INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

INDEX TO VOLUME 85 – 1991

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A comprehensive index to all subjects covered in the *Gazette*, January to December 1991.

2) ALPHABETICAL CASE INDEX:

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Index compiled by Julitta Clancy, B.A.,Dip. Archival Studies.,
(Registered Indexer of the Society of Indexers)

1. SUBJECT INDEX

This is a comprehensive index to subjects covered in the Gazette,the major headings being - Acts of the Oireachtas, Apprentices, Articles, Associations and Societies, Book Reviews, Company Law, Correspondence, Editorials, European Communities, Law Society, Practice Notes, Solicitors, Sports Activities etc. Names given in the Lost Wills section are entered in alphabetical order under LOST WILLS.

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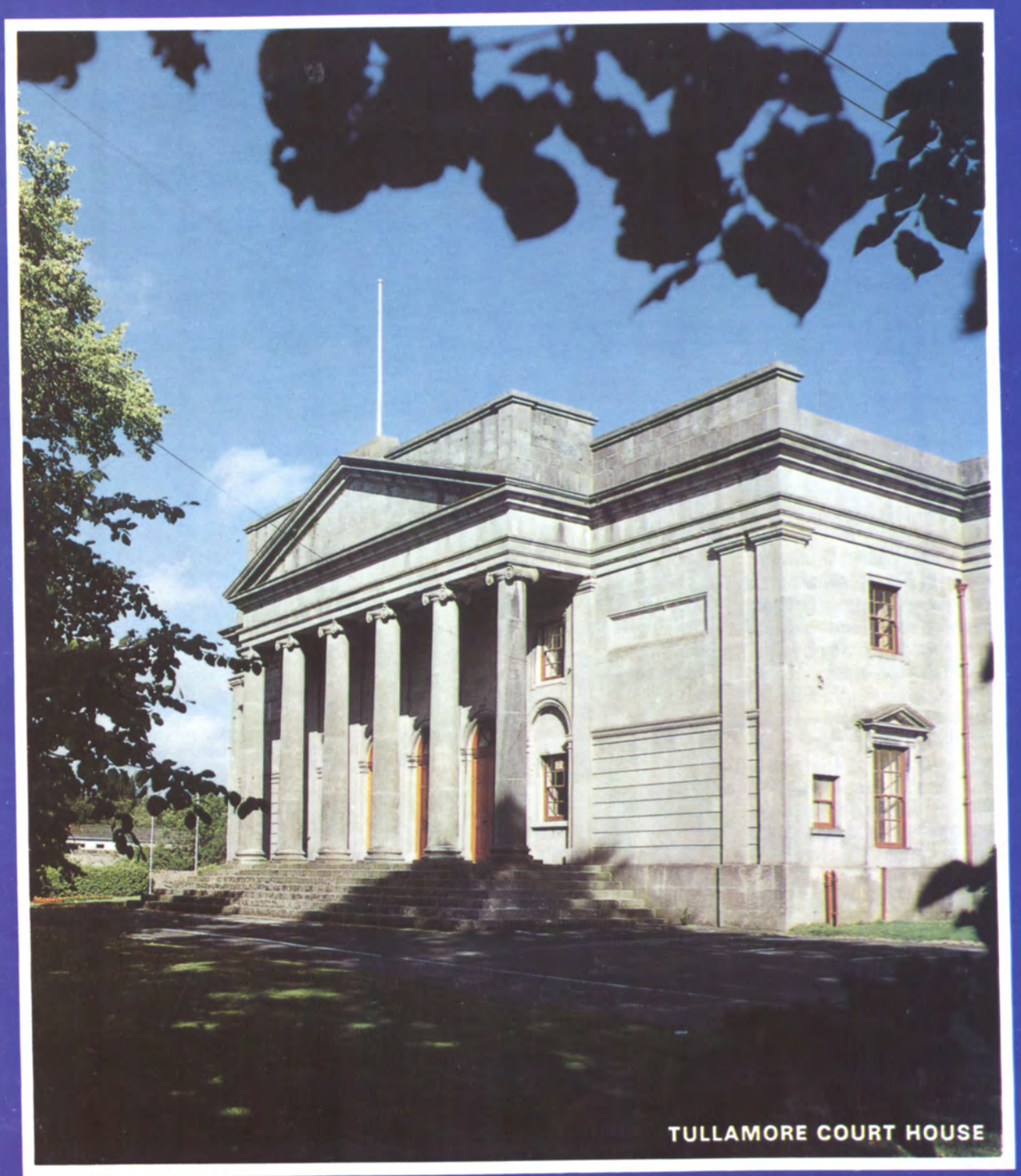

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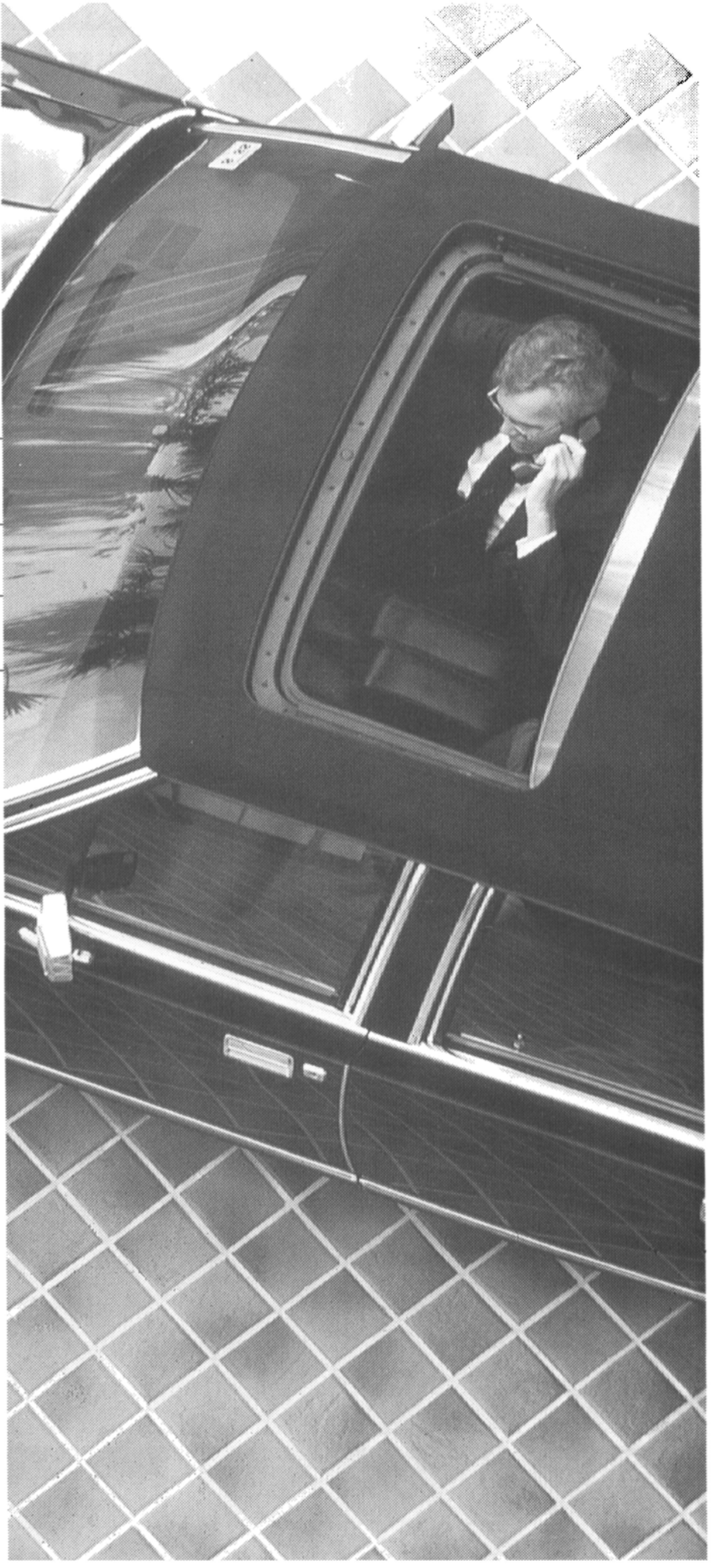

IRISH PERMANENT
BUILDING SOCIETY

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Viewpoint

PLAIN ENGLISH IS ON THE MARCH

The revolt against gobbledegook, whether statutory, legal or commercial, is gaining ground in many common law jurisdictions. Legislation has been a prime target, so too has banking documentation. Perhaps insurance policies should be given urgent priority! Now it is the turn of legal writing. The Law Society of England and Wales has recently published "Clarity for Lawyers", a compendium of letters and more formal documents identifying lack of clarity and suggesting simpler alternatives.

Conveyancers might be reluctant to abandon all of their traditional style of writing. The sanctity of previous judicial interpretation of words and phrases will be called an aid. It is true that certain words are not mere jargon but have precise technical meanings but does that really extend to "hereinbefore recited" and "by divers mesne assurances events and acts in the law". The draftsmen of our current crop of occupational leases have much to answer for, though the dream of a statutory standard form of lease is not likely to be achieved. The almost-forgotten, because never used, forms in the Leases Act of 1845, are a sad example of an earlier attempt to deal with this problem.

Using well worn precedents is comforting. It avoids the need for the exercise of the true discipline of drafting. There are those who would argue for the preservation of the mystique of the law. If the client can understand the document perhaps he would be tempted to draft it himself. The obverse of the coin is that if the client does not understand the document or it has not been explained to him, greater liability may lie with the draftsman. Does adherence to old-fashioned drafting styles hide a deficiency in the teaching of English in our schools? If we are to aim at simple English it will require a greater not a lesser command of the language.

Canadian legislation which, of course, is bilingual, seems to have learned much from the French style of legislative drafting. A comparison of a recent Canadian criminal statute with its U.K. equivalent immediately points up the simplicity and directness of the Canadian approach. It does not attempt to identify every possible category of offence that might be committed (a policy which defendants' lawyers have come to bless). Provisions are broader and yet more direct. This is the lesson that we must learn from the Plain English movement. Using simpler words is not enough. The style has to change too. There are already moves in the public service towards the improvement of the layout and language of a number of forms to be used by the public. Income tax returns and social welfare forms have been simplified.

It is understood that the Law Reform Commission is preparing a report on plain English. The ground for its reception seems to be better prepared all the time. We need to move to a situation where the maxim *ignorantia juris non excusat* (which hardly ever applies to lawyers nowadays) to one of *incomprehensio juris non excusat.*

□

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Privilege & Confidentiality between Solicitor and Client and the Computer

A solicitor has a contractual duty not to disclose, or make use of, confidential information communicated to him by his clients (or by third parties at the instance of his clients), for the purpose of enabling him to deal with his client's affairs.

The general principle is that privilege extends to oral or documentary communications passing between a solicitor and his client. [See Chapter 3, paragraph 3.2 A Guide To Professional Conduct Of Solicitors In Ireland (''the Guide'') and Cordery On Solicitors (''Cordery'')]. Privilege may be lost by inadvertence or waiver (par. 3.5 The Guide) We need not be concerned with the exceptions to privilege here.

The duty of the solicitor to respect the confidence of a client and protect the client privilege extends to the solicitor's staff. According to the Guide ''Staff should be told of their responsibility to refrain from disclosing to any unauthorised party anything they learn in the course of their employment. This duty imposed on each member of the Staff of a solicitor is not terminated by:—

(a) the determination of the retainer of the solicitor by the client, or
(b) the end of the matter in question, or
(c) the termination of the employment of a member of such Staff''

According to Cordery failure to exercise supervision (over an employee) may amount to professional misconduct on the part of the solicitor. Members of staff owe their employers a contractual duty of care in the performance of their duties but it has been held, on the ground of privity of contract, that an employee is not accountable to the client for money received on the employer's behalf. On the other hand, the solicitor, since he is the solicitor who has been retained, is responsible for the negligence of an employee where the act is within the scope of the employee's authority, but not otherwise. So, according to Cordery, he may be civilly responsible for the fraud or even for the criminal conduct of the employee in the usual course of his employment. The nature of a solicitor's business is such as to enable an employee to acquire confidential information concerning, and personal influence over, the solicitor's clients and a covenant directed against advantage being taken of such information and influence can validly be included in the Employee's Service Contract.

by
Henry C. P. Barry
Solicitor

According to the Code of Conduct for Lawyers in the European Community unanimously adopted by the 12 national delegations representing the Bars and Law Societies of the European Community, at the CCBE Plenary Session in Strasbourg on 28 October 1988:—

''Confidentiality

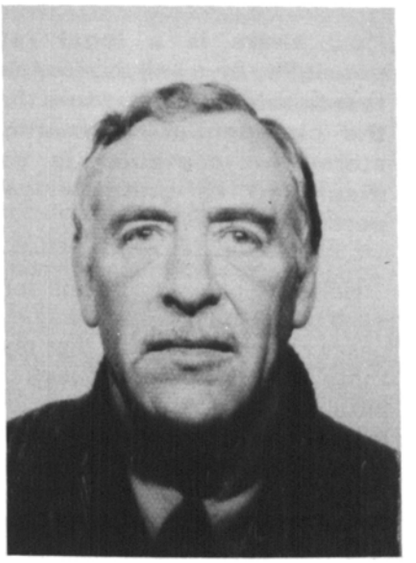
It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

A lawyer shall accordingly respect the confidentiality of all information given to him by his client, or received by him about his client or others in the course of rendering services to this client.

The obligation of confidentiality is not limited in time''.

A lawyer should require his associates and staff and anyone engaged by him in the course of providing professional services to observe the same obligation of confidentiality.

Many Solicitors now have confidential information and data relating to their own and their clients' affairs stored on computer hard disk and with backup copies on floppy disks etc. or other disks. Software and hardware maintenance contracts are entered into by solicitors with either the company who installed the hardware, or software and/or with other companies specialising in computer maintenance. Maintenance is either performed on site or on-line using computer diagnostics by the company's engineer or mechanic. All that is needed for one computer to communicate with another is a device called a modem, suitable communications software, and a telephone line.



Henry C.P. Barry

Whether maintenance is performed on site or on-line, by means of a modem and on-line computer diagnostics, the problem is that the data stored is accessible to the maintenance engineer or mechanic who is performing the repair or maintenance. Such a person can readily access and copy all one's clients' stored confidential data, and if so minded make improper or even fraudulent use of same.

It would appear that there is a legal responsibility on a solicitor to take reasonable steps to ensure that the confidential information stored on computer is not disclosed to unauthorised persons. The problem is how is this to be achieved as it is unrealistic to expect one's clients to sign a general waiver. However, one should make sure that at least one's maintenance contract includes a covenant regarding confidential data and unauthorised disclosure by the company's employees.

As communication is becoming a widely used microcomputer application, the risk of unauthorised access to one's data is becoming a very real problem. Most of the communications software available today allows one to put one's computer into an "auto-answer" mode, which means it will automatically answer any phone call it receives. In this way anybody with the phone number of your computer can, theoretically, access all the data files and programs on your computer from a remote location. This is how on-line computer diagnostics works.

" . . . there is a legal responsibility on a solicitor to take reasonable steps to ensure that the confidential information stored on computer is not disclosed to unauthorised persons."

However, communications software programs nowadays do have password protection so that only those with the correct password are able to gain access to hardware and software data on the phone. If a person has a working knowledge of the password scheme and the operating system, such a person can of course obtain access to one's data.

In fact it is now possible for data to be removed from computers from outside the building. The radiation emitted from a VDU is sufficiently powerful to be received by anyone using an ordinary television set, a standard television aerial and a frequency modulator a hundred metres away. This can be done even where an office is full of VDUs because the frequency signal from each is different.

Finding information on a hard disk is easy. There is a Public Domain software program called Whereis available that will search through all the directories on disk to find a specific file. Once an unauthorised person has gained access to one's computer he can carry out a search for anything that might be of interest in the directories, and download that information. Even a particular word or phrase can be searched for on an entire disk. Files and directories can, however, be hidden. Attributes such as "hidden" and "read only" can be assigned to programs and data.

Utilities are also available on the market which enable one to create "secret" directories. In order for these schemes to be effective, the utilities used to hide the files and data have to be removed from user access: likewise directory utilities which will show hidden files have to be removed from user access.

Security packages, which include password assignments for all users and encrypt or scramble data files are available. These packages do have drawbacks viz:—

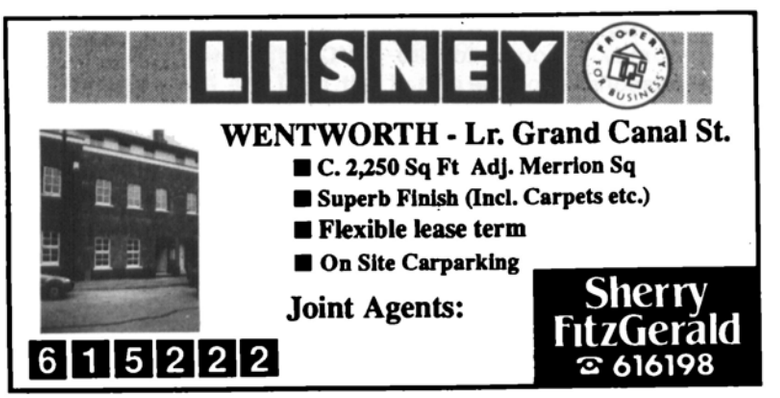
(a) reduced processing speed;
(b) increased administrative tasks e.g. assigning passwords, user access, data file security, data file security levels.
(c) pre-planning and determination of who shall have access to what on the hard disk.
(d) assignment of a hierarchy of security levels for files depending on the sensitivity of the data stored on them, and the availability thereof to certain users;
(e) regular monitoring of the passwords assigned, and the hierarchy of security levels, is essential;
(f) the very real risk of forgetting the password!; and
(g) inconvenience.

They do, however, provide the highest level of data security available for microcomputers.

There is software and hardware on the market which will only allow access to users at specific times; that will make certain directories, files, etc. unavailable to certain staff or will only allow certain staff access to certain files and prevent them changing those files.

Electronic keys, or dongles, are another form of security device. These are hardware units which slot into a 'key-ring' connected to the printer port and allow use of the computer to key carrying personnel only.

There is another device which is a combination of smartcards and signature recognition pads. This involves the person requiring access to the system slotting his smartcard into a receiver and then signing an electronic pad. The smartcard contains a three dimensional image of the person's signature which the control computer uses to check against the one



being signed. This system does have great advantages in a network system where someone may occasionally perhaps in an emergency, require access to an area where they have not been for a long time.

The packages described can monitor illegal attempts at gaining access, and can shut the terminal or computer down if the correct password has not been entered after a certain number of attempts. Having an audit control is the vital element in all these data security systems. This is a record that only the system manager can see, and shows who used what, when, and what was done when they were there.

Protection is also available, and needed, for electronic mail. Frequently confidential memos are left in mailboxes for days, and are easily accessible.

Again, when deleting documents it should be remembered that on some systems the file itself is not erased, only its entry in the directory is. If that file is overwritten it can be accessed by a number of utilities that can recover it.

Apparently this is how a number of insider dealings were detected; the data on their computers had not been erased. It is also believed that Colonel Oliver North met his downfall at the hands of the FBI in the same way. In this country a certain tax defaulter is rumoured to have been nabbed by a Revenue Sheriff as a result of using a password which the Sheriff guessed correctly. A password has to be remembered by the user and usually the user will pick a word which he can easily remember e.g. his wife's christian name, or his dog's name etc. The use of passwords for security is now almost redundant for external access to mainframes or networks. All a hacker has to do is use the Oxford English Dictionary which is available on disk, and set up a program to run through every word in it. It apparently takes three days!

The simplest method of protection against hacking is to instal a dial-back system. This means that once an attempt is made to connect into the system an automatic device checks the operator's security clearance and then dials them back. This serves two purposes; it establishes the identity of the caller and also where the call was made. If it has been made by the authorised person, such as the engineer/mechanic, access will be given.

Finally every firm of solicitors who has data relating to clients stored on disk has an obligation to take reasonable precautions to protect that data. What must be understood is that unsecured data is like an unlocked filing cabinet with a photocopier switched on beside it. □

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Medical Research is also an important element of the College's activities. Cancer, Thromboses, Blindness, Blood Pressure, Mental Handicap and Birth Defects are just some of the human ailments which are presently the subject of detailed research.

The College is an independent and private institution which is financed largely through gifts, donations, and endowments. Your assistance would be very much appreciated, and would help to keep the College and Ireland in the forefront of Medical Research and Education.

For tax purposes, the R.C.S.I. is regarded by the Revenue Commissioners as a Charity. Therefore, gifts and donations may qualify the donors for tax relief.

For further information about the College's activities, please contact:

The Registrar, Royal College of Surgeons in Ireland,
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Finance received through bequests/donations has enabled not only educational and research programmes but also the purchase of life-saving equipment for hospitals nationwide.

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Practice Notes

RE: DOCUMENTS SCHEDULE IN CONDITIONS OF SALE

The intention of the Law Society Conveyancing Committee in preparing the standard Conditions of Sale for general use was that the Vendor would disclose at contract stage sufficient and adequate particulars of the Vendor's title to enable a Purchaser's solicitor to consider properly the adequacy of such title before completion of contracts in accordance with long standing conveyancing practice.

The Conveyancing Committee anticipated that the documents which would be listed by Vendors solicitors in the Documents Schedule to a draft contract would disclose *inter alia,* the root of title and also the length of title being furnished.

The Conveyancing Committee has become quite concerned at the developing practice of solicitors acting for vendors furnishing to purchasers solicitors copies of all documents relating to the vendor's title coupled with a special restrictive condition worded in the following or similar terms viz:

The title shall consist of the documents listed in the Documents Schedule and shall be accepted by the purchaser as full and adequate evidence of the vendor's title to the subject property.

It is the view of the Committee that such a practice is a highly undesirable one as the Committee considers it to be unfair to purchasers and their solicitors as it is a clear attempt to restrict the raising of proper requisitions on title. Furthermore, the Committee considered that such practice also is unfair to purchasers and their solicitors as by putting them on notice of such documents at the pre contract stage it obliges the purchaser's solicitor to carry out a full and detailed investigation of title before advising his client to complete the contract.

The Conveyancing Committee disapproves of the foregoing practice and recommends that in accordance with established conveyancing practice the documents listed in the Documents Schedule to the standard Conditions of Sale should be limited to:—

a. The root of title being shown.
b. Any document to which title is stated to pass under the special conditions.
c. Any document which is specifically referred to in a special condition.

The Conveyancing Committee disapproves, save in very exceptional circumstances, of a practice which would unreasonably restrict solicitors for purchasers in carrying out proper and detailed investigations of title on behalf of their clients. □

Conveyancing Committee

SCALE OF FEES AS AGREED BETWEEN THE IRISH INSURANCE FEDERATION AND THE IRISH HOSPITAL CONSULTANTS ASSOCIATION

These fees apply from 1st January, 1991.

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Circuit Court	– £200 Per day or part thereof.
District Court	– £160 Per day or part thereof.
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CONSULTATIONS

Consultation with Counsel (in consultants' rooms) – £70

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STANDBY FEES

For standby within five (5) miles of Consultant's Hospital – 25% of days attendance rate

For standby for a court more than five (5) miles from Consultant's Hospital – 50% of day's attendance rate. □

CONTINUING LEGAL EDUCATION

ADMINISTRATION OF ESTATES

Due to overbooking the above seminar run in Dublin on 17th December 1990 and Cork 31st January 1991 will be run in Dublin again on Friday 22nd February 2.30 – 6.30 p.m.

Fee: £45.00.

Applications should be sent to Geraldine Pearse, Law Society, Blackhall Place, Dublin 7, Phone 710711.

Meeting with Land Registry

MEMORANDUM OF MEETING which took place at Law Society headquarters on Thursday the 27th September 1990.

Attendance:

Ms. Catherine Treacy, Registrar of Deeds and Titles.

Ms. Maeve Hayes, Chairman of the Conveyancing Committee.

Mr. William Fallon.

Mr. Thomas D. Shaw.

Mr. J J Ivers.

This meeting was a follow-up meeting to the previous meeting which had taken place on the 31st May 1990.

The Registrar reported on the up to date position as follows:

(1) Substantial progress had been made and was continuing in the Filed Plan area. The new form for bespeaking folio and filed plan had been introduced. The Registrar pointed out the importance of filling up the new application form correctly which was still not being done in a number of cases. The initial target which had been set by the Registrar was that 80% of File Plans would issue within a week of being bespoken. The following figures reflect the up to date situation:

44% of File Plans are issued immediately, (i.e. over the counter or the next day).
24% issue within 10 days.
13% issue within 3-4 weeks.
19% take four weeks +.

In the 19% to 20% of requisitions which necessitate a map reconstruction element, it was still difficult to give a definite time turnover. Sixty eight per cent of requisitions therefore are being dealt with within a 10 day period, a not insignificant achievement, and efforts are continuing to improve the situation yet further.

(2) Price Waterhouse had been appointed as consultants and would be reporting to her in November. Mr. Shaw confirmed that the Committee had earlier that morning met Price Waterhouse and had conveyed their views on the aspects on which they had requested views and information.

(3) The Registrar advised that the first step of the computerisation of the Registry of Deeds was completed and would be opened by the Minister on the following day.

(4) The Registrar further advised that they had made substantial progress to clear the arrears in the Dublin Region. Dublin accounted for almost one quarter of the entire intake of dealings and her estimate was that they were approximately half way towards clearing the "setting up of dealings" arrears. Efforts were now being concentrated on the "transfer of part" arrears in this Region. With the sustained cooperation from the staff involved, the Registrar was hopeful of continuing improvement. The Registrar stressed the enormous goodwill and cooperation which she had received from the staff in achieving this target and in bringing about the improving situation in the File Plan area.

(5) The Land Registry programme had been set back by staff transfers over which she had no control. She stressed the difficulties which were created when trained staff were moved to other areas and departments.

(6) The Registrar expressed the view that it was difficult to handle the arrears as distinct from current intake with the staff which was allotted to her. Regular contact was made with the departments involved and the Registrar stressed that the departments were helpful within the constraints of recruitment of extra staff. A number of staff had been assigned to the Registries in recent times.

(7) On the question of possible financial constraints, the Registrar pointed out that on the occasions since she took up office, she had made a case for expenditure on the Registries to cover the Consultancy Report and the Data Capture of the Abstracts in the Registry of Deeds. The Department of Finance had agreed with the cases made by her and had acted in a very expeditious manner in finalising arrangements for such expenditure.

(8) Delays in the registration of deeds were approximately eight to nine weeks. The principal delays were in the comparison department and she again stressed that the quality of the preparation of memorials was not good and that 32% were rejected.

A discussion took place and the Committee welcomed the proposal of the Registrar to introduce new forms which would give the essential material required for a memorial and which would be printed on paper which would be acceptable to the Registry. The Law Society indicated that they would print the forms and sell them to the members if they got the required specification.

The Solicitors would then have the option of word processing memorials on the *thin* paper which would then have to be placed in a plastic cover or alternatively completing the required form which they could purchase from the Law Society which would not have to be placed in the cover.

The Registrar also agreed to get out a specimen list of the memorials to be sent to the Law Society together with a list of the common mistakes which were made.

A general discussion took place on how the arrears could be tackled. The Registrar indicated she was prepared to look at all suggestions but again stressed that it was vitally important that Solicitors would complete the documentation correctly in the first instance. In this connection, she was preparing a list of the commonest faults on the preparation of documents to be circulated to the Society and the Committee would then consider that this and other necessary information should be circularised to the members.

The Committee expressed confidence and support for the Registrar in her work and indicated that if she needed any help or assistance that she should contact us which would be more than willingly available.

The Registrar indicated that she was awaiting her Strategic Plan and the recommendations of the Consultants and that when this was available, she would be in touch with the Society at an early date.

At a reception to mark the computerisation of the Registry of Deeds on the following morning, the Minister announced the approval of the Government in principle to a plan to turn the Land Registry and Registry of Deeds into a single Semi-State body and that legislation to change the Registry status would be introduced by the Government next year after discussions with the legal profession and the relevant staff.

The Society greatly welcomes this move and agrees to co-operate with the Registrar to see it implemented as soon as possible.

Solicitors Golfing Society

Solicitors Golfing Society Annual General Meeting

The Annual General Meeting of the Society took place at Mullingar Golf Club on the 27th of July 1990 and the following Officers were elected.

Captain: Colm Price.
Treasurer: William Jolley.
Secretary: Richard Bennett.

The Captain's Prize will take place at Howth Golf Club on Friday the 24th of May, 1991. The Time Sheet will open on Monday the 13th of May.

The President's (Don Binchy) Prize will take place at Clonmel Golf Club on Friday the 26th of July. The Time Sheet will open on Monday the 15th of July.

During 1990 the Society played Matches against the Institute of Chartered Surveyors, Dutch Bar Association, The Law Society Golf Club (England) and the Northern Ireland Solicitors Golfing Society and emerged the Victor in all of these matches.

It is hoped to increase the range of these Matches as time goes on and also to increase the range of members playing.

Richard Bennett

LAW SOCIETY – ANNUAL CONFERENCE

GREAT SOUTHERN HOTEL KILLARNEY

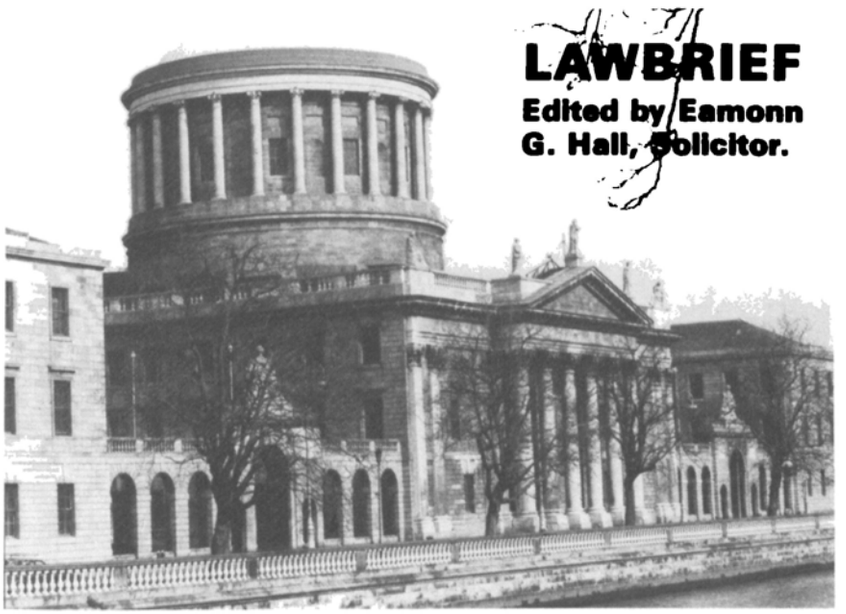
2nd – 5th MAY, 1991.

Conference Rate

Under 5 years qualified £90

Over 5 years qualified £190

Conference Brochure together with booking forms are being posted to all members of the profession shortly. **BOOK EARLY TO AVOID DISAPPOINTMENT.**



LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

ARE THE BENEFITS ARISING FROM THE RE-MARRIAGE OF A WIDOW OF A DECEASED TO BE TAKEN INTO ACCOUNT IN ASSESSING DAMAGES AND, IF SO, ON WHAT BASIS?

The issue of the net question of law whether the benefits arising from the re-marriage of a deceased were to be taken into account in assessing damages and if so on what basis arose in the case of *Fitzsimons -v- Electricity Supply Board and Bord Telecom Eireann,* judgment delivered by Barron J on July 31, 1990. (*The Irish Times,* Law Report, November 12, 1990).

The Facts

The case arose out of an accident in February 1979 when the deceased tried to pull away a telephone wire which was live because a portion of it had hooked itself to an overhead 10 kv electricity power line. The deceased was electrocuted. The dependants of the deceased included his widow, then aged 34, and their five children whose ages ranged from two to 11. The widow of the deceased remarried in February 1985 and since her re-marriage had another child who was aged four at the time of the judgment. No evidence had been adduced in relation to damages. The judge had been told that this was so because of the absence of authority as to how the plaintiff's re-marriage should be treated by the actuaries in preparation of their reports.

Barron J. referred to the judgment of Kennedy C.J. in *Gallagher -v- E.S.B.* [1933] I.R. 558 at p. 566 where he said:

> "From an early date it was established that the damages which may be recovered are in the nature of a compensation for the pecuniary loss sustained by the parties for whose benefit the action is brought and that nothing in the nature of a solatium on account of mental suffering occasioned by such death may lawfully be awarded by the jury. The pecuniary loss upon which the damages awarded must be founded, and by which they are to be limited, may be actual or expected. The damages are to be calculated by reference to the reasonable expectation of pecuniary benefit accruing to the claimant whether of right or otherwise, if the life continued: *Blake -v- Midland Railway Company* (1852) 18 QB 93; *Dalton -v- South Eastern Railway Company* (1858) 4 CB (NS) 296; *Franklin -v- The South Eastern Railway Company* (1858) 3 H & N 211; *Taff Vale Railway -v- Jenkins* [1913] AC 1 . . . There must be affirmative proof of the pecuniary loss suffered by each individual for whose benefit the damages are claimed and the jury may not award damages merely on a basis of guess work or speculation: *Hull -v- Great Northern Railway Company of Ireland (1890-91) 26 LR Ir 289."*

Barron J. stated that against such loss there must be set off any compensating benefit received. This principle was set out in the judgment of Kingsmill Moore J. in *Murphy -v- Cronin* [1966] IR 699 at page 708.

> "It is the net loss on balance which constitutes the measure of damages – *Davis -v- Powell Duffryn Associated Collieries Limited* [1942] AC 601, 609.

Barron J, stated that Kingsmill Moore J referred to Section 49 subsection (1) (a) of the *Civil Liability Act 1961* which provided that the damages are to be "a total of such amounts (if any) as the jury or the judge, as the case may be, shall consider proportionate to the injury resulting from the death to each of the defendants respectively for whom or on whose behalf the action is brought".

Barron J. then stated that a comprehensive review of the relevant authorities was contained in the judgment of Lord Edmund-Davies in *Hay -v- Hughes* [1975] 1 All ER 257. Barron J. stated that, while *Hay -v- Hughes* clearly did not set out one clear principle, it was support for the proposition that reasonable expectation at the time of death of a future benefit is a relevant consideration.

Balancing of Losses and Benefits

Barron J. said he could see no reason why there should not be a recognised principle under which benefits received should or should not be taken into account. The basis of the assessment of damages for fatal injuries is the balancing of losses and benefits. Like any other balance sheet, it seemed appropriate to determine first what items could appear on the balance sheet and then secondly the amount of such items. There can be little doubt but that the amount of the items must be determined as of the date of assessment. Perhaps also whether the item could appear should be determined as of the same date. Barron J stated it seemed more logical that if you are establishing a balance sheet required by reason of a death that the items to appear on it should be determined as of that date. There was nothing unusual in this two tier approach.

There were many cases in Irish

law where a judge must decide as a matter of law whether or not there was sufficient evidence to support a particular allegation and then it must be decided as a matter of fact whether that allegation had been established. A decision whether or not there was a reasonable expectation of a particular benefit accruing is not different from a decision whether or not a head of damage is too remote. The latter was determined as of the date the cause of action accrued. In Barron J's view, the former should also be determined as of that date, i.e. the date of death.

Barron J stated that there seemed no reason in principle why re-marriage of a widow should be treated any differently from any other circumstance which gave rise to a benefit to be offset against losses sustained. It had been suggested that the reason for taking the possibility and obviously also the fact of remarriage into account was that otherwise the widow would be receiving support from two husbands at the same time. But the same could be said of children who are taken in by relatives, but whose damages were not reduced, or of any other case where a benefit was disregarded other than by reason of a statutory provision.

Conclusion

The judge concluded that he would answer the questions which he had already posed in the following way. The evidence of the hearing to assess damages insofar as it related to the re-marriage should be directed in the first instance to establish whether or not there was a reasonable expectation at the date that this would occur. On the basis that this had been established, the evidence should then be directed to determining the then value of the benefits accruing to each of the dependants by reason of that re-marriage. The onus of proof in each case lay on the defendants. The standard of proof of reasonable expectations was that of reasonable probability: *Pym -v- Great Northern Railway Company* (1863) 4 B & S 396.

George V. Maloney, Principal of the firm of George V. Maloney & Co., Cavan, with his daughter Jacqueline Maloney, Solicitor.

75 YEARS IN PRACTICE

George V. Maloney & Co. Solicitors, Farnham Street, Cavan, have celebrated the 75th anniversary of the founding of the firm in Cootehill in 1915.

George V. Maloney & Co. is the longest running family practice in County Cavan. Three generations of the family have been engaged in the practice. The founder of the firm, the late George V. Maloney, qualified as a solicitor in 1915, which was incidentally the same year as Mr. T. Finlay (father of the current Chief Justice) was called to the Bar. The Chief Justice is a nephew of the late Mr. Maloney's wife, Eileen.

East-Cavan Bye-Election

In the famous East-Cavan bye-election of 1918, Mr. Maloney acted as election agent for Arthur Griffith. Griffith defeated John Frederick O'Hanlon, Managing Director of *The Anglo-Celt,* in the election but Mr. Maloney balanced his political activity by marrying Mr. O'Hanlon's niece, Eileen Finlay, in 1923 and they reared a family of seven.

Mr. Maloney was a judge of the Sinn Fein Courts and presided at sittings in private houses in the Cavan area. While so engaged he was fired at, and wounded, on several occasions. After the setting up of the State the late Mr. Maloney also functioned as County Sheriff for a period.

Present Principal

The present principal Mr. George Maloney qualified as a Solicitor in 1955 and joined his father in the practice. His own daughter Jacqueline who qualified in 1979 also practises in the firm. The Maloney family, their staff and former employees marked the Firm's 75 years in practice with a suitable celebration.

IRISH MAINTENANCE ORDER NOT ENFORCEABLE IN ENGLAND.

Macaulay -v- Macaulay.

Divisional Court of the Family Division (England and Wales) (Sir Stephen Brown, President, and Mrs. Justice Booth) 22 November, 1990. *The Independent*, (London), Law Report, December 20, 1990.

The Divisional Court of the Family Division (England and Wales) held that an order of the Irish High Court granting a wife interim periodical payments is irreconcilable with a decree absolute of divorce granted to the husband in England and therefore the Irish order cannot be enforced in England.

The Divisional Court dismissed a wife's appeal by way of case stated by Hove justices who set aside the

registration of a maintenance order made in the High Court of Ireland.

The Facts

The parties were married in 1975 and established their home in Ireland. In 1985 they separated. The wife and two children remained in Ireland and the husband returned to England. In 1986 the wife issued a writ for maintenance in the Irish High Court. The husband filed for divorce in England and applied in Ireland to stay the maintenance proceedings. In January 1987 he obtained a decree nisi.

In February 1987, the Irish court refused to stay the maintenance proceedings and directed the husband to make periodical payments for his wife and children. The husband was granted a decree absolute in March 1987.

In February 1988, Barr J in the High Court of Ireland declared that the English decree was entitled to recognition in Ireland as valid to dissolve the marriage. In November 1989, Barr J decided that despite the recognition of the English decree absolute, the interim periodical payments order in the wife's favour remained in full force.

The interim periodical payments order was registered in the Hove magistrates' court under the *Maintenance Order (Reciprocal Enforcement) Act, 1972* as modified by the *Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974* (S.I. No. 2140). The husband appealed against the registration of the order relating to the wife's maintenance on the grounds that it was irreconcilable with the decree absolute. The justices allowed the appeal on the ground of irreconcilability. The wife appealed.

Enforcement of Irish maintenance order in England.

Mrs. Justice Booth for the Divisional Court said that there were two routes that might be taken to enforce in the English courts a maintenance order made in Ireland. The first was that chosen on behalf of the wife under the 1972 Act and the 1974 Order. The second was found in the *Civil Jurisdiction and Judgments Act, 1982* which implemented the 1968 *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commerical Matters (The Brussels Convention).*

Both provided not only for the recognition and enforcement of judgments and orders, but they also defined those situations where such recognition and enforcement should be refused. Under article 27 of the Convention, a judgment should not be recognised if the judgment was irreconcilable with one given in a dispute between the same parties in the State in which the recognition was sought. The same ground prohibiting the registration of an order was to be found in article 6(5) of the 1974 Order. That was the ground on which the husband relied and on which the justices refused to register the order.

European Court of Justice

The European Court of Justice in *HLM Hoffmann -v- A. Krieg* [1988] ECR 645 considered the application of article 27 of the Convention, where a wife obtained a maintenance order in Germany; the husband was granted a decree of divorce in the Netherlands and the wife applied to the Netherlands court to enforce the German maintenance order. The Netherlands High Court referred the matter to the European Court of Justice.

The European Court of Justice said that in order to ascertain whether a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her was irreconcilable within article 27(3) with a national judgment pronouncing the divorce of the spouses, it should be examined whether the judgments entailed legal consequences that were mutually exclusive.

The European Court of Justice decided that the German maintenance order could not be enforced in the Netherlands.

Mrs. Justice Booth considered that the facts in the above case did not differ in any material respect from the facts of the present case. Mrs. Justice Booth said it would be wholly undesirable for the Divisional Court to distinguish the application of article 27 (3) of the Convention, which was part of English law, and the application of article 6 (5) of the 1974 Order.

The reasoning of the European Court of Justice was as apposite to article 6 (5) as to article 27 (3). The Irish maintenance order was founded on the husband's obliga-

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tion to maintain the wife and that obligation was brought to an end by the English decree of divorce. So the English court was faced with precisely the same situation inasmuch as the legal consequences of the order on the one hand and the decree on the other were mutually exclusive.

Conclusion

Mrs. Justice Booth said that the Divisional Court should adopt the reasoning of the European Court of Justice and held that the Irish order should not be enforced in England. While the English court would enforce after a divorce a maintenance order made by itself during the subsistence of the marriage, a distinction had to be drawn between the enforcement in England of an English order which was properly a matter for English law and the enforcement in England of a foreign order as to which the law and procedures were sought were subject to an international code and considerations of comity. Those considerations pointed to the desirability of one jurisdiction governing the marital status of the parties and any issues arising between them.

By refusing to enforce the Irish order in England, no injustice or hardship fell to the wife. She might apply for financial orders under the *Matrimonial Causes Act, 1973.*

Mrs. Justice Booth held that the justices were correct to set aside the registration.

Sir Stephen Brown P. agreed.

TOURIST BEER ALLOWANCE; LIMITS IMPOSED IN EXCESS OF POWER

Commission of the European Communities -v- Ireland Case C-367/88.

Commission of the European Communities -v- Denmark Case C-208/88.

Court of Justice of the European Communities.

The Times (London) Law Report January 7, 1991.

Before O. Due, President, and Judges G.F. Mancini, T.F. O'Higgins, J.C. Moitinho de Almeida, G.C. Rodriguez Iglesias, F.A. Schockweiler and F. Grevisse. Advocate General M. Darmon. (Opinion July 3, 1990) [Judgments December 6, 1990].

By establishing an irrebuttable presumption that the importation of a quantity of beer in excess of a given volume had a commerical character, Member States exceeded the restricted power given to them by the provisions of the directives in question.

The Court of Justice of the European Communities so held in ruling on applications by the Commission for declarations that by introducing and maintaining in force an allowance limited to 10 litres of beer in the case of Denmark, and 12 litres of beer in the case of Ireland, contrary to the provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ English Special Edition 1969 (1) p. 232) as amended, those Member States had failed to fulfil their obligations under the EEC Treaty.

The Commission considered that the contested allowances introduced by the respective national legislation of Denmark and Ireland were contrary to articles 2(1) and 3(2) of the Directive, on the ground that the importation of more than 10 or 12 litres of beer respectively could not be regarded as automatically having a commerical character.

The Member States contended, on the one hand, that the quantitative limits which they had fixed were equivalent, in terms of total alcohol content, to the quantitative limits laid down in the Directive in respect of wines and spirits and, on the other hand, that the contested measures were necessary on account of numerous abuses by travellers importing larger quantities of beer free of duty for subsequent sale by retail.

The European Court:

1. Delcared that Denmark and Ireland, by introducing and maintaining in force allowances limited respectively, to 10 and 12 litres for beer imported in travellers' luggage, contrary to articles 2 (1) and 3 (2) of Council Directive 69/169, those Member States had failed to fulfil their obligations under the EEC Treaty.
2. Ordered Denmark and Ireland to pay the costs.

GRANT-AWARDING STATE MUST TREAT EQUALLY CHILD OF MIGRANT WORKER STUDYING THERE OR ABROAD

Di Leo -v- Land Berlin.

Case C-308/89. (Court of Justice of the European Communities). (London) *The Times* January 7, 1991.

Before G.F. Mancini, President of the Sixth Chamber, and Judges T.F. O'Higgins, M. Diez de Velasco, C.N. Kakouris and P.J.G. Kapteyn. Advocate General: M. Darmon (Opinion October 3, 1990) [Judgment November 13, 1990].

Where a Member State offered its nationals the possibility of financial support for education and training provided abroad, the child of a Community migrant worker had to be allowed to benefit by the same advantage if he or she decided to follow a course of study outside that State including the case where the course concerned was provided in a State of which the child was a national.

The Court of Justice of the European Communities (Sixth Chamber) so held in answer to a question submitted to it pursuant to article 177 of the EEC Treaty by the Verwaltungsgericht (Administrative Court), Darmstadt. □

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The Minister for Finance in his budget speech announced an amnesty to encourage payment of outstanding Capital Acquisitions Tax and Estate Duty. It will provide taxpayers with the opportunity of clearing their outstanding liabilities before the more rigorous enforcement measures, which were also announced in the budget, become operative.

The scheme for Capital Acquisitions Tax provides for the waiver of interest and penalties up to 30 April, 1991 on tax which is due and payable in respect of gifts and inheritances taken on or before 30 January, 1991 and which is paid on or before 30 September, 1991.

Details of the scheme, which it is proposed to enact in the 1991 Finance Act, are available from the office of the Revenue Commissioners.

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International Bar Association

Formed in 1947 in New York State, the International Bar Association is the world's largest international organisation of Law Societies, Bar Associations and individual lawyers engaged in transnational Law. It is composed of over 13,000 individual lawyer members in 130 countries and 120 national law societies and bar associations together representing more than 3 million lawyers.

The work of the IBA covers a number of different areas of activity: services to individual lawyers; support to Bar Associations and in particular developing bars and support of human rights for lawyers worldwide.

The individual lawyer member is served primarily through the work of the IBA's three Sections, on Business Law, General Practice and Energy and Natural Resources Law, each with its own subject Committees covering matters ranging from Family Law to Space Law, Oil Law to Banking Law, Criminal Law to Medical Law and Corporate Law Departments to Tax Law. Each Section holds its own biennial conference or seminar at which all subject Committees hold working sessions and there are opportunities to meet other members from around the world. Venues for recent conferences include Buenos Aires, Sydney, Singapore, London, Strasbourg and New York while the next IBA Conference will be held in Cannes in September 1992.

The Sections also produce their own journals which publish practical and learned articles and updates on legal matters as well as news about the IBA and its activities. Other services for Section members include an annual Directory in which each member receives a listing of his full address details and Committee membership; this is an invaluable source of contacts and legal expertise. The IBA has also developed a database containing more detailed information about its members, their specialisms, their firms and so on which can be accessed both by computer and by telephone, telex, fax or letter to the IBA Office.

The IBA's latest project is a fully computerised international communications network. IBA/Net, which will go on line to a set of sample subscribers in autumn 1990, will enable lawyers to tap into the IBA database and communicate with other subscribing IBA members worldwide. It will be the first such international service for lawyers.

The IBA also serves its 120 member bars and law societies throughtout the world through its programme of professional activities. Through its General Professional Programme the IBA holds meetings for Bar Leaders on all aspects of the development of the Legal profession and Bar activities in particular. It assists third world Bars through a programme of "twinning" between a developed and a developing bar by which the developed bar provides assistance, advice and expertise. Since the first "twinning" between the Norwegian and Nepal Bars, 56 Bar Associations have entered, or are investigating entering, the scheme.

Through the IBA's Charitable Trust (UK based) and its Foundation (US based), and using income from members Bars, individual members and other charitable bodies, the Association pursues a programme of sponsorship and assistance to developing bars, programmes of seminars in third world countries and so on.

The IBA pursues a policy of extending its activities to all areas of the world through a programme of regional seminars. Such seminars have been held in the Arab region, Eastern Europe, the African continent, Asia and one is forthcoming in South America.

The IBA is also active in the field of human rights, particularly the protection of lawyers' rights to practice independently throughout the world. Through a programme of formal protest, watching briefs and distribution of information to Bar Associations worldwide about human rights violations, the IBA actively pursues the goals for which it stands.

For further details about the IBA, please contact: Hilary Jennings, International Bar Asociation, 2 Harewood Place, Hanover Square, London W1. Tel: 071 629 1206. Tlx: 8812664 INBAR G. Fax: 071 409 0456. □

NOTE RE MONTREAL CONFERENCE

The General Practice Section of the IBA will be holding a Conference in Montreal from the 2nd to 5th June. The 21 Working Committees of the Section will hold sessions on such wide ranging topics as "Intra Family Crime; Commercial Leases; Aids & The Public Interest; Contempt of Court; Freedom of Movement in Europe in 1992; Product Liability & Environmental Disaster". In a plenary session the Conference will address the topic of Evolution of the Law with specific reference to the Environment and Eastern Europe. The Conference Programmes and Registration Forms are available from the International Bar Association, 2 Harewood Place, Hanover Square, London W1R 9 HB, England, Tel: 071-629 1206 – Fax 071 409 0456. □

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Younger Members News

Apprentices Salaries

At a meeting of the Younger Members Committee in December 1989 committee members present told the meeting that there was much disquiet among apprentices at the level of salaries paid to them. The recommended rates of pay from 1st May 1987 were:

£85.00 per week for the first six months after the completion of the Professional Course

£95.00 per week for the second six months.

£105.00 per week after twelve months.

There was no recommended salary for an apprentice prior to taking the Professional Course. At that meeting in December 1989 the YMC took a decision to nominate Joe Kelly, one of its members, to investigate further the views of apprentices on salaries and to produce a report. Joe Kelly, who is also a member of SADSI, obtained the assistance of SADSI members in compiling the report which was then submitted to all members of the Council. Little did the Committee know that this decision would lead to a full scale debate at the Society's Annual General Meeting in November 1990.

As a result of the YMC's investigation a Motion seeking to increase the salary paid to apprentices went before the October 1990 Council Meeting. However, by the time this Motion came up for debate a Motion had been submitted for debate at the Annual General Meeting by the Southern Law Association to the effect that "the salaries to be paid to apprentices should be determined by market forces . . .". As a result of receiving notification of this Motion the Council deferred debating the Motion seeking to increase apprentices salaries.

The Annual General Meeting, which was well attended by both those arguing for and against the Motion, resulted in a good deal of debate both inside and outside the meeting. On being put to a vote the Motion submitted by the Southern Law Association was defeated.

At its meeting in December 1990 the Council then debated the original Motion submitted seeking an increase in salaries. The result of this debate was the issue of a guideline effective from 1st Janauary 1991:

£105.00 per week for the first six months after completion of the Professional Course.

£115.00 per week for the second six months.

£125.00 per week until the commencement of the Advanced Course.

While the YMC welcomes the increase in the salary paid to apprentices it was disappointed that the guideline was not extended to include apprentices before they commence the Professional Course. It is hoped that at some time in the future the climate will prevail which will recommend that these apprentices are paid some minimum salary.

To conclude the YMC would like to thank the Council and all the members of the profession who gave their support which has resulted in an increase in the salaries paid to apprentices.

□

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SOLICITORS BENEVOLENT ASSOCIATION

NOTICE

NOTICE IS HEREBY GIVEN that the One Hundred and Twenty Seventh Annual General Meeting of the **SOLICITORS BENEVOLENT ASSOCIATION** will be held at the Incorporated Law Society's Building, Blackhall Place, Dublin, on Thursday the 21st of March 1991 at 12 noon:

1. To consider the annual Report and Accounts for the year ended 30th November 1990.
2. To elect Directors.
3. To appoint new Trustees.
4. To deal with other matters appropriate to a General Meeting.

CLARE LEONARD
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SOLICITORS

Retirement of Mr. Justice Sean Gannon

On 4th December 1990, Mr. Justice Sean Gannon sat for the last time, having served as a judge of the High Court for just a month short of 18 years. In replying to tributes from all sides, including those on behalf of both solicitors and barristers, the retiring judge expressed the belief that the interest of the litigant client was best served by the separation of the two branches of the legal profession. He saw the solicitor and the barrister as performing separate specialist functions interdependent upon each other, with the strength of each lying in the support given to the standard and performance of the other.

The independence of the respective functions of solicitor and counsel was the underlying concept of Gannon J's. decision in *Dunne -v- O'Neill* (1975), in which he reviewed early decisions on the taxation of legal costs and laid down up-to-date principles in relation to same. His decision was adopted and followed in a number of subsequent decisions of the High Court and the Supreme Court on the taxation of costs.

A decision of Gannon J., subsequently approved by the Supreme Court, which has often been cited in judicial review matter, is *State (Healy) -v- O'Dea* (1976). In the many State-side applications which came before him over the years to review orders of the District Court, it was always apparent that, whether he was upholding or striking-down decisions of the lower court, Mr. Justice Gannon always treated the holder of the office of District Justice with the respect due to a person of judicial status with such an important day to day judicial function to perform. In his decision in *Clune -v- D.P.P.* (1981) Gannon J. took care to underline that the independence of the judges of the courts established by law (i.e. the Circuit and District Courts) included their independence from direction (as distinct from instruction) by judges of the Superior Courts.

His most recent judicial review decision in *Cosgrove -v- Legal Aid Board* (1990) is notable in that it related to the inadequacy of the service of the Legal Aid Board by reason of the lack of adequate State funding.

For almost his entire period on the High Court bench, Mr. Justice Gannon was the Probate judge. Of its nature, the work of the Probate list is almost entirely administrative, with the contentious administration of estates' issues being dealt with on the non-jury side or the Chancery side. Consequently, most of the matters coming before him in the Monday morning Probate list were concerned with technical problems, which lay almost entirely within the function of the solicitor. Under the aegis of Gannon J., practitioners very soon learned that between the right way and the wrong way of applying the relevant law relating to wills there was no half way!

Apart from his many functions on the civil side, Mr. Justice Gannon spent many a term on the criminal side in the Central Criminal Court and the Court of Criminal Appeal. He presided over the then much publicised "Fairview Park Case", where the jury decided that a fatal assault of a young man by a gang of youths in that Dublin park was not murder, and where he imposed suspended sentences on the accused youths on conviction for the lesser offence. With a dignified judicial silence Gannon J. withstood public criticism in Dail Eireann and elsewhere for "letting the accused go free", notwithstanding that the jury, in a rider to its verdict, had expressly requested leniency for the several accused.

In more recent times, Mr. Justice Gannon presided over the Divisional Court which confirmed the extradition of Dominic McGlinchey and he also was a member of the Divisional Court which dealt with the extradition applications in relation to Dermot Finnucane and Owen Carron, which were ultimately decided by the Supreme Court.

