family, or to simplify the difficulty of predicting which of several children is likely to need the greatest share of an estate.

People should make wills, not perhaps "early and often", but certainly "early", in the sense of making a will as soon as they marry or acquire sufficient assets to require administration. The purchase of a house, even one mortgaged to the hilt, is obviously an appropriate occasion for the making of a will. Wills should be revised from time to time on a regular basis, as the circumstances of the will maker and the family alter.

Even if there are no obvious problems, the parents of young children will avoid considerable difficulty if wills are made.

Finally, if any other argument were needed in the cause of will-making, it is cheaper and administratively simpler, not perhaps for the will-maker, but certainly for the estate, to have a grant of probate issued rather than a grant of administration intestate.

Solicitors' fees for drawing wills have traditionally been very modest — seen as "loss leaders", no doubt — but even in these days of more realistic charging

(Continued on P. 176)

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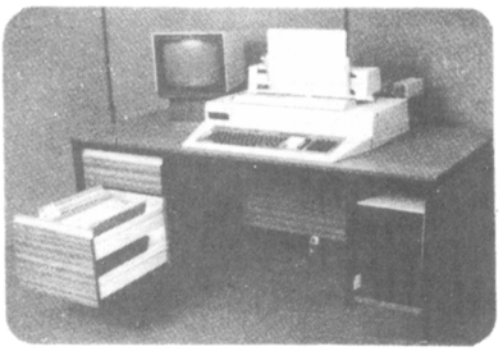

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76. No.8 October 1982

In this issue...

Published at Blackhall Place, Dublin 7.

Comment...

A new era — the V.A.T. era — is upon us. By now, hopefully, the initial trauma has passed but, as yet, insufficient experience has been gained of the problems of administering the system.

Several things have, however, become clear and, in some instances, all too clear. At the time of writing, it is reported by the V.A.T. authorities that, of the Dublin solicitors, only about fifty per cent have as yet registered themselves for V.A.T. To postulate that fifty per cent of Dublin solicitors have a gross turnover of less than £15,000 per annum is to draw the long bow and the only tenable explanation has to be that a number of heads are still buried in the sand.

It seems to be agreed by a substantial majority of solicitors and their accountants that, ideally, the "cash" basis of accounting for V.A.T. is the most advantageous — or the least disadvantageous, depending upon the point of view. Pragmatic considerations have, however, tended to be the final arbiter in the decision of whether to opt for the "cash" or "invoice" basis; most practitioners realised well before the end of August that it would be impossible to reduce their Debtors' Ledgers by the end of that month to a figure upon which they could, with any equanimity, offer the Revenue a gratuitous 18% tax! Thus, a large number of solicitors has opted for the "invoice" basis of accounting, coupled with a vague intention of changing to the "cash" basis when — and if — the level of the Debtors' Ledger, and other circumstances, permit.

Clearly, the profession was unanimous in its feeling that, whatever basis was adopted, it owed its clients a duty, so far as possible, to save them from becoming liable to bear unnecessary V.A.T. Much midnight oil was burnt in costing, invoicing and collection prior to 31st August.

Equally clearly, the very considerable but short-term labour involved in mitigating the clients' V.A.T. liability will be more than matched by the additional long-term accountancy and administrative procedures which will be necessary in order to present to the Revenue the two-monthly V.A.T. Returns. Depending upon the existing form of book-keeping and accountancy, the additional procedures will vary. Kalamazoo has produced completely revised Accounts stationery, to replace its previous system; certain computerised accounts systems are already, or can be modified so as to be, able to handle

(Continued on P. 175)

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Expediting the Administration of Estates

An edited version of a paper by Peter H. Quinlan M.B.A., Solicitor.

SOLICITORS have a growing concern about the increasing complexity of administering estates, the high labour input required and the impact of inflation on the cost of doing the work. Clients are often disappointed by the length of time sometimes taken to complete an administration and exasperated by the real or apparent inactivity of those who are doing the job, as well by a lack of communication.

There are times when the client's views are justified and an analysis of the way in which many administrations are conducted yields evidence of the following problems:—

1. Acceptance of work by solicitors without their considering whether it can be carried out by them at levels of reasonable competence and cost, and their ignoring factors that may create undue complexity or volume of work.

2. Administering estates on the basis of single general correspondence files which are allowed to accumulate unstructured, apart from date sequence, and which often become hopelessly unwieldy. Those involved hope that this file, if analysed with sufficient perseverance, will in some way produce the variety of specific information required for the range of financial analyses and reports such as cash budgets, tax returns, administration accounts, etc. which will be needed during the administration.

3. Failure to appreciate that administration is no longer primarily a distribution and accounting exercise, centered on computation of the residue, and which a competent book-keeper could handle. Now the additional taxes to be accounted for not merely add an extra limb to the work of administration but greatly complicate the distribution accounting itself and increase the need for collecting and arranging information systematically.

4. The absence of any overall plan or strategy for the conduct of a particular case. There should always be an overall plan or strategy to take account of the three main aspects of any estate, namely (i) the entitlements and needs of beneficiaries, (ii) the type and quantity of assets and liabilities (iii) capital tax burdens (if any) so that optimal decisions can be taken for beneficiaries. Such a plan should be formulated as early as possible, because it will involve specifying the main steps to be taken in handling assets, the main financial reports and tax returns that will be required and, accordingly, the structure of information and records.

5. Failure to break down the work into different types of activity, thus limiting the extent to which activities can be delegated.

It is easy to say that the overall objective in the administration of estates should be to distribute as much as possible as quickly as possible, to beneficiaries and to obtain an acceptable level of profit for the solicitor. However, the statement of overall objectives in such terms does not give much help in any particular case: becuase the intervening work activities between the start and finish of a case have not been identified; because such overall objectives are not sufficiently specific to provide guide lines for the intervening work activities — professional, clerical and accounting, that are involved. In order to be helpful they must be restated in terms of the work steps that comprise an administration. Examples of intervening objectives might be: specify what steps are necessary for each case; decide best methods for collecting information efficiently; structure all records to facilitate management of activities and preparation of financial reports.

Adopting a Systematic Approach

It is suggested that a simple and effective system for the administration of estates can be put into operation without difficulty.

The following activities are identifiable as the essential core of administration work.

1. Take instructions.
2. Decide overall strategy.
3. Collect detailed information to ascertaining (a) the title of the persons involved (e.g. Personal Rep., Beneficiary, Creditors) and (b) the amounts and values of assets, debts and legacies.
4. Summarise and arrange this information in (i) the Schedule of Assets (ii) the Administration Record.
5. Prepare tax returns.
6. Obtain Grant of Probate or Administration (or alternative title document e.g. death certificate, or specially negotiated title, where the holder of the asset waives requirement to furnish Grant).
7. Exhibit the Grant (or alternative title document).
8. Collect assets; record cash in Lodgments File.
9. Review correspondence files. Write up Administration Record.
10. Preparation of cash budget and computation of residue.
11. Discharge of debts, legacies and residue.
12. Review correspondence files and write up

Administration Record.

13. Report to client on sources and application of assets.

Having analysed the various activities involved, it is suggested that by the use of a systematic method of keeping records, considerable improvements in efficiency may be achieved.

Keeping of Adequate Records

It is suggested that a General Correspondence File be opened in the normal way, supplemented by a "Lodgments File" and two documents folders, entitled "Tax Documents Folder" and "Probate and Title Documents Folder".

The folder entitled Lodgments File is to be opened when the first cash is collected to accumulate, in date sequence, the letters or dockets covering all lodgments to the solicitor's Client Bank Account and the executors' or administrators' Bank Account. the Lodgment File will avoid the confusion and extra work which arise, for example, where there is no record of several sources which make up a composite lodgment, or where a net receipt is noted but there is no record of the gross funds originally received. This in date order file obviates the need for a separate journal or cash book and enables easy reconciliation of bank statements.

It may be advisable to open a separate file for material relating to continuing Estate income and the accounting for Income Tax thereon.

The Tax Documents Folder will contain copies of all tax returns — in practice, mostly those relating to Capital Taxes handled by the solicitor including various communications from the Revenue, such as Queries, Observations, Receipts and Discharges. Its purpose is to marshal at one point all material relating to the valuation of property, the size of gifts, inheritances and other disposals, and assessments of tax, in order to help the solicitor in his negotiations with the Revenue and so that he can check with ease what receipts and discharges have been issued.

The Probate and Title Documents Folder would, prior to the extraction of the Grant, hold draft probate documents and any title documents, Irish and foreign, such as Stock and Shares certificates, deposit account pass books, Insurance policies, Prize Bonds and title deeds.

Foreign Probates or their equivalent normally require sealed and certified copies of an originating Irish Grant as a base for applications. Jointly owned assets, insurance policies and some pension schemes require death certificates as a proof of death. Foreign countries, such as South Africa, Australia, U.S.A. and Malaysia have their own tax clearance documents to be completed before permission to transfer can be obtained. In other cases, where the value is relatively small and the title clear, the institution holding an asset may agree to release it upon the execution of an indemnity and the furnishing of a letter of clearance from the Revenue.

As soon as the title of the personal representative has been established by obtaining the Grant (or alternative title document), the Probate and Title Documents Folder should have added to it all documents that have to be exhibited and noted by registrars before the title of the personal representative can be registered, including copies of Grants, Irish and foreign; death certificates; indemnities; letters of clearance from Irish and foreign Revenue authorities; insurance policies; bank and building society pass books, withdrawal forms, and pay orders; stock and shares certificates and transfers or letters of request for registration.

These are all documents that have to be "sent out" before the assets concerned can be collected. Accordingly it is convenient to group them together. They act as visible reminders of what is outstanding. If there is in this Folder a spare copy of the Grant and a share certificate still in the name of the deceased, these documents should be sent out without delay and not left lying in the Folder.

Bills Payable

Where there are liabilities to be discharged when assets are realised, it may be convenient to collect all bills in the Probate and Title Documents Folder, because these bills must also be "sent out" with cheques as soon as funds are available.

Coding of Files

For ease of identification of files and folders, separate colours of File covers may be used for each category, e.g. General Correspondence — buff, Lodgment file — blue, Probate and Title Documents Folder — pink, Tax Documents Folder — green.

The Administration Record

In addition to the separate Files and Records Folders, it is suggested that, an Administration Record be set and maintained. The Administration Record is the kernal of the operation of the system. It enables a person coming fresh to the case, or coming back to the case after an absence to see, at a glance, exactly how far the various steps have progressed. It should contain:

(a) an Epitome of reference information, structured to tell in simple profile who and what is involved — particulars of all groups of assets, who is entitled to and who manages them; and the names of professional advisers, accountants and stockbrokers.

(b) a Check List, that in turn enables the preparation of

(c) a Chart listing the main Documents to be processed (Probates, Exchange Control Permission, etc.), and the sequence of stages by which each is to be progressed — drafted, signed, lodged, etc.;

(d) the three final sections of the Administration Record are (i) the Assets Account which describes the assets and records how and when they are collected and (ii) Debt and Legacy accounts, which list debts and legacies and how they are discharged, thus enabling an ongoing Balance Sheet to be maintained.

The use of the Administration Record greatly facilitates the winding up of Estates and Trusts, because so many of the activities involved are predictable and "plannable". When the Schedule of Assets is prepared, a list of the persons involved (settlor, per reps, beneficiaries, creditors) and the opening Balance Sheet items and values are all available. It is this stage, that the Administration Record should be first written up. Later, it will save an enormous amount of time that would otherwise be

wasted in trying to dig out masses of details often buried in correspondence. It will also make it much easier to pick up the threads again after stoppages because the Administration Record provides — laid out in simple form — a cross section of all the detail which will be required for ongoing decisions and reports.

A properly maintained Administration Record progressively builds up what is almost a draft Administration Account, without need for many changes.

It is not suggested that the Administration Record should be written up after every transaction — this would obviously be a great waste of time. It is suggested that information be extracted from the General Correspondence and Lodgments files and transferred to the Administration Record at logical break points — first, for example, when the Schedule of Assets is completed (when the opening balance sheet is available); second, when most assets have been collected — to see what is available for debts and legacies and what is outstanding; third, at the discharge stage, to ensure this is complete.

The system represents a satisfactory working compromise between having no book-keeping on the one hand and full continuous accounting treatment (balance sheet, journals, asset and liability accounts) on the other hand — a compromise that should be effective in terms of performance and economic in terms of cost.

Winding-Up and Report

Since the Administration Record records the extent to which all assets, legacies, and debts have been dealt with, it tells the Solicitor when any stage has been reached at which it would be appropriate to prepare a Report. It also highlights any items outstanding which need attention and which may be holding up the Report and final winding-up, without the need for wading through masses of correspondence.

When it is decided to make a Report, the solicitor will find that he has in his Administration Record and Lodgments File convenient and ready structured lists of all the items he needs to include.

Delegation

By the use of such a system, constant delegation is easily achievable by breaking administration work down into its basic tasks — obtaining valuations, circulating Grants, paying bills — which can then be delegated and checked off periodically in the Administration Record.

Standard and Printed Letters

There is also a strong case, if effective delegation is to be achieved, for standard letters, memos and receipt forms to be prepared. Many letters sent in Administration cases are so similar that the use of a printed form of letter or of a word processor, to produce similar though not identical letters, would be of advantage.

Wide Front Reduces Time

Many of those working in administration insist on completing all activities in sequence.

For example, they may pass the Irish Schedule of Assets and extract Irish Probate before lodging the English or foreign schedules, which could have been passed at the same time as the Irish — and they may wait until the winding up stage before starting to deal with Income Tax. Unnecessary working in sequence merely extends the total time it takes to complete an administration. It should be possible to undertake many activities in parallel. Work should always be progressed on the broadest possible front, which will reduce in width as successive stages are completed. This is greatly facilitated by having an effective control system such as that suggested here.

The systems proposed above are, of course, infinitely variable and can be tailored to suit the circumstances of any individual practice. The thing is to have effective planning and essential control which will enable efficient administration of estates and save it from becoming a "poor relation" of other activities in the office. □

Comment . . . .

(Continued from P. 171)

the additional V.A.T. procedures. The greatest difficulty will probably arise in adapting the many and various mechanical or electronic (but non-computer) accounting machines that have no capacity for an additional V.A.T. function. Such systems, which at present perform very simply and satisfactorily, will, in many cases require to be supported by a range of additional books of "first entry", which must be maintained by hand and which will necessarily entail a very considerable input of book-keeping time.

In terms of cost economics, many practices may conclude that the time has come to consider installing a completely new — and, preferably, computerised — Accounts system.

As it has been explained to the profession that solicitors have been brought into the V.A.T. net in order to conform with E.E.C. regulations and agreements, it is worth remarking that the conformity would seem to begin and end with the principle. The rate of V.A.T. imposed in this Country — 18% — would appear to be the second highest in the E.E.C. (the lowest V.A.T. rate being that of Germany, at 5%), which confers upon us the distinction of boasting the second highest rate of V.A.T. and the highest rate of Stamp Duty.

And it should also be clearly understood that the introduction of the solicitors' profession into the V.A.T. system costs the profession nothing more than the additional administrative trouble involved. It is our clients who pay; regrettably, the increased cost of law must inevitably fall hardest upon that section of the community which needs law most. □

Where There's a Will . . .

(Continued from p. 169)

for will-making, the solicitor's fee will not come anywhere near the premium for an administration bond in the average intestate estate. Premiums for bonds must now range between £50 — £100 in the majority of cases. Suspecting that claims under such bonds were rare, the Law Society enquired from the Federation of Insurers of Ireland about the level of claims brought under such bonds, to be met with the reply that the companies did not keep records in a form which enabled such information to be extracted! The suspicion grows that these bonds may provide a lucrative source of income to insurance companies, with little risk.

Even if such premiums were reduced substantially, or the requirement for an administration bond abolished entirely, it would not affect the basic proposition that everybody who has dependants and who has sufficient assets to require a grant of representation in order to establish the title of the personal representative to deal with these assets, should make a will. It is as much an obligation to one's family as arranging for their housing or education. Failure to make a will may lead to insurmountable difficulties for the survivor. The size of the problem is so substantial that a major push is clearly required to persuade would-be defaulters to mend their ways and make their wills, but it is a campaign which will require to be continuously pressed, most noteably by members of the profession, at every suitable opportunity. □

BILLS INTRODUCED

in the Dáil Sittings: 22—27 January; 9 March — 1 April; 28 April — 16 July, 1982, and Seanad Sittings: 19, 20, 21 January; 26 March — 6 April; 16 April — 22 July.

Title of Bill	Effect	Introduced	Present Position	No. of Act
Social Welfare Bill, 1982	To amend and extend the Social Welfare (Consolidation) Act, 1981.	22/3/82 (Dáil)	Passed by both Houses of the Oireachtas 26/3/82.	No. 2 of 1982
Housing Private Rented Dwellings Bill, 1982 (plus Explanatory Memo.)	Following the Supreme Court decision in *Blake and Madigan v. the Attorney General* 29 June 1981 which held that Parts II and IV of the Rent Restrictions Act, 1960, were unconstitutional — to provide tenants of dwellings controlled under the Rent Restrictions Acts 1960 to 1981, with a measure of security of tenure, to set up a mechanism for the fixing of rents of such dwellings by the District Court if the rents are not agreed between the landlord and tenant and to provide for the payment of rent allowances in certain cases to tenants meeting increased rents.	25/3/82 (Dáil)	Passed by both Houses 13/5/82	No. 6 of 1982
Rent Restrictions (Temporary Provisions) (Continuance) Bill, 1982	To extend to 25 July 1982 the provisions of the Rent Restrictions (Temporary Provisions) Act, 1981, which was enacted following the Supreme Court decision in *Blake and Madigan v. the Attorney General* 29 June 1981, to provide protection for tenants against eviction and to prohibit the enforcement of rent increases notified on or after 18 April 1980. The Act was required to give time for the preparation of the Housing Private Rented Dwellings Bill. (see above).	31/3/82 (Dáil)	Passed by both Houses of the Oireachtas 6/4/82.	No. 4 of 1982
Courts (Amendment) Bill, 1982	To amend the Courts Act, 1981, by postponing for a further twelve months the coming into operation of certain sections of that Act.	23/4/82 (Dáil — Private Members Bill)	Withdrawn 4/5/82	
Prevention of Electoral Abuses Bill, 1982	To amend section 3, of the Prevention of Electoral Abuses Act, 1923. (Definition of personation.)	30/4/82 (Dáil)	Passed by both Houses of the Oireachtas 13/5/82.	No. 5 of 1982
Local Government (Building Land) Bill, 1982 (plus (Explanatory Memo.)	To enable Local Authorities to designate land required for development and to enable a Local Authority to acquire land at existing use value in the forthcoming five years. Provides for the establishment of a Lands Tribunal chaired by a Judge of the High Court to determine questions of compensation where the owner of land and the Local Authority cannot reach agreement.	5/5/82 (Dáil — Private Members Bill	At second stage reading. Joint Committee on Building Land set up 15/7/82 to report by 30/9/83	
Irish Shipping Limited Bill, 1982	To provide for guarantees by the Minister for Finance in respect of moneys payable by Irish Shipping Limited in respect of guarantees given, or under contracts entered into, by Irish Shipping Limited.	6/5/82 (Dáil)	Passed by both Houses of the Oireachtas 19/5/82	No. 8 of 1982
Postal and Telecommunications Services Bill, 1982 (plus Explanatory Memo.)	To provide for the establishment of two State-sponsored bodies — An Post and Bord Telecom Eireann — to manage the postal and savings services and telecommunications services respectively. Implements the White Paper "Reorganisation of Postal and Telecommunications Services" (Prl. 9805).	11/5/82 (Dáil)	Second stage passed 7/7/82	
National Community Development Agency Bill, 1982 (plus Explanatory Memo.)	To establish a body to be known as the National Community Development Agency the functions of which will be to encourage and financially support community development and activity, to co-ordinate the work of statutory bodies and voluntary agencies in the field of poverty and social deprivation and to undertake research and advise the Minister on policies and programmes of self-help in these areas.	20/5/82 (Dáil)	Passed by both Houses of the Oireachtas 22/7/82	No. 20 of 1982

Title of Bill	Effect	Introduced	Present Position	No. of Act
Finance Bill, 1982 (plus Explanatory Memo.)	To charge and impose certain duties of customs and inland revenue (including excise), to amend the law relating to customs and inland revenue (including excise) and to make further provisions in connection with finance.	20/5/82 (Dáil)	Passed by both Houses of the Oireachtas 14/7/82.	No. 14 of 1982
British & Irish Steam Packet Company Limited (Acquisition) (Amendment) Bill, 1982	To provide for the purchase of additional shares in the Company by the Minister for Finance and to increase the limit of the Ministerial guarantee of borrowing by the Company. Amends and extends the British & Irish Steam Packet Company Limited (Acquisition) Acts, 1965 to 1979.	19/5/82 (Dáil)	Passed by both Houses of the Oireachtas 9/6/82	No. 9 of 1982
Urban Development Areas Bill, 1982 (plus Explanatory Memo.)	To provide for the establishment of urban development commissions to secure the regeneration of designated urban areas. Designates the Custom House Docks site in Dublin and the medieval walled city area of Dublin as urban development areas and empowers the Minister to designate other areas by order.	19/5/82 (Dáil)	Second stage passed 16/6/82	
Irish Steel Holdings Limited (Amendment) Bill, 1982 (plus Explanatory Memo.)	To increase the authorised share capital of the Company, to increase the value of the shares which the Minister for Finance may take up and to increase the limit of the Ministerial guarantee of moneys borrowed by the Company. Amends and extends the Irish Steel Holdings Limited Acts, 1960 to 1979.	9/6/82 (Dáil)	Passed by both Houses of the Oireachtas 7/7/82	No. 13 of 1982
Companies (Amendment) Bill, 1982 (plus Explanatory Memo.)	To implement the provisions of the E.E.C. Second Directive on company law. The Directive stipulates procedures for the formation of public companies limited by shares or limited by guarantee and having a share capital and regulates the subscription, maintenance, increase or reduction of their capital. The aim of the Directive is to ensure, throughout the E.E.C., minimum equivalent protection for both the shareholders and creditors in relation to the capital of such companies. The Bill also provides for companies changing between limited and unlimited status.	10/6/82 (Seanad)	Passed by Seanad Éireann 1/7/82	
Trade Disputes (Amendment) Bill, 1982 (plus Explanatory Memo.)	To amend section 5 (3) of the Trade Disputes Act, 1906 (Definition of "workmen").	11/6/82 (Dáil)	As introduced.	
Fuels (Control of Supplies) Bill, 1982 (plus Explanatory Memo.)	To amend the Fuels (Control of Supplies) Act, 1971, to enable the Minister to require that oil companies and other oil importers purchase a percentage of their total requirements from the State-owned Whitegate refinery.	14/6/82 (Dáil)	Passed by both Houses of the Oireachtas 15/7/82	No. 18 of 1982
Community Service Orders Bill, 1982 (plus Explanatory Memo.)	To introduce a new penal measure, the Community Service Order, whereby an offender, of 16 years of age or over, who is convicted of a criminal offence may be ordered by the Court to perform unpaid work for the benefit of the community.	16/6/82 (Dáil — Private Members Bill	As introduced.	
Criminal Justice (Community Service) Bill, 1982 (plus Explanatory Memo.)	As above. Differs in some details.	17/6/82 (Dáil)	As introduced.	
Gas (Amendment) Bill, 1982	To increase borrowing powers of the Gas Board and to increase the limit of the Ministerial guarantee of borrowings by the Board. Amends and extends the Gas Acts, 1976 and 1980.	16/6/82 (Dáil)	Passed by both Houses of the Oireachtas 14/7/82.	No. 17 of 1982
Local Government (Planning and Development) Bill, 1982 (plus Explanatory Memo.)	To amend Section 29 of the Local Government (Planning and Development) Act, 1976 (which imposes limits on the duration of planning permissions); to make provision regarding the validity of certain permissions and approvals granted on appeal; to enable the Minister to issue general policy directives as to planning and development to planning authorities as well as to An Bord Pleanala and to provide for other related matters.	15/6/82 (Dáil)	Passed by both Houses of the Oireachtas, 22/7/82.	No. 21 of 1982

