THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

January-February 1980 VOL. 74 NO. 1

Pictured at a meeting in Blackhall Place with the Incorporated Law Society of Northern Ireland, 20 November, 1979, were (seated, from left): Mr. Patrick Cross, Junior Vice President, and Mr. James Doran, President of the Incorporated Law Society of Northern Ireland (1978-79), with Mr. Gerald Hickey, President, and Mr. Walter Beatty, Senior Vice President of the Society (1978-79).

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Executive Editor: Seamus L. O'Kelly.
Editorial Board: John F. Buckley, Charles R. M. Meredith, Michael V. O'Mahony, Maxwell Sweeney.
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# Annual General Meeting of the Society

BLACKHALL PLACE, DUBLIN 7

FRIDAY, 23rd NOVEMBER 1979

The President, Mr. Gerald Hickey, took the chair at 11.30 a.m. in the President's Hall, Blackhall Place, on Friday, 23rd November 1979.

The notice convening the meeting was read by the Director General, Mr. J. J. Ivers. A list of those attending the meeting is filed with these minutes.

**Minutes**

As the minutes of the General Meeting held in the Great Southern Hotel, Galway, on Friday, 3rd May 1979, were published in the *Gazette*, they were taken as read, adopted and signed by the President.

**Auditors' Report**

The adoption of the Auditors' Report and financial accounts for the year ended 30th April 1979 was proposed by Mr. M. Curran, seconded by Mr. B. St. John Blake, and agreed.

On the proposition of Mr. P. D. M. Prentice, seconded by Mr. A. Smyth, Messrs Coopers & Lybrand were re-elected as the Society's auditors for the year ending 30th April 1980.

**Council Elections**

The Scrutineers' Report on the Council election was read by the Director General as follows:

Valid Poll 1,159.

| | | | |
|---|---|---|---|
| Buckley, John F. | 800 | Bourke, Adrian P. | 597 |
| Quinlan, Moya | 771 | Killeen, Sarah C. | 586 |
| Dundon, Joseph L. | 770 | O'Connor, Patrick | 584 |
| O'Mahony, Michael V. | 726 | Allen, William B. | 577 |
| Binchy, Donal G. | 691 | Monahan, Raymond T | 570 |
| Hickey, G. | 674 | Shields, Laurence K. | 564 |
| Beatty, Walter | 654 | Houlihan, Michael P. | 563 |
| Shaw, Thomas D. | 647 | O'Connell, Michael G. | 561 |
| Osborne, William A. | 645 | O'Donnell, Patrick F. | 560 |
| Blake, Bruce St. J. | 634 | Margetson, Ernest J. | 554 |
| Collins, Anthony E. | 628 | Smyth, Andrew F. | 547 |
| Carrigan, John | 618 | Pigot, David R. | 513 |
| Curran, Maurice R. | 613 | Donnelly, Andrew J. | 497 |
| Daly, Francis D. | 607 | Cullen, Laurence | 496 |
| O'Donnell, Rory | 605 | Sexton, Harry | 468 |
| McEvoy, William D. | 598 | | |

The above members were declared elected.

The following members received the number of votes placed after their names:

| | | | |
|---|---|---|---|
| Maher, Austin V. | 451 | Mangan, Joseph | 374 |
| Dillon, Andrew | 419 | McCourt, Philip E. | 328 |
| Hoey, B. Vincent | 408 | Glynn, John F. P. | 232 |

*Provincial Delegate (Leinster)*

Valid Poll 200

| | | | |
|---|---|---|---|
| Michael J. Hogan | 120 | Smyth, Michael | 80 |

*Provincial Delegates Returned Unopposed*

Connaught:

Patrick J. McEllin, Claremorris, Co. Mayo.

Munster:

Patrick A. Glynn, 84 O'Connell St., Limerick.

Ulster:

Peter F. R. Murphy, Ballybofey, Co. Donegal.

Mr. Hogan and the unopposed members were declared elected. Noting the results of the election, the President expressed his thanks to the scrutineers. He commented favourably on the interest in the election as indicated by the increased number of votes cast.

**Report of the Council**

As the Annual Report of the Council for the year 1978-79 had been circulated in the October issue of the *Gazette*, the President took it as read. In presenting the Report, the President addressed the meeting. He welcomed the opportunity at this Annual General Meeting of the Society to refer to some matter of particular interest to both the profession and the public. The Society understood that the question of Court jurisdiction is at present under review by the Government and while there are differing views within the Society as to precisely the limits of jurisdiction which should be granted to the Circuit Court and the District Court, he believed that a fair approximation of the general view would be that the Circuit Court jurisdiction should be increased to £10,000 and the District Court to £2,500. If the

**Contributors to this issue**

William Binchy, B.A., B.C.L., LL.M., Barrister-at-Law, Research Counsellor, Law Reform Commission.

William O'Dea, LL.M., Barrister-at-Law, Lecturer in Law, U.C.D.

P. J. Farrell, B.C.L., Dip. European Law, Solicitor practising in Dublin.

A. H. Hermann, Legal Correspondent, *Financial Times*.

increases in jurisdiction of this magnitude are brought into effect, it would be the Society's view that the law should be altered, so as to provide that Family Law matters should be dealt with primarily at District Court level with appropriate rights of appeal. The same, in the Society's view, should apply to Criminal Injuries which are sometimes at present dealt with in the Circuit Court at excessive costs in relation to small cases.

He said that in the Society's view, any decision by the Government to increase the jurisdiction of the lower Courts, in particular the District Court, coupled with a decision to give the District Court jurisdiction in relation to Family Law matters and/or Criminal Injuries, will make it absolutely essential that appropriate and adequate new scales of costs are immediately provided to come into effect at the same time as the increases in jurisdiction. Secondly, and at least of equal importance, it will be absolutely necessary that further Judges and Justices are appointed and adequate accommodation provided. Up to now, there has been a failure on the part of local authorities, mainly due to financial problems, to meet their obligations to provide adequate Court accommodation in many parts of the country.

Commenting that it was very hard to understand why this should be so, in the context of good hospital, school and housing facilities, and in the Society's belief, neither the public nor the profession will tolerate much longer the present state of affairs in relation to Courthouse accommodation. In view of the necessity to provide more Judges at all levels, it is in the Society's view, highly desirable that solicitors who, at present, are statutorily excluded from judgeships of the High Court and the Supreme Court, should no longer be excluded and that a number of solicitors should be appointed in the first instance Judges of the Circuit Court to which they can at present be appointed, and at a later date, Judges of the High Court, and, if necessary, the Supreme Court.

Mr. Hickey emphasised the role of the Society in training new solicitors to meet increasing demands and especially in giving them specialised training in advocacy.

He hoped that over a period of years, the appointment of the number of solicitors as Judges of the Superior Courts would improve greatly the relationships between Judges, Bar and solicitors and make it possible for solicitors to appear more frequently in the Superior Courts without Counsel than they do now. In his view, such an extension of appearance by solicitors in the Superior Courts could only facilitate the speedy and inexpensive administration of justice in relation to many matters which now have to be dealt with at too high a cost from the public's point of view.

Finally, he said that he would like to join the Presidents and Chairmen of other organisations in their condemnation of the IBOA Executive for their complete disregard of the public interest.

Speaking to the Report and in particular to the section dealing with the work of the Conveyancing Committee under the heading of Extension of Building Society Vacate System to other Mortgagees, Mr. Eunan McCarron, past President, repeated that the Society had been endeavouring for over nine years to get this simple reform introduced, and that successive governments had failed to implement the required change. The required change was simple but urgent. The President agreed with Mr. McCarronn and said that the implementation of the change would be given priority by the incoming Conveyancing Committee.

On the subject of Legal Costs, Mr. Houlihan commented on the absolute failure of the Society to achieve a satisfactory solution; it had been utterly frustrated by the Government agencies and Ministers involved on the other side. Mr. T. C. Gerard O'Mahony enquired if the Society could follow the example of other professional bodies and take strong action by disregarding statutory restrictions. He pressed that the matter be further discussed at a special general meeting at the end of January. In reply, the President said that he had found no support for strong action at the numerous meetings throughout the country which he had attended, and at which the problem of relating costs to increasing expenses and overheads had been discussed. He did not see the point of arranging for a further general meeting in the very near future.

**Bond Scheme**

At the request of the President, Miss Carmel Killeen drew the successful bonds as follows:

£100 Prize ..... Bonds Nos. 1095 and 1673
£500 Prize ..... Bonds Nos. 1182 and 1205
£250 Prize ..... Bonds Nos. 1716 and 1551

**Annual General Meeting**

This was fixed for 11.30 a.m. on Friday, 21st November 1980.

**Motions**

The Director General informed the meeting that owing to a typographical error, which had only just come to notice, the words of the proposed amendment to Bye-Law 33 required alteration. With the consent of the seconder, Mrs. Moya Quinlan, and of the meeting, Mr. John Buckley withdrew a proposal to amend Bye-Law 33 for rephrasing and re-submission at a later meeting.

Mr. John Buckley proposed and Mrs. M. Quinlan seconded a motion that Bye-Law 34 be amended as follows:

> "The Secretary shall also cause voting papers to be printed in Form D, for each province, containing the names and addresses of all candidates who shall be duly qualified and nominated in accordance with Bye-Law 30, for election as the provincial delegate for each province, arranged in alphabetical order, with the names of their respective nominators, and shall at least one week before the date of the poll or election in each year send one of such voting papers to each member of the Society practising in such province elsewhere than in the city of Dublin as regards the province of Leinster, who shall have paid his subscription for the current year, together with an envelope addressed to the Secretary, having the names of the province printed on the outside. Where only one candidate is validly nominated in respect of any province, the scrutineers of the ballot shall be empowered to return such candidate for election without the necessity of printing or issuing voting papers in respect thereof."

After discussion, Mr. M. V. O'Mahony proposed and Mr. F. O'Donnell seconded that the proposal as

# Index to Gazette of Incorporated Law Society

## Vol. 74 — 1980

# Index to Recent Irish Cases — 1980

(Cases refer to issue of Gazette where case is listed on Green Pages — No numbering of Green Pages)

In **Re Section 25 of the Trade Marks Act 1963 — Arby's Ltd. Applicants.** Additional evidence from the applicant is not admissible in the High Court on appeal from the Controller of Patents, Designs and Trade Marks under S. 25 of the 1963 Act. The High Court in such proceedings is an Appellate Court, and not a Court at first instance. The Supreme Court unanimously reversed Hamilton J., who had admitted an additional affidavit in order to prove that the applicant had intended to use the trade mark in the State — MARCH.

**Bank of Ireland v. Lyons.** Order made by Master of the High Court limiting costs to outlay and Counsel's fees and to salaried members of the legal staff of the Bank. Finlay P., having considered the authorities in detail, held that the Order made by the Master must be varied. An order must be entered by which final judgment be entered for the Plaintiff with default costs, plus costs for hearings — MAY.

**Cleary v. Coffey.** The Plaintiff was owner of licensed premises in Inchicore. He was also one of the executors who was entitled to one twelfth share of the residuary estate of a deceased publican who had licensed premises on Malahide Road. The premises in Malahide Road were sold to administer the estate of deceased. The employees in Malahide Road were paid full redundancy payment, but they also claimed further "Disturbance Claims Payments" as a custom of the licensed trade. The Plaintiff brought proceedings against the employee defendants for an interlocutory injunction to restrain the picketing of her premises in Inchicore, on the grounds that there was no trade dispute there.

**McWilliam J. held:** (1) That there was a trade dispute between the deceased publican and his successors in title. (2) However, there was not at any time any business connection between the premises in Malahide Road and in Inchicore. There was consequently no discernible connection between the Inchicore premises of the plaintiff and the trade dispute which would justify the Inchicore picketing. Interlocutory injunction granted — NOVEMBER.

**Crowley v. Ireland, the Minister for Education, and INTO.** Strike by INTO in Drimoleague National Schools from March 1976. Restricted teaching and, from January 1978, pupils transferred to neighbouring schools. The plaintiff parents contended that their children had a constitutional right to be provided with free primary education in their parish. The full *Supreme Court* upheld McMahon J. in the High Court that the INTO were carrying on this strike for the purpose of infringing the constitutional right of the children to primary education, that this was a conspiracy and consequently actionable.

**The Majority of the Supreme Court,** Henchy J., Griffin J., and Kenny J. per Kenny J.) *held* that, as Article 42 (4) of the Constitution stated that the State shall *provide for* free primary education, the evidence had failed to establish that there had been a breach of constitutional duty on behalf of the State. The obligation on the State, under Article 40 (3), to defend and vindicate the rights of the citizens is not a general one, but only an obligation to defend these rights by its laws enacted by the Oireachtas.

**The Minority of the Supreme Court** (O'Higgins C.J. and Park J.) *upheld* McMahon J. in the High Court in stating that the duty imposed by the State under Article 42 (4) was a continuing one, and that consequently the Minister should have acted to stop the strike. The strike had been exercised for the purpose of infringing the constitutional right of the children to obtain free primary education.

Action against the State, the Minister for Education and the Attorney General dismissed.

Action against INTO upheld — JUNE.

**D.P.P. v. John O'Loughlin.** Accused convicted of larceny of a muck-spreader in Circuit Court. Accused first denied this in one Garda Station, but subsequently admitted it by written statement in another. *Held* by the Court of Criminal Appeal:- (1) That the delay in charging him formally was only occasioned by the necessity for the Gardai to check his story.

(2) That the appellant ought to have been charged, although this had not been done, after his story had failed to check out.

(3) The question was not whether the claim of right that the accused was entitled to take the muck spreader because the owner could not pay his debts, was one known to the law, which the Circuit Judge adopted, but rather whether the accused had an honest belief which would excuse his action. As the Judge had declined to put this matter before the jury, there was a miscarriage of justice.

Conviction quashed — MARCH.

**Di Murro v. Childs.** Plaintiff was tenant of restaurant and ice cream business in Fair Green, Arklow, under a Lease for a term of 10 years from 1 January 1977. The Plaintiff claimed the Lease included a yard with a store and shed at the rere of the shop. The Court looked at the history of the premises and the surrounding circumstances leading to the execution of the Lease. *Held* by McWilliam J. that what was demised to the Plaintiff was the same as had been let in earlier agreements, namely the shed and store and use of the yard — NOVEMBER.

**Duffy v. Doyle and the Attorney General.** Testator had left to his wife "an average of £1,500 per year", and £500 for Masses in the Parish of Bray; he died in April 1976. Construction Summons by Executor Plaintiff as to the meaning of these terms against first defendant, widow of testator. *McWilliam J. held:*

(1) That the testator's estate was to be applied during the life of the widow on trust to provide her with an income of £1,500 per year, and that capital might be applied for that purpose.

(2) That the gift of the residue to Bray Parish was a valid charitable gift and that the matter would stand over until the death of testator's widow, and that the remaining funds would be applied for that purpose at that time — MARCH.

**Dundalk Shopping Centre Ltd. v. Roofspray Ltd.** In 1974, the Plaintiffs were constructing a shopping centre in Dundalk. The defendants described themselves as specialists in the Shell Monoform system of roofing. Although the estimate was accepted in April, the Defendants only commenced work on 24 September 1974. The Defendants continued to work irregularly until 13 November 1974. Then the Plaintiffs repudiated the contract and engaged another contractor who laid an alternative asphalt roof. The Defendants complained that, during their absence, extensive damage had been done to the roof. On 9 November 1974, a major leak occurred through the roof; as a result, the Plaintiffs' Architects advised them to engage another contractor.

**Finlay P.** *held:* (1) That the change in the fall of the roof was not unknown to the Defendants before operations commenced.

(2) That the Defendants held themselves out to be specialists in roofing insulation.

(3) There was an implied term that the Defendants would use reasonable care and skill in their work.

(4) The Defendants had failed in a fundamental term of the contract, namely to provide an effective waterproofing of the roof.

(5) Accordingly, the Plaintiffs were justified in repudiating the contract, and were entitled to Damages — JULY/AUGUST.

**Finnegan v. Planning Board.** Plaintiff objected to constitutionality of Sections 15, 16 and 18 of the Planning Act 1976. Plaintiff lived four miles from Raybestos Manhattan plant in Co. Cork, and was held to have sufficient standing to have *locus standi*. *Section 15* provided for the lodgment by an appellant to the Planning Board of a deposit of £10. *Held* by the Supreme Court that the purpose of imposing this deposit was to prevent appeals which lacked reality and substance and that there was no unconstitutional discrimination involved. *Section 16* gave a discretion to the Board as to whether the appeal should be heard orally or otherwise. *Held* that this submission was fallacious insofar as it was open to the Oireachtas to prescribe that procedure. *Section 18* allows the Board, if it considers the appeal vexatious or unnecessarily delayed, to determine the appeal upon giving seven days' notice and without hearing submissions from the appellant. *Held* that this Section enjoyed a presumption of constitutionality, and that it had to be assumed that the notice would be accompanied by an opportunity given to the defendant to put forward his case. Appeal dismissed — MAY.

**Frigoscandia Ltd. v. Continental Irish Meat Ltd. and Crowley.** The Plaintiffs sold a refrigerating machine for a price to be paid in four instalments commencing with the placing of the order and ending when the machine was ready to operate. The machine was duly installed, but 25% of the purchase money remained unpaid by the first defendant, when the second defendant was appointed Receiver. The

Plaintiff claimed that the machine was still its property, and demanded its return or payment in full of the monies outstanding. **McWilliam J.** *held* that, as there was only one article sold, its resale was most unlikely to be contemplated by either party. Accordingly, the Plaintiff had retained the property in the refrigerating machine until payment in full was made — JULY/AUGUST.

**Harte v. Telecord Holdings Ltd.** Plaintiff's appeal from decision of Redundancy Appeals Tribunal that the employment of the Plaintiff before August 1962 could not be regarded as continuous employment. Plaintiff claimed that she had worked continuously with Defendants from April 1945 to August 1977. As a result of her mother's death in February 1961, the Plaintiff became run down. Her doctor advised her to get away for a while. The doctor had issued a Certificate granting her one year's sick leave from August 1961 to August 1962. The Defendants alleged that they had not received it, but it was presented before the Tribunal.

**McWilliam J.** *held* that it was clear that the cause of the interruption in Plaintiff's Employment was sickness, and that consequently Plaintiff's employment should have been regarded as continuous. Tribunal's decision reversed — MARCH.

**H.S. and S.G. v. Estates Management and Development Agency and Rosario Investments Ltd.** By contract dated 15 February 1974, first Plaintiff agreed to sell to first Defendant in trust for second Defendant the premises 3 Dame Lane, Dublin, for £60,000. A deposit of £6,000 was paid. Completion was to take place on 1 March 1975, but Defendants failed to complete. On 10 December 1975 there was a Court Order for Specific Performance, with a stay for one year, subject to payment of interest and payment of Costs of the action and the sale. Some payments of interest were made, but ceased in August 1976. As Defendants could not pay, the Court fixed 7 February 1977 to issue an order forfeiting the deposit and rescinding the sale. Before it could be heard Mr. S. died on 3 February 1977. In September 1977 the premises were burned down, and the Defendant stated he could do nothing to pay the balance of the purchase money. In 1979, the Defendant's solicitor offered a settlement and to pay the balance due, which was rejected. The Defendants sought to reconstitute the suit.

**Costello J.** *held* that there were no circumstances in the case by which he should not follow the general rule. Accordingly he ordered the Defendants to pay: (1) The balance of the purchase money.

(2)The additional sums agreed to be paid at the December 1975 settlement.

(3) Interest at rate of 15% from 10 August 1976 to 14 January 1980.

(4) All outgoings and costs of previous proceedings — NOVEMBER.

**L. G.J. v. T.M., J.R. and W.N.** *Held by* **McWilliam J.:** (1) That the deed of 8 September 1970 (purportedly granting a wayleave to extend a sewer from Plaintiffs garden) had to be discharged because the Defendant Trustees were holding the property on trust for the Purchases. The position could not be altered without his consent.

(2) That there was no grant of a wayleave by the Vendor and he had no power to make such a grant.

(3) That the Vendor and his Solicitor were in full possession of all relevant facts. A provision to grant the wayleave should have been in the contract, and was not implied.

(4) That the Defendant Trustees were not entitled to compel the Purchaser to accept the reservations or to make the grant required.

**Minister for Agriculture v. Concannon** – In answer to specific questions, Finlay P. *held:*

(1) The evidence of a veterinary surgeon without further proof that he was such was *prima facie* evidence to establish that he was a veterinary surgeon.

(2) The evidence of the veterinary surgeon in the case was sufficient to establish a *prima facie* case that he was lawfully qualified to practise veterinary surgery in the State — NOVEMBER.

**Minister for Agriculture v. Norgro Ltd.** The Minister summoned Defendant for failing to display vegetables in conformity with a Community Directive on 30 October. In the District Court, it was contended by the Defendant that the Summons did not bear on its face the date of issue to show it had been issued within 6 months, in accordance with S. 10 of the Petty Sessions Act 1851. The Minister relied on the endorsement of service to prove that it had been served within 6 months. The District Justice held he had no jurisdiction. Upon a case having been stated to the High Court, **Finlay P.** *held* that:

(1) The time limit arising under S. 10 was a matter of defence for the Defendant, and did not go to the jurisdiction of the District Court to entertain the summons.

(2) Therefore the Minister should have been allowed to prove the issue of the Summons by referring the endorsement of the Summons.

(3) The District Justice had full jurisdiction to hear the Summons — OCTOBER.

**Murphy and Garvey v. Eastern Health Board.** *Held by* **Costello J.:** (1) That the rights of the two Plaintiffs, who were senior executive officers in the Eastern Health Board, and in particular the right to remuneration, were governed by statute, namely by S. 14 (4) of Health Act 1970. In making his determination, the Chief Executive Officer must act in accordance with the directions of the Minister who had absolute discretion.

(2) The Plaintiffs were legally entitled to the additional remuneration they actually received from 3 March to 18 August 1972, but not after that date, because the Department of Health had refused to sanction it after that date — APRIL.

**Myler and Myler v. Mr. Pussys Nite Club Ltd., (2) Ledwich, (3) Amsby, (4) Keogan and (5) Allied Irish Banks.** Premises in Parnell Square, Dublin, held under Lease for 900 years, with no covenant for insurance. The first Defendant, by resolution of 30 September 1977, authorised the third Defendant to deposit the Title Deeds of the premises, with third Defendant's Bank, which was made the same day. The Bank notified the Sun Alliance Insurance Group of this deposit on 31 January 1979. There was a fire insurance with that Company for £5,000 issued by the second and fourth Defendants to September 1979. Fire damaged the premises in March 1979. On 27 July 1979 the two Plaintiffs, who were owners of the landlord's interest in the premises, obtained judgment against the First, Second and Fourth Defendants for £12,000 for repairing the premises, and £1,900 costs.

The matter came before McWilliam J. by way of a Garnishee Order attaching the £5,000 payable to the Defendants by the Sun Alliance under the fire policy. The Bank, as equitable mortgagees, opposed this application of Plaintiffs, as it had an alleged interest in the premises. The Plaintiffs alleged that the Bank had not given any notice requiring the insurance money to be applied to the discharge of the mortgage debt, and that, in any event, the Plaintiffs had priority in their claim. **McWilliam J.** *held:* (1) That the Bank had a statutory right under S. 23 (4) of the Conveyancing Act 1881 to have the insurance money applied towards the discharge of the mortgage debt.

(2) That S. 23 (4) applied to equitable charges by deposit of title deeds as well as to mortgages by deed. Judgment for Plaintiffs — OCTOBER.

In **Re Michael O'Connor decd. — Eileen O'Connor v. Maurice O'Connor and Margaret Vaughan** – Construction of will. *Held by* **D'Arcy J.:** (1) That on 5 May 1975, the deceased was of sound mind and disposition.

(2) That the Will of the deceased dated 5 May 1975 was duly executed in accordance with the Succession Act 1963.

(3) That the deceased knew and approved of the content of the will dated 5 May 1975.

Accordingly Letters of Administration with the Will of the Deceased dated 5 May 1975 were ordered to issue to the Plaintiff — JUNE.

**O'Hara v. Flint Troika Ltd. and Hamburg Investment Co.** Lands in Crosshaven sold to first Defendant, subject to the right of the Vendor to reacquire part of the lands if it was necessary for planning purposes to demolish the building. The second and third Defendants began proceedings against Mr. Flint, the first Defendant, for specific performance to convey the lands which were settled by a Consent Order. The right to re-acquire was upheld on a subsequent resale of land by Mr. Flint to Troika Ltd., the purchaser with prior notice of that right, even though that right had by then been previously assigned by the Vendor to Troika Ltd. McWilliam J. and the Supreme Court unanimously dismissed the Vendor's injunction proceedings which had been taken on the ground that Troika Ltd. intended demolishing buildings on the re-acquired lands — APRIL.

Re **Palgrave Murphy Ltd. and Companies Acts.** Amount of £39.47 claimed by respective Ministers in respect of unpaid cheques in a liquidated company as preferential debts under S. 285 of Companies Act 1963. *Held* that the amount claimed was not due by the company under the Social Welfare Acts, but was money due for the purchase of insurance stamps. Accordingly, the Minister for Posts and Telegraphs was not entitled to priority, but only as an ordinary unsecured creditor — MAY.

**Pattison v. Institute of Industrial Research and Standards.** Plaintiff was a technician employed by Defendants. In January 1970,

negotiations for increased remuneration for 1 year were made by his union, but direct negotiations broke down. After protracted negotiation by the Labour Court, the allowances were duly paid to the professional staff but not to the technician. The Plaintiff sued for a declaration that as a result of a letter, technicians were entitled to Marriage and Children's Allowance as a package for the period ending 1 April 1971. **McWilliam J.** *held* that the Plaintiff was entitled to damages equal to the appropriate Marriage and Children's Allowances for 2 years ending on 1 April 1971 — MARCH.

**The People (D.P.P.) v. Moore and O'Sullivan — C.C.A.** Appellants, convicted of murder, objected to statement which it was contended should not be admitted. The Court of Criminal Appeal per Finlay P. held:

(1) That the function of the Court was to consider the stenographer's report to determine whether or not the trial was satisfactory by reviewing matters of law and of evidence.

(2) That all the findings made by Hamilton J., the trial Judge, would be supported by the evidence. There were no grounds for setting aside the findings of fact of Hamilton J., with regard to the voluntary nature of the presence of the appellants in the Garda station.

(3) There was a conflict of evidence with regard to a file, which Moore said had been used to shatter glass, while O'Sullivan said he had used it to rob cars. This statement should have been excluded, since it was prejudicial, and did not relate to the onus of proof on either side. Nevertheless, since no miscarriage of justice had occurred, this ground of appeal was disallowed by applying S. 5(1) of the *Courts of Justice* Act 1928.

(4) That Hamilton J., was justified in admitting a statement of Moore, even though the Judge's Rules were breached, as no note had been taken by the Gardai of this statement at the time.

(5) The appellants contended that they thought the deceased was dead when they choked him. Hamilton J. had discussed in his charge the presumption that a person intended the natural consequences of his acts. The Appellate Court was satisfied that Hamilton J. was bound in law to discuss the question of intention, and the rebuttable presumption concerning it. Application for leave to appeal dismissed — OCTOBER.

**S.P. v. P.T. and A.T.** Defendants, husband and wife, negotiated the sale of their family home to the Plaintiff. Wife did not sign a standard form of consent under the Family Home Protection Act 1976, but signed a letter agreeing to the sale. There were subsequent domestic difficulties between the Defendants and the wife had a separate solicitor, and contended that she would only leave her home, on condition that the husband should purchase another house, which he had not done. It was also contended that if the consent in writing was necessary for the actual Conveyance to the Plaintiff. **McWilliam J.** *held:*

(1) That the original Consent of July 1978 was an absolutely unconditional Consent. The dispute between the spouses did not affect the disposition of the purchase price.

(2) That it was not the intention of the Legislature to require two Consents for the completion of one Transaction. This would leave the purchaser having to incur unnecessary expense — NOVEMBER.

**The State (Caseley) v. Dr. Daly and Justice O'Sullivan. Gannon J.** *held:*

(1) That, although Caseley had been detained by order of the Minister in the Central Mental Hospital, Dundrum, since 12 May 1975, the order of Justice O'Sullivan, by which the accused was remanded due to illness on 6 November 1975, was not bad on its face, and was not made without jurisdiction, as that order was of an administrative nature, and not of a judicial nature.

(2) As the Ministerial Order was effective only from 12 May to the next remand on 15 May 1977, and as there was no further Ministerial Order, the continued detention of Caseley was not justified in law. Accordingly an Order of Release of the Prosecutor was made — MARCH.

**State (Walsh) v. District Justice Maguire.** A person detained under Section 30 of the Offences Against the State Act 1939 may, notwithstanding the unreported decision of Finlay P. in the **State (Brennan) v. Mahon** – 13 February 1978 – to the contrary, be validly charged at his place of detention during his period of detention under that Section; it is not necessary that he be first charged in the District Court. The prosecutor had been charged with armed robbery in a Garda Station, and sought to make absolute a Conditional Order of Certiorari which was unanimously refused by the Supreme Court — APRIL.

**Treacy v. Dwyer Nolan Developments Ltd.** Plaintiff purchaser liable to Defendant Vendor and Builder for interest on balance of purchase money at contract rate of 20%. In November 1977, the plaintiff left with the defendant a list of defects, which defendant claimed were not serious; the plaintiff inspected the house in mid-December, but no report was furnished to the defendant. The plaintiff continued to contend that the house was defective but, subsequent to the Architect's certificate of the completion of the house in May 1978, the defendant insisted upon full payment of 20% from November 1977. On June 25, 1977, the plaintiff put the balance of the purchase money on joint deposit, and sued for specific performance. Held by McWilliam J.:

(1) That the Defendant was entitled to Interest at 20% from 1 January to 25 June 1978.

(2) That the Plaintiff was not entitled to any damages — OCTOBER.

**Walsh and Others v. Owners of the Motor Vessel "Ora et Labora".** The Plaintiffs were the Coxwain and Crew of the Valentia Harbour Life Boat which, in response to a May Day call, were at sea from 9 p.m. on 3 July 1974 to 4.15 a.m. on 4 July, when they managed to land the Defendant Motor Vessel at Valentia. Finlay P. had held that salvage of the vessel should be calculated on the basis of remuneration or reward to the lifeboat men. He had awarded £750 to the Plaintiffs. The Supreme Court per Griffin J. increased the award from £750 to £1,500 — JULY/AUGUST.

**Wilson v. Sheehan.** Extradition was sought on a warrant which recited that Plaintiff had robbed M.B. of £281 and had used personal violence contrary to S. 8 of the Theft Act 1968. It was submitted by the Plaintiff that under S. 50(2) of the Extradition Act 1965, this offence did not correspond with any indictable offence under the law of the State. The District Justice held that the offence in the warrant corresponded with robbery with violence contrary to the Larceny Act 1916. McMahon J. in the High Court held that the specification in the warrant was not sufficient to identify a corresponding offence in Irish Law and ordered the Plaintiff to be released. On appeal, the Supreme Court per Henchy J. reversed McMahon J. and held that the District Justice had reached the correct conclusion, for he only had to decide whether the charge in the warrant would constitute an offence if the same conduct were charged here. An Order was made to re-arrest the Plaintiff. Henchy J. also criticised the fact that 4½ years had elapsed between the issue of the warrant and the final disposition of the Extradition proceedings. JULY/AUGUST.

Mrs. Moya Quinlan
Senior Vice President of the Society for 1979-80

Mr. Michael P. Houlihan
Junior Vice President of the Society for 1979-80

submitted, be amended by the deletion of the words "elsewhere than in the city of Dublin" and the substitution thereof of the words "elsewhere than in the county and city of Dublin". The amendment was carried and the substantive proposal was passed unanimously.

**Vote of Thanks**

Mr. Walter Beatty, Senior Vice President, took the chair at this point. Mr. T. A. O'Reilly, in proposing a vote of thanks to the President, referred to the outstanding services rendered to the Society by the indefatigable travels of the President during his year of office and the felicitous manner in which he had represented the Society at functions in diverse areas. He referred also to the gracious support given the President by his wife, Dorinda. The motion was seconded by Mr. Frank Daly. The resolution was then put to the meeting and was carried with applause.

The Senior Vice President then declared the meeting closed.

# LAW SOCIETY ANNUAL CONFERENCE
## 1-4 May, 1980
### in Blackhall Place, Dublin

*Discussion Papers*

BUSINESS AND THE LAW
*Speakers:* Martin Rafferty and Gerald Hickey

FARMING AND FINANCE
*Speakers:* T. J. Maher and W. A. Osborne

LEGAL SERVICES FOR THE COMMUNITY
*Speakers:* Michael Zander and Anthony J. Hedderman, S.C.

IS YOUR BARRISTER REALLY NECESSARY?
*Speakers:* Gerald Sheean, Sun Alliance Insurance Group, and Conal Clancy

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**Please Note the Dates in your Diary**

# The Society and the Civil Legal Aid Scheme

## A CALENDAR OF EVENTS

On 2nd May 1979 the Minister for Justice announced the Government's decision to introduce a limited Civil Legal Aid Scheme. Meagre details were given in the official announcement, but it was clearly stated that legal aid and advice would be available only through Legal Aid Centres, staffed by full-time lawyers, employed by the State.

Following the discussion at the Society's Annual Conference at Galway, the President and the Director General met the Minister for Justice and urged that the scheme should provide for the participation of private practitioners, to allow the members of the public availing of the scheme "a choice of lawyer" and, for those in thinly populated areas, ready access to a lawyer. The President also expressed the view that the scope of the scheme should be extended to legal representation before certain tribunals and, in particular, before the Employment Appeals Tribunal.

In the course of the conversation, the Minister indicated that he was bound by a Cabinet decision that the scheme was to be based on Law Centres, but that he would consider the representations being made.

On 31st May 1979 the Minister wrote to the Society indicating that, if Centres proved unable to meet the demands on them, the position would have to be examined and that, in that event, all options, including the proposal for assistance from solicitors in private practice would, of course, be considered. The Minister further indicated that the objective of tribunals was that they should work informally and in such a way as to be "tribunals for the layman". The Minister stated that he had no special knowledge of particular difficulties associated with appearances before the Employment Appeals Tribunal, but the matter would be discussed with the Department of Labour in the context of the preparation of a detailed scheme.

The Society was aware that discussions were in progress between the Department and the Bar Council on the Bar's participation in the scheme, though it was not privy to, nor invited to participate in such talks.

When in October the Minister, in answer to a parliamentary question, stated that he was in consultation with the legal profession in relation to the introduction of the scheme, which he hoped to introduce before the end of 1979, the Council of the Society, not being aware that it was in course of being consulted about any aspect of the scheme, sought an appointment with the Department as a matter of urgency.

On 9th November 1979 a deputation from the Council comprising Mrs. Moya Quinlan, Mr. W. D. McEvoy, Mr. D. G. Binchy and Mr. J. F. Buckley, together with the Director General, Mr. Ivers, met the Assistant Secretary of the Department of Justice and other relevant officials and strongly reiterated the view that Law Centres, while a desirable part of a civil legal aid scheme, could not meet the demands of people in rural areas, who might have to travel long distances to large population centres to get to a Law Centre.

It was pointed out to the Department that in other areas, such as in the State's provision of dental services, where the system was originally set up based on centres and had involved a large capital contribution, the scheme had been a failure and it had been necessary to evolve a scheme involving private practitioners.

It was also pointed out that Law Centres in Dublin were likely to be faced with substantial litigation workloads, which could require substantial numbers of qualified practitioners to handle – it was pointed out that on any given day there could be nineteen High and Circuit Courts sitting in Dublin, seven or eight District Courts sitting in the Dublin Metropolitan Area and a further two or three in Dublin County.

At that November meeting, the Assistant Secretary of the Department indicated that he would bring the views of the deputation to the Minister, who might bring them to the notice of the Government when the scheme came up for final approval.

The Society's deputation again raised the question of making provision in the scheme for legal aid and assistance for employees appearing before the Employment Appeals Tribunals and Mrs. Quinlan, a Vice Chairman of that Tribunal, confimred that her experience was that employers were usually professionally aided but that, in a large number of cases, employees were not legally represented. The Society's deputation was informed that the advice of the Department of Labour on this point was awaited.

The Assistant Secretary of the Department indicated that a number of the other matters which had been raised by the deputation would be matters for the Legal Aid Board to consider when it was established. He stated that he was not in a position to disclose any further details of the scheme, as it had not been approved by the Government.

It was agreed that the Department would prepare a minute of that meeting and would circulate it to the Society. No such minute was received by the Society and, following a report to the Council of the Society on its meeting on 13th December 1979, the Society wrote to the Department reiterating the points which had been made, but received no further communication from the Department before the scheme was published and the members of the Board appointed, on 20th December 1979.

# A Minor Confusion: Children and the Law of Negligence

WILLIAM BINCHY*

The position of children regarding negligence and contributory negligence is a matter of considerable practical importance but has been discussed only rarely in Irish legal periodicals. The present article attempts to set out the main features of the law.

**Contributory Negligence**[1]

It is best to begin with a consideration of contributory negligence, since this aspect of the subject has given rise to considerable judicial analysis, in contrast to negligence where the cases are very scanty. The reason for this difference is relatively easy to determine: whilst it is in the nature of children to get into situations of danger, frequently resulting in injuries to themselves, it is less frequent that a person injured by a child will contemplate suing the child,[2] who normally will have no assets.

The classic statement of the relevant legal principles regarding the contributory negligence of children was made by O'Byrne, J., in *Fleming v Kerry County Council*:[3]

> "In the case of a child of tender years there must be some age up to which the child cannot be guilty of contributory negligence. In other words, there is some age up to which a child cannot be expected to take any precautions for his own safety. In cases where contributory negligence is alleged against a child, it is the duty of the trial Judge to rule, in each particular case, whether the plaintiff, having regard to his age and mental development, may properly be expected to take some precautions for his own safety and consequently be capable of being guilty of contributory negligence. Having ruled in the affirmative, it becomes a question of fact for the jury, on the evidence, to determine whether he has fallen short of the standard which might reasonably be expected from him having regard to his age and development. In the case of an ordinary adult person the standard is what should be expected from a reasonable person. In the case of a child, the standard is what may reasonably be expected, having regard to the age and mental development of the child and the other circumstances of the case."

A number of aspects of this statement of the law require further consideration.

**(a) Minimum Age**

O'Byrne, J., is clearly correct in stating that "there must be some age up to which the child cannot be guilty of contributory negligence". As Chief Baron Palles observed in *Cooke v Midland Great Western Ry. of Ireland*:[4]

> "... the doctrine of contributory negligence is entirely grounded upon the fact that man is a reasoning animal, and has no application to the case of a child of such an age as to be incapable of appreciating the danger, and reasoning in reference to it, any more than if he had been a brute animal."

Manifestly, it would be nonsense to speak of a six-month-old infant as being capable of being guilty of contributory negligence. But the point at which a child may become so has given rise to some uncertainty.

The age of 3 years appears to be the youngest at which the Courts have seriously canvassed the possibility of a child having the requisite capacity. In *Macken v Devine*,[5] Gleeson, J., in the Circuit Court, held that a 3½-year-old plaintiff who had fallen down unguarded steps was not guilty of contributory negligence since he "had not sufficient sense to understand the risk and was incapable of appreciating the danger". In the Canadian decision of *Kaplan v Canada Safeway Ltd.*,[6] Disbery, J., of the Saskatchewan Queen's Bench, expressed the opinion that it would be "absurd" to regard a child of that age as being capable of contributory negligence. In the old English decision of *Gardner v Grace*,[7] where the plaintiff was 3¼ years-old, Channell, B., stated that "the doctrine of contributory negligence does not apply to an infant of tender age". Cases in the United States of America[8] are also overwhelmingly opposed to holding 3-year-olds capable of contributory negligence.

As the child moves towards 4[9] and 5[10] the Courts become increasingly doubtful that he is incapable of contributory negligence. By the time he reaches 6, he is likely to be held to have the requisite capacity, at all events where he is a bright child.[11] Cases have been reported,[12] however, where the Courts have held children above this age incapable of contributory negligence.

The Irish authorities are strongly of the view that 9-year-olds are capable of contributory negligence. In *Behan v Thornhill*,[13] the Supreme Court upheld the verdict of Davitt, P., dismissing an action for negligence brought by a 9-year-old plaintiff arising out of a collision with the defendant's car. The plaintiff was undoubtedly a bright child – Davitt, P., stated that he had "seldom seen a brighter boy in the witness box" – but the case did not proceed on this finding alone. Davitt, P., stated:

> "... I think that a boy of 9 years is capable of contributory negligence. It has been held in some cases that younger boys could not be capable of contributory negligence, but I am satisfied that a boy of 9 years can be capable of contributory negligence."

Similarly, in *Courtney v Masterson*,[14] Black, J., in the High Court, stated that he was

> "not prepared to accept the contention that a boy of 10 years is incapable of contributory negligence."

Whilst the Courts have tended to ask whether children *of a certain age* may be regarded as having the capacity for contributory negligence, it is clear that this is not the best approach and that it is not in harmony with the statement

of O'Byrne, J., in *Fleming v Kerry County Council*,[15] already quoted. As anyone who has had any experience of dealing with young children will appreciate, children develop at different speeds: one 6-year-old may be fully aware of the dangers of a particular situation whilst his friend of the same age may have no such appreciation. This subjective element is recognised where the child has been found to be capable of contributory negligence: it should also be stressed, as O'Byrne, J., has done, where the threshold issue of capacity for contributory negligence is being determined.

**(b) Standard to be Applied in Determining whether a Child was Guilty of Contributory Negligence**

There is a surprising degree of confusion in this country as to the standard to be applied to a child, admittedly capable of contributory negligence, in determining whether he was, in the circumstances of the case, guilty of contributory negligence. O'Byrne, J., in *Fleming v Kerry County Council*,[16] favoured the subjective approach: the standard was

> "what may reasonably be expected, having regard to the age and mental development of the child and the other circumstances of the case."

Yet, in the subsequent Supreme Court decision of *Duffy v Fahy*,[17] Lavery, J., expressed uncertainty as to the meaning of O'Byrne, J.'s, statement, considering it to be

> "susceptible of meaning either the mental development of the individual concerned or the mental development of the normal or average child of that age."

He regarded it as "unnecessary to consider the matter further or to express an opinion thereon".[18] In *Kingston v Kingston*,[19] Walsh, J., favoured the objective approach, looking only to the age, and not the mental development, of the child.

Other decisions over the years have been divided on this matter: some[20] have clearly endorsed the subjective approach, but others[21] have professed to favour the objective standard.

The most recent decision in which the matter was discussed by the supreme Court is *McNamara v Electricity Supply Board*.[22] The case is, of course, a leading one on the subject of occupiers' liability, but in the present context it is the treatment of the plaintiff's contributory negligence that is relevant. It will be recalled that the plaintiff, an 11-year-old boy, was injured when climbing on the defendant's electricity sub-station. He had been warned by his father not to go there. He was aware of the existence of a number of notices around the sub-station warning persons of the danger but claimed that he had never read them although he was able to read. The jury found that he had not been guilty of any contributory negligence and the defendant appealed against this finding (among others).

The standard of care appropriate to the plaintiff was discussed in a number of the judgments delivered in the Supreme Court. Mr. Justice Walsh stated that

> "the test to be applied is that stated by O'Byrne, J., in *Fleming v. Kerry County Council*,[23] which is that it is for the jury to determine whether the boy fell short of the standard which might be reasonably expected from him having regard to his age and *his* development."[24]

In this passage and in the passage following afterwards in his judgment,[25] Mr. Justice Walsh appears clearly to favour the subjective standard (whilst considering that, on the facts of the case, a more objective standard (of age and experience, but not mental development) would have yielded the same result).

Mr. Justice Henchy considered that the relevant standard was that

> "to be expected from a boy aged 11 years of the plaintiff's education and general background . . ."[26]

Mr. Justice Griffin did not refer to the standard in express terms but he appears to have favoured the subjective approach to the extent that he considered[27] the *plaintiff's* capacity to read – rather than that of the ordinary 11-year-old – to be of major significance.

Mr. Justice Budd concurred[28] with the judgment of Mr. Justice Walsh. The brief treatment of the issue by FitzGerald, C.J., does not indicate a clear leaning towards either the objective or subjective approach.

The better view would appear to be that *McNamara*[30] represents a clear preference on the part of the Supreme Court for the subjective approach. This approach is also favoured by the Courts in Canada[31] and the United States.[32] In England[33] and Australia[34] the position is less clear, but the objective approach appears to command support.

**Negligence**

As has been mentioned, there have been very few decisions on the question of the negligence of children. There have been statements[35] to the effect that minority will not afford a defence to an action for negligence, but the better view[36] appears to be that the negligence of a child should be judged by the same standard as that regarding his contributory negligence.

**Children Performing Adult Activities**

Reference should be made to a development in the law in a number of countries overseas – including the United States of America,[37] Canada,[38] Australia[39] and New Zealand[40] – which has not so far taken place in Irish law. Courts in these countries have imposed the adult standard of negligence on children performing adult activities, such as driving a car.

In the leading decision on the subject, *Dellwo v Pearson*,[41] where the defendant, a 12-year-old boy, injured the plaintiff operating a power boat, Loevinger, J., of the Minnesota Supreme Court argued that

> "while minors are entitled to be judged by standards commensurate with age, experience, and wisdom when engaged in activities appropriate to their age, experience and wisdom, it would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standards of care and conduct than those expected of all others . . . One cannot know whether the operator of an approaching automobile, airplane, or power boat is a minor or an adult, and usually cannot protect himself against youthful imprudence even if warned."

This concentration on the expectations of the victim, rather than the responsibility of the child, may be regarded by many as inappropriate. The doctrine of "adult activities" has been carried to ludicrous lengths in the United States of America, the Courts holding that skiing[42] and even golf[43]

are adult activities imposing an adult standard of care on children who perform them.

## Conclusion

The law relating to the contributory negligence and negligence of children is uncertain in a number of important respects. With increasing affluence among older teenagers and with the consequent enhanced likelihood of litigation involving them in the future, it may not be long before the Supreme Court makes a definitive and comprehensive statement on the subject.

*This article is written in a personal capacity.

### FOOTNOTES

1. See generally *Salmond on the Law of Torts*, 521-522 (17th ed., by R. F. V. Heuston, 1977); *Clerk and Lindsell on Torts*, 611-613 (14th ed., 1975); H. Street, *The Law of Tort*, 124, 159 (6th ed., 1976); J. Fleming, *The Law of Torts*, 270-271 (5th ed., 1977); G. Williams, *Joint Torts and Contributory Negligence*, 355-356 (1951); W. Prosser, *Handbook of the Law of Torts*, 154-156 (4th ed., 1971); Anon., *Children and Contributory Negligence*, 100 I.L.T. & Sol. J. 425 (1966); Anon., *Motorists, Children and Contributory Negligence*, 72 I.L.T. & Sol. J. 119 (1938); Anon., *Children and Negligence*, 75 I.L.T. & Sol. J. 89 (1941); Shulman, *The Standard of Care Required of Children*, 37 Yale L.J. 618 (1927).

2. Whilst parents are not as such liable for the torts of their children, they may be liable where they directed, authorised or ratified their child's act (cf. *Waters v O'Keeffe*, [1937] Ir. Jur. Rep. 1 (High Court, Hanna, J., 1936); *Moon v Towers*, 8 C.B. (N.S.) 611, 141 E.R. 1306 (1860)), where there is a relationship of master and servant between parent and child (cf. *Moynihan v. Moynihan*, [1975] I.R. 192 (Sup. Court), analysed by Davies, *Torts*, ch. 15 of H. Wade, ed., *Annual Survey of Commonwealth Law 1976*, at 406 (1978)), where they allow the child access to dangerous things (cf. *Sullivan v Creed*, [1904] 2 I.R. 317 (Ct. App., 1903) or where they are otherwise negligent in affording the child an opportunity to injure another. See generally, Waller, *Visiting the Sins of the Children: The Liability of Parents for Injuries Caused by Their Children*, 4 Melbourne U.L. Rev. 17 (1963).

3. [1955-1956] Ir. Jur. Rep. 71, at 72 (Sup. Ct., 1953).

4. [1908] I.R. 242, at 268 (K.B. Div., 1906).

5. 80 I.L.T.R. 121 (Circuit Ct., Gleeson, J., 1946).

6. 68 D.L.R. (2nd) 627, at 630 (Sask. Q.B., Disbery, J., 1968). Cf. *McEllistrum v Etches*, [1956] S.C.R. 787, at 793 (*per* Kerwin, C.J.C.).

7. 1 F. & F. 359, 174 E.R. 763 (1858). This statement has been criticised as being "scarcely satisfactory, because it is difficult to say what is or is not a tender age": H. Smith, *A Treatise on the Law of Negligence*, 243 (2nd ed., 1884). It should be noted that Channell, B., proposed that the parties settle the action, which might suggest that he did not regard the issue of the child's contributory negligence as a closed one.

8. See the decisions cited by Heinselman, *Annotation: Contributory Negligence of Children*, 107 A.L.R. 4, at 98-101 (1937), and by Shipley, *Annotation: Modern Trends as to Contributory Negligence of Children*, 77 A.L.R. 2nd 917 at 923. See, however, *United Rys. & Electric Co. of Baltimore v Carneal*, 110 Md. 211, 72 A. 771 (Ct. Apps., 1909).

9. Cf. *Brown v Foley*, [1932] LJ., I.F.S. 205 (High Ct., O'Byrne, J.); *Cullen v Heagney*, [1931] LJ. I.F.S. 149; *Carmarthenshire Co. v Lewis*, [1955] A.C. 549, at 563 (H.L. (Eng.), *per* Lord Reid, *obiter*).

10. Cf. *Curran v Padepud*, 72 I.L.T.R. 246 (Circuit Ct., Shannon, J., 1938), rev'd., 73 I.L.T.R. 89 (High Ct., O'Byrne, J., 1939); *Finnegan v The Irish Shell Co.*, 71 I.L.T.R. 200 (Circuit Ct., Sheehy, J., 1937); *Plantza v Glasgow Corporation*, 47 Sc.L.R. 688 (1910); *Ryan v Madden*, [1944] I.R. 154 (High Ct., O'Byrne, J., 1943).

11. Cf. *Donovan v Landy's Ltd.*, [1963] I.R. 441 (Sup. Ct., 1962); *Brien v. McGarry*, 62 I.L.T.R. 166 (Circuit Ct., Davitt, J., 1927); *Curran v Lapedus*, *supra*, fn. 10.

12. Cf. *O'Rourke v Cavan U.D.C.*, 77 I.L.T.R. 16 (Circuit Ct., Sheehy, J., 1942). See also *Brown v Foley*, *supra* fn. 9 (*per* O'Byrne, J., during argument): "I thought the dividing line was between seven and nine."

13. 62 I.L.T.R. 65 (Sup. Ct., 1928, aff'g High Ct., Davitt, P.).

14. [1949] Ir. Jur. Rep. 6, at 7, High Ct., Black, J. See also *O'Gorman v Crotty*, [1946] Ir. Jur. Rep. 34 (High Ct., O'Byrne, J., 1945), 10½-year-old boy held capable of contributory negligence; *McLoughlin v Antrim Electricity Supply Co.*, [1941] N.I. 23 (C.A., 1940).

15. *Supra*, fn. 3.

16. *Id.*

17. [1960] Ir. Jur. Rep. 69, at 74 (Sup. Ct.).

18. *Id.*

19. 102 I.L.T.R. 67, at 67 (Sup. Ct., 1965).

20. *Tiernan v O'Callaghan*, 78 I.L.T.R. 36 (Circuit Ct., Fawsitt, J., 1944); *Byrne v Corporation of Dun Laoghaire*, [1940] Ir. Jur. Rep. 40 (High Ct., Hanna, J.); *McLoughlin v Antrim Electricity Supply Co.*, *supra*, fn. 14.

21. *O'Gorman v Crotty*, *supra*, fn. 14; *Finnegan v The Irish Shell Co.*, *supra*, fn. 10; *Courtney v Masterson*, *supra*, fn. 14.

22. [1975] I.R. 1 (Sup. Ct., 1974), analysed by McMahon, *Note: Herrington and Trespassers in Ireland*, 91 L.Q. Rev. 323 (1975).

23. *Supra*, fn. 3.

24. *Supra*, fn. 22, at 17-18 (italics mine).

25. *Id.*, at 18.

26. *Id.*, at 27.

27. *Id.*, at 36.

28. *Id.*, at 21.

29. *Id.*, at 8.

30. *Supra*, fn. 22.

31. Cf. *McEllistrum v Etches*, *supra*, fn. 6; *Paskiviski v Canadian Pacific, Ltd.*, [1976] 1 S.C.R. 687; *Wade v Canadian National Ry.*, 3 C.C.L.T. 173 (Sup. Ct. Can., 1977).

32. See Shulman, *supra*, fn. 1; Ireland *Comment*, 37 Montana L. Rev. 257, at 261-262 (1976); Katz, *Note: The Standard of Care Required of Infants*, 25 Temp. L.Q. 478 (1952); Irvin, *Comment*, 38 Ore. L. Rev. 268 (1959).

33. Cf. Salmond, *supra*, fn. 1, 521-522; H. Street, *supra*, fn. 1, 122; G. Williams, *supra*, fn. 1, 355-356; *Lynch v Nurdin*, 1 Q.B. 29, 113 E.R. 1041 (1841); *Hughes v Macfie*, 2 H. & C. 744, 159 E.R. 308 (1863); *Mangan v Atterton*, L.R. 1 Ex. 239 (1866); *Lay v Midland Ry. Co.*, 34 L.T. 30 (Exch. Div., 1875); *Clark v Chambers*, 3 Q.B.D. 327 (1878); *Gough v Thorne*, [1966] 1 W.L.R. 1387 (C.A.); *Jones v Lawrence*, [1969] 3 All E.R. 267 (Cumming-Bruce, J., 1968); *Culkin v. McFie & Sons, Ltd.*, [1949] 3 All E.R. 613 (Croom-Johnson, J.).

34. Cf. *McHale v Watson*, 115 C.L.R. 199 (High Ct., Austr., 1966); *Cotton v Commissioner for Road Transport & Trainways*, 43 S.R. (N.S.W.) 66 (Sup. Ct., 1942); *Joseph v Swallow & Ariell Pty. Ltd.*, 49 C.L.R. 578 (High Ct., 1933); D. Harland, *The Law of Minors in Relation to Contracts and Property*, ch. 13 (1974); Disney, *Casenote: Standard of Care in Child Negligence*, 3 Adelaide L. Rev. 118 (1968).

35. E.g. *McHale v Watson*, *supra*, fn. 34, at 224-226 (*per* Menzies, J., dissenting); Halsbury's *Laws of England*, vol. 28, 10 (3rd ed., 1957) (referring to decisions that do not appear to support the proposition for which they are cited).

36. Cf. Salmond, *supra*, fn. 1, 222; J. Fleming, *supra*, fn. 1, 112-113; see, however, *Kingston v Kingston*, *supra*, fn. 19, at 67 (*per* Walsh, J.).

38. Cf. *Ryan v Hickson*, 7 O.R. (2nd) 352, 55 D.L.R. (3rd) 196 (High Ct., Goodman, J., 1974), strongly influenced by the argument of Professor Allen Linden in *Canadian Negligence Law*, 33-34 (1972).

39. Cf. J. Fleming, *supra*, fn. 1, 113, citing *Tucker v Tucker*, [1956] S.A.S.R. 297.

40. Cf. *Taurunga Electric Power Board v Karora* , [1939] N.Z.L.R. 1040 (C.A.), analysed by Anon., *Comment*, 18 Can. Bar Rev. 67 (1940).

41. 258 Minn. 452, 107 N.W. 2nd 859 (Minn. Sup. Ct., 1961), analysed by Anon., *Note*, [1962] Duke L.J. 138.

42. *Goss v Allen*, 134 N.J. Sup. 99, 338 A. 2nd 820 (Sup. Ct., App. Div., 1975), *reversed on appeal*, 70 N.J. 442, 360 A. 2nd 388 (Sup. Ct., 1975).

43. *Neumann v Shlansky*, 58 Misc. 2nd 128, 294 N.Y.S. 2nd 628 (Westchester Cty. Ct., 1968), *aff'd.*, 34 A.D. 2nd 1016, 312 N.Y.S. 2nd 947 (Sup. Ct., App. Div., Second Dept., 1970), *aff'd.*, 318 N.Y.S. 2nd 925 (1971); see Notes by Rosenberg in 20 Syracuse L. Rev. 823 (1969), Stobbs in 71 W. Virginia L. Rev. 434 (1969) and M.J.T. in 33 Albany L. Rev. 434 (1969).

# Income Tax and Employee Participation Schemes

WILLIAM O'DEA

The extent to which Schedule E of the income tax code applies to employee incentive schemes is uncertain. The problem of whether benefits received by an employee under such a scheme are taxable as emoluments "from" his employment under Schedule E has given rise to much difficulty in practice.[1]

It arose again recently in the case of *Tyrer v Smart*.[2] In that case the House of Lords overruled the decisions of both the English High Court and the Court of Appeal. The facts are simple. In 1969 a company decided to go public. It offered 5.6 million shares for sale to the public. The sale was to be at "the striking price", i.e. the highest price at which sufficient applications for all shares offered were received. 10% of the shares were reserved for employees of the company at £1 per share. The employee had to be with the company for at least five years. An employee could apply for as many shares as he wished. Tyrer was an employee of the company. On March 9th he applied for 5,000 shares in the company and enclosed a cheque for £5,000. The offer closed on March 12th. On March 13th a striking price of 25/- per share was announced. Tyrer's application was accepted on March 17th. Dealings on the stock exchange started on March 18th. At close of business on that day the shares had risen to 27/6. Tyrer was assessed to tax under Schedule E. He was assessed on the advantage that had "accrued" to him "from" his employment under Schedule E. Accordingly he appealed.

The Special Commissioners upheld the assessment however. The Commissioners found a number of facts: (a) When Tyrer made his application he had no particular confidence that the shares would increase in price; (b) The value of the shares when Tyrer's legal right to them arose on March 17th was 22/-; (c) The purpose of the offer of shares to the employees at the preferential price was to encourage them to identify with the company and to induce them to be loyal employees of the company to, as it were, give them an interest, understanding, and sense of involvement in the company. They concluded therefore that Tyrer was assessable on the difference between the value of the shares on March 17th (when Tyrer's legal rights to them arose) and the price he paid for them (i.e. 20/-).[3] Tyrer appealed to the High Court. Brightman, J.,[4] disagreed with the result of the Commissioner's determinations. He felt that although the employment was the *causa sine qua non* rather than the *causa causans* of the benefit nevertheless the employee was not assessable to tax.[5] He reasoned that although Tyrer would not have had the opportunity to purchase the shares had he not been employed by this company, nevertheless the benefit which accrued to him resulted from his decision as a private individual to purchase the shares in question and take the commercial risk involved. The benefit, said the Court, did not arise directly as a result of his exercise of his employment. The Court of Appeal affirmed that decision.[6] The House of Lords[7] overruled it however.

The House of Lords allowed the taxpayers' appeal for a somewhat unusual reason. They said that while a different tribunal might well have reached a different conclusion it was, nevertheless, sufficient evidence to enable the Commissioners to come to the conclusion to which they came, i.e. that the offer of shares at a favourable price was an inducement to Tyrer to become and to continue to be a loyal employee of the company, and was, consequently, an emolument "from" his employment. The Commissioners' decision, they said, was not one at which no reasonable Commissioners who knew the relevant law could have arrived. Consequently, there were no grants for reversing that decision.[8]

I feel that this sort of conclusion involves a certain amount of buck-passing particularly in a case such as this. The conclusion reached by the House of Lords may be a reasonable conclusion for the Court hearing the case immediately after the Commissioners (i.e. the High Court). However, when the conclusion of the Special Commissioners was reversed (as in this case) by both the House of Lords and the Court of Appeal it is, I feel, incumbent on the House of Lords to elaborate fully on the grounds for the "reasonableness" of the Commissioners' decision, and, by implication, the "unreasonableness" of the decisions of both the High Court and the Court of Appeal. I would argue that the House of Lords failed to do this.

Lord Diplock[9] delivered the principal judgment. He referred to *Laidler v Perry*.[10] He relied specifically on the remarks of Lord Donovan[11] in that case to the effect that "... the company disbursed these sums to help to maintain a feeling of happiness among the staff and to foster a spirit of personal relationship between management and staff. In less roundabout language that simply means in order to maintain the quality of service given by the staff. Looked at this way, the payments were an inducement to each recipient to go on working well."

That remark, he said, was "very much in point" in the present case. I personally find this somewhat surprising. The facts are different in a very fundamental respect. The Christmas vouchers in *Laidler v Perry* were definite tangible benefits. What was given in the present case was a mere intangible opportunity to take a real commercial risk – a risk which might or might not result in a benefit. This was the very issue on which the High Court and the Court of Appeal in the U.K. parted company with the Special Commissioners in this case and there is no attempt in Lord Diplock's judgment to deal with the arguments used by those Courts on this point. Anyway, I feel that the authority of *Laidler v Perry* is now doubtful, because of subsequent developments (see e.g. *Pritchard v Arondale* [1971] 3 AER 1011). It is worth noting that

Lord Diplock came to his decision "with some reluctance".[12] This was because he thought the scheme adopted here was "excellent".[13] He felt that it might, if generally adopted, be of great benefit to industry and to the entire economy. Far from elaborating on the "reasonableness" of the Commissioners' conclusions Lord Edmund-Davies frankly admitted that he was "dubious"[14] that he would have reached the same conclusion had he been in the position of the Commissioners.[15] Lord Fraser of Tullybelton conceded that there was "clearly room"[16] for the conclusions reached by the High Court and the Court of Appeal and he "sympathised" with those conclusions.[17] He felt that the other cases on this topic were "easier"[18] than the present one. Lord Salmon said that the borderline in cases like this was a "narrow" one and also that in this case "it may well be that different Judges of fact ... [might have reached different conclusions]." Lord Russell of Killowen did not contribute. All in all then a rather inadequate justification for overruling both the High Court and the Court of Appeal. The House of Lords seemed to uphold the assessment because they felt that there were at least some grounds for the Commissioners coming to the conclusion that they did (namely that the advantage the taxpayer got was a reward for past services or an inducement to future services). But could even such a conclusion of itself make the taxpayer assessable? Firstly, there is hardly any attempt in the House of Lords' judgments to ascertain whether the advantage was actually for past or future services or both. It is by no means certain that past services are taxable.[19] Any authority at all that exists is still indirect.[20] As far as future services are concerned it is now settled that a payment simply to induce future services is not taxable under Schedule E.[21] Anyway, Tyrer was under no obligation to perform any future services. He could legally have resigned from the company at any time.[22]

An attempt has been made in the United Kingdom to tighten up and clarify the law on this topic. The relevant legislation is S. 79 of the Finance Act 1972 and S. 20 of the Finance Act 1974. S. 79 applies if the person who gets a benefit got the shares in pursuance of a right or opportunity acquired as a director or an employee. If such an acquisition has taken place and, at a certain time the market value of those shares exceeds the market value at the date of acquisition the excess is chargeable to tax under Schedule E. A charge to Schedule E arises immediately if the person by virtue of his/her ownership of the shares receives a benefit not received by the majority of ordinary shareholders. Only time will tell how effective this legislation will prove to be. The drafting is, I feel, a little loose and there seems to be no limit to the ingenuity of tax consultants.

FOOTNOTES

1. See e.g. *Abbott v Philbin* [1960] 2 AER 763; *Ede v Wilson and Cornwall* [1945] 1 AER 367; *Salmon v Weight* [1935] 1 AER 904.
2. [1979] 1 AER 321 (H.L.).
3. Under schedule 2, par. 1 (1), of the U.K. Finance Act 1956.
4. [1976] 3 AER 537; [1976] S.T.C. 521.
5. To use the terminology of Megarry, J., in *Pritchard v Arundale* [1971] 3 AER 1011; see post.
6. [1978] 1 AER 1089; [1978] S.T.C. 141.
7. [1979] 1 AER 321.
8. See *Edwards v Bairstow* [1955] 3 AER 48; see especially Lord Radcliffe at p. 387.

○*Footnotes continued on page 14*

From left: Mr. James Doran, President of the Incorporated Law Society of Northern Ireland, 1978-79, Mrs. Gerald Hickey, An Tanaiste, Mr. George Colley, Mrs. Frank Griffin and Mr. Gerald Hickey, President of the Society, 1978-79.

# Law Society Annual Dinner Dance

23rd November 1979

Mr. Des Keane, Dublin, and Mr. Bill Reburn, Malahide.





From left: Mrs. Anne McMahon, Booterstown, Mrs. Deirdre Hoffman, Killiney, Mrs. Kevin Russell, Blackrock, and Mrs. Patricia Madigan, Foxrock.

From left: Mr. Gerald Hickey, President of the Society, 1978-79, Mrs. George Colley, Mr. Anthony J. Hedderman, Attorney-General, and Mr. Walter Beatty, President of the Society, 1979-80.

# Conveyancing Act Notes

## GUIDELINES ON WHAT STEPS LESSEE'S SOLICITOR SHOULD TAKE TO EXAMINE THE LESSOR'S TITLE

The Conveyancing Committee has received a number of queries as to the enquiries into the landlord's title which ought to be made by a lessee's solicitor on the occasion of the granting of a lease at a rackrent. While the lessee is not to come under the provisions of the Conveyancing or Vendor and Purchaser Acts entitled to enquire into the lessor's title, both the practice of the profession and certain judicial pronouncements have made considerable inroads on this strict statutory position. Many of the uncertainties seem to spring from the decision in *Hill v. Harris* (1965) 2 A.E.R. which has probably been somewhat misunderstood. The decision does not give authority for the proposition that a lessee's solicitor is bound to investigate fully the lessor's title and to raise requisitions thereon. It merely states that a solicitor acting for a lessee should take "the ordinary conveyancing precautions before allowing his client to take a sub-lease, or finding out by inspection of the head lease what were the covenants, restrictive of user or otherwise contained in the head lease". Any prudent conveyancer acting for a client taking a lease of business or commercial property for more than a three year period should make the following investigations.

(1) If the property to be let is held by the lessor in fee simple the lessee's solicitor should require production of a certified copy of the deed of conveyance under which the lessor purchased the premises. If the lessor's title is registered in the Land Registry the lessee's solicitor should require an up-to-date certified copy of the folio to be furnished. Alternatively, if the premises are leasehold premises or held under a fee farm grant then the lessee's solicitor should require sight of the last assurance of the property together with a copy of the original lease or fee farm grant so that the covenants and conditions in that document may be carefully checked.

(2) The lessee's solicitor should satisfy himself that the lessor has obtained all necessary permissions under the Planning Acts for the development of the property, including its proposed use and that where relevant the necessary building bye-law approvals have been granted by the local authority. The lessee's solicitor should, if the premises have recently been developed, satisfy himself that the conditions contained in the planning permissions and building bye-law approvals have been complied with and consequently it will be necessary for the solicitors to obtain copies of the planning permission, bye-law approvals and architect's certificates of compliance in the usual form. The Conveyancing Committee has, however, indicated that it considered it unreasonable to seek an architect-s certificate of compliance in respect of any development which took place before the year 1970 since the practice of seeking such certificates was not common prior to that date.

(3) The lessee's solicitor should make searches against the lessor, to include judgement and bankruptcy and sheriffs if the lessor's interest is a leasehold one, against the lessor or if the lessor is a company judgement, companies office and where appropriate sheriff searches against the lessor. As a minimum the lessee's solicitor should make a hand search in the Registry of Deeds against the lessor where the title is unregistered, as and from the date of the assurance to the lessor.

(4) The lessee's solicitor should satisfy himself as to the insurance requirements in the draft lease. If the insurance is to be carried by the lessor a copy of the policy should be sought on completion and arrangements made to have the lessee's interest noted on the policy.

(5) In particular cases, specific enquiries may have to be raised, in particular as to the capacity of the lessor to grant the lease, but there should not normally be any need to furnish a full set of requisitions on title.

INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

## Association Internationale des Jeunes Avocats

The Annual Congress of the Association Internationale des Jeunes Avocats will be held this year from 2nd to 6th September 1980 inclusive in Philadelphia.

The themes of the Congress are:

(1) Law and Computers.
(2) Foreign Investment in the U.S.A.
(3) Rights and Responsibilities Relating to Co-Habitation.
(4) Rights of the Defence Counsel.

Further information in relation to the Congress can be obtained from Michael W. Carrigan, Eugene F. Collins & Son, Solicitors, 61 Fitzwilliam Square, Dublin 2. Telephone 785766.

Note: Dublin has been chosen as the venue for the 1981 Congress.

○*Schedule E Income Tax — Footnotes continued*

9. pp. 323-326.
10. [1965] 2 AER 121; [1966] A.C. 16.
11. [1965] 2 AER 121 at p. 128; 1966 A.C. 16 at p. 36.
12. p. 328 (c).
13. p. 328 (d).
14. p. 330 (d).
15. But, he said, "this is not the proper approach here", see p. 330 (E). He is quite correct in this. Such an approach would flout a clear canon of interpretation of Revenue Law.
16. p. 331 (b) and (c).
17. p. 331 (c).
18. p. 331 (e).
19. See *Hochstrasser v Mayes* [1959] 3 Aer 817; [1960] A.C. 376.
20. The point was left open by Viscount Simonds in *Hochstasser v Wainwright* [1947] K.B. 126; *Radcliffe v Holt* [1927] 11 T.C. 621; *Weston v Hearn* [1943] 25 T.C. 425.
21. See *Pritchard v Arundale* [1971] 3 AER 1011, which can be clearly distinguished from both *Jarrold v Boustead* [1964] 3 AER 76, and *Riley v Coglan* [1968] 1 AER 314.
22. See *Holland v Geoghegan* [1972] 3 AER 333.

# Society participates in Inaugural Meeting of Law Teachers Body

The Society was represented by John F. Buckley, Chairman, Education Committee, and Professors Richard Woulfe and Laurence Sweeney as well as the Misses Pearse and Sheehan, wholetime tutors, at the inaugural meeting of the Irish Association of Law Teachers which was held in University College, Cork, from December 14th to 16th. Professor Woulfe was elected to the Council of the Association for the coming year.

The meeting was attended by approximately sixty law teachers from various third-level institutions in Ireland. The Association is to be congratulated, not only in establishing itself on an all-Ireland basis, but in opening its doors to all engaged in third-level law teaching. The U.K. example where university and professional teachers group themselves in the Society of Public Teachers of Law while those teaching in polytechnics and other "lesser" institutions are grouped in the Association of Law Teachers has well been avoided.

The opening lecture was given by Dr. Paul O'Higgins on "Irish Law – does it really exist?" and his principal theme was our neglect of our own legal history. It must have come as a considerable surprise to many of his audience to learn just how great a treasure house they were ignoring (and were probably ignorant of).

The other principal guest at the meeting was Professor William Twining, formerly of Queens University, Belfast, and now of the University of Warwick, whose contribution to the session on "Legal Literature and Publications in Ireland" was extremely valuable and illuminating. Professor Twining was Chairman of the Society of Public Teachers of Law's Working Party on Legal Literature in Small Jurisdictions. Dr. Henry Ellis of N.I.H.E. was the other invited contributor to this session while Tom Hadden of Q.U.B., Andrew Prideaux of Sweet and Maxwell and John Buckley also took part in the discussion. As the Society is now the leading law publisher in Ireland its representatives were most interested in the views expressed in the discussion.

They were even more interested in the succeeding session on Professional Legal Training in which Professor Woulfe participated as a guest speaker. Unfortunately, the Kings Inns had no official representative present. We learned from Mr. James Russell of the Institute of Professional Legal Studies, Belfast, that the problems facing an institution endeavouring to teach a "skills" course leading to a professional qualification in one jurisdiction are remarkably similar to those which arise in other jurisdictions.

After the morning session the Madrigal Society of University College, Cork, treated the attendance to a short concert of medieval songs and Christmas carols which we much appreciated. Working sessions on the teaching of various subjects were held in the afternoon and the meeting concluded with a dinner in the Arbutus Lodge Hotel on the Saturday evening at which the President of University College, Cork, was the guest of honour.

The meeting was organised with great efficiency and friendliness by the Law Faculty of University College, Cork, to whose head, Professor Bryan McMahon, and his staff, particularly David Tomkin and David Morgan, the thanks of the participants are due. It is to be hoped that the Association having got off to such an auspicious start will grow and flourish.

The officers of the Association for the coming year are:
President.....Prof. R. F. V. Heuston
Hon. Treasurer.....Mr. J. Brehony
Hon. Secretary.....Prof. D. S. Greer
Council Members: Professors K. Boyle, J. C. Brady, B. McMahon, R. Woulfe, Dr. H. Ellis, Ms. P. Maxwell.

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INTERNATIONAL BAR ASSOCIATION

# Berlin to be 1980 Conference Site for International Bar Association

The Eighteenth Biennial Conference of the International Bar Association will be held from 25th to 30th August 1980 in Berlin. Karl Carstens, President of the Federal Republic of Germany, will address the opening session.

General sessions of the conference will focus on discussion of two topics: a code of conduct for transnational corporations and lawyer advertising and specialisation. Simultaneous translation into French, German and English will be provided.

In addition to the general sessions there will be dozens of committee-sponsored meetings. Among topics to be debated in these meetings will be atomic energy projects in Europe, expropriation by governments of real property, procedures for settling disputes, construction contracting in the Peoples Republic of China, and a wide variety of criminal law subjects.

International Bar Association members attending the meetings will be guests at receptions hosted by the government of the Federal Republic of Germany at Castle Charlottenberg, by the Deutscher AnwaltVerein in the National Gallery, and by the government of West Berlin at the Berliner Philharmonie.

Other social events highlighting the meeting will be a banquet in the historic Funkturm, a boat trip on the Berlin lakes, and excursions in both East and West Berlin.

For complete programmes and registration forms contact the Director General, The Incorporated Law Society of Ireland, Blackhall Place, Dublin 7; or write to The International Bar Association, Byron House, 7-9 St. James' Street, London SW1A 1EE; or Telex 8812664 INBAR G.

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# Presentation of Parchments

29th JANUARY 1980

1. Allen, John Gerard; "The Moorings", Stillorgan Road, Donnybrook, Dublin.
2. Banks, Karen; "Newpark Lodge", Bray Road, Foxrock, Co. Dublin.
3. Brennan, Gerard M.; 27, Upper Mount Street, Dublin.
4. Broderick, Eileen; 67, Grosvenor Road, Rathgar, Dublin.
5. Buckley, Máire; Effra Road, Rathmines, Dublin.
6. Buckley, Patrick; 3, Castle Close, Blarney, Co. Cork.
7. Callanan, Claire M.; 17, Park Avenue, Sandymount, Dublin.
8. Campbell, Hugh J.; St. Bernard's, Athlone, Co. Westmeath.
9. Chambers, Marion; Kilbride, Newport, Co. Mayo.
10. Copplestone, Henry G.; Dawna, Navigation Road, Mallow, Co. Cork.
11. Courtney, Mary Cliona; 11, Oaklands Park, Ballsbridge, Dublin.
12. Cowhey, William K.; Rye Bank, Maynooth, Co. Kildare.
13. Culhane, Philip J.; Main Street, Glin, Co. Limerick.
14. Cunningham, William J.; 17, Rostrevor Road, Rathgar, Dublin.
15. Dalton, Patrick J.; 10, Lansdowne Tce., Ennis Road, Limerick.
16. Daly, James G.; Westport Road, Castlebar, Co. Mayo.
17. Drumgoole, Bernadette; 37, Avondale Drive, Greystones, Limerick.
18. Dungan, Fiona; Sheelin, The Ninch, Drogheda, Co. Louth.

**Prizewinners who received their awards on 29 January, 1980. From left: Edwina Dunn, Dalkey, Co. Dublin, who was awarded the Society's Prize (2nd Law results) and the O'Connor Memorial Prize (Equity), Gearóid Williams, Kilrush, Co. Clare, who were awarded the Guinness & Mahon Prize (Tax and Commercial Law), Mary Hughes, Mount Merrion, Co. Dublin, who was awarded the Society's Prize (2nd Law results) and the Findlater Scholarship (overall 2nd and 3rd Law results) and John J. Mannion, Clifden, Co. Galway, who was awarded the Allied Irish Banks Prize (Company Law).**

**The President, Mr. Walter Beatty, presenting her Parchment to Miss Karen Banks, former Chairperson of FLAC.**

19. Durand, Maria A.; A.I.B. House, Gort, Co. Galway.
20. Fitzgibbon, William; King's Square, Mitchelstown, Co. Cork.
21. Fleming, Susan; 21, Leeson Park Avenue, Dublin.
22. Foley, Paul; 120, Glenageary Avenue, Dun Laoghaire, Co. Dublin.
23. Gillespie, Carol L.; 2, Glenvar Park, Blackrock, Co. Dublin.
24. Glynn, Raymond P.; 9, Springfield Park, Templeogue, Dublin.
25. Gogarty, Bernard; Bective Street, Kells, Co. Meath.
26. Guilfoyle, David; Lake of Shadows, Farrentrenchard, Castlemartyr, Co. Cork.
27. Heffernan, Francis; Kilmeadan, Co. Waterford.
28. Hynes, Rose; New Quay, Burren, Co. Clare.
29. Kelly, Pádraig J.; Carradoonan House, Castlerea, Co. Roscommon.
30. Kelly, Paul P.; 7, Highfield Park, Leixlip, Co. Kildare.
31. Kelly, Paul V.; Moynehall, Co. Cavan.
32. Loughnane, William; Feakle, Co. Clare.
33. Lynch, Brendan G. T.; Laatoon, 8, Roebuck Road, Clonskeagh, Dublin.
34. Maloney, Jacqueline; Drumelis, Co. Cavan.
35. Mann, Patrick Pius; Church Street, Abbeyfeale, Co. Limerick.
36. Mannion, Thomas; "Villa Nova", Baylough, Athlone, Co. Westmeath.
37. Matthews, Brian J.; 4, Waldemar Tce., Dundrum, Co. Dublin.
38. Matthews, Henry J.; 68, Thomastown Road, Dun Laoghaire, Co. Dublin.
39. Moane, Caroline; "Clancart", Cherrywood Road, Loughlinstown, Co. Dublin.

40. Moran, Enda; Riverstown, Cloone, Leitrim.
41. Moran, James F.; 1, Lansdowne Park, Long Mile Road, Dublin.
42. Murphy, Denis; 86, Main Street, Castleisland, Co. Kerry.
43. Murray, Domhnall F.; 36, Grosvenor Road, Rathmines, Dublin.
44. McKenna, Justin; "Flower Grove", Rochestown Ave., Dun Laoghaire, Co. Dublin.
45. McNulty, Seamus G.; Leopardstown Grove, Blackrock, Co. Dublin.
46. O'Beirne, David P.; 8, Grove Lawn, Blackrock, Co. Dublin.
47. O'Donohoe, Cathal; New Road, Gorey, Co. Wexford.
48. O'Donovan, Marian; Coronea, Skibbereen, Co. Cork.
49. O'Higgins, Anne Sara; 92, Goatstown Road, Dublin.
50. O'Sullivan, Eugene F.; 90, Rathfown Park, Terenure, Dublin.
51. Paul, Mary V.; 26, Lissadell, Maryborough Hill, Douglas, Co. Cork.
52. Pearson, Mark; 5, Eustace Street, Dublin.
53. Quigley, Rory J.; Cannistown, Navan, Co. Meath.
54. Quilty, Maigread M.; "Sea View", Ballinclamper, Ballinacourty, Dungarvan, Co. Waterford.
55. Quinn, James A.; 59, Mountjoy Street, Dublin.
56. Reidy, Gerard; 17, Plassy Ave., Corbally, Co. Limerick.
57. Scott, Tressan; 74, Woodlands, Naas, Co. Kildare.
58. Sheil, Michael J.; 1, Temple Road, Blackrock, Co. Dublin.
59. Smyth, Bryan C.; "Morven", 121, Ballymun Road, Glasnevin, Dublin.
60. Steen, Laurence; Rath Cottage, Dundalk, Co. Louth.
61. Taaffe, Plunkett; "Meelon", Bandon, Co. Cork.
62. Thornton, Fiona; 34, Fitzwillian Square, Dublin.
63. Timmins, Edward G.; Ulster Bank House, Kilcock, Co. Kildare.
64. Toal, Ann; 21, Ashton Park, Monkstown, Dublin.
65. Walsh, John S.; 14, Old Brewery Road, Stillorgan, Co. Dublin.
66. Walsh, Thomas A.; Grennan House, Thomastown, Co. Kilkenny.
67. Williams, Thomas W. J. G.; The Square, Kilrush, Co. Clare.

# Acts of the Oireachtas 1979

List of measures enacted by the Oireachtas during the year 1979

1 Defence (Amendment) Act, 1979 (No. 1 of 1979).
2 Electricity (Supply) (Amendment) Act, 1979 (No. 2 of 1979).
3 Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 (No. 3 of 1979).
4 Health Contributions Act, 1979 (No. 4 of 1979).
5 Údarás na Gaeltachta Act, 1979 (No. 5 of 1979).
6 Gaming and Lotteries Act, 1979 (No. 6 of 1979).
7 Redundancy Payments Act, 1979 (No. 7 of 1979).
8 Social Welfare Act, 1979 (No. 8 of 1979).
9 Agriculture (An Chomhairle Oiliúna Talmhaíochta) Act, 1979 (No. 9 of 1979).
10 Referendum (Amendment) Act, 1979 (No. 10 of 1979).
11 Finance Act, 1979 (No. 11 of 1979).
12 Minerals Development Act, 1979 (No. 12 of 1979).
13 Irish Steel Holdings Limited (Amendment) Act, 1979 (No. 13 of 1979).
14 Restrictive Practices (Confirmation of Order) Act, 1979 (No. 14 of 1979).
15 Courts Act, 1979 (No. 15 of 1979).
16 Garda Síochána Act, 1979 (No. 16 of 1979).
17 Trustee Savings Banks Act, 1979 (No. 17 of 1979).
18 Transport (Miscellaneous Provisions) Act, 1979 (No. 18 of 1979).
19 European Assembly (Irish Representatives) Act, 1979 (No. 19 of 1979.
20 Health (Family Planning) Act, 1979 (No. 20 of 1979).
21 Dangerous Substances (Amendment) Act, 1979 (No. 21 of 1979).
22 Tourist Traffic Act, 1979 (No. 22 of 1979).
23 British & Irish Steam Packet Company Limited (Acquisition) (Amendment) Act, 1979 (No. 23 of 1979).
24 Milk (Miscellaneous Provisions) Act, 1979 (No. 24 of 1979).
25 Córas Beostoic agus Feola Act, 1979 (No. 25 of 1979).
26 Bovine Diseases (Levies) Act, 1979 (No. 26 of 1979).
27 Housing (Miscellaneous Provisions) Act, 1979 (No. 27 of 1979).
28 Defence (Amendment) (No. 2) Act, 1979 (No. 28 of 1979).
29 Housing (Gaeltacht) (Amendment) Act, 1979 (No. 29 of 1979).
30 National Council for Educational Awards Act, 1979 (No. 30 of 1979).
31 Agricultural Credit Act, 1979 (No. 31 of 1979).
32 European Communities (Amendment) Act, 1979 (No. 32 of 1979).
33 Industiral Research and Standards (Amendment) Act, 1979 (No. 33 of 1979).
34 Local Government (Toll Roads) Act, 1979 (No. 34 of 1979).
35 Occasional Trading Act, 1979 (No. 35 of 1979).
36 Broadcasting Authority (Amendment) Act, 1979 (No. 36 of 1979).
37 Merchant Shipping (Certification of Seamen) Act, 1979 (No. 37 of 1979).
38 Dairy Produce (Miscellaneous Provisions) (Amendment) Act, 1979 (No. 38 of 1979).
39 Industrial Credit (Amendment) Act, 1979 (No. 39 of 1979).
40 Payment of Wages Act, 1979 (No. 40 of 1979).
41 Appropriation Act, 1979 (No. 41 of 1979).
The Royal College of Physicians of Ireland (Charter and Letters Patent Amendment) Act, 1979 (No. 1 (Private) of 1979).
Local Government Provisional Order Confirmation Act, 1979 (No. 2 (Private) of 1979).
Sixth Amendment of the Constitution (Adoption) Act, 1979.
Seventh Amendment of the Constitution (Election of Members of Seanad Éireann by Institutions of Higher Education) Act, 1979.

## Musical Events at Blackhall Place

Rock Fox (alias Charles Meredith) and his famous orchestra, opened the series of musical events arranged by the Dublin Solicitors' Bar Association, on Friday, February 29. Playing the music of Duke Ellington, Count Basie, *et al*, the band attracted a sizeable and appreciative audience.

The second in the series will take place on Friday, March 28, when Chris Meehan at the piano, with Jimmy Faulkner, Declan McNelis and Fran Breen, will present "Sounds Contemporary" featuring songs by Bob Dylan, Randy Newman and Tom Waits and including a nostalgic look back at "Fats" Waller.

On Friday, April 25, "The Magic of the Musicals" will feature members of the Rathmines and Rathgar Musical Society in excerpts from the wide range of operettas and musical comedies in their repertoire.

The performances will commence at 8 p.m.

# Practical Aspects of E.E.C. Law

By P. J. FARRELL

**(I) Advising your Client on Liability for Defective Products**

In October 1979 the Commission published its amendments to the proposal for a Council Directive concerning liability for defective products (O.J. No. C271/3, 26.10.79). It proposes some significant changes. The following is a summary of its main provisions.

*(1) Basis of Liability*

A producer is to be liable for damage caused by a defect in an article, whether or not he knew or could have known of the defect.

In other words, liability irrespective of fault. Liability extends only to moveables which have been industrially produced. Primary agricultural products, a craft or artistic products have been excluded.

*(2) Meaning of Producer?*

A "producer" is not only the person who produces the finished article but, includes the producer of any material or component of it, and any person who represents himself as its producer, by putting his name, trademark, or other distinguishing feature on the article.

*(3) When is a Product Defective?*

A product is defective when, being used for the purpose for which it is apparently intended, it does not provide for persons or property the safety which a person is entitled to expect. The emphasis is on the safety of the product and not that it is unfit for use.

*(4) When is a Producer not Liable?*

A producer will not be liable if he can prove that he did not put the article into circulation; having regard to all the circumstances, it was not defective when he put it into circulation; or, it was not produced and distributed within the course of his business activities.

*(5) Meaning of "Damage"*

"Damage" means death or personal injuries; damage to or destruction of any item of property and of a type ordinarily required for private use; and, damages for pain and suffering and other non-material damage.

*(6) Limit on amount of Damages Recoverable*

The total liability of the producer for all *personal injuries* caused by identical articles having the same defect is to be limited to a maximum amount. Pending the determination of this amount by the Council, the limit is 25 million units of account.

Further, the liability of the producer for damage to *property* is to be limited per capita, in the case of moveable property, to 15,000 units of account and, in the case of immoveable property, to 50,000 units of account.

*(7) Limitation Period*

There will be a limitation period of three years within which proceedings for the recovery of damages are to be taken. Time begins to run from the day the injured person became aware, or should reasonably have become aware of the damage, the defect and the identity of the producer. However, the liability of a producer will be extinguished upon the expiry of ten years from the end of the calendar year in which the defective article was put into circulation.

**(II) Drafting a Patent Licence Agreement**

The legislation in Ireland governing patents is the Patents Act, 1964. E.E.C. law has intervened in this area of law through Articles 30 to 36 (free movement of goods) and Articles 85 and 86 (competition policy) of the E.E.C. Treaty. When drafting a patent licence agreement a practitioner should consider the implications of:

(a) Regulation 17/62, Article 4 (2) (b), and Regulation 19/65, Article 1 (b), both of which exempt from notification to the Commission agreements which impose certain restrictions which are permitted by the Regulations; and
(b) the Commission Notice on Patent Licensing Agreements of December 1962, which provides that, in the view of the Commission, certain clauses in patent licensing agreements are not affected by Article 85 (1) of the E.E.C. Treaty.

Practitioners should take note that in March 1979 the Commission published a Draft Block Exemption Regulation concerning certain categories of patent licensing agreements (O.J. No. C58/12, 3.3.79). It sets out the types of patent licensing agreements which need not be notified to the Commission and which will therefore be automatically exempted under Article 85. The Draft Regulation does not apply to, for example, patent pools. It lists a large number of types of clauses which, if included in an agreement, will not entitle the agreement to benefit from the exemption.

Some amendments are expected to be made to the Draft Regulation and a revised Draft is to be published by the Commission.

**(III) Unactionable Debts and the E.E.C.**

It was held in the case of *Societe Generale Alsacienne de Banque S.A. v. Walter Koestler* (Case 23/78) that Articles 59 and 60 of the E.E.C. Treaty, relating to the freedom to provide services in Member States, "do not affect the application of legislative provisions whereby a Member State bars the recovery by legal action of certain debts, such as debts arising out of a wagering contract and similar debts, provided always that such provisions are not applied in a discriminatory manner, either in law or in fact, compared with the way in which similar debts contracted within the territory of the Member State in question are treated" (extract from *Information on the Court of Justice of the European Communities*).

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# Law Society should adopt Royal Commission proposal to investigate negligent Lawyers

By A. H. HERMANN, Legal Correspondent, *Financial Times*

Reprinted by kind permission from the *Financial Times*, 6 December 1979

The opportunity for lawyers to make mistakes has greatly increased over the past decade. At the same time, the Courts have extended the liability of professionals – not only lawyers but also accountants, bankers, surveyors – for negligence, or "malpractice" as it is described in America.

However, it is one thing to know that the lawyer has made a mistake and is liable and another to obtain an award of damages. For this reason, the recommendation of the Royal Commission on Legal Services proposing that the Law Society should investigate fully all types of complaints against solicitors is of prime importance for all users of legal services. The appropriate committee of the Law Society is now considering this recommendation. One would like to hope that it will not take years before the Law Society will start doing what the commission recommended.

Gone are the days when one could rely throughout one's professional life on the knowledge obtained at school and in training. Change is taking place almost as fast in law as in technology. The number of statute books on the shelf seems to be growing exponentially. EEC law is penetrating all aspects of business. The expansion of statute law and the invasion of Community law are surpassed as a source of novelty by the internationalisation of business. The consequences of an increasing number of transactions may now be judged not according to the law of one country only, but according to different laws of several countries where the transaction may have its effect – and the effect need not be contractual but result from some harm or damage experienced by an unknown consumer or user of the product.

Every solicitor needs to keep abreast of developments, if only to be aware of problems facing clients both at home and abroad. Only large partnerships can do this really well and only when they have a large network of correspondents or their own branch offices abroad can they undertake international work responsibly.

The dangers of mistakes which originate from the need to cover such a wide and expanding area are additional to the familiar but apparently not diminishing number of mistakes from what one would call "conventional negligence": a property transaction which a solicitor should have registered but did not, or claims dismissed for want of prosecution, not to speak of actions badly prepared for trial or relying on legal arguments which no Judge would be likely to accept. Moreover, the liability of the lawyer is no longer limited to his client only or to another contractual relationship. The Courts have extended liability of professional advisers, including solicitors, to liability for any wrongful act including negligence which harmed a third party. While the liability out of contract can be claimed only within six years from the breach of contract, liability in tort has a longer life.

In a way, clients or third parties who became victims of a lawyer's dishonesty are better provided for than those who suffered by his honest mistakes or simple negligence. If a client's money is embezzled, it will be repaid by the Law Society which has a special fund for this purpose, but the satisfaction of a claim arising out of negligence is certain only if it is not greater than the solicitor's insurance cover. If it is greater, it can ruin the solicitor without satisfying the damaged party.

The relatively small number of insurance claims – only 1,211 claims were made during the past four years – is no indication of the numbers of dissatisfied clients. It is not easy to prove in Courts that a solicitor was negligent. The reason is not, as is sometimes assumed, that it is difficult to find a solicitor who would act against another, but rather that the litigation is usually long and costly and, predictably, the claims are resisted with more than professional doggedness. It is therefore, of prime importance that the Law Society should heed the recommendation of the Royal Commission and stop turning a deaf ear to all complaints which can lead to actionable claims for damages due to bad professional work. It should not limit its investigations to the relatively rare instances of professional misconduct, but investigate fully all claims unless they are clearly misconceived or frivolous.

# Book Reviews

**Williams and Muir Hunter on Bankruptcy.** 19th edition. Sweet & Maxwell, 1979. £45.00.

By and large, books on the laws of bankruptcy are not going to present any major challenge to Frederick Forsyth and others in vying for the top notch in the best sellers lists.

However, for many reasons, this book deserves the attention of Irish practitioners.

Yes, there are many textbooks on English law which do not relate to Ireland – not so in this case.

The fundamentals of Irish bankruptcy law are set out in the Acts of 1857 and 1872. Although the English laws are a little more up-to-date – their main Act came into force in 1914 – the principles applying to both sets of laws are very similar.

There has been some recent bankruptcy legislation in the U.K., the Insolvency Act, 1976, but, primarily, this Act merely brought some old money limits up-to-date and did not change fundamentals.

As a result of these similarities, this book is a welcome addition to the limited number of modern books on this subject.

The book is very well set out, going through the sections of each relevant Act and commenting on immediately after quotation.

A particular bonus is the fact that there is an independent index to any important commentary which runs for more than a few pages.

As one might expect, there are constant references to cases and, more importantly from an Irish viewpoint, the majority of the cases were decided in the nineteenth century.

There are, of course, numerous recent cases mentioned. How could any legal textbook get by without a reference to our old friend *Romalpa*? Obviously, this case is as important to the legal difficulties arising in personal insolvency as it is to those cropping up in corporate insolvencies. These problems are dealt with very adequately in the book.

It is a sign of the times that the 1976 Act in the U.K. is called the "Insolvency Act". For the first time, the same piece of legislation has enacted provisions relating to the personal and corporate insolvencies.

The draftsmen obviously were looking over their shoulders at the activities of the numerous committees set up in each E.E.C. Member Country to investigate the possibility of ultimately harmonising the bankruptcy laws of the E.E.C. These very discussions probably have discouraged some authors from undertaking the task of compiling comprehensive works on bankruptcy law, and, therefore, we must be all the more thankful that this new edition of a leading textbook on the subject has come our way.

The editors have resisted the temptation to get drawn into the area of international bankruptcy, but, there are quite a number of references to Ireland, including references to the thorny problem of "Orders in Aid" being granted by the Courts in a foreign jurisdiction.

This book has been known as *Williams on Bankruptcy*. The publishers have now decided to recognise Muir Hunter's considerable contribution to this area of the law by including his name in the title. He has been involved in editing the book for over thirty years and well deserves the compliment paid to him.

This is an essential book for practitioners involved in cases dealing with insolvency law and could be referred to usefully by those who encounter the odd client with such an unfortunate problem. One small point – I found the tone of the text to be slightly rigid. Some may consider this to be a decided advantage. Others may point out that the subject of the book does not leave too much scope for humour!

*Barry O'Neill*

# Correspondence

Valuation Office,
6, Ely Place,
Dublin 2.
20 November 1979

*re:* **COMPLAINTS FROM BAR ASSOCIATIONS ABOUT DELAYS IN ADJUDICATIONS**

Dear Mr. Ivers,

I refer to your letter dated 1st November 1979.

At present there are a total of 2,941 adjudications awaiting completion in the Valuation Office. This number includes 578 cases where objections have been lodged. In addition, there are other capital taxation cases on hands.

The authorised professional staff of the Valuation Office is 50 valuers and 25 district valuers. In the past two years there have been four early retirements, one death in service and numerous resignations by experienced staff (including three senior district valuers) to take up employment in the private sector. The serving staff now totals only 54 valuers and district valuers and a current competition will not ease the situation until the recruits are appointed and trained. Effective training takes at least two years.

The annual revision of valuations will be completed and issued on 1st December 1979. Rating valuers, as they come free, are being diverted from their normal duties to market value work wherever possible for as long as possible before the onset of the 1980 rating programme.

Because of this I am advised that there should be a very considerable reduction in the number of cases in hands but this may be offset to a certain extent by the intake of new adjudication cases and other capital tax cases.

However, the unprecedented number of resignations, etc., and the inducements which the private sector can offer have created problems but I hope that the adjudication situation will be stabilised for a period, early in the new year, but without enough staff I cannot say the problem may not recur.

Yours sincerely,

*D. J. Ryan*
(Commissioner of Valuation)

# The Register

**REGISTRATION OF TITLE ACT, 1964**

**Issue of New Land Certificate**

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 31st day of March, 1980.

W. T. MORAN (Registrar of Titles)

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

**Schedule**

(1) Registered Owner: Thomas Anthony Murphy; Folio No.: 29940; Lands: Coolineagh; Area: 167a. 3r. 21p.; County: Cork.

(2) Registered Owner: Michael Sheridan; Folio No.: 477F.; Lands: Drumhalry; Area: 1a. 1r. 5p.; County: Longford.

(3) Registered Owner: Paul Keaveney and Pauline Keaveney; Folio No.: 23057; Lands: Tonafortes; Area: 0a. 1r. 4p.; County: Sligo.

(4) Registered Owner: Joseph Quirke; Folio No.: 5511F; Lands: Ballyvouden; Area: 0a. 3r. 22p.; County: Limerick.

(5) Registered Owner: William Crowley; Folio No.: 1389; Lands: Maulane East; Area: 54a. 2r. 27p.; County: Cork.

(6) Registered Owner: Seán McTaggart; Folio No.: 17850; Lands: (1) Launtaggart, (2) Launtaggart; Area: (1) 1 a. 0r. 10p., (2) 2a. 0r. 10p.; County: Leitrim.

(7) Registered Owner: Michael McMahon; Folio No.: 3726; Lands: Ardskeagh; Area: 3.838a.; County: Clare.

(8) Registered Owner: Eileen Campbell; Folio No.: 16183L; Lands: Oldbawn; Area: 0a. 0r. 5p.; County: Dublin.

(9) Registered Owner: Nora O'Brien; Folio No.: 7431 (Revised); Lands: Gortalinny; Area: 25a. 1r. 32p.; County: Kerry.

(10) Registered Owner: Thomas O'Keeffe; Folio No.: 12085; Lands: Newrath; Area: 28a. 2r. 33p.; County: Kilkenny.

(11) Registered Owner: Richard Simmons; Folio No.: 1991; Lands: Ballyemock; Area: 94a. 3r. 27p.; County: Wexford.

(12) Registered Owner: Thomas Butler; Folio No.: (a) 11950, (b) 5624; Lands: (a) Blackstairs, (b) Blackstairs; Area: 131a. 3r. 0p., (b) 76a. 0r. 5p.; County: Tipperary.

(13) Registered Owner: Joseph Mooney; Folio No.: 4608; Lands: Teltown; Area: 27a. 0r. 5p.; County: Meath.

(14) Registered Owner: Thomas Gilmer Hamilton; Folio No.: 2531 (Revised); Lands: Threecastles; Area: 135a. 2r. 25p.; County: Wicklow.

(15) Registered Owner: John Mannion; Folio No.: 48130; Lands: (1) Cargin, (2) Kilbeg, (3) Cargin; Area: (1) 10a. 3r. 0p., (2) 7a. 3r. 8p., (3) 13a. 2r. 19p.; County: Galway.

(16) Registered Owner: John J. Mahony; Folio No.: 9498; Lands: (1) Garraun, (2) Knockbrack; Area: (1) 7a. 3r. 11p., (2) 8a. 1r. 27p.; County: Kerry.

(17) Registered Owner: David Twomey; Folio No.: 2617L; Lands: The leasehold interest in the property situate to the South of Boherboy in the Parish of Rathcooney; Area: 0a. 0r. 9p.; County: City of Cork.

(18) Registered Owner: James O'Dwyer; Folio No.: 8418; Lands: Gortnasna; Area: 23a. 1r. 21p.; County: Cork.

(19) Registered Owner: John Lavin; Folio No.: 579; Lands: Creevagh; Area: 35a. 3r. 32p.; County: Sligo.

(20) Registered Owner: Walter Potts; Folio No.: 5762; Lands: Cornacreeve; Area: 15a. 1r. 24p.; County: Monaghan.

(21) Registered Owner: Guy Davis and Elizabeth J. Davis; Folio No.: 5963F; Lands: Carrons; Area: 6a. 3r. 13p.; County: Limerick.

(22) Registered Owner: Thomas P. O'Reilly; Folio No.: 21269; Lands: Doon; Area: 0a. 0r. 38p.; County: Cavan.

(23) Registered Owner: Francis McLaughlin; Folio No.: 8885; Lands: (a) Gubaveeny, (b) Gubaveeney (one undivided third part of other part); Area: (a) 15a. 0r. 35p., (b) 31a. 3r. 15p.; County: Cavan.

(24) Registered Owner: Bridget Conneely; Folio No.: 5185; Lands: (a) Emlaghamore, (2) Doonhulla (one undivided sixtieth part of parts), (3) Emlaghmore (one undivided sixtieth part of parts), (4) Emlaghmore (an undivided moiety of other part); Area: (1) 9a. 3r. 19p., (2) 447a. 3r. 36p., (3) 657 a. 2r. 21p., (4) 0a. 3r. 33p.; County: Galway.

(25) Registered Owner: Denis Horgan; Folio No.: 7967; Lands: Callatrim; Area: 30a. 0r. 39p.; County: Cork.

(26) Registered Owner: Cornelius Breen; Folio No.: 4904; Lands: Gneeves (Parish of Kilmeen); Area: 41a. 3r. 37p.; County: Cork.

(27) Registered Owner: Una Brennan; Folio No.: 6841; Lands: (1) Tiknock, (2) Tiknock; Area: (1) 2a. 0r. 18p., (2) 1a. 2r. 6p.; County: Wicklow.

(28) Registered Owner: John Donelan; Folio No.: 36787; Lands: (1) Kilnalappa, (2) Woodfield; Area: (1) 43a. 0r. 19p., (2) 4a. 0r. 24p.; County: Galway.

(29) Registered Owner: Martin Noone; Folio No.: 12677; Lands: Bovinion; Area: 11a. 2r. 13p.; County: Galway.

(30) Registered Owner: Michael Gilvarry; Folio No.: 14912; Lands: Maghercar (part); Area: 9a. 2r. 16p.; County: Donegal.

(31) Registered Owner: Annie Hughes; Folio No.: 7908; Lands: (1) Coldwinters Area, (2) Kilshane Area; Area: (1) 12a. 2r. 25p., (2) 18a. 3r. 8p.; County: Dublin.

(32) Registered Owner: Goerge Jagoe; Folio No.: 3300; Lands: Ballindeasig (Parish of Ballyfoyle); Area: 46a. 3r. 6p.; County: Cork.

# Lost Wills

**Cyril Stanley Cowpar**, deceased, late of "Ardnaree", Elm Park, Limerick. Will any person having knowledge of the will of the above-named deceased, who died on 23rd June 1979, please contact Holmes O'Malley & Sexton, Solicitors, 57 O'Connell Street, Limerick. Phone (061) 43222, quoting reference "MGK".

**Thomas Gavin**, late of Crannagh, Castleblayney, County Galway. Will any person having knowledge of a will of the above-named deceased, who died on 18th December 1979, please communicate with Kieran Murphy & Company, Solicitors, 9, The Crescent, Galway.

**Mary Askin**, deceased, formerly of 7 St. Stephen's Green, Dublin 2, and late of 81 Mount Anthony, Ardee Road, Rathmines, Dublin 6. Would any solicitor or other person having knowledge of a will executed by the above-named deceased, who died on 9th July 1979, please communicate with Patrick J. O'Gara, Solicitor, 14 Mill Street, Monaghan, Co. Monaghan.

**Joseph V. Tierney**, deceased, formerly of Harrow House, Ballybrack, and late of 13 Killiney Towers, Killiney, Co. Dublin, consulting engineer. Will any solicitor or other person holding a will on behalf of the above, please communicate with the undersigned, Arthur O'Hagan & Son, Solicitors, 9 Harcourt Street, Dublin 2.

# Notices

# Bank of Ireland Finance Limited

Bank of Ireland Finance Limited is a licensed Bank under the Central Bank Act, 1971 and is wholly owned by Bank of Ireland. It has full Trustee status under the Trustee (Authorised Investments) Act 1893.

Bank of Ireland Finance is included in the list of approved Banks within the meaning of the Solicitors Accounts Regulations.

A leading Irish Finance House, it provides a wide range of financial services, including the provision of instalment credit to the commercial, industrial, agricultural and private sectors. A comprehensive range of leasing facilities and of short and medium term loans is also provided.

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# Bank of Ireland Finance

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THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

March 1980 Vol. 74 No. 2

JOINT LEGAL EDUCATION MEETING

Representatives of the Education Committees of the Law Societies of England and Wales, Scotland, Northern Ireland and the Republic of Ireland meeting in Blackhall Place on January 31 and February 1, 1980. See further page 41.

Executive Editor: Seamus L. O'Kelly.
Editorial Board: John F. Buckley, Charles R. M. Meredith, Michael V. O'Mahony, Maxwell Sweeney.
Printed by the Leinster Leader Limited, Naas, Co. Kildare.

Published at Blackhall Place, Dublin 7.

# Presentation of Parchments— President's Address

Two major topics – the discipline of the profession and the Civil Legal Aid Scheme – were the subject of the President's address to recipients of parchments in January.

Commenting on the work of the Disciplinary Committee he said that the first great step forward in legislation, concerning the Solicitors' profession was the Solicitors' Act, 1954. Apart from bringing the profession in a statutory way into the 20th century, it achieved two great things: voluntary contribution to compensate for the errors of those few who took money that did not belong to them. It established the Compensation Fund of the Law Society, which is now close to one million pounds. It also gave Solicitors the right to police their own profession with a disciplinary hearing, and, in a fairly swift way, deal with a member of the profession who through his conduct did not deserve to continue to practise in the profession. The Act was fair. It provided that an appeal would lie to the Chief Justice by either the applicant who had brought the complaint against the solicitor, or the solicitor who had been struck off the Rolls.

"The public feel that we are not policing our profession sufficiently. Let us examine the case of any man who, through his humanity, errs, and ask ourselves do we administer the ultimate sanction without first giving him a second chance? The answer must be 'No'. It is wrong for people to be too hasty. It would be terrible not to give a second chance, and maybe a third chance, before taking a man's livelihood from him and reducing his wife and family to a life where shame replaces the zest for living.

"However, a rogue solicitor causing anguish to his clients, and to the community generally, must be disciplined, and this Society devotes many man hours, and a lot of expertise, to ensure that this happens. We were given the power to do this by the Solicitors' Act, 1954, with a right of appeal, by the injured party, to the Chief Justice. The system worked very well. However, the constitutionality of the Solicitors' Act, 1954, was challenged in the Supreme Court and it was decided, by a majority, that we had no right to strike off a solicitor. It was decided that this was a judicial function, because enrolment of solicitors was the function, in those days, of the Supreme Court. It is now vested in the President of the High Court.

"Let the public understand that we would welcome restoration of what was given to us in the Solicitors' Act, 1954. We do not wish to burden the Courts with the discipline of our members, so perhaps the legislature would help us and eliminate two bodies dealing with the same matter. Let me emphasise to those who criticise us for not dealing swiftly with those few members whom I have termed 'rogue solicitors', that the function is a judicial function and not a Society function."

While welcoming the Civil Legal Aid scheme and the publication, last December, of "Scheme for Civil Legal Aid and Advice" by the Minister for Justice, the President said that the Society quarreled about one section headed "Choice of Lawyer".

"When you read the small print you find that there is no choice of lawyer. If you do not accept the lawyer in one Legal Advice Centre then you must resort to another lawyer whose services have been engaged by the Board for the purpose of providing legal services under the scheme. At best, 'choice of lawyer' means that in difficult circumstances you can move from one centre to another. You certainly cannot go to the lawyer you know – maybe you sat beside him at school. Maybe you like him – and probably you trust him. You cannot go to him because he is not a Government official employed by a Legal Advice Centre. On the Western seaboard, that could mean that if there was a clash of personality between an aided litigant and the advice centre he could be sent North or South – a hundred miles – to another centre.

"There is a means test, and aided persons will have to pay towards the cost of the scheme. Therefore, they should have the same right of choice that exists in the case of a patient and his medical practitioner. The right to choose was given recently in the case of dental and opthalmic services.

"Fancy a wife, in a family law situation, taking the bus to a law centre. Do not tell me that her neighbours and friends will not know where she is going, and where she has been. Her husband may not know, but he will be told soon enough. Supposing the next law centre is a hundred miles away – which is quite probable on the Western seaboard. Does then the husband, who is the other party in the dispute, have to travel, or are we to assume a utopian situation where one law centre can deal with two parties in dispute?

"This Society urges the Department to broaden the scope of the free civil legal aid scheme, and to give the public the system which they deserve. Such a system must have enshrined in it the right to choose one's lawyer."

The President said that the Society emphasises the necessity for civil legal aid to be extended to the representation of the public who have to appear before certain tribunals, particularly the Employment Appeals Tribunal. "We have pressed for this very strongly but no concrete recognition has been given to our argument. An

**Contributors to this issue:**

William Binchy, LL.M., Barrister-at-Law, Research Counsellor, Law Reform Commission;
John F. Buckley, Solicitor;
Ian F. French, F.R.I.C.S.

employer is invariably represented before that tribunal. The employee sometimes is not, and if he is not a member of a trade union it is likely that he will not be represented. The Department contends that procedures are so simplified that it is not necessary to provide civil legal aid for representation. A person is over-awed if he has never appeared before a tribunal: people in the weaker section of the community have a problem. A person is disadvantaged who has never appeared before a tribunal before, and is opposed by someone who appears regularly. We ask the Department to have a second look at our representations because the weaker elements of the community should be catered for in this important area."

The President concluded by remarking that one of the best ways of trying to be fair, good and efficient as a lawyer is to keep up-to-date. Qualified solicitors should continue their education through seminars run by the Society, and by the Society of Young Solicitors. Law can change very swiftly, and unless solicitors keep up-to-date they will have enormous problems. The Society provides a wide range of services for its members; the Solicitors' Benevolent Association assists, in a very real way, the widows and children of solicitors who have met misfortune, the Society of Young Solicitors is ongoing in the educational services which it provides for all its members. If newly-qualified solicitors have not joined these bodies already, then it is one of the first things they must do and also become members of their local Bar Association.



# Seminar Comment

The seminar "Freedom and the Media" held in Blackhall Place, 9 February 1980, attracted over 120 media personnel, many of them from the provinces and some from the North.

The response was strong, particularly during the sessions dealing with news reporting, and an excellent rapport was established between members of the profession present and the Press/TV/Radio personnel.