Mr. Justice Gannon was educated at Belvedere College, U.C.D., and King's Inns and was called to the Bar in Michaelmas 1941. During his more than 30 years as a barrister he practised on the Midland Circuit and in Dublin, including many years as a State prosecutor. He was called to the Inner Bar in Trinity 1966 and when appointed to the High Court on 3rd January 1973 he was the last judge so appointed by the late President Eamon de Valera. □

NOTICE
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Seán Ó hOisin, of Oisin Publications, presenting a copy of The Lawyers Desk Diary, 1991, to Clare Leonard, Secretary, of The Solicitors Benevolent Association, with Noel C. Ryan, Director General of The Law Society. 50% of the sales revenue from the *Lawyers Desk Diary* is donated to the Solicitors Benevolent Association.

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"Financial Services for Professionals" Joint Seminar hosted by the Bank of Ireland in association with the Younger Members Committee, 28:11:1990. (Left to right) Noel C. Ryan, Director General of The Law Society, Gerry Prizeman, Marketing Executive, Bank of Ireland, Don Binchy, President of The Law Society, Des Bodley, Regional Manager of The Bank of Ireland, John Campbell, Younger Members Committee and Eamonn Mac Thomais.

Retirement Dinner for James J. Ivers, former Director General of The Law Society, October, 1990. (left to right) William A. Osborne, Past President of The Law Society, James J. Ivers, Moya Quinlan, Past President of The Society and John Carrigan, Past President.

Solicitors Benevolent Association Council. *Front Row — Left to Right:* Andrew F. Smyth - Metropolitan Director and Trustee, Sheila Beale - Metropolitan Director, John M. O'Connor - Chairman and Trustee, Clare Leonard - Secretary, Brian Overend - Deputy Chairman and Trustee, Noelle Maguire - Metropolitan Director. *Back Row — Left to Right:* Michael J. Egan - Provincial Director (Mayo), Colm Price - Metropolitan Director, Thomas Menton - Metropolitan Director, Oliver Fry - Metropolitan Director, Charles Hyland - Metropolitan Director, Noel C. Ryan - Director General - The Incorporated Law Society of Ireland, Gerald Hickey - Metropolitan Director, Niall Kennedy - Provincial Director (Tipperary), Sean Sexton - Metropolitan Director, Brendan J. Lynch - Provincial Director (Leitrim).

James J. Ivers, former Director General of the Law Society with Noel C. Ryan, present Director General.

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The Incorporated Law Society of Ireland

EDUCATION DEPARTMENT TIMETABLE – 1991

The attached timetable for the Education Department of the Incorporated Law Society of Ireland gives – with other information – the dates during which apprentices will be attending the Professional and Advanced Courses in the Society's Law School at Blackhall Place in the year 1991. Offices in which a number of students are apprenticed will find this information particularly valuable.

Under present arrangements, the last class contact day for apprentices attending the Professional Course is some ten days before the date quoted for the end of the course. The reason for this is that the examination in Conveyancing takes place after the end of the Professional Course and apprentices attending the course are given approximately ten days study time between the last class contact day and the Conveyancing examination.

DATE	VENUE	COURSE OR EXAMINATION
January 2 – March 14	Lecture Hall & Tutorial Rooms	26th Professional Course (had started on 20/11/90).
January 15	President's Hall, Gym & C.L.E. Room	First Irish Examination
January 16	President's Hall	Second Irish Examination
February 26 – April 12	Gym & C.L.E. Room	21st Advanced Course
March 6 – June 27	Lecture Hall & Tutorial Rooms	27th Professional Course
March 21	President's Hall	Presentation of Parchments
June 24 – August 2 August 19 – October 24	Lecture Hall & Tutorial Rooms	28th Professional Course
July 9	President's Hall & Gym	First Irish Examination
July 10	President's Hall	Second Irish Examination
July11/12	C.L.E. Room	Preliminary Examination
August 26 – October 11	Gym & C.L.E. Room	22nd Advanced Course
October 11	President's Hall	Presentation of Parchments
October 14 – December 20	Lecture Hall & Tutorial Rooms	29th Professional Course (continued in 1992 – to 13/2/1992)
October 18 – October 31	President's Hall & Gym	Final Examination – First Part
November 4 – December 20	Gym & C.L.E. Room	23rd Advanced Course

January 7, 1991

Privity and Contracts for the Carriage of Goods by Sea

By
Muiris O Ceidigh
B.A., LL.B.

Introduction

Contracts for the carriage of goods by sea are by nature dynamic. The commercial framework in which they arise involves many parties and different legal relationships. Such contracts do not sit easily with the strict requirements of the doctrine of privity.[1] This uneasy relationship has given rise to variations and exceptions to the doctrine of privity that to some extent reflect commercial reality. In what follows some of these variations will be examined and in particular their consequences for the cargo-owner vis-a-vis the carrier, his servants, agents and independent contractors.[2]

Implied contractual relations between the purchaser of a cargo and the carrier.

There is little difficulty in the case of the contract of carriage between the shipper and the carrier. Both parties can sue and be sued by each other. However, when the cargo is sold the shipper will have no interest in taking any action should the goods be subsequently lost or damaged. The purchaser will have no express contract with the carrier since he will not have been party to the original contract of carriage. He must therefore either establish an implied contract or sue in tort.[3]

International sales of goods are commonly on F.O.B. or C.I.F. terms or variations thereon.[4] These contracts are such that the obligations of the seller in relation to the cargo cease on shipment. The risk is passed to the purchaser. If it is purchased while at sea, C.I.F., as often happens, the risk passes to the purchaser retrospectively from shipment. In the case of successive purchasers, the risk for the complete voyage falls on the final purchaser[5] (or his insurer under the doctrine of subrogation[6]).

Contractual relations implied by statute

At common law contracts were not assignable. Hence a transfer of a bill of lading, with the intention of passing the property in the cargo, did not transfer the rights and liability under the contract of carriage; it merely passed the property in the goods.

A great change was brought about by the Bills of Lading Act 1855.[7] Section 1 of that Act provides:

> Every consignee of goods named in the bill of lading, and every indorsee of a bill of lading to whom property in goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Thus when the risk is passed to the buyer so also will the rights of action against the carrier if this section applies.[8]

However this provision has certain limitations which result in it not being applicable in a number of situations.

Unascertained goods and the passing of property.

The Sale of Goods Act 1893 contains an absolute rule that property in unascertained goods cannot pass 'unless and until the goods are ascertained'.[9] (*Flynn -v- Mackin & Mahon.*[10])

Much of the cargo shipped on chartered vassels is shipped as an undivided bulk, whether in liquid or dry cargo form. Parts of the bulk will then be sold to a number of different buyers, but no individual purchaser will be able to state which part of the bulk will be his until it is appropriated to him. Property will pass only when the goods are appropriated to the contract. (*Spicer-Cowan (Ireland) Ltd -v- Play Print.*[11]) However this will normally only occur when the cargo is unloaded at the end of the voyage. Thus in the case of an undivided bulk cargo, risk will usually pass to the buyer on shipment, but property will not pass until discharge.

Therefore, Section 1 of the Bills of Lading Act 1855 will not confer rights on the purchasers of the cargo while the bulk is at sea.

It is to be noted that if a bulk cargo is lost at sea the purchasers will be unable to base a case on Section 1 as the goods will never have been appropriated to the contract as it will not have been divided.

Muiris O'Ceidigh

Express and implied reservation of right of disposal.
Even if the goods are specific or ascertained within the meaning of the Sale of Goods Act 1893, property will only pass to the buyer when the parties intend it to pass; Section 19 of the Sale of Goods Act 1893 provides that despite the appropriation of the goods to the contract, property in the goods will not pass if a right of disposal is reserved. This is the case even if the goods have been delivered to the buyer or a carrier.

It is further provided that where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facia* to be taken to have reserved a right of disposal.

The effect of this section is that a reservation of right of disposal, either express or implied, will deny a purchaser the benefit of Section 1 of the Bills of Lading Act 1855 as a basis for the establishment of a right of action against the carrier in the event of the cargo being lost or damaged. This position was confirmed in the recent English case of *Sullivan -v- Aliakmon Shipping Co. Ltd.*[12] In that case the purchaser's bank had refused to back their bill of exchange in payment for the price of the goods. An exchange of letters then occurred, the effect of which was to vary the contract so that the sellers retained a right of disposal and thus preventing the property passing to the purchaser. This took the purchaser out of the ambit of the Bills of Lading Act 1855 and left him without a basis for an action against the carrier when the goods were damaged.[13]

In any case, as mentioned above, the seller is *prima facie* deemed to have reserved a right of disposal where the bill of lading is made out to his order.[14] Thus property will pass on indorsement of the bill of lading. This will normally occur only against payment of the price, either directly by the buyer or on a commercial credit from a bank.

Section 20(1) of the Sale of Goods Act 1893 provides as follows:

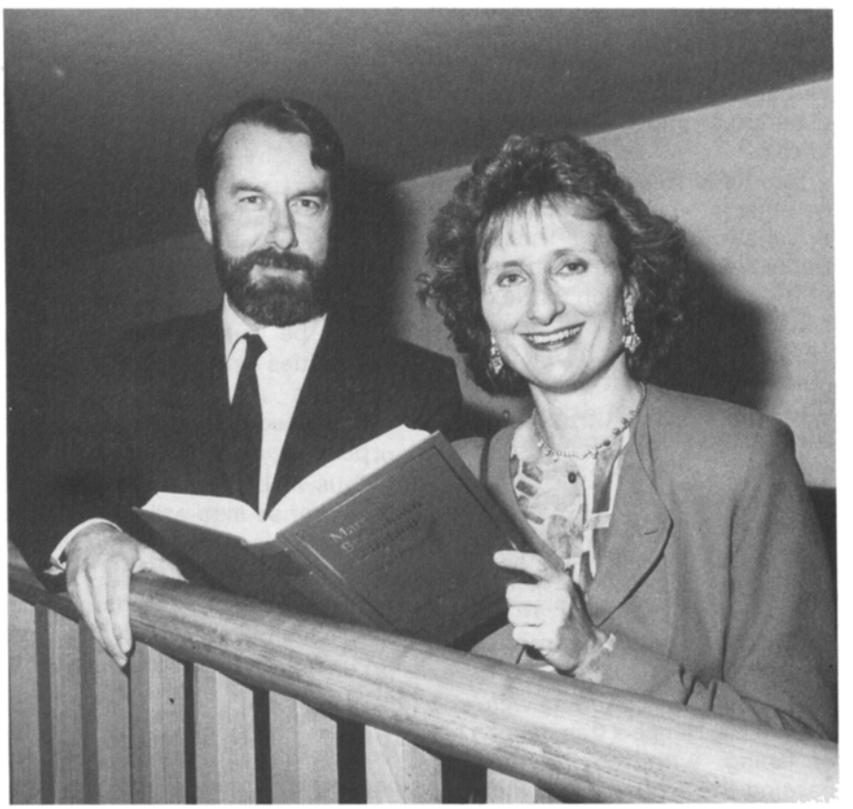
"Unless otherwise agreed the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not."

While this provides for a presumption that risk passes with the passing of property in the goods, this is subject to the proviso that the parties have not "agreed otherwise". It is to be noted that this section does not provide authority for a reverse presumption that property passes with risk. Risk can pass to the buyer even though property has not passed, thus denying him a basis of action.

Where payment is by way of documentary credit, the parties will be deemed to have not intended property in the goods to pass, even if the bill of lading makes the goods deliverable to the order of the buyer. This is because it will be essential to the transaction that the seller retains property in the goods in order to pass it to the bank.[15] Therefore where this method of payment is agreed by the parties it is implied that property will remain with the seller.

In summary then, the implication of a reservation of a right of disposal will arise where the bill of lading is made out to the order of the seller, where payment is by banker's commercial credit or where the bill of lading is retained as a security against payment. On the other hand, the presumption will be undermined if, for example, the sale is between two closely associated companies[16] or the bill of lading is retained by the seller purely as an administrative convenience.

General and special property and banker's commercial credits.
Further difficulties arise in relation to commercial credits. If the sale of a cargo is financed by a banker's commercial credit instead of sending the bill of lading and other documents directly to the buyer the seller will forward them to the bank. The bank then retains them as security in case the buyer fails to reimburse it. The documents can then be used by the bank to claim the goods at the port of discharge. This type of transaction gives rise to a relationship between the bank and the carrier. The bank will want to have recourse to the carrier in the event of the goods being lost or damaged and the carrier may have to claim unpaid freight or demurrage. However, a bank under a commercial credit, as pledgee,



Co-Authors Professor William Duncan and Paula Scully, Solicitor at the launch of *Marriage Breakdown in Ireland: Law and Practice* in Trinity College Dublin on 1st November 1990. The book is published by Butterworths (Irl.) Ltd.

obtains only special property in the goods, general property passing directly to the buyer once the documents are forwarded to the bank by the seller: *Sewell -v- Burdick.*[17]

Therefore banks dealing in commercial credits are unable to rely on Section 1 of the Bills of Lading Act 1855 to ground an action against a carrier.

The requirement as to a Bill of Lading

Section 1 of the Bills of Lading Act 1855 is restricted to transactions involving a bill of lading and no other document will suffice such as a ship's delivery order. In particular this would be the case where part of a bulk was being purchased, where the purchaser will at best have a delivery order and sometimes no documents at all.

Contracts implied at common law

Parties not covered by Section 1 of the Bills of Lading Act 1855 must rely on the common law to imply a contractual relationship between the carrier and themselves. This implication will arise where a bill of lading or ship's delivery order is presented and the goods are delivered on foot of it. The implication is that there is a contract on the terms contained in the document, be it a bill of lading or a ship's delivery order.

The leading case in this area is *Brandt -v- Liverpool, Brazil & River Plate S.N.*[18] In that case goods were shipped damaged but the shipowner nevertheless issued a bill of lading stating that they were shipped in apparent good order and condition. Subsequently, the cargo had to be unloaded and reconditioned, at a cost of £748 and reshipped on another vessel, being forwarded late to its destinatiaon. The bill of lading was indorsed in favour of the plaintiff pledgee (a bank), who advanced money on it in good faith. When the second vessel arrived at its destination, the indorsees presented the bill of lading, paid the freight and, under protest, the sum of £748, which the shipowners demanded, and took delivery of the cargo. The indorsee bank sued the shipowners for damages due to delay (the general value of the cargo having fallen) and repayment of the £748. It was held that while they had no grounds under Section 1 of the Bills of Lading Act 1855, the acts of presenting the bill of lading, payment of freight and the delivery of the cargo, gave rise to an implied contract between the indorsee and the shipowners.

While the point has not been judically considered in Ireland, contracts have been implied between parties originally outside the bargain (see *Fox -v- Higgins*[19]) and there is no apparent reason why the doctrine in *Brandt -v- Liverpool* would not be followed.

In all the cases in which the doctrine has been successfully relied on by a receiver of a cargo, he has paid the freight or demurrage and this is the consideration for the implied contract. However, the consideration for the implied contract need not be of a financial nature. The mere presentation of the bill of lading can be sufficient consideration for the new contract[20] since its delivery relieves the carrier from further obligations regarding the goods and therefore confers an advantage on him and amounts to good consideration. Irish courts would accept this proposition provided the consideration was sufficient. In *Kennedy -v- Kennedy,* Ellis J summarised the position in the following terms:

"once there is consideration, its adequacy . . . is irrelevant to its validity and enforceability"[21]

The doctrine in *Brandt -v- Liverpool* does not depend on the transfer of the bill of lading, or on the passing of property, and so avoids the difficulties inherent in bulk consignments.

In the case of *Peter Cremer, Westfaelische Central SA; The Dona Mari*[22] it was held that the fact that property did not pass would not prevent the principle in *Brandt -v- Liverpool* from operating and that a contract will be implied where the purchaser presents a ship's delivery order and not a bill of lading. However, if the delivery order is not issued by the shipowner no contract will be implied.[23]

Where, as in *Brandt -v- Liverpool* the damage occurs before shipment, the basis of the shipowner's liability is that he is estopped from so pleading, because he has issued a clean bill of lading. Since the statements in the bill of lading or ship's delivery orders are not contractual promises by the carrier[24] it is essential that an indorsee relies to his detriment on such representations in order to bind the carrier in estoppel. The absence of reliance is fatal.[25] The necessity of reliance in the doctrine of estoppel is established in Irish case law (see for example *McCambridge -v- Winters*[26]).

The doctrine in *Brandt -v- Liverpool* is, however, subject to certain limitations. Firstly the contract is implied on delivery of the cargo so obviously it has no application where goods are totally lost at sea and, secondly, the principle does not operate where the documents are not issued by the ship's owners.

Terms of Implied contracts between buyer and carrier

Where a contract is implied between a purchaser and the carrier the terms are those set out in the bill of lading or delivery order. This is not the case between the shipper and the carrier, since in that case the terms will be contained in the contract of carriage which will have been negotiated prior to loading. Thus, where the bill of lading or the delivery order do not contain the same terms as the contract of carriage, the bill of lading or the delivery order will prevail as the terms of the implied contract.

A difficulty arises where an indorsee of the bill of lading is also the charterer of the ship. The problem that arises in such a situation is which contract is to prevail, the charterparty contract or the bill of lading contract. Since the charterparty will invariably have been made before the bill of lading is indorsed to the charterer it is logical that it should prevail in this instance.[27] This will not be the case, however, with subsequent purchasers as they will not have been party to the original contract and will not normally have notice of its terms[28] and therefore these terms would not form part of the contract.

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Implied contractual relations between the purchaser of a cargo and the servants, agents and independent contractors of the carrier.

Carriers have always the option of including an exemption clause in the contract that will limit their liability to the cargo owner in the event of damage being caused to the goods by their servants, agents and independent contractors. Such clauses will have effect provided they meet the ordinary requirements of contract law and do not infringe the Hague Rules.[29]

The cargo owner has the option of suing the servants, agents and independent contractors personally. Since the defendant (usually a stevedore) was not party to the original contract this action will be in Tort. The question therefore arises from the defendant's point of view as to whether he can claim the benefit of the limitations contained in the contract between the carrier and the cargo owner. Efforts to avoid the rigours of the doctrine of privity and to bring such parties within the limitations of the contract have taken a number of forms.

Vicarious Immunity

This approach to the question was stated by Scrutton LJ in *Mersey Shipping and Transport Co. Ltd. -v- Rea Ltd.* as follows:

> "where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of that exemption clause.[30]

While this concept has found academic support in recent times,[31] its reasoning is inconsistent with the doctrine of privity in the sense that it would enable an agent to rely by way of defence on the terms of a contract to which he was not a party. For this reason, the concept of vicarious immunity has been rejected by the House of Lords in the case of *Scuttons Ltd. -v- Midland Silicones Ltd.*[32] However, if priority were given to commercial reality over the exigencies of the doctrine of privity the concept would be accepted.

Carrier as agent of the defendant

It has been standard practice for a number of years for bills of lading to include a clause known as the "Himalaya Clause"[33] excluding any liability on the part of the servants or agents or independent contractors of the carrier. In the two initial cases of *Adler -v- Dickson*[34] and *Scuttons Ltd. -v- Midland Silicones Ltd.*[35] such defendants failed to get the protection of the limitations contained in the contract between the carrier and the cargo owner. The reason for the decision that was adopted by the majority in both cases was that the defendants were not party to the original contract and therefore they could not claim the protection of the clause no matter what it said. However, in both cases Lord Denning restricted the grounds for his rejection of the defendants to the construction of the clause and did not make the difficulty of privity an absolute bar.

With time the clauses came to be re-drafted with explicit reference

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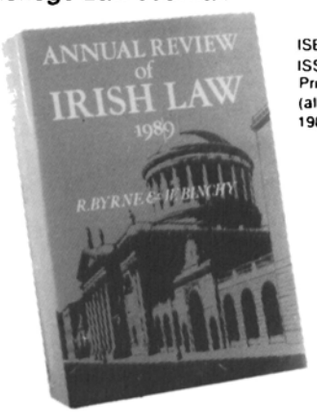

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to an agency relationship between the carrier and potential defendants.[36]

If an agent is appointed and given authority to contract on behalf of a principal then any transaction within the scope of such authority will include and bind the principal. (In this instance we are characterising the carrier as agent of the defendant).

In Ireland the courts have held that such a relationship can arise by implication from the conduct of the parties (see *Kearney -v- Cullen*[37] and *Crean -v- Nolan*[38]). However, before any agency exception can operate there must normally exist an intention to create the relationship of principal and agent: *Sheppard -v- Murphy.*[39]

For New Zealand the Privy Council has determined that the concept of agency was successful in arriving at a Himalaya Clause that would protect third parties such as stevedores. In *The Eurymedon*[40] machinery was to be transported by ship from England to New Zealand. The consignors in England contracted with a carrier. The Carrier employed the defendant stevedores to unload the machinery. The machinery was damaged while being unloaded owing to the stevedores negligence. The consignees sued the defendant stevedores personally in Tort, in order to avoid an exemption clause in the carriage contract (a one year time limit clause on bringing actions, incorporated by article III (6) of the Hague rules). The stevedores were not party to the contract of carriage, into which the time limit clause was incorporated.

" . . . if the parties to the contract envisage that third parties are to be protected, commercial expectations must be respected, ... "

The Himalaya clause expressly purported to protect the stevedores and also declared that the carrier was an agent of the defendants:
"It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner . . . and . . . every exemption, limitation, condition and liberty therein contained . . . shall also be available and shall extend to protect every such servant or agent of the carrier . . . and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of or for the benefit of all persons who are or might be his agents from time to time (including independent contractors as aforesaid) . . . "

The effect of such an agency clause is that the defendant third party, in this case the stevedores, can rely on the protection of the contract of carriage provided that the agency in the carrier is deemed to exist. It is not sufficient that the carrier merely declare himself an agent; he must be one in fact. The third parties must authorise the carrier to act as their agent (or at least ratify the action). This requires a knowledge of the terms of the contract and they must provide consideration themselves for the contract with the owner of the cargo.

In *The Eurymedon* the Privy Council held that the clause constituted an offer by the cargo owner to the stevedores (using the carrier as an agent to convey the offer) to exonerate the stevedores from liability, beyond the period of limitation in the Hague Rules. That offer was accepted by the stevedores unloading the ship. in reliance on the offer. A unilateral contract was therefore formed, with no communication of acceptance being required. The stevedores provided consideration by carrying out their contract to unload the ship.

It is an established principle in Irish law that an agreement to do an act, which one is already under an obligation to a third party to do, can amount to valid consideration because the promisee will receive a direct obligation, which he can enforce. (This line of argument was accepted in the Irish case of *Saunders -v- Cramer*[41]). In other words, he can sue the stevedores for breach of contract should they fail to unload the ship, or perform the task badly.

However, the reasoning in *The Eurymedon* does not stand up to examination. The cargo owner can only sue the stevedores in contract if they have a contract with them. One cannot construct a contract on the foundation of a right to sue which only exists if the contract is already there in the first place.

On the other hand if the carrier is able to sue the stevedores in Tort, after the time limitations set down by the Hague Rules, the doctrine of privity is being preserved at the expense of the convention's aims and in defiance of commercial reality. In any case if the parties to the contract envisage that third parties are to be protected, commercial expectations must be respected, even at the cost of doctrinal or legal niceties.

The requirement that the principal should have some knowledge of the terms of the carriage contract was satisfied in *The Eurymedon* by the fact that the carrier was a subsidiary of the defendant, and an inference of knowledge could be made. The Privy Council in *The New York Star*[42] held it was not a requirement that the relationship be one as close as that in *The Eurymedon* in order that a knowledge of terms be assumed for the purpose of implying the existence of a relationship of agency.

It could be argued that third parties such as stevedores should benefit from immunities which are 'notorious in the trade' and that this should be assumed to be the normal situation.[43] This would accord with commercial reality and would be a logical extension of the "business efficacy" concept in contract law. The idea of 'matters recognised in the trade' is not a new notion. It has been trite law for some time that the custom of a trade can be implied as a term in a contract relating to that trade (see for example *O' Connaill -v- The Irish Echo*[44]) and the related concept of 'course of dealing' is well established.

However, where it is clear that the defendant could not have been aware of the terms of the contract the doctrine in *The Eurymedon* cannot operate. In such a situation it would not be possible to infer acceptance by the stevedores of any offer by the shippers or any authorisation for the carrier to act as their agents in the negotiations with the shipper.

A serious limitation to the use of a Himalaya clause is the requirement that the unilateral offer be accepted and that that acceptance

be referable to the offer. In *Burke Motors Ltd. -v- The Mersey Docks and Harbour Bourd Co.*[45] the damage to the cargo occurred prior to it being loaded by the stevedores. The damage resulted from a motor accident involving an employee of the defendants. A van collided with a container containing a corrosive liquid which escaped and damaged the cargo. No bill of lading had been issued, but the plaintiffs had had previous dealings with the carrier. Had the bill of lading been issued it would have contained an effective Himalaya clause. However it was held that the bill of lading was of no consequence, since in any case the defendants had not performed an act referable to the contract that would constitute an effective acceptance of any offer by the plaintiffs.

It is clear that the result in this case was dictated by the theoretical parameters of the law of contract rather than by commercial reality.

The Merchant Shipping Act 1947 and the Hague and Hague-Visby Rules.

In England the amending protocol to the Hague Rules has been implemented through the Carriage of Goods by Sea Act 1971. Article IV *bis* of the Hague-Visby Rules extends the defences and limitations contained there in to servants and agents of the carrier. However, the Hague-Visby Rules work through incorporation into the contract of carriage.[46] This is also the case with the Hague Rules which were incorporated into Irish Law by the Merchant Shipping Act 1947.[47] Since the whole problem in relation to defendants such as stevedores relates to being party to the contract of carriage, this extension is of no avail where the doctrine in *The Eurymedon* does not apply.

Circular indemnification and Himalaya Clauses.

Since Himalaya Clauses do not represent a complete solution to the problem of personal actions against the agents, servants or independent contractors of carriers the use of circular indemnification is advisable as a complement to it. This involves the cargo owner undertaking not to bring an action against the servants agents and independent contractors of the carrier, and to indemnify the carrier against the consequences of bringing such a claim. The carrier may also in his contract with the potential defendant agree to indemnify him against any claim brought by the cargo owner. Additionally the contract may allow the carrier to recover from the cargo owner any monies recovered in any action against third parties such as the potential defendant. The result is that any action will achieve nothing.

The problem with circular indemnification is that the initiative to restrain an action by the cargo owner against the potential defendant rests with the carrier, because it is on the carrier that the fraud would be committed by the taking of such an action. If the carrier has agreed to indemnify the potential defendant, he, if sued, can pursue a claim against the carrier, leaving the carrier to pursue his own claim against the cargo owner. This will not be the best position for the carrier to be in if the cargo owner turns out to be a poor or difficult mark. Thus neither the Himalaya Clause nor the circular indemnification of parties is a complete solution and their joint use is advisable.

CONCLUSION

Neither Section 1 of the Bills of Lading Act 1855 nor the doctrine in *Brandt -v- Liverpool* is a complete solution to the difficulties arising owing to the strict application of the rules of privity to the relationship between the carrier and subsequent purchasers of a cargo. The main reason for the difficulty arises out of the drafting of the Bills of Lading Act. The requirements of property having passed and the necessity for a bill of lading and not any other document such as a delivery order have given rise to exceptions that in no way relate to commercial reality.

The relationship between the servants, agents and independent contractors, and the cargo owner is also full of uncertainty.

The real difficulty with privity of contract lies in finding a satisfactory accommodation between certainty and justice. It can be reasonably argued that the doctrine has produced both uncertainty and injustice in the area of the carriage of goods and that its function in the area should be questioned. There has been some support recently for the view that the application of the doctrine of privity to contracts for the carriage of goods by sea[48] should be abolished. However, this view may be too extreme.

While English and Irish courts have persistently, if reluctantly, restricted the range of liability to the parties to the contract, American courts recognise an exception which provides that, where a contract expressly mentions third parties as intended beneficiaries of the contract, they will be permitted to claim the envisaged benefits. Furthermore, some American courts go so far as to permit intended beneficaries who were not expressly mentioned in the contract to claim benefits under it.[49] Perhaps a similar approach would be advisable.

In any case, it is clear that the law is in need of extensive updating and reform. The relationship between legislation such as The Sale of Goods Act 1893 and the Bills of Lading Act 1855 needs extensive clarification. The reforms in this area should take the form of repeal and codification as piecemeal amendment will only be productive of further uncertainty.

The government should use the occasion of the enactment of the Visby Rules as an opportunity to undertake such reforms. □

NOTES

1. In *Murphy -v- Bowen (1866) IR 2 CL 506 (CP)* Monahan CJ summarised the principle as follows: "It has been decided that where the foundation of the right of action is rested upon contract, no one can maintain an action who is not party to the contract".
2. The law relating to contracts for the carriage of goods by sea has evolved as a response to the imbalance of bargaining power between shipowners on the one hand and cargo-owners on the other. See R.M. Goode *Commercial Law* p601. Possible actions in Tort are outside the scope of the present discussion.
3. There is a surprising lack of Irish case law in relation to contracts for the carriage of goods by sea. One possible reason for this is the prevalance of the "Both to Blame" clause in shipping contracts, so that the matter can be settled between the insurance companies and never goes furhter than the loss adjusters. The lack of certainty in the law also inhibits litigation.
4. For an Irish case involving a CIF contract see for example, *Michel Freres Societe Anonyme -v- Kilkenney Wollen Mills 1929 Ltd.* [1961] IR 157.
5. For a general outline of F.O.B. and C.I.F. contracts see R M Goode *Commercial Law Chap. 22.*

6. See Liam O'Malley *Irish Business Law page* 215.
7. The Bills of Lading Act 1855 had general UK application and there is no apparent reason why it should not have been carried forward by Article 50 of Bunreacht na hEireann.
8. Since 1855, rights and obligations under a contract of carriage to which this section applies, pass once the property in the goods has passed. The only contract on which the carrier is liable for substantial, as opposed to nominal, damages is the bill of lading contract with the consignee or the indorsee. Some residual rights may remain in the seller, but these are not relevant to the present discussion. For instance, nominal damages may arise in the case of a charterparty. For a general consideration of the relationship of seller and carrier after the operation of section 1 of the Bills of Lading Act 1855 see Lord Diplocks judgement in *Albacrus (cargo owners) -v- Albazero (owner); The Albazero* [1977] A.C. 774 See also David Tiplady *Introduction to the Law of International Trade at p105.*
9. Section 16.
10. [1974] IR 101, SC.
11. H.C. Unrep. 13/3/1980.
12. [1986] 1 AC 785; [1985] 1 QB 350 (C.A.).
13. The Irish Courts have also applied the provision that a retention of right of disposal clause will postpone the passing of property in goods. See for example *In re WJ Hickey Limited (In receivership)* [1988] IR 126.
14. Section 19 (2).
15. *The Knowprincessan Margarita* [1921] 1 A.C. 486.
16. As for example in the case of *Albacruz (cargo owners) -v- Albazero (owners;) The Albazero (1977) A.C. 744.*
17. (1884) 10 App Cas 74. The case involved an action by a carrier against a bank for freight, which failed under section 1 of the Bills of Lading Act 1855 for the reason set out above. Although a documentary credit was not at issue, the decision would apply equally to sales by documentary credit.
18. [1924] 1 KB 575.
19. (1912) 46 ILTR 222, HC.
20. See Paul Todd *Contracts for the Carriage of Goods by Sea,* p162.
21. *Kennedy -v- Kennedy* HC Unrep. January 12, 1984.
22. [1974] 1 WLR 341.
23. In *The Wear Breeze* [1969] 1 QB 219 none of the documents, which included delivery orders, were issued by the shipowner and it was assumed that the purchaser had no contract.
24. *Grant -v- Norway* (1851) 10 CB 665 138 ER 263.
25. *The Sharp* P134.
26. Unrep HC May 28, 1984 *Murphy J.*
27. *The Dunelmia* (1970) 2 QB 289. If the bill of lading terms were preferred to those in the charter party, it would be necessary to infer from the act of taking up the bill of lading an intention to vary already agreed terms. Since the charterer has to take up the bill to collect the goods, such an inference would be unreasonable from this act along.
28. As to incorporation see for example *Olley -v- Marlborough Court Hotel* [1949] 1 KB 532, *Moynihan -v- Crowley & Warren & Co* [1958] Ir Jur Rep 21 (Cir Ct),*Slattery -v- CIE* (1972) 106 ILTR 71 (HC), *Duff -v- Gt Northern Ry* (1878) 4 LR Ir 178 (Exch).
29. Ireland has only acceded to the Bills of Lading convention of 1924 known as the Hague Rules. There was a 1968 amending protocol which is knwon as the Visby Rules and the original convention so amended is known as The Hague-Visby Rules. The Hague-Visby Rules are in force in England. The Irish Government have incorporated the Hague Rules into Irish Law by *The Merchant Shipping Act 1947.*
30. [1925] Lloyds Rep at p378.
31. See for example the comments of Adams & Brownford in *"The Aliakmon and the Hague Rules"* The Journal of Business Law January 1990 p23.
32. [1962] AC 446; cf *Adler -v- Dickson* [1955] 1QB 158: *Cosgrove -v- Horsfall* (1946) 62 TLR 140; *Geny -v- Mathews* [1965] 3 All ER 24; *Gilchrist, Watt & Sanderson Pty. -v- York Products Pty.* [1970] 1 WLR 1262.
33. after *Alder -v- Dickson* [1955] 1 QB 158.
34. loc.cit.
35. loc.cit.
36. The use of agency reasoning has often been artificial: *Hall -v- N E Ry* (1875) L.R. 10 Q.B. 437; *Barrett -v- Great Northern Ry* (1904) 20 TLR 175; *The Kirknes* (1957) P51.
37. [1955] IR 18 (HC).
38. [1963] 97 ILTR 125 (Cir. Ct.).
39. [1867] IR 1 Eq 490 (Ch).
40. [1975] AC 154.
41. (1842) 5 Ir Eq R 12 (Ch), an action related to a breach of promise to marry.
42. [1980] 3 All ER 257.
43. See the Australian case of *Godina -v- Patrick Operations Pty Ltd* [1984] 1 Lloyds Rep 333.
44. [1958] 92 ILTR 156 (Dist.Crt) see also the position in relation to Ulster tenant right: *(1898) 32 ILT p309.*
45. [1986] 1 Lloyds Rep 155.
46. Article II.
47. See footnote no.29 above.
48. Adams & Brownford in *"The Aliakmon and the Hague Rules.* Journal of Business Law January 1990 p23 at p35.
49. For example *Ratzlaff -v- Franz Foods,* 250 Ark. 1003, 468 SW. 2d (1971).

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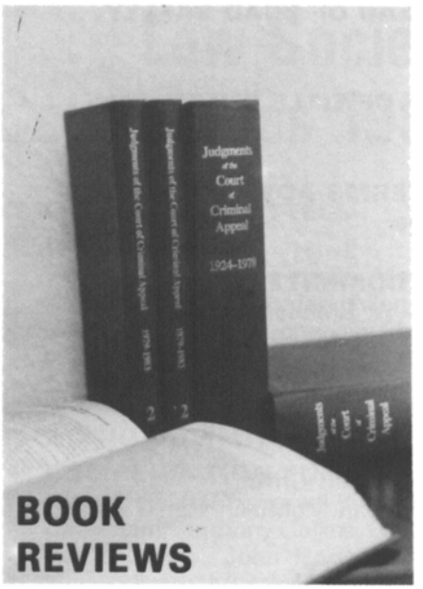

ANNUAL REVIEW OF IRISH LAW 1989

[By Raymond Byrne and William Binchy, The Round Hall Press, Dublin. 1990. 1 + 467pp. IR£55 Hardback]

Raymond Byrne and William Binchy have achieved another remarkable feat: the third volume in the Annual Review of Irish Law series has been published. Some of the most searching and influential expositions of various aspects of Irish Law are to be found within the pages of the *Review.*

The Annual Review of Irish Law 1989 provides a survey of legal developments, judicial and statutory, that occurred during 1989. In relation to case law, the *Review* includes cases where judgments were delivered in 1989, even though they may not have been reported in 1989.

For the benefit of those lawyers (and interested lay persons) who have not benefited from the previous editions, the writer of this notice draws your attention to the various chapter headings: Administrative Law; Agriculture; Commercial Law; Company Law; Conflict of Laws; Constitutional Law; Contract Law; Criminal Law; Defence Forces; Education; Electricity and Energy; Equitable Remedies; European Communities; Family Law; Fisheries; Garda Síochana; Labour Law; Land Law; Law Reform; Licensing; Limitations of Actions; Local Government; Practice and Procedures; Prisons; Revenue Law; Safety and Health; Social Welfare; Solicitors; Statutory Interpretation; Telecommunications; Torts and Transport. One is almost awed with the comprehensive list of chapters. Each chapter is subdivided into sections and subsections.

The reader of the *Review* is assisted by a comprehensive table of cases, constitutional provisions, statutes, statutory instruments, European Community laws, Council of Europe laws, non-statutory schemes, Irish Bills, United Kingdom legislation, United States Codes, and International Agreements and Conventions. There is also a most useful index.

Justice Oliver Wendell Holmes, a Justice of the United States Supreme Court, was the speaker of the day on June 28, 1911 when the Harvard class of 1861 met for the fiftieth anniversary of its graduation. Remembering his Civil War service in the Twentieth Massachusetts Volunteers and remembering his days as a law student, practising lawyer, law teacher, writer, and judge, he told his "brethren of the Alumni":

> "I learned in the regiment and in the class the conclusion, at least, of what I think the best service that we can do for our country and for ourselves: to see so far as one may and to feel the great forces that are behind every detail . . . to hammer out as compact and solid a piece of work as one can, to try and make it first rate, and to leave it unadvertised".

Raymond Byrne and William Binchy have produced a compact and solid piece of work. The *Review* is first rate and should not be left unadvertised. The writer of this notice commends the *Annual Review of Irish Law 1989* to all readers of the *Gazette.*

EAMONN G. HALL

REVIEW OF A HANDBOOK OF ESSENTIAL LAW FOR THE IRISH HOTEL AND CATERING INDUSTRY

[By Francis J. Dempsey, Cert. Publications, 1990]

The hotel, catering and tourism industry is a major sector of the Irish economy with "tourism earnings contributing up to 9% of GNP and over 70,000 people employed full-time in the industry", according to CERT at p.228 of this book. The industry is an important target area for growth in the current Programme for National Recovery. It has not received much attention from academic lawyers or from law reformers. There is almost no legal literature on the industry. Industry activities straddle many of the traditional demarcation lines of academic and professional lawyers. Legal concepts dominate the lawyer's way of seeing legal issues. The standard response of most lawyers when conversing with someone who claims an interest in hospitality law is – what's that? It is a bit of contract? a bit of tort? and maybe sale of goods? That sort of thing? Hospitality law is not a university law subject.

Hospitality law is applied law which focuses on industry specific issues. The specific case and specific legislation is the meat of this subject. The leading and the not-so-leading case from the non-industry context is not of great value in such a subject. Dworkin's principle of integrity in law is a vital component of applied law.

Francis Dempsey's handbook is the first work on hotel and catering law in Ireland, and it is to be welcomed as the first attempt to bring together in a single work the variety of legal rules which affect the industry. The text runs to 191 pages. It is a handbook not a textbook. Its style is descriptive and it avoids legal jargon. It is well laid out, and it will undoubtedly benefit certificate and, to a lesser extent, diploma level students. The book is also addressed to people who work in the industry. Whether it will achieve this aim remains to be seen. Given its length and approach, the treatment of the material is, of necessity, so general and descriptive that it might not satisfy the needs of people who are already familiar with the general ideas and who seek more detailed information. On the other hand, there is good reason to suspect that there is considerable ignorance within the industry of the legal rules which affect it. Leaving aside those who wish to remain in an undisturbed state of ignorance, this

text will probably provide those who wish to inform themselves of the law with a useful starting point.

This text is, however, only a starting point. To take but one example, unfair dismissals law is dealt with in all of five pages, shorter than the Department of Labour leaflet on the 1977 Act, and there is no reference to the huge volume of Employment Appeal Tribunal decisions on industry dismissals. There is a considerable need for a more detailed and critical account of hospitality industry law. Not alone would this benefit the industry and its legal advisers, but law reformers and policy makers would find the undoubted task of law reform less daunting.

MARC MCDONALD
Lecturer in Law
Dublin College of Catering

GUIDE TO THE EUROPEAN COMMUNITIES

[By Butterworths European Information Services (Irish Editor: Aindrias Ó Caoimh). Butterworths, Dublin. 1989. xxiii + 205pp, paperback, IR£12.95].

The aim of this book is to provide, in a concise and easy-to-follow format, the fundamental principles of Community law and a comprehensive reference source of important legislative provisions and judicial decisions which affect everyday problems.

The book is divided into four parts: Part I provides a chronology of events from 1947 to the present day highlighting the events leading up to the foundation of the European Communities and their development since the foundation. The aims and objects of the European Communities and the meaning and application of Community law are also considered.

Part II looks at the main institutions, their organisation and structure, procedure and location. Part III considers all Community policies, each chapter following the same format detailing the relevant treaty provisions and secondary legislation, main principles and cases one should be aware of when faced with a problem in any specific area involving Community law.

Part IV is a fact file containing useful addresses, publications, glossary and abbreviations. As the basis for Community law lies in the Treaty of Rome, as amended by the Single European Act, an Appendix containing the full amended text of the Treaty is included.

The Butterworths Guide is aimed at the practitioner and businessman alike. It is a quick source of reference enabling easy access to specific areas and provisions of Community policies which affect the practitioner and businessman in their daily work.

INTRODUCTION TO LEGAL METHOD

By John H. Farrer and Anthony M. Dugdale. [Third Edition, Sweet & Maxwell, London, 1990].

Introducing law and business students to the Irish legal system and to legal methods of reasoning via a single text is a difficult task.

First, a great deal of description, essential to the comprehension of the basics of law, wearies even the most enthusiastic undergraduate.

Secondly, the comprehension and deployment of legal concepts and ideas on which legal reasoning is founded requires sophisticated analytical and conceptual skills, which have not been developed in Ireland at least by pre-university curricula.

For Irish students books like R. Byrne *Cases and Comment on Irish Commercial Law and Legal Technique* The Round Hall Press, Dublin 1988 or Byrne & McCutcheon *The Irish Legal System* Butterworths, Dublin, 1989 aim to satisfy both requirements, and are to a large degree successful.

This book, *Introduction to Legal Method* is aimed at those beginning law in the U.K. It also deals with aspects of Commonwealth and U.S.A. law. It fills a gap in both the U.K. and the Irish market, in that students can consult this book to find out in more detail (a) how law is structured and what sort of social control is exercised through law, (b) what is involved in "legal method", e.g. distinctions between law and fact, what precedent involves, how legislation (both domestic and European) is made, some of the salient features of non-U.K. jurisdictions, and (c) some of the main issues in contemporary juridical theory.

The book is well thought out, competently written and fair-minded. The authors are both established scholars, well-known and respected in the U.K. academic law heirarchy.

Two useful features of the book may be singled out.

First, there is a strong comparative element: non-U.K. legal systems are described; Issues, such as no-fault compensation etc. are examined in different jurisdictional contexts.

Secondly, the last chapter, devoted to such matters as comparative legal cultures and method, seems to me to present succintly and in an original and scholarly way, much of importance in the broadest of fields; and to be not so much a summary as a contribution to knowledge in this area.

Those teaching introductory Irish law courses should put this book on the "recommended" list, those teaching introductory U.K. law

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courses on the "essential" list. The lawyer who, like myself, is constantly alarmed by the extent of his own ignorance, will find this book instructive in a refreshing and helpful way.

DR. DAVID TOMKIN

THE BUSINESS OF PARTNERSHIPS

Peter J. Oliver and Nigel T. Davey
Second Edition, Sweet & Maxwell, London 1990.

"No doubt it will be a long time before lawyers are as deft at marketing as they are at litigation, or advocacy, but at least it is now recognised as an important discipline". So writes Jeremy Stratton in an interesting article on the general strategies of marketing solicitors' practices in the *New Law Journal* of Friday, December 14th 1990. (Vol. 140 No. 6484 p. 1759-60). This being so, there is no shortage of U.K. and indeed Irish material which aims to induct the managing partner into some of the mysteries of catering for growth and control of a legal business: for example, were you at or did you get the conference papers from the half day conference "Big Bang in the Legal Profession" on Tuesday 20th November (sponsored by the Sunday Business Post and Wang (Ireland) Ltd.)?

This book, *The Business of Partnerships*, is a modest account of the organisation of professional partnerships. It deals with matters such as the firms accounts, time recording, planning and budgeting, reporting results, capital, U.K. taxation aspects, the salaried partner, provision for retirement, mergers and splits, and attracting new work. The information provided is really quite basic, but the book is well written and helpful as a starting point or indeed as a check list. Generally books written on practice management by those who make overt their connection with a particular professional practice have something of a subtext; if you really want to know the answers come and consult us professionally! This book refrains from suggesting that the sole route to profitability lies via Touche Ross and its management consultants.

What is the relevance of this book to Irish practitioners?

If you know precisely what your future market is and how you are going to increase your market share then this book will be a useful check list. If like so many of my friends and contemporaries in practice you are either not sure where your market lies nor have you enough time to take off from current demands of practice to find out where it lies you should perhaps consider reading this book.

The real problem here lies in our local variables: a changing regulatory framework for the professions, an imminent single European market, a profile of commercial work quite different from that obtaining in the U.K., a high dependence on commercial work referred to Irish practitioners from non-Irish lawyers – none of these issues are addressed by this modest book, and so I wonder whether the reader who had done her or his groundwork will find this book insufficient.

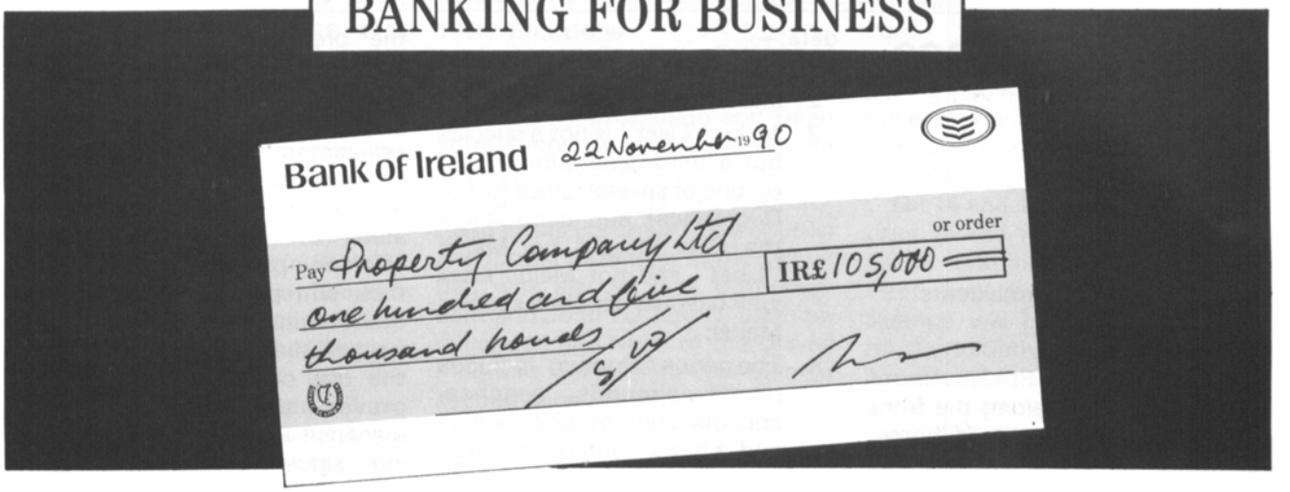
What this book really taught me is that there's room for a joint work between the Law Society and one of our marketing institutions, to be called something like "Marketing Legal Services from Ireland in 1991 and after."

DR. DAVID TOMKIN

PRESIDENT APPOINTS NEW JUDGE OF THE HIGH COURT

Mr. Justice Frederick Morris receiving his warrant of appointment as a Judge of the High Court from President Mary Robinson at Aras an Uachtarain on 20 December, 1990. Also included are Mr. Peter Ryan, Secretary to the President and Mr. John Murray S.C., Attorney General.

BANKING FOR BUSINESS



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Correspondence

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

Re: Trees and Past-Presidents

Dear Editor,

At lunchtime on 28th November 1990, as I strolled along the front of the Society's splendid home, absorbed in consideration of matters weighty and contentious, I was seriously distracted by two small placques beneath two young trees.

These placques told me that one tree had been planted by Past-President Anthony E. Collins and the other by Past-President Laurence Cullen. They further told me that Mr. Collins' tree was Prunus Sub Hirtella – Flowering Crab Apple and that Mr. Cullen's tree was Malus Lisset – Flowering Cherry. I make the following observations on the dendrological data:–

1. Subhirtella is one word;
2. Lisset is spelt with one "s";
3. Malus "Liset" is not a species but a third-generation hybrid (– one of several raised by Mr. Doorenbos) and accordingly the title should be Malus "Liset" and not Malus Liset which would denote a species Malus;
4. The genus "Prunus" includes plums, almonds, peaches, apricots, cherries, bird cherries and cherry laurels. It most certainly does not include apples! If Mr. Collins' tree is Prunus Subhirtella then it cannot be a Crab Apple!
5. The genus "Malus" includes crabs and apples but definitely not cherries! Accordingly Mr. Cullen's tree cannot be both a Malus and a cherry!
6. In short there is a major cock-up!

Inasmuch as the layman (perhaps erroneously) expects linguistic accuracy from solicitors, the errors on the placques demean the profession, and are, moreover, an affront to the two Past-Presidents with whose distinguished names the nonsense is associated.

I recommend that the appropriate committee of the Society take steps to remove forthwith the offending placques and to replace them with placques inscribed with the correct data. Furthermore, I suggest that if the current craze for the use of the vernacular must prevail, then surely one can dispense with the word "Flowering" since every tree in the world must "flower" if it is to set seed!

Any of your readers seriously interested in the content of this letter might wish to refer to W. J. Bean "Trees and Shrubs Hardy in the British Isles" Eight Edition (Vol III pps. 348-418 for Prunus and Vol II pps. 691-717 for Malus).

Yours faithfully,
John E. O'Reilly,
Architect,
1 Clonskeagh Square,
Dublin 14.

THE CCBE CELEBRATES ITS THIRTIETH ANNIVERSARY

The CCBE met in plenary session in Basle from 1-4 November 1990, with delegations representing the national Bars of the twelve member States of the European Community and the six observer States.

The decision to meet in Basle at the invitation of the Swiss Bar was a symbolic one, – it was in Basle, during the congress of the UIA held in the summer of 1960 that the idea of creating a consultative committee comprising representatives of the Bars of the European Community, which then had six member States, – was born.

The celebrations were presided over by guest of honour, Mr. José Luis DA CRUZ VILACA, President of the Court of First Instance of the European Communities, in the presence of a large number of guests including the "founding fathers" of the CCBE, Mr. Hans-Peter SCHMID, lawyer in Basle, and Mr. André DE BLUTS, avocat in Brussels.

1991 Elections

Piet WACKIE EYSTEN, advocaat in Rotterdam, former Head of the Netherlands Delegation and Dean of the Netherlands Bar, was elected President for 1991.

José Manuel COELHO RIBEIRO, Head of the Portuguese Delegation and former Bâtonnier of the Lisbon Bar, was elected first Vice-President and John TOULMIN, barrister in London and Head of the United Kingdom Delegation, was elected second Vice-President.

Extension to the Lawyers' European Home

The twelve member delegations have ratified a model for a convention to be offered to the observer Bars and later to the Bars of the new democracies in Central and Eastern Europe. It involves extending to them the Common Code of Conduct adopted in Strasbourg in October 1988 and the right to carry a CCBE identity card.

The convention was formerly signed by the representatives of the observer Bars on behalf of Austria, Cyprus, Finland, Norway, Sweden and Switzerland.

On 14 and 15 February 1991, just prior to the next meeting of the CCBE Standing Committee, the First European Lawyers' Conference will be held in Brussels, on the initiative of the Deutscher Anwaltverein and the Nederlandse Orde van Advocaten, sponsored by the CCBE. The conference will be open to all lawyers and one thousand participants are expected from all over Europe.

Future Meetings

Standing Committee:
Brussels, 16 February, 1991.

Plenary Sessions:
Dublin, 9-12 May, 1991. The Hague, 31 October – 3 November, '91.

THE IRISH SOCIETY FOR EUROPEAN LAW

At the recent Annual General Meeting of the Irish Society for European Law the following officers and committee were elected:

PRESIDENT:	The Hon. Mr. Justice Brian Walsh
VICE-PRESIDENTS:	The Hon. Mr. Justice T.F. O'Higgins The Hon. Mr. Justice D. Barrington The Hon. Mr. Justice A. O'Keeffe Mr. Vincent Landy, Senior Counsel Mr. Finbarr Murphy, Barrister Mr. Eamonn Hall, Solicitor The Chairman of the Bar Council (ex officio), Mr. Nial Fennelly, Senior Counsel. The President of the Incorporated Law Society of Ireland (ex officio), Mr. Don Binchy, Solicitor.
CHAIRMAN:	Mr. Patrick J.C. McGovern, Solicitor
VICE-CHAIRMAN:	Mr. Arthur F. Plunkett, Barrister
HON. SECRETARY:	Ms. Ann C. Walsh, Solicitor
REGISTRAR:	Ms. Jean Fitzpatrick
HON. TREASURER:	Ms. Mary O'Shea, Solicitor Ms. Margaret Barry, Barrister Ms. Nuala Butler, Barrister Ms. Fionnuala Kilcullen, Barrister Mr. Jeremy Maher, Barrister Mr. Kieran Mooney, Barrister Mr. Michael G. O'Beirn, Solicitor Mr. Aindrias O Caoimh, Barrister Mr. James O'Reilly, Senior Counsel Mr. Vincent J.G. Power, Mr. Bryan Sheridan, Solicitor

Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10 for students, barristers and others in the first three years of practice). Membership forms and further details may be obtained from the Registrar, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, 52 Harcourt Street, Dublin 2. (Tel: 01 714444 ext 5929, Fax. 01 679 3980, Electronic Mail (Eirmail) (Dialcom) 74:EIMO76.

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When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

"I give, devise and bequeath the sum of Pounds to the Irish Cancer Society Limited to be applied by it for any of its charitable objects, as it, at its absolute discretion, may decide."

All monies received by the Society are expended within the Republic of Ireland.

"Conquer Cancer Campaign" is a Registered Business Name and is used by the Society for some fund raising purposes.
The "Cancer Research Advancement Board" allocates all Research Grants on behalf of the Society.