Title of Bill	Effect	Introduced	Present Position	No. of Act
National Heritage Bill, 1982	To establish a body to be known as the National Heritage Council whose function will be to identify, preserve and develop for the benefit of the public specified areas of the national heritage, the maintenance and development of which was formerly vested in other bodies, such as the Commissioners of Public Works, by various public and private Acts. The Minister may by order confer additional functions of a similar nature on the Council.	15/6/82 (Seanad)	As introduced.	
Electricity (Supply) (Amendment) Bill, 1982	To increase the Board's power of borrowing, including foreign borrowing; to provide for the Ministerial guarantee of such borrowings and to provide for other related matters. Amends and extends the Electricity (Supply) Acts 1927 to 1981.	21/6/82 (Dáil)	Passed by both Houses of the Oireachtas 22/7/82.	No. 22 of 1982
Sugar Manufacture (Amendment) Bill, 1982	To increase the share capital of the company; to increase the value of the shares which the Minister may take up, and to provide for other related matters. Amends and extends the Sugar Manufacture Acts, 1933 to 1973.	18/6/82 (Dáil)	Passed by both Houses of the Oireachtas 15/7/82	No. 19 of 1982
Rates on Agricultural Land (Relief) Bill, 1982 (plus Explanatory Memo.)	To provide for the full derating of land in 1983; to give effect to the new scale of rates relief for land holders which is to apply in 1982; and to validate improvements in relief advanced in 1981 and 1980. Amends and extends the Rates on Agricultural Land (Relief) Acts, 1939 to 1980.	21/6/82 (Dáil)	As introduced.	
Gas Regulation Bill, 1982 (plus Explanatory Memo.)	To up-date some aspects of the legislation governing existing gas companies to give the companies a greater degree of flexibility in their operations. It is an interim measure designed to facilitate, in particular, companies which are already taking natural gas or will be doing so shortly. Work on a comprehensive Act to replace all the widely dispersed gas company legislation is due to commence shortly. (Explan. Memo.)	25/6/82 (Dáil)	Passed by both Houses of the Oireachtas 14/7/82.	No. 16 of 1982
Local Authorities (Officers and Employees) Bill, 1982 (plus Explanatory Memo.)	To amend and extend the Local Authorities (Officers and Employees) Acts, 1926 and 1940 to enable the Local Appointments Commissioners to resume the practice of giving extra credit to candidates, at competitions conducted by them, who possess a knowledge of one or both the official languages (Irish or English) and to provide for other related matters.	5/7/82 (Dáil)	As introduced.	
Insurance Bill, 1982	To enable the Minister to regulate rates of commission payments of holders of licences and authorisations and to provide for other related matters. Amends the Insurance Acts 1909 to 1981.	6/7/82 (Seanad)	As introduced.	
Bankruptcy Bill, 1982 (plus Explanatory Memo.)	To consolidate and modernise the entire statute law relating to bankruptcy. Based mainly on the recommendations of the Bankruptcy Law Committee Report, 1972 (Prl. 2714).	6/7/82 (Dáil)	As introduced.	
Social Welfare (No. 2) Bill, 1982 (plus Explanatory Memo.)	To provide that where a person is disqualified for unemployment benefit or assistance on the grounds that he is involved in a trade dispute, he may apply for an adjudication to a tribunal that he has been unreasonably deprived of his unemployment benefit. Provides for the establishment of a Tribunal.	7/7/82 (Dáil)	Passed by both Houses of the Oireachtas 22/7/82.	No. 23 of 1982

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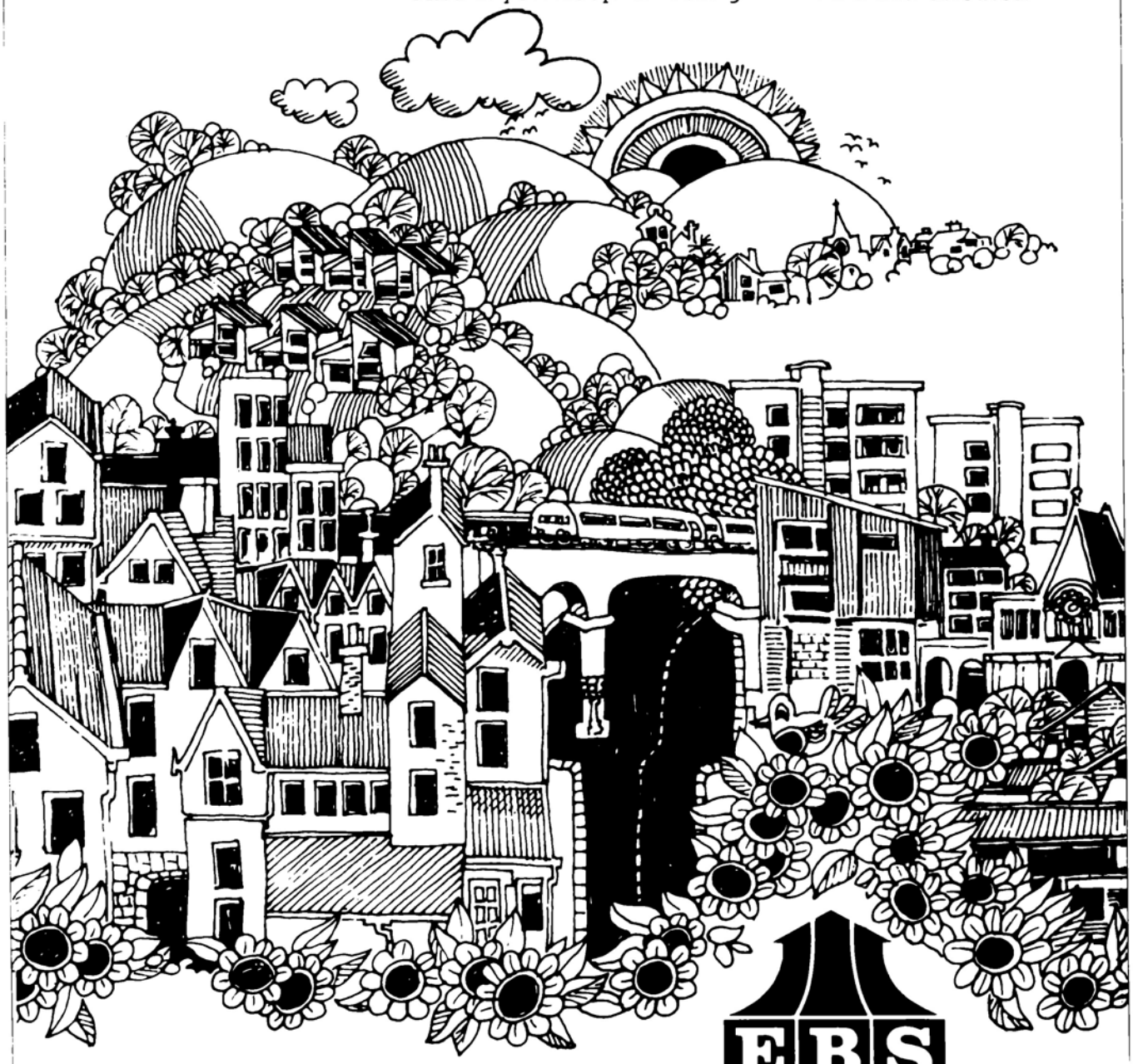

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KENNYS

Instructions for the Rural Will

by

Donal G. Binchy, Solicitor

WE can hope, with some confidence, that the Law Society's "Make a Will Week" will help to overcome the natural reluctance of many people to make Wills and convince people of the genuine necessity to make proper testamentary provision for their families. In turn, solicitors must be ready to meet the challenge by drawing wills that suit the circumstances and requirements of our time.

Historically, the earliest known will is apparently attributed to Noah. Not merely was he reputed to have made the first will, but he also had the largest estate ever recorded. He bequeathed the world between his three sons! Anyone who disputed this was denounced as a heretic by a fourth century Bishop. Noah did not, however, have to contend with the Succession Act, Estate Duty or Capital Acquisitions Taxes, nor with the complexities of agricultural values and tax-free thresholds.

For the modern man, life has become complex. Most people today have some small share of the world's goods, in the form of a house, its contents, a car, insurances and possibly death benefits from their employment. If a will is not made, then this property is divided arbitrarily according to the laws of intestate succession.

The primary purpose of this article is to consider the tax implications that arise in taking instructions for a will, with special emphasis on the rural scene. Clearly, the main tax consideration is Capital Acquisitions Tax, although some considerations of Capital Gains Tax may also be necessary, especially in the context of discretionary trusts. What, then, should be the approach of the modern solicitor? I think it can be summarised as follows:—

1. Take proper instructions, with particulars of:—
   (a) the testator's family and the ages and circumstances of each of them;
   (b) the testator's assets;
   (c) the testator's wishes as to the distribution of his property and as to the appointment of executors.
2. These particulars will identify whether a testator is meeting his obligations in regard to the legal rights of a spouse or children under the Succession Act and whether tax problems may arise by reason of any bequest or benefit or legal right share exceeding the availabe tax-free thresholds. If, as the situation will probably be in many cases, no problem arises on either count, then further consideration of these problems is not necessary and the solicitor can proceed to draft a will with an easy mind.
3. If the legal right of a spouse could exceed the tax-free threshold, then it may be necessary to consider, if possible, renunciation by the spouse of his or her legal right. This has its own problems, including the advisability of independent advice for the spouse. Such renunciation may not be essential, if the testator is satisfied that the spouse will not exercise the legal right. It is a point that needs consideration, however, because the solicitor and testator should consider how the terms of the will may be affected if the spouse does, in fact, claim the legal right.
4. These instructions will also identify whether a Capital Acquisitions Tax (Inheritance Tax) problem is likely to arise in relation to any particular benefit or bequest. If so, then the solicitor and testator must apply their minds to considering whether the liability could be avoided or reduced, without interfering materially with the testator's wishes.
5. Because a will speaks only from the date of death, we must keep in mind that today's values may not obtain when the testator dies. Depending upon the age and circumstances of the testator and of his family, the possibility of a settlement or of *inter-vivos* gifts at present-day values should, in some circumstances, be seriously considered. This can offer other potential benefits or tax advantages. For example, a farmer of pensionable age can transfer a farm reserving very adequate rights of maintenance and support and still be eligible for a pension for himself and his wife of over £51.00 per week. Or a younger farmer can transfer part of his farm to a son and create a partnership, with possible Income Tax savings to both.
6. Once again, it must be emphasised in terms of general approach that the paramount consideration must always be the wishes of a testator, to ensure that his will deals responsibly with his dependants and others, who have a reasonable right of expectation from him. Social obligations should never be subordinated to tax planning.

Prior to the passing of the Finance Act, 1982, on 17th July 1982, the most useful single method of reducing liability for C.A.T. was through asset-splitting between spouses. One spouse transferred property to the other, up to the tax free threshold, following which both spouses built up their assets simultaneously. This enabled both spouses to give benefits to each child up to the amount of their respective tax-free thresholds without incurring any liability to tax. This method of reducing Capital

Acquisitions Tax has been terminated by Section 102 of the Finance Act, 1982. This provides that all gifts or inheritances taken by a donee or successor, after 2nd June 1982, from one disponer or from several disponers to whom the same tax tables apply, are aggregable; so that, for example, gifts or inheritances taken by a child from each parent are aggregable. Likewise, gifts taken by a wife from her husband and from her own parents are aggregable. It is important to note, however, that the Section only applies to gifts and inheritances taken on or after 2nd June 1982. Another important provision of the Section is that, from 2nd June 1982, there is no aggregation between gifts and inheritances taken on or after 2nd June 1982 and those taken before that date. This, of course, is very important in relation to any beneficiaries who may already have taken gifts or inheritances.

In taking instructions it is accordingly most important to ascertain what gifts or inheritances have already been taken by the beneficiary from the testator or from any other donors in the same Table, as well as the date or dates of such gifts or inheritances. Those arising before the 2nd June 1982 can probably now be ignored, but those received after that date must be taken into account in reckoning any possible liabilities to C.A.T. on the inheritances that will arise under the will.

A word of warning is necessary here. Because of the provisions discussed above for aggregation of gifts under the Finance Act, 1982, Section 8 of the C.A.T. Act, 1976, is in many cases not now relevant. Nevertheless, there are circumstances to which that Section can still apply and any intended testamentary disposition should be examined to ensure, as far as possible, that it will not create a "second disposition" which might come within the provisions of Section 8.

The most obvious rural problem that arises is that of the farmer. The circumstances of each case will vary considerably, depending upon the size, situation, nature and value of the farm, and of the testator's other assets and liabilities, the ages and fitness of the testator and his wife and the number and ages of his children. In most cases, however, the following objectives will be common:—

1. to make suitable provision for the testator's spouse;
2. to make provision for testator's dependent children until their education is complete;
3. subject to the foregoing, to ensure that the farm passes to one of testator's children and, if circumstances permit, to make some additional provision for other children;
4. to achieve the foregoing objectives with the smallest — and, preferably, no — tax liability.

If the son who succeeds to the farm (for convenience we will call him the Successor) has not received any benefit prior to 2nd June 1982, then he will be entitled to a single tax-free exempt threshold for C.A.T. from both parents of £150,000. For this purpose, however, agricultural land is artificially valued for C.A.T. at either half its market value (assuming the Successor to be eligible as a "farmer") or its market value less £200,000.00, whichever is the greater. On this basis, the Successor could inherit, free of C.A.T., land with a market value of up to £300,000.00. This is equivalent to about 200 acres, if we take the current value of land at £1,500 per acre and represents a reasonably generous exempt threshold. It will be observed, however, that anything the Successor takes in excess of this, such as stock and farm machinery, will then become liable to tax. But if the Successor were undertaking any liabilities, attaching to the land, stock or farm machinery, this, in turn, would reduce the value of his inheritance for tax purposes. It will also be observed that where a Successor is eligible for the maximum relief for agricultural value, there will automatically be a liability for Inheritance Tax; in other words, to reach maximum relief, the market value of the land must now be £400,000.00, resulting in an inheritance of land at the artificial agricultural value of £200,000 and a consequent Inheritance Tax liability of £12,500.00.

In most cases, therefore, on the basis of present land values, it will be possible to vest in the Successor quite a substantial farm, with some livestock and machinery and no liability for Inheritance Tax. On the basis of the land values mentioned, the successor could take tax-free 150 acres (market value £225,000.00, agricultural value £112,500.00), together with stock and machinery to the value of £37,500.00. By any standards, this represents a reasonable "tax free" start. The whole position depends very much, however, on land values at the moment of inheritance. For example, in Autumn 1978/Spring 1979, the same land could have been worth over £3,000 an acre, whereas the maximum artificial deduction for agricultural value was only £100,000 — so that, at that time, the inheritance of a

mere 70 acres (without stock or machinery) would have resulted in a liability to Inheritance Tax. The combination of reduced land values and increased relief for agricultural value have dramatically changed the position. The problem for a testator, however, is to try to predict the values at date of death; it is because of this difficulty and risk that a transfer to part (this can be either a transfer of an undivided share, as a tenant in common, or an absolute transfer of a specified area) can make very good sense as a hedge against any future inflation. This, of course, raises other issues, such as partnership with the Successor, stamp duties on the transfer, the maturity of the Successor and the needs of other dependants. While these are matters which should be faced discussed and considered, the completion of a suitable will should not be deferred because of any uncertainty about future values, or while *inter vivos* arrangements are being considered. Rather than run the risk of a death intestate, the farmer should certainly consider making even a "holding" will, in comparatively simple and straigh-forward terms, in order, at least, to take maximum advantage of whatever exempt thresholds or lower rates of tax are available under the C.A.T. Act, which could be followed by whatever combination of dispositions, *inter vivos* and by will might be best suited to the circumstances.

The objectives mentioned above can be acheived in a number of ways. In the case of an elderly testator, he can with his wife's concurrence (by release of her legal right) devise the farm direct to the Successor, subject to rights of residence, maintenance and support for his wife and subject to any appropriate charges in favour of other children. A young testator, on the other hand, would be well advised to make a substantial bequest in favour of his wife and create a discretionary trust for the benefit of any children or, perhaps, for the benefit of both children *and* wife; a simple example of this would be to leave an undivided moiety of his estate absolutely to his wife and to settle the other undivided moiety upon discretionary trusts for the children, with power of appointment to his wife or trustees and with the ultimate intention that the farm would pass to the Successor through the joint operation of the devise to his wife and the exercise of the power of appointment, respectively. In a compromise situation, the testator might simply leave his property equally to his wife and the Successor with, or subject to, suitable provision for any dependant children.

Other possibilities which should be kept in mind to avoid, reduce, or make provision for liability for Inheritance Tax include:—

1. the making of small gifts, not exceeding £500 per annum;
2. making a gift, rather than an Inheritance, because Gift Tax is charged at only 75% of Inheritance Tax, unless the donor dies within two years of making the gift;
3. the surrender of Government Stock to pay tax; this can be very useful for a person who holds stocks and shares — the transfer, while alive, of some of his investments into appropriate Government Stock can provide very substantial savings;
4. insurance on the testator's life by a spouse or other beneficiary — but remember that the premiums must be paid from the income of the spouse or other beneficiary or, perhaps, with the assistance of small annual gifts;
5. a bequest or gift of up to £10,000 to the spouse of any beneficiary;
6. when dealing with nephews or nieces, it may be possible to arrange that the nephew or niece will become "a favourite nephew or niece", having worked wholetime for the testator for a period of five years prior to taking the gift or inheritance;
7. when benefits are given to a grandchild, it should be remembered that, where the grandchild is the child of a deceased child and is also a minor, he has the same threshold as a child of the testator; in all other circumstances, a grandchild is entitled to an exempt threshold of £30,000.

It will be seen that the legislation offers — indeed, is clearly intended to offer — considerable scope for the mitigation of the burden of taxation upon the passing of property from one generation to the next. Although this article has not dealt extensively with the uses of the discretionary trust, such trusts have an obvious social importance in cases where a testator leaves infant children or a child suffering from some disability. For such trust to be attacked by government and revenue alike, as being mere vehicles of tax evasion, is to miss a fundamental social point; any such attack must be resisted strenuously. But, discretionary trusts apart, the simple fact remains that everybody having any property whatever to pass on to the next generation, whether of the farming community or not, should make a will. □

AN UNWILLING RESPONSE

We are grateful to Bernard Gogarty, Solicitor, Drogheda, for sending us the following poetic response from a lady client, described in her will as a "spinster".

Dear Bernard,

I acknowledge receipt of my will, sir,
And admire your professional skill, sir.
It's terms I've perused
But the words that you've used
Have incited a passion to kill, sir.

My attorney I've chosen as victim
You'll quite understand why I picked 'im
The terms you apply
To a maid such as I
I'd prefer if you tried to restrict 'em.

For a "spinster" is a word I reject, sir.
It indicates lack of respect, sir.
I get no enjoyment
To see my employment
Described in a style incorrect, sir.

If I was a male (which I'm not), sir.
And the unmarried state was my lot, sir.
A "bachelor", I'd say,
Is not quite the way
You'd define the employment I'd got, sir.

The chauvinist male I detest, sir.
Let this be my final request, sir.
That you should observe
The respect we deserve
My defence for the moment I'll rest, sir.

Yours sincerely,

. . . .

For Your Diary . . .

6/7 November, 1982, *S.Y.S. Autumn Seminar,* Talbot Hotel, Wexford. Topics include the Drafting of Wills, Wills and Taxation, Practical Probate Problems and Negligence of Professional Advisers.

10 December 1982. *Mayo Solicitors' Bar Association Annual Dinner Dance.* Breaffy House Hotel, Castlebar, Co. Mayo.

Tickes and further details from Patrick O'Connor, Solicitor, Swinford, Co. Mayo; Anne McEllin, Solicitor, The Mall, Castlebar and John Gordon, Solicitor, Ballina, Co. Mayo.

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The Incorporated Law Society of Ireland

DINNER DANCE
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FRIDAY, 12th NOVEMBER, 1982
Dinner 8.30 p.m.
Dancing 10.00 p.m. — 2.00 a.m.
TICKETS £15.00

EMPLOYMENT EQUALITY AGENCY

Will hold a Seminar at the Royal Dublin Hotel on 29th & 30th of October entitled: "Employment Equality Legislation Case Law in National and European Courts".

Anyone wishing to attend or seeking further information, please contact Mr. G. Hickey at (01) 765861 or write to the E.E.A., Davitt House, Mespil Road, Dublin 4.