Immediate coverage by the media included news reports on both TV and Radio in addition to reports in evening and daily national newspapers, and subsequently in the RTE-2 *Printout* some days later.

Mr. Jacob Ecclestone, the President of the London-based National Union of Journalists, was among the speakers and – at the close of the proceedings – speaking from the floor warmly thanked the Society for organising the seminar and expressed the wish that some similar project could be run in Britain.

A number of the participants took the trouble to express personally to Society personnel their appreciation of the sessions, adding that they felt them to be of direct benefit.

"Freedom and the Media" was a project of the Public Relations Committee with the President, Mr. Walter Beatty; Senior Vice-President, Mrs. Moya Quinlan, and Chairman of the PR Committee Mr. Frank O'Donnell presiding at the sessions. Mr. Michael V. O'Mahoney and Mr. John F. Buckley discussed libel and contempt of court in lively session which brought many questions from the floor.

[See photographs right] ▶

# Good Response to series of Conveyancing Courses

The professions response to the first series of Conveyancing courses and the new continuing Legal Education Programme has been heartening. By the time the first of the five courses in the advertised series took place, booking for all five courses was so heavy that a further complete series was arranged for the April-May period. Indeed one of the courses, that on Investigation of Title, has proved so popular that it is planned to present it on a third occasion. Over 350 applications for courses in these series have been received.

Future series of courses in Probate and in Administration of Estates are planned for the Autumn (and it is hoped some of these can be arranged for venues outside the Dublin area). A series of courses in Applied Company Law is also being considered.

The continuing Legal Education Programme is administered by the Society's Training Specialist and Course Organiser, Patrick Quinn, who will be very pleased to hear from members with suggestions for future courses.

# FREEDOM AND THE MEDIA

From left: The Hon. Mr. Justice Donal Barrington, who opened the symposium, Mrs. Moya Quinlan, Senior Vice President of the Society and Mr. Tim Pat Coogan, Editor of "The Irish Press".

From left: Mr. Seán McBride, S.C., Mr. Jacob Ecclestone, President, N.U.J., Mr. Patrick Quinn, Law Society Training Specialist and Mr. John Mulcahy, Editor of "Hibernia".

# When is a Contract?

IAN F. FRENCH, F.R.I.C.S.

What I hope to do is to outline the background to the subject and look at some of the difficulties created from the point of view of a chartered surveyor negotiating the sale and purchase of property in the market place. I shall also mention some ways of coping with the new situation that I have come across in practice.

As an aside I would like to say what a good thing I think it is that chartered surveyors and solicitors have got together to discuss this topic which is of vital interest to the two professions who are deeply involved with the sale and purchase of property and I think if nothing else is achieved this evening, as I am sure it will be, the meeting will have been worthwhile if we go away with a better understanding of each other's points of view.

Firstly, then, the background. Before the recent Supreme Court decisions, if I agreed to sell A's property to B, provided that any correspondence contained the words "subject to contract" it seemed in practice if not in law that the parties were not bound until a formal contract was agreed and signed by both parties. I can recall, and I am sure many other surveyors can, making feverish dives for the correspondence in the file to see whether the sacred words were there when a disenchanted purchaser or vendor threatened to take proceedings to enforce a contract. This gap between agreement on a sale and a binding contract creates an uneasy time which could in some cases be weeks or months during which either party could, if his morals permitted him or if the financial carrot was big enough, pull out of the deal. Although the system could be described as too loose and open to abuse, it did, however, enable a purchaser make all the necessary enquiries and have the title examined in the knowledge that he had "secured" the property at an agreed price rather than going to the expense and trouble of doing this beforehand. All this, of course, applied only to sales by private treaty. In the case of an auction the contract or conditions of sale, as we all know, are circulated to prospective purchasers before the auction date and interested parties make all their enquiries about the property before the appointed day to enable them to bid at the auction and sign the contract or memorandum immediately afterwards.

As a result of the two Supreme Court cases the situation now seems to have been turned on its head. If I agree to sell A's house to B and say to B at the time something to the effect "your offer of £25,000 is accepted," or "we have a deal at £25,000," any subsequent correspondence which sets out the essential terms of the transaction is likely to create a binding contract between the parties.

This, needless to say, has caused a great deal of uncertainty and is unsatisfactory from the point of view that both parties are not afforded the opportunity of stating the precise terms and conditions on which they wish the transaction to take place, and indeed a vendor may unwittingly be bound by his actions or those of his agent or solicitor.

Now to turn to the ways that I have come across of dealing with the new situation. The first one is an enlarged caveat which is inserted in correspondence to the effect that "whatever is agreed is subject to a formal contract being agreed and signed by both parties" and for good measure that "in the interim nothing in this letter is to be construed as being part of a contract". These would, of course, only be valid if stated at the time the sale was agreed. The second is that the vendor, or the agent on his behalf, knowingly commits himself when the sale is agreed and in subsequent correspondence. This, I think, can be somewhat hairy and although it may be appropriate on some occasions, I think, correctly, it would be viewed with concern by the legal profession. Thirdly, there is the practice of one particular body of heading all correspondence "without prejudice" which presumably is intended to prevent the plaintiff from using the letters as evidence in any action concerning the transaction. In another case I have seen correspondence which is "subject to principal's approval" and another in which the terms are "recommended for approval" but quite clearly these would not be acceptable to the parties involved in the majority of cases. I have even heard of one particular organisation where they ask the party with whom they are dealing to execute a deed under seal under which they agree not to sue the organisation in any dealings in relation to the property. Again this seems to me to be rather one-sided and would not be generally acceptable.

Lastly, there is the adoption of the system used for sales by auction under which the purchaser would be issued with a draft contract, he would make all the necessary enquiries, examine title and if necessary undertake a survey prior to agreeing terms which would immediately be followed by the signing of the contract and the payment of a deposit.

I do not know whether any of these ideas will work or whether there is another fail-safe solution. One thing, though, I think is important to remember and that is that it is essential that we find a way of dealing with the new set of circumstances in which we find ourselves which is both legally sound and practical in application. The sale of property will go on and we will have to work together to find a way of working within the new framework. I do not think myself that any solution which involves leaving the deal up in the air is workable. A purchaser wants to know where he stands and whether his offer is acceptable and very often he will not make his best bid until he knows that it is acceptable to the vendor. Nor do I think it is practical to put an unreasonable burden on one party such as asking him to sign his rights away. It may, therefore, be that if the enlarged caveat idea will not work an auction type of system may be the only answer, the vendor having a contract prepared and the title put in order before the property is offered for sale. This will enable prospective purchasers to make bids in the full knowledge of the terms and title on which the property is being offered and enables them to sign a contract immediately their bid is accepted. This will involve a considerable change in conveyancing practice and will need the full co-operation of solicitors and surveyors to bring about the change.

# When is a Contract — *An Addendum*

**By John F. Buckley**

Since the publication of "When is a Contract" some further Court decisions on the subject discussed there have been given and the writer has delivered himself of a lecture on the topic to a Joint Meeting of the Dublin Solicitors' Bar Association and the General Practices Section of the Royal Institution of Chartered Surveyors, which led to a most useful and enlightening (for the writer at least) question and discussion session. The contribution of Ian French, F.R.I.C.S., to the Joint Meeting appears earlier in this issue and the summary of the writer's talk and of the question and discussion session may be a useful addendum.

In view of the confusion of thought which abounds in all discussions on the topic, it may be salutary to refer back to the reasons for the introduction of the Statute of Frauds - what was the mischief it was intended to counter?

The Statute introduced a rule of evidence – not a piece of substantive law – "for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury" at a time when neither the Plaintiff nor the Defendant were allowed to give evidence in an action to set up a contract. Like many well meaning pieces of legislation it has not always achieved the aims of its promoters. Professor Farrand has referred to "nearly three centuries of general abuse and judicial evasion". Sir Raymond Walton says "it may be doubted however, whether in the long run, it did not do more to abet frauds than to prevent them, as it enabled unscrupulous vendors or purchasers to resile from deliberate, but oral bargains".

It may be helpful to consider the actual wording of Section 2 of the Statute of Frauds (Ireland) 1695 so far as it relates to contracts for the sale of land. ". . . no action shall be brought whereby to charge . . ., any person . . . of any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

It is clear that the memorandum must record a completed agreement and it is common to refer to the essential terms as "the 4 Ps":

(1) the Parties;
(2) the Property;
(3) the Price;
(4) the other Provisions.

(1) The Parties must be ascertainable – not necessarily stated, but not so vague as merely "the Vendor" or "the Owner";

(2) The Property need only be so described as to be identifiable - even "my house" may be sufficient. The interest being sold need not be defined. It will be taken that an unencumbered freehold is implied, unless the Plaintiff knew that some lesser interest was in sale (Timmins v. Moreland Street Property Company (1958) Ch. 110);

(3) The Price, or the method of its ascertainment, must be stated – "at a fair price" – "at a reasonable valuation" have been held to be sufficient.

(4) The other Provisions – only if there are no other provisions agreed can the omission of them leave the memorandum in order. In Kelly v. Park Hall School no date for the signing of the contract was agreed and the Court held that this was unnecessary.

The Court will be willing to imply terms into agreements, such as that vacant possession will be given on completion; or that completion must take place within a reasonable time; but there is one significant exception to what can be implied and that is where the agreement is alleged to be one for the taking of a lease. In such a case the date of commencement of the lease must be agreed or ascertained. The Supreme Court, in O'Flaherty v. Arvan Properties, has recently confirmed this.

It is possible for the parties setting up the agreement to waive certain provisions. If the memorandum were complete without a provision exclusively benefiting the Plaintiff (and not a material one), the Plaintiff can waive it and the memorandum will stand.

If the memorandum is complete without a stipulation to the detriment of the Plaintiff, he may submit to it and the memorandum will stand.

The equitable procedure known as rectification is available if a term has been omitted from the agreement by common mistake.

The equitable doctrine of part performance may be invoked by a party, even where there is no note or memorandum in writing but, before this doctrine can operate, the following conditions must apply.

(1) there is proper parol evidence of the agreement;
(2) the contract is one which can be enforced by the Court;
(3) the acts of part performance must be such as to render it a fraud in the defendant to take advantage of an oral contract;
(4) the acts of part performance on the Plaintiff's part must be referable to some contract and may be referable to the one alleged. Acts of part performance which have been held to be sufficient are the taking of possession by the Plaintiff, or the carrying out of substantial alterations by the Plaintiff. Until recently, it was firmly believed that the mere payment of money was not of itself a sufficient act of part performance, but there are signs that this doctrine may no longer be as firm as it was thought to be.

On the question left unanswered between the somewhat confiicting decisions of the Court of Appeal in England in Law v. Jones and Tiverston Estates v. Wearwell, Mr. Justice Hamilton, in his judgement in the case of McInerney v. Roper, interpreted the judgement of Mr. Justice Henchy in Kelly v. Park Hall School as confirm-

ing that the memorandum in writing must record a completed agreement and all the terms thereof and must "contain not only all the essential terms, but a recognition that a contract had been made". Mr. Justice Hamilton also referred to the judgement of Mr. Justice Kenny in the case of Law & Anor v. Robert Roberts and quoted him "when a principal has entered into a binding contract, neither he nor his solicitor can deprive it of the binding effect by unilaterally treating the transaction 'subject to contract' " and again quoted from Mr. Justice Henchy's judgement in Kelly v. Park Hall "we have agreed terms subject to contract must be taken to mean that the contract had been made, subject to its being formalised in writing."

The view that the recent decisions represent a departure from a previously understood position does not stand up to examination. It is clear that the Irish Courts have over the years, established a clear distinction between the situation where, on the one hand, parties had agreed on all the necessary terms for the sale of land or a house and all that remained to be done was to reduce the terms of the agreement into writing and the situation, on the other hand, where the parties were still in negotiation.

If people have been surprised by the decisions, it can only be because they were operating in the mistaken belief that the addition of the words "subject to contract" to correspondence had, of themselves, the magic effect of denying the existence of a previously concluded verbal agreement. This, of course, had not been the law in Ireland and the Courts have now confirmed in a series of cases that the use of these words would have no effect if there had been a previously concluded verbal agreement, but would be of significance if the parties were still in negotiation.

The decisions serve as timely reminders to those engaged in the sale of property, whether as principals or agents, of the necessity of ensuring that the parties to any proposed sale are clear at all stages as to precisely how far they are committed. It is difficult to avoid the conclusion that the vendor frequently attempts to ensure that the purchaser will be bound by an offer which he has made, but that the vendor is still free to consider other offers. If a vendor wants to remain in that position, it is difficult for him to do so unless it is made clear to the purchaser that the vendor still regards himself as free to consider other offers up to the time of his accepting the purchaser's offer. Such a stance may, of course, meet with substantial sales resistance from a purchaser, particularly if it has been indicated to him that the vendor is prepared to sell at a particular price and the purchaser offers that price. Persons acting as agents for vendors (or purchasers) are well advised to ensure that their clients clearly understand that they will be bound by any figures at which they agree to sell (or buy), following negotiations.

The writer does not see why parties should not expect to be bound by bargains which they had reached. The constant thread running through the cases which have come to the Courts is one of a vendor who thought he got the best price obtainable and agreed to sell, but subsequently had succumbed to the temptation to try to accept a higher offer. It would be difficult to justify any change in the law which would improve the position of such a party.

In the discussion session which followed, the queries raised fell under four main headings:

(1) As to when an agreement between the parties existed;
(2) As to what was the meaning of "in writing";
(3) As to the question of the authority of a solicitor or other agent to bind his principal;
(4) As to the nature and effect of "booking deposits".

**(1) Agreement between the Parties**

The absence of some normal terms of a contract for sale, such as a closing date, does not mean that there could not be said to be an agreement between the parties. This is one of the terms which a Court would be willing to imply and a reasonable closing date would be fixed by a Court.

It is very doubtful, however, whether the Court would imply the terms in a lease. The Supreme Court has confirmed that the date of commencement of a lease must be either stated or ascertained before there could be a binding agreement.

The only way to keep the position open is by making it clear in negotiations that they are only negotiations and are subject to contracts being signed, preferably exchanged, and a deposit paid.

**(2) "In Writing"**

A solicitor will find it difficult to protect his client, and indeed himself, against providing the necessary evidence in writing by merely sending out a draft contract. The Supreme Court has held in the Park Hall case that the attempted imposition, by solicitors for a vendor of a new term of the contract by seeking the return of the contract within a specified period, was not permitted. The most a solicitor can do is to send out a covering latter which, by its wording, indicates that the parties are still in negotiation, but there can be no guarantee that this will succeed. Even if no covering letter is sent, there must clearly be a danger that the mere sending of the draft contract, with the parties names on it, or the solicitors' names, might be held to be sufficient. In the Irish Intercontinental Bank. case the auctioneer's headed notepaper has been held to be sufficient.

The use of the words "without prejudice" has to be rejected because the mere use of these words does not, of itself, give any protection to the letter. Letters are only truly "without prejudice" if they are written with the purpose of trying to settle or resolve a dispute. It can hardly be suggested that letters sending out a draft contract for the sale of a house should fall into that category.

**(3) Authority**

The position regarding the authority of a director or an employee of a body corporate to bind it presents particular problems and must largely depend on the potition in individual cases; it is suggested, for example, that a director of a company whose principal purpose is dealing in land could hardly avoid the allegation that he had appropriate authority.

On the question of solicitors' liability, an extract from the judgement of Mr. Justice Kenny in Law & Another v. Robert Roberts, where he adopted the view expressed by Mr. Justice Murnaghan in Kearns v. Manning that "comparatively slight evidence, in accordance with

ordinary experience, be required to prove that a solicitor had an authority to make a memorandum as to legal evidence of a concluded contract" is of considerable importance. It is of significance that, in the Irish Inter-continental Bank case and the McInerney v. Roper case, the question of the solicitor's authority was not challenged.

The position with regard to house agents' authority to bind their principals, as distinct from auctioneers conducting a public auction where the authority to bind both vendor and highest bidder is clear, will depend on the facts of each individual case and it would be unwise to assume that the Court would readily reject the agents' implied authority on behalf of a vendor.

The final point raised under this heading was a "general disclaimer", which apparently is being used by a substantial public company, to the effect that nobody has authority to bind the company until there is a contract executed by it under its seal. However ideal a situation this might be from the company's point of view, at first sight, it must be suggested that not very many parties might wish to deal with the company on that basis. At the very least, another party might wish to adopt precisely the same attitude, which would hardly be conducive to fruitful negotiations.

**(4) Booking Deposit**

While the position with regard to booking deposits cannot be said to be entirely clear, in the absence of any reported decisions, it is felt that the initial purpose of a booking deposit, as first introduced by builders selling new houses was to be merely an earnest of the purchaser's good faith sufficient to induce the builder to reserve a particular house or site for the purchaser for the period necessary for him to complete a contract for the purchase of the house or site. It is believed that each party contemplates that neither party is absolutely bound, but that the prospective purchaser has a first option on the house providing that he moves smartly to enter into a contract.

(The author is most grateful to Mr. Charles Meredith for the excellent notes which he took of the discussion which has enabled the writer to refer to the various points raised.)

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# Liability in Tort of Parents for Damage Caused by their Children

William Binchy

## INTRODUCTION

The liability of parents for damage caused by their children is a matter of some practical concern for many solicitors. Frequently, of course, parents admit their moral responsibility for the misdeeds of their offspring and pay without protest for a broken window or a broken nose. But are they legally obliged to do so? The present article examines this question.

## THE GENERAL PRINCIPLE

The general principle is that parents are not, as such, liable for the torts of their children.[1] In *Moon v. Towers*,[2] Willes, J. stated that he was

> "not aware of any such relation between a father and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of any body else."

A number of important exceptions, however, limit the scope of this rule. These will be considered in turn.

## EXCEPTIONS

### 1. Where the Parent has Directed, Authorised or Ratified the Act of the Child

> "It seems clear that if the parent has directed, or consented to, or ratified, the child's acts which cause the damage, the plaintiff will be able to recover damages from the parent as an independent tortfeasor: *qui facit per alium facit per se*."[3]

This has generally been considered to be the position by the commentators,[4] but the decided cases are few. In *Waters v. O'Keeffe*,[5] the children of the defendants, without their authority, erected a gate on their property. The plaintiff was injured when it fell on him while he was climbing on it. The defendants were held not liable for his injuries since their children had acted without their authority.

The leading English decision is *Moon v. Towers*.[6] There, the Court held that there was no evidence of ratification on the facts of the case. The judges expressed some doubt, however, as to whether the parent would have been liable if ratification had been found.[7]

### 2. Where the Parent is Vicariously Liable for the Child's Tort

A parent may be vicariously liable for a tort committed by his child where a master-servant relationship exists between them.[8] Liability may arise not only where there is an express contractual relationship (as, for example, where a dentist employs his daughter as a receptionist), but also where no formal contractual relationship exists between them. In many common law jurisdictions, children driving cars owned by their parents have been regarded by the courts as being in a service or agency relationship, so that liability may be imposed on the parents in relation to the children's negligence.[9] These decisions were generally regarded as being *sui generis* - involving a device to enable injured persons to recover compensation from insurance companies.[10] The decision of the Supreme Court in *Moynihan v. Moynihan*[11] in 1975, however, adopted a broader approach.

The facts briefly were that a two-year-old infant, when visiting her grandmother's home, was scalded by a teapot as a result of the alleged negligence of her aunt (the grandmother's daughter), who was living in the grandmother's home at the time of the accident. The infant sued her grandmother,[12] claiming that she was vicariously liable for her daughter's negligence. The trial judge, Gannon, J., withdrew the case from the jury, but the Supreme Court[13] reversed.

Walsh, J., who delivered the majority judgment (with which O'Higgins, C.J. concurred) based liability on the hospitality extended to the plaintiff by her grandmother:

> "The negligence attributed to [the aunt] was not the casual negligence of a fellow guest but may be regarded as the negligence of a person engaged in one of the duties of the household of her mother, the defendant, whose duties were being carried out in the course of the hospitality being extended by the defendant. The nature and limits of this hospitality were completely under the control of the defendant, and to that extent it may be said that her daughter . . . in her actions on this occasion was standing in the shoes of the defendant and was carrying out for the defendant a task which would primarily have been that of the defendant, but which was in their case assigned to [her daughter]. As the defendant was the person providing the hospitality, the delegation of some of that task to her daughter . . . may be regarded as a casual delegation. [The daughter's] performance of it was a gratuitous service for her mother. It was within the control of the defendant to decide when the tea would be served and where it would be served and, indeed, if it was to be served at all. It was also within the control of the defendant to decide how it was to be served."[14]

In an important passage in the present context, Walsh, J. stressed that:

> "[t]his power of control was not in any way dependent upon the relationship of mother and daughter but upon the relationship of the head of a household with a person to whom some of the duties of the head of the household had been delegated by that head. The position would be no different, therefore, from that of a case where the head of a household had requested a neighbour to come in and assist in the giving of a dinner party because she had not any, or not sufficient, hired domestic help. It would produce a strange situation if in such a case the 'inviter' should be vicariously liable for the hired domestic help who negligently poured hot sauce over the head of a guest but should not be equally liable for similar negligence on the part of the co-helper who was a neighbour and who had not been hired. In my view, in the latter case the person requested to assist in the service, but who was not hired for that

purpose, is in the *de facto* service of the person who makes the request and for whom the duty is being performed."[15]

Walsh, J. referred to the "family car" cases[16] where liability was imposed on parents, stating that they showed that vicarious liability could rest on gratuitous or *de facto* service. He added:

"It may well be, as has been suggested by one noted writer,[17] that the fact that this imposition of vicarious liability has apparently been confined to motor-car cases is because it was developed as a means of reaching the insurance company of the owner of the car. Whatever may be the reasons for the development of the doctrine in a particular area, the reasons cannot mask the basic principle of law involved."[18]

Henchy, J., dissenting, saw:

"no justification for stretching the law so as to make it cover the present claim when, by doing so, the effect would be that liability in negligence would attach to persons for casual and gratitous acts of others as to the performance of which they could not reasonably have been expected to be insured . . . it would be unfair and oppressive to exact compensation damages from a person for an act done on his behalf, expecially in the case of an intrinsically harmless act, if it was done in a negligent manner which he could not reasonably have foreseen and if – unlike an employer, or a person with a primarily personal duty of care, or a motor-car owner, or the like – he could not reasonably have been expected to be insured against the risk of that negligence."[19]

*Moynihan v. Moynihan*[20] would appear to be a decision of considerable importance in relation to the liability of parents for the torts of their children. Whilst it proceeds on the basis of liability for control over domestic hospitality, which was "not in any way dependent upon the relationship of mother and daughter",[21] nevertheless the fact remains that the grandmother *was* held liable for her daughter's conduct. It is relatively easy to conceive of applications of the principle that would extend into areas now only partially covered by the concept of parental negligence (discussed below). If a host asks his ten-year-old son to entertain a guest while the host is in the kitchen for a few minutes, and the son injures the guest with a bow and arrow,[22] the parent may or may not be liable under the law of negligence, depending on a number of factors, such as his awareness of the child's previous propensities. If, however, the *ratio* of *Moynihan* is to apply, the host may be vicariously liable without consideration of these factors.[23]

### 3. Where the Parent is Negligent in Affording his Child an opportunity to injure another

A parent may be negligent in affording his child an opportunity to injure another.[24] The negligence may consist of a wide range of behaviour, which may conveniently be summarised under three headings.

*(a) Dangerous Things*

It may be negligent for a person to leave dangerous things within access of a child in circumstances where injury to the child or another is foreseeable. A clear case is where a person leaves a loaded gun within reach of a young child. Liability will not depend simply on the relationship between parent and child that may exist in such a case but rather on the foreseeability of harm[25] and the reasonableness of attributing blame to the defendant for his lack of care. This was well illustrated in the leading Irish decision on the subject, *Sullivan v. Creed*.[26] There, the defendant, a farmer who had been shooting rabbits on his property, left his gun loaded and at full cock standing inside a fence on his lands. His fifteen-year-old son, not realising that the gun was loaded, pointed it in play at the plaintiff and accidently shot him. A verdict for the plaintiff was upheld by the Court of Appeal.

FitzGibbon, L.J. stated:

"The scope of the duty is the scope of the danger, and it extends to every person into whose hands a prudent man might reasonably expect the gun to come, having regard to the place where he left it. The ground of liability here is not that the boy was the defendant's son, but the fact that the gun was left without warning, in a dangerous condition, within reach of persons using the pathway, and the boy was one of the very class of persons whom the defendant knew to be not only likely but certain to pass by, viz. his own household."[27]

A parent (or other person) may also be liable where he or she negligently entrusts a dangerous thing to a child in circumstances where injury to the child or another is foreseeable. Whether or not the entrustment was negligent ". . . must depend upon the exact facts of every case".[28]

*(b) Child's Dangerous Propensities*

A parent may be liable in negligence where he knows or ought to know[29] of a particular dangerous propensity of his or her child and fails to protect others against injury likely to result from it. Thus, for example, if the parent is aware that his or her child has attacked other persons previously,[30] or has displayed a tendency to steal,[31] or to set fire to property[32] or to drive dangerously,[33] he or she may be liable for failing to take the steps necessary to protect others from harm likely to result from a repetition of such conduct.

The steps that the parent will be required to take will depend on the circumstances of the case. The proper approach may be to discipline the child, encourage him to mend his ways, remove him from likely sources of temptation or warn his potential victims. Clearly the age of the child and the nature of the danger will greatly affect how the parent should behave. It is settled, however, that the parent is not an insurer: he will not be liable where his reasonable best was not sufficient to prevent theinjury.[34]

*(c) Failure to Control Child Properly*

Where a parent fails to control a child properly, he or she may be liable for injuries resulting to others (or, indeed, the child himself or herself).[35]

In *Curley v. Mannion*,[36] the Supreme Court held that it might be negligence for the owner and driver of a car to permit his passenger to open a door without checking that no traffic would thereby be endangered. The case involved the 13-year-old daughter of the driver opening a door in the path of a cyclist. O'Dalaigh, C.J. stated that, in his judgment:

"a person in charge of a motor car must take reasonable precautions for the safety of others, and this will

include the duty to take reasonable care to prevent conduct on the part of passengers which is negligent. In the present case that duty is, it seems to me, reinforced by the relationship of parent and child; and a parent, while not liable for the torts of his child, may be liable if negligent in failing to exercise his control to prevent his child injuring others."[37]

Walsh, J. observed that the steps which the person in charge of a car should take to protect others from injury must be determined in the light of the exact circumstances of each case:

"In this case the defendant by reason of the fact that he was the parent of the tortious child could be held to have had an authority over the child. By reason of his proximity to the child he could be held to have been in a position to exercise that authority."[38]

A number of specific aspects of parental liability based on negligence require consideration.

*(i) The Age of the Child*

Clearly, where the child is very young, the parents' responsibilities are high and they will not be permitted to excuse themselves by having relied on their child to behave carefully when the child's immaturity and lack of experience would not warrant that trust. It has been well observed, however, that:

"[a]s they approach maturity, and as an aid in their attaining it, adolescents require more freedom, and hence less supervision, than . . . young children. As a child grows older there are fewer situations in which his parents have the ability to control him. Concomitantly, as he grows older there should be fewer situations in which they have a legal obligation to do so."[39]

The precise age at which parents cease to be responsible either vicariously or personally for injuries caused by their children is uncertain. It would appear that the age of majority has no magic in this context: parents may be liable in relation to children of full age but obviously the scope of liability would normally be more restricted in such cases than where the child is a minor.

*(ii) Which Parent is Liable?*

Somewhat suprisingly the decisions on parental liability do not contain a clear analysis of this question. Usually the father alone is sued; sometimes both parents are defendants; most rarely, the mother alone is sued. Clearly, the question of which parent is the proper one to sue will depend greatly on the facts of the case. If a father has supplied his child with a gun, he is the obvious person to sue. If a mother lets her child escape onto the roadway while she is shopping, it will not usually occur to a driver who is injured while swerving to avoid the child to sue the father who is at the time busy at work in an office many miles away. It should, however, be possible to argue that, having regard to constitutional, statutory and judicial developments in recent years, the father no longer should be regarded as having more responsibilities in this context than the mother in a case where both parents were involved in the conduct which brought about the plaintiff's injury.

## COMPARATIVE ASPECTS

It is useful to look briefly at the law in other countries on the subject, since there is a suprising divergence of approach. Broadly speaking, the other common law jurisdictions take the same position as in this country. New Zealand[40] and the common law provinces of Canada[41] are virtually identical with our law. Australia seems somewhat more indulgent to parents.[42] The approach in the United States of America[43] is also similar to that of our law, but statutes in forty-five states have altered the position to a certain extent. Directed at curbing juvenile delinquency, these statutes impose liability on parents for damage intentionally inflicted by their children on persons or property.[44] Normally the statutes specify a maximum amount that may be awarded. A statute in Georgia which contained no damages ceiling and which imposed liability irrespective of fault was struck down[45] on the ground of deprivation of property without due process of law. The court distinguished this statute from those involving limited liability on the basis that the latter should be regarded as essentially penal rather than compensatory.

It is the civil law system which is of most comparative interest, since it approaches the question of parental liability from a different starting-point than that of the common law. It begins with the general principle that a person is liable not merely for damage that he himself causes by his own act but also for damage caused by the acts of persons for whom he is responsible.[46] The Civil Codes of most jurisdictions specifically impose on parents liability for damage caused by their minor children who are living with them. Normally parents will be relieved of liability where they can show that they "could not have prevented the damage". In effect, if they can establish that they were not at fault, they will be relieved of liability. Thus the practical difference between our law and that of the civil law system is that parents in this country are presumed *not* to have been at fault unless the contrary is proved whereas in civil law jurisdictions the *reverse* presumption applies.[47]

Whether it would be desirable for our law to adopt the civil law approach on this subject is a matter of debate. In favour of doing so it could be argued that the trend of tort law is already firmly directed towards extending the range of liability[48] and that, if parents are not liable for damage caused by their children, the victim may frequently go without compensation since the child (if liable) will not normally be worth suing. As against this, it has been argued that vicarious liability should not apply to parents in the same way as to employers, since:

"employers in fact have greater control over the behaviour of their employees on the job than do parents over their children. The employer can select his employees, discharge them, and prescribe rewards and punishments to which rational beings will respond. Children tend to be ungovernable; natural parents do not choose their children; children cannot be fired for having been careless. A rule of strict parental liability would have little regulatory effect."[49]

One commentator has suggested a more radical solution:

"[F]rom an historical perspective a child, as a form of personal property, might be subject to deodand. Not an unattractive possibility, at least to a parent."[50]

Footnotes on Page 44

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# Correspondence

Office of the Minister for Finance,
Dublin 2.

Mr. James J. Ivers,
Director General,
The Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7. 20 February, 1980

**Re: Valuation Office**

Dear Mr. Ivers,

Thank you for your letter of 4 February, 1980, concerning delays arising in the Valuation Office. I have also seen your letter of 22 November, 1979, to my predecessor. At the outset I would like to say that I share your concern about those delays.

The number of adjudications awaiting completion has been reduced from 2,941 cases to 1,094 at end-January and the Civil Service Commission are in the process of clearing candidates from a recent Valuer competition, so that offers of appointment will issue to some candidates in the very near future. Moreover, I have written to the Minister for the Public Service, Mr. Gene Fitzgerald, T.D., and asked him to arrange for an examination of the staffing levels, organisation and work procedures in the Valuation Office as a matter of urgent priority.

Unfortunately, there are problems with using valuers in private practice to help clear the backlog. In essence, there could all too readily be a conflict of interest since valuations of property for taxation pruposes often involve disputation between the Valuation Office and private valuers. Also, as you are aware, the Valuation Office acts as an agent of the Revenue in verifying property valuations made by valuers in private practice.

I will write to you again when I have further news.

Yours sincerely,
Michael O'Kennedy,
Minister for Finance

5 & 6 Foster Place,
College Green,
Dublin 2.
5 February, 1980.

**Re: Undertakings**

The Editor,
The Gazette.

Dear Sir,

It is surprising how few of one's colleagues appear to be using the Form of Personal Undertaking devised by the Law Society, and available in booklet form at a modest charge. The recommendations printed on the fly-leaf of the booklet are invaluable in that they act as constant reminders of the responsibilities involved in giving an Undertaking. Furthermore the form, being in quadruplicate, should ensure that the Undertaking is recorded in such a manner that fulfilment of it is not overlooked, namely on the file, with the documents, and most importantly in a Central Register, which can be quickly checked by a Partner or Principal from time to time.

Undertakings, as we know, involve a dual liability:

(a) Professional, the breach of which may lead to Law Society sanction,
(b) Negligence, which may lead to a claim for damages.

In the latter connection it should be noted that Professional Indemnity Policies may only be relied on if the Undertaking has been signed by a Principal or Partner.

I am always relieved when offered an Undertaking on the Law Society's form, since this inspires confidence in the Solicitor's system of recording, and therefore fulfilling it, but, as mentioned, this is all too seldom. I would urge that this form be generally adopted, since I feel that doing so would minimise the claims and complaints arising from breaches of Personal Undertakings.

Yours faithfully,
W. J. McGuire.

77 Lower Leeson St.,
Dublin 2.
19 February 1980

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

**Re: Conveyancing Notes**

Dear Sir,

I have read with interest the Conveyancing Note in the Gazette for December, 1979.

I note that the Conveyancing Committee advise strongly against a Solicitor giving an Undertaking to a Bank to obtain Bridging Accommodation unless and until he is certain that all conditions of the loan can be complied with.

I would suggest, contrary to this, that it would be a matter for the Bank to satisfy itself as to this before making the bridging finance available to the Solicitor concerned. Most Undertaking given, and all of mine, to a Bank include a copy of the Loan Approval itself showing all the conditions to be complied with and contain words to the effect that the amount of loan will be lodged to the credit of the Client's account "when same comes to hand".

It seems to me that if the Bank are watching their own interests they would be advised to satisfy themselves as to the position with regard to the conditions in the Loan Approval. I would further suggest that if the Bank issues Bridging Accommodation in the circumstances outlined in the notes then it is the Bank which is negligent and not the Solicitor, and the Bank must, therefore, suffer the consequences.

It is seldom, if ever, that a Bank will make overdraft facilities or bridging accommodation available on foot of a Contract for the sale of property when such Contract is subject to conditions, e.g. loan clause.

I agree, of course, that a Solicitor should advise *his client* as to the inadvisability of completing a purchase on

bridging finance unless he is satisfied that all conditions in the loan approval have been, or can be complied with.

Yours faithfully,

Thomas P. O'Connor.

33 Raglan Road,
Ballsbridge,
Dublin 4.

The Editor,
Law Society Gazette,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7. 11 March, 1980

Dear Sir,

I had occasion recently to contact a considerable number of the profession in relation to my action challenging the constitutionality of the Rent Restrictions Acts.

May I, through your columns, express my sincere thanks and appreciation to all the colleagues who gave me invaluable assistance and support.

I always felt that the distinguishing mark of a profession was the support offered to all others by the members. This support and help I got in great measure.

It will be of interest to the profession to know that Judge McWilliams reserved judgment. He will give his decision on April 18.

Yours sincerely,

Patrick J. Madigan.

### IRISH BUILDING SOCIETIES ASSOCIATION JOINT COMMITTEE WITH LAW SOCIETY

Following on the approaches made by the then President Gerald Hickey the Society met the Building Societies Association in Blackhall Place on the 26th November, 1979 to discuss ways and means of overcoming delays in completing conveyancing transactions in the private house market and the problems posed by the scarcity of bridging finance. After a wide ranging discussion it was agreed that a Joint Committee representative of the Societys' Conveyancing Committee and of the Law Agents of the Building Societies Association should be established to isolate and deal with those difficulties which seemed to be slowing up conveyancing work. The Committee will issue recommendations on reasonable standards on matters of conveyancing practice and if necessary will arbitrate on differences which may arise between practitioners on such matters. The Building Societies Association agreed to direct their law agents to abide by decisions of the joint committee.

The first such meeting was held on 6th February, 1980, when a number of problems were dealt with and others were listed for further study. A further meeting was arranged for the 5th March, 1980. All agreed guidelines will be published in the *Gazette* in due course. Members or Bar Associations wishing to have points considered by the Joint Committee should forward details of the problems to the Conveyancing Committee.

# Conveyancing Notes

### CONTRACT CLOSING DATE

Because of the complete reversal of the old fashioned concept of getting the money first and then the house, and the additional "para-title" matters introduced by both legislation and practice and procedure, over the past 20 years, such as Bridging Finance, Letters of undertaking, Planning and bye-Law Approvals, Certificates in relation to Planning, Bye-Laws, Taxation, Identity, Mortgages, Debentures, Family Home Protection Act and Mortgages be they Local Authority, Building Society or Bank; the inevitable delay because of the increased volume of work in the Land Registry, Registry of Deeds and Adjudication Office, the correctness of the "standard" four week closing inserted in the Conditions of Sale for a private dwellinghouse (invariably inserted in Auction sales) must be called in question.

Because Conveyancing at one time consisted solely of the transfer of ownership in consideration of cash it was possible to close a sale in four weeks. As the Purchaser began to borrow to buy the house extra work was naturally incurred but Vendors' Solicitors insisted on closing in four weeks and so the idea of Bridging Finance was introduced and became widely accepted as "the way out".

When Bridging Finance was recently curtailed it finally came home to Conveyancers and their clients that it was not possible or practical to close the average house purchase in four weeks and the insistence of the Vendor's Solicitor on this time limit has caused concern to many practitioners, because of the heavy interest incurred by way of penalty for failure to close.

Having reviewed the position it is the view of the Conveyancing Committee that it is unreasonable to expect to close the average private house purchase, which takes place with the aid of a loan, in four weeks and accordingly a minimum period of six weeks should be encouraged. The Solicitors for the Vendor and Purchaser should negotiate agreed dates for the application and receipt of the loan sanction, and the closing date, and the trend towards three-way-closings is commendable. Therefore the Committee does not recommend the practice of inserting in Contracts for the sale of private houses a clause compelling the Purchasers to close the sale within a period of obtaining loan sanction if that period is within six weeks of the signature of the Contract.

# Society hosts Joint Education Meeting

The second joint meeting of the Education Committees of the Law Societies of England and Wales, Scotland, Northern Ireland and the Republic of Ireland was held at Blackhall Place, on January 31st and February 1st, 1980. Each of the Societies has introduced radical changes to its educational systems in the last few years, indeed so recent are the changes, that only in Northern Ireland has the first batch of students passed through the system. While at first sight there are obvious differences between the new systems, e.g. the Northern Ireland system is a joint Solicitor/Bar Training System followed by practice for the Restricted Certificate, the Scottish have a University organised but practitioner taught vocational course, followed by traineeship in a Solicitor's office, the England and Wales system has special courses at Polytechnics and the College of Law, followed by Apprenticeship, and of course our system is a "Sandwich Course" comprising a professional course, service as an Apprentice followed by an advanced course, what emerged was how similar the aims and approaches of all the Societies were. The differences were often brought about by local circumstances, e.g. in Northern Ireland linking the new Institute for the Queen's University Belfast made sense. Queens had the only University law faculty in Northern Ireland, and in Scotland the Universities had long since taken over the training of Solicitors, while in England and Wales, the sheer size of the profession and the numbers seeking entry to articles in any given year, 3,000 places are available in the training courses, ruled out centralisation. The availability of Higher Education Grants dictated that training schemes remain within existing third level institutions in each of the U.K. jurisdictions.

The problem of estimating the demand for Solicitors and providing an adequate supply is common to all four jurisdictions, and indeed to other parts of the common law world, particularly Australia and New Zealand where over supply has reached serious levels, and the Society's 1978 study on the supply and demand of Solicitors in the Republic of Ireland has been the subject of interested enquiry.

A major area in which the Society's professional course differs from its U.K. counterparts is in its abandonment of the old "Eight Questions – do Six in three hours" type examination paper and its replacement by a continual testing and assessment system in the professional course.

Other topics touched on included continuing legal education courses, use of audio visual equipment, and monitoring of apprenticeship.

One of the topics discussed was the reciprocal recognition of qualifications, where the host country was embarrassed to find that because of statutory restraint it was unable to offer the same advances towards mutual recognition as the other jurisdictions had achieved.

Meetings of this nature provide useful cross-fertilisation of ideas enabling the participants to learn by other peoples mistakes rather than their own and hopefully result in each Society borrowing the best ideas of the other. The next meeting in the series will take place in 1981 in Edinburgh.

● **Those present at the meeting and appearing in the cover photo are (from left to right): Professor Larry Sweeney, Law Society, Mr. Frank Daly, Vice-Chairman and Mr. John Buckley, Chairman of the Law Society's Education Committee, Professor Richard Woulfe, Law Society, Mr. W. Alan Logan, Northern Ireland, Mr. James Elliott, Northern Ireland, Mr. Christopher Snowling, England and Wales, Mr. Richard Holbrook, England and Wales, Mr. Comghall McNally, Northern Ireland, Mr. James J. Ivers, Director General of the Law Society, Mr. Christopher Hewetson, England and Wales, Mr. G. R. G. Graham, Scotland, Professor Philip Love, Scotland, Mr. R. A. Edwards, President, Law Society of Scotland, Mrs. Carolyn Slater, Scotland, Mr. Eric Taylor, England and Wales and Mr. Arthur Hoole, England and Wales.**

# Incorporated Law Society of Ireland

## EXAMINATION TIMETABLE 1980

| | *Closing date for receipt of entries* | *Examination Dates* |
|---|---|---|
| Book-keeping | 11 June | 21 May |
| Repeat of Final Examination — 1st Part | 18-25 June (inclusive) | 2 June |
| 1st and 2nd Irish | 8 and 9 July | 12 June |
| Preliminary Examination | 15 & 16 July | 12 June |
| 1st, 2nd & 3rd Law Examinations | 13-25 August (inclusive) | 4 July |
| Book-keeping | 7 October | 15 September |
| 1st and 2nd Irish | 2 & 3 December | 3 November |
| Final Examination — 1st Part | (not Fixed) | —— |

### PRESENTATION OF PARCHMENTS IN 1980

Wednesday, 25 June
Wednesday, 29 October

**All examinations to be held at Blackhall Place unless notice given to the contrary.**

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# The Council reports

## SUMMARIES FROM TWO MEETINGS – JANUARY/FEBRUARY 1980

Problems created for conveyancers by the Family Home Protection Act have been of considerable concern to the Conveyancing Committee. In December, 1979, representatives of the Society discussed the matter with the Department of Justice: little progress was made. The view of the Department was that the general principle of the Act was draconian and that it would remain that way.

The Council approved the backing of the Family Home Protection Act case which had been taken with a view to establishing the conclusiveness of the Folio and, in addition, authority was given to appeal the decision to the Supreme Court to establish a degree of finality in the matter. (See note regarding High Court decision).

### Education Programme

Mr. John F. Buckley (Education Committee) reported on difficulties being experienced in obtaining masters for a number of prospective apprentices who had obtained places in the Law School. Council members were asked to use their efforts to overcome the problem. Mr. Peter Murphy commented that while there was a willingness to help on the part of many firms, accommodation was a difficult problem in the country.

### Computer

The Society's computer has been installed and Mr. Maurice Curran (Finance Committee) reported that the cost was about £30,000. Data for the issue of this year's Practising Certificates is being fed to the computer.

### International

The Council adopted a recommendation from Mr. Raymond Monahan, on behalf of the EEC & International Affairs Committee, that the invitation of the Council of Europe to mount a full-day Seminar on May 1st, 1980, should be accepted.

### Building Societies

The Council read the report of a meeting with the Irish Building Societies' Association in November, 1979, and approved the establishment of the Joint Committee representative of the Society and the Association. The Committee will decide and lay down reasonable standards on matters of practice and, if necessary, will arbitrate on differences which may arise between practitioners on such matters.

*The following matters were among those before the February meeting of the Council:*

The Council approved, on the recommendation of the Professional Purposes Committee, a standard form of affidavit for use in Family Law cases. The precedent will be circulated with the *Gazette*.

### Committee Appointments

Messrs Liam Young and Dudley Potter were appointed to the Education Advisory Committee. Mr. Michael W. Tyrell was appointed to the Incorporated Council of Law Reporting to fill the vacancy caused by the resignation of Mr. Peter Prentice. Tributes were paid to Mr. Prentice for the service given to the Society as a member of the Council of Law Reporting. Mr. Seamus L. O'Kelly was appointed Executive Editor of the *Gazette*.

### Law Clerks

The Society's representatives on the Law Clerks' Joint Labour Committee gave notice of a meeting on the day following the Council meeting. At that meeting it was agreed to pay the 1st phase of the National Understanding, 1979 (9%), as from the earliest possible date and the second phase (7%+£2.40) as from July 1st.

The Society's representatives asked that the creation of a grade of Receptionist should be considered at a future meeting.

### Public Relations

Members will already have seen press reports of a very successful symposium on "The Law and the Media" held in Blackhall Place in February. The principal guest speaker, Mr. Jacob Ecclestone, President, National Union of Journalists, took away with him a favourable view of the Society's outgoing approach in the public relations area. The Committee will organise further symposia later in the year.

### Government Departments

Arising from strong representations by the Society, the Minister for Finance (Michael O'Kennedy) indicated that the arrears situation in the Valuation Office had been reduced from 3,000 cases to 1,600 and that he was pressing the Minister for the Public Service to appoint additional valuers at an early date.

Mr. P. L. O'Reagain, Secretary, Department of Posts & Telegraphs, has assured the Society that every possible effort is being made to bring postal deliveries back to normal.

The enquiry into the conveyancing monopoly is not likely to commence before June 1980, according to Mr. Niall MacLiam, Chairman, Restrictive Practices Commission.

### Liaison with the Bar

The Council considered a report of a meeting with the General Council of the Bar of Ireland and the Federation of Insurers held in Blackhall Place on December 1979. It was agreed that, in advance of the next meeting on February 28th, the President should write to the Bar Council expressing the Council's reservations on the "Two Senior" system and on the engagement of Junior Counsel to the trial stage.

● **Footnotes to "Binchy" article from page 37.**

1. *See generally Salmond on the Law of Torts*, 435 (17th ed., by R. F. V. Heuston, 1977), *Winfield and Jolowicz on Tort*, 645-646 (11th ed., by W. Rogers, 1979), J. Fleming, *The Law of Torts*, 602-603 (5th ed., 1977), Waller, *Visiting the Sins of the Children: The Liability of Parents for Injuries Caused by their Children*, 4 Melbourne U.L. Rev. 17 (1963), *Anon., Dangerous Toys*, 64 I.L.T. & SOL. J. 223, at 225 (1930).
2. 8 C.B. (N.S.) 611, at 615, 141 E.R. 1306, at 1308 (1860). *See also, to similar effect, Curley v. Mannion*, [1965] I.R. 543, at 546 (*per* O'Dalaigh, C.J.), and 549 (*per* Walsh, J.) (Sup. Ct.), *Donaldson v. McNiven*, [1952] 2 All E.R. 691, at 692 (C.A., *per* Lord Goddard, C.J.), *Rogers v. Wilkinson, The Times*, 19 January, 1963, p. 4, cols. 3-4, at col. 3 (Q.B. Div., Thesiger, J.).
3. Waller, *supra*, fn. 1, at 19 (footnote references omitted).
4. *Cf. Halsbury's Laws of England*, vol. 21, 151 (34d ed., 1957), Fleming, *supra*, fn. 1, 670, Stone, *Liability for Damage Caused by Minors: A Comparative Study*, 5 Ala. L. Rev. 1, at 25-26 (1952).
5. [1937] Ir. Jur. Rep. 1 (High Ct., Hanna, J., 1936).
6. *Supra*, fn. 2.
7. *Cf. id.*, at 614 and 1307, respectively (*per* Erle, C.J.) and at 615 and 1307, respectively (*per* Williams, J.).
8. *See Salmond, supra*, fn. 1, 435-436, Fleming, *supra*, fn. 1, 670.
9. *See Fleming, supra*, fn. 1, 373-375, Waller, *supra*, fn. 1, at 21-24, P. Atiyah, *Vicarious Liability in the Law of Torts*, 131 (1967).
10. *Cf. Holderness v. Goslin*, [1975] 2 N.Z.L.R. 46, at 50 (Sup. Ct., Mahon, J., 1974). In Ireland, since 1933, legislation has imposed vicarious liability on car owners based on consensual user: *see* now the *Road Traffic Act 1961*, section 118 (no. 24). See Osborough, *The Vicarious Liability of the Vehicle Owner*, 6 Ir. Jur. (N.S.) 77 (1971). *Cf. Beechinor v. O'Connor* [1939] Ir. Jur. Rep. 86 (High Ct., O'Byrne, J., with jury) (son driving parent's car); *see also Maher v. G.N. Ry. Co.*, [1942]. For a comparison with equivalent Northern Ireland legislation *see* Sheridan, *Note: Irish Private Law*, 2 Int. & Comp. L.Q. 397 (1953) (correcting his error in 1 Int. & Comp. L.Q., at 199 (1952)).
11. [1937] I.R. 192 (Sup. Ct.).
12. But not her aunt: *id.*, at 199 (*per* Henchy, J.).
13. O'Higgins, C.J. and Walsh, J.; Henchy, J., dissenting.
14. *Supra*, fn. 11, at 197.
15. *Id.*
16. *Cf.* fn. 9 *supra*.
17. P. Atiyah, *supra*, fn. 9, 134, makes an observation on these lines. So also does J. Fleming, *An Introduction to the Law of Torts*, 174 (1967) (reprinted (with corrections) 1977).
18. *Supra*, fn. 11, at 199-200. *Cf. Hahn v. Conley*, 45 Austr. L.J.R. 631, at 636 (High Ct. Austr., *per* Barwick, C.J., 1971):

> "In any case, in my opinion, where it is sought to make parents or blood relations liable to their children or relatives because of particular situations those who have to try the facts ought not to indulge in undue subtlety in order to create liability even in these days when the consequence of so many breaches of duty have (*sic*) been passed on by insurance to be borne by others."

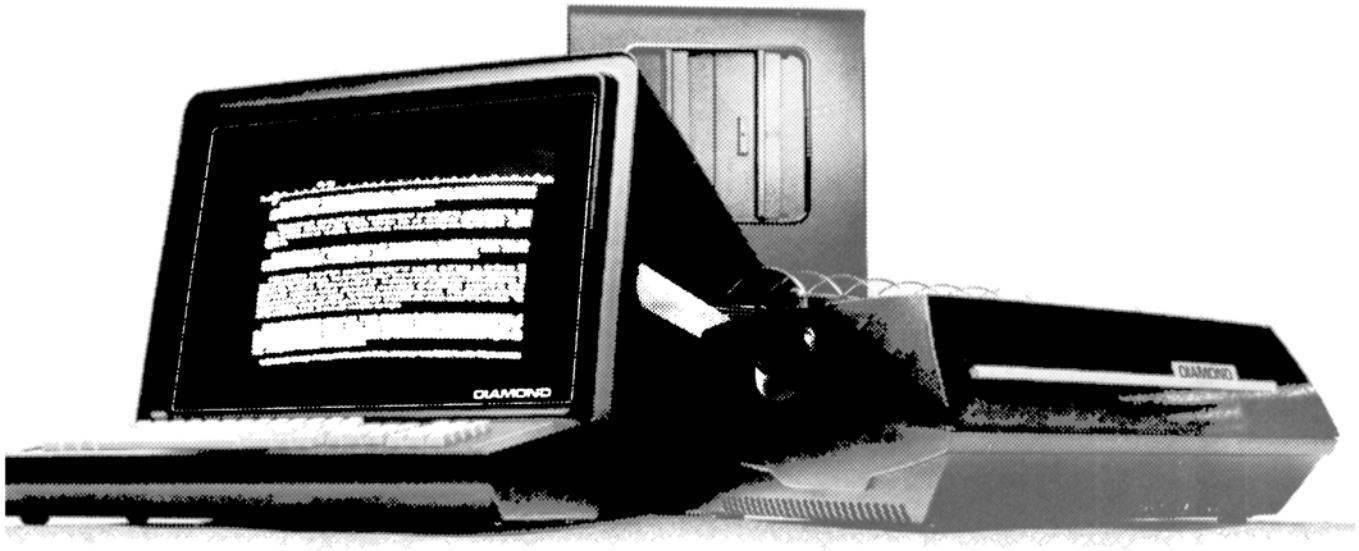
19. *Supra*, fn. 11, at 202-203.
20. *Supra*, fn. 11.
21. *Id.*, at 197 (*per* Walsh, J.).
22. *Cf. Walmsley v. Humenick*, [1954] 2 D.L.R. 232 (B.C. Sup. Ct., Clyne, J.), *Prasad v. Prasad*, [1974] 5 W.W.R. 628 (B.C. Sup. Ct., Rae, J.).
23. *Cf.* Davies, *Torts*, ch. 15 of H. Wade ed., *Annual Survey of Commonwealth Law 1976*, at 406 (1978), who considers that "[t]he implications of this case for family relationships are distrubing".
24. *See generally Salmond, supra*, fn. 1, 436, *Fleming, supra*, fn. 1, 670-671, *Halsbury, supra*, fn. 4, vol. 21, 150-151, Waller, *supra*, fn. 1, at 24-29, Fridman, *Children and Negligence*, 117 New L.J. 35, at 36 (1967).
25. *See Dixon v. Bell*, M. & S. 198, 105 E.R. 1023 (1816), *Lynch v. Nurdin*, 1 Q.B. 29, at 35, 113 E.R. 1041, at 1043 (*per* Lord Denman, C.J., 1941); *cf. Good-Wear Trenders Ltd. v. D. & B. Holdings Ltd.*, 8 C.C.L.T. 87, at 101-102 (N.S. Sup. Ct. App. Div., *per* MacKeigan, C.J. N.S., 1979).
26. [1904] 2 I.R. 317 (Ct. App., 1903). The decision has been widely cited and discussed in many common law jurisdictions: *see, e.g., Reida v. Lund*, 18 Cal. App. 3d 698, 96 Cal. Rptr. 102 (Ct. App. 2nd Dist., 1971), *Dickens v. Barnham*, 69 Colo. 349, 194 P. 356 (Sup. Ct., 1920), *Salisbury v. Crudale*, 41 R.I. 33, 102 A. 731 (Sup. Ct., 1918) (describing the decision as being "of great weight"), *Thibodeau v. Cleff*, 24 O.L.R. 214 (Div. Ct., 1911), *Kenealy v. Karaka*, 26 N.Z.L.R. 1118 (C.A., 1906).
27. Supra, fn. 26, at 340.
28. *Newton v. Edgerley*, [1959] 1 W.L.R. 1031, at 1032 (*per* Lord Parker, C.J.). *See also Donaldson v. McNiven, supra*, fn. 2, *Bebee v. Sales*, 32 Times L.R. 413 (K.B. Div., *Lush & Rowlatt*, JJ., 1916), *Court v. Wyatt*, The Times, 24 June, 1060, p. 12, col. 2 (Q.B. Div., Donovan, J.), *Rogers v. Wilkinson, supra*, fn. 2 *Hinds v. Direct Supply Co. (Clapham Junction) Ltd., The Times*, 29 January, 1966, p. 15, cols. 6-7 (Q.B. Div., MacKenna, J.).
29. On principle, it would appear that a parent who culpably fails to learn of his child's particular dangerous propensities should not be able to shelter behind his ignorance. Nevertheless, some decisions appear to require something akin to *scienter* on the part of the parent: *see, e.g., Streifel v. Stroz*, 11 D.L.R. (2d) 667 (B.C. Sup. Ct., Whittaker, J., 1957).
30. *Cf. Gorely v. Codd*, [1966] 3 All E.R. 891 at 896, (Nield, J.) *Court v. Wyatt, supra*, fn. 28, *Michand v. Dupuis*, 30 N.B.R. (2d) 305 (Sup. Ct., Q.B.D., Richard, J., 1977) (father knew of eleven-year-old son's propensity to throw stones and did nothing to control it), *Zuckerberg v. Munter*, 277 App. Div. 1061, 100 N.U.S. 2d 910 (2nd Dept., 1950) (eight-year-old son attacked domestic servant with baseball bat).
31. *Cf. Streifel v. Stroz, supra*, fn. 29.
32. *Cf. Thibodeau v. Cleff, supra*, fn. 26, *Agnesini v. Olsen*, 277 App. Div. 1006, 100 N.Y.S. 2d 338 (2nd Dept., 1950).
33. *Cf. Lelarge v. Blakney*, 21 N.B.R. (2d) 100 (Sup. Ct., Q.B.D., Dickson, J., 1978).
34. *Cf. Zuckerbrod v. Burch*, 88 N.J. Super. 1, 210 A. 2d 425 (App. Div., 1965).
35. *Cf. Gambino v. Dileo*, 17 D.L.R. (3d) 167 (Ont. High Ct., Osler, J., 1970), *Arnold v. Teno*, 83 D.L.R. (3d) 609 (Sup. Ct. Can., 1978), *McCallion v. Dodd*, [1966] N.Z.L.R. 710 (C.A.).
36. [1965] I.R. 543 (Sup. Ct.).
37. *Id.*, at 546.
38. *Id.*, at 549-550. *See also Carmarthenshire County Council v. Lewis*, [1955] A.C. 549, at 566 (H.L. (Eng.), *per* Lord Reid).
39. Alexander, *Tort Liability of Children and Their Parents*, ch. 14 of D. Mendes da Costa ed., *Studies in Canadian Family Law*, at 867 (1972). *Cf. Hewer v. Bryant*, [1970] 1 Q.B. 357, at 369 (C.A., 1969).
40. *Cf.* D. Inglis, *Family Law*, vol. 1, 215-218 (2nd ed., 1968), Waller, *supra*, fn. 1, at 18-29, *Kenealy v. Karaka, supra*, fn. 26, *McCallion v. Dodd, supra*, fn. 35, *Heberley v. Lash*, [1922] N.Z.L.R. 409 (Sup. Ct., 1921), *Dobson v. Holderness*, [1975] 2 N.Z.L.R. 749 (C.A.).
41. Cf. Alexander, *supra*, fn. 39, at 863-871, Alexander, *Tort Responsibility of Parents and Teachers for Damage Caused by Children*, 16 U. Toronto L.J. 165 (1965), Dunlop, *Torts Relating to Infants*, 5 Western L. Rev. 116, at 120-122 (1966). The most recently-reported decisions are *Floyd v. Bowers*, 6 C.C.L.T. 65 (Ont. High Ct., Starke, J., 1978) and *Lelarge v. Blakney, supra*, fn. 33.
42. *Cf. Smith v. Leurs*, 70 Comm. L.R. 256 (High Ct. Austr., 1945), *Hahn v. Conley, supra*, fn. 18.
43. *See generally* W. Prosser, *Handbook of the Law of Torts*, 871-873 (4th ed., 1971), Spence, *Parental Liability*, [1948] Ins. L.J. 787, Wilcox, *Note: Parental Responsibility for Juvenile Delinquencies*, 34 Chic.-Kent L. Rev. 222 (1956), Watkins, *Note*, 8 Ark. L. Rev. 122 (1953), Jones, *Note*, 27 So. Cal. L. Rev. 214 (1953), Weinstein, *Note*, 52 Mich. L. Rev. 465 (1954), Gudger, *Note*, 19 N. Car. L. Rev. 333 (1944).
44. *See* Freer, *Parental Liability for Torts of Children*, 53 Ky. L.J. 254 (1964), *Anon., Note: Criminal Liability of Parents for Failure to Control their Children*, 6 Valparaiso U.L. Rev. 332, at 337-338 (1972). *Cf.* section 99 (1) of the *Children Act 1908* (8 Edw. 7, c. 67), *and see* J. B. McC[artney], *Responsibility of Parents for Children and Young Persons*, 15 N.I.L.Q. 298 (1964).
45. *Corley v. Lewless*, 227 Ga. 745, 182 S.E. 2d 766 (1971).
46. *See, e.g.* the Civil Codes of France (article 1384, para. 1), the Federal Republic of Germany (article 832(1)), Italy (article 2047(1)), Spain (article 1903, para. 1), Portugal (article 491), Switzerland (article 333), Louisiana (article 2317) and Quebec (article 1054, para. 1).
47. For general analyses of the Civil Law approach, *see* G. Marty, *La Responsabilidad Civil en Derecho Comparado*, 55 ff. (1962), Tunc, *The Twentieth Century Development and Function of the Law of Torts in France*, 14 Int. & Comp. L.Q. 1089, at 1091, 1093-1094 (1965), Larroumet, *Responsabilite de Fait d'Autrui, Dalloz, Repertoire de Droit Civil*, tome VI, paras. 132 ff. (1974), M. Pogliani, *Responsabilita a Risarcimento da Illecito Civile*, 122 ff. (1969), J. Berdejo & F. Revullida, *Derecho de Familia*, 460 (1966), Kimball,

*Note*, 24 La. L. Rev. 656, at 656-659 (1964), Mayhall, *Note*, 21 Loyola L. Rev. 1019 (1975), Davis, *Note*, 6 La. L. Rev. 478 (1945), Theall, *Comment*, 44 Tulane L. Rev. 119, at 126 ff. (1969), *La responsabilité des parents et des educateurs en droit comparé, Travaux du Premier Colloque International Comparé* (1963), Jobin, *La responsabilité présumée du pere pour les dommages causés par son enfant mineur*, 29 Rev. du Barreau 570 (1969).

48. Recent examples are *Siney v. Dublin Corporation*, Sup. Ct., 10 December 1979, and *Finlay v. Murtagh*, Sup. Ct., 21 November, 1978.

49. Posner, *A Theory of Negligence*, 1 J. Legal Studies 29, at 43 (1972).

50. Alexander, *supra*, fn. 39, at 846.

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# The Register

## REGISTRATION OF TITLE ACT, 1964

### Issue of New Land Certificate

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 31st day of March,

W. T. MORAN (Registrar of Titles)

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

### Schedule

(1) Registered Owner: Eugene G. Scanlan & Una Scanlan; Folio No.: 7644; Lands: Hampton Demesne; Area: 37a. 2r. 37p.; County: Dublin.

(2) Registered Owner: Patrick James Canny; Folio No.: 25267; Lands: Part of the Lands of Dunmore with buildings thereon on the East side of High Street in the town of Dunmore; Area: 0a. 0r. 36p.; County: Galway.

(3) Registered Owner: Philip Sweeney & Gertrude Philomena Sweeney; Folio No.: 5505F; Lands: Hansfield or Phibblestown; Area: 126a. 0r. 5p.; County: Dublin.

(4) Registered Owner: William Hegarty; Folio No.: 28491; Lands: Ballinvarrig; Area:140a. 2r. 16p.; County: Cork.

(5) Registered Owner: Daniel and Margaret Butler; Folio No.: 1625 F; Lands: (1) Kilmagar, (2) Kilmagar, (3) Kilmagar; Area: (1) 55a. 1r. 5p., (2) 6a. 3r. 16p., (3) 9a. 2r. 3p.; County: Kilkenny.

(6) Registered Owner: Esther O'Callaghan; Folio No.: 9341L; Lands: The Leasehold interest in the property known as Cottage No. 270 situated in the townland of Curragh and Barony of West Muskerry; Area: ——; County: Cork.

(7) Registered Owner: Charles Brady; Folio No.: 20285; Lands: Money; Area: 24a. 0r. 18p.; County: Cavan.

(8) Registered Owner: The Guardians of the Poor; Folio No.: 394; Lands: Dunboyne; Area: 5a. 1r. 38p.; County: Meath.

(9) Registered Owner: David Stafford; Folio No.: 9032; Lands: Rathcolman; Area: 15a. 2r. 15p.; County: Westmeath.

(10) Registered Owner: Mellifont Abbey Trust; Folio No.: 6953; Lands: Rathbrist; Area: 226a. 0r. 33p.; County: Louth.

(11) Registered Owner: Michael Deely; Folio No.: 11712; Lands: (1) Glenmore East (Part), (2) Rathcahill West (Part); Area: (1) 12a. 3r. 6p., (2) 49a. 0r. 18p.; County: Limerick.

(12) Registered Owner: Michael Brennan; Folio No.: (a) 2210, (b) 445 (Revised); Lands: (a) Michaelschurch, (b) Damma Lower; Area: (a) 39a. 0r. 39p., (b) 56a. 0r. 3p.; County: Kilkenny.

(13) Registered Owner: Patrick J. Burke; Folio No.: 25883; Lands: Bogganstown; Area: 0a. 3r. 30p.; County: Meath.

(14) Registered Owner: Anna Collins; Folio No.: 51723; Lands: Douglas; Area: 0a. 1r. 9p.; County: Cork.

(15) Registered Owner: John Anthony Dolan; Folio No.: 743L; Lands: The Leasehold interest in the property situate in part of the Townland of Killegland and Barony of Ratoath; Area: 0a. 0r. 9p.; County: Meath.

(16) Registered Owner: John P. Naughton; Folio No.: 15344; Lands: Monksland (Parts); Area: 7a. 2r. 32p.; County: Roscommon.

(17) Registered Owner: Ruth O'Shea; Folio No.: (a) 26611, (b) 27170; Lands: Lands (a) Cloonamirran, Mountshannon, (b) Mountshannon; Area: (a) 3a. 3r. 1p., 7a. 2r. 18p., (b) 2a. 0r. 10p.; County: Clare.

(18) Registered Owner: Michael and Marion McCabe; Folio No.: 149L; Lands: 18 Railway Road, situate in the town of Killeshandra; Area: ——; County: Cavan.

(19) Registered Owner: Mervyn H. Smith and Hilary Smith; Folio No.: 8511F; Lands: Kilbogget; Area: ——; County: Dublin.

(20) Registered Owner: John Crowley; Folio No.: 11174F; Lands: Kilnacranagh East; Area: 6.035a. 0r. 0p.; County: Cork.

(21) Registered Owner: Michael Barry; Folio No.: 119; Lands: Ballyea North; Area: 71a. 2r. 35p.; County: Clare.

(22) Registered Owner: Denis C. Cronin; Folio No.: 35687 (This folio is closed and now forms the property No. 1 comprised in folio 42353 Co. Cork.); Lands: Gurteen; Area: 35a. 1r. 6p.; County: Cork.

(23) Registered Owner: Timothy O'Brien; Folio No.: 24032; Lands: Barreragh; Area: 15a. 1r. 6p.; County: Cork.

(24) Registered Owner: Patrick Whelan; Folio No.: 23308; Lands: Coolkill; Area: 0a. 2r. 5p.; County: Tipperary.

(25) Registered Owner: Denis Knowles; Folio No.: 1607; Lands: (1) Raheennahown, (2) Ballycoolan (one undivided ninth part of part), (3) Tullomoy (one undivided ninth part of part); Area: 33a. 0r. 30p., (2) 159a. 2r. 20p., (3) 82a. 1r. 20p.; County: Queens.

(26) Registered Owner: Oliver Clarke; Folio No.: 1797F; Lands: Galbolie; Area: 0.481a. 0r. 0p.; County: Cavan.

(27) Registered Owner: Patrick McCarthy; Folio No.: 10824F; Lands: A plot of ground situate on the Western side of Fair Hill in the parish of St. Mary's Shandon and County Borough of Cork; Area: ——; County: Cork.

(28) Registered Owner: Anne Powderly; Folio No.: 9229; Lands: (1) Philipstown (E. D. Dunleer); (2) Philipstown (E. D. Dunleer); Area: (1) 38a. 1r. 1p., (2) 3a. 2r. 17p.; County: Louth.

(29) Registered Owner: Rose Anne McCormack; Folio No.: 8656; Lands: Ardnaponra (Part); Area: 18a. 0r. 11p.; County: Westmeath.

(30 Registered Owner: Joseph Hanlon; Folio No.: 4399; Lands: Killadangan; Area: 134a. 2r. 24p.; County: Tipperary.

(31) Registered Owner: Patrick Byrne; Folio No.: 419; Lands: Glenmagoo or Firoda Lower; Area: 13a. 3r. 32p.; County: Kilkenny.

(32) Registered Owner: Bernard Flood; Folio No.: 12288; Lands: (1) Clonmellon, (2) Clonmellon (other part being a plot of ground with the houses thereon on the North side of Main Street also a plot of ground on the South side of Main Street in the town of Clonmellon), (3) Clonmellon; Area: (1) 32a. 1r. 33p., (2) 2a. 3r. 5p., (3) 5a. 1r. 29p.; County: Westmeath.

# Notices

## LOST WILLS

**Alphonsus Sheehan,** deceased, late of 130 Upper Glenageary Road, Dun Laoghaire, Co. Dublin and 61 Beech Park, Foxrock, Co. Dublin, 34 Eaton Square, Terenure, Dublin; 13 Ailesbury Park, Ballsbridge, Dublin; 59 Park Avenue, Ballsbridge, Dublin; 100 Park Lane, London. Will any person having knowledge of a Will made subsequent to the 6th day of December, 1938, by the above named deceased who died on the 15th day of November, 1979, at 4 Clare Street, Dublin 2, please communicate with Messrs. Vincent & Beatty, Solicitors, 67/68 Fitzwilliam Square, Dublin 2.

**Thomas Rochford,** late of Barronswood, Kilmacow in the County of Kilkenny, Farmer, deceased. Will any person having a Will or knowledge of a Will of the abovenamed deceased who died on the 18th day of January, 1975, please contact Messrs. Poe Kiely Hogan, Solicitors, 21 Patrick Street, Kilkenny.

**Patrick Carroll,** deceased, late of Coolmore, Churchtown, Mallow, Co. Cork. Will any person having knowledge of a Will of the above-named deceased, who died on the 19th January, 1980, at Coolmore, Churchtown, Mallow, Co. Cork, please communicate with Messrs. James Binchy & Son, Solicitors, Charleville, Co. Cork.

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THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

April 1980 Vol. 74 No. 3

# Law Reform — Now!

The publication of the first Bill to be drafted by the Law Reform Commission prompts an enquiry as to the progress of Law Reform in the Republic in recent years. The result of any such enquiry will disappoint.

A modern state must inevitably be hogtied by antiquated legislation. We need urgently a review of many aspects of our law — our Land Law and our Conveyancing Law (last comprehensively reviewed in 1881) are both out dated. The £1,000.00 awarded to a widow for mental distress under the Civil Liability Act, and the penalties laid down for various minor offences need to be brought into line with modern money values (and then indexed?). Our Licensing Laws and Local Government Law should be codified.

There are at present three primary sources of Statute Law Reform in operation in the State — the Departments of State, the Statute Law Revision Office and the Law Reform Commission. Of the Departments of State, it is the Department of Justice which is the most likely to generate reform of "Lawyers Law". How has it fared in recent years? Not well, for the Department seems not to have had a coherent programme of Law Reform since that prepared while the present Taoiseach was Minister in the early 1960's. Reports of the Committee on Court Practice and Procedure apparently lie unheeded on the shelves; only a small number of the recommendations contained in its many reports have been enacted into Law. Even the Bills which do emerge from the Department take an inordinate time from their inception to reach the Statute Book, only partly due to parliamentary delays. The Landlord and Tenant (Amendment) Bill 1979 which passed through the Senate on the 6th May 1980 contained the proposals first announced by the then Minister for Justice in March 1970. Admittedly, an earlier Bill with similar provisions was lost on the dissolution of the Oireachtas in 1977, but that Bill had only been introduced in 1977.

The progress of Bills through the Oireachtas is too stately, except when some crusading zeal seizes it, as in the case of the illconsidered Family Home Protection Act — a piece of window dressing which dodged the issue of community property in marriage. Who could blame the Department of Justice for working at a leisurely pace in drafting Bills which may merely go to make up a back-log of unattended pending legislation?

We badly need the "special Committee of the house" system to be used more frequently to deal with Bills which are not controversial in party political terms and can be truly considered "Law Reform" Bills. Such Bills as come from the Law Reform Commission should be handled by such Committees.

The Statute Law Revision Office is, it is understood, entrusted with the task of codifying legislation in certain areas. It does not seem to have been successful in getting any of its products introduced in the Oireachtas for some time.

The Law Reform Commission is perhaps the greatest disappointment, greatest because of the high hopes with which it was launched and because of the wealth of legal talent available to the Commission. In its four years of operation it has published seven Working Papers (three of which were completed within the first eighteen months of the Commission's operation), one Report (reports to the end of 1978 and 1979 are awaited) and nothing has been heard of the second topic referred to the Commission on the 3rd December 1975 — "the Law relating to the Domicile of Married Women". Such a pace of work is not acceptable.

The methodology of the Commission is too

*—Continued on p. 65*

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# The End of the "Edison"?

## EGGSHELL SKULLS AND IMPECUNIOUS PLAINTIFFS

By ANTHONY KERR, B.A. (Mod.), LL.M., Assistant Lecturer in Law, U.C.D.

The decision of the House of Lords in *Owners of Liesbosch Dredger v. Owners of SS Edison*[1] has always been taken as laying down that, on the part of a plaintiff damaged by the tort of a defendant, increased loss due to the plaintiff's impecuniosity was irrecoverable. A dredger was sunk and rendered a total loss as a result of the admitted negligence of the defendants. The owners of the dredger required it for the performance of a contract, delay in the completion of which exposed them to heavy penalties; but they did not have sufficient funds to enable them to replace the dredger which had been sunk, although one could have been obtained if they had sufficient funds. So they hired a dredger which they eventually purchased. In their action they claimed the actual value of the "Liesbosch", reasonable expenses while the work was stopped, the hiring expenses of the second dredger and the cost of its subsequent purchase. The Registrar of the Admiralty Division allowed the claim and awarded £19,820. Langton J. on appeal[2] affirmed the Registrar's report but an appeal was allowed by the Court of Appeal[3] who reduced the damages and on further appeal to the Lords[4] their appeal was dismissed. After stating that the object of compensation in negligence was to provide a sum of money as would replace the plaintiffs in the same position as if the loss had not been inflicted on them, Lord Wright, with whom the remainder of the law lords agreed, then stated that the compensation was to be assessed as if the plaintiffs had been able to go into the market and buy a dredger to replace the "Liesbosch". Their want of means, their impecuniosity was not to be taken into account. Despite the further extra judicial comments on this case by Lord Wright[5] the decision is still a curious one and somewhat difficult to understand. It sits uneasily with the principle that a tortfeasor takes his victim as he finds him – if you run over a person earning a large salary the damages will be higher than if you ran over an unemployed person – in physical injury cases, the "eggshell skull rule" accepted by the Supreme Court in *Burke v. John Paul and Co. Ltd.*[6] Here the plaintiff, who was an employee of the defendant, was injured whilst cutting steel bars by means of a hand-operated cutting machine. The blades of the machine were blunt and this caused the plaintiff to exert a greater physical effort during his work than would have been necessary if the blades were not blunt. The plaintiff tore his abdominal muscles and developed a hernia. At the trial of the action, before McLoughlin J. and a jury, in which the plaintiff claimed damages for the negligence of the defendant, the plaintiff's case was withdrawn from the jury because evidence was given that a hernia usually developed where there was an area of congenital weakness of the abdomen, and McLoughlin J. decided that there was not sufficient evidence to justify a finding that the defendant could have reasonably foreseen that the plaintiff would have developed a hernia as a result of operating the machine. The Supreme Court allowed the plaintiff's appeal and ordered a new trial. Budd J.[7] pointed out that McLoughlin J.'s decision appeared to rest on the test of foreseeability as adopted by the Privy Council in *Overseas Tankship (UK) Ltd. v. Morts Dock and Engineering Co. Ltd.*[8] The Privy Council there said that, in determining liability for the consequences of a tortious act of negligence, the test is whether the damage is of such a kind as a reasonable man should have foreseen. The application of this test led McLoughlin J. to the conclusion that since the plaintiff's predisposition to getting a hernia would not be discovered on any ordinary examination it was impossible for the defendants to know of this predisposition and that therefore they could not have foreseen that the use of extra exertion and pressure by the plaintiff in cutting the bars would result in a hernia developing. But as Budd J. then went on to point out the answer to this was the "eggshell skull rule" and stated that that rule had in no way been impugned by the Privy Council decision in the Wagon Mound. He cited Lord Parker C.J. from *Smith v. Leech Brain and Co. Ltd.*[9] "It has always been the law of this country that a tortfeasor takes his victim as he finds him," and Lord Parker C.J. himself went on to cite Kennedy J. in *Dulieu v. White and Sons*:[10] "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart." This means that the amount of damage will depend on the characteristics and constitution of the victim and upon the operation of any new risks to which he is exposed as a result thereof. As Hepple and Mathews[11] have asked, what is the logical justification for excluding from this doctrine of taking the victim as you find him his want of means?

The New Zealand Court of Appeal in *Bevan Investments Ltd. v. Blackhall and Struthers* (No. 2)[12] mentioned that it might be questioned how far the decision in the "Edison" still represented the law, since the Privy Council in *Muhammed Issa el Sheikh Ahmen v. Ali*[13] in an action in contract, and without referring to the "Edison", permitted a plaintiff to recover for the increased loss due to his impecuniosity. Applying contractual rules of remoteness the damages consequent on impecuniosity were not too remote because the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken. Additionally, Lord Wright himself in *Monarch Steamship Co. Ltd. v. Karlshamnos*[14] referred to the "Edison" in language evidently accepting that on the facts of a given case impecuniosity might fall within the reasonable contemplation principle and said

that the difference between the "Edison" and Ali case "did not depend on the difference (if any) between contract and tort in question". Regarding the principles as to remoteness in tort and contract but without wishing to "swim in this sea of semantic exercises" it appears that the rules are coming together,[15] and that impecuniosity is one of the matters to be considered in the question of reasonable foresight or degree of likelihood.

Recently, however, the "Edison" has come before the High Court for consideration. In *Riordan's Travel Ltd. v. Acres and Co. Ltd.*[16] the plaintiffs took over a lease of a shop. Acres and Co. Ltd. were the lessors and they also owned the adjoining premises. They employed the second defendants, G. & T. Crampton Ltd., to demolish the adjoining premises, and the second defendants sub-contracted the actual demolition to the third defendants Mathew O'Dowd Ltd. When the demolition and excavation work had reached an advanced stage the side of the plaintiff's premises, where they were carrying on the business of travel agents, collapsed so that the plaintiffs were entirely deprived of the use of the premises and had some of their property damaged, and it was eighteen months before they were reinstated in new apartments in a new building on the site of their old premises.

Their claim for damages fell under various headings:- the value of the equipment damaged and destroyed; the rent of alternative accommodation from the time of collapse until their return to the new offices; loss of profits from being deprived of the use of their premises; and interest on money which they had to borrow in order to pay for the rent of the alternative premises. The first two caused very little problem, but there were difficulties in calculating the loss of profits. Various projections and estimates were made and McWilliam J. was satisfied that there was a reduction in business due to the conditions under which the plaintiffs had to work "but there are too many imponderables, such as the increase in oil prices and the resulting increases in fares for one to accept as accurate the figures presented on these projections". In the absence of any reasonably accurate method of assessing the losses, but looking at the increases in business actually achieved he awarded a smaller sum than that claimed by the plaintiffs. The fourth head – the interest they had to pay on the borrowed money – was the most contentious since the decision of the House of Lords on the "Edison" appeared to be the authority in point.

The plaintiffs had to borrow the money because they did not have sufficient funds of their own. McWilliam J. pointed out that as their original premises were totally destroyed, they would have been put out of business completely had they not taken steps to acquire new premises as speedily as possible. The money borrowed was thus borrowed for the purpose of mitigating their loss and he found that they had acted reasonably in doing this. He accepted as a correct statement of Irish law the passage from *Mayne on Damages* approved by Davies L.J. in *Moore v. Der Ltd.*[17] that "although the plaintiff must act with the defendant's as well as with his own interests in mind, he is only required to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer," and McWilliam J. went on to say "acting reasonably to me means doing the best a plaintiff can in the circumstances in which he finds himself".

Not unexpectedly, the defendants relied on the House of Lords decision in the *Edison*. It should be pointed out that the Registrar of the Admiralty Division in that case considered the additional expenditure to be reasonable, however the House of Lords did not consider this to be relevant and McWilliam J. confessed to having difficulty in following Lord Wright's reasoning on this.

He said that Lord Wright was considering two possible points. Firstly, whether the plaintiff's financial embarrassment was a consequence of the loss of the dredger and, secondly, whether the financial embarrassment was a cause of loss quite independent of the sinking of the dredger. He did not consider it relevant to deal with the question of mitigation and what that duty entailed. This was made clear by his statement that "if the appellant's financial embarrassment is to be regarded as a consequence of the respondent's tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger,"[18] and his later comment that the Lords were dealing with the measure of damage and not the victims duty to minimise "which is quite a different matter".[19]

McWilliam J. was convinced that the issue before the House of Lords should have been whether the plaintiffs acted reasonably to mitigate their loss. The suggestion that their financial situation could have been a consequence of the tort was inappropriate, and it was not satisfactory to describe their financial embarrassment as an independent cause of damage.

"There would have been neither damage nor embarrassment if the defendants had not negligently sunk the dredger. There was no financial embarrassment at the time the dredger was sunk which affected the appellant's capacity to operate the dredger if it had not been sunk. The dredger was totally destroyed and the financial embarrassment which does not appear to have been significant before the sinking, only affected their capacity to mitigate the loss."

The only consequence of their financial situation at the time their dredger was sunk was that they could not buy a new dredger and so mitigate the loss to the fullest. It might have been argued that it was not reasonably foreseeable that the owners of the dredger would have all their liquid resources tied up in the contract with the Harbour Board for whom they were using the dredger but these were the days when Polemis[20] reigned and the Lords were concerned with the question of direct cause, and Lord Wright felt that the plaintiff's actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous and distinct in character from the defendant's negligence. McWilliam J. therefore, "with hesitation in view of the eminence of the Court," declined to apply the "Edison". It did not provide "assistance on questions arising from the incapacity of a plaintiff to mitigate damage to the greatest advantage of a defendant," and anyway it appeared that the duty to mitigate and the Wagon Mound principle "precluded the enunciation of any hard and fast rule that impecuniosity can never be taken into account in the assessment of damages". Liability for damage depends on whether that damage is of such a kind as a reasonable person would have foreseen. In the present case any reasonable person must have foreseen that the plaintiff's business must cease and the plaintiffs thereby

sustain a very great loss unless they could obtain new premises in which to continue business.

Although it appeared to McWilliam J. that no question of foreseeability arose with regard to the question of mitigation he was satisfied that: "Any reasonable man in business circles at the present time must appreciate that, if property and premises are destroyed and alternative property and premises have to be obtained the person obtaining such property or premises will not have money in a stocking or under a mattress or even in current account for that purpose, but will either have to apply money which is bearing interest and so lose such interest or will have to borrow money and pay interest on the money borrowed."

In awarding damages to cover the interest paid he stressed that, whether there was any justification for it, there was a distinction between the principles governing an award of damages applicable to interest on money actually expended on mitigating loss and interest claimed in other connections as on the amount of a final decree.

He said: "It has not been the practice in Ireland to award interest on the amount of a decree from the date when the cause of action arose until the date of the decree and it has not been argued that I have any jurisdiction to award such interest. Nevertheless, I have been referred to English cases in which interest upon the entire decree was allowed or refused under a discretion to do so given by the Law Reform (Miscellaneous Provisions) Act 1934. This Act gave the English Courts discretion to award interest for any period between the date when the cause of action arose and the date of judgement. In so far as these decisions depend on the express provisions of the English statute they are not relevant to a discussion of the principles upon which interest may be allowed on the amount of a decree in Ireland and do not deal at all with interest on money borrowed to mitigate loss."

One case that would have proved of assistance, if needed, to McWilliam J. is the New Zealand Court of Appeal[21] decision in *Taupo Borough Council v. Birnie*[22] where the "Edison" was similarly distinguished if not actually discarded. Here, due to the negligence of the Borough Council largely flooding occurred in Mr. Birnie's hotel grounds. The hotel lost a lot of business and eventually had to be sold by public auction at a mortgagee's sale. The question before the Court was whether damages for loss of profits and loss of capital suffered as a result of the mortgagee's sale were recoverable. The Court held that the hotel's loss of accommodation profits was a foreseeable and immediate consequence of the flooding caused by the Borough Council's negligence, but as regards the loss of capital head it was contended that lack of funds was the real cause of the forced sale and that therefore the head of damage was too remote. Despite the high authority of the "Edison" the trial Judge, Haslam J., felt that reasonable foreseeability was the broad test for remoteness, took judicial notice of the likelihood that a hotel company operating a hotel in New Zealand could be expected to have mortgage liabilities and would depend on the uninterrupted maintenance of its operations to meet its covenants thereunder and held that loss on the forced resale (since a mortgagee's forced sale is likely to produce less than market value) was not too remote. The Court of Appeal unanimously refused to disturb this. Cooke J., in a judgement concurred in by the remainder of the Court said: "There can be no doubt that impecuniosity is one of the matters to be considered in the question of reasonable foresight."

1. 1933 AC 449.
2. 1931 P 230
3. 1932 P 52.
4. Lords Wright, Tomlin, Buckmaster, Warrington of Clyffe, and Russel of Killowen.
5. *Legal Essays*, pp. 96-123.
6. 1967 IR 277.
7. With whom Ó Dálaigh C.J. and Haugh J. agreed.
8. 1961 AC 388 (The Wagon Mound I).
9. 1962 2 QB 405.
10. 1901 2 KB 669.
11. *Tort: Cases and Materials* (1974) p. 192.
12. 1978 2 NZLR 97.
12. 1947 AC 414.
14. 1947 AC 196 at p. 224.
15. On which see the decisions of Peter Pain J. in *Ichard v. Frangoulis* 1977 1 WLR 556. Lord Denning M.R. in *H. Parsons (Livestock) Ltd. v. Uttley Ingham and Co. Ltd.* 1977 3 WLR 990. The Court of Appeal in *Esso Petroleum Ltd. v. Mardon* 1976 2 AER 5, although cf. contra the decision of the House of Lords in *The Heron* 2 1969 1 AC 350. For an interesting Irish High Court decision on this area see Finlay P. in *Hickey and Co. Ltd. v. Roches Stores (Dublin) Ltd.* High Court unrep. 14-7-1976, and the case note by Clark 1978 29 NILQ 128.
16. High Court unrep. 14-11-1978 and 17-1-1979.
17. 1971 1 WLR 1476.
18. Ibid., p. 460.
19. Ibid., p. 461.
20. Re an arbitration between Polemis and Furness Withy and Co. 1921 3 KB 560.
21. Richmond P., Woodhouse and Cooke J.J.
22. 1978 2 NZLR 397.

# Certification of Legal Specialists in the State of California

By JAMES B. CORISON

Riverside, California (Chairman California Board of Legal Specialization)*

During the last few years, a new movement within the legal profession has come into being. Although the movement is growing throughout the United States, its roots are in California. The following is a short history of its development in the Golden State.

In 1966 the Board of Governors of the State Bar of California took its first step in the implementation of an innovative programme for the formal certification of legal specialists. The programme was designed to meet needs of the public and of the profession arising from the recognised increase in specialised law practice over the past few decades which resulted from ever broadening demands upon lawyers. Countless governmental agencies with their regulations, more complex tax laws, a changing attitude within society concerning social and economic rights, laws for the protection of the environment and for the conservation of resources all have contributed to the "specialised lawyer".

Initially, a Special Committee was created to conduct a thorough study of specialisation and to prepare, if found to be necessary and practicable, an experimental programme under which members of the bar might seek to become certified specialists. During the three years of its existence, the Committee collected information on the subject of specialisation, conducted panel discussions at association meetings and held informal all-day hearings to learn the views of local bar associations, deans of law schools, members of the Conference of Barristers and other interested persons. In addition, the Committee devoted considerable time and effort to the preparation of a survey of 2,196 members of the California Bar, selected at random, to ascertain the extent and nature of existing *de facto* specialisation and the desirable characteristics of a certification programme.

The survey was conducted in early 1968 and revealed that two out of three attorneys concentrate their practice in one field or a related few fields of law, that concentration increases with years of practice, and that attorneys who concentrate have higher incomes. The survey further showed that 72% of the bar would prefer to concentrate its practice in the future. Large majorities anticipated that the public and profession would benefit from certification of specialists and that certification would generally improve professional competence.

After an analysis of the information received and an interpretation of the results obtained from the survey, the committee recommended that certification of legal specialists be tried on an experimental basis in three diverse fields, Criminal Law, Taxation, and Worker's Compensation (recovery for industrial injury). The three fields were especially chosen to test the ability of the organised bar: (1) to create meaningful standards for certification; (2) to set up reasonable testing procedures for practitioners who presumably are already above average in knowledge and expertise; (3) to provide adequate continuing legal education for the specialist when certified; and (4) to administer such a programme fairly, objectively and without cost to the rank and file lawyer not affiliated with the specialisation programme.

The work product of the now disbanded Special Committee was the California Pilot Programme in Legal Specialisation, approved by the Board of Governors in 1970 and adopted by the Supreme Court of the State of California in 1971. It rested upon four basic concepts; experience as a lawyer, substantial involvement in the speciality field, special educational experience and adequate testing to insure quality performance. Several other characteristics of the plan are as follows:

(1) Participation is voluntary.

(2) The certified specialist is not to take advantage of his position to enlarge the scope of his representation of a referred client.

(3) The existence of certified specialists in a field of law does not preclude the non-certified lawyer from practising in the field. Conversely, the certified specialist is not precluded from practising in other fields of law.

(4) A lawyer may be certified in more than one field of law if he meets the established standards.

(5) The responsibilities and privileges of the certified specialist are personal in nature and may not be attributed to or fulfilled by a law firm.

(6) A certified specialist is authorised to communicate the fact of his certification to other lawyers and to the public.

(7) Certified specialists must demonstrate continued proficiency in the field by qualifying for recertification every five years.

The Pilot Programme created what was initially a nine-member, now a thirteen-member, Board of Legal Specialisation (the "Board") and nine-member Advisory Commissions for each field to implement the plan. The Board now consists of six lawyers-at-large, the dean of an accredited law school (currently the University of Southern California), a representative of Continuing Education of the Bar (a Berkeley based continuing legal educational institution sponsored by the State Bar of California and the University of California), the Chairman of the Committee on Maintenance of Professional Competence of the State Bar and four Chairmen of Advisory Commissions (a new commission for Family Law has recently been added). The Advisory Commissions consist of acknowledged experts in each field. Only one of the members-at-large of the Board is a certified specialist. All members of the Advisory Commissions are certified except for the members of the newly established commission for Family Law.

The Board has overall responsibility to administer the plan, to give final approval of Standards for Certification, to administer examinations of applicants on a regular basis and to certify and rectify specialists who qualify. The Advisory Commissions advise the Board concerning various matters pertaining to its field, suggest to the Board tentative standards for Board consideration, monitor the fitness of continuing legal education courses for accreditation for certification purposes and supervise the preparation and grading of examination questions. Both the Board and the Advisory Commissions are active with rejected applications where a hearing is requested and facts are disputed by the applicant.

Prior to adoption of any standards for certification of specialists, the Board decided as a matter of policy that the standards should not be so stringent that only the rare lawyer with an outstanding reputation who practices in a metropolitan environment representing large and wealthy clients can participate. Rather, most competent, experienced lawyers sufficiently involved in the fields of law should qualify.

From the inception of the work of the Special Committee in 1966, it was intended that the public be the primary beneficiary of the certification programme by insuring that the programme provide a method to identify the competent practitioner and to communicate this identification. The programme was not and is not intended as merely a guarantee of threshold competence in a field, but neither is it intended as a means to insulate from their peers a few well-placed lawyers or to serve as the basis to increase legal fees.

Lawyers were first certified under the Pilot Programme on 20th November 1973 under standards adopted for the three fields which are quite diverse. Each requires a minimum of five years practice of law. Practice of law is defined as "full time legal work done primarily for purposes of legal advice or representation". Each set of standards requires special educational experience, both prior to certification and following certification (in order to qualify for recertification), but in varying amounts dependent upon the nature of the field. Taxation law has the heaviest requirement for special educational experience as it has often been said that the half life of knowledge in the tax field is perhaps five years.

The standards for both Criminal Law and Taxation Law provide for peer review, but the requirement under the Criminal Law standards are much more stringent in this regard. A Taxation Law applicant must merely furnish the names and addresses of five other lawyers familiar with his or her practice, not including current partners or associates of the applicant, who can attest to his or her reputation for involvement in the field of Taxation Law. The applicant for Criminal Law certification is subject to the following peer review, taken directly from the standards.

> "An applicant shall submit the names and addresses of persons to be contacted as references to attest to the applicant's proficiency in the practice of criminal law. Except as hereinafter provided, the applicant shall not submit as a reference the name of an applicant for whom he or she has acted as a reference. Four (4) shall be lawyers, chosen by the applicant, who practise in the same areas as the applicant; one (1) shall be a judge of any court of record in California, or any federal court, chosen by the applicant, before whom the applicant has appeared as an advocate in criminal proceedings within the two (2) years immediately preceding application; three (3) shall be California lawyers with whom applicant has tried a criminal case, but with whom applicant is not associated. In appropriate instances of limited practice the Criminal Law Advisory Commission, upon prior motion, may permit the applicant to submit as a reference the name of an attorney for whom he or she has acted as a reference.
>
> "The Criminal Law Advisory Commission shall select four (4) lawyers or judges who practice or preside in the same area as the applicant for further evaluation of the applicant's proficiency in the practice of criminal law."

Workers' Compensation Law has no requirement of peer review.

It is in the area of substantial involvement in the speciality field that the standards diverge the most. Both Criminal Law and Workers' Compensation Law are primarily quantitative as to this standard, while Taxation Law relies more on a qualitative approach. Because of the more limited nature of its field, Workers' Compensation Law requires only one-fourth of the applicant's time be spent in the field in each of three of the five years immediately preceding application, but it does require that the applicant make at least 300 appearances by personal attendance before a forum in California dealing with Workers' Compensation matters within the same five-year period. The Criminal Law standards require one-third of the applicant's time during each of three years of similar five-year period to be devoted to the field and requires participation in a rather complex series of felony jury trials, other trials, special criminal proceedings, extraordinary writ proceedings and appellate proceedings in order to qualify. The standards for Taxation Law require that, in a similar period, "more than one-half of the applicant's practice be devoted to matters in which issues of tax law are significant factors". The applicant is then required to show that he has had "substantial and direct participation in such tax issues by giving information concerning the frequency of the work and the nature of the issues involved".

The examinations evolved by all of the Advisory Commissions seek to allow the applicant to demonstrate his familiarity with the more recent issues and trends which have appeared in the field, the approaches to many of which are not yet resolved by the leading practitioners or the trial forums, and which constitute matters currently creating problems for the experienced and involved practitioner. Contrary to the Bar Examination administered to law school graduates shortly after matriculation for the purpose of admission to practice, which examination tests the student's knowledge of statutory law and rules under *stare decisis* pertaining to the pertinent subject matter as well as his approach to issue recognition and legal reasoning, the specialists' examination tests whether or not this experienced lawyer is living on the "cutting edge" of the law in his field.

Since standards were adopted in the original three fields of the Pilot Programme, additional standards have been promulgated in the fields of Family Law, Labour

Law, Probate and Trust Law, and Bankruptcy Law. The Family Law standards have been adopted and the Family Law Advisory Commission is now drafting an examination which should be given in April of 1980. The standards for Probate and Trust Law are now being revised following public hearings. The standards for Labour and Bankruptcy Law are now in abeyance pending further study of whether or not the impact of a certification programme in these fields in the near future will be of sufficient importance to the public and the profession to justify the cost at the present time.

An Advisory Commission of noted California trial lawyers is currently engaged in the creation of standards in the field of Civil Trial Law. This is an interesting experiment in view of the unusual diversity of skills and knowledge involved in the breadth of the subject matter. Quite possibly the field will have to be broken into a series of subspecialities for certification purposes.

Although the California Pilot Programme in Legal Specialisation is the first of its kind, it no longer stands alone. Shortly after California initiated its effort, the State of Texas began a certification programme. Florida recently implemented a certification plan similar to that in California. Other States involved in plans directed toward the certification of legal specialists, as shown by the most recent statistics available, are:

Alaska
Arizona
Arkansas
Colorado
Connecticut
Hawaii
Indiana
Iowa
Kansas
Maryland
Massachusetts
Missouri
New Hampshire
New Jersey
New York
Ohio
Pennsylvania
Rhode Island
Tennessee
Virginia
Washington

There is currently under way an evaluation of the certification programme in California for the purpose of ascertaining whether it is having the salutory effects of protecting and assisting the public and upgrading the profession which were the goals of the original Special Committee set up to study legal specialisation some thirteen years ago. A master plan has been drawn projecting the certification programme into approximately twenty fields of law by 1985 should the evaluation conclude that the programme is worthwhile. Obviously, should new fields be included, the standards for each must remain flexible, and those administering the plan must recognise that the programme is an evolving one and that evolution is the successful adaptation to a changing profession in a changing world.

*Mr Corison has lectured throughout the United States on legal specialization and remains interested in consulting with groups from any area concerning certification of legal specialists.

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# Dublin Solicitors' Bar Association

**Registry of Deeds**

The Association has been engaged in correspondence with the Registry of Deeds with a view to reducing delays in the comparison and registration of Deeds.

The Assistant Registrar has explained that delays in comparison were due to the combination of a number of factors, including above — average levels of lodgements following the postal strike. Extra staff have been assigned to the office and already considerable progress has been made in reducing the arrears, resulting in a noticeable improvement from behind the Solicitor's desk.

The Assistant Registrar took the opportunity of pointing out that a proportion of the delay was inevitably caused by material appearing to be defective at comparison stage and having to be returned to the Solicitors concerned. The most frequent defects are:

(i) failure to complete the Memorial by the accurate inclusion of the execution and witnessing of the Deed;
(ii) incomplete description of the premises;
(iii) defects in the Affidavit or Jurat.

In future, in order to minimise delay, the staff of the Comparison office have been instructed to make a brief examination of all Memorials, to check for the more usual shortcomings. Only if a Memorial passes this examination, will comparison proceed.

It was pointed out to the Assistant Registrar that his Staff had introduced, without warning or apparent authority, a practice rule that the particulars of execution and witnessing included in Memorials should be typewritten, instead of being inserted in handwriting.

For clarity, we set out the following practical guide lines, observance of which will greatly facilitate the Registry staffs:—

1. The body of the Memorial, as well as the partilulars of execution and witnessing, should be typewritten, for maximum legibility.
2. The Deed and its Memorial should have a properly detailed description of the premises.
3. Ensure that the Deed and its Memorial are properly witnessed and that the Affidavit of the attesting witness and the Jurat to that Affidavit are both properly completed and dated.

As a further practical aid to the completion of Memorials, we would remind Solicitors acting for Purchasers to obtain on closing detailed particulars of the witnesses to the Vendor's execution of the purchase Deed and Memorial.

The Association has also been discussing with the Registry of Deeds the possibility of procuring Searches by post.

This proposal was made by the Assiatant Registrar, who invited the Association to consider it and to let him know its views. The Conveyancing Committee of the Association was unanimously in favour of the suggestion and is so informing the Registrar.

The broad basis of the arrangement would be that the Requisition for Search would be lodged by post, together with a standard fee. When the Search was ready, it would be certified by the Registry and returned by post to the Solicitors. When the sale had been completed and the closing act registered, the Purchaser's Solicitors would relodge the Search, with a standard fee, so that it could be continued and closed as heretofore. It would then be returned to the Solicitor by post.

This system would link satisfactorily with a further proposal that Registry of Deeds fees should, so far as possible, be standardised.

**Dublin Corporation and Dublin County Council Mortgages**

The Association, after lengthy discussion and consideration, has procured the agreement of the Dublin Corporation and of the Dublin Councy Council to the execution of Releases of Mortgage in advance of actual repayment.

The practice should obviate the extensive delays, which have become standard, in procuring executed Releases *after* the Mortgage debt has been repaid.

For either the Dublin Corporation or the Dublin County Council to arrange the sealing of a Release of Mortgage in advance of repayment, the following must be observed:—

1. There must be a specific written request from the Borrower or his Solicitor to seal the Release in advance of repayment, together with an assurance that the repayment moneys are or soon will be made available.
2. The Borrower and his Solicitor must confirm in writing that if repayment is not made within three months of the sealing of the Release, the Release may be cancelled and destroyed by the Local Authority.
3. The sealed Release must remain in the custody of the Local Authority until repayment is made.

**Company Formation**

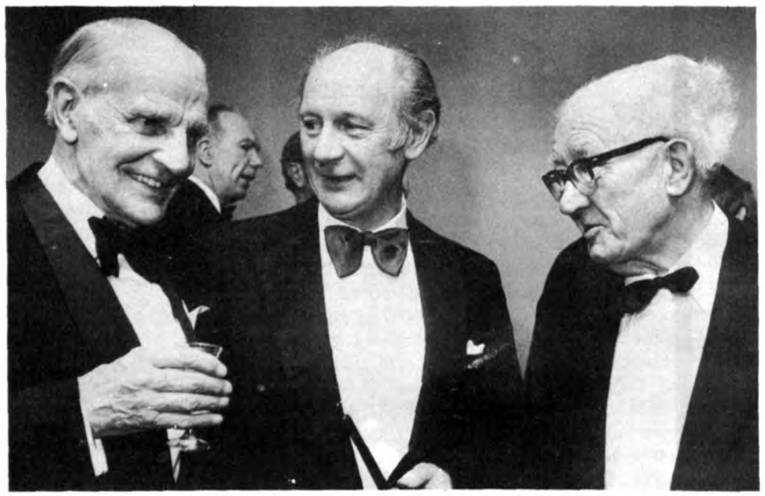
Considerable difficulty has been experienced by the profession in recent years in procuring the approval of the companies Office to the proposed names of intended new Companies. The practice has become general of submitting for approval several alternative proposed names, in the hope that one of them may be acceptable. Notwithstanding the submission of alternatives, problems are still arising with what is, apparently, even greater frequency.

While the Association appreciates the necessity to ensure, as far as is reasonably possible, that Companies are so named as to avoid possible confusion between them, it is felt that the present system must be capable of modification in order to assist the practitioner in what now is, in many cases, a real difficulty.

The Association is pressing the Registrar of Companies to assist the profession by indicating with greater precision why his staff have refused any particular name or names and to indicate in any such circumstances, what combination of the relevant or "key" words in any proposed name would be acceptable.

Law Society
Council Dinner
27th March
1980

**Above, from left:** Master David Bell, Mr. Walter Beatty, President of the Incorporated Law Society and Master Toirleach de Valera.



**Above, from left:** Mr. James W. O'Donovan, Past President of the Incorporated Law Society, Mr. Jack Lynch, T.D., and His Honour Judge Charles Conroy.

**Below, from left:** Mr. Donal Stuart, The Chief Justice, the Hon T. F. O'Higgins, and Mr. Michael O'Beirn.



**Above, from left:** The Hon Mr. Justice Thomas Doyle, Mr. Garrett Fitzgerald, T.D., Mr. Fintan Burke, Law Society, and Mr. James McDonnell, Supreme Court Registrar.

**Above, from left:** The Hon. Mr. Justice Declan Costello, Mr. John Nash, Past President of the Incorporated Law Society, Mr. F. X. Burke.

**Below, from left:** Mr. Tommy Lombard, President of the Institute of Auctioneers and Valuers, Mr. Frank O'Donnell, Mr. John F. Buckley and Mr. Patrick Gilna, President of the Institute of Professional Auctioneers, Valuers and Livestock Salesmen.

It is also felt that, once the Companies Office has expressed its approval of any proposed name, that name should be reserved exclusively for the applicant for a period of, say, fourteen days from the date of the Companies Office's notification of such approval.

To whatever extent the implementation of any such proposal may require a change in law, representations will be made appropriately.

Arran House,
35 & 36 Arran Quay,
Dublin 7.

18th April 1980

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

Dear Sir,

It is a pity that so many of the profession, particularly the younger members, so not seem to be acquainted with the traditional mode of tilting a letter.

I always understood that in titling a letter one put the name of one's own client first, for example, in acting for a Plaintiff one would put Murphy v. Jones, but, if acting for the Defendant, Jones v. Murphy. Similarly in conveyancing when acting for the Vendor or Lessor it would be Murphy to Jones, but, if acting for the purchaser or Lessee, it would be Jones from Murphy.

Further the traditional method of amending documents seems to be completely forgotten, which only adds to the labour of all concerned when reading a number of amendments. Again I understand the correct procedure to be, the first amendment in red ink, the second amendment in green ink, the third amendment in purple ink. If this rule is followed in a document which is complicated and has several amendments it is easy to immediately follow the series of the amendments, when they were made and by whom and this facilitates one's work.

I feel that I am not being pedantic in suggesting that these traditional methods be observed, but that they would simplify a great deal of correspondence and amendments.

Yours faithfully,

Desmond Moran.

**CONVEYANCING NOTE**

# Transfers between Related Persons Application of 1% Duty

It has come to the notice of the Conveyancing Committee that some practitioners may not be conscious of the true position relating to the 1% stamp duty payable on Transfers or Conveyances between related persons or that such rate applies whether the transaction is a sale or a voluntary transaction. In such transactions, to obtain the 1% rate of duty *all* of the parties to the transaction must come within the specified degrees of relationship, that is the person or *each of the persons* becoming entitled to the entire beneficial interest in the property on foot of the Transfer or Conveyance must be related to the person or to *each of the persons* who was or were immediately therefore entitled, as a lineal descendant, parent, grandparent, step-parent, husband, or wife, brother or sister of a parent, or brother or sister, or lineal descendant of a parent, husband or wife, or brother or sister. If there is a person or persons involved in the transaction, either as transferor/s or as transferee/s who is not within the relationship specified, then the Transfer or Conveyance will be liable to stamp duty at the full appropriate rate and not at the 1% reduced rate.

The above principle applies, irrespective of whether the property is transferred or conveyed to parties to hold as joint tenants or as tenants in common.

Should a client wish to transfer property to a relative and to a non-relative either as joint tenant or as tenants in common, the use of two deeds will effect a saving in Stamp Duty. For example, a father if he transfers property to the value of £25,000.00p to his daughter and her husband in one deed Stamp Duty will be payable at 4% and will amount to £1,000.00p. If the father transfers to his daughter first, that deed will attract Stamp Duty of £250.00p (1% of £25,000.00p). The daughter can then transfer a moiety to her husband which will attract Stamp Duty of £125.00p (1% of £12,500.00p) or nil if the exemption in the Family Home Protection Act applies. If the above transfer was made to a daughter and an intended son-in-law in consideration of an intended marriage between the parties, then the Stamp Duty payable is limited to 50p being the duty payable on transfers in consideration of marriage. (See Sect. 74 Finance (1909/10) Act, 1910 as amended by Section 32 Finance Act, 1978).

# BOOK REVIEWS

**A Report on the Law and Procedures regarding the Prosecution and Disposal of Young Offenders.** By Denis C. Mitchell. The Stationery Office, Price £1.00.

This report by Mr. Denis Mitchell was commissioned by the Office of the Director of Public Prosecutions and was published in October 1977. It is a most useful reference book for practitioners as it clearly sets out the manner in which the Courts may deal with children, from the ages of seven to fifteen; young persons from the ages of fifteen to seventeen and finally juvenile offenders from the ages of seventeen to twenty-one.

The Cjhildren's Act 1908 together with the Children Act 1941 are the main Statutes in which most of the law is contained. But certainly the 1908 Act covers so many other matters relating to children and young persons that it is a most unwieldly Statute to come to grips with and indeed to find the particular information one requires from it. The author manages to condense a lot of relevant information into this brief manual.

On the age of criminal responsibility, we are told that the Kennedy Report 1970 recommended that the age of criminal responsibility should be increased from seven years to twelve. In Great Britain the Children and Young Persons Act 1969 raised the age to fourteen except in homicide cases. In Ireland children between the ages of seven and fourteen, that is under fifteen, are presumed incapable of crime (Doli incapax) but this is a rebuttable presumption. The issue is even more confused by the fact that the 1908 Act, Section 131, as amended by the 1941 Act, Section 29 (1), defines a child as a person under fifteen, but as far as principles of responsibility are concerned, one is dealing with the seven to fourteen age group. Mr. Mitchell points out that as the 1941 Act raised the legal age of a child to fifteen the doli incapax presumption should now apply to seven to fifteen year olds. Unfortunately it appears that lawyers in Ireland do not very often argue the issue of doli incapax when representing this age group.

Persons under fifteen cannot be imprisoned and indeed there has been case law in Ireland on that subject, but they may however be sent to an institution not being a prison.

The section of the book dealing with options open to the Court for seven to fifteen year olds gives a brief explanation of each method. If quotes from the Kennedy Report that the "fit person order" whereby the Court is empowered to commit a child to the care of a relative or friend had not at least in 1970 been used by the Children Court for many years. One wonders if in the following seven years this procedure has been used more often, but unfortunately no comment is made by the author.

Young persons, that is those between the ages of fifteen and seventeen can be imprisoned and in certain circumstances sent to St. Patrick's Institution. Juvenile offenders, those between seventeen and twenty-one, may be sent to St. Patrick's instead of prison, and in extreme cases a sixteen year old may be sent to St. Patrick's. Shanganagh Castle and Loughan House are institutions for males of this group also, but it should be noted that a female offender between seventeen and twenty-one if she is to be sent for a custodial sentence must be imprisoned in Mountjoy or Limerick prisons.

I would recommend that this report should be read by lawyers, social workers and probation officers dealing with young persons and the law, as it concisely and clearly sets out the powers and limitations of the Court. My only criticism would be that I would like to have heard more from the author about possible areas of reform and about how the law operates in practice in the Courts, but perhaps that is not what he was commissioned to do.

*Barbara Hussey*

J.C.W. Wylie — **Irish Conveyancing Law.** Professional Books Limited 1978.

This is a twin volume to Irish Land Law written by the same learned Author (who is reader in law at University College, Cardiff) and again with the Hon. Mr. Justice Kenny, Judge of the Supreme Court of the Republic of Ireland acting as Consultant Editor.

Irish Conveyancing Law deals comprehensively, but in a most readable manner, with the Law and Practice of Conveyancing in Ireland. It is so set out that each page has copious footnotes giving legal authority for the statements and conclusions reached in the text. It is therefore both casual reading for the Practitioner anxious to up-date (or re-educate) himself, as well as an invaluable reference (with the relevant Authorities readily available) in the event of pending of threatened legal strife arising in the course of any conveyancing transaction.

This book deals comprehensively with both The Law Society's Contract for Sale and Requisitions on Title and sets out in detail the legal position of Vendor and Purchaser and their respective Solicitors. The thorny question of pre Contract Requisitions, and their validity (as well as their suitability) in the Republic of Ireland, is examined and discussed.