IRISH CANCER SOCIETY

5 Northumberland Road, Dublin 4, Ireland. Tel: 681855

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IRISH HEART FOUNDATION

4 Clyde Road, Dublin 4.
Telephone: 01-685001.

Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

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

LOST LAND CERTIFICATES

Edward Scanlon, Folio No. 22477; Lands: Killeedy South; Area: 3A.2R.32P. County: **LIMERICK.**

Evelyn Grealish, Fairhill, Galway. Folio No. 2850F. County: **GALWAY.**

Seamus (orse James Edward) Murphy and Eithne Murphy, 48 Blackheath Park, Clontarf, Dublin 3. Folio No. 22296L; Lands: Carrickhill; Area: 0.089 (hectares). County: **DUBLIN.**

John Duffy and Thomas Duffy are tenants in common of an undivided moiety each. Folio No. 6655; Lands: Greenmount; Area: 77A.3R.28P. County: **LOUTH.**

Bruce Blackwell, Cregg Cottage, Kilronan, Aran Island, Co. Galway. Folio No. 30929. Lands: Townland: Part of the Land of Killeaney in the Barony of Aran, containing 1A.2R.6P. County: **GALWAY.**

Patrick Butterly, 'Marieville', Channel Road, Rush, Co. Dublin. Folio No. 6391; Lands: Townland: Rush, Barony: Balrothery East; Area: 0.384 (Hectares). County: **DUBLIN.**

Laurence O'Malley, Folio No. 115R; Lands: Tuogh; Area: 1A.0R.1P. County: **LIMERICK.**

James McGowan, Quignalegan, Ballina, Co. Mayo. Folio No. 32205. County: **MAYO.**

Mary Teresa Staunton, Ballyglass, Co. Mayo. Folio No. 49226; Lands: Townland (1) Ballyglass (2) Gortnahurra; Area: (1) 35A.0R.5P. (2) 2A.1R.20P. County: **MAYO.**

Sisters of Mercy, Tuam Diocese, Our Lady of Novitiate, Dublin Road, Tuam, Co. Galway. Folio No. 53560; Lands: (1) Roundstone (2) Roundstone; Area: (1) 4A.0R.24P. (2) 3A.1R.30P. County: **GALWAY.**

Samuel Holmes, Folio No. 16316; Lands: Courtstown; Area: 1A.0R.30P & 155A.1R.4P. County: **KILKENNY.**

Elizabeth Melia, Folio No. 3658; Lands: Crossmorris; Area: 3A.0R.38P. County: **KILDARE.**

Martin Begadon, Folio No. (a) 3369 (b) 16718; Lands: (a) Tintore (b) Ballycolla; Area: (a) 4A.3R.37P. (b) 1A.0R.0P. County: **QUEENS.**

The County Council of the Co. of Donegal, Folio No. 6950; Lands: Stranolar; Area: 2A.2R.32P. County: **DONEGAL.**

Nicholas McGrath, Folio No. 461 (now closed to 14350); Lands: Drimaterril; Area: 3A.3R.8P. County: **QUEENS.**

Eugene McArdle, Folio No. 5954; Lands: Corblonog; Area: 11A.3R.35P. County: **MONAGHAN.**

John Joseph Holland & Noreen Holland, Folio No. 13298; Lands: Ballybrassil; Area: 27A.1R.24P. County: **CORK.**

Margaret Keane, Ballina Street, Belmullet, Co. Mayo. Folio No. 44466; Lands: Part of the land of Belmullet on the South Side of Barrack Street in the town of Belmullet. County: **MAYO.**

Sarah O'Donnell, Folio No. 18726; Lands: Bruse; Area: 4A.2R.8P. County: **CAVAN.**

Catherine Troy and Charlotte Troy, 100 Errigal Road, Drimnagh, Dublin 12. Folio No. 17159F; Lands: Property known as 100 Errigal Road situate on the east of Errigal Road in the parish and district of Crumlin. County: **DUBLIN.**

Matthew J. Gill, Folio No. 7152F; Lands: Farranadum; Area: (a) 17.438 acres (b) 4.113 acres (c) 9.369 acres (d) 22.963 acres. County: **KILDARE.**

I.A.P. Limited, of 2 Hardwick Street, City of Dublin. Folio No. 71461L; Lands: Townland of Fox & Geese; County: **DUBLIN.**

Patrick J. Doherty & Son Ltd., Folio No. 22522; Lands: Letterkenny; Area: 4.945 acres. County: **DONEGAL.**

Richard Brian Sleeman & Jennifer Isabelle Sleeman, Folio No. 25110; Lands: Ballylibert; Area: 2A.0R.39P. County: **CORK.**

Alice O'Callaghan, Folio No: 5996; Lands: Marshes Upper; Area: 0A.2R.7P. County: **LOUTH.**

Matthew O'Connor, Folio No. 16663 closed to 12755F; Lands: (1) Knocknacaperagh (2, 3, & 4) Rea; Area: (1) 1.325 acres (2) 33.969 acres (3) 4.375 acres (4) 7.995 acres. County: **KERRY.**

Francis Tanner Bailey, Folio No. 6091; Lands: Glennahulla; Area: 34A.2R.16P. County: **CORK.**

Patrick O'Donovan, Folio No. 56745; Lands: Dunmore; Area: 8 Acres. County: **CORK.**

William Phelan, Folio No. 124F; Lands: Pallas Little; Area: 1A.1R.15P. County: **QUEENS.**

Stephen Furlong, Folio No. 13743; Lands: Killagoey; Area: 2.400 acres. County: **WEXFORD.**

Bruce Blackwell, Gegg Cottage, Kilronan, Aran Island, Co. Galway. Folio No. 30929. County: **GALWAY.**

John Kelly, Folio No. 59L; Lands: Part of the land of Maudlintown, with the dwelling-house thereon situate on the west side of The Faythe in the town of Wexford. County: **WEXFORD.**

John Callaby, Buckill, Ballaghderreen, Co. Roscommon. Folio No. 9364; Lands: Townland: Buckill; Area: 41A.1R.35P. County: **ROSCOMMON.**

Seamus Kavanagh, Folio No. 8499F; Lands: Ballintemple; Area: 0.963 acres. County: **KERRY.**

James Gibney, Folio No. 1991 closed to 24826; Lands: Balreask Old; Area: 20A.3R.30P. County: **MEATH.**

Breda Cummins, Folio No. 2572L; Lands: Shannabooly; Area: 0A.0R.20P. County: **LIMERICK.**

Cornelius Halton, Folio No. 1000; Lands: Kilcogy; Area: 7A.1R.28P. County: **CAVAN.**

Thomas Dullaghan, of Castlebar St., Newport, Co. Mayo. Folio No. 15810; Lands: Part of the land of Ballindine North with buildings thereon on the south west side of the road leading from Claremorris to Tuam in the town of Ballindine containing 17 perches. County: **MAYO.**

Desmond Duffy, Folio No. 3162F; Lands: Part of the townlands of Ballymaclinaun situate in the Barony of Corcomroe. County: **CLARE.**

Catherine Keogh, of 263 Errigal Rd., Drimnagh, Dublin 12. Folio No. 13945F; Lands: A plot of ground situate on the north side of Errigal Rd. in the parish and district of Crumlin. County: **DUBLIN.**

Joseph & Patricia McCabe, of Main St., Monasterevan, Co. Kildare; Folio No. 2619L; Lands: Property known as 74 Wilfield Rd. situate on the west side of the said road in the district of Pembroke, parish of Donnybrook. County: **DUBLIN.**

Lost Wills

CUNNINGHAM, Thomas, deceased, late of Blackrock College, Blackrock, County Dublin, date of Death 19th April, 1990. Will any person having knowledge of the whereabouts of a Will of the above named deceased please contact Teresa Mullan, Solicitor, Abbey Street, Ballinrobe, Co. Mayo. Telephone No. (092) 41800.

MURPHY, Kenneth, deceased, late of Lauradell, Kill Lane, Foxrock, Dublin 18. Date of death 25th July, 1990. Would anyone having knowledge of the whereabouts of the Will for the above-named deceased please contact Cathal N. Young O'Reilly & Co., Solicitors, 1 Lr. Leeson Street, Dublin 2. Telephone 761728/763028/763001. Ref: CNY/tdeg.

CULLEN, Edward J., deceased, late of Tickerlevan, Graiguenamanagh, County Kilkenny. Will anyone having knowledge of the whereabouts of a Will of the above deceased who died on 4th May, 1938, please contact Messrs. Fitzgerald & Kelly, Solicitors, of 8 William Street, Kilkenny. Tel: (056) 22563.

HALLISSEY, Mrs. Bridie (otherwise Bridget), deceased, late of Carhoomeengar, Kenmare, Co. Kerry. Will anybody having knowledge of the whereabouts of any Will made by the above named deceased who died on the 2nd of December 1990 please contact Messrs. Martin Sheehan & Co., Solicitors, 16 South Mall, Cork. Telephone No. (021) 270986.

PATTERSON, Isobella, deceased, late of Corry post office, Drumkerrin, Co. Leitrim. Date of death the 1st of October, 1987. Would any person having knowledge of the whereabouts of a Will for the above named deceased please contact Flynn & McMorrow, Solicitors, Carrick-on-Shannon, Co. Leitrim. Tel. (078) 20033.

McSWEENEY, Molly (otherwise Mary), deceased, late of Cresley, Castlepollard, Co. Westmeath. Date of death 24th November, 1990. Will any person having knowledge of the whereabouts of any will for the above named deceased, please contact Wm. Smyth O'Brien & Hegarty, Solicitors, 24 Lr. Abbey Street, Dublin 1. Tel. 786130.

HUGHES, Timothy, deceased, late of Knockdoe, Claregalway, Co. Galway. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased, who died on 15 December, 1948, please contact MacDermot & Allen, Solicitors, 10 St. Francis St., Galway.

NOLAN, Thomas, deceased, late of Straffan Villa, Straffan Rd., Kill in the County of Kildare. Would anybody having knowledge of the whereabouts of a Will of the above-named deceased, who died on 24 day of December, 1990, please contact Messrs. Hanahoe & Hanahoe, Solicitors, 14 North Main St., Naas, Co. Kildare. Ref: Mr. Hanahoe/1451. Tel: (045) 97784/76272. Fax No: (045) 76272.

DOYLE, Robert Valentine, deceased, late of 87 Cashel Rd., Crumlin, Dublin 12. Will anyone having knowledge of the whereabouts of the Will of the above-named deceased, who died on 3 January, 1991, please contact Mr. Walter Doyle, 46 Balally Hill, Dundrum. Tel: 955265.

GILFILLAN, Rev. Francis J., deceased, late of Granard, Co. Longford, and formerly of Shannon Bridge, Co. Offaly, and Mohill, Co. Leitrim. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased, who died on 7 October, 1986, please contact Thomas K. Madden & Co., Solicitors, 4 Dublin St., Longford. Tel: (043) 41192/41561.

McCARROLL, Joseph, late of Clareview, Claregalway, Co. Galway, and Bloomfield Hospital, Morehampton Rd., Dublin 4. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on the 1 November, 1989, please contact Lewis C. Doyle & Co., Solicitors, Augustine Court, St. Augustine St., Galway. Tel: (091) 65677.

DINN, John Jared, deceased, late of Oriel Lodge, Seafield Avenue, Monkstown, Co. Dublin. Will any person having knowledge of a Will of the above-named deceased, who died on 16 October, 1990, please contact Messrs. Orpen Franks, Solicitors, 28/30 Burlington Rd., Dublin 4. Tel: 689622. Ref. RMW.

KEARNS, Rev. Martin J., deceased, late of Lanesboro Street, Roscommon. Will any person having knowledge of a Will of the above-named deceased, who died on 8 January, 1991, please contact Timothy J.C. O'Keeffe & Co., Solicitors, Abbey St., Roscommon. Tel: (0903) 26239.

KELLY, Francis (otherwise Frank), deceased, late of Vermaak, 51A Dollymount Avenue, Clontarf, Dublin 3. Will anyone having knowledge of the whereabouts of a Will of the above-named deceased, who died on 25 August, 1989, please contact O'Connor & Bergin, Solicitors, 30 Bachelors Walk, Dublin 1. Ref. MB/MD. Tel: (01) 732411.

TURNER, Catherine, deceased, late of Doone, Ballinahowen, Athlone, Co. Westmeath. Will anyone having any knowledge of the whereabouts of a Will of the above-named deceased, who died on 25 May, 1987, please contact Millett & Matthews, Solicitors, Baltinglass, Co. Wicklow. Tel: (0508) 81377.

Lost Title Deeds

NICHOLAS LEDWIDGE, deceased late of 3 Main Street, Bray, Co. Wicklow and **MARY JOSEPHINE LEDWIDGE,** of 3 Main Street, Bray, Co. Wicklow. Will any person having knowledge of the whereabouts of any Title Deeds to the above property please contact: Vincent & Beatty, Solicitors, 67/68 Fitzwilliam Square, Dublin 2. Phone No. 01-763721. Ref: COC.CF.L1312.1.

Miscellaneous

We are a firm of Solicitors in Northern Ireland currently handling several cases involving **"Glass Blower's Hands"** – a condition evidencing itself on the sufferers, hands in the form of dryness, fissuring and lichenification. This condition is caused by a combination of the friction of the blowing tube rolling against the skin together with the heat of the materials with which a person is required to work.

We would be obliged if any of your members have any knowledge of any similar cases, in this regard we are particularly interested in any successful cases brought against employers for damages for such a condition; if they would be kind enough to contact us with any relevant information or documentation.

The cases with which we are dealing with at present are the first of their type, as far as we can ascertain, to be contemplated in Northern Ireland. It is therefore for this reason that we would be obliged to hear from any of our colleagues outside our jurisdiction who may have acted for members of the glass blowing industry in similar circumstances or who know of any relevant cases or case law on the subject.

Any person having any information which they feel may be relevant should be kind enough to contact:–

Mrs. P.M.B. Kelly, LLB,
John Joy, Son & Murphy,
William Street,
Dungannon,
Co. Tyrone

Telephone: (0808687) 23221

CLONMEL ESTATE: Would anybody having knowledge of the present Estate Agents or Solicitors dealing with the Clonmel Estate please contact: Collins & Martin, Solicitors, 55 O'Connell Street, Limerick.

GERMAN – intensive course for beginners, given by solicitor, starting in February '91. Flexibility as to time and place. Phone Caroline Lynam at 213234 or 205825.

MARY T. MORRISSEY, SRN SCM Dip. in Hospital Admin. & Health Services, has commenced practice as Rehabilitation Consultant at: "Exeter", 39 Clashduv Estate, Glasheen Road, Cork. Tel: 021-543956.

THINKING OF RETIRING! Solicitors' practice seeks to acquire practice of retiring solicitor. Arrangements can be made concerning consultancy and premises. Reply in strict confidence to **Box No. 10.**

WANTED a set of Acts of the Oireachtas new or second-hand. Reply to **Box No. 11.**

RECENTLY QUALIFIED SOLICITOR available for temporary work such as sick leave or maternity cover in Dublin and the North East. Wide experience, excellent references available. Tel. 491646 (outside office hours).

ORDINARY SEVEN DAY PUBLICANS LICENSE wanted from any area in the State, free from endorsements. Please reply to:- O'Donovan Murphy & Co., Solicitors, Wolfe Tone Square, Bantry, Co. Cork. Ref: FM.HC. D1745.

Professional Information

PATRICIA HARNEY & CO. wish to advise that they have moved to Shortcastle, Mallow, Co. Cork. Telephone: 022-20140, Fax: 022-20289 are unchanged.

CONSULTANCY: Solicitor with 16 years experience of general practice (of which 10 at partnership level), with emphasis on property and commercial transactions; knowledge of office administration, including the use of computers in the small office; own modest client base; good communication skills, seeks position on part time basis as Consultant with small to medium established city firm, in order to gain free time to pursue legal research project. Terms: negotiable, but longer term partnership potential an advantage. Apply to **Box No. 14**. Confidentiality assured.

LANIGAN INTERNATIONAL FREIGHT LTD., of 96 Upper Drumcondra Road, Dublin 9. Folio No.: 71946L; Lands: Property situate on the north side of Langan Road in the parish and district of Finglas; County: **DUBLIN.**

Accounts Services

PROBATE/TRUST ACCOUNTS prepared for solicitors in Kerry/Cork. **Box 12.**

EXPERIENCED LEGAL BOOKKEEPER wishes to do accounts for small firms on part-time basis. Manual or computerised service available. Tel: 802271 evenings/ weekends, or **Box 13.**

Law Branch of the Patricans

will discuss

"Divorce – Remedy or Recipe for Breakdown"

at

St. Josephs, 191 Rathgar Rd., on 22 February, at 8.00p.m.

Mr. William Binchy will give the first paper.

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CHARTERED INSTITUTE OF ARBITRATORS (IRISH BRANCH)

THE ' EXPERT ' WITNESS

What are the Rights, Responsibilities and Liabilities of an Expert Witness?

Seamus Sorahan S.C.

Do you know what the Judiciary thinks of today's Expert witness?

The Hon. Mr. Justice John M. Gannon

Do you know what Arbitrators think of them?

Seán Mc Dermott F.R.I.C.S. F.C.I. Arb.

Contact : **Anne Bunni**
Branch Sec.

Wilton Place, Dublin 2.
Phone: 322475 Fax: 326587

1st March 1991

I.E.I.,
22 Clyde Road, Dublin 2.

2.00 P.M. *Followed by Reception at 6.00 P.M.*

Fee Members £40 Non Members £50

Law Society.....

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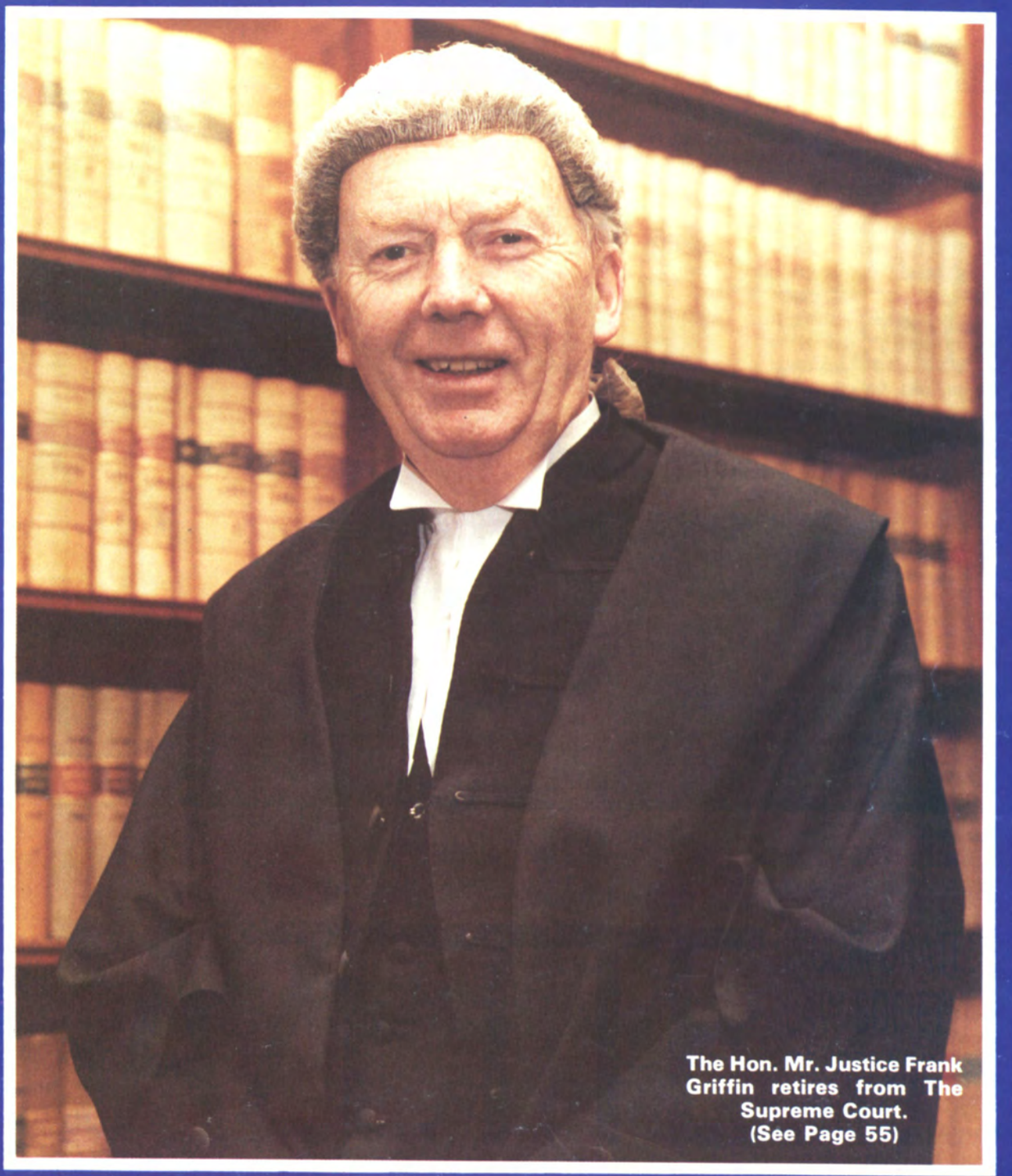
INVESTMENT CENTRES:
28 South Mall, Cork. (021) 275711.
Park House, Forster Street, Galway. (091) 63167/8/9.
125 O'Connell Street, Limerick. (061) 42477.

GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 85 No. 2 March 1991



The Hon. Mr. Justice Frank Griffin retires from The Supreme Court.
(See Page 55)

- Without prejudice or without effect?
- Trusteeship and the Pensions Act 1990

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 85 No. 2 March 1991

Viewpoint

GETTING THE SYSTEM TO WORK

In his talk on the occasion of the presentation of the P J O'Reilly Award, Dr. Tony O'Reilly drew our attention to the difficulties of participating in the economic systems of Russia and Eastern Europe. His firm could not put a factory into a Russian city because the Law of Property and the Law of Contract there did not exist. He could not assure his shareholders that the jurisprudential underpinning which is taken for granted by us, would operate within the next 20 or 30 years. We should be grateful for the underpinning and infra-structure which facilitates and exhilarates commerce and economic development here.

While it is of course true that we do have the constitutional and other protections that a well developed legal structure gives to the conduct of commerce and indeed of ordinary life, there are aspects on which we should not congratulate ourselves.

The improvement of infra-structure in this country has largely concentrated on the improvement of physical infra-structure, roads, communications etc. The practical legal infra-structure still is quite inadequate. We do not have a Land Registry system or indeed a Registry of Deeds system which works within acceptable time limits. Both of these institutions have been deprived of funds over the years and have not been permitted to develop themselves so as to provide an adequate service to their consumers. The Companies Office, even more strategic perhaps to commercial activities, is in a similar position. Ministers have made much play of the introduction of computerisation into these Registries. It has to be said that there is little point in computerising the end product if the process is impossibly slow. To have information emerge from a computer, as is the position in the Companies Office, which is anything up to 10 weeks old, does not serve any useful purpose. It is difficult to avoid the suspicion that there is a certain amount of window dressing about the computerisation.

The Land Registry is due to be converted into some form of State Corporation. This alone will not be sufficient, though it is essential that it be properly funded and structured, it requires also a reform of our Laws of Property and Conveyancing to enable it to operate in what will shortly be a 21st Century climate.

The other part of this island has just produced its recommendations for the reform of its Land and Conveyancing Law. The work of the Working Party under Professor John Wylie had the enormous advantage of the basic review of Northern Ireland Land Law published in 1971 but it still took 10 years to complete its work.

We cannot afford a 10 year time scale for the preparation of recommendations if we are to present ourselves as a Western developed country. The present Law Reform Commission was asked to give special attention to areas of Criminal Law and a whole time Commissioner, experienced in this area was appointed to spear head this work. Much of it will have been completed by the time the present Commission's term of office expires at the end of 1991. There is a strong case for making Land Law and Conveyancing a principal object of the next Commission's attention during its 5 year term. We are already a long way behind other Common Law countries and now Northern Ireland in this modernisation of Land and Conveyancing Law, and priority must be given to it. □

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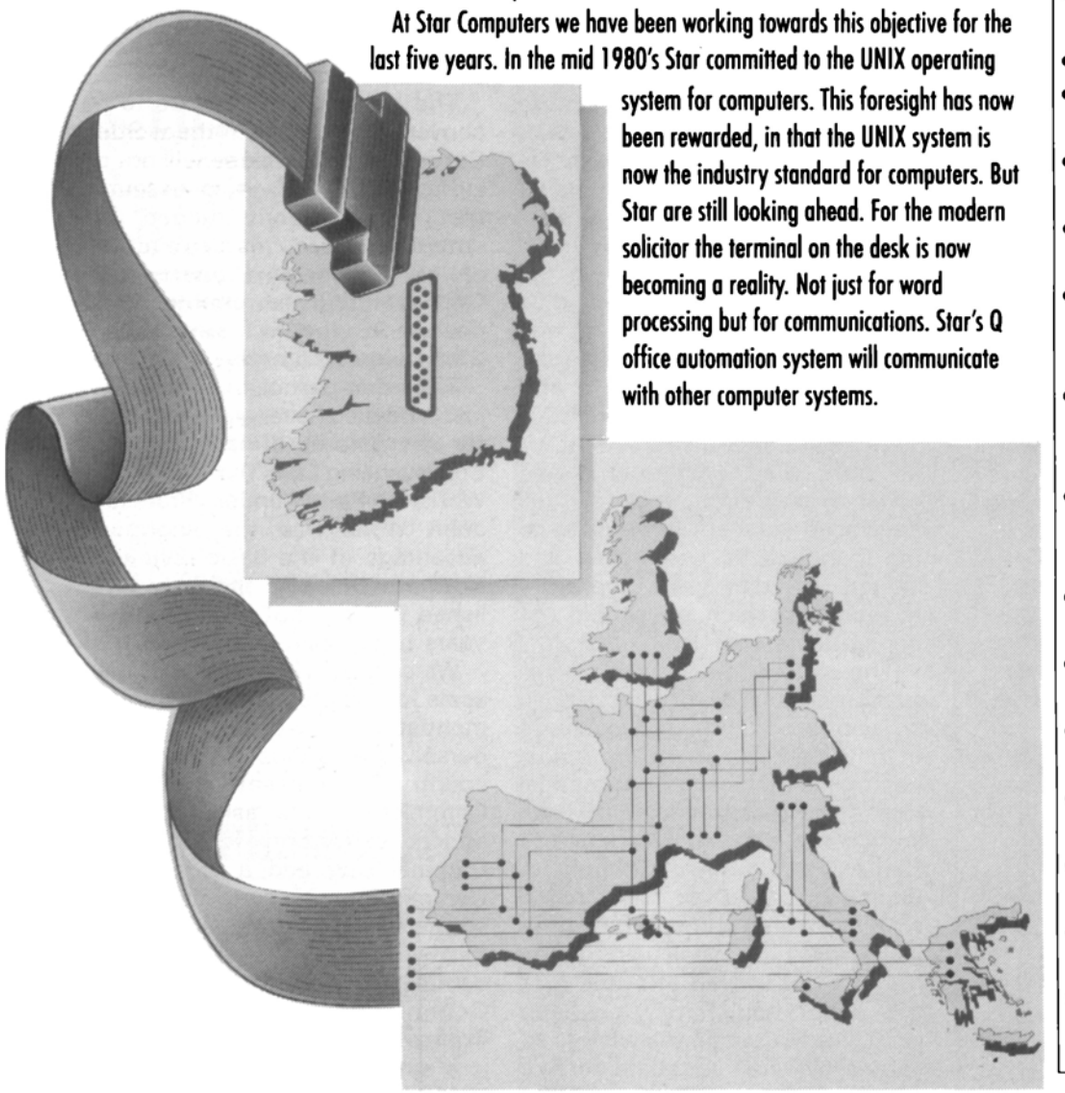

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Without prejudice or without effect?

Part 1

"It is public policy to encourage litigants to settle their differences and since they are most unlikely to negotiate satisfactorily if every word they make can be quoted against them later, the general rule has long been that nothing which is written or said "without prejudice" can be referred to in court subsequently without the consent of all parties concerned".[1]

As every practising lawyer is aware, litigation is a costly and time consuming business. Most legal actions have one trait in common – they are not cut and dry. Most have not one, but many, sides. As such, common sense and mutually fair compromise ought to prevail. Not only are the interests of the individual litigants furthered, but so also are the interests of public policy, in that valuable court time is spared for truly contentious matters.

In the settlement of disputes, compromise is a valued quality and there is recognition that it ought to be nurtured.[2] A prerequisite to compromise is negotiation. Should negotiations fail, were it not for some exception to the general rule that all relevant evidence is admissible,[3] such a compromise offer would be admitted in evidence to the court, with adverse consequences for the offeror.

The words "without prejudice" form the bedrock of such an exception to the general rule, when used in the appropriate and recognised circumstances. From the point of view of every practising lawyer, it is imperative that the limits of this privilege are fully appreciated.[4] Such an exception has received consistent endorsement from the courts on the basis that peaceful settlement of disputes is to be encouraged as furthering public policy. The most recent example of this indorsement by the Irish courts has come from Murphy J in *Holland and Ors. -v- McGill and Ors.* (1990).[5]

"In the settlement of disputes, compromise is a valued quality and there is recognition that it ought to be nurtured."

It has, however, been consistently repeated in judicial dicta, that these words are not to be used as if they had "magic properties".[6] Indeed, the use of these precise words may not be necessary in order that inadmissibility be achieved. As was stated by Lord Griffiths in *Rush and Tompkins Ltd. -v- GLC* (1988).[7]

> "... the application of the rule is not dependent on the use of the phrase 'without prejudice' and if clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission".

by
Thomas Courtney,
B.A., LL.B,
&
Nuala Jackson, B.A. (Mod),
LL.M., B.L.

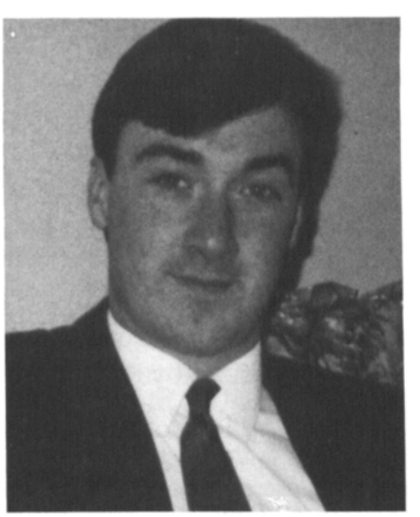
A failure to appreciate the true boundaries of effectiveness of the words "without prejudice" may be clarified by a review of the current state of the art principles, espoused by the courts in both Ireland and the United Kingdom. A useful, albeit pessimistic, baseline is that all admissions are admissible as evidence – the words "without prejudice" are but a qualification to this general principle.[8]

1. "WITHOUT PREJUDICE" – The words defined

A colourful definition of the words was provided by Kekewich J. in *Kurtz and Co. -v- Spence and Sons* (1887).[9]

> "Now you and I are likely to be engaged in severe warfare; if that warfare proceeds you understand I shall take every advantage of you that the game of war permits; you must expect no mercy and I shall ask for none; but before bloodshed let us discuss the matter and let us agree for the purpose of this discussion we will try to come to terms and that nothing that each of us says shall ever be used against the other so as to interfere with our rights of war if, unfortunately, war results".

A standard successful application of the words may be seen in *Rabin -v- Mendoza* (1954).[10] Here,



Thomas Courtney

Nuala Jackson

the defendant surveyor was employed to do a report in respect of a dwelling house. Subsequently, they were sued in negligence by the purchasers who employed them. During the attempts at achieving a settlement of the plaintiff's claim, "without prejudice" negotiations took place and as part of these, it was agreed that the plaintiff should try to get insurance against further defects developing. To this end, another surveyor's report was obtained. The plaintiffs later sought the production of this report[11] for the purposes of the trial but the court upheld the defendant's plea of privilege from production. Denning L.J. held

> "... if documents come into being under an express, or I would add, a tacit, agreement that they should not be used to the prejudice of either party, an order for production will not be made".[12]

2. "WITHOUT PREJUDICE" – An exception to the Rule

In order to make an admission, through the use of the words "without prejudice" inadmissible as evidence, it is essential to be aware of the limits which the authorities place on this exception to the general rule of admissibility:-

(a) litigation must be contemplated and the parties must be attempting to conclude a negotiated settlement thereto;
(b) statements must be made bona fide by the offeror;
(c) where an offer is accepted, the "without prejudice" privilege is lost;
(d) the statements made "without prejudice" must relate to the dispute in hand;

(a) Litigation must be contemplated.

The words "without prejudice" will only be effective when used to exclude statements made under the protective mantle of the words[13] where they pertain to the settlement of a dispute between the parties and where legal proceedings are contemplated. This is illustrated in the Irish case of *O'Flanagan -v- Ray-Ger* (1983).[14] The High Court had to decide upon the admissibility of a letter written by the defendant to the plaintiff which supported the plaintiff's claim to a beneficial interest in the property concerned. The defendant unsuccessfully sought to rely on the words "without prejudice" which headed this letter. The court held that these words do not constitute a magic formula and they have no application unless the parties are in dispute or negotiation and the communication in question is with a view to settlement. The court found that no dispute had existed between the plaintiff and defendant prior to the writing of the letter and therefore the defendant was making a statement as to the plaintiff's rights and was not trying to settle a dispute. The court thus concluded that the letter should be admitted. As Costello J stated:[5]

> "The rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another and terms are offered for the settlement of a dispute or negotiation (see *In re Daintrey* (1893) 2 Q.B. 116, 119). Mrs. O'Flanagan did not threaten any legal proceedings; her main concern was to ascertain from the defendant's solicitor what the true position was about her property. Having admitted the document in evidence without having read my view as to its admissibility was confirmed when I did so as it will be seen that the defendant was not offering to settle a dispute but was making a statement as to the right of the plaintiff and her husband in relation to the property; in addition he was himself threatening legal proceedings against Mrs. O'Flanagan. It is clear that the defendant obviously hoped that by heading the letter "without prejudice" he would be able to ensure that the letter could not be used if Mrs. O'Flanagan subsequently attempted to rely on it to support her claim that the company held the property as a trustee for her and her husband. I am satisfied that the letter was a true admission and acknowledgment that the company held the property in trust".

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That the words only retain their effect while negotiations are continuing is clear from the judgment of Murphy J in *Holland -v- McGill* (1990).[16]

> " . . . in the month of October and into early November negotiations took place with a view to resolving the differences that had arisen between them in relation to the litigation which was then pending. The correspondence relating to those negotiations was marked "without prejudice" and was without prejudice. However, the letter of 10th November which was tendered in evidence was admitted by me because it was clear that the negotiations were at an end from that letter".

But at what stage will a court hold that litigation was in contemplation? Is the applicable test objective or subjective? As will be seen below, it is submitted that the operative test is that the privilege is entirely dependent on the intention of the offeror to rely on it, such intention being within the reasonable contemplation of the offeree.

(b) Statements must be made bona fide.

An attempt to abuse the protection given will lead to the exercise of the court's discretion in a manner which is unfavourable to the offeror. This is illustrated in *Re Daintrey* (1883).[17] Here a debtor sent a letter, expressed to be without prejudice, to his creditor stating that he was suspending payment of his debts. This letter was held to be admissible in evidence to prove an act of bankruptcy as the letter was

> "one which from its character, might prejudicially affect the recipient whether or not he accepted the terms offered thereby".

Thus, the communication must be a genuine attempt at settlement. As explained by Fox L.J. in *Cutts -v- Head* (1984).[18]

> " . . . whilst the ordinary meaning of "without prejudice" is without prejudice to the position of the offeror if his offer is refused, it is not competent to one party to impose such terms on the other in respect of a document which, by its nature, is capable of being used to the advantage of that other".

It should further be noted that the courts tend to exercise their discretion against affording the usual protection which these words bestow if the compromise proposal is accompanied by threats or other inequitable conduct. This point is further considered at (d) *infra.*

(c) Where an offer is accepted, "without prejudice" protection is lost. Without prejudice communications are only rendered inadmissible if the offer contained therein is not accepted.[19] To this end, the courts will have to look at the communications between the parties as a preliminary step in determining whether or not such an agreement has been concluded.

Two distinct situations must be considered in this context

(i) partial settlements and

(ii) subsequent litigation between one of the parties to the settlement and a third party relating to a similar cause of action.

(i) PARTIAL SETTLEMENTS

A and B are in dispute and negotiations for a settlement commence. B makes an offer which consists of a multiplicity of elements some of which are acceptable to A and others which are not. B.'s communications are expressed to be without prejudice but, as stated above, these words only provide protection where the negotiations fail and the privilege is lost if settlement is reached. To what extent will the parts which are accepted lose the without prejudice protection if A agrees to them? The courts have decided this by investigation whether a binding agreement has resulted between the parties on the separate issues in question (in which case protection is lost in relation to those issues agreed upon) or whether the elements of the offer were so interlinked that rejection of one term means rejection of all so that the without prejudice privilege continues to attach to the whole? This issue was discussed in *Tomlin -v- Standard Telephones and Cables Ltd.* (1969)[20] where two matters, namely liability and quantum were separately under negotiation.

Here, the plaintiff suffered an accident at work. In subsequent negotiations between the plaintiff and the defendant employer, the extent of the latter's liability, as well as the quantum of damage, was discussed. Agreement was reached that liability should be equally apportioned but settlement efforts

"The courts have decided . . . whether a binding agreement has resulted between the parties on the separate issues."

were unsuccessful on the issue of quantum. The plaintiff's solicitors confirmed by letter the 50/50 agreement on liability. References, on the part of the defendant employer, to the agreement on liability were headed "without prejudice" but did not refute the plaintiff's letter. The defendant sought to have the question of liability re-opened before the court on the basis that the offer of settlement as to liability was inadmissible having been made without prejudice and, further, that the negotiations regarding liability and quantum were inextricably linked so that partial final settlement on one issue alone was not possible. The Court of Appeal held against the defendant employer. The protection of the words was lost once agreement was reached and the court could look at the correspondence in order to determine if there had been such agreement. Here the correspondence disclosed a binding agreement on the question of liability and, thus, insofar as an agreement had been reached, the words "without prejudice" lost their effectiveness. Danckwerts L.J. referred to the dictum of Lindley L.C.J. in *Walker -v- Wilsher* (1889).[21]

> " . . . they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter although written without prejudice operates to alter the old state of things and to establish a new one".

Thus, the words were held not to be effective to prevent disclosure to the court of a partial settlement

of "a separate and severable question".[22]

(ii) **THIRD PARTIES**

Negotiations which have taken place between A and B on a "without prejudice" basis may have resulted in the settlement of their differences. However, one or both of these parties may continue to be in dispute with C in connection with the same subject matter and negotiations with C may have been unsuccessful resulting in resort to litigation. Will without prejudice communications made for the purpose of compromise in the settled action be discoverable and admissible by C in litigation against either A or B or vice versa?

This was discussed in *Rush and Tompkins Ltd. -v- Greater London Council and Another* (1988).[23] The plaintiff builders entered into a construction contract with the first named defendant. The second named defendant, P.J. Carey Plant Hire (Oval) Limited, was a subcontractor. A dispute arose between the parties in that the subcontractor sued the plaintiff for loss and expense suffered due to delay and disruption.

The plaintiff contended that they were entitled to have these sums reimbursed by the first defendant (GLC). Negotiations having failed, the plaintiff commenced proceedings in order that the amount due to the second named defendant might be established and also sought a declaraction as to their right to be reimbursed by the first named defendant. Prior to the hearing, a compromise was reached between the plaintiff and the first-named defendant on the basis of negotiations which had been undertaken "without prejudice". The second named defendant, convinced that these negotiations must have disclosed matters relating to the valuation of their claim, sought discovery of these settlement documents and this was contested by the plaintiffs who argued that the without prejudice nature of the documents protected them from discovery. The House of Lords first addressed the admissibility of such documents in the litigation with the second named defendant and, in deciding this issue, had to balance the public policy of encouraging amicable settlement of disputes against the requirement that evidence be admitted where the justice of the case so requires.[24]

The House of Lords (overruling the Court of Appeal) decided in favour of the plaintiff contractor, Lord Griffiths holding that

> "... as a general rule the without prejudice rule renders inadmissable in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party".[25]

In reaching such a conclusion, the House of Lords clearly favoured the public policy objective of uninhibited opportunities for dispute settlement

> "... the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties".[26]

It is submitted that this decision does not amount to a deviation from the principle that the without prejudice protection disappears once settlement is reached; rather it redefines that principle so as to remove the protection only *inter partes.* Clearly there has been no such settlement between the third party and the party to the settlement against whom he is still in contention and so, in relation to the dispute between these parties, the without prejudice protection should remain.[27]

"... the House of Lords clearly favoured the public policy objective of uninhibited opportunities for dispute settlement..."

What, therefore, is the significance of the removal of the without prejudice label following settlement if it only applies as between the parties to that settlement? First, as illustrated in *Bentley -v- Nelson* (1963),[28] this rule prevents a party to the settlement from taking legal action in contradiction to the terms of the settlement and thereafter relying on these words to prevent the terms or the fact of the settlement being disclosed to the court. Secondly, the continuation of the without prejudice protection as against third parties may in itself be of limited extent, Lord Griffiths confining it to

> "... any subsequent litigation connected with *the same subject matter"*

As such, his Lordship envisaged that in litigation involving different subject matter, the "without prejudice" protection might well be lost.

(d) **STATEMENTS MUST RELATE TO THE DISPUTE IN HAND.**

Cross[29] states

> "... the statement in respect of which privilege is claimed must have some bearing on negotiations for a settlement".

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Thus, if, contained within the document headed without prejudice, there are statements unconnected with the attempts at settlement, these will be admissible as falling outside the scope of its protection. Threats and defamatory statements may be admissible despite their having been uttered in a without prejudice document.[30] This, it is submitted, is in conformity with the public policy behind the principle concerned and with the requirement of bona fides. There are numerous authorities in support of this principle. In *Kurtz & Co. -v- Spence and Sons* (1887)[31] the defendants were the owners of a patent and the plaintiffs were negotiating with them for the right to manufacture using the process concerned. Negotiations were conducted without prejudice, both orally and in writing, and, in the course of these without prejudice negotiations, the defendants threatened that unless agreement was reached, they would seek to enforce their legal rights. Such threats were contrary to the Patents Act 1883 s. 32.[32] It was held that the "without prejudice" protection only extended to genuine attempts at settlement and thus did not extend to the defendants' threats as to the likely outcome if negotiations failed.

The privilege against disclosure is not, however, limited to offers but extends to all communications forming part of the negotiations unless the privilege is otherwise defeated in the manner set out infra. In *South Shropshire D.C. -v- Amos* (1987)[33] the court was asked to consider whether or not the protection of this rule extended to an "opening short" in negotiations. This case concerned an application for compensation by the defendant in respect of his premises, the use of which had been discontinued owing to an order having been made in accordance with the Town and Country Planning Act 1971 (U.K.). The defendant's claim was made in letters headed "without prejudice". These negotiations were eventually unsuccessful and, in accordance with the statutory provisions, the matter was referred to a Lands Tribunal. It was argued by the plaintiffs that claims for statutory compensation could not, *inter alia,* be made on a without prejudice basis and that, in any case, initiating offers were not protected.

"The privilege against disclosure is not, however, limited to offers but extends to all communications forming part of the negotiations . . . . "

This argument gained support from the judgment of Harman J in *Norwich Union Life Insurance Company -v- Tony Waller Ltd.* (1984)[34] in which he stated that a course of negotiations was essential

> " . . . which must imply that each side has expressed a view and that a modus vivendi between them is being proposed . . . ."

He therefore concluded that the protection did not extend to letters initiating negotiations. Parker L.J. disagreed with this limitation.

> "If this were so no one could safely proceed directly to an offer to accept a sum in settlement of an as yet unquantified claim".

The court accepted that the juridical basis for such extension was the implied agreement between the parties as referred to Fox L.J. in *Cutts -v- Head.*[35]

> " . . . to achieve a compromise one of them has to make an offer. He might be apprehensive that his offer might be used against him if the negotiations failed. So he would make his offer without prejudice to his position if the offer was refused. But that was unfair to the other party. It was one-sided. So it was necessary to extend the without prejudice umbrella to cover both parties".

Thus, the court allowed the defendant's appeal and the letters were held to be inadmissible.

Part 2 of this article will appear in the April, 1991 *Gazette.*

NOTES

(1) *Simaan General Contracting Co. -v- Pilkington Glass Ltd.* [1987] 1 All E.R. 345 at 347, per Judge John Newey Q.C.

(2) See *Cutts -v- Head* [1984] 1 All E.R. 597 at 605 – 606 where Oliver L.J. held

> "That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in *Scott Paper Co. -v- Drayton Paper Works Ltd.* (1927) 44 R.P.C. 151 at 157, be encouraged freely and frankly to put their cards on the table . . . The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of traial as admissions on the question of liability".

(3) R.S.C. ORder 32 rule 2 – "Either party may call upon the other party to admit any document *saving all just exceptions . . . .*"

(4) *Roche -v- Peilow* [1986] I.L.R.M. 189; cf. *Hanafin -v- Gaynor* (1990) Irish Times Law Report 24 September 1990.

(5) *Holland and Others -v- McGill and Others Unrep.* H.C. 16/3/1990 per Murphy J.

(6) *O'Flanagan -v- Ray-Ger Limited, Poper and Bourke Unrep.* H.C. 28/4/1983. Here Costello J. said:-

> "the defendant had headed the letter "without prejudice" but these words alone possess no magic properties and some more substantial grounds had to be found to justify the defendants' objection to the admissibility of this letter".

(7) *Rush and Tompkins Ltd -v- Greater London Council and Another* [1988] 3 All E.R. 737 at 740.

(8) " . . . all evidence which is sufficiently relevant to an issue before the court is admissible" (Cross on Evidence 7th Ed. at p. 51). But this is subject to the proviso set out at page 60 thereof" . . . that the evidence tendered does no infringe any of the exclusionary rules that may be applicable to it".

This general principle of the admissibility of relevant evidence would appear to be part of the constitutional guarantee of fairness of procedures – *S -v- S* [1983] I.R. 68. See also *The People -v- T., Unrep.* CCA 27/07/88 where Walsh J. stated at p. 42 of the transcript

> " . . . the administration of justice itself requires that the public has a right to every man's evidence except for those persons who are privileged in that respect by the provisions of the constitution itself or other established and recognised privilege".

(9) *Kurtz and Co. -v- Spence and Sons* (1887) 58 L.T. 438.

(10) *Rabin -v- Mendoza and Co.* [1954] 1 All E.R. 247.
(11) Note that the privilege is not confined to communications between lawyers inter se, or even the parties themselves inter se, but arguably has a wider application, discussed supra.
(12) Loc. cit. per Denning L.J.
(13) The intention that the privilege would exist is sufficient to invoke the exception to the general Rule of Admissibility: That words other than "without prejudice" will invoke the exception is discussed supra.
(14) Op Cit.
(15) Ibid at pp. 14-15.
(16) Loc. cit. per Murphy J. at pp. 7-8.
(17) Re Daintry (1893) 2 Q.B. 116, 119. This dictum was cited with approval by Costello J. in *O'Flanagan -v- Ray-Ger and Others* loc. cit. at p. 14.
(18) *Cutts -v Head* [1984] 1 All E.R. 597.
(19) *Knapp -v- Metropolitian Permanent Building Association* (1888) 9 N.S.W.L.R. 468 and *Bentley -v- Nelson* [1963] W.A.R. 89.
(20) *Tomlin -v- Standard Telephones and Cables Ltd.* [1969] 3 All E.R. 201.
(21) *Walker -v- Wilsher* (1889) 23 Q.B.D. 335.
(22) Loc. cit. but cf. Ormrod J.'s dictum in *Tomlin*.
(23) Loc. cit.
(24) In the House of Lords, the sub-contractors sought discovery of the without prejudice documentation, notwithstanding the inadmissibility thereof. They contended that this would reveal the valuation which Rush and Tompkins Ltd. had put on the claim and, thus, would provide "a realistic starting point for negotiations and therefore be likely to promote a settlement" (per Lord Griffiths at p. 742). This argument was rejected by the court and discovery was refused.
"If the party who obtains discovery of the without prejudice correspondence can make no use of it at trial it can be only of limited value to him. It may give some insight into his opponent's general approach to the issues in the case but in most cases this is likely to be of marginal significance and will probably be revealed to him in direct negotiations in any event. In my view, this advantage does not outweigh the damage that would be done to the conduct of settlement negotiations if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation".
(25) *Rush and Tompkins Ltd. -v- Greater London Council and Another* [1988] 3 All E.R. 737 at 741.
(26) Ibid, per Lord Griffiths.
(27) Discussed supra.
(28) *Bentley -v- Nelson* [1963] W.A.R. 89. Here a disagreement in respect of a lease was settled on the basis of without prejudice communications with the lessor being permitted to re-enter the premises. The lessees then sought to restrain such re-entry and at an ex parte application to this end, the terms of the settlement were not disclosed to the court. It was held that the "without prejudice" protection did not survive once settlement had been reached and the terms of the settlement in their entirety should have been disclosed to the court.
(29) Cross on Evidence 7th Ed., p. 453.
(30) *Underwood -v- Cox* [1912] 4 D.L.R. (2d) 66; *Greenwood -v- Fitts* (1961) 29 D.L.R. 260.
(31) See footnote 9.
(32) Section 32 Patents Act 1883 provides:
"where any person claiming to be the patentee of an invention, by circulars advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture use sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats. Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent".
(33) *South Shropshire District Council -v- Amos* [1987] 1 All E.R. 340.
(34) *Norwich Union Life Insurance Co. -v- Tony Waller Ltd.* (1984) 270 E.G. 42.
(35) Loc. cit. at footnote 18.

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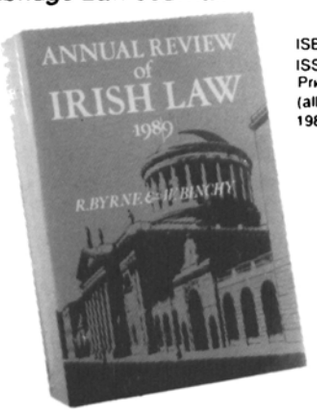

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Mr Justice Frank Griffin – a Retrospect

Mr. Justice Frank Griffin retired as a judge of the Supreme Court on 12 March, 1991, on attaining the retiring age of 72, after eighteen years of illustrious service on our highest court.

Frank Griffin was called to the Bar in Trinity term 1946 and to the Inner Bar in Hilary term, 1961. On 9 October, 1971, he was appointed to the High Court and on 3 January, 1973, to the Supreme Court. While on the High Court he was the first presiding judge in the re-established Special Criminal Court.

When a barrister is appointed to be a judge of the High Court or Supreme Court generally his working pattern has been formed, the discipline to which he has subjected himself professionally has become a habit, his prejudices, if any, have become established and his fairness or otherwise is part of his personality. Frank Griffin's practice at the Bar was impressive in volume and extensive in variety. Where required, his research of the law was thorough and accurate. He was gifted with an exceptionally good memory for facts and people. He was a skilful advocate and his overall performance was tempered by commonsense.

In 1971, when Frank Griffin believed that he was about to be confronted with making a choice between accepting an appointment to the High Court bench or continuing his practice, he discussed his problem with a number of his colleagues. The problem, as he saw it, was that the professional demands on his time were so heavy that he thought that if he went on the bench, he would have more time to devote to family life. He made his choice, but he never got the leisure for which he had hoped. His period as a High Court judge was a turbulent period in the Special Criminal Court which involved a good deal of stress and strain and, I believe, even a demonstration outside his own home.

Many people do not appreciate the volume of work, ever increasing, thrown on a judge of the Supreme Court. A judge has to have the energy and capacity to draw from the transcript and accompanying documents a picture of the case and the issues involved. Mr. Justice Griffin, in spite of some vicissitudes of health, had and has, tremendous energy and capacity for attention to detail. The writer has never known Griffin, J. to be wrong in any detail in the transcript and papers which he had to read and there have been many cases in which the volume of papers lodged in the Supreme Court for reading by the judges would have to be seen to be believed.

Every judge of the Supreme Court is independent in the exercise of his functions, and is free to express his personal opinion on matters of law and fact arising in the course of a case. It is not infrequent that judges, for the time being forming the Court, differ in their attitudes to issues of law and fact in a particular case. In a final court of appeal it is probably helpful that a problem is looked at from several angles.

It would be impossible within the scope of this article to attempt to make a full assessment of the role played by Mr. Justice Griffin in the Supreme Court during his eighteen years of service. All one can do is to present the broad picture, as subjectively viewed by the writer.

During his time on the Supreme Court, Mr. Justice Griffin served with three Chief Justices. It is interesting to recall that Mr. Justice William O'B. Fitzgerald was appointed Chief Justice on the same date as Frank Griffin was appointed a judge of the Supreme Court. When Chief Justice Fitzgerald died in October 1974, he was succeeded by Chief Justice Thomas F. O'Higgins who resigned in January, 1985 in order to serve as the Irish Judge on the EC Court and was succeeded by the present Chief Justice, Thomas A. Finlay.

From the very beginning Mr. Justice Griffin's judgments were independent, balanced, dealing with the facts accurately, clearly and fairly, and showing excellent and lucid research when reciting from prior precedent. Like virtually all judges, he had sympathy for the weak and poor, for the individual against the powerful corporation but his sense of fairness and commonsense prevented him from allowing sympathy to lead to injustice. Whereas at times his judgment simply consisted of concurring with one or more of his colleagues in most cases he delivered an independent judgment setting out his own reasons. It is my perception that in most cases his judgments coincided in their conclusion with that of the majority of the Court.

As an illustration, I would refer to one of his early judgments delivered in 1974, in *McNamara, an infant -v- Electricity Supply Board,* [1975], I.R. 1. The plaintiff, an 11-year old boy living in a housing estate in Limerick City, close to an ESB sub-station which was surrounded by a chain-link wire fence with numerous warning notices, having got over the fence on to a flat roof came in contact with a conductor carrying 10,000 volts causing him very serious injuries including amputation of part of the right arm and part of the left arm. The issue was the obligation, if any, of an occupier towards a trespasser, if the occupier had reason to believe that trespass was occurring. The judgment of Mr. Justice Griffin is a model of a study of changes in the law, how they came about, and the necessity to adjust to modern conditions. In the course of his judgment he said:—

> "If, by reason of its rigidity or harshness, a rule is found to be unsatisfactory it is undesirable that efforts to circumvent it should be made rather than it should be reconsidered. This has been done in recent years in regard to the rule in *Addie's Case*".

He also said:—

> *"Purtill's case* was criticised by counsel for the defendants on the basis that it was breaking new ground and that the notion of proximity was being introduced for the first time in that case. However, this is not so, as it is to be found in *Heaven -v- Pender* . . . . so that, like

Donoghue -v- Stephenson, Purtill's case could be said to be restorative rather than revolutionary".

I refer to these parts of the judgment to illustrate that from the very early period in the Supreme Court Mr. Justice Griffin's judgments were the result of thorough and careful research, and of intellectual exercise at a high level. Throughout his career on the Supreme Court he maintained a remarkable consistency in his approach to legal issues, adjusted to the changing facts of life such as the level of damages. He was a just judge and a lawyers' judge, but he always, and possibly deliberately, maintained a low profile in that he never hit the headlines with any startling pronouncements.