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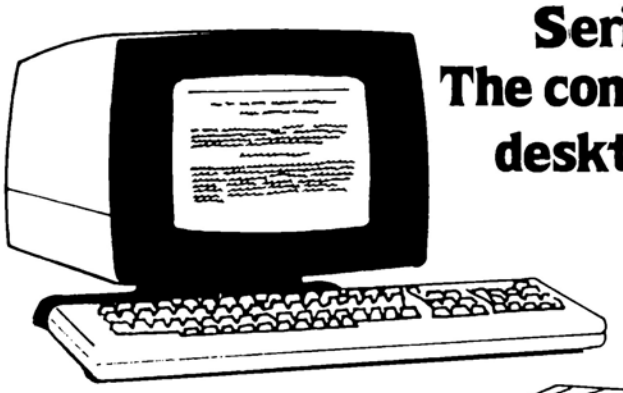

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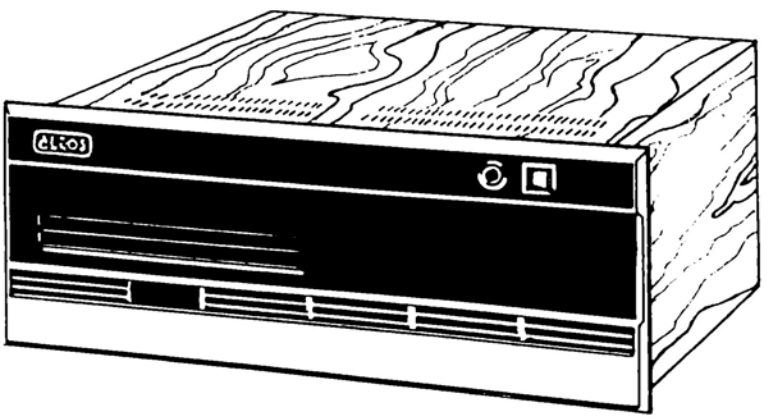

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Client Care is Business Care

by

Maxwell Sweeney

WELL-ESTABLISHED client relationships are a highly desirable objective of solicitors; once established, these relationships must be nurtured by good and efficient service. The problem arises in the assimilation of new clients, who are essential to the refreshment and development of any practice.

The image of the solicitor in the public mind, certainly in the minds of many prospective clients, is still tinged with Dickensian impressions. Unfortunately, the exterior of many offices — and sometimes the offices themselves — does little to alleviate this impression.

Many prospective clients approach a solicitor's offices with a degree of apprehension; they are entering unknown territory which they feel, in an undefined way, is associated with "trouble". They are psychologically disorientated, a condition frequently observed by solicitors when a witness is in the box for the first time. This atmosphere is not conducive to an early establishment of a good relationship.

Most solicitors have a good approach to clients, but what may have happened between the decision of a prospective client to visit a solicitor for the first time and arrival of that client at the office? Presumably a phone call has been made to arrange an appointment. How was that call handled, initially at the switchboard and, subsequently, by whoever arranged the interview?

The selection and training of telephonists and receptionists is important; it is at this point that the "public relations" of the practice are most frequently at fault. Too often the name of the practice is mumbled or, alternatively, rattled out in a manner which causes the caller to re-check, a cause of irritation for both the caller and the receiver of the call. The over-exuberant manner, apparently encouraged at some advertising agencies, may be admirable for their stylised approach, but is not to be recommended for a solicitor's practice! A simple, clear statement of the practice name and an inquiry as to how the caller may be helped is all that is needed. The off-putting cross-examination attitude is too frequent; just a suggestion that the receptionist is interested and cares about the caller is all that is needed. "Be interested" is the recommendation. Solicitors — and members of their staff — sometimes appear to forget that it is clients who provide their income.

Waiting areas are a disaster in many establishments. The members of the practice have probably become so familiar with these areas that defects and discomforts no longer make any impact on them, but they can have a very depressing effect on the first-time visitor. While waiting areas are not expected to have the decor of a popular lounge bar, reasonable brightness and comfort should be provided. The solicitor, as a member of a caring profession, aims to put clients at ease; this is more difficult if a poor preliminary impression has been acquired before the actual meeting. Tattiness outside the building and in the reception area all contribute to that Dickensian impression.

To remind a solicitor that he should not keep a client waiting longer than necessary may seem impertinence, but it does happen; the solicitor might be reminded that delays may seem, to the stranger, to be a ploy to impress. Sometimes they are! If a delay is inevitable, a solicitor should ensure that the person in the waiting room is made aware that the solicitor knows he or she has arrived and that the delay is unavoidable.

A solicitor should remember that while, to him, the new client may come in with "just another case", to the client it is the most important case.

Does the office into which the client is ushered to meet the solicitor for the first time suggest orderliness? Not always! The client ideally should find in the solicitor's own room, a reinforcement of good impressions gained on the way, through initial reception and treatment.

One of the most frequent complaints about solicitors is that of delay. Members of the profession know the legitimate reasons for many of these delays; the client doesn't. A "holding" letter or a phone call can do a great deal to increase confidence.

Solicitors, usually with some justification, assume that new clients know little or nothing of legal matters. A new client therefore starts from scratch and, while that client may be unsophisticated, treatment that suggests half-wittedness is irritating. Time spent in breaking down the invisible barriers between the "all-knowing" professional and the "helpless" client may seem to be time wasted, but a very real psychological barrier can exist, created by the confused impressions of the client, all too often compounded by his initial reception at his solicitor's office.

The profession cares for its clients: a client who is conscious of this attitude will be a good client and will subconsciously promote the interests of the individual solicitor and of the profession. Word of mouth publicity is the best and cheapest publicity in the world and it contravenes no rules! □

Maxwell Sweeney is Public Relations Consultant to the Law Society.

LAND REGISTRY — Telex Facilities

Telex facilities are now available at the Chancery Street Office of the Land Registry, which caters for all counties other than Dublin, Roscommon, Sligo, Mayo, Galway and Clare. The number is 90331 L Reg EI.

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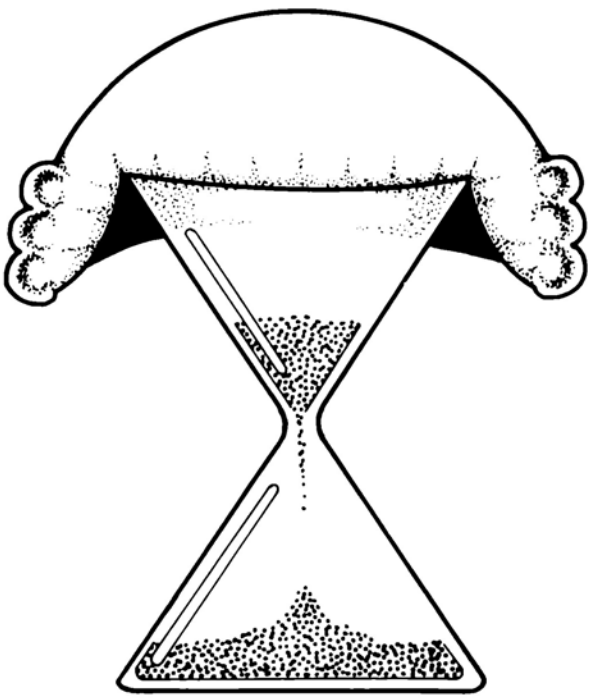

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BOOK REVIEW

The Law of Local Government in the Republic of Ireland by Ronan Keane, Senior Counsel — Judge of the High Court, Dublin. The Incorporated Law Society of Ireland. £17.50 + £1.55 p. & p.

This book is very welcome and is another example of the Author's outstanding capacity for work. Mr. Justice Keane has written a most useful, reliable and practical book that will appeal to Lawyers, Administrators and Students and is likely to become the standard work in its field.

Judge Keane describes the organization of Local Government in the Republic with some reference to its historical development. There is a brief and perceptive account of the Management System and the relationship of the elected Members with the Manager and his officials and of the division of functions between them. The various powers and duties of Local Authorities in relation to Roads, Sanitary Services, Housing and Planning are treated in some detail and the underlying legal principles are explained clearly and accurately. There are two outstanding chapters on Compulsory Acquisition of Land and the Assessment of Compensation. There is a valuable exposition of the law relating to Rating and Audit and there are extensive Appendices.

The first point that strikes one is the wealth of reference to decided cases, English and Irish, reported and unreported. The handling of the case law is most impressive. The principles are clearly stated and set out with admirable brevity, but it is evident from the numerous citations that the Author has undertaken onerous researches and heavy labours so as to lighten the task of his reader and to make easily and conveniently available all the essential references, especially the modern Irish references.

The book is written in a modest, unassuming, self-effacing style, but this does not conceal the Author's wide knowledge and exceptional powers of clear and cogent exposition and analysis. His approach is practical and pragmatic — the sources are decided cases, rather than academic discussion or theoretical speculation. He treats problems as they arise and as they are dealt with in the decided cases and avoids conjecture and surmise.

There are a number of particularly good things in the book. For example, the treatment of the law about dangerous buildings and the difficult case of *The State (McGuinness) -v- McGuire* on Page 107, is most enlightening and a good instance of the Author's use of effective and appropriate quotation from the words of the judgment. Similarly, the account of the law about Planning Applications and Permissions and the Conditions that may (and may not) be attached to them is accurate, clear and comprehensive and very closely directed to the difficulties that arise in actual practice.

There are interesting indications that in his judicial capacity, Mr. Justice Keane may be open to argument on such matters as the doubtful status of Section 4 Resolutions directing a Manager as to how he should decide Planning Applications, and the possibility of challenging confirmed Compulsory Purchase Orders, even after the expiration of the statutory three weeks. He is also interested in escaping, if he can, from what may be called the second leg of the decision of the Supreme Court in *Frescati Estates -v- Walker,* which requires an applicant for Planning Permission to have ownership or at least the consent of the owner and which can give rise to practical problems both for developers and planning authorities.

Local Government Law is changing so rapidly that even this book has to some extent been overtaken by events. The Fire Brigades Act, 1940 is gone, Building Bye-Laws must be on the way out and the Rateable Valuation system itself is holed, if not sinking. I should have liked to see a more detailed treatment of Tenant Purchase Schemes and of loans and mortgages under Section 39 of the Housing Act, 1966, and the former Small Dwellings Acquisition Act, as these are important features of the everyday activity of Local Authorities and are not without legal interest and problems. The relationship between local and central authorities in such matters as finance, staffing and personnel, land acquisition and disposal, general policy and administrative discipline are other areas where I should have welcomed the enlightened guidance of the learned Author.

The Dublin Corporation Act, 1890 is printed, more or less in full, as an appendix. It is doubtful if it is worth its place. The Act is not extensively availed of or well known, even in Dublin. Section 88 was roundly castigated for obscurity by Black J. in *Dublin Corporation -v- Keyes* [1947] I.R. 299, but otherwise the Act has been little noticed or employed in modern times.

The book is accurately printed in very legible type, there is a good Index and the whole production is thoroughly creditable.

In summary, a very successful and worthwhile book that can be highly recommended to anyone interested in Local Government.

W. DUNDON

Professional Information

Land Registry—

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated this 21st day of October, 1982.

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

1. REGISTERED OWNER: Bridget Scanlon, 67 Fitzwilliam Square, Dublin 2. Folio No.: 51065; Lands: Miveevillin; Area: 12a. Ir. 37p. County: **MAYO.**

2. REGISTERED OWNER: Nora Heneghan, Ballyhard, Glenamaddy, Co. Galway. Folio No.: 37643; Lands: Common; Area: 12a. 3r. 29p. County: **GALWAY.**

3. REGISTERED OWNER: Philip and Maura Cunnane, Carrowbeg, Claremorris, Co. Mayo. Folio No.: 9388; Lands: Carrowbeg; Area: 38a. Ir. 14p. County: **MAYO.**

4. REGISTERED OWNER: Liam (otherwise Hilary) Ralph; Folio No.: 27410; Lands: Corbally; Area: Oa. 2r. 10p. County: **TIPPERARY.**

5. REGISTERED OWNER: Patrick Costello, Lissacurkia, Tulsk, Castlerea, Co. Roscommon. Folio No.: 17652; Lands: (I) Lissacurkia, (2) Carrownageelaun; Area: (I) 4.750 acres, (2) 7.225 acres. County: **ROSCOMMON.**

6. REGISTERED OWNER: Michael C. Geary; Folio No.: 1388F now closed to 15852F; Lands: Kilmurry (Archer); Area: 34.113 acres; County: **LIMERICK.**

7. REGISTERED OWNER: Cornelius O'Connor; Folio No.: 12414; Lands: (1) Knockundervaul (pt); (2) Lisroe (pt); Area: (1) Oa. Or. 13p., (2) 30a. 1r. 24p. County: **KERRY.**

8. REGISTERED OWNER: Patrick Malone, Rosmeen, Ballintubber, Co. Roscommon, Dermot Mary McDermot and Kevin Dockery, Knockroe, Castlerea, Co. Roscommon. Folio No.: 20069; Lands: Castlereagh; Area: Oa. 3r. 22 3/4p. County: ROSCOMMON.

9. REGISTERED OWNER: Annesly Wallace Dickie and Jean Graham Dickie. Folio No.: 19372; Lands: Carraleena; Area: 10.175 acres; County: **DONEGAL.**

10. REGISTERED OWNER: Edward Sheehy; Folio No.: 14936; Lands: (1) Danesfort, (2) Danesfort; Area: (1) 87a. 3r. 24p. (2) 27a. 2r. 21p. County: **KILKENNY.**

11. REGISTERED OWNER: Rose Mooney; Folio No.: 8541; Lands: Footstown Great (part); Area: 23a. 1r. 6p. County: **MEATH.**

12. REGISTERED OWNER: Joseph F. Brown and Teresa Brown; Folio No.: 37197; Lands: Garranacanty; Area: Oa, 1r. 13p. County: **TIPPERARY.**

13. REGISTERED OWNER: Mary McGovern; Folio No.: 346 R; Lands: Owen Gallees; Area: 9a. 2r 26p. County: **CAVAN.**

14. REGISTERED OWNER: Julia Bernadette O'Sullivan; Folio No.: 33365; Lands: Killarainy; Area: 0.366 hectares; County: **GALWAY.**

15. REGISTERED OWNER: John McAndrew; Folio No.: 13149; Lands: (1) Corbally; (2) Corbally; Area: (1) 36a. 2r. 25p.; (2) 7a. Or. 15p.; County: **SLIGO.**

16. REGISTERED OWNER: Michael McDermott; Folio No.: 1241; Lands: Carrowreagh (Parish of Kilcorkey); Area: 29a. 2r. -p.; County: **ROSCOMMON.**

17. REGISTERED OWNER: Thomas P. Ryan and Teresa Ryan; Folio No.: 24431; Lands: Dunshaughlin; Area: Oa. 1r. 21p. County: **MEATH.**

18. REGISTERED OWNER: John Arthur McNally; Folio No.: 631F; Lands: Cuilbeg in the Barony of Carbury; Area: Oa. Or. 10p. County: **GALWAY.**

19. Registered Owner: John McGreal (Junior); Folio No.: 29270; Lands: (1) Garrynabba, (2) Gortfadda, (3) Garrynabba; Area: (1) 12a. 2r. 8p., (2) 6a. 1r. 18p., (3) 4a. 1r. 27p.; County: **MAYO.**

20. REGISTERED OWNER: Kevin Buckley; Folio No.: 16357; Lands: Derragh; Area: 36.956 acres; County: **CORK.**

21. REGISTERED OWNER: Patrick and Margaret Conroy; Folio No.: 9470; Lands: Tullakeel; Area: 21a. 3r. 9p.; County: **LOUTH.**

22. REGISTERED OWNER: Mary McEntegart; Folio No.: 426; Lands: Drumgill; Area: 10a. 3r. 17p.; County: **MEATH.**

23. REGISTERED OWNER: Michael and Anne Donlon; Folio No.: 1395F; Lands: Cloontumpher; Area: 0.500 acres; County: **LEITRIM.**

24. REGISTERED OWNER: Michael Rossiter; Folio No.: 3597F; Lands: Southknock; Area: 3.675 acres; County: **WEXFORD.**

25. REGISTERED OWNER: General Plastics O'Brien Ltd.; Folio No.: 45122; Lands: Ardarostig; Area: 4a. Or. Op.; County: **CORK.**

26. REGISTERED OWNER: Arnold Mahon; Folio No.: 92F; Lands: Leagh; Area: 15.125 acres. **QUEEN'S COUNTY.**

27. REGISTERED OWNER: Thomas Francis O'Brien; Folio No.: 35709; Lands: (1) Lagile, (2) Lisglasheen, (3) Moanlahan; Area: (1) 46.988 acres, (2) 1a. Or. 36p. (3) 22a. 1r. 13p.; County: **CORK.**

28. REGISTERED OWNER: Matthew Sullivan; Folio No.: 4453; Lands: Nohoval, Castleisland; County: **KERRY.**

29. REGISTERED OWNER: Achates Investment Company; Folio No.: 4969; Lands: (1) Ratoath, (2) Jamestown; Area: (1) 36a. 3r. 18p., (2) 56a. 2r. 2p.; County: **MEATH.**

30. REGISTERED OWNER: Andrew Hill; Folio.: 9768; Lands: (1) Tattintlieve, (2) Tallintrat; Area: (1) 19a. 1r. 12p, (2) — — 37p.; County: **MONAGHAN.**

31. REGISTERED OWNER: James Murphy; Folio No.: 1497. Lands: Coltstown; Area: 107a. 1r. 2p.; County: **KILDARE.**

32. REGISTERED OWNER: John O'Sullivan and Maura B. O'Sullivan, Folio No.: 5281 F.; Lands: Cloonydonigan Upper; Area: 2a. Or. 3p.; County: **KERRY.**

33. REGISTERED OWNER: Patrick Declan Berney: Folio No.: 4744; Lands: Silliothill; Area: 79.031 acres; County: **KILDARE.**

34. REGISTERED OWNER: Daniel J. O'Sullivan; Folio No.: 1093; Lands: Carrigkerry; Area: 22a. 1r. Op.; County: **Limerick.**

35. REGISTERED OWNER: Thomas Scanlon; Folio No.: 12475; Lands: (1) Ballinderry; (2) Ballinderry; Area: (1) 16a. 3r. 8p.; (2) 42a. 1r. 36p.; County: **ROSCOMMON.**

36. REGISTERED OWNER: Daniel Francis Lennon and John Joseph Lennon; Folio No.: 453 R; Lands: Oghil; Area: 23a. 3r. 30p.; County: **LONGFORD.**

37. REGISTERED OWNER: Alice Vickers and Eileen Shine; Folio No.: 8967; Lands: Oldcourt; Area: Oa. 1r. 30p.; County: **WICKLOW.**

38. REGISTERED OWNER: Samuel Murphy and Ann Murphy; Folio No.: 22155F; Lands: Ballydesmond; Area: 0.460 acres; County: **CORK.**

39. REGISTERED OWNER: James Keena; Folio No.: 13353; Lands: (1) Ballymacallen, (2) Shinglis; Area: (1) 14a. 3r. 20p, (2) 18a. 1r. 22p. County: **WESTMEATH.**

40. REGISTERED OWNER: John O'Flaherty & Ursula O'Flaherty; Folio No.: 10600 F; Lands: Ballincollig (part); Area: — County: **CORK.**

41. REGISTERED OWNER: Nicholas Geraghty; Folio No.: 7672; Lands: Collon; Area: Oa. 1r. 18p.; County: **LOUTH.**

41. REGISTERED OWNER: Nicholas Geraghty; Folio No.: 7672; Lands: Collon; Area: Oa. 1r. 18p.; County: **LOUTH.**

42. REGISTERED OWNER: Michael Martin; Folio No.: 1646; Lands: The Broughan, The Ward; Area: 20 acres, 3 roods; County: **DUBLIN.**

43. REGISTERED OWNER: Patrick Walsh; Folio No.: 17179. Lands: (1) Knocknakearn, (2) Knocknakearn; Area: (1) 1a. 2r. 26p., (2) 6a. 1r. 35p.; **QUEEN'S COUNTY.**

Lost Wills

Daly, John Peter, deceased, late of No. 4 Eden Park, Sandycove, Co. Dublin. Would anyone having knowledge of any Will of the above-named deceased who died on 31 May, 1982, please contact Robert P. Barrett, Solicitor, 26 Grand Parade, Cork. Tel: (021) 24212.

Murphy, Humphrey, deceased, late of Clouhane, Iron Mills, Killarney, Co. Kerry, retired businessman. Would anyone having any knowledge of any Will of the above-named deceased please contact Fionnuala Murphy, Solicitor, Murphy & Co., 5 Castle St., Tralee, Co. Kerry.

O'Toole, Annetta, deceased, late of 2 Mays Cottages, Saint Josephs Parade, Dublin 7, formerly of "Luckington", Ennis Road, Limerick. Would anyone having knowledge of the whereabouts of the last Will and testament of the above-named deceased who died on 1 July, 1982, please contact Messrs. Corrigan & Corrigan, Solicitors, 3 St. Andrew Street, Dublin 2.

O'Sullivan, Garda Michael, deceased, late of Kilsheelan, Clonmel, Co. Tipperary. Retired Garda. Would anyone having any knowledge of any Will of the above-named deceased who originated in Glengarriff, West Cork, and died on the 18 July, 1982 at St. Joseph's Hospital, Bantry, Co. Cork, please contact Denis A. O'Donovan, Solicitor, New Street, Bantry, Co. Cork. Tel: (027) 50808.

Grant, Thomas J., deceased, late of Lanesborough, Co. Longford. Would any person having knowledge of a Will of the above-named deceased who died on 20th November, 1981, please contact Con O'Leary, Solicitor, New Street, Bantry, Co. Cork.

Kavanagh, John J., deceased, late of 15 Madden Road, South Circular Road, Dublin 8. Will any person having knowledge of the original Will of the above named deceased who died on the 15th day of April, 1982 which he made on the 26th day of March 1976, or any other Will made by him, please contact P.C. Moore & Company, Solicitors, 17 South Great George's Street, Dublin 2. REF: 223/82/RMMcA/.