The Book has a total of 921 pages (including an invaluable Index) and to my mind is essential reading for the Conveyancing Preacitioner, experienced or otherwise. A comprehensive, knowledge of Conveyancing Law and Practice is generally obtained from text books and lectures in the first instance and subsequently from experience in practice. Very often by the time a Practitioner becomes an experienced Conveyancer, the theory is long forgotten. Also legislation is enacted from time to time effecting material changes in the law and practice of Conveyancing. This book codifies both the existing theory and practice of Conveyancing in Ireland and in so doing provides an invaluable and necessary aid to those Solicitors who would regard themselves as experienced Conveyancers while at the same time giving the less experienced members of the profession the benefits of experience gained by others in the Practice of the Law of Conveyancing.

Most Practitioners will have found Irish Land Law (1975) of great assistance. I am informed that Mr. Wylie has been prevailed upon to up-date both Irish Land Law and Irish Conveyancing Law (as the need arises) by means of supplements. Accordingly the present edition of Irish Conveyancing Law will not be superceded and I understand that the first supplement thereto is presently being considered to take cognizance of (inter-alia) the abolition of Wealth Tax, the 1978 Landlord and Tenant Acts, the Landlord and Tenant Bill of 1979, The Law Society's new form of Requisitions, and recent decisions on Conveyancing matters such as those arising from the Family Home Protection Act 1976.

In my opinion no Practitioner can afford to be without this volume of Irish Conveyancing Law and we are indeed extremely fortunate to be provided with a modern text and reference book (written in plain English) covering such an important segment for daily practices.

Frank O'Flynn.

**Review of "The Modern Cases on Negligence".** By Richard Bingham. Third Edition, 1978. Sweet & Maxwell, London. Price £28.00.

The Irish legal profession, solicitors equally with barristers, should be aware of the latest edition (Third Edition, 1978) of Richard Bingham's "The Modern Cases of Negligence". One can perceive no more helpful way of focusing one's mind legally on a particular problem arising in this most common area of practice than to open Mr. Bingham's book and find, among the 2,873 cases, one or more which (to quote the author in the preface to the first edition in 1961) "provides(s) those who handle personal injuries claims at any stage with a quick and convenient method of reference to the current trend of decisions on any particular aspect which may arise . . .". The book contains a summary or category reference to all or virtually all the English reported decisions, as well as unreported Court of Appeal decisions of which transcripts are available in the Bar Library in London. Some 500 of the 2,873 cases in this edition are unreported. The growing volume of cases in this area of the law is seen from the increase in the number compared with the second edition (1964) which contained 1,995 cases and compared with the first edition (1961) which contained 1,646 cases, all of which cases are not earlier than the year 1936.

Of course, the value to the Irish practitioner of references to unreported English Court of Appeal decisions (of which transcripts are only readily available in the London Bar Library) is limited, but there are enough well summarised reported cases in any particular category of the subject to recommend its practical usefulness.

The book is broken into three main parts:

Part 1 deals with the more general areas, including duty of care, standard of care, proof of negligence and defences;

Part 2 deals with particular classes, including liability under Donoghue v. Stevenson, dangerous things under Rylands v. Fletcher, animals, and liability of occupiers for dangerous premises;

Part 3 deals with consequential matters, including damages, pleading and practice, and costs.

Each part is broken down into specific categories of cases. By way of example, under the main heading of "Standard of Care" is a sub-category, "Reasonable", with a summary at the beginning of that sub-category of nine summarised cases, such as "Reasonable man – neither over-apprehensive nor over-confident" – "Reasonable man – not a paragon of circumspection" – "Reasonable man – the average man in his good moments"!

What would be of even more benefit to the Irish legal practitioner (solicitor and barrister) would be an Irish supplement to Bingham, particularly if it contained summaries of the many unreported decisions of the Supreme Court and the High Court on the topic of negligence. The preparation of such a supplement (with the approval of Mr. Bingham!) would be a very worthwhile activity for a young practising barrister, not yet overworked, who wanted to ensure that no older colleague out-manoeuvred him by being able to call to mind, while on his feet in the course of legal argument, an unreported decision of years ago, of which everyone except himself and the judge had forgotten.

In conclusion, an amusing reflection of a recent development in the law of negligence is contained in the preface to this third edition, when the author states:

> "Finally, I have to turn to the subject of Errata and Addenda. Previous editions seem to have been reasonably clear of these vices, but one can never be wholly sure on these matters, and accordingly, with the precepts of *Hedley Byrne v. Heller* in mind, it has to be said that the contents of this book are put forward without responsibility in law on the part of myself or the publishers and that neither I nor the publishers assume any duty of care (as distinct from a duty of honesty) in relation therewith."

It does seem unlikely, from the painstaking way this edition (like the previous editions) has been prepared, that Mr. Bingham will have to rely on this exemption clause!

*Michael V. O'Mahony*

**INCORPORATED LAW SOCIETY OF IRELAND**

**PRESENTATION OF PARCHMENTS**

**The next Presentation of Parchments will take place on Wednesday 25th June, at 4.00 p.m. at Blackhall Place, Dublin 7.**

The number receiving parchments will be limited to 75 persons each of whom may bring two guests. This limitation will not prevent apprentices who do not secure a place from entering on the Roll of Solicitors.

**Professor Richard Woulfe**
**Director of Education**

# Bills before the Oireachtas 1980

## During the Dail Session 20 February — 27 March

## and the Seanad Session 6 February — 27 March

| Title of Bill | Effect | Introduced | Position at 27 March, 1980 |
|---|---|---|---|
| Safety in Industry Bill, 1978. | To update and amend the Factories Act, 1955, by making further provisions for securing the safety, health and welfare of persons at work, and to provide for other related matters. | 30 March 1978 (Dáil) | Committee Stage (Dail) |
| Sale of Goods and Supply of Services Bill, 1978. | To amend and extend the provisions of the Sale of Goods Act, 1893, the revision of its provisions and the extension of its scope to embrace hire-purchase transactions, contracts for services, guarantees and other practices in need of regulation. | 7 Nov. 1978 (Dáil) | Passes by Dáil Éireann 28/11/79 At Committee Stage (Seanad) |
| Landlord and Tenant (Amendment) Bill, 1979. | To amend the law relating to the renewal of leases and tenancies and other matters. Contains provision that new leases under Part 3 of the Landlord and Tenant Act, 1931, will now be subject to rent review. Provides for the repeal and re-enactment with amendments of the Landlord and Tenant Act, 1931, and the Landlord and Tenant Reversionary Leases Act, 1958. | 28 Feb. 1979 (Seanad) | Passed by Seanad Éireann 2/5/79 At Report Stage in the Dáil |
| Fisheries Bill, 1979. | To establish the Central Fisheries Board and the Regional Fisheries and to dissolve the Inland Fisheries Trust Incorporated and certain Boards of Conservators established by the Fisheries (Consolidation) Act, 1959, and to provide for other related matters. Amends and extends the Fisheries Acts, 1959 to 1978. | 14 Feb. 1979 (Seanad) | Passed by Seanad Éireann 4/4/79. Passed by Dáil Éireann 20/2/80. Passed by both Houses of the Oireachtas, 12/3/80. |
| Trading Stamps Bill, 1979. | To make provision in relation to trading stamps, including provision for regulating the issue, use, and redemption of trading stamps and to make provision for regulating the business of issuing and redeeming trading stamps and for other related matters. | 14 May 1979 (Dáil) | Committee Stage (Dáil) |
| Plant Varieties (Proprietary Rights) Bill, 1979. | To create proprietary rights over certain plants and to establish an office of Controller of Plant Breeders' Rights and to provide for other related matters. | 10 Oct. 1979 (Dáil) | Second Stage (Dáil) |
| Ombudsman (No. 2) Bill, 1979. | Provides for the appointment and functions of an Ombudsman and other related matters. | 23 Oct. 1979 (Dáil) | Second Stage (Dáil) |
| Local Government (Superannuation) (No. 2) Bill, 1979. | To provide for Superannuation Schemes and the granting of securities in respect of employees of certain bodies. Amends the Health (Corporate Bodies) Act, 1961, the Health Act, 1970, and the Local Government Services (Corporate Bodies) Act, 1971. Repeals the Local Government (Superannuation) Act, 1956, and certain other enactments relating to superannuation and provides for other related matters. | 14 Nov. 1979 (Seanad) | Passed by Seanad Éireann, 21/11/79. At Second Stage in the Dáil. |
| Turf Development Bill, 1979. | To amend and extend the Turf Development Acts, 1946 to 1975, by increasing the borrowing powers of Bord na Móna. | 15 Nov. 1979 (Dáil) | Second Stage (Dail) |

| Title of Bill | Effect | Introduced | Position at 27 March 1980 |
|---|---|---|---|
| National Film Studios of Ireland Limited Bill, 1979. | To authorise the Minister for Finance to take up shares in National Film Studios of Ireland Limited, to provide for the guaranteeing of borrowings by the Company and other related matters. | 26 Nov. 1979 (Dáil) | Second Stage (Dáil) |
| Irish Film Board Bill, 1979. | To provide for the establishment of the Irish Film Board to encourage the development of a film industry in the State. | 26 Nov. 1979 (Dáil) | Second Stage (Dáil) |
| Agriculture (Amendment) Bill, 1979. | To amend the Agriculture Acts, 1931 to 1974, to provide for the appointment of Committees of Agriculture by each council of a County. | 30 Nov. 1979 (Dáil) | Second Stage (Dáil) |
| Law Reform (Abolition of Criminal Conversation) Bill, 1980. | To provide for the abolition of the action known as Criminal Conversation. | 8 Jan. 1980 (Dáil – Private Member's Bill) | Defeated in a vote on the motion for the Second Stage reading 5/3/80. |
| Pyramid Selling Bill, 1980. | To prohibit the inducing of persons to participate in pyramid selling schemes and to provide for other related matters. | 16 Jan. 1980 (Dáil) | Second Stage (Dáil) |
| National Institute for Higher Education, Limerick, Bill, 1980. | To establish the National Institute for Higher Education, Limerick, on a statutory basis and to provide for other related matters. | 4 Feb. 1980 (Dáil) | Second Stage (Dáil) |
| Packaged Goods (Quantity Control) Bill, 1980 | To make provision for a new system of control over the quantity contained in packaged goods. Based on system set out in 2 EEC Directives, 75/106/EEC and 76/211/EEC. | 26 February, 1980 (Dáil) | Second Stage (Dáil) |
| Ministers and Secretaries (Amendment) Bill, 1980 | To provide for the appointment of not more than 15 persons to be Ministers of State, and to provide for other related matters. Amends and extends the Ministers and Secretaries Acts, 1924 to 1977 and amends Sec. 2 of the Statutory Instruments Act, 1947. | 26 February, 1980 (Dáil) | Passed by Dáil Éireann 5/3/80. Passed by both Houses of the Oireachtas, 12/3/80. |
| Social Welfare Bill, 1980 | To give effect to the changes in the schemes of Social Assistance and Social Insurance announced in the Budget statement of 27th February, 1980. | 4 March, 1980 (Dáil) | Passed by Dáil Éireann, 11/3/80. Passed by both Houses of the Oireachtas 12/3/80. |
| Employment Guarantee Fund Bill, 1980 | To establish an Employment Guarantee Fund under the control and management of the Minister for Finance for the purpose of defraying expenditure on projects or schemes which in the opinion of the Minister will result in the creation of additional employment or the maintenance of existing employment. | 12 March, 1980 (Dáil) | Passed by Dáil Éireann 26/3/80. Passed by both Houses of the Oireachtas 27/3/80. |
| Shannon Free Airport Development Company Limited (Amendment) Bill, 1980. | To amend and extend the Shannon Free Airport Development Company Limited Acts, 1959 to 1978. | 20 March, 1980 (Dáil) | Order made for Second Stage. |
| Rates on Agricultural Land (Relief) Bill, 1980 | To allow relief of rates on certain agricultural land by amending and extending the Rates on Agricultural Land (Relief) Acts, 1939 to 1978 | 25 March, 1980 (Dáil) | Order made for Second Stage. |
| Council for Adult Education in Ireland Bill, 1980 | To establish the Council for Adult Education in Ireland, the functions of which shall be generally to plan, organise, co-ordinate, encourage, facilitate, promote and develop adult education. | 26 March, 1980 (Dáil) | Order made for Second Stage. |

## LAW REFORM — NOW!

—*Continued from p. 49*

conservative, the formal advertisements for submissions, followed by the learned working paper, requests for comments and, ultimately, the draft Bill. Perhaps the example of the Australian Law Reform Commission, where the Chairman appears on "talk-in" radio programmes, would be too radical but the New South Wales Commission practice of issuing pamphlets containing brief summaries of the working papers, written in laymans' language, might well be copied.

The approach of our Commission in its working papers has been, in general too academic: while its papers are a fascinating source of legal knowledge, they point in the wrong direction — backwards. There is too much emphasis on research into the state of the law here, which is sometimes found to be uncertain and, while there is useful comparative material, there is too little evidence of a striving to decide what the Law should be.

The topics which the Commission have chosen for themselves,with one exception, are narrow ones. Why only "the law relating to the Domicile of Married Women"? Why not examine the doctrine of domicile itself, confusing to seven of our fellow EEC member countries and a survival of an era when mobility of the population was unknown.

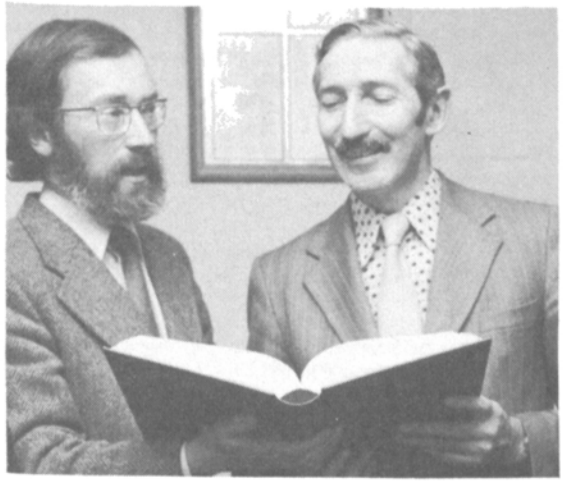
Other countries have recognised the slow progress likely to be produced by Government Departments and Law Reform Commissions entrusted with the drafting of legislation and have tackled these problems by employing experts, on contract, to tackle Law Reform subjects.

Some four years ago the Government of Trinidad and Tobago commissioned Professor J. C. W. Wylie to prepare draft legislation revising their Land Law, Conveyancing Law, Registration of Title Law and Planning Law. All this has now been done by Professor Wylie and the legislation is currently going through the houses of Parliament in Trinidad. He was given a free hand to go out and meet all parties who might have an interest in the reform of the Law, to discuss their problems with them and then to draft the legislation. Our need is perhaps not as great as that of Trinidad and Tobago, but there are certainly wide areas of our Land Law and Conveyancing Law which should be reformed.

Practitioners in other areas would not doubt argue that reform is equally necessary there.

It seems clear that the rate of progress of the three bodies entrusted with keeping our law up to date is not sufficient. Perhaps the Law Reform Commission might improve its productivity by adopting different methods and selecting topics which might be dealt with more rapidly than some of those already tackled.

It is suggested, however that the freelance expert may prove not only a more effective, but a more efficient and, indeed, a more economic achiever of Law Reform than our present combination of bodies.



**S.Y.S. Presentation**

Mr. Terence Dixon (left) Chairman of the Society of Young Solicitors, and Professor Richard Woulfe, Director of Education, Incorporated Law Society of Ireland, admiring one of a set of five bound volumes of the lectures delivered to the S.Y.S. since April 1965. The inscribed volumes were presented by the Society of Young Solicitors to the Law School of the Incorporated Law Society of Ireland at a pleasant ceremony at Blackhall Place on the evening of March 31st 1980. In addition to Mr. Dixon who made the presentation and to Professor Woulfe who accepted it on behalf of the Law School, the ceremony was attended by S.Y.S. committee members, by Mr. James J. Ivers, Director General of the I.L.S.I. and by staff members of the Law School. The set of lectures has been placed in the library for the use of students who were represented at the presentation by Miss Emer Moriarty and Mr. John Hurley.

# Incorporated Law Society of Ireland

## EXAMINATION TIMETABLE 1980

| | *Examination Dates* | *Closing date for receipt of entries* |
|---|---|---|
| Repeat of Final Examination — 1st Part | 18-25 June (inclusive) | 2 June |
| 1st and 2nd Irish | 8 and 9 July | 12 June |
| Preliminary Examination | 15 & 16 July | 12 June |
| 1st, 2nd & 3rd Law Examinations | 13-25 August (inclusive) | 4 July |
| Book-keeping | 7 October | 15 September |
| 1st and 2nd Irish | 2 & 3 December | 3 November |
| Final Examination — 1st Part | (not Fixed) | —— |

**Please note that this Notice corrects the Notice under the heading "Examination Timetable" which appeared at page 41 of the March, 1980 GAZETTE.**

# S.Y.S. Lecture Scripts

**Orders for the Full Set of S.Y.S. Lecture Scripts, in 5 bound volumes, price £191.60 (carriage extra) should be sent to:-**

**S.Y.S TRANSCRIPT SERVICE**
**C/o Mr. Normal Spendlove,**
**Solicitor**
**94, Grafton Street,**
**Dublin 2**

# Notices

**Solicitor,** English, seeks post with Irish Solicitors; qualified 6 years, all-round experience. Write Box 001.

## LOST WILLS

**Kathleen Bolger and Honor Bolger,** deceased, both late of 5, Greenmount Lawns, Terenure, Dublin 6. Anyone having knowledge of any Wills of the above named deceased who died on or about the 25th January, 1980, please contact Mr. Darach Connolly, Solicitor, 21 Parliament Street, Dublin 2.

**Timothy Kinsella,** deceased, late of Clifden Lodge, Vessingtown, Kildalkey, Co. Meath. Will any person having knowledge of any Will made by the above named deceased, who died on or about the 25th of February, 1980, please communicate with Messrs. McMahon & Tweedy, Solicitors, 9/10 Ely Place, Dublin 2.Tel. 688288. Reference "CRMM".



## SOLICITORS SEEKING POSITIONS

Commencing with this issue the Society is making space available in each issue of the GAZETTE to newly-qualified Solicitors seeking employment. The insertion of a notice in this column is free of charge. Those interested in inserting a notice should contact Mr. Nicholas G. Moore, Education Officer, the Law Society, Blackhall Place, Dublin 7.

Replies to Box Numbers in this column should also be addressed to Mr. Nicholas G. Moore, Education Officer.

Recently qualified Solicitor (March 1979), Honours B.C.L., presently engaged in post graduate studies at U.C.C. seeks position. Reply Box No. 1.

Young Solicitor, experience in Conveyancing and Probate seeks challenging position. Anywhere considered. Reply Box No. 2.

Experienced senior managing clerk aged 30, with twelve years experience in English conveyancing/criminal matters seeks employment with Donegal practice. Reply Box No. 3.

Newly qualified Solicitor seeks position in either Dublin or country office. Has experience of general practice (working apprenticeship) and over 1 year's experience of Insurance Litigation. Reply Box No. 4.

23-year-old female Solicitor, B.C.L., apprenticed in leading Dublin office – now out of Articles. Formerly officer of S.A.D.S.I.; skilled debater; worked as a student in Free Legal Aid Centres: Hons. European Law in Final plus working knowledge of German and commercial French. Prepared to work anywhere in the country. Excellent references available. Reply Box No. 5.

Final year apprentice seeks further office experience in the Dublin area. Reply Box No. 6.

Newly qualified Solicitor, good working apprenticeship and academic record, experience in Probate, Conveyancing and Civil Litigation, fluent French, seeks challenging position in Dublin or surrounding area. Reply Box No. 7.

Solicitor, recently qualified, seeks position, city or country, with view to experience. Reply Box No. 8.

Young Solicitor with some experience capable of working on own initiative, seeks challenging position – anywhere considered. Reply Box No. 9.

Solicitor, qualified one year, seeks position in city or country. Has experience in general practice and in EEC Law. Reply Box No. 10.

Newly qualified Solicitor, with good general experience, seeks a challenging position, willing to work in either a town or country practice. Reply Box No. 11.

# The Register

## REGISTRATION OF TITLE ACT, 1964

### Issue of New Land Certificates

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 13th day of June, 1980.**

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

### Schedule

1. Registered Owner: Francis Kennedy; Folio No: 7560 (This folio is closed and now forms the property No. 1 comprised in folio 26866); Lands: Clough West; Area: 28a. 1r. 34p; County: Limerick.

2. Registered Owner: John Nowlan and Philip Joseph Nowlan; Folio No: 16015; Lands: Ballynabola; Area: 140a. 0r. 6p.; County: Wexford.

3. Registered Owner: Catherine McCormack (otherwise Catherine McCormack otherwise Ina McCormack otherwise Catherine Daffy otherwise Ina Daffy); Folio No: 4688; Lands: Mooeenalion Commons Upper, Barony of Newcastle; Area: 8.806 acres; County: Dublin.

4. Registered Owner: Edward McSwiney; Folio No: 2426; Lands: Rooves More; Area: 0a. 0r. 22p; County: Cork.

5. Registered Owner: Michael Stokes; Folio No: 2271; Lands: Ballyvockoge; Area: 38a. 3r. 30p.; County: Limerick.

6. Registered Owner: Helen Daly; Folio No: 15104; Lands: Dawros; Area: 70a. 0r. 11p.; County: Galway.

7. Registered Owner: Edward Daly; Folio No: 9432; Lands: Mullinganstown; Area: 66a. 1r. 31p.; County: Westmeath.

8. Registered Owner: James Patrick Fowley; Folio No: 230 LSD; Lands: Drumcondra, Parish of Clonturk; Area: ——; County: Dublin.

9. Registered Owner: Bernard McGuinness; Folio No: 6432; Lands: Commons Lower; Area: 23a. 1r. 8p.; County: Dublin.

10. Registered Owner: John Casserly; Folio No: 2827; Lands: Coolnahinch; Area: 14a. 1r. 24p.; County: Longford.

11. Registered Owner: Henry Reburn; Folio No: 4112; Lands: Cashel; Area: 17a. 1r. 29p.; County: Cavan.

12. Registered Owner: Kathleen O'Dea; Folio No: 4034; Lands: Tuiterath; Area: 5a. 3r. 1p.; County: Meath.

13. Registered Owner: Patrick Coughlan otherwise Coghlan; Folio No: 9083; Lands: (1)Cloncarbon, (2) Cloncarbon, (3) Clonbeale More, (4) Cloncarbon, (5) Clonbeale More; Area: (1) 35a. 1r. 8p., (2) 8a. 1r. 10p., (3) 8a. 3r. 20p., (4) 11a. 2r. 10p., (5) 5a. 1r. 10p.; County: Kings.

14. Registered Owner: Thomas Duggan; Folio No: 35398; Lands: Clooncarrabaun (situate on the south side of Chapel Street in the town of Louisburgh, Parish of Kilgeever.); Area: 0a. 0r. 11p.; County: Mayo.

15. Registered Owner: Patrick J. Donohoe; Folio No: 13656; Lands: (1) Liss (Part), (2) Liss (24 undivided 216th part of other part); Area: (1) 13a. 3r. 0p., (2) 17a. 1r. 35p.; County: Galway.

16. Registered Owner: Catherine Carty and John Carty; Folio No: 23938; Lands: (1) Oldtown (Kilcashel), (2) Oldtown Kilcashel, (3) Cranberry Island; Area: (1) 33a. 1r. 37p., (2) 0a. 3r. 5p., (3) 2a. 0r. 9p.; County: Roscommon.

17. Registered Owner: James Rohan; Folio No: 29063; Lands: (1) Deelis, (2) Deelis, (3) Deelis; Area: (1) 11a. 2r. 12p., (2) 1a. 2r. 16p., (3) 2a. 2r. 17p.; County: Kerry.

18. Registered Owner: John Donelan; Folio No: 627 (This folio is closed and now forms the property No. 1 comprised in folio 36787 Co. Galway); Lands: Kilnalappa; Area: 43a. 04. 19p; County: Galway.

19. Registered Owner: Michael J. Murray; Folio No: 50633; Lands: Swineford; Area: 0a. 0r. 26p.; County: Mayo.

20. Registered Owner: John Sullivan; Folio No: 22217; Lands: Cullenagh Lower; Area: 12a. 2r. 0p.; County: Kerry.

21. Registered Owner: John Reilly; Folio No: 4550; Lands: Derreenavoggy; Area: 32a. 0r. 21p.; County: Longford.

22. Registered Owner: Thomas Rhatigan; Folio No: 1078; Lands: (1) Tullyvrane, (2) Lehery (Part); Area: (1) 13a. 3r. 0p., (2) 31a. 0r. 36p.; County: Longford.

23. Registered Owner: Michael McCabe and Marion McCabe; Folio No: 149L; Lands: Property known as No. 18 Railway Road in the town of Killeshandra and Barony of Tullyhunco; Area: ——; County: Cavan.

24. Registered Owner: Michael Joseph Byrne; Folio No: 8209; Lands: Glencormick South; Area: 6a. 3r. 6p.; County: Wicklow.

25. Registered Owner: Mary Doyle; Folio No: (a) 8972, (b) 8973; Lands: (a) Knocks (Part), (b) Knocks (Part); Area: (a) 2a. 0r. 32p., (b) 1a. 0r. 16p.; County: Wexford.

26. Registered Owner: Margaret O'Riordan; Folio No: 2574; Lands: (1) Clydagh, (2) Addragool (One undivided sixth part); Area: (1) 4a. 1r. 13p., (2) 9a. 0r. 28p.; County: Galway.

27. Registered Owner: Jeremiah Bernard O'Sullivan; Folio No: 11031; Lands: Gortnaclohy; Area: 9a. 1r. 16p.; County: Cork.

28. Registered Owner: Colette Duggan and Josephine Pender; Folio No: 14384F; Lands: A plot of ground situate to the south side of Curraheen Road in the parish of St. Finbarr and Townland of Ballinaspigmore; County: Cork.

29. Registered Owners: James Cullen and Marcella Cullen; Folio No: 5179 (Revised); Lands: Clogrenan; Area: 31.543 acres; County: Queens.

30. Registered Owner: Annie McDonagh; Folio No: 2307; Lands: Shenicks Island, Balrothery East; Area: 14.406 acres; County: Dublin.

31. Registered Owner: Thomas and Ann O'Leary; Folio No: 9835F; Lands: Kilmoney situate in the Barony of Kerrycurrihy; County: Cork.

32. Registered Owner: James Carthy - deceased; Folio No: 11590; Lands of Rush with the cottage thereon; County: Dublin.

33. Registered Owner: Richard Donohoe; Folio No: 7582; Lands: (1) Lissagallan, (2) Cams (One undivided sixtieth part); Area: (1) 24a. 3r. 25p., (2) 30a. 0r. 0p.; County: Roscommon.

34. Registered Owner: Thomas Williamson; folio No: 16792; Lands: Inishammon; Area: 37a. 2r. 38p.; County: Monaghan.

35. Registered Owner: James Walsh; Folio No: 5206 (Revised); Lands: Mountneill; Area: 51a. 3r. 18p.; County: Kilkenny.

36. Registered Owner: Thomas Glennon; Folio No: 8119; Lands: Toor (Part); Area: 8a. 3r. 4p.; County: Meath.

37. Registered Owner: Martin Allen; Folio No: 23132; Lands: (1)Loughatarick South (Part), (2) Loughatarick South (One undivided third part), (3) Loughatarick South (Two undivided tenth part of part.); Area: (1) 13a. 1r. 17p.; (2) 121a. 3r. 15p., (3) 680a. 1r. 32p.; County: Galway.

38. Registered Owner: Peter McAteer; Folio No: 3981; Lands: Corglass; Area: 23a. 3r. 8p.; County: Longford.

39. Registered Owner: Ellen Manley; Folio No: 814; Lands: Ballybeg; Area: 4a. 1r. 2p.; County: Wicklow.

40. Registered Owner: James Power; Folio No: 9302; Lands: (1) Carrickaready, (2) Ballyvadden; Area: (1) 128a. 2r. 13p., (2) 35a. 3r. 30p.; County: Waterford.

41. Registered Owner: John Joseph Finn; Folio No: 2147; Lands: Portersize; Area: 114a. 3r. 35p.; County: Kildare.

42. Registered Owner: Michael Stafford; Folio No: 978; Lands: Ballynastraw; Area: 32a. 2r. 0p.; County: Wexford.

43. Registered Owner: Doris Farrell; Folio No: 17917; Lands: Cornacarrow; Area: 5a. 0r. 32p.; County: Cavan.

44. Registered Owner: Hugh F. Quinn; Folio No: 42160L; Lands: Knocklyon, Barony of Uppercross; Area: 0a. 0r. 11p.; County: Dublin.

45. Registered Owner: Denis E. Lucey; Folio No: 690L; Lands: The Leasehold interest in the property situate in part of the Townland of Leixlip in the Barony of Salt North; Area: 0a. 0r. 10p.; County: Kildare.

46. Registered Owner: Clement Joseph Deevy; Folio No: 5602; Lands: The dwellinghouse and premises situate on the South side of a new road leading Southward from passage road in the Parish of St. John's and City of Waterford measuring in front to the said new road 37 feet in the rere 32 feet and in depth from front to rere on the West side 225 feet 8 inches; County: Waterford.

47. Registered Owner: Patrick O'Rourke; Folio No: 22574; Lands: Glantaunluskaha; Area: 1a. 0r. 0p.; County: Kerry.

48. Registered Owner: Maurice and Catherine Davidson; Folio No: 52716; Lands: Maulicarrane; Area: 9a. 2r. 23p.; County: Cork.

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THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

May 1980 Vol. 74 No. 4

LAW SOCIETY ANNUAL CONFERENCE, BLACKHALL PLACE, DUBLIN, 1-4 MAY, 1980.

**Speakers at the session, "Farming and Finance" were *from left:* Mr. Donal G. Binchy, Mr. Walter Beatty, President of the Incorporated Law Society of Ireland, Mr. W. D. McEvoy, Mr. T. J. Maher, President of the Irish Co-Operative Organisation Society Ltd., and Mr. W. A. Osborne.**

Executive Editor: Seamus L. O'Kelly.
Editorial Board: John F. Buckley, Charles R. M. Meredith, Michael V. O'Mahony, Maxwell Sweeney.
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# Half-yearly General Meeting of the Society

## held at the headquarters of the Society, Blackhall Place, Dublin 7, on Friday, 2nd May, 1980

The meeting was called to order by the President Mr. Walter Beatty, at 10 a.m. precisely. The list of members present is recorded in the Attendance Book. The Director General, Mr. James J. Ivers, was also in attendance.

### WELCOME

**Mrs. Moya Quinlan,** Senior Vice-President of the Society and President of the Dublin Solicitors Bar Association, warmly welcomed the delegates in Irish and in English.

### NOTICE OF MEETING

The notice convening the Meeting, having been circulated, was taken as read.

### MINUTES

The Minutes of the Annual General Meeting held at Blackhall Place, Dublin, on the 25th November 1979, having also been duly circulated were likewise taken as read at the suggestion of the President, Mr. Walter Beatty.

### PRESIDENT'S ADDRESS

The President of the Society, **Mr. Walter Beatty,** then delivered his presidential address, which is reported at page 73 of this issue of the Gazette.

### SUPERANNUATION SCHEME — PROGRESS REPORT

The Progress Report was read by **Mr. Maurice Curran,** Chairman Finance Committee. The details are at page 74 in the Gazette.

### AMENDMENTS TO THE SOCIETY'S BYE LAWS

In the absence of Mr. A. Smyth, on his nomination, **Mr. John F. Buckley** proposed and **Mrs. Moya Quinlan** seconded a motion that Bye Law 28 be amended to read as follows:—

"The President and Vice-Presidents, with such other number not to be less than seven, of members of the Society (but not of the Council), as may be determined by the Council from time to time to be nominated by the Chairman of the previous Meeting, together with the Director General, shall be Scrutineers of the Ballot (three forming a quorum), and have charge of the Ballot boxes, which, after the close of the Poll are to be sealed by the Scrutineers of the Ballot, and remain sealed until the scrutiny shall commence."

Introducing the motion **The President** indicated that the Council had nominated the following Scrutineers:— Messrs. P. D.M. Prentice, J. R. C. Green and P. C. Moore.

The amendment was passed unanimously.

**Mr. John F. Buckley** then proposed and **Mrs. Moya Quinlan** seconded an amendment of Bye Law 33 as follows:—

That Bye Law 33 be amended by the insertion of the words "and standing committee meetings" after the words "council meetings" in the said Bye Law and that Schedule 'C' to the Bye Laws be amended by the addition of the following columns **Maximum number of attendances at standing committee meetings during past year.** (When this column is blank the candidate is not a member of out-going council). **Actual Number of attendances at Standing Committee Meetings during past year.** (When this column is blank the candidate is not a member of out-going council).

Mr. Buckley in proposing the motion said that its object was to give a credit to those members of the Society who are actually doing the most work. The Council meetings were generally held in an afternoon and because of improvement in procedures and methods now rarely occupied more than one and a half to two hours. The actual day to day working of the Society was carried out by Standing Committees meeting frequently during the year and it was right that Council members attending those meetings should get credit for their attendance. The Council Meetings owed their great efficiency to the work of the Standing Committees.

**Mrs. Moya Quinlan** supported the motion. **Mr. Laurence K. Shields** said Standing Committee meetings took place on days other than many Council Meetings and to that effect most of the work of sub-committees was carried out by a few members who got no recognition for their work. Most of the work fell on the shoulders of some members only. **Mr. Frank D. Daly,** opposed the motion. He agreed that the Dublin members carry a greater burden but that was due in the main to their availability. If members from Cork, Donegal, and Kerry, for example were to attend, they would have to give up a complete day and while they were quite willing to do their share they were at an obvious disadvantage. He feared that if the motion were carried in its present form it would result in the polarisation of the profession as between Dublin members and Country members. **Mr. David Pigot** said that he basically agreed with the motion but he thought Mr. Daly's point was valid. The practicality of the matter was that the Standing Committee meetings could not be confined to Council days. There were also to be considered other committees which did not function as Standing Committees, for example, those dealing with accountancy regulations, conveyancing matters and so forth. **Mr. Brendan Allen,** also opposed the motion.

The President intervened to say that having regard to the matters which emerged in discussion he was sure that Mr. Buckley would agree to the deferment of his motion to a later date. In the interim the matter could be discussed between city and country solicitors. **Mr. Buckley** agreed to withdraw the motion for discussion and possible rephrasing. Others who spoke to this motion were Mr. Patrick O'Connor, Swinford, Miss Carmel Killeen and Mr. McEvoy.

Mr. Laurence K. Shields commented upon the procedure recently adopted by the Government in amending legislation by Statutory Instrument and particularly by signing a Statutory Instrument on the same day as the Instrument came into force. The President noted Mr. Shield's remarks and it was agreed that representations would be made in respect of this matter.

**Appointment of Scrutineers of Ballot for Council for 1980/81**

Following the amendment of Bye Law 28 the meeting elected eight scrutineers as follows, Laurence Brannigan, Eunan McCarron, Alexander MacDonald, Brian McCormack, Roderick Tierney, Peter D. M. Prentice, James R. C. Green and P. C. Moore.

**Other Business**

A matter raised by **Mr. M. B. O'Maoileoin** under this heading was ruled out of order by the President.

There being no other matters for discussion the meeting was declared closed.

## Dublin Document Exchange

Members are advised that the Law Library's Box, No. 81, will be closed during the long vacation.

# President's Review

A strong speech by the President, Walter Beatty, to the half-yearly meeting of the Society, focussed attention on the weaknesses of the free civil legal aid scheme and was widely reported in the newspapers.

He said, in part, that the Society has advocated a free civil legal aid scheme for many years. It made representations to the Department of Justice, which were ignored, and a scheme which provides seven law centres was introduced without reference to the Society. "We welcome the introduction of a free legal aid scheme, but sadly this welcome is on the basis of 'any scheme is better than no scheme at all'. We hope that what has been introduced is merely an interim scheme, and, if it is expanded to take into account the location and the expertise of this profession as a whole, it can become a good scheme, and I would urge that the Department of Justice would broaden the scheme to do just that. There is no objection to law centres in the big cities, but these cannot serve rural Ireland. People will become suspicious of it because in areas like Waterford, Sligo and Galway, in matters of family law, travelling necessities will dictate those involved in a broken marriage attending the same centre. This is highly undesirable. Can you imagine the same firm of solicitors acting for husband and wife in dispute?

## NO CHOICE

"In the booklet issued to the Oireachtas last December, there is a most misleading heading 'Choice of Lawyer'. There is no choice of lawyer. There is only choice of a lawyer in a centre, and that means that in Dublin somebody either has to move from Ballymun to Tallaght — or maybe travel all the way to Galway. The lawyers in the centre — and this is the only service that is envisaged at this stage — will be paid civil servants, and, if they are not very good, or if you had a row with them previously, or if you are involved in a broken marriage and do not believe that the one centre should act for your husband as well as yourself, then you must go to another centre.

"There is a means test, and most people will be contributing towards the cost of the scheme. Therefore, they should have the right to choose their own lawyer. The dispensary system was abolished approximately ten years ago, and since then there has been choice of doctor. The same principle was applied recently in relation to opthalmic services.

"Take Mayo, where there is no centre. It is a small-farmer agricultural county and the only appreciable industrial towns are Ballina, Castlebar and Westport. The nearest centres will be in Galway and Sligo. There will be two lawyers in the centre in Sligo who will be dealing with that county, County Donegal, County Monaghan, County Cavan, County Leitrim, County Roscommon, parts of Longford and Westmeath, and, most important of all, with Co. Mayo.

## TRAVEL PROBLEMS

"A Mayo person living in Belmullet, if they want to avail of free civil legal aid at the centre in Sligo must telephone to make an appointment, because otherwise the two lawyers may be out at the many District Courts that they will have the impossible task of trying to cover. Then, unless they possess a car — unlikely if they are looking for free civil legal aid — they must leave Belmullet at 7 a.m., and probably arrive in Sligo between noon and 1 p.m. They would then be faced with returning from Sligo that evening to Ballina at approximately 8 p.m., and there would be no connection to their home in Belmullet from Ballina at that hour. What about the travelling cost? A ticket from Ballina to Galway, or Ballina to Sligo, would cost approximately £4.50 and £3.00 return respectively. If it is a family law case, the aided person will have to travel probably at least on three occasions to the centre, and the lawyers in the centre, who are covering the District Courts, may on occasions have to travel anything up to 120 miles at an average cost of 25p per mile.

"In Mayo there are 19 towns in which the District Court sits, and this means that in that county alone there are 19 days out of every 20 working days in every month in which the Distrcit Court is sitting. In addition, the Circuit Court sits at Castlebar, Westport, Ballina and Swinford during seven weeks of the year. Picture two lawyers in Sligo, who will get the brunt of that county in the first instance, trying to deal with 19 District Courts all over the county in Mayo during 20 working days every month, and also trying to deal with all the courts in Sligo, Donegal and the other counties mentioned. It can only create a cause of serious grievance in the mind of the public, who eventually, unless there is a vast improvement in the scheme, must turn its back on the centre system, which means that we, as a profession, will once more be asked to deal with this problem because it is there, and because the Department's scheme has failed. It is essential that the Department takes the necessary steps to broaden this scheme so that people will not have to travel long distances to a centre, and so that they will have a real belief in the scheme, and it is essential that the Department extends the scheme so that the profession, as a whole, is involved, a system which has worked well in other countries and is the only system which will work well here.

## ROLE OF THE BAR

"One last point is the position of the Bar in the scheme. Some people may think that District Courts and Circuit Courts can be dealt with by barristers being in attandance. This is not an answer, because, apart from the enormous expense involved, barristers cannot appear in Court without being attended by a solicitor or by someone from his office. A breach of this rule would be considered a serious disciplinary matter by the Bar Council.

## INCREASE IN FEES

"Eight years ago a secretary's salary was approximately £40.00 per week. It is now well over

double that figure. In those days I could fill the tank in my car for £3.00. It now costs me £15.00. I could heat my office for £300 a year. Using a lot less oil now, it costs me over £1,200 a year. During those eight years there has been a vast increase in the cost of stationery, postage, telephone charges, lighting, rents and all the other overheads that are routine to running a business. The last general increase that this profession received in fees was eight years ago. On the 20th September 1978, we filed an application with the Prices Commission for adjustment in Court costs, and no action whatsoever has been taken by the Commission in relation to our application. Professor Lees headed an enquiry into solicitors' remuneration and he received every assistance from this profession. The findings were by and large fair, and, with one or two exceptions, were acceptable. His findings were not implemented by the Prices Commission, nor by the Department of Justice. So, we have had the expense of a lengthy enquiry paid for out of State funds and the disullusionment of the members of the profession throughout the country, who gave many hours of their time in assisting the enquiry on a voluntary basis.

### REPORTS IGNORED

"The all to frequent failure to implement the many reports which have issued from voluntary boards are are a cause of concern. If this practice continues it will become very difficult to find first-class people to serve on Boards in the future. Apart from the Pringle Report of Civil Legal Aid, many worthwhile reports have been submitted by the Committee on Court Practice and Procedure, and reform here is long overdue. Nothing has been done to implement these reports, and our Courts are, therefore, not able to function as they should.

The Law Reform Commission was established in 1975 and working papers have been published to deal with a number of subjects. There is a great need for reform of the law in this country in a practical way. There are many instances where out-moded practises still exist, and where fines and other statutory money figures are quite ludicrous. "I would urge the Department of Justice to get down to it, and to bring in legislation swiftly to cure such anomalies as exposure to being made bankrupt for £40, which was fixed by statute when Queen Victoria was still a young woman. Another example is Section 49 of the Civil Liability Act 1961, which fixed the limit on compensation for distress in fatal injury cases at £1,000, a figure that had some meaning then but has none now. An indexing formula should be introduced in all statutes in future, so that money values will keep pace with inflation."



# RETIREMENT FUND GROWTH

There was an increase in the membership of the Society's Retirement Annuity Plan during the past year, but the committee believes that the comparatively slow growth is due, in part, to the age imbalance of the profession where half the members are still concentrating on developing their careers and not interested in retirement.

The Retirement Annuity Plan is operated on a unit basis. The initial (1975) unit was 100p (97.59 after the administration charges); on March 1 last the unit value was 211.03p — a gain of over 111p free of tax since the inception of the Fund. The Fund valuation on March 1 last was just over £950,000, by the end of April — due to the subscriptions received to that date — the total Fund reached £1.13 million.

The first property investment was made during the past year; further such investments will be made, as appropriate. In the meantime the Fund continues to be invested in Irish and UK gilts and equities.

The associated Life Assurance Plan is commended to the younger members of the profession; it is organised through the New Ireland Assurance Company Ltd. at very competitive rates.

Since April 6th last premiums payable under the Income Continuance Plan are fully allowable against personal tax, under Section 8 of the 1979 Finance Act. Benefits, however, once tax relief has been granted on the premiums will be taxable under PAYE at source, the underwriting company acting as a subsidiary employer. Solicitors who are self employed, can apply for an exclusion order under Section 125 of the 1967 Income Act, and once an exemption has been granted, any claims payments will be brought into the individual's accounts and charged as part of business profits.

This tax relief should be an added incentive for solicitors who have not yet joined the Income Continuance Plan, to become mambers and avail of the protection provided.

Negotiations were successfully concluded during the year, which increased the maximum cover available from £15,000 to £520,000, provided this amount does not exceed 75% of annual remuneration less a single person's basic disability entitlement, if applicable. Also, the exclusions relating to suicide and alcoholism have been removed, the only siginficant exclusion remaining is the war risks clause.

The Committee, in its report, thanked the Trustees — Mr. E. M. A. Cummins and Mr. J. Power, Trustee Department, Bank of Ireland; Mr. D. Harvey Kelly and his colleagues in the Investment Bank of Ireland; Mr. John O'Connor, Solicitor, and the Society's Finance Director, Mr. P. J. Connolly, who audits the Fund.

# Legal Services for the Community

A Paper read to the Law Society Annual Conference
by
Dr. Michael Zander, Professor of Law,
London School of Economics

Mr. President, Ladies and Gentlemen,

It is a great honour to be invited to address the Conference. I am delighted to be here to take part in this session and to have the opportunity of meeting many of you.

My theme is Legal Services for the Community — a title which covers every aspect of the services provided by lawyers and non-lawyers in dealing with the legal problems of citizens. Obviously it is impossible to deal with the whole subject. I shall therefore limit myself to a few central issues. My purpose is to suggest that in recent years a consensus has started to emerge in many countries as to the way to deal with legal problems. There are of course significant differences of approach between countries and some counties are able to devote considerably greater resources to the subject than others. But the conceptual and policy problems are beginning to be resolved as, increasingly countries agree on the best way to proceed.

**Legal Aid**

First, it has now been almost universally accepted that any country which has a serious concern for equality of justice must establish a legal aid system based on government funding. The old notion that the legal profession could be relied on to provide such services as were needed by the poor by way of charitable contribution is today wholly discredited. Much very valuable work has of course been done by private practitioners without fee but the reality is that few can make a significant proportion of their time available to provide services without charge. Some do little or nothing and even those who do a good deal cannot be expected to provide unremunerated services on any considerable scale. A private practitioner has to charge for most of the work he does in order to remain in practice. Unless the state is willing to provide legal aid at its expense the legal system will in practice be inaccessible to the poor.

**The Airey Case**

This proposition was recognised not merely as a political axiom but as a legally enforceable principle by the European Court of Human Rights in the recent decisions in the *Airey* case. Mrs. Johanna Airey complained that she was denied her rights under the European Convention through the non-existence in Ireland of any system of legal aid to enable her to bring proceedings for judicial separation. The Irish Government resisted her claim but in October last the Court by a majority found that there was a denial of access to the High Court for the purpose of obtaining a determination of Mrs. Airey's civil rights contrary to Article 6 of the Convention. Not all civil cases required the provision of legal aid. In some types of cases it might be possible for the applicant to handle the case on his or her own but if the citizen could not in practice manage without a lawyer it was the duty of the state to provide one. Although therefore the state did not have to provide free legal aid for every dispute relating to a civil right, Article 6 compelled the state to provide for the assistance of a lawyer "when such assistance proves indispensable for an effective access to court either because legal representation is compulsory ... or by reason of the complexity of the procedure or of the case".

The *Airey* case is a welcome affirmation of the principle of equal access to justice. So far as Ireland is concerned it came only a few weeks before the Minister for Justice laid the Government's proposals for a civil legal aid scheme before the legislature. Presumably the Government's plans had in fact been agreed before the European Court gave its decision. At all events, when implemented it will give tangible expression to the Irish Government's commitment to the principle of state aid for legal services in civil as well as in criminal matters.

**Two Approaches to Legal Services**

The second main principle that is increasingly accepted in country after country is that a variety of methods are needed to put legal services on the ground. The two chief approaches to this problem have been that of the English system based on legal aid provided by private practitioners and the American model which has relied rather on state salaried lawyers working in neighbourhood law firms or law centres rather than private firms.

Each of these two great systems has its strengths. The chief advantage of providing legal aid through private practitioners is that they are already there and are scattered widely throughout the community. Law centres by contrast have to be set up, at considerable cost. It may or may not be true that law centres are cheaper per unit of work done but a very substantial capital sum has to be expended to establish a national newwork of law centres to duplicate the geographical spread of private offices. Of course if legal aid were to be made available only to the very poorest and if they all obligingly lived in a small number of areas law centres on their own might be the answer — but the objective of most properly constituted legal aid schemes is to reach more than the very poorest and in any event the poor tend to be found in many areas. Clients do not want to travel great distances to get a lawyer and if those eligible for the scheme are to be served, access to private practitioners is likely to be easier to achieve than building up a national network of law centres.

The difficulties for potential clients to reach the small number of proposed law centres were vividly illustrated in the powerful Presidential address of Mr. Walter Beatty, and I wholeheartedly endorse his view that half a dozen or so centres for the whole of the Republic of Ireland is bound to be completely inadequate.

**Skills already there in Private Practice**

The second great advantage of using private

practitioners is that they already have the skills to deal with a considerable part of the work that the poor would want to bring to lawyers. This applies especially in the field of matrimonial matters which in most countries is the largest single item of work in the civil field. Whether this would be true in a country such as Ireland with its special attitude to divorce remains to be seen but there can be little doubt that many of the legal problems of the poor are the same as those of the middle classes. Legal difficulties connected with the ownership of property, by definition, do not greatly affect those who have none but when property related issues and matters are excluded research shows that many legal problems affect the social and economic classes more or less equally. The special survey done for the English Royal Commission said for instance that in matters which did not concern property 'the profile of users of lawyers' services by socio-economic group is not greatly different from that of the adult population in general'. (*Report of the Royal Commission on Legal Services*, Cmnd. 7648, Vol. 2, p. 205, para. 8.115). Insofar as private practitioners already possess the know-how to handle the legal problems of the poor, it is obviously sensible to employ that experience rather than to establish new offices with different lawyers.

This is the more true since experience shows that salaried service in law centres tends to attract young, enthusiastic but necessarily inexperienced lawyers whereas legal aid via private practitioners makes use of the full range of experience in the profession. In the United States for instance most legal services to the poor are provided by the few thousand young neighbourhood law firm lawyers. In England by contrast legal aid is provided by many more thousands of solicitors and barristers, including most of the leaders of the profession. Even Queen's Counsel derive a considerable proportion of their earnings from legal aid work.

I therefore think it very unfortunate that the Irish Government's proposed civil legal aid scheme should be based entirely on salaried lawyers (full-time or part-time), and that the recommendation of the Pringle Committee for a mixed system using law centres and private practitioners should have been rejected. I am a great supporter of law centres and regard them as an essential feature of a developed legal aid system but I do not believe that they should be used to shoulder the main burden of civil legal aid. Indeed, I am convinced that if they are used in this way one risks losing the main virtue of the law centre concept. First, it fails to make use of the huge resource of the private profession which is more or less geographically spread to provide a service to the public. Secondly, the law centres will as a result be swamped by the kind of work that traditionally comes into solicitors' offices and as a result will have little time to undertake the even more valuable work for the broader community which law centres in England at least see as their main raison d'etre.

**Government's Unease**

I sense in the Irish Government's scheme a distinct unease about legal services that go beyond the narrowest confines of the relationship between the lawyer and an individual client. The applicant would be refused a certificate for legal aid it is said if he is acting in a representative capacity or where numerous persons have an interest or where the application is not made in the sole interest of the applicant but 'is of a kind commonly described as a test case' (para. 3.2.4, p. 14). It is true that the document goes on to say that an applicant will not be refused by reason only of the fact that the proceedings if successful would benefit other persons, but that in such a case the Legal Aid Board would assess the applicant to an additional contribution reflecting the reasonable participation of such other person. I am bound to say that if such restrictive conditions had been laid down to guide law centres in the United States, Canada, Australia or England the law centre movement would not have made the great impact it has as a new model for the provision of legal services.My fear is that the Irish Government's scheme will achieve the worst of both worlds. The elimination of the private practitioner from the system will deprive the citizen of easy access to local lawyers capable of handling ordinary civil disputes. On the other hand, the insistence that the law centres engage only in case-work for individual clients will emasculate the law centre movement.

**English Royal Commission**

Admittedly the Royal Commission on Legal Services in England did take a distinctly frosty tone about the broader kind of law centre activity. Law centres it said should confine their activities to providing legal advice and assistance and representation in regard to legal problems. Some law centres went beyond this to work for the community at large or sections of it. They often sought 'to attack the roots of problems by organising groups to bear on landlords, local authorities and central government either to improve working, housing or living conditions or to urge changes in priorities of public expenditure' (Vol. 1, p. 83, para. 8.19). Such work the Royal Commission said was not appropriate for a salaried legal service. But this part of the Royal Commission's Report seems to me to be based on a fundamental misreading of the nature of law centre work. Of course a line has to be drawn somewhere as to what work is properly within the scope of a state salaried lawyer. But if the line is drawn as narrowly as the Royal Commission suggest much of the point of having law centres in lost. The law centres in their evidence to the Royal Commission said that they were increasinly convinced that work for groups was more important than work for individuals and that this was where they saw their main contribution to lie. Unfortunately they did not give the Royal Commission enough insight into what kinds of activities they had in mind. It was only after the Report was published that they produced in their response to it a long list of examples of law centre work that ought, they argued, to be permitted.

One law centre for instance had acted for numbers of parents concerned about the effects on children of lead in petrol. This led to discussions with the local authority which eventually agreed to try to ban the sale of petrol containing lead throughout the borough. Another law centre helped to push for better conditions in a large doss house with over a thousand beds and advised on the residents' rights to medical care, welfare benefits, and decent housing. A law centre negotiated with the local authority better conditions in regard to rapair and security of tenure for all the tens of thousands of council tenants in the borough. Another got engineers and surveyors to report on the conditions of highways and pavements which had fallen into bad repair causing an unusual number of accidents and as a result persuaded

the local authority to spend much more money on highway maintenance. Another law centre acted for a group of pensioners worried about getting heating allowances to help them form an association and to get a lease. The general experience of law centres the report said was 'that people need and demand to have their problems approached in a way which differs from that of private solicitors. It is a way which makes it necessary for the law centre employees to be available outside the centre — in the tenants' and residents' associations, in the youth clubs and luncheon clubs, at meetings in the evenings or at weekends, providing legal services which is innovative and imaginative' (Law Centres Federation 'Response to the Royal Commission on Legal Services', p. 15). The proposed Irish scheme I believe will not easily be capable of providing legal services that are innovative and imaginative if the lawyers are restricted in the ways outlined in the Government's paper.

**Local Committees**

The Government's proposals do however recognise albeit in a somewhat halfhearted way, the concept of local consultative committees for law centres. Local Committees consisting in the main of local residents have proved to be a very valuable aspect of the English system. Under the proposals the Legal Aid Board would have the power to establish such committees if it thought 'that legal services could be provided more effectively in a particular area if consultations between persons representing local interests and the person responsible for the management of the centre were provided for' (para. 5.3.2.). This puts it very tentatively. It would be greatly preferable I believe if, as proposed by the Pringle Committee, the Board were expected to establish such a committee in each locality where a law centre was set up. The consultative committee can perform the crucial function of keeping the law centre in touch with local problems and conditions and of helping it to decide its priorities.

But although the Government seem to be equivocal about the need for lay participation in running law centres at the local level it seems to be persuaded of the value of having this arrangement at the national level.

**Legal Aid Board**

The Legal Aid Board has 12 members of whom only two are practising barristers and two are practising solicitors. Several of the first appointees are civil servants but two at least are ordinary laymen.

In England civil legal aid is of course run by the Law Society — under the watchful eye of the Lord Chancellor's Legal Aid Advisory Committee. (The Government have just announced that it intends to implement the recommendation of the Royal Commission that criminal legal aid should also come under the aegis of the Lord Chancellor and therefore presumably within the scope of the Advisory Committee.) In England therefore the scheme gives the professional body the responsibility for managing the scheme but there is a broadly based advisory committee with a lay chairman and a substantial number of other laymen to act as the watchdog — monitoring developments.

Some of the evidence to the Royal Commission, notably that of the Legal Action Group, suggested that legal aid should be taken away from the Law Society and given instead to a new Legal Services Commission which would have the task not only of running the legal aid scheme but of acting as policy maker and review body. The Royal Commission preferred that legal aid should be left with the Law Society but that a new Legal Services Council should be created with the task of keeping under review the provision of legal services in the whole country whether provided by private practitioners or by law centres and whether from the public or the private purse. The Council would have mainly advisory functions though it was also said that it should have such executive functions, if any, as might be allocated to it by the Lord Chancellor.

The Irish scheme provides for a very different set-up. The running of the scheme would be in the hands of the Board which would therefore have to make provision not merely for policy management but also establish and run systems to handle the processing of applications. It would run law centres, determine and collect contributions from clients and generally manage the fund. In this proposal the Government has followed the recommendation both of the Law Society and of the Pringle Committee but I am not convinced that it will provide the best answer. In one sense it appears a more accountable system than the English where so much power seems to lie with the professional body. But in fact the Law Society has little real power — its main task is simply one of stewarding and administration. In my estimation there is much value in separating the day-to-day administration of the scheme from the review of policy. That is why in my own evidence to the Royal Commission I urged that the Law Society be left to run the scheme and that the Advisory Committee be given the widest possible terms of reference. This was in fact the scheme adopted by the Royal Commission.

**Administration of scheme**

Under the Irish proposals the Board will have the job of day-to-day administration even though most if not all of its members will be part-time. Obviously it will have to employ persons to carry out its administrative functions. I imagine that the membership of the Board is likely to be broad and there will therefore be a variety of viewpoints represented to feed in ideas about the ways in which to develop legal services. But there will be no one outside the Board to act as Greek chorus on a continuing basis. One problem is of course that it would be inappropriate I suppose to ask the Law Society to run a scheme which consists wholly or mainly of salaried law centres. Some concept such as that of the proposed Board was probably inevitable. But ways will have to be found of keeping the Board in touch with continuing developments.

One technique that the Lord Chancellor's Advisory Committee has instituted is to hold conferences at which the main interested parties assemble from time to time on a regular basis to discuss current problems. Those who take part in these conferences include representatives of the government departments concerned, the Law Society, the Bar Council, the Law Centres Federation, the Legal Action Group, the TUC, the Child Poverty Action Group and the National Association of Citizens' Advise Bureaux.

Another idea worth attention is the recommendation of the English Royal Commission that the proposed Legal Services Council have regional off-shoots similarly constituted to assess the need for legal and para-legal services in their areas and to co-ordinate regional services and agencies. The model for such regional committees is

the Legal Services Committee that has been working very successfully for the past few years in Greater Manchester which was set up by the Law Society and which brings together some 20 members from a variety of organisations concerned with the provision of legal services in that community. The regional committee would make an annual report to the National Council which in turn would submit an annual report to the Lord Chancellor and through him to Parliament. The annual reports of the Lord Chancellor's Legal Aid Advisory Committee have over the years proved a very important source of policy making as well as being the way in which the system is accountable not only to the responsible Minister but to all those concerned with the legal aid system — MPs, the press, the legal and other experts, academics and ordinary citizens. The Irish scheme provides for the submission by the Legal Aid Board of an annual report and I have no doubt that you will find this an immensely important device. I am a little concerned only whether the Board will feel absolutely free to be independent in so far as several of its members are civil servants.

**Research and Experimentation**

The quality of the work done by the Board will also be influenced by the extent to which it disposes of funds and other resources to undertake or commission research. The Pringle Committee in its report urged that the Legal Aid Board should have the duty to undertake 'research and experimentation in the provision of legal aid and advice services' and the English Royal Commission made a similar recommendation for its Legal Services Council. Regrettably however there is no mention of such a duty or even power in the Government's announced scheme.' Of course much depends on what persons are appointed to the Legal Aid Board, but even more will turn on the climate of opinion in the community generally. In England the current climate of opinion is one of concern about the unmet need for legal services reflected for instance in the willingness of individuals and organisations to involve themselves in activities designed to improve the system. The Legal Action Group which publishes the influential monthly Bulletin devoted mainly to problems of legal services for the poor has over 4,000 subscribers. The Citizens Advice Bureaux (roughly the equivalent I think of your Community Information Centres) has over 10,000 workers, most of whom act on a voluntary basis. They have persuaded the Law Society to institute a fixed fee interview scheme under which anyone irrespective of means can get half an hour's diagnostic advice for £5 including VAT. Over 80% of solicitors' firms now operate the scheme. The Citizens' Advice Bureaux have also succeeded in establishing more than 200 rota schemes of private practitioners under which solicitors provide advice in the CAB for its clients and then take them back to their own offices if the client's problem requires continued assistance. The solicitors taking part in such rota schemes need a waiver from the Practice Rules but the Law Society has been granting waivers without difficulty. The session in the CAB is free to the client and the solicitor can claim no remuneration for it from the state scheme but if the client is taken back to the office for further help the solicitor is then acting either on a private paying basis or under the legal advice and assistance scheme. The legal advice and assistance scheme has also been utilised increasingly to provide services in magistrates courts through duty solicitor schemes under which solicitors attend to give advice to unrepresented prisoners in the cells — as to their plea, whether to ask for an adjournment, how to apply for legal aid etc. There are now over 100 such schemes.

Another comparable development is the idea of a 24 hour emergency advice service on the telephone, manned by a duty solicitor whose telephone number is advertised locally. The rules about advertising by private practitioners have been relaxed to permit the Local Law Society to insert in the local newspaper details of the name and address of local firms and of the work they undertake. The Royal Commission has gone further and recommended that solicitors should be able to advertise on their own behalf and to publicise not only their existence but also their standard fees. The Law Society has just announced that it is not in favour of this proposal but similar proposals have been adopted not only in the US but also in Canada, and most recently now in the Report of the Royal Commission for Legal Services in Scotland.

**Insurance against Legal Costs**

Another development that I regard as of great potential value is the initiative taken by several insurance companies to provide policies against legal costs. The premium for extensive coverage is low and this offers the possibility of providing for the disaster of litigation at a reasonable cost. Legal costs insurance is a way (perhaps the only way) of providing for the ordinary wage earner who is either outside the means test limits of the legal aid scheme or is subject to a prohibitively high contribution. It will be difficult to persuade *individuals* to take out policies but groups, such as trade unions, may come to see the value of subscribing to policies for their members. In the United States this is a major growth form of legal services showing benefits not only to those covered by the schemes but also of course to lawyers who provide the services. There is also another United States development that may in time prove to be of importance in other countries under which private practitioners offer low cost, routine legal services in so called clinics which make their profits by high turnover. This is hardly what the fastidious professional man regards as the traditional form of practice but from the customer's point of view it is proving to be a highly marketable service and one that I suspect is likely to spread.

**Non-Lawyers and Legal Services**

Quite apart from the developments of services by lawyers there are of course a great variety of new ways of providing help with legal problems from non-lawyers. The do-it-yourself movement is flourishing in England in the field particularly of divorce, small claims in the county court and applications for probate. Advice on legal problems is being provided not only by enterprises such as banks but by neighbourhood advice agencies, Citizens Advice Bureaux, consumer advice centres, housing aid societies and a variety of other non-lawyer organisations. The National Consumer Council is a pamphlet published in 1977 referred to the recent explosion of lay advisory facilities as forming in effect a new social service (*The Fourth Right of Citizenship: A Review of Local Advice Services*). There are some lawyers who criticize and fear

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# LAW SOCIETY
# ANNUAL CONFERENCE
## Dublin, 1-4 May, 1980

Mr. Walter Beatty, President of the Society, 1979/1980, with Mr. Thomas A. O'Reilly who was President of the Society in 1954/1955.

CLASS OF 1955

Some of those who were presented with their parchments on 2nd June, 1955, by the then President of the Society, Mr. Thomas A. O'Reilly.

Back row, *from left:* Nicholas Hughes, Patrick Treacy, Valentine Carney, P. Dermot Gardiner, Patrick O'Connor, Aidan O'Donnell, Michael Staines, Fintan P. Clancy.
Front Row, *from left:* Max W. Abrahamson, Kevin J. Early, Seán Delap, Thomas A. O'Reilly, Past President, Incorporated Law Society of Ireland, Walter Beatty, Patrick Cooney, Kenneth Henderson, Timothy Murphy.

*From left:* Mrs. Ruth Margetson, Mr. Ernest J. Margetson and Mrs. Frankie Beatty.

*From left:* Mrs. George Overend, Mr. George G. Overend, Professor Michael Zander, Mrs. John Bowron, Mr. Patrick Cross, President of the Incorporated Law Society of Northern Ireland, and Mr. Kenneth Henderson.

*From left:* Mr. and Mrs. Andrew F. Smyth, Mrs. Frankie Beatty, Mr. Walter Beatty, President of the Society, Mrs. Moya Quinlan, Senior Vice-President of the Society and Mr. Michael Quinlan.

Mr. and Mrs. George V. Maloney, Cavan.

Professor Michael Zander and Mrs. Moya Quinlan.

*From left:* Mr. Gerald Hickey, Mrs. Moya Quinlan, Mr. Patrick J. Lindsay, Master of the High Court, Mrs. Eileen McEllin and Mr. Patrick J. McEllin.

Mr. and Mrs. Bro

Blake.

Mrs. Frankie Beatty and Mr. Anthony J. Hederman, S.C., Attorney General.

Mrs. Joan Osborne and Mrs. Moya Quinlan.

Mr. Conal Clancy, Mr. Michael P. Houlihan, Junior Vice-President of the Society, and Mr. Gerald Sheean.

- Continued from page 78

this development but in my view it is to be welcomed on at least two counts. First from the point of view of the public interest, it represents help for the citizen with problems that he cannot easily solve for himself. The help may not be from the best trained source but frequently it is more than adequate and in most cases it is very much better than no help at all, which in practice would normally be the alternative. Secondly, from the narrow point of view of the lawyer's self interest lay advisory agencies tend to generate a great deal of work for lawyers mainly by direct referrals. It is in any event a fact of modern life and likely to increase.

There is therefore a movement in many countries reflecting a heightening of consciousness about the existence of the unmet need for help with legal problems and concern about ways of meeting it. Many new ways of bringing services to the client have been developed in the past decade and I dare say that in the next ten years we will discover even more. In the enactment of a new civil legal aid scheme the Irish Government is taking a major step in securing equality of justice for its citizens and although I have ventured to offer some criticisms of the scheme I recognise that it represents a step in the right direction. Moreover the first step is not I hope the last. In this field we are learning all the time and we try to move as far and as fast as our respective financial resources permit. I wish the Irish scheme much success and look forward to returning some time in the future to review with you the progress made.

# Blackhall Place

The President's Hall has been subject to yet another change of use for which, doubtless, planning and bye law permission were obtained long in advance. Since ceasing to accommodate the religious observance of the pupils of *The Free Hospital and School of King Charles the Second*, the President's Hall has filled many widely diverging roles from the Presentation of Parchments to newly admitted colleagues, through the Whiddy enquiry, Seminars, Dinners and Weddings to, most recently, providing a "night life" atmosphere for Rock Fox and his famous orchestra and "Chris Meehan & Friends" Jazz Rock Group.

On Thursday, April 10th, the President's Hall was the setting for the first public recital of classical music, under the auspices of the Music Association of Ireland. The occasion was the coming-out recital of Una Hunt, a native of Belfast who had studied the piano at the Ulster College of Music, at the Royal Irish Academy of Music in Dublin and at the Hochschule Fur Musik, Vienna.

Miss Hunt's excellently played programme included J.S. Bach's French Suite No. 6 B V W 817; Beethoven's Piano Sonata, Opus 110, in A. Flat; Sonata in three movements (1910) by Igor Stravinsky and Chopin's Piano Sonata in B Minor Opus 58.

The acoustics of the Presidents Hall were found to be surprisingly good and would, it was felt, be even better with a large audience. It is hoped that the Music Association of Ireland will use the Presidents Hall for similar recitals in the future.

# Replying to correspondence — the Solicitor's obligations

The Society is seriously concerned at the number of complaints it is receiving from clients and other Solicitors arising out of the failure of Solicitors to acknowledge or reply to correspondence. In certain cases such failure may in fact amount to professional misconduct.

Between professional colleagues the failure of one party to answer correspondence creates a great deal of extra work for the other Solicitor involved, not to mention a natural sense of annoyance and frustration at correspondence being ignored. There may be many reasons why a Solicitor is not immediately in a position to fully reply to a letter received from a colleague, but there is not reason why he cannot at least acknowledge the letter.

When complaints received by the Society from clients of Solicitors are analysed, it is found that the principal reason why such clients have sought the assistance of the Society is that they cannot get any information from their Solicitors. A particular Solicitor can be carrying out the work that he has been instructed to do, but unless that Solicitor regularly communicates with his client there will be the inevitable break-down in the professional relationship. The client most likely will not know the procedures for extracting a Grant of Probate or bringing a High Court action to trial and it is therefore essential that the Solicitor should correspond with his client and keep him fully informed about what has happened, and what is to happen, and when. It is, of course, even more important that any correspondence received from the client should be promptly acknowledged and fully answered.

The Council urges all practitioners to communicate regularly with clients and answer promptly all correspondence from clients or fellow practitioners and so ensure that the standards we all expect from Solicitors in practice are maintained.

# Conveyancing Notes

## HOUSES CONSTRUCTED BY DIRECT LABOUR:

## PRACTICE OF THE IRISH PERMANENT BUILDING SOCIETY

It will be of interest to members to know the requirements of the Irish Permanent Building Society where a house is constructed by direct labour.

The Society requires that the erection of the premises be supervised by an Architect or Engineer, who, on completion of the premises, will complete a Declaration verifying:

A. That the house was built in accordance with the plans and specifications.
B. That he supervised the erection of the premises and verifies that same have been completed to his satisfaction.
C. That the Building Conditions of the Planning Permission have been complied with in full.
D. That the cost of erection of the premises, including the site cost of £X is not less than £Y.

A Declaration in the above form, supported by the usual Architect's/Engineer's Declaration required for new houses would satisfy the Society's requirements. The Society will rely on the Declaration to verify the price (construction costs plus site cost), and will not require production of invoices from the Applicant or his Solicitor in respect of construction costs, cost of materials, etc.

Supervision need not be continuous but a minimum of five inspections is felt essential so long as they include an inspection of foundations and, at completion, of roof timbering.

It sometimes happens that potential Borrowers do not advise the Society that the premises will be erected by direct labout and consequently do not find out about the need for this supervision until too late. Members acting for clients purchasing or taking transfers of sites might consider warning clients about this requirement to avoid difficulty at a later state.

## LAPSE OF PLANNING PERMISSION

The attention of the Conveyancing Committee has been drawn by Mr. Michael O'Connell of Tralee to the position which will arise under Section 29 of the Local Government (Planning and Development) Act 1976 on and after the 1st November 1981. Section 29 is the Section which provides that Planning Permission will lapse five years after the date of Section 29 coming into operation or the date of the granting of the permission, which ever is the later, subject to certain minor exceptions.

Accordingly on the 1st day of November 1981 the fifth anniversary of the Section coming into operation a number of Planning Permissions will lapse.

The point that Mr. O'Connell has brought to the attention of the Committee is that an outline permission granted prior to the 1st day of November 1976 will lapse on the 1st day of November 1981 even if there is a subsequent approval in existence or there is an application pending for an approval or for a full permission. In his book "Planning and Development Law" at page 24 Mr. E. M. Walsh explains the position as follows:

"Outline permission, permission and approval—These are the three forms of application which it is possible to make to a Planning Authority and the distinction between them should be clearly understood. Section 24 of the Planning Act 1963 forbids development (other than exempted development) without a permission. Section 25 entitles the Minister to make Regulations which provide for outline permissions for development subject to the subsequent approval of the Planning Authority. There are therefore two types of permission, namely, Outline Permission and (full) Permission. A Permission is complete in itself because the applicant submits to the Planning Authority the details necessary to enable it to consider his application in all its aspects. This may involve the presentation of detailed drawings at a cost of thousands of pounds. When Permission is granted the planning process is complete and the development can proceed. An Outline application is an application for permission in principle. The applicant wants to know whether or not the development which he contemplates is acceptable before he becomes involved in the considerable expense of preparing detailed drawings. It is rather like an application for a declaratory Order under Section 15 of the Intoxiating Liquor Act 1960 where an applicant wants to avoid the expense of building a public house before applying for a licence for it. An outline application can be confined to a site plan and a request for permission to build a house on the site. If Outline Permission is granted then the applicant feels free to incur the expense of preparing detailed plans and when there are conditions attached to the Outline Permission he makes his plans conform to the conditions. Before any development is commenced there must be a permission. It can be an Outline Permission or a Permission. If it is an Outline Permission there must be a subsequent Approval. Outline Permission plus Approval equals Permission."

It follows therefore that an applicant should understand what it is necessary to apply for. At the outset the first decision must be to apply for Outline Permission or Permission. If Outline Permission is applied for and obtained then the follow-through application should be for Approval. The printed form of application provided by most Planning Authorities sets out at its head the words "Outline Permission", "Permission" and "Approval" and the applicant is expected to strike out the words which are not appropriate. No branch of planning law has given rise to greater confusion and misunderstanding that the distinction between these three forms of planning application. Very often an Outline Permission is followed by an application for Permission which frees the Planning Authority from any restraints imposed by the existence of the Outline Permission. Sometimes an application for Approval is made which travels outside the limits of the Outline Permission and which can therefore be properly rejected. The distinctions are clear-cut and the importance of understanding them cannot be over-stated.

Practitioners are advised to consider carefully the differences between permissions and approvals.

A further point of concern under Section 29 is that, again with some minor exceptions, where development has been commenced but has not been completed at the expiry of the five year period the permission will cease to have effect as regards so much of the development as has not been completed.

# "DONATIO MORTIS CAUSA" IN RELATION TO REAL PROPERTY

by

Julian Deale, Barrister-at-law

Practising lawyers in their everyday work are aware that equity will not complete an incomplete trust in favour of a volunteer. Essentially this means that where there is a gift of property without consideration, the aid of equity cannot be invoked in order to perfect that gift.

However, for centuries the Courts have recognized that a "donation mortis causa" is a particular type of gift and in many, many instances the Courts have been prepared to perfect such a gift. However, it is well settled in the casebooks that a donatio mortis causa cannot be the subject matter of a valid gift when that gift concerns either real property or leasehold interests. There is no doubt that this rule has a solid foundation in that, under the Statute of Frauds, 1695, any disposition of any interest in land must be evidenced in writing.

However, a line of English decisions which commenced in 1874, the principles of which have been followed in this country, has established that an "intention" to make a gift can be perfected in the manner outlined below. This novel approach has, in fact, been extended in England to a gift of *real* property which, on its face, would appear to be in contravention of the Statute of Frauds. As long ago as 1874 (Strong v. Bird (1874) L.R. 18 E.Q. 315) it was decided that where a person owed money to another and that other person manifested during his lifetime an obvious desire to forgive the debt, the subsequent appointment of the debtor as the creditor's executor was sufficient to forgive the debt. The principle underlying this decision was, simply, that the desire of the creditor to forgive the debt was treated by the Court as being, in effect, an "equity" which conferred upon the debtor an equitable interest in the amount of the debt; by the appointment of the debtor as the executor of the creditor, the debtor enjoyed both the legal estate in the subject matter of the "gift" and the equitable interest; consequently, the two estates, the equitable and legal, merged into one and the debtor was, therefore, released from the need to repay the debt.

This proposition was further extended in the case of In Re Stewart (1908) 2 Ch. 251 to the case of a testator who intended to make a *gift* of personal estate, not merely to forgive a debt.

In the case of In Re James (1935) Ch. 449 it was held to be irrelevant how the debtor or donee became the personal representative of the creditor or donor; in other words, the debtor or donee could be the executor appointed by the will or, alternatively, an administrator either with will annexed or intestate.

None of these cases, of course, necessarily suggests that a "donatio mortis causa" of real estate could be perfected by the appointment of the intended donee as the executor or administrator of the estate of the donor. However, a very significant development in this doctrine took place in the case of In Re Comberlach; Saunderson v. Jackson (1923) 73 Sol Jo. 403, in which the principles in Strong v. Bird were extended to apply to real property. In the case of Comberlach, the circumstances were that a person manifested over a long period a desire to make a gift of real estate and the person to whom the gift was intended to be made was subsequently appointed to be the intending donor's personal representative. The Court had no difficulty in upholding the principle of the two estates, that is the "equitable" estate comprising the desire to give, and the legal estate passing to the donee by being appointed as the personal representative of the donor, but held, further, that by the merger of the two estates in the same person, the need for a note of memorandum in writing was apparently dispensed with.

It should be pointed out that the principles of Strong v. Bird have already been followed in this country in the case of In Re Wilson (1933) I.R. 729. It is not unlikely that, if such a case arose, the decision in Comberlach could also be followed in this country.

In the administration of estates, instances of imperfect gifts from testator to executor or administrator must arise, and it is suggested that practitioners should consider carefully such apparently imperfect dispositions with a view to ascertaining whether or not they might in fact be perfected by the implementation of the decisions outlined above. This applies not only to "donatio mortis causa" but to other forms of imperfect gift, which may have the potential to be perfected in the eyes of equity.

However, until an imperfect gift arises of sufficient magnitude to justify the cost of proceedings, the question may well remain untested.

# FARMING AND FINANCE

Paper read to the Law Society Annual Conference
by
W. A. Osborne, Solicitor

One of the crucial elements in relation to farming and finance is the full usage of all available land, its transfer within the family and its devolution from generation to generation, all of which are complex matters.

The preface to the 3rd Edition of Cherry's Irish Land Law published in 1902, comments that in the ten years which had elapsed since the 2nd Edition was published in 1892, seven new Acts of Parliament had been passed dealing with Land Law and the then new 3rd Edition contained reference to approximately 800 new cases decided in that ten year period, bringing the total number of reported cases referred to in the 3rd Edition to more than 2,000.

Nonetheless, there are many uninformed people who say that the ownership of land, its usage, sale, disposal and devolution should be a simple matter to arrange legally; indeed as simple as the transfer of ownership of a car. That is, as we know, not so.

### "THE LAND ACTS"

The introduction of the Land Acts towards the end of the 19th Century provided machinery whereby a tenant occupier could acquire the freehold ownership in the farm so occupied. To a large degree this legislation defused the land agitation, which had existed continuously over many years and which had bedevilled farming. But with that right of freehold ownership came a feeling of possessiveness in relation to land, which in turn has created problems in its user, its devolution and availability. The possessiveness to which I have referred is understandable, in that for generations, a land war was fought with the tenant occupier, under a Landlord and Tenant system, coming off second best and hence, once the freehold ownership was achieved by a tenant, he became dogged in his determination to retain ownership and that determination not to part with ownership is reflected in the attitude of many farmers who are reluctant even to consider a transfer, or sharing of ownership with their own family, or to retire, having reached an age at which one is incapable of farming fully. It is for that reason I believe that the E.E.C. and Land Commission farm retiral schemes, designed for older farmers, have not succeeded.

### TAXATION AND THE PRACTITIONER

Allied to this reluctance are the problems created by Inheritance Tax and Gift Tax and to a lesser degree, but equally important, by the family legal rights created by the Succession Act of 1965. Hence we have a combination of social and legal problems.

A substantial part of our work as Solicitors, particularly country practitioners, but not by any means exclusively so, is concerned with family advice in relation to the family farm, its usage, transfer and devolution. It is not part of my brief to deal in detail with taxation problems, but having overcome the basic reluctance to transfer or change ownership within a family, any intended transfer of ownership or of part ownership, or of part of the farm must then be very fully considered and discussed in all its aspects, to include taxation. It is helpful to bring as many members of the family as possible into all such discussions, so that all concerned will fully appreciate the tax implications, the difficulties confronting the parent who wishes to make a transfer to one of the family, namely the uncertainty as to whether that person is capable of taking on the responsibility of providing adequately for the remainder of the family, including particularly the parents, or whether that person will indeed be willing or inclined to do so. The uncertainties as to whether the member of the family will marry and should he or she do so, will ownership, should that member of the family die in the parent's lifetime, pass the property on to his spouse and will he or she be able to provide adequately for the parents and family, particularly if the spouse has a family of his or her own to provide for; or will she be forced in such circumstances to dispose of the property and if so, where will the parents and the remainder of the family stand. On the other side of the picture is the farming son or daughter who has remained at home, contributing full time to the farm and its working and receiving in return keep and maintenance and small sums by way of pocket money and who is understandably eager for and perhaps insistent that his or her future be provided for, by means of a transfer of ownership of the farm, or of part of the farm and perhaps also insistent on having a greater say in the running and operation of the enterprise. When confronted with these uncertainties and dilemmas, more often than not, any thought of an immediate transfer is postponed and the frustration of the farming son or daughter grows, resulting in a very unhappy relationship, which can, despite even a great measure of understanding and goodwill, most certainly in time lead to a rift in the family, which will be difficult, if not impossible to heal in the future.

### UTILISATION OF FARMLAND

Apart from the problems associated with the family farm, it is now generally acknowledged that there is a vast under-utilization of farm land. Despite the fact that it plays a vital role in the economy and is one of, if not indeed our prime source of wealth. This state of affairs usually occurrs by reason of circumstances outside the immediate control of the land owner and is probably by reason of family circumstances, or lack of capital or equipment, but more often than not, it will arise by virtue of old age, illness, or other incapacity, the unavailability of assistance on the farm, there being no child or other near relative to inherit or assist in the full working of the land, or small holdings which are incapable of being farmed economically, or which are unable to provide for the owner the basic necessities of life and necessitate part-time off farm employment.

There is a general belief that farmers individually are owners of large tracts of very valuable land. The current urban belief that all farmers are possessed of wealth which is capable of providing substantial income permitting them to live like semi-millionaires, is so far

from the true facts as to lead one to the conclusion that this belief is based on ill conceived notions, or is the consequence of uninformed comment of a most harmful nature.

Statistics are available to show clearly that the vast majority of farms have an area of 50 acres or less and a very large percentage are under 30 acres, the smaller farms being usually found north west of a line drawn approximately from Dundalk to Limerick, with some exceptions. Since 1930 there has been a slow, but nonetheless significant change in the structure of farms. The number of farms of 30 acres and less have decreased on average by 12 per cent and the larger farms over acres have decreased in number. There has been approximately a 15 per cent increase in the number of farms in the region of acres to acres.

Underutilization is greatest in areas where the average farm is between 20 and 30 acres.

**CON-ACRE AND GRAZING**

Over the years the area of lands set out in con-acre or for grazing has averaged around 6% of all farmland. The existence of a con-acre and grazing system on the eleven months basis is proof, if proof be needed, on the one hand of the reluctance of land owners, who for one reason or another are unable to farm themselves, to sell or dispose of the farm and on the other hand is proof of the availability of young hard working eager farmers, who are prepared to rent lands to enlarge the area they farm and thus make their farming enterprise more economical. The cost of land in recent years has also made the con-acre grazing eleven month system attractive to the two parties involved. Letting out land in this fashion is bad in the long run, in that the land runs down in quality, due to over-cropping or grazing with the owner and the occupier each as a rule failing to put anything back into the land in the nature of fertilising or in improving or creating greater utilization.

It is clear from the many reasons mentioned that ways and means must be found whereby our land can be put to greater and more extensive use and whereby the reluctance to dispose of land and the problems of the family farm can be surrmounted. How can this be achieved and what part, if any, can we as Solicitors play? By reason of the possessiveness to which I have referred, I believe that any attempt to have owners of under-utilized lands part with ownership, either by offering incentives, pensions or using compulsory purchase powers, or by limiting the area of land which any one person may own, will fail.

**FARMING COMPANIES**

The legacy of land law which I have already referred to is still on our Statute Books and does not enable a land owner to lease land with any great confidence or degree of certainty that by doing so he will retain ownership, or the right to repossess fully the property leased. Our tax laws, as presently structured do not encourage the formation of Limited Companies for the ownership, or indeed for the farming of lands. There is a case to be made for farming Companies, provided the tax structures are altered and provided that farming is approached from tax purposes by the Revenue Commissioners as a business and is treated in the same fashion as any ordinary business enterprise.

**PARTNERSHIPS**

We are therefore left with partnership, which while it may seem to be Hobson's Choice in the circumstances, has nonetheless many attributes which can provide a reasonable solution to the many problems mentioned. A partnership arrangement can be in many varied forms to suit the circumstances of the particular case, it can be for a short trial period, it can be extended, should it fail, or if difficulties should arise by virtue of the incompatability of the partners it can be terminated on terms which have already been mutually agreed. It can be between two or more parties and there is a whole wide range of variations to suit all circumstances. There are countless people in all walks of life who carry on various types of business enterprise in partnership with a very full and rewarding involvement and with a measure of success to the benefit of all of the parties involved. There is no reason to my mind why the farming community should not be equally successful, especially the younger landless farmer, who is as astute and able a businessman as most.

If a parent and son or daughter operate a farm on a partnership basis, the land owner or parent contributing the land, but the ownership of which he retains, and he also contributing his expertise and such work as he may be capable of, depending on age and the younger person contributing his ability and eagerness to work, both sharing the profits of a profitable enterprise; must lead to a happier and a more contented farming family than now often exists, particularly where a son is merely working at home in receipt of a weekly allowance with no say or standing.

As between local farmers two or even more who have small holdings, the advantages are obvious. The batchelor farmer, or the farmer who through age, illness or who is otherwise unable to utilize his lands fully could, by way of partnership with a younger man achieve satisfaction and a greater income through the full utilization of his property. The consequent sharing of expense and farm implements will be advantageous. The land owning farmer also has the assurance that his ownership of the land does not become involved in any way and after a trial period of operation, a decision can be arrived at as to whethere the junior partner in the arrangement should have options or arrangements, permitting him in due course to purchase the ownership from his co-partner.

I am glad to say that there has been great co-operation between the I.F.A., the A.C.C. and the Society over the past year and this matter has been under active consideration. Recently Macra na Feirme have indicated to the Society that they would welcome a meeting to set up a Committee to consider in particular partnership arrangements in farming and a meeting will take place shortly. From the practical steps which are in mind, each of us in our own way, can encourage farmers where necessary, in the settlement of their affairs to consider the partnership idea and we can encourage them to do so and in that respect we should be in a position to provide suitable forms of partnership agreements when required and to advise fully in relation to all aspects of these matters.

The idea of farming in partnership is new to the farming community, who heretofore have operated as very independent indivualistic persons, each paddling his canoe to the best of his or her ability. It will therefore take time before the confidence necessary to engage in partnership arrangements grows and in that respect, perhaps a beginning could be made with the family farm.

# The Register

**REGISTRATION OF TITLE ACT, 1964**

**Issue of New Land Certificates**

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 31st day of July, 1980.

W. T. MORAN (Registrar of Titles)

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

**Schedule**

1. Registered Owner: William and Annie Brennan; Folio No: 1337; Lands: (1) Ardateggle (2) Coornariska; Area: (1) 18a. 0r. 33p.; (2) 32a. 3r. 32p.; County: Queens.

2. Registered Owner: Patrick J. Burke; Folio No: 15833; Lands: Whitehall with house thereon; Area: 0a. 2r. 0p.; County: City of Dublin.

3. Registered Owner: John Healy; Folio No: 1629; Lands: Cloonylyon; Area: 19a. 1r. 0p.; County: Roscommon.

4. Registered Owner: Edmond Herbert; Folio No: 407L; Lands: 187, Griffith Avenue; Area: —; County: City of Dublin.

5. Registered Owner: Thomas Kennedy; Folio No: 5002; Lands: Ardfarn; Area: 13a. 0r. 12p.; County: Donegal.

6. Registered Owner: Patrick J. Nolan; Folio No: 16330; Lands: (1) Ahalahana (Parts), (2) Murher (Part); Area: (1) 7a. 3r. 32p., (2) 23a. 1r. 35p.; County: Kerry.

7. Registered Owner: Michael Wogan; Folio No: 10080; Lands: Ballyboughal; Area: ¼a. 0r. 0p.; County: Dublin.

8. Registered Owner: Patrick Conlon; Folio No: 1648; Lands: Derryhasna; Area: 24a. 1r. 23p.; County: Limerick.

9. Registered Owner: Thomas O'Keeffe; Folio No: 7631; Lands: Moyaliff; Area: 14a. 1r. 3p.; County: Tipperary.

10. Registered Owner: Noel Eugene Healy and Mary Geraldine Healy; Folio No: 27285; Lands: Part of the lands of Donore situate in the Barony of Duleek Lower; Area: —; County: Meath.

11. Registered Owner: Michael Bracken; Folio No: 2050F; Lands: Garra; Area: 0a. 0r. 39p.; County: Wexford.

12. Registered Owner: Robert Maghey Warwick and Isabella Patricia Warwick; Folio No: 2612F; Lands: Drumaweer; Area: 0a. 1r. 0p.; County: Donegal.

13. Registered Owner: Michael J. Bourke; Folio No: (1) 3686, (2) 3634; Lands: (1) Monslatt, (2) Monslatt; Area: (1) 38a. 3r. 13p., (2) 71a. 1r. 22p.; County: Tipperary.

14. Registered Owner: Edward Finbar O'Shea; Folio No: 709L; Lands: The Leasehold interest in the part of the Townland of Browningstown situate on the South side of Ballinlough Road, Parish of St. Finbar's and County Borough of Cork; Area: 0a. 0r. 10p.; County: Cork.

15. Registered Owner: Rev. James Gibbons, Arthur Hanley, Thomas Kean, Seamus O'Malley and John F. McHugh; Folio No: 50287; Lands: (a) Clare, (b) Clare; Area: (a) 0a. 0r. 7p., (b)0a. 0r. 19p.; County: Mayo.

16. Registered Owner: Diarmuid Linehan and Maura Linehan; Folio No: 11447F; Lands: Part of the townland of Farran situate in the Barony of East Muskerry; Area: 0a. 2r. 19p.; County: Cork.

17. Registered Owner: Michael Dunne and Kate Dunne; Folio No: (a) 10606, (2) 9378; Lands: (a) Ballymaddock, (b) Carrigeen (E.D. Kilmurray); Area: (a) 19a. 2r. 24p., (b) 6a. 1r. 24p.; County: Queens.

18. Registered Owner: Hannah Roche; Folio No: 9105; Lands: Ballinena; Area: 2a. 0r. 16p.; County: Limerick.

19. Registered Owner: Vincent Kirwan; Folio No: 7059; Lands: Gortnalaght; Area: 20a. 3r. 30p.; County: Waterford.

20. Registered Owner: Henry Jones; Folio No: 10352; Lands: (a) Kilduff, (b) Kerry; Area: (a) 15a. 2r. 4p., (b) 0a. 3r. 32p.; County: Cavan.

21. Registered Owner: John O'Mahony; Folio No: 57543; Lands: (a) Maughanaclea, (b) Maughanaclea (Seven undivided 250th parts); Area: (a) 40a. 1r. 30p., (b) 248a. 0r. 31p.; County: Cork.

22. Registered Owner: John Forde; Folio No: 4822; Lands: Drumrooghill; Area: 13a. 1r. 0p.; County: Monaghan.

23. Registered Owner: The Guardians of the Poor; Folio No: 541; Lands: Ballyhest; Area: 5a. 0r. 0p.; County: Waterford.

24. Registered Owner: John Patrick Brosnan and Alice Marian Brosnan; Folio No: 6396; Lands: Laragh East; Area: 30a. 1r. 14p.; County: Wicklow.

25. Registered Owner: John Higgins; Folio No: 50305; Lands: Townparks (Parish of St. Nicholas); Area: 0a. 2r. 17p.; County: Galway.

26. Registered Owner: John Jennings; Folio No: 12093; Lands: Ladytown; Area: 36a. 1r. 37p.; County: Kildare.

27. Registered Owner: Mary Josephine Holdwright; Folio No: 3882; Lands: Coolcahan; Area: 9a. 2r. 10p.; County: Westmeath.

28. Registered Owner: Desmond Thomas Fitzpatrick; Folio No: 10512; Lands: Ballynerrin; Area: 0a. 1r. 12p.; County: Wicklow.

29. Registered Owner: John Nugent; Folio No: 2122; Lands: Monroe East; Area: 95a. 2r. 38p.; County: Tipperary.

30. Registered Owner: Bernard Kilbride, Albert West and Thomas Bagnall junior; Folio No: 7599; Lands: Bohernabreena; Area: 0a. 5r. 0p.; County: Dublin.

31. Registered Owner: Laurence Rooney; Folio No: 4202; Lands: Grange; Area: 0a. 1r. 35p.; County: Sligo.

32. Registered Owner: Patrick and Catherine O'Flynn; Folio No: 680L; Lands: Rathpeacon; Area: 0a. 0r. 26p.; County: Cork.

33. Registered Owner: Stephen and Rosaleen O'Hanlon; Folio No: 12871; Lands: Rathmore; Area: 0a. 1r. 10p.; County: Louth.

34. Registered Owner: Thomas Sweeney; Folio No: 18627; Lands: (1) Castletown, (2) Owenbeg, (3) Castletown, (4) Castletown, (an undivided moiety), (5) Owenykeevan or Tawnamaddoo; Area: (1) 9a. 3r. 0p., (2) 2a. 1r. 10p., (3) 2a. 3r. 5p., (4) 3a. 1r. 20p., (5) 1a. 0r. 21p.; County: Sligo.

35. Registered Owner: Timothy Kelleher; Folio No: 33360; Lands: Piercetown; Area: 205a. 0r. 18p.; County: Cork.

36. Registered Owner: Patrick Butler; Folio No: 31855; Lands: No. 1 Rathbaun (E.D. Mount Falcon); Area: 23a. 3r. 32p.; County: Mayo.

37. Registered Owner: William Townsend and Mary Townsend; Folio No: 2366 (This folio is revised and is now comprised in folio no. 2416F; Lands: Ballypierce; Area: 107a. 1r. 23p.; County: Carlow.

38. Registered Owner: Mary Kirwan; Folio No: 11583; Lands: Part of the land of Clogher with a cottage thereon; Area: —; County: Louth.

39. Registered Owner: Irene Kathleen McCullagh; Folio No.: 6068; Lands: A plot of ground with a dwellinghouse and outoffices thereon situate at Grange Upper in the parish of St. John's Without, City of Waterford, measuring in front to the road 35 ft. 10 in.; County: Waterford.

## LOST WILLS

**Estate of Michael Clohessy,** late of 78 Lower Leeson Street, Dublin. Will any person having knowledge of any Will of the abovenamed deceased who died on 10th April, 1980, please contact Messrs. James O'Brien & Co., Solicitors, 24, Castle Street, Nenagh, Co. Tipperary.

**Patrick Holland,** deceased, late of Peterswell, Co. Galway. The abovenamed died at the County Hospital, Castlebar on the 28th January, 1980. Will any person having a Will or knowledge of a Will of the deceased please contact Patrick J. Chambers, State Solicitor, Ennistymon, Co. Clare.

**Christopher Flynn,** late of 134 Woodfarm Acres, Palmerston, Dublin, who died on the 14th May, 1980. Would anyone knowing of the whereabouts of a Will of the abovenamed deceased, please contact J. A. Shaw & Co. Solicitors, Mullingar.

## NOTICES

**WANTED:** Any of the following back numbers of the Irish Law Times – 1882-1891, 1903, 1904, 1906, 1914, 1918, 1933 and 1962 to date. Phone 783442.

**Secretary,** with 8 years' legal experience and own electric typewriter, transport and phone, will do legal work in own home. Phone 450890.

**Solicitor,** 2 years experience in general practice, hard worker, excellent references, presently in Dublin but desires change. Conveyancing, probate, litigation, criminal law, company law experience. Please reply: Box No. 01.

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THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

June 1980 Vol. 74 No. 5.

**COUNCIL OF EUROPE INFORMATION MEETING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS HELD IN BLACKHALL PLACE, 1 MAY, 1980**

*From left:* **Mr. Rory O'Hanlon, S.C., Mrs. Jane Dinsdale, Directorate of Human Rights of the Council of Europe, Judge Philip O'Donoghue, former Irish member of the European Court of Human Rights and Mr. Anthony E. Collins, Council member of the Law Society and member of the Society's E.E.C. and International Affairs Committee.**

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# Associated Companies — The Turn of the Screw

By CHARLES HACCIUS, Barrister-at-Law

As anticipated, the "Imposition of Duties (No. 241) (Limit on Stamp Duty in respect of Certain Transactions between Bodies Corporate) Order 1979" (hereinafter referred to as "the Order") has been embodied in the Finance Bill 1980, which at the same time has revoked the Order "with respect to instruments executed on or after the date of the passing of this Act". The Order, it will be recalled, came into effect on 17th July, 1979 and replaced S.19 Finance Act 1952, as amended by S.76 Finance Act 1959, which until that date had been the relevant legislation granting relief from the ad valorem stamp duty which would otherwise have been payable on conveyances or transfers between associated companies. The new legislation, as embodied in the Bill, takes the form of a new Section 19 to be substituted for the existing S.19 Finance Act, 1952 in relation to instruments executed on or after the date upon which the Bill becomes law. In this article, the Order and the new Section 19 are referred to as "the new legislation", the existing S.19 Finance Act 1952, as amended by S.76 Finance Act 1959, being referred to as "the former legislation". The new legislation is reminiscent of those familiar jokes whereby the camp commandant addresses the assembled prisoners of war in the words "Prisoners! I have good news and bad news. First the good news . . .".

**The good news**

S.19(2) in the new legislation, modelled on S.42(2) and (3) Finance Act 1930 (U.K.), as inserted by S.27(2) Finance Act 1967 (U.K.) in the United Kingdom legislation, has greatly extended the ambit of the former legislation, while at the same time removing a few minor yet irritating points of difference between the Irish and the United Kingdom legislation. Reliance can therefore be placed on United Kingdom case law as an aid to the construction of the relevant legislation to a far greater extent than before.

In order of appearance, the differences between the new legislation and the former legislation are as follows:—

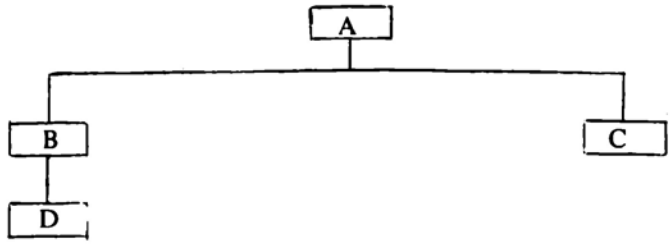
(1) Under the former legislation it was necessary to establish to the satisfaction of the Revenue Commissioners not merely that the effect of the instrument in question was to convey or transfer a beneficial interest in property from the transferor to the transferee, but (a) that the transferor was entitled to "the entire beneficial interest" in the subject matter of the conveyance or transfer, and also, (b) that in consequence of the conveyance or transfer the "entire beneficial interest" in the subject matter of the conveyance or transfer vested in the transferee.

Under the former legislation, therefore, it was a matter of some doubt whether a fee farm grant between associated companies qualified for relief, the grantor conveying or transferring his estate subject to the reservation of a rent charge.[1]

All that need now be established is that the effect of the instrument in question is to transfer "a" beneficial interest in property from the transferor to the transferee, without going on to establish further that the transferor has parted with his entire beneficial interest.

(2) Under the former legislation the relief applied only if either (a) the transferor was the "beneficial owner" of "not less than ninety per cent" of the "issued share capital" of the transferee (or vice versa), or (b) a "third body corporate" was the beneficial owner of not less than ninety per cent of the issued share capital "of each" of the transferor and transferee. In Diagram (I) below, for example,

(I)



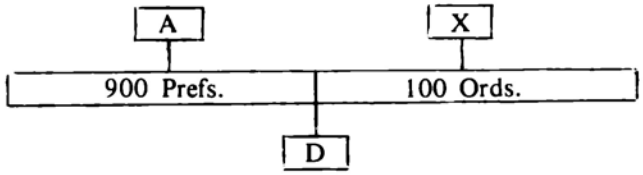

where A, a holding company, was the beneficial owner of the entire issued share capital of two subsidiaries B and C, and B was the beneficial owner of the entire issued share capital of a sub-subsidiary D, a conveyance or transfer by A to B, A to C or B to C would qualify for relief, as would a conveyance or transfer by B to D, but not one by A to its sub-subsidiary D, the reason being simply that B and not A was the "beneficial owner" of the issued share capital of D: *Rodwell Securities Ltd. vs. IRC* (1968) 1 All E.R. 257.

In S.19(2) the new legislation remedies this by invoking subsections (5) to (10) of S.156 Corporation Tax Act 1976 with the substitution of the expressions "body corporate" for "company", and "issued share capital" for "ordinary share capital". Subsections (5) to (10), although somewhat intimidating are quite simple in their effect. In order to ascertain whether the holding company (A in Diagram I above) is to be treated for the purposes of the new legislation as the "beneficial owner" of the requisite proportion (90 per cent) of the issued share capital the subsubsidiary (D), one simply works one's way through the "intermediary" (B), and so on through the whole "chain of intermediaries". In so doing, one ignores class rights and concentrates on the nominal value of the share capital of each company in the beneficial ownership of its immediate holding company, this being the

effect of the substitution of the expression "issued share capital" in subsections (5) to (10) of S.156 Corporation Tax Act 1976 for "ordinary share capital": *Canada Safeway Ltd. vs. IRC* (1973) Ch. 374.

The effect of S.19(2) in the new legislation will be apparent on comparing Diagrams (II) and (III) below:

(II)

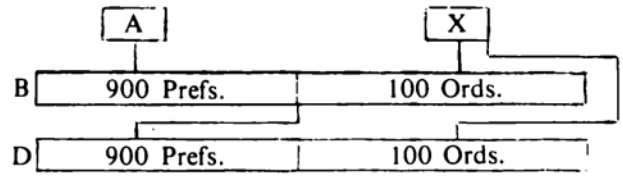



In this instance, the holding company (A) is the "beneficial owner" of 90 per cent of the "issued share capital" of the "intermediary" (B), even though its holding is confined to non-voting, non-participating preference shares. Another company (X) which is not associated with A in any way holds the entire equity share capital of B, entitling it both to the entire voting power and also to the surplus assets of B on a winding up, yet holds only 10 per cent of the "issued share capital" of B. B in turn has a wholly owned subsidiary D.

For the purposes of S.19(2), A is treated as the "beneficial owner" of 90 per cent of the "issued share capital" of D, A being the beneficial owner of 90 per cent of the "intermediary" B, which in turn is the beneficial owner of 100 per cent of the issued share capital of D.



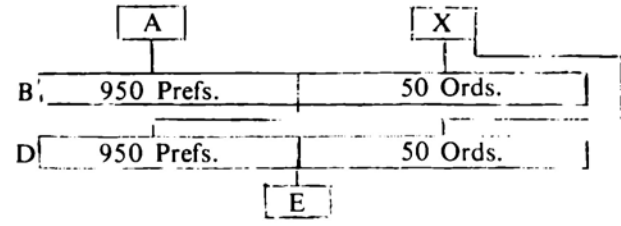
(III)




Suppose, however, that the share structure of D is the same as that of B, the preference share capital of B being in the beneficial ownership of A, the preference share capital of D being in the beneficial ownership of B, and the equity share capital of both B and D being in the beneficial ownership of X. In such a case, A would be treated under S.19(2) as the beneficial owner of only 81 per cent of the issued share capital of D since it would be the beneficial owner of 90 per cent of the issued share capital of the intermediary B, which itself would be the beneficial owner of 90 per cent of the issued share capital of D.

As already mentioned, the principle outlined above applies through any number of subsidiaries and sub-subsidiaries. For example:—

(IV)




In this instance, the share structure of B and D is the same as in Diagram (III) above, as is the ownership of the issued share capital of each, except that the ratio of preference share capital to ordinary share capital in B and D is in this case 950 to 50 instead of 900 to 100, and D has a wholly owned subsidiary E.

Under S.19(2) in the new legislation A would be treated as the beneficial owner of 90.25 per cent of the issued share capital of E. Tracing one's way through the "chain of intermediaries", A would be the beneficial owner of 95 per cent of the issued share capital of B. B would be the beneficial owner of 95 per cent of the issued share capital of D, with the consequence that A would be treated for the purposes of para. 4 as the beneficial owner of 95 per cent of 95 per cent of the issued share capital of D ( 90.25 per cent of the issued share capital of D). D would be the beneficial owner of 100 per cent of the issued share capital of E, with the consequence that A would be treated as the beneficial owner of 90.25 per cent of the issued share capital of E. A conveyance or transfer by A to E would therefore qualify for relief.

In passing, it may be pertinent to remark that the draftsman has inserted the words "at the time of the

execution of the instrument" in S.19(2) to define the precise moment of time at which the required degree of association must be present and has rephrased the United Kingdom legislation, which is drafted in the present tense, in the past tense. It submitted that these departures from the United Kingdom legislation are in no way material.

**The bad news**

Now for the bad news:—

The former legislation included a requirement whereby it had to be further established, in addition to the appropriate degree of association between the transferor and transferee, that the transfer or conveyance had not taken place pursuant to an "arrangement" whereby either:

(a) The "consideration" was to be "provided" "directly or indirectly" by a "person" not associated to the required degree with either the transferor or the transferee (i.e. to the extent that either the transferor or the transferee held not less than 90 per cent of the issued share capital of the "person" providing the consideration, or vice versa), or

(b) A "beneficial interest" in the subject matter of the conveyance or transfer had been "previously conveyed or transferred" by a person not associated as mentioned in (a) above.

The expression "arrangement" (a favourite with the Parliamentary draftsman) is "apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons — a plan arranged between them which may not be enforceable at law". It comprehends "not only the initial plan but also all the transactions by which it is carried into effect": *Newton vs. C. of T.* (1958) A.C. 450,465 per Lord Denning.

The purpose of this additional requirement, which was based on the former S.50(1) Finance Act 1938 (U.K.) in the United Kingdom legislation (with the significant omission of the words "for the transfer or conveyance" after the word "consideration" in (a) above), was to counter a device known as the 'dummy bridge company' referred to by Lord Denning in *Escoigne Properties Ltd. vs. IRC* (1958) A.C. 549,567:—

> "They took advantage of section 42 by forming a small company which was a puppet in their hands. It was done in this way: If company A wished to sell property to company B for £100,000 and avoid stamp duty, company A would form a small 'bridge' company of 100 £1 shares in which it held all the shares. Company A would convey the property to the 'bridge' company for £100,000 but the price would be left owing. By reason of section 42 that conveyance would be exempt from stamp duty. Then company A would sell the 100 shares in the 'bridge' company to company B for £100: and stamp duty of a trifling amount would be paid on that transfer. The 'bridge' company would then convey the property to company B for £100,000 on the terms that the £100,000 should be paid direct to company A. By reason of section 42 no stamp duty would be payable on that conveyance. So the sale from company A to company B was completed without paying any stamp duty on the £100,000. The success of that device was not due to any defect in section 42. It was due to the cleverness of the persons who managed to bring the conveyances within section 42 beyond any doubt.
>
> The object of section 50 was to put a stop to that device: and it succeeded. If anyone were to resort to it after 1938, both conveyances would be liable to stamp duty. The first conveyance would be caught by subsection (1) (a). The second by subsection (1)(b)."

(The references to section 42, and to subsections (1)(a) and (1)(b) above must of course be read as references to S.19 Finance Act 1952, as amended, and to (a) and (b) referred to above).

Both (a) and (b) above have been restained in S.19(3) in the new legislation, which is modelled on S.27(3) Finance Act 1967 (U.K.).[2] The words "or any part of the consideration for the conveyance or transfer" have been inserted after "consideration" in the new legislation and the words "or received" after "provided" thus making the new legislation identical in this respect with the current United Kingdom legislation.

*Escoigne Properties Ltd. vs. IRC* (1958) A.C. 549 is itself an example of the operation of (b) above. The facts were simple. By an agreement for sale made in 1950 one Samuel Cohen agreed to sell certain land to Samuel Cohen (Properties) Ltd. ("the old company") in consideration of the issue to him of 9,998 shares of £1 in the capital of the old company. Subsequently a conveyance was executed whereby Samuel Cohen's executors, by the direction of the old company as beneficial owners, conveyed the land to Escoigne Properties Ltd. in which the old company held not less than 90 per cent of the issued share capital. The Revenue contended that relief under the United Kingdom equivalent to the former legislation was precluded by (b) above. The appellant company replied that the beneficial interest in the land had not been "previously conveyed or transferred" to the old company by the late Samuel Cohen, having vested in the old company by operation of law on the execution of the agreement of sale.

The House of Lords was in no mood to listen to such a technicality. "... when Cohen entered into the 1950 contract and received the consideration therefor, and beneficial interest in the property accordingly passed to the old company, it was his act by which it passed, and it would be too narrow a construction to say that nevertheless it was not conveyed or transferred by him": 560 per Viscount Simonds.

The decision was followed by Danckwerts J. in *Littlewoods Mail Order Stores Ltd. vs. IRC* (1961) Ch. 210, the facts of which, so far as relevant, were as follows. A friendly society, the Independent Society of Oddfellows ("Oddfellows"), had on 8th December 1958 granted a lease of Jubilee House, in Oxford Street, London, to the appellant company ("Littlewoods") for a term of 22 years and 10 days at a rent of £6 p.a. On 9th December 1958 Littlewoods assigned this lease to a wholly owned subsidiary, Fork Manufacturing Co. Ltd. ("Fork"). Danckwerts J. upheld the Revenue's contention that the assignment did not qualify for relief under the United Kingdom equivalent to the former legislation on the ground that the assignment failed to satisfy (b) above[3] Oddfellows (which was not associated with either Littlewoods

or Fork) having by the lease dated 8th December 1958 "previously conveyed or transferred" the premises to Littlewoods. Somewhat surprisingly, Danckwerts J.'s decision was upheld both by the Court of Appeal[4] and by the House of Lords[5] and must now be accepted as settled law.

The shortcomings of (a), on the other hand, became apparent in *Shop and Store Developments Ltd. vs. IRC* (1967) 1 A.C. 472, the facts of which, so far as material, were as follows. As part of an admitted "arrangement" Greenwoods (Hosiers and Outfitters) Ltd. ("the clothing company") which was the beneficial owner of not less than 90 per cent of the issued share capital of the appellant company ("the property company") had transferred certain freehold and leasehold property to the appellant company for £984,541, paid and satisfied by the allotment to the clothing company, credited as fully paid up, of 2,920,000 shares of 5s.0d. each in the capital of the property company, valued at 6s.9d. each, of which the clothing company subsequently sold 1,200,000 shares to an issuing house at 6s.5d. per share (i.e. for £385,000). The Revenue contended that under the arrangement part of the "consideration" had been provided indirectly by a person (the issuing house) which was associated neither with the property company nor with the clothing company, and that the transfer of the freehold and leasehold property consequently failed to satisfy (a) above.

The Revenue's argument, on this occasion, failed to convince the House of Lords, which by a majority of three to two held that the appellant company was entitled to the relief it sought. "The clothing company sold their properties to the property company. If it is asked what did the clothing company get in return the answer, and, as it seems to me, the complete answer, must be that they got 2,920,000 shares in the property company". "In agreement with Pennycuick J.[6] I recognise that the words 'directly or indirectly' cast a wide net, but I also agree with him that if company A sells property to company B in consideration of fully-paid shares in company B and if company A, even pursuant to a pre-arranged plan, then sells some of the shares to C, it cannot be said that C has provided directly or indirectly the consideration for the sale of the property by company A to company B": 494, 496 per Lord Morris of Borth-y-Gest.

The United Kingdom Legislature's reaction was swift. It replaced S.50 Finance Act 1938 by a new enactment, S.27(3) Finance Act 1967, which, while preserving both (a) and (b) above, shored up the tottering edifice by the addition of a third paragraph, and a statutory gloss expanding the meaning of (a). Both amendments are to be found in S.19(3) in the new legislation.