As an illustration of Mr. Justice Griffin's consistency in legal matters, it is interesting to look at two cases, one being *Boland -v- An Taoiseach & Others* [1974] IR 338 and the other being his later judgment in *Crotty -v- An Taoiseach & Others* [1987] IR 713. *Boland's case* was a challenge to the Sunningdale Agreement and a claim for an injunction restraining the Government from implementing any part of what was set out in the joint communiqué issued on the making of the Agreement. *Crotty's case* related to the action of the Government in relation to the Single European Act generally, and particularly in relation to Title III of the Treaty. In the *Boland case* Mr. Justice Griffin delivered a very clear judgment relating to the separation of powers under the Constitution.

In both cases an issue arose as to the right of the Court to restrain the Government in the exercise of its jurisdiction relating to foreign affairs. Article 29.4.1 of the Constitution provided that the executive power of the State in connection with its external relations has, in accordance with Article 28, to be exercised by or on the authority of the Government. Article 29.5 provides that every international agreement to which the State becomes a party shall be laid before Dail Eireann, and provides that the State shall not be bound by any international agreement involving a charge upon public funds unless the agreement has been approved by Dail Eireann. Article 29.6 provided that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas. Article 6 provides that all powers of Government, legislative, executive and judicial, derive under God, from the People, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy according to the requirement of the common good. Article 6.2. provides that those powers of Government are "exerciseable only by or on the authority of the organs of State established by this Constitution".

In *Crotty's case* the same principles were again laid down by Chief Justice Finaly, and by Mr. Justice Griffin. The majority of the Supreme Court (Walsh, Henchy and Hederman JJ). decided to the contrary. In the course of his majority judgment, Walsh J. said:

> "The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State, or the People, the contemplated restrictions upon freedom of action. To acquire the power to do so would, in my opinion, require recourse to the People 'whose right it is', in the words of Article 6, 'in final appeal to decide all questions of national policy according to the requirements of the common good'. In the last analysis it is the People themselves who are the guardians of the Constitution".

Henchy, J., in his separate majority judgment, said:

> "It follows that the common good of the Irish People is the ultimate standard by which the Constitutional validity of the conduct of foreign affairs by the Government is to be judged. In this, and in a number of other respects throughout the Constitution, the central power of the common good of the Irish People is stressed as one of the most fundamental characteristics of Ireland as a sovereign, independent, democratic State".

It is arguable that the majority decision did not pay due respect to Articles 29 and 6 of the Constitution, particularly to Article 6.2 which provided that the powers of Government are exerciseable *only* by or on the authority of the organs of State established by this Constitution. On the view of the Chief Justice and Mr. Justice Griffin political matters were left in the hands of politicians, and the Government was responsible to Dail Eireann. It may be that, as a result of the Supreme Court decision in *Crotty's case*, the Government, in entering into any foreign agreement or treaty in the future, will always have to look over its shoulder to see whether the treaty or agreement would be approved of by the Supreme Court, or to be precise, by the particular persons who happen at the relevant time to be members of the Supreme Court.

The issue of the quantum of damages for personal injuries resulting from negligence is a very live issue. It has been the subject of a number of leading cases in the Supreme Court dealing with the amount to be awarded for general damages for pain and suffering, and in dealing with compensation for future loss of earnings and future expenses consequent on incapacity and injury. The Supreme Court has endeavoured to find general principles which would guide judges to consistency of assessment. It may be that the recent substitution of a judge for a jury in the High Court will, by reason of the personal reaction and sensitivity of individual judges to similar circumstances, add a new variant. This is an area in which Mr. Justice Griffin has played a very prominent role. He delivered the majority judgment of the Court in *Reddy -v- Bates* [1983] IR 141 in July, 1983, and again the majority judgment on the damages issue in *Cooke -v- Walsh* [1984] ILRM 208, in March, 1984, reiterating and applying the principles laid down in *Reddy -v- Bates.* He also delivered the majority judgment in *Griffin -v- Van Raaj* [1985] ILRM 582, in July, 1985, enunciating similar principles. These judgments present a balanced and commonsense approach to a difficult subject.

When Mr. Justice Griffin retires he will be judged by his own judgments. The quality of these judgments was high. They were the product of research, care and preparation, and independence of view. The judgments also had the merit of consistency in legal principle, which nevertheless did not inhibit the exercise of charity where required by the justice of the case. In manner on the bench he was always gentle, and never overbearing. He will be missed. Everyone who had the honour of knowing him will wish him a long and happy retirement.

T. KEVIN LISTON, S.C.*

**T. Kevin Liston, S.C. is currently "Father of the Irish Bar" and one of its preeminent members over the last 50 years. It is an added tribute to Mr. Justice Frank Griffin that Kevin Liston should be the colleague-in-law who presents this retrospect.* □

From the Director General

The Compensation Fund

There is understandable concern in the profession at present about the Compensation Fund and in particular about the implications of recent claims (and possible further claims) on the cost of Practising Certificate. This year solicitors are being asked to pay £890 - of which £475 represents their individual contributions to the Fund. This is substantial both for the individual sole practitioner and the larger firm. In England and Wales, the Compensation Fund charge is £125 (for solicitor in practice for 6 years) and in Scotland it is £150 (for a solicitor of 3 years practice). The perception in the profession is that it is a spiralling charge; and the demand is that the Law Society must address the problem - and be seen to do so - in a serious and determined way.

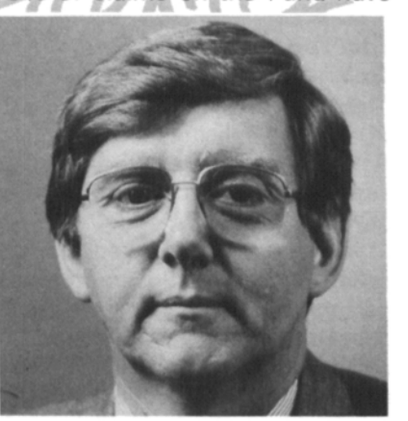
Some members believe that it is time to abolish the Fund and replace it with a system of fidelity bonding such as auctioneers and stockbrokers maintain. Many believe that, whatever happens, a 'cap' must be placed on individual claims limiting them at a reasonable level (£250,000 is the limit on individual claims under the S.M.D.F. indemnity cover).

There can, perhaps, be few practitioners who would seriously maintain that the existence of the Fund has not in the past been good - if in recent years costly - for the profession. As evidence of the existence of concern for the highest professional and ethical standards, it is difficult to think that the profession could provide anything better. And in a context where consideration might in the future be given to introducing 'licensed conveyancers', I doubt if any argument would carry more weight with Government for maintaining the *status quo* than the plain fact that, when conveyancing work is done by solicitors, the public are fully protected against fraud. So it can be argued that, even in a limited economic sense, the Fund has important advantages. In short, it has in the past given value. The question is can that be said to-day?

No doubt, as originally conceived, the Fund was defensible. But the framers of the 1954 and 1960 Solicitors Acts can never have envisaged - much less intended to afford protection for - the kind of cases that can nowadays arise where, arising from the decision in the *Trustee Savings Bank* case,* substantial claims can be made in circumstances where the money in question has never been handled, at least in the physical sense, by the solicitor. And such claims can be made by financial institutions who deal in the commercial world at arm's length with their clients, assess their risks in accordance with normal business principles and carry their own insurance - or ought to - against the risk of fraud. Can anything be more harsh than that the ordinary solicitor should be expected to bear the cost of claims, that could run to millions, in these circumstances?

The Law Society has been actively working to solve this problem. Its approach has been essentially two-pronged. First, it had made vigorous representations to the Minister for Justice and to the Attorney General - in writing and in face to face discussions - to the effect that the law must be changed to bring the Fund back to its original concept, namely, to provide protection for the client who trusts his solicitor with his property and suffers loss because of that solicitor's dishonesty. It has also urged that there should be a limit of £250,000 on any one claim. And the Society believes - and has said so - that a new criminal offence should be created which would make it easier to prosecute solicitors who misappropriate clients' funds.

But the Society has also been examining the problem from an 'in-house' perspective to see what changes might be required in areas of professional practice and in the Society's general overseeing of the profession to enable it to identify more easily and more quickly the factors that tend to give rise to problems that ultimately end up as Compensation Fund claims. The vast majority of solicitors are beyond reproach in their honesty and professional integrity. That applies also to sole practitioners; but the evidence suggests, nevertheless, that more sole practitioners get into trouble than any other category in the profession. In the past 10 years, 95% of claims on the Fund have



Noel C. Ryan
Director General

come from sole practitioners accounting for a total of £3.9 million in that period. Late submission to the Society of accountants' certificates is undoubtedly one of the early warning signs and the Society has now embarked on a policy which will see Practising Certificates withheld where solicitors offend against this requirement. It is also the policy of the Society to issue injunction proceedings against solicitors who continue to practise without a Practising Certificate. Recently, staff at Blackhall Place has been augmented to enable effect to be given to this policy. Other measures are also being considered and the matter will, it is hoped, be one of the issues that the forthcoming Solicitors Bill will address.

It is in nobody's interest that the protection which the ordinary member of the public enjoys at present should be lessened in any way; that is not the Society's objective. That could happen, however, if the Fund were not in a position to meet the demands placed upon it.

It might also, of course, happen if the courts were to hold that the Fund, in its present form, is not in accordance with constitutional norms of justice and the Government would do well to bear that in mind. A challange has already been threatened.

The Society intends to continue to press its case for reasonable change while, at the same time, monitoring the profession with the utmost diligence to try to lessen the burden on the honest practitioner.

Noel C. Ryan,
Director General

*Trustee Savings Bank -v- Incorporated Law Society of Ireland [1989] I.R. 234

This case concerned specifically s.21 (4) of the Solicitors (Amendment) Act, 1960, relating to the Compensation Fund, which subsection provides as follows:-

"Where it is proved to the satisfaction of the Society that any *person* has sustained loss in consequence of dishonesty on the part of any solicitor or any clerk or servant of a solicitor in connection with that solicitor's practice as a solicitor or in connection with any trust of which the solicitor is a trustee, then, subject to the provisions of this section, the Society shall make a grant to that person out of the Fund and the amount of the grant shall be such as represents in the opinion of the Society full indemnity for that loss".

By comparison s.23, (2) of the 1960 Act, which provides for the making by solicitors who practice in both parts of Ireland of a combined annual contribution to the Compensation Funds of the Incorporated Law Society of Ireland and the Incorporated Law Society of Northern Ireland, refers to a scheme operated by the Northern Ireland Society requiring contributions to a fund "for the compensation or indemnification of *clients* for or against losses due to defalcations of such practitioners or their clerks or servants . . . "

M., a partner in a firm of solicitors, applied to the plaintiff for a loan which was expressed to be for the purpose of purchasing a house. The plaintiff agreed to make the loan on condition that it received certain undertakings from the applicant's firm. A letter, which contained the required undertakings and which purported to be signed by another partner on behalf of the firm, was forged by M., and presented to the plaintiff, and monies were advanced by the plaintiff to the firm's account. When called upon to do so, both M. and his firm failed to repay the loan. The plaintiff applied to the defendant for compensation in respect of its loss from the fund maintained by the defendant. The defendant refused to pay compensation on the grounds that the plaintiff had not been a client of the solicitor. The plaintiff successfully applied to the High Court for a declaration that it was entitled to be paid compensation by the defendant out of the fund, and for an order that such payment be made. (See [1987] I.R. 430 for High Court decision of Johnson J. delivered 30/7/87).

On the defendant's appeal against the judgment and order of the High Court, it was *Held* by the Supreme Court (Finaly CJ, Griffin and McCarthy JJ concurring) in dismissing the appeal,

1. that the fact that s.21, sub-s.4 made specific provision for cases where a person sustained loss in consequence of dishonesty on the part of a solicitor "in connection with any trust of which that solicitor is a trustee" did not mean that the phrase "any person" in the sub-section should otherwise be interpreted as including only those who had been clients of solicitors; the special provision had been added in recognition of the fact that solicitors were often chosen to act as trustees but, in carrying out such duties, were not necessarily acting in connection with their practices as solicitors.

2. That the description given in s.23, sub-s.4 to the scheme operated by the Northern Ireland Law Society, which was expressed to be for the compensation of "clients" of solicitors, had no relevance to the interpretation to be given to s.21, sub-s.4 of the Act.

3. That, interpreting s.21, sub-s.4 according to its plain and unambiguous meaning, the plaintiff was rightly held to be a person which had sustained loss in consequence of dishonesty on the part of a solicitor, within the meaning of the subsection.

4. That in providing the plaintiff with a forged letter purporting to contain undertakings and to be issued on behalf of the firm of which he was a partner, M. was guilty of dishonesty in connection with his practice as a solicitor. □

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1991 AMERICAN BAR ASSOCIATION ANNUAL MEETING

Atlanta, Georgia, 8th to 15th August

The Law Society, in keeping with its policy of promoting Irish Solicitors in the international area as providers of services in the Commercial, Litigation, Arbitration, European, and General Fields of Law has decided to take a stand at the 1991 American Bar Association Annual Meeting.

The Law Society of England and Wales and the General Council of the Bar of England and Wales are also in attendance.

There are 28 hours of Exhibition time as follows:

Thursday 8th August	**11 a.m. – 5 p.m.**
Friday 9th August	**9 a.m. – 5 p.m.**
Saturday 10th August	**10 a.m. – 4 p.m.**
Sunday 11th August	**12 p.m. – 4 p.m.**
	7 p.m. – 11 p.m.

Apart from manning the stand solicitors will also have an opportunity of attending other activities during the A.B.A. Meeting in order to further promote their firms.

To defray the cost of providing the stand at the Exhibition one hour slots of exhibition time are being offered to interested Solicitors Firms at a cost of £500 per hour. As exhibition time is limited it will be allotted on a first come basis.

Firms wishing to book time on the stand should contact the undersigned as soon as possible.

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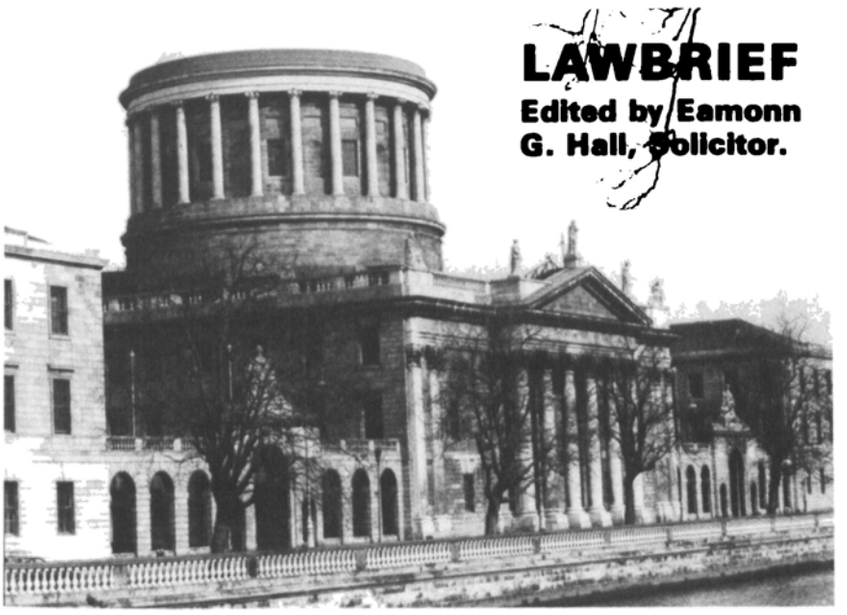

LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

PROBLEMS OF SEEING JUDGE IN HIS ROOM

In the case of *Regina -v- Pitman,* the Court of Appeal (England and Wales) (Lord Lane, Lord Chief Justice, Aliott and Auld JJ), *The Times* (Law Report) October 31, 1990 stated that many difficulties arose from visits by counsel and solicitors to a judge in his private room, which resulted in a steady flow of appeals.

The Lord Chief Justice said that the appellant had withdrawn a plea of not guilty to a charge of causing death by reckless driving and pleaded guilty. This had occurred after counsel had seen the judge in his private room. The Lord Chief Justice stated that there was a flow of appeals to the Court of Appeal arising from visits by counsel to the judge in his private room that no amount of criticism, no number of warnings and no amount of exhortation seemed to be able to prevent.

In order to draw to the attention of courts the point which the Court of Appeal hoped might at last go home, the Lord Chief Justice thought it necessary to cite at length a portion of the judgment of the court given by Mustill LJ in *R -v- Harper Taylor: R -v- Bakker, The Times,* (March 3, 1988).

> "A first principle of criminal law was that justice was done in public, for all to see and hear. By that standard a meeting in the judge's room was anomalous; the essence and, indeed, the purpose being that neither the defendant nor the jury nor the public were there to hear what was going on. Undeniably, there were circumstances where the public had to be excluded. Equally, the jury could not always be kept in court throughout.
>
> The withdrawal of the proceedings into private, without even the defendant being there, was another matter. True, as the court had stated in *R -v- Turner (Frank)* ([1970] 2 QB 321, 326), there had to be freedom of access between counsel and the judge when there were matters calling for communications or discussions of such a nature that counsel could not, in the interests of his client, mention them in open court.
>
> Criminal trials were so various that a list of situations where an approach to a judge was permissible would only mislead; but it had to be clear that communications should never take place unless there was no alternative.
>
> Apart from the question of principle, seeing the judge in private created risks of more than one kind. The need to solve an immediate practical problem might combine with the more relaxed atmosphere of the private room to blur the formal outlines of the trial.
>
> Again, if the object of withdrawing the case from open court was to maintain a confidence, as it plainly had to be, there was room for misunderstanding about how far the confidence was to extend; and, in particular, there was a risk that counsel and solicitors for the parties might hear something said to the judge which they would rather not hear, putting them into a state of conflict between their duties to their clients and their obligations to maintain the confidentiality of the private room.
>
> The absence of the defendant was also a potential source of trouble. He had to learn what the judge had said at second hand, and might afterwards complain (rightly or not) that he was not given an accurate account.
>
> Equally, he could not hear what his counsel had said to the judge and hence could not intervene to correct a misstatement or an excess of authority; a factor which might not only be a source of unfairness to the defendant but which might also deprive the prosecution of the opportunity to contend that admissions made in open court in the presence of the client and not repudiated by him might be taken to have been made with his authoritity."

The Lord Chief Justice said that the instant case was a prime example of the sort of difficulties which arose when those injunctions were disregarded.

Both counsel were told by the court clerk that the judge wished to see them in his room. Neither counsel had requested to see the judge in chambers before the start of the hearing. No shorthand writer was present and no recording device was present inside his room.

The Lord Chief Justice said that counsel, of course, had no option but to see the judge at his request. The only small criticism that could perhaps be made of counsel was that they could have suggested to the judge that a shorthand writer or some other recording device might perhaps be obtained.

" . . . there was a flow of appeals . . . arising from visits by counsel to the judge in his private room that no amount of criticism, no amount of warnings and no amount of exhortation seemed to be able to prevent."

Their Lordships concluded that the proceedings in the judge's room and everything said and indicated by the judge there amounted to a material irregularity. They put the appellant and his advisers in obvious difficulty. They placed pressure, improper pressure, albeit indirectly on the appellant to change his plea to one of guilty in the fear that what the judge had said meant, first, that his chances of acquittal were thin and that, if he was convicted by the verdict of the jury, he would almost certainly go to prison.

The Court of Appeal held that the conviction for causing death by reckless driving was both unsafe and unsatisfactory. Accordingly the conviction on a plea of guilty of causing death by reckless driving was quashed.

THE RIGHT OF COMMUNICATE: BREACH OVER PRISONER'S LETTERS

The European Court of Human Rights has held in *McCullum United Kingdom* (Case No. 20/1989/180/238) that restrictions imposed upon Mr. McCullum's correspondence while he was in prison constituted violations of Article 8 of the *European Convention on Human Rights.* The Court delivered judgment on August 30, 1990.

Article 8 of the European Convention on Human Rights provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

While the applicant was detained in prison, the prison authorities stopped five letters written by him, delayed two others and also withheld from him copies of two letters written on his behalf. In addition, a disciplinary award imposed on him included a 28-day restriction on his correspondence.

I. **Alleged violations of Article 8.** Neither the United Kingdom Government nor the applicant contested the Commission's opinion on this point. The Court saw no reason to disagree and held unanimously that, with the exception of the delaying of the two letters in question, the measures affecting the applicant's correspondence which were at issue constitued violations of Article 8.

II. **Alleged violations of Article 10.** The applicant had not pursued his claim of breach of Article 10, which guaranteed freedom of expression. The Court held unanimously that it was not necessary for it to examine the case of its own motion under this provision.

III. **Alleged violations of Article 13.** The applicant had initially submitted that, contrary to Article 13, he had no effective domestic remedy in respect of his claim, that the conditions of his detention in the Inverness segregation unit and the measures affecting his correspondence had given rise to violations of Article 3 and Article 8 respectively. However, at the Court's hearing his counsel conceded that the judicial remedies available through the national courts would have been effective and that there had therefore been no breach of Article 13.

In those circumstances the Court held unanimously that it was not necessary to examine the case under Article 13.

IV. **Application of Article 50** The Court dismissed unanimously a claim by the applicant for £3,000 as compensation for the distress and sense of isolation occasioned by the interference with his correspondence, considering that its finding of violations of Article 8 constituted sufficient just satisfaction. On the other hand, it unanimously awarded him £3,000 out of a total claimed of £14,889, in respect of costs and expenses referable to the proceedings in Strasbourg.

Kearney's Case

It is appropriate to refer to the decision of *Kearney -v- Minister for Justice* [1987] ILRM 52. There, the plaintiff was a convicted prisoner. Every letter by or to him, including to or from his legal adviser, was read by the prison governor or other person deputed by him in accordance with rule 63 of the *Rules for the Government of Prisons, 1947*, which provided that in the event of any letter's contents being objectionable it shall not be forwarded, or the objectionable part shall be erased, according to discretion. The plaintiff had claimed that rule 63 was in breach of his constitutional right to communicate. In addition, the plaintiff claimed damages for breach of his constitutional rights in circumstances where he discovered that certain items of correspondence had not been forwarded to him. The defence claimed that while the items in question had been interfered with in the context of an industrial dispute this had not been authorised and the State was not liable for such actions since they were outside the course of the duty of the persons concerned.

In *Kearney,* Costello J held that the right to communicate under Article 40.3 of the Constitution which had been considered in some detail in *Attorney General -v- Paperlink Ltd.* [1984] ILRM 373 was not a right to communicate freely, but had to be considered in the light of the security and other requirements of the prison environment in relation to convicted prisoners and the real risk of, for example, legal advisers abusing the confidentiality of the solicitor-client relationship. In the light of the practice under which rule 63 was operated, where only material relating to the security of the prison and privacy of other prisoners was treated as "objectionable" for the purpose of the rule and where staff must treat information in legal advisers' communications as confidential, the rule did not infringe the plaintiff's right.

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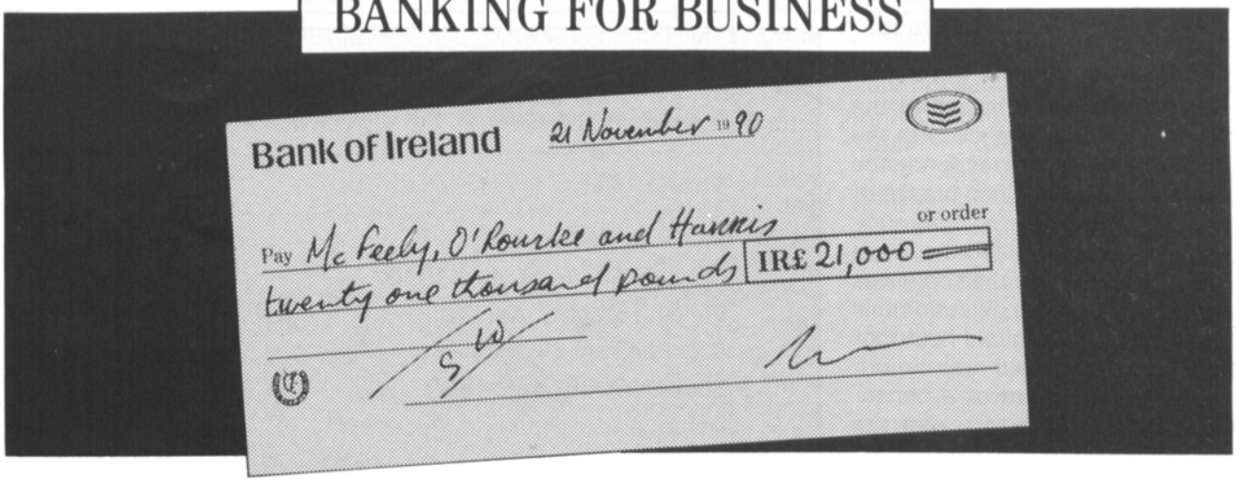

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Unjustified Breach of Constitutional Rights

However, Costello J held that the unauthorised interference with the plaintiff's items of correspondence constituted an unjustified breach of his constitutional right to communicate, since they should have been delivered to him once their contents were found not to be objectionable under rule 63. Costello J held that the wrong committed was an unjustified infringement of a constitutional right not a tort, and the State could be sued in respect of it and, although it was not authorised, the State was liable when it could be shown that had the wrong been a tort, vicarious liability would attach to the State. Costello J concluded that since the plaintiff suffered no pecuniary or other loss arising from the delay in delivering his letters, and there was no sufficient evidence to show that the wrongful actions were so oppressive or vindictive as to justify an award of exemplary damages, the plaintiff was entitled to nominal damages only.

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An tOireachtas

List of Measures enacted by the Oireachtas during the year 1990

Title of Act	Number
Bord Glas Act, 1990	1 of 90
Decimal Currency Act, 1990	2 of 90
Building Control Act, 1990	3 of 90
B & I Line Act, 1990	4 of 90
Social Welfare Act, 1990	5 of 90
Defence (Amendment) Act, 1990	6 of 90
Dun Laoghaire Harbour Act, 1990	7 of 90
Horse Breeding Act, 1990	8 of 90
Larceny Act, 1990	9 of 90
Finance Act, 1990	10 of 90
Local Government (Planning and Development) Act, 1990	11 of 90
Firearms and Offensive Weapons Act, 1990	12 of 90
International Carriage of Good by Road Act, 1990	13 of 90
Derelict Sites Act, 1990	14 of 90
Industrial Credit (Amendment) Act, 1990	15 of 90
Criminal Justice Act, 1990	16 of 90
Control of Clinical Trials and Drugs Act, 1990	17 of 90
National Treasury Management Agency Act, 1990	18 of 90
Industrial Relations Act, 1990	19 of 90
Shannon Navigation Act, 1990	20 of 90
Local Government (Water Pollution (Amendment) Act, 1990	21 of 90
Turf Development Act, 1990	22 of 90
Health (Nursing Homes) Act, 1990	23 of 90
Broadcasting Act, 1990	24 of 90
Pensions Act, 1990	25 of 90
Insurance Act, 1990	26 of 90
Companies (Amendment) Act, 1990	27 of 90
Teacher's Superannuation (Amendment) Act, 1990	28 of 90
International Development Association (Amendment) Act, 1990	29 of 90
Public Hospitals (Amendment) Act, 1990	30 of 90
Foir Teoranta (Dissolution) Act, 1990	31 of 90
Criminal Law (Rape) (Amendment) Act, 1990	32 of 90
Companies Act, 1990	33 of 90
Criminal Justice (Forensic Evidence) Act, 1990	34 of 90
Exchange Control (Continuance) Act, 1990	35 of 90
Electoral (Amendment) Act, 1990	36 of 90
Unit Trusts Act, 1990	37 of 90
Appropriation Act, 1990	38 of 90

John Kelly

John Kelly's untimely death has deprived Irish academic life in general, and the Faculty of Law at University College Dublin in particular, of a gifted and distinguished legal scholar whose loss will be keenly felt by those who knew him as a generous and supportive colleague.

John was appointed to the Chair of Jurisprudence and Roman Law in University College Dublin in 1965 and during his long tenure of that office he was in the front rank of academic lawyers in this and the neighbouring island, and in mainland Europe. Indeed, with respect to his published work in the field of Roman Law, his scholarly reputation knew no geographical boundaries but was worldwide.

Like other distinguished lawyers of his generation he did not read law for his primary degree but pursued a brilliant undergraduate career in classics, obtaining first class honours in his final degree examination. His Professor of Latin, among others, hoped that he would pursue an academic career in the Faculty of Arts in University College but this was not to be. He was awarded a Travelling Studentship by the National University in 1953 which took him to the renowned German University of Heidelberg. There his doctoral research which obtained for him a Dr. Jur. was conducted in the field of Roman Law which was to remain one of his abiding interests throughout his academic life.

On his return to Ireland he pursued his legal studies for the Irish Bar to which he was called in 1957. It was perhaps inevitable, however, that someone of his ability, and with his interests, should return to the academic world which he did to Oxford where he obtained a B. Litt. in 1960 and an M.A. in 1961. He was a Fellow and Lecturer in Law at Trinity College Oxford from 1961 until his return to Dublin in 1965.

Shortly after his return to Dublin he succeeded William Finlay as Dean of the Faculty of Law in University College. His tenure as Dean coincided with a policy change in the Faculty of Law which had been initiated by his predecessor as Dean, William Finlay, which saw part-time teachers who were almost all distinguished practitioners being replaced by full-time academics. John Kelly's reputation as a teacher and scholar was to make University College Dublin an attractive goal for aspirant young academics of law. The transition to a Law School staffed by full-time academics took some time however and distinguished practitioners continued to teach in the Law School. A measure of the quality of such part-timers during John's period as Dean is that three of them became judges of the High Court and one a judge of the Supreme Court.

Not least of his contributions to the Law School in University College was his part in the acquisition of *The Irish Jurist* on the death of its then proprietor and editor Vincent Delany. During John's editorship of the *Jurist* his own standing as a Roman lawyer enabled him to commission articles from leading Roman lawyers in Europe and this guaranteed the international appeal of the *Jurist*. It continues to enjoy the international reputation established during John's editorship under its current editor, Professor W.N. Osborough, who worked closely with John in the early days of University College's stewardship of the *Jurist*. It has provided law teachers in University College and elsewhere in this jurisdiction with an important outlet for the publication of learned articles on different aspects of Irish law and a heavy debt is owed by the Irish legal community to John Kelly for his work on, and commitment to, the *Jurist*.

Law as an academic discipline in Ireland had suffered because of the dearth of indigenous legal materials and John's seminal work *Fundamental Rights in the Irish Law and Constitution,* published in 1961, set a salutary example for Irish law teachers to follow. His magnum opus on the *Irish Constitution* was first published in 1980, and is now in its second edition. His Roman Law publications include *Princeps Judex* (Weimar 1957), and *Roman Litigation* (Oxford, 1965).

He has added much more to the corpus of Irish legal literature, and his retirement from active politics and return to full-time academic life held the promise of more books and many learned articles. He had taken leave of absence in the first term of the current academic session to complete work on a major new book entitled *"Western Legal Thought"*; academic friends and colleagues must ensure publication of this work as a posthumous tribute to a great Irish scholar.

He wore his own distinction lightly and was the most congenial and affable of men who was ever ready to help and encourage his junior colleagues to publish the fruits of their research. He established an impressive rapport with his students and was prepared to listen to their various woes and tribulations with sympathy and understanding without sacrificing the high standards which characterised his academic life.

I knew John Kelly for more than twenty years as a colleague and I was privileged to have numbered him among my friends. The members of the Law Faculty of University College express their sincere condolences to his widow, Delphine, his son Nicholas who not so long ago was one of our students, and the other members of his family.

Ar dheis Dé go raibh a anam dílis.

J.C.B.

Antonia O'Callaghan, Barrister

Antonia O'Callaghan, BL.

Mr. Noel Clancy, Senior Counsel, delivered a eulogy to the late Antonia O'Callaghan, barrister, at a recent Memorial Mass. Among the congregation were the President of Ireland, Mary Robinson, the Chief Justice, the Hon. Mr. Justice T.A. Finlay, the President of the High Court, the Hon. Mr. Justice Liam Hamilton, other members of the judiciary and legal colleagues. The following is an extract from Mr. Clancy's eulogy.

"Antonia O'Callaghan was called to the Bar in 1977 having achieved, in the words of the late and esteemed Mr. Justice John Kenny, miraculous results. She had previously taken her primary degrees, including an LL.B, in University College, Galway, and thereafter had taught in Mallow, Tralee, Limerick and finally in the Presentation Brothers College, Bray, for almost six years. She was a devoted professional teacher and it is quite understandable that her students had continued to call on her at her house in Killiney, literally in droves, to seek her help and her guidance. So many of them attended her funeral and are here today.

With others of the legal profession, Antonia O'Callaghan founded CLASP - Concerned Lawyers Association for Social Problems, which now has more than 160 members including members of the judiciary, solicitors, barristers, psychiatrists and social workers. Through this organisation hostels have been founded, prisons are visited and a host of other works are undertaken.

With Breeda Ging, barrister, she founded and ran for seven years, with great success, the Dublin School of Legal Studies.

Antonia was a lecturer at King's Inns and she performed in this role with the ultimate success of her students as her only goal. She regarded any failure as her responsibility, any achievement as that of the student.

As a member of the Law Library she was constantly surrounded by younger members who posed question after question. She found time to answer them all with competence and understanding. It is a sobering thought that her influence on her students will be reflected in generations of future lawyers. May she rest in peace." □

THE EUROPEAN LAW STUDENTS ASSOCIATION

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A two-day International Conference

"The Free Movement of Persons – Towards a Common European Home"

on Friday, 19th and Saturday, 20th of April, 1991

commencing at 10.00a.m.

in the European Commission Building, Molesworth St., Dublin 2.

The conference will be opened by Mr. Peter Sutherland S.C., Chairman AIB Group and former European Commissioner for Competition. Distinguished practitioners from Brussels, the UK and Ireland will address the conference on the practical implications which the free movement of persons will have for workers, professionals and students. The conference will also address the consequences which the removal of impediments to free movement will have for State security and for the policing of international crime.

For further details contact: Eamon Marray or Antoinette Long at 720622.

CRIMINAL LAWYERS COMMITTEE -

Members of the profession, particularly those engaged in the practice of Criminal Law, should note that the Society's newly formed Criminal Lawyers Committee meets monthly in Blackhall Place. The Committee is chaired by Mrs. Moya Quinlan and consists of the following members:-

Mr. Michael Staines
Ms. Anne Rowland
Mr. Garrett Sheehan
Mr. Peter Reilly
Mr. James McGuill
Mr. Dermot Lavery
Mr. Gerard Griffin
Mr. Padraig Ferry
Mr. Barry Donoghue

The Committee welcomes queries and the submission of topics for discussion and any correspondence should be sent to the Secretary, Criminal Lawyers Committee, The Law Society, Blackhall Place, Dublin 7.

Younger Members News

Young Members for Europe

With Europe rushing to meet us in 1992, the Younger Members Committee (YMC) have decided to go some of the way towards meeting some of our colleagues in the other cities of Europe. The equivalent organisations, such as the Young Paris Bar (see separate advert), in other European Countries are having their annual conferences throughout the coming year.

It has been proposed that a member of the Younger Members Committee and any other younger member should travel to the various conferences in order to get to know some of our fellow European colleagues. Out of funds provided by the Law Society, the YMC will make a contribution towards the traveller's costs. If you are interested in availing of this opportunity please write to the Chairman of the YMC, c/o The Law Society, applying to be considered for a specific conference according to the list below.

The selection of "A Younger Member" to travel to a particular European conference will be based on the following criteria:-

1. A knowledge of the language of the State sponsoring the conference would be a definite advantage. Please state the level of your proficiency in that language.
2. Evidence of previous involvement with European organisations and any present involvement in same.
3. Please state the reason why you wish to avail of the opportunity to travel to the particular conference.
4. Please submit your ideas on the issues you feel the YMC should deal with at these conferences or otherwise.
5. Please also remember that you will be required to do a report on the conference upon your return.

People who have not previously involved themselves in either Younger Member activities or European Oriented activities are especially invited to submit their names for travel to one of the conferences.

Anybody interested in travelling should write to Sandra Fisher, Media Officer, The Law Society, Blackhall Place, Dublin 7, before Friday 19th April 1991.

Joseph Kelly, YMC

Younger Members Committee

Committee Meetings 1991	*Other Events*
1. Thursday, 17th January	
2. Wednesday, 20th February	
3. Wednesday, 20th March	13-18 Brighter Homes Exhibition Law Soc. of Scot. Conf. 22-24 March, Gleneagles 7th March Galway Quiz 4th April Joint Quiz Night – Waterford & Kilkenny – Granville Hotel, Waterford. Athlone & Limerick Quizzes – dates to be finalised
4. Thursday, 18th April	10 April – Quiz Night Final – Royal Marine Dun Laoghaire SYS – Westport 12-14 April Law Soc. of N.I. Conf. Elterwater, Lake District, England.
5. Thursday, 16th May	25th May – Soccer Blitz Law Society Blackhall Place. Law Soc. Conf. Killarney 2-5 May.
6. Thursday, 20th June	21st June – Bicentenary Ball.
7. Thursday, 25th July	
8. No Committee meeting in August	
9. Thursday, 19th September	
10. Thursday, 10th October	Law Soc. of England Conf. – Brussels, 16-20 Oct. 14th November – Law Society – Annual General Meeting

YOUNGER MEMBERS COMMITTEE

in association with the Dublin Solicitors Bar Association

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Wednesday, 10th April 1991

at The Royal Marine Hotel, Dun Laoghaire

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For further details and application form please contact: Sandra Fisher, Media Officer, The Law Society, Blackhall Place, Dublin 7. Tel: 710711, Fax: 710704 (Closing date for receipt of application forms is Monday, 8th April 1991).

Younger Members News – Contd.

Northern Ireland Young Solicitors Group

Calendar of Events

1991

Apr 12-14	Paris – Union Des Jeunes Avocats de Paris European Weekend
Apr 24	Seminar: Liquor Licensing
Apr 25	Annual European Young Lawyers Reception and Dinner (in conjunction with The British Council)
Apr 26-28	Lake District – Law Society of N.I. Annual Conference
Apr 26-28	Activity Weekend at Lough Mevlin Outdoor Pursuit Centre, County Fermanagh
May 3-5	Birmingham – YSG (England & Wales) National Conference
Mar 10-11	NIYSG Sixth Annual Conference – Templeton Hotel, Templepatrick
June 13-16	Holland (The Hague) – Young Bar's Annual Conference AGM for 1990-91

The 29th Annual Congress of the

INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Westminster - London
1-6 September 1991

For further details contact: AIJA 1991, c/o 10 Wendell Road, London W12 9RT, UK. Tel: 081-743 3106. Fax: 081-743 1010.

UNION DES JEUNES AVOCATS DE PARIS

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12-14 April 1991

For further details please contact: Sophie Ferjanj, 139, Avenue Victor Hugh, 75116 Paris. Tel: 47.55.07.47.

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2nd row: (left to right): Philip Joyce, P. Frank O'Donnell, John G. Fish, Thomas D. Shaw, Grattan d'Esterre Roberts, Geraldine M. Clarke, Elma Lynch, David R. Pigot, Patrick Glynn, Michael V. O'Mahony, Gerald Hickey, James McGuill, James V. Long.
3rd row (left to right): Ward McEllin, Bruce St. J. Blake, Liam Irwin, John Harte, Michael Irvine, Brian Mahon, Laurence K. Shields, Francis D. Daly, Gerard Doherty, Patrick O'Connor, Timothy Lucey, Anthony H. Ensor, Michael Quinlan.
Back row (left to right): Gerard Griffin, Niall Casey, Owen Binchy, Anne Neary, Justin McKenna, Peter F. Murphy, Raymond Monahan, William Osborne, Barry Galvin, Eugene O'Sullivan.

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Donal G. Binchy, President of the Law Society, with President Mary Robinson, on the occasion of a recent visit to Aras an Uachtaráin.

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The President of the Dublin Solicitors Bar Association, Dominic M. Dowling, presenting a cheque to The Lord Mayor of Dublin, Michael Donnelly, on behalf of The Council of the DSBA for The Mansion House Fuel Fund.

Visit by Attorney General to Blackhall Place
(Left to right): Noel C. Ryan, Director General, Mrs. Moya Quinlan, Donal G. Binchy, President, John L. Murray, S.C., Attorney General, Andrew F. Smyth, Junior Vice President, Ward McEllin, Maurice Curran and Michael V. O'Mahony.

Medico-Legal Society of Ireland Dinner
Top Row: Nora Callaghan, Solr., Eamonn Hall, Dr. Sheila Willis. Ph. D., Dr. Robert Towers, Dr. Desmond McGrath, Ms. Emer O'Donoghue, Solicitor, Dr. John Harbison, State Pathologist, Dr. Anne Clancy, Dr. Donal McSorley, Dr. Max Ryan.
Seated: Prof. P. N. Meenan, Carmel Killeen, Solicitor, Prof. P.D. J. Holland, Ms. Mary MacMurrough-Murphy, Barrister, President, Brendan Garvan, Solicitor, District Justice A. B. Cassidy.

Southern Law Association Dinner at Jury's Hotel, Cork
(Left to right): Peter Whyte, George Crosbie, Simon Murphy (Hon. Secretary), Dan McLoughlin and John O'Meara.

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LAW SOCIETY – ANNUAL CONFERENCE

GREAT SOUTHERN HOTEL KILLARNEY

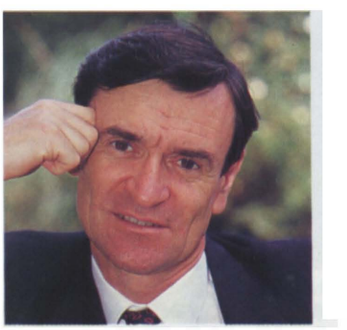
2nd – 5th MAY, 1991.

IRISH LEGAL PRACTICE IN THE 1990's

(Conference Brochure was recently circulated to all members)

CONFERENCE COMMITTEE
(Left to right): **Chris Mahon (Director, Professional Services), Anthony Ensor, Paddy Glynn, Pat O'Connor, Noel C. Ryan (Director General), Donal G. Binchy (President), Raymond Monahan and Sandra Fisher (Media Officer).**

"Through a Glass Darkly – Fine Wines"
Speaker: Dr. John Kavanagh



"Living and Stress"
Speaker: Prof. Anthony Clare

Practice Notes

INFANTS' FUNDS IN COURT – UNDERTAKINGS

The Litigation Committee is of the opinion that a solicitor should never give an undertaking in respect of or in anticipation of the release of funds from Court upon an injured infant plaintiff attaining the age of 18.

The procedure for obtaining the release from Court of funds upon the attainment of majority has been greatly simplified in recent times. Court Orders now generally provide that a person, upon attaining the age of 18, may apply directly for the release of the funds to which he/she is entitled. Thus a solicitor, who had given an undertaking in relation to funds which were due to be released from Court upon the attainment of the client's majority could find that the client had secured the direct release of the funds in question without the assistance of or reference to the solicitor. □

Litigation Committee

The Litigation Committee are concerned at the number of consultations which take place outside the Law Library at lunch hour which involve clients. The Litigation Committee recommends that in order to afford privacy to clients at these consultations, practitioners should make every effort to reserve a Consultation Room. □

Litigation Committee

STATUTORY INSTRUMENT NO. 264 OF 1990 SOCIAL WELFARE (CONTRIBUTIONS) (AMENDMENT) (NUMBER 2) REGULATIONS, 1990.

Social Insurance became compulsory for self-employed persons in April 1988. One of the qualifying conditions for the Old Age (Contributory) Pension is that the claimant must have commenced paying Social Insurance Contributions at least 10 years before reaching pension age, i.e. before they reach 56 years of age. This applies equally to employed contributors and to self-employed contributors.

Where employed contributors enter insurance after reaching 56 years of age, they are entitled to a refund of the Old Age (Contributory) Pension element of the PRSI contribution.

The above Regulations determine, in the case of self-employed contributors, the amount of the contribution paid in respect of the Old Age (Contributory) Pension and provide for its return to self-employed contributors who enter insurance after 56 years of age.

The Regulations also provide that refunds of the pension element of the PRSI contribution for employed and self-employed contributors will not be payable where the insured person qualifies for an Old Age (Non-contributory) Pension.

Finally, the Regulations provide for the payment of interest on refunds of the pension element of the PRSI contribution.

Practitioners requiring a copy of the Regulations should contact the Committee Secretary. □

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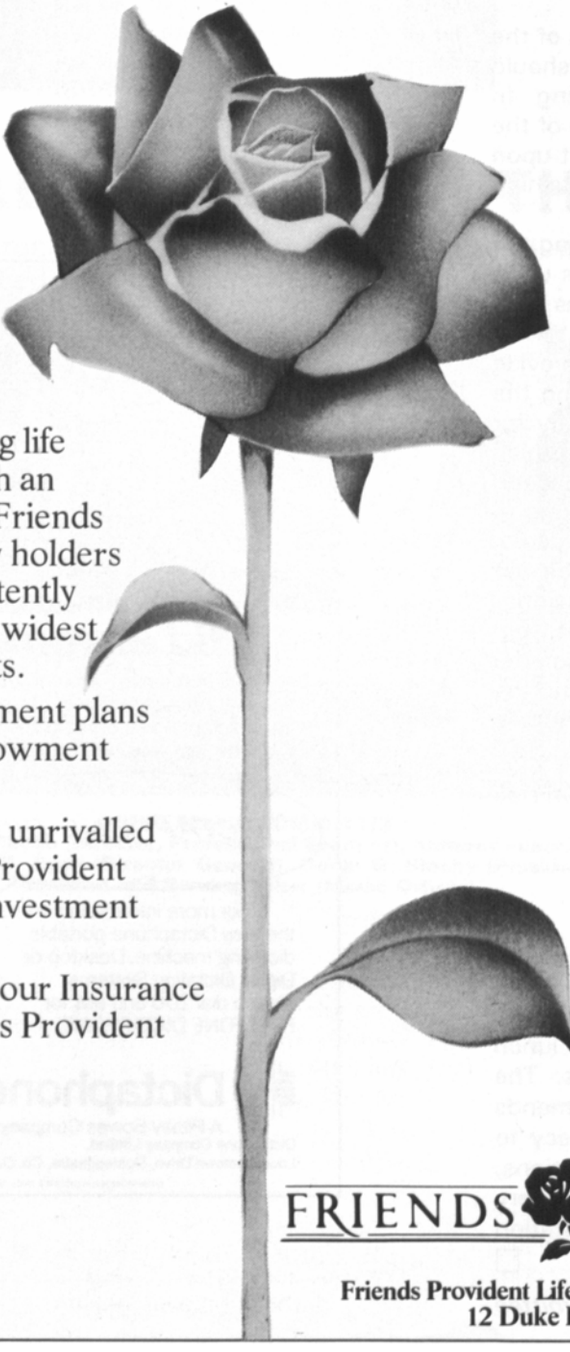

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Trusteeship and the Pensions Act 1990

Introduction

What follows is a general look at the Pensions Act 1990 from a trustee's point of view, without attempting to review the Act in detail.

Before the passing of the Act, the activities of trustees in relation to schemes were governed by the Trustee Act 1893 and the provisions of the documents constituting the scheme and, in relation to the tax treatment of schemes, the Finance Acts of 1958, 1972 and 1974, the Income Tax Act 1967 and the Revenue Commissioners' practice thereunder.

As a result of the passing of the Act, trustees will have to comply, in addition, with the specific requirements of the Act and of the numerous orders and regulations which will be made thereunder and may be affected by directions, orders, guidelines or codes of practice from, and inspections or investigations by, the Pensions Board. While the diligent and industrious trustee should have nothing to fear, nevertheless he will now need to devote much more time to his trusteeship than heretofore in view of the extensive requirements to be observed.

It appears that there may be practical difficulties in implementing some aspects of the Act. In addition, since trustees and others involved will be dealing with new law, much of which probably will develop on a day-to-day or case-by-case basis, I believe there will be a considerable need for a high degree of co-operation between practitioners, trustees and the officials of the Pensions Board and of the Department of Social Welfare in the operation of the Act and that both solicitors and trustees will ease their burdens if particular care is given to the drafting of pension scheme documentation.

" . . . one of the functions of the Pensions Board will be to encourage the training of trustees."

Application

Some schemes are not established under the formality of a trust, but the persons responsible for administering them will be bound by the Act, since the Act defines a trustee as including a person who is administrator of a scheme which is not established under a trust. The Act does not go so far as requiring trustees to have any particular qualification for acting as such, but one of the functions of the Pensions Board will be to encourage the training of trustees.

by
Chetwode Hamilton,
Solicitor

General duties

By section 59, the Act imposes on scheme trustees general duties, which are expressly without prejudice to trustees' duties generally and are in addition to any other requirements under the Act. These general duties are:

(a) To ensure, so far as is reasonable, that the contributions payable by the employer, and the members where appropriate, are received.

There is nothing to indicate how a trustee should ensure receipt of the contributions. If contributions are to be paid on a regular basis by specified dates, a trustee might issue a reminder if the relevant date passes without any contribution having been received. Should he insist that payment be made by standing order and/or that arrangements be put in place to deduct contributions from wages? What if the employer pleads inability to pay? What is "reasonable" will vary from scheme to scheme. The Pensions Board may issue a guideline or a code of practice on this, as on other matters where the Act does not express specific requirements.

(b) To provide for the proper investment of the resources of the scheme in accordance with its rules.

There is nothing to help the trustee in indicating what constitutes proper investment. To some extent his attitude, and that of practitioners advising him, will depend on whehter the fund is an insured or non-insured fund. If it is non-insured and management of a fund is delegated to particular firms or individuals then a trustee may expect that he would be regarded as owing a duty of care in his selection of the manager, if that function is open to him. A trustee should insist that management performance should be monitored and reviewed. In general, as long as a trustee ensures that the investment is in accordance with the scheme's constitution, he should have nothing to fear. It follows that trustees and practitioners should ensure that the rules of the scheme adequately provide for investment and give the trustees clear directions and discretions.

(c) Where appropriate, to arrange for payment of the benefits provided under the rules, as they become due.

This is directed to ensuring that trustees arrange for the benefits actually to be paid. As with the investment and management of funds, I doubt if it is sufficient for a trustee simply to ask someone else to make the payments without afterwards checking to see that the payment arrange-

ments are actually working.

(d) To ensure that proper membership and financial records are kept.

The Act does not assist trustees by indicating what are "proper" records, but they should be sufficient to allow an audit to be done.

I believe it is possible that trustees could find themselves in a position where, through no fault of their own, they are not in a position to comply fully with these general duties. The existence of guidelines or codes of practice issued by the Board may be of assistance to the trustees, but may not necessarily relieve them from responsibility under this section 59. While other parts of the Act contain provisions which are intended to resolve conflicts under the rules of a scheme and the Act, there is no such provision in Part VI (which deals with trustees generally). The point I wish to make is that, in the circumstances of a particular case, compliance with one of these general duties might prove not to be possible in practice, so that theoretically a trustee then would be liable to prosecution for an offence under the Act.

"The existence of guidelines or codes of practice issued by the Board . . . may not necessarily relieve [trustees] from responsibility under . . . section 59."

Before considering some of the many specific duties of trustees under the Act, it may help to consider the Pensions Board, the activities of which will have a profound impact on the life of trustees.

The Pensions Board

The Board's functions are specified in s.10 and will include:

(a) to monitor and supervise the operation of the Act and advise the Minister for Social Welfare ("the Minister") on the Board's functions and on pensions developments generally;

(b) to issue guidelines on the duties and responsibilities of trustees and codes of practice on specific aspects of those responsibilities;

(c) to encourage the training of trustees;

(d) to advise the Minister on standards for trustees and implementation of them;

(e) to publish annual reports and other reports; and

(f) to perform such tasks as the Minister may request (these are not specified).

In addition under s.11 (1) (a) the Minister may by order, with the consent of the Minister for Finance, confer on the Board such additional functions, connected with the functions above, as he considers appropriate; and, by order with the same consent, the Minister may make "such provision as he considers necessary or expedient in relation to matters ancillary to or arising out of . . ." those functions.

The Act also confers on the Board "such powers as are necessary for or incidental to the performance of its functions", without specifying what these are. In addition the Board has power, under s.3(5), to institute summary proceedings to prosecute for offences under the Act.

Trustees may take confort from the fact that the composition of the Board is broadly based and consists of a chairman and twelve ordinary members, appointed by the Minister. Seven of the ordinary members must be representative of the different interests, namely trades union, employers, occupational pension schemes (two members), the actuarial profession, the accounting profession and the legal profession. One member is to be a representative of the Minister and another to be a representative of the Minister for Finance, leaving three further ordinary members to be appointed by the Minister without necessarily representing any particular interest.

As has been reported in the press, the Minister has established the Board and appointed all its members with Mrs. Mary Broughan as chairman.

Undoubtedly the decisions of the Board are likely to have a considerable impact on the performance by trustees of their duties and responsibilities. While the Board does have a function to issue guidelines and codes of practice as indicated above, neither the guidelines nor the codes of practice are expressed to be binding upon trustees.

As far as trustees are concerned, probably the principal provisions of the Act relating to the Board are those contained in section 18 (which authorises any employee of the Board to inspect or investigate the state and conduct of a scheme) and section 25 (which requires trustees to pay to the Board yearly fees as the Minister prescribes with the consent of the Minister for Finance). The entire operation of a scheme may be inspected and investigated by a Board representative. The employer and the trustees concerned are obliged to furnish such information, explanations, books of account and other documents as may be specified by the Board (or the authorised person on its behalf). The Board's representative is specifically empowered to enter the premises of any employer, trustee or agent and make such examination or enquiry as may be necessary. The duties of producing or providing information, documents, material or explanation extend to any person being an officer or employee of the employer or a trustee or agent. These extensive powers are given some teeth by the express provision that obstruction of a Board's representative, refusal to produce information, documents, material or explanation and refusal to answer any questions are all offences, conviction for which renders the person liable, on summary conviction, to a fine of up to £1,000 or one year's imprisonment or both or, on conviction on indictment, to a fine of up to £10,000 or to imprisonment of up to two years or both.

In view of section 25 referred to above, pension schemes will be expected to defray part of the costs of the Board's operations. The Minister is empowered to advance moneys to the Board with the consent of the Minister for Finance, so to some extent the Board's operations may be funded from the Exchequer. It is not clear yet to what extent the Board's operations will be funded by fees charged on pension schemes.