O'Connor, Thomas, deceased, late of Lower Main Street, Clogheen, Co. Tipperary. Will any person having knowledge of a Will of the above named deceased, who died on 8th December, 1978 please contact M. J. O'Callaghan & Son, Solicitors, Mitchelstown, Co. Cork. Tel: (025) 24500 with any information, please. It has been established that a Will was made by the late Thomas O'Connor in the year 1954 and was executed by him in the presence of Mr. Thomas O'Brien, Solicitor, Clonmel. Despite exhaustive searches made we have failed to locate any Will of the said deceased.

Devaney, John, deceased, late of Knockollsa, Cong, Co. Mayo. Will any person having knowledge of the whereabouts of the last Will and Testament of the above named Deceased, please contact: Messrs. O'Connor & Dudley, Solicitors, West End, Mallow, Co. Cork. Tel: (022) 21467.

O'Grady, Rev. Patrick Francis, deceased, late of St. John's Presbytery, Normanton, West Yorkshire, formerly of Emly, County Tipperary. Any person having knowledge of the Will of the above-named deceased who died on the 17th day of July 1982 please contact Darach Connolly, Solicitor, 21 Parliament Street, Dublin 2. Reference: CR.

George Quain, deceased, late of Creggane, Charleville, Co. Limerick. Will any person having knowledge of a Will of the above named deceased who died on 24th June 1982 please contact Messrs. James Binchy &Son, Solicitors, Charleville, Co. Cork.

Toft, Marion, deceased. Would any person or persons having knowledge of the whereabouts of Title Deeds to premises 45, Thomas Davis Street West, Inchicore, Dublin 8, property of the late Marion Toft, late of same address, who died on the 7th of June 1976, please contact Peter J. Cusack & Co., Solicitors, Orchard Road, Clondalkin, Co. Dublin. Telephone 517864 or 592407.

Miscellaneous

For Sale: Ordinary 7 day Publican's Licence — unendorsed; Offers in the region of £6,500 to Denis A. O'Donovan, Solicitor, New Street, Bantry, Co. Cork.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76. No. 9 November 1982

Visit of President of Ireland, Patrick Hillery to Blackhall Place, 21 September, 1982.

Pictured (from left) Mr. W.D. McEvoy, Junior Vice-President, Incorporated Law Society of Ireland, Mr. W. Brendan Allen, President, Incorporated Law Society of Ireland and His Excellency, Patrick Hillery, President of Ireland.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76. No. 9 November 1982

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .
. . . competence to instruct

HARD on the heels of the Law Society's "Make a Will Week", it may be instructive to refer to an article which appeared in the *Journal of the Irish Medical Association* as long ago as October 31st, 1978, entitled "Mental Impairment in the Elderly".

The article describes in considerable statistical and analytical detail a study of 502 patients admitted to the North Dublin Geriatric Service between July and October 1976 and which produced what, to lawyers as much as to the medical profession, can only be regarded as very worrying findings.

Out of the total number of patients assessed, 44.8% were found to have mental impairment on admission. Of these mentally impaired patients, 37.7% recovered during treatment to a "normal" mental condition for their age. Most significantly, however, persistent mental impairment — which the authors refer to as "Chronic Brain Failure" — was diagnosed in nearly 28% of all patients and was more common amongst females — 20% amongst males and 31.6% among females.

Even without considering in close detail the authors' analysis and discussion of their study, the implications for the lawyer are abundantly clear; although it would be unfair to suggest that something like 20% of our elderly male clients and 30% of our elderly female clients are suffering "Chronic Brain Failure" and are thus incapable of giving us valid instructions, it is plain that a higher proportion of the elderly than was previously realised may well be suffering from sufficiently diminished mental capacity as to give cause for real concern.

This brings home only too plainly not only the necessity to assess as carefully as possible the mental condition of all elderly clients, when taking their instructions, but also the inherent difficulties which must face the solicitor in attempting such an assessment. Short of applying the same tests as those used by the authors of the article, and over an equivalent period, how is "Chronic Brain Failure" — or even temporary mental impairment — to be recognised?

At present it would seem impossible to do little more than counsel caution, when taking instructions from elderly clients. Look for irrationalities in what the

(Continued on p. 199)

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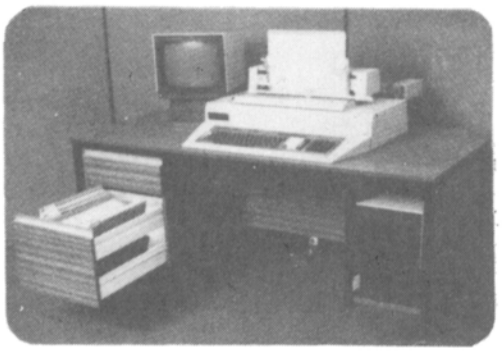

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"Hedley Byrne" Marches On

Duty of Public Authority in Providing Information to Enquirers

by
John F. Buckley, Solicitor

THE extension of the application of the Hedley Byrne and Heller & Partners doctrine to the acts of a Public Authority providing information to enquirers about such Authority's road widening or zoning proposals in another Common Law country may be of considerable interest to practitioners in Ireland.

The High Court of Australia, that Country's highest judicial tribunal, so determined recently in *L. Shaddock & Associates Pty. Limited and Another -v- the Council of the City of Paramatta* (High Court of Australia 28/10/81)* The facts of the case were as follows:

The Appellants contracted to purchase a property for the purpose of redevelopment. They would not have concluded the purchase if they had known the land would be substantially effected by road widening proposals which had been approved in principal by the Paramatta City Council in 1971. Before the exchange of contracts the appellants' solicitor made a telephone call to the Council and enquired from an unidentified person in the Town Planning Department whether there was any local road widening proposal affecting the property. He was told that there was not. On the following day he lodged with the Council a form of application for certificates given by Local Authorities under a New South Wales Statute; one of the appellant companies was described as the purchaser and the purpose for which the information was required was stated to be "Conveyancing". Under the heading "other information indicated under remarks" the question was asked "Is the property affected or proposed to be affected by any of the following:—

Road widening or re-aligning proposals?

In response to this application the solicitor received a certificate from the Local Authority with respect to matters that the Council was authorised to issue certificates under the Statute. These matters did not include the effect on the land to which the certificate related of a *proposed* local road widening scheme which was not included in a prescribed scheme or a scheme in course of preparation. The local road widening proposals were not so included and there was therefore no obligation to include the information in a certificate issued under that Statute.

The solicitor believed that the absence of any notation as to a local road widening proposal on the certificate indicated that there was no such proposal. His previous experience indicated that it was the practice of the Council when it received a request for such a certificate and for additional information as to whether the property was proposed to be effected by road widening proposals, and when there was a relevant proposal, to type or write (usually in red ink) a reference to the proposal at the foot of the certificate. During a three year period the solicitor had received about eight such certificates and had seen at least two others sent to other solicitors. The Town Clerk of the Council gave evidence to show that it was the practice of the Council to give information other than that which the Council was authorised by the Statute to give, including information as to road widening proposals, both orally over the telephone and by endorsements on certificates issued under the Statute. An examination of the files of the Council revealed that about 10,000 certificates under the Statute had been issued during a two and a half year period of which about 650 had been endorsed with a reference to road widening proposals. The High Court accepted that the evidence abundantly supported the finding of the trial judge that it was the practice of the Council to answer enquiries as to the existence of any road widening proposals made by the use of the application form by making an appropriate endorsement on the certificate issued under the Statute if there was such a proposal.

The Court held that the return of the certificate unendorsed was tantamount to the giving of information that there were no proposals and that it was clearly careless to give such a certificate. The question which arose for decision was as to whether there was a duty to answer carefully the questions put to the Council orally and in writing. The Court held that it would not have been reasonable for the appellants to have relied on an unconfirmed answer given by an unidentified person in response to an enquiry made over the telephone and that the Council owed no duty of care in making response to such an enquiry.

The majority of the Court interpreted the decision of the majority of the Privy Council in *Mutual Life and Citizens Assurance Company -v- Evatt* [1971] A.C. 793, as confining the duty of care in relation to the provision of advice or information by a person to the situation where he carries on a business or profession and in the course of it provides advice or information of a kind which calls for skill and competence or he otherwise professes to profess skill and competence and provides advice or information

when he knows or ought to know that the recipient intends to act or rely on it; and that a duty of care may arise where the speaker has a financial interest in the transaction with respect to which the statement is made. The Court, however, preferred the arguments of the minority of the Privy Council (who were of course supporting the view of the High Court of Australia in the *Evatt case*) that the possession or professed possession of skill and competence was not an essential element in the foundation of the duty of care.

It will be recalled that Mr. Evatt had sued the insurance company when he suffered loss as a result of gratuitous advice and information given to him by the insurance company about the liabilities of a company which was an associate of the insurance company.

Gibbs C.J. in his judgment held that a person giving information may be so placed that others can reasonably rely on his ability to carefully ascertain and import the information while Mason J. (with whose judgment Aickin J. agreed) went further saying:

> "The specialised nature of the information, the importance which it has to an owner or intending purchaser and the fact that it contains what the Authority proposes to do in the exercise of its public functions and powers, form a solid base for saying when information (or advice) is sought on a serious matter, in such circumstances that the Authority realises, or ought to realise, that the enquirer intends to act upon it, a duty of care arises in relation to the provision of the information and advice."

The Court noted that the Canadian Supreme Court in *Hodgins -v- Hydro-Electric Commission of Napean* [1975] 60 D.L.R. (3d), I, had taken the view that the judgement of the House of Lords in the *Hedley Byrne* case did not suggest that only those engaged in private enterprise, in particular trades or professions, may attract such a duty of care. It also noted that in other Canadian cases, *Windsor Motors Limited -v- District of Powell River* [1969] 4.D.L.R. (3d) 155, where incorrect advice given by a municipality about the zoning of land was concerned; and *Gadutsis -v- Milne* [1972] 34 D.L.R. (3d) 455, where the City of Toronto was held liable in damages for negligent misrepresentation concerning permitted uses in a particular zone of the city; and in *H. L. & M. Shoppers Ltd -v- Town of Berwick* [1977] 82 D.L.R. (3d) 23; the Hedley Byrne doctrine had been held to apply. The court also noted that there was a line of authority in the United Kingdom courts commencing with the case of *Ministry of Housing and Local Government -v- Sharpe* [1970] 2 QB 223, which was mentioned in *Moorgate Limited -v- Twitchings* [1977] A.C. 890 and applied in *Ross -v- Caunters* [1979] 3. W.L.R. 605 which suggested that notwithstanding the decision in *Mutual Life and Citizens Insurance Company -v- Evatt* (supra) public bodies were not excluded from the *Hedley Bryne* Doctrine.

Although McMahon and Binchy in their recently published book "Irish Law of Torts" (pp 397-403) expressed reservations about the continuing significance of the *Hedley Byrne* doctrine in Irish law it must now be at least a possibility that in the case of claims against public authorities it may have a greater significance in the future.□

*The author is grateful to Mr. Tony Baines of Carroll & O'Dea, Solicitors of Sydney for calling attention to the importance of the judgment in this case.

Practice Note — Extension of Period of Validity of Sub Division Consents

The Land Commission has decided to extend the period for which certain consents are valid. The form of consent most commonly used by the Commission to date provides that the consent is valid for a period of 12 months. The Commission has now decided to extend the initial period of validity to 3 years.

The arrangement will not apply to consents in the case of applications in respect of non agricultural properties e.g. for building purposes where the consents are not subject to any time limit.□

Value Added Tax

In a letter to the Society, dated 27 August, 1982 the Revenue Commissioners have stated that:— 'the normal practice is to give two week's notice of visits for inspections of accounts for VAT purposes. This practice will be extended to solicitors and meets the requirements of the Society's Taxation Committee.□

Narrow Victory for Visiting Cricketers

No more exciting conclusion could have been prescribed for the first cricket match between teams representing the Incorporated Law Society of Ireland and the Law Society of England and Wales than that which took place. The match was played at Castle Avenue, Clontarf on the 9th August and with only one ball remaining, the visitors needed 6 runs to win. Their leading scorer Price — Rowlands struck a resounding blow which carried the boundary and won the day.

The start of the match was delayed as a result of morning rain which restricted the length of the game aside. The Irish side batted first and, thanks largely to David Martin (62) and Eamonn Delahunty (25), totalled 126 for 8 wickets in their allotted open.

The visitors at first scored steadily thanks to contributions from Rowes (25) and Sutton — Mathews (24) but their scoring rate later fell below the required rate. The arrival of Price - Rowland who ended with an unbeaten 26 led to a speeding up of the scoring rate and ultimately put the visitors within sight of victory. Gerry Kirwan was the most successful of the home bowlers taking two wickets for 42 in 14 overs.

The visiting side also played games against the Leprechauns and Halverstown during their short tour.□

Solicitors' Golfing Society

President's Prize (W. Brendan Allen) and Law Society Cup.
Winner: P. Treacy (13) 38 pts.
Runner up: D. Fullam (7) 37 pts.

St. Patrick's Plate
Winner: J. Lynch (6) 37 pts on 2nd nine.
Runner up: W.R. White (9) 36 pts.

Veterans Cup
Winner: P. O'Doherty (16) 36 pts on 2nd nine.
Runner up: A. O'Donnell 33 pts.

Over 13
Winner: C. Bergin (13) 35 pts.
Runner up: C. Price (16) 33 pts.

1st Nine
P. Malone (9) 19pts.

2nd Nine
D. McAuliffe (11) 18 pts. last 6.

Over 30 miles
D. Alexander (7) 34 pts. last hole.

Lot
J. McKnight (18) 32 pts.
C. Coyle (8) 34 pts.

Officers for 1982/83
Captain: Gerard A. Walsh.
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Hon. Secretary: John R. Lynch.
Committee: Henry N. Robinson; Gerard M. Doyle, David Bell.

Comment . . .

(Continued from p. 195)

client proposes; talk the client through the circumstances to see whether the intentions seem well-founded or the implications fully understood. Wherever possible, retain intact all revoked Wills. Above all, keep comprehensive attendance records — despite every care by the profession, the consequences of unfortunate decisions taken by our elderly clients will, in the main, be sorted out long after the event.□

Interest and the Courts Act 1981

by

Ciarán O'Mara, Solicitor

IN the midst of the controversial changes in the jurisdiction of the lower courts the implications of the Courts Act 1981 ("the 1981 Act") for the law on interest should not be ignored. The new legislation represents the first substantive developments of our law in this area since the foundation of the State. That reform has come about is hardly surprising with the unprecedented levels of inflation in the last ten years.

Both Church and State frowned upon usury in the Middle Ages and the common law would not allow claims for interest at all. With the growth of commerce and trade, investment had to be facilitated and the law came to allow the charging of interest where commercial risk was involved. By the end of the eighteenth century it was possible to recover as a debt the payment of interest where it was expressly provided for in the contract. For a period, the courts of common law waivered on the question of recovery of interest as damages for the withholding of a debt. Finally, the common law rejected such a jurisdiction.

The leading case is the decision of the House of Lords in *London, Chatham and Dover Railway Company* -v- *Southern Eastern Railway Company* [1893] A.C. 429. The plaintiffs had obtained a judgment for a longstanding debt and claimed interest on it. It was argued that there was a right at common law to an award of interest by way of damages for the wrongful detention of a debt. Although the sympathies of their Lordships were with the plaintiffs the House concluded that interest on an unpaid debt was only recoverable at common law where it was provided for by agreement of the parties, express or implied, and that, on the facts of the particular case the plaintiffs had no such right. The harshness of this common law rule stood in the U.K. until 1934 and in our jurisdiction until May 12, 1981 (i.e. date of final passing of the 1981 Act).

Despite the rejection by the common law of the jurisdiction to award interest as damages, courts of equity and of admiralty took a different view. In Admiralty, the practice grew up of awarding interest on damages where the complainant ship-owner had lost the use of his money between the sinking of his ship and the judgment of the court. Equity awarded interest where money had been withheld or misapplied by an executor or a trustee or anyone else in a fiduciary position or where equitable remedies, such as specific performance or recession, were granted. For example, in *Walersteiner* -v- *Moir* (No. 2) [1975] QB 373 the defendant was ordered to repay money that he had appropriated wrongfully and to pay compound interest on the sum due, calculated at 1% over the minimum lending rate with yearly rests.

The Bills of Exchange Act 1882, in section 57, provided that the holder of a bill that has been dishonoured may calculate the sum that would have been due as interest if a stipulation for interest had been agreed, and might sue for it as liquidated damages. If there appeared to be no defence to the action he could thus avoid having to take his case to trial and could instead apply for summary judgment. It was provided, however, that the court that heard the application for summary judgment might disallow or reduce the amount of interest claimed. So the remedy available is partly discretionery — the interest may be claimed as of right but the court has discretion to reduce or reject it completely.

Interest on a debt may be payable as of right at common law or by statute. At common law, such a right may arise where the parties have provided for it expressly. A promise to pay interest may be inferred from the course of dealing between the parties, from the custom of the trade or from the circumstances of the particular transaction. By statute, interest may be payable as of right in respect of certain debts. For example:—

(a) A partner may claim interest at 5% per annum on money advanced to the firm, subject to agreement to the contrary *(S.24(3) Partnership Act 1890)* and interest may be claimed at the same rate in partnership dissolution accounts as an alternative to claiming a share of the profits attributable to the use of the money (ibid, S42(1)).

(b) Interest may be recovered by the Revenue Commissioners on overdue taxes at prescribed rates in certain circumstances.

Judgment Debts

The Debtors (Ireland) Act 1840 provides in Section 26 that all judgment debts should carry interest at a certain rate. Until 1981 this was at 4% per annum. Whatever effect such a penalty had in Victorian times, by the 1970's it was an open invitation to delay paying until after judgment. With record inflation and interest rates, debtors realised that their judgment debts could be turned to their advantage. The 1981 Act has changed the rate to 11%. In addition, Section 20 of the 1981 Act, empowers the Minister for Justice to make an order varying this rate as often as every two years "if he is satisfied that the rate of interest per annum for the time being ... ought, having regard to the level of rates of interest

generally in the State, to be varied". The Minister must lay such an order before the Oireachtas in the usual way.

Until 1981, interest on judgment debts also ran on the costs awarded with it but this applied only to decrees and orders of the High Court. Now, Section 27 of the Debtors (Ireland) Act 1840 has been extended by Section 21 of the 1981 Act so that interest runs on Circuit Court costs. Another innovation is that judgment debts not exceeding £150 do not carry interest irrespective of the Court in which the judgment was obtained (S.23 1981 Act). The Minister for Justice may vary by order the figure of £150.

The new statutory discretion to award interest

By Section 22 of the 1981 Act, a judge has discretion in any proceedings where he orders payment of money, including damages, to order payment of interest thereon. This section is modelled on Section 3 of the English Law Reform (Miscellaneous Provisions) Act, 1934. It must be remembered, however, that the Irish section has several important differences from its English counterpart. It is worth quoting Section 22 of the 1981 Act in full:

1. Where in any proceedings a court orders the payment by any person of a sum of money (which expression includes in this section damages), the judge concerned may, if he thinks fit, also order the payment by the person of interest at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840, on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgment.
2. Nothing in subsection (1) of this section —
   (a) shall authorise the giving of interest, or
   (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise, or
   (c) shall affect any damages recoverable for the dishonour of a bill of exchange, or
   (d) shall authorise the giving of interest in respect of a period before the passing of this Act, or
   (e) shall authorise the giving of interest on damages for personal injuries, or in respect of a person's death, in so far as the damages are in respect of —
      (i) any loss occurring after the date of the judgment for the damages, or
      (ii) any loss (not being pecuniary loss) occurring between the date when the cause of action to which the damages relate accrued and the date of the said judgment.
3. In this section—
   "damages for personal injuries" includes damages for personal injuries arising out of a contract;
   "pecuniary loss" means loss in money or money's worth, whether by parting with what one has or by not getting what one might get;
   "personal injuries" includes any disease and any impairment of a person's physical or mental condition;
   "proceedings" includes proceedings to which the State or a State authority (within the meaning of the [Courts (Supplemental Provisions) Act 1961]) is a party."

Already the High Court has considered this Section in the judgment of Finlay P. in *Mellowhide Products Ltd.* -v- *Barry Agencies Ltd.* (22 February, 1982 unreported). This case involved the usual summary summons to recover payment for goods sold and delivered. The Master of the High Court ordered that the Plaintiff be at liberty to enter final judgment for the debt in question together with interest at 11% from the date of issue of the summons. The Registrar of the High Court refused to enter judgment for the interest being of the opinion that she did not have power under Section 22 of the 1981 Act. The matter went back to the Master who transferred the summons to the High Court judge's list, having discharged his earlier order.

Finlay P. had to consider, firstly, whether it was within the jurisdiction of the Master to grant interest under Section 22 (1) of the 1981 Act and secondly, whether his discretion to do so should be exercised in this particular case.

The learned President reluctantly concluded that the phrase in the Section, "the judge concerned . . . ", could not be construed as giving the Master any jurisdiction. The Courts (Supplemental Provisions) Act 1961 made it clear that a judge of the High Court could only be one appointed under the Constitution and could not include the Master or a Registrar. It followed therefore that the new statutory discretion to award interest was not available in the Master's Court. Finlay P. pointed out that this was not only different from the U.K. section in their 1934 Act but also caused an anomaly that the legislation might consider remedying. He stated:

> "If in order to recover interest before judgment a creditor suing in default of appearance or in default of defence has to seek to have the matter put in the judge's list then such creditor will be put to additional cost and expense and if the amount is recoverable in full the debtor will be put to additional cost and expense even if he does not appear or defend".

In the President's view there did not appear to be any logical reason why the Master should not have the statutory discretion.

Finlay P. decided to allow the claim of the Plaintiff for interest from the date of issue of the summons, stating:—

> "Where a debt is due as the result of an ordinary trading or commercial transaction it would appear to me that the debtor delaying the due payment of his liabilities is clearly and in a sense intentionally depriving his creditor of the use and value of the money concerned".

He was also influenced by "the fact as a matter of common knowledge" that prevailing interest rates

were much higher than the 11% provided for in the Debtors (Ireland) Act 1840, as amended by the 1981 Act.

The granting of interest in this case did not mean that the recovery of interest on arrears in any claim by way of liquidated demand should be automatic. Per Finlay P.:

> "The Court must exercise a discretion and it may well be that Plaintiffs seeking an order for such interest, and, unless and until the legislation is amended, having to come to the Court for that purpose, may well be advised to amplify the effects and consequences of the failure or refusal of the Defendant to pay so as to justify a claim for interest."