The first, which is designated (c), precludes relief if the "arrangement" envisages that the transferor and the transferee will at some future date cease to be associated to the required extent. This, in itself, would have been sufficient to close the loophole exposed by the decision in *Shop and Store Developments Ltd. vs. IRC* (1967) 1 A.C. 472. Suppose, for example, that a holding company (H) is the beneficial owner of the entire issued share capital (£100, represented by 100 Ords. of £1) in a subsidiary (S). H wishes to sell its premises to a third party (P) for £100,000. Under the former legislation this could have been done without P paying ad valorem stamp duty by simply arranging for S to take a transfer of the premises from H for a consideration of £100,000 paid by S to H with moneys raised by S on overdraft, P subsequently subscribing for 100,000 Ords. of £1 in the capital of S, and S applying the proceeds of the issue of the 100,000 Ords. of £1 in discharge of its overdraft. At the time of the execution of the transfer H and S would have been associated to the required extent, S being a wholly owned subsidiary of H, and the "consideration" (£100,000) for the transfer would have been paid by S to H, so that (a) above would have been in no way contravened. P would thus become the owner of the premises through its wholly owned subsidiary S at the cost of, at most, £1,000 in capital duty.

Under the new legislation, however, such a scheme would not qualify for relief, since an essential ingredient of the "arrangement" would be that H and S would cease to be associated to the required extent on P subscribing for 100,000 Ords. of £1 in the capital of S.

As an additional preventative to any attempted repetition of the scheme which was successful in *Shop and Store Developments Ltd. vs. IRC* (1967) 1 A.C. 472 the Legislature added a gloss to (a), providing that the consideration for the conveyance or transfer is to be treated as having been provided by a person not associated to the required extent with either the transferor or the transferee if, as part of the "arrangement", such a person makes a "payment or other disposition" which "enables" the transferee to "provide" the "consideration" payable.

The precise set of circumstances to which the statutory gloss is intended to have reference is not clear. Suppose, as before, that a holding company (H) wishes to convey its premises to its wholly owned subsidiary (S) for £100,000. S raises the requisite sum by way of mortgage, and on closing, the mortgagee's solicitors hand over a draft for £100,000 made out to S, which S endorses over to H. There is no question of any third party, P, subscribing for or purchasing shares in S. The matter is purely an internal one, involving only H and S. Is the endorsement by S of its draft over to H a "payment or other disposition" by an outside person (the mortgagee) "enabling" S to pay the required "consideration" to H? If so, does the statutory gloss treat the consideration for the conveyance as having been provided not by S but by the mortgagee, thus precluding relief under the new legislation? It is difficult to imagine that the statutory gloss could have been intended to have such an unreasonable effect.

It is submitted that the statutory gloss, like the rest of the new legislation, must be construed in the manner laid down by Lord Denning in *Escoigne Properties Ltd. vs. IRC* (1958) A.C. 549, 566: "When the draftsman is drawing the Act, he has in mind particular instances which he wishes to cover. He frames a formula which he hopes will embrace them all with precision. But the formula is as unintelligible as a mathematical formula to anyone except the experts: and even they have to know what the symbols mean. To make it intelligible, you must know the sort of thing Parliament had in mind. So you have to resort to particular instances to gather the meaning."

It is probable that the draftsman of S.19(3) in the new legislation (or rather his United Kingdom colleague before him) had in mind a set of circumstances similar to those in *Curzon Offices Lts. vs. IRC* (1944) 1 All E. R. 163, 606, the facts of which were as follows.

A holding company, Humphreys Ltd. ("Humphreys") was the owner of the entire issued share capital (£100, represented by 100 Ords. of £1) of a wholly owned subsidiary Curzon Offices Ltd. ("Curzon"). Humphreys owned a block of London flats (Chelsea Cloisters) and Curzon an office block (Curzon Street House). Humphreys had in fact built Curzon Street House for Curzon and Curzon was in consequence indebted to Humphreys for the building costs of £286,596.

Humphreys, having agreed to sell both Chelsea Cloisters and Curzon Street House to a purchaser, Regis Properties Co. Ltd. ("Regis"), took the following steps:—

(1) Humphreys conveyed Chelsea Cloisters to Curzon for £568,078, of which £238,404 was to be payable in cash and the balance (£392,672) left owing on the security of the Cloisters.
(2) The National Provincial Bank then lent Curzon £525,000, which Curzon paid to Humphreys. Of this, £286,596 was paid in discharge of Curzon's indebtedness to Humphreys in respect of the building of Curzon Street House, and the balance (£238,404) in part payment of the purchase price of Chelsea Cloisters.
The National Provincial Bank's loan of £525,000 was secured, inter alia, by a bank guarantee from Regis.
(3) Regis acquired the issued share capital (100 Ords. of £1) of Curzon from Humphreys at par (i.e. for £100).

Macnaghten J. (165) held that Curzon was not entitled to relief in respect of the conveyance to it by Humphreys of Chelsea Cloisters on the ground that the consideration for the conveyance had been provided in part by Regis' guarantee of the National Provincial Bank's loan, and that Regis not being associated with either Curzon or Humphreys to the required extent at the date of the conveyance, Curzon's claim for relief failed to satisfy (a). The Court of Appeal (606) took the same view.[7]

Strangely enough, no mention appears to have been made of *Curzon Offices Ltd. vs. IRC* (1944) 1 All E.R. 163, 606, in *Shop and Store Developments Ltd. vs. IRC* (1967) 1 A.C. 472, either in the Law Lords' speeches or in argument.

It is submitted that the draftsman of S.19(3), apprehensive that the decision had been impliedly overruled by the simplistic view taken by the majority of the House in *Shop and Store Development Ltd. vs. IRC* (1967) 1 A.C. 472, inserted the statutory gloss referred to above to ensure the survival of the principle established in *Curzon Offices Ltd. vs. IRC* (1944) 1 All E.R. 163, 606. If so, the purpose of the statutory gloss at once becomes clear.

It is intended to apply where the conveyance or transfer in question is merely a step in an overall arrangement whereby either the subject matter of the conveyance or transfer, or the share capital of a company owning it, is to be transferred by one party to another party, neither of which is associated with the other to the extent provided in S.19(2). In such a case the consideration for the conveyance or transfer in question is treated as having been provided by the purchasing party, even though immediately payable by a company associated with the transferor to the required extent. Construing the statutory gloss in accordance with the principles laid down by Lord Denning, therefore, it is clear that it is not intended to apply to an internal conveyance or transfer by a parent to its subsidiary, or vice versa, even if the finance for the consideration payable is raised from an outside source. In such a case ". . . there is no real change in the beneficial interest at all: there is, of course, a change in form and change in law, but the beneficial interest really remains where it was": *Curzon Offices Ltd. vs. IRC* (1944) 1 All E.R. 606, 607 per Goddard L. J.

In closing, it should be pointed out that in many instances avoidance schemes based on the former legislation came to grief because the transferor was not the "beneficial owner" of the requisite proportion of the issued share capital of the transferee. In *Holmleigh (Holdings) Ltd. vs. CIR* 45 T.C. 435, for example, Great Universal Stores Ltd. ("GUS") had agreed to acquire the issued share capital of a manufacturing company, A. W. Flateau & Co. Ltd. ("Flateau") for £1,835,000. Flateau, however, owned certain assets, valued at £870,000, which GUS had no interest in acquiring, and it was therefore agreed that these assets would be transferred to the appellant company (of which Flateau held the entire issued share capital of £2, represented by two ordinary shares of £1 held by the subscribers in trust for Flateau). The original members of Flateau subsequently acquired these shares for £870,000. Harman J. (455), upheld the Revenue's decision of *Leigh Spinners Ltd. vs. CIR* 45 T.C. 425, upheld the Revenue's contention that the appellant company was not entitled to relief under the United Kingdom equivalent to the former legislation, on the ground that the two shares were "subject to equitable obligations in favour of others" (i.e. the former members of Flateau) which prevented Flateau from being the "beneficial owner" thereof at the date of the transfer of the assets.

Any kind of legally enforceable arrangement, therefore, whereby the shares in the transferee constituting the required degree of association between the transferor and the transferee are to be sold subsequently is sufficient to subject the shares in question to equitable obligations in favour of the intended purchaser thereof, and thus prevent the transferor from being the "beneficial owner" thereof. Decisions to the same effect abound[8] and it is strange that the point has been so frequently overlooked.

**And worse news**

The requirements of S.19(3), stringent though they are, will not be contravened unless it is envisaged at the outset that the transferor and the transferee will eventually part company.

Under the United Kingdom equivalent to the new legislation a subsequent reorganisation of the share capital of the transferor or the transferee having this effect will not prejudice the relief unless it can be shown by the Revenue to have been a necessary ingredient of the original arrangement, in the contemplation of the parties from the outset.

Not so in Ireland. In an excess of zeal, the Irish Parliamentary draftsman, determined to outdo his United Kingdom colleague, had added an additional S.19(6) providing for the withdrawal of the relief in the event of

the transferor and transferee ceasing to be associated to the required extent at any time within two years of the date of the conveyance or transfer, whether or not this was envisaged by the original "arrangement". If so, then irrespective of whether or not it has been adjudicated, the conveyance or transfer is to become liable to ad valorem stamp duty, the duty payable being a "debt due from the transferor and the transferee jointly and generally to the Minister for Finance", bearing interest meanwhile at 1.25 per cent per month.[9]

Unfortunately, this is not the end of the story. While the Revenue's intended targets are undoubtedly the transferor and the transferee, the introduction of S.19(6) ignores the fact that the primary sanction for the collection of stamp duty is the inability to adduce a document in evidence unless it is duly stamped: S.14 Stamp Act 1891. Suppose, for example, that a holding company (H) conveys its premises to its wholly owned subsidiary (S) and the Revenue concedes that under the new legislation stamp duty is payable on the conveyance at 50p only. Subsequently, S conveys the premises to a third party (P), ad valorem stamp duty being paid in the usual way by P on this second conveyance. Within two years of the execution of the original conveyance H and S cease to be associated in circumstances not envisaged at the date of the execution of the original conveyance (for example, by the subsequent injection into S of additional capital by another company Q, unconnected in any way with H). Does this mean that the original conveyance by H to S "shall . . . again become chargeable" with ad valorem stamp duty, and that P, although not a party to the events whereby H and S have ceased to be associated, and even, in all probability, totally ignorant of them, will be unable to prove his title to the premises without first paying the outstanding duty, the original conveyance being an essential link in his chain of title?

It is submitted that it does not. S.19(4) in the new legislation requires that an instrument to which S.19(2) applies be submitted for adjudication under S.12 Stamp Act 1891. Having been stamped in accordance with the adjudication the instrument "shall be admissible in evidence, and available for all purposes notwithstanding any objection relating to duty": S.12(5) Stamp Act 1891. These last six words, it is submitted, are sufficient to dispose of any objection to P's title based on S.19(6). The fact that the original conveyance by H to S "shall . . . again become chargeable" with ad valorem stamp duty in no way prevents P from tendering it in evidence to prove his title to the premises.

Fortunately however, a practical solution to the problem exists. Since the maximum amount of any additional stamp duty is readily calculable (6% of the consideration + interest) liability can be guarded against by means of an insurance company bond. It is understood that at least one major Irish insurance company has agreed to provide such a bond.

FOOTNOTES

1. See, however, *John Emery & Sons Ltd. vs. CIR* 20 TC 213.
2. Replacing S.50 Finance Act 1938 (U.K.) above.
3. "On the whole, I have come to the conclusion that, for the purposes of the present case, a lease is a conveyance and a person who grants a lease is a conveying party." (227) One is reminded of the story of the harrassed booking clerk endeavouring to explain the railway company's fare schedule to a passenger: "Cats is dogs, hens is dogs and so's rabbits. But them tortoises of yours, ma'am, is insects, and they travel free".
4. (1961) Ch. 597.
5. (1963) A.C. 135.
6. (1966) Ch. 108.
7. cf. *Times Newspapers vs. IRC* (1971) 3 All E.R. 98 where the transferee's bank overdraft was not guaranteed.
8. See, for example, *Parway Estates Ltd. vs. CIR* 45 T.C. 135, *Brooklands Selangor Holdings Ltd. vs. IRC* (1970) 2 All E.R. 76 and *Baytrust Holdings Ltd. vs. IRC* (1971) 3 All E.R. 76. It was also a secondary ground for the decision of the Court of Appeal in *Curzon Offices Ltd. vs. IRC* (1944) 1 All E.R. 606, the facts of which are set out above. See per Goddard L. J. (607).
9. The Legislature appears to be less impressed, however, with the desirability of introducing legislation corresponding to S.91 Finance Act 1965 (U.K.) authorising the Court to order the payment of interest on stamp duty ordered to be repaid on a successful appeal by way of case stated under S.13 Stamp Act 1891.

# Dismissal for participating in Strike or other Industrial Action: Section 5(2) of the Unfair Dismissals Act, 1977

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**The Need to Regulate Loss of Employment in Strikes**

It is sometimes forgotten that collective labour relations is not principally about industrial action but the promotion and regulation of collective bargaining. This includes as one element the protection of the freedom to strike. The freedom to strike is a crucial factor in the conflict between the principal interest of management and of labour in collective bargaining. The principal interest of management has always been the maintenance of industrial peace over a given area and period. The freedom to strike plays an important role in assisting the principal interest of labour, namely, the creation and maintenance of certain standards over a given area and period — standards of distribution of work, of rewards, and of stability of employment.

As Lord Wright put it in 1942, in *Crofter Harris Tweed v. Veitch,*

> '[The] right of workmen to strike is an essential element in the principle of collective bargaining'.

It is an essential element not only of the unions' bargaining power, that is for the bargaining process itself, it is also a necessary sanction for enforcing agreed rules. If employees are penalised for taking part in strike action, industrial relations consequences vary depending on the strength or weakness of the union or unions involved (although strikes need not be associated with unions). If a union is weak, there will be little effective resistance to the actions of a hostile employer. The concentrated power of accumulated capital can be matched only by the concentrated power of workers acting in solidarity. As long ago as 1896, in *Vegelahn v. Guntner,* Oliver Wendell Holmes, in a classic passage of a dissenting opinion in the Supreme Judicial Court of Massachusetts, stated that

> 'Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way'.

Where there is nothing like equilibrium between labour and management, there is a pressing need for legislation to regulate the loss of employment in strikes. This need is increased by the uncertainty of common law rules concerning the effect of strike and other industrial action on the individual contract of employment.

In this context, Section 5(2) of the Unfair Dismissals Act, 1977, is of crucial importance. The sub-section purports to deal with the dismissal of employees for participating in strike or other industrial action. It provides that

> 'the dismissal of an employee for taking part in a strike or other industrial action shall be deemed, for the purposes of this Act, to be an unfair dismissal, if —
>
> (a) one or more employees of the same employer who took part in the strike or other industrial action were not dismissed for so taking part, or
> (b) one or more of such employees who were dismissed for so taking part are subsequently offered re-instatement or re-engagement[1] and the employee is not.'

The sub-section has been described (correctly, as will be seen) as an 'extremely obscure and technical' provision.[2] There is no empirical evidence of the number of workers who lose their jobs through striking: nonetheless, given the high number of man-days lost each year on account of strikes, it is telling that the sub-sectioin has never been invoked (Official Statistics published in the Central Statistics Office in March, 1978, issue of the *Irish Statistical Bulletin* show that there were 152 disputes in 1978 involving 32,558 workers with a loss of 624,266.)

*Prima Facie,* Section 5 protects the freedom to strike. It is consonant with the theory that Ireland recognises a positive right to strike in domestic and international law. This article will touch on the extent of such recognition before proceeding to examine Section 5 (2) and the extent to which it may be said to achieve the desired equilibrium between laour and management where job security is at risk on account of industrial action. British Law is referred to where appropriate or enlightening.

**The Right to Strike — Constitutional and International Law: A Fundamental Right**

In the constitutional sense, the right to strike is a human right, impliedly recognised by Art. 40.3g. *Bunreacht na hÉireann.* The right has not been analysed in any depth. On three occasions, it has been referred to, *obiter,* by judges. The first reference occurs in *Brendan Dunne Ltd. v. Fitzpatrick and Others* [1958] I.R. 29, 34. Mr. Justice Budd declared that

> 'The Articles of the Constitution to which I have referred [Arts. 40.3, 40.6, 43] seem to me to preserve amongst other rights those of the employer and worker respectively to deal with and dispose of their property and labour as they will without interference, unless such interference be made legitimate by law. The right of citizens to assemble peaceably, to express their opinions freely are guaranteed only subject to public order and morality'.

The language here is ambigious. Only by a generous extension of the words used could the worker's right 'to deal with and dispose of' his property and labour be taken to include a right to strike. It is clear that the right —

whatever its precise meaning — is not an absolute one (in any event we would not expect it to be). A legitimate interference with its exercise may be permitted by 'law'; presumably this is not the only form such interference may take.

In the later case of *Educational Co. of Ireland v. Fitzpatrick* [1961] I.R. 345, 397, Kingsmill Moore J. said in the Supreme Court that

> 'The right to dispose of one's labour and to withdraw it seems to me a fundamental personal right, which, though not specifically mentioned in the Constitution as being guaranteed, is a right of a nature which I cannot see to have been adversely affected by anything within the intendment of the Constitution'.

These *dicta* suggest that a fundamental personal right to strike exists outside the Constitution and that it is simply 'not adversely affected' by those rights within. The judge may have had in mind the (incorrectly styled) common law 'right' which derives from the various statutory immunities conferred on those taking part in industrial action. The *Educational Co.* case was decided before the celebrated High Court judgment of Kenny J. in *Ryan v. A.G.* [1965] I.R. 294. If one is dealing with a fundamental personal right, as Kingsmill Moore J. certainly suggests, it could be argued today that it falls within the category of personal rights in Article 40.3.1°. The case for a personal right to strike can be put in terms of social ethics: O. Kahn-Freund and B. Hepple: *Laws Against Strikes* (Fabian Research Series, no. 305, 7). If people may not withdraw their labour, this may mean the law compels them to work. A legal compulsion to work would be abhorrent to the Irish system of law with its constitutional tradition of guaranteed human rights and fundamental freedoms.

So far, in the extracts given, Irish judges have referred to the freedom to strike in an individual sense. More recently the freedom was discussed in a collective context but the insight into its nature is most unsatisfactory. In *Crowley and Others v. Ireland and Others* (Supreme Court, unreported, 1 October 1979) a number of national teachers withdrew their labour in pursuance of a trade dispute affecting a particular school. Part of the defendant teachers' defence was that their action was no more than an exercise of the constitutional right to withdraw their labour. Chief Justice O'Higgins did

> '... not accept that such teachers had any constitutional right to do what they did. However, *if they had any such right so to refrain from teaching,* [emphasis added] it was not a right which could be exercised for the purpose of frustrating, infringing or destroying the constitutional rights of others. Rights guaranteed by the Constitution must be exercised having regard to the rights of others. It is on this basis that such rights are given by the Constitution. Once it is sought to exercise such rights without regard to the rights of others, and without regard to the harm done to others then what is taking place is an abuse and not the exercise of a right given by the Constitution'.

If these words convey that a right to strike is qualified, they are unexceptional. But they appear to go much further than that. They apparently do not perceive as worthy of consideration the central point that strike action is used as an economic or political weapon. If it could not be used as a weapon, it would be a pointless phenomenon of industrial relations:—

> 'Every strike is in the nature of an act of war. Gain on one side implies loss on the other ...' (Sir. Fitzjames Stephen: *The History of the Criminal Law of England,* Vol. III, 219).

Given the broad and unlimited spectrum of constitutional rights involved or likely to be involved in any industrial conflict, it is impossible to forsee a situation where strike action would not result in some degree of frustration, infringement or destruction of the rights of others. In all cases, therefore, is strike action to be unlawful? We cannot deduce from the Chief Justice's words, either the extent of the right to strike or the way in which the courts might view a conflict of rights where, for example, strikes involved essential services, or were political or unconstitutional or where outsiders were unprotected. The Chief Justice (with Parke J.) delivered a minority judgment in *Crowley's* case: the majority of the Court (Kenny, Henchy, Griffin JJ.) did not consider the constitutional point in relation to strike action.

**International Law**

The right to strike is also found in international law. The United Nations International Convention on Economic, Social and Cultural Rights adopted in 1966 expressly mentions the right to strike, to be exercised in accordance with the national law. This was the first time that, on an international basis, the right to strike was recognised.

The European Social Charter to which Ireland is a party, provides in Article 6 that

> 'With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties ... recognise: ... The right or workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.'

This right is confined to conflicts of interest and does not extend to conflicts of right. It can be subject to restrictions which 'are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of the public interest, national security, public health, or morals' (Art. 31). Note that in the Charter the 'right' to strike is an institution complementary to collective bargaining, not a fundamental human right. (As such right, it would not have been germane to the Social Charter).

**Ireland is a member of the International Labour Organisation.**[3]

In 1955, following repeated and persistent representations by the Irish TUC, the Government ratified ILO Convention no. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise and Convention no. 98 (1949) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. (See *Trade Union Information* May-Ju. 1955, 14, 15.) Article 8(2) of ILO Convention no. 87 enjoins that

> 'The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.'

The Governing Body's Committee on Freedom of Association has frequently reiterated in its interpretations of these two conventions that, although there is no express reference to strike action in them, they impliedly guarantee a right to strike: *Freedom of Assembly: Digest of Decisions of the Freedom of Assembly Committee of the Governing Body of the ILO:* Geneva, 1972, paras. 240, 292.

Bearing in mind the foregoing considerations of constitutional and international law, we turn to consider the meaning of section 5(2) of the Unfair Dismissals Act.

**The Meaning of Section 5(2)**

During the Committee Stage of the Unfair Dismissals Bill in Dáil Éireann, the Minister for Labour explained the intention behind section 5(2):—

> '. . . that no individual victimisation would result from a return to work after a trade dispute'

further

> '[the] section would cover a number of employees who would collectively feel themselves victims of unfair treatment at the hands of the employer'[4].

Dismissal in the circumstances referred to in Section 5(2) is 'deemed' unfair. At first glance, dismissal for taking part in strike or other industrial action belongs to the category of 'automatically unfair' dismissals (see, in this context, Section 6(2) and (3) of the Act). There is no doubt that unions and employers regard it in that light.

The 'deeming' in Section 5(2) would be straightforward were it not for Section 6(1) of the same Act which provides:

> 'Subject to the provisions of this Section [i.e., Section 6] the dismissal of an employee shall be deemed, *for the purposes of this Act*, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal' (emphasis added).

By virtue of this blanket declaration all dismissals are deemed unfair for the purposes of the Unfair Dismissals Act. What is the relationship between Section 5(2) and Section 6(1)?

**Possible Interpretations**

Contrary to the commonly held belief as to the intention of Section 5(2), the sub-section may be interpreted in four possible ways. The first two relate to the principle which is enunciated in the text; the second to the contrary principle which is implied therein. Interpretative difficulties arise in relation to non-selective or non-discriminatory dismissals which are *not* covered by Section 5(2) but which arise in precisely the same circumstances (where workers have participated in strikes or other industrial action). Does the Act imply that these are outside its jurisdiction? Here, too, there are alternative interpretations.

In relation to the *positive principle* which is specified in Section 5(2), it may be argued that

(1) the sub-section effects a conclusive presumption that selective or discriminatory dismissals for taking part in strike or other industrial action are unfair. (This is generally regarded as the intention behind sub-section 2). Thus the adjudicating bodies would treat dismissal in the circumstances of Section 5(2) as automatically unfair independently of any excuses or justification on the employer's part. Alternatively, it could be argued that

(2) Section 5(2) does not effect a conclusive presumption; instead Section 6(1) applies to dismissals under the sub-section as to other dismissals 'for the purposes of' the Act. Thus an employer could prove that his decision to dismiss selectively contrary to section 5(2) was not unfair 'having regard to all the circumstances'. The merits of dismissal would be relevant.

Concerning the *implied principle* it may be argued that

(1) the contrary implied presumption in Section 5(2) is conclusive; in other words, a non-discriminatory dismissal would be conclusively presumed not to be unfair. An employer could thus dismiss all of the workforce for taking part in industrial action and not contravene the legislation. The principle of *inclusio unius exclusio alterius* would apply. Alernatively, it could be maintained that

(2) the contrary implied presumption is not conclusive. A non-selective dismissal is no less a dismissal 'for the purposes of this Act' than any other. Section 6(1) would apply and an employer could argue the merits of his decision.

**Interpretation of Express Presumption**

The first two possibilities concern the positive element or express presumption in the Act and may be considered together. Section 6(1) states the underlying principle upon which the Act is based: a dismissal 'for the purposes of this Act' is presumed unfair unless there are substantial grounds to justify it. This is 'subject to the provisions' of Section 6. That section enumerates certain grounds which are generally believed to render a dismissal automatically unfair.[6] No reference is made at any point, either directly or indirectly, to dismissal for taking part in strike or other industrial action. Looking at the plain words which are used in the Act, it is clear that Section 5(2) does not effect a conclusive presumption of unfairness. Whatever may have been intended by the legislature, Section 6(1) is so drawn as to flood the entire Act. Every dismissal 'for the purposes of the Act' is deemed unfair unless there are substantial grounds to justify it. Section 5(2) dismissals are no exception.

It may be argued in support of the present law that it is reasonable to allow an employer to adduce substantial grounds justifying the selective dismissal of strikers. Employers are no less vulnerable than employees to victimisation on account of industrial action. And if industrial action is accompanied by unlawful activities such as violence, obstruction or threats, would an employer be dismissing unfairly if he took back into employment only those workers who had not engaged in unlawful activities? (see, analogously, ss.57(3) and 62, EPCA, 1978, which do not lay down a conclusive presumption.) This argument is, however, inconsistent. It confuses the various incidents or results which may accompany strike action with the act of striking itself. If Section 5(2) were to embody a conclusive presumption, that would not preclude the possibility of an employer dismissing workers because they used unlawful acts or methods in connection with strike action. In such circumstances the cause of dismissal would not be the act

of striking itself. It goes without saying that there are acts which the law must forbid and as best it can suppress, irrespective of the purpose for which they are done, or the circumstances in which they arise. An assault remains an assault, malicious damage to property just that, and physically obstructing the highway or access to a factory or power plant remains a public nuisance, no matter what. No one has ever argued that freedom to strike should include freedom to commit or to threaten physical violence to persons or property, or more generally, to commit what one may call common as distinct from specifically economic crimes or torts. Freedom to strike may be exercised in what amounts to a very complicated situation in law and in fact but the act of striking itself is capable of being and, it is submitted, should always be, distinguished.

Two practical considerations may be invoked in support of amending Section 5(2) so as to except it from the influence of Section 6(1). First, an argument *ex negativo*. If the subsection is *not* amended, the Rights Commissioner or the EAT will be called on to consider the merits of collective industrial disputes whenever the sub-section is relied on. Not only would this be a manifestly unsuitable role for these authorities, it is one they would be most unlikely to welcome. Secondly, the statutory definition of strike action is relevant. It is a restrictive definition (see below). Its purpose must be to secure the acceptance or non-acceptance of terms or conditions of or affecting employment. Consumer or political strikes are not covered. To dismiss selectively, therefore, under an amended Section 5(2) would not be automatically unfair where men struck in order to advance any cause whatsoever, whether the enactment of a statute, or the elimination of an unpopular measure of foreign or educational policy, to avoid a new tax or an increase in bus fares. The strike in Section 5 is solely the phenomenon of industrial relations; it retains its traditional link with the processes of collective bargaining.

(to be continued)

FOOTNOTES

1. Note the difference between the definition of these remedies in s.5(4) and s.7(1) of the Unfair Dismissals Act. The latter contains no reference to an 'associated employer' which in any event is not defined in the Act. ('Associated company' is defined in the Redundancy Payments Act, 1967, s.16(4).

2. Naomi Wayne: *Labour Law in Ireland* (Kincora Press and ITGWU, 1980), 93.

3. In general, see M. Cashell: 'Influence on Irish Law and Practice of International Labour Standards': (1972) 106 *International Labour Review* 47.

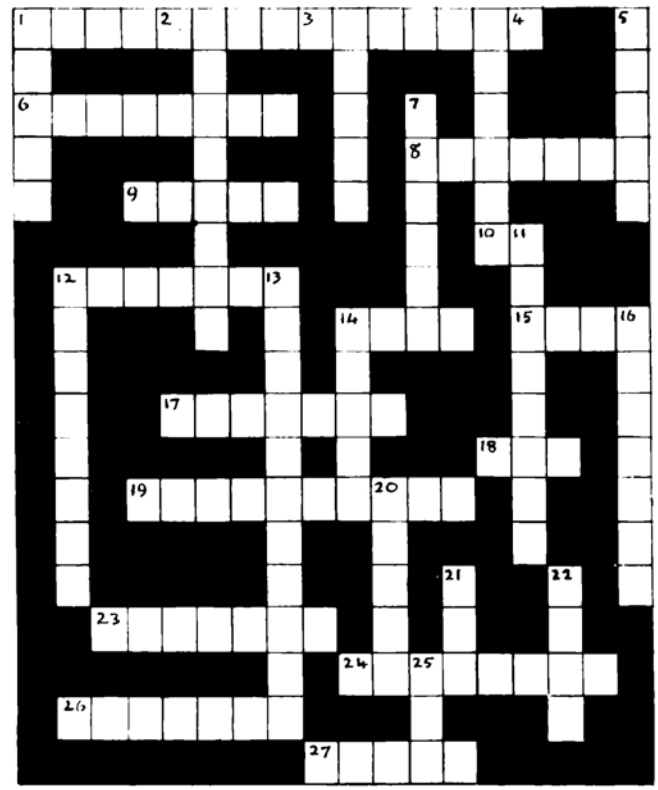
4. *Dáil Debates*, Vol. 296 (25 Jan. 1977) Cols. 59 and 60. The philosophy behind the equivalent s.62 of the British Employment Protection (Consolidation) Act, 1978, may be contrasted: see Sir Hugh Griffiths in *Heath v. Longman Ltd.* [1973] 2 All E.R. 1228 at 1230 '1 and see, too, Phillips J. in *Thompson v. Eaton* [1976] 3 All E.R. 383, 388.

5. An equally absorbing question, which lies outside the scope of the present text, concerns the relationship between s.6(1) of the Unfair Dismissals Act and s.6(2), (3) and (4) of the same Act; the latter describe so called 'automatically' unfair dismissals. Subsections (2), (3) and (4) each begin "Without prejudice to the generality of sub section (1)". It is clear that, far from effecting grounds for automatically unfair dismissals, the sub sections permit an employer to adduce substantial grounds in defence of his decision to dismiss. What is the difference between a dismissal under any one of these sub sections and an 'ordinary' dismissal under section 6(1)?

6. See footnote 5 *supra*.

## CROSSWORD

(prepared for use in the Land Registry Module of the Society's Professional Course)



### ACROSS

1. If issued, must be lodged with all dealings affecting ownership. (4, 11)
6. The holder of the entire estate is registered with this title. (8)
8. The Legal personal representative does this to the beneficiary. (7)
9. There are four kinds of this to leasehold land. (5)
10. Two-Thirds of "Mayday"! (2)
12. With 18 across, to bind a purchaser with the result of a suit. (7)
14. 1 across may be held subject to this. (4)
15. The class of owner who holds the entire estate. (4)
17. Mechanism to protect an unregisterable right. (7)
18. 1st part of 12 across in Latin. (3)
19. Title conferred where no or insufficient documentary title exists. (10)
23. They appear on part III of folio. (7)
24. Particulars of this are on part 1 of folio. (8)
26. 11 or 12 down does this to folio for 14 days. (7)
27. The number of freehold titles. (5)

### DOWN

1. Must be furnished with folio on sale by assignement. (5)
2. Land Commission vests subject to these. (8)
3. An extract from the register. (5)
4. These are not disclosed on a folio. (6)
5. Registrar may do this to folio of his own accord. (5)
7. Special form of discharge available to Building Societies. (6)
11. + 12. A search that does 26 across. (8 and 8)
13. These could give rise to limited ownership. (11)
14. One of the compulsory Registration Counties. (5)
16. A class of Ownership. (7)
20. He appears on part II. (5)
21. Registered property is identified by reference to this. (3)
22. Is found above dealing number and is important. (4)
25. The collection number, if any, is found on this part of the folio. (3)

[For solution see page 113]

# SOCIETY WELCOMES NEW UNIVERSITY COLLEGE GALWAY LAW PROSPECTUS

The Society's Education Committee has welcomed the new prospectus issued by the Faculty of Law at University College Galway. Under the guidance of Professor Kevin Boyle legal studies in the College have been reorganised in recent years. To quote from the new prospectus "Law is not taught at U.C.G. with the traditional purpose of preparing students for careers in legal practice as barristers and Solicitors. The objective of the recent reorganisation has been to both broaden the scope of legal study and the range of career outlets which graduates who have read legal subjects may take up. There may be a misconception that the only point to reading law at university is to prepare the student for a career as a private practitioner of law. In fact the study of law can prove a valuable and enjoyable educational discipline in its own right, while also providing an excellent basic education for careers in a large number of fields in modern society. There is now considerable evidence that as a community we are educating a sufficient, if not an excessive number of people hoping to follow careers in the private practise of law. Students embarking on the study of law in the Republic should be aware that the demand for Solicitors and barristers is likely to be limited for the forseeable future. As a society our present need for legally trained people lies in other directions including local and central government administration, industry and commerce and the international sectors of both government and industry.

The programmes of legal study developed at Galway are based on an appreciation of these facts. But within this overall approach it remains possible at Galway to read the necessary subjects in law which will enable a student to prepare for entry to the solicitors or the barristers profession, or to use such professional qualifications for careers other than private practise."

It is not perhaps surprising to find the newer or smaller institutions breaking free more easily from the traditional pattern of the law schools of the Irish Universities as being simply conduit pipes through which undergraduates passed on their way to the legal profession. In establishing this pattern the Irish Law Schools seem to have gone even farther than their U.K. counterparts where this pattern is discernible though less pervasive.

The Law Faculty in a continental European university is often the largest faculty, — attracting students most of whom have no intention of ever practising law. The legal degree, which also includes an economics or history element is regarded as the appropriate grounding for careers in administration, government or business. With the increasing importance of the E.E.C. — a community of legal rules — a legal education — if not necessarily a professional qualification — will be of great benefit, arguably essential, for those in the public service or business whose work will be directly influenced by the E.E.C.

This move in U.C.G. and the Law Option in the European Studies degree offered by N.I.H.E. Limerick are very welcome. It is to be hoped that consideration will be given in the other three Law Schools to offering such courses to their students in the near future.

The popularity of Law Faculties among prospective students may well fade if no efforts are made to ensure that career prospects for law graduates are improved.

1st July 1980.

# SOLICITORS' ACCOUNTS REGULATIONS

**Approved Authorised Depositories for Solicitors Funds at July, 1980.**

Agricultural Credit Corporation Limited;
Algemene Bank Nederland (Ireland) Limited;
Allied Irish Banks Limited;
Allied Irish Finance Company Limited;
Allied Irish Investment Bank Limited;
Ansbacher & Company Limited;
Bank of America;
Bank of Ireland;
Bank of Ireland Finance Limited;
Bank of Nova Scotia;
Banque Nationale De Paris (Ireland) Limited;
Bowmaker (Ireland) Limited;
Citibank N.A.;
Chase & Bank of Ireland (International) Limited;
City of Dublin Bank Limited;
First National Bank of Chicago;
Forward Trust (Ireland) Limited;
Guinness & Mahon Limited;
Hill Samuel & Company (Ireland) Limited;
Industrial Credit Company Limited;
Investment Bank of Ireland Limited;
Irish Bank of Commerce Limited;
Irish Intercontinental Bank Limited;
Lombard & Ulster Banking (Ireland) Limited;
Mercantile Credit Company of Ireland Limited;
Northern Bank Limited;
Northern Bank Finance Corporation Limited;
Post Office Savings Bank;
Royal Trust Bank (Ireland) Limited;
Trinity Bank Limited;
Trustee Savings Banks;
Ulster Bank Limited;
Ulster Investment Bank Limited;
United Dominions Trust (Ireland) Limited.

# RECENT COUNCIL DECISIONS AND ACTION

The suggestion that the Society should seek to acquire — at auction — the Smithfield site in Benburb Street, which adjoins the Blackhall Place property, was rejected by a special meeting of the Council in May. The decision was taken after considering advice from a Property Consultant, the Society's Architect and Solicitor, and reviewing the accommodation requirements for the next decade and the financial implications of the purchase.

The financial cost was considered too high for a single generation of solicitors to carry.

### Northern visitors

The Ordinary Meeting of the Council, held on the same day, was attended by the following members of the Incorporated Law Society of Northern Ireland:

> Messrs. Patrick S. M. Cross, President; James G. Doran, Senior Vice-President; C. C. McNally, Junior Vice-President; Miss T. McKinney, Mr G. P. Jemphrey and the Secretary, Mr Sydney Lomas.

During the meeting some Council members and the Director-General were excused to attend in the High Court as witnesses in the case of *John Fanning and Anor v The Incorporated Law Society of Ireland*. In his judgment, delivered after a day-long hearing, Mr Justice Butler found in favour of the Society.

A report of the case will be published in the *Gazette*.

The Court of Justice of the European Communities has indicated that it will accept the CCBE Identity Card as evidence of a lawyer's right to audience before the Court.

To be valid for this purpose the CCBE Identity Card must have been dated within the previous 12 months.

Grave concern was expressed by the Council over the substantial arrears in Accountants' Certificates, reported by the Registrar's and Compensation Fund Committee.

Instructions were given that the firms concerned should be pressed to submit the appropriate Certificates immediately.

The Union Internationale du Notariat Latin (UNIL) is to be invited by the Society to hold a meeting in Dublin on a date to be agreed within the next two years.

### Taxation Commission

When the Council was told, at its meeting in May, that the Minister for Finance had declined to appoint a Solicitor on the Commission on Taxation, the Council established an ad hoc Committee to draft a submission to the Commission. Mr L. K. Shields was appointed Convenor of the Committee.

Representations were made to the President of the High Court (at the request of Mr Michael O'Connell) for an extension of time for service of Motions for judgment. Following these representations the period required has been extended from four to ten days.

### Valuation Office delays

Abnormal delays in the Valuation Office were the subject of concern of a number of members at the June Council meeting. This problem is being discussed with both the Minister for Finance and the Minister for the Public Service, and the need for early improvement is being emphasised.

There was unanimous agreement to support the proposal that the Town Agents' requirement should be abolished. The matter is currently being considered by the Superior Rules Committee.

Following representations by the Society there has been a change in the handling of the granting of Social Welfare Pensions. Members were advised of the change when official notification was received from the Department of Social Welfare.

The Parliamentary Committee's submission in relation to Section 60 of the Finance Bill 1980 was endorsed.

### Stimulating interest

The greater interest, involvement and participation of the younger members of the profession in the Law Society is to be sought through the work of a Committee which will study how this stimulation can be achieved. The new Committee, which has power to co-opt additional members, has been set up by unanimous decision of the Council following consideration of a resolution on the subject from Mr P. O'Connor and Mr L. K. Shields, who will form the nucleus of the Committee.

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In the matter of Myles P. Shevlin a solicitor and in the matter of the Solicitors' Acts 1954 and 1960.

BY ORDER of the President of the High Court dated the 28th day of July, 1980, the name of the above named solicitor has been restored to the Roll of Solicitors solely for the purpose of defence in criminal proceedings, state side work and declaratory actions arising out of criminal proceedings.

JAMES J. IVERS,
Director General.

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In the matter of Philip F. Tormey a solicitor
and
In the matter of the Solicitors' Acts 1954 and 1960.

BY ORDER of the President of the High Court dated the 28th day of July, 1980 (1980 No. 5S.A.) the name of the above-named solicitor has been struck off the Roll of Solicitors.

JAMES J. IVERS,
Director General.

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# BOOK REVIEWS

**Common Market Law of Competition,** 2nd edition, by C. W. Bellemy and Graham D. Child (1978) Sweet and Maxwell.

This is the second edition of a work first published in 1973. In its preface the authors state that between the publication of the first and second editions, the volume of Community Competition Law has approximately doubled without any concommitant decrease in the number of undecided questions. This is not an exaggeration. The expansion has been well dealt with by the authors who have kept the increase in the text to a minimum while significantly increasing the authorities cited in the footnotes.

The book contains a general introduction to E.E.C. Competition Law and then deals in more detail with certain topics. These are well divided in relation to problems as they arise in practice. This book is, I think a useful source for practitioners who, whilst familiar with the general principles involved, need on occasion to remind themeslves of the specific principles and decisions on a particular problem in hand. It has the advantage for Irish Lawyers of having been written by Common Lawyers and is in a form of text book familiar to us. It is concise, and well supported by references to Decisions of the Commission and Judgements of the Court of Justice which are well referenced. When the first edition was published there was no English edition of the European Court reports available and the Authors gave the Official Journal references for all decisions. Now that an English edition of the European Courts is available the Authors in this edition have retained the Official Journal references but also give the references to the English edition of the European Court Reports.

These were not available at the time of publication of the first edition. The work contains in appendices the principal European texts relating to Competition Law. This is convenient.

The principal drawback to the book is that the law contained therein is stated as at 20th September 1977. In most areas of importance to practitioners included in the book there have been important developments in terms of Decisions of the Commission and Judgements of the Court since that date. Thus the work can now only be relied upon by practitioners as a starting point and must be supplemented by the almost impossible task of trying to find the latest Commission Decision or Judgment of the Court on a particular point. In fairness to the Court the last volume of the official reports for each year includes an index by subject matter, but these reports are almost one year in arrears.

Mary Finlay.



**A Manual of International Law** by Georg Schwarzenberger & E. D. Brown. Sixth Edition. Professional Books Limited, 1976. lix, 612 pp.

Ireland, as a member of the E.E.C. and an active participant in the affairs of the United Nations and many other international organisations, is becoming increasingly involved in the system of law which governs the relations between states and between international institutions, states and individuals. Furthermore, international law has developed considerably in recent years to embrace individuals, and it is becoming increasingly common for solicitors to be confronted with problems involving the relationship between international and national law. In recent years, this relationship has attracted wide notice in areas such as fishing, human rights and extradition, but there are others which have not attracted such publicity.

International law is no longer the exclusive concern of a few officials in Government Departments. It is actually or potentially important for all lawyers.

For that reason, the sixth edition of the Manual on International Law by Professors Schwarzenberger and Brown should be particularly welcomed by Irish practitioners. For many years, Georg Schwarzenberger has been regarded as one of the world's leading experts in the subject. His rigorous, inductive approach to international law, together with his sometimes abrasive but always stimulating methods of teaching, have inspired several generations of students at the University of London and elsewhere.

The latest edition of the Manual continues to display all the stimulating qualities and the careful scholarship which have always characterised his teaching and writing. These virtues are supplemented by the contributions of Prof. Brown, and the combined efforts of the authors and Professional Books, the new publishers for this edition, have resulted in an up-to-date, highly systematic and comprehensive introduction to the subject.

The Manual has always aimed at providing a sound theoretical foundation for the beginner, and, as the Preface states, once the foundations are laid, the reader should be enabled to deepen and widen his knowledge in accordance with his own predilections.

This edition succeeds admirably in achieving these aims. The material included ranges from the helpful glossary of basic terms and maxims (Part Four) to extensive tables of Cases, Treaties and Bibliographies. The revised Study Outlines in Part Two, which occupy over 200 pages of the work, continues to be one of the most valuable and attractive features of the Manual.

The inductive approach, while it cannot exclude all traces of subjectivity, may justly claim to diminish it considerably. The Manual presents the fundamental principles and rules of international law as they have been established and applied in State practice, national courts and international tribunals. It distinguishes between the exclusive law *creating* processes (Treaties, International Customary Law and the General Principles of Law) and the law *determining* agencies (National and International Courts, Diplomatic Practice and Doctrinal Writing). The reader of this work will be left in no doubt about what the rules of international law *are*, unlike the reader of some other textbooks, where the dividing line between the law

that is in force (*lex lata*) and the law which it is desired to establish (*lex ferenda*) is not always clearly drawn.

Prof. Schwarzenberger has been criticised for what has been described as an unduly conservative and restrictive approach to the development of new rules of international law. Such criticism is based on a misapprehension. He and Prof. Brown are not opposed to the emergence of new rules in any sphere, and discuss the pros and cons of new developments where appropriate, e.g. the new emerging law of the sea (Chapter 5) and the de jure and de facto revision of the Charter of the U.N. (Chapter 10). Incidentally, as regards the law of the sea and the Rockall issue, Irish readers will note with interest the "illustrative" official U.K. Naval Chart on the Maritime Frontiers of the U.K. which is reproduced on page 102.

Where the authors differ from others is their repeated insistence on the necessity for evidence that a new rule has been established, and their reminders that a clear distinction exists between the problem of the "the technical improvement of international law as a legal system to make it commensurate with the needs of contemporary world society" and the problem of "an international order on which international law may safely rest" (p. 312).

Proposals for sweeping reforms in the international legal system, however desirable in principle, are likely to remain utopian if unrelated to the type of international order on which they must rest.

Users of this Manual will obtain a general introduction to the theory of international law, a necessarily brief statement of the established rules, a remarkably wide and comprehensive reference book for further investigations into a chosen topic and a thought provoking discussion of many of the problems of a world dominated by the Super Powers.

J. F. O'Connor

**The Irish Constitution** by J. M. Kelly. Jurist Publishing Co. Ltd., University College Belfield, Dublin 4 1980 xxxii, 605 pp. £22.80 (paperback), £28.30 (hardback) including V.A.T. and postage.

If the Irish lawyer has not been overwhelmed by the quantity of books on Irish law in recent years, he can have no complaint about the quality. To John Wylie's classic books on land law we can now add this major work from John Kelly on the Irish constitution. Professor Kelly has done for his sibject what Professor Wylie did for his. He has provided us with a systematic treatment in print of the sources of constitutional law in this state and he has equally for the first time given an exposition of the vast range of principles and rulings developed in constitutional litigation and practice over the years.

That it takes 600 pages to achieve this, and the citation of over 500 cases is a measure not only of the author's achievement but the size of the gap this book now fills. It is a serious rebuke to us all as lawyers, whether academic, or practising, that we have had to wait this long for the first comprehensive commentary on our basic law. Before this, the constitutional jurisprudence of the state, a subject that affects all citizens and invades every area of legal practice, was scattered through the decision of the courts reported and unreported or available only in the heads of practitioners. But our low productivity as writers about law is a theme for another day. With the appearance of John Kelly's book we can celebrate another field covered and expect confidently that it will prove an equal success to the Wylie volumes. It certainly deserves to do so.

This book takes the form of annotations on each article of Bunreacht na hEireann and since that document follows so closely the provisions of the 1922 Constitution the work embraces all that remains important about that constitution as well. It is not, no more than Wylie, a book to be read at one sitting. But for the practitioner it will prove invaluable as a reference book and because of its organisation, easy to use as such. For those with time for curiousity, much will be learned by browsing (for the author the following: the name of the State is *not* the Republic of Ireland, that is its description, the name is Éire, or in the English language, Ireland, — Art. 4). For the student the book will be indispensable, and remembering that the Constitution has a lot to say about the Oireachtas and its procedures we may yet see Kelly being read into *Hansard* as assuredly we will see it cited in the Four Courts.

Aside from the fact of judicial review of legislation it has been in the specifications of fundamental rights that the Irish constitution has differed most from the British constitutional model, which in other respects it mirrors quite closely. At least half of this book is given over to the analysis of the case law on Article 40-44 concerning fundamental rights more especially since *Ryan v. Attorney General* (1965) I.R. The practitioner and the general public will find in the book, set out in crystal clear style, the impact of the enormous number of 'state-side' applications since that decision, cases he may otherwise only recall as a stream of headlines in the newspapers. These cases have resulted in some fields in the rewriting of areas of common law for example criminal procedure, and Professor Kelly's book is the only place where the current law is to be found.

With one reservation, the book is easy to read and well constructed. The text of the constitution is set out article by article in bold type, each article followed by the detailed commentary. The commentary is helpfully broken up by marginal notes that aid the reader to find the exact point he may be searching for. The reservation concerns the failure to use quotation marks for the very frequent citations from decisions. These are set in on the page, so that they can be distinguished from the author's commentary, but it is easy to confuse citation and comment, and quotation marks would have helped. The organisation of the statute index is crude; U.K. and Northern Ireland Acts being distinguished by prefixes. There are conventions established for citations and they should have been followed.

But these are minor matters. Professor Kelly's enormous industry and scholarship in preparing this book deserves our acclaim and buying it is one way of demonstrating that.

K. Boyle.

# International Union of Latin Notaries

For a number of years the Incorporated Law Society has been represented at Bi-annual Meetings of the Common Market Section of The International Union of Latin Notaries (the proper title in French being — "La Section Marché Commun de la Commission des Affaires Europeénnes de L'Union Internationale du Notaratiat Latin"). As meetings of The European Section of the Union take place the day after the meeting of The Common Market Section, the Law Society's Representatives have attended these meetings, along with Representatives from the Law Society of London and the Scottish Law Society, as observers.

The purpose of this note is to outline the nature of these meetings, the topics discussed thereat, together with a general note on the function of a "Notaire".

As the name implies, the Common Market Section is confined to delegates from the Notarial Associations of each Member State in the Community. However delegates from non-E.E.C. countries in Europe also attend as observers, with the result that meetings of both the Common Market Section and the European Section held the following day, are attended by upwards of 50 persons. Additionally the Representatives for the Common Market Section — other than the Irish, English and Scottish Representatives — are not the same Representatives for European Section meetings, so that all in all more than 100 people can be involved in the Meetings generally!

When the Incorporated Law Society was invited to send Representatives to the Meetings, it was thought at the time appropriate to send two Delegates as was the practise of both the Scottish and English Societies. More recently however it was felt that one delegate was sufficient to attend.

The Common Market Section is concerned with the role of the Notary in the E.E.C. As a result Community Legislation affecting that role figures exclusively on the agenda. Thus any proposed Community Directives (for instance in Company Law) are considered only to the extent that a Notary's function may be affected by such Directives. Accordingly topics such as the recent Lawyers' Directive on Services would not be considered at all by Notaries — the Notary having been excluded from the definition of "Lawyer" in the Directive.

Meetings which are conducted entirely in French, unlike meetings of the Commission Consultative, where Delegates can use either English or French, are strictly formal, the work of each Section being dealt with on topics having previously been selected. Topics are farmed out to Sub-Committees who, following detailed Questionnaires to each Delegate, makes a Report to the General Session. It is then up to each Delegate to publish, if they so desire, the results in their respective Notarial Reviews or Gazettes.

More recently the Section has been concerned with topics of general interest to Solicitors, such as an examination of Mortgages throughout the Market, the characteristics of Private Companies and the system of security given by Companies by way of Floating Charges.

The European Affairs Section deals not only with the legislatative changes in the Laws of each Member State so far as same might affect the position of notaries, but also concerns itself on matters of a more general European nature. Thus for example considerable time and attention is given to studies of the respective matrimonial and succession laws, laws relating to minors throughout Europe etc. This particular Section recently concluded the publication of "The Blue Book" a study of the laws relating to Matrimony and Succession in Europe — a copy of this volume is held by the Law Society's Library. As with the Common Market Section all meetings are conducted in French and the business of the Meeting is again in a strictly formalised manner.

Continental Notaries are usually public officials, appointed for life or for a fixed term, having power to execute authentic deeds, usually in respect of will or intention and also retain original Deeds on behalf of clients. Legal Acts, which, to be valid in law in many countries associated in the Union, require to be evidenced or established in a notarial Deed, e.g.

(a) Creation of mortgages on real property and ships,
(b) Transfer of Real property,
(c) Gifts,
(d) Marriage Contracts,
(e) Various forms of Last Will and Testament.
(f) Division of Deceased estates where a minor is entitled to a share.
(g) Formation of Limited Liability Companies.

It will be seen therefore that the function of a Notary goes further than that provided by a Notary Public in Ireland and to a certain extent these functions are similar to those carried out by Solicitors.

At a recent meeting each Delegate was requested to draw his colleagues' attention to a list of various Notaries or associations who would be willing to assist them on any points of law or to assist in a general way. A list of those persons or associations who might prove to be of useful contact to Irish Practitioners in the event of problems arising especially in the area of succession or family law is available for consultation in the Law Society Library.

John Fish,
Irish Delegate to the U.I.N.L.

## Sale of Goods Act, 1893

Copies of the Sale of Goods Act, 1893, are available from the Society.

Price: £1, plus postage.

# CORRESPONDENCE

Office of the Minister for Finance,
Dublin 2.

3 July, 1980.

Mr. James J. Ivers,
Director General,
The Law Society.

**Re: VALUATION OFFICE**

Dear Mr. Ivers,

Further to my letter of 30 May in which I indicated that I had taken up the question of the staffing, organisation and work procedures in the Valuation Office with the Minister for the Public Service and hoped to have definite word for you shortly, the following is the up-to-date position.

The survey of the Valuation Office which was initiated by the Minister for the Public Service has unfortunately been held up as a result of certain objections by valuer staff and the Minister is at present trying to resolve the impasse. In the meantime, however, he has authorised the filling of 21 valuer posts, although I am sure that you appreciate that new recruits require a familiarisation period before they can perform their functions efficiently.

Yours sincerely,

Michael O'Kennedy,
*Minister for Finance.*

High Street.
Trim,
Co. Meath.

14 July 1980.

James J. Ivers, Esq.,
Director General,
The Law Society.

**Re: OLD AGE PENSION APPLICATIONS**

Dear Sir,

I am pleased to note the concession made by the Department of Social Welfare towards the production of Adjudicated Transfer before the granting of a Pension. A Transfer Deed will now be accepted by the Department if accompanied by a Solicitor's undertaking that it will be stamped in due course.

While this concession will be welcomed by all Members of the Profession we should be mindful of the dangers of giving the undertaking requested by the Department without first being in funds to cover the Stamp Duty or, alternatively, arrangements being made with the Client's Bank that the funds would be forthcoming when required. When assessing the duty it will be necessary to bear in mind that the valuation as furnished by the client will normally be increased by the Valuation Office.

Yours faithfully,

Rory McEntee,
M. A. Regan, McEntee & Co.

Capital Taxes Branch,
Office of Revenue Commissioners,
Dublin Castle,
Dublin 2.

25th June 1980.

Mr. James J. Ivers,
Director General,
The Law Society.

**TELEX FACILITIES**

Dear Mr. Ivers,

I refer to a recent meeting with you in the course of which you raised the question of the availability of telex facilities in this Branch of the Office of the Revenue Commissioners. I am pleased to inform you that such facilities are now available and that the number, which is indicated on current correspondence, is 4652.

Yours sincerely,

G. E. P. Johnston.

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

14th July, 1980.

Mr. James J. Ivers,
Director General,
The Law Society.

**Re: REGISTRY OF DEEDS**

Dear Mr. Ivers,

I have your letter of the 10th instant.

There will be no necessity for a Solicitor to operate through his Town Agent when the new practice is operative. A Common Search should issue within ten days. If the Solicitor puts his reference on the requisition forms he will have the reference with the result of the Searches.

Yours sincerely,

William T. Moran,
*Registrar.*

8 South Georges Street,
Dublin 2.

23rd June, 1980.

The Editor,
Law Society Gazette,

**Re: TITLES OF LETTERS**

Dear Sir,

Ever slow to tilt at a colleague, for once, I might take issue with Mr. Desmond Moran (his letter of the 18th of April, 1980-April, 1980 Gazette). Our view here, has been, that in litigation matters the title of letters, would always follow as in the title of the litigation, whether one acts for Plaintiff or Defendant. I wondered how Mr. Moran might title his letter where he acts for a Third Party.

# Correspondence (contd.)

I cannot now recall (if I ever knew) the correct colour sequence to amend draft documents, but in 1980 bottles of ink, certainly bottles of red, green and purple ink are not in frequent use, and the dreaded Ball-Point seems more readily available in blue, black, red and green. Hence perhaps the procedure of using the nearest Ball-Point to hand. Really it is hardly the colour of the ink that is important, but the clarity of the amendment, and an indication on the document showing the date the amendment was made. This makes life easier for the busy Practitioner and/or colour blind Practitioner.

Yours sincerely,

Barry O'Reilly.

ACC House,
Upper Hatch St.,
Dublin 2.
30th May, 1980.

The Editor,
Law Society Gazette.

**Re: FINANCIAL AGREEMENTS**

Dear Sir,

A propos Gerry Hickey's comments at the recent half-yearly meeting on the involvement (of lack of it) by Solicitors in the preparation of financial agreements, I was recently handed a draft agreement containing provisions which might be of interest to your readers.

Under the heading 'Invalidity of provision' the following appeared:—

> "Terms and conditions which are invalid shall be implemented according to the spirit of this Agreement."

I hasten to add that an Irish lawyer was not involved and wonder whether perhaps the draftsman had, in final interpretation, intended the invocation of the Third Person of the Trinity!

Yours faithfully,

Dermot Jones.

Oifig an Ard-Chláraitheora,
Custom House,
Dublin 1.
17th June, 1980.

Mr. James J. Ivers,
Director General,
The Law Society.

**Re: MARRIAGE CERTIFICATE APPLICATIONS**

Dear Mr. Ivers,

I have received your letter of 28th May concerning applications for marriage certificates for purposes of raising loans for house purchase.

I realise that there is at present some delay in dealing with applications to the General Register Office. The present difficulties in the office arose out of last year's postal dispute. The very large number of applications which were held up at that time built up into a considerable volume of arrears when the dispute ended. The position was aggravated by the fact that staff were not being recruited to the Civil Service during the dispute and by the unprecedented increase in the demand for certificates during the early part of this year.

Steps have been taken to reduce the arrears and the position is now improving. I expect that when the backlog has been cleared applications for certificates will again be dealt with quickly. In the meantime I suggest that if people apply to the local Superintendent Registrar for the County in which their marriage took place they will get a faster service there.

Yours sincerely,

Brendan Hensey,
*Ard-Chláraitheoir.*

Land Registry, Central Office,
Chancery Street,
Dublin 7.
18th June, 1980

Mr. James J. Ivers,
Director General,
The Law Society.

**Re: LAND REGISTRY TRANSACTIONS**

Dear Mr. Ivers,

With effect from and including Wednesday, 2nd July, 1980 all Land Registry transactions in relation to Counties Clare, Galway, Mayo, Roscommon and Sligo will be dealt with at the following address:—

Land Registry,
Nassau Building,
Setanta Centre,
Nassau Street,
Dublin 2.

Transactions relating to Dublin City and County will continue to be dealt with at the above address.

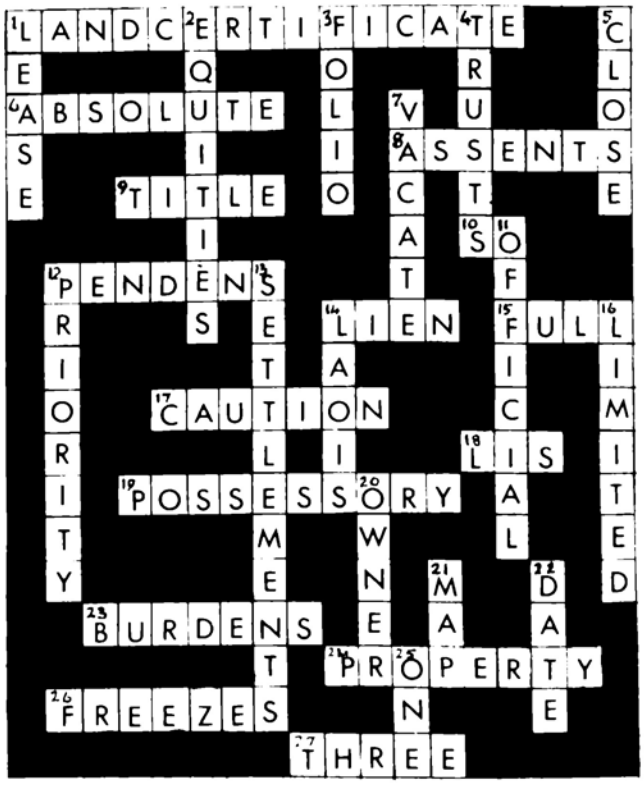
William T. Moran,
*Registrar.*

THE HIGH COURT

## MOTIONS ON NOTICE (Common Law)

By reason of current postal delays in the transmission of documents between Solicitors' town agents and their country offices, it may happen that the Solicitor to whom a Notice of Motion is directed (although served in time and in compliance with the Rules of the Superior Courts) may not become aware of the Motion until after the return date named in the Notice. Consequently, pending further direction, MOTIONS ON NOTICE in Common Law matters (other than those returnable for the Sitting of the Court) being brought either before the Court or the Master will not be listed for hearing before the lapse of a period of 10 days after the lodgment of the Notice in the Central Office (except by special leave of the Registrar).

J. K. WALDRON,
*Registrar.*



# The Register

**REGISTRATION OF TITLE ACT, 1964**

**Issue of New Land Certificate**

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 August, 1980.

W. T. MORAN (Registrar of Titles)

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

**Schedule**

1. Registered Owner: Mary McSweeney; Folio No.: 25147; Lands: Ballincranig (part); Area: 72a. 2r. 17p; County: Cork.
2. Registered Owner: John Doyle; Folio No.: 21681; Lands: Collballow; Area: 0a. 2r. 16p.; County: Wexford.
3. Registered Owner: Hugh Harkin; Folio No.: 38553; Lands: Craig; Area: 4a. 04. 25p.; County: Donegal.
4. Registered Owner: Edward J. Donelan; Folio No.: 16340 (Revised); Lands: Durrow (part); Area: 0a. 3r. 3p.; County: Galway.
5. Registered Owner: Patrick Ballesty; Folio No.: 2114; Lands: Dysart; Area: 39a. 1r. 27p.; County: Westmeath.

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**No advertisement relating to a Lost Land Certificate should be published in the Incorporated Law Society Gazette or elsewhere by Solicitors except under direction of the Registrar of Titles or his Officers.**

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6. Registered Owner: Michael Scally; Folio No.: 945P; Lands: (1) Mayne (with cottage thereon), (2) Mayne; Area: (1) ——, (2) 3a. 1r. 20p.; County: Westmeath.
7. Registered Owner: Ambrose Gaughan; Folio No.: 52892; Lands: Rathbaun; Area: 1a. 0r. 11p.; County: Mayo.
8. Registered Owner: The County Council of County Laois; Folio No.: 382R; Lands: Townparks; Area: 4a. 0r. 20p.; County: Queens.
9. Registered Owner: James Joe Gibbons; Folio No.: 4784; Lands: Tiranascragh; Area: 50a. 0r. 8p; County: Galway.
10. Registered Owner: Kenneth Moore and Nuala Moore; Folio No.: 11490F; Lands: Moneygurney; Area: 0a. 0r. 32p.; County: Cork.
11. Registered Owner: Elizabeth McNamara; Folio No.: 109L; Lands: The leasehold estate in the dwellinghouse and premises situate on the North side of the road leading from Farranshore in the parish of St. Nicholas and City of Limerick measuring in front of the said road 20 ft. and in depth from front to rere 111 ft. 6 inches; County: Limerick.
12. Registered Owner: Owen O'Reilly (Junior); Folio No.: 6531; Lands: Aghnaclue (part); Area: 17a. 0r. 16p.; County: Cavan.
13. Registered Owner: Eileen Minehane; Folio No.: 4033F; Lands: Dromleigh South; Area: 2a. 0r. 9p.; County: Cork.
14. Registered Owner: Tagaste Limited; Folio No.: (1) 2604, (2) 2799; Lands: (1) Barrystown (part), (2) Ballsughton (part); Area: (1) 36a. 2r. 29p.; (2) 3a. 0r. 7p.; County: Wexford.
15. Registered Owner: Edward Williamson; Folio No.: 36838; Lands: Knockskagh; Area: 48a. 1r. 5p.; County: Cork.
16. Registered Owner: William Fisher; Folio No.: 17770; Lands: Tullycleave More (part); Area: 50.438a.; County: Donegal.
17. Registered Owner: John Anthony O'Gorman; Folio No.: 14318; Lands: Doon East (part); Area: 70.769a.; County: Kerry.
18. Registered Owner: Annie and Daniel Sweeney; Folio No.: 241; Lands: Drumtoland (part); Area: 13a. 2r. 0p.; County: Donegal.
19. Registered Owner: Mary Anne Rudden; Folio No.: 431 (Revised); Lands: Creeny; Area: 11a. 1r. 24p.; County: Cavan.
20. Registered Owner: Martin and Mary Margaret Ryan; Folio No.: 2596 (This folio is closed and now forms the property Nos. 1, 2 and 3 of Folio 13031); Lands: (1) Carriglegan, (2) Boley Lower, (3) Ballyshawn; Area: (1) 12a. 1r. 5p., (2) 35a. 2r. 31p., (3) 49a. 1r. 24p.; County: Wexford.
21. Registered Owner: Mary Shire; Folio No.: 3082; Lands: Beabus (part); Area: 55a. 1r. 0p.; County: Limerick.
22. Registered Owner: Patrick Danaher; Folio No.: 5303; Lands: Singland (part); Area: 13a. 0r. 22p.; County: Limerick.
23. Registered Owner: Analore (Properties) Limited; Folio No.: 4685; Lands: Marshes Upper; Area: 9a. 1r. 27p.; County: Louth.
24. Registered Owner: Michael O'Connor and Mary O'Connor; Folio No.: 8109; Lands: Killygarry; Area: 36a. 0r. 33p.; County: Cavan.
25. Registered Owner: The Dublin District Milk Board; Folio No.: 4426; Lands: (1) Balgaddy, (2) Kosloge; Area: 72.7.13a.; County: Dublin.
26. Registered Owner: Mairead McCormack; Folio No.: 1441F; Lands: Carrowhugh; Area: 0a. 1r. 5p.; County: Donegal.
27. Registered Owner: Mary Josephine Whelan; Folio No.: 514 (Revised); Lands: Ratholm; Area: 10a. 3r. 32p.; County: Wexford.
28. Registered Owner: James McCarthy; Folio No.: 12662 (Revised); Lands: Carrigane; Area: 47a. 2r. 8p.; County: Cork.
29. Registered Owner: Thomas Mone (Junior); Folio No.: 11433; Lands: Loughbrattoge (part); Area: 14a. 2r. 20p.; County: Monaghan.
30. Registered Owner: Aidan Egan; Folio No.: 7252, 7253, 10138, 10148, 16169; Lands: (1) Barmoney (parts), (2) Barmoney (parts), (3) Coolnagree (parts), (4) Coolnagree (parts), (5) Barmoney; Area: (1) 9a. 2r. 26p., (2) 15a. 2r. 1p., (3) 35a. 1r. 33p., (4) 30a. 1r. 22p., (5) 6a. 0r. 0p.; County: Wexford.

## LOST WILLS

**Miss Nora O'Connor,** deceased. Will any person having knowledge of a Will or Codicil of the above named who died on the 17th day of May, 1980, and who resided at different times at the various addresses set out hereunder. Please contact C. I. Foley & Co., Solicitor, Gort, County Galway. Addresses: 1) St. Paul's Nursing Home, Dooradoyle, Limerick; 2) 1, Elm Park, Lisbeg Lawn, Renmore, Galway; 3) c/o Kathleen O'Loughlin, Lahinch Road, Ennistymon, Co. Clare; 4) St. Kevin's Presbytery, Harrington Street, Dublin 2; 5) Parochial House, Newtown, Kilmacthomas, Co. Waterford; 6) c/o Rev. J. Stone, C.C., Sacred Heart Church, Donnybrook, Dublin 4.

**Barnadette Fitzhugh,** deceased, late of 1, Charlemont Avenue, Dun Laoghaire, Co. Dublin. Will anyone having knowledge of any Will made by the above named deceased who died on or about the 4th May 1980, please contact Mr. Brian Kirby, Solicitor, Blackrock, Co. Dublin. Tel. 888333.

**Charles Kennedy,** deceased, late of 30/31 Fitzroy Ave., Drumcondra, Dublin 9. Would any Solicitor or other person having knowledge of any Will of the above-named deceased please contact Donal T. McAuliffe & Company, Solicitors, 57 Merrior Square, Dublin 2. Tel. 761283.

**Charles Reynolds,** deceased, late of 1 Patrick's Terrace, North Circular Road, Dublin. Will any person having knowledge of a Will of the above named deceased who died on the 18th day of July 1979 at Dr. Steevens Hospital, Dublin, please contact J. Delaney, Gannon & Co., Solicitors, Mohill, Co. Leitrim. Tel. Mohill 4 and 79.

## NOTICES

**"Second-hand set** of current edition of Butterworths Modern Forms and Precedents required. 'Phone 765473 during office hours quoting reference PDG".

**Complete set** of First Edition Hallsbury's Law of England (thin paper). 31 volumes including index, perfect condition. Price £50.00. Tel. Mrs. O'Toole Dublin 976584.

**Ordinary 7-day Publican's licence** for sale. Apply: Wolfe, Collins, O'Keeffe & Partners, Solicitors, Skibbereen, Co. Cork. Ref. M.2072.

**Ordinary Publican's Licence** (7 day) for sale. Price £7,000. Apply: Eoin C. Daly & Co., Solicitors, 17, South Mall, Cork.

# Bank of Ireland Finance Limited

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THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

July-August 1980 Vol. 74 No. 6

# Stamp Duty a Penal Tax on Irish Home Owners

It requires no great insight, or even experience, to realise that changing one's residence can be an extremely expensive activity. A move from one owner-occupied house to another involves, literally, a wealth of complicated, costly and, in G.N.P. terms, wasteful procedures which, arguably, could and should be made simpler and cheaper. With this in mind, this Society has already recommended to the Government that the legal costs of investigation of title and mortage by Building Societies should be borne by the Building Societies themselves and, in addition, a joint working committee of the Law Society and the Building Societies Association has issued a number of recommendations designed to simplify and accelerate the whole process of purchase by way of Building Society finance.

While we are by no means unfamiliar with criticism levelled at the fees collected by the various professionals involved in the act of passing property from one person to another, until recently surprisingly little protest has been expressed at the amount collected, in such transactions, by the Exchequer — which in many instances will exceed the total fees of all the professionals involved. If the price of a house purchased falls between £20,000 and £50,000, the Revenue Commissioners cream off a substantial four per cent of that price, as Stamp Duty on the purchase deed.

For many years the average (and maximum) rate of Stamp Duty on the purchase deed was three per cent, and quite bad enough at that. To increase that level to four per cent on the average transaction and to six per cent on purchases in excess of £50,000 — by no means unusual these days — can only be regarded as a cynical act, condoned by successive governments, calculated to exact the maximum toll from one of the most essential of human activities — that of providing a roof over one's head.

We are all well aware of the growing feeling abroad that the Republic of Ireland is pricing itself out of a number of world markets. In this context, our level of Stamp Duties should be contrasted with those prevailing in Northern Ireland and in Britain. In Northern Ireland and in Britain, house purchases between £20,000 and £25,000 bear Stamp Duty at *one-half* per cent! Between £25,000 and £30,000, the rate of Duty is one per cent. From £30,000 to £35,000 the rate is one and a half per cent; and in excess of £35,000, a beneficient (and realistic) government contents itself with two per cent.

To add insult to very real injury, in Northern Ireland and Britain, purchases at less than £20,000 are wholly exempt from Stamp Duty, whereas the paltry exemption enjoyed in this country applies only to transactions below a derisory £1,000. Hardly an inducement to our separated brethren in the Six Counties to throw in their lot with the South!

Added to this highly questionable state of affairs is the even more questionable anomally that if one is sufficiently fortunate to be able to be the first purchaser of a newly-built house, and to be able to enter into the contract to purchase and to tie up the necessary legal formalities before the building has progressed beyond a purely arbitrary stage of construction (roofing stage), then one can complete one's purchase at an amount of Stamp Duty calculated only on the value of the site upon which the house stands; if one happens to be purchasing in an

— *Continued on page 128*


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Published at Blackhall Place, Dublin 7.

# Dismissal for participating in Strike or other Industrial Action: Section 5(2) of the Unfair Dismissals Act, 1977

## Part II*

Mary Redmond, B.C.L., LL.M., Solicitor, Fellow of Churchill College, Cambridge.

**Interpretation of Contrary Implied Presumption**

There has been much confusion about the contrary implied presumption in Section 5(2) of the Act. It is commonly believed that the sub-section affords complete liberty for an employer to dismiss all of his employees during a dispute and that the question of unfair dismissal arises only where work is resumed *and* the employer is selective in his treatment of the workforce.

Applying the principle of *inclusio unius exclusio alterius* it might be deduced that, by deeming selective dismissal for taking part in strike or other industrial action to be unfair, Section 5(2) by implication deems non-selective dismissal not to be unfair (conclusively or otherwise) in the same circumstances. Because dismissal of all the workforce for taking part in strike action is deemed not to be unfair, this argument proceeds, apparently logically, to the conclusion that Section 6(1) is irrelevant. Thus, non-selective dismissals are nimbly withdrawn from the protection of the Unfair Dismissals Act. It would appear that an employee dismissed in such circumstances would be left to seek redress at common law where, *inter alia*, he would have to overcome such obstacles as the effect of strike or other industrial action on the contract of employment.

The British Employment (Consolidation) Act, 1978, (Section 62) provides for an exclusion of jurisdiction where all the workforce have been dismissed. Its wording could not be more unequivocal: unless there is discrimination in dismissal or in the reinstatement or re-engagement of workers taking part in strike or other industrial action the Act declares that 'an industrial tribunal shall not determine whether the dismissal was fair or unfair'.[7] The belief that Section 5(2) of the Irish Act is similarly restrictive may spring in some measure from the view that Section 5(2) re-echoes Section 62 of the British Act. But there is a significant difference between the wording of the two provisions. Section 5(2) of the Unfair Dismissals Act deems it unfair for an employer selectively to dismiss in an industrial dispute situation — no more, no less.

May complete freedom to dismiss non-selectively be inferred *ex silentio?* It should be recalled that the *expressio unius* rule is 'often a valuable servant, but a dangerous master to follow in the construction of statutes'.[8] As it happens, the rejection of the *expressio unius* rule in relation to Section 5(2) is supported by constitutional and international law obligations. As we have seen above, the right to strike is arguably a 'personal right' within Article 40, s. 3, sub-s. 1 of the Constitution.[9]

If, by striking, a person is exercising a fundamental constitutional right it would be *ultra vires* the Constitution if the Legislature purported to grant an immunity to employers who penalise their entire workforce by dismissing each and every employee who takes part in strike action.[10] The essence of a right as opposed to a liberty to strike is that those exercising the right are protected against any prejudice or detriment in consequence of having struck, particularly at the hands of their employer. Post-1937 Acts are presumed constitutional. A practical effect of this is that if, in respect of any provision or provisions in an Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional,

> 'it must be presumed that the Oireachtas intended only the constitutional construction, and a Court called upon to adjudicate upon the constitutionality of a statutory provision should uphold the constitutional construction'.[11]

Adopting the constitutional construction of Section 5(2), as we are bound to do, Section 5(2) could not be interpreted as implying that non-selective dismissals for taking part in strike action lies outside the scope of the Unfair Dismissals Act.

Additional arguments in support of this interpretation are found in international law. Ireland, it will be recalled, is a party to the European Social Charter. O'Higgins[12] has described the right to strike in the Charter as meaning that

> '. . . within the areas of protected conduct strikers are not to be subject to any penalty, disadvantage or detriment at the instance of an employer in virtue merely of having participated in strike action. In the European context this means that after the strike is over the worker returns to work and continues in employment without loss of any advantage (other than loss of pay for the period of the strike)'.

O'Higgins refers to s. 26 of the Industrial Relations Act, 1971, which foreshadowed s.62 of the EPCA, 1978. He writes:

> 'No more astonishing provision could be found in this astonishing piece of legislation than this provision that dismissal for striking, even after due notice has been given, should, save in the most exceptional circumstances, be a fair dismissal A more blatant violation of Article of the European Social Charter would be difficult to envisage'.

O'Higgins points out . that it would be incompatible with the Charter for a striker who resumes work to be penalised as regards pension or other rights. (It may even be unlawful for an employer to offer *re-engagement* to a striker, as this involves a diminution of the employee's accrued rights. See s.5(2)(b) and s.5(4) of the Act.) It would clearly be incompatible with the Charter to enable an employer to dismiss all of the workforce for having participated in strike action.

*Part I of this article appeared in June Gazette, 1980, p. 101.

The Social Charter does not provide a very effective enforcement machinery but the Committee of Independent Experts examine the question of enforcement every two years: See e.g. *Council of Europe, Committee of International Experts on the European Social Charter Conclusions I* Strasbourg 1969-'70 (First Report): *Council of Europe, Committee of International Experts on the European Social Charter Conclusions II* Strasbourg 1971 (Second Report). A crucial point in relation to Article 6 was made in the Committee's first report:

> '. . . The Committee examined the compatibility with the Charter of a rule according to which a strike terminates the contracts of employment. In principle, the Committee takes the view that this is not compatible with the respect of the right to strike as envisaged by the Charter. Whether in a given case a rule of this kind constitutes a violation of the Charter is, however, a question which should not be answered in the abstract, but in the light of the consequences which the legislation and industrial practice of a given country attaches to the termination and resumption of the employment relationship. If in practice, those participating in a strike are, after it termination, fully reinstated and if their previously acquired rights, e.g., as regards pensions, holidays and seniority in general, are not impaired, the formal termination of the contracts of employment by the strike does not, in the opinion of the Committee, constitute a violation of the Charter': *First Report*, 39.

The Irish Government, as a signatory to ILO Conventions no. 87 and 98, is bound to observe their provisions and not to introduce legislation contrary to them. It would be contrary to Article 8(2) of ILO Convention no. 87 to interpret the contrary or negatitve element in Section 5(2) as implying an exclusion of jurisdiction. The Committee on Freedom of Association set up by the Governing Body of the ILO has laid down and acted upon the principle that 'the right to strike is generally admitted as an integral part of the general right of workers and their organisations to defend their economic interests'.[13] The Committee believes in the need to protect a right to strike, albeit subject to limitations. In this context, the right appears to mean the opportunity for workers, subject to conditions, to participate in strike action without being prejudiced as a consequence upon their return to work.[14]

In the light of constitutional and international law obligations, it is submitted that the jurisdiction of the Unfair Dismissals Act could not be excluded in the event of dismissal of all the workforce for taking part in strike action. Section 6(1) would apply and each dismissal be deemed 'for the purposes of the Act to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal'. The employer could adduce, in support of the dismissal, any of the reasons set out in Section 6(4) of the Act, although in view of constitutional and international law implications it may be virtually impossible for an employer to justify dismissal in these circumstances.

Further support may be derived for this interpretation if one considers section 6(2)(a) of the Unfair Dismissals Act under which the dismissal of an employee is deemed, for the purposes of the Act, to be an unfair dismissal if it results wholly or mainly from the employee's '. . . engaging in activities on behalf of a trade union or excepted body under the Trade Union Acts, 1941 and 1971, where the times at which he engages in such activities are outside his hours of work in which he is permitted pursuant to the contract of employment between him and his employer so to engage.' If an exclusion of jurisdiction were read into the contrary implied presumption in S.5(2) a serious conflict could arise where an employer dismissed all the workforce some or every one of whom belonged to a trade union (as defined in the Act) for participating in strike or other industrial action (say) outside of their working hours. One of the reasons not regarded as valid for termination of employment under ILO Recommendation no. 119 (para. 3(a)) is 'participation in union activities outside working hours, or, with the consent of the employer, within working hours'. In this context, it is worth noting that the ILO Committee of Experts' *Report* in 1974 (Report III: *Termination of Employment* Int. Lab. Conf., 59th Sess., 1974) noted that 'The legislation in several countries refers expressly to participation in strikes as an activity for which termination is unlawful'. (Para. 46).[15]

Apart from its presumptions, further interpretative difficulties arise in relation to section 5. The terms used therein, such as 'strike' and 'industrial action', are assigned specific meanings. In particular, the definition of 'industrial action' narrows the scope of the section's effectiveness.

**Strike or other industrial action in Section 5(2)**

A strike is essentially a collective rather than an individual activity and involves a complete stoppage of

activity or withdrawal of labour. For the purposes of the Act, it is defined in Section 1 to mean

> 'the cessation of work by any number or body of employees acting in combination or a concerted refusal or a refusal under a common understanding of any number of employees to continue to work for an employer, in consequence of a dispute, done as a means of compelling the employer or any employee or body of employees, or to aid other employees in compelling their employer or any employee or body of employees to accept or not to accept terms or conditions of or affecting employment'[16]

If strike notice is expressed as notice to terminate the contract and is of sufficient length it will bring the contract to an end. A grave disadvantage of giving strike notice in this form is that the worker will not be protected by the Unfair Dismissals Act. The Act is inapplicable where the employee has effectively resigned (unless he is able to show that the employer has broken the contract and his resignation is in response to this breach). A strike starts from the moment an employee makes his intentions clear to his employer.[17]

It is worth noting that the statutory protection for strikers in section 5 has rendered academic for the purposes of the Act the lengthy arguments about whether the effect of strike notice at common law is to terminate the contract of employment or 'merely to suspend the contract' as suggested by Lord Denning in *Morgan v. Fry* [1968] 2 Q.B. 710, and supported by Walsh J. and the majority of the Irish Supreme Court in 1973 in *Becton Dickinson Ltd. v. Lee* [1973] I.R. 1, 35. Before *Morgan v. Fry*, see Devlin and Donovan L. JJ. in *Rookes v. Barnard* [1963] 1 Q.B. 623, 682-83; [1964] A.C. 1204 (House of Lords); Denning L.J. in *Stratford v. Lindley* [1965] A.C. 307, 322. In Britain, the doctrine of suspension has now been severely doubted and a more reasonable approach adopted by the EAT in *Simmons v. Hoover Ltd.* [1977] I.C.R. 61.[18]

> 'Industrial action' is defined in Section 1 to mean 'lawful action taken by any number or body of employees acting in combination or under a common understanding, in consequence of a dispute, as a means of compelling their employers or any employee or body of employees, or to aid other employees in compelling their employer or an employee or body of employees, to accept or not to accept terms or conditions of or affecting employment'.

'Industrial action' is any *lawful* action short of cessation of work or refusal to work. It is impossible to explain why 'lawfulness' should be required for industrial action and not for strikes. The sort of industrial action that can be described as 'lawful' is very limited.

In Britain, industrial action is not defined. It is generally held open to complainants to argue that 'lawful action' by employees is not encompassed by s. 62 of the EPCA. There industrial action applies to action short of a strike, such as picketing within the works or a collective refusal to obey instructions to work on a particular machine: *Thompson v. Eaton Ltd.* [1976] 3 All E.R. 383; [1976] ICR 336. It also applies to an unlawful go-slow, work to rule, or ban on overtime: *Derving v. Kilvington* [1973] 8 ICR 266. The Industrial Relations Act, 1971, defined 'irregular industrial action short of a strike' as action involving a breach of contract; neither the phrase nor its definition were retained in TURLA, 1974. The fact that TURLA did not incorporate a similar definition for 'other industrial action' does not necessarily mean, according to some writers, that a similar distinction between lawful and unlawful action cannot be read into TURLA. The earlier definition was omitted; it was not replaced by a different definition. Until Parliament provides a positive definition of 'other industrial action', rejecting the former definition, it has been argued that complainants may contend that 'lawful action' by employees is not encompassed by S.62.[19]

**Lawful industrial action**

In Ireland several different branches of the law (tort, criminal law, contract and constitutional law) may be involved in assessing lawfulness. Some forms of industrial action constitute criminal offences under statute or at common law. An example of the former is the Conspiracy and Protection of Property Act, 1875, which lists a number of prohibited actions. Section 7 provides, *inter alia*, that it shall be a criminal offence for any person in relation to another 'to watch or beset the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place'.[20]

It is likewise a crime for those working in gas, water (Conspiracy and Protection of Property Act, 1875, S.3) and electricity (Electricity (Supply) Act, 1927, s.110) undertakings to break their contract of employment by, e.g., taking strike action without giving notice; it is a crime for any worker to break his contract of employment if this would endanger human life or cause serious bodily injury (Conspiracy and Protection of Property Act, 1875, S.5). In more modern times the Offences against the State Act, 1939, and the Prohibition of Forcible Entry and Occupation Act, 1971, in addition to other statutes, have created offences which apply to trade disputes.

In tort law, the Trade Disputes Act, 1906, in so far as it is not inconsistent with the Constitution, renders certain forms of industrial action 'lawful' (e.g., in relation to the civil law: inducing breaches of contracts of employment, civil conspiracy and picketing).[21] Certain forms of industrial action lie outside the scope of the Act, or are unprotected due to restrictive judicial interpretation, or are unlawful in virtue of the means used, e.g., where picketing amounts to intimidation;[22] or the language used is associated with social ostracism and physical violence;[23] or picketing involves excessive numbers of workers.[24]

Contract law tends towards an excessive technicality. Depending upon the circumstances involved and the terms (express or implied) in the relevant contracts of employment, the go-slow,[25] work to rule,[26] overtime ban,[27] occupation or sit-in[28] may all be viewed as unlawful. Moreover, most collective agreements in Ireland have a peace obligation of one kind or another. This may refer either to the necessity to process a claim or a grievance in a particular way through the procedure or forbid recourse to strike or industrial action until there has been reference to the body or bodies that are entitled to conciliate or arbitrate in the matter. The circumstances in which these may be incorporated into the contract of

*—Continued on page 123*

—*Continued from page 121.*

employment are far from certain. In *Becton Dickson Ltd. v. Lee & Co.*[29] Walsh J. in the Supreme Court implied that if workers agree to a particular condition — an express no-strike condition — they will not be able subsequently to raise this condition as a trade dispute.[30] From this it is arguable that collective action by workers which is inconsistant with a peace obligation may constitute unlawful means arising out of breach of contract: in Ireland, the courts look upon collective agreements as contracts, it is presumed the parties intended to be bound by their agreement.[31] Where a peace obligation is incorporated into the individual contract of employment, either expressly or by necessary implication, any form of industrial action in opposition thereto will be unlawful.

Constitutional law may also be involved in assessing the lawfulness of industrial action. Where workers involved in an industrial dispute employ means which are likely to bring about a violation of the Constitution, their action may be unlawful.

In sum, 'unlawful action' in Section 5(2) may encompass an extraordinarily wide field. So interpreted in relation to industrial action, the sub-section is reduced to an absurdity. '[An] intention to produce an unreasonable [or absurd] result is not to be imputed to a statute if there is some other construction available'.[32] The only 'other construction available' in the circumstances would be a severe narrowing of the ambit of unlawfulness. If the EAT were to confine its interpretation of 'unlawfulness' to the principles of the criminal law, an unreasonable or absurd result in relation to Section 5(2) could be avoided. Otherwise, in relation to industrial action, the sub-section will be devoid of content for all practical purposes.

We turn finally to examine certain matters which might arise in relation to the practical application of Section 5(2) of the Unfair Dismissals Act.

**Selectiveness**

British caselaw deals with a number of issues which could be germane to the operation of Section 5(2) of the Irish Act.[33] Concerning the question of selectiveness, for instance, the House of Lords in *Stock v. Frank Jones*[34] declared that, in deciding whether employers had picked and chosen, all those who 'had taken part in' the strike or industrail action, not just those still taking part at the date of dismissal, should be considered. It is irrelevant that some strikers may have been taken back before others.[35] If an employer warns strikers that they will be dismissed unless they return by a certain date, and if, say, two return but the rest remain on strike and are dismissed, Section 5(2) could be invoked by the dismissed employees: the workers who were taken back were nevertheless workers who 'took part in' the strike. This may put the employer in a difficult position since, if he issues an ultimatum that the strikers must return or be dismissed, that ultimatum is valueless if even one of the strikers returns. It would then be impossible for him fairly to dismiss the remainder (within Section 5(2)).[36]

The problems concerning reasonableness of dismissal which have arisen in Britain should encourage the appropriate parties in Ireland to urge that Section 5(2) be amended so as to embody a conclusive presumption. Such an amendment would sidestep a multitude of problems. In *Cruikshank v. Hobbs*[37] for example, which arose out of the Newmarket stable lads' strike of 1975, the overall reasonableness of the dismissal had to be determined in accordance with the then relevant legislative provision, schedule 1 of the Trade Union and Labour Relations Act, 1974. The employer dismissed five of the six strikers for redundancy and the question was whether it was unfair in accordance with the relevant legislation to select those strikers for redundancy. The EAT rejected the submission that striking was irrelevant to the issue of selection for redundancy on the grounds (i) that the strike might have contributed to the need for redundancies; and (ii) that if the strike had been long enough there might be technical or administrative difficulties in taking the men back; and (iii) that to take back strikers and dismiss those who had remained at work would cause friction, impairing the efficiency of the undertaking. Accordingly, by a majority, the tribunal held the dismissals to be fair.[38]

A further difficulty is illustrated by *Thompson v. Eaton*.[39] Some employees objected to the way in which management wished to test new machines and accordingly, when one of the machines was installed, they stopped work and crowded around the machine to prevent proving operations. After being warned, the men were dismissed. The EAT held that the men were either engaged in a strike or at the very least in 'other industrial action' and accordingly dismissed the application for unfair dismissal. The Tribunal pointed out that the employer's approach to the issue had been 'obtuse'; yet the courts would be put in a difficult position if the law required them to inquire into the merits of the initial dispute. The EAT did acknowledge that a danger exists where there is gross provocation and the dispute has been provoked or engineered by the employer. It recognised that para. 8 (the provision excluding jurisdiction in TURLA, 1974, sch. 1) ought not to apply in such a case and suggested that one way of achieving this would be to say that the employer's conduct amounted to a repudiation of the contract of employment by him with the result that the strike occurred *after* dismissal. This argument would not be ruled out by the House of Lords' decision in *Photo Productions Ltd. v. Securicor*.[40] In any event, the later British case of *Wilkins & Others v. Cantrell & Cochrane (Great Britain) Ltd.*[41] gave the quietus to Mr. Justice Phillips' suggestion that an engineered strike might not fall within the legislation. The EAT held in *Wilkins* that the mere act of going on strike did not amount to a sufficient indication by an employee that he was treating the contract as having been terminated by the employer's repudiation. The following extract from *Wilkins* was cited with approval by Talbot J. in *Marsden & Others v. Fairey Stainless Ltd.*[42]

> 'Even if the employers had been in fundamental breach of contract by requiring the employees to drive vehicles which were overloaded [which was alleged in the case before him] the act of going out on strike could not be held to be a sufficient indication by an employee that he is treating the contract not only as capable of being repudiated but as one which has been broken and which he, therefore, regards as at the end. The point of a strike is so that the existing contract can be put right, so that grievances can be remedied, so tha5 management will agree to the demands. The law makes it plain that going on strike does not

terminate the contract. Rather, as was established in *Simmons v. Hoover Ltd.*[43] it gives the employer a right to regard the conduct of the employee as a breach of contract and to dismiss him.'

Although Irish law, strictly speaking, does not follow the approach in *Simmons'* case,[44] the reasoning in this passage would be no less applicable: the law makes it plain that going on strike does not terminate the contract. The reality of the parties' intentions during a typical strike supports Talbot J.s' view.'

**Conclusion**

In most cases where workers are dismissed for participating in strike or other industrial action, statutory protection may be necessary as union bargaining power will ensure that there is no discrimination. But for unorganised or unprotected workers the protection afforded by Section 5(2) of the Unfair Dismissals Act could be of considerable significance. In its present form, Section 5(2) does not effect a conclusive presumption of unfair dismissal. This means an employer may adduce grounds justifying his decision to dismiss. In the writer's view, the law in this respect is undesirable and should be amended. There is arguable no presumption in relation to the contrary implied element in Section 5(2); *semble*, non-selective dismissals are not excluded from the jurisdiction of the Act but are deemed unfair unless an employer is able to justify his action within Section 6(1).[45] Dismissed employees who 'qualify' within Section 5(2) will find that the application of the sub-section thereafter fairly bristles with problems. The restrictive meanings assigned to 'strike' and 'industrial action' under s.1 of the Unfair Dismissals Act will remove many workers from the Act's protection.

The need to protect strikers against loss of jobs is a very real one. The vagueness and uncertainties in Section 5(2) of the Unfair Dismissals Act hinder rather than promote this protection. Our 'obscure and techincal' sub-section needs to be reviewed, revised, and its intentions formulated more clearly.

*(Concluded)*

**FOOTNOTES**

7. See R. Kidner: 'Dismissing Strikers' (1978) Vol. 128 NLJ 203.

8. 'The maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice': *Colquhoun v. Brooks* (1888) 21 QBD 52, 65.

9. See June Gazette, 1980, page 101.

10. Policy considerations are relevant although they fall outside the present scope.

11. *MacDonald v. Bord na gCon* [1965] I.R. 217, 239, *per* Walsh J.

12. P. O'Higgins: 'The Right to Strike - Some International Reflections' in *Studies in Labour Law* (ed. J.R. Carty-Hall, MCB Books, 1976) 110, 112.

13. Jenks: *The international protection of trade union freedom* (1957) 370.

14. See, further, Valticos: *Droit international du travail* (1970, para. 265).

15. The following examples are cited: Finland, Contracts of Employment Act, s.37; France, Labour Code, section L.521-11 (as interpreted by the courts); Italy, Act. no. 300 of 1970, s.15; Panama, Labour Code, s.388, para. 1(3).

16. See a similar definition in section 6 of the Redundancy Payments Act, 1967. (Note that a strike is not defined for purposes of s.62 of the EPCA).

17. *Winnet v. Seamark Bros. Ltd.* (1978) EAT 695/77.

18. See X. Blanc-Jouvan: 'The Effect of Industrial Action on the Status of the Individual Employee' in *Industrial Conflict - A Comparative Legal Survey* (eds. B. Aaron and K.W. Wedderburn, 1972); K. Foster: 'Strike Notice: Section 147' (1973) 2 *Industrial Law Journal* 28; P. O'Higgins: 'Strike Notices: Another Approach' (1973) 2 *Industrial Law Lournal* 152-'7; Lord Denning: The *Discipline of Law (Butterworths 1979) 180-'2.*

*19. See S. D. Anderman: The Law of Unfair Dismissal* (Butterworths 1978) 179.

20. Section 7 cases fall into the category of 'scheduled' offences under the Offences Against the State Act, 1939; if he chose to do so, the DPP could order them to be tried in the Special Criminal Court.

21. But the limitation of the protection of the Act of 1906 introduced by the Trade Union Act, 1941, would not be relevant. Nor would the technical and rigid interpretation of 'trade dispute' for the purposes of the Act of 1906: see, on this, Max W. Abrahamson: 'Trade Disputes Act - Strict Interpretation in Ireland' (1961) 24 MLR 596; V.T.H. Delany: 'The limitations of a trade dispute' (1955), 18 MLR 338.

22. *Brendan Dunne Ltd. v. Fitzpatrick* [1958] IR 29 wherein Budd J. said in the High Court that '... picketing is not lawful if the methods adopted are such as to overawe those who happen to be on the premises being picketed or the members of the public who might be minded to have business dealing with them, to the extent that people of ordinary nerve and courage may be prevented from doing what they have a lawful right to do' (at 44).

23. *E.I. Co. Ltd. v. Kennedy & Ors.* [1968] I.R. 69: 'The use of words such as "scab" or "blackleg" are historically so associated with social ostracism and physical violence as to be far beyond anything which might be described as mere rudeness or impoliteness and so beyond what is permitted by law. In the present context the references made to the race or nationality of the employers could produce the same disorderly response and also go beyond what is permitted by law' *per* Walsh J. at 91 (Supreme Court).

24. *Fitzpatrick's* case above, footnote 22. 'The method of picketing must be reasonable having regard to all the circumstances. It would not be justifiable I feel to place a picket consisting of a hundred or so persons on a small suburban business premises with one or two of a staff. On the other hand, it might be quite reasonable to place several quite large pickets on a large factory with several entrances. It is a matter of degree according to the circumstances and the number of the picket should bear reasonable relation to the nature of the premises and the number of persons with whom the dispute arises': *per* Budd J. at 44.

25. This is inevitably regarded as a breach of contract.

26. The courts could regard this as a meticulous observance of the rules, thereby rendering it lawful, or as an unreasonable interpretation of the rules, thereby rendering it a breach of contract.

27. The legal effect of an overtime ban depends on the nature of the employee's overtime obligations. Where overtime is compulsory, a refusal to work more than the basic hours amounts to breach of contract. Where it is optional an employee is free to refuse to work overtime. If there is no express clause governing overtime, and employee's obligations will be determined by what is customary in the employment concerned.

28. This may constitute a breach of the civil law (trespass) or be regarded as a common law conspiracy to trespass, which is both a civil and criminal wrong. The Prohibition of Forcibly Entry and Occupation Act, 1971, may also be relevant. The Act makes it a criminal offence to enter someone else else's premises by force; bar the entrance to such premises; physically resist attempts to be removed by the owner or the Gardai; or encourage or advocate any of the foregoing.

29. [1973] I.R. 1, 38 (In UK, see now s. 18(4) TURLA, 1974).

30. The judge did not reveal the basis upon which a stipulation that refers to a collectivity, a group of workers, could be incorporated into a contract of employment. But he did say that: 'An express no-strike clause in a contract is itself such an unusual feature of a contract of employment and is such an apparent departure from the long established right to strike that a court would be slow to imply it where it is not expressly included in the contract or where it is not a necessary implication; a court would probably only do so in cases where there was some particular provision for machinery to deal with disputes, the provision being so phrased as to give rise to the implication that it had been agreed between the parties that not other course would be adopted during the currency of the dispute'.

31. Most recently, see *Gouldings Chemicals Ltd.* [1977] I.R. 218.

32. *Artemiou v. Procopiou* [1966] 1 Q.B. 878, 888, *per* Danckwerts L.S.

33. One must remember that s.5(2) of the UDA, 1977, does not involve a conclusive presumption of unfairness and contrast this with the stark exclusion of jurisdiction found in s.62 of the EPCA, 1978.
34. [1978] ICR 347.
35. *Stock v. Frank Jones (Tipton) Ltd.* [1978] ICR 347.
36. Ways of neutralising the decision are suggested by Collins in (1979) *Industrial Law Journal*, 109 - '10.
37. [1977] ICR 725.
38. *Cruikshank's* case is perhaps unique in that someone allegedly had to be dismissed and the choice was between strikers, returned strikers, and those who had stayed at work. It may not have been unreasonable to select strikers over workers who remain but this is no argument for suggesting that it is reasonable to dismiss a person who has been on strike.
39. [1976] 3 All E.R. 384. See also a different problem which arose in *Edwards & Others v. Cardiff City Council* [1979] IRLR 303.
40. [1980] 1 All E.R. 556.
41. [1978] IRLR 483.
42. [1979] IRLR 103, 105 (EAT). On the facts before the EAT it was held that there was no evidence that the strike had been engineered by the employers in order to get rid of the employees.
43. [1977] Q.B 284; [1977] ICR 61; [1976] 3 WLR 901; [1977] 1 All ER 775.
44. See page 121 above.
45. An underlying problem of such legislative treatment is that industrial action is equated with ordinary misconduct at work. The analogy with individual fault is no longer credible in a society which recognises the legitimacy of industrial action in pursuance of a fair standard of living and job security. The appropriate rules governing management discretion in disciplining the workforce in the ordinary course of production are not suitable for deciding what economic sanctions should be permitted to both sides during industrial conflict. The principal defect in the current law is that it puts jobs at stake every time there is a strike or lock-out.

Michaelmas Law Term

## ANNUAL SERVICES

All members of the Legal Profession are invited to attend the Michaelmas Law Term Annual Services —

**ON MONDAY, 6 OCTOBER, 1980**
at
ST. MICHAN'S CHURCH,
HALSTON STREET, DUBLIN,
at 10.00 a.m.

ST. MICHAN'S CHURCH,
CHURCH ST.., DUBLIN,
at 10.15 a.m.

and afterwards are invited by kind invitation of the Benchers of the Honorable Society in Kings Inns to Coffee at the Inns, at 11 o'clock.

*Please note that no individual written invitations are being sent to members.*

# COUNCIL REPORT

## COMPLAINTS PROCEDURE TO BE REVIEWED

The procedure for dealing with complaints against solicitors is to be reviewed by the Law Society with a view to expediting the handling of complaints and the prosecution of solicitors, where necessary. This review is to have particular regard to the continued necessity for two hearings before the Disciplinary Committee and the procedure for the Registrar's Committee. The resolution, proposed by Mr. Frank O'Donnell at the July Council meeting, also suggests that the Society seek additional powers, if necessary, to enable them to conduct spot checks on solicitors' books.

Adopting all the steps and the machinery, the processing of a complaint as far as the President of the High Court, could take a minimum of thirteen months, commented Mr. O'Donnell. In his view cases involving defalcation or failure to honour undertakings should be sent direct to the Disciplinary committee. The Society should have the strongest representation possible before the President of the High Court in dealing with disciplinary cases.

Mr. John Buckley who seconded the motion, in the absence of Mr. Rory O'Donnell, said that in his view a policy of protecting the Compensation Fund should only be followed where the Society was in absolute control of running the practice. The handling of the initial reply was too slow, and officers of the Society were too easily fobbed-off by the replies which were given. There was a need to protect colleagues and it was unfair to have information within the Society which was not generally available.

It might be a good thing if the Interviewing committee were to visit recalcitrant practices. Publication of a list of members with Practising Certificates should be re-commenced.

## ACCOUNTANTS' CERTIFICATES

The procedures followed by the Registrar's and Compensation Fund Committees were detailed by Mr. T. D. Shaw who indicated that the size of the problem of outstanding Accountants' Certificates was not fully appreciated until the Committee had seen the computerised list of certificates. The priority was to establish a roll of solicitors in practice and to follow on from that point. There was need for additional accounting staff particularly as the investigation function would be a heavy one in the coming years. Mr. J. P. Hooper said he was not yet quite clear as to the functions of the two Committees. Were they to protect the client or the solicitor and the Compensation Fund? He considered that the evidence and results of disciplinary hearings and High Court proceedings should be published in the "Gazette". Mr. Harry Sexton remarked that an examination of the activities of the Registrar's Committee over a period of years showed that there were 20/30 firms about whom there were a string of complaints. These represented only the tip of the iceberg in that many clients in such offices were dissatisfied but not prepared to complain.

Mr. W. A. Osborne said that in his experience the Society needed further powers, particularly limited powers to fine or suspend. The Council should ask a small committee to look at the constitutional aspect of granting the Society additional powers.

The President reported that the matter had been discussed at the Finance committee earlier in the day and since the Society was now aware of the arrears situation in both Accountants' Certificates and Practising Certificates it would deal with the matter as a top priority.

The motion was put to the meeting and carried.

## PROFESSIONAL STAFFING

The staffing situation is to be reviewed with the aim of increasing the investigation capability of the Society at professional level. Mr. Michael Houlihan emphasised the importance of notifying the profession that the Council was to take a tougher line on arrears of certificates.

A special meeting of the Registrar's Committee is being held in December to deal with cases of outstanding certificates.

(Mr. Michael Park, President of the Law Society of Scotland, who was in attendance at the meeting addressed the Council at the conclusion of its formal business and commenting on discipline said that in his Society the disciplinary procedures were one of the most important aspects of its workings and the programme was an exceedingly expensive one particularly as the Society carried out random investigations. The Society had to be seen to be effective in this area and in the case of the Law Society of Scotland it had to stand up to the scrutiny of a lay observer. It was policy to report to the criminal authorities where a solicitor was found to be dipping into the till.)

## INTEREST ON MONEY

Mr. Ernest Margetson reported that the administration was getting an increasing number of enquiries regarding the rights of clients to interest on money held by solicitors. The matter was referred back to the Professional Purposes Committee to come forward with specific recommendations in relation to stake holders of clients' money and other money. The problem will be on the agenda for the forthcoming conference of Presidents and Secretaries of Bar Associations. A submission designed to take the opportunity afforded by the forthcoming Courts Bill is to be made to seek a Court administration independent of the Department of Justice along the lines of that introduced in Northern Ireland within the past year.

## LAW REFORM

The establishment of a small committee to deal with law reform was proposed by Mr. John Buckley who argued that if the Society was seen to be genuine in its desire for law reform it should have a committee placing special emphasis on the matter. When Mr. Donal Binchy suggested that to some extent it would be overlapping with the Parliamentary Committee it was agreed that he and Mr. Buckley should discuss the matter before the next Council meeting to eliminate any overlapping which might arise.

The President suggested that a Litigation Committee, on the lines of the Conveyancing Committee, should be established and Mr. Margetson was asked to submit a

recommendation as to the composition of the committee to the next council meeting.

When Mrs. Moya Quinlan, Senior Vice President, indicated that some Civil Legal Aid Centres would commence work in August Mr. Houlihan emphasised the need to get information to members, particularly in the country, as they required a guideline on what their reaction should be to working with the Legal Aid Centres. The Society is seeking some information from the Legal Aid Board for circulation.

**IN BRIEF**

The Society's submission to the Commission on Taxation is to be forwarded to the Commission before the next Council meeting.

The submission on Court costs to the National Prices Commission is now being examined at technical level.

The Council emphasised that the adjustment in pay ments to law clerks, effective from July 1, should not be overlooked.

The delay in the supply of Marriage Certificates from the General Register Office at the Custom House was raised. This is to be taken up with the Minister for the Public Service.

On consideration of a letter from the Centre for the Independence of Judges and Lawyers regarding the dissolution of the Syrian Bar Association and detention of 20 of its leading members, the Council agreed that a letter should be written to the Syrian Arab Republic deploring the treatment meted out to the profession.

The venue for the 1981 conference will be the Waterville Lake Hotel, County Kerry and the following committee has been appointed to organise the event: Messrs P. O'Connor, Chairman; L. Shields, J. F. Buckley, A. F. Smyth and Miss Clare Cusack. Additional members will be co-opted if required.



**STAMP DUTY A PENAL TAX ON IRISH HOMEOWNERS**

*—Continued from page 117.*

area with insufficient newly-built housing, then it is four per cent — or else! This can only depress the market in second-hand houses, leaving the unfortunate seller of a second-hand house even less well equipped to purchase his next residence.

Ours is not the first voice to ventilate this topic, nor will it be the last.

Surely, a Government — any Government — that appreciates that special Capital Gains Tax provision should be made for the "principal private residence", can extend its thinking as far as Stamp Duty. Or are we left wondering whether successive Governments, conscious that half our population is now under 25 years of age, have been cynically rubbing their hands, waiting for the Great Stamp Duty Bonanza?

# Criminal Lawyers Group Formed

Solicitors practising criminal law in the Dublin area have agreed to establish a new body, the Association of Criminal Lawyers. This decision was made at a meeting at Blackhall Place attended by Mrs. Moya Quinlan, Senior Vice President of the Incorporated Law Society, and James J. Ivers, Director-General. An executive committee was appointed with Brendan Kingston as chairman, and a subscription of £15 per annum was agreed.

The Association will promote an adequate scheme of representation for all persons appearing before the Courts, requiring representation on criminal charges. It will work in consultation with the Incorporated Law Society in the hope of achieving a consultative status to the Society in the future. The Association will cover the whole country and is open to all members of the profession interested in the area of criminal law.

The whole sphere of criminal practise will be kept under review, with the aim of involving the Law Society and representatives of other parties concerned with criminal practice in discussion on necessary changes and development. Meetings and seminars will be organised for the ongoing education of practitioners and a journal or review will be published on a regular basis to provide information and opinion in the area of criminal law and practice.

The Association's executive will initiate a programme, including the opening of formal links with the Law Society. It is intended that a code of conduct involving rules of etiquette will be drawn up and form part of the constitution of the association which will also be concerned with the Criminal Legal Aid Scheme to ensure that the Scheme is kept up-to-date and meets the needs of required work-loads.

Solicitors may obtain further information or membership application forms by writing to the Secretary, Association of Criminal Lawyers, The Law Society, Blackhall Place, Dublin, 7.

# Action by Solicitor Against Law Society Fails

An action brought by John Fanning ("the first-named plaintiff") and Noel C. Fanning, a solicitor's apprentice (apprenticed to his father, the first-named plaintiff) ("the second-named plaintiff") against the Incorporated Law Society of Ireland failed in the High Court on 27 March 1980 following a hearing before Mr. Justice Sean Butler. In his unreserved judgment delivered on that day Mr. Justice Butler held that in so far as any Order of the High Court or any freezing order (under Section 20 of the Solicitors (Amendment) Act, 1960) of the President of the High Court (Finlay P.) made affected either the plaintiffs' bank accounts they referred only to the first-named plaintiff's (solicitor's) client's money accounts and therefore the second-named plaintiff could not in any way have suffered damage. Mr. Justice Butler held that the first-named plaintiff's claim for damages for breach of his rights in natural justice, or, alternatively, breach of his constitutional rights, had not been established.

The Compensation Fund Committee of the Law Society, at a meeting held on 30 March 1977, had formed the opinion that it was proper to apply to the High Court pursuant to Section 20(1) of the Solicitors (Amendment) Act, 1960, to make an Order freezing the first-named plaintiff's bank accounts. A freezing order was made by the President (Finlay P.) on 1 April 1977. Section 20(1) provides as follows:

CONTROL OF BANKING ACCOUNTS OF SOLICITORS

"(1) Where the Society are of opinion that a solicitor or a clerk or servant of a solicitor has been guilty of dishonesty in connection with that solicitor's practice as a solicitor or in connection with any trust of which that solicitor is a trustee, they may apply to the High Court, and the High Court may make an order directing either—

(a) that no banking company shall, without leave of the High Court, make any payment out of a banking account in the name of the solicitor or his firm, or

(b) that a specified banking company shall not, without leave of the High Court, make any payment out of a banking account kept by such company in the name of the solicitor or his firm."

The first-named plaintiff claimed that this freezing order was an order which affected him adversely, (which the Court held to be true) and that it was made without notice to him and without giving him an opportunity of being heard (which on the facts the Court found was not true). The Court found that in fact both plaintiffs knew from the previous June 1976 that the Law Society was investigating the financial affairs of the first-named plaintiff's firm (Fanning & Co., 45 Gardiner Street, Dublin 1). Mr. P. J. Connolly, the Law Society's accountant, gave evidence that he did not get any reasonable co-operation from the first-named plaintiff in seeking financial and accounting information about Fanning & Company, and, as a result of this, the Law Society (through the Compensation Fund Committee) in January 1977 took a decision that the firm be formally investigated by its accountant, and Mr. Connolly was duly appointed an authorised officer to carry out such an investigation under Regulation 20 of the Solicitors' Accounts Regulations, 1967 (S.I. No. 44 of 1967), as inserted by the Solicitors' Accounts (Amendment) Regulations, 1970 (S.I. No. 231 of 1970).