The Act recognises that there may be conflicts between the provisions of any scheme and the provisions of the Act contained in Part III (preservation of benefits), Part IV (funding standard) and Part V (disclosure of information in

relation to schemes). The Act confers on the Board the power to determine whether or not there is a conflict under any of those Parts and to determine disputes under Part VII (equal treatment for men and women). In so determining, the Board is obliged to take account of any representations made to it. While representations may be made by "any persons concerned", the Act does not clarify who these are, but one must assume that they would include the trustees, the employers and any member involved. The Board is given power to hold an oral hearing in connection with any determination. If an oral hearing is held the person holding the hearing may require any person to attend and give evidence at the hearing or to produce any documents which may be required, failure to comply with which will be an offence. While the Act does specify some procedural requirements incidental to the holding of a hearing, the procedures at the hearings are to be prescribed by regulations. Interestingly, any person concerned may be ordered to pay the reasonable expenses of any other "person concerned" in connection with the hearing.

"The Board is given power to hold an oral hearing in connection with any determination."

Despite the mechanism for the Board to determine any conflict, there may be difficulties in practice in implementing the relevant provisions of the Act. The relevant sections (38, 53 and 58) provide that the provisions of the relevant Part of the Act, of any regulations made thereunder and of any schedule related thereto override any provision of a scheme to the extent that the scheme provision conflicts with the provisions of the Act, etc. The sections go on to provide that the Board is to determine whether any relevant provision conflicts with a scheme provision. The difficulty for trustees and practitioners will be that a determination that there is such a conflict may result in a defective or unclear section overriding the relevant provisions of the scheme. So it is possible that where there is a doubt as to the effect of a particular section and the constitution of a scheme attempts to provide an answer, that attempt may be set aside.

Specific duties and obligations

The Act imposes a number of specific duties and obligations on trustees, in addition to any imposed under the deed and rules of any particular scheme and to the general duties under s.59.

The Minister by order has brought into operation ss.60 and 61 with effect from 1st January 1991, so that an initial duty of trustees will be to register the scheme within the time limits provided by the Act, effectively by 1st January

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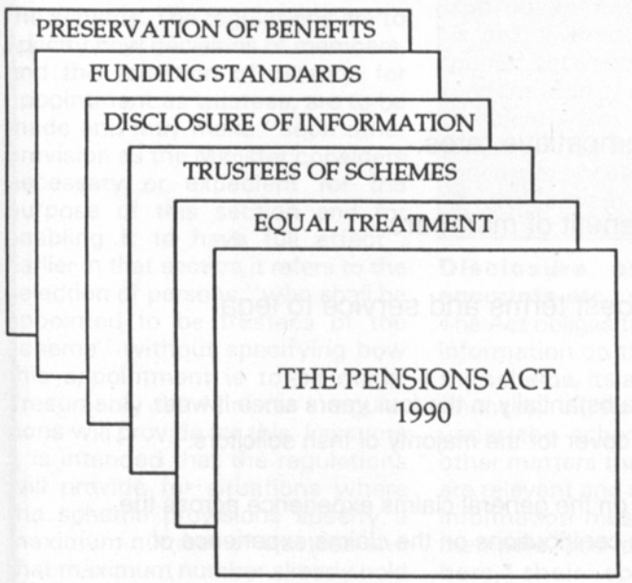

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consider that additional provision should be made for increased administrative expenses as a result of the operation of the Act. This would mean increased funding would be required from the employer.

The Act requires trustees to prepare an annual report containing whatever information may be prescribed, on a yearly basis. This requirement is distinct from the requirement to have accounts audited, but may be compared to the directors' report to accompany the audited accounts of companies.

The drafting of the Act has resulted in a practical difficulty in relation to S.55 which imposes the requirement to produce the report. The explanatory memorandum published with the Bill as initiated indicated that death benefit schemes and "frozen" schemes would be exempt from this requirement, However, S.55 (2) (which expresses the exemption) is so worded that it must be construed as meaning that a scheme will be exempt only if it is at the same time both a death benefit scheme and a "frozen" scheme (as opposed to being in either one category or the other). Clearly this was an error in the drafting of the Act.

The trustees are obliged by s.56(1) to have the accounts of a scheme audited (for periods as may be prescribed, but presumably on an annual basis), to have the scheme assets valued by the actuary and, in respect of the audit and valuation, to have specified documents prepared (the audited accounts, auditor's report and actuary's report). The documents are specified in sub-section (2). Then sub-section (6) exempts certain specified categories of scheme from sub-section (2). However, the practical difficulty is that sub-section (6) should have referred to sub-section (1). The result appears to be that the trustees of the scheme in question would still be obliged to have the accounts audited and the fund valued, but not obliged to have audited accounts, an auditors' report or an actuary's report prepared. A further practical difficulty is that sub-section (6) suffers from the same drafting error as that in relation to s.55(2), namely that it is so worded that it must be construed as meaning that a scheme will only be exempt if it falls within each (not any one of) of the categories specified in sub-section (6).

While section 57 enables the Minister to modify the extent of the application of sections 54 (disclosure of information), 55 (annual reports) and 56 (annual accounts and actuarial valuations) to certain schemes, it is doubtful whether it will be possible by regulation to correct the deficiencies in ss.55 and 56.

Part III of the Act is devoted to the requirements on trustees to secure the preservation of accumulated benefits for scheme members. Part IV introduces the requirement for all schemes, other than defined contribution schemes, to meet a funding standard, which will be evidenced by the provision of actuarial funding certificates which the trustees are obliged to procure and submit to the Board. There is not scope in this article to deal with these requirements in detail. Suffice it to say that the Act imposes extensive obligations on the trustees. However, compliance by the trustees inevitably will require co-operation between the employer concerned and the actuary to ensure that all the requirements are complied with in good time. Despite the fact that failure to comply with these obligations may not be the trustees' fault, nevertheless a trustee still faces the sanction of prosecution for failure to comply. The Act does not indicate that a trustee has any defence on the ground that matters were beyond his control.

" . . . it is doubtful if it will be possible by regulation to correct the deficiencies in SS.55 and 56."

Equal treatment

Part VII introduces the requirement to secure equal treatment for men and women in occupational benefit schemes. No move has been made to bring this part into operation yet. It remains to be seen precisely what impact the judgement of the European Court of Justice in May 1990 in Case C 262/88 *Barber -v- Guardian Royal Exchange* [1990] 2 All ER 660 will have on Irish pension schemes.

Appointment and removal of trustees

Under s.63, the High Court may appoint one or more trustees of a scheme in substitution for the existing trustees. This may be done only on application by the Board by petition and the court may make an order only if it considers that the trustees have failed to carry out the duties imposed on them by law (whether under the Act or not) and that the scheme is being or has been administered in such a manner as to jeopardise the rights and interests of members thereunder. In addition to the powers conferred on the court, the Board may appoint new trustees, on the application of any person interested. This power may be exercised only where there are no trustees or the trustees cannot be found and the Board considers it necessary to make the appointment. The Act provides for the vesting of scheme assets in the new trustees following an appointment. Where the assets are in registered form the new trustees should ensure that a copy of the order is produced to the relevant registrar.

Conclusion

The Act imposes numerous duties and obligations on pension scheme trustees, confers on them some rights and discretions and sets many different time limits with which they must comply. It is clear, therefore, that the life of such trustees is going to become considerably more complicated. The indifferent trustee faces the possibility of criminal sanctions for his indifference. All trustees face a looming forest of possible interpretation difficulties and detailed compliance requirements. I believe that these can be met and most of the practical difficulties overcome with the co-operation of all involved in the establishment and administration of pension schemes. However, I question whether all the anomalies that occur in the Act can be corrected merely by prescription or regulation. Against that background, we all may expect a challenging future under the Act. □

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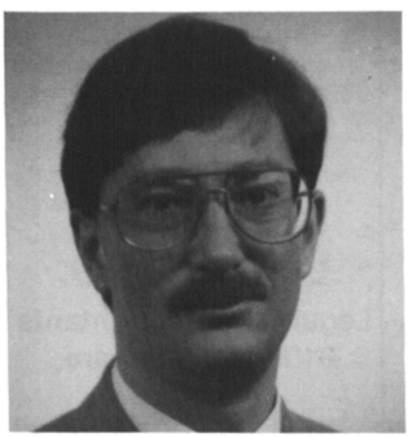
Video on CAT self assessment

I recently wrote to all solicitors about the CAT training video.

I mentioned that the intensification of audit procedures referred to by the Minister for Finance in his budget speech on 30 January, 1991, would necessitate a change of emphasis in the administration of CAT self assessment. In line with the approach adopted for income tax, returns will be accepted as filed, subject to audit.

Revenue recognises that this approach places the responsibility for ensuring the accuracy of returns squarely on solicitors and other tax practitioners. During the initial phase of self assessment, Revenue devoted considerable resources to providing advice and assistance to tax practitioners. We will not have the resources in future to provide the same intensive level of support on a continuing basis particularly as the intensification of auditing will require the deployment of staff to this activity. In any event a professional group such as solicitors should not need such an intensive briefing from the Revenue on a continuing basis now that the initial phase of self assessment is complete.

This is where the video has an important role. It ensures that solicitors have a permanent, relevant and very practical source of professional guidance.



Andrew McLaughlin

The CAT training video is a sensible investment for any solicitor with a probate business. The video alerts the viewer to many of the mistakes being made at present. The video was produced with Revenue expertise and is based on practical difficulties encountered by practitioners. A tax deductible outlay of £95 is hardly excessive when the stakes are so high for the client.

I have heard that some Bar Associations have bought one video to be shared amongst all members. This is being penny wise and pound foolish. The video programme was not designed to be viewed in one sitting. Each practitioner should have a copy. It is an easily accessible reference source for refreshing knowledge about specific areas of the tax when a return in being filed or when a client seeks advice. I know that many tax practitioners spend hours figuring out how to deal with situations which are clearly explained in the video.

It is obvious that a familiarity with the contents of the video would considerably increase the accuracy of returns filed and dispense with wasteful exchanges of correspondence.

The bottom line is that your client could lose a considerable amount of money if mistakes are made when filing CAT self assessment returns. The video is an insurance policy which helps to ensure that all aspects are covered and that the tax is correct.

I strongly recommend its purchase directly from the Law Society.

Andrew McLaughlin,
Manager, CAT Self Assessment Unit, Capital Taxes Branch.

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Sinead Burke
Sedgwick Dineen

The company Solicitors Financial Service (SFS) formed by the Law Society in 1989 is now almost 18 months old. As stated in the annual report (copies available) over 260 firms had joined up to 30th September, 1990.

A high proportion of member firms have rejoined and along with the "new" members joining the total membership now is around the same level as last year.

It is worth noting that in these days of rising costs the SFS has REDUCED the fee, as shown below.

lighted to learn that their solicitor, through the SFS, can provide expert advice on Investment. Solicitor members need to inform clients, if necessary in a circular, that the service is available. Even a small amount of marketing will yield surprising results. It may surprise solicitors to know that two actual winners of substantial amounts in the National Lottery have been advised by SFS to the not unwelcome profit of the solicitors concerned.

Clients receive a very comprehensive investment report and

No. of Solicitors in Practice	Subscription Rate -£-	VAT -£-	Total -£-
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2 – 5	200.00	46.00	246.00
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Joining the scheme is simple. You send a cheque payable to The Incorporated Law Society for the relevant amount and you then become registered. Sedgwick Dineen takes over from there and a Consultant will visit the firm and introduce the service to you. Incidentally many new members may be wondering why they have not received the plaques and display stands, the reason being that all the stock has had to be re-ordered and the user manuals have had to be reprinted. Over the next few weeks the team of Consultants will be delivering new stocks.

Comparing the last four months since the October renewal to the same period in 1989, *more* income has been generated and this trend is very encouraging. In order for the scheme to achieve optimum results, individual solicitors in each firm *must* generate enquiries.

There are a large number of solicitors clients who will have surplus funds, whether large or small, who will be only too delighted to learn that their solicitor, through the SFS, can provide expert advice on Investment. Solicitor members need to inform clients, if necessary in a circular, that the service is available. Even a small amount of marketing will yield surprising results. It may surprise solicitors to know that two actual winners of substantial amounts in the National Lottery have been advised by SFS to the not unwelcome profit of the solicitors concerned.

Clients receive a very comprehensive investment report and Sedgwick Dineen will meet him/her and their solicitor to discuss the various options available. Remember that Sedgwick Dineen is completely independent of any bank, financial institution or insurance company and can give advice on the most suitable products available to the client.

There are many other examples such as providing advice to clients on inheritance tax planning or implications which the budget has on Section 60 Policies.

Members of the Profession are urged to seriously consider membership of the service, as it has proved to be a substantial source of additional income for its members. It is a system which is very simple to operate and enables a solicitor to provide an expert service in an area of client business where the solicitor does not have to be expert himself.

□

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There will also be an excellent social programme for the Delegates and their Partners.

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ITAZ Database provides comprehensive up-to-date information on each of the 50,918 townlands and 4,000 towns and villages of Ireland.

Access to the information through Minitel enables solicitors to produce accurate documentation for debt collection purposes within five minutes. Without the use of the system, it can take an average of six telephone calls over two days to accumulate the necessary details for the issue of a district court civil process.

Even then there is no guarantee that these time consuming telephone calls have garnered the correct information. There is no current up-to-date index to the townlands of Ireland. The last such index printed was the 1901 Topographical Index to the Townlands of Ireland. It has been out of print for almost fifty years and is something of a collector's item.

The correctness of the address of the person to whom a District Court process is being sent is a pre-requisite if a firm of solicitors is to successfully sue for monies owed. The postal address is designed only for the delivery of mail by An Post. It cannot be relied upon to determine the correct District Court Area for the issue of a civil process for the sitting of the District Court. Hence, the necessity for numerous phone calls to ascertain the correct address.

Such information will become even more important when the Department of Justice completes its review of the existing structure of the 250 District Court venues throughout the country.

Announcing the review in 1989, Gerry Collins, the then Minister for Justice, stated that the existence of 250 District Court venues could no longer be justified in the light of improved methods of travel. It is believed that at least eighty of those venues will be abolished soon. This will lead to a distribution of the territories of the abolished District Court sittings.

As a result, a smaller number of District Court areas will cater for larger geographic territories. This will have major implications for solicitors in the areas of collection of unpaid monies to suppliers and wholesalers and the issue of civil proceedings.

Once the change in territories comes into effect, it will be very difficult for solicitors to determine the correct district court area for the civil processes as no other person or organisation in Ireland has access to the information in the ITAZ database.

The ITAZ database provides comprehensive information on each of 50,918 townlands and 4,000 towns and villages of Ireland. Each townland, town and village is supported with the following information: the district electoral division; the District Court areas, both summary and civil; barony, civil parish; Garda station serving the particular townland; and the ordnance survey map reference numbers.

In respect of each District Court area, the following information is provided: District Court number; time of court sittings; day of month; month of the year; District Court clerk's name, address and telephone number; mode of service of court documents; and Circuit Court venue on appeal from the District Court.

It is estimated that 75 per cent of all firms of solicitors use computers to some extent. It is now common for larger practices to have a systems partner who has responsibility for the application of computer technology to the business. Computerisation offers the legal profession more opportunity to practise law instead of wasting time rooting through old and dusty files.

Solicitors can gain access to the ITAZ database through the on-line Minitel system or through the purchase of a software package.

Minitel constitutes Ireland's introduction to high technology information systems through the use of a 'phone line and data network'. The Minitel service offers a commercial system for the delivery of non-voice electronically based services such as videotex, electronic mail and transactional services. It is a mass market service directed at both the business and residential users and is modelled on the successful French Teletel service, which has been in operation since 1981.

The Minitel service can be best envisaged as a non-voice telephone style service. The services are hosted on the system by third party service producers, such as the ITAZ database. The user, in this case the solicitor, gains access to the service by way of a Minitel set which is used instead of the normal telephone handpiece.

The Minitel set is a small screen for viewing text and graphics, rather like a small television or computer screen, and a keyboard for inputting information. Among the services offered, or planned to be offered to users, include general information, trans-actional services interactive communication and computational services.

Service providers, such as ITAZ database, develop a computerised service which is then connected to the Telecom Eireann data network. There is no one central computer or database. Each provider puts together its own system which is then connected to the network.

Users take out a separate subscription to the screenphone service from Minitel Communications Limited. The billing for charges incurred is also separate. Users follow a log-on procedure and enter a simple access code to obtain the desired service.

The total cost of the Minitel service to the user consists of two components: the rental charge for the Minitel screen; which is £5 a month and the call costs for the services used.

Users have the option to purchase the screenphone and avoid the rental charges, if they prefer. Call charges are based on the call duration and the tariff rate that

applies to the particular service being used. Calls are charged at the same rate to all users in Ireland for a particular service, no matter what the location of the user. Minitel subscribers receive a single bill from Minitel Communications Limited for all of their service calls at the end of each billing period.

Minitel was launched early this year and is expanding its services monthly. AIB Group and Credit Lyonnais, two of Europe's major banks, each own a 20 per cent stake. France Telecom and Telecom Eireann each own a 30 per cent share of the company.

The system is modelled on the successful French version, which has been successful in reaching 20 per cent of the French telephone user's market. It offers over 13,000 services to 5.5. million users. The Irish Minitel operation has far more modest initial aspirations. It is hoping for an inital uptake of approximately 10,000 sets in the first year of operations, but it ultimately hopes to reach a 15 per cent market penetration, which would give it 150,000 users in Ireland alone.

A range of other services are, or will soon be, available on the Minitel network. These include agri-business, banking and finance, business services, entertainment, freight and transport, media and communications, shopping and travel and tourism.

Among the services provided under these headings are: a bibliographic index of Irish periodical literature relevant to the agri-business sector; Cognotec, which provides foreign exchange rates, bank interest rates, bank account information, share prices and business news, among other information; Dun & Bradstreet, whose databases provide up to date access to credit and financial data on more than 16 million business worldwide; and Kompass, a database of products, services and management personnel of the top 11,000 Irish companies.

Information from such services is clearly of interest to the legal sector. Using the various databases available through Minitel, the legal firm can get basic information about key personnel and important aspects of a company's business.

Dublin Library's bibliographic index of Irish business periodicals from 1982 onwards is accessible through Minitel. Journal articles on a particular company or subject can be found through a search. Solicitors wishing to make contact with clients or colleagues can also do so through the Eirpage System available on Minitel.

These are only a random selection of the services available on Minitel. And those worried about the costs of the services should know that a special Lotto service is also available. This helps Minitel users to pick their lottery numbers by generating random selections of six numbers. □

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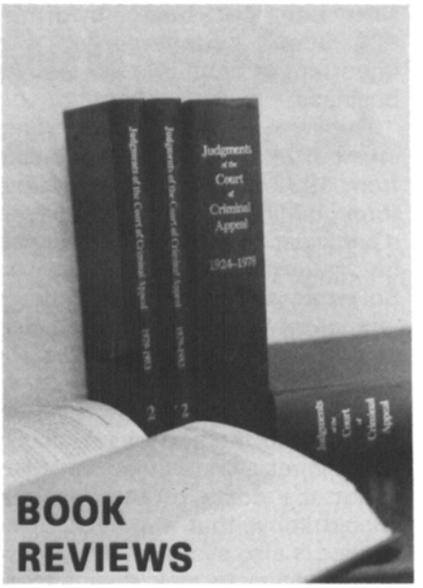

A MEMOIR OF THE SOUTH-WESTERN CIRCUIT

By Gerard A. Lee, S.C. Moytura Press, Dublin. Paperback: IR£4.99

Gerry Lee is almost fifty years at the Irish Bar; he cut his teeth on the South-Western Circuit which, of course, is an offshoot of that most arcane of all Irish legal institutions, viz. the Munster Circuit.

We have been bereft of any legal reminiscences since Maurice Healy's classic: ''The Old Munster Circuit''. By comparison, it has to be said that this is a rather slim volume.

It was my high privilege and pleasure to take part in the launching of this book at the King's Inns last December and in the course of it I pleaded with Gerry to make sure that there was a fuller account of those stirring times and the great men who dominated the circuit in the old days, such as Maurice Danaher, William Binchy and Billy Roche. Appropriately enough the book is dedicated to the gracious Maurice Danaher.

I am a constant fan of the Daniel O'Connell correspondence and it is interesting to note that aside from the arrival of the motor car how little the life of the journeyman barrister had changed in the one hundred years or so since O'Connell's time to the 1940's.

Now, for good or ill, we live in the age of the word processor and the fax machine and, indeed, of the regional airport. So, with the litigation, the workman's compensation code has disappeared; rent restrictions and the correcting of old titles are a thing of the past. The first brief a barrister tended to get was a payment out but as Mr. Justice Barrington once pointed out this most humble of all applications led to one of the great cases, viz. the *Sinn Fein Funds* case.

I would urge all practitioners to buy a copy of this book; indeed, they should buy a few copies of it and keep it ''in stock''. As the years go by the memoirs will be all the more valuable.

The solicitors' profession can claim credit for its inspiration because it was Eamonn Hall who urged Gerry Lee to write this book in the first instance; so there should be no problem about a full complement of legal *glasnost* in its circulation.

In the course of his very affectionate foreword to the book Mr. Justice Lardner points out how Gerry has brought to life the woods and waters and hills of Kerry and Clare and of his beloved Limerick; the circuit towns with their graceful stone courthouses and galleried courtrooms; the antiquated yet friendly hotels, the way of life and travel of the circuit barristers.

I join with Mr. Justice Lardner in hoping that Gerry may be moved to write a further and more adventurous volume.

Hugh O'Flaherty

FROM DATA PROTECTION TO KNOWLEDGE MACHINES: THE STUDY OF LAW AND INFORMATICS

Edited by Professor P. Seipel. [Kluwer, Law and Taxation Publishers, Deventer, The Netherlands, 1990, xi + 283pp. paperback]

TRANSBORDER FLOW OF PERSONAL DATA WITHIN THE EC

[By A.C.M. Nugter, Kluwer, Deventer, 1990, xviii + 430pp. Dfl. 150,/US $85 paperback.]

If Karl Marx were alive today he would probably have written his magnum opus on *Die Information* and not *Das Kapital*. The current technological revolution in information storage, processing and retrieval is slowly affecting all aspects of our economic, political, legal and cultural lives.

Tehranian in his book *Technologies of Power* (1990) argues, with some poetic licence, that at least four contending perspectives have evolved in relation to the impact of information technologies. The *technophiles* tend to be the optimists who believe that the present technological revolution in information storage, processing and retrieval has already inaugurated a ''post-industrial, information society'' with higher productivity and plenty at the world centres that will eventually trickle down to the peripheries. The *technophobes* are, by contrast, rather pessimistic about such promises of widespread productivity and plenty. They point to the threats that increasing robotisation and computer-assisted design and manufacturing (CAD—CAM) hold for rising structural unemployment; to the perils that the new databases pose for political surveillance and individual privacy; to the dangers that homogenisation of culture by media monopolies present for cultural antonomy and diversity.

The *technoneutrals* typically tend to be the consultants, who have few theoretical pretensions and considerable interest at stake not to alientate their clients. The *technostructuralists* include some reluctant optimists and pessimists who argue that technologies are by themselves neither good, nor bad nor neutral. None of us must ever forget that the tools of technology do not operate in a vacuum; the tools of technology are man-made and man-used.

From Data Protection to Knowledge Machines is the fifth publication in the computer/law series from Kluwer. The international board of editors includes Dr. Robert Clark, lecturer in law, University College Dublin. *From Data Protection to Knowledge Machines* contains articles and papers by international experts in relation to privacy protection and access to information. The first article in this collection deals with data protection and its author is Professor Knut Selmer of the Oslo University. His contribution deals with a number of problems which are met by data inspection authorities both in his own country

and generally. Professor David H. Flaherty of the University of Western Ontario, London, Canada, emphasises comparative aspects and places the issues relating to personal data into the broader framework of national policies and strategies for the development and management of information resources.

Herbert Burkert clarifies the differences between legislation on data protection and legislation on acess to government information. Professor emeritus Jan Hellner treats the notion of tort liability in the computer context. Susan Colman in her article titled "Practising Computer Law" reveals the interdisciplinary nature of the field in her discussion of the law of computation (lex computationis). Peter Seipel who is professor of law and informatics at the University of Stockholm deals with laws on access to information held by public authorities and the regulation of various processes in commerce, administration and transport where electronic messages are rapidly beginning to replace traditional paper-bound communication. Cecilia Magnusson deals with a number of fundamental issues associated with automation in contexts where legal norms are created and applied. Other contributions deal with practical and theoretical aspects of computer law.

In *Transborder Flow of Personal Data within the E.C.,* A.C. Nugter presents the fruits of his doctoral thesis. This book analyses the privacy statutes of four European countries i.e. Germany, France, The United Kingdom and The Netherlands and their impact on the transborder flow of personal data within the private sector. The main issue under consideration is how these statutes regulate the transborder flow of personal data and, subsequently, what this implies for subjects whose data are involved and for data users and computer bureaus operating on international markets. Special attention is paid to the impact of the EC Treaty on the transborder flow of personal data. The author also describes what should be done to safeguard the interest of data subjects and privacy protection in the interests of international firms in the free flow of information.

Both these books are noteworthy and timely contributions that will serve as a useful reference for ongoing research activities and, hopefully, stimulate discussion and debate about the issue of data protection and privacy.

Eamonn G. Hall

WORDGLOSS

(Words and Concepts you need to Know, Where they come from, What they mean). By Jim O'Donnell [Dublin; Institute of Public Administration in association with Irish Permanent Building Society 1990. IR£9.95 paperback].

The basis of law is language. Great lawyers and great judges must have a command of language. Words are the tools of the lawyer's trade. The solicitor and barrister must, by the use of words, convince the tribunal of the rightness of his or her case. The judge is often the interpreter of words. In some cases, the judges are the final interpreters of the meaning of words. Justice Jackson of the US Supreme Court wrote in *Brown -v- Allen* 344 US 446, 540 that "we are not final because we are infallible, but we are infallible only because we are final". The Supreme Court is often the final authority on the meaning of a word. The Supreme Court is often the Great Dictionary.

Professor Brian Farrell in his perceptive foreward to *Wordgloss* notes that too often we speak and write words, without much regard for, or even knowledge of, their roots and meanings. Professor Farrell states that it is precisely that discriminating awareness of the root-meanings of words which distinguishes the educated, the discerning, the critical elite. The reader's appetite is whetted by Professor Farrell's announcement that Jim O'Donnell, the author, has constructed "an adventure-playground" with words and concepts that leads to a fuller appreciation, and therefore a more exact and powerful command, of language.

Jim O'Donnell, the author of *Wordgloss*, is assistant director general of the Institute of Public Administration (IPA). He has developed the IPA's periodical and book publishing programme virtually from scratch. He originated the IPA's perennial best seller *Administration Yearbook & Diary* in 1967 as well as *Young Citizen*, a social and political education magazine for post-primary schools, and other publications. He has published almost a hundred books for the IPA on a wide range of public affairs topics by some of the leading authors of our day.

The Táinaiste, John Wilson, TD, with Jim O'Donnell, the author, at the launch of *Wordgloss*

The author states in his preface that he seeks to increase our delight in words, especially those in discussing public affairs. *Wordgloss* (a dictionary of words concepts and ideas) consists of words drawn from a number of sub-sets. One such sub-set is of key political concepts such as democracy. Another consists of key institutions, such as the Constitution, the President, the Taoiseach, the Cabinet, the Dáil and the Seanad. Another consists of legal terms such as law, Act, crime, injunction, jury, and statute. There are also sub-sets of philosophical, economic, social and historical terms. A sub-set of Latin expressions such as *in camera, de facto,* and *ultra vires,* are also explained.

Jonathan Swift (1667-1745) wrote that lawyers were "a society of men bred from their youth in the art of proving by words multiplied for the purpose that white is black and black is white according as they are paid". The reader should comfort himself or herself with the knowledge that lawyers are more honest today in their use of language.

Jim O'Donnell has given us a rich treasury. *Wordgloss* contains a treasure house of words arranged according to ideas and meaning. *Wordgloss* cannot fail to improve our knowledge of English.

Eamonn G. Hall

ROAD TRAFFIC LAW IN THE REPUBLIC OF IRELAND
By Robert R. Pierse.
[Butterworth (Ireland) Ltd, 1989 lvi + 403 pp £29.50, hardback.]

In the words of the author "this book attempts within narrow confines to state and outline the present law on Road Traffic in the Republic of Ireland." As Mr. Justice Johnson says in his Foreward "a great deal of well ordered industry has gone into the production of this book". There are 387 pages of text dealing methodically with the myriad of legislation, including statutory instruments and bye laws, governing this topic.

It must be said that so far as this reviewer could establish no topic, ranging from lost property in street serviced vehicles to tachographs, has been omitted. The chapter topics are as logically ordered as they are comprehensive and Mr. Pierse has limited himself strictly to road traffic law and has not been tempted to meander into the wider issues, such as those relating to the initiation of proceedings and the validity of summonses or charge sheets.

The commentary is largely factual rather than discursive and the author seldom attempts to distinguish court decisions in any great detail.

It is clear that both Mr. Pierse and the publishers see the book as primarily a reference work. Indeed the author declares "It is hoped that the busy lawyer, administrator or Garda searching for a reference may be helped by this one". It is unfortunate then that in this area the undoubted hard work of the author is let down by the quality of the referencing. It is perhaps not surprising in an extensive work that mistakes should arise. It is nevertheless frustrating for the busy practitioner to discover that references are not dependable. Several mistakes were found by this reviewer within the index. Discussion with colleagues has revealed that some of the case references have also been incorrect. No doubt a second edition will allow the author and publishers the time necessary to check and eliminate these errors.

In keeping with the author's object to produce a practical and consolidated guide, a most useful 20 page glossary of words and phrases, which have been defined either legislatively or judicially, is provided at the end of the text.

There is no doubt that a practitioner will find in this book a most useful digest of source material even while we await a more thoroughly proofed second edition.

DAIRE MURPHY

BREHONS SERJEANTS & ATTORNIES - D Hogan & W N Osborough Editors – the Irish Legal History Society/Irish Academic Press 1990.

This first major publication of the Irish Legal History Society is a fascinating compendium of articles on a wide range of topics ranging from "Lawyers in Early Ireland" through "Conversions among the Legal Profession in Ireland in the 18th Century" and "Vacancies for their Friends Judicial Appointments in Ireland 1866/1867" to "The Lawyers of the Irish Novels of Anthony Trollope". Truly there is something in this book for everyone. It is eminently suited to "dipping in". Even though the level of all of the articles is of high academic standing fortunately this does not mean that they are unreadable. The Irish Legal History Society is to be commended on publishing this work.

Membership of the Society is available at subscription rates of £30 for individual members and £15 for student members. Members are entitled to copies of each of the Society's publications as part of their subscription. Subscriptions may be made to the Secretary of the Irish Legal History Society, School of Law, Trinity College, Dublin 2. □

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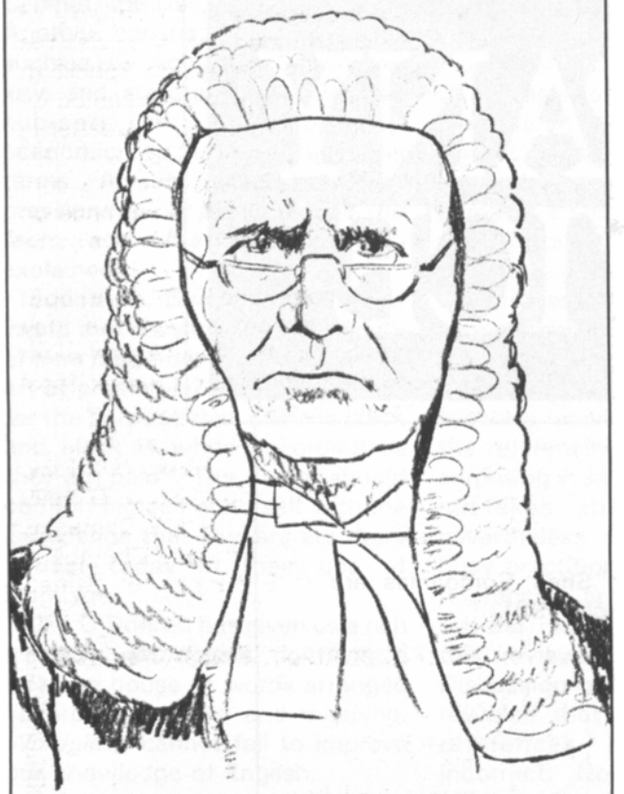

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Editor,
Law Society Gazette,
Law Society,
Blackhall Place,
Dublin 7.

17th December 1990

Re: Irish Travel Agents Association Arbitration Scheme

Dear Sir,

Many colleagues will have experienced the difficulties which arise when an unfortunate consumer, who has travelled abroad, and has found his holiday to be disrupted and has subsequently sought compensation from the Travel Agent, only to find that the travel agent seeks, in the first instance, to have the matter referred to arbitration, pursuant to the terms of the booking contract, and secondly that the arbitration is held in accordance with the terms as set out in the Irish Travel Agents Association Arbitration Scheme. This scheme, *inter alia*, seeks to limit the liability of the Defendant, to a sum of not more than £5,000 and furthermore specifically excludes any claim for personal injuries. In addition the explanatory note accompanying the rules of the arbitration scheme specifically state "parties to a dispute are encouraged not to seek legal representation for such hearings, though they may do so if they wish".

On Tuesday 11th December 1990 Carroll J in the High Court, delivered an *ex tempore* judgment in the matter of *McCarthy & Ors. -v- Joe Walsh Tours Limited* and held, *inter alia*, that the provisions of The Sale of Goods and Supply of Services Act 1980 applied to the contract the subject matter of the dispute, and that as Section 39 of that Act implies:

a. that the defendant has the necessary skill to render the service
b. that the defendant would supply the service with due skill care and diligence.

and this implied term has no limitation on its liability.

Furthermore as Section 40 of the Statute only allows an implied term to be varied or negatived by an express term of the Contract, *inter alia*, provided that where the recipient of the service deals as a consumer it must be shown that the express term is both fair and reasonable and has been specifically brought to the attention of the consumer.

As the I.T.A.A. Scheme itself limits liability to £5,000 for any claim and excludes personal injuries, Carroll J held that it is a provision restricting the liability of the supplier for a breach of an implied term under the statute, and that as the provision restricting the liability was not contained in the general conditions of the contract, and accepted the averment of the Plaintiff that the purported restriction was not brought to his attention, the Arbitrator could not apply the scheme as drawn up and went on to hold that the Scheme was inoperative and incapable of being performed and dismissed the appeal by the Defendant/Appellant.

This judgment was accepted by the Defendant shortly thereafter in the similar case of *Whitfield -v- Joe Walsh Tours Limited,* when they consented to an Order being made on similar terms as in *McCarthy -v- J.W.T.*

Fortunately the Plaintiffs in both actions did not accept the Irish Travel Agents Association's recommendation not to seek legal representation.

Yours faithfully,
Raymond St. J. O'Neill,
Raymond St. J. O'Neill & Company,
Courthouse Chambers,
27/29 Washington Street,
Cork.

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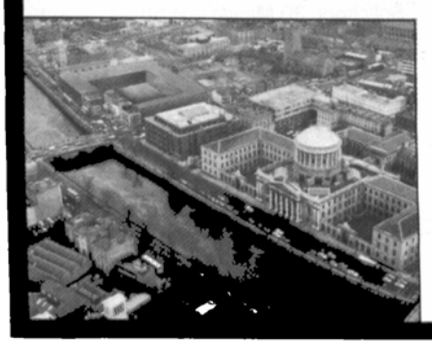

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Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

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

LOST LAND CERTIFICATES

Joseph F. & Patricia Groarke, Beechlawn, Ballinasloe, Co. Galway. Folio No. 40670; Lands: Townland: Dunlo; Area: 3.355 Acres. County: **GALWAY.**

Lanigan International Freight Limited, 96 Upper Drumcondra Road, Dublin 9. Folio No: 71946L; Lands: Property situate on the north side of Langan Road in the Parish and District of Finglas. County: **DUBLIN.**

Charles Byrnes, Tooreenard, Killoran, Ballinasloe, Co. Galway. Folio No: 40230; Lands: Townland: (1) Pollatlugga (2) Pollatlugga; Area: (1) 1a.2r.27p, (2) 20a.1r.34p. County: **GALWAY.**

Brennan Shoes Limited, Folio No: 20640; Lands: Bree; Area: 0a.2r.2p. County: **MONAGHAN.**

Thomas Donoghue, Castleblakeney, Ballinasloe, Co. Galway. Folio No: 32937; Lands: Part of the lands of Castleblakeney in the Barony of Tiaquin. Area: 0a.1r.2p. County: **GALWAY.**

Bridget Rogan, Cornelscourt, Foxrock, Co. Dublin. Folio No: DN000119; Lands: Townland: Deansgrange and Cornelscourt Barony: Rathdown. County: **DUBLIN.**

David Kennedy, Folio No: 6884; Lands: Pallas; Area: 180A-3R-11P. County: **KERRY.**

Nan Murphy, Folio No: 20435; Lands: Ballask; Area: 0a.0r.17p. County: **WEXFORD.**

William Doyle, 135 Ballogan Road, Carrickmines, Co. Dublin. Folio No: 12034; Lands: Ballyogan. County: **DUBLIN.**

John Brophy, Folio No: 17432; Lands: Rathtillig; Area: (1) 49a.3r.35p, (2) 5a.0r.5p, (3) 19a.2r.4p, (4) 17a.2r.25p, (5) 20a.2r.25p, (6) 17a.1r.20p, (7) 18a.3r.30p. County: **CARLOW.**

Nora Dorgan, Folio No: 47557; Lands: Ballynafarsid; Area: Midleton; County: **CORK.**

John Carden (Junior), Drinaghan, Enniscrone, Co. Sligo. Folio No: 18451; Lands: (1) Carowcolier, (2) Drinaghan More; Area: (1) 8a.3r.26p, (2) 5a.1r.16p. County: **SLIGO.**

Patrick J. O'Sullivan, Folio No: 2109F; Lands: Knockboy; Area: 1.106 acres. County: **WATERFORD.**

Cado Systems (Ireland) Limited, Folio No: 26757F; Lands: Ballinlough; Area: 2.500 acres. County: **CORK.**

Patrick Farrelly and Bridget Catherine Farrelly, Folio No: 2442; Lands: Corfeyhone; Area: 29a.0r.0p. County: **CAVAN.**

Patrick Moore, Folio No: 3841; Lands: Corbetstown; Area: 3a.2r.0p. County: **KINGS.**

Most Rev. Donal J. Herlihy, Very Rev. James Cummins, Rev. James Curtis, Folio No: 590(R); Lands: (1) Mersheen, (2) Clonsharragh; Area: (1) 5.161 Hectares, (2) 3.401 Hectares. County: **WEXFORD.**

Richard Power, Folio No: 13499; Lands: Caherelly East; Area: 44a.2r.29p. County: **LIMERICK.**

John Tierney and Kate Tierney, Folio No: 1049R; Lands: Cranna; Area: 64a.0r.0p. County: **TIPPERARY.**

Philip Christopher Govern and Vera Govern, Folio No: 8138; Lands: Cookstown; Area: 1a.3r.20p. County: **MEATH.**

John Benedict Cross, Folio No: 7459; Lands: (1) Staplestown, (2) Corkeragh; Area: (1) 46a.2r.0p, (2) 10.731 acres. County: **KILDARE.**

James Condan & Margaret Carroll, Folio No. 42830; Lands: Glanturkin; Area: 0a.0r.33p. County: **CORK.**

Declan Griffin, Folio No: 1374F; Lands: Ballaghkeeran; Area: 0a.3r.1p. County: **WESTMEATH.**

Margaret Mary Quinn, Folio No: 6394; Lands: Glebe; Area: 0a.3r.36p. County: **MEATH.**

Robert Latimer, Folio No. 1267L; Lands: 6 Gilford Park, situate on the north side of the said Park in the parish of Donnybrook, District of Pembroke. County: **CITY OF DUBLIN.**

Desmond Joseph Lynch, of Whitehall, St. Johnston, Co. Donegal. Folio No. 3499; Lands: Whitehall; Area: 60a.1r.15p. County: **DONEGAL.**

Patrick O'Connor, of Lugh North, Doolin, Co. Clare. Folio No. 681F; Lands: Townland of Woodpark; Area: 0a.1r.16p. County: **CLARE.**

Loughlin McManus, Folio No. 530F; Lands: Cloonorick; Area: 1a.2r.3p. County: **LEITRIM.**

John Gullfoyle, Folio No. 1271; Lands: Lewistown; Area: 10a.2r.12p. County: **KILDARE.**

Lost Wills

NUGENT, Robert Patrick, deceased late of 237 Ratoath Road, Cabra, Dublin 7. Would any person have a knowledge of a Will executed by the above named deceased who died on the 7th day of October 1990, please contact F.H. O'Reilly & Co., Solicitors, 334 North Circular Road, Phibsborough, Dublin 7. Reference: JMCD, Telephone: (01) 303122.

McCARROLL, Joseph, late of Clareview, Claregalway, County Galway and Bloomfield Hospital, Morehampton Road, Dublin 4. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 1st day of November, 1989 please contact Lewis C. Doyle & Co., Solicitors, Augustine Court, St. Augustine Street, Galway. Telephone: (091) 65677.

MORAN, Joseph Patrick, deceased late of Smithstown, Julianstown, Drogheda, Co. Meath and formerly of Mornington, Drogheda, Co. Meath. Would anyone having knowledge of the existence or whereabouts of a Will of the above named deceased who died on the 27th day of December, 1990 please contact Messrs. Smyth & Son, Solicitors, 30 Magdalene Street, Drogheda, Co. Louth. (Reference: PRS/MK).

WADE, John Finbarr, deceased, late of 7 St. Patrick's Terrace, Greenmount, Cork. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on 23 January, 1991, please contact Messrs. Edmund P. Hogan & Co., Solicitors, Inverell, Bishopstown Road, Cork. Tel: (021) 546155.

GARRIGAN, Fidelma, deceased late of 41 Mount Prospect Grove, Clontarf in the City of Dublin. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 16th December, 1990, please contact: Messrs. B. Vincent Hoey & Co., Solicitors, 15 Drogheda Street, Balbriggan, Co. Dublin. Telephone: (01) 413500.

GLYNN, Patrick Christopher, late of 23 Willington Grove, Templeogue, Dublin 12, Plumbing and Heating Supplier. Will anyone having knowledge of the whereabouts of a Will or codicil of the above named deceased who died on 4th December, 1990, please contact Mary B. O'Malley, B.C.L., Solicitor, 1 Brews Hill, Navan, Co. Meath. Tel: (046) 22669, (046) 29738. Fax: (046) 22669.

RINN, Charles, deceased late of Coole, (Castlelyons), Fermoy in the County of Cork. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 25th November, 1990 please contact, Messrs. Healy Crowley & Co., Solicitors, 9 O'Rahilly Row, Fermoy, Co. Cork, Ref DC.SN.R.207. Telephone: 025/32066.

COYNE, Mary Ellen, late of 38 Palmerston Road, Rathmines, Dublin 6 and Doirin Glas, Lettermore, Co. Galway and 53 Sandford Road, Ranelagh, Dublin 6. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on 24th January, 1991 please contact Michael Tracey & Co., Solicitors, 6/8 Wicklow Street, Dublin 2. Phone: 6791550.

CURRAN, Kieran, deceased, late of Creggconnell, Rosses Point, Co. Sligo. Date of Death – 2nd January, 1990. Will any person having knowledge of the whereabouts of any Will of the above named deceased, please contact C.E. Callan & Co., Solicitors, Boyle, Co. Roscommon. Telephone: (079) 62019.

BURTENSHAW, Gerard, deceased, late of "Firtrees", Blackhill, Kill, County Kildare. Would any person having knowledge of the whereabouts of a Will of the above named deceased who died on the 7th May, 1989, contact Ciara Kehoe, c/o Coughlan & Co., Solicitors, Main Street, Newbridge, Co. Kildare. Telephone: (045) 33332.

SWEENEY, Molly, (otherwise Mary), deceased, late of Cresley, Castlepollard, Co. Westmeath. Date of death 24 November, 1990. Will any person having knowledge of the whereabouts of any Will of the above named deceased, please contact Wm. Smyth O'Brien & Hegarty, Solicitors, 24 Lr. Abbey St., Dublin 1. Tel: 786130.

Lost Title Deeds

KENNEDY, John, deceased late of Beaufort House, Newcastle West, Co. Limerick and formerly of Chapel Street, (otherwise Boherbee), Newcastle West, Co. Limerick.

Title Deeds to property of the above named deceased at Chapel Street, Newcastle West, Co. Limerick.

Land Certificate Folio 9823 Co. Limerick. Lands at Coolanoran, R.O. Maurice Kennedy.

Will any person having knowledge of the whereabouts of any of the above documents please contact Cornelius J. Noonan, Solicitor, Newcastle West, Co. Limerick. Phone Number (069) 62848.

Miscellaneous

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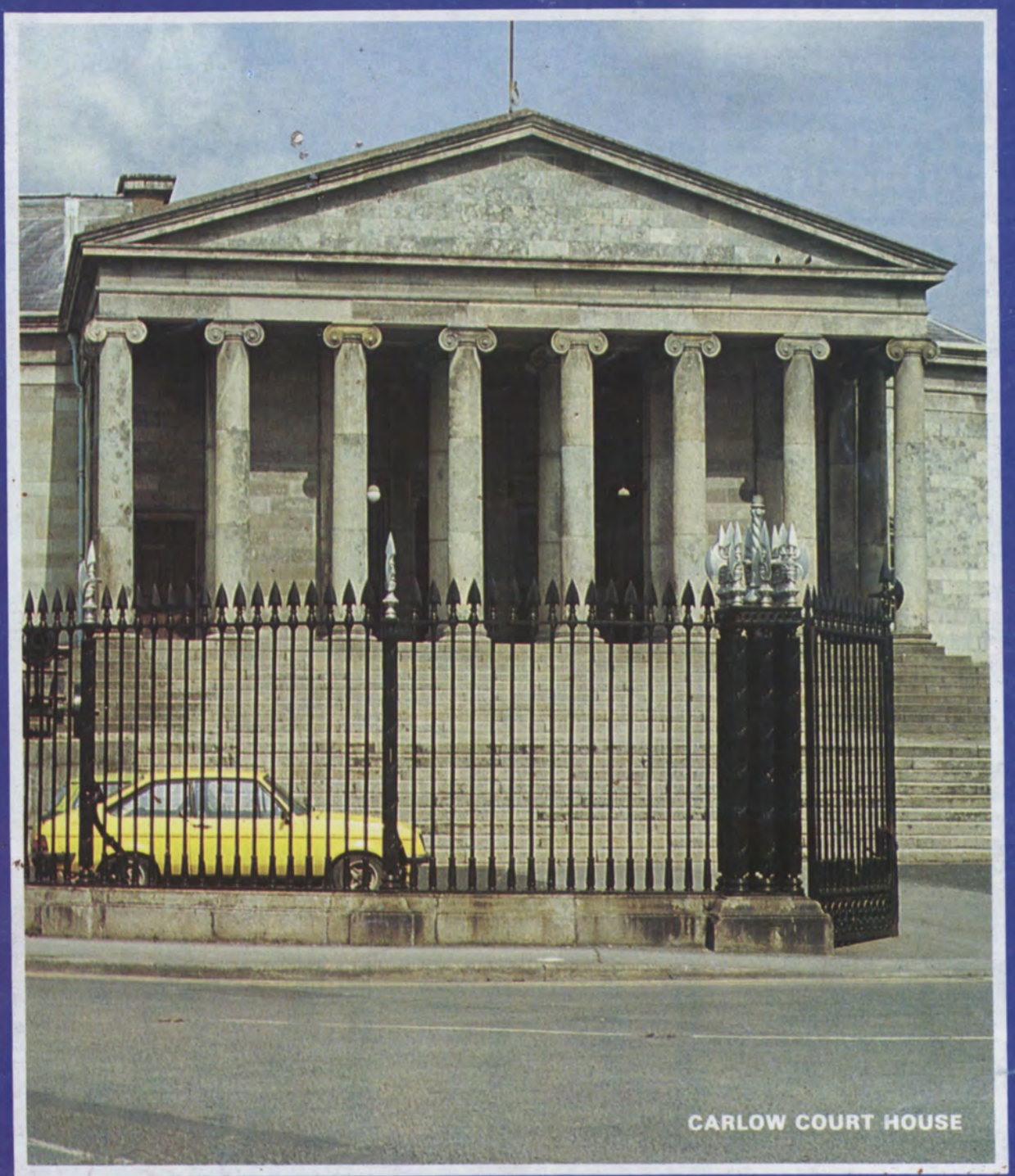

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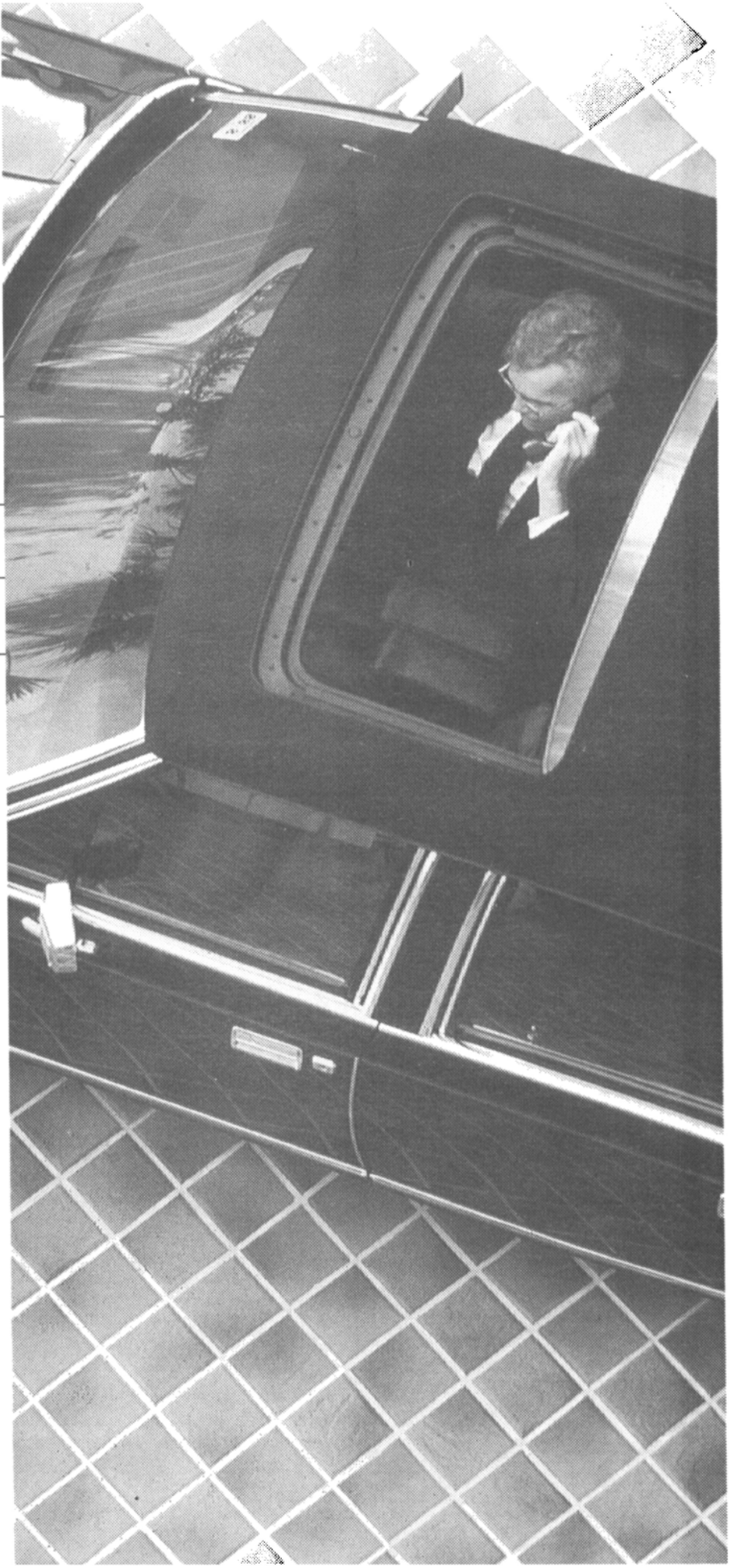

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Criminal Justice

Viewpoint

Miscarriages of Justice

What have we learned from Guildford and Birmingham?

Everyone who truly cherishes the fundamental core values of our legal system - respect for justice and the rule of law - will rejoice at the collapse of the case against the Birmingham Six and their long - delayed release by the English Court of Appeal, just eighteen months after the release, in similar circumstances, by the same Court of the Guildford Four.

We extend to the Birmingham Six our congratulations at their final vindication and, in doing so, we salute all those, including, in particular, the principal defence solicitor involved Ms. Gareth Peirce, who have worked so tirelessly on their behalf. Seventeen years was far too long but, then, conspiracies to pervert the course of justice are not easy to break down and this, of course, was no ordinary conspiracy. It was, by any of the normal standards against which we judge matters of this kind, an extra-ordinary case - a unique coming together in one remarkable time-frame of a series of incidents, facts, circumstances and people which, on the surface and at the time, gave the case a plausibility that was always going to be difficult to shake. The "appalling vista", from which Lord Denning so publicly recoiled, has now come to pass. As we write, those charged with responsibility for the police and the main elements of the courts system in England have begun another re-examination to see what further lessons can be learned. A Royal Commission is to sit.

It is not unreasonable to ask what we, in this country, have ourselves learned from these two tragic occurrences. Soon after the Guildford Four were released, the Government appointed Circuit Judge Frank Martin to head a committee to examine the implications of that case for our system. That Committee reported, with commendable speed, in March, 1990. We have heard very little since. We still have no means of judicially reopening a conviction here - in similar circumstances - even where there is new evidence.

More recently, public concern has been voiced following judicial remarks (in the context of the dismissal of a murder charge against a young person) querying in a critical way an apparent conflict of evidence of the circumstances surrounding the making of an inculpatory statement by the accused. It may be recalled, that, during the course of its passage through the Oireachtas, the Bill, which became the Criminal Justice Act 1984, was amended to insert a provision which, the then Minister for Justice promised, was intended to facilitate the introduction of the tape recording or video recording of the interrogation of suspects in police custody. The Minister said, at the time, that he had set up a Committee (another Committee ?) to examine this. May we ask what became of this promise made all of eight years ago now?

We would ask whether it is not abundantly clear by now that it is highly unsatisfactory to expect juries to determine issues of guilt or innocence in cases involving serious offences when the main - or only - plank of evidence is a disputed confession and the dispute centres on the manner in which the alleged confession was taken from the accused person in police custody. Given the availability and comparative low cost of audio/video recording equipment nowadays, there is little excuse for this. Independent verification of what exactly was said by an accused person in a statement and the circumstances surrounding the taking of the statement by the police must be available to the court, in the interests of both defence and prosecution.

(Contd. on p. 104)

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Agreement to waive set off – "an unfortunate difference of opinion"

Since Law depends on precedent, nothing unsettles the lawyer more than the inability of Judges to agree on how the law is to be applied to a given set of facts. The best recent example in Ireland is the question of whether the standard form Building Contract issued by the Royal Institute of Architects of Ireland does or does not contain an agreement by the employer to waive his right of set off. This question, not on the face of it very difficult, has produced what Costello J. described[1] as "an unfortunate difference of opinion": i.e. of three High Court Judges. In considering effect of the same contract, one reached the directly opposite conclusion to the other two. Further, if one looks to U.K. precedent for guidance, one finds so many differences of opinion that the mind reels.