Lastly, the learned President ruled that it was not necessary to explicitly mention the claim for interest on the summons.

Since the *Mellowhide Products* case the practice has been developing in the High Court of transferring undefended cases to the judge's list for ruling on claims for interest. It is to be hoped that the Oireachtas will listen to the suggestion that the Master should also have this jurisdiction so that unnecessary expense can be avoided.

Another difference from the English section is that the Irish Court is compelled to give interest at the rate specified for the time being in the Debtors (Ireland) Act 1840, (as amended by the 1981 Act) that is, 11% at the present time.

The judge's discretion to award interest as he thinks fit is qualified by Section 22 (2) (a) which provides that the Section shall not "authorise the giving of interest on interest". Thus compound interest is not possible and where the creditor has a contractual right to interest on his debt the judge has no jurisdiction to award interest on the interest element in the claim. In England, it has been decided, however, that interest may be awarded on damages even where the damages are assessed by reference to interest which the plaintiff has had to pay, *Bushwall Properties Limited -v- Vortex Properties Limited [1975] 1 WLR 1649).*

A further limitation on the judicial discretion to award interest is the preservation by Section (2) (b) of the 1981 Act of the common law rules on interest due by right on a debt as described earlier; and likewise, the position on bills of exchange is unchanged.

A restriction on the power of the Irish judge which does not exist in the English section in their 1934 Act is contained in Section 22 (2) (e) of the 1981 Act. Interest may not be given on damages for personal injuries, or in respect of a person's death, in so far as the damages are in respect of any loss occurring after the date of the judgment for the damages, or any loss other than pecuniary loss occurring between the date of accrual of the damages and the date of judgment. Since 1969, the English Administration of Justice Act provides that in every case of personal injury or wrongful death where the damages exceed £200 an award of interest should be made unless there are special reasons for refusing it. The reasoning behind this is to encourage claims to be brought before the courts with greater speed. It is submitted that, despite the objections of the Irish insurance companies, a similar rule here would be beneficial and would lead to more efficient litigation and more expeditious settlements.

A fairly obvious weakness of the new Irish interest provisions is where a debtor settles his debt prior to judgment or to an order for payment. In such a situation he cannot be ordered to pay interest to his creditor as there is no order for payment. Furthermore, where money is paid on account, even after proceedings have commenced, the Plaintiff must credit the payment against the debt and may only obtain judgment for the balance (*Hughes -v- Justin [1894]* 1 Q.B. 667). As interest may only be awarded in respect of the sum for which judgment is given, the debtor who has the means to pay his debt may obtain a period of interest-free credit by delaying payment until the last moment before judgment. Even if he does not pay it all before judgment he can only be ordered to pay interest in respect of the balance left outstanding for which actual judgment is given.

A surprising oversight by the drafters of the Irish interest provisions is the complete vacuum in regard to arbitration. Section 22 is not specifically extended to arbitrators. Yet at the same time as the Oireachtas was considering the concept of judicial discretion to award interest, the English Court of Appeal was casting grave doubt on the powers of arbitrators to award interest by way of analogy with the English 1934 Act. This was in *Tehno-Inpex* -v- *Gebr. Van Weelde Scheepvaarkantoor B.V.* [1981] 2 W.L.R. 821. Even more judicially alarming in that latter case Lord Denning M.R. in a dissenting judgment on the point sought to reverse the House of Lords 1893 decision in the *London, Chatham and Dover Railway Company* case (supra.) and argued that arbitrators had power to award interest at common law. Whereas the other two judges in the Court of Appeal disagreed with Lord Denning, the resulting uncertainty from the *Techno-Inpex* case should make prudent solicitors advise clients entering into contracts with astute debtors to ensure provision for late payment and for interest.

The 1981 Act has undoubtedly improved the law on interest and was certainly long overdue. It is frustrating that the Oireachtas did not fully learn from the English experience when modelling our legislation on their 1934 Act. New anomalies have been created which will await reform. Hopefully the pace of change will not be as slow as the centuries it has taken us in this jurisdiction to change the structure of the common law. □

Small Law Firm Dos and Don'ts for Acquiring a Computer

by Thomas S. Clay, Altman & Weil, Inc. Management Consultants, Ardmore, PA; Northfield, IL; Orinda, CA

TECHNOLOGICAL advances made during the 1970's required lawyers and law firms to answer the threshold question: "Should we be using a computer in our law practice?" For many firms the question has been answered affirmatively, and now the question is: "What computer or system should we acquire?" With the proliferation of low priced microcomputers, allegedly touting they can do everything but try a case, more poor decisions than good ones are being made by smaller law firms acquiring computers. Unlike smaller law firms, large firms have financial, clerical and management resources available to help rectify mistakes. Larger firms can also amortize the "cost" of their mistakes or inefficiencies over a wider range of owners. In a smaller law firm, a $10,000 or $15,000 mistake can do irreparable harm and be far more costly through disruption to the law firm's financial systems. The potential for an operational disaster or financial chaos is greatly increased in the smaller environment. Consequently, small firms must be even more cautious in making a computer decision.

The purpose of this article is to provide several important dos and don'ts for small law firms considering a computer. These points will assist the smaller law firm in analyzing the many systems available and will preclude a potentially disastrous installation. We will not deal with conceptual issues of technology or the conduct of a properly performed computer study. These issues are written about extensively and most effectively in LAW OFFICE AUTOMATION AND TECHNOLOGY, published by Matthew Bender & Company, a comprehensive volume on the use of technology in the law office.

This article is not written for the computer enthusiast or evangelist, but for the lawyer and administrator who are not gadget-oriented or do not have the time to immerse themselves in technical detail. Reading these few pages will not make the reader an expert on small computers or their selection, but it will cover some basic decision-making in a firm's entry into the rapidly changing technology of mini and microcomputers.

Following are some examples of small firms which should have followed the included list of dos and don'ts.

1. A firm of 12 lawyers bought a microcomputer and software to perform rudimentary time accounting and billing functions. The system worked relatively well until an operator error caused the entire disk to be erased. Standard operating procedures dictate that law firms back up or save information residing on disk at least daily. The computer model that the firm purchased did not provide a back-up medium; therefore, all of the client and matter time files were destroyed. Fortunately, the firm retained time slips and, through a heroic effort, was able to duplicate its files. The system purchased could be expanded to include back-up capabilities, but the firm failed to consider this important requirement. The firm is now facing a significant equipment upgrade cost.

2. A firm of 3 lawyers was convinced by another lawyer, who was an enthusiast of microcomputers, to purchase a system that would provide data processing, word processing, and additional legal support functions. The firm bought this "panacea" machine. When the system required maintenance, as all systems do, the only way for hardware maintenance to be performed was to send the unit back to the manufacturer. This caused the firm to be without its data processing and word processing functions for three weeks.

3. A firm of 8 lawyers puchased a small, multiple-terminal system to perform word processing and data processing without seeing a detailed demonstration of the system's capabilities. After installation, the firm discovered that the system could not perform several of its major billing requirements. To compound the problem further, when data and word processing were performed simultaneously on the computer, serious degradation (or computer slow-down) occurred. As a result, the law firm had to purchase a second computer for word processing, and it is still waiting for the software supplier to redesign the system to handle its billing requirements.

There are major horror stories that can be related, with equally disastrous results. All of the major vendors of computer systems for law firms and most of the microcomputer vendors are targeting small law firms as clients. The expectations of these smaller firms are great. In fact, the computer is perceived as a solution to functional and economic problems. As a practical matter, the rewards and benefits of technology are often intangible and difficult to quantify. Consequently, many smaller firms will experience not only disappointment in the use of a computer, but will spend thousands of dollars unwisely.

Following are the ten DOS and ten DON'TS that, if adhered to, will greatly increase the firm's potential for a successful installation. These DOS and DON'TS are a result of years of working with law firms and observing many mistakes that have occurred.

Dos

1. Do make sure that local hardware maintenance is available, including an inventory of parts and trained personnel. This is especially important where the system is to perform the word processing function, which cannot be down for hours, much less days. Do not be caught having to send your equipment back to the factory to be serviced.
2. Do attend a practical demonstration of all the functional requirements that you have determined are necessary. Hold this demonstration in the vendor's place of business and not in another law firm. You should not be prejudiced by another law firm that may or may not have made an appropriate decision.
3. Do buy hardware only from a company that has a solid background. With the myriad computer companies, especially microcomputer vendors, now providing equipment, it is a certainty that failures will occur. The market is changing too rapidly for firms to consider equipment from companies still in the early stages of growth.
4. Do require that the hardware and software vendors provide efficient, well written documentation with the system. This documentation should be written so that a nontechnical individual in the office can operate the equipment and perform the desired functions by reading the documentation.
5. Do hold acceptance tests (these criteria should be documented in the contract). Acceptance tests are tests performed, using the equipment to be purchased, to prove that the equipment and software work to the satisfaction of the purchaser. Monies should not change hands until the acceptance tests have been completed to the purchaser's satisfaction.
6. Do project five and ten year growth volumes and require that the vendor(s) provide you with calculations depicting the required memory size and disk storage capacity. These volumes should be couched in terms of accounting transactions, numbers of timekeepers, and the like. If the vendor is unable to provide such calculations, do not deal with them.
7. Do prepare a formal Request for Proposal for subsmission to all vendors. This will ensure that vendor responses are more easily compared. In addition, the RFP should state that vendor proposals will be incorporated by reference into the contract. This helps insure more accurate responses.
8. Do investigate law firm references of similar size and practice that have purchased systems from the vendor under consideration. If you will be the largest firm to install the system to date, be very cautious.
9. Do request some financial data (income statement, number of employees, number of installations and dates) from the software supplier. In many cases, these companies are small businesses with relatively little financial resources and assets. Their potential for bankruptcy is high. Remember that the software is the most important component of the system.
10. Do purchase a system that can be configured with a letter quality printer. Even if you do not intend to perform word processing functions, final billing capabilities are a must.

Don'ts

1. Don't let the vendor (or salesperson) define your requirements. Many salespersons of the large established vendors to law firms have become fairly knowledgeable regarding law firm operations and needs. However, with the advent of newer systems and more software, one should not expect the salesperson to be very familiar with small law firm operations.
2. Don't purchase a software package that has not been installed before with other law firms. Smaller law firms should not undertake pilot projects or become test sites for vendors. The potential for the project to go sour is too great.
3. Don't purchase a computer that cannot expand its internal memory, disk capacity, and peripheral devices. If the system cannot expand commensurate with the projected requirements for disk storage and peripheral devices (video terminals, printers) for a five and ten year period, the system should not be purchased.
4. Don't purchase a system that does not have a removable medium to perform back-up. The system must be able to copy information from the primary medium to floppy disk, hard disk or magnetic tape for storage.
5. Don't buy a system without a software maintenance agreement. If the vendor is unable to guarantee support of the software, in effect, the software is useless.

6. Don't sign a vendor's standard contract. Contrary to popular belief, vendors will negotiate contracts. The contract should be comprehensive, covering such items as payment schedules, acceptance tests, expansion capabilities and the like. See Chapter 19 of LAW OFFICE AUTOMATION AND TECHNOLOGY for a thorough discussion of negotiating computer contracts.
7. Don't buy a computer that performs data processing and word processing on the same system if you require the best of both worlds. Typically, major vendors who have developed both functions, have developed one as an "add-on" to help sell the system. Even though some of the systems have become quite sophisticated, the secondary function, in most cases, continues to be a step-child. In the case of microcomputers, many of the software packages available are extremely rudimentary and less acceptable to the requirements of law firms.
8. Don't expect a computer to solve administrative problems. If lawyer compliance and the state of administrative systems is poor, then installation of a system will not necesarily improve either, and quite likely will only cause additional problems.
9. Don't acquire a system that does not have the capability of supporting multiple terminals. If you wish to do more than one function, you will need the capacity for multiple terminals.
10. Don't expect the vendor to be of much assistance once the system is installed, no matter what promises are made prior to the sale. The economics of commission structures and profit margins in the smaller marketplace require purchasers to rely upon themselves and not vendors.

It is estimated by some that computer technology will change at a 25% compounded rate annually, during the next decade. Given this assumption, computer technology will change 100% in less than three years. This rapidity of change makes selection of a computer system a difficult task for most firms. The dos and don'ts, if heeded, will improve your chances of selecting and implementing a system that will meet your requirements. Additional information is available through periodicals such as *Legal Economics*, *Law Office Economics and Management* and the Altman & Weil *Report to Legal Management*, or through attendance at seminars presented by bar organizations, the Association of Legal Administrators, and some management consulting firms.□

Irish Kidney Association Ltd.

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Dr. Michael Carmody,
M.D., F.R.C.P.I.,
Medical Advisor.

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Further information may be obtained from the Irish Kidney Association, 29 Eaton Square, Monkstown, Co. Dublin.

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Launch of "Dismissal Law in the Republic of Ireland", 23 September, 1982.

Attending the launch were (from left) Mr. W. Brendan Allen, President, Incorporated Law Society of Ireland, Ms. Mary Redmond, author and His Honour, Judge John Gleeson who wrote the introduction to the book.

Launch of "Directory of Services, 1982", 21 October 1982.

BOOK REVIEW

George Gavan Duffy 1882-1951, A Legal Biography, by G. M. Golding. Irish Academic Press, 1982 (xvi, 224p.) £15.00.

To write the life-story of a modern judge is a daunting task. Because of the nature of his office a judge is remote from the people and relatively remote from the legal profession. He must not merely be independent; he must be seen to be so. And the manner of his life is such that a biographer is deprived of those dramatic or eccentric touches which enliven a story and make it racy of the soil. Respectability is not a rich subject matter for biography unless it is accompanied by genius or sanctity.

Sir Jonah Barrington acquired popularity only after he had been removed from the 18th century Irish Bench for financial impropriety and thereby found the time to write his delightful social memoirs which won for him posthumous fame and a plaque on his house in Harcourt Street, Dublin. Likewise Cicero is more honoured for his philosophical essays than for his speeches at the Bar or his public activities.

If Plowden, Coke and Davies have acquired a noteworthy place in legal literature it is largely because they initiated or developed the important craft of law reporting at a time when the common law was taking shape. And it is precisely within the domain of the law reports that a good and learned judge finds a permanent place for his legal opinions as he endlessly pursues the elusive goddess of Justice down the arches of the years and through the dark undergrowth of modern commercial and industrial life. The man himself may be dead and forgotten but his judgments remain embalmed in their leather and buckram tombs and consulted by students and lawyers in their search for judicial precedent and the application of *stare decisis.*

Why then has Mr. Golding disturbed the peace and rest of an Irish judge by writing his biography? In the first place he *was* different. A son of Sir Charles Gavan Duffy, the future judge was born in Cheshire and educated in Nice and in England. His defence of Roger Casement cost him his partnership in a firm of London solicitors and, after practising for a brief period under his own name, he moved his home permanently to Ireland and began to read for the Bar. He became a member of the team which negotiated the Anglo-Irish Treaty in 1921 and became Minister for Foreign Affairs for a period and, ultimately, President of the High Court.

Mr. Golding outlines the events of the early years and the period of his parliamentary life up to 1923 with ample notes and references. The chapter with most general interest for the legal profession, however, is likely to be that dealing with his years as a barrister before he was appointed a judge of the High Court in 1937. It has been stated by an experienced colleague that Gavan Duffy's most clearly distinctive feature as a lawyer was his passionate devotion to the advancement of human rights and the rights of private citizens as against the executive authority. A major essay which he published on the need for law reform confirms this statement and distinguishes him as a liberal and far-seeing judge.

In the essay he advocated the abolition of primogeniture and the Royal prerogative. He called for a reform of the law relating to charities and adoption and the modernisation of company law and arbitration. With keen foresight he also advocated generally the legal-right principle in favour of a testator's surviving spouse and, in the law of tort, he sought the abolition of the action for seduction and the clarification of the concept of concurrent wrongdoers. Most important of all he would abolish the 'last opportunity' rule, apply the rules of contributory negligence and legislate for the survival of certain causes of action on the death of a claimant. Years later when most of these reforms have been implemented one realises how profound was his appreciation of the need for reform.

Mr. Golding humbly asserts that his book is merely a modest judicial biography and that many helpful guidelines were taken from earlier biographical studies of judges. In particular he acknowledges his debt to Mr. Vincent Delany who had summarised the legacy of Chief Baron Palles in relation to his contribution to the law. With the mass of material available in the form of his judgments the author considers that it would be presumptuous to have even attempted to utilise them all in endeavouring to analyse Mr. Justice Gavan Duffy's legal method, philosophy or style. However these judgments are considered at length in relation to the common law of Ireland, emergency legislation, judicial review and the Constitution and, finally, his work as a Chancery Judge. All the celebrated cases are discussed at length and several critical and even controversial views are expressed. The author considers that *Cook* -v- *Carroll* and *Schlegel* -v- *Corcoran and Gross* were regrettable judgments but he is generous in his comment in relation to the latter case. In the final analysis he considers that the judge should be remembered as a Catholic gentleman in the liberal continental tradition and for his great contribution to the development of the Constitution.

Mr. Golding is a solicitor and is a lecturer in Business law at University College, Dublin. One is filled with admiration for the pains which he obviously took during the period of research and for the ability which he has shown in writing this book. He had many interviews with judges and lawyers during the course of his task and several of his statements are the result of personal communication with them. With thirty three pages of notes, supported by the relevant authorities, and six pages

of sources and bibliography the extent of his research is obvious.

A school of thought exists which considers that judges, who are looking at the world from the inside, should themselves publish memoirs or reminiscences and say to the world what they wish to say like Felix Frankfurter in the United States and Lord Denning in England. In default of such an event in the present instance one must congratulate Mr. Golding sincerely for having written this first biography of a distinctive and distinguished judge.

GERARD A. LEE

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Binders which will hold 20 issues are available from the Society.

Price: £5.14 (incl. VAT) + 87p postage.

Correspondence

Charles R.M Meredith, Esq.,
Solicitor,
C/o The Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

2nd July, 1982

Dear Mr Meredith,

I have been shown a copy of the Incorporated Law Society's *Gazette* for October 1981 containing an article by you under the title "The Legal Problems of Ageing" and as I was for a number of years an official in the office of the Registrar of Wards of Court (and previously in the office of the Registrar to The Chief Justice) in Dublin, I found your article of much interest and I am taking the liberty of writing to you.

In particular, I was surprised to see that in both the Republic and Northern Ireland the provisions of sections 13, 14, 15, 18 and 68 of the Lunacy Regulation (Ireland) Act, 1871, have apparently remained substantially unaltered since their enactment, except as to the monetary limits mentioned in section 68.

I like your suggestion to the effect that every case, regardless of the capital value of the estate or its income (but presumably excluding those under section 103), should be capable of being dealt with under section 68. Quite a long time ago (1930) I published a small volume "Law and Practice in Lunacy in Ireland" dealing with these matters and, had it then occurred to me, I might well have made the suggestion myself.

While in the Registry, and later while in practice at the Bar, I had occasion to participate in several of these lunacy inquisitions with juries under the Act, and my experience was that in such cases juries are mistakenly inclined to treat the matter as a criminal trial, requiring that the appropriate standard applicable is proof of insanity *beyond all reasonable doubt*.

Indeed I recall one case, heard before the then Registrar (the late John Muldoon K.C.), where the alleged lunatic, who was obviously mentally very deficient, was declared by the jury not to be of unsound mind, where-upon the Registrar, in closing the proceedings, told him (quite correctly) that he was probably the only person then in Court who had ever been expressly found by a jury to be sane!

With kind regards and congratulations upon your article.

Yours sincerely,
L.G.E. Harris,
P.O. Box 43798
Nairobi,
Kenya.

The Editor,
Gazette I.L.S.I.
Blackhall Place,
Dublin 7.

4th October 1982

Re. Solicitors Golfing Society

Dear Sir,

I intend making some research into the general history and foundation of the above Society and would be obliged to receive from members any information whatsoever concerning the Society viz. press cuttings, photographs, score cards, names of winners, venues of outings etc.

It appears that the Irish Solicitor's Golfing Society was in fact founded on 7th October 1920 at a Meeting held in Portmarnock Golf Club. The purpose of the Society was to bring together in the field of Golf members of the Solicitors Profession throughout Ireland.

The first Officers elected were President: C. St. G. Gamble, Pres. I.L.S.I., Captain: J. B. Moore, Committee: Thomas F. Monks, Basil Thompson, Paul A. Brown, R. G. Warren and T. Earley, Hon. Secretary: H. Horan.

I have a Booklet which gives the names of the Presidents and Captains from 1920 to 1933 and which also contains some of the rules, the winners of the various cups and a list of members, any further information would be very welcome.

Thanking you in anticipation,

Yours sincerely,
Gerard M. Doyle,
Solicitor,
Rutledge Doyle & Co.,
51 Lower O'Connell St.,
Dublin 1.

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

17th August, 1982

Re: Feeding the Estoppel

Dear Madam,

We will all be pleased with the Recommendation of the Joint Committee of Building Societies Solicitors and the law Society published in the June 1982 issue of the Gazette that no Deed of Rectification be required where a Deed of Release is dated subsequent to the Deed of Assignment and that the doctrine of Feeding the Estoppel operates and soforth. The recommendation mentions that the legal profession has been crying out for years to have Releases operate like Vacates.

I think I can claim to have been the first of our profession to champion this (? lost) cause. In the course of an address as then President to the A.G.M. of November 1969 I said:—

"I would exhort the Department of Justice to introduce legislation similar to that of Sections 42 and 43 of the Building Societies Act 1874 which provides that Vacates of Building Societies Mortgages relate back. I cannot see any reason why we should not bring all mortgages into line and thus avoid an immense amount of difficulty for purchaser's solicitors on closing. They must wait sometimes for quite a long time for a Release to be executed, stamped and registered before their own clients and their mortgages can perfect their own titles by registration. A similar section is all that is required, and I am assured by Senior Conveyancing Counsel that there cannot be any valid grounds for objection to such a course."

The then Minister for Justice and I believe any of his successors who gave the matter a thought and Senior Officers of the Department (and I badgered many of them) unanimously agreed with my suggestion.

The following letter was published in the Gazette of November 1970:—

Dear Sir, — I am directed by the Minister for Justice, Mr. D. O'Malley, T.D., to refer to your letter of the 7th September regarding the suggestion that releases of mortgages generally should be brought into line with building society vacates.