The first-named plaintiff was notified of this by letter from the Law Society of 1 February 1977. However, notwithstanding this, Mr. Connolly was not able to inspect the books of the first-named plaintiff's firm. Mr. Connolly made appointments with the first-named plaintiff which were fruitless and promises were made by the first-named plaintiff which were not kept and in effect Mr. Connolly was not getting anywhere. The Director General of the Law Society (Mr. James Ivers) wrote a letter on 28 February 1977, some five weeks before the freezing order was ultimately made on 1 April 1977, the letter clearly informing the first-named plaintiff what the Society's thinking and intentions were, and stating (inter alia) that "this decision will not be pursued if you furnish the accounts and give Mr. Connolly an opportunity to check the accounts" . . . but that "if you do not co-operate and furnish the accounts, an application for a (freezing) order will be made, ex-parte".

Furthermore, in reply to a written request from the first-named plaintiff whether any complaints had been made and whether any client was complaining that he had not been paid and asking for any such complaints against

—*Continued on page 131.*

**SOCIETY OF YOUNG SOLICITORS**

## AUTUMN SEMINAR

**Week-end: 8/9 November, 1980**
**in**
**The Talbot Hotel, Wexford**

**Lectures:**

**Landlord & Tenant (Amendment) Act, 1980.**
Speaker: Maurice R. Curran, Solicitor.

**The Conclusiveness of the Register**
Speaker: J. Brendan Fitzgerald, Solicitor, Deputy Register, Land Registry.

**Insurance Claims — The Solicitor's Role?**
Speaker: Gerald J. A. Sheean, A.C.I.I., Claims Controller, Sun Alliance Group.

**Consumer Information Act, 1978, and Sale of Goods & Supply of Services Act, 1980.**
Speaker: James Murray, B.L., Director of Consumer Affairs.

**FULL PROGRAMME AND REGISTRATION FORMS WILL BE CIRCULATED SHORTLY.**

*(Continued from page 129)*

his firm to be set out, the first-named plaintiff was, by letter from the Law Society dated 11 March 1977 informed of the grounds of complaint; and in addition that letter from the Law Society finished by again notifying the first-named plaintiff of the course of action that the Law Society proposed to take (i.e. applying for a freezing order). On 21 March 1977 the Law Society again wrote to the first-named plaintiff stating that unless his outstanding accountant's certificates were delivered within a week the Law Society would proceed. The first-named plaintiff did nothing and on 1 April 1977 the Law Society applied to the President (Finlay P.) for a freezing order. Although the application for a freezing order under Section 20(1) of the Solicitors (Amendment) Act, 1960, was an 'ex-parte' one in the first instance, in fact on that day the first-named plaintiff appeared before the President, who gave him an opportunity of saying what he wanted to say before the President made the order. On 4 April 1977 the first-named plaintiff gave guarantees to the High Court and agreed to lodge money in Court and to co-operate fully with the Law Society in allowing an inspection of his books of account; on that basis the President had discharged his order of 1 April 1977. Mr. Justice Butler then said he had to infer that the guarantees and undertaking were not complied with because on 7 April 1977, during the Easter vacation, the Law Society had to apply again to the High Court (Hamilton J.) which made an order re-imposing the freezing order and adjourning the matter to 18 April 1977. On 18 April 1977 and again on 29 April 1977 the first-named plaintiff appeared with the Counsel before the President who on each occasion continued the freezing order.

Mr. Justice Butler stated that he had no hesitation whatsoever in finding on the facts of the case that the Law Society had acted more than fairly and that both plaintiffs knew well everything that was going on; and that from 28 February 1977 on, if not sooner, both plaintiffs knew that, unless they co-operated with the Law Society, the Law Society was going to apply for a freezing order.

The High Court therefore dismissed the plaintiff's claim.



**turtlenecks** — by Charles Fincher


*(Reprinted by permission of the American Bar Association Journal).*

EMPLOYMENT REGISTER

## AMALGAMATIONS & PARTNERSHIPS

This Society maintains an employment register on which solicitors seeking employment may place their names and on which practitioners may indicate their requirements for qualified staff.

The Society is now extending this service to cover the area of amalgamations, partnerships and mergers; any practitioner or firm desiring to form a partnership or to amalgamate his or its practice with another firm is invited to furnish details to the Society and this will be maintained on a register which may be inspected by other practitioners or firms with like plans.

Newly qualified solicitors are reminded of the facility available to them of inserting a notice in the Gazette seeking employment; confidentiality is secured by using a Box Number for replies.

Enquiries in respect of these services — which are free — should be addressed to:

The Education Officer,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

# President's strong criticism of RTE programme structure

The strong reaction of solicitors to the unfair pattern of the "Week In" programme broadcast by RTE 2 on May 19 was expressed by the President who spoke to a special Press conference at Blackhall Place on the following day about what he characterised as "irresponsible TV".

The President asked:

"What do you do with an anonymous letter? Most responsible people treat an anonymous letter with contempt and consign it to the wastepaper basket. Responsible newspapers have always made it clear that people who wish to shelter behind the veil of anonymity must give their name and address to the Editor, and they are therefore aware that they are identifiable. Yet RTE 2, as a lead into their programme on the legal profession on Monday night, started with three anonymous interviewees. In the case of the last man who was interviewed we were treated to the spectacle of a Mafia type interview in a motor vehicle. Not alone do we not know the names and addresses of those who were interviewed, but in the case of the car interview we were not even allowed to see his face. We only saw the back of his head.

"I am concerned that RTE should be irresponsible in this way, and should permit those interviewed in serious matters, which slanted the whole programme, to be thus sheltered. Surely, if they have valid criticisms to make, they are not fearful to put their name where their mouth is. Otherwise, what they say is suspect. It is easy to be highly critical if you know in advance that viewers do not know who you are, and, in the case of the last man, cannot even know what you look like, because all that is shown is the back of your head.

"Let us be quite clear that I make this statement more in sorrow than in anger, and in no way as a reaction to any criticism of our profession in the programme. We are not above criticism. We welcome criticism where it is well-founded. We deal with all criticism. Well-founded criticism will help us to be better people and to continue to serve the public in the high tradition which this profession has maintained during the last 128 years."

**TIME TO REPLY**

The chairman of the Public Relations Committee, Mr. Frank O'Donnell, who took part in the programme with Mr. John Rochford, said that RTE had not given them the time they had been promised to reply to the allegations made on the programme. "The Irish Independent" in its report of the Press conference, headed "RTE accused of 'dirty tricks' ", said in part:

"They also attacked the recording of the comments of Mr. Alan Ball, of the Clients of the Legal Profession Association. They said these should have been made in the live interview.

"The editor of "Week In", Mr. Alan Wright said the station had picked the three unnamed people from a panel of about 50.

"Each member of the studio discussion panel, he said, had been given an average of three minutes to speak, Mr. O'Donnell had been given over eight minutes and Mr. Rochford about five minutes.

"Mr. Wright told the news conference: 'I think the legal profession was fairly defended. They were given ample time to give their views'."

Mr. Frank O'Donnell sent a formal letter of complaint to the Director-General of RTE, Mr. George Waters, and received the following reply:

13th June, 1980

Dear Mr. O'Donnell,

Thank you for your letter of 28th May. I note your reservations about the treatment of the subject matter of our Programme "Week-In" presented on Monday 19th May and I am sorry that you feel aggrieved with the Production team's treatment.

I understand that the editor of the Programme, Mr. Alan Wright, attended the Press Conference called by your President on 20th May, 1980, and during the course of the Conference answered all of the questions raised in your letter. I also understand that Mr. Wright's answers to these questions were to a large extent acceptable to your President. Indeed, some days later Mr. Wright received a letter from Mr. Beatty which confirmed that this in fact was the case.

I hope you will accept that RTE's objective in presenting a programme such as this was merely to high-light an issue of public concern and was in no way intended to denegrate in any way the Legal Profession as a whole.

Yours sincerely,
George T. Waters.

# Bills before the Oireachtas 1980

## During the Dáil Session 15 April — 26 June and the Seanad Session 16 April — 3 July

| Title of Bill | Effect | Introduced | Position at 3 July, 1980 |
|---|---|---|---|
| Safety in Industry Bill, 1978 | To update and amend the Factories Act, 1955, by making further provisions for securing the safety, health and welfare of persons at work, and to provide for other related matters. | 30 March 1978 (Dáil) | Passed by Dáil Eireann 7/5/'80<br>Passed by both Houses of the Oireachtas 28/5/80. |
| Film Industry Bill, 1978 | To provide for the establishment of a Board to be known as An Bord Scannan to assist and encourage the development of a film industry in the State, to empower the Board to provide grants, loans and guarantees of loans for the making of certain films in the State, to define its other powers and functions and to provide for other matters connected with the matters aforesaid. | 2. Nov. 1978 (Dáil) | Withdrawn 15/4/80 |
| Sale of Goods and Supply of Services Bill, 1978. | To amend and extend the provisions of the Sale of Goods Act, 1893, the revision of its provisions and the extension of its scope to embrace hire-purchase transactions, contracts for services, guarantees and other practices in need of regulation. | 7 Nov. 1978 (Dáil) | Passed by Dáil Éireann 28/11/79.<br>Passed by Seanad Eireann 21/5/80.<br>Passed by both Houses of the Oireachtas 18/6/80. |
| Landlord and Tenant (Amendment) Bill, 1979. | To amend the law relating to the renewal of leases and tenancies and other matters. Contains provision that new leases under Part 3 of the Landlord and Tenant Act, 1931, will not be subject to rent review. Provides for the repeal and re-enactment with amendments of the Landlord and Tenant Act, 1931, and the Landlord and Tenant Reversionary Leases Act, 1958. | 28 Feb. 1979 (Seanad) | Passed by Seanad Éireann 2/5/79.<br>Passed by Dáil Éireann 17/4/80.<br>Passed by both Houses of the Oireachtas 28/5/80. |
| Trading Stamps Bill, 1979 | To make provision in relation to trading stamps, including provision for regulating the issue, use, and redemption of trading stamps and to make provision for regulating the business of issuing and redeeming trading stamps and for other related matters. | 14 May 1979 (Dáil) | Passed by Dáil Éireann 24/6/80.<br>Passed by both Houses of the Oireachtas 2/7/80. |
| Plant Varieties (Proprietary Rights) Bill, 1979 | To create proprietary rights over certain plants and to establish an office of Controller of Plant Breeders' Rights and to provide for other related matters. | 10 Oct. 1979 (Dáil) | Passed by Dáil Éireann 19/6/80.<br>Passed by both Houses of the Oireachtas 3/7/80. |
| Ombudsman (No. 2) Bill, 1979. | Provides for the appointment and functions of an Ombudsman and other related matters. | 23 Oct. 1979 (Dáil) | Passed by Dáil Éireann 24/6/80.<br>Passed by both Houses of the Oireachtas 3/7/80. |
| Local Government (Superannuation) (No. 2) Bill, 1979 | To provide for Superannuation Schemes and the granting of securities in respect of employees of certain bodies. Amends the Health (Corporate Bodies) Act, 1961, the Health Act, 1970, and the Local Government Services (Corporate Bodies) Act, 1971. Repeals the Local Government (Superannuation) Act, 1956, and certain other enactments relating to superannuation and provides for other related matters. | 14 Nov. 1979(Seanad) | Passed by Seanad Éireann 21/11/79.<br>Passed by Dáil Éireann 20/5/80.<br>Passed by both Houses of the Oireachtas 28/5/80. |

| Title of Bill | Effect | Introduced | Position at 3 July, 1980. |
|---|---|---|---|
| Turf Development Bill, 1979 | To amend and extend the Turf Development Acts, 1946 to 1975, by increasing the borrowing powers of Bord na Móna. | 15 Nov. 1979 (Dáil) | Passed by Dáil Éireann 24/4/80. Passed by both Houses of the Oireachtas 17/6/80. |
| Agriculture (Amendment) Bill, 1979 | To amend the Agriculture Acts, 1931 to 1974, to provide for the appointment of Committees of Agriculture by each council of a County. | 30 Nov. 1979 (Dáil) | Passed by Dáil Éireann 20/5/80. Passed by both Houses of the Oireachtas 4/6/80. |
| Pyramid Selling Bill, 1980 | To prohibit the inducing of persons to participate in pyramid selling schemes and to provide for other related matters. | 16 Jan. 1980 (Dáil) | Passed by Dáil Éireann 24/6/80. Passed by both Houses of the Oireachtas 2/7/80. |
| National Institute for Higher Education, Limerick, Bill, 1980. | To establish the National Institute for Higher Education, Limerick, on a statutory basis and to provide for other related matters. | 4 Feb. 1980 (Dáil) | Passed by Dáil Éireann 24/6/80. Passed by both Houses of the Oireachtas 3/7/80. |
| Packaged Goods (Quantity Control) Bill, 1980 | To make provision for a new system of control over the quantity contained in packaged goods. Based on system set out in 2 EEC Directives, 75/106/EEC and 76/211/EEC. | 26 Feb. 1980 (Dáil) | Passed by Dáil Éireann 21/5/80. Passed by both Houses of the Oireachtas 4/6/80. |
| Rates on Agricultural Land (Relief) Bill, 1980. | To allow relief of rates on certain agricultural land by amending and extending the Rates on Agricultural Land (Relief) Acts, 1939 to 1978. | 25 March, 1980 (Dáil) | Passed by Dáil Éireann 18/6/80. Passed by both Houses of the Oireachtas 25/6/80. |
| Land Bond Bill, 1980 | To amend S.6 of the Land Bond Act, 1934 (as amended by the Land Bond Act, 1978) by increasing the total amount of land bonds created and issued under the 1934 Act to not more than £5 million. | 1 April 1980 (Dáil) | Passed by Dáil Éireann 1/5/80. Passed by both Houses of the Oireachtas 7/5/80. |
| Arbitration Bill, 1980 | To enable two international Conventions on arbitration to be ratified — the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1965 Washington Convention on the Settlement of Investment Disputes between States and nationals of other States. Also amends the Arbitration Act 1954, in relation to the power of a court to stay legal proceedings in a matter which is the subject of an arbitration agreement. | 10 April 1980 (Dáil) | Passed by Dáil Éireann 20/5/80. Passed by both Houses of the Oireachtas 28/6/80. |
| Prisons Bill, 1980 | Provides for the continuation in operation of S. 2 of the Prisons Act, 1972, as amended by the Prisons Act, 1977, relating to the transfer of prisoners to military custody, until 31 May, 1983. | 21 April 1980 (Dáil) | Passed by Dáil Éireann 6/5/80. Passed by both Houses of the Oireachtas 21/5/80. |
| Finance Bill, 1980 | To change and impose certain duties of customs and inland revenue (including exise) to amend the law relating to customs and inland revenue (including exise) and to make further provisions in connection with finance. | 29 April 1980 (Dáil) | Passed by Dáil Éireann 12/6/80. Passed by both Houses of the Oireachtas 24/6/80. |
| Fishery Harbour Centres Bill, 1980 | Amends Sec. 4(6)(a) of the Fishery Harbour Centres Act, 1968, by increasing the fine from £100to £500 and amends the Schedule to the 1968 Act by substituting "Rossaveel" for "Galway". | 30 April 1980 (Dáil) | Passed by Dáil Éireann 24/6/80. Passed by both Houses of the Oireachtas 24/6/80. |
| Local Government (Building Land) Bill, 1980 | To enable Local Authorities to designate land required for development and to enable Local Authorities to acquire land at existing use value in the forthcoming five years. Provides for the establishment of a Lands Tribunal which will be chaired by a Judge of the High Court. | 12 May 1980 (Dáil) | Defeated (Dáil) 11/6/80. |

| Title of Bill | Effect | Introduced | Position at 3 July, 1980 |
|---|---|---|---|
| International Development Association (Amendment) Bill, 1980 | Amends Sec. 3 of the International Development Association Act, 1960, to enable the Government to make payments totalling £6,230,000 to the Sixth Replenishment of the International Development Association. | 13 May 1980 | Passed by Dáil Éireann 18/6/80. Passed by both Houses of the Oireachtas 19/6/80. |
| National Heritage Bill, 1980 | To amend and extend the National Monuments Acts, 1930 to 1954. | 14 May, 1980 (Dáil) | Second Stage (Dáil) |
| Export Promotion (Amendment) Bill, 1980 | To amend and extend the Export Pormotion Acts, 1959 - 1977 by increasing the non-repayable grants which the Minister for Finance may make to An Coras Trachtala to a maximum of £90 million. | 20 May 1980 (Dáil) | Passed by Dáil Éireann 24/6/80. Passed by both Houses of the Oireachtas 25/6/80. |
| Electoral (Amendment) Bill, 1980 | To revise Dail Constitution in the light of the 1979 census returns. Scheme of constituencies contained in the Schedule is based on the recommendations of the *Report of the Dáil Éireann Constituency Commission 1980* Prl. 8878. | 30 May, 1980 (Dáil) | Passed by Dáil Éireann 24/6/80. Passed by both Houses of the Oireachtas 25/6/80. |
| Restrictive Practices (Confirmation of Order) Bill, 1980 | To confirm the Restrictive Practices (Motor Spirit) Order, 1980 (S.I. No. 15 of 1980). | 3 June 1980 (Dáil) | Passed by Dáil Éireann 19/6/80. Passed by both Houses of the Oireachtas 25/6/80. |
| Sexual Offences Bill, 1980. | To amend the law relating to sexual offences. | 5 June, 1980 (Seanad) | As presented. |
| Army Pensions Bill, 1980 | To provide for the granting to the widows of Special Allowance Holders under the Army Pensions Act, 1943 or the Army Pensions Act, 1953, and to amend and extend the Army Pensions Acts, 1923 to 1973. | 10 June 1980 (Dáil) | Passed by Dáil Éireann 19/6/80. Passed by both Houses of the Oireachtas 26/6/80. |
| Health (Mental Services) Bill, 1980 | To repeal all existing legislation governing the treatment of mental illness and replace it with provisions which will have full regard to modern developments in psychiatry. | 23 June 1980 (Dáil) | Order made for Second Stage. |
| Irish Whiskey Bill, 1980 | To define Irish Whiskey and certain descriptions used in relation to Irish Whiskey and to repeal the Irish Whiskey Act, 1950. | 23 June, 1980 (Dáil) | Order made for Second Stage. |
| Dumping at Sea Bill, 1980 | To control dumping in the sea. | 25 June 1980 (Dáil) | As presented. |

## REGISTRATION OF BIRTHS, DEATHS AND MARRIAGES

The following directive has been received from the General Register Office, Custom House, Dublin 1.

Due to the heavy demand at present there is a considerable waiting period in the issue of certificates from the General Register Office. It is suggested that if applications are sent in writing to the Superintendent Registrar of Births, Deaths and Marriages for the county in which the event occurred (see list attached) together with the necessary particulars, fees and postage, they will be dealt with more speedily.

**Fees**

Short Birth Certificate (including search fee): 25p.
Full Birth, Death or Marriage Certificate (including search fee): 47½p.

**Particulars to be furnished**

*Birth:* Names of person whose birth record is required, exact place of birth, date of birth and parents names (including mother's maiden surname).

*Death:* Names, date, place of death and if possible age of deceased.

*Marriage:* Names of parties married, date and place of marriage.

**Application for Certificates of Birth, Death and Marriage may be made to the Superintendent Registrar for the County in which the event took place.**

**Carlow** (0503) 41106: St Dympna's Hospital, Carlow.
**Cavan** (049) 31822: The Courthouse, Cavan.
**Clare** (065) 21525: The Courthouse, Ennis, Co. Clare.
**Cork North** (022) 21251: County Office, Annabella, Mallow, Co. Cork.
**Cork South** (021) 25126: 18 Liberty Street, Cork.
**Cork West** (028) 21114: The Courthouse, Skibbereen, Co. Cork.
**Donegal North:** Supt. Registrar's Office, Kilmacrennan Road, Letterkenny, Co. Donegal.
**Donegal South** (Ballybofey 38): Stranorlar, Co. Donegal.
**Dublin** (772397): 191 Pearse Street, Dublin.
**Galway** (091) 63151: County Buildings, Galway.
**Kerry** (064) 32251: General Register Office, Ardnanweely, Killarney.
**Kildare** (045) 76001: Basin Street, Naas.
**Kilkenny** (056) 21208: John's Green, Kilkenny.
**Laois** (0502) 21135: The Courthouse, Portlaoise.
**Leitrim** (Carrick-on-Shannon 5): Courthouse, Carrick-on-Shannon.
**Limerick** (City area) (061) 51522: St. Camillus' Hospital, Limerick.
**Limerick** (County) (Newcastle West 124): Newcastle West, Co. Limerick.
**Longford** (043) 6211: Co. Clinic, Longford.
**Louth** (042) 35457: Courthouse, Dundalk.
**Mayo** (094) 22333: Town Hall, Castlebar.
**Meath** (046) 31512: The Courthouse, Trim.
**Monaghan** (047) 81333: Rooskey, Monaghan.
**Offaly** (0506) 21868: The Health Centre, Arden Road, Tullamore.
**Roscommon** (0903) 6518: The Courthouse, Roscommon.
**Sligo** (071) 5211: Markievicz House, Sligo.
**Tipperary (North Riding)** (0504) 21055: Hospital of the Assumption, Thurles.
**Tipperary (South Riding)** (052) 22011: Supt. Register's Office, Room 22, Co. Clinic, Western Road, Clonmel.
**Waterford (City area)** (051) 3321: St. Patrick's Hospital, Waterford.
**Waterford (County)** (058) 41100: Argus Brugha, Dungarvan, Co. Waterford.
**Westmeath** (044) 80221: Co. Clinic, Mullingar.
**Wexford** (053) 22211: Co. Clinic, Grogan's Road, Co. Wexford.
**Wicklow** (0404) 2324: Kilmantin Hill, Wicklow.

# The Register

**REGISTRATION OF TITLE ACT, 1964**

**Issue of New Land Certificate**

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 24 day of September, 1980.

W. T. MORAN (Registrar of Titles)

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

(1) Registered Owner: Luke Cunningham; Folio No: 50303; Lands: Carrowroe South; Area: 0a. 2r. 0p.; County: Galway.

(2) Registered Owner: Denis Creaton (Jnr.); Folio No: 20106 (rev).; Lands: Loughlinn and Cuiltyboe; Area: 19a. 2r. 23p.; 6a. 2r. 6p.; County: Roscommon.

(3) Registered Owner: Timothy Kyne (Jnr.); Folio No: 31340; Lands: Corcullen and Clydagh; Area: 2a. 1r. 0p.; 22a. 1r. 1p.

(4) Registered Owner: James Cannon; Folio No: 15394; Lands: Ballydavid North and East; Area: 20a. 2r. 11p.; 1a. 3r. 33p.; County: Galway.

(5) Registered Owner: James Fleming and Anne Fleming; Folio No: 26916 L; Lands: 13 Holywell Crescent, Donaghmede; Area: ——; County: Dublin.

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**No advertisement relating to a Lost Land Certificate should be published in the Incorporated Law Society Gazette or elsewhere by Solicitors except under direction of the Registrar of Titles or his Officers.**

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(6) Registered Owner: Thomas Keaveney; Folio No: 3330; Lands: Shanballymore; Area: 68a. 3r. 21p.; County: Galway.

(7) Registered Owner: James Gaynor and Freda Gaynor; Folio No: 4182 F; Lands: Ballinglanna; Area: 0a. 1r. 2p.; County: Cork.

(8) Registered Owner: Martin Ansbro; Folio No: 13674; Lands: Clonmore, Common, Cloondarone; Area: 54a. 0r. 15p.; 6a. 3r. 11p.; 1a. 3r. 37p.; County: Galway.

(9) Registered Owner: Mary T. O'Neill; Folio No: 9000; Lands: Coldwinters (part), Barony of Castleknock; Area: ——; County: Dublin.

(1) Registered Owner: Denis J. Nunan; Folio No: 750; Lands: Ballyroe Upper; Area: 5a. 2r. 23p.; County: Limerick.

(11) Registered Owner: Michael Kirby; Folio No: 577; Lands: Bealkelly (Eyre); Area: 8a. 1r. 11p.; County: Clare.

(12) Registered Owner: Mary Donohoe and Thomas Donohue; Folio No: 706; Lands: Blunsheens (parts), Yaletown (part); Area: 1.581a.; 8.169a.; County: Wexford.

(13) Registered Owner: Richard Ronald Johnston Colli ᴛ; Folio No: 1866; Lands: Carnew (part); Area: 2a. 04. 10p.; County: Wicklow.

(14) Registered Owner: Seamus Doyle; Folio No: 9981; Lands: Kilmallock (part); Area: 27a. 2r. 19p.; County: Wexford.

(15) Registered Owner: Philomena Gleeson; Folio No: 2015; Lands: Ballyglishen (part); Area: 7a. 1r. 25p.; County: Queens.

(16) Registered Owner: Edward J. Browne; Folio No.: 6082; Lands: Sheean; Area: 0.206a.; County: Mayo.

(17) Registered Owner: John and Frances O'Dwyer; Folio No.: 23821 L; Lands: Kilbogget, Barony of Rathdown; Area: 0a. 0r. 14p.; County: Dublin.

(18) Registered Owner: Michael Branagan; Folio No.: 41977 L; Lands: The leasehold interest in the property situate to the North of Kincora Road in the Parish and District of Clontarf; Area: 0a. 0r. 7p.; County: City of Dublin.

(19)Registered Owner: Margaret Dunne; Folio No: 31659 L; Lands: 79 Mourne Road, Drimnagh, Dublin 12; Area: 0a. 0r. 1p.; County: Dublin.

(20) Registered Owner: Governor and Company of Bank of Ireland; Folio No: 12829; Lands: Ballymaddock, Cullenagh; Area: 1a. 2r. 6p.; County: Laois.

(21) Registered Owner: James Delahunty; Folio No.: 12162; Lands: Ballymaddock, Cullenagh; Area: 47a. 14r. 5¼ sq. yds.; County: Laois.

(22) Registered Owner: Ita McCaffrey; Folio No.: 17913; Lands: Carrickaderry; Area: 0a. 2r. 19p.; County: Monaghan.

(23) Registered Owner: James and Hannah O'Callaghan; Folio 221 (revised); Lands: Fornaught; Area: 46a. 3r. 20p.; County: Cork.

## LOST WILLS

**Would any person having knowledge of any Will made by Miss Margaret Claffey,** late of 64 Patrick St., Dun Laoghaire, Co. Dublin, who died on the 7th May, 1980 please communicate with Messrs. Conway & Kearney, Solicitors, Tullamore, Co. Offaly. Phone (0506) 21201 & 51241.

**Patrick Stritch** (deceased), late of 40 Cross Avenue, Blackrock, County Dublin. Will any person having knowledge of a Will of the above-named deceased, who died on the 16th day of July, 1980, please communicate with Messrs. Vincent & Beatty, Solicitors, 67/68 Fitzwilliam Square, Dublin 2.

## NOTICES

**The Practice** of the late Joseph P. Black, Solicitor, Clones, has been acquired by Miss Josephine Duffy, Solicitor. Miss Duffy shall continue to carry on the solicitor's practice at the above address and at the sub-office at Ballyconnell as heretofore under the title "Joseph P. Black & Company".

**Secretary,** with own transport, typewriter and 'phone, will do legal work in her own home. Telephone: Mrs. Patricia Coffey, 462078.

**For Sale:** Butterworths Forms and Precedents, 1909 edition, full set (17 vols.) with Supplemental Forms and Notes, excellent condition, best offer. Replies to Box No. 010.

**Young Lady Solicitor,** 2 years experience, 6 years in employment, seeks position. Reply: Box No.: 011.

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**Change of Address.** Please note as and from Monday, 29th September, 1980 Lysaght, Dockrell, Shields & Farrell, Solicitors will be in practice at 51/52 Fitzwilliam Square, Dublin 2. Telephone 606888. Telex 30851 DDE. No. 92.

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THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

September 1980 Vol. 74 No. 7

**Cases and Materials on the Irish Constitution**

Authors, Mary Redmond and James O'Reilly, presenting a copy of their book, **Cases and Materials on the Irish Constitution,** to the Chief Justice, the Hon. T. F. O'Higgins, who introduced the book at the launch in the Law Society, 18th September, 1980. Also in the picture is Mr. Walter Beatty, President of the Incorporated Law Society of Ireland.

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# Is Your Barrister Really Necessary?

G.J.A. Sheean, A.C.I.I.

(Text of a paper read to the Law Society Annual Conference, 1-4 May, 1980)

**"Is Your Barrister Really Necessary"**

Ere I go into Court I will read my brief through
(Said I to myself — said I)
And I'll never take work I'm unable to do
(Said I to myself — said I)
My learned profession I'll never disgrace
By taking a fee with a grin on my face
When I haven't been there to attend to the case
(Said I to myself — said I)
(Iolanthe — Gilbert & Sullivan)

These admirable sentiments were expressed in song by the Lord Chancellor in Gilbert & Sullivan's opera Iolanthe. Although written long before the turn of the century, much of W.S. Gilbert's satire still seems apt when translated into present day terms.

Before examining the function of Counsel however, it is necessary to look a little closer at the operation of our Courts and here we find that the list of Jury Actions has reached massive proportions. The present delay in Dublin is approx. 20 months from the setting down of the Action to the date of the Trial, and in Cork the period is not much different. Later I will suggest that Solicitors contribute to a significant degree to this backlog but first, I would like to examine other causes.

The Postal Strike in 1979 did nothing to alleviate the situation but undoubtedly a major factor was, and still is, the failure of the Department of Justice to implement legislation to increase the level of jurisdiction of the Circuit Court. This has remained at £2,000 since 1971. It should be remembered however, that the recommendations which gave rise to the setting of the limit at that time, were those contained in the 5th Interim Report of the Committee on Court Practice and Procedure. That Report was published on the 20th April 1966. There are some indications that the limit of jurisdiction of the Circuit Court will shortly be increased to £15,000 and that of the District Court to £2,500. Whilst this figure of £15,000 in the Circuit Court is somewhat more than was recommended in the 20th Intermim Report of the Committee, this Report was in fact submitted on the 1st August 1978. If these new limits are implemented, they will only be effective in the short term unless there is a regular updating to keep pace with inflation.

To cope with the backlog which I have described, presiding Judges have adopted the expedient of listing substantial numbers of cases for Hearing each day. In Cork last January, as many as 20 Jury Actions were listed for Hearing before two Judges each day. This often resulted in a state of near chaos. This procedure entirely ignores the convenience of litigants, witnesses, Jurors and Solicitors but needless to say, it operates entirely to the financial benefit of Counsel. It is sad to note that Solicitors appear to have no voice in the Courts by way of protest and appear to be unable to make representations to the Judge in regard to such listings.

The following extract from a letter which I received recently serves to highlight the problems facing litigants.

> "This case was first listed for the previous Thursday and not reached. It was about to start on Friday but Judge X would not take it because it was an "All issues" case and could not be guaranteed to finish by 2.30 p.m. when he wished to depart for Dublin. When we got down to Hearing on Monday I discovered it was placed not first but fourth in the list and what was worse, the case behind it was taken first because there were witnesses from England. That case ran in one Court and A v. B in the other and we would have been back a fourth day had it not settled. Accordingly, the Plaintiff accepted the sum of £5,000 because the Costs were getting out of all recognition to the size of the claim".

The pressure to settle in circumstances such as I have detailed, is severe and one must question if justice can be done between the two parties, under such conditions. The position of the Solicitors is an extremely difficult one as he is faced with having to placate not only an angry Client but also restive witnesses. Whilst delays can occur in the best regulated Courts, massive listings such as I have described cannot really be acceptable to responsible practitioners.

One cannot examine the operations of the Courts without questioning the function of Juries in Civil Actions. Whatever view one has as to the merits of the Jury System their involvement is accepted as adding substantially to the length of Trial. Apart altogether from this I am firmly of the opinion that Juries have outlived their usefulness, if indeed they ever served a useful purpose, in Civil Actions. The original concept of a Trial by the Peers of litigants, i.e. people who knew intimately each party, has changed beyond recognition.

The Jury System is largely of Anglo-Saxon origin and having adopted it we seem very slow to follow the British in abandoning it as being unsuitable in Negligence Actions.

I have already made mention of the Committee on Court Practice and Procedure and this Body was set up in 1962. One of its Terms of reference was "To consider whether and if so to what extent the existing right to Jury Trial in Civil Actions should be abolished or modified". Much has been said on the subject in the meantime but no concrete proposals have emerged although there appears to be some support at Government level for their abolition. In my view, Juries introduce into cases, an uncertainty which is wholly unproductive although it must be admitted that the system at times appears to appeal to the gambling instinct of the litigants.

One of the most humorous histories of the Jury System appeared in the book "Windward of the Law" by Rex Mackey S.C. I will content myself by closing this subject by a quotation from that book "When it is considered that the average Jury consists of 12 diverse individuals fortuitously drawn together in an artificial association to decide between conflicting stories upon which different

complexions are placed by trained advocates and in accordance with a set of Rules of which they are profoundly ignorant, it can be appreciated that the System supplies a field of legal lore which is inexhaustable".

Having suggested that the Postal Strike, delay in raising jurisdiction of the Circuit Court and the involvement of Juries have all contributed to the present sorry state, I would now like to suggest that there is much that Solicitors could do to remedy the position.

If, as is clear, Parties to an Action can be coerced (I use the word advisedly) into settlement on the morning of the Court, one must question why these settlements cannot be arranged long beforehand. The responsibility to a litigant for the handling of an Action rests firmly with the Solicitor who is solely answerable to the Client. How that duty is discharged may ultimately determine whether the case ends up as a further addition to the already long Court lists. There is no reason why the Solicitor (other than one of very junior experience) should not be in a position to determine whether or not his Client has a good case. The view is reached on assessment of the information given by the Client and by witnesses or professional persons such as Architects or Engineers. Such assessment is after all, the daily task of Insurance Claims Staff who do not claim the same professional status as Solicitors. On the question of value, the Solicitor is in a better position to decide the value of the claim as he has the advantage, not shared by Counsel, of having met the Client on a number of occasons and therefore being in a position to assess the effect of injuries on that person.

Instead of adopting this responsible role, Solicitors rely far too heavily on Counsel. This dependency is undesirable, as it creates a totally unbalanced relationship between the professions. The relationship should be one of mutual respect but we find that often Solicitors are treated in the most cavalier of fashions by Counsel, as demonstrated by inexcusable delays and abandonment of Briefs at the last moment. The balance needs to be adjusted and I would like to suggest some ways in which this can be done.

**Negotiations**

I regard this as the most important area in which a Solicitor can be effective to the best interest of his Client. Negotiations for settlement often do take place and sometimes are successful. In my experience however, discussions are often one-sided with the Insurer making most of the running. There is nothing more frustrating than having a realistic offer turned down without a counter-proposal. I feel that good manners alone demand a meaningful response. Often, the reaction stems from advice given by Counsel who may offer an inconclusive view or alternatively, suggest a figure which is totally removed from reality. It is not in my view normally necessary to consult Counsel in the first place but having done so, the view cannot be totally ignored and indeed, the Client may have to be advised of the content of the Opinion. If however, the figure mentioned is an unrealistic one, then the scene is set for a protracted delay and a final confrontation on the morning of the Court. No doubt at that stage, the miracle will be performed and a settlement arranged. It is surprising how many reasons can be found to justify the taking of less or the giving of more as the case may be. Often at that stage, the view of Counsel given 2 or 3 years beforehand appears to be vindicated but I will discuss this aspect later and suggest that in fact this is merely an illusion.

**Day to day conduct of the case**

It is surprising how much reliance is placed on Counsel during the normal processing of the case. May I take as an example, the reaction to an Agreement which I negotiated with the Professional Purposes Committee of the Law Society and which was subsequently recommended to Members by the Council. This related to the exchange of Medical Reports. The Procedure was readily adopted by many Solicitors but I know of some who in no case would release their Client's Medical Report without first asking Counsel if this should be done. This in my view, is a complete abrogation of responsibility and must inevitably reduce the stature of such person in the eyes of Counsel. Indeed, I am aware of one case where a Senior Counsel had the temerity to reprimand a Solicitor for having released a Report.

**Drafting of Pleadings**

Probably the greatest single cause of delay arises from the passing of papers between Solicitors and Counsel. It is unnecessary for me to remind you of the frustration involved and those of you who invariably receive a prompt service are indeed favoured. I would suggest however, that much of the delay is needless as the Solicitor is competent to draft all the necessary Pleadings in a normal High Court Action. By doing this it is no exaggeration to say that as much or indeed more than 12 months could be saved.

The High Court Writ is an innocuous document and it is normal nowadays to use the short form of the Statement of Claim. This is if I may say so, a pretty useless document as it gives very little information but certainly does not require to be drafted by Counsel. The Notice for Particulars whilst asking a large number of simple and often pointless questions, does not require a particular expertise and the Reply to that Notice is parpared on the basis of information largely supplied by the Client. There is not an infinite variety of workings used in the Defence and the appropriate form could be selected by the most junior practitioner with little risk of error.

Having become frustrated by these delays, I have recently, on an experimental basis, arranged for our Solicitors in certain cases, to enter both the Appearance and Defence at the same time. This "arcane" procedure as it is called by one Senior Counsel, initially caused some confusion in the High Court Office but has since been accepted as being valid. Many High Court Actions involve very simple issues and the exchange of Pleadings add little to the knowledge of either party.

At this stage, I would like to advert to the problems created by the necessity to Brief two Senior Counsel and one Junior Counsel in each and every High Court Action. The size of the present High Court lists and the procedure adopted by the Court make it difficult to predict accurately, the date of Hearing in any one case. In addition, the conflict between the Sittings of different Courts make it impossible for a guarantee of attendance to be given by Counsel. The operation of the "Two Senior Rule" does little to alleviate the problem and carries with it no guarantee of either Senior Counsels' attendance but only improves to some extent the odds in favour of the Solicitor. The Bar Council deny that there is any such thing as a "Two Senior Rule" and say that Senior Counsel is not obliged to insist on the instruction of a second Senior in any case. The reality of the situation however, seems to be far removed from this assertion. It is normal practice, although quite improper, for an Advice of Proofs to include the instruction "brief two Senior and one Junior Counsel". This is in my view, no longer acceptable and it is time that concrete proposals emerged to ensure that a more equitable system operates. There is no reason why a full Brief Fee should be paid to a person who attends Court only briefly, if at all.

One must accept that the position of Counsel is an extremely difficult one and that the issue of two Senior Briefs may continue to be necessary until such time as the conduct of our Courts is carried out in a more orderly fashion. I would suggest however, that only one Senior Counsel should attend to the case and election should be made on the morning of the Court as to which Counsel is available. The second Brief in my view, should be returned, and what might be called a "Preparation Fee" could be paid although this would not equate to the amount of a Brief Fee.

Turning to the function of Junior Counsel — a fee should in my view, only be paid where he attends the Court and remains for the duration of the case. It is not in my view, acceptable that a Brief Fee should be paid merely for opening the Pleadings. You will be aware that in England it is not now necessary to brief Junior Counsel even though he may and probably will have prepared, some of the earlier Pleadings.

I referred earlier to Opinions on quantum by Counsel and it can appear that a view expressed at an earlier date is shown to be correct. The following example, however, may show that the apparent gain is in fact an illusion. A motor accident happened in 1975 and negotiations took place early in 1977 as a result of which an offer of £12,500 was made in March of 1977. This was acceptable to the Solicitor who however, wished to obtain the advice of Counsel and the papers were duly sent to him. Months passed and threats had to be used before the papers were returned but the advice given was that the sum offered was inadequate. That case is still outstanding and may be heard at the turn of the year but now the asking figure is £21,000. Let us however, return to March 1977 and examine the figure of £12,500 and see how it relates to the present time. We can do this in one of two ways, by calculating the amount of interest that would have been earned in the meantime or alternatively by determining what figure would be required in present day value to provide the same purchasing power. High rates of interest have been available for the past few years and $12\frac{1}{2}\%$ per annum might represent a conservative figure. Thus, £12,500 would have become £14,000 by March 1978, £15,750 by March 1979 and £17,000 by March 1980. By the time the case reaches a Hearing this amount could have increased to about £19,000. If the sum of money rather than being allowed to lie dormant, had been made to work undoubtedly greater gains could have been achieved. By applying the annual rate of inflation, the result achieved would be very little different. If this case settles on the morning of the Hearing for a figure of £19,000 or £20,000 the Client and indeed I suspect the Solicitor, may well feel that Counsel has proved to be right in thinking that the original sum was inadequate.

In discussing the function of Counsel, relative to offers of settlement, I would like to refer to an abuse which appears to have grown up of recent time. This is illustrated by a case which has been drawn to my attention but in which I am totally unaware of the identity of any of the parties involved. A substantial sum of money was offered by an Insurer in settlement of a case and in reply, the Claimant's Solicitor wrote as follows "there are certain things which I would like to clear up in advance regarding costs. Counsel have indicated that before they advise on the settlement that fees for such advice will have to be paid. Our professional fees will be £2,000 and in addition to the ordinary outlay, there would be a sum for both Counsel amounting to £210 for advising on the settlement. Kindly confirm that these fees will be paid".

Having regard to the amount of the settlement offered, the fees suggested for Counsel represent in fact full Brief Fees and I need hardly say that this is totally unacceptable. It is disappointing however, to note that not alone did the Solicitor apparently support the outrageous suggestion but also associated himself by claiming his fee as a condition to settlement.

May I issue a final word of warning. When and if the limits of jurisdiction of the Circuit Court are increased some of you may feel that the larger claims could not be left to Junior Counsel but that Senior Counsel should be involved. May I plead that no one should submit to this temptation which will only exacerbate an already extremely difficult situation.

I asked the question at the outset "Is Your Barrister Really Necessay?". I am sure that no one expected a simple yes or no answer, and of course no such answer can be given. I hope however, that I have gone some way to showing that he may not always be necessary and that too great a dependance on Counsel is counter-productive and unnecessary because the knowledge and expertise required is already available within your own profession.

(concluded)

## Bank robbery at Ballaghaderreen

The following resolution was passed unanimously by the Law Society Council at its July meeting:

"The Council of the Incorporated Law Society of Ireland unreservedly condemns the callous murders of Garda Henry Byrne and Detective Garda John Morley in the course of their duty and offers deep sympathy to their families and to the Commissioner and their fellow members of the Garda Siochana".

A copy of the resolution has been sent to the Garda Commissioner, the families of the deceased Gardai and the Secretary of the Garda Representative Body.

The Society was represented at the funeral of the Gardai at Knock by the President, Mr. Walter Beatty.

# The Employment Appeals Tribunal

By GARY BYRNE, Solicitor

Employers/Employees and Trade Unions have traditionally avoided settling their differences in courts of law preferring to tackle their problems in a more informal and speedier manner, while retaining their rights to extra-legal sanctions.

This reluctance of the parties to enter court is understandable in light of the comment of Geoffrey Lane, J., in the case of *Ford Motor Co. Ltd., v. AUIFW and others* [1969] W.L.R. 339, that the court was "merely concerned with the strict legal problems involved, regardless of their impact and regardless of their consequence". The legislature therefore, were faced with the difficult problem, in drafting the labour legislation of the 1970's, as to how to enforce the various Acts. Those Acts requiring to be dealt with were the Unfair Dismissals Act, 1977, the Minimum Notice and Terms of Employment Act, 1973, and the Redundancy Payments Acts.

There was a need for what the Donovan Commission (Chap. X paragraph 578) called "an easily accessible, speedy, informal and inexpensive procedure for settlement of disputes". The problem was neatly sidestepped by revamping the old Redundancy Appeals Tribunal, and renaming it the Employment Appeals Tribunal.

The Redundancy Appeals Tribunal was established under S.39 of the Redundancy Payments Act, 1967, its scope was widened by S.11 of the Minimum Notice and Terms of Employment Act, 1973, and further extended by the Unfair Dismissals Act, 1977, and under S.18 of that Act, the title was changed to the "Employment Appeals Tribunal".

The Tribunal consists of a Chairman and three Vice-Chairmen, with legal qualifications, and a panel of twenty-four ordinary members, twelve nominated by I.C.T.U., and twelve by employer organisations. Each Division of the Tribunal consisted of a Chairman, and two of the ordinary members, one each from the I.C.T.U., and employer panels. The Tribunal is based in the Dept. of Labour building in Mespil Road, Dublin, but also sits at venues outside Dublin. In 1978, The Tribunal visited 69 such venues for 186 separate sittings.

The Employment Appeals Tribunal produces an annual report, which is available from Government Publications. These reports indicate the volume of the work done by the Tribunal, and breaks it down into various headings such as types of representation, number of cases allowed or dismissed, etc.

The difficulty with these figures is that each claim under each Act is classified as an Appeal, when in actual fact, one Appeal can consist of claims brought under the three Acts, and the Claimant might only be successful in one of these claims. A simpler, and in my opinion, more accurate method of assessing the effect of the Tribunal is to survey decisions, as published monthly, for a period of twelve months regardless of the date of filing of the claim, or hearing of the claim.

Taking the 580 decisions published from January to December (inclusive) 1979, the figures are as follows:

**Table I Types of Claim**

54% of claims included claims under the Min. Notice Act
51.3% of claims included claims under the U.D. Act
43.3% of claims included claims under the Redundancy Acts.

**Table II Representation**

**Claimants**

34.5% of claimants represented themselves
28.6% of claimants were represented by Solicitors – of these 39% used counsel
27.6% of claimants were represented by Trade Union
2.3% of claimants were represented by others
7.0% of claimants failed to appear

**Respondents**

35.5% of respondents were represented by Solicitors – of these 27% used counsel
32.0% of respondents represented themselves
11.2% of respondents were represented by FUE
4.3% of respondents were represented by Construction Industry Federation
5.% of respondents were represented by 'others'
12.00 of respondents failed to appear

**Table III Results of Appeals**

*(a) Unfair Dismissal*

40.0% of Unfair Dismissal cases were successful with a monetary total for the year of £146,138, with an average award of £1,228.
12.0% of U.D. claims resulted in an order of re-instatement
0.12% of U.D. claims resulted in an order of re-engagement
2.5% of U.D. cases resulted in awards of Maximum compensation.

In 3 U.D. cases, claimants were successful, but no compensation was awarded.

In 1 case, there was held to be an Unfair Dismissal, but that the employee contributed 100%

*(b) Minimum Notice*

33% of Minimum Notice claims were successful.

*(c) Redundancy*

35.5% of Redundancy claims were successful.

**Table IV General**

31.5% of all claims were struck out on the merits
14.5% of all cases were settled, and 69% of these involved Solicitors
6% of cases were appeals from Rights Commissioners
0.9% of cases involved FLAC
In 4.0% of cases, Accountants appeared for Respondents of cases where no appearance was made by the Respondents, 7.5% were Liquidators.

It is evident from the foregoing, that Trade Union and employer organisations engaged in the Industrial Relations mechanism, prefer to have their cases heard by a Rights Commissioner, and this appears to be a most successful method of dealing with cases as evidenced by the surprisingly small percentage of appeals from Rights Commissioners heard by the Tribunal. The legal profession have a respectable share of the representation for both sides, but there remains a very large number of Claimants and Respondents who appear with no representation at all. The average award of £1,228 in Unfair Dismissal cases would compare favourably with the majority of Circuit Court awards, the main difference being in the area of costs in that each party must bear their own costs before the E.A.T. win, lose, or draw. The average award figure is somewhat misleading, in that the majority of awards tend to be around the £750 mark, and are boosted by a number of five figure awards in the year.

There is a disturbing number of claims brought under the Minimum Notice Act. Entitlement under the Act is very simply assessed, and the only significant ground of dis-entitlement is misconduct. Many Claimants include Minimum notice claims with U.D., and Redundancy claims, but a good proportion of cases are Minimum Notice only. In reading cases for this survey, I noticed many simple Minimum Notice cases brought solely due to the employers ignorance of the employees entitlement. In one case brought solely under the Minimum Notice Act, both sides retained Solicitors, and the case went to a full hearing, resulting in an award of less than £20.

The figures on settlement of cases are a little misleading also. While 69% of cases settled were settled by Solicitors, of cases involving Solicitors, only 6.4% were settled. The FUE were involved in 10.6% of all cases settled, but of cases involving FUE, 14% were settled.

The overall impression given by the results of this survey is that the Employment Appeals Tribunal is providing a very valuable service in a speedy and efficient manner. The Tribunal have been at times, criticised by both employers, and employees as being biased in favour of the other side, but the decisions of the Tribunal do not bear this out. I would have two minor criticisms of the workings of the Tribunal. Firstly, that by not awarding costs against a Claimant, the Tribunal have allowed the situation develop where an employee properly dismissed can put his former employers to great trouble and expense by filing a claim, and conducting his own case at no cost to himself, even though his case be devoid of merit. Secondly, that the Circuit Court Rules governing cases appealed from the Tribunal to the Circuit Court S.I. No. 10 of 1979 – do not require an appellant to notify the Tribunal of an appeal and it is therefore most difficult to follow cases once and they are dealt with by the Tribunal.

**Addendum**

Since the time of writing the above, details of new Rules of Procedure for Industrial Tribunals in England (which come into force on October 1st next), have been published and are deserving of study by the Department of Labour. The new rules cover complaints for Unfair Dismissal, Redundancy, Sex and Race Discrimination, together with various other employment protection complaints. It should be remembered that English Tribunals cover a far wider range of subjects than our E.A.T. The parallel of our E.A.T. in England is the Industrial Tribunal from which appeal lies to the Employment Appeals Tribunal on a question of law only. The English E.A.T. is equivalent to the High Court, but with procedure akin to that of the Industrial Tribunals. The main changes in the new rules are:-

(a) The existing rules relating to Discovery and Further Particulars are extended. There is a completely new provision providing for pre-hearing assessment on the application of one of the parties, such assessment to be on representation submitted in writing and oral argument – no mention is made of hearing evidence. If the Tribunal considers that a complaint is unlikely to succeed or a party has no reasonable prospect of success, it can given an opinion that if such party continues their case, costs may be awarded against them. The case then goes before a completely new division of the Tribunal for a full hearing in the normal way.
Our rules make no provision for particulars or discovery at any stage of the proceedings.

(b) Tribunals are not bound to observe formal rules about the admissibility of evidence - this is already the case in England and Ireland, and now receives statutory recognition.

(c) The Tribunal can at its discretion, cut out the right of a party to make an opening or closing statement.

(d) A Tribunal can award costs where a party has acted 'frivolously or vexatiously' or 'otherwise unreasonably'. Such costs can be awarded in a fixed sum, and can include 'expenses'. Orders of this nature will, of course, be tied in closely with the pre-hearing assessment at (a) above.

While amendments such as these, if introduced into the working of the E.A.T. in Ireland, would not be welcomed by the non-lawyers who appear before the Tribunal, they would nevertheless enable the Tribunal to retain its "Legal" status which it is in danger of losing. This status is most important in setting the Tribunal apart from the Labour Court whose attraction is its informality, and the non-enforceable nature of its decision. We do not need another forum for the informal solving of problems, rather we need a formal forum with set rules, yet retaining discretion, which will demand the respect necessary for its operation within a legal framework such as exists at present.

# The Role of the Lawyer in Industrial Relations in the Federal Republic of Germany

By NICOLA BARR

The lawyer in the federal republic of Germany plays a prominent role in German industrial relations. This is largely owing to the fact that the industrial relations in Germany are more extensively regulated by law than in most other EEC states. In Germany, the terms of an individual employment agreement are extensively governed by law, e.g. sickness benefit, period of notice, etc. Further, now the organisation of the management structure and the decision making of a company is regulated by law in order to ensure that the employees have the right of participation in management decisions. This idea was begun in 1952 with the Companies' structure Act (Betriebsverfassungsgesetz), which established a workers' representative council in all companies with more than 5 workers. This Council is to be consulted in specified circumstances e.g. the termination of an employee's contract of employment, and culminates with the Workers Participation Act, 1976 (Mitbestimmungsgesetz) which provides for workers to be members of the Supervisory Board, when the company has more than 2000 employees. Although different rules apply to different sized companies, all companies with at least 5 employees are to some extent affected.

Most company heads of the Personnel department have a legal education. Such legal education is at least a degree and some are professional lawyers as well. Further, in some cases, he may be a lay-judge in the labour court. In all large companies, which have a legal department for the companies business, the industrial relations legal questions would be exclusively dealt with in the Personnel department. Such division comes from the recognition that industrial relations and other company legal questions require different legal training and experience. Legal training is necessary in the Personnel department to ensure implementation of this complex set of laws which affect the contract of employment and company management.

Furthermore, in Germany, collective agreements play a large role in industrial relations and are legally binding agreements, breach of which gives rise to a legal action. During discussion on a collective agreement, lawyers are always present. The employees are usually represented by the relevant union. Each union in Germany has its own team of lawyers – full time employees of the union. In some cases the employers conclude the collective agreement themselves – assisted by their lawyer employees – or when it is an industry wide collective agreement the employers union of that industry would negotiate the agreement – here again assisted by its own lawyers.

In the situation of threatened or actual legal action the unions and employers are advised by their lawyers, for industrial action may only be taken in limited circumstances.

In Germany, the lawyer plays a large part in the discussions of a collective agreement and deal with a workers' dispute, and these lawyers are not independent solicitors, but employees of the relevant parties. These lawyers are familiar with the industry and the problems attaching thereto. Only in rare cases when a dispute would come to court would a solicitor become involved in industrial relations.

**Selected Employment Appeals Tribunal Decisions, 1978**

The above appeared as a Supplement to the July/August, 1980 issue of the **Gazette** of the Incorporated Law Society of Ireland.

The insert was prepared by Nicola Barr, B.A. (Mod.), former Editor of **the Dublin University Law Review**, whose name was inadvertently omitted from the title page.

Additional copies of the insert are available from the Society, price £1.00 plus postage 12p.

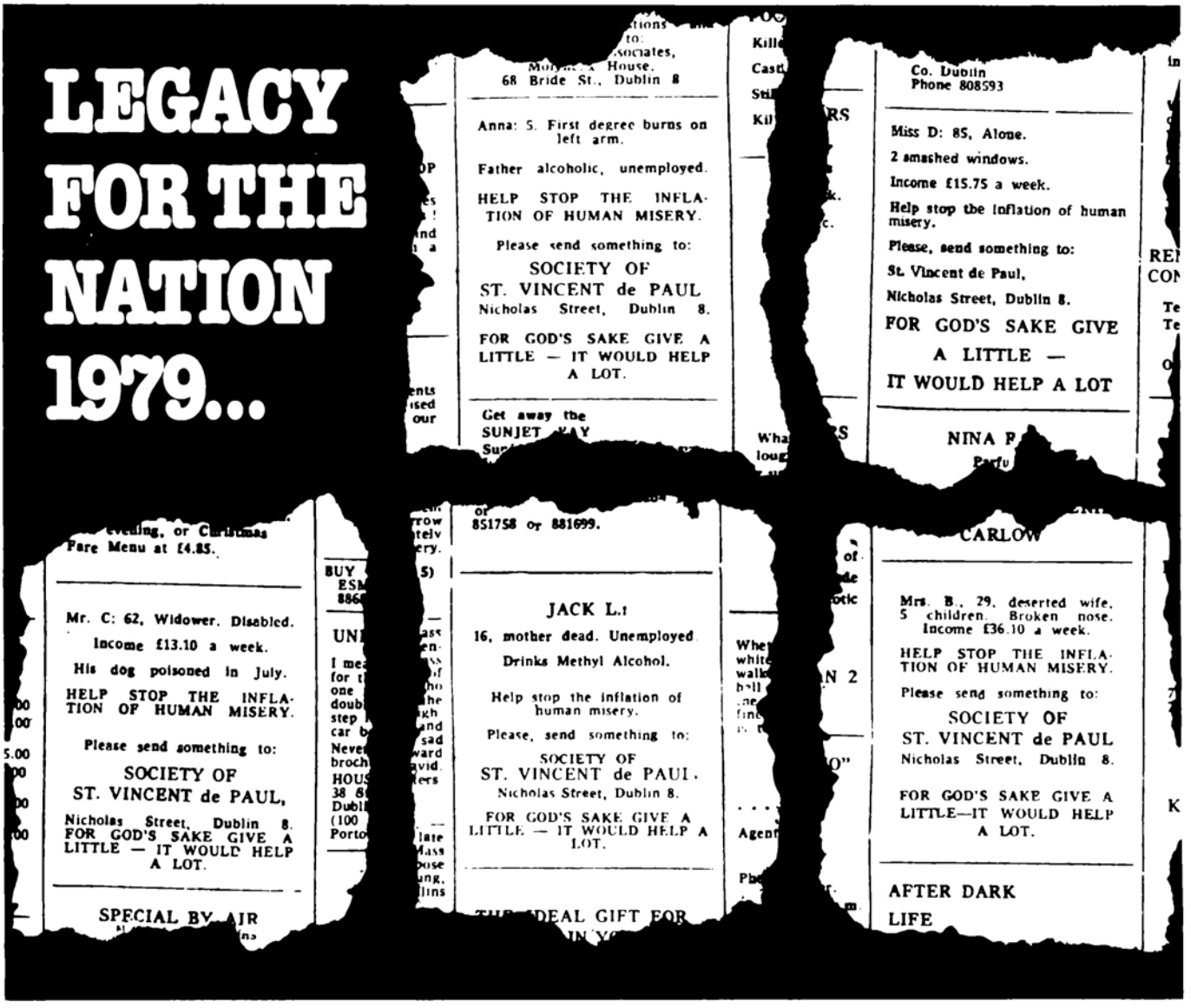
# Solicitors' Benevolent Association

**Miss Noelle Maguire, presenting a cheque for £2,015.99 to Mr. Eunan McCarron, Chairman of the Solicitors' Benevolent Association**

A most elegant and enjoyable function was held at Blackhall Place on the 23rd May last for which members of the profession were invited to subscribe for tickets to raise money for the assistance of the Solicitors Benevolent Fund. The guests were served with wine and savoury delicacies and entertained by the music of the Dublin Symphony Orchestra. An exhibition of the paintings of Mr. Billy Noyk and of Miss Siobhan Cuffe formed an interesting side attraction for those interested neither in the delights of music, nor conversation, nor the scrutiny of the glamorous attire of the Ladies and (Gentlemen) present.

At the end of the evening those attending participated in the raffle of several sides of smoked salmon which had been kindly donated by Jury's Hotel.

The occasion was such a great success that it is hoped to make of it an annual affair. Thanks are due to all of those who subscribed for tickets, to the exhibitors and musicians and to Jury's Hotel, and to Ann Kane of the Law Society who gave such assistance to the organisers.

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**Nicholas Street, Dublin 8.**

# Some Practical Aspects of E.E.C. Law

By P. J. FARRELL, B.C.L., Dip. Eur. Law, Solicitor

**1. Free Movement of Workers and Social Security**

Practitioners may have been asked questions by clients which touch upon the free movement of workers and social security. It may be that practitioners have had a client who wished to know what the position is under E.E.C. law if he, as an Irish national, wishes to take up employment in another Member State, and particularly, what arrangements there are about acquiring, retaining, calculating and paying social welfare benefits.

(a) Articles 48 to 51 of the E.E.C. Treaty lay down the main principles of free movement of workers and provisions for social security of migrant workers. "Workers", are persons employed by others, not self-employed persons. The latter are dealt with under Articles 52 to 58 of the Treaty (Right of Establishment).

The main secondary legislation dealing with free movement of workers which practitioners should be aware of is as follows:

(i) Regulation 1612/68 (J.O. 1968, L 257/2).
(ii) Directive 68/360 (J.O. 1968, L 257/13).
(iii) Regulation 1251/70 (J.O. 1970, L 142/24).

**Regulation 1612/68**

Article 1 provides that:—

"1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of a national of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State."

Article 7 (1) and (2) provides that:—

"1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers."

(b) In relation to questions of social security the main Regulations are Regulation 1408/71 (J.O. 1971, L 149/2) and Regulation 574/72 (J.O. 1972, L 74/1). These two Regulations have been codified (O.J. C 138 June 1980). In a later article it is proposed to examine in detail the provisions of these Regulations and the practical steps that must be taken by intending migrant workers.

**2. Commission's power to take copies of documents of a Company**

Under Article 14 of Regulation 17 the Commission has wide powers of investigation, which include the taking of copies of or extracts from the books and business records of an undertaking or an association of undertakings. In the case of *National Panasonic (U.K.) Limited v. Commission of the European Communities (Case 136/79),* the Commission instituted an investigation and during the course of the investigation took copies of several documents. The Plaintiff attempted to challenge the Commission on a number of grounds, but unsuccessfully. Accordingly, practitioners should note that the Commission may enter premises and take away copies of confidential documents.

**3. Brief Notes**

(a) *Driving Licences*

The Council of the E.E.C. has adopted in principle a Directive which proposes the issue of a community driving licence.

(b) *State Aids*

Pursuant to Article 90 (3) of the E.E.C. Treaty, the Commission has adopted a Directive on greater transparency in financial transactions between Member States and public enterprises. A number of sectors are excluded, for example, banks, electricity, transport, post and telecommunications.

(c) *Insurance Contracts and Non-Life Insurance*

Discussions are still continuing on the Draft Directives on insurance contracts and non-life insurance. The Economic and Social Committee has delivered opinions on them (O.J. C 146 June 1980) and practitioners, particularly those who specialise in this area, should be familiar with them.

# Legal Aspects of Non-Accidental Injury to Children

DENIS GREENE

**Denis Greene is a Dublin solicitor and law agent to the Eastern Health Board. This article is based on a paper he delivered to a seminar of health board officers and legal advisers on 10 October, 1979.**

## Introduction

Let me start by defining the objective and, at the same time the limitations of this paper. The primary aim is to deal in a general way with children at risk and some of the procedures available under present legislation whereby action can be taken to protect them. I hope that it will serve to open up a general interest in this subject. In relation to the legislation I limit myself to some comment on the Children Acts. An exhaustive review of those Acts is not possible within the limits of this paper. Priority, therefore, must be given to a consideration of some sections which are of immediate relevance to the taking of action to protect children found to be at risk. Before going into detail about the Children Acts there are a number of preliminary points which can usefully be considered.

## Children at risk

How prevalent is the 'battered baby' type of case and is it found more frequently now than in the past? The only statistics I have to offer are the returns by health boards to the Department of Health given in Appendix 1. I merely make the general comment that while I have acted for the Eastern Health Board and its statutory predecessors for many years, it has really only been in the past decade that I have been called upon to deal with cases involving children at risk. They have increased in number steadily over that period. I cannot say whether this indicates a real increase in absolute terms or whether the frequency of occurrence is no greater than in past years but more cases are being discovered because of the larger number of social workers now working in the community. Possibly both factors are involved.

## Problem people

When one hears of violence done to a baby or a young child it is easy to react emotionally and feel that the battering parent or other adult responsible should be treated with the utmost rigour that the law allows. Unfortunately, it is a sad feature of these cases that violence in the home can be handed down from generation to generation. One would think that a battered child, when grown up and become a parent, would avoid the very thing that caused such suffering to him/her in childhood. Yet experience shows that a battered child can, in adulthood, become a battering parent. One must remember, therefore, that in these situations we are dealing with problem people and that the full sanctions of the criminal law are not always an appropriate way of trying to deal with them.

As an indication of the background in many cases of child violence I quote from a book *Web of Violence* by Jean Renvoize (Harmondsworth: Penguin, 1979) which surveys research work by various people and agencies on the subject of violence in the home:

> To sum up, most battering parents are inadequate, self-defeating, introverted, immature people who need love but find difficulty in giving it; who want gratification for their impulses *now*, not next week; who often love their children and show great concern for them but whose love is inconsistent and incapable of standing up to the stresses life can inflict; who in a few extreme cases hate their children or are totally incapable of ever rearing a child satisfactorily and from whom the chldren must be taken. Frequently clinically neurotic or depressed, they usually have a poor sense of identity and very little self-esteem, and live isolated lives (particularly the mother). Although they yearn to behave differently they cannot help inflicting on their own children their own style of upbringing. Finally, frustrated in their lifelong desire to be loved and cherished, they nurse bitter anger along with their guilt, hidden from authority with whom they still (how well the lesson has been learned) attempt to appease.

Given that background you will appreciate more fully my point that we are dealing with problem people and that invoking the sanctions of the criminal law is not always the best means of trying to deal with them.

## Prolonged ill-treatment of children

It is horrifying at times to find cases in which it turns out that the ill-treatment of a child has been going on over a period. For example, it has happened on occasions that when a child is being x-rayed for one injury that has come to light, evidence is found that bones or ribs have been broken in earlier incidents and left to heal themselves without medical attention.

To focus our minds on what may really happen in a child-at-risk type of case, let me quote, as an example, one of the more serious ones I had to deal with. It came to light following the admission of a child to hospital with serious injuries. A preliminary order to remove the child to a place of safety was obtained to get him out of the custody of his parents. A Fit Person Order (this procedure is explained below) was then applied for so that the child would be committed to the care of the Eastern Health Board. The father appeared in court to oppose the application. He first explained that the incident given rise to the injuries had occurred in circumstances of particular stress, while he was unemployed and the family were living in bad housing; he said that by the time he had got to court his circumstances had improved because he had a job and a good mobile home. In fact he was not telling the truth (as was brought out in cross-examination) because he was employed and in the mobile home when the child was injured. He then went on to explain that the incident had occurred when he was upset following a row

with his wife. To give vent to his anger he had taken a live turf ember out of the fire and had burned the child with it. Because the child screamed he got angry with it and shook it so violently that he caused further serious physical injury. This man and his wife had another older child. That child had had to be committed to an institution with permanent brain damage. The explanation for it was that the child had been lying on a couch but had rolled off and fallen on its head on the floor. Nothing could be proved to the contrary but a very big question mark remains against that explanation in the light of what happened the second child.

**Protection of the child and rules of evidence**

One of the most frustrating things about trying to take action to protect a child at risk is the difficulty at times of trying to substantiate a case within the normal requirements of the rules of evidence. To take a child away from his home and parents is a serious thing. Apart from establishing a case under the Children Acts (with which I deal in more detail later on), one has to bear in mind that natural justice and constitutional rights, which are so readily invoked these days, have to be respected.

In one way or another social workers may become quite convinced that a child may be at risk within a particular home. It may not even be a case of all the children in the home being at risk because sometimes one out of the number of children in the family can be rejected. A child may be noticed to be withdrawn and neglected-looking at school. He may even display bruises which are highly suspect but which could be due to accidental cause. Neighbours may talk but that is only heresay evidence. If one wants them to come forward as witnesses they are unwilling to do so.

Information may be obtained through public health nurses who normally are welcomed into the houses in their district. They may see conditions which give rise to concern about the welfare of a child in a particular house. In the Eastern Health Board area there is a reluctance on the part of the nurses and their superiors to have the nurses appear as witnesses. The reason is that if they are seen to appear as witnesses against the parents and in support of applications to take children away from those parents they will be identified as part of the 'Establishment' and there will be a high risk that doors will be closed against them in the future. Consequently, I will only call a public health nurse as a witness when it is unavoidable.

Difficulty can arise even where there is medical evidence of physical injury to a child and the parents themselves have actually brought the child to hospital for medical attention. They will seldom admit to deliberately injuring the child. Instead, a plausible explanation may be given claiming the injuries were caused in some accidental way. The social workers and the doctor concerned in the case may be satisfied in their own minds (having regard to the surrounding circumstances of the case) that the injuries were deliberately inflicted. Nevertheless, when he comes to give objective evidence, the doctor may have to acknowledge that a genuine accidental cause cannot be completely ruled out, however much he may personally believe it was not the true cause. The court then has to weigh up all the evidence and decide whether or not to accept the parents' explanation of accidental cause.

**Anticipation of risk**

There is also the problem that one cannot ask the court to anticipate something even though there may be a definite risk that it is going to happen. I had a case in which I was consulted one September about a child who had been assaulted by his parents. The assaults had occurred in the early part of the year and positive evidence of injury had been found by a doctor in the preceding February. An arrangement was then made that the child would be voluntarily placed in the care of grandparents with whom he remained until the time I was consulted.

I was consulted because the parents were then insisting on getting the child back. In view of the past history the social workers were satisfied the earlier assault had arisen out of certain inadequacies in the parents. As these inadequacies were still present the social workers were apprehensive that the child would be assaulted again if returned to the parents. The question was, what could be done to prevent it? I had to advise that I did not think we could move in September to get a Fit Person Order on the basis of what had happened over six months previously. Had action been taken the previous February, a Fit Person Order would certainly have been granted. Instead, the parents had voluntarily agreed to place the child in the care of the grandparents. It was possible of course that the parents may have come to realise the error of their ways so there was no positive proof that they would repeat the previous ill-treatment of the child. There was really no option, therefore, but to let the child go home to the parents on the basis that the home would be kept under the closest possible supervision. We would have to await a further act of ill-treatment (if it were to happen) to provide fresh evidence on which a Fit Person Order could be sought. The child was allowed home and was assaulted once again. Needless to say, we moved in very fast then and got an Order committing the child into the care of the Eastern Health Board.

**Supervision by social workers**

The case just mentioned underlines a major difficulty in these children-at-risk cases, namely that supervision must of necessity be limited. One obviously cannot have a social worker in a problem home all the time. The degree of supervision must be carefully worked out. If there is too much a mother's own initiative and morale could be undermined. Or it could create resentment in the mother which could be turned against the child. Even with the best supervision an act of violence can occur spontaneously and injury be inflicted in a matter of minutes.

**Social work with parents**

I mentioned in my opening comments that in the child-at-risk type of case we are not dealing with the child in isolation but are dealing with problem people in the family unit. I also mentioned that the invocation of the criminal law is not always appropriate and social workers do not normally wish to see it invoked. It would only add to the stress in an already very difficult situation and could well build up an anti-Establishment feeling in the parents.

It is vitally important that the social workers should be free to try to maintain the best possible relationship with the parents with a view to helping the child at risk as well

as the parents themselves. Even when a Fit Person Ordered is obtained committing a child into the care of the Eastern Health Board there is further social work with the parents with a view to bringing about an improvement in the home conditions which put the child at risk in the first instance. Continuing contact between the parents and the child allows the parents to visit the child. As things improve the child may be allowed out, initially for short periods with the parents and then for increasingly longer periods. Eventually things may improve to the point where the child can go home permanently.

**Children Act 1908**

Before getting down to a detailed consideration of some of the procedures available under the Children Acts there are two important factors which should be borne in mind: (1) the limitations of the Children Act 1908, as amended, in the light of modern needs; (2) the possible risk of conflict with constitutional rights and natural justice.

So far as the first point is concerned, it is understandable that as the Children Act 1908 was drafted just over seventy years ago, and at a time when social services such as we have them today were simply not available, it is not ideally suited to modern-day needs. Indeed, its main provisions are concerned with offences against children and offences by children. Nowadays in working practice social workers are not concerned with offences as such but rather with problem families wherein children are at risk and which need a good deal of help and guidance.

As regards the second point, constitutional rights and natural justice are nowadays readily invoked in all kinds of situations. Traditionally the family unit has always had a special place in Ireland and this is reflected in some of the provisions of our Constitution. Indeed, I think it has been said in some of the cases argued before the High Court in relation to the custody and adoption of children that the legislation is more concerned with the rights of parents than the rights of children. In moving to have children committed into care one must, therefore, move carefully notwithstanding that the known ill-treatment of a child may scream out for 'instant action' to get the child away from the home.

I have had a few cases in which action taken at District Court level was challenged in the High Court. I am happy to say that the lawyers in those cases acting for the parents were very concerned by the imlications of winning their cases with a consequential return of the children to the parents. That was very proper. I believe a judge of the High Court on one occasion when addressing lawyers reminded them that when acting for parents in child custody cases they should always bear in mind that in the background they had another client, namely the child concerned in the case. As a consequence of this philosophy my High Court cases just mentioned were settled out of court in a manner that reasonably protected the interests of the children.

While the 1908 Act is a very good Act in many respects it is not completely suited to modern-day needs. As I commented before, it is more concerned with offences against children and by children. Nowadays we are not really concerned with offences as such but rather with child and family welfare as social matter. I will not attempt a detailed analysis of the unsatisfactory features of the Act as regards present-day needs. Space and time really only allow for the consideration of a few sections and the procedures they provide which are mostly invoked for the purpose of getting children into care.

The Children Act 1908 was amended by some succeeding Children Acts but the details of the amendments need not be dealt with in this paper. In conjunction with the 1908 Act one must consider the Summary Jurisdiction Rules 1909 (S.R.O. 1909 No. 952). When I first came across these Rules I was in considerable doubt as to whether they were still in force. I then found they had been amended by the District Court Rules (1942) (No. 2) (S.R.O. 1942 No. 144). The 1942 Rules really only substituted new forms for those in the 1909 Rules. None of the new forms was directly and immediately usable for the type of cases I was dealing with so modified ones had to be prepared. I now comment on some of the sections in the 1908 Act.

**Section 20**

Superficially, section 20 seems a very useful section in that it provides a means whereby a child may very quickly be taken to a place of safety. Under it a constable can act on his own initiative to remove a child at risk to a place of safety. Another person may do so if authorised by a Justice. But that section only deals with cases in which offences have been committed against children or there is reason to believe they have been committed. Furthermore, it is a limiting one in that the child may only be detained while a decision is being made to prosecute in respect of the offence and, if a prosecution is brought, until it has been determined.

**Section 21**

Section 21 enables a Fit Person Order to be made in respect of the child if the person having the custody, charge or care of the child is convicted of an offence of the type mentioned in the section, is committed for trial for such an offence or is bound over to keep the peace towards the child. If the person committed for trial is found not guilty or the charge dismissed for want of prosecution the Fit Person Order already made becomes void. As I have already mentioned, social workers are not concerned with having prosecutions brought so this particular procedure is only of limited interest so far as health boards are concerned.

**Section 24**

Section 24 is a more useful section and has a two-stage procedure. Firstly it provides a means whereby a child can be quickly removed to a place of safety if there is reasonable cause to suspect that a child or young person has been or is being assaulted, ill-treated or neglected in a manner likely to cause the child or young person unnecessary suffering or to be injurious to his health or if an offence of the type mentioned has been committed against him. A 'place of safety' is defined as any workhouse or police station, or any hospital, surgery or other suitable place, the occupier of which is willing temporarily to receive an infant, child or young person. Secondly, the removal is a temporary one until the child can be brought before the court, at which stage the court may commit him to the care of a relative or other fit person.

Some comments on section 24 are appropriate. To

enable him to issue a warrant, it is only necessary that the Justice is satisfied that there is reasonable cause to suspect that the child or young person has been or is being assaulted, ill-treated or neglected in the manner specified in the section or that an offence has been committed. These things do not have to be proved as positive facts at that stage. That is reasonable for the aim is to get the child away to a place of sofety if there is reason to suspect he is at risk so as to protect him until the case can be further gone into.

An application for a warrant is made ex parte. An information is sworn, normally by a social worker. I consider that the strict rules of evidence do not apply at this stage so that the informant can simply refer to information stated to have been received from other sources if the informant cannot give direct evidence of seeing any assault, ill-treatment or neglect. If the Justice is satisfied he then issues a warrant. This is pre-prepared so that if the application is granted the warrant can then be handed in and signed immediately. It is normally addressed to the Garda Superintendent for the district wherein the child is.

I once ran into trouble over a form of warrant I had then been using. Using some of the wording out of the first part of the concluding paragraph of section 24(I), the warrant authorised the garda to search for the child and, if he was satisfied that he had been or was being assaulted, ill-treated or neglected, then to take him and detain him in a place of safety until he could be brought before a court of summary jurisdiction. For quite a few cases everything worked smoothly as the garda was normally satisfied by the evidence in the information of the social worker that the child had been assaulted, ill-treated or neglected. Then I ran into a snag in which a very conscientious garda inspector went to execute the warrant. All was quiet in the house in question when he arrived and there were no signs visible to him that the child had been ill-treated in any way. He took the view that unless he saw signs of ill-treatment himself he was not entitled to take the child pursuant to the warrant and he declined to do so in that particular case.

Need I say that this touched off a hasty review of the wording in the standard form of warrant I was then using. I noted that in the section in question it was provided that the Justice could, in the alternative, simply authorise a garda to remove the child or young person and detain him. In other words, the Garda would then have to do no more than take the child away. I promptly reworded the standard form of warrant and have been using that ever since. But I am particularly careful when drafting the information in the first instance to ensure that it sets out good grounds on which a Justice might reasonably issue a warrant for the immediate taking of the child and removing him to a place of safety.

Rule 12 in the 1909 Rules requires a summons to be taken out immediately after a child has been taken into care on foot of a warrant. And 'immediately' means just that — as quickly as possible. In one case I had which was challenged in the High Court the summons had been delayed as there was hope of some compromise on the custody of the child being worked out with the parents. No compromise was agreed and the summons was issued some weeks later. In the High Court proceedings which followed the point was taken that because a summons had not issued immediately after the warrant was executed, the child was being detained illegally. That case was settled before going to full hearing so the legal point in issue was not decided.

Under Rule 12 in the 1909 rules the informant in the information must be named as the complainant in the summons. I consider it would be much more appropriate to have an application for a warrant made on behalf of a health board or other child care agency and for the proceedings to be continued in the name of the board or agency. The naming of a social worker as the formal complainant could be prejudicial to that worker's future relationship with the parents.

While it is easy to make a valid case in an information that there is reasonable cause to suspect a child has been assaulted, ill-treated or neglected one has to face up to the necessity of later establishing, as a question of fact, that there was assault, ill-treatment or neglect. At that stage one can no longer rely on hearsay evidence. One must have positive evidence. That is not always easy to obtain in the form of admissible evidence.

When the 1908 Act was being drafted I am sure that the terms 'assault', 'ill-treatment' and 'neglect' referred to actual physical acts. Seventy years later we are now only too well aware that a child can be emotionally battered and that that can be as serious as physical battering. I am happy to say that district justices follow the normal judicial rule of interpreting old statutes in such a way that the language can be adapted and made to work in present-day circumstances. Accordingly, emotional battering is recognised as a form of ill-treatment or neglect and thus within the ambit of section 24. Needless to say, it can be more difficult to prove than physical acts against a child of which one normally more easily gets visible evidence.

A 'fit person' is defined in section 38(1) for the purposes of part II of the Act as including any society or body corporate established for the reception or protection of poor children or for the prevention of cruelty to children. A Fit Person Order is normally granted until the child attains sixteen years of age and has the effect of giving the fit person the legal custody and control of the child. The Order provides for the child's being in care until he attains sixteen years of age 'unless the Order is sooner revoked or varied'. These qualifying words have been deliberately put in to my standard form of Order to allow for the possibility that before the child attains sixteen years of age the home conditions may have improved to such an extent that the child can then go home permanently. In that event an application can be made to the court to vary or revoke the Order.

There is one absurdity in this form of Order. Following the wording of the section it speaks of the justice as being empowered to commit the child to a fit person in lieu of sending him to an industrial school. Isn't it totally unrealistic when dealing with, as so often happens, a baby or very young infant to refer to the possibility of his going to an industrial school?

As a concluding comment on section 24 I mention that in the second stage of action under it, it provides for bringing the child before the court after he has been removed to a place of safety. That must be followed and the child must be physically present in court for the application for the Fit Person Order.

**Section 58**

Section 58 of the 1908 Act provides other grounds for

seeking a Fit Person Order. I normally proceed under sub-clause (I) (b) on the ground that the child has been found having a parent or guardian not exercising proper guardianship. That is a broad ground in contrast to the three narrower grounds in section 24. It is much easker to prove a case under it, particularly in the emotional battering type of case.

It should be noted that the opening words of the section are: 'Any person may bring before a pretty sessional court any person. . . .' In other words, it is an essential part of the application that the child in respect of whom the Fit Person Order is sought must be brought before the court. Thus, the section cannot be invoked if the child in question is still in the custody of the parents and they are unwilling to bring him to court. The section can be availed of when the circumstances permit, for instance when the child is in the custody of some third party such as in hospital or has been temporarily placed in care and it is certain that he or she can then be brought to court.

To establish that the child has a parent or guardian who does not exercise proper guardianship within the meaning of sub-clause (I) (b) it is not necessary to prove the equivalent of mens rea against the parent or guardian. The parents may be doing their best within the limits of their capabilities yet they may be hopelessly inadequate and unable to care for a child. I had a case once of a mother who was mentally underdeveloped. Though she was over twenty years of age she herself only had the mental development of a child of about half her age. Within her limitations she looked after her baby as best she could. In practice she was like a young child playing with a doll. When she was in the mood she looked after the baby reasonably well. But when her interest flagged, as it frequently did, the child was left outside for long periods even in the rain, unattended to and unfed. In that case the court upheld my contention that the mother was not exercising proper guardianship even though she could not, because of her own underdeveloped mental state, be held culpably in default.

An application under section 58 is based on a summons. In it the health board can be named as the complainant. That is because the opening words of section 58 empower 'any person' to bring the child before the court. There is a very useful proviso at the end of rule 16 in the 1909 Rules whereby the taking out of a section 58 summons may be dispensed with if it is inexpedient or impracticable to take it out. Thus, when a health board has got de facto custody of a child but the whereabouts of the parents are unknown, or they are known to be outside the jurisdiction, it is still possible to seek a Fit Person Order under the section.

In the form of Fit Person Order used on foot of the section 58 summons it is customary to make it effective until the child attains sixteen years of age unless sooner varied or revoked. I have only had one case in which a Justice declined to make an Order until the child attained sixteen years of age. He said he would never make one beyond the child's attaining seven years, though he allowed for the possibility that when the child attained that age an extension of the Order could be applied for. I do not know how that will fare out when the child in question attains seven years of age. It could well be that there will be no improvement in the home circumstances so that it would be totally contrary to the interests of the child to send him home. Yet how could it be said that the parents were still not exercising proper guardianship if the child had been compulsorily taken out of their custody under a court order and kept away from them?

## DISCUSSION

### Fosterage

The effect of a Fit Person Order is defined in Section 22 (1) of the Children Act 1908. In part it reads:

> Any person to whose care a child or young person is committed under this Part of this Act shall, whilst the order is in force, have the like control over the child or young person as if he were his parent, and shall be responsible for his maintenance, and the child or young person shall continue in the care of such person, notwithstanding that he is claimed by his parent or any other person. . . .

When the child is in its care the Eastern Health Board considers that, by reason of that section, it has a right to make whatever arrangements it deems fit in a parental capacity for the child. Fosterage is usually preferred to institutional care because in a foster-home the child will enjoy a family environment.

### Enforcement of Orders

A weakness in the legislation is that it lacks proper 'teeth' for the enforcement of Place of Safety Orders and Fit Person Orders. Section 22 of the 1908 Act deals with the 'escape' of a child or concealing a child who has escaped. This concept of escape is not always applicable to cover every type of incident.

Section 22 vests parental control in the fit person to whom the child has been committed. I would argue that that includes a power to retake a child who has been wrongfully taken away from the fit person. But such retaking may not always be practicable, for instance if the child cannot be found or there is a threat of violent resistance to the retaking.

It is important that the legislation be tightened up to make any improper interference with the custody of a child under a Place of Safety Order or a Fit Person Order an offence and to provide for clear Garda 'back up' for the retaking of a child improperly removed from a place of safety or a fit person.

### The Task Force

There is a special Task Force reviewing children legislation. I hope that its report when made will quickly result in new legislation which will deal with child care in a different context from that of the present provision in the 1908 Act and, in particular, will not be primarily working on the basis of offences by or against children. I would like to see new legislation simply dealing with children at risk and their families as social problems. I would like to see procedures for getting them into care simplified and the welfare of the children being given priority over the rights of parents where a conflict of interests arises.

### Warrants

It is important there should be an assured right of entry to a home and to get information if there is reasonable cause to suspect that a child is or has been at risk in the

home. Such powers are given under some other Acts to assist authorised persons in the enforcement of those Acts so it would be reasonable to provide powers under which social workers can get access to homes where that seems necessary. A power already exists in section 24(3) of the 1908 Act in favour of a constable but that makes it a police matter. While that can be a very useful display of authority in some types of cases, it would be helpful if social workers could also have a right of entry which could be exercised on a more low-key basis.

I would like to see provision also being made for a warrant to remove a child to a place of safety (pending being brought before the court) issuing directly to a social worker rather than a Garda. That would be a more realistic acceptance of the reality of the situation. Technically speaking, the present wording of the 1908 Act requires the Garda executing the warrant to take and detain the child himself in an appropriate place of safety. In working practice the child is immediately given to the social worker concerned who arranges to have the child looked after pending the hearing of the summons.

I would also like to see provision made for a warrant being issued by any Justice without his being tied down to territorial limits of jurisdiction. Section 24 requires the warrant to be issued by the Justice for the area within which an assault, ill-treatment or neglect of a child has taken place. Thus if the parents and child have moved out of one area in respect of which the proof of assault, Ill-treatment or neglect exists and move into another area, there could be difficulty if there is no evidence of a continuance of the assault, ill-treatment or neglect in that second area. One has to go back to the Justice of the first area.

Again, I would like to see provision whereby a warrant can be obtained from a Peace Commissioner if no Court is sitting at which an application can readily be made. Some of my most worrying cases have come late on a Friday afternoon at the beginning of a holiday week-end. There was a a scramble trying to get an information drawn up and get to the court with the informant in time before the court rose. On one or two occasions we were too late so we were left with a great deal of anxiety about the safety of the child over the weekend.

**The interests of the child**

The present legal necessity to have the children physically present in court when Fit Person Orders are being sought in respect of them serves no useful purpose if they are so young as to be incapable of comprehending the proceedings. If they can comprehend the proceedings they will hear distressing evidence being given against their parents. It would be reasonable, therefore, to remove the present necessity for their presence in court and leave it to the court to require the presence of the child in any particular case if the court needed to see or hear the child.

I am by no means suggesting that the interests of parents should be readily sacrificed by an over-simplification of procedure. But we are dealing with children at risk so, on balance, I feel that the safety of the child should always be the paramount consideration.

The fairly large number of cases I have dealt with by now has clearly demonstrated to me that social workers do not readily rush in and try to take children away from homes. On the contrary, where possible, every effort is made to work with the parents so as to eliminate whatever risks to the child there may be. I know that, save in a matter of great urgency, the social workers immediately concerned will consult with superiors. Very often decisions to seek Fit Person Orders are taken at a case conference with a number of interested parties sitting in on it.

**Deciding when and how to act**

In the Eastern Health Board there is a very satisfactory system of delegation in operation whereby social workers can come directly to me to discuss problem cases and, if necessary, to ask me to take action. This saves a great deal of time that would otherwise be lost if instructions had to be channelled to me through some administrative pipeline. I have general authority to use my own discretion and to institute proceedings without getting more formal instructions from some administrative level if I consider the facts of the case warrant its being done. But I report action taken afterwards and will particularly look first for instructions where I consider them necessary to deal with any unusual features in a case. I myself act as a kind of filter and will not institute proceedings unless I am satisfied that they are justified by the facts of the case and have a reasonable prospect of succeeding. This last mentioned point in a very material one. I feel it could leave a child in serious danger to bring proceedings and be totally unsuccessful in them. The parents might then feel they were beyond the reach of the law and could do what they liked with the child.

I hope this paper may serve to stimulate further interest in what has become a very important subject.

**Appendix I**
**Incidence of Non-Accidental Injury to Children, 1 April 1977 to 31 December 1978**

| Board | No. reported | No. confirmed |
|---|---|---|
| Eastern | 86 | 28 |
| Midland | 17 | 17 |
| Mid Western | 62 | 10 |
| North Eastern | 8 | 2 |
| North Western | — | — |
| South Eastern | 37 | 12 |
| Southern | 23 | 23 |
| Western | 10 | 6 |
| Total | 243 | 98 |

This article first appeared in ADMINISTRATION, Vol. 27, No. 4, and is reprinted here with kind permission of the Institute of Public Administration of Ireland.

# Book Reviews

**Press Law** by Robin Callender-Smith (Sweet & Maxwell, London, 1978). Paperback. £2.75.

The Preface tells us that "this book was born of a concern about the general level of legal ignorance among journalists".

I had occasion to read this book while preparing a paper for the Society's recent symposium "Freedom and The Media" (Law Society, 9 February 1980). Although it is written about English law, for the English journalist, the Irish journalist (and the 'media man' generally) will find the book extremely interesting and informative. The Irish journalist must, however, read it conscious that the law in the United Kingdom and the law in the Republic of Ireland differ in a number of respects, particularly the statutory law.

There are three main parts to the book:

Part 1, headed "General Matters", contains chapters dealing with (inter alia) defamation (including comments on the recommendations of the Faulks Committee on Defamation, 1975), the Rehabilitation of Offenders Act 1974 (unfortunately, no equivalent here), injurious falsehoods, contempt of court (including comments on the recommendations of the Phillimore Committee on Contempt, 1975), privacy, and the Official Secrets Acts;

Part 2, headed "Courts and Reporting Restrictions", deals (inter alia) with an outline of the legal profession, the criminal process, the courts, the press and juveniles, sentencing and coroner's courts;

Part 3, headed "Associated Matters", deals with parliamentary privilege, copyright, admission to local authority meetings, disciplinary bodies, the Theft Act 1968, and the Race Relations Act 1976.

The lengthy chapters on both defamation and contempt of court would be a very convenient introduction to the Irish journalist to those important topics. The style of writing, interspersed with readable summaries of leading English court decisions, is easy to comprehend, and quite clearly, the author, Mr. Callender-Smith (as a practising barrister and as a former fulltime reporter and examiner for the National Council for the Training of Journalists), has considerable knowledge of how the journalist works in practice and what essentially he should know about the law.

It became clear at the Society's symposium, "Freedom and The Media" (February 1980) that it is particularly in the legal areas of defamation and contempt of court that the Irish journalist feels himself unduly restricted. However, the law in both these areas does reflect the conflict between, and the balancing of, the rights of the individual to his personal integrity and good name and to a fair trial, on the one hand, and the right of free press on the other. Particularly in the area of contempt of court, there is, undoubtedly, a journalistic minefield of uncertainty and inconsistency. Nonetheless, the reality might be that if the journalist was more familiar with the legal principles in both these areas and particularly the legal defences available, he would feel himself more free to do his work responsibly and be less inclined to engage in self-censorship arising from lack of legal knowledge. Also, if the journalist was more informed on the law in those areas, he would (quite rightly) be less deferential and more questioning and critical of the lawyer, where legal opinion is sought in advance of publication of sensitive copy. Rightly or wrongly, the lawyer is viewed by the journalist as highly conservative and as someone who, if he has any doubt about whether something should be published, would be more inclined to adopt a 'safety first' attitude and advise against publication; whereas the legally informed journalist would insist that the lawyer's stance should be: "what legal recommendations can I make to ensure that that particular copy is published without legal risks, with as few changes as possible?"

On the other hand, it would make life easier for the lawyer who is dealing with the journalist, to know that the journalist understands the legal principles at issue, where the lawyer is either vetting copy in advance of publication and, perhaps after the institution of libel proceedings against the journalist's newspaper, where a decision has to be made on whether to defend or settle.

Mr. Callender-Smith's book is to be recommended as a means of narrowing the divergence between the lawyer and the journalist as well as informing the journalist of the actual scope which the law gives him to do his work.

Michael V. O'Mahony.

**Sale of Goods and Consumer Credit** by A. P. Dobson. 2nd edition (Sweet and Maxwell, London, 1980). Paperback, £6.85. Cloth, £12.50.

Though university lecturers usually turn up their well-bred noses at 'Concise College Texts' and other distilled forms of scholarship, the newcomer to the subject or the busy practitioner trying to keep up with developments in the various areas of the law could do much worse than read Mr. Dobson's text.

The second edition usefully bring together U.K. Sale of Goods and Consumer Credit Law into one short, but not cheap volume, (£6.85 paperback). Part Two of the book deals with "Consumer Credit" i.e. money for the man in the street. The book gives an interesting summary of the law in the U.K. but is by and large irrelevant to the reader in the Irish Republic, until at least the E.E.C. draft directive on consumer credit brings our law closer to that of the U.K.

Part One of the text deals with the Sale of Goods and is useful to the reader in the Irish Republic in the context of the Sale of Goods and Supply of Services Act, 1980. The Sale of Goods law enthusiast will have a chart pinned to the wall of his bathroom which shows at a glance how generally our law lines up with that of the U.K. and particularly how our Sale of Goods Act does.

Notably part two of our Sale of Goods and Supply of Services Act which corresponds to the U.K. Sale of Goods (Implied Terms) Act, 1973. Part Five of our Act is similar to the Misrepresentation Act, U.K. 1967. Section 44 of our Act is equivalent to the U.K. Unsilicited Goods and Services Act, 1971 and our Pyramid Selling Act has a parallel in the U.K. Unfair Trading Terms Act, 1973. Armed with this information Mr. Dobson's book becomes relevant to the reader in the Irish Republic if he accepts the obvious drawbacks of a 'concise text'. The style of the book is lucid and bears the

imprint of Mr. Dobson's undoubted teaching experience.

Curiously in a book on the Sale of Goods there is a chapter on "Manufacturers Liability". The familiar cases on manufacturers liability starting with *Donoghue v. Stevenson* and the usual problems are well presented. Mr. Dobson becomes vague, however, when he says that "an action in negligence is not restricted to shock and personal injury but may also include damage to property" but does not cite any authority for this proposition. In most instances however Mr. Dobson carefully cites authority for every proposition and there is a good table of cases even if they are all English.

In the chapter on Exemption Clauses Mr. Dobson correctly observes that the U.K. Unfair Contract Terms Act, 1977 is a "major landmark in the development of the law of contract". Our contract law moves forward in step almost with the Sale of Goods and Supply of Services Act.

Trade Descriptions and Fair Trading are also well explained by Mr. Dobson. These subjects are relevant in the Irish context if you read Pyramid Selling Act for Fair Trading Act, U.K. and Consumer Information Act, 1978 for Trades Descriptions Act, 1968. Mr. Dobson's neat explanation of the working of the Trade Descriptions Act, 1968 should be useful to an Irish Lawyer suddenly confronted with a problem under the Consumer Information Act, 1978.

Overall this 'concise text' is a useful though expensive guide for students of the law on the Sale of Goods and could be helpful to a busy practitioner who wants to keep up with developments in this area of the law and who does not have a new Benjamin at the elbow.

Edward J. Donelan

# CORRESPONDENCE

Patrick J. Madigan & Co.,
33 Raglan Road,
Ballsbridge,
Dublin 4.
August 12th, 1980.

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

**Re: High Court-Constitutional Action Patrick Madigan & Ors. v. Attorney General. Challenge to Rent Restrictions Acts.**

Dear Sir,

As you are no doubt aware, Judge McWilliam in the High Court on April 18 last declared Parts II & IV of the Rent Restrictions Acts unconstitutional.

This will obviously be of interest to the Members of the Profession. To assist your Members, I enclose copy of Judge McWilliam's Order and a copy of the Judgment, which you could make availabe to Practitioners, if they require same.

I also enclose copy Notice of Appeal and wish to confirm that the Attorney General has in fact appealed the case and it is expected that the hearing will come on in the Supreme Court in or around November next.

I will keep the Society informed of developments.

Yours sincerely,

Patrick J. Madigan

Civil Office,
Metropolitan District Courthouse,
Morgan Place,
Dublin 7.
25th August, 1980.

The Secretary,
Dublin Solicitors' Bar Association,
9/10, Ely Place,
Dublin 2.

**Re: Sean O'Braonain Appeal Fund**

Dear Sir,

I am happy to inform you of the successful outcome of the Sean O'Braonain Appeal Fund, which amounted to the sum of £1,961.

I enclose herewith the relevant Bank Statements and other documents certifying same, except for the sum of £250 being the amount of two cheques for £100 and £150 from the Dublin Solicitors' Bar Association and the Solicitors' Benevolent Society respectively. These cheques were made payable to Mrs. O'Braonain and were sent to her directly by me.

To summarise:

| | | | |
|---|---|---|---|
| By Cheques (2) Payable to Mrs. O'Braonain herself | £250 | Cheques transferred to Mrs. O'Braonain | £250 |
| By Subscriptions to No. 2 A/C | £1,711 | To Bank Drafts to Mrs. O'Braonain from No. 2 A/C | £1,710 |
| Total | £1,961 | To Current A/C Fees | £1.00 |
| | | Total | £1,961 |

I wish to thank the Association for its excellent response to the Appeal and for the goodwill evoked in such a deserving cause.

Yours faithfully,

John G. Tidd

48, St. Peter's Crescent,
Walkinstown,
Dublin 12.
25th August, 1980.

The Secretary,
Dublin Solicitors' Bar Association,
9/10 Ely Place,
Dublin 2.

Dear Sir,

It is with deep appreciation that I wish to acknowledge your expression of sympathy on the death of my dear husband Sean R.I.P., conveyed to me through Mr. Tidd of the District Court.

Might I also take this occasion to thank the Dublin Solicitors' Bar Association and the Solicitors' Benevolent Association in so thoughtfully coming to my financial assistance at the time of Sean's death.

Furthermore I wish to thank the many individual Solicitors and Firms, who in appreaciation of Sean's service over the years, contributed to a fund set up by Mr. Tidd and his staff to my benefit.

The widespread kindness has been overwhelming, and I shall always remember it in deep appreciation.

Yours sincerely,

Maura O Braonáin.

# Presentation of Parchments 25th June 1980

1. Christine Ashe, Gorse Hill, Killiney, Co. Dublin.
2. Simon Broderick, 123 Pine Valley Avenue, Rathfarnham, Dublin.
3. Kevin J. Brooks, Baldwin Street, Mitchelstown, Co. Cork.
4. Joseph A. Chambers, Henry Street, Kilrush, Co. Clare.
5. Justin Condon, Montana, Crab Lane, Blackrock, Cork.
6. Francis G. Costello, 23 Kilteragh Road, Foxrock, Dublin.
7. Michael J. Crowe, 56 Claremont Rd., Sandymount, Dublin.
8. Michael J. Cullen, Cedar Lodge, Courtown, Demesne, Gorey, Co. Wexford.
9. Janet Doherty, 62 Priory Avenue, Stillorgan, Dublin.
10. Patrick Duffy, 113 Lakelands, Naas, Co. Kildare.
11. Michael Dunne, 2 Grove Lawn, Blackrock, Dublin.
12. Mary Kate Egan, Mountain View, Castlebar, Co. Mayo.
13. Paul H. Fetherstonhaugh, Elton, Kilcoole, Wicklow.
14. David J. Fitzpatrick, 17 Brooklawn, Mount Merrion Ave., Dublin.
15. Eamonn Anthony Fleming, 40 Melbourn Road, Bishopstown, Cork.
16. Mary A. Flynn, 9 El Greco, St. James' Court, Serpentine Ave., Dublin.
17. James P. Foley, Summerhill House, Enniscorthy, Wexford.
18. Gerard J. Gallagher, Hollybank Avenue, Ranelagh, Dublin.
19. Paul A. Gill, 7 Clonskeagh Road, Dublin 14.
20. Joseph Gilsenan, 14 Dartry Park, Dublin.
21. Duncan Grehan, 13 Larchfield, Dundrum, Dublin.
22. Edward J. P. Hanlon, 6 Fernhurst Villas, College Road, Cork.
23. Brenda M. Hannigan, Post Office House, Ballybofey, Donegal.
24. Joseph G. Hegarty, Ballyloskey, Carndonagh, Donegal.
25. Paul P. Hickey, Windgates, Greystones, Wicklow.
26. Margaret Horan, Knockuragh, Drangan, Thurles, Tipperary.
27. John M. Joy, Silverspring, Clonmel, Co. Tipperary.
28. Maurice P. Joy, Highfield, South Hill Avenue, Blackrock, Dublin.
29. Aidan Judge, Clooncrim, Ballinlough, Roscommon.
30. Jane M. Kelly, Lancewood, Henry Street, Kilrush, Co. Clare.
31. Mary Kennedy, 7 Morehampton Terrace, Donnybrook, Dublin.
32. Michael J. Kennedy, 13 Radlett Grove Portmarnock, Dublin.
33. Paula Kennedy, Ormonde, 42 Devon Park, Salthill, Galway.
34. Pauline Kennedy, Caragh House, Tuam, Galway.
35. James Lardner, Cinnard, Tramore, Waterford.
36. Joseph Lavan, Bridge Street, Dungarvan, Waterford.
37. Adrian Ledwith, 30 Stapleton Place, Dundalk, Louth.
38. Evelyn Leyden (nee Egan), 2 Drummond House, Martins Row, Chapelizod, Dublin.
39 Ciaran Mangan, 52 Crannagh Road, Dublin.
40. Oonagh Meade, St. Finnbarrs, 2 Glenalbyn Road, Stillorgan, Dublin.
41. Mary Miley, Rathdrum, Co. Wicklow.
42. Daire Murphy, San Iuda, Newcourt Road, Bray, Co. Wicklow.
43. Daniel Murphy, Corsini, 2 The Ridgeway, Model Farm Road, Cork.
44. Richelle McCarthy, Abbotsford, Dublin Road, Sutton, Dublin.
45. Laura MacDermott, 4 Lower Hatch Street, Dublin.
46. Lonan McDowell, 2 Temple Gardens, Rathmines, Dublin.
47. Colette MacMahon, Termon, Virginia, Cavan.
48. John McMullin, Aughadegnan, Longford.
49. Marie O'Brien, 5 Rathdown Drive, Terenure, Dublin 6.
50. Catherine O'Donnell, 18 St. Bridgets, Clonskeagh, Dublin.
51. Hugh Gerard O'Neill, 32 Leopardstown Drive, Blackrock, Co. Dublin.
52. Hugh O'Neill, 36 Meadow Vale, Foxrock, Co. Dublin.
53. Denis G. O'Sullivan, Melrose, Sundays Well, Cork.
54. Valerie Peart, Willow Bank, Westminster Road, Foxrock, Co. Dublin.
55. Terry Quinn, Lilac Lodge, Castlepark Road, Glenageary, Co. Dublin.
56. Colm S. O Riain, Cnoc Muire, 3 Ashdale, Bothar Dughlaise Threa, Corcaigh.
57. Niall R. Rooney, Grianach, Murrough, Galway.
58. Avril Sheridan, Lonsdale, 21 Temple Road, Dartry, Dublin.
59. Martin Sills, Cove Park, Tramore, Co. Waterford.
60. Damien M. Tansey, Grattan Street, Ballymote, Co. Sligo.
61. Patrick J. Thomas, Suytus, Ballymackenny Road, Drogheda, Louth.
62. Anne Tipping, 4 Seaview Terrace, Donnybrook, Dublin.
63. Hilary Walpole, 11 Shrewsbury, Ballinlough, Cork.

# The Register

**REGISTRATION OF TITLE ACT, 1964**

**Issue of New Land Certificate**

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 15th day of October, 1980.

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

**Schedule**

(1). Registered Owner: Kenmare Investments Limited; Folio No.: 33637; Lands: Gortamullin; Area: 6a. 1r. 2p.; County: Kerry.

(2). Registered Owner: James J. Camon; Folio No.: 1120F; Lands: Ballingowan Glebe; Area: 0a. 3r. 0p.; County: Offaly.

(3). Registered Owner: John Murray; Folio No.: 12520; Lands: Ballymabin; Area: 0a. 0r. 25p.; County: Waterford.

(4). Registered Owner: Patrick Philpott; Folio No.: 2852; Lands: Dromdowney Upper (part); Area: 28a. 2r. 37p.; County: Cork.

(5). Registered Owner: Gerard Creaven; Folio No.: 1691F; Lands: Tomnahulla (E. D. Annaghdown); Area: 1a. 0r. 16p.; County: Galway.

(6). Registered Owner: Thomas & Kathleen Casey; Folio No.: 299; Lands: Shanaghy; Area: 10a. 2r. 28p.; County: Mayo.

(7). Registered Owner: Patrick J. & Eileen P. Scanlon; Folio No.: 27221; Lands: Cloughatisky; Area: 0a. 0r. 4p.; County: Galway.

(8). Registered Owner: John Shannon; Folio No.: 15445; Lands: Ardvalley; Area: 24a. 1r. 35p.; County: Mayo.

(9). Registered Owner: Charles Parkes; Folio No.: 16636; Lands: Pallboy; Area: 0a. 2r. 0p.; County: Leitrim.

(10). Registered Owner: Timothy Anthony Walsh; Folio No.: 14170; Lands: (1) Clogagh North (parts) (2) Skeaf West (part); Area: (1) 104a. 0r. 26p. (2) 0a. 3r. 27p.; County: Cork.

11. Registered Owner: Dorothy & Bartholomew T. Murphy; Folio No.: 15768F; Lands: Brookville; Area: 0.538 acres; County: Cork.

(12). Registered Owner: Patrick McDonnell; Folio No.: 9966; Lands: Red Bog; Area: 5a. 0r. 0p.; County: Meath.

(13). Registered Owner: Robert Holmes; Folio No.: 10973; Lands: Kilquane; Area: 38a. 0r. 33p.; County: Clare.

(14). Registered Owner: Vincent Hannelly; Folio No.: 3154; Lands: Cloonconra; Area: 42a. 3r. 10p.; County: Roscommon.

(15). Registered Owner: Michael Scally; Folio No.: 945F; Area: (1) (2) 3a. 1r. 20p.; Lands: (1) Mayne (with cottage thereon (2) Mayne; County: Westmeath.

(16). Registered Owner: Aidan Egan; Folio No.: 16069; Area: 6a. 0r. 0p.; Lands: Barmoney; County: Wexford.

(17). Registered Owner: Patrick McGullion; Folio No.: 14581 (This folio is closed and now forms the property Nos. 1 and 2 in Folio 24399); Lands: (1) Uragh (part): (2) Drumbrughas (part); Area: (1) 11a. 0r. 38p. (2) 8a. 2r. 32p.; County: Cavan.

(18). Registered Owner: Patrick Hayes; Folio No.: 12191; Lands: Greatconnell; Area: 1a. 1r. 14p.; County: Kildare.

(19). Registered Owner: James Flynn; Folio No.: 30142; Lands: Ballygarrett; Area: 2a. 0r. 25p.; County: Cork.

(2). Registered Owner: Timothy Kyne (Jnr.); Folio No.: 31340; Lands: Corcullen & Clydagh; Area: 26a. 1r. 0p.; 33a. 1r. 1p.; County: Galway.

(21). Registered Owner: Edward J. Browne; Folio No.: 6082f; Lands: Sheean; Area: 0.206 acres; County: Mayo.

## LOST WILLS

**Daniel McCauley,** deceased, late of 22 Bengal Terrace, Ballyneety Road, Limerick. Will anyone having any knowledge of any Will made by the above named deceased who died on or about the 22nd day of August, 1980, please contact Mr. Peter Shee, Solicitor, of Connolly, Sellers, Geraghty & Co., Solicitors, 6, Glentworth Street, Limerick. Tel. (061)44355.

**Brian Kevin Donegan,** deceased, late of 19 Seagrange Road, Baldoyle, Dublin. Anyone having knowledge of any Will of the above named deceased who died on or about the 18th day of August, 1980, please contact Barbara Hussey & Company, Solicitors, of 31 Dame Street, Dublin 2.

**Cecil Walter Raymond Lockyet,** deceased, will anyone knowing of a Will made by the above named deceased late of 43 Dermot O'Dwyer Flats, Hardwick Street, Dublin 1, who died on the 25th of April, 1980, please contact Messrs. Trethowans of College Chambers, New Street, Sailsbury, Wiltshire SP1 2LY, reference (TC).

**William Walsh,** deceased, late of 3 Jobstown, Tallaght, Co. Dublin. Will anyone having any knowledge of any will made by the above named deceased who died on the 25 February, 1980, please contact Francis J. O'Mahony & Co., Solicitors, New Road, Clondalkin, Co. Dublin.

**Mary Kitt,** deceased, late of Ardfry View, Grattan Road, Galway. Will ay person having a will or knowledge of a will of the above named deceased who died on 2 June, 1980, please communicate with Messrs. Macdermot & Allen, Solicitors, 10 Francis St., Galway.

## NOTICES

**Solicitor** (newly admitted in UK) seeks employment. Male graduate (Trinity) of mature age. Litigation biased Articles plus 1½ years practical experience embracing Civil Litigation, Employment Law, and Family Law. Available to commence immediately if required. – Box No. 001.

**Solicitor,** 1 year's experience in busy rural practice seeks work in similar dynamic practice in Galway, Mayo, Sligo or Donegal. Please reply to Audrey Shannon, Leaffoney, Kilglass, Co. Sligo.

**Newly qualified Solicitor,** B.C.L., with some experience, seeks position in city or country. Reply – Box No. 002.

**New Zealand Barrister** and Solicitor, L.L.B. (Honours), 2 years experience, seeks position in Ireland. Kindly reply Box No. 003.

**Urgent** – Would the Solicitor who acted for the late Mr. Timothy Collins, Harold's Cross, Dublin 6, please contact his son, Mr. Tony Collins. Tel. 978934.

**Solicitor** with three years experience, particularly in conveyancing and litigation, seeks position. Reply to Box 004 or phone 806721 after 6 p.m.

## OBITUARY

**John B. J. (Jack) Dunne** died at his home at Whitesland House, Kildare, on 28th July, 1980. He qualified as a Solicitor in Hilary Term, 1914 and set up his practice in Kildare. He was a founding member of the County Kildare Solicitors' Bar Association. Until his retirement at the age of 88 in 1978 he maintained a busy practice, and was the longest practising solicitor in the State.

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THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

October 1980 Vol. 74 No. 8.

**An Taoiseach, Mr. Charles J. Haughey, T.D., presenting a bust of the late President Cearbhaill O'Dalaigh, to Mr. Walter Beatty, President of the Law Society. Also in the picture are, from left, Mr. Peter D. M. Prentice, Past President of the Society, Mrs. Moya Quinlan, Senior Vice-President, and Mr. Michael Houlihan, Junior Vice-President of the Society.**

Executive Editor: Mary Buckley.
Editorial Board: John F. Buckley, Charles R. M. Meredith, Michael V. O'Mahony, Maxwell Sweeney.
Printed by the Leinster Leader Limited, Naas, Co. Kildare.

Published at Blackhall Place, Dublin 7.

# The Purchase of Second Hand Flats— avoiding the pitfalls

By MICHAEL W. CARRIGAN

The sale of flats is a comparatively new development in conveyancing in this country and it is only now, when major repairs to many of the initial blocks can be avoided no longer, that purchasers are for the first time becoming aware of the importance of the kind of flat scheme in which they are involved and the extent to which the management provisions of the scheme affect them.