By
Christopher Doyle,
B.L.,

Procedure

All three cases involved claims by contractors that payment on foot of certificates issued by the architect had been wrongfully withheld by the employer: being liquidated each claim was brought on foot of a Summary Summons seeking liberty to enter final judgment. In each case the employer sought to resist judgment: however in one case it was not entirely clear what form of relief he sought. In *Rohan Construction Ltd. -v- Antigen Ltd.*[2] the Defendant sought a stay either pursuant to the contract or in the alternative under O.42, r.17, R.S.C. In *P.J. Hegarty & Sons -v- Royal Liver Friendly Society*[3] leave to defend was sought on the ground that the employer had an arguable defence of equitable set-off on foot of proceedings already issued. In *John Sisk & Son -v- Lawter B.V.*[4] it was stated that the defendant filed an affidavit seeking to resist judgment on the grounds of a cross-claim for unliquidated damages; though this does not appear from the judgment, presumably leave to defend was sought on the grounds of an equitable set-off. Since the stay in *Rohan Construction* was sought principally on the grounds of a right to have the claim to an equitable set-off arbitrated, it would appear that in each case the claim on foot of the certificate was met by a claim for equitable set-off.

U.K. Precedent

Until 1971, it would not have been questioned in Britain that an unliquidated claim for damages for negligence and/or delay in regard to the work done could properly be pleaded as an equitable set off against the amount due on interim certificates to the contractor. Certainly the Judgment of Morris L.J. in *Hanak -v- Green*[5] regarded as the best survey of the topic, would allow such a claim. However, in *Dawnays Ltd. -v- F.G. Minter Ltd.*[6] Lord Denning M.R. announced somewhat to the surprise of the profession that building contracts of their nature exclude the right of set-off. He said:—

> "Every business knows the reason why interim certificates are issued and why they have to be honoured. It is so that the sub-contractor can have the money in hand to get on with his work and the further work he had to do. Take this very case. The sub-contractor has had to expend his money on steel work and labour. He is out of pocket. He probably has an overdraft at the Bank. He cannot go on unless he is paid for what he does as he does it. An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross claims. whether good or bad – except so far as the contract specifically provides. Otherwise any main contractor could always get out of payment by making all sorts of unfounded cross claims".[7]

This was followed in a number of Court of Appeal decisions but it was not until 1974 that the question reached the House of Lords in *Modern Engineering Ltd. -v- Gilbert-Ash*[8] The result justifies Glanville Williams' remark that the Law Lords often leave the law more confused than they found it. Although the five Law Lords were unanimous in the result and it may be said that, on the application of the law to the particular facts before them, it is difficult to find any general proposition on which all five could agree, and the reasoning used to support the result varies between speeches. The relevant passage from Lord Denning M.R.'s Judgment in *Dawneys* was disapproved entirely

Christopher Doyle

by three out of the five.[9] In the view of the majority, Building Contracts are in no way distinct from other contracts for goods sold or work done; in the words of Lord Salmon:—

> "When a claim is made for the price of goods sold or delivered or work and labour done, the Defendant is entitled to set-off or set up against the amount claimed any damages which he had suffered as a result of the Plaintiff's breach of contract under which the goods were sold and delivered or the work and labour were done".[10]

The majority agreed that the parties to the contract can extinguish the right of set-off by agreement: however, while Lord Salmon stated that the exclusion could be "expressly or by clear implication",[11] Lord Diplock stated that it must be in "clear unequivocal words",[12] while Viscount Dilhorne did not elaborate on the meaning of "exclusion". Considering first the contract in ***Dawnays*** which provided inter alia:—

> "The contractor shall notwithstanding anything in the sub-contract be entitled to deduct from or set-off against any money due from him to the sub-contractor . . . any sum or sums which the sub-contractor is liable to pay to the contractors under this sub-contract".

"The majority [of the House of Lords] agreed that the parties to the contract can extinguish the right of set-off by agreement . . ."

It is very hard to quarrel with the majority view that this clause expressly preserved the right of set-off and that the Court of Appeal had simply ignored the agreement actually made. Turning to the contract in *Gilbert-Ash,* it provided (inter alia):—

> "The contractor also reserves the right to deduct from any payments certified as due to the sub-contractor and/or otherwise to recover the amount of any bona fide contra accounts and/or other claims which he, the contractor, may have against the sub-contractor in connection with this or any other contract".

The majority were unable to find any ambiguity and were satisfied that the contract expressly preserved the right of set-off.

Lord Morris, while agreeing that the Contract in ***Gilbert-Ash*** preserved that right of set-off, took an entirely different view of ***Dawnays***; he said:—

> "The decision of the Court of appeal in that case turned upon the meaning of the particular words there in question, it cannot guide decisions in the present case. Leave to appeal was refused by the Court of Appeal and a subsequent petition for leave to appeal was dismissed. Had the case come up for review I consider as at present advised, that an appeal ought to have failed."[13]

On the face of it this means that the clause in *Dawnays* which seemed to reserve the right of set-off, in fact excluded it: an idea which Lord Diplock found "astonishing".[14] Yet another view of *Dawnays* was taken by Lord Reid: stressing that the relevant passage of Lord Denning's judgment could apply equally to employer/contractor agreements, or as in *Gilbert-Ash* and *Dawnays* an agreement between main and sub-contractors, he stated that *Dawnays* might well be correct in regard to the former type of contract, but not the latter. In so finding he appeared to ignore the clear language of the clause in *Dawnays* and a judgment in which the "right conclusion" has no relevance to the facts is surely in the same position as one which was wrongly decided.

From this welter of conflicting views it is hard to find a ratio. The most one can safely say is that a majority held that a building contract, either between employer and main contractor or between main and sub-contractors does not by its nature exclude a right of set-off; the question is whether the contract itself contains such an exclusion, though even here the majority did not agree on whether the exclusion could be implied or must be explicit. Further, while they had the advantage of dealing with a clause expressly preserving set-off, their intrepretation of more ambiguous clauses caused difficulty when their speeches were considered by the Irish Courts.

John Sisk & Son -v- Lawter

Finlay P. in *John Sisk* stated that the question of exclusion of set-off in a building contract had not previously arisen in an Irish court but claimed, perhaps over optimistically, to have found considerable guidance in *Gilbert-Ash*; while recognising that, not being a dispute between employer and main contractor, *Gilbert-Ash* was not strictly in point, he shared the disapproval of Lord Denning's view in *Dawnays,* but also criticised Lord Diplock's opinion that set-off must be excluded by "clear unequivocal words". Finlay P., echoing Lord Salmon in *Gilbert-Ash,* said:—

> "I believe the true test to be not whether the Common Law right of set off has by the terms of the building contract been unequivocally excluded, but rather as to whether all the relevant terms of the building contract are in any particular event inconsistent with the exercise in that event of such a right of set-off."[15]

It is hard to quarrel with this statement, whether or not it can be reconciled with all the speeches in *Gilbert-Ash*. The facts of *John Sisk* however are in a crucial respect different from those of the English precedents: there is no clause in the R.I.A.I. Contract expressly preserving the right of set-off and Finlay P. therefore had to work out the intention of the parties from clauses which said nothing about the point at issue. In finding that set-off *was* excluded, he relied on three provisions:-

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(i) That the contractor had an immediate right to be paid subject only to specified deductions.
(ii) That if not paid on a certificate, the contractor could suspend work;
(iii) That, with exceptions (stated by Finlay P. to be immaterial), arbitration on disputes was not to open until after the works were complete.

It may be questioned, with respect, whether any of these clauses should settle the issue. As to the first, Lord Salmon in *Gilbert-Ash* (whose approach is closest to that of Finlay P. in *John Sisk*) described a similar Clause as "entirely neutral". He said:—

> "It is a common feature of any commercial contract that it should make provision for the dates and conditions upon which payments are to be made. I have never yet heard it suggested that such a provision in any way affects the rights of set off. Set-off indeed does not come into play unless and until some sum is otherwise due and payable by the Defendants".[16]

One would agree that provision for payment can hardly in itself exclude a set-off since set-off cannot arise until there is a right to be paid. As to the second clause, the exceptions regarded as immaterial include[17] a right to immediate arbitration on a certificate, a point which Murphy J. in *P.J. Hegarty & Sons -v- Royal Liver Friendly Society* was to stress in differing from Finlay P. With all respect to Finlay P., since he regarded the right to payment on the certificates as crucial, can the right to immediate arbitration on this question really be "immaterial"? As to the third clause, it is to say the least regrettable that Lord Salmon in *Gilbert-Ash* took a similar clause as evidence for the opposite conclusion.[18]

Clearly, each of the clauses relied on by Finlay P. is at least open to a different construction; can it therefore be said that set-off was excluded, either in clear words or by necessary implication? While the test laid down by Finlay P. is admirably clear, one may question the way he applied it.

P.J. Hegarty & Son -v- Royal Liver Friendly Society

The only material difference between the facts of *John Sisk* and those of *Hegarty* was that in the former the 1966 Edition of the R.I.A.I. Contract was used, in the latter the 1977 Edition. Murphy J quoted the relevant passage from Lord Denning's judgment in *Dawnays*: while noting rather regretfully that it was attractively phrased and "good commercial sense" he pointed to the central law in it i.e. that contracts depend on what the parties agreed, whether or not their agreement is commercially sensible. Turning to *Gilbert-Ash* he tried to summarise its effect as follows:—

> "(i) That an amount included in a certificate (whether interim or final) does not constitute a debt of a particular character and enjoys no special immunity from any cross claim or right of set-off to which the debtor may be entitled.
> (ii) One starts with the presumption that each party to a building contract is entitled to all those remedies for its breach as would arise by operation of law including the remedy of setting up a breach of warranty in diminution or extinction of the price of materials supplied or work executed under the contract.
> (iii) Parties to building contracts or sub-contracts, like the parties to any other type of contract, are entitled to incorporate in their contract any clause they please. There is nothing to prevent them from extinguishing, curtailing, or enlarging the ordinary rights of set-off.
> (iv) Whether the parties had in fact curtailed or restricted the Common Law or equitable right of set-off depends on the construction of the agreement between them".[19]

If one excludes the views of Lord Reid and Lord Morris, this is probably as close as one can come to the ratio of *Gilbert-Ash*. Turning to *John Sisk*, Murphy J quoted the passage from page 8 set out above and agreed with it. Considering the three Clauses relied on by Finlay P., he appeared of the view (which the writer shares) that none of them clearly excluded set-off. He would however have followed *John Sisk* were it not for his view that the arbitration clause was central to Finlay P.'s reasoning. Pointing out that the relevant clause in the 1977 Edition clearly referred to arbitration on the certificate, before completion, he stated that this took the arbitration point "out of the reckoning" and that since in his view the other two clauses were ambiguous, he found that the right of set-off had not been clearly excluded.

Though the writer agrees with the result reached by Murphy J and with much of his reasoning, there is one serious difficulty: the wording of the arbitration clauses in the two Editions is effectively identical. The arbitration clause cannot therefore be "taken out of the reckoning". Since Murphy J expressed his great reluctance to differ from Finlay P., he should, on that ground at least, have reached the same result, though he might well have queried Finlay P.'s view of the reference to arbitration on certificates as "immaterial"). Alternatively, while accepting the test laid down by Finlay P., he might have found that it had been wrongly applied in *John Sisk* itself, on the ground that no clause is inconsistent with a set-off. At any rate the "difference of opinion" goes well beyond a reading of the arbitration clause.

Rohan Construction -v- Antigen

Like *Hegarty, Rohan Construction,* was concerned with the 1977 Edition of the R.I.A.I. Contract. In view of Murphy J's distinction between the two Editions, Costello J. in *Rohan Construction* compared the two and could find no material difference between the arbitration clauses. He stated that, but for *Hegarty,* he would have had no difficulty in applying *John Sisk* and regretting the "unfortunate difference of opinion" he stated that he preferred Finlay P.'s reasoning and found the parties had agreed to exclude the right of set-off. Given

the "difference of opinion" one regrets that Costello J did not examine the contract in any detail nor explain why he preferred Finlay P's finding. Since no clause of the agreement in terms excludes a set-off and since, as Lord Salmon has pointed out, mere provision for payment cannot in itself rule set-off out, why precisely did he find that the parties must have excluded this right?

One other aspect of *Rohan Construction* perhaps deserves comment: the application by the defendant for a stay under O.42, r.17. Costello J refused this after considering what he stated were the principles laid down in *Agra Trading -v- Minister for Agriculture.*[20] With all respect, *Agra Trading* was hardly in point, since the defendant there applied not for a stay but for a plenary hearing. Barrington J's judgment is concerned with the intrepretation of and relationship between O.19 r.2 and O.37.r.6; at no point did he refer to O.42 r.17. Clearly the question of whether it is appropriate to send a motion for final judgment to plenary hearing is quite different from whether a stay should be placed on judgment; it is impossible to know whether Barrington J. in *Agra Trading* would have grated a stay if asked. Costello J did not, it seems, consider Murphy J's statement in *Hegarty* that had he not given leave to defend he would without hesitation have granted a stay under O.42 r.17. Surely *Hegarty* rather than *Agra Trading* was the appropriate authority?

Conclusion

Having entered this maze of conflicting views, is there a way out again? The test laid down in *John Sisk -v- Lawter* is, on the face of it, a better guide that the speeches in *Gilbert-Ash*; yet it is submitted, the attitude of the Law Lords, and of Murphy J in *Hegarty*, that the kind of language relied on by Finlay P. is too ambiguous to exclude the right of set-off is the correct method of applying that test. One may regret that no party has appealed any of the relevant judgments to the Supreme Court: when the matter does reach them it is submitted that while they should approve the *John Sisk* test, they should like Murphy J be extremely wary of using it to find an exclusion of set-off in the absence of very clear language.

NOTES

1. See *Rohan Construction -v- Antigen Ltd.* [1989] I.L.R.M. 783 at 784.
2. [1989] I.L.R.M. 783.
3. [1985] I.R. 524.
4. Finlay P. unreported, 15th November, 1976.
5. [1958] 2 Q.B. 9.
6. [1971] 1 W.L.R. 1205. [1971] 2 All E.R. 1389.
7. [1971] 1 W.L.R. 1205 at 1209 [1971] 2 All E.R. 1389 at 1393.
8. [1974] A.C. 689.
9. Viscount Dilhorne, Lord Diplock and Lord Salmon.
10. [1974] A.C. 689 at 722.
11. See [1974] A.C. 689 at 723.
12. See [1974] A.C. 689 at 718.
13. See [1974] A.C. 689 at 703.
14. See [1974] A.C. 689 at 719.
15. At p. 8 of his unreported Judgment.
16. (See [1974] A.C. 689 at 723.
17. An extract from the relevant Clause is helpfully set out in the case note on *Hegarty -v- Royal Liver Friendly Society* in Lyden and MacGrath "Irish Building and Engineering Case Law" at p.358.
18. See [1974] A.C. 689 at 726.
19. [1985] I.R. 524 at 528.
20. Barrington J. Unreported, 19th May, 1983.

Viewpoint - Contd. from p. 99

It is sometimes said of the British that they find it difficult, in matters affecting the Irish, to learn from their mistakes. Their recent insistence on derogating from the European Convention on Human Rights to enable them to keep in their law the 7 days detention period contained in their Prevention of Terrorism Act, following a finding in the *Brogan* case that this breached the Convention, and their subsequent decision to put a new Prevention of Terrorism Act on the statute books would tend to support that view. It is to be hoped that, in matters of such importance, affecting the liberty of the subject and going to the heart of our criminal justice system, the worst we will ever be accused of in this country is lethargy or, perhaps, even incompetence, and that, there will not be serious cause for regret at the failure to implement the necessary procedural reforms in this important area. □

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From the President . . .

Report from Vienna European Presidents' Conference

Vienna is obviously one of the highlights of a President's itinerary. It surpassed all advance expectations.

We arrived in Vienna on the evening of 6th February. The temperature was minus 10 degrees and we awoke on the following morning to find the city under a heavy carpet of snow – the first major snow-fall experienced there for three years. This added to the beauty of the city.

There was a meeting of the International Bar Association on the afternoon of Thursday, 7th February at which we got an interesting address by the English delegate, John Young, on "Liberalisation and expansion of international trade in legal services – the GATT proposal and its implementation".

It was nice to hear the meeting being told that Ireland along with Germany were the only two countries who were fully up-to-date in their international obligations in passing the required legislation for implementing the E.C. Directive of 21/12/88 on the mutual recognition of Higher Education Diplomas.

At this meeting also there was a reference to the CCBE meeting to be held in Dublin early in May. I assured the meeting that they would find a warm welcome in Ireland and I expressed the hope that the required resolution would be passed for the purpose of approving the draft Directive on establishment.

The Conference or meeting of Presidents was held at the Ferstal Palace. This was an all day meeting on Friday, 8th February. I estimate that 26 countries were represented - in effect, I understand that all countries of Europe were represented with the exception of Iceland and Malta. It was a fascinating international experience. At the meeting itself, the Irish delegation comprising Peter Kelly of the Bar Council and myself were flanked by the French delegation on one side and the Italian delegation on the other side and in the course of the social events over the few days, we had the pleasure of meeting a wide variety of Europeans including Dr. Kurt Waldheim, President of Austria, Dr. Walter Schuppich, President of the Austrian Bar, and the delegates from England, Scotland and North of Ireland. On one evening, I dined with the Presidents of the Lawyers Associations from Romania and Bulgaria and had a "night cap" with the President from Finland.

The meeting took the form of reports from all the different European countries. These were extremely interesting and varied. There was a report from Dr. Klaus Shmalz of Germany on the problems arising from the unification of East and West Germany – the former having approximately 2,000 lawyers and the latter about 58,000. The delegate from Czecheslovakia reported on the position before and after the Revolution of November, 1989; that they were now as free as Western Europe and the principle of free access to the legal profession was accepted. There had been a dramatic increase in the number of lawyers. There was also a report from Romania on the position since the Revolution there.

In Denmark, they thought "the one stop shop" was a threat to the independence of the legal profession and it was very important for the profession to remain independent. Under a 1990 law, incorporation was allowed for lawyers provided 100% of the equity was owned by practising lawyers. Legal advice could only be given by lawyers in private practice or incorporated as aforesaid.

Holland – the Dutch Bar had examined the question of multi-disciplinary practices. They are permitted to co-operate with other professions in partnership provided there is comparable education and disciplinary rules but, so far, not with accountants. Here, the view still was that the role of accountants, especially in auditing, was impartial and the role of advocates was partial - hence, an immediate conflict.

Tony Holland, the English President, expressed the view that the age of professions was possibly coming to an end. The reality was – whether we liked it or not - that we were in an age of consumerism. Lawyers had to service an international market and clients with international requirements. There was strong consumer pressure and competition, especially from accountants.

There were contributions also from the delegations of Liechtenstein (where I think they have only 43 lawyers and one of their main problems related to money laundering), Poland, Luxembourg, Hungary, Yugoslavia, Turkey and Les Jeunes Avocats.

It was interesting to learn also from Dr. Karl Hempell, Vice-President of the Viennese Bar, that he receives and regularly reads our Gazette. If this Report is inaccurate in any way, then I would be greatly pleased if he would write to correct me - indeed, perhaps he might write in any event to elaborate and expand on my comments.

It was a fascinating and enriching experience to hear one's colleagues from all over Europe. There is no formal constitution or regulations governing this meeting of Presidents. They have no rule-making or disciplinary powers. But the potential of this meeting as an influence for law, order, justice and peace throughout Europe is enormous through the exchange of ideas, the example of high ethical values and the mutual help the legal profession in each country can give to the others, and of

course the way in which we can learn from one another.

On the social side, the Juristen Ball was cancelled because of the Gulf War but we were otherwise entertained royally. We attended a Heuriger (wines evening) at Fuhrgassl-Huber on Thursday evening. We attended receptions given by the Federal Chancellor of the Republic of Austria, Dr. Franz Vranitzky, and the Federal President of the Republic of Austria, Dr. Kurt Waldheim, at the Imperial Palace. A ceremonial banquet was given by the Mayor of Vienna in the Pallavicini Palace instead of the Juristen Ball. We were also taken for a guided tour of the Mozart Exhibition.

Vienna is truly at the historical and cultural centre of Europe and through this annual meeting of Presidents has taken on a central role for the legal professions in times of profound political and economic change.

Donal G. Binchy.

(See photo on page 116).

APPRENTICES "ZEITGEIST" NEEDS YOU!

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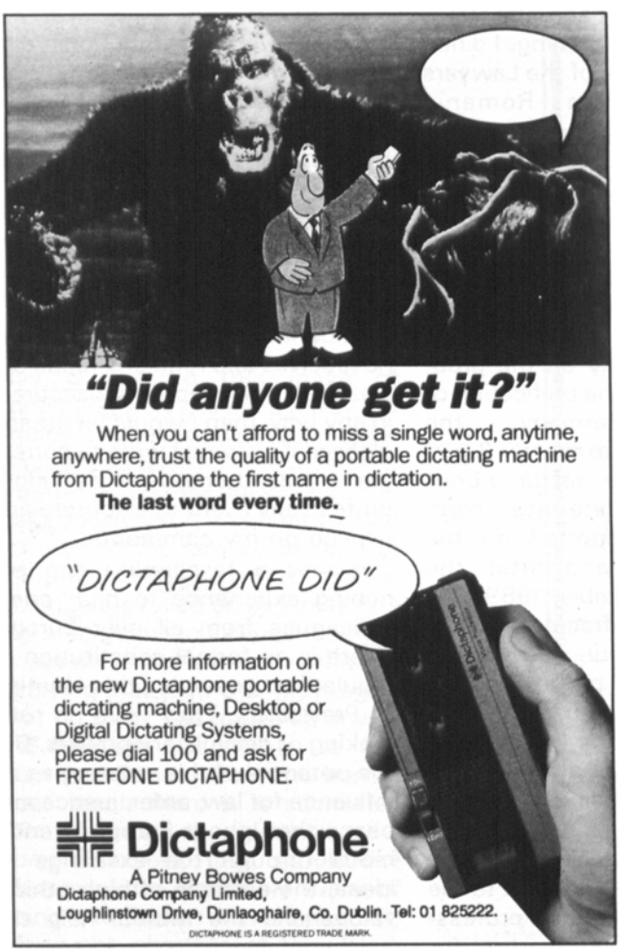

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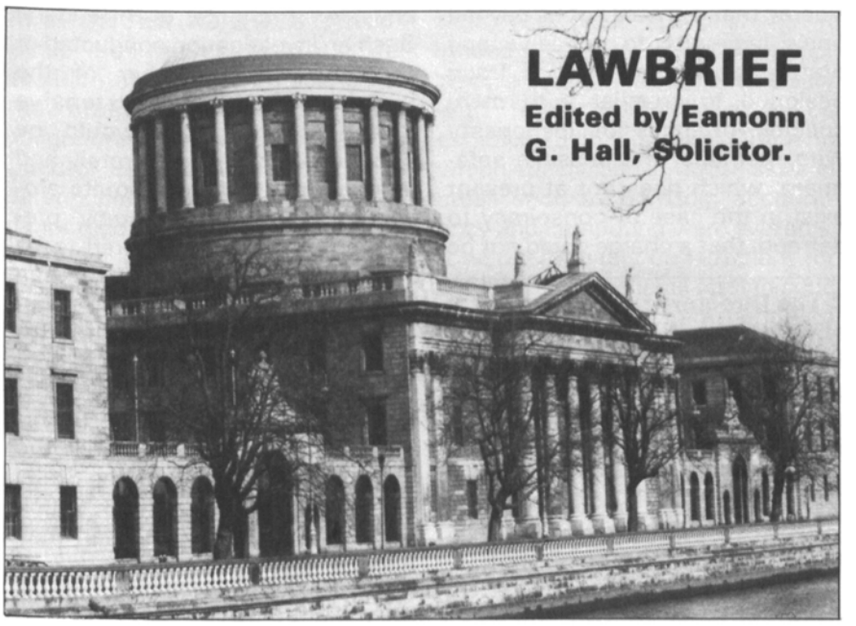

WHITE-COLLAR CRIME

The Director of Public Prosecutions, Mr. Eamonn Barnes, delivered an imporant lecture to the Irish Centre for Commercial Law Studies on February 21, 1991. The Director spoke about the adequacy or otherwise of the Irish criminal justice system in coping with fraud, particularly with large and complicated cases. The Director stated that unless Ireland adopted new and radical ideas and concepts, both in our laws and procedures, he feared that the new electronically-controlled worlds of national and international banking, financial services, trade, commerce, customs, tariffs and interventions "may rapidly become happy hunting grounds in which any reasonably sophisticated white-collar criminal could roam at will, untroubled by any perturbation that his activities would be effectively checked or inhibited by the Irish criminal justice system".

LAW OF DISHONESTY

The Director of Public Prosecutions stated that the law relating to dishonesty essentially was contained in the *Larceny Act, 1916*. Mr. Barnes stated the present law, though flawed, was adequate enough to deal with the neighbourhood robber and burglar. The law could cope with simple larcenies and, with increasing strain, the generality of other statutory larcenies, false pretences and embezzlements. The Director stated that the strain approaches breaking point, however, when we enter the world of false accounting and fraudulent conversion. One generally needed a co-operative suspect in those areas, co-operative, that is either in the transparent nature of his fraud or in his attitude towards the investigation, in order to mount a prosecution which holds out any prospect of success.

"The Director stated that unless Ireland adopted new and radical ideas and concepts both in our laws and procedures, he feared 'a happy hunting ground in which any reasonably sophisticated white-collar criminal could roam at will . . .' "

Eamonn Barnes

The Director was of the opinion that the fault was not all with the substantive Criminal Law. The law of Evidence and Ireland's system of criminal investigation and procedure militated strongly against the detection and the prosecution of persons guilty of sophisticated frauds. However, the Director stated that the law itself was clearly inadequate in 1991; the law required root and branch reform. The Director noted from the *Eleventh Annual Report of the Law Reform Commission* that a Discussion Paper on dishonesty was at an advanced stage. While he would not wish to trespass on the Commission's functional area, the Director said that we urgently needed legislation which reformulated the principal concepts of the law of dishonesty which related to property, ownership, services, credit, appropriation, loss and prejudice, deception and dishonesty itself. Whether such reforming legislation would follow the lines of the UK *Theft Acts of 1968 and 1978*, whether it would draw on the fruits of the extensive studies in this area over the past forty years by law reform agencies in other Common Law jurisdictions in North America and the Antipodes, or whether it would constitute something which the Director would like to see but which may not be a practical proposition – an entirely Irish solution – was something on which he had no very strong view. Whatever form the solution may take, what was required was a reformulation of the fundamental concepts to which it referred so that, as far as human ingenuity could achieve it, there would always be a criminal offence to fit grossly dishonest conduct. The Director stated that this has often not been the case, even before the introduction of electronically-performed financial transactions and accounting.

NO CRIMINAL OFFENCE OF FRAUD

The Director of Public Prosecutions considered that there was no reason why, if new dishonesty laws were enacted, the old ones could

not be retained for five or ten years as a fall-back position, should the new law spring serious leaks in practice. The Director considered that it may come as a surprise to many that there was in fact no criminal offence of fraud. There was, however, the offence of conspiracy to defraud which, on the authorities, was notably wide in its sweep. The scope of the offence was so wide as to cause periodic misgivings among lawyers and law reformers but it survived all suggestions of abolition. The reason was that it was necessary. Situations arose in which the prosecution either could not isolate, or could not prove, individual offences committed in a fraudulent course of conduct, even though that course of conduct was clearly designed to defraud a person or persons or the public at large. It was obviously a prosecutorial weapon to be used with extreme caution and restraint and, of course, if substantive offences were committed and provable, any prosecution would normally relate specifically to them. Mr. Barnes stated that he and many others found it odd and illogical that conduct, howsoever dishonest, could be an indictable offence carrying unlimited imprisonment if committed by two persons, but criminally not unlawful if committed by one. Conspiracy to defraud had been a common law offence for a very long time and he was not aware of any case in which the authorities in this jurisdiction had misused or abused their powers in this respect. He considered that it should not be beyond one's ingenuity to conceive and draft a general offence of fraud designed to co-exist with more specific offences of dishonesty with, perhaps, the possible safeguard, which does not at present exist in the case of conspiracy to defraud, that a charge could not be preferred except by or with the consent of the Director of Public Prosecutions.

"[The Director] considered that it should not be beyond one's ingenuity to conceive and draft a general offence of fraud designed to co-exist with more specific offences of dishonesty . . . . "

Criminal Investigation

The Director stated that the two most difficult types of criminal offence to investigate and prosecute were those involving fraud and sex. They were also among the offences which gave rise to the greatest public disquiet, particularly, when a prosecution was deemed inappropriate or impossible. The Director considered these offences were suitable for and frequently required some kind of inquisitorial approach. He believed that the appointment of an examining magistrate invested with the appropriate powers and working with and through the Garda Siochana would greatly enhance the chances of the successful investigation of serious and complex fraud and thereby reduce public disquiet regarding both the prevalence of the offence and the immunity of offenders. Such an investigation conducted or directed by a member of the judiciary exercising extensive investigative powers would be conducted entirely separately and independently of the ultimate prosecuting authority, thereby preserving what he considered to be the extremely important separation of the investigative and prosecutorial functions. The Director suggested that should the idea of an investigating magistrate prove to be unacceptable, it would, in his view, be necessary to invest the investigative authority of the State, the Garda Siochana, with much more extensive powers than they now possessed if serious fraud was to be confronted in a serious manner. Some of the required powers were obvious, such as the power presumably on application to a court to enter, search and seize and would not in any way be unusual or unprecendented. Other powers which the Director would regard as absolutely necessary and the absence of which in the past had seriously hampered fraud investigations, would broadly correspond with those conferred on the Director of the Serious Fraud Office by section 2 of the UK *Criminal Justice Act of 1987.*

"[The Director] believed that the appointment of an examining magistrate invested with the appropriate powers . . . would greatly enhance the chances of the successful investigation of serious and complex fraud . . . "

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RESPONSES TO QUESTIONS

While not advocating a total abolition of the right to silence or the creation of an absolute obligation to self-incriminate, the Director considered it odd that a person, believed to be involved in a minor road traffic offence, could be obliged under pain of imprisonment to admit that he was driving the vehicle at the relevant time, thereby supplying the missing link in the chain of evidence against him, but a person suspected of swindling scores of persons of millions of pounds was not obliged to say whether or not he made a particular entry in an account or caused a particular withdrawal to be made. The rule against self-incrimination did not prevent a suspect having to provide what was often an extremely incriminating sample of his blood or urine under the Road Traffic Code, again under pain of severe penalties. Other provisions enable fingerprints and swabs to be taken which may well result in a conviction for serious crime. The provisions of section 20 of the *Finance Act, 1936* have, for over half a century, been a most valuable weapon in the prosecution of customs offences. The Director saw no logical reason why the responses to questions properly asked in the course of a fraud investigation by a person duly authorised to do so by an Act of the Oireachtas should not be admissible in evidence, if we were really serious about the investigation of serious fraud.

COMBINED INVESTIGATIVE AND PROSECUTIONAL FACILITY

The Director raised the question whether or not Ireland should have a combined investigative and prosecutorial facility akin to the UK Serious Fraud Office. He knew that that the UK Office operated extremely well and efficiently. He meant no reflection on that Office when he said that on balance, for Ireland, he considered that, in this jurisdiction at least, the separation of the investigative and the prosecutorial functions and the preservation of the independence of each from each other were of the very great importance indeed. The Director considered that the time was fast approaching, if indeed it had not already arrived, when a section dealing exclusively with fraud would have to be established in his own Office in which specialised in-house skills in areas such as banking, accountancy and computing were available. It would probably be sufficient for the present if the legal staff in such a section underwent a period of training in those disciplines but he suspected that the employment of fully qualified persons may become necessary sooner rather than later. At present with existing staffing levels it was not feasible for a Legal Assistant dealing with a complex fraud case to give it the exclusive attention it deserved and indeed he would usually have murder, rape and robbery files demanding his urgent attention at the same time.

LAW OF EVIDENCE: TERRITORIAL JURISDICTION; CRIMINAL PROCEDURE

Finally, the Director made brief references to the Law of Evidence, problems of territorial jurisdiction, and criminal procedure. In relation to the Law of Evidence he stated that the problems identified in *Myers* case had been greatly exacerbated by the advent of the micro chip, the micro fiche and the magnetic tape. Draft legislation in this difficult area was, he understood, at an advanced stage.

Even more difficult problems of a jurisdictional nature arose from the increasingly international character of fraudulent financial and commercial transactions. In relation to criminal procedure, he was greatly attracted by the provisions of section 4 of the UK *Criminal Justice Act 1987*. The Director considered that in relation to preliminary examinations generally, there was an unanswerable case for their abolition in the case of serious and complex fraud.

The Director of Public Prosecutions concluded by stating that the investigation and prosecution of serious fraud cases in Ireland was fraught with serious difficulty.

□

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Practice Notes

Derelict Sites Act 1990

Practitioners should be aware of the Derelict Sites Act 1990 which came into effect on the 27th of June 1990.

The Act provides a definition of a "derelict site" and imposes a general duty upon the owner or occupier of any land to take all reasonable steps to ensure that the land does not become or continue to be "a derelict site".

The Act goes on to provide that within one year after its commencement all local authorities shall compile and maintain a register of all derelict sites within their area. This register shall contain certain particulars of each derelict site such as the name of the owner or occupier (if they can be located), the exact location of the site, its market value and any action which the authority has envisaged in relation to it. Once such an entry is made in the register the owner or the occupier of the land shall be notified. The local authority may then serve a notice upon the owner or occupier of the derelict site obliging him to take whatever action is thought necessary in relation to it.

Among the powers given to local authorities under the Act is the power to enter upon land for the purposes of determining whether it should be entered on the register of Derelict Sites, and power to compuslorily acquire any derelict site.

Local authorities are obliged to levy and collect a charge to be known as a "derelict sites levy" from the owner of all derelict sites within their area. The Act provides that this levy, and interest on it, shall be a charge on the land to which it relates.

Once land which is entered on the Register of Derelict Sites is transferred from one person to another it shall be the duty of both transferor and transferee to notify the authority of the change of ownership within 4 weeks of it taking place. In the case of a transmission on death it shall be the duty of the person acquiring the land to notify the authority within 6 months of the transfer, and the duty of the personal representative to notify it within 2 months of the Grant of Representation issuing.

Practitioners acting for Purchasers of any lands capable of or likely to be affected by the Act should raise a Requisition on Title as to whether the lands are entered in the Register of Derelict Sites and, if so, should seek evidence as to the requirements of the local authority in relation to the lands, and evidence of the payment of any Derelict Sites Levies. □

Conveyancing Committee

Supreme Court Order for security for costs

In an oral judgment on November 16, 1990, the Supreme Court ordered an appellant/plaintiff residing within the jurisdiction (who was appealing against a High Court Order dismissing his claim), to give security for costs of the second-named defendant to be occasioned by the Appeal "in such sum as shall be determined by the Master of the High Court and that such security be given by placing the said sum on deposit in the joint names of the respective solicitors for the Plaintiff and the second-named defendant within one month of such determination by the Master of the High Court and that in default of such security being duly given as aforesaid the plaintiff's appeal do stand struck out".

It is understood that this is the first case in which a defendant successfully applied for security for costs of an Appeal where the appellant/plaintiff resided within the jurisdiction.

(Fallon -v- An Bord Pleanala and Burke, Supreme Court 16 November, 1990 per Finlay C.J. with Griffin and Hederman JJ. concurring).

□

Criminal Lawyers Committee

The Criminal Lawyers Committee wish to obtain submissions from Criminal Law practitioners in relation to the adequacy of fees paid under the Legal Aid Scheme. Any inquiries or submissions should be directed to Linda Kirwan, The Law Society, Blackhall Place, Dublin 7.

Correction

Land Registry/Registry of Deeds handout circulated with *December 1990 Gazette* Page 4. Item no 20.

The second sentence of this item should read:-

"Deeds of charge lodged with leases should be in the form applicable to **un**registered land".

Conveyancing Committee

Land Registry - Ground Rents Section

Notice is hereby given that Ground Rents Section of the Land Registry will move to Ormond House, Ormond Quay, Dublin 7 on Monday, 29th April 1991. Tel: 01-732233. Fax: 01-728654.

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Solicitor's Duties under the CAT Amnesty

In his Budget Speech on 30 January 1991, the Minister for Finance announced an Amnesty in respect of interest and penalties for outstanding Capital Acquisitions Tax and Estate Duty. In effect, this is almost identical to the Income Tax Amnesty of 1988 which was such a resounding success in gathering tax and in finalising many problems where the taxpayer, through lack of accounts or whatever, had been in default or claims for tax had lain dormant for many years.

The Amnesty gives a final opportunity to taxpayers to settle outstanding Capital Acquisitions Tax and Estate Duty liabilities by 30 September next, without the payment of a great bulk of the interest or penalties. There are, however, certain conditions attaching to the granting of this amnesty:-

1. A self-assessment return must be completed;
2. The return must be sent to the Revenue Commissioners with a cheque for payment of the outstanding tax;
3. Any other Capital Acquisitions Tax outstanding at the time of payment must also be paid;
4. A letter accompanying the return and payment must apply for the waiver of interest and penalties.

As stated earlier, this affords a final opportunity to taxpayers to put their affairs in order before the Revenue introduce new stringent enforcement measures with effect from 1 October. These new stringent enforcement measures will be taken from the Income Tax Code and include:

(a) Powers for the Revenue Commissioners to attach certain financial accounts of the taxpayer (Sec. 73 FA 1988);
(b) The use of Revenue Sheriffs to attend the taxpayer at his home or business and to levy the tax and penalties, if not in cash, by distraint;
(c) Adoption of the audit procedures in relation to Capital Acquisitions Tax claims and to examine in detail, including a visitation from the appropriate officer of the Revenue Commissioners, all returns made and to inspect property, not only real property, to confirm the accuracy of those returns.

It is the duty of every solicitor to bring this tax amnesty to the attention of his clients to make them aware that if they have at any time received a gift or an inheritance *or made a gift* and full disclosure has not been made to the Revenue Commissioners, either through ignorance or the client being afraid that a tax liability will attach to the benefit, it is necessary to formalise this situation for the client and, if tax is due, to advise full compliance within the amnesty.

By
Brian Bohan
Solicitor

It may not always be obvious to clients whether a gift has taken place and for that reason it might be necessary, depending on the circumstances of each client, to enumerate certain instances where such events might have taken place.

"It is the duty of every solicitor to bring this Amnesty to the attention of his clients . . . "

CAT legislation targets gifts taken as a source of gift tax. It may be obvious to a client, where an inheritance is taken, that a liability to tax will or may exist, but gifts are separate from these and they may not always be obvious. Gifts can take many forms. For example, a parent might sell land to a child at an undervalue and of course the difference in value is a gift.

It may be easy for the solicitor to enumerate to his clients the circumstances which might apply to that particular client and, by way of reminder, some of the areas might be:

(1) Sale of land at an undervalue.
(2) Sale of shares in a family company at an undervalue.
(3) Interest free loans or loans at less than a commercial rate of interest.
(4) Interest free loans to family companies.
(5) Passing of family heirlooms to the next generation before death, e.g. jewellery, antique furniture etc.
(6) Purchase of a car for a child or grandchild.
(7) Payment of the deposit on the purchase of a house for a child or grandchild.
(8) Capital injection into family companies.
(9) The issue of shares to family members on the set up of a family company.
(10) The placing of assets into joint names.

The above list is not exhaustive and it is up to every solicitor to familiarise himself with the circumstances which could give rise to a claim.

Another area of concern to the solicitor must be professional indemnity, whether through the Solicitor's Mutual Defence Fund or through independent insurance. Many claims against the Defence Fund (and probably in respect of independent insurance companies) are caused by the solicitor's negligence in dealing with tax matters, particularly those tax matters which are endemic to his profession, namely, gift tax and inheritance tax. There are a number of ways in which a solicitor may have failed his client in dealing with tax:

(i) Failure to identify a claim for tax.
(ii) Failure to deal with a claim for tax.

(iii) Failure to advise a client properly in relation to a potential claim for tax.
(iv) Cases where the solicitor has "sat down", by not accounting for a claim for tax.

It is necessary that each solicitor review his files, particularly those files dealing with taxable matters, to ascertain if any of the above circumstances arise and, if necessary, to account for the appropriate tax. If it is not in the knowledge of the solicitor, he should and must seek proper advice so that he can either be satisfied that no claim to tax arises or, if necessary, prepare the return and account for the tax.

The Amnesty also applies to Estate Duty and, although this tax has been "dead" since 1 April 1975, it is still possible that there are some claims still outstanding. There may not be many of us who remember Estate Duty but it was the forerunner to Capital Acquisitions Tax and took the form of a "mutations tax", i.e. tax charged on the property as it passed and not, as we understand it today, on the property as it is taken.

In relation to the administration of estates, Estate Duty was payable before the issue of the grant of probate or administration and it was, in many cases, for the solicitor to arrange the borrowing from the bank so that the duty (tax) could be paid to enable the Grant of Probate, or Administration to issue. This, in many cases, meant that the estate might have to borrow a substantial sum as Estate Duty was a more savage tax than CAT.

The rates of Estate Duty were progressive and charged on the whole estate, not on units or bands of the estate. For example, the maximum rate of Estate Duty at the end of its era was 50%, viz. 50% was charged on the total estate if it exceeded a certain figure. For example, if an estate of £500,000 (a very large sum in 1975) was passing, the Estate Duty would be £200,000. The Inheritance Tax on such an estate passing in its entirety to a stranger, today, would be approximately £167,500.

It may be that there are still certain cases where Grants of Probate were not obtained in the 50's or 60's to clear title to land or house property. It might have been tempting for the client to "postpone" the issue of a Grant of Probate or Administration until he or she was in more favourable circumstances to enble the Estate Duty to be paid. It may be that the solicitor advised such postponement in view of the lack of funds. If such circumstances do exist, it will now be necessary for the solicitor, again, to review his files and take appropriate action. It would be better to clear title etc. under the terms of the Amnesty than to let the matter go any further and find that the client has to pay interest and possibly penalties on top of the outstanding tax or duty.

In relation to the Mutual Defence Fund, any solicitor who finds himself in either of the above circumstances, where there is a claim to Capital Acquisitions Tax or Estate Duty outstanding, would be doing a very great disservice to his profession if he does not take avantage of this Amnesty to deal with the matter. The tax is something which exists and would, except in unusual circumstances, be the liability of the client taxpayer but the question of interest and penalties, arises from the solicitor's delay, inefficiency or inability to deal with the matter. It is to be hoped that this opportunity will be taken to, at least, ease the burden on an already harassed profession.

Similarly, failure to advise an errant client to take advantage of the Amnesty may expose the solicitor to future problems.

The effect of the amnesty is that interest to 30 April and penalties will be waived on tax which is due and payable in respect of gifts or inheritances which have been received on or before 30 January, 1991. Provided the tax is paid on or before 30th April, the interest which would have been payable up to 30 April will be waived and proceedings will not be initiated or continued for the recovery of any penalty which a donee or successor would have incurred through default in payment.

" . . . failure to advise an errant client to take advantage of the Amnesty may expose the solicitor to future problems."

The amnesty applies to the following:
(1) Where the taxpayer (or the solictor) has been in default of payment.
(2) Where tax is being paid by instalments.
(3) Where an arrangement has been made with the Revenue Commissioners and tax has been paid on account. Interest arising on the unpaid part will be waived provided all the tax is paid.

It seems unfair, in these circumstances, that the compliant taxpayer will be penalised where the defaulting taxpayer may benefit by his default. It is to be hoped that the Revenue Commissioners will make some concessions in relation to interest already paid on instalments or on payments on account.

The amnesty will not apply in the following circumstances:
(1) Where additional tax becomes payable by reason of an increase in the value of property, following the Revenue Commissioners consideration of that valuation. However, if the tax is paid prior to 30 September, it will still apply.
(2) Where a surcharge payable by virtue of the undervaluation of property under the provisions of Section 79 FA 1989 unless paid prior to 30 September.
(3) Where tax is under appeal and the appeal results in unpaid tax being confirmed or tax in excess of the tax already paid being payable, unless the additional tax is paid by 3o September.
(4) Where there is a judgment for the payment of tax and interest (and penalties), if applicable.

If a solicitor finds himself in any of the above situations (apart from the last one), he should consider advising his client to pay the additional tax before the due date. In this way he will have protected his client from interest and penalties and, if the matter goes his way, he will receive the tax back with interest under the general provisions of the Capital Acquisitions Tax legislation.

For many years now the Law Society has continued the tax education of solicitors through the Continual Legal Education system and, recently, a video of the practical aspects of CAT has been produced in a joint venture with the Revenue Commissioners. This video is an essential element of giving clients a full service in relation to wills, estates and family matters and in meeting the Amnesty deadline and should be acquired by every firm in the country. It is available to solicitors at the reduced rate of £95 per copy.

We must await the publication of the Finance Bill to see the exact details of the Amnesty, but the solicitor must do his homework now and must review all his files to see if any circumstance exists which might expose him to liability if he fails to take advantage of the Amnesty. This is one final opportunity for solicitors to "clear the decks" with the Revenue Commissioners in relation to Capital Acquisitions Tax and it is to be hoped that we will grab it with both hands. □

THE IRISH SOCIETY FOR EUROPEAN LAW

Founded in 1973

Irish Affiliate to the
Fédération Internationale
Pour le Droit Européen (F.I.D.E.)

President: The Hon. Mr. Justice Brian Walsh

Chairman: Mr. Patrick J.C. McGovern, Solicitor

LECTURE PROGRAMME FOR SUMMER 1991

1. Thursday, May 16th, 1991:
   Anthony Collins, Referendaire at the Court of Justice of the European Communities – *"The availability of interlocutory injunctive relief in national courts to uphold rights at community law".*
2. Thursday, June 6th 1991: John Meade, E.E.C. Department, Arthur Cox & Co., Solicitors – *E.E.C. Competition Law: The Impact on the Irish Market.*

Lectures take place at 8.15p.m. at the Kildare Street and University Club, 17 St. Stephen's Green, Dublin 2, by kind permission.

Members and their guests are invited to join the Committee and guest speakers for dinner at the Club at 6.15p.m. on the evening of each lecture. Members intending to dine must communicate with the Registrar, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, 52 Harcourt Street, Dublin 2. (Tel: 01-714444 ext. 5081, Fax. 01-679 3980, Electronic Mail (Eirmail) (Dialcom) 74: EIM076) not later than two days before the dinner, as advance notice must be given to the Club.

Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10 for students, barristers and solicitors in the first three years of practice). Membership forms and further details may be obtained from the Registrar.

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For further information about the College's activities, please contact:

The Registrar, Royal College of Surgeons in Ireland,
St. Stephen's Green, Dublin 2.

Younger Members News

Coyle Hamilton Debate 1991

The final of this year's law student's debating tournament for the Coyle Hamilton Trophy took place on the 19th February last in the President's Hall, Blackhall Place.

This prestigious debate was, once again, convened by SADSI. The motion for debate was "that the Irish public would be better served by a fused legal profession." Proposing the motion were teams from UCG and the King's Inns. The opposition speakers hailed from Queen's University, Belfast and SADSI.

The debate was, once again, very ably chaired by the Chief Justice, the Honourable Mr. Justice Thomas A. Finlay. The distinguished panel of adjudicators was composed of the Honourable Mr. Justice Niall McCarthy, the Honourable Mr. Justice John Blayney, Mr. Niall Fennelly S.C., Mr. Donal Binchy and Judge Michael Moriarty.

Following some excellent debating, the adjudicators retired to make their decision which, as usual, proved very difficult in view of the high standard of all the speakers. The winning team was Queen's University, Belfast comprising of two speakers, Adele O'Grady and Deborah Irwin.

The prize for the best speaker of the evening was given to Maire Anne Ni Ghallchoir from the SADSI team. The SADSI team (Maire Anne Ní Ghallchoir and Maura Hennessy) were awarded the runners up prize.

Mr. Ronan Fearon, the Chairman and Chief Executive of the Coyle Hamilton Group then presented the prizes which included the Coyle Hamilton Trophy and an expenses paid debating visit to the United Kingdom.

The evening once again proved to be a tremendous success and sincere thanks and praise is due to Coyle Hamilton Insurance Brokers for their very generous sponsorship of this event.

Eileen Roberts
Convenor

Younger Members Committee

7-A-SIDE SOCCER BLITZ – Mixed Competition*

Saturday, 25th May 1991

in aid of the Solicitors Benevolent Association

Sponsored by the Educational Building Society

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Live music throughout the day!

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The Soccer Blitz will be followed by a social evening.

For further details please contact:-

Sandra Fisher, Media Officer, The Law Society. Tel: 710711.

*Four male and three female players.

Closing date for receipt of applications: **Friday, 17th May 1991.**

This year's final participants photographed with the Chief Justice and Mr. Ronan Fearon, Chairman and Chief Executive of the Coyle Hamilton Group. Standing left to right. Adele O'Grady (Queens), Timothy O'Leary (King's Inn), Maire Anne Ni Ghallchoir (SADSI), Oisin Quinn (King's Inn), Deborah Irwin (Queens), Geoffrey Shannon (UCG).

Seated left to right Maire Hennessy (SADSI), Ronan Fearon, the Chief Justice and Elaine Hannify (UCG).

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Limerick Bar Association Annual Dinner
District Justice Michael Reilly with Margaret O'Connell.

Joseph Kelly, Auditor of The Solicitors Apprentices Debating Society, 1990-1991.

Limerick Bar Association Annual Dinner
(Left to right): Paddy Glynn, Noel Ryan (Director General of The Law Society), Mary Glynn, D. Morrissey Murphy and Una Ryan.

European Presidents' Conference, Vienna
(left to right): Dr. Kurt Waldheim, President of Austria, Donal G. Binchy, President of the Law Society, Peter Kelly, S.C., and John Pellabauer, Canada. (See report on President's page.)

Solicitors Apprentices Debating Society Committee 1990-91
(Left to right): James Mackey (Recording Secretary), Maire Ann Ni Ghalchoir (Treasurer), Eddie O'Connor, Committee member, Donal Taaffe (Debating Secretary), Sean Mahon, Committee member, Joseph Kelly (Auditor), Stephanie Coggans (Vice Auditor). Absent from the photo were Orla O'Dea, Pat Crowley, Kevin McErlean, Emmet Fitzgerald, David Waters and John O'Sullivan.

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Without prejudice or without effect?

Part 2

by
Thomas Courtney,
B.A., LL.B,
&
Nuala Jackson, B.A. (Mod),
LL.M., B.L.

3. THE BASIS UPON WHICH THE RULE IS FOUNDED

It is submitted that the without prejudice rule is founded upon public policy. The intention of the offeror that the communications in question should not be admissible against his must be coupled with an actual or constructive recognition on the part of the offeree to this end. The public policy reasoning is clear and has been referred to previously. Likewise, that the rule reflects the intentions of the parties has been accepted in several judicial dicta.[36] However, if the foundation stone of the rule is the parties' intention and the recognition of same, it is submitted that so long as this intention/recognition is found, the use of the express words "without prejudice" is not necessary. However, it is plausible that cases may arise where the words are not used and, yet, the privilege will be conferred. Paradigm cases involved a series of letters, the first and perhaps some subsequent are headed "without prejudice", but one or more are not. In such a case, what some writers call an "implied without prejudice", comes into play. The intention must be on the part of the offeror with public policy dictating that the offeree must not unreasonably disregard this intention by seeking to admit the documents in question.[37] However, once the conditions for the privilege to attach have been met, waiver will only be possible with the consent of both.[38] Clearly the offeree must have reasonable notice of this intention. Using the words "without prejudice" is the most straightforward way of bringing such an intention to the notice of the other side. But there are alternative methods.

" . . an 'implied without prejudice' [may come] into play."

It is without doubt that the courts have sometimes given protection without the express use of the "magic formula" and it is therefore essential to consider the manner in which such an intention may be expressed and reasonably contemplated if the precise words are not used.

One context in which the courts have been asked to consider this question is where the words are used in the initiating document and a course of correspondence follows thereafter; is the initial expression of the words sufficient to evince an intention to protect later documents in the same course of negotiations even if the words are not specifically used in the later documents?

It would appear from the authorities that if the course of negotiations is commenced without prejudice, this protection will be sufficient to cover subsequent discussions.[39] An exception to this rule would be where there is a clear break in the chain of correspondence.[40] However, such a break merely means that a renewed expression of intention and reasonable contemplation is required if protection is to exist in relation to this new chain of correspondence. It would further appear that it may be possible to benefit from the protection retrospectively where the position has been rapidly rectified: [redacted] (1877).[41] Halsbury states that the juridical basis of the possible retrospective use of these words is

> " . . . if a communication is intended to be "without prejudice", and is accepted by the other party as such, then the privilege attaches".[42]

However, judicial dicta in cases where this has been considered, seem to view the second letter, attempting to attach the privilege, as merely a postscript to the earlier letter. This would mean that the time lapse between them would need to be extremely short so that the two could effectively be read as one. The former rationale, as expressed by Halsbury, would appear to permit a greater time lapse between the relevant communications. This issue was considered by the English Court of Appeal in *Oliver -v- Nautilus Steam Shipping Company*.[43] The plaintiff had suffered an injury in the course of his employment. It was contended that he should be barred from claiming compensation for his injuries on the basis that he had accepted weekly payments made to him by his employer. The evidence was that the first such payment had been accepted unconditionally but that the second and subsequent payments had been accepted on a "without prejudice" basis.

Nevertheless, the court was prepared to hold that the privilege attached to all of the payments. That the court so held was clearly based on the view that this was the intention of the parties. Romer L.J. stated

> "I think the second payment and subsequent payments, which were made expressly without prejudice, shew, under the circumstances, that the parties must, as between themselves, have treated the first payment as not having irrevocably bound the workman, but, for the purpose I am now considering, as having been made also without prejudice".

It would further appear that,

based upon the intention of the parties, the court may be prepared to extend the without prejudice protection to communications made by third parties which are connected with the settlement of the dispute. In *Rabin -v- Mendoza* (1954)[44] disclosure of a surveyor's report acquired in aid of settlement was prohibited.

The conclusion, therefore, must be that so long as the requisite intention and reasonably contemplated recognition are established, the use of any precise formula is not required. Possible alternatives would be "off the record" or "for negotiation purposes only".

4. PROTECTION EXTENDS TO BOTH ORAL AND WRITTEN COMMUNICATIONS

How many times have you spoken with another solicitor on the telephone and said "Everything I say is without prejudice"? A vast majority of the authorities in this area focus on written communications. It is nevertheless clear that the privilege extends to oral communications where prefaced by these words or their equivalent. Provided the conditions in Part 1 of this article are fulfilled, there is no difference between the principles applicable in respect of the written and spoken word.[45] However, from a practical and evidential point of view it is clearly in the interests of the offeror, who wishes to avail of the privilege, to have tangible evidence that he has sought to invoke this exception to the general rule as to admissiblity.