An outline of a provision which would give legislative effect to this proposal has been prepared and has been sent to the Revenue Commissioners for their observations; the Revenue Commissioners are, of course, concerned because changes in liability to stamp duties may be involved.

As to the enactment of the necessary legislation, the Minister is contemplating the inclusion of a provision on the lines suggested in the proposed Registry of Deeds Bill, which is the only measure in the Minister's present legislative programme that could suitably carry it. It will be some months yet before the Minister will be in a position to ask for leave to introduce this Bill.

Yours faithfully,
C.S. McCarthy,
Private Secretary to Minister.

Readers may be surprised to learn that the exercise of pushing open doors becomes after many years utterly exhausting. I simply had to give it up.

Yours faithfully,
Eunan McCarron.
P.S. I'm sure the Estoppel is as fed up as I am.

Eunan McCarron Esq.,
Solicitor,
9, Upper Mount Street,
Dublin 2.

16th November, 1970.

RETIREMENTS FROM THE COUNCIL

Two outgoing council members, Messrs. Gerald Hickey and W.D. McEvoy did not seek re-election to the council at the recent elections.

Mr Hickey, who was elected to the Council in 1967, served as President of the Society in the year 1978/79.

Mr McEvoy, who was elected to the Council in 1974, served as Junior Vice-President of the Society in the year 1981/82.

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 1st day of December, 1982.

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

1. REGISTERED OWNER: John James McDonnell, Carrownedin, Killasser, Swinford. Folio No.: 33534; Lands: (1) Tiraninny; (2) Carrowneden; Area: (1) 7a. Or. 10p; (2) 7a. 2r. 6p; County: **MAYO.**
2. REGISTERED OWNER: Nora Diffney; Folio No.: 236L; Lands: known as No. 9 Malahide Road, Clontarf, **CITY OF DUBLIN.**
3. REGISTERED OWNER: Vincent J. Tierney; Folio No.: 3984L; Lands: of The Leasehold estate in the dwellinghouse and premises situated to the south side of Cray's Lane in the Parish and District of Howth; County: **DUBLIN.**
4. REGISTERED OWNER: James Rowland and Annie Rowland, Main Street, Castlebar, Co. Mayo. Folio No.: 43696; Lands: Gortnaheltia; Area: 49a. 3r. 20p. County: **MAYO.**
5. REGISTERED OWNER: Peter O'Sullivan and Geraldine O'Sullivan; Folio No.: 3018; Lands: Gullaba; Area: 29a. 3r. 20p. County: **KERRY.**
6. REGISTERED OWNER: Jeremiah Dullea; Folio No.: 21335; Lands: Reagrellagh; Area: 73a. Or. 20p.; County: **CORK.**
7. REGISTERED OWNER: John Francis Kelly; Folio No.: 11154; Lands: Clonlonan; Area: 14a. 1r. 29p. County: **MONAGHAN.**
8. REGISTERED OWNER: John & Nora O'Donoghue; Folio No.: 1642; Lands: Carrigeenculla; Area: 167a. 3r. 8p.; County: **KERRY.**
9. REGISTERED OWNER: James G. Maxwell, Kingston, Taylors Hill, Galway; Folio No.: 52339; Lands: Shangort; Area: Oa. 1r. 20p.; County: **GALWAY.**
10. REGISTERED OWNER: Stuart Lesley Bathhurst, Martin Julian Hall and Wilfred Stuart Atherstone Hales Pakenham Mahon C/o Messrs. Darley Orpen and Synnott, Solicitors, 30 & 31, Kildare Street, Dublin.; Folio No.: 1S; Lands: (1) Lisroyne, (2) Lisroyne, (3) Lisroyne; Area: (1) 3r. 10p.; (2) 3r. 12½p.; (3) 1a. 12p. County: **ROSCOMMON.**
11. REGISTERED OWNER: Angela McKenna; Folio No.: 20923L; Lands: of The Leasehold Interest in the property known as No. 127 Collins Avenue East, **CITY OF DUBLIN.**
12. REGISTERED OWNER: Nora Heneghan, Ballyhard, Glenamaddy, Co. Galway; Folio No.: 25945; Lands: Ballyhard; Area: 5a. 1r. 30p; County: **GALWAY.**
13. REGISTERED OWNER: John McNally; Folio No.: 8940L; Lands: situate in part of the Townland of Windmill lands containing Oa. Or. 14p. in the Barony of Nethercross and County of Dublin; County: **DUBLIN.**
14. REGISTERED OWNER: Gladys McGlynn; Folio No.: 309SDL; Lands: at No. 13 Albermarle Road, **CITY OF DUBLIN.**
15. REGISTERED OWNER: John Patrick Duffy; Folio No.: 50121; Lands: (1) Roosky, (2) Roosky; Area: (1) 19a. Or. 7p., (2) 2a. 2r. 9p.; County: **SLIGO.**
16. REGISTERED OWNER: John Mornane, Mount Catherine, Clonlara; Folio No.: 1355; Lands: Cappavilla North; Area: 46a. 3r. 8p.; County: **CLARE.**
17. REGISTERED OWNER: Mathew Byrne; Folio No.: 1109; Lands: Dysartleagh; Area: Oa. 3r. 29p. County: **LAOIS.**
18. REGISTERED OWNER: Thomas Rochford; Folio No.: 66; Lands: Barnyand Bealady; Area: 44a. 2r. 7p. County: **LAOIS.**
19. REGISTERED OWNER: Josephine Myles; Folio No.: 7264; Lands: Lisnadarragh; Area: 17a. 3r. 10p. County: **MONAGHAN.**
20. REGISTERED OWNER: Peter Fleming; Folio No.: 7LSD; Lands: of South Circular Road, County: **DUBLIN.**
21. REGISTERED OWNER: Robert Laurie; Folio No.: 7654; Lands: Ballinagree; Area: 782a. Or. 33p. County: **WICKLOW.**
22. REGISTERED OWNER: William Kelly; Folio No.: 6132; Lands: Camaross; Area: 9a. 2r. 2p. County: **WEXFORD.**
23. REGISTERED OWNER: Shannon Homes Limited; Folio No.: 9826F; Lands: Bryanstown; Area: 3.250a. County: **MEATH.**

Miscellaneous

For Sale: Publican's Ordinary Seven Day Licence. For particulars apply to Messrs. James Fagan & Co., Solicitors, 57/58 Parnell Square West, Dublin 1 — reference PK/1434/T.

19 year old with Leaving and Matriculation Certificates (Hons. English and History) seeks position as trainee Law Clerk. Dublin area. Secretarial skills. Excellent references. Phone 909262.

Canadian Solicitor currently seeks position as assistant in solicitor's office for a period of three years. Phone 944406.

For Sale, by Solicitor's firm changing to larger system, I.B.M. Display Writer—Word Processor with printer and relevant programme. Enquiries to Box Number

Found: Small item of jewellery at Wexford S.Y.S. Contact: Margaret Corbett, Neil Corbett & Co., Solicitors, 62 Main Street, Mallow, Co. Cork. Tel. (022) 22115/22862.

Lost Wills

Smith, Christopher, deceased, late of 1, Thomas Moore Road, Walkinstown, Dublin 12. Will any person having knowledge of the whereabouts of the last Will and Testament of the above named Deceased, who died on the 25 September 1982, please contact Messrs. Herman Good, Hubert Wine & Co., Solicitors, 22-23 Dawson Street, Dublin 2.

McMahon, Thomas, deceased, late of 12 Newlands Park, Clondalkin, Co. Dublin. Would any person having knowledge of a Will of the above named deceased who died on the 12th October, 1982 please contact Francis J. O'Mahony & Company, Solicitors, New Road, Clondalkin, Co. Dublin.

Broderick, John Hart, deceased, late of Killarney Road, Castleisland, Co. Kerry, Civil Servant. Would anybody having knowledge of any Will of the above named deceased, who died on the 10th July, 1982, please contact Messrs. O'Donnell Liston & Co., Solicitors, 4 Denny Street, Tralee, Co. Kerry. Tel. (066) 21082/23259.

Recent U.S. Law Graduate seeks short-term (mid-November to mid-February ideal) volunteer law clerk position. Main interests in comparative and criminal law. Require only small stipend for room and board. J. Packer, 2845 North Park Blvd., Cleveland Heights, Ohio 44118 U.S.A.

Title Deeds — Mary P. Schworer, 24 South Circular Road, Dublin 8. Would anyone having any knowledge of the whereabouts of the title deeds of the above property which was purchased around 1959 please contact McKeever & Son, Ref: GW. Phone 779681.

Seven Day Full Licence for Sale: Apply to: Messrs. Lanigan & Curran, Solicitors, Dungarvan, Co. Waterford. Phone No.: (058) 41085.

Incorporated Law Society of Ireland

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After a lapse of one month, the solicitor will be informed that unless the Accountants' Certificate is received within a further month, disciplinary proceedings will be commenced without further notice and that, at the same time, the Bar Association and County Registrar will be notified that the solicitor is practising without a current Practising Certificate.

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JAMES J. IVERS,
Director General

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76. No. 10 December 1982

The President 1982/83

Mr. Michael P. Houlihan has been elected President of the Incorporated Law Society for the year 1982/83. Mr. Houlihan is senior partner in the firm of Ignatius M. Houlihan & Sons, Solicitors, 10/11 Bindon Street, Ennis, Co. Clare, and is the eldest son of Ignatius Houlihan and Oona Treacy Houlihan, both solicitors.

Educated at Ennis C.B.S., Cistercian College, Roscrea, U.C.D., and the Incorporated Law Society of Ireland, Mr. Houlihan was admitted a solicitor in 1963, and has been a member of the Council of the Incorporated Law Society since 1970. Mr. Houlihan has served on most of the Society's Committees, and is a former Chairman of the Society's Privileges, Professional Purposes and Insurance Committees, and was for many years the Society's representative on the Superior Court Rules Committee. He has also represented the Society at many International Conferences.

Mr. Houlihan is a founder member of the Society of Young Solicitors, a former President of the County Clare Law Association and a member of the Local Authorities' Solicitors' Association. He is also a member of the International Bar Association and has represented his country at its meetings, and he is also actively involved with the Society of Computers and Law, London.

Married, with three children, Mr. Houlihan is County Solicitor for the County of Clare, and is a director of a number of property and development companies. He is also a former President of Ennis Chamber of Commerce.

Mr. Houlihan's election as President is unique in that it is the first occasion that a Clareman has been elected to this position in the history of the Incorporated Law Society of Ireland.

Mr. Frank O'Donnell of Bell, Brannigan & O'Donnell, 22 Lower Baggot Street, Dublin 2, was elected Senior Vice President and **Mr. Ernest J. Margetson** of Matheson Ormsby & Prentice, 20 Upper Merrion Street, Dublin 2, was elected Junior Vice President.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 76. No. 10 December 1982

In this issue . . .

Published at Blackhall Place, Dublin 7.

Comment . . .

Wills Week — Retrospect

THE impact of "Make a Will Week" is likely to be observed in practices during the coming months. Making a will is not an impulsive act and the campaign was planned with the intention of stimulating members of the public to move towards the will-making decision.

The Press advertising was directed specifically at the 25-35 age group of "young marrieds" with the message opened out in order to embrace a broader market. This was evident in the radio advertising campaign and in the speech made by the President (Brendan Allen) at the launching of the project. Mr. Allen also took the opportunity to float the idea of a State Register of wills which would be of convenience to both the profession and the public.

The launching of the campaign "collided" with the dissolution of the Dáil; this, and the subsequent General Election campaign, undoubtedly limited the press coverage although the event was noted by the newspapers and strongly supported by a leading article in the *Irish Times* and TV coverage on three occasions. Background information was supplied to all national and provincial newspapers and to a number of freelance writers and this should generate follow-up features in the future.

Public reaction has been good, as assessed by conversations not angled to seek approval. The number of people who mentioned the radio commercial was an indication of the impact of this media. A decision was taken not to use illegal "pirate" radio stations and it was agreed that the Society should not provide speakers for them. This was endorsed by the President. TV advertising was considered and rejected because of the high cost in relation to the budget.

Criticism — anticipated by some members whose conservatism was reluctant to accept corporate advertising — has not been apparent. Support from Bar Councils throughout the country was generally good and undoubtedly reinforced the message as broadcast in the national newspapers and on radio. The initial impact can be further reinforced, as opportunity offers, in talks with local organisations and in client conversations. The follow-up by the Public Relations Committee, which organised the campaign, includes contact with the membership

(Continued on p. 212)

Recognition of Foreign Divorces — a further gloss

by

John F. Buckley and Michael V. O'Mahony, Solicitors

THE recent decision of the Supreme Court in the case of *M.T.T. -v- N.T.* (1 April 1982, unreported) appears at first sight to signify a significant change in the attitude of the Court to the basis upon which it will recognise foreign divorces but the change is one which, in the circumstances of the case, the Court could hardly have avoided. In the earlier cases of *Bank of Ireland and Caffin* [1971] I.R. 123, and *Gaffney -v- Gaffney* [1975] I.R. 133, Kenny, J., (confirmed in the latter case by the Supreme Court), took the view that the Court would recognise a decree of divorce granted in the country where the parties were *domiciled.* In the *Gaffney* case, Kenny, J, expressly reserved consideration of the Court's position if a decree was granted in a foreign country on the basis of the residence of the parties. The *Caffin* and *Gaffney* decisions reflected the old common law rule in *Le Mesurier -v- Le Mesurier* [1895] A.C. 517. At the time of that case the doctrine that a wife's domicile depended on that of her husband prevailed throughout the part of the common law world then forming part of the British Empire and to a lesser extent in the United States. The crucial test was therefore, in all but a tiny majority of cases, the husband's domicile which established the domicile of the parties.

The facts in the *M.T.T.* case were that the wife, M.T.T., was a natural-born Irish citizen who married N.T., the husband, a natural-born British citizen, in London in 1966. They lived in London, where the four children of the marriage were born, until 1974 when they all moved to Co. Cork where the husband got a permanent and pensionable local authority post. Their only place of residence from 1974 until 1976, when the marriage broke down, was in Co. Cork. The husband moved out of the family home towards the end of 1976 but continued to reside in Cork. In February 1977 the husband filed (and served on the wife) a petition in London for the dissolution of the marriage on the grounds that it had broken down irretrievably. The petition was not defended and a decree nisi absolute issued in August 1978. In the meantime, the wife had obtained an order for maintenance under the Family Law (Maintenance of Spouses and Children) Act 1976 in the Cork District Court in 1977 and a variation of that order in 1978. Following the divorce decree in August 1978 the husband applied to the Cork District Court for a variation of the existing maintenance order contending that the divorce absolved him from liability to continue to make maintenance payments to the wife. The validity of this divorce was challenged by the wife on the grounds that the husband's domicile was Irish he having acquired an Irish domicile of choice.

The judgments in the Supreme Court (Henchy and Griffin J.J.) do not give an indication of the basis upon which the English Court took jurisdiction in the matter. Under the provisions of Section 5 (2) of the U.K. Domicile and Matrimonial Proceedings Act 1973 the High Court or a divorce county court has jurisdiction "if (and only if) either of the parties to the marriage, (a) is domiciled in England and Wales on the date when the proceedings are begun; or, (b) was habitually resident in England and Wales throughout the period of one year ending with that date".

The husband was clearly not habitually resident in England and Wales for the prescribed one year period, ending in February 1977 when the divorce proceedings were commenced, so the only lawful basis on which the English court could have taken jurisdiction was the domicile of the husband, which the Supreme Court subsequently held to have been English.

Per Henchy J.:

> "Before the husband's domicile could be held to be Irish it would have to be established that he had abandoned his British domicile of origin and had opted instead for an Irish domicile of choice. This is a mixed question of law and fact, an affirmative answer to which depends on whether it appears from the husband's conduct and the general course of events that he had cast off his British domicile of origin and had chosen to take on in its place an Irish domicile. The rebuttable presumption is that a person retains his domicile of origin . . .
>
> . . . A man's sojourn abroad with his wife and children for two years, even in a position of permanent employment, is not, without more, capable of displacing the presumption that the domicile of origin has been retained. The period lived abroad may be no more than the extended manifestation of the temporary compulsion of circumstances. Such bare facts as we have in this case as to the husband's foreign residence do not show the volitional and factual transition which is a '*sine qua non*' for shedding a domicile of origin and acquiring a domicile of choice".

The law in Ireland is still that a married woman has a domicile of dependency, the same as that of her

husband, irrespective of her domicile of origin or her place of residence. That same U.K. Domicile and Matrimonial Proceedings Act 1973 changed the law in the U.K. in that regard, Section 2 providing that:

> "the domicile of a married woman ... instead of being the same as her husband's by virtue only of marriage, shall be ascertained by reference to the same facts as in the case of any other individual capable of having an independent domicile."

The Section went on to provide that where immediately before the section came into effect (i.e. July 1973):

> "a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section."

That change in the law in the United Kingdom (including Northern Ireland) enabling a married woman to have an independent domicile obviously made it more difficult for the Supreme Court to adhere to its previous position (see *Caffin* and *Gaffney* supra) that it would recognise decrees of divorce granted in the country where the *parties were domiciled.* Once it was possible for parties to a marriage to have different domiciles a new position had to be adopted. The *M. T. T.* case is one in which it must have been likely that, having regard to the facts, the wife would be held, at least in a U.K. Court, to have revived her Irish domicile, if not on the occasion of the move back to Ireland in 1974, certainly on the occasion of the breakdown of the marriage in 1976. One effect of this, would of course have been to prevent the wife herself petitioning for a divorce in the U.K. because she would not have fitted into either of the two categories prescribed by Section 5 (2) of the 1973 Act (i.e. either domiciled in England and Wales or habitually resident throughout the period of one year ending on the date of the filling and serving of the petition for divorce). Presumably the Supreme Court, if the issue had come before it, would have had to accept that the effect of the U.K. 1973 Act was to enable the wife and husband to have seperate domiciles even though under Irish law the wife's domicile would still have been that of her husband's at least until the final decree of divorce.

The fact that the Supreme Court appears to have accepted that the English Court was properly entitled to assume jurisdiction under the provisions of Section 5(2)(a) of the 1973 Act, (i.e. that the *husband* was at the time of the service of the petition domiciled in England) must surely bring the Court closer to having to recognise jurisdiction taken by a U.K. divorce court based on the *habitual residence* of one of the two parties to a marriage under the provisions of Section 5(2)(b) of that same Act.

In the light of such a possible development it is even more important than ever for deserted wives living in Ireland not to ignore petitions for divorce served in U.K. proceedings brought by husbands, who may, *prima facie,* have established the necessary one year's habitual residence enabling the English or Welsh Court to assume jurisdiction. It is ironic that the wife in the *MTT* case could have mounted a challenge to the jurisdiction of the English Court in the divorce proceedings questioning the domicile of the husband. While, as events proved, his domicile was held to be English, there would have been at least enough doubt to give the wife a prospect of achieving a settlement of the English proceedings, including an order for alimony, in consideration of her agreeing to an uncontested divorce.

In the more typical case of the deserted wife whose husband seeks a divorce in England, where both parties have an Irish domicile of origin, a challenge to the jurisdiction of the English Court may be seen to be more optimistic even if the jurisdiction is claimed on the basis of one year's habitual residence rather that on domicile. In any circumstances where a deserted wife (particularly where she has custody of dependent children) is served with a U.K. divorce petition by her husband, then, in the absence of a clearly binding deed of separation providing for index-linked maintenance, the wife should consider a jurisdicitional challenge coupled with a claim for alimony. Even if there is a prior deed of separation providing for an appropriate level of maintenance for the future, the wife should ensure that any U.K. divorce decree acknowledges the existence of the deed of separation and provides for alimony to be paid at the appropriate rate in sterling equivalent to the provisions contained in the Irish deed of separation.□

Comment . . .

(Continued from p. 209)

(7,000 in about one hundred clubs) of the Irish Federation of Women's Clubs, and a direct mail contact with the welfare officers in major commercial and industrial companies throughout the state.

The Society's first venture into corporate advertising may be considered a success and earned commendation in an *Irish Times* leading article which said (in part):

> "The Incorporated Law Society, in launching its "Make a Will Week", is doing a public service. Its President, Mr Brendan Allen, has pointed to the risks involved in people making wills on their own. Sometimes, he says, these documents turn out to be flawed or imprecise. In this day of complexity of law and of business, the learning and experience of the professional are not merely desirable but necessary."

The project was one which supported the claim of the Society that to be a solicitor is to be a member of a caring profession.□

Apprentices

The Council, at its October meeting, recommended a minimum wage of £60 a week as from 1st January 1983 for apprentices who had completed their Professional Course in the Society's Law School and who were working full-time in the offices of their masters during the eighteen month office training period which elapses between the end of their Professional Course and the beginning of their Advanced Course. The recommended minimum scale has been £50 a week since October 1981. The Education Committee stresses that these apprentices are trained to do responsible work in the office and that the volume and spread of that work will benefit both apprentice and master.

Apprentices who have completed their Advanced Course and have passed the Final Examination — Third Part but whose Indentures have not expired have — in the Committee's view — completed their formal training and they should be able to take on the range of duties normally discharged by a qualified solicitor — apart from appearing in Court. Their salaries should reflect that new status as circumstances permit. These apprentices should be advised whether or not they will be offered a position in their master's firm when they qualify. If such a position is not available, the Committee recommends that masters should place no impediment in the way of the apprentices' seeking other employment.

I would welcome the views (in writing) of Masters on the new training programme.

Professor Richard Woulfe,
Director of Education.