Since this development in conveyancing began ten years or so ago, many kinds of scheme have been tried, and while the schemes currently being used by flat developers have to a large extent been standardised, purchasers of second hand flats are faced with a variety of schemes, not all commendable, which will impose varying obligations on them. It will usually fall to the purchaser's solicitor to consider the extent of these obligations, and, if it does, it is essential that he appreciates fully the importance of doing so even before any contracts are exchanged.

The most important area, in any flat scheme and certainly the one likely to give rise to the most difficulty, is that relating to the management of the block of flats when the development has been completed. The solicitor for a prospective purchaser should consequently spend a little time before any contracts are exchanged and possibly before any investigation of title, analysing the constitution of the management company and ascertaining where the responsibility for the provision of services and the overall maintenance and insurance of the block of flats lies, because the success or failure of any flat scheme will hinge largely on the kind of management company which is set up at the outset by the developers, and the extent to which the management company is in a position to deal with the day to day management problems which will arise, whether in regard to the repair and maintenance of the common areas or the possible enforcement of the lessee's covenants in the lease.

The basic principle of the well-drawn flat scheme is that the flat owner should only be responsible for those repairs which either concern him alone or, as in the case of the party walls, concern him and another flat owner but do not concern the flat owners generally. This means that in such a scheme the lessor will, until the development has been completed and the obligation of the lessor vested in the management company, retain responsibility for:–

(a) the maintenance of the structure of the block of flats (which will include the main walls, the roof, the foundations and the common parts of the building such as staircases, halls and corridors),
(b) the provision of the common services such as lifts, water, gas, electricity and central heating (except in so far as they serve one flat and are the responsibility of that flat owner),
(c) the upkeep of the car park and the ground surrounding the building,
(d) the insurance of the building and the common areas under a block policy,
(e) the provision of proper refuse disposal facilities.

This will effectively leave the individual flat owners with responsibility for internal repairs and services insofar as they serve individual flats only and with the liability for payment of an annual service charge to the management company which will have direct responsibility for the maintenance of the structural parts of the building and of the common areas.

As far as the liability for payment of a service charge is concerned, the purchaser of a flat should be warned at the outset that there may be substantial annual payments to be made and that he may find himself having to take some interest and perhaps even a very active part in the management of the block.

It is important that he appreciates also that his concern should extent not just to the flat which he is purchasing but also to the entire development to which the service charge for that flat applies because the common areas will normally include, at the very least, the entire structure of the block of flats of which his flat forms part. In some schemes it may even include the structure of several blocks of flats with the flat owner taking on a proportion of the liability for maintaining the common parts of them all. He should therefore be aware that if, after he signs the contract, substantial repairs have, for example, to be carried out to the roof, he may well be responsible for a proportion of the repairing cost and, if there is no sinking fund in existence, this could involve him in a substantial payment which he might not only not have provided for but which he may not in his wildest dreams have anticipated would fall within his liability. (In the well-drawn flat scheme the developer will, by the establishment of a contingency, or so-called sinking fund, make proper provision for large expenditure which is likely to arise even just through ordinary wear and tear ten or twenty years after the development has been completed. There will come a time when the roof may start to leak or when the lift will have to be replaced and it is best that a fund be available to meet this kind of liability when it arises, not just because it would impose excessive hardship on the owners of the flats in the replacement year but also because the problem to be dealt with by the Management Company may well be one for which it has had little warning but which involves it in immediate expense. The sinking fund will enable the Management Company to build up a fund over a period of years to meet contingent liabilities and from the flat owners point of view is a less painful way to deal with emergencies that are likely to arise than being faced with sudden and specific levies).

The full extent of the possible liabilities which a purchaser can incur in buying a flat can only be considered when a proper analysis of the management of

the block of flats has been made. It is therefore suggested that the following pre-contract enquiries be made:-

1. Is there a management company? If so:-
(a) What kind of management company is it and what are its rules?
(b) Is it active?
(c) Who are its members and are they just the owners of the flats in the block where the flat is being purchased or are other persons involved?
(d) Does it relate only to the block in which the flat is being purchased or does it have responsibility for maintenance of other blocks within the development?

2. Are the accounts of the management company available for the previous financial year?
3. How is the service charge currently payable?
4. What is the service charge currently payable?
5. Is there a sinking fund and, if so, what size is it?
6. Are there defaulting lessees or have all service charges or other amounts payable been paid up to date?
7. Is the flat owner aware of any possible claim on the management company funds which is not apparent from the account furnished?
8. Is the flat owner aware of any proposal by the management company to carry out repair work which would eventually affect the service charge presently payable?
9. Is the flat owner aware of any structural repair necessary to any part of the common areas which is the liability of the management company?
10. Have professional managers been appointed, and if so, what are the terms of their appointment?
11. What kind of insurance policy is in existence and has the premium been paid up to date?

Depending on the kind of scheme involved there may be additional pre-contract enquiries to be made but the information resulting from these enquiries is information which any flat purchaser should have before contracts are exchanged. If it is only obtained by him after contracts are signed it may well be too late.

It is important therefore that if the management in the development appears to be inadequate or unworkable, the purchaser's solicitor should advise his client accordingly. If his client decides to go ahead he may well be lucky and have the satisfaction of getting a profit on his investment if he can buy in and sell out before the inevitable deterioration sets in. It is, however, up to the client to decide whether he is prepared to take that risk.

# Improperly obtained Evidence and the Constitution

By Peter Charleton, B.L.

> "It is much better that a guilty individual should escape punishment than that a court of justice should put aside the vital fundamental principle of Law in order to secure his conviction. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of those rights should delay or even defeat the end of Justice in a particular case, it is better for the public good that this should happen than that a great Constitutional mandate should be nullified."
>
> (Per Carroll C.J., in *Youman v. Commonwealth*, 189 Ky. 152 noted with approval by O'Higgins C.J., in *People v. Madden*, [1977] I.R. 336.

There is no logical reason why the origin of evidence offered against an accused in a criminal trial should affect the admissibility of that evidence where the method of procuring it in no way affects the credibility or weight of the evidence. The rules which require that a confession be proven beyond reasonable doubt to be the voluntary statement of the accused before admission and which allow admissions and confessions to be tested, before the jury, to determine the weight to be afforded to them are logical in that to question may be to suggest an answer and that to bring pressure to bear on an accused is to compel him to produce the answer his captors desire to hear. Similarly the discretion given to a judge in disallowing evidence procured in breach of the judge's rules can be seen more to relate to the laws desire that all statements condemning a man from his own mouth should be procured in circumstances of scrupulous fairness and be accordingly credible. Further, the judge's discretion to exclude from the consideration of the jury evidence which is of probative value but which by its prejudicial nature may induce the jury to attach undue weight to it or use it for inadmissible purposes, has its genesis in a consideration of the quality rather than the course of the evidence. In this context the rule of Irish law, which allows a trial judge a discretion to exclude evidence which has been illegally obtained is extraordinary. In no way can the quality of the evidence have been affected by its theft or by the assault perpetrated on a citizen to secure its production and any prejudicial value which attaches to it would seem to weigh, in terms of a jury's sympathy, against the prosecution.

The second category of improperly obtained evidence is evidence obtained in deliberate breach of the rights of the citizen under the 1937 Constitution; here an absolute rule of exclusion operates and no discretion rests with the trial judge. This is by far the more important category in that the application of the rules are increasingly far reaching and as it arises logically from the terms of Article 40.2 of the Constitution it is inflexible and may be removed only by referendum. I shall deal firstly with evidence which has been illegally, but not unconstitutionally, obtained.

### Evidence Obtained Illegally, But Not Unconstitutionally

It is a rule of law that the presiding judge in a criminal case has discretion to exclude evidence of facts obtained by illegal means where it appears to him that public policy, based on the balancing of public interests, requires such exclusion. The public interests to be balanced are the interests of citizens that criminals should be brought to justice and the interest that the law should be observed even in the detection of crime. This principle contemplates that the law should be observed and if an illegality is committed in the detection of crime it may be that the public interest requires the investigators to be frustrated in their efforts to secure conviction by excluding the fruits of illegality.

The binding authority is *People v. Gerald and Patrick O'Brien* [1965] I.R.142. The accused were both charged with house breaking and the first accused was also charged with stealing while his brother was charged with receiving. The stolen goods were the main evidence in the trial. They were identified by their owners and linked with the accused by being found by the Gardai in their dwellinghouse at No. 118 Captain's Road, Crumlin. The goods were found by the Gardai pursuant to a search warrant which described the address of the accused as "118 Cashel Road, Crumlin". The Gardai were therefore not in possession of a valid search warrant and had accordingly been trespassers in the accuseds' house and had violated the dwelling of the accused by entering it otherwise than in accordancw with the law. The trial judge admitted the evidence and the accused appealed. In the Court of Criminal Appeal Maguire C.J. followed the English case of *Kuruma v. The Queen* [1955] A.C. 197 and the earlier Irish case of *People & O'Brien v. McGrath* 99 ILTR (1965), 40 in admitting the evidence. He accepted the view of Goddard L.J. in *Kuruma* that "the test to be applied in both civil and criminal cases in considering whether evidence is admissible is whether it is relevent to the matters in issue. If it s, it is admissible and the Court is not concerned with how it was obtained." In that case the accused, a Kenyan African, was stopped and searched illegally, in that the persons searching him were not of the rank of Assistant Inspector or above. The police found ammunition and a pocket knife. The accused was convicted of unlawful possession of ammunition and sentenced to death. Goddard L.J. in the course of his judgment did admit that a judge in a criminal case always had a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. Goddard L.J. cited *Noor Mohamed v. R.* [1949] A.C. 182 and *Harris v. D.P.P.* [1952] A.C. 694 as authority. Both are cases of the well established duty of a trial judge to exclude evidence where its prejudicial effect outweighs its probative value, something, as explained above, which is inapplicable to improperly obtained evidence. His Lordship cited the example of obtaining an incriminating document from an A.C. by a trick and said – "in the cir-

cumstances the judge would have a discretion to exclude it": As authority he cited Lord Guthrie in the Scottish case of *H.M. Advocate v. Turnbull* 1951 J.C. In the second case Maguire C.J. relied upon *People v. McGrath* 99 ILTR, (1965), 40, fingerprints were taken without lawful authority. Davitt P. admitted the evidence, stating that the correct test where admissibility was relevance and further saying that it was no function of the Judiciary to enforce compliance with the Rule of Law by excluding relevant evidence. The Judge also refused to equate the taking of fingerprints with the giving of an incriminatory statement. The duty of the Judge not to admit confessions which were not proven to be free and voluntary was imposed as the inducement may colour the state of mind or will and affect the truth of what is said. Such statements were never rejected from a regard to public faith.

In the Supreme Court, Kingsmill-Moore J. gave the judgment of the majority on the question of legally obtained evidence. Walsh J. dissented but the entire court was agreed on the subject of the inadmissibility against an accused of unconstitutionally obtained evidence. Kingsmill-Moore J. reviewed the English, Scottish and American authorities and rejected them all. Three answers were possible to the problem of admitting the evidence. Firstly, the strict rule of admissibility as laid down in Kuruma's case; this was rejected as to operate it always might involve the State in moral culpability. Secondly, the American Doctrine of the fruits of the poisoned tree excluding all evidence obtained by the State in breach of the accused's constitutional rights, even where these breaches were unintentional and trivial; common sense rejected this for illegally obtained evidence but the court adopted the same principle for unconstitutionally obtained evidence. The third solution was a solution adopted by the court; a disrection vested in the trial judge. Kingsmill-Moore J. said:

> "A choice has to be made between two desirable ends which may be incompatible. It is desirable in the public interest that crime should be detected and punished. It is desirable that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should not attempt to advance its end by utilizing the fruits of such methods. It appears to me that in every case a determination has to be made by the trial judge as to whether the public interest is best served by the admission of or by the exclusion of evidence of facts ascertained as a result of, and by means of, illegal action, and that the answer to the question depends on a consideration of all the circumstances. On the one hand the nature and extent of the illegality has to be taken into account. Was the illegal action intentional or unintentional, and, if intentional, was it the result of an *ad hoc* decision or does it represent a settled or deliberate policy? Was the illegality one of a trivial or technical nature or was it a serious invasion of important rights, the recurrence of which would involve a real danger to necessary freedoms? Were there circumstances of urgency or emergency which provides an excuse for the action? Lord Goddard in Kuruma's case mentions as a ground for excluding relevant evidence that it had been obtained by a trick and the Lord Justice General in Lawrie's Case refers to an unfair trick. Those seem to me to be more dubious grounds for exclusion. The police in the investigation of crime are not bound to show their hand too openly provided they act legally. I am disposed to lay emphasis not so much on the alleged fairness to the accused but on the public interest that the law should be observed even in the investigations of crimes. The nature of the crime being investigated may also have to be taken into account."

The learned judge stressed this last point by referring to the Californian case of *People v. Cahan*, 248 P. 2d. 905, when in a prosecution for a gambling offence microphones had been concealed in private property and the evidence of the conversation thus obtained was excluded by the strict exclusionary rules for breaches of the Fourth Amendment. His Lordship stated that if a discretionary rule had been applicable he could conceive of the evidence being admitted if the conversation revealed crimes of a more serious nature such as conspiracy to murder or the activities of a narcotics organisation. The majority of the court was concerned that trivial illegalities should not hamper the prosecution of serious offences. In exercising its discretion in this case the court admitted the evidence:

> "The mistake was a pure oversight and it is not being shown that the oversight was noticed by anyone before the premises were searched. I can find no evidence of deliberate treachery, imposition, deceit or illegality; no policy to disregard the provisions of the Constitution or conduct searches without a warrant; nothing except the existence of an unintentional and accidental illegality to set against the public interest having crime detected and punished."

Little further can be said on the subject of evidence

which has been merely illegally obtained. Comparatively speaking the principles expounded by Kingsmill-Moore J. are unique. In Scotland a similar principle is held, save here the competing interests are the interests in the detection of crime and the interest of the citizen to be free from illegal searches and seizures; *Lawrie v. Muir* (1950) S.L.T. 37: and this is to be expected where no written Constitution protects those rights. In the United States it has been decided that, at common law, evidence merely illegally obtained cannot be excluded; *People v. Olmstead*, 227 U.S. 438. In England the discretion to exclude illegally obtained evidence is based on the discretion of a judge to exclude the prosecution from calling evidence where that would be unfair or oppressive to the accused; *C. F. Wong Kamming v. the Queen* [1979] 1 All E.R. 939. In *R. v. Singh* [1979] 2 W.L.R. 100, the House of Lords held that there was no discretion vested in a trial judge to exclude improperly obtained evidence. According to Lord Diplock, with whom all but one of the Lords agreed, Lord Goddard's dictum in *Kuruma v. R.*, that a document obtained by trick could properly be excluded, had been misunderstood. Such an exclusion was analogous to the trial judge's discretion over admissions and confessions. The anagoly could properly be used and had been used in England (*R. v. Payne* [1963] 1 All E.R. 848) in cases which fell within the maxim *nemo debet prodere se ipsum*. Apart from that a discretion to exclude could only be used in cases governed by the judges rule or where the prejudicial affect of the evidence outweighs its probative value; *Harris v. D.P.P.* [1952] A.C.694 Decisions such as *Jeffrey v. Black* [1978] 1 All E.R. 559 which extended this discretion to circumstances where evidence was obtained by the police misleading, acting oppressively or behaving otherwise in a morally reprehensible manner, were considered to have been wrongly decided and accordingly overruled.

One last point occurs in relation to a certain class of illegally obtained evidence which has not yet been argued here. This arises in relation to evidence obtained from such matters as medical inspections and fingerprinting, which need the express authorisation of a statute to be permissible. In the Australian case of *R. v. Ireland* [1970] ALR an accused was told that he had to be photographed and undergo a medical examination for which there was no statutory warrant. Zelling J. said:

> "Where a power to interfere with a man's civil rights and obtain evidence thereby specifically given by statute exercisable only on the performance of certain conditions precedent and to rule that the evidence may be obtained by methods other than those sanctioned by statute and then successfully used in court is not simply to declare the law but to amend the law and this no judge has any right to do. In traditional language it is *ius dare* and not *ius dicere*."

**Unconstitutionally Obtained Evidence**

In *People v. O'Brien* the presence of police officers without a valid search warrant in the house of the accused was not merely illegal but unconstitutional. Article 40.5 of the Constitution provides:

> "The dwelling of every citizen shall be inviolable and shall not be forcibly entered save in accordance with the law."

Walsh J. who dissented from Kingsmill-Moore's view on the power of the trial judge to exclude illegally obtained evidence had the unanimous support of the Supreme Court in expanding the doctrine of the inadmissibility of unconstitutionally obtained evidence. He interpreted the article as follows:

> "That does not mean that the guarantee is against forcible entry only, in my view the reference to forcible entry is only an intimation that forcible entry may be prohibited by law but that in any event the dwelling of every citizen is inviolable save where entry is permitted by law and that, if necessary, such law may permit forcible entry."

His Lordhip then went on to expound the principle on which unconstitutionally obtained evidence is excluded:

> "When the illegality amounts to infringement of constitutional right the matter assumes a far greater importance than is the case where the illegality does not amount to such an infringement. The vindication and the protection of constitutional rights is a fundamental matter for all courts established under the Constitution. That duty cannot yield place to any other competing interest. In Article 40 the State has undertaken to defend and vindicate the inviolability of the dwelling of every citizen. The defence and vindication of the Constitution of the right of a citizen is a duty superior to that of trying such citizen for a criminal offence. The court in exercising the judicial power of Government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State, or its servants, or agents as a result of a deliberate or conscious violation of the constitutional rights of the accused person no extraordinary excusing circumstances exist, such as the imminent destruction of vital evidence of the need to rescue a victim in peril. A suspect has no constitutional rights to destroy or dispose of evidence or to imperil the victim. I would also place in the excusable category evidence obtained by a search incidental to and contemporaneous with the lawful arrest although made without a valid search warrant.
>
> "In my view evidence obtained in deliberate conscious breach of the constitutional rights of an accused person should, save in the circumstances outlined above, be absolutely inadmissible. It follows therefore that evidence obtained without a deliberate and constitutional violation of the accused's constitutional rights is not excludable only by reason of a violation of his constitutional rights."

Thus, it follows from Walsh J.'s judgment that evidence obtained as a result of a breach, by the servants or agents of the State, of the constitutional rights of an accused citizen is absolutely inadmissible against him as an accused for such breach is not proven, on the balance of probabilities to have been inadvertant. This rule is similar in many respects to the absolute rule of exclusion for evidence obtained as a result of breaches of the rights of citizens under the Fourth Amendment of the American Constitution, expounded by the Supreme Court in 1914 in *Weeks v. U.S.*, 223, U.S. The rule is different to the one for illegally obtained evidence in that no discretion rests with the trial judge; once the rights of the accused have been infringed the evidence cannot be admitted

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unless the prosecution prove extraordinary excusing circumstances for the breach or prove that the breach itself was inadvertent. In O'Brien's case as it was clear from the evidence that since the Gardai never noticed that the address on the warrant was incorrect and the warrant accordingly useless, the evidence could not be excluded simply because, in fact, the accused's right to the inviolability of their dwelling under article 40 had been violated.

The absolute nature of the exclusionary rule for unconstitutionally obtained evidence means that the slightest infringement of a constitutional right is sufficient to render a statement inadmissible. No considerations arise, or should arise, as to the nature of the breach and the value of the evidence thereby excluded in relation to the seriousness of the crime, as they arise in the Irish approach to illegally obtained evidence. Thus the merest oversight or technical flaw will exclude evidence which would otherwise be sufficient to convict an accused of serious crime. Where the oversight or technical flaw amounts merely to an illegality the judge would probably exercise his discretion in favour of admitting the evidence, especially where the charge is a serious one. This is not possible in relation to unconstitutionally obtained evidence. Thus in *People v. Farrell* [1978] I.R.13. the accused was convicted in the Central Criminal Court of causing an explosion contrary to the Explosive Substances Act, 1883, and the conviction was based on an admission obtained by the police during an extended period of detention under Section 30 of the Offences Against the State Act, 1939. That section gives the Gardai power to arrest, detain and interrogate for 24 hours any person they believe to have committed or intends to commit or has information in relation to the commission or intended commission of any offence under the Act or Schedule 5 thereof. The period of detention may be extended for a further 24 hours if a Garda not below the rank of Chief Superintendent or Superintendent, authorised in writing by the Commissioner, so directs. All the incriminating statements made by the accused were made after the expiry of the first 24 hours of detention. The purported extension of the detention was made by a Superintendent who was not proven to have authority from the Commissioner to extend that detention. The accused had been deprived of his liberty and that deprivation of liberty had not been in accordance with the law. No evidence had been adduced that the failure to extend correctly had been an oversight and so bring the evidence outside the rule in O'Brien's case and accordingly the court could deal with the matter under their Legal Evidence Rule and so exercise a discretion. In fact the only flaw in the evidence in this case was that no evidence had been adduced by the prosecution that the Superintendent who extended the period of detention into the second day had been authorised by the Garda Commissioner, the Supreme Court refused to presume that he had been so authorised. O'Higgins, C.J. in giving the judgment of the court said:

> "Mr. Landy submitted that the maxim *omnia presumuntur or rite esse acta* applied. In other words he submitted that the court ought to presume that anything which ought to have been done was done, and that the Superintendent was acting regularly and properly. I do not think that the presumption mentioned in the maxim could have any application in a case of this nature. It might well be that under such a maxim the Court might assume that the Superintendent had been regularly appointed as such, and indeed, possible in relation to the exercise of the normal powers and functions of a Superintendent who is acting properly and regularly. However, here we are concerned with the power not normally given to a Superintendent and which, for its exercise by a Superintendent requires a special authorisation designated by the legislature. No court in relation to a penal statute could apply any such presumption in a matter of this kind. Certainly this court will not do so."

Some breaches of the constitutional rights of the accused would be more serious. In *People v. O'Loughlin* (unreported 11/13/78 CCA) the accused voluntarily accompanied Gardai to a Garda station after having been accused of stealing a muck spreader. In the station his explanation that he had bought the muck spreader was checked and found to be incorrect. Instead of being arrested, charged, released or brought before a Peace Commissioner he was held in custody, in order that he might be questioned about "cattle rustling". He was never arrested or charged with this second offence. While being questioned about cattle rustling he made a full statement about the muck spreader; he was then charged and formally taken into custody. He had already been in informal custody for 13 hours. O'Higgins C.J. in delivering the judgment of the Court of Criminal Appeal was of the opinion that the detention could be divided into two periods. The first, from the time the accused came into the charge of the Gardai to the time the Gardai discovered that his first statement in relation to the muck spreader was incorrect, was not a deprivation of liberty as the accused had been in the station voluntarily. There is however authority for the proposition that a person who voluntarily accompanies another in order to answer a charge of felony is falsely imprisoned if that charge later turns out to be unfounded; c.f. *Peters v. Stanway* 6 Car. & P. 738. From that point on the accused was not in custody voluntarily and would have been arrested if he had tried to leave. Yet the accused had not been deprived of his liberty in accordance with the law as he had never been arrested and consequently could not have been accorded his right to bail. Following *Dunne v. Clinton* [1930] I.R. 336 O'Higgins C.J. reaffirmed that—"holding for questioning, taking into custody or detaining are merely different ways of describing the act of depriving a man of his liberties. To do such without lawful authority is in open defiance of Article 40.4 of the Constitution." The Chief Justice went on to hold that as a result of the unlawful detention the accused had made the incriminatory statements. On the facts no submissions that the deprivation of liberty was inadvertent could be sustained. The statements were accordingly excluded. The Chief Justice then went on to affirm that no discretion vested in the Trial Judge in admitting evidence obtain in breach of the rule in O'Brien's case and stated that there were no extraordinary excusing circumstances which could justify the invasion of the accused's rights in this particular case:

> "The Trial Judge, even on the basis of there having been a deliberate and conscious violation of the constitutional rights was prepared to exercise his discretion in favour of admitting the statement. He was prepared to do so because in his view it would

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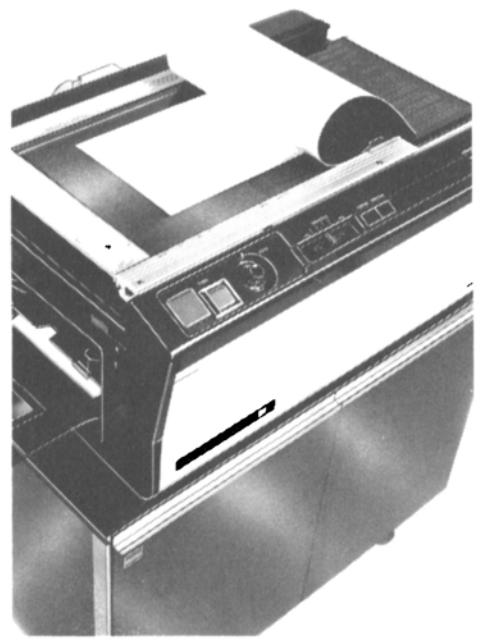


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serve the public interest in the circumstances. This court cannot agree with this view. There are no circumstances in this case which can excuse what took place, and it would ill-serve respect of the Constitution and the laws, if this court, by allowing evidence so obtained, were to indicate to citizens generally of the obligation on the State to safeguard and vindicate constitutional rights, could in the circumstances of a criminal investigation be dispensed with or eased."

**The Rule in O'Brien's Case**

Under the rule in O'Brien's case if the invasion of constitutional rights has been inadvertent the court is not obliged to exclude the evidence. As the infringement of constitutional right always amounts also to an illegality the Court, of course, has a discretion to exclude it. However, the burden of proving that the infringement of the accused constitutional rights was not deliberate, and the evidence accordingly merely illegal, rest with the prosecution. This is a strict principle and its operation well illustrated by the great case of *People v. Bartholomew Madden* [1977] I.R. 337. The accused had been arrested under Section 30 of the Offences Against the State Act, 1939, at 7.15 a.m. on the 19th June, 1975, to be questioned concerning the murder of one, Laurence White, killed by a burst of machine-gun fire on a public road in Cork. The usual period of 24 hours detention was extended to 48 hours in the correct manner. He therefore should have been released or charged on the 21st June, at 7.15 a.m., at the latest. At 6.40 on that day Bartholomew Madden began to make an incriminating statement. He completed the statement at 10.30 a.m. when he was told he could go home. The statement was admitted and Madden convicted as an accessory to murder. The judgment of the Court of Criminal Appeal was given by O'Higgins C.J. On the facts, from 7.15 a.m. to 10.30 a.m. Madden had been deprived of his liberty otherwise than in accordance with the law. The next question was whether the invasion of a citizen's rights had been deliberate. The Chief Justice emphasised that the burden of proving inadvertance was on the prosecution. On examination of the trial transcript it was found the Madden was detained although the Gardai knew that the period of lawful detention had elapsed. The fact that they thought that the period had been extended by the accused's voluntary statement was discounted by the court. The duty of the servants of the State is primarily to vindicate the right of the citizen; the taking of the statement was secondary:

"As matters stand, this statement was taken by a senior Garda officer who must have been aware of the lawful period of detention which applied in the defendant's case and in circumstances which suggested that he deliberately and consciously regarded the taking of the statement as being of more importance than according the Defendant his right to liberty, should he, the defendant, desire to exercise his rights. . . . By reason of the fact that it may have been taken under circumstances which involved a deliberate and conscious breach of the defendant's constitutional rights the statement ought to have been excluded."

Accordingly, where there is not evidence that an invasion of the citizen's rights is inadvertent the evidence must be excluded. Thus Higgins C.J. further stated that no element of willfulness or *male fides* is required of the servant of the state to bring the invasion of the citizen's rights within the rule in O'Brien's case, he said:

"What was done or permitted by Inspector Butler and his colleagues may have been done or permitted for the best of motives and in the interest of the due investigation of crime. It was, however, done or permitted without regard to the right of liberty guaranteed to this defendant by Article 40 of the Constitution and to the State's obligation under that article to vindicate this right. This lack of regard for and failure to vindicate the defendant's constitutional right may not have induced or brought about the making of the statement but was the dominating circumstances surrounding its making."

As the Chief Justice and Walsh J. had earlier said, if the State would not vindicate the citizen's rights then it fell on the court to do so by the only means available to it, exclusion of evidence so obtained.

It has now been finally settled by the case of *People v. Raymond Walsh* (Supreme Ct. 17/1/80, unreported) that the fact that the police officer, infringing the accused's constitutional rights does not know that his action is illegal or unconstitutional does not make the infringement of the accused's rights inadvertent and so allow the evidence to be admitted at the trial judge's discretion. This inadvertence within the rule relates specifically to fact and not to law. This over-rules the earlier decision of Costello, J. in *People v. Shaw* (C.C.A. 22/5/79 unreported). Walsh's case also decides that an arrest which is unlawful by reason of the accused's not having been told the reason for his arrest can later be validated by that information being supplied. The raison d'être of the rule in O'Brien's case in this country based on the doctrine of the fruits of the poison tree enunciated by the United States Supreme Court in *Weeks v. U.S.*, are one and the same; to allow in fact a flaunting of the natural and constitutional right of the citizen is to encourage the kind of society obnoxious to free men. It is submitted that under no circumstances should a lack of knowledge of the law or Constitution provide an excuse for illegal action.

**The Discretionary Principle**

There are three circumstances in which evidence obtained in breach of a citizen's constitutional rights does not fall within the rule in O'Brien's case but falls to be dealt with by the discretionary principle. In this respect the Irish law seems to be borrowed from the rule in Week's case and Walsh J. in his judgment in O'Brien's case adopted the exceptions thereto.

(1) Evidence obtained in breach of the constitutional right of a third party may be used against an accused. This is so because, as Walsh J. said, the primary function of the courts under the Constitution is the vindication of the constitutional rights of the citizen. The courts will vindicate the breach of the rights of the accused by the State by refusing to allow the State to use any evidence obtained as a result against him. It would be futile to vindicate the constitutional rights of a party other than an accused by refusing to admit otherwise admissible evidence against an accused whose rights have not been infringed, thereby perhaps saving him from a conviction and punishment in which the third party also had an interest under the Constitution. The Courts will vindicate

the rights of the third party by giving him damages in an action based on tort. Thus in *Wong Sun v. U.S.* 371 U.S. 471, two defendants were tried together on a narcotics charge. The first defendant, under illegal arrest, made statements which led the police to seize narcotics from a third party. These drugs were inadmissible evidence against the first defendant as they were the fruits of the unconstitutional action of the State against him. The same evidence was admissible against the second defendant as a violation of no right of his led to their production which would entitle him to object to their use at his trial. The rule is stated in *Jones v. U.S.*, 262 U.S. 257.

> "In order to qualify as a person agrieved by an unlawful search and seizure one must have been the victim of a search and seizure common to one against whom the search is directed, as distinct from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else.
>
> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of the search as the basis for surpressing relevant evidence that he alleged, and if the allegation be disputed that he established, that he himself was the victim of an invasion of privacy."

(2) As the burden to vindicate the citizen's constitutional rights is on the State the evidence sought to be adduced by the State will only be inadmissible where their servants or agents have been the perpretators of the breach of the accused's constitutional rights. Again in this respect we follow the position in the United States. Thus in *Burdow v. McDowell* 1931, 256 U.S. 465, the petitioner accused was charged with illegally transmitting mail. He was employed and had an office at the premises of Doherty and Co. as head of their Natural Gas Division. On the petitioners dismissal from office for alleged fraudulent malpractises an officer of the company placed McDowell's office in the hands of private detectives and grilled open his private safe to obtain his papers which were later surrendered to the Federal Prosecutor Burdow. On indictment the petitioner objected to the use of evidence so obtained as a violation of the rule in Week's case. Mr. Justice Day held that the case did not fall within the doctrine of the exclusion of the fruits of the poison tree expounded in Week's case. He stated that the constitutional prohibition was intended:

> "As a restraint upon the activities of the sovereign authority, and was not intended to be a limitation upon other governmental agencies."

(3) The third exception in American law to the doctrine of the exclusion of the fruits of the poisoned tree does not seem to be implicit in the judgment of Walsh J. in O'Brien's case and may not be followed here. It is less logical than the previous two. In *Walder v. U.S.* 247 U.S. 62 (1953) heroin had been obtained from the petitioner through unconstitutional search and seizure. An indictment against him for illegal possession of narcotics was dismissed for lack of admissible evidence. On a subsequent indictment for illegal dealings in narcotics the petitioner testified that he had never purchased, sold, or possessed any drugs. To impeach his testimony the prosecution introduced the testimony of officers who had participated in the earlier search and siezure and the evidence of the chemist who had analysed the drugs seized. The Trial Judge admitted the evidence but charged the jury carefully that it went to the credit of the accused's testimony but was irrelevant to the issue of guilt. Frankfurter J. affirmed the Trial Judge's decision and said:

> "The Government cannot violate the Fourth Amendment in the only way that the Government can do anything, namely through its agents – and use the fruits of such unlawful conduct to secure a conviction; *Weeks v. U.S.*, 233 U.S. Nor can the Government make indirect use of such evidence for its case; *Silverthorne Lumber Co. v. U.S.* 251 U.S. or support a conviction obtained through leads from the unlawfully obtained evidence. Cf. *Nordone v. U.S.*, 308 U.S. All these methods are outlawed and convictions obtained from them invalidate it because they encouraged the kind of society that is obnoxious to free men.
>
> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the Defendant can turn the illegal method by which the evidence was obtained to his own advantage and provide himself with a shield against his own untruths. Such an extension would be a pervertion of the Weeks doctrine."

It strikes me as illogical that unconstitutionally obtained evidence may be admitted in a criminal trial to prove that the accused is a liar but cannot be admitted to prove that he is a murderer.

**Evidence Admitted in Extraordinary Circumstances**

Even though the rule in O'Brien's case is infringed, under the rule extraordinary circumstances may excuse the breach of the accused's rights, and allow the evidence to be admitted. Walsh J. in his judgment in O'Brien's case mentioned as extraordinary and excusing circumstances, the destruction of vital evidence, and the need to rescue a victim in peril. He also included a search incidental to and contemperaneous with unlawful arrest though made without a valid search warrant; in England the common law has developed to the extent of making this action within the law; Cf. *Jeffrey v. Black* [1978] 1 All E.R. 559. The rationale for the existence of these circumstances, which would allow the unconstitutionally obtained evidence to be admitted, appears from the judgment in O'Brien's case to be that in certain extraordinary circumstances the obligation, placed on the State by Article 40.2. to vindicate the personal rights of the citizen may have to yield in extraordinary circumstances to a higher duty, that of protecting the rights to life of a citizen in peril or of rescuing vital evidence which is about to be destroyed. If, in these extraordinary circumstances the State has no obligation to vindicate the accused's personal rights, that duty will not fall on the Courts, as the obligation on the Government under Article 40.2, is not an absolute one but is expressed in terms of "protect as best it may". The extraordinary circumstances will necessitate a breach of the accused's personal rights but that breach will not be a failure to vindicate his rights as best the State may in circumstances of sufficient gravity and urgency. In these circumstances there may be no constitutional mandate.

**People v. John Shaw**

In *People v. John Shaw* (unreported) 22/5/79 CCA, the accused and one Jeffrey Evans were taken into custody for questioning on Sunday the 26th September 1977, at 11.30 p.m. The detention was illegal. The accused was not brought before the District Court sitting at 10.30 a.m. on Monday, nor was he arrested or charged. Evans however was validly arrested as being in possession of a stolen motor car. While in custody the Gardai noticed that the description of the two men tallied with those of two persons wanted in connection with the disappearance of one Elizabeth Plunkett who had last been seen at Brittas Bay in County Wicklow on 28th August 1976. Superintendent Reynolds who was in charge of that case, arrived at the station on Monday morning and began to interrogate the men who by this time had been lawfully arrested for stealing a car. The circumstances of the disappearance of Elizabeth Plunkett had led Superintendent Reynolds to believe that the same men had been implicated with the disappearance of another girl, Mary Duffy, who was last seen in Castlebar on the 22nd of September 1976. The Superintendent considered that there was a good chance that this girl, Mary Duffy, was still alive and in the circumstances that it might be vital to discover her whereabouts as soon as possible. For most of Monday Shaw was questioned on this. He said nothing. On Tuesday, at 4 a.m., he made a complete confession of abduction, rape and murder. Shaw then promised to show the Garda, places around Conne mara where these crimes and the later burial of Mary Duffy had occurred. He rested in his cell until 1.30 p.m. on Tuesday when he went in a car with the Gardai to whom he showed the places where Mary Duffy had been murdered and where her clothing had been burned and finally to Lough Inagh where he had disposed of her body. On Wednesday morning he was brought before the District Court on these charges.

The Trial Judge, Costello J., found that the paramount concern of the Gardai from the time they discovered Shaw's implication in the disappearance of Mary Duffy, was to save her life and that they had grounds for believing she was still alive. These grounds arose in part from the statement of Jeffrey Evans that the other girl, Elizabeth Plunkett, had been kept alive when in custody for some time after her abduction. He further found that this position did not materially change after Shaw's confession to her murder on Tuesday. Shaw was mentally disturbed, he had clearly implicated himself with Mary Duffy's disappearance but could easily have been lying about her death. Accordingly the Gardai were right to be more concerned for her life than with charging Shaw and affording him his rights to bail. The learned Trial Judge held that the paramount and primary purpose of Shaw's detention was to save the life of Mary Duffy whom the Gardai reasonably believed to be in peril. The evidence was accordingly admitted.

On appeal to the Court of Criminal Appeal McMahon J. affirmed these findings of fact. He held that extraordinary excusing circumstances existed within the ruling of O'Brien's case. However the learned Judge held that the admissible evidence obtained as a result of the invasion of the accused's personal rights was confined to the evidence, the discovery of which was required by the extraordinary excusing circumstances and that no other evidence obtained in breach of the accused's rights could be admitted. McMahon J. termed this evidence "target evidence", and said "this restriction of the admissible evidence appears to follow logically and the fact which rendered it admissible and evidence which is extraneous to the purpose ought to be inadmissible". Accordingly Shaw's admissions as to the whereabouts of Mary Duffy were admitted but evidence as to her death which had not been part of the target evidence of the extraordinary excusing circumstances could not be admitted.

**Conclusion**

In conclusion it must be said that the Irish law on this topic is wholly logical and not easily criticized. It is also an advantage that the law can be stated with precision and certainty, the judgments referred to above being admirably clear. The principle which gives a Trial Judge a discretion over illegally obtained evidence seems the best solution between the position in English law and a rule of absolute exclusion. It must be remembered that the Constitution gives every citizen on a criminal charge the right to a trial in due course of law. This, as explained by Gannon J. in *State (Healy) v. Donoghue* [1976] I.R., 325 implies that above all else that the rules governing the conduct of the trial should be fair. There may be circumstances in which the absence of a discretion to exclude evidence illegally obtained would result in unfairness. Kingsmill-Moore J. in O'Brien's case instanced evidence obtained from a person by violence to his wife. In these circumstances if no discretion is vested in the Trial Judge it is not hard to conceive that a conviction obtained as a result would be held not to have been in due course of law. The existence of this discretion over illegally obtained evidence is important in the context of the law on unconstitutionally obtained evidence. As the Trial Judge who cannot exclude unconstitutionally obtained evidence, because it falls ithin one of the exceptions in O'Brien's case or is admitted within the rule, has then a discretion over the evidence, an invasion of any citizen's rights being always illegal. It must be said that the absolute rule of exclusion for unconstitutionally obtained evidence as formulated by O'Brien's case and explained by Madden's case and Shaw's case is framed only as widely as Article 40.2 requires; the three exceptions outlined above clearly limiting it to the express words of that Article. The circumstances rendering evidence obtained in breach of the rule admissible as regards inadvertence in Madden's case, or excusing circumstances, in Shaw's case, are scrupulously fair in placing the burden of proving inadvertence on the prosecution and limiting the admissibility of evidence necessitated by extraordinary excusing circumstances to the target of those excusing circumstances. The two rules outlined above taken together constitute a further check on the action of an unscrupulous Government against the rights of a citizen. It has been said that nothing brings own a Government faster than failure to observe its own laws. Be that as it may, though a Government in this country collapse, the Rule in O'Brien's case, by protecting the citizen from high-handed governmental action in ensuring that no citizen was convicted by evidence obtained by that Government in breach of those citizen's rights the Government has been charged by the people to vindicate, may ensure that other edifices under the Constitution will remain intact.

(Concluded)

# CONVEYANCING NOTES

**Land Commission Consents General Consent to Subdivision**

The attention of members is drawn to the recent edition of the General Consent (June 1980) issued by the Land Commission and circulated to the profession. This consent corresponds generally with the version issued in December 1977 save for the important fact that the permitted maximum size of individual sites within the framework of the consent is increased from 1 acre to 1 hectare (2.471 acres). The limitation in paragraph 6 (ii) of the General Consent, the provision relating to the minimum size of the balance of the holding, is now two hectares instead of 5 acres.

Paragraph (vi) (iii) of the 1977 form of consent precluded more than five divisions of a holding. Under the new consent the number of subdivisions is not relevant, the limitation is now one of area and the limit is 2 hectares.

The amended consent should be carefully studied.

**Section 45 Consent**

The Society has again applied to the Land Commission to bring in a General Consent under Section 45 to cover the increasing number of housing estates, industrial estates and shopping centre developments which are situate outside the town, urban district or borough limits referred to in the Section. There are now wide areas of the country outside such limits which have been developed for housing or industrial estates or shopping centre developments. County Dublin is a particular example of this.

It could hardly have been the intention for the Land Commission to retain control over the vesting of ownership in suburban housing. It is equally hard to understand why control of the vesting of ownership in industrial estates should remain with them. In some cases on industrial estates there is an alternative but it is not always possible to certify that the user of a proposed unit is for "an industry". Since the results of applications for consents in these areas seem to be automatically granted it is not at all clear why the bureaucratic procedures still have to be gone through. It must be very doubtful that the intention of the Land Act was to give the Land Commission control over consent to vesting in relation to housing, industrial or shopping developments and probable that this merely arose as a result of the excessibely strict wording of the Act.

**Section 46(i) Local Registration of Title (Ireland) Act, 1891**

Registry of Deeds in the following circumstances. The freehold title was registered in the Land Registry on a freehold Folio and a Lease for more than twenty-one years had been granted of part of the lands in the Folio prior to the 1st January 1967 (the date of the coming into force of the Registration of Title Act 1964). No leasehold folio had been opened in respect of the leasehold interest and the Lease had not been registered in the Registry of Deeds. The Solicitor concerned had then been asked to have the Lease registered in the Registry of Deeds but felt that it was unnecessary to do so.

At the Conveyancing Seminar in Blackhall Place held on Saturday the 27th September a Solicitor asked as to whether there was an obligation to register a Lease in the

The speakers' panel expressed the view that registration in the Registry of Deeds was not necessary although all subsequent documents dealing with the leasehold interest, including Assignments and Mortgages would of course have to be so registered but were unable to quote the precise authority for their view. Mr. Dermond Moran volunteered what turned out to be the correct answer namely that there was a specific section in the Local Registration of Title (Ireland) Act 1891 which dealt with the position. Section 46(i) of that Act provides

"Registration of a burden under this Act shall have the same effect as, and make unnecessary, registration of any deed or document relating to such burden, in pursuance of any other public general or local and personal Act of Parliament or of any Provisional Order confirmed by Parliament, but in case of a leasehold the ownership of which is not registered in any subsidiary register under this Act, such exemption from the necessity of registration in pursuance of the Acts relating to the Registry of Deeds shall extend only to the lease itself, and not to any other deed or document relating to the title to a leasehold."

On the coming into operation of the Registration of Title Act 1964 the position changed radically in that it then became obligatory to open new leasehold Folios for any leasehold interests for more than 21 years.

In view of the fact that there was some confusion as to the correct position the Conveyancing committee felt it might be helpful to publish this note clarifying the position.

# COMPANY LAW NOTES

## Second Council Directive on Co-ordination of Regulations relating to the formation of Public Limited Liability Companies and the Maintenance and Alteration of their Capital (97/91/EEC)*

The Second EEC Directive on Company Law was adopted by the Council of Ministers on 13 December 1976 and required Member States to adopt legislation implementing its provisions by December 1978. The Directive was implemented in the United Kingdom some months ago by the Companies Act, 1980, but no legislation has yet been proposed in Ireland, although it is expected that a Bill will be published before the end of this year.

Of the Directives under review, the Second Directive will undoubtedly have the most noticeable effect on Irish solicitors' everyday practice of company law. Its most significant provisions may be discussed under the following headings:

**Classification of Companies**

In Ireland and the U.K., the Directive applies to public companies limited by shares and to public companies limited by guarantee and having a share capital, and (unless otherwise stated) the word "company" in this note is intended to refer only to such companies. A company must indicate its nature in its title; in the U.K., this has been done by requiring such a company to include the words "public limited company" in its corporate name. The U.K. has also altered the grounds for distinguishing between public and private companies found in Ireland in Section 33 of the Companies Act, 1963 by removing the provisions requiring private companies to limit the number of their members and restrict the transfer of their shares. Instead, the U.K. Act provides that the essential distinction between public and private companies will now be the prohibition on private companies offering their shares to the public. (The U.K. Act also prohibits the formation of any new companies limited by guarantee having a share capital, but this is not required by the Directive.)

Provisions will have to be made in the implementing legislation for somewhat altered procedures for the incorporation of public and private companies and for the conversion of private companies into public companies and vice versa.

**Memorandum and and Articles of Association**

The Directive specifies certain basic data relating to the company which these documents must contain and also requires the publication of other information not presently filed, such as the actual or estimated amount of all costs payable by the company in connection with its formation.

**Subscription of Capital**

The Directive requires a company to have a minimum subscribed capital of 25,000 European Units of Account (about IR£16,750) before it can commence business. It provides for the adjustment of this minimum capital in the event of fluctuation of the exchange rate between national currencies and the E.U.A. and also provides for a fiveyearly review of the minimum as calculated in E.U.A. The Directive contains transitional provisions hich will allow existing public companies achieve the minimum capital figure over a period of up to 3 years from the date on which the implementing legislation enters into force. Member States are free to adopt a higher figure if they wish: the U.K. Act requires a minimum capital figure of £50,000.

Shares issued (for cash or other consideration) on incorporation or on an increase in capital must be paid up to at least 25% of their nominal value before the company can commence business. Where the consideration is other than cash, it must be contributed to the company within five years of the date of allotment.

The Directive prohibits the issue of shares at a discount except to persons who "place shares in the exercise of their profession". This provision has led to the repeal in the U.K. of the equivalent of Section 63 of the Companies Act, 1963.

The Directive requires a company's subscribed capital to be made up of assets "capable of economic assessment" and prohibits a company from accepting an undertaking to perform work or supply services as part of those assets. To ensure that these principles are observed, the Directive goes on to provide that where shares are issued for a consideration other than cash, either on the incorporation of a company or on an increase in capital, the company must obtain an independent expert's report on the value of the assets being contributed to the company and this report must be published. The "independent expert" in Ireland will almost certainly be the company's auditor. A similar report is required if, within two years of incorporation, a company acquires any assets from its promoters for a consideration equivalent to 10% or more of its issued capital.

Member States need not require an expert's report on an increase of capital where shares are issued on a takeover or merger involving an exchange of shares.

**Maintenance of Subscribed Capital**

The Directive introduces an important new rule in relation to the payment of dividends by providing that they can be paid only to the extent that the company's "net assets" after payment of the dividend will not be less than the subscribed capital plus any reserves not available for distribution. The term "net assets" is not defined in the Directive; in the U.K., the legislation provides for the definition of net assets by statutory instrument, which will permit developments in accounting practice - such as inflation accounting – to be taken into account. The Directive also provides that distributions to shareholders may not exceed the aggregate of (a) the profits at the end

**(continued on p. 181)**

*(Official Journal L26 of 31.1.77).

**(continued from page 179)**

of the last financial year, (b) profits brought forward and (c) reserves available for distribution *less* the aggregate of (d) any losses and (e) sums required to be transferred to reserves. This is also a substantial change from the present position in Ireland where previous losses do not have to be made good before a dividend can be paid. The Directive contains similar provisions in relation to interim dividends.

The Directive prohibits a company subscribing for its own shares (which is no change from the present position in Ireland) but also expressly provides that a person subscribing as nominee for the company shall be deemed to have done so on his own behalf and to be personally liable for the subscription price. The Directive also contains provisions which permit a company to acquire its own shares on certain strict conditions: Irish law in this area is generally more restrictive than the provisions of the Directive, but the rules relating to forfeiture of shares will require modification.

The Directive also prohibits a company from giving financial assistance to a third party for the purpose of acquiring shares in the company. No provision is made for a procedure such as that allowed in subsections (2) to (11) of Section 60 of the Companies Act, 1963, which will therefore have to be repealed; but the exceptions permitted by subsection (13) of Section 60 conform with the provisions of the Directive.

Redeemable shares are permitted on essentially the same terms as those set out in Section 64 of the Companies Act, 1963.

Where there is a "serious loss of subscribed capital", the Directive requires the company to call a general meeting of shareholders to consider whether the company should be wound up or other measures taken. The loss of half or more of the subscribed capital is deemed to be a serious loss for this purpose.

**Increases in Subscribed Capital**

A company may increase its share capital or issue convertible securities only with the approval of a general meeting and where there are several classes of shares, the decision of the company will be subject to a separate vote of each class whose rights are affected by the transaction. This will extend the rights of class shareholders under Irish law in such a situation.

Where a company's equity share capital is increased by consideration in cash, the Directive requires the company to offer existing equity shareholders the opportunity to purchase the new shares in proportion to their existing shareholdings. This right of pre-emption will also apply where a company issues securities convertible into equity shares. The Directive allows but does not oblige Member States to provide that, where a company has several classes of shares, new shares must first be offered to the shareholders of the class to which they belong before they are offered to shareholders in other classes. Pre-emption rights may be restricted or withdrawn by a two-thirds majority of the shareholders (or by simple majority if the holders of half the subscribed capital are present at the meeting at which the proposal is discussed).

**Reduction of Subscribed Capital**

A reduction in capital also requires the approval of a two-thirds majority of the shareholders unless the holders of half the issued share capital are present at the meeting, in which case a simple majority is sufficient. Approval of the court is not required by the Directive (although it will remain necessary unless Section 72 of the Companies Act, 1963, is amended). Member States laws must contain adequate safeguards for creditors of companies whose capital it is proposed to reduce and a company may not of course reduce its capital below the minimum capital limit.

# Society Launches Major New Work On Constitution

The Society has just published "Cases and Materials on the Irish Constitution" by James O'Reilly and Mary Redmond. This represents a significant milestone in Irish Legal Publishing because the work is the first major Casebook, in the American style, to have been published on any aspect of Irish Law. The Society is particularly pleased that the Authors have both been members of the Solicitors profession although James O'Reilly is now practising at the Bar.

The book was launched by the Chief Justice at a reception in the Law Society on the 18th September and in his address at the launching the Chief Justice included the following remarks. "It may be a misunderstanding of the true function of judicial review that has led some people in recent years to criticise the courts as exceeding their powers in declaring the invalidity of legislation. It must be recognised however that the Constitution depends for its virility and for the significance of the rights accorded to citizens on the proper function of the Oireachtas being observed and on the State itself honouring and discharging the duties and obligations cast upon it by the Constitution. If our Legislature were permitted to exceed its powers or the State to ignore its obligations the Constitution would become a meaningless collection of words of no significance and the rights and freedoms of the people would disappear. It is the duty of the Courts under the Constitution to ensure the Constitutional checks and balances are observed. In doing so the the courts assume no powers other than the Constitution ordains and seek to do no more than to discharge the solemn duty placed upon them by the people in enacting the Constitution. That same duty falls to be discharged by the Courts in ensuring that powers given to Bodies under ordinary legislation are in no way exceeded. I have no doubt that these duties will continue to be discharged honourably and courageously by the Courts."

In his foreword to the book Mr. Justice Brian Walsh commented "their book will promote serious and critical study of Constitutional interpretation and decision making in the Irish Context. Doubtless they had as one of their objectives, relying upon their experience as teachers, the compilation of the kind of book that would be valuable to use in class. But it would be of great value to the Lawyer, the Legislator and the Layman alike. Here will be found an intelligible and an illuminating presentation of the workings of the judicial process in the field of Constitutional Law in this Country. The materials they have assembled include not only judicial decisions but also legislative and other non-judicial material which call attention to the historical context. In particular the case Law is reproduced in sufficient textual length to satisfy the serious student".

In her remarks at the launch Mary Redmond expressed the hope that the book would contribute towards the obtainment of stage 2 in Law Publication. "That stage is the stage of the critics, the analysts. Their stance will not (because it cannot) be that of a fairly strict neutrality. Their service will be to emphasise the need for further and detailed exploration of the Constitution, to defend it against vague and illconsidered, often political, catch cries calling for its repeal. . . . Humpty Dumpty taught Alice a lesson in Through the Looking-Glass; "When I use a Word" he said in a rather scornful tone, it means just what I choose it to mean – neither more or less". "The Question Is" said Alice "Whether you could make words mean so many different things".

"The Question Is" said Humpty Dumpty "Which is to be Master That's All". Fortunately in this country it is not the slogan as to who are the Masters of our Constitution – it is the Judges who are the Masters, in their constitutionally received role. It is they who interpret the Constitution, they who are aware, as Mr. Justice Holmes expressed in such a delightful metaphor in Towne v. Eisner that "A word is not a crystal, transparent and unchanged it is a skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used". Judicial interpretation in the light of prevailing conditions in this country is an obvious and compelling subject of interest in the publication which is being launched this afternoon".

The book is now available from the Society at £25.00 plus £2.50 V.A.T. plus 80p postage.

**ROYAL IRISH ACADEMY**

**National Committee for the Study of International Affairs**

## Third Annual Conference 21st November 1980

**"Neutrality: A Review"**

**Registration forms are available from the Society or from the Royal Irish Academy, 19 Dawson St., Dublin 2. Tel. 764222 ext. 17 or 24.**

# Table of Fees in High Court Matters

**EFFECTIVE FROM 10th NOVEMBER 1980**

**Plenary Proceedings**

| | |
|---|---|
| Summons | £ 9.45 |
| Statement of Claim or Defence | |
| (a) Common Law | £26.25 |
| (b) Chancery | £31.50 |
| Reply | £ 9.45 |
| Counterclaim or Defence thereto | £26.25 |
| Letter seeking Particulars | £13.65 |
| Letter giving Particulars | £18.90 |

**Special Summons**

| | |
|---|---|
| Summons | £18.90 |
| Principal Affidavit | £31.50 |
| Further Affidavits | £12.60 |
| Brief Fee | £45.15 |

**Summary Summons**

| | |
|---|---|
| Summons | £18.90 |
| Principal Affidavit | £26.25 |
| Further Affidavits | £12.60 |

**Motions for Judgment**

Before the Master in:

| | |
|---|---|
| (a) *Liquidated Claims* | |
| (1) Where the amount does not exceed £20,000 | £34.65 |
| (2) For every £1,000 over £2,000 up to £20,000 | £3.15 |
| (3) Suitable increases for amounts in excess of £20,000 | |

**Ejectments**

| | |
|---|---|
| (1) Where the rent does not exceed £600 | £45.15 |
| (2) Where the rent exceeds £600 but not £1,200 | £63.00 |
| (3) Suitable increases for higher rents. | |

**Other Motions**

| | |
|---|---|
| (1) Notice | £12.60 |
| (2) Principal Affidavit | £26.25 |
| (3) Further Affidavits | £12.60 |
| (4) Brief Fees: | |
| (a) Appln. to Master (ex-parte) | £18.90 |
| (b) Appln. to Master (on Notice) | £26.25 |
| (c) Appln. to Court (ex-parte) | £31.50 |
| (d) Appln. to Court (on Notice) | £34.65 |
| (e) Motions on Consent | £23.10 |

**Advices**

| | |
|---|---|
| (1) Preliminary Case to Advise Plaintiff or Defendant | £31.50 |
| (2) Separate Advice re Offer or Lodgment | £31.50 |
| (3) Detailed Advice on Proofs: | |
| (a) Proceedings to assess Damages | £35.70 |
| (b) Other proceedings | £48.30 |

**Consultations**

| | |
|---|---|
| (a) Pre-trial where Brief sent | £22.05 |
| (b) Others | £31.50 |
| (c) Suitable increases where Consultation exceeds 1 hour | |

**General**

| | |
|---|---|
| Settling Third Party Notice | £16.80 |
| Interrogatories | £31.50 |
| Affidavit of Discovery | £45.15 |
| Notice of Appeal | £26.25 |
| Taking of Judgment | £26.25 |

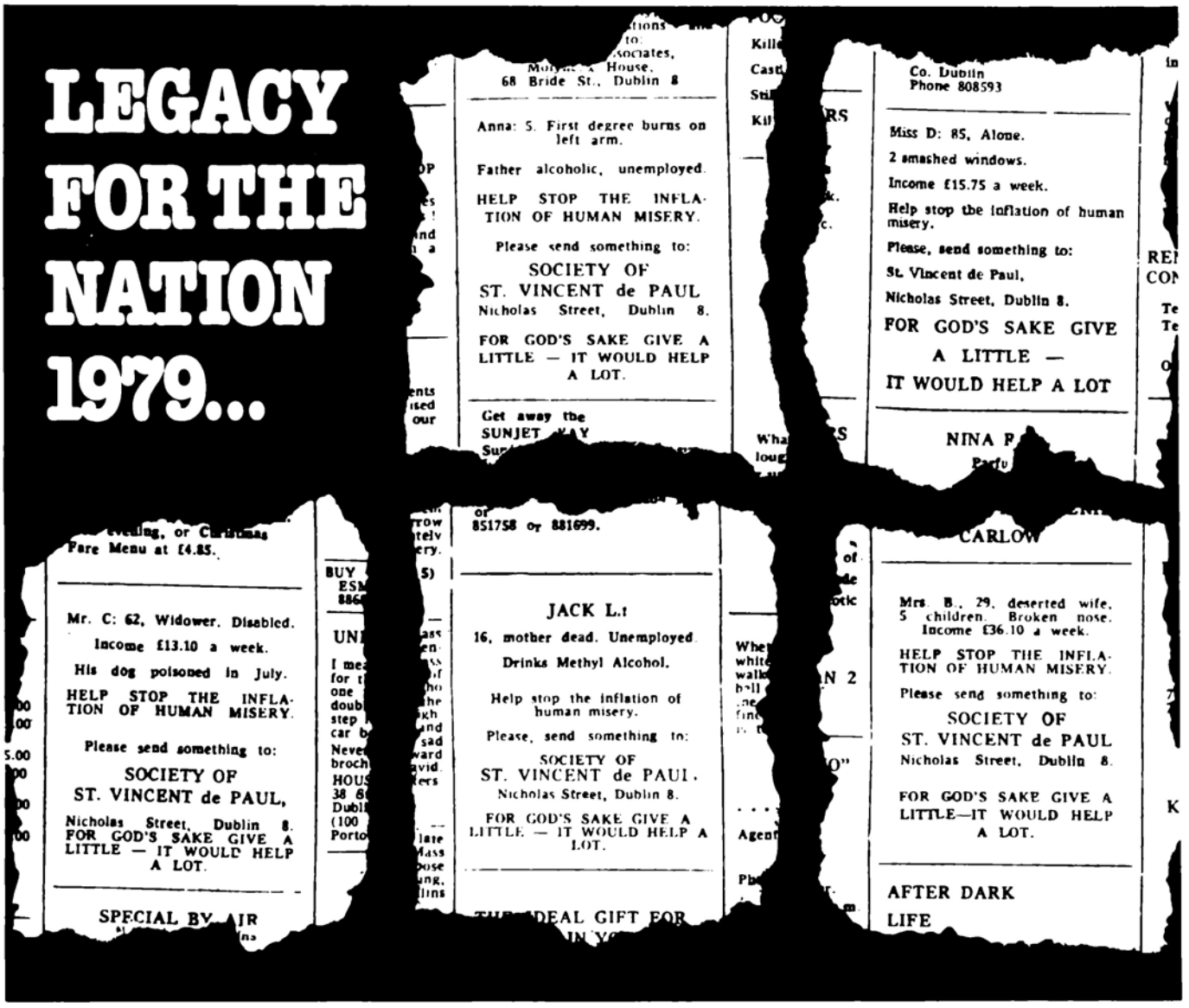
# Further Continuing Legal Education Courses

Following the success of the Society's Conveyancing Seminars the Society's Legal Education Programme continues with 7 further one day Seminars being held between the middle of November and Christmas. The topics to be covered and their locations are as follows:

| Date | Topic | Participants | Location |
|---|---|---|---|
| Tuesday 18th November 1980 | Wills | Robert Johnston<br>Andrew Comyn | Blackhall Place |
| Monday 24th November | Administration of Estates | E. M. A. Cummins<br>Peter Quinlan | Tralee |
| Wednesday 26th November 1980 | Administration of Estates | Do.<br>Do. | Ennis |
| Friday 28th November 1980 | Administration of Estates | Do. | Sligo |
| Tuesday 2nd December 1980 | Licensing Law | Carol O'Kennedy<br>Barry O'Reilly | Blackhall Place |
| Saturday 6th December 1980 | Wills and their Tax Implications | Robert Johnston<br>Raymond Downey | Waterford |
| Tuesday 9th November 1980 | Family Law Separation Agreements | Michael V. O'Mahony<br>Alan Shatter | Blackhall Place |

The emphasis in the administration of estates seminars will be on the day to day administration of ordinary estates. Andrew Comyn will speak from the point of view of a country Solicitor, E. M. A. Cummins will talk on the strategy of an administration and Peter Quinlan will discuss enough systems for the administration of estates and recommend and provide precedent documents.

It is anticipated that these Seminars will be repeated inother areas of the Country early in the New Year.

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# The Register

**REGISTRATION OF TITLE ACT, 1964**

**Issue of New Land Certificate**

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 15th day of November 1980.

W. T. MORAN (Registrar of Titles)

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

(1) Registered Owner: Francis Walsh; Folio No.: 17829; Lands: Ballynaskea; Area: 39a. 0r. 20p.; County: Meath.

(2) Registered Owner: John Ryan; Folio No.: 17371; Lands: Curraheen (Part); Area: 26a. 2r. 10p.; County: Tipperary.

(3) Registered Owner: Elizabeth McCallion; Folio No.: 23342; Lands: Rathonoragh; Area: 0a. 1r. 3p.; County: Sligo.

(4) Registered Owner: Thomas and Ann Stewart; Folio No.: 6518F; Lands: Crag; Area: 0.388 acres; County: Kerry.

(5) Registered Owner: John Flynn; Folio No.: 281 Revised; Lands: Ballymaquirk; Area: 42a. 1r. 26p.; County: Cork.

(6) Registered Owner: John Galvin; Folio No.: 5545; Lands: Coolduff; Area: 3a. 2r. 26p.; County: Cork.

(7) Registered Owner: John Keaney; Folio No.: 11108; Lands: (1) Roscarban (part), (2) Keshcarrigan (part), (3) Corderry (Peyton), (part); Area: (1) 1a. 0r. 20p., (2) 28a. 0r. 12p. (3) 0a. 3r. 6p.; County: Leitrim.

(8) Registered Owner: Hugh McMahon; Folio No.: 25610; Lands: Gouldavoher; Area: 6a. 0r. 3p.; County: Limerick.

(9) Registered Owner: Dominick McGuire; Folio No.: 28778; Lands: (1) Carn (E.D. Killala), (2) Castlereagh; Area: (1) 1a. 3r. 10p., (2) 26a. 1r. 33p.; County: Mayo.

(10) Registered Owner: Patrick McCormack; Folio No.: 20878; Lands: Kilkilleen with the cottage thereon (part); Area: –; County: Limerick.

(11) Registered Owner: Mary Arthur and Thomas Woods; Folio No.: 4813; Lands: Aghnaskeagh (part); Area: 6a. 1r. 36p; County: Louth.

(12) Registered Owner: Thomas and Anne La Grue; Folio No.: 1765L; Lands: Terenure, Parish of Rathfarnham; Area: –; County: City of Dublin.

(13) Registered Owner: Frederick W. Tuthill (Junior); Folio No.: 19319; Lands: (1) Tullysran, (2) Creenagh, (3) Creenagh; Area: (1) 41a. 0r. 27p., (2) 4a. 0r. 26p., (3) 10a. 0r. 13p.; County: Leitrim.

(14) Registered Owner: Mother Teresa Clifford and The Right Rev. Monsignor John Duggan V.G.; Folio No.: 44106; Lands: Scartagh; Area: 1a. 3r. 28p.; County: Cork.

(15) Registered Owner: Thomas Chambers; Folio No.: 26963; Lands: (1) Carrowkeel, (2) Rathredmond, (3) Carrowkeel (E.D. Manulla), (4) Knockmore (Oughter); Area: (1) 16a. 1r. 11p., (2) 3a. 0r. 37p., (3) 0a. 1r. 32p. (4) 5a. 2r. 23p.; County: Mayo.

(16) Registered Owner: Christopher Queenan; Folio No.: 2484; Lands: Cuppanagh; Area: 31a. 0r. 35p.; County: Sligo.

(17) Registered Owner: John Carney; Folio No.: 2L; Lands: Killinear in the Barony of Drogheda; Area: 76a. 1r. 34p.; County: Louth.

(18) Registered Owner: Martin Cunningham; Folio No.: 16256 (This folio is closed and now forms the property No. 1 in Folio 17149); Lands: A plot of ground in the townland of Newtownallen with the cottage thereon; Area: –; County: Kildare.

(19): Registered Owner: John Bohan; Folio No.: 29817; Lands: (1) Gortnaskehy, (2) Dromard More, (3) Dromard More; Area: (1) 14a. 1r. 21p., (2) 2a. 2r. 0p., (3) 16a. 3r. 17p.; County: Tipperary.

(2) Registered Owner: Peter Clarke; Folio No.: 6918; Lands: Killaconner; Area: 10a. 3r. 6p.; County: Louth.

(21) Registered Owner: Thomas Deevy; Folio No.: 18575; Lands: Turra; Area: 0a. 2r. 6p.; County: Queens.

(22) Registered Owner: Frank Flanagan; Folio No.: 1649F; Lands: Crosscool Harbour; Area: 0a. 2r. 0p.; County: Wicklow.

(23) Registered Owner: Thomas Hynch; Folio No.: 632; Lands: Roskerragh (parts); Area: 23a. 3r. 8p.; County: Cavan.

(24) Registered Owner: Richard Barry and Margaret Colgan; Folio No.: 2269L; Lands: Part of the Townland of Marshes Upper and Barony of Dundalk Upper situate to the South of the Long Avenue in the Urban District of Dundalk; Area: 0a. 0r. 15p.; County: Louth.

(25) Registered Owner: Rita Harris; Folio No.: 1421L; Lands: Leasehold interest in the premises and dwellinghouse known as 18 Ardagh Road, Crumlin, Dublin 12; Area: – County: City of Dublin.

(26) Registered Owner: William J. Healy; Folio No.: 22541 (This folio is closed and now forms the property No. 2 in Folio 54385); Lands: Reagrellahg (Part); Area: 36a. 0r. 34p.; County: Cork.

(27) Registered Owner: John Cullivan and John Griffin; Folio No.: 20307L; Lands: Balbutcher, Barony of Coolock; Area: – County: Dublin.

(28) Registered Owner: Edward Gerard McCauley; Folio No.: 16682; Lands: Warren or Drum (Part); Area: 0a. 1r. 28p.; County: Roscommon.

(29) Registered Owner: Veronica Rowe, Glenfarm, Woodside Road, Sandyford, Co. Dublin; Folio No.: 27275; Lands: Ballynagranagh; Area: 1a. 0r. 38p.; County: Clare.

## LOST WILLS

**Patrick Whelehan,** deceased, late of Mountrath, Kilbeggan, Co. Westmeath. The above named died at St. Mary's Hospital, Mullingar, on the 14th July 1979. Will any Solicitor or other person having a Will or knowledge or a Will of the deceased please contact Messrs. D. P. & D. H. Morris & Co., Solicitors, 40 Upper Abbey Street, Dublin 1.

**Thomas Rogers,** deceased, late of Lord Edward Street, Ballymote, Co. Sligo, Publican. Any person having knowledge of a Will of the aforesaid deceased who died on the 12th October, 1980, please contact Johnson & Tighe Solicitors, Ballymote, Co. Sligo.

**Cecil Walter Lockyer,** deceased. Will anyone knowing of a will made by the above named deceased late of 43 Dermot O'Dwyer Flats, Hardwicke Street, Dublin 1, who died on the 25th of April, 1980, please contact Messrs. Trethowans of College Chambers, New Street, Sailsbury's, Wiltshire SPI 2LY, Ref.: (TC).

## NOTICES

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THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

November 1980 Vol. 74 No. 9

TREE PLANTING CEREMONY AT BLACKHALL PLACE, 16th October 1980

**The President of the Society, Mr. Walter Beatty planting a winter-flowering Cherry tree in the gardens of the Law Society. Assisting is Mrs. Moya Quinlan, Senior Vice-President.**

Executive Editor: Mary Buckley.
Editorial Board: John F. Buckley, Charles R. M. Meredith, Michael V. O'Mahony, Maxwell Sweeney.
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# TRADE DISPUTES ACT 1906 — 'Employment or non-employment'

by Anthony Kerr, B.A. (Mod.), LL.M.,
Assistant Lecturer in Law, U.C.D.

It is well known that the extent to which employees may picket is governed by the Trade Disputes Act, 1906 ("the 1906 Act") and the meaning given to the 'golden formula' contained therein; that such industrial action, which would otherwise be tortious, will not be actionable when it is taken 'in contemplation or furtherance of a trade dispute'. 'Trade dispute' is defined in section 5(3) of the 1906 Act as 'any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour of any person'. It is proposed in this article to focus on recent decisions affecting the words 'employment or non-employment'.

At the outset it is important, in order to avoid confusion, to emphasise that in this discussion two issues arise which must be kept separate. The first of these is the meaning of 'employment or non-employment', the second is the meaning to be given to the word 'workmen'. Section 5(3) of the 1906 Act goes on to provide that the expression 'workmen' means 'all persons employed in trade or industry'.[1] The word 'employed' does not signify that the dispute must be between persons who are actually in employment at the time of the dispute. As Meredith, J. said in 1937 in *Ferguson v. O'Gorman*[2]; 'A workman does not cease to be a workman because he has been dismissed and is out of employment'. Such a person is still to be regarded as 'employed in trade or industry' and the employer cannot argue that there is no dispute between employer and workmen.

It follows from this that a dispute between an employee and an employer over dismissal and a claim for compensation and/or reinstatement would be a valid trade dispute, firstly, because it is between an employer and a workman, and secondly, because it is connected with employment or non-employment. It does not matter if the dismissal was perfectly lawful, fair or for reasons of redundancy. The Supreme Court has confirmed in *Gouldings Ltd. v Bolger*[3] that the fact that picketers have been validly dismissed does not take them outside the statutory immunity. The lawful dismissal of a workman can be the subject of a trade dispute[4] and it was emphasised that the decision of Overend, J. to the contrary in *Doran v. Lennon*[5] was erroneous.

Counsel for the employer in *Gouldings case* argued that as the Redundancy Payments Acts 1960-1971 recognised that employers might be compelled to dismiss employees as a result of economic pressures those Acts must be taken as having impliedly amended the 1906 Act so as to withdraw from the protection of the 1906 Act employees entitled to redundancy payments under those Acts. The Supreme Court did not accept this argument. Kenny, J. held that the statutory entitlement to redundancy pay was a minimum which the employer had to pay and that employees were quite entitled to demand a sum greater than that and to take industrial action (which would be protected under the 1906 Act) if the claim were refused.[6] This has been subsequently made abundantly clear by McWilliam, J. in *Cleary v. Coffey*[7] where the dispute was over the payment of 'a disturbance claim bonus' in addition to the statutory redundancy entitlement, as was claimed to be customary in the licensed trade. Mc William, J. held that this was a trade dispute within the meaning of the 1906 Act and that it did not cease to be one merely because the claim appeared to be unreasonable.

It is surprising that this point is still being argued by employers since the Supreme Court has clearly indicated that a trade dispute is not confined to disputes over legal rights. As Lavery, J. put it in 1955, in *Quigley v. Beirne*;[8] 'The Trade Disputes Act, 1906, is designed to permit within limits, certain actions to secure recognition of extra-legal claims of a particular nature and to bring pressure to bear on an employer to observe certain principles and standards which the law does not impose. Trade disputes may involve matters of legal right, but ordinarily they are concerned with other matters'.

**The concept of Non-Employment**

It is clear, therefore, that dismissal is included within the expression 'employment of non-employment'; but non-employment is a much wider concept than dismissal and must necessarily cover other matters. In *McHenry v. Carey*[9] Hamilton, J. held that the refusal to hire a person could form the basis of a trade dispute within the statutory definition. In his opinion there could be no logical distinction between the case of a dismissed employee and that of a person seeking initial employment or a person who had been for a period out of employment.

This latter decision has been recently reconsidered by the High Court in *J. Bradbury Ltd. v. Duffy*[10] in which McWilliam J. accepted the *McHenry Brothers* decision as being correct on its facts, but said there had to be 'some restriction on the universality of the application of the term 'non-employment'. He gave two examples of 'non-employment disputes' which would not be valid trade disputes. The first example was where an employer, starting a business, advertised for ten employees and received fifty applications. He could not accept that the forty unsuccessful applications were entitled to take industrial action solely because they had not been given a job. The second example was the case of an employee who had voluntarily left employment and his job was then filled. If the employee subsequently changed his mind and asked for his job back it could not be said that he was entitled to take industrial action because his former

employer was unable to re-employ him because the job was no longer available.

Subsequently Hamilton, J. in *Stephen Geraghty and Co. Ltd. v Whelan*[11] granted an injunction restraining the defendant employees from picketing the plaintiff employer's premises. The company owned a hardware store and a granary in Carnew, Co. Wicklow. The defendants were employed only in the hardware store which closed at 6 p.m. and they asked the employer if they could do overtime work in the granary. The employer refused, saying that overtime granary work was for granary workers only and the defendant employees had picketed the premises.

It is as difficult to reconcile the *Stephen Geraghty* decision with the statutory definition as it is with the earlier case in 1924 of *Barton* v *Harten*.[12] In *Barton's case* a publican's assistant was arrested by Government forces in October 1922 and was not released until September 1923. The employer had kept the job open until about January 1923 when a full-time replacement was hired. When the assistant was released from custody he asked for his job back and the publican refused saying there was no room. I.N.U.V.G.A.T.A[13] called the publican's employees out on strike and organised pickets. The High Court (Malony C. J.) held that there was no trade dispute, saying: 'there is no dispute at all, but only an attempt on the part of an organisation to compel an employer to give employment to one who had been out of employment for a long time and whose position has been filled in the ordinary course'. In *J. Bradbury Ltd. v. Duffy*[14] McWilliam J. said that *Barton's case* indicated that a clearly discernible connection with non-employment was not always sufficient to justify industrial action and that there had to be 'something more'. However, McWilliam J. indicated no priniple as to how this 'something more' should be ascertained. In this respect the judgment of O'Higgins C. J. in *Gouldings Ltd. v Bolger*[15] is very pertinent, since in it he expresses a great deal of sympathy for the argument that for a trade dispute to exist there had to be 'some reality' in the question of possible employment, if the dispute was over reinstatement or refusal to hire.

**Demands outside Statutory Immunity**

This view of O'Higgins C. J. appears to be extremely close to those of Lord Denning who has in both *The Camilla M*[16] and *PBDS Ltd.* v *Filkins*[17] expressed the view that if employees or union officials make demands that cannot possibly be met there is no trade dispute. He said that if demands were made that were "wholly extortionate or utterly unreasonable or quite impossible to fulfil" they were outside the statutory immunity. However the *Camilla M* has been expressly[18] overruled by the House of Lords in *NWL Ltd.* v *Woods*.[19] Lord Diplock there said that the fact that a demand appeared to the court to be unreasonable because compliance with it was "so difficult as to be commercially impracticable or would bankrupt the employer or drive him out of business" did not prevent it from being a dispute connected with "terms and conditions of employment". He concluded that the immunity was not forefeited either by the employer or the employee being "pigheaded or stubborn".

Nevertheless the Irish courts appear to have introduced into the statutory text of the 1906 Act Lord Denning's "reasonable possibility" argument. This would explain not only the recent decisions but also the earlier decisions of *Doran* v *Lennon*[20] and *Corry* v *Beirne*[21]. In Doran's case industrial action was taken, inter alia, for an increase in pay which was forbidden by statute. In *Corry's case* the action was designed to secure the reinstatement of an employee who could not lawfully be employed because he was under age. Injunctions were granted in both cases. Beyond this, however, there appears to be no justification for reading into the 1906 Act limitations which the High Court considers desirable. As the House of Lords have recently made abundantly clear in *NWL Ltd.* v *Wood*, no limitation on the ordinary meaning of the words of the 1906 Act is permissible and Lord Scarman said: "None is needed; none was intended". Judicial decisions cannot impose limitations on the language used by the legislature, where it is clear from the words, context and policy of the legislation that no limitation was intended. The legislative policy of the 1906 Act was to exclude trade disputes from judicial review. There is nothing in the 1906 Act entitling the courts to substitute their opinion on the wisdom or merits of industrial action for the opinion held by those instigating or participating in the industrial action complained of. All the 1906 Act requires the courts to do is to ascertain whether the dispute is connected with the statutory formula.

It is worth recalling the words of Peterson J.,[23] accepted by both Maguire C. J.[24] and Hamilton J.[25]:

> "In all these cases it is of the utmost importance that the court should keep in mind the fact that it is

not to consider questions of policy or whether the conduct of employers on the one hand or the workmen or their representatives on the other is considerate, wise or expedient. The sole duty of a judge is to consider whether the action complained of is lawful or unlawful".

1. for meaning of 'employed in trade or industry' see *B and I Steampacket* v *Brannigan* (1956) 90 ILTR 98; *Smith* v *Beirne* (1955) 89 ILTR 24.
2. [1937] IR 620, 634.
3. [1977] IR 211.
4. as had been held in *Quigley* v *Beirne* [1955] IR 62, *Maher* v *Beirne* (1958) 93 ILTR 105 and *Bird* v *O'Neal* [1960] AC 907. See also *Myerscough & Co. Ltd.* v *Kenny* (High Court per Gannon J. 18/4/74, unreported).
5. [1945] IR 315.
6. As he had previously held in *Newbridge Industries* v *Bateson* High Court unrep. 7/7/75; see also *Cunningham Bros Ltd.* v *Kelly*. High Court unrep. 18/11/74.
7. High Court 30/10/79 unreported.
8. [1955] IR 62.
9. High Court — 19/11/76 unreported.
10. *J. Bradbury Ltd.* v *Duffy* High Court — 26/3/79 — unreported.
11. High Court 19/9/79 — unreported. Irish Times 20/9/79.
12. [1925] 2 IR 37.
13. Irish National Union of Vintners Grocers and Allied Trades Assistants.
14. supra n. 10.
15. supra n. 3.
16. (1978] IRLR 507.
17. [1979] IRLR 356.
18. And *PBDS Ltd.* v *Filkins* impliedly.
19. [1979] 3 ALL ER 614.
20. supra n. 5.
21. [1950] IR 315.
22. [1979] 3 ALL ER 614, See also *Express Newspapers v. McShane* [1980] 1 ALL ER 65 (HL); *Suport Steel Ltd.* v *Sirs* [1980] 1 ALL ER 529 (HL) and the author's article in [1979/80] Dublin University Law Journal, p. 59.
23. *White* v *Riley* [1921] 1 Ch 1, 80.
24. In *Educational Company of Ireland Ltd.* v *Fitzpatrick* [1961] IR at p 378.
25. In *Reg. Armstrong Motors* v *CIE* High Court. 2/12/75 — unreported.

THE INCORPORATED LAW SOCIETY OF IRELAND

## ANNUAL CONFERENCE 1981

**The Annual Conference will take place**

**on 30th April - 3rd May, 1981**

at the

**Waterville Lake Hotel.**

Full Programme will be available shortly.

# THE FAMILY AND THE LAW

## Proceedings of a Seminar held at Blackhall Place, 11 October, 1980

The Government's immediate plans for the reform of family law include legislation in the current session of the Dáil dealing with criminal conversation; a Bill which will deal with extensions of the jurisdiction of the Circuit and District Courts and the jurisdiction of the courts in family law cases. This Bill emerges from the recommendations in the 20th Interim Report of the Committee on Court Practice and Procedure for increasing the monetary limits of the civil jurisdiction of the District and Circuit Courts and for conferring new jurisdiction on those Courts.

This outline was given by the Minister of State at the Department of Justice (Sean Doherty, TD) when speaking at the Law Society's symposium on "The Family and the Law" at Blackhall Place, Dublin, on October 11. He continued (in part): While the general subject of marriage breakdown is clearly a highly complex matter, it was his view that the abuse of alcohol is intricately bound up witn the failure of many a marriage. It is not the only cause or perhaps even the chief cause of marriage breakdown; there are other causes such as immaturity or lack of preparation for marriage. "It has been one of my priorities since being appointed Minister of State in the Department of Justice, to see what legislative changes could be brought about which would make our liquor laws more effective. It is not just a question of examining the liquor laws, but of educating people, young people especially, in how to use alcohol in a mature way and in the dangers of its misuse".

### Domicile and nullity

Other questions that may require the attention of the legislature concern such matters as the law of domicile and the question of nullity. The law of domicile says, in effect, that the domicile of a married woman shall be that of her husband and shall remain so as long as he lives. Most people would agree that this law should be changed. It cannot be changed overnight. "If Parliament did that, and did no more, the result would probably be a spate of legal actions going all the way to the Supreme Court in order to determine what would replace it. The law of domicile has many implications and it is necessary therefore to set out what will replace the present law or possibly to abolish the legal concept of domicile entirely".

The Law Reform Commission has examined the law concerning the domicile of married women and has prepared a preliminary draft Working Paper on the subject. The Commission pointed out that consideration of the subject raised some fundamental matters concerned with the question as to whether the concept of domicile should be retained at all or replaced by the concept of habitual residence. "I believe that work is in progress on the subject of habitual residence and a first draft of a scheme for a Conflict of Laws (Habitual Residence) Bill has been prepared. I mention this in some detail here today in order to show that despite the general agreement that the law of domicile should be changed, and despite the goodwill and efforts of all concerned in trying to change the law, as a legislator I must be as sure as is humanly possible that whatever change is proposed will stand up to scrutiny".

### Continued discussion needed

The Minister of State commented on the importance of a continuing reasoned public discussion on all aspects of family law. "People have to be aware of the problems before they will contemplate change. They may respond to arguments for change, if the arguments are put forward fairly in a clear and logical manner and are seen to be for the common good. I have met many organisations over the last few months whose primary aim could be loosely described as the betterment of women in our society. Without exception, I have been impressed by their dedication and sincerity and by the honest and forthright way they put forward their views. You can feel assured that all views are being given serious consideration. You should not be disheartened or feel the meetings have in some way been a failure if you do not see your proposals in legislation within a short period. It is important that legislation be good rather than quick and not end up being challenged in the courts for constitutional or other reasons".

### Family Law Proposals Lacking in realism

During the session on "Marriage Break-up" at the Law Society's symposium on "The Family and the Law" the limited powers of the Courts in questions relating to matrimonial property were discussed by Alan Shatter, Solicitor, who also sharply criticised current proposals on the reformation of family law.

He said that as a general rule the Courts have no power to transfer property owned by a husband to a wife even if they believe that it is in the interests of the welfare of the family that such a property transfer order be made. If property is held by a husband in his sole name for the Courts to hold that a wife has a proprietory interest in the property she must be shown to have made some financial contribution towards its acquisition. Work done by a wife in the family home as housewife and mother does not in law confer on a wife any proprietory interest in the family home or entitle the Courts to transfer the property into her sole name. The Commission on the Status of Women in 1972 recommended that matrimonial property laws be examined and that the possibility of introducing a system of community of property in marriage be investigated but no progress has been made.

### New social policy

Until a family law ideology and a coherent social policy relating to the family marriage has been developed, many of the badly-needed reforms will not be introduced, he told the audience and continued by remarking that

At the Seminar were Ms. Mary O'Sullivan, Solicitor and Mr. Pierce Rayel, Chief Executive of the Legal Aid Board.

Attending the Seminar were Mr. Sean Doherty, T.D., Minister of State, District Justice Agnes Cassidy, Chairman of the Adoption Board and Mr. Laurence Branigan, Solicitor.

A VIEW OF THE AUDIENCE ATTENDING THE SEMINAR

whilst recognising that the family based on marriage is of prime importance to society, any such policy must also take into account the limitations of the law and the social realities of Irish family life. Marriage is a personal relationship between two people subject to all the stresses and strains that fluctuations of physical and mental health as well as social pressures bring to it. Programmes should be created to reflect the value of marriage in practical terms. Those entering marriage, should, through education, be fully prepared for the relationship into which they are entering. Family counsellors should be available to assist spouses overcome marital difficulties. "It must also be recognised that irrespective of the state of the law or the conditions prevalent in society marriages will always break down. When that breakdown is irretrievable the object of the law should be to mitigate the harmful consequences and to assist the parties to re-organise their lives with the minimum of distress, bitterness and recrimination".

**Supports for marriage**

To date, the State has failed to provide the required type of supports for marriage. There are no State-sponsored family counselling services that are solely concerned with marriage and education for marriage. Nearly all of the work in this area has been left to voluntary agencies who receive little, if any, State support. The Court system itself is designed in a way to exacerbate rather than alleviate family conflict, and recently-proposed legislation seeks to further perpetuate this situation.

"The States policy of 'support', for marriage is a negative one. It is summed up in one sentence: the prohibitior on divorce contained in the Constitution. It is time that legislators stopped sheltering behind this Article in the Constitution and using it prove that in Ireland we protect and support the family based on marriage. The reality is that many thousands of marriages are breaking down, and the State's approach is to stand back and do nothing".

"The State's failure to recognise the reality of broken marriages is creating a further social problem of major dimensions. There are many couples residing in this country who have re-married after obtaining a Church decree of annullment or a foreign decree of divorce not recognised by Irish law. These second marriages are not only invalid but also criminally bigamous, but a blind eye is turned by the State. We thus have the spectacle of a country which professes interest in protecting marriage and safeguarding marriage as an institution, encouraging members of its populace to enter into bigamous unions".

Commenting on the Government's proposals for reforming family law, Mr. Shatter said that the first proposal is to abolish the High Courts jurisdiction in custody cases and to transfer it to the District Court, and Circuit Court, and also to abolish the High Court's jurisdiction to hear proceedings for judicial separation and to transfer it to the Circuit Court. This will not result in any substantial change in the law or in any way improve the remedies available to spouses upon a marriage breaking down. A matter of particular concern is that the High Court has had in recent years considerable experience in dealing with custody cases and a comprehensive case law has been built up. The District Court and Circuit Court have had no such experience and difficulties will be encountered in practice if the High Court jurisdiction is abolished. If family cases are still to be dealt with within the existing Court structure the urgent need is to provide qualified and specialist social workers and psychiatric personnel to assist Courts dealing with marital and custody cases. Ultimately what is required is a unified system of family Courts throughout the country.

**Criminal Conversation**

The second proposal for law reform made by the Government relates to "criminal conversation, enticement, and harbouring". The Commission has recommended that these actions be replaced by what it refers to as "an action for damages for adultery". Under the Commission's recommendation if a spouse commits adultery the person with whom the adultery was committed could be sued for damages by the other spouse. The Law Reform Commission in arguing in favour of such an action suggest that it would "provide a buttress for stable marital relationships" and that it would deter persons from intruding into other peoples marriages.

"The arguments against the action proposed by the Commission are, I believe, overwhelming. The Commission fails to take into account the fact that the State cannot by legislation compel spouses to be compatible and make marriages viable. Marriage is a relationship that can only function properly with the co-operation of both parties. When that co-operation breaks down, that relationship cannot be helped, but can only be demeaned by such proceedings.

Such actions are not appropriate as they are only concerned with the symptoms and not the causes of marital breakdown. Upon a marriage running into difficulties the issuing of proceedings for adultery could militate against a reconciliation between spouses, and in fact drive a further wedge between them.

"It is difficult to understand the Commissions reasoning. Why, for example, should the action for damages be confined to adultery? In order to establish adultery in law a Plaintiff must prove that his or her spouse has engaged in voluntary sexual intercourse with a third party. Sexual intimacy falling short of adultery between a spouse and a third person can provide just as great a "threat" within the Commissions reasoning to a marriage, as can other extra marital sexual relationships, for example, a homosexual or a lesbian relationship".

"Rather than providing a means to assist spouses come to terms with their marital difficulties, the proposed action would provide a means whereby one spouse could black-mail the other into returning to the family home without the parties first resolving their marital problems. This could place in jeopardy the welfare of children living with parents who are continuously at war with each other".

**No "realistic recommendations"**

In his summing-up Mr. Shatter said that "the establishment of the Law Reform Commission in 1976 was hailed as an event that would be of considerable benefit to the

country and result in the swift reform of many outdated laws. The reality is that the impact of the Law Reform Commission in the area of Family Law has been minimal. The tragedy is that its recommendations in relation to the establishment of "an action for adultery" suggest that the Commission lacks any real understanding of intra-family relationships and that it is not capable of producing realistic recommendations for reforming those areas of family law that relate to marital breakdown".

# PRACTICE NOTES: Joint Committee of Building Societies/Law Society

**Architects Certificates**

The Law Society's recommended form of Architects Certificate was a suggested minimum form of certificate and required to be adapted to the exact circumstances of the case.

In particular if a certificate is furnished relating to houses in a large development the standard form is not adequate. Some Builders solicitors argue that it is sufficient to certify that the house has been constructed in accordance with the provisions of the planning permission. The Committee disagree. It may be implicit in such a certificate that all general conditions have been complied with but something as important as this should not be left to implication. In the Committee's view an Architects Certificate for a house in a building estate should at the very minimum contain a paragraph on the lines of the following:

> "I also certify that the general conditions of the planning permission relating to the estate of which this house forms part (including all conditions precedent) have been complied with in all material respects in so far as it is reasonably possible at this stage of the development".

This recommendation arose out of the celebrated case in suburbs of Dublin where the necessary drainage arrangements had never been agreed. Purchasers solicitors were being offered a certificate of an Architect saying that the house had been built in accordance with the plans and specification and ignoring the fact that one of the main general conditions as to drainage had not been complied with.

The qualification of a person to give a Certificate of Compliance with planning permission raises many vexed questions. There is no system or registration of Architects in Ireland so that a person with very inadequate training and experience can legitimately call himself an Architect. There are very great difficulties in many parts of the country where properly qualified Engineers or Architects are simply not available. Solicitors in these areas quite sensibly use their discretion and accept certificates from persons who have many years of experience and practice on their own account as "Architects" although they may not have any strict educational qualifications or be members of the various institutes whose members would automatically be considered qualified to issue such certificates. A member complained to the Committee that certain building companies in the Dublin area had been taking advantage of this lacuna by giving Purchasers solicitors Certificates of Compliance signed by technicians who are not adequately qualified. In the cases he reported the building company in question had on their staff properly qualified persons but he suggests it suited them to pass the responsibility to someone else if they could. The member went on to point out that very few such technicians would have the financial standing to back up a certificate if a loss arose.

The Committee recognised that a person may be well justified in calling himself an Architect on the bases of experience alone but take the view that such experience must be lengthy and in most cases be gained while self employed in the field of Architecture. The Committee recommend that sympathetic consideration be given to the acceptance of certificates from persons operating in those parts of the country where there is a shortage of qualified personnel. They feel however, that such sympathetic consideration is not appropriate in cases of building estates. They recommend that in such cases Certificates of Compliance should only be accepted from persons who are properly qualified as Engineers or Architects or have many years practical experience as such on their own account.

**Identification**

A member queried the correct procedure in the following circumstances. If the title of the property is registered on a leasehold or freehold folio and the original lease or a duplicate or attested copy transfer is furnished by the Vendor and contains a map satisfactorily identifying the premises is it reasonable to require the Vendor to furnish a copy Land Registry map in addition?

The Committee take the view that if it is clear that the folio comprising the property for sale is the entire property contained in the Lease or Transfer there is no need to require further evidence of identification.

# OBSERVATIONS ON THE VOLUNTARINESS TEST IN IRISH LAW

by Paul O'Connor, B.C.L., LL.M., (N.U.I.), LL.M. (Penn),
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## 1. Introduction

The basic principle to have emerged at common law which determines when the inculpatory statements of an accused are admissible in evidence is that such statements be voluntarily obtained. This principle is embodied in the classic statement of Lord Summer in *Ibrahim* v. *The King*.[1]

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority".

Before elaborating on the meaning of this prinicple in the context of Irish law the implications attaching to particular and distinct conceptions of the criterion of voluntariness will be briefly examined.

One approach to the issue of voluntariness stresses that inculpatory statements should not be obtained as the result of oppression or by any threats or inducements held out by persons in authority.[2] According to this approach voluntariness depends primarily on the presence or absence of any of these factors. In the absence of these disqualifying factors a confession will be regarded as prima facie voluntary. On the other hand there is an approach which concentrates exclusively on whether a confession was freely and voluntarily given. The "great mistake", according to Lefroy C. J., has been to focus the inquiry solely on whether there were any threats or inducements.[3] The Chief Justice observed with respect to a confession that it may ". . . be made under such circumstances showing that it was not made under the influence of any threat or inducement, and yet may not have been made freely and voluntarily".[4] For example, an accused may confess his guilt without having been cautioned by the police that he need not say anything. In such a situation there may not have been any inducements. Yet, according to Lefroy C. J., failure to issue a caution has the effect of rendering the confession one which was not freely and voluntarily made.[5] A useful comparison may be made between the voluntariness test and an alternative test espoused by Dean Wigmore which is based on the concept of trustworthiness. Here, the underlying reason behind rejecting certain confessions in evidence is based on the recognition that under certain conditions people tend to falsely state that they are guilty of acts of which they are in fact innocent.[6] Among the most potent factors recognized by Wigmore in inducing persons to falsely admit guilt are threats and promises. Thus, according to this criterion, testimonial untrustworthiness, and not a principle of voluntariness unrelated to the existence of threats and promises, constitutes the basis for exclusion.

The distinction drawn above between the two species of voluntariness test and the trustworthiness test is of practical importance. However a fuller appreciation of the practical implications of these distinctions will emerge when the efficacy of the judically settled view of the voluntariness test is considered in the context of the values it purports to safeguard. It will suffice to say at this stage that a 'pure' voluntariness test[7] is more favourable to the position of the accused than either a voluntarififfiness test which is activated only by the existence of specific factors like threats or inducements and a trustworthiness test which presumably is not in any way violated by the admission in evidence of involuntarily obtained confessions as long as they are deemed not to have been in any way untrustworthy.

## 2. Meaning of the Voluntariness Test in Irish Law

In discussing the prevailing judicial attitude in Ireland to the reception of confessions in evidence one should bear in mind the observation of Mr. Justice Kenny that the "admission in evidence of incriminatory statements has been the subject of numerous judgments and rulings which are not easy to reconcile".[8] However, the following judicial statements do support a coherent view of the voluntariness test. O'Higgins, C. J. in *People (D.P.P.)* v. *Madden*[9] clarified his position on the requirement that the statements of an accused must be voluntary by saying that they must not be made "as a result of any inducement or promise of advantage".[10] Earlier, O'Byrne J. observed in *People (A.G.)* v. *Murphy*[11] that a statement must be voluntary "in the sense that it has not been obtained . . . by fear of prejudice or hope of advantage exercised or held out by a person in authority".[12] At the highest judicial level Walsh J. remarked with respect to the role of the trial judge in admitting the statement of an accused that "if he is satisfied that it was not voluntary then his decision can only be to exclude it".[13]

A judge, in determining whether to admit the statements of an accused in evidence, confronts two essentially different issues. Mr. Justice Kenny in *People (A.G.)* v. *Galvin*[14] stated that the first issue concerned the standard inquiry into determining if a statement is voluntary "in the sense that it has not been obtained from an accused person either by fear of prejudice or hope of

advantage exercised or held out by a person in authority".[15] The second issue involves a judge deciding whether to exercise his judicial discretion, after the above inquiry has been made, to refuse to admit the statement in evidence because it "was obtained under circumstances of such pressure that it ceased to be one freely made".[16] This approach, while recognizing a residual discretion on the part of the trial judge to admit or reject statements in evidence, is still primarily concerned with defining voluntariness in the context of whether there are any threats or inducements. Indeed, much of the case law on the subject reflects this orientation.[17] One would have thought that a statement, which was obtained under circumstances of such pressure that it ceased to be one freely made, was not voluntary. This apparent contradiction can be explained on the basis that a distinction can be drawn between statements which are voluntary and statements which are volunteered. According to Kennedy C. J. it is not necessary in order for a statement to be voluntary that it be volunteered.[18] Thus, a statement obtained from an accused must be voluntary in the sense described by Lord Sumner in *Ibrahin* v. *The King*.[19] Judicial discretion to exclude statements in evidence is permissible only when they have been held to be voluntary beyond all reasonable doubt.[20] The kind of circumstances which a judge can take into account in the exercise of his judicial discretion were referred to by Kennedy C. J. in *A.G. v McCabe*:[21] "He will differentiate between statements led to by questions put to a person not in custody for the purpose of the investigation of crime and the tracing and arrest of the party and confessions resulting from questions put to a person in custody not so much to clear up doubtful matters in a narrative by him as to trap him or put pressure on him".[22]

In *The Queen* v. *Johnston*[23] the Irish Court of Criminal Appeal considered the question of the interrogation of suspects by members of the police force. A number of the dissenting judgments reflect a particularly hostile attitude towards the practice of interrogation.[24] These opinions supported the view that answers given to questions which were put to a prisoner during interrogation were not voluntary. This view was rejected by Mr. Justice Kenny in *Galvin*. Thus, the conception of voluntariness embodied in the judgment of Lefroy C. J.[25] does not, it is submitted, represent the law. Nonetheless the position in this jurisdiction with respect to admitting the inculpatory statements of an accused in evidence represents a clear commitment to a principle of voluntariness. A consequence which can be attributed to the rejection of the concept of voluntariness as understood by Lefroy C. J. is that judicial scrutiny has dwelt predominantly upon specific issues like the presence or absence of inducements. A narrowing of the judicial inquiry has taken place which, it can be argued, has resulted in a limitation upon the consideration of the psychological dimension of an accused's detention in custody.

### 3. Values which are protected by the Voluntariness Test

In identifying the values which the voluntariness test may be said to protect it is helpful to bear in mind that this requirement of our law is just one of the many demands emanating from the adversarial and accusatorial nature of the criminal justice system. The consistent refusal by the courts to rely on involuntarily obtained statements springs from the judicially perceived danger that such statements are inherently untrustworthy and that innocent individuals should not be wrongly convicted by unreliable evidence.[26] In this respect judicial insistence upon the voluntary nature of an accused's statements may be seen to comply with the constitutionally prescribed mandate of a fair trial.[27] The voluntariness requirement clearly operates as an exclusionary mechanism which strengthens the values underlying the accusatorial and adversarial nature of the Irish system of criminal justice.

The words of Hawkins that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction"[28] seems to focus on the idea of the presevation of the individual's sense of reflective autonomy. The preservation of such autonomy requires that the individual *qua* individual must be accorded a certain level of respect by the executive. This is because the individual as a rational and moral being is capable of acting freely and responsibly. These human attributes invest the invididual with a dignity which arguably can compel the provision of procedures so that a truly free and rational choice can be made in the exercise of the right to remain silent. The kind of procedures which would facilitate choosing between speaking and remaining silent, on the part of the individual suspect, are those calculated to supply him with sufficient information so that whatever the eventual choice it will at least be an intelligent and informed one.

There has been no judicial discussion in this jurisdiction which treats the notion of informed choice related to the dignity of the individual. Irish judges in excluding involuntarily obtained confessions have, it would seem, been concerned with preserving the integrity and fairness of the trial process. The judicial gaze has been fixed firmly on the trial and hardly at all on the suspect defined as an ethical entity who deserves, solely by virtue of his inherent dignity, safeguards guaranteeing the conditions necessary to make an informed choice on whether to submit to interrogation or to remain silent.

The voluntariness requirement is also resorted to by the courts for a more indirect purpose, namely, the disciplining of the police for using improper methods in obtaining confessions from suspected persons.[29] In so doing expression is given to a deep-rooted feeling that the police must obey the law while enforcing it. What is recognized here is the danger to life and liberty which results from illegal methods used to secure convictions.

### 4. Some Criticisms of the Voluntariness Test

Voluntariness as defined in the context of the law relating to confessions is a term of art. A statement, according to Kennedy C. J., may be voluntary "though not necessarily volunteered".[30] The legal conception of what constitutes a voluntary statement may thus be viewed as implying the use by officials of a certain permissible level of compulsion. It may be argued that all statements, even though made in stressful situations, are voluntary in the sense that an individual elects between possible alternatives. However, if the question is whether a statement would have been made in the absence of

official inquiry then few statements would ever be voluntary. The greatest weakness of the voluntariness test lies in the unwieldly role which it must fulfill — that of exploring a phenomenon as elusive as the level of psychological coercion to which a suspect has been subjected. Such an inquiry is incapable of yielding consistent results. Whether a confession was in fact involuntarily obtained will depend on the particular judge's assessment of the amount of psychological pressure present. In any given case dealing with this matter too much room is provided for judicial disagreement.

The judicial understanding of voluntariness which has evolved in this jurisdiction must be considered in the light of the legally sanctioned practice of interrogation. In so doing one can ask whether this practice of interrogation, controlled by the prevailing conception of voluntariness and the Judges' Rules, provide an optimal level of protection and respect for the suspect. In *The Queen* v. *Johnston* Pigot C. B., dissenting, refered to the subtly coercive nature of interrogation.[31] In *Galvin* Justice Kenny rejected the dissenting view of Pigot C. B. which held that interrogation was impermissible. Thus, interrogation is regarded today as a quite routine and indispensible means of gathering information for the prosecution of crime. The acceptance of interrogation as a legally permissible activity carried out under executive powers is based on a recognition of the social necessity and public interest in detecting crime. The limitations imposed on the use of interrogation on the other hand reflect a commitment to securing the voluntary co-operation of the suspect in custody. While the major function of interrogation is to gain information about the commission of crime a suspect is, at present, given the opportunity to choose between answering questions put to him or remaining silent.[32] If the right to silence is waived then a suspect can be comprehensively questioned as to his knowledge about, and involvement in, the commission of the particular crime under investigation. An opportunity is also given in this scheme of things to a suspect so that he may exculpate himself and so dispel any suspicion of criminal involvement.

Despite the existence of the voluntariness test and the Judges' Rules there is still present in the custodial setting a psychologically intimidating dimension. The suspect who is detained in custody is removed from the world he knows. There is generally no independent party present to record what occurs during interrogation nor any person who can be appealed to to control the examination within reasonable bounds.[33] Since the system of interrogation represents an intrusive practice created by the executive a special obligation rests on the executive to ensure as far as possible that the statements taken from a suspect are freely and voluntarily obtained. The accusatorial and adversarial nature of our criminal justice system impose limits on the practice of interrogation because it demands that the issue of guilt be determined in a court of law and not in the police station.

## 5. Conclusion

The values which have been identified as the subject of protection under the voluntariness test are of sufficient importance to warrant a very high level of protection. The voluntariness test, as expounded in this jurisdiction, is limited to the extent it focuses on the presence or absence of such factors as threats, promises, inducements or oppression. When it comes to applying the voluntariness test practical difficulties are encountered. The major difficulty relates to the task of assessing the element of psychological coercion to which an accused has been subjected.[34] In addition, due to the lack of any requirement that what takes place during interrogation be objectively recorded, there is a gap in the courts' knowledge. This shortcoming is of considerable importance when one considers the situation of the accused who denies that his confession was voluntarily obtained in the face of police denials to the contrary. Whom does the court believe?

It is not proposed to offer here any specific solution to the problems mentioned. A solution though would seem to rest on the provision of more information. The accused should be given the information necessary to make an informed choice. He should be able to freely and intelligently choose between waiver and silence. In this way an accused will be able to fully avail of his trial rights. Any proposed curtailment in the present regime of protection should be sensitive to the values which are involved — values which lie at the heart of our criminal justice system and which form the basis of our conception of the accused as a moral agent entitled to be presumed innocent until proven guilty.

**FOOTNOTES**

1. [1914] A.C. 599 at p. 609 Lord Summer's statement of the law was approved in *People (A.G.)* v. *McCabe* [1927] I.R. 129.
2. *Callis* v. *Gunn* [1963] 3 All E.R. 677 at p. 680.
3. *Queen* v. *Johnston* [1865] 15 IR. C.L.R. 60 at p. 130.
4. Ibid. at p. 130.
5. *Queen* v. *Johnston* [1865] 15 IR C.L.R. 60 at pp 133-5.
6. John Henry Wigmore. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law, 2nd Ed.*, section 822, pp 139-142.
7. i.e. a test which seeks to determine whether the accused's confession was *freely* and *voluntarily* given (per Lefroy C. J. in Johnston).
8. *People (A.G.)* v. *Galvin* [1964] I.R. 325 at p. 330.
9. [1977] I.R. 336.
10. Ibid. at p. 354. The Chief Justice also accepted the proposition that confessions may be rendered involuntary as a result of oppressive questioning.
11. [1947] I.R. 236.
12. Ibid. at p. 240.
13. *People (A.G.)* v. *Cummins* [1972] I.R. 312 at p. 322.
14. [1964] I.R. 325.
15. Ibid. at p. 330.
16. Ibid at p. 330.
17. See, for example, *People (A.G.)* v. *Ainscough* [1960] I.R. 136, *People (A.G.)* v. *Flynn* [1963] I.R. 255.
18. *People (A.G.)* v. *McCabe* [1927] I.R. 129 at p. 134.
19. [1914] A.C. 599 at p. 609.
20. In *People (D.P.P.)* v. *Shaw*, unreported, May 1979, Court of Criminal Appeal, the beyond a reasonable doubt standard was used to determine whether statements and admissions of an accused were voluntary (see p.
21. *People (A.G.)* v. *McCabe* [1927] I.R. 129.
22. Ibid. pp. 134-135. Accepted by Kenny J. in *People (A.G.)* v. *Galvin* [1964] I.R. 325 at p. 333.
23. (1865) 15 IR C.L.R. 60.
24. See Pigot, C. B., Lefroy, C. J., O'Brien J. O'Brien J. in referring to answers given by a prisoner detained in custody to questions put to him by the police observed: "The very fact of these questions being put by such a person, unaccompanied by any such caution, conveys to the prisoner's mind the idea of some obligation on

his part to answer them, and deprives the statement of that voluntary character which is essential to its admissibility". Ibid., p. 90. The reason behind this judicial hostility to police interrogation may be partially explained on the basis that at one time the questioning of accused persons was carried out by magistrates.

25. See Note 3.

26. *Commissioners of Custom and Excise* v. *Harz* [1967] 1 A.C. 760 at p. 820.

27. Recent Irish decisions reflect an uncompromising attitude on the part of judges in their insistence that the trial of an accused be conducted in accordance with the constitutionally prescribed mandate of justice. In fulfilment of this constitutional directive the accused has been invested with an impressive array of constitutional rights. In *The State (Healy)* v. *Donoghue* [1976] I.R. 325 the concept of justice inhering in the Constitution implied the existence of the following rights: that the accused has a natural right to be informed of the nature and substance of the accusation, to have the matter tried by an impartial and independent court, to hear and test by examination the evidence by or on behalf of the accused and to be allowed to give or call evidence in his defence, to be heard in argument or submission before judgment is given. (per Gannon, J. at pp. 335-336).

28. 2 Hawkins P. C. at 604, 2nd Ed. Cited in *People (A.G.) v. Galvin* [1964] I.R. 325 and mentioned with approval by Lefroy, C. J. in *Queen* v. *Johnston* (1865) 15 IR. C. L. R. 60. This line of thought behind the rejection of confessions is recognized by Lord Reid in *Commissioner of Customs and Excise* v. *Harz* [1967] 1 A. C. 760 in the form of the maxim *memo tenetur seipsum prodere* (at p. 820).

29. *See* 11th Report, Criminal Law Revision Committee on *Evidence*, Cmnd. 4991, p. 35. This reason for exclusion is referred to in the Report on the "disciplinary principle". This principle was referred to by Browne, L. J. in *D.P.P.* v. *Ping Lin* [1976]. A.C. 574 at p. 584.

30. *People (A.G.)* v. *McCabe* [1927] I.R. 129 at p. 134.

31. Pigot C. B. pointed to the dangers attending the practice of interrogation. The danger to be guarded against is that statements may be made which are not consistent with truth in order to escape from the pressure of the moment. Referring to the interrogation of a prisoner detained in custody Pigot C. B. observed: "A prisoner so circumstanced may not hear, in terms, one word of hope held out or of mischief threatened, and yet he may and in many cases must, be actuated by hope that his answers will lead to his liberation, or fear that his answers may cause his detention in custody. He is placed in immediate contact with one who for the time is his gaoler, for the most part with no third person present to witness what passes, and almost always without the presence of any person to whom he can appeal for protection, or who may control the examination within fair or reasonable bounds. Manner may menace and cause fear as much as words. Manner may insinuate hope as well as verbal assurances. The very act of questioning is in itself an indication that the questioner will or may liberate the answerer if the answers are satisfactory, or detain him if they are not". (ibid. at p. 122).

32. Rule 3 of the Judges' Rules requires that persons in custody should not be questioned without a caution being administered.

33. *The Report of the Committee to recommend certain safeguards for persons in custody and for members of a Garda Siochana* (the O'Briain Report) 1978 recommended certain safeguards with respect to the detention and interrogation of suspects e.g. that arrested persons brought into custody for questioning be assigned a "custodial guardian", that interrogation take place in a non-intimidatory environment, and that a reasonable time should be allowed elapses for the attendance of a solicitor. See pp. 15-18.

34. In *Culombe* v. *Connecticut* 6 L. Ed. 2d 1037, Justice Frankfurter observed that "The notion of voluntariness is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes". (at p. 1059).

## LAW SOCIETY CRICKETERS DEFEATED BY AUSTRALIANS

On the occasion of their first visit to Ireland the Australian Lawyer-Cricketers XI played a Law Society XI at Castle Avenue, Dublin, on Tuesday, the 2nd of September. The Australian Club were on their fourth overseas tour having previously played in the West Indies, Hong Kong, The United States and England.