International Bar Association Protest at Arrest of Bangladeshi Lawyers

The Council of the International Bar Association, a federation of Bar Associations and Law Societies from 59 countries, themselves representing over 600,000 lawyers, at its meeting in New Delhi, India, on 22 October 1982 was deeply concerned to learn

— that the Government of Bangladesh has arrested a number of lawyers of its Supreme Court, including present and past Presidents of the Bar Association and two former Attorney-Generals
— that many other lawyers have been threatened with imprisonment
— that lawyers are being prevented from freely exercising their profession due to Government interference

and as a consequence, urges the Government of Bangladesh to respect the rule of law by releasing those lawyers imprisoned and by permitting a free profession of practising lawyers who can exercise, without State interference, their profession, including the defence of their clients in the Courts, and uphold the principles of Human Rights. □

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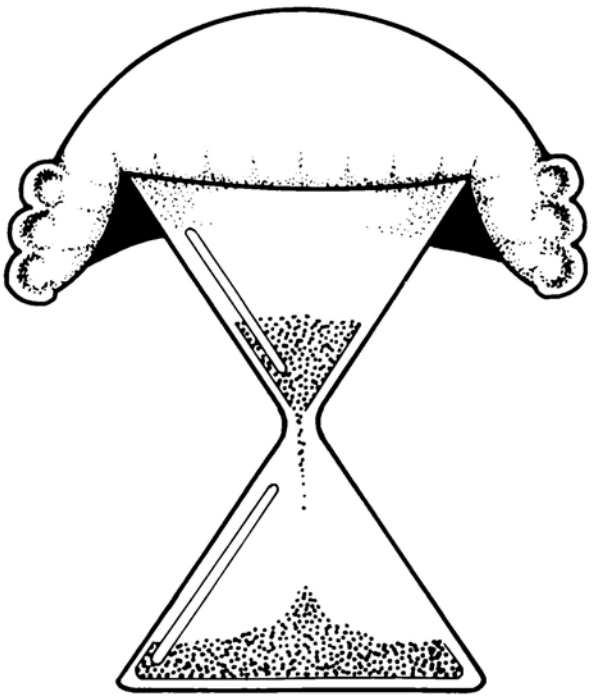

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Housing Finance Agency Loans — a Caution

Criticisms of delays in implementing the Housing Finance Agency scheme of house purchase loans have tended to overshadow the inherent dangers of the scheme for certain categories of borrowers. While the risks which such borrowers took were mentioned in the Society's newsletters, their primary purpose was to alert solicitors to the difficulties which clients who either could or could not get bridging finance would face because of the long gap then existing between approval and payment of the loans. Now that this gap has reputedly lessened considerably, it may be apposite to renew the warnings about the inherent risks for such borrowers. Repayments of loans under the scheme differ radically from any other house purchase mortgage scheme previously operated in Ireland. The factors which determine the amount of the annual repayments are:—

1. any increase in the consumer price index during the previous year (interest is not to exceed the rate of inflation plus 3.25%) and
2. the borrower's gross income in the previous year (payments not to exceed 18% of such income).

The aim of the scheme is a desirable one, namely, to reduce the burden of mortgage repayments in the early years of the loan, but this inevitably means the mortgage debt will rise. The agency has published an example showing an original debt of £22,500 increasing to £58,000 in the 10th year and £101,358 in the 15th year. Using projections of average annual inflation of 15% and average annual salary increases of 16% over the period, the agency shows that the ratio of the borrower's debt to his current income will decline from the figure of 2.90 to nil over the 25 year period.

Leaving aside doubts about the inevitability of salary increases bettering inflation (and economists have usually been rather better at pathology than prophecy) is it necessarily true that there will be a commensurate increase in house prices particularly in the short term? If there is not, then it may prove very difficult for a borrower to sell his house. Taking the agency's calculations and assuming a purchase price of £26,000 and a loan of £22,500, the borrower would at the end of the third year have to repay £31,647 to the agency and, therefore, to have the same percentage of the sale price in his pocket as he had of the initial purchase price would require to achieve a selling price of £35,147, or an increase over the three-year period of 40% over the initial price. Present trends in house prices would not encourage the belief that there would be such an increase.

What is certain, however, is that a borrower will not be able to refinance the mortgage from a normal source of mortgage finance. The most obvious case would be a purchaser who is employed by an institution with its own house mortgage scheme, but who does not immediately qualify for the scheme by reason of his short service with the institution. If he qualifies for the scheme within a few years, he will be faced with precisely the same dilemma as the borrower who wishes to sell, namely, that he is not going to be able to borrow enough under the usual terms of such institution schemes to discharge the loan to the Housing Fianance Agency. Even the ordinary borrower who wishes to turn to a building society or other similar institution for a long term loan will almost certainly find that the amount necessary to discharge the Housing Finance Agency loan will be in excess of what he could borrow from a building society.

These are points which should be clearly explained to prospective borrowers from the Agency. The Agency's own explanatory memorandum is in general very fair, but it must be said that it could perhaps improve its answer to hypothetical question 12 — "what happens if the borrower wants to sell the house?" — the answer "this problem will be treated in the same way as a conventional mortgage. The borrower must redeem the outstanding loan, there will be no special charge for this purpose" might reasonably include some reference to the particular situation created by the fact that there is no repayment of debt in nominal terms for the first 18 years of the loan in the example supplied by the Agency. □

International Bar Association — Delhi Conference

The 19th Biennial Conference of the International Bar Association was held in New Delhi between the 17th and 23rd October 1982, the host organisation being the Bar Association of India. The attendance was approximately 1,600 lawyers and guests.

The Conference was inaugurated by Mrs. Indira Gandhi, Prime Minister of India. The Chief Justice of India and the Law Minister also honoured the Conference by addressing it.

The Main Topics were "The Eighties — The Challenge to the Legal Profession and the Judiciary" with speakers including Lord Lane, the Lord Chief Justice of England, and Jules Deschenes, the Chief Justice of Quebec and "Legal Problems of Investment by International Companies in Developing Countries" where speakers included Heribert Golsong, Secretary General, International Centre for Settlement of Investment Disputes and Past Vice-President and General Counsel, World Bank, Washington DC; Dr. Nitish Sengupta, Chairman, UN Commission on Transnational Corporations 1981-82, and The Hon N.A. Palkhivala, Indian Ambassador to the USA 1977-79, Vice-President, Bar Association of India; and Liu Chu, Deputy Director of Department of Treaty and Law, Ministry of Foreign Economic Relations and Trade, People's Republic of China.

Forty-two of the IBA's specialised Committees held meetings on topics of current international interest. Many of the papers read will be published in the Journals of the two Sections — *International Business Lawyer* and *International Legal Practitioner.*

Presidents and Secretaries of some of the IBA's eighty-nine Member Organisations met and had a lively discussion following a talk by the Secretary-General of the English Law Society on "Which Services can a Bar Association perform for its members and for Society?"

Social Programme. The Indian Mela following the Inaugural Session, complete with elephants, monkeys, dancing bears and fireworks and the classical programme of Kuchipudi dances after the Final Session, truly reflected the fabled glamour and mystery of the East. Apart from excursions, the programme included dinner in the homes of Indian lawyers, a tea party hosted by the Acting-President of India at the Presidential Palace, a Polo match for the IBA President's Cup followed by a musical ride by the President of India's Bodyguard, and a son et lumiere showing the events of centuries at Delhi's Red Fort.

The Society's delegation was headed by the President W. Brendan Allen and the Senior Vice President, Michael P. Houlihan.

At the conference the following officers were elected for the period: 1982—1984

Dr. Franz Reichenback CBE, Switzerland — President
Dr. Enrique Syquia, Philippines — Vice President
James Sutherland CBE, Scotland — Secretary-General
John W. Kennedy, Canada — Treasurer

George C. Seward, USA was elected an Honorary Life President of the IBA in recognition of his great services to the Association as Founder-Chairman of its first Section, that on business law.

The following were elected Chairman of the sections

Richard C. Meech QC, Canada — Chairman, Section on Business Law
Jacob E. Knoll, South Africa — Chairman, Section on General Practice
Robert L. Pritchard, Australia — Chairman, Section on Energy and Natural Resources Law

Mr. Joseph L. Dundon, a former President of the Society was co-opted to the Council of the I.B.A. at the Delhi Conference. □

International Bar Association Establishes New Section on Energy

The IBA Council at their meeting in New Delhi in October, 1982 approved the change in status of Energy and Natural Resources Law (Committee O) of the Section on Business Law of the IBA to the section on Energy and Natural Resources Law (SERL) with effect from 1 January 1983.

Since its formation in 1970 membership of Committee O has grown to over 800 and its activities have expanded considerably. The Section aims to advance the development and understanding of the law as it affects oil, gas, coal, uranium and other mineral and energy sources, both nationally and internationally. Members will include lawyers in private practice, oil and mining companies, government, academic circles and international organisations.

Between 1975 and 1982 Committee O held five advanced, usually residential, seminars on energy and resources law, bringing together up to 350 specialists from all parts of the world. The major focus of the new Section's activities will be this continuing education programme. The next seminar will be held in Houston, Texas from 19-24 February 1984. In addition to these intensive seminars the Section will discuss current international energy and natural resources topics at meetings held during the IBA and SBL Conferences.

The new Section will have four Committees dealing with specialist subjects of interest to energy lawyers namely, Oil and Gas Law, Mineral Law, Coal Law and Renewable Energy Law. Each Committee, will hold meetings to discuss matters within its particular sphere.

The Section will continue to publish the full proceedings of its seminars, in addition to its own quarterly newsheet containing information on Section activities, membership news, articles and reports on current energy and natural resources law in the major resource countries of the world.

Any person who is a qualified member of the legal profession is eligible to join the IBA (annual dues stg. £27.50, or under 36 years of age, stg. £15) and may join the Section on Energy and Natural Resources on payment of additional annual dues of stg. £15.

Full details of membership of the IBA and the new Section are available from: The International Bar Association, 2 Harewood Place, London WIR 9HB. □

Presentation of Parchments, 18 November, 1982

Pictured from left: Ms. Barbara Dowling, Ashbourne, Co. Meath; Ms. Susan Doyle, Mount Merrion, Dublin; Ms. Julia Burke, Cahir, Co. Tipperary and Ms. Denise McNulty, Corbally, Co. Limerick.

The Role of the Law Office in the Administration of Justice

by
Louis M. Brown

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SEVENTY-FIVE years ago Roscoe Pound, then of Lincoln, Nebraska, later the illustrious dean of Harvard Law School, addressed the subject "The Causes of Popular Dissatisfaction with the Administration of Justice" at the annual meeting of the American Bar Association. The opening sentence: "Dissatisfaction with the administration of justice is as old as law." He proceeded by limiting his subject to an "attempt only to discover and to point out the causes of current popular dissatisfaction. The inquiry will be limited to civil justice." His address concerned the law and law courts. He gave only a glancing reference to lawyers.

It is my position that we have yet to give full recognition to the factors, elements, and institutions involved in the administration of justice. We practicing lawyers do not yet see ourselves as we should. There have been minds, great minds, who have drawn attention to the bar. Karl Llewellyn, the renowned professor of law, wrote strikingly in 1937 of "The Bar's Troubles, and Poultices — and Cures" (5 *Law and Contemporary Problems* 104 (1938)). His incisive observations were put in the context of a symposium on unauthorized practice of law rather than in the posture of dissatisfactions with the administration of justice.

Discussions of the administration of justice consider the house of justice but neglect the entry way. Almost every dispute that gets to the courts does so through the entry way known as the law office. Ninety per cent of cases filed in the courts are not determined by court decision but rather by settlements made by and with lawyers and clients. There are, to be sure, tribunals from which lawyers are excluded (for example, many small claims courts) and others (arbitration and many administrative tribunals) where lawyers do not have the monopoly Karl Llewellyn described. Yet exceptions notwithstanding, the law office is the stellar institution in both the entry and exit of our dispute resolution justice system.

The law office is the stopping point, too, for those client claims that never get filed. The circumstances may be that the claim is legally unwarranted, or practically unsound, or financially unacceptable to the law office, or settled without a court filing — circumstances that bear heavily on the total administration of justice.

A major weakness in the academic and popular consideration of justice is that the concern is exclusively dispute resolution. Law and justice are not thusly limited. Many of the legal consequences in nonadversarial matters have more to do with the lives of people than do the judgments of a court. I am utterly fond of the statement of Thomas Shaffer, "My father's will may have more to do with what my life will be like than anything the federal court of appeals will ever do." (*Legal Interviewing and Counseling,* page 3 (1976)). And what is the legal tribunal that is the source of decisions regarding that will? The straightforward answer is, of course, the law office. It is the law office that is the supreme court for the legal decisions in the practice of preventive law. Signing on the dotted line legally commits the signer. Choices, legal and practical, available prior to that signature thereafter are barred or restricted. Some people, including me, assert that law office decisions are more numerous and often more significant to the clients than are even the court decisions in which a client might be a party.

Importance in our society is often measured in dollars. I am hard put to find an authentic figure for the total cost in this country of all our courts. I am harder put to find an authentic figure for the total dollar payment to our law offices — that is, the total gross fees received by lawyers. Certainly the total cost to society of law offices must far exceed the total cost of all the operations of all the dispute resolution tribunals. My ballpark estimate is that the law office industry is somewhere in the range of $35 billion a year. Our informational weakness about cost and the items that account for costs lies deeper.

We know nothing about the number of persons, either as clients or potential clients, who enter law offices, or about the purposes for their doing so, whether for litigation law practice (dispute resolution) or preventive law practice (nonadversarial matters). Our ignorance is appalling. We do not know the number and classification of dispute resolution matters that enter law offices. We are ignorant of the number and kind of these matters that go no further than the law office. If we looked at court filings, we might find out the number and kind of dispute matters that reach the clerk's cage, but this gives us only a fragment of law office entries.

If there are public concerns about the law office in its dispute resolution function, the concerns about it as it functions in nonadversarial matters should be

even greater. For in these matters, the law office is usually the public's only official resort for matters of law. Here, an understanding of its functions and purposes would include the number and kind of non-adversarial matters. How many wills do we prepare? How many and what kinds of transactions and contracts is the law office called on to guide and complete?

Though the customary analysis of dissatisfaction with the administration of justice is confined to disputes that enter the courts, in my opinion dissatisfaction really starts earlier in the chain of human events. It may start with the functions of the gatekeeper— the lawyer who directs the route to the court. But, though less announced, I sense that it starts earlier. Pound is heard to say that there are causes for dissatisfaction with any legal system. Why? Because, in my opinion, there is dissatisfaction that the court system needs to be used at all. The greatest dissatisfaction is not that it — the court system — is used but rather that it is used in situations that might otherwise have been prevented. I mean something more fundamental than other ways to solve disputes. I mean that there is and ought to be virtual resentment in those aggravating and costly dispute situations in life that need never have occurred.

I mean something more. The legal system exists not only to resolve disputes, and lawyers in our midst perform not only to minimize the risk of disputes, but also to maximize legal opportunities. In the absence of disputes, the court system is not to be blamed for the failure of a person to obtain positive benefits, for the court system is not concerned with them. If there are people entitled to food stamps who do not have them, the court system does not call that benefit to their attention. If a business would be better governed or more profitable as a corporation than as a partnership, the court system does not inaugurate the decision concerning the legal structure of the business enterprise. If a person seeks to accomplish the most favourable estate tax results, it is not to the courts to which that person should turn for a satisfactory solution.

James W. Hurst, the illustrious scholar of American legal history, put the point forcefully: "(The lawyer) has, in the bar, collectively constituted one of the key institutions of social order in our history ... the lawyer as a member of the bar, (is) a part of the totality of lawyers constituting an important agency of social organization. It is too narrow a view to define the instruments of government as the executive, legislative, and judicial branches. Realism requires that we recognize that lawyers in their collective impact, as the bar, constitute in effect a fourth arm of government." Hurst, 50 *Marquette Law Review* 594, 598 (1967).

We often credit courts with reaching out into the development of law. Law professors are fond of pointing out to embryonic lawyers the creativity of appellate courts in advancing or developing legal theories, many of which have large societal effects. We should also point out that, while the appellate court made the pronouncement, that pronouncement may have been derived from the presentation to the court made by a lawyer.

We need to make studies of the influence of lawyers' briefs on the decisions, reasoning, and language of our appellate courts. My professor friends whose field of research and teaching is the appellate court are unable to direct me to scholarly accounts of that influence. And, on a different level, I point out that it was not the court that started the process that enabled it to have the issue before it, or even the lawyers who helped frame the legal issue, but rather the client, as litigant, that enabled the process to get started and keep moving. We could learn a great deal about the administration of justice by in-depth investigation of the motives, factors, influences, desires, and costs of the clients.

My point though is that the law office has made and continues to make an imprint on society that, although seemingly idden from view, has had enormous effects and *sotto voce* gives rise to great satisfactions in the total legal order. I illustrate with both old and new examples — examples that derive from explorations into the preventive law practices of lawyers.

The lender of money, if curious, may ask about the origin of the provisions found in negotiable promissory notes — the provision, for example, of attorney's fees when enforcement of a note becomes necessary. Think about the origin of that provision. Certainly the clause must have been an invention not of the courts but rather of a lawyer collaborating with a client. The earliest installment obligation provided for periodic payments. Later that provision was made — not by a court, but by a lawyer — for acceleration on default of an installment. The entire creation of trusts is traceable to lawyers. The spendthrift trust must have arisen in a law office long before any court ever saw it. Similarly the pour-over trust. The birth of the convertible security took place in a law office.

These inventions are examples. They happened quietly. Somehow they spread into the fabric of society and became part of the total legal and operating system in our society. The institution in which they were created is the law office. The story of the inventions that have taken place in that institution has yet to be told.

Our leaders in jurisprudential thinking have not given an adequate account. they have written about, analyzed, and theorized about the decisions of the courts. They have not regarded decisions made by lawyers as worthy of decisional theory. Roscoe Pound hardly mentions these sort of phenomena in his five volumes of jurisprudence. Julius Stone in his extensive three volumes does have one on lawyers' reasoning, but that volume and that reasoning concern appellate court reasoning, not law office nonadversarial thinking and reasoning. Nonadversarial decision processes must include the client as part of the conceptualizations. Pound never mentions the client in his five volumes. Stone is able to write three extensive volumes without mentioning the concept of the client. Benjamin Cardozo wrote "The Nature of the Judicial Process," which may not be a definitive account of that process, but neither he nor anyone else has done an equivalent treatment of "The Nature of the Lawyering Process."

Of course, this is not a full account of our thinkers in jurisprudence. I can find some lawyering in jurisprudential ideas of Eugen Ehrlich, H.L.A. Hart, Hans Kelsen, Jerome Frank, Lon Fuller, and Karl Llewellyn, but often ideas and concepts about lawyering were slid in sideways. Almost nowhere is there a regard for nonadversarial lawyering. I have made meager attempts, often with the help of others. An early article with Walter Probert (19 *University of Florida Law Review* 447 (Winter, 1966-67)), another with Thomas Shaffer (17 *American Journal of Jurisprudence* 125 (1972)), and more recently Edward Dauer (a section of *The Lawyer's Handbook* (American Bar Association, 1975) and *Planning by Lawyers: Materials on a Nonadversarial Legal Process* (Foundation Press, 1978)), and some other pieces of my own are among the efforts. But these efforts are nowhere near the possibilities and needs of the project.

This might be enough to make the point, but I cannot resist the temptation and desire to go further and to express some views as to the needs for development of the thesis. Concerning legal health and its maintenance, we know little. Somehow we should be curious not only about the legal needs of people but also about the actual uses by people of the law office. How often and for what purposes do clients and potential clients now seek assistance of the law office? We know so little, in short, of the legal health of our population and the role of the law office in that enterprise.

Structuring the methodology for that inquiry is no easy task. At a minimum it will need at some point the co-operation of the lawyers who operate law offices, for the law office is the repository of great amounts of information of the contact of the public with law. We could use that information, if we had it, to analyze the methods we now have to deliver legal services. We might find ways to help maintain legal health by periodic legal checkups, and ways to improve the profitability and responsibility of business enterprise by periodic legal status reports. I do not put it beyond an inquiry that we might, through the law office as an institution capable of improving the legal health of people, find ways to reduce the dissatisfactions that Pound expressed concerning the administration of the courts.

This forecast should not neglect a brief word about legal education, which, with its traditional attachment to the appellate court opinion, has sadly neglected the decisional processes of the law office. Perhaps a recognition that the law office is an institution will help to alert the academic community to a realization of its importance. Perhaps there will be a growing regard in academic for the intellectual achievements of lawyers — both litigators and preventive law lawyers. The adjustment of law teachers to this newer concern does not come easily. Appellate opinions are too beautiful, too numerous, and so easily available. We need, somehow, to make the decisional processes and inventions of lawyers as readily available. Many are certainly as intellectually beautiful as appellate court opinions.

The educational processes in law schools color the emotions and minds of embryonic lawyers. When, for example, they study so little of processes by which disputes are settled by lawyers and so much about court judgments, they msut get a skewed view of both lawyering and reality. When they are so little exposed to the decisional processes of the lawyer with the client, they fail to see the client as a person but at most as the name of which an appellate case is classified for legal research.

When as little attention is given by the academic community to the thousands of units — law offices — producing legal services, the embryonic lawyers get an incomplete view of the process by which justice is pursued. It grieves me to say that it is possible to advance in academe by keeping a respectable distance from the law office. In fact, sometimes it seems that the further away one gets, the greater is one's opportunity for advancement. This fourth arm of government deserves far more attention than the present atmosphere permits. There is current hope. The client is beginning to find a place in law school education and in the concepts of jurisprudence.

We cannot understand the administration of justice and leave out the law office. I would put it the other way around. We understand the administration of justice only when we start with the law office and keep it constantly before us. □

(Louis M. Brown, who has written extensively on preventive law, practices law in Los Angeles and teaches at the Unversity of Southern California Law School.)

BOOK REVIEWS

The Case for Divorce in the Republic of Ireland

By William Duncan. Irish Council of Civil Liberties 1982. 107pp. IR£2.40.

In view of the importance of the topic, we present contrasting reviews by Brendan Fitzgerald and Paul A. O'Connor.

This book is a revised edition of a report commissioned by the Irish Council of Civil Liberties on "The case for Divorce in the Republic of Ireland". The author is Mr. William Duncan of Trinity College Dublin Law School. The first edition was in 1979. The revised edition contains a postscript giving developments in the debate on the political side and gives further up-dated statistics and results of Opinion Polls as well as an enlargement of some of the arguments and replies to objections made.

It is not a legal text. It is rather a sociological study high-lighting a good deal of marriage problem areas in Ireland and dissatisfaction with the legal remedies in so far as they apply to "an increasing minority of cases" to use Mr. Duncan's phrase.

The Report's stated objective is very briefly described in the blurb on the back of the cover viz. "The object of this study is to present in detail the arguments for the introduction of divorce into the Irish Republic, and to reply to those who fear that divorce would have a damaging effect on the stability of family life." A longer resumé is given in the Introduction.

The Report is clearly intended as an instrument of persuasion in the campaign to provide for divorce in Ireland. Mr. Duncan acknowledges that there is no specific right to divorce nor is it a human right but claims it is a civil right.

The Report contains seven short chapters (with notes, sources and references) ranging from the scale and causes of marital breakdown in Ireland in the first chapter to the summary and conclusions in the seventh. There are two appendices and the "Postscript Two Years On". Incidentally the Postscript is not referred to in the contents.

It is only possible within the confines of this short review to put before readers a few of the most pertinent arguments made for the case and to comment on them.

In Chapter 1 Mr. Duncan illustrates marriage breakdown in Ireland from various statistics and ends the chapter suddenly by asking the reader to accept that divorce has in fact no effect on marriage breakdown. This is said would be proved later in Chapter 5. Even at the end of the Report he makes the inconclusive statement that divorce could be the cause — or just a symptom of breakdown of marriage. He is really "begging the question". The inclusion of the number of applications to Regional Marriage Tribunals is not relevant as evidence of breakdown of marriage. He comments however that these figures "provide an indication only of the minimum extent of marital breakdown among Roman Catholic couples." (p. 13).

Chapter 2. "The problem defined. What's so different about divorce?" is really a misnomer because here he tries to persuade the reader that a divorce decree is the same as a nullity decree. He very properly distinguishes the terms, legal separation, decrees of nullity and divorce. A nullity decree in effect says there was no valid marriage. It is not a question of a right to re-marry as Mr.Duncan insists. He says if the result of both decrees of nullity and divorce are the same on social grounds why deny a right to remarry after a divorce decree? He seems to say that there is no legal basis for a nullity decree. Surely there must be provision for nullity, in any legal system that deals with marriage? Mr. Duncan continues however through the Report in the vein of dismissing the important place of a nullity decree in marriage laws e.g. at page 41 and Chapter 4 under heading "The future without divorce — Living with annulment" pages 44 et seq. The argument must assume that the annulment of marriage is not based on any consideration of marital breakdown.

Readers could not but agree with the statement at page 33. "It should be remembered that family law represents only one element of state policy in relation to marriage and the family. In the long term it seems likely that social and economic policies, particularly in relation to housing and family income, will exercise a far greater influence on the future stability of Irish family life than changes in matrimonial laws." Recent legislation e.g. the Succession Act, 1965, the Family Home Protection Act 1976 etc. have been positive and supportive of marriage and the family but the case for divorce advocates the ultimate radical and destructive force of dissolution to deal with problems in marriage.

It is good however to see reference in the Notes to the NESC Report No. 47 "Alernative Strategies for Family Income Support" in the Report. It is most relevant.

At page 43 it is argued that while marriage is a voluntary free act of the parties the absence of divorce facility brings compulsion into marriage and Mr. Duncan continues "put more crudely, marriage without divorce is a trap from which each spouse knows that the other cannot escape." Readers will no doubt regard this argument under the heading "the absence of divorce being damaging to marriage and family life," which some horror and amazement.

The equality (or rather inequality) argument at page 41 has two parts, one, that nullity allows re-marriage where it is possible to find defects in a marriage whereas prohibiting divorce is a form of discrimination. In fact this is not so, since in a nullity decree it must be conceded that there was legally no first marriage therefore it is *not* a question of re-marriage.

The second part, that the rich can get foreign decrees while the poor cannot, is far-fetched and it is not true, as practitioners will verify. It is further stated that there is collusion by practitioners. Foreign decrees create their own difficulties on domicile. The comparative systems of divorce law at chapter 6 can hardly be considered a basis for "a good divorce law"

where only grounds of divorce are set out. The reader may rightly ask "what's beyond the 'good divorce law' for wives and the children?" At page 69 Mr. Duncan agrees with the Canadian Commission as being against the administrative process, whereas in Note No. 16 at page 71 he argues for conciliatory procedures rather than investigation as to whether grounds for divorce have been established. There is some contradiction here.

The last sentence of the Report at page 102 concludes — "The case is based rather on the view that the social consequences of its denial are far more undesirable than the risks attached to its introduction." The "social consequnces" and risks of divorce are not revealed by Mr. Duncan. He says we must try to predict. The statistics available of divorce and multiple divorce through several generations must be sufficient to predict at this stage. They just scream out as evidence that divorce is destructive of the true objective common good of Society. There is deprivation of property rights and enormous financial consequences for wives and children (as well as the State) from divorce. This is where the humanitarian argument wears very thin indeed.

I think Mr. Duncan has not really shown the cold facts of divorce. He has underplayed these hardships even in his further replies to objections in the Postscript. The words of Montesquieu seem so apt: "Such is the effect of bad laws that even worse are needed to check the evils of the first."

The argument for the case for divorce under the heading "the Individual's right to control his or her own destiny" p. 36 is a narrow and individualistic one. Considering that the sciences of politics, sociology and economics deal with individual and collective human welfare, the case for divorce ignores the philosophical and religious implications of man's origin, nature and destiny in relation to marriage. ("Man" of course embraces "woman"). Nowhere does the Report treat of marriage as a natural institution which is in the realm of the sacred. If one regards marriage as based on mere contractual rights the arguments for the case for divorce may seem persuasive to that degree only.

The chapter on the different roles of Church and State could be found somewhat exasperating to many readers in Ireland. Here Mr. Duncan purports to attach blame and create confusion about a clear and legitimate jurisdiction of the Catholic Church in relation to the validity of the marriages of its members. It is difficult to see how its nullity jurisdiction could be regarded as a challenge to the civil law as stated on page 29. It may be agreed, however, there are some problems in which the civil law could help in relation to the consequences of nullity decrees. The phrase "current social teaching of the predominant Church" p. 39 is a vague and strange one. If it refers to indissolubility of marriage Catholics would not accept this as just current or social but as perennial teaching.

I found the Report stimulating and provocative too particularly where some of the arguments at times became over-laid, over-persuasive. An over-eager salesman can prove to be off-putting, and one begins to ask "where are the snags?"

His painstaking research into all the varied facets of this very live and difficult issue is truly extensive.

Some small criticisms of the text would be a frequent reference to a later chapter at a critical stage of an argument or vice versa a reference back to an earlier chapter. Also here and there an agrument is continued in the notes at end of chapters.

The binding in this edition is unfortunately bad. Pages come loose very easily.

The Report is worth reading. It impels one to deeper consideration and study of the reality of true marriage. It is so easy to get bogged down completely in the problematic aspects. This does not exclude concern to find ways and means to solve family problems.

The "Case for Divorce" presents two positions. It attempts to persuade all citizens (1) to introduce divorce into the laws of the State on the general arguments made, or (2) to allow it as an "extra option" for some few people who want it. It aims at objective No. (1) but will settle for objective No. 2 if No. 1 fails. If objective No. 1 wins acceptance the success of objective No. 2 is assured.

If the "extra option" argument were accepted it would be the thin edge of the wedge.

It would be good to see the I.C.C.L. commission a complementary Report on the defence of marriage also.

Brendan Fitzgerald

This is a revised edition, with a postscript added, of the work first published in October 1979. Mr. Duncan's, *The Case for Divorce in the Irish Republic* has, in the intervening years, attracted a good deal of attention. The work has in the main been well received and, in this reviewer's opinion, deservedly so. The case for divorce is clearly presented by the author and cogently argued. A commendable feature of the work is the sensitivity which is displayed towards the competing view that the introduction of divorce in this jurisdiction would be socially undesirable. In short, the author is in no way dismissive of the traditional understanding of the institution of marriage in this country.

The author states in his introduction that "the case for divorce is basically a humanitarian one". Specifically, it is the unhappiness which results from broken marriages which constitutes the primary justification for divorce. In such situations the author suggests that divorce should be made available to those who wish to dissolve the legal ties of marriage. He makes it clear as to what he means by an unhappy marriage: it is one which has irretrievably broken down. The system of divorce which is favoured by the author is therefore based on 'irretrievable breakdown'. There are other systems of divorce such as divorce by repudiation, divorce by consent, and divorce based on marital fault but the author decided that a detailed discussion on the kind of divorce system which might be introduced into this jurisdiction did not fall within the ambit of his study.

One can, perhaps, agree that acceptance of divorce in principle, and the particular kind of divorce law

which might be suitable for this jurisdiction, can be treated as separate issues. However in a polemical work of the kind Mr. Duncan has written, the omission in not dealing with a specific divorce law which might find a place in the statute books of this country is unfortunate. Divorce is not an abstract issue and in this reviewer's limited experience many people in this country feel confused as to the criteria which would be employed in any legislative scheme for divorce based on this notion of irretrievable breakdown.

Given that the introduction of divorce is expressed to depend primarily on humanitarian considerations, there is no need for the author to establish that there is a high incidence of marriage breakdown. The relevant consideration is not the size of such a problem but rather the fact that marriages break down, and do so, irretrievably.

Before proceeding to a consideration of the arguments adduced by the author in favour of divorce some observations ought to be made. Firstly, Mr. Duncan's attitude towards the family is fundamentally conservative. He accepts the constitutionally defined position of the family, as described in Article 41, as "the natural primary and fundamental unit group of society", and "the necessary basis of social order" and as "indispensable to the welfare of the nation and the State". One might further add that it is the family which is founded on the institution of marriage which the State in Article 41 pledges itself to guard with special care and protect against attack. Thus, to a very large extent, the author shares the same views of the family and the institution of marriage as those who oppose the introduction of divorce. Given that this is the case the major area of disagreement between Mr. Duncan and his opponents pertains to the *effect* which divorce would have on family life. This leads to my second observation. One cannot prove that the introduction of divorce in Ireland would not adversely affect the institution of marriage and the family. In arguing his case for divorce the author, it is submitted, does not purport to do this. What the author does purport to do, and succeeds in doing, is to provide a reasoned argument in favour of divorce.

One of the principal arguments made by Mr. Duncan in support of the case for divorce is the individual's "right" to control his or her own destiny. This normative proposition is quite capable of being used to support the adoption of radical divorce systems in Irish law. However, Mr. Duncan is far from radical in his approach. Such "right" is clearly envisaged as a limited one since it is specifically linked to a divorce system based on irretrievable breakdown. Under such a system the freedom of individuals to shape the legal incidents of marriage in the way they see fit would be quite limited. The view that one should introduce divorce is grounded by the author on a political argument which is inspired by humanitarian considerations.

Mr. Duncan further argues that the absence of divorce creates inequality between married persons in similar circumstances. The inequality results, it is claimed, from the fact that persons whose marriages are a nullity and those who obtained foreign divorces, which are recognized in this country, are free to remarry but that other persons whose marriages have irretrievably broken down cannot. It is submitted that this argûment, from the legal point of view, is open to question. A claim by a citizen that he has not been accorded equal protection by the State typically involves inpugning legislation which is alleged to have impermissibly discriminated between that individual and another individual similarly situated. Thus, for example, if divorce were made available in this country only to those persons who belonged to religious groups that permitted divorce, there would, in the legal sense, be discrimination. The situation which Mr. Duncan refers to does not involve a statute arbitrarily including or excluding specific classes of individuals from its provisions. Rather he refers to three different legal situations: nullity, the recognition of foreign divorce decrees, and the absence of divorce *a vinculo*. There is no legal discrimiantion with respect to how the law in each of these situations is applied. Logically, each of the situations is separate from the other; they each embody a different legal reality. As such, the fact that it is possible to remarry when what was thought to be a valid marriage is deemed a nullity, and where a valid foreign divorce is obtained, is incapable of supporting the view that this constitutes discrimination, in the accepted legal sense, against parties to valid marriages which have broken down.

The case for divorce is most persuasive when it is argued from the point of view of principle. It is not possible to prove on an empirical basis the desirability of introducing divorce. This is not to suggest that empirical studies are irrelevant. Far from it. Mr. Duncan performs a useful service in drawing the reader's attention to a number of studies which cast doubt on the empirically based arguments of those who suggest that divorce is a source of marital instability. The point is made repeatedly by the author that it has not been shown in those countries that have divorce that divorce is a major determinant of marital breakdown.

However, there is much that can never be proved such as whether a liberal divorce system would result in ill-considered marriages and whether children would tend to suffer more by being raised by divorced parents as opposed to remaining with the parents of a broken marriage.

The revised edition of *The Case for Divorce* bears ample testimony to the valuable and continuing contribution being made by Mr. Duncan to the divorce question in this jurisdiction. He is to be congratulated for his efforts in this regard.

Paul A. O'Connor

Contract

By Robert Clark. Sweet & Maxwell Ltd., London. 1982. IR£8.32.

This book is one of the first two titles in the publishers' Irish Legal Texts series. Because of the abundance of good books on English contract law, some may have felt that its production was unnecessary. However, Robert Clark has proved

otherwise; for *Contract* is rich in Irish judicial precedents.

The layout of the book is standard. Part 1 consists of chapters dealing with Offer and Acceptance, Consideration, Intention and Formal Requirements. The author could usefully have mentioned the Consumer Information Act, 1978 in page 5 when commenting on criminal prosecutions for misleading advertising.

Part II covers Contract Terms and Exemption Clauses. The section in Chapter 7 headed "Statutory Intervention" treats the Sale of Goods and Supply of Services Act, 1980 in a very scant fashion, despite the author's acknowledgement in the Preface of the "sweeping changes initiated by the 1980 legislation." The effect of Section 22 of the 1980 Act on basic contract terms, is surely of such importance that it merits more than the comment "Readers are referred to O'Malley, Business Law."

Four chapters dealing with the vitiating factors of Mistake, Misrepresentation, Duress and Undue Influence make up Part III. The new statutory right to damages for innocent misrepresentation under S45(1) of the 1980 Act, is clearly outlined in Chapter 10, and Chapter 12 includes a most interesting section on the extent of equitable relief available in respect of 'Unconscionable Bargains'.

The topic of Illegality is competently handled in Part IV, whilst Contractual Capacity is dealt with in Part V. In the context of contractual capacity of Infants, it would have been useful if the author had included some comment on the United Kingdom cases of *Coutts & Co. -v- Browne-Lecky* (1947) and *Yeoman Credit Ltd. -v- Latter* (1961).

The remaining parts of the book deal with privity, Discharge and Remedies for breach of contract. In respect of Remedies, the author confines his attention in the final part to damages, although some equitable remedies such as Specific Performance, Rescission and Rectification are mentioned in earlier chapters.

A most stimulating feature of the work is the manner in which the author constructively criticises case law (and occasionally statutory) sources. Examples are to be found in Chapters 11 and 13, where the Supreme Court decisions in *Rogers -v- Louth C.C.* (1981) and *Gavin Lowe Ltd. -v- Field* (1942) are examined.

A dilemma facing any author with a limitation on the length of his work is the balance to be struck between the width and the depth of treatment of his subject matter. He can try to treat each topic to the same depth or, perhaps more picturesquely, he can endeavour to apply the paint evenly over the whole canvas. This the author has not done. Instead, he has applied the paint liberally in some places e.g. Illegality; and thinly in other parts, e.g. Statutory Intervention and Exemption Clauses. There are also gaps. For example, Assignment of Contractual Rights is not covered. However, given his publishers' guidelines on length, the author's approach is both understandable and acceptable.

Contract is modelled on the "Concise College Texts" series. Does inclusion in such a series not presuppose the existence of at least one major definitive work on Irish Contract Law? In its absence, I hope the publishers will permit the author to develop and expand this most useful book in subsequent editions. Robert Clark has certainly whetted your reviewer's appetite for more.

Henry Ellis

VAT OFFICES

Revenue Commissioners	Castle House, Sth. Great George's St., Dublin 2	(01) 718711
Collector-General (Returns, payments and receipts)	Teach Earlsfort, Hatch Street, Dublin 2	(01) 783499
Inspector of Taxes:		
Athlone	Pearse Street	(0902) 2681
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Cork	Hibernian House, 80A South Mall	(021) 508111
Dublin	4 Claremont Road, Sandymount, Dublin 4	(01) 607111
Dundalk	Earl House, Earl Street	(042) 32251
Galway	Hibernian House, Eyre Square	(091) 63041
Kilkenny	Gaol Road	(056) 21142
Letterkenny	Government Buildings, High Streeet	(074) 21299 (074) 21380
Limerick	Sarsfield House, Francis Street	(061) 48711
Sligo	The Mall	(071) 2714
Thurles	Stradavoher	(0504) 21544
Tralee	Custom House	(066) 21844
Waterford	Government Buildings, The Glen	(051) 73565
Wexford	Anne Street	(053) 22777

Correspondence

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

Dear Sir,

Further to Professor Wolfe's Article in the January/ February, 1982 Gazette regarding the enlargement of the Malicious Injuries Code under the Malicious Injuries Act 1981, practitioners may be interested to note that the Circuit Court has now given Judgment in favour of two Applicants against a Local Authority for damage caused to motor vehicles stolen from outside the Applicants private dwelling houses and subsequently recovered in a crashed and severely damaged state.

These Applications which were previously unsustainable under the old Malicious Injuries Code are now actionable against the Local Authority in whose area the car was stolen from.

The Applications are brought under Section 5, subsection (2), subsection (d) of the Malicious Injuries Act 1981 and His Honour Judge Martin in a decision given on the 5th November, 1982 has ruled that that subsection was specifically drafted and included by the Legislature to cover cases where the private property of individuals was stolen or taken away and subsequently recovered in a damaged state.

Judge Martin stated that the phrase "whether or not" for the purpose of commiting a crime against the property damaged were the essential words of the section. He stated that he had no doubt that subsection (d) was intended to provide relief to Applicants for the exceedingly common acts of malice and wanton destruction of private property which were so common place nowadays.

Practitioners should note however that this section will not provide relief where there is evidence adduced by the Local Authority to prove that the damage occurred as a result of a direct Act of negligence by the unknown party in either crashing into another vehicle or crashing into another person.

Practitioners should also be aware of the scope of Section 12 (1) which allows the Court to take into consideration any contributory negligence by the Applicant in his conduct as respect any precautions that might reasonably have been taken by him to avoid the damage and the loss in these particular applications, in particular the question of whether or not the car was securely locked or parked in a normal and careful manner.

Prior to the determination of the above mentioned matter by Judge Martin, the City Manager and County Manager had made it a rule of practice that cases of this type would not be settled in a Consent list and would all be remitted to a Defendant List. It must be hoped therefore that in view of the decision of the Circuit Court more types of this particular case will be settled without the necessity of bringing the matter into the Defendant List.

Yours faithfully,

Peter Lennon, Esq.,
Solicitor,
58 Merrion Square,
Dublin 2.

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

Dear Sir,

For over twenty years I have been registered as Owner of some £9.00. 6% Land Bonds and £4.00. 4% Land Bonds representing small fees allocated to me in Land Commission Purchases. The interest is totally insignificant and not worth the trouble of Banking. The dividend Warrants are sent out in separate envelopes at ordinary postal charges and the waste of expensive Civil Service time which this involves is dreadful to contemplate. The chances of the Bonds being redeemed seems slight.

There must be many similar holdings in the hands of solicitors all over the country and it occurs to me to suggest that to turn the bonds and the interest they earn to anything like worthwhile account they could by a process of individual donations be consolidated to the credit of the Solicitors Benevolent Association.

I therefore proffer a donation of the Bonds to the Association on the basis of my professional brethren doing the same. Incidently, this would save the taxpayer quite an appreciable expense.

Yours sincerely,

Noel Reid, Esq.,
Solicitor,
13 Lr. Ormond Quay,
Dublin 1.

GEORGE GAVAN DUFFY

MEMORIAL LECTURE

A Memorial Lecture on the occasion of the centenary of the birth of Mr. Justice George Gavan Duffy was delivered by Mr. Colum Gavan Duffy, former Librarian of the Society and former Editor of the Gazette, to the Clogher Historical Society in Monaghan on 30 November, 1982, and will subsequently be delivered in Dublin, Cork and Galway.

A copy of the script of this lecture will be available for consultation in the Society's Library.

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.

7th day of January, 1983.

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

1. REGISTERED OWNER: John O'Connell; Folio No.: 36492; Lands: (1) Cooldrisla, (2) Newport, (3) Annaholty; Area: (1) 18a. Or. 1p; (2) 11a. Or. 6p.; (3) 2a. Or. 29p. County: **TIPPERARY.**

2. REGISTERED OWNER: Stephen and Christina O'Connor; Folio No.: 10930; Lands: Blackhill; Area: Oa. 2r. Op. County: **KILDARE.**

3. REGISTERED OWNER: Curley Brothers Limited; Folio No.: 9455; Lands: Kiltormer West; Area: 7a. 1r. 35p. County: **GALWAY.**

4. REGISTERED OWNER: Sean O'Foghlu; Folio No.: 8414; Lands: Abbeyland South (Parts); Area: 1a. 1r. 34p. County: **MEATH.**

5. REGISTERED OWNER: Thomas J. Timlin; Folio No.: 10569; Lands: Tawnykinaff (Part); Area: 89a. 3r. 14p.; County: **MAYO.**

6. REGISTERED OWNER: Thomas Quinn; Folio No.: 7903; Lands: Mullaghmore (part); Area: 44a. 3r. 35p. County: **SLIGO.**

7. REGISTERED OWNER: Thomas Shine; Folio No.: 23617; Lands: Monksland; Area: Oa. 1r. Op. County: **ROSCOMMON.**

8. REGISTERED OWNER: Patrick McKenna; Folio No.: 12336; Lands: Pollnacroaghy; Area: 4p. 15¼ sq. yds. County: **MAYO.**

9. REGISTERED OWNER: Thomas Sweeney, Rehins, Castlebar, Co. Mayo; Folio No. 8600; Lands: Tully; Area 26a. 3r. 4p. County: **MAYO.**

10. REGISTERED OWNER: John Patrick Duffy, Roosky, Doocastle, Ballymote, Co. Sligo; Folio No.: 50121; Lands: (1) Roosky, (2) Roosky; Area: (1) 19a. Or. 7p.; (2) 2a. 2r. 9p. County: **MAYO.**

Lost Wills

Thornberry, Margaret and Thomas, deceased, late of Whitegate, Co. Clare. Will any person having knowledge of the whereabouts of the last Will and Testament of the above named deceased, made between March and August, 1978, please contact Mr. Alan Young, 8 Sandown Road, South Norwood, London SE25. Phone No. (031) 6540330.

Miscellaneous

Legal Secretary will do typing in own home. Box No. 044.

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