The Law Society was able to turn out a reasonably strong side of Dublin League cricketers captained by David Pigot who has been capped for Ireland on a number of occasions.

In spite of having the services of Gerry Kirwan of Clontarf who was the leader in the Senior League bowling averages in Dublin in 1980, the Law Society team's attack proved inadequate to contain the Australians, who amassed a total of 181 for 7 wickets in their allotted 45 overs.

The Law Society's innings got off to a promising start and largely due to the contributions of the Phoenix pair David Pigot and David Ensor seemed to be going nicely when they reached 120 for the loss of 4 wickets. Unfortunately the middle order batting failed and in spite of resistance from the tailenders the innings ended 25 runs short of the target.

The visiting party were entertained at a reception at Blackhall Place later in the evening.

### Law Society XI v. Australian Lawyers XI
### Played at Castle Avenue, Dublin
### on 2nd September, 1980

#### AUSTRALIAN XI

| | | |
|---|---|---|
| M. DAVID | b. HANBY | 15 |
| T. EVANS | ct SOWMAN b. TIGHE | 64 |
| P. FRASER | b. KIRWAN | 35 |
| R. SMITH | Run Out | 37 |
| S. O LOUGHLIN | ct PIGOT b. TIGHE | 7 |
| C. CONNOR | Not Out | 15 |
| M. HOGAN | b. KIRWAN | 2 |
| S. WAITES | b. KIRWAN | 0 |
| T. LAMBERT | Not Out | 1 |
| | EXTRAS | 5 |
| | TOTAL (Innings Closed—45 overs) | 181 for 7 wkts. |

Did Not Bat—A. Zachariah, R. McCaffrie

| Bowling | 0 | M | R | W |
|---|---|---|---|---|
| H. TIGHE | 13 | 0 | 55 | 2 |
| P. HANBY | 6 | 0 | 27 | 1 |
| G. KIRWAN | 16 | 4 | 41 | 3 |
| B. COLLINS | 9 | 0 | 43 | 0 |
| D. R. PIGOT | 1 | 0 | 10 | 0 |

#### LAW SOCIETY XI

| | | |
|---|---|---|
| D. R. PIGOT | ct FRASER b. CONNOR | 45 |
| D. JACOBSON | ct WAITES b. HOGAN | 2 |
| A. R. DEMPSEY | LBW DAVID | 10 |
| D. MARTIN | St. EVANS b. ZACHARIAH | 0 |
| D. ENSOR | ct SMITH b. ZACHARIAH | 48 |
| C. LYSAGHT | Run Out | 7 |
| P. HANBY | ct HOGAN b. ZACHARIAH | 1 |
| B. COLLINS | b. ZACHARIAH | 0 |
| H. TIGHE | St. EVANS b. O LOUGHLIN | 13 |
| F. SOWMAN | b. McCAFFRIE | 10 |
| G. KIRWAN | Not Out | 6 |
| | EXTRAS | 14 |
| | TOTAL | 156 |

| Bowling | 0 | M | R | W |
|---|---|---|---|---|
| M. HOGAN | 7 | 2 | 13 | 1 |
| S. O LOUGHLIN | 63 | 0 | 21 | 1 |
| M. DAVID | 3 | 0 | 12 | 1 |
| C. CONNOR | 7 | 1 | 28 | 1 |
| A. ZACHARIAH | 12 | 0 | 43 | 4 |
| R. McCAFFRIE | 8 | 0 | 25 | 1 |

# COMPANY LAW NOTES

## Fourth Council Directive on the Annual Accounts of Certain Types of Companies (78/660/EEC)*

### Background

The Fourth Directive, which deals with the content, layout, audit and publication of the accounts of public and private companies, was adopted by the Council of Ministers of the EEC on 25 July, 1978. The implementing legislation must be enacted by the Member States before 15 August 1980 and it must enter into force within a further eighteen months at the latest, i.e. by 15 February 1982. At present it seems unlikely that the Irish legislation will be published much before the end of 1980, but it should be possible for it to be enacted by the ultimate target date of 15 February 1982.

The main purpose of the Directive is to require the publication in standard form of certain financial information relating to companies established in different Member States, thus making such information available in a comprehensible form throughout the EEC. However, as many of its provisions are optional, the exact form in which the Directive is likely to be implemented in Ireland will not be known until the draft legislation is published.

### Scope

In Ireland, the Directive will apply to public and private companies limited by shares or by guarantee and its most noticeable effect here will probably be the requirement that private companies should publish their Annual Accounts. The Directive does not apply to non-profit-making organisations and Member States need not apply its provisions to banks, other financial institutions and insurance companies (as it is intended to introduce special directives dealing with their accounts at some later date). Member States are also allowed to require less detailed disclosure of small and medium sized companies, but no company can be entirely exempted merely on grounds of size.

The Directive applies only to accounts of individual companies and does not require consolidated accounts since these are to be governed by the draft Seventh EEC Directive on Company Law. Pending its adoption, Member States may apply certain provisions of the Fourth Directive to "affiliated undertakings".

The Directive lays down minimum standards; Member States may therefore impose exacting requirements in their national legislation should they wish to do so.

### Content

The "Annual Accounts" referred to in the Directive consist of the Balance Sheet, the Profit and Loss Account and the Notes on the accounts. The over-riding requirement is for the Annual Accounts to give a "true and fair view" of the company's assets, liabilities, financial position and profit or loss, even if this involves some departure from the provisions of the Directive. This basic principle of Irish accountancy practice, which is already given the force of law by Section 149 of the Companies Act, 1963, will therefore continue to operate after the implementation of the Directive.

The Directive contains numerous provisions relating to the contents of the Balance Sheet and Profit and Loss Account as well as detailed definitions of many items to be included in those accounts. These requirements will not result in any major alteration of present Irish accountancy practice, apart from the fact that such matters will now be governed by law rather than by the accountancy bodies' decisions as to what is necessary in order to present a "true and fair view" of a company's financial position.

The Directive also lays down strict rules relating to valuation: the basic approach is that of historical cost accounting, with specific provisions requiring the company to be valued consistingly from year to year as a going concern, such valuations to be carried out on a prudent basis but taking accruals into account. Only profits made at the Balance Sheet date may be included, but account must be taken of all income and charges relating to the financial year irrespective of the date of receipt or payment; all forseeable liabilities and potential losses must be taken into account and depreciation must always be provided for. Member States may, however, authorise or require the use of inflation accounting, provided historical cost figures are also given for Balance Sheet items such as fixed assets.

The Directive contains extensive requirements relating to the contents of the Notes on the accounts. For example, these must show details of companies in which at least 20% of the share capital is held, details of movements in the company's own share capital, long term liabilities (i.e. those becoming due after more than five years), financial commitments not included in the Balance Sheets, turnover analysed by activity and geographical market, employees analysed by category and directors' emoluments and loans.

The company's Annual Report must include a review of the company's business during the financial year and a statement of important events since the year-end as well as an indication of the company's likely future development, its research and development activities and information about acquisitions of its shares.

### Layout

One of the move obvious effects of the Directive will be seen in the new layout of the Balance Sheet and Profit and Loss Account, which will have to be presented in strict accordance with one of the formats prescribed in the Directive.

There is a choice of vertical or horizontal layout for both the Balance Sheet and the Profit and Loss Account and, in addition, there are two possible forms of Profit and Loss Account. Member States have the option of allowing companies a choice between the layouts permitted by the Directive or, alternatively, of requiring the adoption of only one of them.

### Audit

The Directive lays down as a general rule that all

* (O. J. L221 of 14.8.78).

companies must have their Annual Accounts audited by persons authorized by national law to audit accounts, but it does grant an option to Member States to exempt small companies (as defined below) from this obligation).

**Publication**

Generally, the Fourth Directive requires all companies to publish their Annual Accounts and the Auditor's Report in accordance with the publication requirements of the First Council Directive of 9 March 1968 (68/151/EEC,[1] However, Member States are allowed exempt "small" and "medium-sized" companies from some of these publication requirements.

A small company[2] may be authorised to publish only an abridged Balance Sheet and abridged Notes to the accounts, being exempted entirely from the obligation to publish a Profit and Loss Account and Annual Report. A medium-sized company[3] may be allowed publish an, abridged Balance Sheet, abridged Profit and Loss Account and abridged Notes to the accounts.

Pending the adoption of the draft Seventh Directive on consolidated accounts, Member States may exempt subsidiaries from the provisions of the Fourth Directive provided certain conditions are fulfilled: these include, in particular, that the subsidiaries' debts are publicly guaranteed by the parent and that its accounts are consolidated by the parent. In addition, parent companies may be exempted from publishing a separate Profit and Loss Account if they produce consolidated accounts conforming as far as possible with the provisions of the Fourth Directive.

**Further Reading**

"Handbook on the EEC Fourth Directive": The Institute of Chartered Accounts in Ireland.

"The Fourth Directive": Whinney Murray Ernst & Ernst (Kluwer Publishing, London).

1. OJ. L65 of 14.3.68.

2. A Company which does not exceed any two of the following critieria:
(i) Balance Sheet total: 1,000,000 European Units of Account (i.e. about IR£670,000).
(ii) Net turnover: 2,000,000 EUA (i.e.: about IR£1,340,000).
(iii) Average number of employees: 50.

3. A company which does not exceed any two of the following criteria: critieria:

(i) Balance Sheet total: 4,000,000 EUA (i.e.: about IR£2,680,000).
(ii) Net turnover: 8,000,000 EUA (i.e.: about IR£5,360,000).
(iii) Average Number of Employees: 250.

# The Benefit of the Doubt

by Fr Eddie Brady, W.F., Longford*

Before I became a priest I was Town Clerk of Cavan. The part of the job I liked best was attending the district court – as a witness, of course. We had prosecutions; rent defaulters; disputes over sewers; wasting of water and breaches of byelaws.

I used to love listening to Justice Lavery. He was an old man – but his brain was young and active – he could spot a legal point or loophole like a hawk.

What impressed me most about him was his fairness. Thirty years have passed since I saw him, but in my mind's eye I can still see him and hear him say, "There is a doubt in this case; I will therefore give the accused the benefit of that doubt".

I thought again of him here in Africa. It was rather peculiar. We were having a Baptism course for adult pagans, boys and girls about eighteen years of age. Everything was ready; the Baptism would be next morning; they were decorating the bush Church; all were full of joy and enthusiasm.

At dusk, I went to my hut to make myself a cup of tea. Then some neighbours came to see me. I invited them in and they sat on the mud floor. After some palaver they told me their complaint, which it upset me to hear.

The complaint concerned Sylvia – one of the girls who was to be baptised next morning who, they said, secretly intended to marry a pagan boy. If this were true, she should not be baptised until the usual undertakings were given, but this would have to be investigated and approved by the Village Church Council. It would take days. I was distressed.

I called Sylvia from the Church, where she was fixing flowers on the Altar. She came to my hut. We told her the rumour. She was very upset, and strongly denied it. She began to cry. I don't know whether it was her tears or the remembrance of that old judge back home that won the day for Sylvia, but I gave my verdict – I gave her the benefit of the doubt. Radiant with joy, she was baptised next morning along with her companions.

She was right. The rumour was untrue. It was mere gossip. There is malicious gossip in Africa, just as in Ireland. What harm it can do! Sylvia is now married – to a Christian boy. She has three beautiful big-eyed black kids – two girls and one boy.

Always, when I see her, I think of old Judge Lavery with his wig and gown and his, "benefit of the doubt" for he was human, and he had taught me to be human, too.

*The author was appointed Town Clerk, Cavan, in 1953. 1953.

He resigned in 1959 to study for the Missionary Priesthood with the White Fathers (Missionaries of Africa). He was ordained Priest in 1966.

He taught in a secondary school in Tanzania, East Africa for five years. Then he was assigned to mission promotion in Ireland.

Back in Africa (Tanzania again) in 1976, he had charge in a parish in a remote area in the bush.

At present he is home again on mission promotion in Ireland. He hopes one day to return to his beloved Africa.

# PRESENTATION OF PARCHMENTS 29 October, 1980

1. Finbarr Allen, Straffan, Co. Kildare.
2. Peter M. Allen, Rochbarton, Salthill, Galway.
3. Robert Anderson, 8 Woodlands Avenue, Stillorgan, Dublin.
4. Frederic J. Binchy, Bruce Villa, Clonmel, Co. Tipperary.
5. Ian Kenny Boyd, The Red Cottage, Brighton Road, Foxrock, Co. Dublin.
6. Patrick Breen, 36 Corrin View Estate, Fermoy, Cork.
7. Colin Byrne, Sunnydale, 4 Nugent Road, Churchtown, Dublin.
8. Ruth Carolan, Kilcarne Park, Navan, Co. Meath.
9. Maeve M. T. Carroll, St. Michaels, 54 Renmore Road, Galway.
10. Catherine Carton, 10 Roebuck Crescent, Clonskeagh, Dublin.
11. Darach Laurence Connolly, 16 Zion Road, Rathgar, Dublin.
12. Eamonn Creed, 51 Thornhill, Sligo.
13. Michael J. Curneen, 3 Brighton Terrace, Sandycove, Dublin.
14. Isabelle Curran, Ballina, Falcarragh, Donegal.
15. Rosemary Daly, 19 Beaumont Drive, Ballintemple, Cork.
16. Fearghal L. J. M. de Feu, Aghaboe, Portloaise, Co. Laoise.
17. Patrick A. Derivan, John Street, Carrick on Suir, Tipperary.
18. Katherine A. Elliott, Moyne Lodge, Baldoyle, Dublin.
19. Dennis Fitzsimons, 10 Donaguile, Castlecomer, Kilkenny.
20. Paul M. L. Flynn, Ard na Cree, St. Michaels Road, Tipperary.
21. Francis Gearty, 4 Church Street, Longford.
22. Miriam Glynn, New Barn, Kilsallaghan, Dublin.
23. Lorna Groarke, Lissoy, The Pigeons, Athlone, Westmeath.
24. Doughlas Heather, Roslyn, Claremont Road, Howth, Dublin.
25. Deborah G. Hegarty, Glencairn, Bishopstown Road, Cork.
26. Thomas E. Honan, The Rock, Arklow, Co. Wicklow.
27. Michael J. Hughes, Tudor House, Oulton Road, Clontarf, Dublin.
28. Maeve Jones, Killeen Glebe, Dunshaughlin, Co. Meath.
29. Peter D. Jones, Carrick Hill House, Portmarnock, Dublin.
30. Rosemary Kearon, Pine Ridge, Kilgobbin, Co. Dublin.
31. Brian C. Kiely, Ashfield, Kilkenny.
32. Padraig Lankford, 58 Upper Rathmines Road, Dublin.
33. Henrietta Lane, 19 St. James Court, Serpentine Avenue, Dublin.
34. Philip P. Lee, Sydney Lodge, Booterstown Avenue, Blackck, Co. Dublin.
35. Peter M. Lennon, The Hut, Thornmanby Road, Howth, Dublin.
36. Michael T. Lyons, 13 Montrose Crescent, Artane, Dublin. Dublin.
37. Onagh Lysaght, Bawnbrack Stud, Killenaule, Co. Tipperary.
38. Declan T. Madden, Dunshaughlin, Co. Meath.
39. Rossa Martin, Gortachurra, Valleymount, Blessington, Co. Wicklow.
40. John Anthony Mernagh, Coolmurry, Davidstown, Enniscorthy, Wexford.
41. Mary Molloy, Kieran Street, Kilkenny.

**Receiving his parchment was Peter M. Allen, with his parents, Mr. and Mrs. W. B. Allen.**

**Nicholas G. Moore, former Education Officer with the Law Society, who received his parchment, with Miss Yvonne O'Reilly.**

42. Nicholas Moore, Melvin, Whitehall Road, Terenure, Dublin.
43. Anthony M. Murphy, Old Quarry, Dalkey, Dublin.
44. Finbarr Murphy, Gurranabraher House, Gurranabraher, Cork.
45. Kathleen McCabe, Cortagher House, Roslea, Fermanagh.
46. Marina McGoldrick, Leinster Street, Rathangan, Kildare.
47. Terence B. McGrath, 118 Cherryfield Road, Walkinstown, Dublin.
48. Margaret McGreevy, 15 Maywood Lawn, Raheny, Dublin.
49. Pauline McHenry, 31 Raphoe Road, Crumlin, Dublin.
50. Anne Mary E. MacNamara, Main Street, Cashel, Co. Tipperary.
51. John Joseph McMullen, 15 Whitethorn Crescent, Artane, Dublin.

John McPoland, Slemish, Dublin Road, Naas, Co. Kildare.

53. Maeve M. P. McQuaid, 3 Rathdown Crescent, Terenure, Dublin.
54. John Nash, Glandaree, Tulla, Co. Clare.
55. Cathy O'Brien, 35 Lombard Street. West. Dublin.
56. Denis O'Connor, Swinford, Co. Mayo.
57. Susan O'Mahony, The Stud Farm, Carrigaline, Cork.
58. Paul O'Shea, 7 Leopardstown Lawn, Blackrock, Dublin.
59. Dominick G. O'Sullivan, Cnoc an Aitinn, Ballylickey, Bantry, Cork.
60. Una Power, Springfield, Kilmallock, Limerick.
61. Murtagh B. Rabbitt, 23 Foster Street, Galway.
62. Aibhe Rice, 13 Whitehall Road, Churchtown, Dublin.
63. John Richardson, Ballyowen House, Lucan, Co. Dublin.
64. Gerard W. Sandys, 55 Father Griffin Road, Galway.
65. John O. Shanley, Blackfriary, Trim, Co. Meath.
66. Brian Sheridan, 10 Gilford Park, Dublin.

67. Ronan Smith, 77a Marlborough Road, Donnybrook, Dublin.
68. John Spencer, 19 Coislinne, Gorey, Wexford.
69. John C. Walsh, 6 Fortwilliam, Mount Merrion Ave., Blackrock, Co. Dublin.
70. Thomas J. Walsh, Learga, 27 Ballineaspaig Lawn, Bishopstown, Cork.
71. Mary R. Woods, Gayfield, Clonminch, Tullamore, Co.

# BOOK REVIEW

**The Irish Social Services** by John Curry (Institute of Public Administration, Dublin, 1980) Paperback, £9.90.

The social services dealt with in this book are those provided to improve the individual's welfare as distinct from other public services which have the good of the community as a whole as their objective. They are income maintenance, health, education, housing and welfare or personal social services. They are the services that affect us all at some time or other in the course of our lives and some indeed have continuous dependance on one or more of them. They account for about half of all public expenditure.

The book is stated to be based on lectures given to first year students attending the Diploma in Administration Science course at the Institute of Public Administration where the author is a lecturer. It is an attempt at providing in one book an overview of the social services in Ireland. This the author does quite successfully with an introduction on the socio-demographic, economic and policy factors which influence social services in Ireland. A chapter on each of the services and concluding with an interesting comparison with the corresponding services in other EEC countires. For each service there is a brief note of the historical background, its development particularly in recent times, the scope and coverage of the service, the financing and administration of it. Statistical material is plentiful but is not used in such a way as to mar the enjoyment of reading. The book is clearly the result of extensive and careful reading. The historical material in the book is interesting. In dealing with the health services it recalls the controversy on the proposed mother and child scheme in 1951 which was opposed by the medical profession on the grounds that it represented a dangerous advance towards complete state control of medicine, and by the Catholic Hierarchy on the grounds that it was contrary to Catholic social teaching. The Cabinet abandoned the scheme and Dr. Noel Browne resigned as Minister for Health. Although the book does not recall it those who were interested in health legislation at the time will know that the offending situation sprung from Section 21 of the Health Act, 1947, which states "A health authority shall ... make arrangements for safeguarding the health of women in respect of motherhood and for their education in that respect".

Of course a book of 289 pages had its limitations. Each of the services dealt with already commands its own extensive literature. However, the reader who wants to learn more will find good guidance in the book. It is not in any way a critical review of the services with which it deals. An area in which the author does allow himself some comment is on the question of abuse in unemployment assistance. Not everyone will agree with his apparently ready acceptance of the "official" assessment of the extent of such abuse.

It is a book which is highly informative and can be read with pleasure, but tinged with the regret which is expressed in the preface that the text can so quickly become outdated because of developments that affect the services. Let us hope that a means can be found of keeping it up to date.

Whilst it is not a legal text book it is one that should be given a place in the reading of law students and practitioners. Because of the already crowded curriculum law students can now finish their studies with little opportunity for acquaintance with the social service that can so intimately affect the lives and affairs of those who will be their clients. Busy practitioners have even less opportunity. This book can be of enormous assistance to them.

Walter MacEvilly

# Solicitors Golfing Society

Results of recent outing to Heath Golf Club.

**Captain's Prize & Golfing Society Challenge Cup**
1, Alan Woods (9) 38 Pts.; 2, Tom Shaw (5) 37 Pts.

**St. Patrick's Plate**
1, Andy Smyth (8) 37 Pts. on last hole; 2, Tom O' O'Grady (12) 34 Pts.

**Veteran's Cup**
1, Philip Meagher (14) 33 Pts.; 2, John Bolger (14) 30 Pts. on 2nd nine.

**13 & Over**
1, John McKnight (16) 32 Pts.; 2, James Cahill (20) 31 Pts.

**First Nine**
Frank Gleeson (24) 19 Pts.

**Second Nine**
Don McAuliffe (11) 18 Pts. on last six.

**Over 30 Miles**
1, Declan Fallon (12) 33 Pts.; 2, Pat O'Doherty (17) 30 Pts.

**SOLICITOR'S GOLFING SOCIETY OFFICERS 1980/81**

*President:* President I.L.S.S.
*Captain:* Patrick Treacy
*Hon-Treasurer:* Paul W. Keogh
*Hon-Secretary:* John R. Lynch.
*Committee:* Henry N. Robinson, Gerard N. Doyle, David Bell.

# Reports/Periodicals/Newsletters on EEC Law

The following list was prepared as a guideline for the Society's EEC & International Affairs Committee on periodical material available on EEC Law. It is not intended to be an exhaustive list. Subscription prices are in pounds sterling.

| | Annual Sub. | Coverage |
|---|---|---|
| *Bulletin of the European Communities*<br>Office for Official Publications of the EEC,<br>Boite Postale 1003,<br>LUXEMBOURG.<br>(incorp. Supplements to the Bulletin) | £16.00 | Reports on activities of Commission and other Community Institutions. |
| *Bulletin of Legal Developments*<br>British Institute of International & Comparative Law,<br>Charles Clore House,<br>17 Russell Square,<br>LONDON WC1B 5DR. | £50 p.a. | Fortnightly survey of U.K. European, Foreign, Commonwealth & International legal events, conventions, international guidelines, statutes, etc. |
| *Commercial Laws of Europe*<br>European Law Centre Ltd.,<br>Elm House,<br>10-16 Elm Street,<br>LONDON WC1X OBD. | £92 | Specialises in regular systematic publication of significant legislation in fields of marketing, consumer protection, data bank control, product liability, patents and trade marks. Provides English translations of foreign Statutes, etc. Occasionally prints secondary legislation and treaties. |
| *Common Market Law Reports*<br>European Law Centre Ltd.,<br>Elm House,<br>10-16 Elm Street,<br>LONDON WC1X OBD. | £85 | Reports cases before European Court of Justice & Commission of the EC with English translations. Weekly. |
| *Common Market Law Review*<br>Journal Dept.<br>A. E. Sijthoff,<br>P.O. Box 66,<br>Groningen,<br>THE NETHERLANDS. | £43.65 | Functions as a medium for the understanding & implementation of Community Law within 9 members & for dissemination of legal thinking on Community law matters. Aims to meet needs of both academic and practitioner. |
| *European Commercial Cases*<br>European Law Centre Ltd.,<br>Elm House,<br>10-16 Elm Street,<br>LONDON WC1X OBD. | £70 | Quarterly: aims to reproduce selected judgments on aspects of national commercial law delivered by Courts and Tribunals of various Western European Countries and Institutions. |
| *Eurolaw Commercial Intelligence*<br>European Law Centre Ltd.,<br>Elm House,<br>10-16 Elm Street,<br>LONDON WC1X OBD. | £58 | Twice monthly survey of European commercial law developments: Covers international relations; Bankruptcy; Consumer Protection; Insurance; Product Liability; Sale of Goods; etc. Also notes on Conferences, publications. |
| *European Court Reports*<br>Hammicks,<br>16, Newman Lane,<br>Alton,<br>HANTS. GU34 2PJ. | £30.50 | Official Reports of cases before the Court of Justice of the EEC. |
| *European Intellectual Property Review*<br>ESC Publishing Ltd.,<br>14, Suffolk House,<br>265, Banbury Road,<br>OXFORD OX2 74N. | £85 | Monthly journal concerning the management of technology, copyright and trade names. Includes book reviews; case comments. |

| | | |
|---|---|---|
| *European Law Digest*<br>European Law Centre Ltd.,<br>Elm House,<br>10-16 Elm Street,<br>LONDON WC1X OBD. | £62 | Wide ranging & factual survey of legislation and case law taken from each country. Emphasis on EEC law, transport law and industrial property law. Monthly. |
| *European Law Review*<br>Sweet & Maxwell,<br>North Way,<br>Andover,<br>Hants. SP10 5 BE. | £50 | Covers the impact & effect of European Communtiy treaties and resultant legislation, consequent alteration of national law of each member state & changes in legal relations with states outside EC. |
| *Financial Times European Law Letter*<br>Bracken House,<br>10, Cannon Street,<br>LONDON EC4P 4BY. | £95 | Checklist of legal developments which affect business planning & decision making throughout Europe. Monthly. |
| *Legal issues of European Integration*<br>Kluwer,<br>PO Box 23,<br>Deventer,<br>THE NETHERLANDS. | 48Dfl. | Law Review of the European Institute University of Amsterdam. Academic in style & content. Studies European Integration in interdisciplinary framework. Contributions from economists, lawyers, and political scientists. |
| *Official Journal of the European Communities*<br>Office for Official Publications of the European Community,<br>Boite Postale 1003,<br>LUXEMBOURG. | £50 | Documents legislation of EC i.e. Regulations, Directives, etc. Also prints Notices, Information, Bulletins, etc., Daily. |
| *Proceedings of the Court of Justice of the European Communities*<br>Information Department,<br>Court of Justice of the European Communities,<br>P.O. Box 1406,<br>LUXEMBOURG. | No charge | Weekly bulletin of Judgments, Opinions & Oral Procedure of Court of Justice. |
| *Societies in the U.K. & Ireland promoting the study of Eoropean Law*<br>Solicitors European Group,<br>The Law Society,<br>113 Chancery Lane,<br>LONDON WC2A 1PL. | Details of membership on application | Organizes courses and lectures on Community Law. Publishes a Newsletter regularly which deals with practical aspects of EEC Law, showing the relevance of EEC Law to the practitioner; it also includes details of forthcoming Seminars, etc., both national and international. |
| *Northern Ireland Solicitors' European Group*<br>c/o Faculty of Law,<br>Queen's University,<br>Belfast. | do. | Organizes lectures on Community Law. Publishes works on EEC Law. |
| *The Scottish Lawyers' European Group*<br>Law Society's Hall,<br>26 Drumsheugh Gardens,<br>EDINBURGH EH3 7YR. | do. | Organizes courses and lectures on Community Law. Publishes a Newsletter regularly. |
| *Irish Society for European Law,*<br>c/o The Hon. Secretary, ISEL,<br>51, Merrion Square East,<br>DUBLIN 2. | do. | Organizes lectures on Community Law. Publishes the *Journal of the Irish Society for European Law.* |

# CONVEYANCING NOTES

Due to a printing error the following note appeared incorrectly in the October Gazette. It is reprinted here in full.

**Section 46(i) Local Registration of Title (Ireland) Act, 1891**

At the Conveyancing Seminar in Blackhall Place held on Saturday the 27th September a Solicitor asked as to whether there was an obligation to register a Lease in the Registry of Deeds in the following circumstances. The freehold title was registered in the Land Registry on a freehold Folio and a Lease for more than twenty-one years had been granted of part of the lands in the Folio prior to the 1st January 1967 (the date of the coming into force of the Registration of Title Act 1964). No leasehold folio had been opened in respect of the leasehold interest and the Lease had not been registered in the Registry of Deeds. The Solicitor concerned had then been asked to have the Lease registered in the Registry of Deeds but felt that it was unnecessary to do so.

The speakers' panel expressed the view that registration in the Registry of Deeds was not necessary although all subsequent documents dealing with the leasehold interest, including Assignments and Mortgages would of course have to be so registered but were unable to quote the precise authority for their view. Mr. Desmond Moran volunteered what turned out to be the correct answer namely that there was a specific section in the Local Registration of Title (Ireland) Act 1891 which dealt with the position. Section 46(i) of that Act provides

"Registration of a burden under this Act shall have the same effect as, and make unnecessary, registration of any deed or document relating to such burden, in pursuance of any other public general or local and personal Act of Parliament or of any Provisional Order confirmed by Parliament, but in case of a leasehold the ownership of which is not registered in any subsidiary register under this Act, such exemption from the necessity of registration in pursuance of the Acts relating to the Registry of Deeds shall extend only to the lease itself, and not to any other deed or document relating to the title to a leasehold."

On the coming into operation of the Registration of Title Act 1964 the position changed radically in that it then became obligatory to open new leasehold Folios for any leasehold interests for more than 21 years.

In view of the fact that there was some confusion as to the correct position the Conveyancing committee felt it might be helpful to publish this note clarifying the position.

**COUNCIL RECOMMENDATION — 'Interest on Client Accounts'.**

The Society recommends that when a Solicitor holds or receives for or on account of a client money on which, having regard to all the circumstances (including the amount and the length of time for which the money is likely to be held) interest ought in fairness to the client be earned for him, the Solicitor shall either:

(a) Deposit such money in a separate designated account and account to the client for any interest earned thereon or

(b) Pay to the client a sum equivalent to the interest which would have accrued for the benefit of the client if the money had been deposited in a separate designated account.

The Solicitor is entitled to charge fees for any work in relation to the placing of the monies on deposit or accounting to the Revenue Commissioners for interest earned.

# The Register

**REGISTRATION OF TITLE ACT, 1964**

**Issue of New Land Certificate**

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 23rd day of December, 1980.

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

(1) Registered Owner: Peter Gaynor; Folio No: (1) 15473; (2) 15741; (1) Lands of Leenaun (One undivided forty fifth part of other parts). (2) Leenaun (Parts); Area: (1) 0a. 1r. 22p.; (2) (a) 2a. 2r. 38p. (b) 417a. 0r. 29p; County: Galway.

(2) Registered Owner: James Manton; Folio No: 15566; Lands: Cornaveagh (Parts); Area: 29a. 1r. 33p.; County Roscommon.

(3) Registered Owner: Michael & Sarah Keane; Folio No: 4226; Lands: Kiltybo (Parts); Area: 21a. 2r. 4p.; County: Mayo.

(4) Registered Owner: Ivan Joseph & Jacqueline Rosenberg; Folio No. 2769F; Lands: Gallowshill; Area: 0a. 2r. 10p; County: Clare,

(5) Registered Owner: William Walsh; Folio No: 13917; Lands: Part of the land of Castlelost with the cottage thereon; Area: 0a. 2r. 0p.; County: Westmeath.

(6) Registered Owner: John Derrig; Folio No.: 7257; Lands: (a) Cappaghduff East (Part), (b) Cappaghduff East (Part); Area: (a) 0a. 2r. 3p., (b) 0a. 1r. 0p. County: Mayo.

(7) Registered Owner: Charles Bernard O'Connor; Folio No: 513 (Revised); Lands: Tubrid; Area: 22a. 2r. 0p.; County: Kerry.

(8) Registered Owner: James Rogers; Folio No: 13067; Lands: Dromore (part); Area: 13a. 0r. 20p.; County: Leitrim.

(9) Registered Owner: Jeremiah Aherne; Folio No: 7494; Lands: Haggardstown; Area: 0a. 1r. 5p.; County: Louth.

(10) Registered Owner: Peter McKenna; Folio No: 11205; Lands: Derrylea Beg (part); Area: 7a. 3r. 32p.; County: Monaghan.

(11) Registered Owner: Edward D. Holt; Folio No: 1857F; Lands: Knocklyon; Area: 0a. 0r. 9p.; County: Dublin.

(12) Registered Owner: Lily Lee; Folio No: 12244; Lands: (1) Rateerbane (part); (2) Radeerpark (part); Area: (1) 0a. 3r. 4p.; (2) 6a. 2r. 25p.; County: Monaghan.

(13) Registered Owner: Maurice Heelan; Folio No: 11438; Lands: Elton (part); Area: 2a. 1r. 6p.; County: Limerick.

(14) Registered Owner: John Michael Walshe; Folio No: 6339; Lands: Clashroe; Area: 97a. 3r. 38p.; County: Cork.

(15) Registered Owner: Francis William Weir; Folio No: 3219; Lands: Tuogh; Area: 87a. 0r. 35p.; County: Limerick.

(16) Registered Owner: Michael Durkin; Folio No: 10523; Lands: (a) Ballyreaghan (b) Kilshurley (c) Ballyreaghan; Area: (a) 11a. 2r. 5p. (2) 2a. 1r. 35p. (c) 9 a. 3r. 36p. County: Longford.

(17) Registered Owner: Andrew Moore; Folio No: 1439L; Lands: Leasehold interest in 49 Larkfield Grove, Rathmines; Area: ; County: City of Dublin.

(18) Registered Owner: Michael Prendergast; Folio No: 6769; Lands: Killeenasteena (part); Area: 43a. 0r. 4p.; County: Tipperary.

(19) Registered Owner: James Keane; Folio No: 1859 (This folio is closed and now forms the lands No. 1 in Folio 3798F). Lands: Corrasluastia; Area: 4.656 acres; County: Roscommon.

(20) Registered Owner: Mary Dolan; Folio No: 1677; Lands: (1) Dunavinally (parts; (2) Cornagher (part); Area: 18a. 2r. 20p.; (2) 0a. 1r. 35p.; County: Leitrim.

(21) Registered Owner: Patrick Conlan; Folio No: 7624; Lands: Montpelier; Area: 34a. 3r. 9p; County: Limerick.

(22) Registered Owner: Denis Casey and Mary S. Heelan; Folio No: 744F; Lands: Courtback (with cottage thereon); Area: 0a. 1r. 4p.; County: Cork.

(23) Registered Owner: Michael Roarty; Folio No: 795; Lands: (1) Beltany Lower (2) Beltany Lower; Area: (1) 10a. 3r. 11p.; (2) 0a. 1r. 10p.; County: Donegal.

(24) Registered Owner: Sean O'Cinneide; Folio No: 18785L; Lands: Oldbawn; Area: 0a. 0r. 10p.; County: Dublin.

(25) Registered Owner: John Leahy; Folio No: 13873; Lands: Codrum (part); Area: 28.497 acres; County: Cork.

(26) Registered Owner: Francis Conway: Folio No: 9477 Revised; Lands: (1) Derryleedigan (Jackson) (2) Knockatallan; Area: (1) 16a. 0r. 14p.; (2) 0a. 2r. 14p.; County: Monaghan.

(27) Registered Owner: Irish Onion Sets Limited; Folio No: 11840; Lands: Haynestown; Area: 0a. 3r. 30p.; County: Louth.

(28) Registered Owner: Francis Kelly; Folio No: 2035 (This folio is closed and now forms the property No. 1 in Folio 6F); Lands: Corglancey; Area: 8a. 1r. 33p.; County: Leitrim.

(29) Registered Owner: Daniel C. Gamble; Folio No: 49475; Lands: Croghta-More; Area: 0a. 0r. 6p.; County: Cork.

(30) Registered Owner: Hannah Lucey; Folio No: 6295; Lands: Lyre (part); Area: 14a. 0r. 14p.; County: Cork.

(31) Registered Owner: James William Foster; Folio No: 2129; Lands:— Area: —; County: Fermanagh.

(32) Registered Owner: Patrick Higgins: Folio No: 52318; Lands: A plot of ground situate on the South side of Friars Road in the Parish of St. Nicholas; Area: 0a. 0r. 7p.; County: City of Cork.

(33) Registered Owner: Rose Farrell; Folio No: 19259; Lands: (1) Derrydorraghy (2) Shee (3) Shee; Area: (1) 5a. 3r. 32p. (2) 2a. 1r. 20p. (3) 5a. 2r. 3p.; County: Monaghan.

(34) Registered Owner: Emmet Travers; Folio No: 42218; Lands: Drumacrin; Area: 2 a. 1 r. 6p.; County: Donegal.

(35) Registered Owner: James O'Brien; Folio No: 3383; Lands: Clonmoney South; Area: 6a. 3r. 0p.; County: Clare.

## NOTICES

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## LOST WILLS

**John O'Donnell,** late of Carrigane, Mitchelstown, Co. Cork, farmer, deceased. Anybody having any knowledge of any will of the above-named deceased, please contact Messrs. Eugene P. Finn & Co., Solicitors, Mitchelstown, Co. Cork.

**Frank Duff,** deceased. Will any Solicitor, or any person holding a will of the above-named deceased, late of De Montford House, North Brunswick Street, Dublin 7, kindly communicate with Smyth & Son, Solicitors, Drogheda, Co. Louth.

**Mary Holland,** deceased, late of 82 South Mall, Cork, retired school teacher. Would any person having knowledge of any Will made by the above-named deceased who died on the 3rd September, 1980 please communicate with Messrs. O'Flynn Exhams and Partners, Solicitors, 58/59 South Mall, Cork.

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THE INCORPORATED LAW SOCIETY OF IRELAND

# GAZETTE

December 1980 Vol. 74 No. 10

## THE PRESIDENT 1980/81

**Mrs. Moya Quinlan** has been elected President of the Incorporated Law Society of Ireland for the year 1980/81. Mrs. Quinlan was educated at the Dominican College, Sion Hill, Blackrock and University College Dublin. She was admitted in Easter Term, 1946 and has been a member of the Council since 1969. Mrs. Quinlan is Principal of Joseph H. Dixon & Co., 8 Parnell Square, Dublin 1.

# VICE-PRESIDENTS 1980/81

**Mr. William B. Allen** has been elected Senior Vice-President of the Society for the year 1980/81. Mr. Allen was educated in Galway at St. Ignatius College and St. Joseph's College. He was admitted in Michaelmas 1945 and was first elected to the Council in 1970. Mr. Allen is the Senior Partner of MacDermott & Allen, Solicitor, Galway.

**Mr. Patrick (Frank) O'Donnell,** has been elected Junior Vice-President of the Society for the year 1980/81. Mr. O'Donnell was educated at Castleknock College, Dublin, and attained a B.C.L. degree in University College Dublin in 1962. He attended Harvard University in 1965/66 and obtained an LL.M. degree in 1966. He was admitted in Easter term 1964. Mr. O'Donnell is a partner in the Dublin firm of Bell, Brannigan, O'Donnell and O'Brien. He was first elected to the Council in 1971.

Executive Editor: Mary Buckley.
Editorial Board: John F. Buckley, Charles R. M. Meredith, Michael V. O'Mahony, Maxwell Sweeney.
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# ANNUAL GENERAL MEETING OF THE SOCIETY

## Blackhall Place, Dublin 7

The President, Mr. Walter Beatty, took the Chair at 11.40 a.m. in the Lecture Hall, Law School, Blackhall Place, on Friday 21st November, 1980.

The notice convening the meeting was taken as read. A list of those attending the meeting is filed with the minutes. The President, welcomed the members present and thanked them for their attendance. In particular, he welcomed the President of the Incorporated Law Society of Northern Ireland, Mr. Patrick Cross.

**Minutes**

As the minutes of the General Meeting, held in Blackhall Place, Dublin, on Friday, 2nd May, 1980, were published in the Gazette, they were taken as read, and were adopted and signed by the President.

**Auditors' Report**

The adoption of the Auditors' Report and financial accounts for the year ended 30th April, 1979, was proposed by Mr. B. Allen, seconded by Mr. P. D. M. Prentice, and agreed. On the proposition of Mr. P. C. Moore, seconded by Mr. C. R. M. Meredith, Messrs. Coopers & Lybrand were re-elected as the Society's auditors for the year ending 30th April, 1981.

**Council Elections**

The scrutineers' report on the Council election was read by the Director General as follows:

Valid Poll: 1,347

Buckley, John F. 922; Quinlan, Moya 912; Beatty, Walter 798; Binchy, Donal 790; Dundon, Joseph L. 769; O'Mahony, Michael V. 766; O'Driscoll, Rory 765; Shaw, Thomas D. 738; Blake, Bruce St. John 738; Collins, Anthony E. 726; O'Connor, Patrick 712; Hickey, Gerald 711; McEvoy, W. D. 709; Carrigan, John 703; Allen, William B. 686; Daly, Francis 683; Smyth, Andrew 683; Houlihan, Michael 681; O'Donnell, Patrick F. 672; Monahan, Raymond T. 670; Burke, Adrian P. 667; Curran, Maurice R. 664; Cullen, Laurence 656; Shields, Laurence K. 652; Margetson, Ernest 645; Pigot, David R. 638; Killeen, Sarah C. 623; Sexton, Harry 591; Dillon Andrew 586; O'Connell, Michael 582; Donnelly, Andrew 577. The above members were declared elected.

The following members received the number of votes placed after their names:

Madigan, Patrick 530; Reidy, John 521; Doyle, Gerard 456; McCourt, Philip 453; Mullen, George 343; Garvan, Brendan 204.

Provincial Delegates returned unopposed: *Connaught:* Patrick J. McEllin, Claremorris, Co. Mayo; *Leinster:* Michael J. Hogan, 21 Patrick Street, Kilkenny; *Munster:* Patrick A. Glynn, 84 O'Connell Street Limerick; *Ulster:* Peter F. R. Murphy, Ballybofey, Co. Donegal.

The Provincial Delegates returned unopposed were declared elected. Noting the results of the election, the President expressed his thanks to the scrutineers.

**Report of the Council**

As the Annual Report of the Council for the year 1979/80 had been circulated, the President took it as read. On the President's report, in reply to Mr. T. C. G. O'Mahony, the President stated that the Society's Computer had been installed after obtaining the best available advice and careful study. No person had been deprived of employment as a result, but, the efficiency of the Society had been increased. On the Report of the Council, Mr. T. C. G. O'Mahony expressed his satisfaction in the matter of the steps being taken on the issue of legal costs and suggested that there was a shortage of consultation rooms in the Four Courts. This was accepted and, it was indicated that in the longer term the accommodation which had been made available to the Office of Public Works, would be recovered and converted to additional Consultation Rooms.

The meeting then went on to consider the reports of the various Committees as follows:

**Registrars and Compensation Fund**

The President's expression of thanks to Mr. Shaw for his work on both of these Committees, was received with applause. In reply to Mr. T. C. G. O'Mahony, the Director General explained the manner in which the investment account, in relation to the Compensation Fund, operated.

**Professional Purposes**

No comment arose on this report. The President expressed his thanks to Mr. Margetson.

**Parliamentary**

Mr. D. Moran enquired if it would be possible, under the Courts Bill, to increase the fines under the Summary Jurisdiction Acts, which at present were at a ridiculous level. Mr. Binchy thought the suggestion might be more appropriate to a Bill dealing with Criminal Law, but undertook to look into the matter. The President thanked Mr. Binchy and his Committee for their work during the year.

**Finance**

Mr. Curran dealt with queries from Mr. T. C. G. O'Mahony on the Insurance Premium in respect of the Compensation Fund, the Law Club and the increase in the

Law School expenditure as between 1979 and 1980. In the case of Law School, Mr. Curran pointed out that it had not been running in its new form for the full year in 1979. Mr. Curran also dealt with the query from Mr. B. Garvan on the manner in which depreciation was treated. The President thanked Mr. Curran for the work of the Committee during the year.

**Disciplinary**

No comments arose on the Disciplinary Committee report. The President thanked Mr. Doyle for the work of the Committee.

**Public Relations**

The report was introduced by Mr. F. O'Donnell, who was thanked by the President for the worthwhile coverage achieved during the year. Speaking on the report, Mr. J. F. Donovan commented that everybody could get on R.T.E. programmes and into the Press if they professed to criticise the legal profession. Since the Society appeared to take no action on these criticisms, he wondered if it was treating them as beneath contempt. The President, in reply, referred to the Press Conference which he had called, arising out of the programme on which Mr. O'Donnell appeared. That Press Conference had received wide publicity. Mr. O'Mahony suggested that there should be, within the profession a small group to analyse what was coming from the media, particularly T.V. and radio, and ensure that the contrary view point had a right of reply. He felt the profession should give a lead in this matter, and he volunteered his services. He commended the Public Relations Committee for the work done. The President referred to the Symposia held during the year, and those being planned for the coming year. These were being organised to get the legal implications of various situations across to the broadest possible spectrum of the public. The Society's efforts in mounting the Symposia had been very well received. Mr. Shields suggested that it might be worthwhile for the Public Relations Committee to consider organising television programmes, such as the recent Richard Dimbleby Lecture by Lord Denning.

**Education**

The President thanked Mr. Buckley for getting the New Course off the ground. Mr. T. C. G. O'Mahony congratulated Mr. Buckley on the progress of the Law School and on the Continuing Legal Education Programme. However, he wondered if an undue surplus was being made on the Continuing Legal Education Programme. Mr. Buckley explained that the figures shown took no account of the Society's overheads and that if these were included in the costs, a break even situation would arise. Mr. Meredith commented that the apprentice coming out from the New Course was a far more mature and experienced person than the Old System apprentice who frequently came straight from school. The problem today was that Masters did not know how to use the new type of apprentice and many of them were getting frustrated. It was agreed in discussion that there was a need to communicate with Masters on the position.

**Publications**

No comment arose on this report.

**E.E.C. and International Affairs**

The President thanked Mr. Monahan for the work of the Committee during the year and for the manner in which he had represented the Society at meetings of the C.C.B.E. In reply to Mr. O'Mahony, Mr. Monahan indicated that due to the massive amount of directives regulations etc. issuing from Brussels, it was not possible for an individual solicitor to keep abreast of developments. The Committee was trying to highlight those affecting the profession and also judgments of relevance in the Gazette. In reply to Mr. O'Mahony's contention that it was a serious matter if lawyers were not able to keep abreast of the law, Mr. Monahan made the point that while an enormous amount of material was coming through from Brussels, it was, at the same time, quite easy for a lawyer to follow through the material in which he had a particular interest at any given time. Mr. Moore said that in so far as E.E.C. literature was concerned, there was need for a special library. This had been brought to the notice of the Government some years ago, but the cost of the project had killed it.

**Premises**

To Mr. Moran, who complained of the inadequate toilet facilities in the Four Courts, the President explained that the gents toilet on the ground floor had been refurbished and put back into use. He added that the Premises Committee was anxious for suggestions from members as to how the Society's facilities might be improved. Mr. M. Kenny suggested that the tourist authorities be approached with a view to putting Blackhall Place on the bus tour circuit. Miss McCarthy asked if some definite arrangement could be made regarding the Dining Room as she had come for lunch on a number of occasions when it was closed, whereas on other days it was open. Mr. Collins said that this particular problem was under consideration at present. He emphasised the importance of telephoning before hand. Mr. Donovan pointed out that it was possible to make a reservation through the Four Courts. Mr. Garvan asked that some arrangements be made for the storing of coats in safe custody in the Four Courts.

**Company Law Committee**

No matter arose.

**Conveyancing Committee**

No matter arose. The President thanked Mr. Shields and Mr. O'Donnell for their work on these Committees.

**Library**

The President proposed a vote of thanks to Miss M. Byrne, Librarian, and her staff, which was carried with applause.

**Bond Scheme**

At the request of the President, Mrs. Moya Quinlan drew the successful Bonds as follows: £1,000 Prize, Bond Nos 1375, 1147, 1444 and 1221. £500 Prize, Bond Nos. 1694, 1840, 1838 and 1700. £250 Prize, Bond Nos. 1842 and 1281.

**Questions**

The President read the following question from Mr. T. C. G. O'Mahony and Mr. A. F. Hussey:

'In accordance with Bye Law 13 of the

Incorporated Law Society of Ireland, we give you notice of the following special business to be dealt with at the General Meeting of the Society to be held on 21st November next. We refer to the Memorandum attached hereto (commencing with letter dated 23rd July, 1980 and addressed to each member of the Society). We wish to know why the Public Relations Committee of the Society and/or its Editorial Board refused to a Member, the postal facility of having said memorandum included with copies of the Gazette mailed to members since 23rd July 1980, especially as a comparable facility has been extended to non-members before and after that date'.

The President said he wanted everybody to feel that the matter had been fairly dealt with. Mr. O'Mahony said the matter at issue had been circulated fairly. He then proceeded to read further detailed correspondence, copies of which were passed out to the members present. The President then called on Mr. Hussey to speak. Mr. O'Mahony said that Mr. Hussey was not present and asked to be excused. The President commented that it was a pity that this had not been made clear earlier. Mr. Prentice pointed out that while the premises were made available to a Jazz Orchestra, it had also been made available to a Symphony Orchestra. Similarily, if an anti-abortion group was allowed to use the premises, the Society would also be under pressure to allow a pro-abortion group similar facilities. This could bring the Society into controversy. Mr. McEvoy said that the use of the Gazette was not open to members, except for matters coming within the Society's objectives. Mr. O'Donnell, in his capacity as Chairman of the Public Relations Committee, replying to the question, said that the Committee took the view that the decision on the circulation of the material should be "No", for the reason set out in the letter to Mr. O'Mahony, which he had read out to the meeting. In the Society, a General Meeting was held twice a year, and this gave members, including Mr. O'Mahony, an opportunity to speak. Insofar as endeavouring to convene an extraordinary General Meeting was concerned, it was the view of the Committee and the Council of the Society that those seeking to call such a meeting should do their own foot slogging for the necessary number of signatures. If, and when, they got the signatures to requisition a General Meeting, then the Society would issue the notice. In the particular case, as a gesture of good will, the Society had sent Mr. O'Mahony labels for the circulation of his material. Nothing Mr. O'Mahony had said at the meeting would encourage him to change his mind on the decision which had been taken. When Mr. O'Mahony proceeded to comment on the points which had been made in discussion, Mr. Collins said the question had been asked and answered, and it was not fair that Mr. O'Mahony should detain members further on the matter. When Mr. O'Mahony endeavoured to comment further, the President moved on to next business.

**Annual General Meeting, 1981**

On the proposition of Mr. Collins, seconded by Mr. Beatty, it was agreed that this be held on Friday, 20th November, 1981.

**Other Business**

At this stage, Mrs. Quinlan, Senior Vice-President, took the chair and called on Mr. G. Doyle, to propose a vote of thanks to the President. In doing so, Mr. Doyle thanked the President and Mrs. Beatty for their work on behalf of the Society during the year, a year, which in his view, had seen much progress. Accordingly, Mr. Doyle was pleased to propose a vote of thanks to the President. The vote was seconded by Mr. McLoughlin. In conveying the vote of thanks to the President, Mrs. Quinlan expressed her own personal appreciation and remarked that the President had given a shining example to his successor in office.

The Senior Vice-President then declared the meeting closed.

# Denning: Helmsman of the Common Law?

by E. G. Hall, B.A., LL.B., H.D.E., Solicitor

This article, in the nature of an extended review, has been prompted by the publication of Lord Denning's two recent books, *'The Discipline of Law'*,[1] and *'The Due Process of Law'*.[2] Despite the pretentious title of this article, no hypothesis is being advanced. No one school of thought is being represented. The ideas expressed are personal views on a name familiar to a generation of Irish law students, a Judge who has exerted considerable persuasive influence in this country, as in other countries which share the common law tradition, and a man who last January celebrated his 81st birthday.

## Apex of judicial pyramid

Lord Wright, in 'Legal Essays and Addresses' wrote that "a good judge is one who is the master and not the slave of cases". Alfred Thompson Baron Denning of Whitechurch, Master of the Rolls, personifies that maxim. Lord Denning's two recent books and his judgments are testaments to it.

Lord Denning was born the son of a village draper in 1899. He took a first class honours degree in Mathematics at Oxford. A few months later, he took a First in Law. In March 1944, he was appointed to the Bench and assigned to the Divorce Division. He was the youngest High Court judge (save for Lord Hodson) for 150 years. He disliked divorce work. Eighteen months later he was transferred to King's Bench Division, which he liked. He spent four years in the High Court before he was promoted to the Court of Appeal. In 1957, he reached the apex of the judicial pyramid — the House of Lords. He stepped down in 1962 — a voluntary demotion from what has been described as "the well paid, secure, respected and relaxed life of a Law Lord" to the busy, dynamic and influential post of Master of the Rolls in the Court of Appeal.

It was a voluntary demotion virtually without precedent. Did he prefer the power he could exercise in the Court of Appeal to the glory of being a Law Lord? Denning explains it thus:

> "(In the Lords) I was too often in a minority. In the Lords it is no good to dissent. In the Court of Appeal it is some good".

On the question of dissenting judgments, Denning asserts that his dissents in the Court of Appeal probably paved the way for the Lords dissenting from previous precedents and establishing principles about liability for negligent statements, *Candler v Crane, Christmas & Co*;[3] ministerial discretion, *Padfield v Minister of Agriculture, Fisheries and Food*;[4] Crown privilege, *Conway v Rimmer*[5] a case considered by the Supreme Court in *Murphy v Lord Mayor of Dublin and the Minister for Local Government*,[6] in regard to discovery of documents and executive privilege.

## Judicial Innovator

Lord Denning has been described as a judicial innovator. In this context, we must remember that the Master runs the civil side of the Court of Appeal. Most of the 'interesting' cases heard on the civil side of the Courts of England come to the Court of Appeal. This has presented Denning with opportunities for judicial innovation. He invented the concept of the deserted wife's equity — only, as he says himself, to be eventually blown to "smithereens" by the House of Lords in *National Provincial Bank v Ainsworth*.[7] As one wit put it, Denning had been endeavouring to ensure that the words "All my wordly goods I thee endow" became no empty phrase. Then, there was the wife's share in the matrimonial home — even though the house stood in the husband's name alone *(Rimmer v Rimmer)*[8] and, most famous of all, the *'High Trees' case*,[9] the development of estoppel — the principle as Denning describes it:

> "of justice and equity . . . when a man by his words or conduct, has led another to believe that he may safely act on the faith of them — and the other does act on them — he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so".

## 'High Trees'

Undoubtedly, Denning will be remembered for the 'seminal' decision in the *'High Trees' case*. Denning, looking back on the years since the *'High Trees'* case, the principles then stated and the extensions of them, maintains that:

> "the effect has been to do away with the doctrine of consideration in all but a handful of cases . . . I do not recall any case in which it has arisen or been discussed. It has been replaced by the better precept: 'My word is my bond', irrespective of whether there is consideration to support it. Once a man gives a promise or assurance to his neighbours — on which the neighbour relies — he should not be allowed to go back on it".

Denning's views have obviously changed since he observed in *Combe v Combe*;[10]

> "Seeing that the principle (in 'High Trees') never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side wind. Its ill effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge.

The *''High Trees'* case was considered by Kenny J., in *Cullen v Cullen*[11] when he stated:

> "It seems to be that the principle stated by Denning J. in *Central London Property Trust Ltd. v High Trees House Ltd.*[12] and affirmed by the same Judge when he was a Lord Justice of Appeal in *Lyle — Meller v Lewis & Co. (Westminster) Ltd.*,[13] applies to this aspect of the case . . . If I had jurisdiction to make an order I would do so, but I do not think I have".

A way out of the problem was however found by Kenny J., in Section 52 of the Registration of Title Act 1891. Kenny J., in the High Court, in the case of *Revenue Commissioners v Moroney*[14] further applied the doctrine of promissory estoppel and found support for his conclusion in the "revival" of the doctrine by Denning J. (as he then was) in 'High Trees'. In this context, Wylie in his book, 'Irish Land Law',[15] offers an interesting observation on the development of equity in the Irish Courts. He states that most of the instances (in the development of equity) have occurred in England and have rarely been followed in Ireland.

> "This is not necessarily to be taken to mean that Irish Judges have taken a different view from their English brethern; the fact is, that in most instances, cases have not arisen in Ireland putting the matter at issue".

**Matrimonial Law**

Denning cites the developments in the area of matrimonial law as examples of how the judges have evolved new principles to meet the new situation. After the Lords' rejection of the concept of the deserted wife's equity,[16] he applied the concept of the trust to give the wife a share in the family home. Denning describes the use of the trust concept as "one of the most fruitful trees in the orchard of English law". The trust concept was adopted and applied by him in *Falconer v Falconer*.[17]

The same trust concept was applied by Kenny J. in *Conway v Conway*[18] in the case of a wife making payments towards the purchase of a house or the repayment of mortgage instalments when the house is in the sole name of the husband. In Conway's case, Kenny J. held that the husband became a trustee for the wife of a share in the house and the size of it depended on the amount of the contributions which she had made towards the purchase or the repayment of the mortgage.

Denning played a vital part in the recent important decision of the House of Lords in the conjoined cases of *Williams & Glyn's Bank Ltd., v Boland and Williams & Glyn's Bank Ltd., v Brown.*[19] Denning held in the Court of Appeal that a wife who contributed to the purchase of a house, but who was not registered as a joint owner, had an equitable interest which affected the legal estate and that anyone lending on the security of the matrimonial home ought to realise that a wife might have a share in it. The House of Lords affirmed the decision of the Court of Appeal as it affected the wives and held, in the circumstances of the cases, that the wives had an 'overriding interest' binding on a mortgage.

**Judicial Law maker**

Denning rejoiced in the role of law maker. Most judges rarely stress their law making powers. It has been said that their creativity is hidden behind a "screen of analogy or precedent". In the context of 'judicial creativity', one is reminded of Austin's observation when deriding the theory that Natural Law was always part of English Law. He called it:[20]

> "the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing I suppose from eternity, and merely declared from time to time by the judges".

Denning was of the opinion that judges do make laws. In *A.G. v Butterworth*,[21] on contempt of court and the question of a witness obtaining redress in a civil court for damages if he had been damnified by victimisation or intimidation, Denning said:

> "It may be that there is no authority to be found in the books, but, if this be so, all I can say is that the sooner we make one the better".

Denning was at his most "alarmingly" inventive in the case of *Dutton v Bognor Regis Urban District Council.*[22] Denning described the case as "one of the most important of modern times". Builders in Bognor Regis built a house on a "rubbish tip", but the house had no proper foundation. It was too thin. The Council's surveyor

inspected and passed the house. The first buyer bought it in ignorance and sold it to Mrs. Sadie Dutton. While Mrs. Dutton had the house, cracks in the walls and ceilings appeared.

Counsel for the Council submitted that the Inspector owed no duty to a purchaser of the house; that a professional man such as the Inspector owed no duty to one who did not employ him but only took the benefit of his work, that the Inspector was in a like position; that even if the Inspector was under a duty of care, he owed that duty only to those who he knew would reply on this advice — and who did rely on it; that in any case the duty ought to be limited to those immediately concerned and not to purchaser after purchaser and, finally, that the liability of the Council would in any case be limited to those who suffered bodily harm and did not extend to those who only suffered economic loss.

The Court of Appeal held for Mrs. Dutton — but the case is significant in Denning's extension of the doctrine of negligence and the concept of the legal duty to take care. Denning said;

> "The time has come when in cases of new import, we should decide them according to the reason of the thing. In previous times when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: was the defendant under any duty to the Palintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth".

The Council did not appeal to the House of Lords. Later, the House did consider the Dutton case in *Anns v Merton Borough Council,*[23] and approved it subject to one or two qualifications. Does this case illustrate Denning as a judge at his best — look at the merits and see how the law can yield the right results? In this context, it is interesting to note the observation of Mr. Donal Barrington, S.C., as he then was, writing in the Irish Jurist 1973[24] with reference to *Byrne v Ireland;*[25]

> ". . . it is arguable that because the (Supreme) Court felt that Miss Byrne had a moral right to compensation from the State, it invented a remedy to give her relief".

**Powerful Imagery**

The narrative form adopted by Denning in his judgments and in his books is terse and full of evocative imagery. On the interpretation of contracts, in the case of *British Movietonenews v London and District Cinemas Ltd.*[26] Denning stated:

> "We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that 'qui haeret in litera, haeret in cortice', which, being interpreted means; 'He who clings to the letter, clings to the dry and barren shell and misses the turth and substance of the matter' . . . ".

When the case reached the Lords, Viscount Simon was critical of Denning's judgment but wrote a letter afterwards to "soften the blow".

**Reminiscences**

Denning's narrative and engaging style is further illustrated by the personal reminiscences and anecodotes in his books. In "The Due Process of Law", writing on contempt of court, Denning cites an example from his own experience.

He was sitting as a Lord Justice of Appeal, at the time, in the Court of Appeal.

> "It was a hot day. Counsel were talking a lot of hot air. A man got up with his stick and smashed the glass window. To let in some fresh air, I suppose. At any rate, we did not commit him for contempt of court. We sent him off to Bow Street to be dealt with for malicious damage".

In another example, illustrating that intimidation or victimisation of witnesses is a gross contempt of court *(A.G. v Butterworth),*[27] Denning recalls the Butterworth case for a particular reason — a reason which allows him to divert from his subject;

> "It was argued for three days on Wednesday, Thursday and Friday 11, 12 and 13 July, 1962. It was the 'night of the long knives'. The Prime Minister, Mr. Harold Macmilan, dispensed with most of his Ministers, at a minute's notice; they included the Lord Chancellor, Lord Kilmuir. That left him very sore. Now one of the duties of the Master of the Rolls is that he has to swear in any new Lord Chancellor. One day I was warned that I would have to swear in a new Lord Chancellor. I was not told who he was. But during that morning, the Attorney-General, Sir Reginald Manningham-Buller (who was arguing the case himself), asked to be excused for an hour or two. We guessed the reason. He was to be the new Lord Chancellor. So on one day he was arguing before us as Attorney-General. The next day he was Lord Chancellor above us. We decided in his favour — but on the merits of his argument — not because he had become Lord Chancellor. Things like that make no impact on us. As in all these cases we do not delay. We prepared our judgments over the week-end and gave them on a Monday morning".

In the case,[28] Denning stated that there can be no greater contempt than to intimidate a witness before he gives evidence or to victimise him afterwards for having given it. Denning was also of the opinion that if the witness had been damnified by the intimidation or victimisation, he may well have redress in a Civil Court for damages. Denning admitted that there was no authority directly on the point but stated that there are many pointers to be found in the books in favour of the view he expressed.

**Denning's Critics**

Denning has his critics. He is accused of so reconciling the words of statutes with their desirable meaning that he ignores rules of statutory interpretation and so damages the law. But central to his approach is 'whenever there is a right, the law should give a remedy — 'ubi ius ibi remedium'. In *Magor and St. Mellons Rural District Council v Newport Corporation,*[29] Denning, L. J. (as he then was), said:

> ". . . I have no patience with an ultra-legalistic interpretation which would deprive (the appellants) of their rights altogether . . . We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis".

The House of Lords rejected that proposition. Viscount Simonds sharply disapproved and dogmatically stated:

> "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation".

In another context, Denning acknowledges that he received a "crushing rebuff" from the House of Lords. His efforts were described[30] as a "one man crusade" to free the Court of Appeal from the shackles of *stare decisis* — the doctrine of precedent.

Denning is not against the doctrine of precedent.

> "I treat (the doctrine of precedent) as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it".

In support of Denning's plea, one is reminded of the observation of Walsh J., in State (Quinn) v Ryan.[31]

> "The advantages of stare decisis are many and obvious so long as it is remembered that it is a policy and not a binding unalterable rule".

**Duty**

Denning never flinched his duty. In June 1963 he was asked by the Prime Minister, Mr. Harold Macmillan to undertake an inquiry. The Secretary of State for War, The Rt. Hon. John Profumo, O.B.E., had resigned during the Whitsun recess. It was the start of the 'Christine Keeler Affair' Denning describes the atmosphere at the time:

> "Rumours spread like wildfire. Not only about Mr. Profumo and the Russian Naval Attaché, but many other Ministers also. Their morale was shaken to the core. The security of the realm was said to be endangered. Nothing like it has been seen since Titus Oates spread his lies in 1678, when Macaulay tells us 'The capital and the whole nation was mad with hatred and fear' . . .".

The inquiry was not an easy task because of the political overtones. Although the inquiry report was praised in the House of Commons, it was later made clear that there never ought to be an inquiry like it again.

**Thirst for Justice**

Denning's judgments have been part of the Irish Law student's "tools of the trade" for the last quarter of a century. Writing in "The Times",[32] Sir Leslie Scarman stated:

> "The past 25 years will not be forgotten in our legal history. They are the age of legal aid, law reform and Lord Denning".

A reviewer, in another context, recently wrote that some scholarly writings groan heavily on bookshelves. Denning's books and his judgments — although scholarly — are not of that genre. Denning's voice — his eloquence, his single-mindedness, his thirst for justice as expressed in his judgments, will grace our law reports for years to come. Finally, the question may be posed: Is Denning one of the great helmsmen of the Common Law?

**FOOTNOTES**

1. The Discipline of Law, Butterworths, 1979, xxii, 331p. IR £5.19p (paperback).
2. The Due Process of Law, Butterworths, 1980, xviii, 263p. IR £5.94p (paperback).
3. (1951) 2 KB 164, (1951) 1 ALL ER 426.
4. (1968) AC 997, (1968) 1 ALL ER 694.
5. (1967) 2 ALL ER 1260, (1967), 1 WLR 1031, revsd (1968) AC 910, (1968) 1 ALL ER 874.
6. (1972) IR 215.
7. (1965) AC 1175.
8. (1953) 1 QB 63.
9. Central London Property Trust Ltd., v High Trees House Ltd., (1947) KB 130, (1956) 1 ALL ER 256.
10. (1951) 2 KB 215, (1951) 1 ALL ER 76.
11. (1962) IR 268 at p. 292.
12. Central London Property Trust Ltd., v. High Trees House Ltd., (1947) KB 130, (1956) 1 All ER 256.
13. (1956) 1 ALL ER 247.
14. (1972) IR. 372.
15. Page 90.
16. (1965) AC 1175.
17. (1970) 1 WLR 1333.
18. (1977) ILTR. 133.
19. (1980) 2 All ER 408.
20. Jurisprudence II P. 634.
21. (1962) 3 ALL ER 326. (1962) 3 WLR 819 CA.
22. (1972) 1 QB 373. (1972) 1 ALL ER 462.
23. (1977) 2 ALL ER 492. (1977) 2 WLR 1024.
24. Article on "Private Property under the Irish Constitution".
25. (1972) IR 241.
26. (1951) IKB 190. (1950) 2 ALL ER 390 revsd. (1952) AC 166. (1951) 2 ALL ER 617.
27. (1962) 3 All ER 326. (1962) 3 WLR 819 CA.
28. A.G.V. Butterworth (1962) 3 ALL ER 326. (1962) 3 WLR 819 CA.
29. (1952) AC 189. (1951) 2 ALL ER 839.
30. See (1978) 2 WLR 553 at 559.
31. (1965) IR 70; 100 ILTR 105.
32. The Times 5th January, 1977.

DUBLIN SOLICITORS BAR ASSOCIATION

# ANNUAL DINNER 1981

The Association will hold its Annual Dinner on Friday, **6th February, 1981** at the Law Society, Blackhall Place, 7.30 for 8.00 p.m.

Application for tickets (price £13 per person) should be sent together with the appropriate remittance to the Hon. Treasurer, Clare Cusack, Industrial Credit Co., 25/28 Adelaide Road, Dublin 2.

Early application is advisable as accommodation is limited.

# OPENING OF NEW LAW TERM

6 October, 1980

**The following are the texts of the homilies delivered for the opening of the Law Term:**

## SERVICE

at St. Michan's, Church St., the **Rt. Rev. Henry R. McAdoo,** Archbishhop of Dublin said:

"Love cannot wrong a neighbour; therefore the whole law is summed up in love". (Romans 13:10).

"No doubt the servants and administrators of the law occasionally permit themselves a wry smile when they hear those words and reflect on some of their professional experiences. Further reflection may suggest to them that you cannot legislate for love anyway; that justice is all about legal rights. Holland's *Elements of Jurisprudence* tells us that 'Jurisprudence is specifically concerned only with such rights as are recognised by law and enforced by the power of the State'.

"Indeed nobody could quarrel with this and the spectacle of judges pontificating on theology and ethics would be as terrifying as that of bishops laying down the law on law.

"Yet that verse was not written by the apostle out of or into what you might call either a simply ecclesial or a purely personal setting. It was written to ordinary members of the Church who lived in a society controlled by the Imperial Roman Government. In this passage St. Paul is taking about law, rights, responsibilities and relationships in the context of citizenship, and he asserts that love is the ultimate.

"The fact of experience is that man is native to two worlds, the physical and the spiritual, and his citizenship in the State and his membership in the Body of Christ cannot be disentangled, for he is one person. His outward actions and his sense of obligation, his sensitivity to the rights of others, are not detachable from his inner life of values, attidues and outlook. These latter are created and nourished, for the Christian, by his shared life in the Body of Christ, the new community of the new commandment 'that you love one another'. 'Love cannot wrong a neighbour, therefore the whole law is summed up in love'. Can the administration of the law take congisance of this, or is it an irrelevancy, something literally outside the law?"

"One suspects that for the Christian lawyer and legislator and servant of the law there must often be felt a tension at the heart of things as he seeks, in the words of the prophet Micah, both to do justly and to love mercy. All the time he is aware that the law is legislating for persons in the rich totality and wholeness of their personhood. They are, as we clergy also need to be reminded, persons not problems.

"What about justice and rights and love and law?

"First of all, what exactly was the apostle saying in this passage written in or about the year 54 A.D., to these Roman Christians about their behaviour in and relation to society as a whole?

"His position here was recently summed up by T. W. Manson: 'All other power or authority is derivative, either authorised or permitted by God. Hence resistance to legitimate authority, legitimately exercised, is wrong. It is assumed in these verses that the State is doing its appointed task of maintaining order and administering justice . . . The motive for obedience must be something more and better than fear of punishment: there must be awareness of a personal responsibility which may not be evaded. The obligations of a Christian to the State include payment of taxes, direct and indirect, since the civil rulers are in God's service (whether they know it or not) and busy with their proper task, the encouragement of good and the repression of evil. They have a right both to your material and your moral support. The sum total of Christian ethics is 'to love one another'. There is not duty that is not included in 'love', and nobody that is not included in 'one another'.

"The apostle was saying to the Church members in Rome that they should put this whole question of obedience to law, of obligations and rights, in a new context. That context is 'love' and the concept of love is not simply an interiorized one. It colours and includes all the duties. It is not only creative of attitudes but productive of actions — 'Love cannot wrong a neighbour; therefore the whole law is summed up in love'.

"In our contemporary society, because of its very complexity, people are deeply and currently concerned with rights, their own and others. Nobody in his senses, even were he competent, would attempt on an occasion like this to differentiate between justice as a cardinal virtue and justice in the fuller Biblical sense, or to expound commutative justice, distributive justice, legal justice and social justice. Nor could he begin to differentiate the various kinds of rights attached to each. All that we can ask here is to what extent commitment to the Christian world-view bears on the concept of justice and its administration, as we struggle to create in our own land a just society. Does this passage of Scripture suggest a direction, a line to be followed, if men and women are to have any success in building a just society? Or is it mere hyperbole to say 'love is the fulness of law', the sort of predictable thing clergymen may be expected to say?

"Justice is differentiated in the light of the rights for which it caters. Aquinas says that it is the 'firm and constant will to give each one his due'. Justice, in this sense, is concerned with the actual and exact according of his right, his due, to each person. The law can determine the extent of the obligation and enforce its fulfilment. The New Testament concept of justice goes beyond this and takes love as its criterion and says that this justice is, in effect, love — 'love is the fulness of law'.

"Is not the rendering of their dues, the granting of their rights, to all, the expression of one's duty to one's neighbour? We recall from the Catechism that this is a duty to love: 'My duty towards my neighbour is to love him as myself, and to do to all men as I would they should do unto me'.

"The hard saying here is that justice establishes and enforces the exact area of somebody's rights. That is its admirable and essential task. Love wants to go further than the enforceable minimum and is even ready to give up its own rights for the sake of the neighbour, for love 'seeketh not her own'. Through love, the goal and objective of justice which is to order the rights, the duties of individuals and communities, for the good of the whole and of each member, is reached — but it is also surpassed. That, I suppose is the 'gap-area' as between Christian ethics and moral theology on the one hand and the concept and practical principles of jurisprudence on the other. Yet the gap is not a no-man's land, since it is an area occupied by the human person whose rights, obligations, duties and responsibilities are the concern of both disciplines, although in different ways. The overlap is there.

"Is one justified in drawing a conclusion that here may be seen the difference, real if not stated, which is or should be discernible in the legal systems of professedly Christian countries as opposed to other codes of law? Are we able to see justice as love's guarantor and law as love's protector? To expound such a proposition may be — though for all I know it may not be — a legal heresy! It is surely Christian orthodoxy. Responsibility is both social and personal and, once again, the overlap between individual and society points to a shared area of concern — the nature and destiny of the whole man in community.

" 'Has not man a hard service upon the earth?' asks the Book of Job. Whatever religion and law can do to transpose this, so that it becomes the service of perfect freedom, is a truly pastoral function. It can be shared at different levels by both: 'Help one another to carry these heavy loads, and in this way you will fulfil the law of Christ'.

## VOTIVE MASS

At St Michan's, Halston St, the **Rev Donal Murray** said:

"We are here at the beginning of the Law Year to worship God. We do so because we recognise that words like 'law' and 'justice' ought to be spoken with a certain humility and reverence. These words are reminders that there is a Law and a Justice by which we will all be judged, counsel and criminal, judge and accused, solicitor and litigant — and priest. We are here as people who are conscious that 'we shall all stand before the judgment seat of God'. The words 'law' and 'justice', as Pope John Paul II expressed it, 'recall the model of a higher justice, the Justice of God, which is set as the goal and as an inescapable term of comparison' for every human system of law.

"There is a Justice which does not suffer from our limitations. This Justice, as Isaiah foretold, is exercised by the Messiah. On him rests the spirit of wisdom, insight, counsel, power, knowledge and the fear of the Lord. Jesus Christ, full of these gifts of the Holy Spirit, or, as one might call them, the qualities of true justice, judges the world with integrity and with equity.

"Our first duty is to acknowledge that the justice which we administer falls short of that inescapable term of comparison. It does so because the laws which we apply may be less than perfect, because the society in which we live has many injustices, open and hidden, because the evidence available is inadequate or misleading or even dishonest and because of our own lack of wisdom, insight and knowledge. As we celebrate the Eucharist we are in the presence of Jesus Christ, 'the one ordained by God to be the judge of the living and the dead'. To him we bring our efforts to administer justice with humility but also with hope and determination because the Justice of God is not just a humbling term of comparison, it is also the goal to which we try approximate.

"We see the Justice of God as the goal of our actions when we are clearly conscious that our treatment is not God's. It may have seemed somewhat inappropriate to read at this Mass a Gospel passage in which Jesus says: 'Judge not, and you will not be judged yourselves'. Yet all Christians need to be reminded that there is a judgment which belongs to God alone. The people engaged in litigation may at times appear to be behaving unreasonably, or selfishly or stubbornly; the people who stand in the dock in our courts may appear hopeless and lacking in dignity, they may have acted with violence and dishonesty. But they, like us, have been called by God; they, like us, may have received the pledge of eternal life in the Eucharist; they, like us, await the ultimate judgment. It is not for any human being to seek to root out the cockle from the wheat. The Christian may not despair of anyone.

"In the life of every Christian the effort to respect the dignity of others is required. It is an effort that is all the more necessary if one frequently meets those who are easily regarded as failures. All of those with whom we come in contact, not just clients and colleagues but those who are guilty of terrible crimes, all are people with whom we hope to share in the eternal kingdom. Their inner struggles and difficulties we may never know. Our aim should be that, in their contact with us, they may recognise our awareness of the dignity to which they have been called. They may indeed be responding to that call better than we know. It is a salutary thought that it was to the guardians and interpreters of the law that Jesus said that the most despised in society would enter the kingdom before them.

"We see the Justice of God as the goal of our actions when we recognise that no legal system can exhaust our obligations to individuals or to society. To be a servant of the law is a noble contribution to the establishing of justice, but, for Christians, all laws are 'summed up in this single commandment: You must love your neibhbour as yourself

"We are called by today's Gospel to be generous without hope of reward, to give, even when it seems unreasonable: 'to the man who takes your cloak from you, do not refuse your tunic'. Even in the necessarily formal context of court proceedings, and in our many other contacts, professional and non-professional, and our general social involvements, members of the legal profession, and all those who follow Christ, may show that his justice is much more than a matter of standing on rights, of passing judgment and of imposing punishment — important though all these may be. Divine Justice is God's constant, faithful readiness to be true to his promises of eternal love and peace. In the absence of this readiness to love generously and unwaveringly, human justice is in danger of losing its heart. Pope Paul VI put it with his usual perceptiveness:

'If, beyond legal rules, there is really no deeper feeling of respect for and service to others, then even equality before the law can serve as an alibi for flagrant discrimination, continued exploitation and actual contempt'.

"We see the Justice of God as the goal of our actions when we realise that justice is not the concern of the legal profession alone. The Eucharist is always an act of the whole Christian community. Our celebration today is a sign that your work is a service to all of us, and that it is a work in which we are all involved. It is a work which is gravely hampered if members of the community see themselves as uninvolved spectators in the administration of justice. The formal opening of the Law Year is a reminder to all citizens of their responsibilities.

'There is no point in a person complaining that prison fails to rehabilitate prisoners if he or she would not be willing to give an ex-prisoner a chance to make a new start; there is no point in a person complaining that some parents fail to control their children if he or she is not ready to do something to support and encourage families who find it difficult to cope; there is no point in a person complaining about the growth of violence if he or she is violent in word or attitude, indulging in 'selective indignation, sly insinuations, the manipulation of information, the systematic discrediting of opponents' — all of these, as the Pope has said, are attitudes 'capable of fostering the murderous game of violence'; there is no point in a person complaining about the threat to law and order which arises from the frustration of the young unemployed if he or she is content to see the maintenance of their own standard of living take precedence over the preservation and creation of jobs. For all of us, not just the groups represented here, and in every aspect of our lives, the Justice of God is the goal to which we are called and which we must approach together. Justice is a task for all of us.

"We see the Justice of God as the goal of our actions, finally, when we are aware that God's Justice must, in the end, be brought about by him not by us. Our respect for the dignity of others, our generosity, our sense of common purpose are taken up by his power into a new creation. Justice is something for which we must not only work but for which we must pray. That is, in fact, what we have come to do. We pray in this Mass that, in the coming year, in our work as members of the legal profession in Ireland and in our lives as citizens, we may foster that human dignity, community and freedom which we hope to find again, illuminated and transfigured in God's kingdom of justice and love. At the same time, we renew our resolve that our work and our lives will make us ready to stand before the judgment seat of Christ knowing that the amount we measure out will be the amount we will be given back".

# Company Law Notes

**EEC Council Directive of the European Communities of 5th March, 1979 to co-ordinate the Conditions for Admission of Securities to Official Stock Exchange Listing.**

The purposes of the Directive are:

(1) To co-ordinate the conditions for the admission of securities to official listing on stock exchanges situated or operating in the Member States;

(2) To facilitate the admission to official stock exchange listing in each Member State of securities from other Member States and the listing of any given security on a number of stock exchanges in the community and thereby make for greater interpretation of national securities markets and therefore contributing to the prospects of establishing a European capital market;

(3) To create the right to apply to the courts against decisions by the competent national authorities in respect of the application of the Directive.

In addition the Directive recognises the right of competent national authorities to retain individual discretion regulating their own particular security market as each security market serves different needs which must be facilitated. Accordingly the Directive will initially establish minimum standards only.

The stock exchange in Dublin will be the relevant national authority in respect of the Republic's security market. The most novel concept set forth in the Directive is contained in Article 15 which provides:

> "Member States shall ensure that decisions of the competent authorities refusing the admission of a security to official listing or discontinuing such a listing shall be subject to the right to apply to the courts".

It may well be that the disciplines of merchant bankers and stockbrokers in bringing a company successfully to the market will ensure that undesirable applications to the Stock Exchange will be most unlikely. However the creation of the right to appeal to the Courts will force the Stock Exchange to be more legalistic in its approach to applications. Clearly the Stock Exchange will have to take legal advice for discountinuing a listing of any company in view of the right of appeal.

The other area in which the Directive introduces a new concept is in Article 13, the publication of information by a company. The article provides that:

> "Where the protection of investors or the smooth operation of the market so requires, a company may be required by the competent authority to publish certain information in such a form and within such time limits as the national authority consider appropriate. Should the Company fail to comply with such requirement, the national authority may itself publish such information after having heard the company".

The innovating principle is the right of the national authority to issue the information itself. If the national authority is to exercise this right it will need to have very wide powers to ensure that the information that it is publishing is accurate, complete and not misleading. It would seem therefore it will have to have power to inspect documents and examine witnesses. How practical such inspections and examinations of documents would be in protecting investors must be open to doubt in view of the length of time such investigations will take and the undoubted unfavourable publicity that they will attract. The Directive does not make it clear what is the legal position of the Directors of a company who believe that certain information should not be published or believe that the information which the national authority insists on publishing is misleading in form or content.

By removing from the Directors of the company the ultimate responsibility for keeping shareholders informed and placing on the Stock Exchange is in effect undertaking to ensure that all information published by a company is complete, accurate and not misleading.

**EEC Third Council Directive Concerning Mergers of Public Liability Companies (EEC 78/855 OJ L 295/20/78)**

**Scope**

The directive is concerned with harmonisation of national rules affecting domestic mergers of **public limited liability companies,** where one company acquires all the assets and liabilities of another, and the latter is dissolved without liquidation.

**Aim**

The aim of the directive is to co-ordinate the procedures for and effects of mergers and similar operations in order to arrive at an equivalent degree of protection throughout the Community for the members, creditors and employees of companies involved in such operations.

**Provisions**

The provisions of the directive, which must be converted into national law prior to 12th October, 1981, define what is meant by a merger, stipulate those companies which may be merged, lay down minimum requirements for the contents, publication and supervision of the draft terms of mergers to be drawn up by administrative or management bodies, and determine the powers of general meetings and the rights of individual shareholders and of minority shareholders.

Other Articles are concerned with the protection of interests of creditors, particularly debenture holders.

The protection of employees in the event of mergers and similar operations was dealt with in the specific directive (Directive EEC 77/187 OJ L 61/26, 14/2/77) adopted in 1977 on the maintenance of employees' rights

in the event of transfers of undertakings. In view of the degree of protection afforded by this directive and the short space of time that has elapsed since it was adopted, the present directive reaffirms the existing protection by referring to the previous legislation. The directive also governs the grounds and detailed procedures for rendering mergers void; such nullity may only be ordered under certain conditions. The directive also applies in the case of merger by the formation of a new company.

The Council of Ministers in adopting this directive thought that it might also progress negotiations on a convention, currently being prepared by an intergovernmental group of experts, on mergers between public limited liability companies of different member states.

The directive is expected to have only a limited effect on existing merger practice in Ireland.



## COMMISSION OF THE EUROPEAN COMMUNITIES IN-SERVICE TRAINING PROGRAMME

The Commission of the European Communities organizes twice yearly in-service training periods lasting from 3 to 5 months, for candidates from universities and from the public and private sectors. The training periods start on 16 February and 16 September each year and are held in Brussels.

Trainees are selected from among nationals of the Member States of the European Communities on the basis of academic qualifications.

Application forms and further details are available from:

Mr. Denis Corboy,
Director,
Commission of the European Communities,
Press and Information Office,
39 Molesworth Street,
Dublin 2.

Please note that applications must be received $4\frac{1}{2}$ months before the start of the training period (i.e. by 30 April or 30 September each year).

# Nominal Plaintiffs and the Irish Constitution

## A consideration of the decision in *Cahill v. Sutton*

by Gerry Whyte, B.C.L., Lecturer in Law, Trinity College, Dublin.

Until quite recently the issue of the 'locus standi' of Irish citizens in constitutional actions had been considered on only one occasion by any Irish court. In *East Donegal Co-Operative Livestock Mart and others v A.G.*[1] Walsh J., delivering the judgement of the Supreme Court, said, 'obiter', ". . . at one end of the spectrum of opinions on this topic one finds the contention that there exists a right of action akin to an 'actio popularis' which will entitle any person, whether he is directly affected by the Act or not, to maintain proceedings and challenge the validity of any Act passed by the Parliament of the country of which he is a citizen or to whose laws he is subject by residing in that country. At the other end of the spectrum is the contention that no one can maintain such an action unless he can show that not merely do the provisions of the Act in question apply to activities in which he is currently engaged but that their application has actually affected his activities adversely. The Court rejects the latter contention and does not find it necessary in the circumstances of this case to express any view upon the former".[2] He went on to point out that, "the provisions of Art. 34 expressly confer upon this [Supreme] Court and the High Court power to determine the question of the validity of any Act of the Oireachtas without any qualification or condition requiring that there must be in existence a dispute or conflict as to legal rights between the parties and peculiar to the parties".[3]

These statements however must now be considered in the light of the recent Supreme Court decision in *Cahill v. Sutton*.[4]

The facts of that case were as follows — in 1968, the Plaintiff attended the Defendant, a consultant gynaecologist, for treatment of a gynaecological complaint. He prescribed certain tablets for her but after commencing the course of tablets she began to suffer illness and disability.

In 1972, four years after she first began to suffer from this illness and disability, she instituted proceedings in the High Court against the Defendant for damages for negligence and breach of contract, on the grounds that he had negligently prescribed incorrect and harmful medication.

The defence, in addition to denying the substantive points of the Plaintiff's claim, also pleaded that the Plaintiff's claim was barred by Section II(2)(b) of the Statue of Limitations Act, 1957, which provides that:

> "An action claiming damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statue or independently of any contract or any such provision), where the damages claimed by the plaintiff for the negligence, nuisance or breach od futy consist of or include damages in respect of personal injuries to any person, shall not be brought after the expiration of three years from the date on which the cause of action accrued".

This contention was one of a number of preliminary issues which came before Hamilton J. in the High Court in 1975 and he held, on this point, that the plaintiff's claim in contract[5] was barred by Section 11(2)(b). On appeal to the Supreme Court, counsel for the plaintiff applied for liberty to riase the question of the constitutionality of the Section. Permission was granted and this issue was remitted to the High Court for decision.

In the High Court, Finlay P. had held that Section 11(2) (b) did not infringe the plaintiff's constitutional rights under either Art 40(1) or Art 40(3). The plaintiff appealed this decision to the Supreme Court and it was in the course of the hearing of this appeal that the question of the plaintiff's 'locus standi' arose for the first time. It arose in the following way: the plaintiff contended that Section 11(2) (b) violated Art 40(1) and Art 40(3) of the Constitution because its absolute and unqualified terms did not permit any extension of the three year period of limitation in a case where the prospective litigant did not know, and could not have learned within that period, of the accrual of the cause of action. If the plaintiff succeeded on this point, then Section 11(2) (b) would be declared invalid and the plaintiff's action could proceed through the ensuing lacuna in the law.

The question of the plaintiff's 'locus standi' arose, however, because on the facts of the case, a qualification to Section 11(2) (b) along the lines contended for by her would not protect her in the instant case as at all material times she was aware of the facts necessary to constitute a claim against the defendant. The plaintiff was obliged therefore to rely on the putative constitutional rights of a hypothetical third party who would be protected by such a qualification, in order to attack the constitutionality of Section 11(2) (b). The issue for the Supreme Court then, was whether "such an indirect and hypothetical assertion of constitutional rights gives the plaintiff the standing necessary for the successful invocation of the judicial power to strike down a statutory provision on the ground of unconstitutionality".[6]

### The decision in the East Donegal Case

The leading judgment was delivered by Henchy J. He began by quoting from the decision of the Supreme Court in the *East Donegal* case[7] but pointed out that Walsh J's remarks in that case were necessarily obiter as it had been held in that case that the plaintiff's would be directly affected by the provisions which they sought to impugn. He continued by observing that Walsh J. had referred to "opinions or contentions" and not to judicial practice, and that neither of the two opinions mentioned appeared to have received authoritative judicial acceptance in any other comparable jurisdiction. In actual fact, judicial practice in such jurisdictions usually required that the person challenging a particular legislative provision must

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# MEDICO-LEGAL SOCIETY OF IRELAND

## List of Meetings

**Thursday 29th January, 1981**
*Topic:* "Family Planning and the new Act".
*Speakers:* Dr. David Nowlan, Medical Correspondent, Irish Times and legal speaker to be arranged.

**Thursday 26th February 1981**
*Topic:* "Abortion Law"
*Speaker:* William Binchy, B.A., B.C.L., L.L.M.

**Thursday 26th March, 1981**
*Topic:* "When Blood is their Argument"
*Speaker:* Dr. Patrick J. Lincoln, Ph.D., M.R.C.Path., Senior Lecturer in Forensic Serology, The London Hospital Medical College and Assistant Secretary General to the British Academy of Forensic Sciences.

**Meetings will be held in the Incorporated Law Society Buildings in Blackhall Place at 8.15 p.m.**

show either that he had been personally affected by it or was in imminent danger of becoming the victim of it.

The great advantage of such an approach, according to the learned judge, is that it would give "concreteness and first hand reality to what might otherwise be an abstract or hypothetical legal argument,"[8] thereby preserving the flexibility and reach of the particular constitutional provision involved. On the other hand, the actio popularis had a number of disadvantages. Firstly such a case, being decided 'in vacuo', would tend to lack the force and urgency of reality; secondly, there was a danger that a person whose case had been argued unsuccessfully by another, might feel aggrieved on the grounds that his case was wrongly or inadequately presented; thirdly, the 'actio popularis' might result in the court's jurisdiction to review legislative provisions being abused by "the litigious person, the crank, the obstructionist, the meddlesome, the perverse, the officious man of straw".[9]

These considerations led the learned judge to lay down, as a precondition to the exercise of the constitutional power of judicial review, "that the impact of the impugned law on (the litigant's) personal situation discloses an injury or prejudice which he has either actually suffered or is in imminent danger of suffering".[10] This rule is not absolute, however, and may be qualified whenever the justice of the case so requires, e.g. where those prejudicially affected by the impugned statute are not in a position to assert adequately, or in time, there constitutional rights. Henchy J. declined to establish the precise limits of this rule of personal standing, stating that it could be relaxed wherever the particular circumstances of a case disclose weighty countervailing considerations justifying such an approach.

In the instant case the plaintiff failed to satisfy this test of personal standing as she had been at all times aware of the material facts which constituted her claim and therefore was not directly affected by the alleged constitutional infirmity in Section 11(2)(b), viz., the absence of a proviso protecting those litigants who did not know of the accrual of the cause of action within the three year limitation period. Nor did there appear to be any pressing constitutional need to examine the validity of Section 11(2)(b), which might justify a waiver of the test of 'locus standi' in this case. Henchy J. did suggest however that the Oireachtas should consider the introduction of a qualification to Section 11(2)(b) similar to that contained in Section 1 of the Limitation Act 1963 in the U.K. which protects a person in the position of the plaintiff's putative litigant. A brief concurring judgment was delivered by O'Higgins C.J.[11]

It would appear therefore that before a citizen can challenge the validity of a piece of legislation, it must be shown that such legislation has adversely affected or is about to affect adversely, that citizen, though this requirement may be waived in certain unspecified cases.

The decision in *Cahill v. Sutton* has an additional and deeper significance however. It is submitted that it is evidence of a reaction among members of the judiciary against the growing tendency to utilise the courts for the resolution of issues which might be more properly dealt with by the Oireachtas. Since the decision in the *East Donegal case* in 1970, the Irish Courts have had to tackle a number of controversial issues. These include the right of Irish citizens to obtain contraceptives;[12] discrimination based on sex and property in relation to jury service;[13] discrimination based on marital status in the Government's fiscal policy.[14] It is submitted that the decision in Cahill v Sutton will have the effect of impeding this development and of limiting the involvement of the courts in these types of controversial political and social issues.

Support for this can be found in the judgment of Henchy J. At page 18-19 thereof, he says,

> "In particular, the working interrelationship that must be presumed to exist between parliament and the judiciary in the democratic scheme of things postulated by the Constitution would not be served if no threshold qualification were ever required for an attack in the courts on the manner in which the legislature has exercised its law-making powers. Without such a qualification the courts might be thought to encourage those who have opposed a particular Bill on its way through Parliament to ignore or devalue its elevation into an Act of Parliament by continuing their opposition to it by means of an action to have it invalidated on constitutional grounds. It would be contrary to the spirit of the Constitution if the courts were to allow the opposition that was raised to a proposed legislative measure, inside or outside Parliament, to have an unrestricted and unqualified right to move from the political arena to the High Court once a Bill has become an Act. And it would not accord with the smooth working of the organs of State established by the Constitution if the enactments of the National Parliament were liable to be thwarted or delayed in their operation by litigation which could be brought at the whim of every or any citizen, whether or not he has a personal interest in the outcome".

No one would deny that the balance of powers between the three branches of Government (i.e. the legislative, executive and judicial branches) must be respected under our present Constitution. It does not follow, however, that *Cahill v. Sutton* makes good law. It is conceded that a similar test of 'locus standi' is applied by the American courts,[15] who also function under a Constitution which recognizes the separation of the powers of Government. However there are significant differences between the constitutional position of the American judiciary and that of their Irish counterparts. Firstly, the power of judicial review was implied into the U.S. Constitution by the American Supreme Court in *Marbury v. Madison*,[16] whereas it is expressly conferred on the Irish judiciary by Art. 34 of the Irish Constitution. Secondly, the American courts have to deal with a greater volume of work than that coming before the Irish courts. Both of these factors distinguish the Amierican position from that which obtains in the Republic, and therefore the fact that a test of 'locus standi' exists in American constitutional law should not deter us from levelling a number of criticisms at the existence of a similar test in Irish law.

Firstly, the Irish Superior Courts were not without protection against the "busybody and the crank" prior to the adoption of the test of locus standi in Cahill v Sutton. O.19, r. 28 of the Rules of the Superior Courts, 1962 empowers the High Court to stay any "frivolous or

vexatious" action. It is submitted that this is adequate to protect the balance of powers as it exists between the Oireachtas and the courts. Indeed one would be inclined to hold the view that if a constitutional issue arises which is neither frivolous nor vexatious, then the courts should pronounce judgment on it. Secondly, it is difficult to find any justification in the Constitution for the requirement of 'locus standi' as set out in *Cahill v Sutton*. The constitutional power of judicial review created by Art. 34(3) (2) when read in the light of the preceding sub-section of Art. 34 is merely part of the High Court's "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal". It is submitted that it is not apparent from this that a potential litigant must be personally affected by a particular issue before resorting to the High Court for a decision on the point and indeed it is significant that neither member of the Supreme Court, who delivered judgment in *Cahill v Sutton*, cited any provision of the Constitution in support of his conclusions. Criticising the celebrated decision of Kenny J. in Ryan v A.G.,[17] Prof. J. M. Kelly said that it represented

> ". . . the introduction of the principle of testing . . . legislation against the background of rules whose recognition resides only in the breasts of the judges, whose individual or collective reactions the representatives of the people cannot be expected to forsee".[18]

It is submitted that similar criticism can be levelled, mutatis mutandis, at the Supreme Court's decision in *Cahill v. Sutton*, which appears to have been decided solely on the basis of policy. Deciding a constitutional issue in this way is fraught with danger, especially if the issue involves the fundamental rights of the citizen. What might appear to be sound policy to one section of the community can often be deplored by another. Therefore, if the judiciary wish to retain the confidence of society as a whole they should, in their reasoning, adhere closely to objective legal principles and eschew the subjective morass of public policy, which regrettably appears to form the basis of the judgment in *Cahill v Sutton*.

**Postscript**

The test in *Cahill v Sutton* was applied in the recent High Court case of *Norris v A.G.*[19] Here the plaintiff argue, inter alia, that Sections 61 and 62 of the Offences Against the Person Act, 1861, were unconstitutional inasmuch as they infringed the right of privacy of married couples by criminalising buggery. McWilliam J. held, however, that as the plaintiff was unmarried, he was precluded by the decision in *Cahill v Sutton* from advancing this argument.

The test was also applied by the Supreme Court in the recent decision of *King v D.P.P. and the A.G.* (31.7.1980 — unreported). In this case, the Plaintiff had been convicted of loitering with intent to commit a felony and of being in possession of house breaking implements with intent to commit a felony contrary to Section 4 of the Vagrancy Act, 1824. This section created a wide variety of offences but the Supreme Court held that the plaintiff could only question those parts of the Section which had effected him personally. [See O'Higgins, C.J. at p. 9 of his judgment; Henchy, J. at p. 19].

**FOOTNOTES**

1. [1970] I.R. 317.
2. Ibid. at p. 338.
3. Ibid. at p. 339.
4. Supreme Court, 9 July 1980 — unreported.
5. The Plaintiff had waived her claim in tort.
6. Per Henchy J. at p. 10.
7. Cf. p. 1 supra.
8. Per Henchy J. at p. 15.
9. Ibid. p. 18.
10. Ibid. p. 20.
11. As the constitutionality of Section 11(2) (b) was not actually decided by the Supreme Court, the one judgement rule in Art. 34(4)(5) did not apply.
12. McGee v A.G. [1974] I.R. 284.
13. De Burca v. A.G. [1976] I.R. 38.
14. Murphy v. A.G. High Court 12 Oct, 1979 — unreported. Supreme Court, 25 January 1980 — unreported.
15. See, for example, the decision of the U.S. Supreme Court in *Tileston v Ullman*, 318 U.S. 44 in which it was held that a physician's claim that the lives of certain of his patients would be endangered by child-bearing did not give him a standing to question the constitutionality of a State Statute prohibiting the giving of advice as to the use of contraceptives.
16. I Cranch 137; 2 L.Ed. 60 (1803).
17. [1965] I.R. 294.
18. Prof. J. M. Kelly, *Fundamental Rights in the Irish Law and Constitution* 2 Ed., Dublin, 1967, at pp. 43.
19. High Court, 10 October, 1980 — unreported.

# Conveyancing Notes

## HOUSING DEVELOPMENT

### UNREGISTERED TITLES

The Conveyancing Committee has been receiving an increasing number of representations from practitioners about the presentation of sets of title documents to unregistered land. The Committee recommends that as a matter of good professional practice all such sets of title documents should:

(1) Contain an Index or List of Contents.

(2) Have all pages numbered.

(3) Have all maps properly coloured.

(4) Be clearly printed, preferably by the letterpress or litho-method (not stencilled).

(5) Contain a full set of searches against the title.

The Committee is satisfied that a Vendors solicitor is under an obligation to furnish proper books of title and urges solicitors acting for Purchasers to reject any booklets which do not reach an acceptable standard.

In an increasing number of cases no Registry of Deeds Searches are furnished with or in a Booklet of Title. The Builders solicitors apparently claim that they are basing this practice on a recommendation of this committee. No such recommendation was ever made. Any practice notes issued by this Committee regarding searches emphasised that the current practice that Registry of Deeds Searches be furnished by developers solicitors should continue. When Builders or Developments purchase property for a housing development their solicitors pay extra attention to the investigation of title and to searches knowing that it will be vitally important to be able to explain all queries which will arise in the course of the investigations by the many Purchasers and Mortgagees solicitors. The Committee cannot think of any reasonable circumstances where searches are not available and think that it is unreasonable for Builder's solicitors not to furnish copies with the title with suitable explanations.

Solicitors for Builders are reminded that the Land Registry will now give priority to first registrations of development property. There should be no difficulty in any ordinary case in achieving registration in good time and builders solicitors are urged to avail of this facility.

## BUILDING DEVELOPMENT

A member has drawn the attention of the Conveyancing Committee to the fact that solicitors for some Builders selling houses on developments which comprise unregistered land are refusing to furnish Memorials executed by the Vendor as has always been the practice. The Committee feels that a Purchaser is entitled to have a Memorial executed by the Vendor and can see no good reason for a departure from the practice that in building estates a Memorial duly executed by the Vendor is furnished at his expense.

# Recommendations of Law Society /Building Societies Joint Committee

## BUILDING SOCIETY VACATED MORTGAGES

Pending the production of the Building Society Mortgage with receipt under seal, it is recommended that Solicitors acting for Purchasers and Mortgagees shall not defer completion of the sale nor registration of the Purchase Deed nor completion of a Mortgage by the Purchaser provided the said Solicitors are satisfied that all monies due on foot of the Building Society Mortgage have been discharged and that a satisfactory undertaking to forward same with receipt has been furnished.

This is having regard to Section 84 of the Building Societies Act 1976 which provides, inter alia, that a receipt under seal of the Building Society for all monies secured by the Mortgage shall:

(1) In the case of unregistered land operate to vacate the Mortgage and to vest the property comprised in the Mortgage in the person for the time being entitled to the equity of redemption.

(2) In the case of registered land for the purposes of Section 65 of the Registration of Title Act 1964 be sufficient proof of the satisfaction of the Mortgage.

## FAMILY HOME PROTECTION ACT

Two questions relating to requisitions under this Act, have been submitted fo the Committee for a consideration. These are:

Is it reasonable or necessary to enquire into the position in relation to the Family Home Protection Act:

(1) In respect of a sale by a Company or

(2) In respect of the occupation of a premises by non-conveying beneficiaries on a sale by a personal representative.

The Committee is unanimously of the opinion that in each of the above cases such investigation is neither reasonably nor necessary. In the first case it points out that a Company cannot have a spouse and accordingly a conveyance by a Company could not be void due to lack of consent of any separate legal person such as a Director who may have lived in the premises the subject of the sale.

In the second case the Committee feel that a purchase from a personal representative *qua* personal representative should not be concerned with the Family Home Protection Act in relation to that particular assurance. It would be quite different if an assent had been executed and the sale was by a beneficiary as beneficial owner.

# The Register

## REGISTRATION OF TITLE ACT, 1964

### Issue of New Land Certificate

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 January, 1981.

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

(1) Registered Owner: Kieran McManus, Derrylahan, Athlone, Co. Roscommon; Folio No.: 31923; Lands: Clonburren and Derrylahan; Area: 1a. 3r. 0p.; 34a. 3r. 39p; County: Roscommon.

(2) Registered Owner: Julia Hastings, Faha, Gurteen, Ballinasloe, Co. Galway (limited owner); Folio No.: 4311; Lands: Faha (part); Gortnahultra (part); Area: 24a. 2r. 0p.; 17a. 3r. 10p.; County: Galway. Galway.

(3) Registered Owner: Paul Finn, Oranmore, Co. Galway; Folio No.: 34190; Lands: Rinmore; Area: 0a. 0r. 25p.; County: Galway.

(4) Registered Owner: Joseph Richard Whitley; Folio No.: 8040; Lands: (1) Skeagh (parts) E. D. Skull, (2) Ardmanagh (E. D. Skull) 1 undivided 29th part of parts, (3) Meenvane (E. D. Skull) 1 undivided 29th part of parts, (4) Cooradarrigan (E. D. Skull) 1 undivided 29th part of parts, (5) Skeagh (E. D. Skull) 1 undivided 29th part of parts; Area: (1) 30a. 2r. 12p.; (2) 190a. 3r. 8p.; (3) 3a. 1r. 38p.; (4) 10a. 2r. 26p.; (5) 193a. 0r. 32p.; County : Cork.

(5) Registered Owner: Patrick Keenan (orse Patrick Keenan Junior); Folio No. 878; Lands: Aghameen (part); Area: 39a. 2r. 8p.; County: Louth.

(6) Registered Owner: Frank and Delia Glynn, Clare Road, Ballyhaunis, Co. Mayo; Folio No.: 13272; Lands: Hazelhill; Area: 0a. 0r. 4p.; County: Mayo.

(7) Registered Owner: Francis and Patrick Kerins, Tubberbride, Collooney, Co. Sligo; Folio No.: 22944; Lands: Doorly, Liscoony; Area: 12a. 3r. 10p.; 1a. 3r. 12p.; County: Sligo.

(8) Registered Owner: Patrick Casserly of Kilroghter, Co. Galway; Folio No.: 19583; Lands: Kilroghter (part); Sylaun (part); Area: 7a. 2r. 20p.; 5a. 0r. 34p.; County: Galway.

(9) James H. Dunn; Folio No.: 26730; Lands: Golan; Area: 12a. 3r. 8p.; County: Donegal.

(10) Registered Owner: Agnes Clancy; Folio No. 10506; Lands: Plots of ground (formerly known as parts of the lands of Park); Area: 1a. 3r. 12p.; County: Limerick.

(11) Registered Owner: James Fitzgerald; Folio No.: 8090 (This folio is closed and now forms the property No. 1 in Folio 10671F); Lands: Cloonaduff; Area: 48.281 acres; County: Limerick.

(12) Registered Owner: John Manley; Folio No.: 28189; Lands: Coole West; Area: 54a. 0r. 13p.; County: Cork.

## LOST WILLS

**Would any person** having knowledge of any Will made by Robert O'Brien, late of 17 Parnell Street, Clonmel, Co. Tipperary, who died on the 14th November, 1980, please communicate with Messrs. Henry Shannon & Co., Solicitors, 2 Brighton Place, Clonmel, Co. Tipperary. Phone (052) 21700 and 21181.

**Estate of Thomas Casserly,** deceased, late of 15 Saint Lawrence Road, Clontarf, Dublin 3. Will any person having knowledge of any Will of the above named deceased who died on the 22nd November, 1980, please contact Messrs William F. Semple & Co., Solicitors, Lough Corrib House, Waterside, Galway.

**In the goods of** Richard William Markby, late of Scart, Ballysimon, Co. Limerick, Farmer, deceased. Will anyone having knowledge of a will or codicil of the above named who died on the 11th December 1980, please contact Michael Tynan & Co., Solicitors, 16 William St., Limerick. Tel. (061) 45888.

## NOTICES

**Wanted:** Spirit Retailers off-licence and Beer Retailers off licence. Replies to: McCann Fitzgerald, Roche and Dudley, Solrs., 28/32 Upr. Pembroke St., Dublin 2. Tel. 765888. Ref. WHC.

**Solicitor** – 1½ years taxation experience seeks position. Box No. 02.

**Newly qualified Solicitor,** hard worker, seeks position in any area, three years experience in general practice, i.e. Conveyancing, Probate, Taxation, Litigation, Co. Law, etc. Box No. 03.

**Hard working** young English solicitor seeks position as assistant in Dublin. Conveyancing and Probate preferred but anything considered. Reply to Box No. 01.

**We require** Bound copies of the Acts of the Oireachtas for the following years, 1958-'62, 1966-'1969 inclusive, 1971 and 1972. If available, please contact Kent Carty & Co., Solicitors, 48 Parnell Square, Dublin 1. Tel. (01) 740809.

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# RECENT IRISH CASES

## CRIMINAL LAW

**Conviction for larceny quashed by Court of Criminal Appeal because (i) a written statement of accused made while in unlawful detention ought to have been excluded by trial judge, and (ii) the claim of right of the accused to the charge of larceny should have been allowed to go to the jury.**

The Appellant had been convicted of the larceny of a muck-spreader in the Circuit Court. The muck-spreader had been found by the Gardai on the Appellant's farm and the Appellant had accompanied Gardai to a Garda station at 9.30 a.m. and told them that he had bought it from a dealer. The Gardai checked the Appellant's story and at 2 p.m. he was told that the dealer had denied the story. Sometime after that the Appellant was brought to a different Garda station, and that therefore his relation to an outbreak of cattle stealing. At 10 p.m. that evening the Appellant made a written statement admitting that he took the muck-spreader. Counsel for Appellant submitted that the Appellant was never formally arrested despite the fact that he was in custody once he had been brought to the first Garda station and that therefore his detention was unlawful and in breach of his constitutional rights.

*Held* (per O'Higgins, C.J.):

(1) That the evidence disclosed that the Appellant had consented to accompany the Gardai to the first Garda station; that the Gardai had been of the opinion that he had committed an offence; that the only delay in charging him had been occasioned by the necessity of checking his story; and that the formality which had been lacking could not amount to a conscious and deliberate violation of the Appellant's constitutional rights and, that, therefore, his verbal statement was admissible.

(2) That the Appellant however, ought to have been charged after his story had failed to check out. Per O'Higgins C.J.:

"Apart from the special situation provided for under the Offences Against the State Acts, there is no procedure under our law whereby a person may be held in a Garda station without charge. In particular our law does not contemplate or permit the holding of a person for questioning". The decision not to charge the Appellant at that time could only have been the result of a deliberate decision by the Gardai; that the concern of the Gardai to continue their investigation into cattle-stealing was not such a special circumstance which could excuse the violation of the Appellant's constitutional rights which had taken place; and that accordingly, the Appellant's written statement ought to have been excluded.

The trial judge had also decided that the Appellant's claim of right – that he took the muck-spreader in the belief that he was entitled to do so because the owner could not pay for his debts – could not arise. The trial judge had felt that, to establish a claim of right, the claim must be one known to the law.

*Held* further (per O'Higgins C.J.):

(3) That following *AG v. Gray* [1944] I.R. 326, the question to be considered was not whether the claim of right being put forward was one known to the law, but rather whether it was one honestly believed in by the accused, and, whether, with that honest belief, what he did could be excused; that this was a matter to be decided on by the jury and that since the trial judge had declined to permit the Appellant to put forward this defence that there had been a miscarriage of justice; and that accordingly, the conviction ought to be quashed.

**D.P.P. v. John O'Loughlin** – Court of Criminal Appeal (per O'Higgins C.J., with Finlay P. and Doyle J.) – 11 December 1978 – unreported.

## HABEUS CORPUS AND CERTIORARI

**The power of the Minister for Justice to transfer a prisoner to the Central Mental Hospital, Dundrum, only authorises the detention of a person where the District Justice has made an Order of remand "for further medical examination", and then only for the specified period of remand**

**Extent of the power of the Minister under Section 13 of Lunatic Asylums (Ireland) Act 1875 as adapted and extended by the Criminal Justice Act, 1960, considered. Distinction between purely administrative orders and judicial orders of the District Court also considered.**

The Prosecutor (Caseley) was arrested on 8 May 1975, and on 9 May 1975 was charged before a District Justice (the second Respondent) with the offence of having unlawfully and maliciously set fire on 8 May 1975, to a school. He was then put on remand in custody until 15 May 1975, with consent to bail and a request by the District Justice for a medical report on the Prosecutor, who in the absence of bail, was detained in Mountjoy Prison. On 12 May 1975, he was transferred from Mountjoy to the Central Mental Hospital at Dundrum, Dublin, pursuant to an order of the Minister for Justice of that date made under Section 13 of the Lunatic Asylums (Ireland) Act 1875, as adapted and extended by the Criminal Justice Act 1960. The Prosecutor was never subsequently brought before the District Court and remained detained in the custody of the first Respondent, the director of the Central Mental Hospital, without any further order of the Minister for Justice. It appeared that on 15 May 1975, in the absence of the Prosecutor, evidence was given in Court by a doctor to the District Justice that the Prosecutor was unfit to attend court and on that date and on ten subsequent stated dates the District Justice made further orders remanding the Prosecutor in custody for stated periods, but the Prosecutor was not informed of any of these matters nor was he given an opportunity of attending in court on any of these occasions. The Prosecutor stated (on affidavit) that he was not suffering from any physical or mental disability and was physically and mentally fit to attend court and to understand proceedings and to instruct a solicitor, and that he believed that his continued detention was on the basis that he was alleged to be unfit to attend court.

On 6 November, 1978, in the High Court, the Prosecutor was granted a Conditional Order of Certiorari relating to a particular order of the District Justice of 13 October, 1978 (being the last of a series of similar orders) the terms of which order were as follows:

"And I did adjudge that evidence of Dr. E. H. that due to illness (the Prosecutor) could not appear in court. Might be fit for court in three months. Remand 12/1/79 at 10.30 a.m."

Also on 6 November, 1978, the Prosecutor was granted a Conditional Order of Habeas Corpus ad subjiciendum, directed to the first Respondent, the director of the Central mental Hospital.

It was argued on behalf of the Prosecutor that the confinement authorised by the Order of the Minister for Justice of 12 May 1975 was expressed to be for the duration only of the remand in custody to 15 May 1975, directed by the District Court Ordér of 9 May 1975; that in that respect the order of the Minister conformed precisely to the terms of Section 13 of the 1875 Act as restricted and adapted in accordance with the judgment of the Supreme Court in *The State ("C") v. The Minister for Justice*, [1967] I.R. 106, at pp. 113 and 123; that the order of 13 October 1978, was defective in that it did not specify the place of detention for the period of remand, and was made in excess of jurisdiction insofar as it purported to authorise the detention to be in the Central Mental Hospital or anywhere other than in a prison; that the effect of Section 13 of the 1875 Act, as construed by the Supreme Court in *The State ("C") v. The Minister for Justice* (supra) was that a new and further order under Section 13 was necessary in respect of each period of remand, provided such remand be "for further examination"; that, on the authority of *The State ("C") v. Daly*, [1977] I.R. 312, the District Justice had no authority to commit the Prosecutor to the Central Mental Hospital for detention there and that his order of 13 October 1978 could not be a sufficient warrant for the continued detention of the Prosecutor in that hospital.

It was argued on behalf of the Respondents that the District Court Order of 13 October 1978 and preceding orders had been made prusuant to Section 24 of the Criminal Procedure Act, 1967, the effect of which section was that the District Justice, when continuing the remand in custody of the Prosecutor, had to adopt as the place of continued detention the place where the Prosecutor happened to be when, because of illness, he could not attend in court, and that the District Justice did not need to specify the place of detention save to effect a change.

*Held* (per Gannon J.):

(1) That the District Court Order of 13 October 1978 was not bad on its face and was not made without or in excess of jurisdiction, as that order of remand made pursuant to Section 24(4) of the Criminal Procedure Act 1967 was not an adjudication of a judicial nature but was administrative only and none of the grounds of objection to that order were pertinent to such an administrative order. *Per Gannon J.*

"The provision of a place for detention of a person under an order of commital by the court, whether as a convicted person or as a person awaiting trial following a determination that there is, prima facie, evidence to justify holding a trial, is a function of the executive authority of the State. I do not think an order of the District Justice is bad merely on the grounds that it does not specify the place of detention, but it may be bad if it should direct the detention to be in a place not permitted by law."

At no time was the District Justice required to, nor did he, in fact, either determine the nature or effect of evidence in support of the charge, or determine whether the Prosecutor was "unfit to plead" under Section 207 of the Mental Treatment Act 1945 – both of which would have been judicial functions. *Per Gannon J.*

"A decision as to whether a person is "unfit to plead" is a judicial decision founded on medical evidence and is not a medical decision. The determination of that issue is a judicial function which should be performed in a judicial manner upon proper notice to the Prosecutor with proper opportunity for him, if required, to be adequately represented and should not be postponed indefinitely at the instance initially of the Minister for Justice and thereafter by medical officers."

The case shown was allowed and the conditional order of certiorari was discharged.

(2) That, as the only warrant for his authority offered by the director of the Central Mental Hospital (first respondent) for the detention there of the Prosecutor was the order of the Minister for Justice made on the 12 May 1975, and, as that ministerial order was effective only for the limited period (i.e. until the next remand on 15 May 1975) stated in it, and, as no further or subsequent order had been made by the Minister, *there* was no valid or sufficient warrant of authority for detention by the director and the continued detention of the Prosecutor there had not been justified in law. The purported cause shown against the conditional order of Habeas Corpus was disallowed and an order for the release of the Prosecutor pursuant to Article 40.4.2. of the Constitution issued.

**The State (Caseley) v. Daly and O'Sullivan** – High Court (per Gannon J.) – 19 February 1979 – unreported.

## CONTRACT OF EMPLOYMENT

**An assurance given as an element in a "package" settlement of a claim for increased remuneration dependent on the outcome of other employees' negotiations then being determined by the Labour Court formed part of a binding Contract between the employee and the employer through his Union which negotiated the settlement.**

The Plaintiff was an experimental officer in the employment of the Defendant and one of a group classified as "technicians" for the purposes of his conditions of employment.

In early 1970 a claim for increased remuneration for a two year period up to 1st April, 1972, was made and negotiated by officers of the AUEW (TASS) of which Union the Plaintiff was a member. When these direct negotiations broke down the parties met under the auspices of the conciliation department of the Labour Court. Negotiations then proceeded between the parties by way of correspondence,

meetings and telephone conversations.

At that time in 1970 a claim was pending before the Labour Court for an award of Marriage and Children's allowances to the professional employees of the Defendants. This claim was discussed in the Defendant's negotiations with the officers of the Plaintiff's Union when it was indicated that if that claim of the professional staff was allowed by the Labour Court the Plaintiff and other members of his Union who were "technicians" employed by the Defendant would receive the same allowances. The position was left as stated in a letter dated 16 November, 1970 from the Defendant to the Union:

> "Should the question of Marriage and Children's allowances be resolved satisfactorily and should payment of this be made to professional staff, I can assure you that similar allowances will be made to all staff of the Institute (i.e. the Defendant) including the technicians."

In February 1971, the Labour Court declined to make a recommendation that such Marriage and Children's allowances be paid to the professional staff. However, subsequently, on the laying of new facts before the Labour Court, this decision was reversed in favour of the professional staff when these allowances were recommended with effect from 2 April 1970 and the allowances were duly paid by the Defendant to the professional staff.

A similar application by the technicians was refused by the Labour Court in 1974 and 1975.

The Plaintiff then issued proceedings in the High Court for a declaration that the assurance given by the Defendant to the Plaintiff's Union in the letter of 16 November, 1970, that were the Marriage and Children's allowances recommended by the Labour Court to be paid to the professional staff that similar allowances would be paid to the technicians, formed a term of a binding Contract between the Plaintiff and the Defendant.

*Held* (per McWilliam J.) that the Plaintiff's claim of a binding Contract between him and the Defendant included the term in respect of the Marriage and Children's allowances in so far as it was intended to be part of a "package" settlement for the two year period ending 1 April 1971, and was a term relied upon by the Plaintiff's Union in its acceptance of the offer made by the Defendant upon which the claims then being negotiated were settled; that the fact that the Labour Court at that time decided against the claim of the professional staff did not end the matter as the Labour Court reversed its decision at a later date on having further information before it; that this reversal indicated that the Labour Court was satisfied that it had been incorrect initially in refusing the professional staff's claim; and that accordingly, the Plaintiff was held entitled to damages equal to what would have been the appropriate yearly Marriage allowance and the appropriate yearly Children's allowances (on proof that he was married and had children) for the two year period ending 1 April, 1972.

**Harold P. Pattison v. Institute for Industrial Research and Standards** – High Court, McWilliam J. – 31 May 1979 – Unreported.

## WILL-CONSTRUCTION

**Meaning of a bequest of "an average of fifteen hundred pounds per year" to a testator's widow – nature of a residuary bequest to "the Parish of Bray" and whether or not a charitable gift.**

The testator, who died on 13 April 1976, had made a short will as follows:

> "I give divise and bequeath unto L.D. my niece ... the sum of £2,000. Also £500 for Masses to the Parish of Bray. I bequest an average of £1,500 per year to my wife M.D. and after her death to the Parish of Bray, County Wicklow the residue of my property."

The Plaintiff was the executor and sought the assistance of the Court, *first*, as to the meaning of the expression "an average of £1500 per year", and, *second*, as to the nature of the residuary bequest, whether it was a valid charitable bequest, what entity was designated by the expression "the Parish of Bray", whether the residuary bequest was void for uncertainty or not, and, if the gift was a valid gift, how it was to be administered.

On the *first* question, it was argued on behalf of the testator's widow (the first defendant) that the gift of "an average of £1,500 per year" being for an unlimited time was an absolute gift of sufficient capital to produce an average of £1,500 per year. Reference was made to *Theobald on Wills* (13th ed., paragraph 1326) which stated that a gift of the income of property to a person without limitation as to time, is a gift of capital.

On the *second* question, with regard to the residuary gift, it was uncertain under the terms of the will what beneficiary or beneficiaries the testator intended to include in the description "the Parish of Bray" although, having regard to the use of the same expression to designate the beneficiary of the gift for Masses, it could be assumed that he had in mind either the Roman Catholic Church in that parish or the memnbers of that church in the parish.

There was no indication as to how the residuary legacy was to be applied and unless the gift was a charitable gift, it would have failed for uncertainty and would have passed as on intestacy to the testator's widow.

Reference was made to a number of cases in which gifts for the benefit of the inhabitants of a parish or town or to a parish as such were held to be charitable, including, *In re Smith*, Public Trustee v. Smith [1932] 1 ch. 153, in which a gift "unto my country England" was held to be a good charitable gift.

*Held* (per McWilliam J.):

(1) That the testator's estate was to be held during the life of the widow on trust to provide her with an income of £1,500 per year; that capital might be applied for that purpose; and that, if there was a surplus of income in any year, that that surplus was to be retained with the capital and would, if required, be applicable with the capital to make up the sum of £1,500 in any subsequent year. The principle referred to in *Theobald* by the first named defendant was a well established principle but the proposition

was (that a gift of the income of property to a person without limitation as to time was a gift of capital) subject to the overriding principle that the intention of the testator must first be ascertained. By his will the testator did not give the income of any particular property and it appeared from the continuity of the clause, that he intended to give his wife £1,500 per year for her life and that he intended what remained to go to the Parish of Bray after her death.

(2) That the gift of the residue was a valid charitable gift and the matter would stand over until the death of the testator's widow for the consideration of the application of such funds, as would then be remaining, under the circumstances then existing in the Parish of Bray. The authority of *In Re Smith, Public Trustee v. Smith* (supra) (and the cases approved therein) was accepted. The only indication of the intention of the testator was that he wished to benefit the Parish of Bray. There was no indication of any particular purpose in his mind, or whether he was thinking of the general public. As he wished to benefit the parish, it was reasonable to assume that if he had appreciated that he could only do this in a general way by giving the residue specifically for charitable purposes he would have adopted this course. Therefore the gift in this case had to be presumed to have been intended for general charitable purposes.

**Anthony Patrick Duffy v. Mary Doyle and the Attorney General** – High Court (per McWilliam J.) – 9 May, 1979 – Unreported.

## LABOUR LAW

**Redundancy Payments Acts – Continuity of Employment.**

This was an appeal from a decision of the Redundancy Appeals Tribunal ("the Tribunal") that the employment of the Plaintiff prior to August 1962 could not be regarded as continuous with her employment after that date.

The Plaintiff had commenced work for the Defendant in April 1945 and was made redundant on 13 August 1977. She claimed that she had worked continuously for the Defendant from April 1945 until August 1977 but the Defendant claimed that she had been out of its employment from July 1961 to August 1962. The Plaintiff's mother had died in February 1961 and the Plaintiff became run down and suffered from neurasthenia. Her doctor advised her to get away from her environment for a while. She decided to go to America for a time, where she had some relations, and she gave a doctor's certificate to the Defendant's representative but did not give him any details as to how long she expected to stay in America, when she intended to come back or whether she intended to come back at all. The Defendant's representative stated so far as he was concerned the Plaintiff was emigrating, that he had no recollection of receiving a medical certificate, that he did not, and had no authority to, give her leave of absence. The Plaintiff said she did not get her social insurance cards from the Defendant when she left in July 1961.

The Plaintiff's doctor gave a certificate for leave of absence from work following her mother's death in February 1961. No evidence was given by the doctor but the Tribunal had accepted a further certificate from him dated 11 October 1977 which stated that the Plaintiff "took a year's sick leave – neurasthenia – August 1961 to August 1962". It appeared that neither party stated definitely in 1961 that the Plaintiff's employment had terminated or was to terminate. If the Plaintiff's condition was such as had been alleged and there appeared to be no suggestion to the contrary, this should have been apparent to the Defendant. It was as much the responsibility of the Defendant as of the Plaintiff to make the position clear.

The only question in issue was as to whether the Plaintiff's employment was interrupted by a period of not more than 78 consecutive weeks by reason of sickness, or whether it was interrupted by her voluntarily leaving the Defendant's employment, within the meaning of paragraphs 4 and 5 of Schedule Three of the Redundancy Payments Act 1967 as amended by the Redundancy Payments Act 1971.

*Held* (per McWilliam J.) that on the evidence furnished to the Court by the Tribunal it was clear that the cause of the interruption in the Plaintiff's employment was sickness and that the Plaintiff's employment prior to August 1962 should have been regarded as continuous with her later employment.

**Clare Harte v. Telecord Holdings Company Limited** – High Court (per McWilliam J.) – 18 May 1979 – Unreported.

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# RECENT IRISH CASES

Summaries of judgments prepared by Eric Brunker, Franklin J. O'Sullivan, Michael Staines, S. W. Riordan, and edited by Michael V. O'Mahony.

## CONTRACT OF EMPLOYMENT

**The Basis of computation of remuneration of Health Board Officers is that which the Board determines in accordance with the directions of the Minister: — In making such computation the inclusion of allowances over and above basic salary is discretionary — Section 14 of the Health Act 1970.**

The Plaintiffs were senior executive officers in the Eastern Health Board. Prior to his promotion to this position, the first Plaintiff was employed as a section officer with the Board and on 21 September 1971 he was assigned to Organization & Method (O & M) duties and he became entitled to an O & M allowance; on 3 March 1972, less than 12 months after the commencement of O & M allowance, he was appointed a senior executive officer in a permanent capacity. Likewise, prior to his promotion to this position, the second Plaintiff had been assigned to O & M duties on 15 July 1971, but he was appointed in a permanent capacity as a senior executive officer also on 3 March 1972.

The appointment of the Plaintiffs was made by the Chief Executive Officer of the Board under the provisions of Section 14 of the Health Act 1970. The relevant sub-sections of Section 14 are as follows:-

"(1) In addition to the Chief Executive Officer, there shall be appointed to a Health Board such and so many other officers and such and so many servants as the Board from time to time determines in accordance with the directions of the Minister (for Health and Social Welfare).

(2) an officer or servant of a Health Board appointed under this Section shall hold office or employment on such terms and conditions and shall perform such duties as the Chief Executive Officer from time to time determines.

(3) There shall be paid by a health Board to an officer or servant appointed under this Section such remuneration and allowance as the Chief Executive Officer from time to time determines.

(4) (a) In making an appointment of an officer or servant the Chief Executive Officer shall act in accordance with the directions of the Minister but no such direction shall be in conflict with Section 15.

(b) In making a determination under sub-section (3) or (4) the Chief Executive Officer shall act in accordance with the directions of the Minister and shall have regard to any arrangements in operation for conciliation and arbitration for persons affected by the determination".

In a Circular (Number 10/71) dated 29 March 1971, the Minister gave general directions in relation to the appointment and conditions of service of officers and servants of Health Boards. Paragraph 14 of this Circular dealt with "Starting Pay on Promotion" with (inter alia) the following provisions:-

(i) "where the same salary scale applies to the officer's existing office and the office to which he has been newly appointed he shall remain on the same point of the scale and may retain his existing incremental date" . . .

(iv) "subject to sub-paragraph (1) above the minimum of the new salary scale is less than existing pay the officer may enter the new scale at the point nearest but not below existing pay plus one increment".

On 3 March 1972 the Chief Executive Officer, in determining the remuneration payable to the Plaintiffs, took into account the O & M allowance which each had received and decided that their cases fell within the ambit of Paragraph 14 (4) (above). However, on 5 April 1972, the personnel department of the Board wrote to the Secretary of the Department of Health referring to a number of appointments and seeking approval for the decision in relation to the remuneration payable to the Plaintiffs. Following correspondence between the Board and the Department of Health, the Department wrote to the Board on 18 August 1972 stating that neither of the Plaintiffs should be allowed to reckon the O & M allowance paid for the purpose of determining his entry point to the senior executive officer's scale. A request to have the ruling reversed was refused and by letter dated 12 September 1972 the Board was informed of the Minister's confirmation of the previous decision. The Chief Executive Officer, acting on the directions given to him in the Department's letters, reduced the Plaintiffs' remuneration by calculating it in accordance with another sub-paragraph of Paragraph 14 of the Department's Circular.

The Plaintiffs sought a declaration that the Department was wrong in its view that the O & M allowance should not be taken into account in ascertaining the Plaintiffs' remuneration at the time of their promotion.

*Held* (per Costello J.):

(1) that the Plaintiffs rights, and, in particular, the right to remuneration, were governed by statute, and they were only entitled under Section 14(4) of the Health Act 1970 to such remuneration and allowance as the Chief Executive Officer from time to time determined.In making his determination the Chief Executive Officer must act in accordance with the directions of the Minister. The Minister was acting "intra vires" when he made the direction of 18 August 1972 and the Chief Executive Officer was bound, as a matter of law, to comply with it whatever nomenclature applied to the office the Plaintiffs then held;

(2) that the Plaintiffs were legally entitled to the remuneration they actually received from the date of appointment on 3 March 1972 to 18 August 1972 and no claim for overpayment legally arose. The practice that had grown in the interpretation of the Minister's direction, where an officer of a Health Board had been in receipt of an allowance for a year or more, that such an allowance was to be included in calculating the "existing pay", was not binding where such an officer had received such allowance for a period less than a year, as was the case here.

**Colm Murphy and Brendan Garvey and The Eastern Health Board and The Minister for Health and Social Welfare** — High Court (per Costello J.) — 22 June 1979 — Unreported.

## CERTIORARI

**A person detained under section 30 of the Offences Against the State Act 1939 may be validly charged at the place of detention during his period of detention under that Section; it is not necessary that he be first charged in the District Court.**

The Prosecutor (Walsh) had been arrested on 16 March 1977 pursuant to Section 30 of the Offences Against the State Act 1939 in connection with an armed robbery. This arrest under Section 30 of the Act of 1939 allowed his detention for a period of 24 hours, but Section 30 also provided that the period of detention might be extended for a further period of 24 hours if an officer of the Garda Siochana not below the rank of Superintendent so directed; such a direction was given, and the Prosecutor could therefore be legally detained under the Section for a maximum of 48 hours from the time of his arrest on 16 march 1977 to the same time on 18 March 1977.

Section 30(4) of the Act of 1939 provides that:

> "A person detained under the next preceding sub-section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence or be released by direction of an officer of the Garda Siochana and shall, if not so charged or released, be released at the expiration of the detention authorised by the said sub-section".

After making a statement of an incriminating nature to the Gardai early on 18 March 1977, the Prosecutor had been taken with two Guards to a house where the Prosecutor had stated he had brought three men who had been involved in the armed robbery. He was then returned to the same Garda station where he had been detained. Later on the same day, 18 March 1977 at the Garda station he was formally charged with armed robbery. On the same afternoon, before the end of his permitted detention under Section 30 of the Act of 1939 was reached, he was brought before the District Court on that charge. Eventually, on 14 July 1977 he was returned for trial by the District Court to the Special Criminal Court.

After more than six months after the return for trial in July 1977, the Prosecutor applied on the 9 March 1978 to the High Court for a conditional order of Certiorari to quash the District Court Order returning him for trial, on the ground that because he was charged with the robbery, not in Court but in the Garda Station while detained pursuant to Section 30 of the Act of 1939, the return for trial was invalid. The Prosecutor relied on the recent High Court decision (per Finlay P.) in *The State (Brennan) v. Mahon* (13/2/78 – unreported) where an absolute order of Certiorari had been granted to quash an order of return for trial, where the accused who had been held under Section 2 of the Emergency Powers Act 1976 had been charged in the place of detention and not in the District Court. The Prosecutor in the present case wished to extend that decision to the provisions of Section 30(4) of the Act of 1939 which in this respect were similar to Section 2 of the Act of 1976. However, the High Court (Costello J.) had refused a conditional order holding that the Prosecutor was not in detention pursuant to Section 30 holding that the detention had ended when he had been taken from the Garda Station before he was charged to point out the house to the Gardai.

The Prosecutor appealed to the Supreme Court.

*Held:* (per Henchy J.) that:

(1) As the application for the Conditional Order had been made outside the six months time limit provided for in 0.84 r10 of the Rules of the Superior Courts, the Prosecutor would have to show that there were exceptional and compelling reasons why his failure to move within six months must be overlooked. In this case he had not done so, notwithstanding that *The State (Brennan) v. Mahon,* (13/2/78) had been in the meantime decided and was being relied on.

(2) Despite the interlude of the journey in the motor car with the two Gardai on 18 March 1977, the Prosecutors absence was but a temporary deviation from the statutory custody, (and a deviation to which the Prosecutor had consented) and when he was brought back to the Garda Station the correct statutory detention under Section 30 of the Act of 1939 had been resumed.

(3) The High Court decision in *The State (Brennan) v. Mahon,* that it was not lawful to charge a person who was arrested pursuant to the provisions of Section 2 of the Emergency Powers Act 1976 otherwise than in a District Court or a Special Criminal Court, was not a correct reading of the Section or of Section 30(4) of the Act of 1939. The sub-section could not be read as excluding a power to charge the detained person before he was brought to Court. If such an exclusion was intended, it would have been expressly stated. The power to charge the detained person before a Court before the end of the specified period of detention is not intended for any purpose other than to ensure that detention under the Section may be terminated before the specified period (24 hours or 48 hours) had expired.It could not be construed as precluding the charging of a person before charging him in Court.

(4) It was therefore unnecessary to deal with the submission made on behalf of the Defendant namely that even if it was not permissible to charge the Prosecutor other than before the Court, that the invalidity of the earlier charging of the Prosecutor at the place of detention would not deprive the District Justice of jurisdiction to deal with the case when it did come before him, including making an order returning the Prosecutor for trial.

*Per Griffin J.* (in a concurring judgment):

"If the Oireachtas had intended that it was not permissible to charge the person detained at his place of detention, it seems to me that this would have been clearly stated in the sub-section by the use of appropriate words".

*Per O'Higgins C.J.* (in a concurring judgment):

"It is to be noted that the sub-section does not direct that the person concerned 'be charged in' the District Court or Special Criminal Court. It merely provides that he shall be charged 'before' either of these Courts. If, as in the *Brennan* case, and in this case, a person is charged with an offence in the Garda Station and is then brought before the District Court or the Special Criminal Court and evidence is given in obvious explanation of his being there, that he had been so charged with an offence, can it be said that he

is not there and then 'charged', that is to say, accused 'before' that Court.In my view this is the true meaning and effect of the words in question. Their purpose was to ensure that the person concerned would appear in court accused publicly of an offence – a right which he would otherwise have had under Section 15 of the Courts of Justice Act 1951 had he not been in detention".

Conditional order of Certiorari refused.

**The State (Jeremiah Walsh) v. District Justice Cyril Maguire** – Supreme Court (per Henchy J., with concurring judgments from O'Higgins C.J. and Griffin J.) – 14 February, 1979 – unreported.

## SALE OF LAND

**Land sold subject to right to re-acquire part in certain specified circumstances. Right to re-acquire upheld on subsequent resale of land to purchaser with prior notice of that right, even though that right was by then assigned to another party.**

Mr. Hayes the owner of lands at Crosshaven by contract dated 7 December 1972 agreed to sell a property called Crosshaven House and 15 acres to Mr. Flint (the first Defendant) subject to the right of Mr. Hayes or the actual developer of retained adjoining lands to re-acquire part of the sold property if it was necessary for planning purposes to demolish the building on that portion specified to be re-acquired. The relevant part of the special condition of the said contract provided that "... the vendor and the purchaser have agreed that the vendor may re-acquire the premises coloured blue on the map if it is not reasonably practicable for him or the actual developer of the said adjoining land to carry out the development without demolishing the said (House" ... "whether for the purpose of erecting a roadway thereon or for the purpose of allowing a reasonable line of vision for an adjoining road at its junction with the existing (road)". The conveyance to Mr. Flint was completed on 8 October, 1973.

Mr. Hayes contracted to sell 70 acres of the retained adjoining lands to Mr. Dovey and this was completed by conveyance dated 5th July 1974. Mr. Dovey subsequently conveyed these lands to Troika Limited ("Troika") but remained a director of that company. On the 31st December 1974 Mr. Hayes assigned the right to re-acquire, to which Mr. Flint's land was subject, to Troika.

By agreement in 1974 Mr. Flint agreed to sell his land to Mr. O'Hara (the Plaintiff) subject to the aforementioned right to re-acquire Troika and its related company, Hamburg Investment Company (the Third Defendant), began proceedings for specific performance requiring Mr. Flint to convey to them the necessary lands. By Consent Order of the High Court on 1 July 1975 Mr. Flint was restrained from selling the lands the subject of the right to re-acquire ("the reserved lands") until he conveyed them to Troika and the High Court declared that the agreement of 7 December 1972 in so far as it related to the reserved lands ought to be specifically performed. On 18 July 1979 the reserved lands were conveyed to Troika by Mr. Flint. Mr. O'Hara on hearing that Troika intended demolishing buildings on the re-acquired lands issued injunction proceedings, restraining Mr. Flint and Troika from such demolition. Mr. O'Hara's action was dismissed by the High Court (McWilliam J.) and Mr. O'Hara appealed to the Supreme Court.

*Held* (per Kenny J.) that Mr. O'Hara had entered into his contract with Mr. Flint with full notice of the prior agreement of 7 December 1972 between Mr. Hayes and Mr. Flint, and of the special condition (above quoted) in that agreement; and that, furthermore, Mr. O'Hara's claim under his contract in 1974 was later in point of time to Troika's right arising under the agreement of 7 December 1972 and this right of Troika was perfected by the conveyance to Troika of the reserved lands by the conveyance of 18 July 1975. Accordingly the Appeal of Mr. O'Hara was dismissed.

*Note:* In the early part of his judgment Kenny J. said:

"The solution of the problems in this case is not made easier by the bad and confused drafting of the special conditions and by the fact that though the lands are referred to by reference to a map which has a number of colours on it, the copies of the maps furnished to us are photostat only and do not show any colours. I trust for the future that solicitors will remember that, when preparing books of appeal for this Court, photostat copies of plans with colours on them are worthless".

**O'Hara v. Flint, Troika Limited and Hamburg Investment Company** – Supreme Court, (per Kenny J. with Griffin and Parke JJ.) – 31 July 1979 – Unreported.

## TRADE MARKS

**Additional evidence from applicant/appellant not admissible in High Court on appeal from Controller of Patents, Designs and Trade Marks ("the Controller") under Section 25 of the Trade Marks Act 1963 ("the Act of 1963"). The High Court in such proceedings is an appellate Court only and not a Court of first instance.**

This was an appeal to the Supreme Court by the Controller following the decision of the trial judge in the High Court to allow an appeal against the decision of the Controller. The appeal to the High Court by the applicant pursuant to Section 57 of the Act of 1963 had been from a decision of the Controller who had not been satisfied that the applicant intended to use the trade mark ("Arby's") in the State as no sufficient evidence of user had been offered by the applicant and, as a result, the application had been refused pursuant to Sections 2 and 25 of the Act of 1963. In the High Court, the trial judge (Hamilton J.) also had not been satisfied on the materials before him that the applicant intended to use the trade mark in the State and he adjourned the hearing to allow the applicant to file a further affidavit. An affidavit by a Mr. Smaltz had then been filed and subsequently on the resumption of the hearing the trial judge had allowed the applicant's appeal against the Controller's decision.

"Trade Mark" is defined in Section 2 of the Act of 1963 as meaning "a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark". Section 25(1) of the Act of 1963 provides that any person claiming to be the proprietor of a trade mark used or proposed to be used by him who is desirous of registering it must apply in writing to the Controller for registration. Thus, use of the trade mark or an intention to use it in the State must be proved before the Controller may register it.

Section 25(7) of the Act of 1963 provides:

> "Appeals under Section 57 of this Act against decisions of the Controller under this section shall be heard on the materials stated as aforesaid by the Controller, and no further grounds of objection to the acceptance of the application shall be allowed to be taken by the Controller, other than those so stated as

aforesaid by him, except by leave of the Court".

Griffin J. contrasted the provisions of Section 25(7) of the Act of 1963 with Section 26 which provides for the situation in which there is opposition to registration, and in which Section 26(9) provides that:

"On the hearing of an appeal under Section 57 of this Act against a decision of the Controller under this Section any party may, either in the manner prescribed or by special leave of the Court, bring forward further material for the consideration of the Court".

*Held:* (per Kenny J. with concurring judgments from Griffin and Parke, JJ.): that the words "except by leave of the Court" applied only to the grounds of objection taken by the Controller. The High Court had no power to allow any further materials to be introduced after the Controller had stated his decision; it is an appellate Court when dealing with appeals from the Controller and not a Court of first instance. The affidavit by Mr. Smaltz on behalf of the applicant should not have been admitted or considered by the trial judge for he had not power to do so; and without that affidavit there was no evidence that the applicant had used or intended to use the trade mark in the State.

Per Parke J. (in a concurring judgment):

"The onus of establishing the monopoly which is conferred by the registration of a trade mark clearly lies on the applicant at all stages. If he fails to discharge this onus at the hearing before the Controller (for which the applicant himself has applied) he should not be allowed to mend his hand on the appeal by producing evidence or other material which the Controller had no opportunity of considering. The Act vests in the Controller, in the first instance, the right and duty to decide whether a proposed mark should be registered. It is only when his decision is unfavourable to the applicant that an appeal lies to the Court. If the applicant could produce evidence or material at that stage the proceedings would no longer be an appeal, but a trial at first instance in which the Court would be substituting its own judgment for that of the Controller".

*Note:* At the end of his judgment Kenny J. stated:

"It is lamentable that an application lodged in 1972 should not be disposed of by the Controller until 1976. It is equally lamentable that this appeal came before us in 1979 when the Controller had stated his reasons in 1976. These great delays are a feature of most trade mark applications and do considerable harm to the commercial reputation of this country".

**In the matter of the Trade Marks Act, 1963. Arby's Limited (Applicant).** Supreme Court, (per Kenny J. with concurring judgments from Griffin and Parke JJ.) – April, 1979 – unreported.

# RECENT IRISH CASES

Summaries of judgments prepared by John F. Buckley, E. Rory O'Connor, Barry O'Neill, Peter Quinlan and edited by Michael V. O'Mahony.

## COMPANY LAW – LIQUIDATION

**Purchase of social welfare insurance stamps in bulk does not constitute the payment of the "weekly employment contribution" under Social Welfare Acts 1952/61, and cost of these stamps not qualified for preferential treatment under Section 285 of Companies Act 1963.**

During the period between 6 May and 11 November 1970 Palgrave Murphy Limited ("the Company") purchased social insurance stamps at a number of post offices and paid for them by cheques totalling £3,947.68. On 19 November 1970 the Company was placed in liquidation and none of the relevant cheques were paid.

It was claimed by the Minister for Social Welfare and the Minister for Posts and Telegraphs that the amount unpaid qualified for preferential treatment under Section 285 of the Companies Act 1963.

It was submitted on behalf of the Ministers that the employer makes contributions to the Department of Social Welfare through the Departments of Posts and Telegraphs and as evidence of such contributions he receives stamps which can be stuck upon the employee's insurance cards.

After full consideration of relevant sections of the Social Welfare Act 1952 and of Statutory Instrument No. 382 of 1952, entitled Social Welfare (Powers in relation to Insurance Stamps) Order 1952, and S.I. No. 381 of 1952, entitled Social Welfare (Collection of Contributions) Regulations 1952, the Court referred specifically to Article 11(1) of the latter S.I., which provided as follows:

> "Every weekly employment contribution payable under the Act shall, except as otherwise provided in these Regulations, be paid by the affixing of an insurance stamp of the appropriate value to the insurance card of the employed contributor in the space indicated for that purpose upon the card."

*Held* (per Hamilton J.) that the amount claimed was not due by the Company as a contribution under the Social Welfare Acts but was merely due in respect of the purchase of insurance stamps which could be used for the payment of contributions under the said Acts, and that, therefore the Minister for Posts and Telegraphs was not entitled to the priority afforded by Section 285 (2) of the Compahies Act 1963 and must rank in the liquidation as an ordinary unsecured creditor.

**In the matter of Palgrave Murphy Limited and In the matter of the Companies Act 1963** – High Court (per Hamilton J.) – 20 February 1979 – unreported.

## PRACTICE – SOLICITORS' COSTS

**Costs – liquidated demand – Solicitor for Plaintiffs (a bank) a salaried solicitor – Master's Order to enter final judgment limiting plaintiffs' costs to outlay and counsel's fees – application to High Court to discharge Master's Order limiting costs and substituting an Order allowing full costs – Attorneys and Solicitors Act, 1870, sections 4 and 5.**

This was an application to a judge of the High Court seeking an order pursuant to O. 63, r. 9 of the Rules of the Superior Counts (R.S.C.) – (1) discharging an order made by the Master of the High Court giving liberty to enter final judgment for a liquidated demand, in so far as the form of such order limited the costs awarded to the plaintiffs to outlay and counsel's fees; and, (2) substituting for the said Master's Order an order awarding the full costs, *including profit costs*, of the proceedings to the Plaintiffs.

The order made by the Master on 25 May, 1979, gave the Plaintiffs liberty to enter final judgment for £3,864.74 on foot of a Summary Summons and also for costs on that amount, such costs to be taxed and "to be limited to outlay and counsel's fee".

O. 99, r. 43 of the R.S.C. provides that:

> "In cases of judgments for a liquidated demand under O. 37, when no step has been taken by the defendant after appearance, there shall, unless the Court shall otherwise order, be added to the principal sum for which judgment is marked for costs, the same sums as are hereinbefore respectively allowed in case of judgment by default of appearance, together with such further costs of the motion for judgment as the Court may allow."

O. 99, r. 39 of the R.S.C. provides that:

> "In all cases of judgment by default of appearance for a liquidated demand, where the plaintiff is entitled to costs, there shall be added to the principal sum for which the judgment is marked the respective sum for costs set out in Appendix W, Part (111)."

The affidavit grounding the Plaintiffs' motion for the order sought in their notice of motion averred that the Master had limited the order for costs on the amount of the judgment to outlays and counsel's fee on the grounds that the law agent of the Plaintiffs and other members of the Plaintiffs' law department were salaried employees of the Plaintiffs and that the law agent and the law department did not constitute an independent firm of solicitors.

Having expressed dissatisfaction that the Court was being asked to decide a question of principle arising on an application without having had the assistance of argument on behalf of the Defendant and being also obliged to assume the reasons underlying the limitation on costs imposed by the Master's Order, the Court reviewed a number of cases opened to it by Plaintiffs' counsel and the relevant statutes.

Section 4 of the Attorneys and Solicitors Act, 1870 (33 and 34 Vic. C. 28) provides that a solicitor may make an agreement in writing with his client in regard to the amount and manner of payment of fees, charges or disbursements in respect of professional business done or to be done by such solicitor which may provide for payment either by a gross sum or by commission or percentage *or by salary* and either at the same or a greater or lesser rate as or than the rate at which he would otherwise be

entitled to be remunerated. Section 5 of the Act of 1870 provides (inter alia), in relation to such an agreement, that it shall not affect the amount of or any rights or remedies for the recovery of any costs payable to the client by any other person, and that any such other person may require any costs payable by him to the client to be taxed according to the rules for taxation of costs unless otherwise agreed, provided however that the client who has entered into such an agreement shall not be entitled to recover from any other person under any order for the payment of costs embraced by such agreement more than the amount payable by the client to his own solicitor under the agreement. The Court considered that if this was the basis for the limitation on costs imposed in the Master's Order then it appeared that the order made by the Master went far beyond a mere compliance with the proviso contained in Section 5 of the Act of 1870. The Court further considered that if this was the issue before it it would be simply decided by holding that the proviso in Section 5 of the Act of 1870 did not warrant or justify confining the Plaintiffs' costs to outlay and counsel's fees where the proceedings were conducted by the Plaintiffs' law agent as a salaried solicitor.

The Court considered that the more important questions to be decided were these:

1. What was the appropriate Order if that was not it?
2. On whom did the onus lie in such a situation to prove that no more than the amount of the costs payable by the client to his owh solicitor was being recovered?

In reviewing the relevant authorities the Court referred to the common law principle approved by Cousins-Hardy M.R. in *Gundery v. Sainsbury* [1910] 1LB 645, namely, that costs must always be considered as an indemnity to the person entitled to them and must not be imposed as a punishment on one party or given as a bonus to the other. The Court considered the criteria laid down by the Court of Appeal in *Re Eastwood, deceased* [1975] Ch. 112, at p. 113) for cases where the person entitled to costs was represented by a salaried solicitor (the Treasury Solicitor in that particular case) and which (briefly stated) were as follows:

1. It was proper to deal with the taxation of costs as though the bill were that of an independent solicitor.
2. There was no reason to suppose that the conventional method was other than appropriate to the case of both independent solicitors and employed solicitors.
3. It was a sensible and reasonable presumption that the figure arrived at on this basis would not infringe the principle that the taxed costs should not be more than an indemnity to the party against the expense to which he has been put in the litigation.
4. There might be certain cases in which it became clear that the principle would be infringed if the method of taxation appropriate to an independent solicitor's bill was entirely applied; it would be impractical and wrong in all cases of employed solicitors to require a total exposition and breakdown of the activities and expenses of the department with a view to ensuring that the principle was not infringed.

*Held* (per Finlay P.) that the order made by the Master be varied and an order entered in lieu thereof that the final judgment to the Plaintiffs be with default costs as provided in the Rules of Court and in addition a measured sum of £35 in respect of the hearing before the Master (thus following the practice until recently followed by the Master of allowing costs on the default scale) and also a sum for measured costs of the hearing before him.

**The Governor and Company of the Bank of Ireland v. Thomas P. Lyons** – High Court (per Finlay P.) – 2 November 1979 — unreported.

## CONSTITUTION

**Sections 15, 16 and 18 of the Local Government (Planning & Development) Act, 1976 not repugnant to the Constitution.**

The Plaintiff (appearing in person) sought a declaration that Sections 15, 16 and 18 of the Local Government (Planning & Development) Act, 1976 were repugnant to the Constitution.

**Section 15** provides for the lodgment by an appellant to the Planning Board ("the Board") of a deposit of £10 with the Board and for its return after the determination of the appeal unless the Board deems the appeal to have been vexatious.

**Section 16** provides that the Board, except when so directed by the Minister (for the Environment), has an absolute discretion whether or not to hold an oral hearing or any reference or appeal to the Board, and further provides for the service of notice on any person who sought an oral hearing, of the Board's decision not to hold an oral hearing of any such person a right to apply to the Minister to give a direction to the Board to hold an oral hearing.

**Section 18** provides that where the Board is of the opinion that a reference or appeal is vexatious or is being unnecessarily delayed by any party the Board, having given the prescribed period of notice (not less than seven days) to that party, may proceed to determine the appeal notwithstanding the fact that no submission has been made to the Board by that party in relation to the reference or appeal.

The Court noted that the only personal interest which the Plaintiff was entitled to claim in the outcome of the proceedings arose from the fact that he resided some four miles away from the questioned development (i.e. Raybestos Manhattan in Co. Cork). Because the Plaintiff had not been professionally represented either in the High Court or the Supreme Court, because the question of his standing to raise the constitutional issue had not been pleaded by the Defendants, and because of the urgency and gravity of the complaint against the development in question, the Supreme Court was prepared to assume, without so holding, that in the particular circumstances the Plaintiff had "sufficient standing to mount an attack on the relevant statutory provisions on the ground of alleged unconstitutionality."

With regard to Section 15, the Plaintiff submitted that by the imposition of a deposit of £10 a restriction which he described as being contrary to the democratic nature of the Constitution was imposed on persons wishing to appeal against a decision of a planning authority to grant a permission, and that thereby a discrimination was made between those who had money and those who had not, contrary to Article 40.1 of the Constitution.

(1) *Held:* (per O'Higgins C.J.) That this submission was without substance; that the purpose of

Section 15 was to prevent appeals or references which were without reality or substance, that the amount of the deposit was not so high as to prevent genuine appeals being brought; that, in addition, it was a deposit which was returnable when the appeal was heard, withdrawn or determined; that a similar provision was made under the Electoral Acts in relation to candidates standing for Dail and other elections; and that there was no unconstitutional discrimination involved in the Section.

With regard to Section 16, the Plaintiff submitted that giving the discretion to the Board as to whether an appeal should be heard orally or otherwise was an unconstitutional interference with certain constitutional rights of citizens and particularly that as such a citizen bringing a planning appeal under the 1963 (Planning) Act had an absolute right to an oral hearing and that the change in the law by the 1976 (Planning) Act was an unconstitutional deprivation of that right.

(2) *Held:* (per O'Higgins C.J.) That this decision was fallacious and that it was open to the Oireachtas in providing for this type of appeal to alter the law in the manner provided for in Section 16. With regard to Section 18, the Plaintiff submitted (without going into detail) that such wide powers ought not to have been given to the Board.

(3) *Held:* (per O'Higgins C.J.) That the Section enjoyed a presumption of constitutionality and that it was also to be presumed that it would be operated without violating constitutional rights; that while Section 18 gave to the Board power to determine an appeal notwithstanding the fact that it had heard no submission from the appellant, it had to be assumed that the notice provided for in the Section would be accompanied by an opportunity given to the appellant to put forward his case; that the powers given to the Board by the Section could only be exercised under the Section after an opportunity is so afforded; and, that the Section did not infringe the Constitution in the manner submitted.

**Finnegan v. An Bord Pleanala and Industrial Development Authority and Raybestos Manhattan (Ireland) Limited** — Supreme Court (per O'Higgins C.J., giving the opinion of the full Court, with Henchy, Griffin, Kenny and Parke JJ.) — 27 July 1979 — unreported.

## CONTRACT — Special Condition

**Where the Vendor fails to make clear provision in a Special Condition for what the Purchaser is to be bound to do Purchaser is not bound by that condition.**

The Plaintiff was the Purchaser from the third Defendant ("the Vendor") who was Parish Priest of Templemore, of a dwellinghouse ("the premises") at Templemore under a written contract dated 13 August 1976, containing the following special condition:

> "The public sewer which serves the said premises at present terminates in the garden of the said premises. Permission has been granted to extend this sewer so that it will cross the Templemore-Thurles road and extend into the property at the west side of (that) road, and for that purpose permission was given to enter in the said garden at all reasonable times and do all work that is necessary or expectant in connection with the said extension. Any damage to the said garden or to the premises in the making of the said extension will have to be made good to the satisfaction of the Vendor. The premises are being sold subject to the reservation in this respect and no obligation or requisition will be made by reason thereof."

The Vendor occupied the premises by virtue of his office under a deed of trust of 3 December 1943 whereby the property had been conveyed to trustees. At the date of the contract, the Vendor was not a trustee and all the trustees thereby appointed were dead. The contract provided that the conveyance to the Purchaser would be made by the personal representative of the last surviving trustee. The deed of trust did not contain any power of sale, nor did it contain any power to grant a wayleave or any other easement. The three Defendants were appointed the new trustees of the deed of trust of 1943 by the Commissioners of Charitable Donations and Bequests ("the Commissioners") by deed dated 28 October 1977 and on 7 February 1978 the Commissioners authorised the sale. The title being then in order on 9 March 1978 the Purchaser's Solicitors sent their requisitions. No special requisition was made regarding the extension to the public sewer. The usual formal requisition regarding rights or agreements relating to the laying of wires, cables, pipes or poles under or over the property was included — to which the answer was: "Yes". There is reserved the right to extend the town sewer from the rear of the premises across the Thurles road to the land at the west side of the Thurles road."

The Purchaser made no further requisition on this matter.

In September or October 1976, because the Vendor had been unable to complete without the intervention of the Commissioners, the Purchaser had been let into possession under a caretaker's agreement and the purchase money had been put on joint deposit. In May 1978 a draft conveyance and engrossment, which made no reference to the permission to extend the sewer, were sent by the Purchaser's Solicitors to the Vendor's Solicitor. Later that month the Vendor's Solicitor wrote enquiring either that the conveyance should contain a reservation of the right to extend the sewer or that there should be a grant of such a right by another deed and for the first time the Vendor's Solicitor disclosed that the permission was in favour of his (the Vendor's Solicitor's) wife. No further information was given as to the agreement for the extension of the sewer. The Purchaser refused to comply with this requirement and the Vendor claimed to be entitled to have such a grant or reservation made to the wife of his Solicitor. The Purchaser issued a summons in June 1978 to determine whether he was bound to give effect to the agreement with regard to the extension of the sewer in this manner or not and also whether he was liable to pay interest to the Vendor (or to the Trustees) at a rate higher than that payable on the joint deposit, and, if so, in respect of what period he must pay it. By a deed of 8 September 1978 the Defendants

purported to grant the wayleave for the extension to the sewer.

The Court (McWilliam J.) in considering the facts emphasised the reticence of the Vendor's Solicitor when drawing the conditions of sale, as to the particulars of the agreement granting permission for the extension of the sewer. There was no indication of the date for this agreement, the person or body with whom it was made, the line of the proposed extension, or the extent of ground or the nature of the proposed development it was intended to serve. These matters were within the Vendor's Solicitor's own knowledge as he personally obtained permission on behalf of his wife but he precluded the Purchaser from making any requisition or inquiry regarding them although he must have realised that they were of importance to the Purchaser if he was to be required to make the reservation or grant being claimed.

The Court considered that the sole question before it was whether, on the true construction of the special condition, the Purchaser had bought the premises subject to such right as was enforceable by the person claiming to have permission to extend the sewer, or whether he bought subject to a condition that he would give such permission either by reservation in the conveyance to him or by a grant by him by another deed.

*Held:* (per McWilliam J.)

(1) That the deed of 8 September 1978 (purportedly granting the wayleave) had to be discharged because the Defendants (the Trustees) were then holding the property on trust for the Purchaser and could not alter the position as it then stood without his consent.

(2) That there was no grant of a wayleave by the Vendor and he had no power to make such a grant; there was no agreement in writing to make such a grant (although the wayleave would be an interest in or concerning land within the meaning of the Statute of Frauds) nor was there any consideration for the grant of permission for the extension of the sewer; and the person interested (i.e. the Vendor's Solicitor's wife) to claim the right was not a party to the proceedings.

(3) That the Vendor and his Solicitor were in full possession of all the facts and, if it had been intended that the Purchaser should grant the wayleave or allow reservation to that effect it would have been very easy to put a clear provision in the contract. The words in the special condition that "The premises are being sold subject to the reservation in this respect . . . ." could not be interpreted as meaning more than that the property was being held subject to the permission which had been granted and he did not accept that it bound the Plaintiff to make a grant either by including a reservation (of the right to extend the sewer) in the conveyance or by executing another deed.

(4) That the Defendants were not entitled to compel the Purchaser to accept the reservation or make the grant they required, whatever may be the rights of the person to whom the permission was given.

**L.G.J. v. T.M., J.R. and W.N.** — High Court, (per McWilliam J.) — 7 December 1978 — unreported.

# RECENT IRISH CASES

## CONSTITUTIONAL LAW — EDUCATION

**The effect of Article 42.4 of the Constitution, which prescribes that the State shall provide *for* free primary education and the extent of constitutional duty of the State acting through the Minister for Education to provide buildings, teachers, means of transport for pupils and minimum standards.**

In the parish of Drimoleague, Co. Cork, in 1975, there was a mixed four-teacher school called Drimoleague National School which had 133 pupils on its roll, and two other national schools called Knock Bui and Castledonovan. The principal teacher at the Drimoleague National School was due to retire on 30 June 1975. Rule 15(1) of the Rules of the National Schools provided that the Manager, who had the duty of appointing the principal teacher, had to comply with Rule 76 in making the appointment, which latter Rule provided that in schools which had from 80 to 199 pupils, the person appointed had to have the qualifications, that his last three years of service had been satisfactory and that he had given in all not less than five years service as a teacher.

In June 1975, Father Crowley, the Manager wrote to the Minister for Education ("the Minister") that he had been directed by the patron of the school (the Bishop of Cork, Dr. Lucey) to appoint Mr. Nicholas McCarthy as principal teacher. Mr. McCarthy, who had been highly recommended by the divisional inspector of schools as the most suitable candidate, had not on the 30th of June 1975 five years service as a teacher; he would not have this until 1st July 1976. When Fr. Crowley appointed Nicholas McCarthy as principal teacher, the Minister refused to sanction his appointment as permanent principal teacher and Father Crowley then appointed him to act as temporary principal teacher, a step which the Minister approved. The Minister directed Fr. Crowley to re-advertise the post and the same persons applied again, and Mr. McCarthy was so appointed as temporary principal teacher.

The Irish National Teachers Organisation ("the I.N.T.O."), a registered trade union, was pressing the claims of Mr. James Collins, and organiser of the I.N.T.O. and a member of its national executive, whom the Minister regarded as unsuitable. The I.N.T.O. suspected that Fr. Crowley, acting under the orders of the Bishop, was going to retain Mr. McCarthy as a temporary teacher until 1 July 1976 and then, when he was eligible, to appoint him as permanent principal teacher. In October 1975, a board of management of which Fr. Crowley was chairman took over the duties which he had previously performed. In 1976, the I.N.T.O. threatened strike action against the Minister because he had allowed the appointment of an ineligible person as principal teacher in a temporary capacity while eligible applicants were available. On 16 March 1976, the I.N.T.O. wrote to Fr. Crowley to inform him that unless he re-advertised the position and undertook to appoint a qualified person, the teachers in the three schools in the parish of Drimoleague would be withdrawn on 29 March 1976. As Fr. Crowley did not give this undertaking, the I.N.T.O. placed pickets on the three schools on 29 March 1976 and all the teachers at the three schools, except Mr. McCarthy, did not pass them. These pickets were continued until 5 May 1976 when they were withdrawn but the teachers at the three schools continued the strike and did not attend at the schools.

The parents of the children attending these three schools tried to get their children into other schools but, on 20 August 1976, the I.N.T.O. sent a circular to all their members in the areas adjoining Drimoleague directing them not to enrol pupils from Drimoleague. The instruction in this circular remained in force until 13 June 1977 when it was withdrawn. This circular is the foundation of the proceedings against the I.N.T.O. and the members of its Central Executive Committee.

When the parents could not get their children into adjoining schools, they tried to recruit teachers. Mr. McCarthy, who had been appointed permanent principal teacher in July 1976 on the recommendation of a board of assessors, continued to teach, and a retired lady teacher volunteered to do so, and a number of girls who had got their Leaving Certificates but were not qualified as teachers tried to do so. Fr. Crowley tried to persuade the Minister to pay these temporary teachers but he refused to do so and they were paid by contributions made by the parents to a fund. The education received by the younger children who were not taught by Mr. McCarthy was seriously deficient.

On 21 April 1977, the parents, suing in the names of their children, brought proceedings against Ireland, the Minister, the Attorney General, the I.N.T.O. and the members of the I.N.T.O. Central Executive Committee claiming against the first three defendants the provision of free primary education within the parish of Drimoleague and claiming against the other defendants (i.e. the I.N.T.O. and its Central Executive Committee), damages for conspiracy. Whe interlocutory relief was sought, a compromise was reached under which, from 1 January 1978, the children were to be brought to adjoining schools by buses provided and paid for by the Minister and taught there.

The High Court (McMahon J.) had found that the circular of 20 August 1976 was an unlawful interference with the infants' constitutional rights and that the Minister had failed to carry out his constitutional duty to provide for free primary education for the infant plaintiffs from 1 April 1976 to 31 December 1977.

In the High Court, the plaintiffs' main case was that they had a right to be educated in their own parish and that their transport to and from schools in adjoining parishes was not a performance by the Minister of the State's constitutional duty. They also said that the mode of transport was unsatisfactory and imposed great hardship on them. The High Court had rejected all these contentions and the Plaintiffs did not appeal to the Supreme Court against this part of the High Court judgment.

*Held:* (per Kenny J. with Henchy and Griffin JJ.: and with O'Higgins

C.J. and Parke J. dissenting in part):

(1) That the Minister was not bound to defend and vindicate the children's right to be provided with free primary education under the terms of Article 40.3.1. of the Constitution. Per Kenny J.: "The obligation imposed on the State by both subsections of Article 40.3 is as far as practicable by its *laws* (emphasis added) to defend and vindicate the personal rights of the citizen. It is not a general obligation to defend and vindicate the personal rights of the citizen. It is a duty to do so by its laws for it is through laws and by-laws that the State expresses the will of the people who are the ultimate authority."

(2) That Article 42.4 laid down that the State was to provide *for* free primary education. There was a distinction between providing free education and providing *for* it. Per O'Higgins C.J.: "In my view, the effect of this part of Article 42 in accordance with the words used both in the Irish and in the English text, is to oblige the State to see that machinery exists under which and in accordance with which such education is in fact provided."

(3) (With O'Higgins C.J. and Parke J. dissenting):
That the whole of the evidence must be looked at to ascertain whether the Minister had failed to carry out the constitutional obligation imposed on the State and that in the present case, the totality of the evidence, oral and written, and the inferences that were to be drawn from it, failed to establish that there had been such a breach of that constitutional duty.

(4) That the action in so far as it related to Ireland, the Minister for Education and the Attorney General would be dismissed, but that against the other defendants (i.e. the I.N.T.O. and its Central Executive Committee) it would be continued, in respect of the claim for damages for conspiracy.

**Eilish Crowley and Ors. v. Ireland, the Minister for Education, the Attorney General, the Irish National Teachers' Organisation, Bernard Gillespie and Ors.** — Supreme Court, (per Kenny J. with Henchy and Griffin JJ.; and with O'Higgins C.J. and Parke J. dissenting in part) — 1 October, 1979 — Unreported.

## WILL — ANIMUS TESTANDI

**Mental capacity — whether the deceased, at the time of the execution of an alleged will was of sound disposing mind; knowledge and approval — whether the deceased at the time of the execution of the alleged will knew and approved of the contents; due execution — whether the will was duly executed in accordance with the Succession Act 1965.**

The deceased died on 16 May 1975. He was an elderly bachelor and was survived by two sisters, the Plaintiff and the second-named Defendant, by his brother, the first-named Defendant, and by nephews and nieces.

The deceased made an alleged last will on 5 May 1975 whereby he bequeathed all his property to the plaintiff and appointed M.B. and J.S. executors. He made an earlier will on 10 December 1974 whereby having bequeathed £3,000.00 each to his nieces M. O'C., a daughter of the first-named Defendant, B.V., a daughter of the second-named Defendant, and M. O'C., a daughter of the Plaintiff, he bequeathed all his property to the Plaintiff. By that will he also appointed M.B. and J.S. executors. The executors renounced.

The Plaintiff claimed to have the will dated 5 May, 1975 established in solemn form. Each of the Defendants entered caveats. Their defence raised the issues of due execution, testamentary capacity, and knowledge and approval. In addition both Defendants pleaded that execution of the will was secured by the undue influence of the plaintiff (but this undue influence plea was withdrawn prior to the hearing).

The questions for determination by the Court were as follows:

(1) whether the alleged last will of the deceased dated 5 May 1975 was executed pursuant to the Succession Act 1965,

(2) whether the deceased at the time of execution of the alleged will dated 5 May 1975 was of sound disposing mind, and

(3) whether the deceased at the time of execution of the alleged will dated 5 May, 1975 knew and approved of the contents.

Similar questions were left regarding the alleged will of 10 December, 1974.

The deceased was a quiet reserved country man and other than his work his only interest was horses. When his brother and two sisters (i.e. the Plaintiff and the two Defendants) left the licensed premises at Ballyhooly, Co. Cork, which was the family home, the sisters on marriage and the brother to go to work in Youghal, the deceased continued to reside there with his parents. He was not, at any time, interested in the working or management of the licensed premises. He spent his time working a farm of about 60 acres, originally belonging to his father and subsequently to himself, in the neighbourhood. In 1968 his father transferred the licensed premises to the deceased subject to a right of support and maintenance for their lives for the deceased's father and mother. After the deceased's father died in 1969, the deceased's brother, the first-named Defendant, his wife and children, came to reside in the licensed premises with the deceased and his mother. In 1970 the deceased transferred the licensed premises to the first-named Defendant subject to the right of residence of his mother and a right of residence for himself for life.

In Autumn 1973 the deceased became ill and suffered blackouts, and was admitted to hospital in Cork from October 1973 to the beginning of January 1974. He was suffering from viral meningitis and incelfilitus. There was inflamation of the membrane of his brain. He had a tumour on the brain and had suffered epilepic seizures. Whilst in hospital he was in a coma for a number of weeks. On his discharge from hospital he reutrned to live in the licensed premises at Ballyhooly. From the time he went to hospital the deceased was unable to take any part in the running of his land which was then looked after by the first-named Defendant who in return got £10.00 per week and also some perquisites.

In March 1974 the deceased left the licensed premises at Ballyholly and went to reside with the Plaintiff at Doneraile. In May 1974 the deceased again became ill. He was

suffering from orchitis (swelling of the testicles). He was admitted to and remained a patient in hospital in Cork from 29 May 1974 to 10 June, 1974. On his discharge he returned to live with the Plaintiff. He rarely moved out of the Plaintiff's house and lands. He went to Mass on Sundays, made odd visits to the Defendants and visited his mother as long as she was alive. His mother died on 24 August, 1974.

On 10 December, 1974 the deceased made his first will. He was brought to the Solicitor's office of Mr. B. in Charleville by the Plaintiff's husband who had other business to attend to there.

On 12 March, 1975 the deceased returned to Mr. B's office and gave instructions to transfer his lands to the Plaintiff. At this stage Mr. B. was acting for the Plaintiff and so he told the deceased that he would have to obtain independent legal advice. Arrangements were made for the deceased to attend the office of Mr. McC., Solicitor, in Charleville on 26 March, 1975 who advised the deceased that he should not transfer his lands to the Plaintiff subject to the safeguards which were then being reserved for the deceased, which Mr. McC. regarded as being insufficient. In view of the deceased's age Mr. McC. advised him that it was a most improvident transaction. The deceased accepted Mr. McC's advice.

Then Mr. McC. (and there was no evidence that he had any instructions to do so) negotiated with Mr. B., as to the terms upon which he (Mr. McC.) would be prepared to advise the deceased to execute the transfer. These were that the deceased should be paid an annuity of £520.00 with a cost of living escalation clause, by weekly payments of £10.00 for life and further that he should be paid £10,000.00 to be payable by £1,000.00 per annum for 10 years and that the usual rights of residence and support should be reserved. A transfer was drafted containing these provisions and also providing for a charge in the sum of £1,000.00 each in favour of the three nieces, who were given legacies of £3,000.00 each in the deceased's will of 10 December, 1974. This draft transfer was sent to the Plaintiff by Mr. B. The deceased did not approve of the terms in the draft and on 14 April 1975 wrote to Mr. B. to let him know his views on the matter.

The Plaintiff sought another solicitor to give independent advice and gave the deceased a choice between three solicitors. He picked Mr. N., Solicitor, at Doneraile. Mr. B., after he had been telephoned by Mr. N., sent him an engrossment of the transfer which Mr. N. read over to the deceased who then realised that difficulties might arise, as under the will the deceased had made the previous December he left his three nieces £3,000.00 each whereas under the transfer he gave them £1,000 each. Mr. B. accordingly wrote to the deceased asking if he wished to make a new will. Mr. B. got a message that he did and on 5 May 1975, Mr. B. (Junior) and Mr. W.D., then a clerk with Mr. B (Senior's) office and since deceased, saw the deceased at the Plaintiff's house. Mr. B. (Junior) brought the previous will of 10 December, 1974 with him and also a copy of the transfer. The deceased told Mr. B. (Junior) that he was going to hospital. Mr. B. (Junior) read the transfer and the previous will to the deceased. He asked the deceased whether he wished to clarify it in any way. The deceased said that his nieces were only to get the £1,000.00 in the deed. Everything else was to go to the Plaintiff. Mr. B. (Junior) there and then wrote the will of the deceased dated 5 May 1975. The will was read to and approved by the deceased. It was then properly executed by the deceased in the presence of Mr. B. (Junior) and Mr. W. D. Mr. B. (Junior) and Mr. W.D. then executed the will in the presence of the deceased. Mr. B. (Junior) said in evidence that the deceased was perfectly normal although physically weak and that he showed no signs of distress. That night the deceased was brought to hospital in Mallow and died there of lung cancer on 16 May 1975.

In this case the substantial issue was one of the degree of mental incapacity; how far, it at all, the deceased had recovered from his admitted brain injury.

The Court stated that the onus of proof lay on the plaintiff propounding a will. In this case it went further and was heavier. The deceased was living "under the protection" of his sister, the Plaintiff.

*Per D'Arcy J.*: "The facts of this case bear no resemblance to those of *Corboy deceased, Corboy v. Leahy* [1969] I.R. 148, but I consider the circumstances are such that the principles enunciated in *Fulton v. Andrews* (1875) L.R. 7 H.L. 448, and in *Conboy's case* must be applied. One must be suspicious of (the Plaintiff's) evidence and be vigilant and zealous in examining it. I must not pronounce in favour of either will unless my suspicions are removed, and I am satisfied that the paper propounded expresses the true will of the deceased".

All the witnesses gave evidence as to the degree of mental incapacity on the deceased's part. There was conflicting evidence by members of his family as to the degree of the recovery made by the deceased after his first discharge from hospital. There was a conflict of evidence among the non-professional witnesses also as to why the deceased moved from Ballyhooly to the Plaintiff's house at Doneraile in March 1974. However, the evidence of five solicitors and two of the doctors who attended to the deceased satisfied the Court that the deceased had the mental capacity to make a will on both 10 December, 1974 and 5 May, 1975.

In relation to the question of knowledge and approval the Court considered the cases of *Julia Begley, Begley and others v. McHugh [1939] I.R. 479*, and also considered *Re Morris (deceased), Lloyds Bank Limited v. Peake [1970]* 1 All E.R. *1057* and in particular the judgment (not reported) of *Sachs J.* in *Re Crerar* referred to by Latey J. in *Re Morris* (supra).

*Per D'Arcy J.*: "I do not consider that the presumption of knowledge and approval has been rebutted by any of the circumstances in this case. However, I am unwilling to put myself in any such straight-jacket as referred to by Sachs J. in *Crerar v. Crerar*. Independently of any presumption, I am satisfied, on the evidence of Mr. B. (Junior), solicitor, that the deceased knew and approved of his will dated 5 May, 1975."

*Held* (per D'Arcy J.):

(1) that on 5 May, 1975 the deceased was of sound disposing mind;

(2) that the Will of the deceased dated 5 May, 1975 was duly

executed in accordance with the Succession Act, 1965.

(3) that the deceased knew and approved of his Will dated 5 May, 1975.

Accordingly, letters of administration with the Will annexed of the Will of the deceased, dated 5 May, 1975, were ordered to issue to the Plaintiff.

**In the Goods of Michael O'Connor, deceased; Eileen O'Connor v. Maurice O'Connor and Margaret Vaughan** — High Court (per D'Arcy J.) — 19 December, 1978 — unreported.

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# RECENT IRISH CASES

## CONTRACT — RESERVATION OF TITLE

**The effect of reservation of title clauses in contracts for the sale of goods must be considered in the light of the intentions of the parties as shown by the provisions of the whole agreement and each case rests on its own facts and the nature of the transaction.**

The Plaintiffs sold a refrigerating machine to the first Defendant for a price which was to be paid by four instalments during the period commencing with the placing of the order and ending shortly after the machine was *in situ* and ready for operation. The contract contained *(inter alia)* the following clauses:—

(1) "Until all sums due to the Seller have been fully paid to it, the plant, machinery and materials supplied by the Seller herein shall remain the Seller's personal property and retain its character as such no matter in what manner affixed or attached to any structure. If the Buyer fails fully to perform this contract, the unpaid portion of the purchase price shall, at the option of the Seller, become immediately due and payable without notice, together with all reasonable legal or collection agency fees incurred in the collection thereof".

(3) "In case of default, the Seller reserves the right to enter upon the premises where the materials are located and take possession of and remove the same, if so elects. In the event of such removal the Seller may retain all payments made therefor as compensation for the use of the materials."

The facts, which were not in dispute, were that the machine was installed and operational but that approximately 25% of the purchase monies remained outstanding when the second Defendant was appointed Receiver over the property of the first Defendant.

The Plaintiff claimed that the machine was still its property and demanded its return or payment in full of the monies outstanding. The Defendants argued that the property in the goods passed either on delivery or once user commenced and that the reservation of title clause (above quoted) was only effective to create a charge or some other kind of security on the machine for the purchase price, and as such ought to have been registered under Section 99 of the Companies Act, 1963. As it was not so registered, the Defendants claimed that the clause was void as against the Receiver and creditors of the first Defendant.

The High Court (McWilliam J.) had considered the effect of a number of such clauses in the previous case of *Stokes McKiernan Limited* (December 1978 unreported) where the Court had been referred to and relied on the earlier decision in the case of *Aluminium Industries B.V. v. Rompala Ltd.* [1976] 1 WLR 676 but that unfortunately at that time (December 1978) the full judgement of Slade J. in re *Bond Worth Limited* [1979] 3 All ER 919 had not then been delivered. The High Court considered that in the *Bond Worth* case, the wording of the clause in question (in fact similar to the wording of one of the clauses in the *Stokes McKiernan* case) and the nature of the transaction as a whole did appear to create only an equitable charge over the goods in question for the purchase price. The clause in the *Bond Worth* case was as follows:—

> "The risk in the goods passes to the buyer upon delivery, but equitable and beneficial ownership shall remain with us until full payment has been received (each order being considered as a whole) or until prior resale, in which case our beneficial entitlement shall attach to the proceeds of resale or to the claim for such proceeds."

The clause in the Romalpa case was similar to that in the present case in that the entire property in the goods was expressed, although in a different form, to be retained by the vendor until all that was owing had been paid. The clause was as follows:—

> "The ownership of the material to be delivered to A.I.V. will only be transferred to purchaser when he has met all that is owing to A.I.V., no matter on what grounds."

McWilliam J. had held in the *Stokes McKiernan* case (December 1978) adopting the view expressed in the *Romalpa* case that a clause such as condition (1) in the present case was effective to retain the property in the goods in the vendor even though the goods were in the possession of the purchaser.

> *Held:* (per McWilliam J.) that in the present case, the clause and nature of the transaction appeared to be more similar to that in the *Romalpa* case, but that the wording of the clauses and the construction of the intentions of the contracting parties as evidenced by the contract as a whole must be considered and each case must stand on its own facts. The parties to a contract could agree to any terms they wished and the Court would have to decide what was their intentions. The clause in the present case was clear, in that there was only one article sold, the resale of which was most unlikely to have been contemplated by either the vendor or purchaser, and accordingly the Plaintiff had retained the property in the refrigerating machine until payment was made in full.

**Frigoscandia (Contracting) Limited v. Continental Irish Meat Limited and Lawrence Crowley** — High Court (McWilliam J.) — 25 April 1979 — Unreported.

## CONTRACT

**Specialist roofing contractors liable for damages arising from their failure to provide an effective waterproofing of a roof within a reasonable time. The specialist roof contractors had a duty to provide for and insist on any special precautions in the design of the basic roof structure that they required for their specialist form of roofing insulation.**

In 1974 the Plaintiffs were in the course of constructing a shopping centre in Dundalk. The Defendants, who described themselves as specialists and licencees in the Shell Monoform system of roofing and re-roofing quoted for roofing in the shopping centre. The quotation was accepted on behalf of the Plaintiffs by their Architect on 2 April 1974 subject to the fact that the Defendants commenced work on 24 September, 1974, at which time the

estimate for completion of the work was just under four weeks. The Defendants continued to work from that time, though not continuously, until the 13 November 1974, when the Plaintiffs purported to repudiate the contract and engaged another contractor who laid an alternative type of roof, namely an asphalt roof.

The initial period of the Defendants' work, commencing on September 24, 1974 had ceased on 2 October 1974, when the Defendants left the site, as the Defendants were awaiting the completion of work by other contractors to permit them to continue the further insulation of the roof. The Defendants complained that during that initial period of work and during the period of their absence from the site extensive damage had been caused to the roof and that when they returned to the site on October 18, 1974 they were faced with an extremely difficult problem. The Defendants further complained that between that time and the 13 November 1974 (when the purported repudiation by the Plaintiffs took place) damage continued almost uninterrupted despite protests and complaints on their part.

On 9 November 1974 a major leak through the roof in various places occurred during, admittedly, very wet weather. As a result the Plaintiffs' Architect was called to the shopping centre and a series of meetings were held with the Defendants when proposals were made by the Defendants for repair. The Plaintiffs' Architect expressed the point of view that the Defendants had completely failed to carry out the system as an effective and efficient system and that their explanations for the failure were unacceptable; he accordingly advised the Plaintiffs to engage another contractor. The advice was accepted and the Plaintiffs purported to repudiate their contract with the Defendants on 13 November 1974.

Changes in the design of the basic roof structure had been made by the Plaintiffs resulting in a change in the fall of the roof, and the case was made by the Defendants that this was a major contributing factor to the failure of their roof insulating operation.

It was undisputed at the hearing that a water-tight or weather-tight roof was not achieved as at 13 November 1974, and the dispute between the Plaintiffs and the Defendants on liability turned on two contentions of the Defendants', namely.

(i) The Defendants contention that they were at the commencement of the work supplied with an architect's drawing which indicated that the fall on the roof would be one in one hundred and that without their knowledge or approval this was altered to a fall of one in three hundred only with the consequence that there was a marked lack of drainage on the roof causing the lodging of water which destroyed the process which they were applying.

(ii) The Defendants' further contention that during the entire process of the work being carried out by them the roof was subjected to damage due to the negligence of the Plaintiff Contractors, their servants or agents and of the servants or agents of other sub-contractors.

*Held* (per Finlay, P.):

(a) That on the evidence the alteration and design of the roof by the Plaintiffs was not the cause of the failure nor was the change in the fall of the roof unknown to the Defendants before their operations commenced.

(b) That the Defendants held themselves out as specialists in a specialist form of roofing insulation and that under the term undoubtedly implied into the contract, the Defendants would use reasonable skill and care in the carrying out of their work and that the Defendants had a duty to provide for and insist upon any special precautions that they required. In the circumstances the repudiation of the contract by the Plaintiffs on 13 November 1974 was justified as the Defendants had failed in the fundamental term of the contract namely to provide an effective waterproofing of the roof within a reasonable time. Accordingly, the Plaintiffs claim for damages was successful.

**Dundalk Shopping Centre Limited v. Roofspray Limited,** High Court, (Finlay P. 21 March 1979 — unreported.

## EXTRADITION

**Robbery with violence contrary to Section 8 of the English Theft Act, 1968, does correspond to robbery with violence under the Larceny Act 1916, in this State, provided the recital of the offence in the warrant identifies the offence by reference to the factual components relied on and not merely because the offences have the same name. Sections 47(2) and 50(2)(c) of Extradition Act, 1965, considered.**

Extradition was sought on a warrant which recited that the Plaintiff on a specified date at a specified place in Middlesex "did rob M.B. of £281 in cash and immediately before doing so, used force, to wit personal violence, to the said M.B." In a separate entry in a separate paragraph in the warrant the offence was said to be contrary to Section 8 of the Theft Act, 1968.

The sole matter in issue was whether (as required for the issue of a direction under Section 50(2) (c) of the Extradition Act, 1965) the offence so specified "does not correspond with any offence under the law of the State which is an indictable offence or is punishable on summary conviction by imprisonment for a maximum period of at least six months." The fact that this test is expressed in a negative form (both in Sections 47(2) and 50(2) (c) of the Act of 1965) was not indicative of where the onus of proof lay; it merely laid down that, for the allowance of this exemption from extradition, the Court had to be of the opinion that in the circumstances of the case there did not exist dual criminality to the extent required for the specified correspondence of offences. The requirement for extradition was satisfied when correspondence was shown between the specified offence and *any* offence which either was an indictable offence or carried a punishment on conviction of a maximum term of six months imprisonment.

The District Justice had held that the offence in the warrant corresponded with robbery with violence, contrary to the Larceny Act, 1916. When the Plaintiff instituted these proceedings in the High Court seeking a direction that he be released under Section 50(2) (c) of the Act of 1965 the High Court (per McMahon J.) held that the specification in the

warrant was not sufficient to identify a corresponding offence in Irish Law and he ordered the Plaintiff to be released. That High Court Order was appealed to the Supreme Court.

*Held* (per Henchy J.) that to show the necessary correspondence between the offence in the warrant and an offence in the State, it was necessary for the warrant to identify the offence by reference to the factual components relied on; and that it was only by looking at those components that a Court could decide whether the offence would, regardless of what name was attached to it, if committed here, constitute a corresponding criminal offence of the required gravity. The words in the warrant should be given their ordinary meaning, unless they were used in a context which suggested that they had a special signification. As the statement in the warrant in question that the offence was contrary to Section 8 of the (English) Theft Act, 1968, was made as a separate entry in that warrant, it was not necessary to have regard to what that Section said. Since "rob" in ordinary usage meant "deprive a person of property unjustifiably by force" the District Justice only had to decide whether the charge in the warrant would constitute an offence if the same conduct were charged here. Since the particulars of offence in the warrant would amount to an indictable offence in the State under one or other of the unrepealed sections of the Larceny Act, 1916, there was the necessary correspondence and an order for delivery of the Plaintiff was made. High Court decision reversed.

On the question of correspondence of offences the Court considered the Supreme Court decisions of *The State (Kelly) v. Furlong* [1971] I.R. 132; and *Wyatt v. McLoughlin* [1974] I.R. 378, and also the English decision of *Re Arkins* [1966] 3 All E.R. 651, (dealing with the corresponding provision in the Backing of Warrants (Republic of Ireland) Act, 1965).

*Note:* At the end of his judgment Henchy J. stated the following:

> "Unfortunately, in disregard of the repeated statements from this Court that it is the duty of the authorities in this State to see that extradition proceedings in our courts are speedily disposed of, these proceedings have been allowed to drag on for an inordinate and inexcusable length of time. Four and a half years have been allowed to elapse between the issue of the warrant and this final disposition of the extradition proceedings. Whether from the point of view of the plaintiff or from that of the prosecuting authorities in England, the chances of a fair and proper trial have not, to put it mildly, been enhanced by that delay".

**William Matthew Wilson v. John Sheehan,** Supreme Court, (per Henchy J. with O'Higgins C. J. and Griffin J.) 23 May, 1979 — unreported.

## ADMIRALTY — SALVAGE

**Salvage by lifeboat men in the course of saving life should not be awarded as a proportion of the value of the rescue vessel but on the basis of remuneration for services.**

The Plaintiffs' appeal to the Supreme Court arose from a High Court decision (per Finlay P.) to award them £750 for the salvage of motor trawler "Ora et Labora" (which had an agreed value of £45,000) in July, 1974. The Plaintiffs were the coxswain and crew of the Valentia lifeboat called out by a "Mayday" distress message from the trawler on 3 July 1974, the engines having failed a mile off a lee shore. The wind was westerly force six. In response to the message the lifeboat was launched at approximately 9 p.m. From their experience the coxswain and crew of the lifeboat had calculated that the trawler would be likely to drift to the cliffs near Ducall and Bolus Heads, Co. Kerry, and would be in grave danger not only from the cliffs but from submerged rocks some hundreds of yards to seaward. The lifeboat had reached the disabled vessel, then only several hundred yards from the lee shore, at approximately 11 p.m. The crew had then passed a line to the trawler and had towed it to safety and ultimately to Knightstown where it had been secured at 4.15 a.m. on the following morning.

The High Court found that there was an immediate danger of the loss of the motor trawler. The Plaintiffs had claimed salvage based on a proportion of the value of the salved property. The claim to any salvage had been resisted by the Defendants, but on the hearing of the appeal the latter conceded that salvage was awardable but only on the basis of remuneration in respect of the work actually performed by the Plaintiffs.

Under the regulations of the Royal National Lifeboat Institution, which was the owner of the lifeboat, where a lifeboat has been launched on life saving duty, the coxswain and crew are permitted to engage in salvage services to property subject to refunding consumables, the cost of repairs and replacement resulting from loss or damage incurred during the service. The Institution does not claim salvage or allow salvage to be claimed on its behalf. Where therefore a salvage claim arises in respect of salvage to property, it is a personal claim by the individual lifeboat men and is in respect of the personal services rendered by them; there can be no claim in respect of services rendered to the salved vessel by the lifeboat itself.

The question for the Court to determine was the amount of an award as would fairly compensate the coxswain and crew, without injustice to the interests of the salved vessel, the award to be such as would, in the interests of public policy, encourage others in like circumstances to perform like services.

English cases considered in the High Court and on appeal were the *"Corcrest"* [1947] 80 Ll.L.Rep., 78, the *"Guernsey Coast"* [1950] 83 Ll.L.Rep., 483 and the *"Africa Occidental"* [1951] 2 Ll.L.Rep., 107. The *Corcrest case* was considered to be irrelevant to the present case in that on that occasion the lifeboat ultimately put to sea to salve a vessel known to be unmanned, the crew embarking solely on a salvage mission. The *Guernsey Coast cast* and the *Africa Occidental case* were considered to enunciate principles that were applicable. In both cases the lifeboat was launched on a rescue mission and whilst engaged on that purpose assisted in the salvage of the striken vessel.

It had been held by the High Court that salvage should not be calculated upon the basis of a proportion of the value of the ship salved but on the basis of remuneration or reward to the lifeboat men. In assessing the

amount of salvage the High Court had taken the view that the measures which should be taken should be as in the two cases decided in 1950 *(Guernsey Coast)* and 1951 *(Africa Occidental)*, respectively. The lifeboats in those cases involved ten crew each, something which the High Court had taken to be relevant, the awards being £200 and £250 respectively. In arriving at the remuneration to be awarded to the Plaintiffs the High Court had taken the figure of £250 and had used a multiplier of 6 to allow for inflation since the 1950/1951 period and in view of the fact that ten crewmen were involved in the earlier cases and five crewmen in the present case, had halved the resulting figure of £1500 to give a remuneration of £750 which the High Court had awarded to the Plaintiffs.

The Supreme Court affirmed the judgment of the High Court save in one respect — the multiplier used.

*Held* (per Griffin J.) that the multiplier should be that as applied to earnings (not prices) and in the circumstances decided that the multiplier would have been 12 had the attention of the High Court been brought to the relevant issues of the Irish Statistical Bulletin. The result would have been a remuneration of £1500 which sum was allowed by the Supreme Court to the Plaintiffs.

**Dermot Walsh and Others v. The Owners of the M.V. "Ora et Labora"** — Supreme Court, (per Griffin J., with Kenny and Parke JJ). 6 April 1979 — unreported.

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Summaries of judgments prepared by Paula Scully, John Hooper, Francis E. Sowman, Timothy Bouchier-Hayes and edited by Michael V. O'Mahony.

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# RECENT IRISH CASES

## CONTRACT — SPECIFIC PERFORMANCE — INTEREST

**Plaintiff purchaser liable to Defendant Builder for interest on balance of purchase money at contract rate from date defects in new house remedied up to date when purchaser put balance on joint deposit receipt, and after that date builder only entitled to the interest on the deposit receipt.**

The Plaintiff (purchaser) signed a contract with the Defendant (builder) on 6 September 1977 which provided that the Defendant would complete a house and sell it to the Plaintiff by 29 September 1977 but that the Defendant would not be liable for any delay. The contract also provided that any dispute relating to work in progress or completion would be decided by the Defendant's architect whose decision would be final and binding; and that if the Plaintiff did not pay for the house on final completion the contract provided that an interest rate of 20% would be charged from two weeks after the date of (final) completion when the balance of the purchase price would be payable. On 27 October 1977 the Defendant told told the Plaintiff that the house was ready, but the Plaintiff did not accept this and left with the Defendant a list of defects which was confirmed by letter of 27 November 1977 furnished to the Defendant's solicitors. The Defendant accepted that there were defects at this stage but said that they were not of a serious nature and claimed that they had all been remedied by early December 1977. The Plaintiff attended the premises with a qualified person (who appeared to be a friend or relative of the Plaintiff), in the middle of December 1977 and an inspection was carried out but no report of this inspection was furnished by the Plaintiff to the Defendant though the inspection was referred to in a letter from the Plaintiff's solicitor of 24th January 1978. Between the date of that inspection by the Plaintiff and the issue of an architect's certificate by the Defendant in May 1978 confirming completion, correspondence passed between the parties wherein the Plaintiff claimed that the house was defective and that he required inspection of it and the Defendant claimed that the house was completed and that he required closing and interest at 20% on the balance of the purchase price payable from November 1977. The Plaintiff did not make an appointment to inspect but when the Defendant furnished the architect's certificate in May 1978 the Plaintiff agreed to complete and pay interest from that date but the Defendant insisted upon full payment of interest from that date at 20% from November 1977. On 25 June 1978 the Plaintiff put the balance of the purchase money on joint deposit receipt in the names of the Plaintiff and the Defendant and he commenced proceedings for specific performance on 3 August 1978.

On the evidence before him the Court (McWilliam J.) was satisfied that the premises were not completed in October or November 1977 but accepted that the defects were not of a serious nature and that they had probably been remedied by the middle of December 1977 when the Plaintiff examined the house with his qualified friend or relative. The judge commented that it was significant that this qualified friend did not furnish a written report and did not give evidence. It was accepted by the Defendant that if interest was payable by the Plaintiff then, for convenience, since no definite dates in December 1977 had been established, the premises would be held to have been completed on 1 January 1978. The Defendant also accepted that the Plaintiff was entitled to his decree for Specific Performance and the Court made no decision in that respect.

*Held* (per McWilliam J.):

1. That the Defendant (builder) was entitled to interest at 20% from 1 January 1978 until 25 June 1978 when the Plaintiff placed the balance of the purchase money on joint deposit receipt but that after the 25 June 1978 the Defendant was entitled only to the interest earned on the joint deposit receipt.
2. That the Plaintiff was not entitled to any damages for being kept out of the house from 1 January 1978 until the date of the judgment.
3. That the Defendant was responsible for the damage to the house caused by the hard winter of early 1979 in so far as this was due to his want of reasonable care; but that the Court had been given no evidence whatsoever as to the position in that respect.

**Derek Treacy v. Dwyer Nolan Developments Limited** – High Court (per McWilliam J.) – 31 October, 1979 – unreported.

## CRIMINAL LAW — APPEAL

**An application for a certificate of leave to appeal to the Court of Criminal Appeal on the grounds that certain statements and certain parts of statements ought not to have been admitted by the trial judge — Criminal Justice (Evidence) Act 1924, Section 1 (F).**

The Appellants, W.T.M. and B.O'S., had been convicted at a joint trial in the Central Criminal Court with the murder of one J.H. In the course of their trial, certain statements made by them had been admitted into evidence. Counsel for the appellants had objected to the admission of these statements on several grounds at the trial. At the hearing of the application for a Certificate for leave to appeal to the Court of Criminal Appeal, their Counsel argued that the statements ought not to have been admitted. Their main ground for this contention was that the appellants had not voluntarily gone to the station where they made their statements, but, in fact, had been arrested, and were in custody when they made their written statements, and that they ought to have been brought before the District Court prior to the time that they made their statements. At the trial, there had been conflict of evidence between the Gardai and the accused.

*Held:* (per Finlay P.)

(1) That the function of the Court of Criminal Appeal on issues such as this was set out by the C.C.A. in *The People v. Madden* [1977] I.R. 336 at p. 340 (per O'Higgins C.J.)

> "... it would seem to be the function of this Court to consider the conduct of the Trial as disclosed in the stenographer's report to determine whether or not the trial was satisfactory in the sense of

being conducted in a constitutional manner with fairness, to review as far as may be required any rulings on matters of law, to review so far as may be necessary the application of the rules of evidence as applied in the trial, and to consider whether any inferences of fact drawn by the court trial can properly be supported by the evidence; but otherwise to adopt all findings of fact, subject to the admonitions in the passage cited above".

(2) That the Court was satisfied that all the findings made by the trial judge could be and were supported by the evidence adduced before him. There were, therefore, no grounds for setting aside the findings of fact by the trial judge with regard to the voluntary nature of the presence of each of the appellants in the Garda Station, or of the voluntary nature of the statements made by them.

(3) However, that with regard to each of the statements made by the appellants each contained a reference to a file or "a shatter bar", which one of the appellants described as being used for shattering glass in robberies, and which the other appellant described as an implement he carried in his pocket for "doing cars". Counsel for both appellants submitted that these references should have been edited out of the statements of the appellants and that these references had been admitted in contravention of the Criminal Justice (Evidence) Act 1924, Section 1 (f) of which Act provided that

> "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character unless . . ." (Exclusion to subsection not material).

It was held by the Court that the 1924 Act dealt only with questions which might be asked or must be answered by an accused in giving evidence on his own behalf, and did not apply to the contents of his statement made prior to the trial which was tendered by the prosecution in evidence; but that, notwithstanding this, following the decision in *The People v. Kirwan* [1943], I.R. 279 this portion of the statement should have been excluded since it was prejudicial and did not relate either to the general onus of proof on the prosecution, or to any defence which might have been available to either of the appellants. The Court cited with approval what O'Sullivan C.J., had quoted in *Kirwans Case* from the judgment of Lord Herschell in *Makin v. A.G. for N.S.W.* [1894] AC 57 as follows:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged were designed or accidental or to rebut a defence which would otherwise be opened to the accused".

Even though these references were not edited out of the statements at the trial, the Court was of the opinion that there was no possibility that any conceivable miscarriage of justice could have occurred. Accordingly Section 5(1) (a) of the Courts of Justice Acts 1928 was applied, and this ground of appeal was not allowed.

(4) That in relation to an objection which was also taken by Counsel for one of the appellants (W.T.M.) to the admission of an oral statement allegedly made by that appellant, which statement was made after caution but no note at that time was taken of this by either of the Gardai who alleged that it was made in their presence; that the trial judge did not err in principle in admitting the statement notwithstanding the breach of the Judges' Rules.

(5) That the final ground of appeal concerning the trial judge's charge to the jury should also be dismissed. The appellants' case had been that they thought that the deceased was dead when they choked him. The trial judge had discussed the presumption that a person intended the natural consequences of his acts. It was argued on behalf of the appellants that this concept had no relevance in this case, since the real question for determination by the jury was whether the prosecution had established that the two accused did not believe that the deceased was dead when the sheet was pulled around his neck, choking him – for if they believed that the deceased was alive, they must have intended death or serious injury. The Court held that the appellants were seeking to draw a distinction between belief and intention. The Court stated (per Finlay P.)

> "This Court is satisfied that belief in the context of the defence in this case is an integral part of intention. An assertion by a man that he carried out what did in fact constitute a fatal choking of another who was then alive in the belief that the other had already died is nothing more or less than a denial of the intention to cause the natural and probable consequence of the act actually committed by him namely the choking of a live person".

Therefore, the Court was satisfied that the trial judge was bound in law to discuss the question of intention and the rebuttable presumption concerning it.

Accordingly, the application

of each of the appellants for a certificate of leave to appeal against the conviction of each of them was dismissed.

**D.P.P. v. William Thomas Moore and D.P.P. v. Brendan O'Sullivan,** Court of Criminal Appeal (per Finlay P. with Griffin and Costello J.J.) – 29 May 1979 – unreported.

## CRIMINAL PROCEDURE

**Petty Sessions (Ireland) Act, 1851, Section 10 (4). Whether the six months limit for the commencement of proceedings in the District Court is a matter of defence, or does it go to the jurisdiction of the Court to entertain the Summons.**

The Defendants were vegetable wholesalers, and were summonsed by the Minister for Agirculture (the Complainant) for allegedly displaying vegetables which failed to conform to common quality standards set by an EEC Directive. The alleged offence took place on 30 May 1977, and the return date of the Summons was 1 February 1978. The Summons did not bear on its face any note of the date on which it had been issued by the District Court Clerk. The Defendant contended in the District Court that there was therefore no proof before the District Justice that the proceedings had commenced within the six month time limit after the date of the alleged offence provided for by Section 10 (4) of the Petty Sessions (Ireland) Act, 1851. The Complainant sought to adduce evidence that the summons had been issued within the six month period by relying on an endorsement of service on the summons which indicated that it had been served within the six month period. The District Justice, however, held that he lacked jurisdiction to enter upon the hearing of the summons, and indicated that he proposed to strike it out. The Complainant then asked the District Justice to state a case for the opinion of the High Court on the matter.

*Held:* (per Finlay P.)

1. That if, in fact, the complaint had not been made and the summons had not been issued within six months of the date of the alleged offence, a good defence would be afforded to the Defendant.
2. That the time limit, arising under Section 10 of the Petty Sessions (Ireland) Act, 1851, was a matter of defence to the Defendant only, and did not go to the jurisdiction of the District Court to entertain the summons.
3. That therefore, the Complainant should have been permitted to prove the date of the issue of the summons by referring to the endorsement of Service on the summons once the Defendant had raised the question of the time limit.
4. That accordingly, the District Justice was not correct in law in holding that he had no jurisdiction to enter upon the hearing of the complaint.

In the Course of his decision, Finlay P. referred to the cases of:– *The State (James Hempenstall) v. Judge Shannon and District Justice Reddon* [1936] I.R. 326 and *The Attorney General v. Conlon [1937] I.R. 762.* **The Minister for Agriculture v. Norgro Limited** – High Court, (per Finlay p.) 23 July 1979 – unreported.

## INSURANCE — CONVEYANCING ACT 1881 SECTION 23 (4)

**Mortgaged premises damaged by fire — equitable mortgagee (by deposit of mortgage deeds) entitled to proceeds of insurance policy effected by mortgagor, where insurance company notified of mortgage.**

The premises, in Parnell Square, Dublin, were held by the first Defendant under a lease for a term of 900 years, which contained a covenant by the lessee to repair, but did not contain any covenant to insure.

By resolution of the first Defendant dated 30 September 1977, the third Defendant was authorised to deposit the title deeds of the premises with the third party Bank, and this deposit was made on the same day. Notice of this deposit was given to the Sun Alliance and London Insurance Group by the Bank on 31 January 1979, the Premises having been insured with that Group against fire for the sum of £5,000 in the names of the second Defendant and fourth Defendant, two of the directors of the first Defendant, for the year period from 19 September 1978 until 18 September 1979.

Fire damaged the premises in March 1979, and on 27 July 1979, the two Plaintiffs, being the owners of the lessors' interest in the premises, obtained judgment against the first, second and fourth Defendants for the sum of £12,000 being the cost of repairing the premises, and £1,900 for costs.

This matter came before the Court by way of an application by the Plaintiffs for an order of garnishee attaching the sum of £5,000 payable to the Defendants (or one or more of them) by the Sun Alliance under the fire policy.

The third party Bank (as equitable mortgagees of the premises by deposit of title deeds) opposed the application of the Plaintiffs, on the grounds that the Bank had an interest in the premises, that the Plaintiffs could not have a greater interest in the money than the insured, and that the Bank had a right of some sort to have its security maintained, although as was pointed out in the judgment, no authority was cited for this proposition. A further argument on behalf of the Bank was based on the provisions of Section 23 (4) of the Conveyancing Act, 1881. Section 23 (4) of the 1881 Act provides as follows:–

(3) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgage so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

It was submitted on behalf of the Plaintiffs that the Bank did not give any notice requiring the insurance

money to be applied towards the discharge of the mortgage debt; that as between the two claimants, the Plaintiffs were first in making their claim and, therefore, should have priority over the Bank; and, that the Plaintiffs' claim should have priority because the Plaintiffs had a judgment which entitled them to execute forthwith, whereas the Bank had only got a cause of action.

*Held* (per McWilliam J.):–

That the Bank had a statutory right under Section 23 (4) of the 1881 Act to have the insurance money applied towards discharge of the mortgage debt and had, in exercise of that right, given notice to the Sun Alliance before the date of the fire; and that Section 23 (4) was not restricted to insurances effected under a mortgage deed or under the 1881 Act, as was the position under Section 23 (3); and that this distinction between Section 23 (4) and Section 23 (3) was recognised in the cases of *In the matter of J. E. Doherty, a bankrupt,* [1925] 2 I.R. 246 and *Halifax Building Society v. Keighley* [1931] 2 K.B. 252; that in each of those two cases the mortgage was by deed and it had hitherto normally been assumed that the 1881 Act only applied to a mortgage by deed, but that clause (vi) of Section 2 of the 1881 Act defined "mortgage" as including any charge on property for securing money or money's worth, and that an equitable charge by deposit of title deeds was a charge on property for securing money.

In his judgment the judge also referred to the current (4th) edition of Halsbury's Laws of England, Vol. 17, p. 522, para. 1032, which stated that a contract of fire insurance was a personal contract which did not pass with the property and that where mortgaged property had been insured by the mortgagor and was destroyed by fire, that the mortgagee was not, in the absence of a covenant as to the application of the insurance money, entitled to have it applied in payment of the mortgage debt.

(Per McWilliam J.):

> "... the principle stated in Halsbury ought to be read so as to include a reference to a statutory provision in addition to the reference to a covenant as to the application of the insurance money".

**Brendan Myler and Carmel Myler v. Mr. Pussy's Nite Club Limited, Liam Ledwich, Alan Amsby and Tony Keogan (Defendants) and Allied Irish Banks, Third Party** – High Court (per McWilliam J.) 11 December 1979 – unreported.

Summaries of Judgments prepared by: John Gore-Grimes, William J. Maguire, Michael Staines and edited by Michael V. O'Mahony.

# RECENT IRISH CASES

## CONVEYANCING

**Family Home Protection Act 1976 — consent of spouse to conveyance not necessary where consent already given to contract.**

The Defendants (a husband and wife) negotiated the sale of their family home to the Plaintiff. The wife was reluctant to attend the Husband's solicitors' office to execute the standard form of consent endorsed on the contract, dated 20 July, 1978, but signed a letter addressed to the husband's solicitors drafted by the husband unequivocally consenting to the sale, on 3 July 1978. The solicitors for the husband informed the solicitors for the Plaintiff of the receipt of this letter and stated that it would be furnished in lieu of an endorsement on the contract. Domestic difficulties arose between the Defendants themselves and on 11 July 1978 the Husband's solicitors wrote a letter to the wife which letter did not contain any reference to the sale, but which letter included:

> "as you are already aware, the Family Home Protection Act, 1976 prevents the sale of the family home by either spouse without the consent of the other spouse. I would recommend, therefore, that both you and your husband execute separate deeds of renunciation of your rights under this Act in order to protect any future property transactions by either party".

On the same day, the solicitors for the husband wrote a somewhat similar letter to the husband.

The wife subsequently engaged separate solicitors to whom the husband's solicitors wrote on 14 August 1978 to say that the wife had informed them that she was not prepared to execute a Family Home Protection Act declaration and endorse her consent on the deed (to the Plaintiff). This letter contained the following statement:

> "Your client (i.e. the wife) did consent to the sale".

Negotiations proceeded between the husband's solicitors and the wife's solicitors as to terms on which the wife would endorse her consent, but without success.

The Plaintiff and the wife had had three meetings between June and the end of August, 1978 and at the last meeting the wife had asked for a further week to complete and get out of the family home, but did not suggest that she was not going to get out at all. The Court felt that it seemed to follow from this that the wife did not suggest that she had not intended to consent to the sale or that she thought the consent was conditional on the husband purchasing a house in Dundrum, Co. Dublin, (on which the Defendants had put a small deposit), or that she thought that the consent was, for any reason, not final and binding when she signed the letter of 3 July 1978.

Presumably because of the matrimonial situation the husband did not proceed with the purchase of the house in Dundrum and that left the wife in the position, as she stated in evidence, that she "had nowhere to go and could do nothing about it".

It was argued by the Defendants that the consent of the wife was conditional on the husband purchasing the house in Dundrum. It was also argued that if the consent were held to have been unconditional, a further consent in writing was necessary for the actual conveyance to the Plaintiff and that the Court should refuse to make an order dispensing with the wife's consent under section 4 of the said Act of 1976 as it was not unreasonable for the wife to refuse consent having regard to the provisions of Section 4(2) of that Act, which provides as follows:

> "the Court shall not dispense with the consent of the spouse unless the Court considers that it is unreasonable for the spouse to withold consent, taking into account all the circumstances including,
> (a) the respective needs and resources of the spouses and of the dependant children (if any) of the family . . ."

*Held* (per McWilliam, J.):

(1) That the consent of 3 July 1978 was intended to be an unconditional consent, although the wife may have believed that the husband was going to proceed with the purchase of the house in Dundrum. The Court did not accept that the dispute between the husband and the wife as to the disposition of the purchase price, which arose after the consent, and that therefore that consent of 3 July, 1978 was sufficient to comply with Section 3 of the said Act of 1976.

(2) That while on a strict interpretation of Section 3 of the said Act of 1976, it could be said that there must be a consent, both to the Contract and to the final conveyance, it could not be believed that it could have been the intention of the Legislature to require two consents for the completion of one transaction and thus leave a purchaser in the position of conducting all the work and incurring all the expenses necessary for the completion of a purchase only to find that a spouse had changed his or her mind about giving consent and required that the whole transaction be abandoned.

**S.K. v. P.T. and A.T.** — High Court (per McWilliam, J.) — 15 July 1980 — unreported.

## EVIDENCE

**When evidence is given under oath by an expert witness that he holds a particular qualification and is entitled to practice a particular profession, when that expert would be commiting an offence if he were not so entitled or qualified to so practice, then there is a rebuttable presumption in favour of the expert that he is so qualified until the contrary is proven.**

The Defendant was prosecuted, as owner of a herd of cattle, for breach of the Brucellosis Testing Regulations, (S.I. 120 of 1966) made pursuant to the Diseases of Animals Act, 1966, for failing to present for brucellosis testing an eligible animal, that being an animal not being a reactor from a previous test or an animal deemed to be a reactor under the Bovine Tuberculosis (Attestation of the State) Order 1965. For the purpose of carrying out these tests there is a statutory provision for the

taking of samples by a veterinary surgeon or by an officer of the Minister of Agriculture authorised to take samples.

At the hearing in the District Court the District Justice was satisfied that the Defendant had failed to make an eligible animal available for a brucellosis test which was carried out by a Mr. O'Flaherty, who, when called to give evidence, stated that he was a veterinary surgeon. He was not questioned about this assertion nor was it challenged nor was any evidence to the contrary adduced by the Defendant. At the conclusion of the prosecution's case, counsel for the Defendant contended that a mere statement by the witness that he was a veterinary surgeon was insufficient proof, having regard to the terms of the Regulations and the Act applicable, of the fact that he was a veterinary surgeon within the meaning of the Act, nor was there any evidence that he was an officer of the Minister of Agriculture authorised to carry out the test. Consequently, the Defendant contended that the prosecution had failed in an essential proof. The District Justice then stated a case, he being satisfied, that:

(i) the case made out against the Defendant was that the requisite sample was taken by a veterinary surgeon within the meaning of the Act, and,
(ii) the evidence adduced by the prosecution in this respect was Mr. O'Flaherty's statement that he was a veterinary surgeon.

He sought the opinion of the High Court, as follows:

(a) Was it necessary for the prosecution to prove that the necessary test was carried out by a person lawfully qualified to practice veterinary surgery in the State?
(b) Was Mr. O'Flaherty's evidence sufficient to establish a prima facie case that he was a veterinary surgeon?

(3) Was Mr. O'Flaherty's evidence sufficient to establish a prima facie case that he was lawfully qualified to practice veterinary surgery in the State?

The Court found that if Mr. O'Flharty was not a veterinary surgeon he would have commited an offence when stating under Oath that he was a Veterinary Surgeon. There was a presumption against the commission of crime. This presumption was rebuttable. The Defendant did not challenge Mr. O'Flaherty as to his qualifications nor did he adduce evidence to the contrary. The evidence by Mr. O'Flahery that he was a veterinary surgeon was prima facie proof of that fact.

*Held* (per Finlay J.) in answer to the specific questions submitted:

(a) In the absence of proof of a person authorised by the Minister under the Regulations; Yes.
(b) Yes.
(c) Yes.

**The Minister of Agriculture v. John Conneannon** — High Court (per Finlay, J.) 14 April 1980 — unreported.

## LABOUR LÁW — TRADE DISPUTES

**Trade Disputes Act 1906 — In order to justify the picketing of a person's premises there must be a sufficiently discernible and close connection between that premises and the trade dispute. Two licensed premises picketed in pursuance of a claim of redundancy payments in excess of the statutory entitlement. One of the premises belonging to a personal representative entitled to a small share in the residue of the estate.**

The Plaintiff, who was the owner of a licensed premises in Inchicore, Dublin, was one of the executors and was entitled to one-twelfth share of the residuary estate of a deceased publican who had a licensed premises on Malahide Road, Dublin. It was necessary to sell the premises on Malahide Road for the purpose of the administration of the estate of the deceased and all the employees of the Malahide Road premises were given notice and paid the full redundancy payment to which they were entitled, but the employees also claimed they were entitled to further payments under the heading of "Disturbance Claims Payments", which they claimed was the custom in the licensed trade. It was not claimed that there was any business association between the Plaintiff's premises in Inchicore and the premises on Malahide Road. The Plaintiff brought proceedings against the employee Defendants for an interlocutory injunction to restrain the picketing of her own premises in Inchicòre on the grounds that there there was no trade dispute between the employees of the deceased publican and the deceased's successors in title.

*Held:* (per McWilliam J.)

1. That there was a trade dispute between the employees of the deceased publican and his sucessors in title:
"It appears to me to be clear that there is a trade dispute between the employees of the late (deceased) and his successors in title whether the claim by the employees is sustainable under their contracts of employment or is reasonable on other grounds or not. A dispute does not cease to be a trade dispute within the meaning of the Trade Disputes Act, 1906 merely because the claim by the employees appears to be unreasonable. A "trade dispute" within the meaning of the Act is "any dispute between employers and workmen" . . . which is "connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of any person". This dispute is between employers and workmen and is connected with the terms of the employment of the employees of the late (deceased). The employees are claiming that, in the licensed trade, on the termination of employment employees are entitled to substantially more than the statutory redundancy payments. This claim may or may not be correct, but it appears to me that it constitutes a trade dispute within the meaning of the Act".
2. However, that as there was not at any time any business connection between the Inchicore premises of the Plaintiff and the Malahide Road premises of the deceased and that the Plaintiff had not at any time carried on business in the Malahide Road premises of the deceased or

taken over any of the stock-in-trade of the deceased, that there was not a sufficient "clearly discernible connection" between the premises of the Plaintiff and the trade dispute which would justify the picketing of the Plaintiff's own premises. Accordingly, an injunction was granted restraining the picketing of the Plaintiff's premises in Inchicore pending the hearing of the action.

**Alice Cleary v. Patrick Coffey and Others,** High Court (per McWilliam J.), 30 October 1979 – unreported.

## LANDLORD AND TENANT

**Limited description of property in Lease – Surrounding circumstances and correspondence used to ascertain intention of parties at the time lease was granted.**

The Plaintiff was lessee of premises under a lease dated 21 November 1977 for a term of 10 years from 1 January 1977.

The premises were described in the lease as "the lock-up shop premises at shop No. 1, Back Street, otherwise Fair Green, Arklow, in the County of Wicklow". The Plaintiff claimed the lease included a yard with a store and shed at the rear of the shop. The Court looked at the history of the premises and the surrounding circumstances leading to the execution of the lease.

The shop in question was Shop No. 1 in a terrace of three shops all owned by the Defendant landlord. Behind the terrace there was a yard and one toilet. It was intended that the occupiers of each of the shops would have the right to enter the yard to obtain access to the rear doors of their shop and presumably to use the one toilet. Shop No. 1 had been let in 1968 to a predecessor in title of the Plaintiff for a term of five years with a clause for renewal. That predecessor in title had erected the (disputed) store with the consent of the Defendant. Ultimately in 1971 the Plaintiff took an assignment of Shop No. 1 and had already or thereafter obtained the leasehold interests in both the adjoining Shop No. 2 and in the flat which extended over both shops. The Plaintiff then covered in a portion of the yard behind Shop No. 1 and made some alterations to the store. This covered-in space was then used for a refrigerator and a machine for preparing potato chips for the fish and chip business the Plaintiff carried on in Shop No. 1. The Plaintiff fell into arrears with rent in 1975 and the Defendant in 1976 obtained a judgment against the Plaintiff for the then amount of the arrears. Subsequently, an agreement was made on 29 March 1977 between the Plaintiff and the Defendant whereby the Plaintiff agreed to pay the amount of the judgment by instalments and to vacate the overhead flat in consideration of the Defendant granting the Plaintiff a new (fixed term) lease of Shop No. 1 for ten years from 1 January 1977.

A lease pursuant to the agreement of 29th March 1977 was ultimately granted and was dated 21 November 1977 and the Plaintiff continued in occupation under that lease and was apparently also using the yard and store at the rear. Later, the Defendant became exasperated with the way the Plaintiff was using the yard and the way grease from his cooking operations was choking the drain. The Defendant, relying on the wording of the lease, sought to exclude the Plaintiff from the yard and store and ultimately the Defendant blocked the entrance and knocked down the store.

*Held* (per McWilliam J.) that it was relevant that the shop had been used and was, in accordance with the lease, to continue to be used as a restaurant and shop and that the restaurant and shop had, to the knowledge of the Defendant, been at all times used for fish and chips and "take-away" type of business with a rear entrance to the shop from the yard which had been used for the delivery of goods to the shop; also, there was no toilet in the shop and so the toilet in the yard had been used. It appeared from the evidence, that at the time of the agreement – March 1977 – and of the lease in November 1977 that no specific agreement had been made to exclude from the lease the toilet and the store and the use of the yard. Therefore, it was clear that what was intended to be demised, and what was demised, by the Defendant to the Plaintiff, was the same as had been let in the earlier agreements relating to Shop No. 1 i.e. it included the toilet and store and use of the yard.

**Magno Di Murro v. Elizabeth Childs** – High Court (pert McWilliam J.) 14 December 1979 – unreported.

## PRACTICE AND PROCEDURE

**Delay after specific performance order not a bar to forfeiture — Effect of Plaintiff's delay.**

Mr. S. agreed to sell No. 3 Dame Lane, Dublin for £60,000 to the first-named Defendant in trust for the second-named Defendant by a Contract dated 15 February 1974. A deposit of £6,000 was paid and the closing date was fixed for 1 March 1975. The Defendants failed to complete and proceedings for specific performance were instituted. These were settled and the terms of the settlement were incorporated in a Court Order dated 10 December 1975 which contained a decree for specific performance with a stay on the order until 10 December 1976. There were provisions for the payment of interest by monthly instalments and for the payment by the second-named Defendant of the costs of the action and the sale. The Defendants made some payments of interest but ceased these payments in August 1976 and their solicitors told the Plaintiffs' solicitors that the second-named Defendant was not in a financial position to close the sale. The Plaintiffs' solicitors re-entered the motion and on the hearing of the motion the Defendants' solicitors indicated that they had no instructions in the matter. At the judge's suggestion a motion claiming an order forfeiting the deposit and rescinding the sale was issued on 7 February 1977, but before it could be heard Mr. S. died, on 3 February 1977, and the motion was adjourned generally.

In September 1977 the premises were burned down and a Mr. Stafford, who said he was the purchaser, telephoned the Plaintiffs's solicitors and stated that there was nothing he could do about paying the balance of the purchase money at present. Inconclusive negotiations for

a settlement followed some months later.

In January 1979 the Defendants' new solicitors wrote seeking a settlement and the "acquisition of the relevant property on mutually acceptable terms". On 15 May 1979 the Defendants offered to pay the balance due, which offer was rejected. By motion dated 25 September 1979 the Defendant sought to have the suit reconstituted and sought liberty to pay the sum of £56,000 into Court. The present Plaintiffs were joined in the action and further negotiations took place but were fruitless. The Defendants re-entered their motion and the Plaintiffs re-entered their motion of 2 February 1977.

*Held* (per Costello, J.): Rejecting the Defendants' contention that its jurisdiction was now confined to making an order enforcing its earlier specific performance order and referring to *Johnson v. Agnew* (1979) 2W.L.R. 497, that the court still had power to forfeit the deposit, bring the contract to an end and order the Defendant purchasers to pay damages. A Court should be slow to order forfeiture of a deposit and termination of a contract if at the hearing the purchaser satisfied the Court that:

(a) His previous non-compliance with the Court order was due to financial difficulties which have now been overcome, and,
(b) he is able to compensate the vendor for any loss his non-compliance had caused him.

The Court found that there were no circumstances in the case which suggested that it should not follow the general rule. The Court accepted that the premises had greatly increased in value and that the Defendants had been twice in serious default but the failure to seize the opportunity afforded by the Defendants' second default and to forfeit the deposit rested on the successors of Mr. S.

The Court ordered the payment of:

(a) the balance of the purchase price;
(b) the additional sums agreed to be paid on the settlement of the action; and,
(c) the capitalised value of the interest on the balance of the purchase money from 1 March 1975 to 10 December 1975.

Interest on the total of those amounts was to be paid at the rate of 15% (the contract rate) from 10 August 1976 to 14 January 1980 together with all outgoings incurred by the deceased vendor and his successors, and the costs of the motion, the costs of the action and the conveyancing costs having already been met by the Defendants.

**H.S. AND S.S. v Estates Management & Development Agency Limited & Rosario Investments Limited.** High Court (per Costello, J.) 14 July, 1980 — unreported.

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Summaries of judgments prepared by John F. Buckley, Ciaran Keys, Colin Keane, Kieran O'Brien and edited by Michael V. O'Mahony.