"... there is no difference between the principles applicable in respect of the written and spoken word"

5. JUDICIAL DISCRETION

As with legal professional privilege and public policy immunity, the without prejudice claim cannot be a unilateral decision of the party invoking it.[46] Rather, in all circumstances in which it is sought to exclude relevant evidence from the court, the ultimate decision as to admissibility will be subject to the supervision and discretion of the court. In *Holland and Others -v- McGill and Others*,[47] Murphy J. inspected the documents which were marked "without prejudice" and it was ultimately the court which decided that the documents in question were admissible and that the words would not afford the protection sought by the user thereof. On the facts of the *Holland* case, the reason for this ineffectiveness was because the court found that negotiations had ended at the time the letters were written. Such an inspection by the court was also undertaken in *Buckinghamshire County Council -v- Moran*[48] and a similar conclusion to that of Murphy J was reached i.e. the letter in question did not indicate that its communication was for the purpose of negotiation. Slade L.J. stated:

> "... it amounted not to an offer to negotiate, but to an assertion of the defendant's rights, coupled with an intimation that he contemplated taking his solicitor's advice unless the Council replied in terms recognising his asserted rights. I cannot derive from the letter any indication, or at least any clear indication, of any willingness whatever to negotiate."

As has been seen at Part 1 of this article, not only the stage at which the words are used (they must be during the course of negotiations) but also the subject matter of the communication so marked (it must relate to the dispute and be bona fide) is essential to the effectiveness of the words. Such information can only be ascertained by an examination of the documents in question by the court with a view to the exercise of its ultimate discretion. Likewise, the protection is lost if an agreement is reached. A review of the correspondance, despite being so headed, may be essential if it is to be determined whether or not such agreement was reached. It was so held in *[redacted] Standard Telephones and Cables Ltd.*[49]

Thus, it is clearly the case that the court has a residual discretion in deciding all these points and, while not specifically alluded to in the cases discussed infra., it is submitted that this judicial power of vetoing the effectiveness of the words derives from the inherent discretion of the court.[50]

6. MODIFICATION ON THE USE OF THE WORDS "WITHOUT PREJUDICE"

If the protection afforded by the courts to documents tending to facilitate settlement is based upon the intentions of the parties, then clearly the courts will give effect to modifications intended to be placed upon this protection by the offeror and known to the offeree. Perhaps the most important modification on the traditional use of the words "without prejudice" has been the Calderbank letter. Obviously considerable hardship may be caused to a party who during negotiations made a generous and bona fide offer which the other party rejected which, it later transpires, was greater than or equal to the award made by the court. The continuation of the litigation will have been unnecessary and expensive. The offeror in such a situation may, not unreasonably, feel that it is only fair that his offer should be admissible to the court in determining the issue of costs. This problem is illustrated by the *Calderbank* case itself.[51]

The court was concerned with a dispute over matrimonial property. The settlement offered by the wife involved the transfer to the husband of property valued at £12,000. The husband rejected this and when the action was eventually tried the court ordered payment to the husband of £10,000 from the sale of the matrimonial home. The question of costs then arose and the court, in line with the traditional interpretation of these words, held that the letter containing the wife's offer, expressed to be without prejudice, could not be referred to by the court.

However, Cairns L.J. suggested a solution for the future whereby the benefits of without prejudice communications could be retained during the trial but with the documents becoming admissible when the issue of costs arose for determination.

"It is common practice for an offer to be made by one party to another of a certain apportionment. If that is not accepted no reference is made to that offer in the course of the hearing until it comes to costs, and then if the court's apportionment is as favourable to the party who made the offer as what was offered, or more favourable to him, then costs will be awarded on the same basis as if there had been a payment in."

Thus emerges the adaptation to the words "without prejudice *save as to costs*". The suggestion of Cairns L.J. has been adopted in many matrimonial cases[51a] but, as the subsequent decisions show, it is not limited to such cases. The first indication of further extension came in a dictum of Megarry V.-C. in *Computer Machinery Co. Ltd. -v- Drescher*[52] (1983) when he said:

"Whether an offer is made "without prejudice" or "without prejudice save as to costs", the courts ought to enforce the terms on which the offer was made as tending to encourage compromise and shorten litigation; and the latter form of offer has the added advantage of preventing the offer from being inadmissible on costs, thereby assisting the court towards justice in making the order as to costs".

The question of admissibility for a limited purpose, i.e. costs, came up for more detailed consideration in *Cutts -v- Head* (1984).[53] This case concerned the plaintiff's right of access to his fishery over the defendant's lands. The plaintiff as successful in his claim but the trial judge declined to examine the offer of compromise made by the plaintiff when the court came to consider the question of costs. The plaintiff was not awarded full costs and, on appeal, argued that the judge had erred in not examining the offer made when it came to the issue of costs. Oliver L.J. supported the modification contended by the plaintiff and stated that such a modification did not offend against the public policy served by the "without prejudice" protection:

"Thus emerges the adaptation to the words "without prejudice *save as to costs*' "

"As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement, whilst, on the other hand, it is hard to imagine anything more calculated to encourage obstinacy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much or more than everything to which he is entitled".

This acceptance was subject to a proviso, however, that in the case of simple money claims, such a qualification of the term "without prejudice", should not operate as a substitute for the payment of money into court by the offeror:

"The qualification imposed on the without prejudice nature of

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the Calderbank letter is, as I have held, sufficient to enable it to be taken into account on the question of costs; but it should not be thought that this involves the consequence that such a letter can now be used as a substitute for a payment into court, where a payment into court is appropriate. In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and, speaking for myself, I should not, as at present advised, be disposed in such a case to treat a Calderbank offer as carrying the same consequences as payment in."[54]

It should be noted that the equivalence or otherwise between a payment into court and without prejudice offers in the context of an application for security for costs was discussed in *Simaan General Contracting Co. -v- Pilkington Glass*[55]. The plaintiff company was incorporated outside the jurisdiction and was claiming damages for negligence against the defendant suppliers. The defendants applied for an order for security of costs and the plaintiffs submitted that without prejudice offers made by the defendants should be admissible on such an application as showing the substance and merit of the plaintiffs' claim. It had previously been held by Lord Denning in *Sir Lindsay Parkinson and Co. Ltd -v- Triplan*[56] that a payment into court was a matter the court might consider in relation to such an application but Judge John Newey Q.C., considering the nature of and purpose behind without prejudice negotiations, concluded that such evidence was inadmissible for this purpose also stating that

"A defendant who has the misfortune to be sued by a plaintiff against whom it may be difficult to enforce an order for costs should not be at a disadvantage in obtaining security because he has, for whatever reason, made attempts to settle the case."

See also *Corby District Council -v- Holst and Co. Ltd.*[57] Therefore, the Calderbank letter would appear to have gained more widespread acceptance and is not limited in its application to matrimonial cases.

6. SUMMARY AND CONCLUSION

As can be seen from the above, as a general rule, all admissions are admissible. To this general rule there are certain notable great exceptions. The focus of this article has been on that exception which is commonly referred to as the "without prejudice exception". In essence, this "exception" is dependent on the subjective intention of an offeror, where such is within the reasonable contemplation of an offeree. It is submitted by the writers that where this primary condition is fulfilled then, subject to judicial discretion and the rules intrinsic to that exception, communications, as defined, will be deemed inadmissible as evidence. It is only through an appreciation of these rules that a party may successfully invoke this particular exception to the rule pertaining to general admissibility.

NOTES

(36) See *Rush and Tompkins Ltd. -v- Greater London Council and Another* [1988] 3 All E.R. 737.

(37) Foskett, *The Law and Practice of Compromise* 2nd Ed. (1985) p.108. FN 37: - "See also *Bord na Mona -v- John Sisk and Son Ltd* [1990] I.R. 85 where at p.88 Costello J. stated "I think that it is clear that the discussions which were held between the parties were held on a "without prejudice" basis and that even though only one of the letters is so headed that the correspondence between the parties took place on the same basis. It seems to me therefore that the plaintiff is entitled to claim that they were all privileged communications . . . "

(38) Per Fox L.J. in *Cutts -v- Head* [1984] 1 All E.R. 597 – see quote at footnote 35 infra.

(39) *Paddock -v- Forrester* (1842) 3 Man & G. 903 per Tindal C.J. "It would be a hard thing to allow the answer to an offer, which is stated to be without prejudice, to be received in evidence, because the same words are not adopted in such answer."
Re Harris (1875) 32 LT. 417 per James L.J.
"the first letter of the correspondence having been headed "without prejudice", that covers the whole correspondence. It is not necessary to go on putting "without prejudice" at the head of every letter".

(40) *India Rubber Gutta Percha and Telegraph Works Co. Ltd. -v- Chapman* (1926) 20 BWCC 184.

(41) *Peacock -v- Harper* (1877) 26 W.R. 109.

(42) Halsbury "The Laws of England" 4th Ed.; Vol. 17 at 212 fn.10.

(43) *Oliver -v- Nautilus Steam Shipping Company* [1903] 2. K.B. 639.

(44) Loc. cit. at note 10.

(45) Foskett, *The Law and Practice of Compromise* 2nd Ed. (1985) p. 107.

(46) In the case of legal professional privilege and, in particular, in relation to putting forward such a claim in an affidavit of discovery, this is illustrated by the recent case of *Bula Limited* (in Receivership) *and Others -v- Crowley and Others* [1990] I.L.R.M. 756. At p. 758, Finlay C.J. referred to the dictum of Murphy J. in the High Court in which he stated "Discovery is a procedure which is left to the integrity of the parties themselves".
The Chief Justice went on to state "I am not satisfied that such an absolute protection of the decision by a deponent with regard to the question of discovery is warranted on principle".

(47) Loc. cit. at note 5.

(48) *Buckinghamshire County Council -v- Moran* [1989] 2 All E.R. 225 at 231.

(49) Loc. cit. at note 20.

(50) R.S.C. Order 32 r.2.

(51) *Calderbank -v- Calderbank* [1975] 3 All E.R. 33.

(51a) Some protection of communications between married couples for the purpose of aiding a peaceful resolution of marital conflicts may derive from the Constitution in this jurisdiction. In. *E.R. -v- J.R.* [1981] I.L.R.M. 125 Carroll J. stated "The provision of confidential marriage counselling which may help a married couple over a difficulty in their marriage is protection of the most practical kind for the family and should be fostered."

(52) *Computer Machinery Co. Ltd. -v- Drescher* [1983] 3 All E.R. 153 per Megarry V-C.

(53) Loc. cit. at note 18.

(54) Ibid.

(55) *Simaan General Contracting Co. -v- Pilkington Glass* [1987] 1 All E.R. 345.

(56) *Sir Lindsay Parkinson and Company Ltd. -v- Triplan Ltd.* [1973] 2 All E.R. 273.

(57) *Corby District Council -v- Holst and Co. Ltd.* [1985] 1 All E.R. 321.

*The authors would like to acknowledge the assistance of Caoive M. Collins B.A. (Mod.), Solicitor in writing this article. The views expressed herein are, however, totally and exclusively those of the authors and the authors take full responsibility therefor.

Present at the County Galway Solicitors Bar Association Annual dress dance at the Ardilaun Hotel, Galway on Saturday, 8th December, 1990 were:- Front Row: (L. to R.):- Ms. Eva Tobin, Hon. Secretary; Mrs. Una Ryan; Mrs. Mitchell; Mrs. Ann Sweeney and Mrs. Geri Silke. Back Row: (L. to R.):- Professor Liam O'Malley, Law Faculty, U.C.G.; Chief Superintendent Jim Mitchell, Galway Gardaí; Mr. Noel Ryan, Director General of the Incorporated Law Society, Dublin; Ms. Hilary Molloy, Committee; Mr. Leonard Silke, President, Co. Galway Solicitors Bar Association; Ms. Emilie Watters, Committee member; Mr. Bruce St. John Blake, former President of the Law Society, Dublin; Mrs. Dorothy O'Malley and Mr. Jim Sweeney, Manager, Bank of Ireland, Galway, who sponsored the pre-dinner reception.

Henry F. (Harry) Hayes, Solicitor of F.P. Gleeson & Co., Thurles, Co. Tipperary, celebrates 50 years in practice. Harry Hayes qualified and was enrolled on the 17 January, 1941, originally practised in Nenagh and has been with the firm of F.P. Gleeson & Co., for over 20 years. He is pictured here with the four partners of this firm, Francis P. Gleeson, William F. Gleeson, Keith P. Finnan and Martin B. Hughes, his son Sean Hayes, a partner in Holmes O'Malley & Sexton, Limerick, and his long time friend and fellow Nenagh man, Pat Treacy.

Mandatory Liability Fund - An American Experience

Operation of America's only mandatory liability fund for attorneys has been detailed by Kirk R. Hall, Chief Executive Officer of the Oregon Professional Liability Fund, in a paper of which the following is a summary.

* * * *

Founded in 1978, the Oregon Professional Liability Fund is a mandatory body covering all attorneys in private practice in the State of Oregon, approximately 5,200, and provides malpractice coverage up to an aggregate of $300,000 a year. Coverage is provided on an individual, not on a firm basis. The cost of coverage in the current year (1991) is $1,800 per attorney, dropping to $1,700 next year. New attorneys pay half the regular assessment in the first year, stepping up to full rate over four years.

Attorneys with prior claims are charged an additional amount for their coverage in future years. There is no surcharge for claims which are defended or settled for $10,000 or less, which is the great majority of claims. For larger claims the surcharge is equal to two per cent of the total of defence and indemnity costs in excess of $10,000. The surcharge is paid each year for five years.

Attorneys must obtain extended coverage when they leave the private practice of law. This coverage applies to claims first made against the attorney after retirement arising from actions occurring before retirement.

Because Oregon has a mandatory programme and the limits of coverage are relatively low ($300,000 per claim) the Fund is able to operate safely without reinsurance.

Loss prevention is regarded as a major achievement and $70 per lawyer per year is spent on loss prevention activities which embrace education by way of written materials and workshops; in-office assistance with law office systems; alcohol and chemical dependency counselling and intervention; stress, burnout, and career change counselling and intervention. Audio cassette programmes are supplied to lawyers free on request. Handbooks on malpractice are mailed free to all members. Three staff members travel around the State working with lawyers on a confidential basis on matters related to loss prevention. This programme is independent of the Bar and does not report information to the Bar discipline staff.

When claims are made they are handled primarily by staff attorneys with several years' experience in private practice. Independent lawyers are employed for cases in actual litigation. Only 45 per cent of claims go into litigation, and the plaintiff wins a verdict in only 7 per cent. More than 55 per cent of claim files are closed without any payment or indemnity. Of the 5,200 lawyers in private practice in the State of Oregon approximately half carry additional malpractice coverage above the $300,000 limits. Starting this year (1991) the Oregon Professional Liability Fund will offer excess coverage to firms on an optional underwritten basis. Firms will be able to obtain aggregate coverage up to $5 million at rates significantly lower than those charged by commercial carriers. The programme will be reinsured through Lloyds of London and other reinsurers, and will be financially separate from the mandatory primary fund.

□

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Regulation of Insurance Intermediaries

This article was originaly delivered as a paper at a Seminar held in the Law Society on 16 November, 1989.

Part IV of the Insurance Act, 1989 ("the Act") which is entitled "Regulation of Insurance Intermediaries" came into force on 1st October, 1990 and provides for the control and regulation of insurance agents and brokers ("insurance intermediaries").

by
Alvin Price,
Solicitor.

While there is no obligation on the public to deal with insurers through the medium of an intermediary, in fact approximately 75% of Irish domestic insurance business is placed through intermediaries. The final report of the committee of Inquiry into the insurance industry, the O'Donoghue Report, published in 1976, found that there was no question but that intermediaries provided a valuable service and must be regarded as a practical if not a theoretical necessity. The O'Donoghue Report identified a number of defects in the regime applicable to insurance intermediaries which called for remedies.

The primary defects so identified were:—

(a) firstly that the legal relationship between insurance intermediaries and the public on the one hand and the insurance company on the other was quite unclear. Particular criticism was levelled at the convention under which an insurance agent in completing a proposal form was deemed to be the agent of the client rather than of the insurance company; and

(b) secondly the public looked upon and were entitled to regard insurance brokers as competent persons prepared to give disinterested expert and independent advice on the choice of a policy from the range available from various insurance companies;

(c) thirdly there was no supervision of the financial affairs of insurance intermediaries notwithstanding that they handled substantial amounts of money on behalf of clients and insurance companies.

So, ten years later the Insurance Bill 1986 was published and was ultimately enacted as the Insurance Act 1989. Part IV of the Act sought to remedy some of these defects and has been in operation since 1st October, 1990.

"... the O'Donoghue Report ... found that ... intermediaries provided a valuable service and must be regarded as a practical if not a theoretical necessity"

Insurance Intermediaries

An insurance intermediary is either an insurance agent or an insurance broker.

Certain classes of persons are disqualified from acting as insurance intermediaries without the prior permission of the High Court where the person:—

(a) has been convicted of an offence in connection with his business;

(b) is adjudged bankrupt;

(c) fails to meet his financial or legal obligations in relation to any monies received from a client;

(d) is convicted of an offence involving fraud or dishonesty;

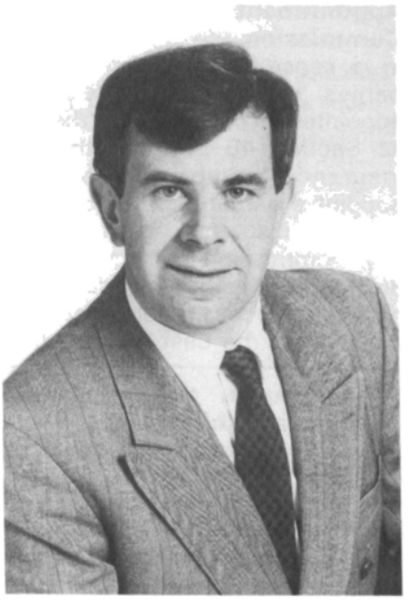
(f) is disqualified under Section 184 of the Companies Act, 1963.

Insurance Agent

An insurance agent is defined as any person who has a written appointment from an insurance company enabling him to place insurance business with that insurance company.

Under Section 49, however, a person who fulfils this definition of an insurance agent may not act as such or hold himself out to be an insurance agent unless he has an appointment in writing from each insurance company for which he is an agent and the names of such insurance companies and the fact that he is an agent are set out on his notepaper and unless he informs each of his clients that he is an insurance agent and of the name or names of the insurance companies for which he is an agent.

While the minimum number of appointments required to qualify a person as an insurance agent is one, at present there is no maximum number. The Minister for Industry and Commerce ("the Minister") is however empowered by Section 49(3) of the Act to bring into force not earlier than 1st October, 1992 a requirement that insurance agents may not hold more than four appointments in



Alvin Price

respect of non-life insurance and four in respect of life insurance.

Insurance Broker
An insurance broker is defined as a person who brings together clients and insurance companies and carries out work preparatory to the taking out of policies of insurance.

The Act however provides that no person who otherwise fulfils this definition may act as or hold themselves out to be an insurance broker unless he holds appointments in writing from and can arrange insurance contracts on behalf of his clients with at least five companies in non-life business or five companies in life business.

The distinction therefore between an insurance agent and an insurance broker essentially relates to the number of insurance companies with whom he is in a position to place insurance. The drawing of the line between insurance brokers and insurance agents is clearly somewhat arbitrary and gives rise to some anomalies in that while there is at present no limit on the number of appointments an insurance agent can hold an insurance broker may hold himself out as such, while holding appointments from only five different companies, all in, for example, the life business.

An additional requirement in the case of an insurance broker is that he must either comply with the provisions of the Act or be a member of a representative body of insurance brokers, which by its rules requires compliance with the provisions of the Act.

Appointment and Payment of Commission
In a sense, the insurance companies themselves have been appointed as policemen to the Act as Section 46 provides that an insurance company shall not appoint a person as an insurance broker or insurance agent nor pay any commission to any person unless the insurance company having made reasonable enquiry is satisfied to the best of its knowledge and belief that the person is either a member of a representative body of insurance brokers or alternatively is a person who complies with the requirements of the Act.

"In a sense, the insurance companies themselves have been appointed as policemen to the Act . . . ."

Each insurance company must keep a register of all insurance intermediaries, whether brokers or agents, which they may have appointed. This register must be kept at the principal office in the State of the Insurance Company and be open to public inspection during normal working hours.

Similarly, an insurance broker or agent may not pay any commission other than to another broker or agent unless he is satisfied, to the best of his knowledge and belief, having made reasonable enquiry, that the person is either a member of a representative body of insurance brokers or alternatively is a person who complies with the Act.

For this purpose, a commission payment is widely defined as including a commission or other remuneration, reward or benefit in kind paid or payable by a broker or agent to another broker or agent in connection with the first mentioned broker's or agent's business and includes allowing time for payment.

"The IICB will carry out the necessary investigations and compile a Central Register of insurance intermediaries which will contain [relevant] information . . . . "

Although it is relatively easy to ascertain whether a person is a member of a recognised body of insurance borkers it is indeed extremely difficult to judge whether someone is in compliance with the provisions of the Act. To overcome this problem and to avoid the necessity of each insurance company carrying out its own individual enquiries the Irish Insurance Federation set up the Insurance Intermediary Compliance Bureau (the "IICB"). The IICB will carry out the necessary investigations and compile a Central Register of insurance intermediaries which will contain information in relation to the names, addresses, number of appointments and bank account details of all insurance intermediaries. Insurance companies will therefore be able to check whether a particular broker or agent is in compliance with the provisions of the Act by consulting this Central Register.

Professional Indemnity Insurance
Section 45 was intended by the Government to enable the Minister to make separate regulations requiring insurance brokers to take out professional indemnity insurance in such form, for such period and in such amount as the Minister may from time to time determine. However, immediately prior to the passing of the Act, this Section was amended to apply equally to insurance agents and accordingly the Minister now has power to require professional indemnity insurance in the case of both brokers and agents. However, from comments made by the Minister at the time of the Dail Debates on the Bill as it then was it appears clear that the Minister has no intention of imposing any such requirement on agents in the foreseeable future.

However, these last minute amendments give rise to a somewhat curious effect in that having gone to some length to make a distinction between brokers on the one hand and agents on the other, the specific provisions of the Act then proceed to apply equally to both brokers and agents. Accordingly, it would appear that the real distinction intended to be made between brokers and agents will only appear in the regulations which the Minister is empowered to make under this Section.

Bonding
As in the case of professional indemnity insurance, the requirements in regard to the taking out of insurance bonds contained in Section 47 apply equally to insurance brokers and agents.

(a) **Regulations**
The Minister has issued regulations under this Section (S.I. No. 191 of 1990) which came into force concurrently with this Part of the Act. These specify the form of the bond, the period for which it is to apply (generally 12 months), the persons with whom such a bond may be taken out (Section 3) and provide that a copy of such bond be displayed at the premises and on the notepaper and sales literature of the broker or agent (Section 6).

(b) **Effect**
The effect of the Bond, however, must be such that in the event of the broker or agent being unable to meet his financial obligations in respect of monies received by him from or on behalf of his clients, the bond will provide a sum of money to become available to a person nominated or approved of by the Minister and be applied by such person for the benefit of any client who has suffered a loss in consequence.

(c) **Amount**
Generally, insurance brokers and agents are required to take out an insurance bond to the value, in the case of non-life insurance business, of £25,000 and in the case of life assurance business to the value of the greater of £25,000 and 25% of the brokers or agents life assurance turnover in the previous accounting year. It should be noted that the Minister has power to alter the figures of £25,000 and 25% turnover and to distinguish in that regard between brokers and agents.

For the purpose of these bonding requirements which are largely based on the bonding requirements which have applied for some time to travel agents, the expression "turnover" has been given a somewhat unusual meaning. It does not relate to turnover of the broker or agent in the normal accounting sense and, in fact, it excludes therefrom his commission and service charges entirely. The definition relates instead to the aggregate amount of "client monies" which in any year an insurance broker or agent is required to pay into separate bank accounts under Section 48 of the Act.

Client Accounts
The maintenance of separate client accounts is required by Section 48 of the Act. This applies to brokers and agents alike and requires them to maintain two separate bank accounts.

The first bank account relates to non-life premiums and monies payable to policy holders under non-life contracts.

The second account to be maintained is an account in connection with premiums payable in respect of life insurance and monies payable by policy holders in respect of life policies.

An insurance intermediary, whether a broker or agent, is bound to pay all monies other than commission payments and service charges which he receives in connection with life business or non-life business into the relevant bank account maintained by him. Such accounts are effectively client account but are designated under the Act as "Section 48 – Non-Life Insurance Account" and "Section 48 – Life Assurance Accounts" respectively. Both these accounts must be maintained even where only one class of insurance business is carried on

"The maintenance of separate client accounts is required by Section 48 of the Act. This applies to brokers and agents alike."

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by the intermediary i.e. life or non-life.

It is to be noted that no person including the State has any right of recourse against money standing to the credit of either such client account until all proper claims by clients in respect of such monies have been satisfied in full.

Tied Insurance Agents

The requirements, detailed above, in regard to the keeping of separate bank accounts do not apply to what is referred to as "tied insurance agents". A tied insurance agent is one who has undertaken with a particular insurance company to refer all insurance proposals to that Company or who has entered into an arrangement with an insurance company which restricts his freedom to refer insurance proposals to other insurance companies. A tied insurance agent may only offer contracts with one life and with one non-life insurance company.

The insurance company will henceforth be responsible for acts and omissions of its tied insurance agents in relation to policies taken out with that Company as if the tied insurance agent was an employee of the insurance company.

Agent of Insurance Company in Certain Cases

A significant alteration to the law of agency has been effected by Section 51 which provides that an insurance *agent* will be deemed to be acting as agent of the insurance company when he completes in his own handwriting or assists the proposer of an insurance policy to complete a proposal for insurance and in such circumstances, the insurer will be responsible for any errors or omissions in the completed proposal form.

"Section 51 provides that an insurance agent will be deemed to be acting as agent of the insurance company [in certain circumstances]."

Deemed receipt by Insurance Company of Premiums

An insurance company will be deemed to have received a premium paid to a broker or agent where the premium relates to a renewal of a policy invited by the insurance company or in respect of a proposal accepted by the insurance company. However, such deemed receipt will not apply where the insurance company has given reasonable notice in writing directly to the client that the broker or agent has no authority to collect the premiums on behalf of the insurance company.

Procedure for acceptance of insurance proposals

An insurance broker or agent may not accept money from a client in respect of a proposal unless it is accompanied by a completed proposal form or the proposal has already been accepted by the insurance company or in the case of a renewal of the policy of insurance unless it has been invited by the insurance company.

Whenever a broker or agent accepts a completed insurance proposal or a renewal premium, he must give to his client a document indicating that it was given under Section 52 of the Act and specifying the name and address of the client, the amount involved and the date of its receipt by the broker or agent, the particular proposal or renewal in respect of which it is paid and the insurance company involved. A suggested format for this receipt may be obtained from the IICB. Such a document shall be prima facie evidence of the facts set out therein. The requirement to issue such a document does not apply where the broker or agent has authority to and does issue the actual policy of insurance.

Code of Conduct

Finally, it should be noted that it is the express intention of the Minister to foster and encourage the representative bodies in the State for insurance brokers and, in that regard, Section 56 is relevant. Pursuant to these provisions, the Minister has approved a Code of Conduct to be observed by insurance brokers and agents copies of which may be obtained from the IICB. This Code of Conduct must now be displayed in a prominent position in the public area of an intermediary's business premises.

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JESSUP MOOT REGIONAL FINAL

The Irish final of the Philip C. Jessup Moot Court Competition recently took place in Trinity College, Dublin. The two regional finalists were the Kings Inns and the Solicitor's Apprentices Debating Society of Ireland.

The format of the competition was that teams were asked to consider a fictional situation based on the U.S./Japan trade controversy concerning car imports. The dispute involved issues of jurisdiction, anti-trust law and the application of the General Agreement on Tarrifs and Trade. Both teams had to submit detailed written submissions, which accounted for approximately 30% of the marks awarded.

SADSI represented Japan and the Kings Inns, the U.S.A. before a court composed of the Hon. Niall McCarthy of the Supreme Court, John Cooke, S.C. and Alpha Connolly, lecturer in international law in U.C.D. Yvonne McNamara and T.P. Kennedy argued the SADSI case and Maura McNally and Mick Delaney appeared for the Inns. After a hard fought contest, judgement was given in favour of SADSI.

The winning team will represent Ireland in the international semi-finals which will be held shortly in Washington D.C. Approximately 40 other national teams will be participating. The full SADSI team is: Yvonne McNamara (Matheson Ormsby Prentice), Donagh McGowan, Judith Lawless, T. P. Kennedy and Tom Hallinan (all of McCann FitzGerald).

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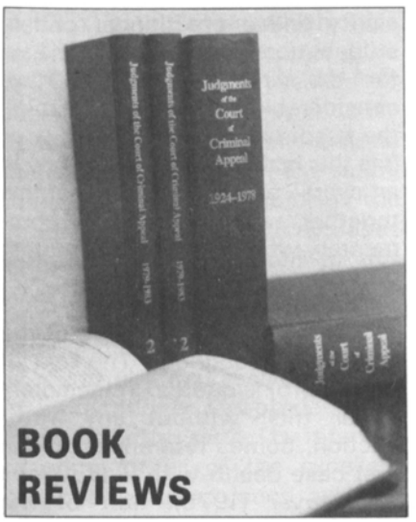

LAW AND LITERATURE: A MISUNDERSTOOD RELATION

By Richard A. Posner. [Harvard University Press. xi+371pp paperback].

In the United State, in recent years, there has developed a field of enquiry known as law and literature. The practitioners of this field of enquiry seek to apply the methods of legal analysis to literary texts and the methods of literary analysis to legal texts. Such persons seek to explore the interrelations between these two ancient fields of learning.

The author, Richard A. Posner, is Judge of the United States Court of Appeals for the Seventh Circuit, Senior Lecturer at the University of Chicago Law School and the author of many books and articles. In his introduction, he states that legal writing is full of "legal fictions" – a form of metaphor. Some are dead metaphors (which no one notices) like "breaking" a contract. Others are live metaphors: a drug dealer whose underlings hold and dispense drugs is guilty of "constructive possession" - as if he possessed the drugs. The author states that the legal fiction reflects the desire of judges and lawyers to create an appearance of continuity when innovating.

The author argues that the poet uses similes, like metaphors, to create arresting images. But the lawyer's purpose is the opposite: to make things that are unlike in what might appear to be important respects seem as alike as possible so that an appearance of continuity of legal doctrine is maintained.

The author rightly draws attention to the fact that both legal and literary scholarship are centrally concerned with the meaning of texts. In the case of law, these texts are constitutions, statutes, judicial and administrative rules, and judgments. Interpretation is therefore a central issue in both fields. Legal scholarship, like literary scholarship, consists to a significant extent of commentary on text temporally and culturally remote from the commentator. The author argues that judges and other lawyers resemble literary artists in the close attention they pay to the choice of words in which they express themselves, as well as in their fondness for metaphors and similes.

The legal process, especially the adversary process of civil and criminal trials, has a significant theatrical dimension. This is one reason why trials are a staple of literature and why writers of fiction have turned their talents to the description of actual trials.

The author argues that practitioners in both fields of law and literature have become restive with the limitations of their subject matter. He argues that neither law nor literature seems quite so glorious a subject today as a quarter of a century ago. Law has become more politicised, more commercialised, more specialised, and more bureaucratised and is increasingly interpreted in economic terms, which distresses many law professors. The author argues that the humanities have lost prestige and cultural centrality to the combined forces of natural and social science, television and movie entertainment, and technology generally and, like academic law, have experienced debilitating political, ideological and methodological fissures. The author argues that, to law professors, literature offers a hope of redemption from a technocratic future. To literature professors, he argues that law offers a hope of redemption from social marginality.

The most interesting chapter in the book is that entitled "Judicial Opinions as Literature." Investigating the literary properties of judicial opinions is not a new undertaking; Justice Cardozo, for example, did it in his essay "Law and Literature." The author reviews developments in this field. The style of US Chief Justice Marshall is considered. Marshall's style is described as magisterial but never pompous. Patient, systematic, unadorned, unemotional, unpretentious, his style is described as the calming and confident voice of reason. A related characteristic of Marshall's opinions, remarkable in our legal culture, is the absence of citations to previous decisions and also his avoidance of legal jargon. The author correctly argues that although he required (and possessed) great political wisdom, he did not face as severe an interpretive problem as his successors did; nor did he have the modern judge's burden of negotiating a minefield of authoritative precedents. The author states that Justice Brandeis wrote well by judicial standards but says of him, with more justice than T.S. Elliot said of Milton, that his style was a bad influence on that of his successors. It was the style of the sledgehammer. It is described as a hectoring style, a style that grabs you by the lapel and shouts in your face demanding your assent rather than engaging you in a discussion.

The author agrees with Teachout (and with Orwell, Swift and many others before them) that language shapes thought, that choice of words can therefore have political and social consequences, that an impoverished vocabulary can impoverish thought. The author argues that the interdisciplinary study of law and literature deserves a place in legal teaching and research. The author complains that most law students, even at the best law schools, have little acquaintance with the classics of western literature. The author fears a stunted race of legal specialists. The insights as well as the rhetorical devices of literature can be professional assets for lawyers.

Judge Posner has produced an outstanding work. The author displays an impressive command of his material - literature, law and the commentaries associated with these branches of learning. This is an original and instructive study of what literature has to teach about the law.

Eamonn G. Hall

THE EEC CONVENTION ON THE JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS
Peter Byrne, [Round Hall Press, 1990, IR£45.00]

While the preface to this book does not specifically set out in detail the purpose and aims of same it does express the aspiration that:

> ''This book should be of benefit to anyone concerned with the law in this area. This includes not only Lawyers, Law students or Administrators but also those people within and outside the Community affected by the extensive scope of the Convention, whether in business or as private individuals''.

'Convention Law' *per se* is not explained, neither is the reference to 'Conventions'.

Convention Law in fact comprises the 1968 Convention as amended *to date* by:

> The 1971 Protocol on the interpretation of the 1968 Convention by the European Court signed at Luxembourg on the 3rd of June, 1971;
>
> The Accession Convention of the United Kingdom, Denmark and Ireland signed at Luxembourg on the 9th of October 1978;
>
> The Greek Accession Convention.

The Conventions are taken in chronological order (together with the 1971 Protocol). The relevant article is quoted and underneath there is an exposition of the article concerned, largely comprising the views of the drafting Committee and extracts from the relevant Judgements of the European Court. Decisions of the Courts of Member States are not dealt with except in so far as they have a bearing on references by these National Courts to the European Court of Justice for an interpretive ruling. This is perfectly acceptable given that it is the European Court of Justice alone which interprets the Convention. The book does not in any way purport to be a 'potted' account or a schematic overview. Therefore given the magnitude of the task undertaken, the size of the book is somewhat surprising – a mere 246 pages taking in not only the Conventions, Protocol etc., as set out above but also five appendices and an index. The author therefore has chosen to take on a fairly substantial undertaking in a book of modest proportions. When one subtracts the space devoted to the text of the Conventions Protocol appendices etc., the amount of space left over for exposition, commentary and analysis is necessarily small.

As far as the Convention itself is concerned, (and by this is meant the 1968 Convention as amended) many of its key concepts are left undefined and therefore a considerable body of interpretive jurisprudence has been developed by the European Court. In the leading Case of *Tessili -v- Dunlop* (1976) which was the first interpretive reference to the European Court of Justice under the 1971 Protocol, the Court laid down the basic principle of interpretation, that the Convention was to be interpreted having regard both to its principles and objectives and to its relationship with the E.E.C. Treaty.

The Book itself contains no footnotes as to further reading, articles etc. The bibliography is thin. It does not refer to that excellent book, Kaye: *Civil Jurisdiction and the Enforcement of Foreign Judgements* (1987), the series of articles on the Convention by Gill or indeed to the two excellent publications produced by the Irish Centre for European Law, one of which deals entirely with the Convention.

However, the principal and recurrent problem with this book is the sparsity, or indeed complete absence in many cases, of an explanatory introduction, following not only the relevant article but preceding cases arising on foot of the particular articles. There are generous references to the views of the drafting Committee (of which judicial notice must be taken of course). There are also references to the various submissions made to the European Court in relation to the cases concerned followed by an extract from the Judgement – but no more. At a point where one would expect an analysis followed by a conclusion in relation to the particular case, or indeed the end of the exposition of the case law etc., dealing with the particular article there is a very sparse commentary and quite often none at all.

The result in this reviewer's opinion is a considerable lack of clarity and a practitioner or law student coming to Convention Law for the first time would have considerable difficulty in grasping the essentials of Convention Law. It is this lack of placing case law in an overall explanatory perspective together with the lack of commentary which causes the greatest difficulty with the book.

The author's handling of Article 5(5) is rather characteristic of the approach throughout. The text of Article 5(5) is quoted. Immediately under this, without any introduction, comes references to the first case dealth with – *de Bloos -v- Bouyer* (1976). Part of the opinion expressed by the Advocate General in relation to this case is referred to. Then comes an extract from the judgement and nothing further – the author immediately proceeding to the next case *Somafer -v- Saar Ferngas* (1978). The facts are stated. There is an extract of some five lines from the opinion of the Advocate General. This is followed by an extract from the judgement and ruling at the end of which is a terse comment to the effect that it is in each case for the Court before which the matter comes to find the facts whereon it may be established that an effective place of business exists and to determine the legal position by reference to the concept of 'operations'. The next case immediately follows – *Blanckaert & Willems -v- Trost* (1981) – with no introduction. The facts are set out. A four line reference to the opinion of the Advocate General is given together with an extract from the Judgement. There is no commentary and the author immediately proceeds to the next case *Schotte -v- Parfums Rothschild* (1987). Again there is no introduction. The facts are set out. There is a four line reference to the opinion of the Advocate General followed by an extract from the judgement. This is the end of Article 5(5) – as far as the author is concerned. The actual commentary consists of the few lines referred to above and described justifiably, it is thought, as 'terse'.

From a practical point of view Article 5(5) has immense importance to the practitioner, particularly if any of his clients are contemplating penetrating markets of other contracting States (that is

to say, those States which have ratified the Convention). The unthinking choice of vehicle to achieve this may very well cause the client to be made amenable to the courts of the other contracting State which, if this was never the intention of the client, may cause somewhat of a problem for his solicitor.

Given the lack of analysis and commentary in this book the view is regretfully expressed that the Irish practitioner, law student etc., might be better served by referring to some or all of the excellent publications cited (such as Kaye etc.)

JOAN O'NEILL

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Invitation

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The venue for this one day Exhibition shall be the *Great Southern Hotel, Eyre Square, Galway.* Special week-end rates are available for all those wishing to attend. Why not take this opportunity to spend an enjoyable week-end in Galway!

For further details and booking contact:

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The above is an International Society with an Irish region based at University College, Cork.

The society is aware that solicitors often come across old records that may appear redundant. In many cases these records have a valuable archival significance. Valuable material has, in the past, been lost through important records being disposed of in tips and dumps. Clearly this is unsatisfactory.

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University College, Cork,

who will be happy to advise on the most appropriate method of disposal of such material.

Amnesty Lawyers Group

"The right to a fair hearing and the right to due process".

This topic will be discussed at a Coffee Afternoon in the Barristers Tea Room at 4.30p.m. on Monday, 6 May, 1991. Guest speakers will be Mr. Patrick McEntee, S.C., and Mr. Michael McDowell, S.C.

All members of the Legal Profession are welcome to attend.

Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

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

Lost Land Certificates

SCHEDULE OF REGISTERED OWNERS

Patrick Clifford, Folio No. 1208; Lands: Rathanny; Area: 1a.0r.24p. County: **KERRY.**

Thomas and Anne Droney, Aughiskamore, Lisdoonvarna, Co. Clare. Folio No. 6621F; Lands: (1) Aughiska More, (2) Cahermacrusheen, (3) Ballyryan (undivided 1/26th Part), (4) Cahermacrushen (1 undivided 32nd Part), (5) Cahermaclanchy, (6) Cahermaclanchy (1 undivided 20th Part), (7) Cahermacrusheen (1 undivided 16th Part), (8) Ballyryan (1 undivided 26th Part). Acres; Area: (1) 98.838 acres, (2) 16.225 acres, (3) 549.800 acres, (4) 0.113 acres, (5) 6300 acres, (6) 84.313 acres, (7) 0.113 acres, (8) 549.800 acres. County: **CLARE.**

Thomas McManus, Folio No. 18503; Lands: A plot of ground containing 0a.0r.18 1/2p situate to the South of Sundays' Well Road in the town of Mullingar and Barony of Moyashel and Magheradernon, County: **WESTMEATH.**

Raymond Durkan, Aughagowla, Newport, Co. Mayo. Folio No. 16958; Lands: Knocknaboley; Area: 13.800 acres. County: **MAYO.**

Michael and Mary Clery, Folio: 19886F; Lands: Parish of St. Nicholas, County: **LIMERICK.**

Timothy Donnellan, Finuremore, Mullagh, Co. Clare. Folio: 550; Lands: Townland Part of the Lands of Rineroe Area: 8a.0r.0p. County: **CLARE.**

Mary Conroy, c/o Frank Burke & Co., 19 Eyre Street, Galway; Folio: 22272F; Lands: Townland: Carroroe North, County: **GALWAY.**

James Fay, Blanchardstown, Co. Dublin. Folio: 3539; Lands: Townland: Blanchardstown; County: **DUBLIN.**

Diarmuid Newton, Folio: 435L; Lands: Croghta, County: **CORK.**

Eugene Gerard McKenna, Folio: 2585F; Lands: Part of the Townland of Ballycarnane and Barony of Middle Third situate to the west side of the road leading to Princes Road in the town of Tramore, County: **WATERFORD.**

Margaret Donovan, Folio: 1434; Lands: Moneygall, County: **KINGS.**

Brian Dempsey (deceased); Folio: 17032; Lands: Slievenagrane, County: **WEXFORD.**

Weinberger Bros Ltd. Folio: 45460; Area: 0a.2r.30p. County: **CORK.**

William O'Grady, Folio: 34857; Lands: Glenkeen; Area: 8a.3r.16p. County: **MAYO.**

John Corrigan, Folio: 5553; Lands: Coolreagh; Area: 137a.2r.37p. County: **KILDARE.**

Patrick Quinn (deceased); Folio: 245; Lands: Cushina; Area: 297a.2r.20p. County: **KINGS.**

Catherine McGowan, Lugdoon, Templeboy, Co. Sligo. Folio: 3833; Lands: Ballyeeskeen; Area: 6a.2r.35p. County: **SLIGO.**

Maureen Reen, Folio: 21298; Lands: Avenue; Area: 0a.1r.8p. County: **KERRY.**

Peter (Junior) McGrath of Richardstown, Ballyboughal, County Dublin. Folio No: 40832F; Lands: Townland of Richardstown, Barony of Balrothery East. County: **DUBLIN.**

Arthur William Westcott-Pitt, Folio No: 1845; Lands: Coxtown East; Area: 3a.2r.25p. County: **WATERFORD.**

Dermot Glynn and Margaret Glynn, Folio No: 14466F; Lands: St. Patricks; County: **LIMERICK.**

Otto Puls, Folio No: 14614F; Lands: Ardgroom; Area: 1.006 acres. County: **CORK.**

Margaret Nolan, Kiltoom, Athlone, Co. Roscommon. Folio No: 21120; Lands: Part of the land of Kiltoom in the Barony of Athlone South. Area: 0a.2r.20p. County: **ROSCOMMON.**

John Donegan, Cloonkellaun, Corballa, Ballina, Co. Mayo. Folio No: 14399; Lands: Cloonkeelaun; Area: 57a.1r.29p. County: **MAYO.**

Michael McMahon, Ballyroe, Sixmilebridge, Co. Clare. Folio No: 16241; Lands: Townland of (1) Ballyroe, (2) Cappaghlodge; Area: (1) 29a.0r.28p, (2) 20a.1r.11p. County: **CLARE.**

Patrick Dowling, Folio No: 8174; Lands: Aghowle Upper; Area: 0a.2r.18p. County: **WICKLOW.**

Anthony Kelly, Cortober, Carrick-on-Shannon, Co. Roscommon. Folio No: (1) 14725, (2) 14733; Lands: (1) Townland of Cortober, (2) Drishoge Cortober; Area: (1) 6a.0r.3p, (2) 3a.1r.36p, 5a.2r.32p. County: **ROSCOMMON.**

Frank O'Donnell, Folio No: 41114; Lands: Leckenagh; County: **DONEGAL.**

Norman D. Wilkinson, Folio No: 903L; Lands: Haggardstown; Area: 0a.0r.14p. County: **LOUTH.**

John Brophy, Folio No: 17432; Lands: Rathillig; Area: (1) 49a.3r.35p, (2) 5a.0r.5p, (3) 19a.2r.4p, (4) 17a.2r.25p, (5) 20a.2r.25p, (6) 17a.1r.20p, (7) 18a.3r.30p. County: **QUEENS.**

Timothy Gavin, of Cloghan, Mount Talbot, Co. Roscommon. Folio No: 34253; Lands: (1) Cloghan, (2) Curraghadoon, (3) Cloghan, (4) Cloghan, (1 undivided 9th part), (5) Cloonlaughnan; Area: (1) 9a.2r.38p, (2) 14a.1r.12p, (3) 20a.3r.8p, (4) 1a.2r.4p, (5) 5a.0r.11p. County: **ROSCOMMON.**

Thomas J. McDonagh, Folio No: 24415F; Lands: Unit 61 Cookstown Industrial Estate, Tallaght. County: **DUBLIN.**

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Lost Wills

McCARTHY, Frances, late of Kitestown, Crossabeg, Co. Wexford, Spinster. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 19th December, 1990 please contact Doyle Lowney & Co., Solicitors, 12 North Main Street, Wexford.

AEDAMAR Aiken, deceased – late of 47 Wedgewood Estate, Dundrum, Dublin 14 and formerly of "Dun Gaoithe" Sandyford who died on the 8th February, 1991. Will any person having knowledge of the whereabouts of a Will of the above named deceased, please contact Woodcock & Sons, Solicitors, 28 Molesworth Street, Dublin – Telephone: 761948.

DOYLE, Robert Valentine, deceased, late of 87 Cashel Rd., Crumlin, Dublin 12. Will anyone having knowledge of the whereabouts of the Will of the above-named deceased, who died on 3rd January, 1991, please contact Mr. Walter Doyle, 46 Balally Hill, Dundrum. Tel: 955265.

FOLEY, Catherine, late of The Wood, Fethard-on-Sea, New Ross, Co. Wexford. Spinster. Will anyone having knowledge of the whereabouts of a Will dated the 10th September, 1979 of the above named deceased who died on the 3rd February, 1990, please contact Doyle Lowney & Co., Solicitors, 12 North Main Street, Wexford.

McCARTHY, Mary Teresa, deceased, late of 45, Crowndale Rd., NW1 London, (formerly of Rossbrin, Schull, Co. Cork), date of death 16th June, 1989. Will any person having knowledge of the whereabouts of a Will of the above named deceased please contact Messrs. O'Donovan, Murphy & Co., Solicitors, Wolfe Tone Square, Bantry, Co. Cork. Tel: (027) 50808.

NOLAN, Margaret, deceased, late of Sunnymount, O'Connell Avenue, Limerick. Will anybody having knowledge of the whereabouts of a Will of the above named deceased please contact Mary Cashin & Associates, Solicitors, Central Buildings, Abbey St., Ennis, Co. Clare. Tel: (065) 40034 or Fax: (065) 40034.

COLLERY, Patrick Aloysius, deceased, late of 7 Knock Terrace, Sligo, 3 Wine St., Sligo and Cowley, Oxford, England. Date of death: 11 or 12 may, 1990. Will any person having knowledge of the whereabouts of a Will of the above named deceased, please contact Howley & Armstrong, Solicitors, Teeling St., Sligo. Tel: (071) 42648.

BYRNE, William, deceased,. late of 43 North Summer St., Dublin 1, and of Flat 21, Father Scully House, Grenville St., Dublin. Will any person having knowledge of the whereabouts of a Will of the above named deceased, who died on 8th March, 1991, please contact Millett & Matthews, Solicitors, Main St., Baltinglass, Co. Wicklow. Tel: (0508) 81377.

DOYLE, John, deceased, late of Drimnamore, or Derreenaclaurig, Sneem, Co. Kerry. Would any person having knowledge of a Will of the above named deceased who died on the 15th day of January, 1991, please contact John O'Connor, Solicitor, of 168 Pembroke Rd., Ballsbridge, Dublin 4. Tel: (01) 684366 or Fax: (01) 684203.

O'CONNELL, Anthony, deceased, late of Portree House, Mary Street, Waterford, Co. Waterford. Will any person having knowledge of the whereabouts of a Will of the above named deceased please contact Timothy J.C. O'Keeffe & Co., Solicitors, Abbey St., Roscommon, Co. Roscommon. Tel: 0903-26239.

BRENNAN, Harriet, deceased, late of 2 Corrib Terrace, Woodquay, Galway. Will any person having knowledge of the whereabouts of a Will of the above named deceased, who died on 17 December, 1990, please contact Messrs. O'Donnell O'Hara, Solicitors, "The Halls", Quay St., Galway. Tel: (091) 62037.

Miscellaneous

WANTED immediately to purchase **Publican's ordinary 7 Day Licence.** Reply to Petty & Co., Solicitors, Parliament St., Ennistymon, Co. Clare.

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Lost Title Deeds

IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF WILLIAM HEALY AND MARGARET HEALY IN RESPECT OF PROPERTY AT 7 HIBERNIAN BUILDINGS, CORK.

TAKE NOTICE that William Healy and Margaret Healy both of 7 Hibernian Buildings, Cork have lodged an application for their registration on the Lease hold Register for the residue of the term of years outstanding as set out in the Schedule hereto.

The original Lease, certified copy documents and copy documents specified in the schedule hereto are stated to have been lost or mislaid.

The application may be inspected in the Registry.

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

Any such notification should state the grounds on which the documents of title are held and quote Reference S2259/91. The missing documents are detailed in the Schedule hereto.

Dated the 26th day of March, 1991.

Francis C. Kelleher & Co.,
Solicitors,
1 Pearse Square,
Cobh,
Co. Cork.

SCHEDULE

1. Original Lease dated 31st December 1963 – Cork Improved Dwellings Company Limited to William and Margaret Healy the property therein leased held for a term of 500 years from the 29th September 1870 subject to the yearly rent of £1.00.
2. Certified copy Lease dated 23rd November, 1874 – William Lumley Perrier and David Barry to Cork Improved Dwellings Company Limited.
3. Certified copy Deed of Mortgage dated 12th May, 1876 – Cork Improved Dwellings Company Limited to The Commissioners of Public Works.
4. Certified copy Deed of Reconveyance dated 24th January 1917 – Commissioners of Public Works to Cork Improved Dwellings Company Limited.
5. Photostat copy memorandum of Association of Cork Improved Dwellings Company Limited.
6. Photostat copy of Extract from An Iris Oifigiuil.
7. Copy Contract for Sale.
8. Copy Counsel's Opinion (E. F. Ryan).

NOTICE TO CREDITORS, BENEFICIARIES AND OTHERS.

In the Estate of: SAMUEL CLARKE (Formerly of Tassagh House, 15 Blairmount Road, Tassagh, Armagh and Late of 126 Tassagh Road, Armagh) deceased.

NOTICE is hereby given Persuant to section 28 of the Trustee Act (Northern Ireland) 1958 that all Creditors, Beneficiaries and other persons having any claims against or interest in the Estate of the above-named deceased who died on the 11th day of March 1991 are hereby required to send on or before the 26th day of June, 1991, particulars of such claims or interests to the undersigned Solicitors for the personal representatives of the deceased. And Notice is hereby further given that after the said 26th day of June, 1991 the said personal representatives will proceed to convey or distribute the property of the said deceased among the parties entitled thereto having regard only to the claims and demands of which particulars have been received.

Dated this 26th day of March, 1991

ARCHIE T L GIBSON,
Solicitor for the personal Representatives,
23 College Street,
Armagh,
N. Ireland.

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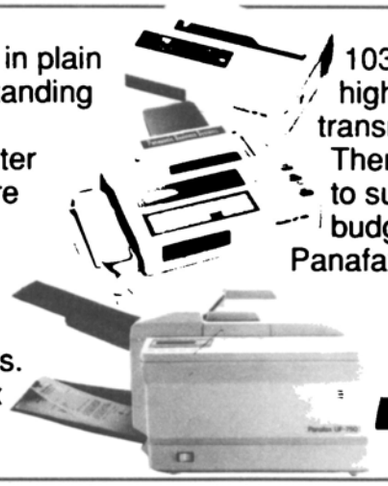

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125 O'Connell Street, Limerick. (061) 42477.

GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 85. No. 4 May 1991

The Hon. Mrs Justice Susan Denham, who was recently appointed to the High Court. **(See page 158)**

- Role of the Actuary in Assessment of Damages
- Future of the Land Registry
- Title to Land in Hong Kong

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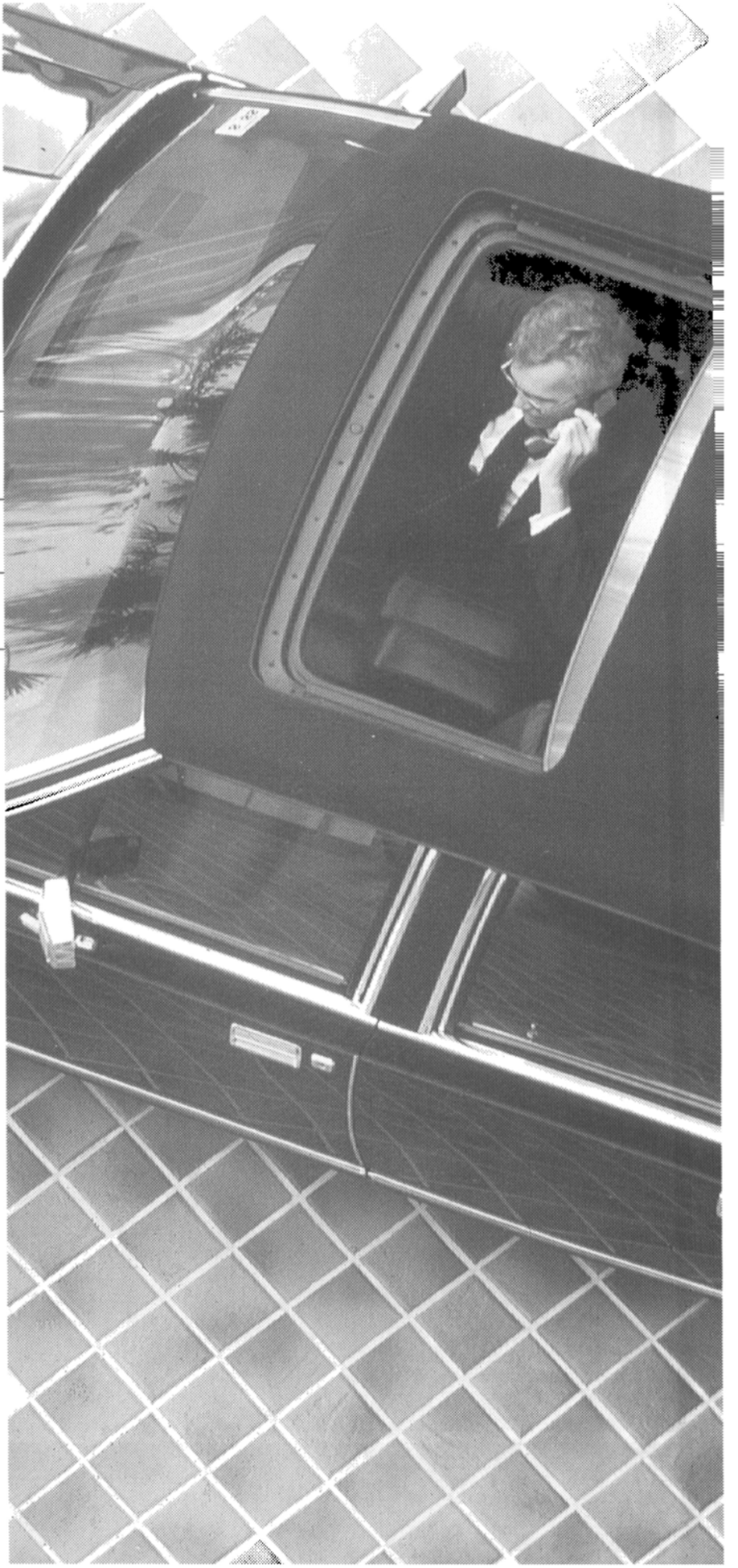

IRISH PERMANENT

BUILDING SOCIETY

GAZETTE
INCORPORATED LAW SOCIETY OF IRELAND
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Viewpoint

It is to be hoped that the enthusiasm being expressed by the Minister for Industry & Commerce about the new Competition Bill will be matched by equal enthusiasm for its application, particularly in the area of Semi-State or other State sponsored bodies. Many of the monopolies or dominant positions in the Irish economy are held by such bodies. Originally their existence was justified by the absence of participation by the private sector in the provision of the products or services concerned. Without encouraging a Thatcherite privatisation campaign there is clearly room for competition in areas which have previously been dominated by the State sector.

While the removal of the cumbersome Restrictive Practices Acts procedures with their lengthy enquiries and largely unimplemented reports is to be welcomed, concern must be expressed about the statement in the explanatory memorandum of the Bill that "existing orders made under the Restrictive Practice Acts will be revoked". Hopefully this means that they will be revoked on a phased basis for the procedures envisaged in the new Bill, welcome though they are, including as they do, recourse to the Courts, cannot of their nature be instantaneous in operation. It would be highly unsatisfactory if any sector which has been the subject of a Restrictive Practices Order were to be freed from restriction until such time as the procedures under the new legislation can be invoked.

For the solicitors' profession there is a delicious irony in the enthusiasm of the Minister for the encouragement of competition and in particular price competition. The only legally enforceable price regulation of solicitors' fees is the statutory one governing conveyancing fees. Not many solicitors will be sorry to see the abolition of the scale fee which has become increasingly irrelevant to the cost of the provision of the services covered by it. Price competition in the residential market, in Dublin at least, has been a factor for many years and in recent years price competition has entered the major commercial lending market also. Meeting the balance of paying a reasonable price and getting a reasonable service may be difficult to achieve. We would not need consumer protection legislation if all out competition were to be desirable.

The Minister has expressed reservations about Law Society or local Bar Association recommended scales of charges. If the Minister wants to ensure that the client is given a reasonable indication of the likely charges before a legal transaction is commenced, it is difficult to see how this can be done if a solicitor is asked to carry out a transaction of a type which he has not dealt with previously unless he gets some indication from recommended scales of charges as to what the likely level of fees should be. Guess work or checking with colleagues who may have little more experience of such transactions would not be very satisfactory from the client's point of view. The distillation of the experience of colleagues who have regularly dealt with such transactions into recommended charges should not be discouraged. The experience is that these charges are regarded as guidelines and are negotiable. They should be permitted to remain. □

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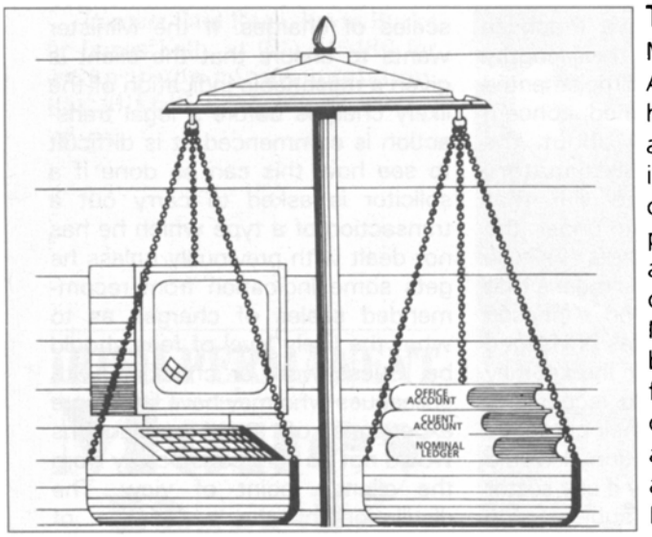

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The role of the actuary in the assessment of damages in personal and fatal injury claims

(presented to the Society of Actuaries in Ireland 1st November, 1990)

by
R. P. Delany, FIA

1. INTRODUCTION

As far as I can ascertain, only one paper on this topic has been presented to the Society and this was in March 1974 when Piers Segrave-Daly gave his paper on *Problems in Valuing Death and Injury Claims.*[1] I shall refer to this paper again later on.

There have not been many papers on the subject in the United Kingdom either. My researches have thrown up:-

- *Actuarial Assessment of Damages*[2] which was written by J H Prevett
- *The Actuary in Damages Cases – Expert Witness or Court Astrologer?*[3] by Robert Owen and Philip Shier presented to the Institute of Actuaries Student Society in March 1985.

A paper, *Compensation for Personal Injury*[4] was presented to the Institute in March 1980 but this paper dealt mainly with the Pearson Report. More recently, a paper *Worktime lost through Sickness, Unemployment and Stoppages: Measurement and Application*[5] was presented to the Institute in April 1990. This last paper I shall refer to again.

The attitude to actuarial evidence in this country is vastly different from that in the United Kingdom. The attitude in the United Kingdom is summed up for me in the Judgement in the Court of Appeal in 1984 in *Auty & Others -v- National Coal Board* where Lord Justice Oliver stated that

". . . as a method of providing a reliable guide to individual behaviour patterns or to future economic and political events, the predictions of an actuary could be only a little more likely to be accurate (and were almost certainly less entertaining) than those of an astrologer" ([1985] All ER 930, 939, CA).

"The attitude to actuarial evidence in this country is vastly different from that in the United Kingdom."

2. DAMAGES

In his judgment in the Supreme Court appeal of the personal injuries case *Reddy -v- Bates* [1983] IR 141, [1984] ILRM 197, SC, Mr. Justice McCarthy said that

"The conventional description of damages awarded for personal injuries sustained through the tortious act of another is to ask the jury to award such sum as will, so far as money can do so, put the Plaintiff in the same position as he or she would have been if the tortious act had not occurred" ([1983] IR 141, 150, [1984] ILRM 197, 204).

In the House of Lords in 1969 in giving judgment in the appeal of the fatal accident case *Mallett -v- McMonagle,* [1970] AC166, [1969] 2 All ER 178, HL, Lord Diplock said that

"the purpose of an award of damages under the Fatal Accidents Act is to provide the widow and other dependants of the deceased with a capital sum which with prudent management would be sufficient to supply them with material benefits of the same standard and duration as would have been provided for them out of the earnings of the Deceased had he not been killed by the tortious act of the defendant, credit being given for the value of any material benefits which will accrue to them, (otherwise then as the fruits of insurance) as a result of his death".

The Civil Liability Act, 1961, is the basis, as I understand it, for claims in this country for damages in personal injury and fatal accident cases. In a personal injury claim damages are usually sought under four headings. Past and future special damages, and past and future general damages. Special damages are in respect of monetary loss and general damages are for the pain and suffering experienced, or to be experienced.

In fatal claims damages are sought and awarded under three headings:

- Financial loss
- Mental distress
- Funeral and other expenses

Actuarial involvement is in respect of future loss of income and/or expenses in a personal injury claim and for financial loss in a fatal case.

Section 50 of the Civil Liability Act, 1961 states that in assessing damages account shall not be taken of:-

(a) any sum payable on the death of the deceased

under any contract of insurance,

(b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the death of the deceased,

Section 2 of the Civil Liability (Amendment) Act, 1964 provides that where damages are sought for injury not causing death account shall not be taken of:-

(a) any sum payable in respect of the injury under any contract of insurance,

(b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury.

Perhaps, I should mention, also, that in an injury case certain payments received under the Social Welfare Acts are expressly deductible from damages. Section 39 of the Social Welfare (Occupational Injuries) Act, 1966 provides that, irrespective of Section 2 of the Civil Liability (Amendment) Act, 1964, there shall be deducted from damages any injury benefit or disablement benefit received during the five years after the accident. Section 12 of the Social Welfare Act, 1984 extended the deductions to include, in the case of accidents involving mechanically propelled vehicles, disability benefit including pay-related benefit, and invalidity benefit receivable during the same five year period.

3. ACTUARIAL EVIDENCE

In 1972 the Chief Justice in his judgment in the appeal of *Donnelly -v- Brown* (unreported), Supreme Court, 15 May 1972, said that he was satisfied that the Trial Judge

"... was right in the circumstances of the case to admit actuarial evidence. Without such evidence the jury could not be expected to calculate the deduction appropriate to be made for the payment now of wages that would fall to be paid over many years stretching into the future."

In the same case Mr. Justice FitzGerald said

"While actuarial evidence is generally properly addressed in cases where the wage earner has died or has been permanently totally incapacitated from earning anything, it appears to me that it is relevant, and consequently admissible, where there is evidence of diminution in wage earning capacity either certain or probable. In the present case there is clear evidence of a probable, if not certain, diminution of earning capacity and the actuarial evidence is, in my view, consequently admissible".

In his judgment in the *Reddy -v- Bates* appeal Mr. Justice Griffin said

"It has been decided by this Court in many cases over the past 20 years that where future loss of earnings, or a likelihood of regular necessary payments for medical, hospital or other expenses, form a substantial part of a plaintiff's claim, an actuary should give evidence" ([1983] IR 141, 146 [1984] ILRM 197, 201).

4. DISCOUNT FOR CONTINGENCIES

In the *Donnelly -v- Brown* appeal the Chief Justice remarked

"It is also right to observe that actuarial figures are a calculation on the basis of steady loss of wages, and, where appropriate, some allowance must be made for the uncertainties of the employment market and of human health."

In the same appeal Mr. Justice FitzGerald said

"It should, however, be appreciated that the actuarial figure is based on an assumption that the pre-accident rate of earnings would have been maintained for the man's working life time irrespective of any loss of earnings from incapacity due to ill health or to the risk arising from the condition of

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the labour market. Both these risks are incidental to any employment of a working man and if one were to accept the actuarial figures it would amount to insuring the Plaintiff against either risk for the rest of his probable working life. This would place him in a position of security which he could never have obtained if he had not been injured by accident. Consequently I consider that the actuarial evidence cannot be availed of as an established loss, but merely as a guide-line which must be discounted to allow for the risks to which I have referred."

In his judgment in the *Reddy -v- Bates* [1983] IR 141, [1984] ILRM 197 appeal Mr. Justice Griffin said

"In calcuating the [*loss*] *the actuary allowed for the possibility of death, using standard mortality tables, having regard to the sex of the plaintiff, and allowing for changing interest rates... . This figure does not take into account the marriage prospects*† *of the plaintiff; nor does it take into account any risk of unemployment, redundancy, illness, accident or the like. It assumes that the plaintiff, if uninjured, would have continued to work, week in and week out, until retirement . . . would have* [*in effect*] *guaranteed employment at a constantly increasing annual rate of wages, until retirement or prior death"* ([1983] IR 141, 146, [1984] ILRM 197, 201).

It seems that the taking account of these risks, while they might have been recognised, was not put into practice until after the Supreme Court judgment in the *Reddy -v- Bates* case. This is usually referred to nowadays as the *Reddy and Bates discount.*

We see therefore that in certain circumstances actuarial evidence must be provided but it is to be used only as a guide-line.

Haberman and Bloomfield in their paper put forward a theoretical approach to the quantification of contingency discounts. They point out that there is difficulty in obtaining the necessary data so that the theory can be put to practical use. I suggest similar difficulties exist in obtaining the necessary data in this country. This is an area where, perhaps, research could be undertaken.

"... the taking into account of [the risks of unemployment, redundancy, illness, accident or the like] ... was not put into practice until after ... *Reddy -v- Bates* ...."

†**Editor's Note:** *see now Fitzsimons -v- Electricity Supply Board and Bord Telecom Eireann,* High Court (Barron J), 31 July 1990, The Irish Times Law Report, 12 November 1990.

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5. THE ACTUARIAL MULTIPLIER

5.1 What is required

In very simple terms what an actuary is called upon to do is indicate the capital value of each £1 per week or month or year that has been lost. Clearly, in order to do this, we need to know:

- the age and sex of the person
- for how long the loss would have continued
- the state of health of the person

In order to calculate the "capital value" or as it is more often referred to in court, the "multiplier", the actuary in addition must decide on:

- the mortality table
- marriage rates
- discounting factor
- tax

to use in his calculations.

5.2 Age

Very often we might be given the age of a Plaintiff or of a dependant only to find out at a later stage perhaps even just as one is about to go into court, that the age originally supplied is incorrect. A doctor might have prepared a report in 1985 say in which he states the age of the Plaintiff. In 1987 the solicitor writes to the actuary quoting the age from the doctor's report. Clearly this is incorrect. It is essential therefore, in my opinion, that one be supplied with dates of birth and not ages.

5.3 Duration of loss

In an injury case perhaps it is over-simplifying matters to say that wages loss would continue to retirement and that expenses would continue for a lifetime. There can be variations on this in that loss might commence in 5 or 10 years time or alternatively medical evidence might be that the Plaintiff will recover in 5 years time after which there might be no loss.

If we are contemplating a fatal claim then the loss suffered by a widow would be the support she got from her husband which would have continued for as long as both were alive. If we are considering the death of a son or daughter who was contributing at home then any loss sustained by the parents might have continued for as long as one of the parents was alive and the son or daughter was not married.

5.4 State of health

Unless indicated otherwise an actuary must assume that an individual's life expectancy is normal. If there is any question of a reduced life expectancy the extent of that reduction must be quantified by a medical expert. An actuary is neither qualified nor in a position to indicate the extent of any reduction of life expectancy.

"... an actuary must assume that an individual's life expectancy is normal."

5.5 Mortality

It could be argued that it would be appropriate to use population statistics or more specifically a life table derived from Irish Census Returns. In my opinion we are more often than not dealing with mortality that is more likely to be active service than population. Population mortality includes persons of all states of health and, in particular, permanently disabled and permanently unemployed people. Full active service mortality would not be appropriate either in that not all the people involved would be actively employed.

In practice we use the A49-52 mortality table, rated down for females. We are currently looking at the appropriateness of this table compared to population statistics. The life table derived from the 1986 Irish Census Returns is not yet available. In the life table derived from the 1981 Census male mortality is approximately in line with the A49-52 but there is some evidence that the rating down currently used for females is insufficient. Further consideration of this is being deferred until the life table based on the 1986 Census is available.

5.6 Marriage rates

Marriage rates for use in our calculations have been derived from successive Irish Census Returns. The current rates come from the 1986 Census and represent the proportion of the population who do not remain single.

In a case involving the death of an independent son or daughter contributing to his or her parents there is considered to be loss to the parents if the contribution is more than the cost of maintaining the son/daughter. In turn, such loss is assumed to continue while at least one parent is alive and the deceased not married. Hence the need for marriage rates.

5.7 Discount rate

When I first became involved in court work in the early 1960s I remember using a rate of interest of 6% which moved out to 6½%. The practice at that time was to take the long term yield on Government Stock and deduct a ½%. Inflation then was of very small amounts. I can remember interest rates escalating up to the very large amount of 8% and inflation ceasing to be insignificant. Capital values would be given based on 8% and also on 5% being 8% less inflation at a rate of 3% as an example.

Let me quote again from the Chief Justice's judgment in the appeal of *Donnelly -v- Brown:*

"As to the choice between the 5% and 8% tables it should be noted that this court has on a number of occasions – and most recently in Long -v- O'Brien & Another (unreported, Supreme Court, 24th March 1972) stated that the accepted annual allowance

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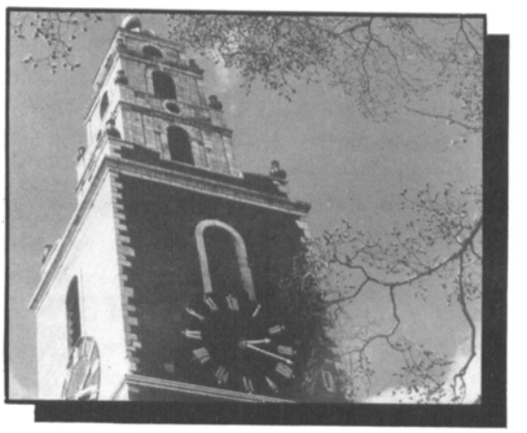

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to cover the now well established pattern of inflation is 3% and therefore acted on the 5% tables."

In spite of this I have a recollection of giving evidence before a well known High Court Judge who has since retired who would not allow figures to be given allowing for inflation. His view was that nobody could say what inflation would be in the future and therefore it was speculation. It always struck me that ignoring inflation was also speculative in that it made an assumption that there never would be any future inflation.

The problem was resolved by the judgment of Lord Diplock in the *Mallett -v- McMonagle* appeal. In his judgment he said:

"In my view the only practicable course for courts to adopt in assessing damages . . . is to leave out of account the risk of further inflation on the one hand, and the high interest rates which reflect the fear of it and capital appreciation of property and equities which are the consequence of it, on the other hand. In estimating the amount of the annual dependency in the future had the deceased not been killed money should be treated as retaining its value at the date of the judgment, and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to times of stable currency such as 4% to 5% should be adopted."

This fitted in very nicely with the practice of using 5% and from some time in the early 1970s calculations were always done using an interest rate of 5%.

In 1982 in the case of *Cooke -v- Walsh* [1984] ILRM 208 the appropriateness of using 5% was called into question. For a number of years there had been negative real rates of return and in particular in the *Cooke -v- Walsh* case we were dealing with an infant whose award would be lodged in court and could be invested only in Trustee Securities. Very briefly Trustee Securities are Government Stock and the two major banks. The trial Judge decided that a rate of interest of 2½% was appropriate and gave him judgement accordingly.

The case was appealed and Mr. Justice Griffin in his judgment in March 1984 stated:

"Having heard all evidence given in respect of the rate which should be accepted, the learned trial judge was, in my opinion, entitled to accept and adopt the rate of 2½%, and this Court is not entitled to interfere with that finding made by him. It may very well be that, in other cases, a different rate may be accepted on the evidence given in such cases" ([1984] ILRM 208, 216).

Since the *Cooke -v- Walsh* judgment the rate of interest used has been altered twice. firstly to 3% and secondly to 4%. Currently a rate of interest of 4% is used.

Efforts are continuing in Britain to have actuarial evidence accepted in the courts. The choice of a rate of interest is however an easier decision to make. Index-linked securities are available to the man in the street and, therefore, there can be no argument as to the real rate of return. Index-linked securities are not available to the public in this country. There is one aspect about index-linked securities to which I would refer. The indexing is linked to price inflation whereas in the majority of cases the loss we are trying to replace is related to wages and therefore it is wage inflation that we should be looking at. Traditionally wage inflation has been greater than price inflation.

5.8 Tax

Piers Segrave-Daly in his paper *Problems Involving Death and Injury Claims* says:

"despite the . . . Court decision in the case of Glover -v- BLN (No. 2) [1973] IR 432) *that income tax should be taken into account, the practice of the High Court in the vast majority of injury cases is that damages for loss of earnings are calculated without taking tax into account."*

The present practice is to take account of tax and logically, in my opinion, no other approach is valid.

A man who has lost £1,000 gross income in a year on which he would have paid tax at 30% has in reality lost only £700. If this loss were to continue until age 65 (say) he would be expected to invest whatever capital sum he receives by way of damages and he would be liable to tax on the income derived from those investments.

On the one hand an individual's loss is not the gross amount of income lost but rather the net amount after tax. The individual receives the net amount only. On the other hand investment income derived from damages is liable to tax and the multiplier should be based on the net amount of interst earned after allowing for tax. It is too simplistic, quite apart from being incorrect, to say that tax on investment income cancels out tax on income. I have looked at the value of a loss of income over periods of 10 years to 60 years and at rates of interest varying from 2½% to 5% per annum and allowing for tax at rates of 30%, 48% and 53% and in all cases I find the value of a loss of gross income at a gross rate of interest is always more than 100% of the value of the net income valued at the corresponding net rate of interest.

"It is too simplistic . . . to say that tax on investment income cancels out tax on income."

It is of interest to note in the

Cooke -v- Walsh appeal that in his judgment Mr Justice Griffin said:

". . . the learned trial Judge multiplied the entire of the rate of wages (£115) by the full multiplier used by him. In my view this is not correct, as it is the "take home pay" and not the gross pay that should be used as the multiplicand" ([1984] ILRM 208, 217).

Mr Justice McCarthy in his judgment in the same case in relation to the deduction of tax from gross wages said:

". . . there was no reference, whatever, to this aspect of the case in the evidence, the submissions, the relevant portion of the judgment, nor, indeed, in the grounds of appeal . . ." ([1984] ILRM 208, 221).

My own recollection is that in the particular circumstances of that case it made no difference.

Tax, in my opinion, cannot be ignored.

Section 5 of the Finance Act, 1990, provided that in the case of a person who is permanently and totally incapacitated by reason of mental or physical injury from maintaining himself, any income arising from the investment of damages is exempt from tax.

6. OTHER CONSIDERATIONS

6.1 Life expectancy

A popular misconception is that an actuary bases his calculations on the life expectancy of a person. This manifested itself in the *Auty -v- National Coal Board* case ([1985] 1 All ER 930, CA) to which I have already referred. In the introduction to their paper, Owen and Shier refer to the concern expressed by Stewart Lyon, at the Institute of Actuaries' Annual General Meeting in June 1984, with the judgment in the same case given by Lord Justice Waller who erroneously stated that the expectation of life was an average and assumed that everybody lived to that age and then died.

Those of us who are used to giving evidence in Court, no doubt, have met, many a time, the incomprehension expressed when giving different values for £1 per week to age 65 and life for a 30 year old plaintiff whose life expectancy is reduced to 25 years. The belief is that that person will be dead at age 55.

The value of £1 per week for life is often taken to mean the value of £1 per week for a

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period equal to the plaintiff's life expectancy. The following table shows the correct value and the value based on the life expectancy.

Age	Life Expectancy	Value of £1 per week Actuarially calculated	Based on expectancy	Error
20	52.54	1133	1161	2%
30	43.08	1053	1085	3%
40	33.60	936	974	4%
50	24.53	779	822	6%
60	16.56	597	636	6%
70	10.13	410	436	6%

6.2 **Assets**

In a fatal case, as well as having regard to the support lost by the dependants of the deceased, account must be taken of any assets which pass to them. Let me briefly refer again to the judgment of Lord Diplock in the *Mallett -v- McMonagle* case where he said:

" . . . credit being given for the value of any material benefits which will pass to them . . . "

Section 50 of the Civil Liability Act, 1961 excludes the proceeds of life policies and any pension, gratuity or like benefit. The practice exists also of ignoring the family home as an asset where the plaintiff is the spouse of the deceased.

Clearly a dependant has gained in receiving assets as a result of the early death of the deceased. That dependant, however, had an expectation in the asset had the dependant survived the deceased. By virtue of the death the dependant has gained the difference between the asset received and the value of the expectation of receiving the asset in the event of the deceased predeceasing the dependant. The value of the expectation is a straightforward actuarial calculation.

6.3 **Lost years**

In an injury case where the life expectancy of the plaintiff is impaired as a result of the injuries received the question arises as to how, if at all, should damages be calculated to compensate for the "lost years".

In 1966 an appeal was heard in the Supreme Court in the case of *Doherty -v- Bowater Mills Ltd.* [1968] IR 277, SC. This was a case in which a man was seriously injured. His normal life expectancy would have been about 38 years but as a result of the injuries it was reduced by one quarter. Actuarial evidence was given at the trial as to the capital value of future earnings based on the reduced life expectancy. The evidence so given was taken and acted upon on the assumption that the Plaintiff was not entitled to recover, as part of his damages, any sum in respect of the loss of wages for the number of years by which his expectation had been reduced. The trial judge expressed the view that was the correct legal position.

In the Supreme Court appeal of the case Mr. Justice Walsh in his judgment said:

"In my opinion the period or the length of time by which the expectation of life has been reduced must also be taken into account though, of course, for that particular period the sum to be considered would not be the gross loss of wages for the period but the surplus, if any, after providing for what it would have cost (the Plaintiff) to live during those years if he had not had the accident". ([1968] IR 277, 285).

There is a common sense approach to the problem of the lost years which I suggest is arrived at in the following way. In a fatal case the claim for loss is based on the support which the dependants of the deceased received and would have expected to receive from the deceased. In a more simplistic way this is viewed in the British Courts as being the wages of the deceased less whatever amount thereof he might have spent on himself. A more detailed and pragmatic approach is adopted in the Irish Courts and I shall say more about that later on. In an injury case on the other hand what a plaintiff can claim is the value of the wages or income that he or she has lost.

Where a person's life expectancy has been impaired, as in the *Doherty -v- Bowater* case, what we are looking at, based upon the figures in that case, is a situation where Doherty could have expected to live for about 38 years but as a result of the accident would live for only 28 years. Is it not reasonable to say that for the reduced life expectancy he can claim the loss of wages and for the difference between the reduced expectancy and normal expectancy his dependants have a claim? Essentially, in my opinion, this is what the Supreme Court held in the appeal of the *Doherty -v- Bowater* case.

Where there is any question of on-going medical or other expenses clearly these can be claimed only in respect of the reduced life span of the Plaintiff.

7. VALUING A FATAL CASE

7.1 **Data**

The information required to enable an actuary to value a fatal case is set out in the Appendix to this paper. Most of this information will be included in the Statement of Claim and Particulars and in any request for further Particulars and the Reply thereto. It may well be that, having received and con-

sidered these documents, further information might have to be sought from the solicitor.

Quite often, when one asks how the family income might have been spent, the total expenditure is likely to exceed the deceased's net income.

7.2 Dependants

Section 47 of the Civil Liability Act, 1961 defines the deceased's dependants as any member of the family who suffers injury or mental distress. The members of the family are defined as wife, husband, father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister.

This section goes on to include adopted children and illegitimate children and indicates that a person *in loco parentis* to another shall be considered the parent of that other.

7.3 Financial Dependants

As the wording implies, a financial dependant is somebody who was financially dependent on the deceased. Obvious financial dependants in the case of the death of a man would be his wife and dependent children.

The Actuary is concerned only with financial dependants. Other dependants may have a claim for mental distress but determination of who is to receive what amounts under the heading of mental distress is a matter for the trial Judge. Incidentally, the maximum damages for mental distress were set at £1,000 in the 1961 Act and increased in 1981 to £7,500.

7.4 Period of loss

Loss to a spouse is considered to have continued for what would have been the joint life time of deceased and spouse. In the case of children the loss is considered to continue until the child ceases to be dependent. As I mentioned earlier, where a son or daughter is killed, any loss is assumed to continue for as long as one parent is alive and the deceased not married.

7.5 Amount of loss

7.5.1 *At date of death*

The deceased's income will have been spent on his own maintenance and on providing for his wife and his dependent children. Detailed information may be available as to the cost of running the family home, i.e. rent, light, heat, etc. It is unlikely that a detailed breakdown will be available as to the amount spent on each member of the family. More often than not it is left to the Actuary to indicate the amount spent on each member of the family.

An approach is to consider three units of expenditure in running the home, three units for a wife and two units for each dependent child. Alternatively one might consider two units for the household overheads of deceased and his wife and one unit for each child.

7.5.2 *Between death and date of trial/report*

No-one knows with any certainty what would have happened had the deceased lived. It is reasonable to assume that the support the deceased gave his dependants would have increased in line with the increase in his income. As likely as not the deceased's take home pay would have kept pace with inflation. To the extent that details of gross income are available then increases in line with the increase in net income can be ascertained. In arriving at net income one would have regard to the tax rates in a particular year and the tax free allowances that the deceased might have enjoyed. Account would be taken also of the deceased's PRSI contributions. Alternatively, increases are assumed to be in line with inflation.

The present well established practice is to accumulate past loss up to the present time and to build in the probability of survival.

7.5.3 *After children become independent*

When the children become independent the money previously spent on them becomes available for the other members of the family. In practice it is assumed that what was spent on a child will be enjoyed equally by the deceased and his wife. No longer do we have to consider an adjustment in the deceased's tax now that child allowances no longer apply.

James Nash

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Consideration might have to be given to apportioning the money not only to husband and wife but also amongst other children – this, in my experience, is a rare occurence.

7.5.4 *After retirement*
When an individual retires, probably at age 65, that person as likely as not will experience a reduction in gross income and no doubt in take home pay. As with the period between death and date of trial, in which support is assumed to increase in line with increases in earnings, so also must one allow for a reduction in support as a result of a reduction in income at retirement.

8. OTHER TYPES OF CASES

8.1 **Wrongful dismissal**
Wrongful dismissal can arise because of a breach of contract in which event one would be in the Law Courts or there might be unfair dismissal, in which event one is appearing before the Employment Appeals Tribunal. The essential difference is that in the latter case compensation is restricted to 104 weeks remuneration irrespective of the value of the loss.

In wrongful dismissal cases the major function performed by an actuary is in valuing any pension rights that might be lost as a result of an individual losing his or her job.

8.2 **Criminal Injuries Tribunal**
The Criminal Injuries Compensation Tribunal can award damages to people who have suffered as a result of criminal injuries, for example the family of a man who might have been murdered or an individual who might have received injury in a fight. The compensation is paid out of Government funds and is totally gratuitous. Because of that, the exclusions in Section 50 of the Civil Liability Act, 1961 and in Section 2 of the Civil Liability (Amendment) Act, 1964 do not apply in so far as pensions payable by the State are concerned, i.e. a widow's pension or a disablement pension – in other words, the Government is not going to compensate somebody twice.

8.3 **Garda Compensation Acts**
These Acts provide a basis for compensation in the event that a Garda is injured or killed in the course of duty. In the event of death, a widow's pension is not set off against the financial loss but, in the event of injury, any pension payable is taken into account.

9. CONCLUSION

The views expressed in this paper are my own. Any errors are entirely my responsibility.

APPENDIX

1. Date of death.
2. Dates of birth of deceased, his wife, of each of his children and any other statutory dependants who were financially dependent on him.
3. How much was deceased earning at the time of his death?
4. If deceased were still alive what would he now be earning and how, and with effect from what dates, has this altered between the date of his death and the present time?
5. What deductions were made for tax and social welfare at the time of his death, and what deductions for these items would now be made?
6. Was deceased's wife working at the time of his death and, if so, how much was she earning? How much is she now earning? If no longer working, is this as a direct result of deceased's death or for other reasons?
7. How did deceased spend his income?
   (a) Did he give his total income to his wife, who in turn gave him pocket money or
   (b) did he withhold some of pocket money, and give the balance to his wife, or
   (c) did he give his wife a fixed amount, and
   (d) did he contribute to any other member of the family?
8. What was the cost of household overheads, such as rent, rates, light, heat, fuel, TV, etc. at the date of death?
9. Who paid the overheads?
10. Did deceased run a car? If so, what was the cost of running that car, and who paid for it? Can deceased's wife drive?
11. Did deceased provide services in and around the home which are not now being provided? This would cover such items as growing vegetables, cutting turf, painting, decorating etc? What was the value of these services at the time of death?
12. What was deceased's health before his death? What is the state of health of his financial dependants?
13. When would deceased have retired and what would his income then have been?
14. Were the children pursuing or likely to pursue third level education?
15. What assets did deceased leave? Please supply a Schedule of Assets.
16. Did deceased die testate or intestate?

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Susan Sontag

Readers are requested to send (old or new) photographs of lawyers and photographs (old and new) of scenes associated with lawyers which will be considered for publication in the *Gazette*. From time to time, a photograph is also required for the front cover.

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Topic:

"Lawyers – their qualifications, their field of operation and their opportunities in Germany"

Dr. Albrecht, who has a doctorate of law from the University Saarbruecken, has worked as a lawyer at a Bank in Germany and is since January 1991, Head of the Legal and German Market Department of the German-Irish Chamber. He will give an overview of the current situation for lawyers in Germany.

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Younger Members News

Society of Young Solicitors 1991 Spring Conference – Westport, Co. Mayo.

"Catch the Champagne Express"! We said and so they did. These dedicated conference-goers and first-timers did not wait to reach Mayo to set the pace for the weekend. Upon arrival in Westport, only those who were either young enough or practised enough lasted the pace into the small hours at the disco. Saturday morning dawned (all too quickly for some) and saw an excellent turn out for the morning's lectures – not surprising given the eminence of the speakers: the Honourable Mr. Justice Ronan Keane on the impact of the Companies Act, 1991 on Directors and Insider Dealing and Professor William R. Duncan on the effect of the Judicial Separation and Family Law Reform Act, 1989, on litigation, property and succession rights. Both speakers are author and co-author respectively of "Company Law in the Republic of Ireland" and "Marriage Breakdown in Ireland, Law and Practice" – books which practitioners in those areas of law should not be without.

The serious side of the conference complete for the day, delegates now set about the other task in hand – that of amusing themselves. Guidance in the right direction was provided at a welcoming reception hosted by Westport Urban District Council at which the virtues of Westport were extolled with great eloquence. They need not have worried. It would be hard to beat the beauty of Croagh Patrick or Clew Bay on a warm sunny day. The decision to take the coach trip around the bay to Leenane (location for the film "The Field") was definitely the right one.

Although Westport boasts many excellent restaurants, the attractions of the established highlight of the weekend proved too great. The formal banquet and dance held on this occasion in the Hotel Westport drew a capacity attendance. Our thanks must go to the Hotel and particularly to its friendly and co-operative staff. Nowhere was the presence of the 35 strong contingent from Northern Ireland felt more than at the banquet. Once Colin Sainsbury, Chairman of the SYS, had given his address, no time was lost in dispensing with further formalities. The band was edged out and the Northern boys took over. Previously undiscovered talent found a new platform and the crack was mighty. The pace never lessened, continuing with the disco into the early hours of Sunday morning.

Fortified with hearty Irish breakfasts (and, in some cases, something stronger) delegates assembled for the last lecture of the conference – a panel consisting of Frank O'Donnell, Solicitor, Frank Lanigan, Solicitor and Alison Dickenson of Douglas Llambias and Associates and dealing with developments in legal practice, its management and operation.

Our thanks to all our speakers not only for their lectures but also for making the journey and participating in the events of the weekend; to the hardworking sub-committee responsible for organising the conference (Jimmy McCourt and Paul Marren assisted by Colin Sainsbury); and, last but not least, to our generous sponsors – Investment Bank of Ireland (our main sponsor), Butterworths, Sweet and Maxwell and Douglas Llambias and Associates.

The Conference drew to a close as delegates made their way to cars, coaches and trains. For others, Sunday lunch was just beginning . . . . . .

Details of the SYS Autumn Conference will appear in the next issue of the *Gazette*.

Jennifer Blunden
Public Relations Officer,
SYS.

Society of Young Solicitors Conference, Westport
(left to Right): Adrian Burke, Chris Mahon, Sandra Fisher, James McCourt, Deirdre Sainsbury and Colin Sainsbury.

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Launch of Conveyancing Handbook, Blackhall Place
Members of The Conveyancing Committee (left to right): Felix McTiernan, Linda Kirwan, and Rory McEntee.

Law Society Dinner for Non-Council Committee Members
(Left to right): Laurence Sweeney, Director of Training, Gabrielle Dalton, Younger Members' Committee, and Michael Lanigan, Younger Members' Committee.

Launch of the Garda Síochana Guide, 6th Edition
(Left to right): Donal G. Binchy, President of The Law Society, Ray Burke, T.D., Minister for Justice, and Garda Commissioner Patrick J. Culligan. (An order form for the Garda Guide, 6th edition, is circulated with this issue of the Gazette.)

Tipperary Bar Association Annual Dinner
(Left to right): Nicholas Shee, President, Tipperary Bar Association, Marie Shee, Joan Binchy, and Donal G. Binchy, President of The Law Society.

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APPRENTICE SOLICITORS MIXED SOCCER

The Solicitors Apprentices Debating Society (SADSI) held an inter-professional course Soccer Tournament in Westport on the week-end of the SYS Conference on the 13th April.

Westport provided the ideal venue in that the best facilities were available within a short walking distance of the main conference Hotel, the Hotel Westport.

The competition involved full 11-a-side Teams composed of four ladies and seven men. Just for a change, the men had to use their heads to score whilst the ladies were permitted to score with any part of their anatomy. This made for a very interesting and successful competition and there were plenty of thrills and spills to keep spectators amused.

A team from Northern Ireland were very welcome participants in the competition and although defeated at an early stage, their merriment added an extra spice to things; indeed their resilience in taking the field at all despite the extreme tiredness which many of them felt after their long journey through the night, was acknowledged with a special presentation after the Tournament.

Teams from the 22nd, 23rd, 24th, 25th and 26th courses also participated, with only the Law School-tied 21st and 27th courses unable to field teams. The rigours of their respective professional and advanced courses have taken their toll.

The Final was fought out between the 26th course led by Rory McGarry and a Kevin Murphy-powered 22nd course. While the eventual winner of this encounter was undoubtedly exhaustion, the name on the Trophy was that of the 26th course which just about shaded the match to win by 1-0 with a goal from Alva Meenan.

Many thanks to Michael Twomey whose masochism was much appreciated in putting himself forward to undertake the refereeing duties. Thanks also to John O'Sullivan and Kevin McErlean for organising the competition, and to the SYS for giving the go-ahead to SADSI to run the competition. SADSI would also like to thank Westport Sports Complex for providing such excellent facilities and also to Matt Mulloy's Hostelry for sponsoring refreshments and to Charlie Gilmartin for providing lively entertainment to accompany said refreshments. Thanks to everyone who took part.

□

22nd Professional Course

Back (left to right): Jos O'Sullivan, Joseph Kelly, David O'Donnell, Conor Mullaney, Liam Brazil, Ronan Long, Lerin Murphy, Sean McDonagh. Front (left to right): Aoife Sexton, Laura McGinley, Maura Hennessy, Sarah O'Keeffe.

26th Course

Back (left to right): Aidan Marsh, Michael Mee, Brian Kiely, John Prior, Rory McGarry, Donal O'Carroll, Declan Whittle, Charlie Gilmartin, John O'Gorman. Front (left to right): Eddie O'Connor, Alva Meenan, Josephine Fitzpatrick, Siobhan Daly, Helena Brady.

Title to Land in Hong Kong – A brief Review with reference to the relevance of Irish Law

In Hong Kong, with its teeming crowds and towering buildings on an ever-changing skyline, almost all land is held on lease from the Crown for various terms often with rights of renewal for further terms of similar length. The Sino-British Agreement, in a special annex, provides for continued recognition of these leases after the handover of sovereignty by Britain to the Peoples Republic of China in 1997.[1] This recognition has to a certain extent been incorporated into domestic law already[2] and there are specific confirmatory provisions in the Basic Law which will constitute the constitution of the Hong Kong Special Administrative Region of the Peoples Republic of China after July 1, 1997.[3]

by
Patrick J. Sheehan,
Solicitor (Ireland),
Solicitor (Hong Kong)

Ownership of multistorey buildings in Hong Kong is usually by means of a tenancy in common whereby a particular flat owner will acquire a number of undivided shares in the property as a whole and a right of exclusive possession of his own particular unit, the right being created by way of covenant between the co-owners of the building under a "Deed of Mutual Covenant" (commonly referred to as a "DMC"). Of course, for every "right" one obtains there are corresponding rights for other units owners. The enforcement of these covenants depends on the law relating to running of the benefit and burden of covenants.

. . . almost all land is held on lease from the Crown for various terms often with rights of renewal . . .

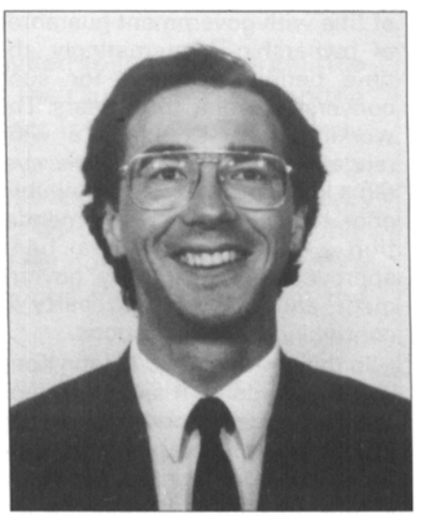
This system of ownership of multistorey buildings is not without its problems as the rights of individual flatowners are often framed in terms of easements (which of course they are not as there are no dominant and servient tenements, rather one piece of land under co-ownership) and sometimes misunderstood as such. Further, some covenants relating to management of the building commonly included in DMCs may not always run with the land so as to bind successors in title.[4] The system has been criticised but has become widely accepted as a workable if at times unwieldy method of dealing with the phenomenon of multiownership of single pieces of land.

Title to land is proved by reference to deeds and title is normally shown by producing the Crown Lease and at least 15 years title commencing with a good intermediate root of title.[5] However, although vendors are only obliged to produce 15 years title purchasers are still obliged by common law rules to seek 60 years title or, if less exists, to trace title back to the original Crown Grant.[6] However, in practice many purchasers (and their solicitors) do not bother to do so the rationale being that given the heavy demand for property they will have no difficulty selling on later and they themselves need only give 15 years title. However, pre-intermediate root of title defects may still of course have serious consequences and both vendors and purchasers may put themselves at risk if they choose to ignore them.[7]

Investigating title in Hong Kong can often be a nightmarish experience as there are invariably defects on title which owe their origins to the transient nature of the general population. Assignments are often executed by attorney acting on behalf of overseas vendors and purchasers but the relevant powers of attorney may be insufficient for their purpose and there may be no evidence to show non-revocation of the power. It often becomes impossible to trace either the donor of the power or his donee. There have been attempts by the legislature to deal with this problem but it is still an area of frequent litigation.[8]

Another problem for conveyancers is caused by missing title deeds. Fortunately copies certified by the government are sometimes available from the Land Office but for documents before a certain date, only copies of memorial of such documents are available. Where title deeds are missing one is forced to rely on statutory declarations and it is here that the Irish experiences with such matters are particularly relevant.[9] Because of the retention of a title by deeds system in Ireland, the Irish cases on this issue are apposite.

"Investigating title in Hong Kong can often be a nightmarish experience . . . ."



Patrick J. Sheehan

However, perhaps the most striking relevance of Irish law is in the area of determining priority between competing interests. Briefly, the present Hong Kong system is a hybrid between a registration of title and a registry of deeds system. It provides a register of lands against which dealings can be registered. In this respect it is akin to a registration of title system. However, the government does not guarantee the title; registration of an assignment in the Land Office does not mean that the person named as assignee is owner of the land. The colonial administration gives no guarantee in that respect. One has still to look to the title deeds to investigate title. In this respect it is very much a Registry of Deeds system. Registration at the Land Office is for the purposes of acquiring priority over other registrable instruments.

The precursor of the Hong Kong Land Registration Ordinance,[10] which provides a system for determining priority between competing instruments, was based in part on the Registration of Deeds Act (Ireland), 1707 and the Irish cases were therefore and indeed continue to be relevant.[11] There are, however, a number of serious loopholes in the present system and over the years there have been several calls for substantial amendment of the Ordinance or its replacement by a system of registration of title.[12]

The Registrar General of Hong Kong Government set up a working party in 1988 to consider the feasibility of introducing registration of title to land and has now proposed the conversion of the present system to a full registration of title with government guarantee of ownership.[13] Interestingly, the time period proposed for such conversion is only three years. The working party examined a wide range of registration of title systems including that of the Republic prior to making its recommendation. The proposal has been approved in principle by government and the working party is continuing its deliberations.

In the run-up to 1997 Hong Kong is due to undergo major expansion with hugh airport, port and housing developments planned by the administration. Unless registration of title to land is introduced the solicitor's task of ensuring proper title to land will continue to be a difficult one and reference to the experience of other jurisdictions including those of both Northern Ireland and the Republic will no doubt continue to be made.

FOOTNOTES

1. Annex III to Sino-British Agreement on the Future of Hong Kong, especially paragraphs 1, 2 and 3.
2. New Territories (Extension of Leases) Ordinance, Chapter 150 of the Laws of Hong Kong.
3. Articles 120-123 of the Basic Law of Hong Kong S.A.R. of the P.R.C. promulgated by decree on 4th April 1990 following adoption by the National People's Congress.
4. See Nield, Legal Framework of Deeds of Mutual Covenant, Multi-Storey Building Management, pp.1-25 esp at 12 (Hong Kong Law Journal Limited).
5. Section 13, Conveyancing & Property Ordinance, Chapter 219 of the Laws of Hong Kong.
6. See Nield, The Conveyancing & Property Ordinance, 1984 – Questions & Solutions, (1985) Law Lectures for Practitioners pp. 121-124.
7. There are no statutory equivalents in Hong Kong to Sections 1 and 2 of the Vendor and Purchaser Act, 1874 and Sections 3 (1) and 13 (1), Conveyancing Act 1881 so investigation of title for the full 60 years is necessary.
8. See Nield, Powers of Attorney – A Title Headache, Conveyancing Miscellany – Title & Other Problems, pp.33-40 (Hong Kong Law Journal Limited) and cases cited therein. See also *Leung Woon Chau -v- Gladeal Limited* (1990) HC MP No. 597 of 1990, (unreported judgement of Godfrey, J.).
9. See Sheehan, Missing Title Deeds – All is not Lost, Conveyancing Miscellany, pp.23-31 and cases cited therein. See also *Chan Kam Sung & Anor. -v- Grace Lam* (1990) HC MP No. 3276 of 1990, (unreported judgment of Findlay, J.)
10. Chapter 128 of the Laws of Hong Kong.
11. See W. K. Thompson, The Land Registration Ordinance of Hong Kong, (1974) Hong Kong Law Journal pp.242 et seq. The Irish cases on the effect of written and unwritten equities such as *Re Burke's Estate* (1881) 9 L.R. Ir. 24 and *Fullerton -v- Provincial Bank of Ireland* [1903] A.C. 309 are relevant. See also *Financial & Investment Services for Asia -v- Baik Wha Securities* [1986] HKLR 106.
12. See Thompson, loc. cit at 270; Nield at 6 above esp at 124 and Sheehan, Commentary on *Ng Kam Ha -v- Vincent Sina Traders Ltd.* 18 HKLJ 302 at 305.
13. See Paper dated 16th February 1990 of Registrar General of Government of Hong Kong proposing conversion from present system to registration of title.

Patrick J. Sheehan is an N.U.I. graduate with B. Comm. and LL.M. degrees. He has qualified as a solicitor both in Ireland and Hong Kong. He currently practises in Hong Kong with Messrs. S. H. Leung & Co.

The Hon. Mrs. Justice Susan Denham

The Government recently appointed Mrs. Susan Denham, S.C., to be a Judge of the High Court. Called to the Bar in 1971, Mrs. Denham was educated at Alexandra College, Dublin, Trinity College and Columbia University, New York. She was called to the Inner Bar in 1987.

She is regarded as an expert on judicial review and extradition matters, having done a lot of State work in major extradition cases in recent years. She was vice-chairwoman of the Adoption Board for a number of years.

Mrs. Denham is married to Mr. Brian Denham, a paediatrican in Our Lady's Hospital for sick Children, in Crumlin, and they have four children.

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CONVEYANCING HAND-BOOK

The Conveyancing Committee are pleased to produce this Handbook being a compilation of Recommendations, Practice Notes and Articles on Conveyancing issued by it over the years. In preparing the Handbook, recommendations which are no longer relevant to current Conveyancing Practice, or which were subsequently reviewed by the Committee have been omitted. In some cases explanatory footnotes have been added to draw Practitioners' attention to developments since the original publication of the Practice Notes. It is hoped that the Handbook will prove a useful guide to Practitioners in ascertaining what the Committee consider to be good Conveyancing Practice in particular areas. The Committee's views on such matters have assumed even greater importance in recent years as a result of the system of Certification of Title for Home Loans and the new form of Undertaking agreed with the Irish Banks Standing Committee whereby the question of what is "a good marketable title" will initially be addressed to the Conveyancing Committee for its adjudication.

It should be noted that the recommendations from the Conveyancing Committee represent merely the combined wisdom of the Members of the Committee and reflect their thinking at the time of issue. They do not purport to be an authoritative interpretation of the Law the ultimate arbiters of which are the Courts. In many instances recommendations of the Committee are designed to ease Conveyancing Practice and take account of the practicalities of Conveyancing transactions. If there is an inconsistency between any two Practice Notes or Recommendations the more recent should be taken to reflect the opinion of the Committee.

The Handbook contains the Recommendations and Practice Notes of the Committee up to August 1990. The Practice Notes published since August are set out below and practitioners are urged to insert copies in the Handbook to keep it fully up-to-date.

October 1990 –	Redemption of Mortgages and Title Documents **11.35.**
November 1990 –	Certificate of Title in relation to Houses in the course of construction. **5.17.**
December 1990 –	Undertakings in the Agreed Forms between the Incorporated Law Society and the Irish Banks Standing Committee. **2.15.**
	Stamp Duties – The Finance Act, 1990. **9.15.**
	New House Grants. **5.18.**
	Land Registry, Registry of Deeds – handout.
Jan/Feb 1991 –	Document Schedule in Conditions of Sale. **12.13.**

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THE IRISH SOCIETY FOR EUROPEAN LAW LECTURE PROGRAMME FOR SUMMER 1991

Thursday, June 6th 1991:
John Meade, E.C. Unit, Arthur Cox & Co., Solicitors – *E.E.C. Competition Law – The Impact on the Irish Market.*

Lectures take place at 8.15p.m. at the Kildare Street and University Club, 17 St. Stephen's Green, Dublin 2, by kind permission.

Members and their guests are invited to join the Committee and guest speakers for dinner at the Club at 6.15p.m. on the evening of each lecture. Members intending to dine must communicate with the Registrar, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, 52 Harcourt Street, Dublin 2. (Tel: 01-714444 ext. 5081, Fax; 01-679 3980, Electronic Mail (Eirmail) (Dialcom) 74:EIM076) not later than two days before the dinner, as advance notice must be given to the Club.

Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10 for students, barristers and solicitors in the first three years of practice). Membership forms and further details may be obtained from the Registrar.

The Future of the Land Registry and the Registry of Deeds

by
Catherine Treacy,
Registrar of Titles

The following is the text of a lecture delivered by The Registrar of Titles to the Lawtech Exhibition, 1990.

I am delighted to be here today participating in this very useful exercise which has been, as one has come to expect, so well planned and organized by the Law Society.

The combined Registries, i.e. Land Registry and Registry of Deeds, have been the subject of various criticisms over the last number of years which highlighted the negative aspects of the Registries, such as the arrears situation and the consequent delays in registration.

I do not propose to dwell on such matters, except to say that significant effort has been directed towards the elimination of these arrears in key areas, the benefits of which I would hope some of you are experiencing already. My brief, however, is to look ahead and convey to you what I see as the future role of the Registries.

The fact that I am here to talk about the future of the Registries is a definite indication of my confidence that there *is* a future for the Registries and a good one at that. I consider also that a Seminar which is part of a technology exhibition is an *appropriate* forum for this exercise in looking ahead as it is my firm belief that the successful future of the Registries lies in their ability to adapt to the technological era.

" . . . significant effort has been directed towards the elimination of . . . arrears in key areas . . . "

The services which the Registries provide are record-based. Every application made for registration involves the retrieval and updating of the folio. It may also involve the retrieval of a map or previous instruments.

There are approximately 100,000 applications for registrations made in the Land Registry yearly. Many of these would involve a number of folios. This statistic gives a clear indication of the enormity of the task of retrieval alone.

That, however, is only part of the picture. Before an actual application for registration is made, or indeed in some cases where no application is subsequently made, folios and instruments are requested by our clients for inspection, copying purposes etc. When the demand in this area is added to the actual applications, the total demand for folios comes to approximately 2,500 per day. Even if the error rate in the manual re-filing of these folios was kept to a half of 1%, that would involve the misfiling of around 12 folios per day. With a record base of 1.25 million manual folios and growing at the rate of approximately 20,000 per year, finding these possibly misfiled 12 folios per day would reduce the task of finding the proverbial needle in the haystack to child's play by comparison.

It is not just a problem of volume that we have to cope with however; there is a continuous problem caused by the multiplicity of demand. It is not just that these 2,500 folios are needed daily in one area alone; many of these folios will have been requested simultaneously for a number of purposes e.g. copy folio, land certificate, inspection etc. The paper folio like other physical objects can however only be in one place at any given time, and it is impossible therefore to cope satisfactorily with the multiplicity of demand.

Our business in the Registries is therefore tailor-made for taking advantage of the speedy access and multi-access facilities which technology offers.

This has been proved in the Dublin Region of the Land Registry where all of the folios are now computerised. The computerised programme has been extended to the Western Region where all new folios opened since January 1987 are computerised.

Being a firm believer in proper planning and research so that implementation can then take place smoothly and efficiently and also believing totally that technology can only succeed in increasing efficiency when it is linked into and co-ordinated with the proper organisation of a business, one of my first acts on taking up office in April of this year was to set about drawing up a Strategic Plan to determine future strategy in the

Catherine Treacy

use of Information Technology. To this end I enlisted the aid of professional consultants, Price Waterhouse. This is not merely a computerisation implementation plan however. It is the intention to link the business goals and objectives of the organisation with the optimum technological requirements and organisational functions to enable better usage of existing and future resources. Therefore the Registries as an Organisation are being examined to determine the best structures, practices etc. that would help us fulfil our statutory requirements most efficiently. This plan will provide the basis for development of new technology in the Registries over the next five years.

This Strategic Plan will provide the Registries with a clear direction regarding the acquisition and development of technology which will require a high level of investment and expenditure in its initial stages. It will indicate the applications systems of strategic importance to the Registries in providing the service or services which you our customers need and expect. To this end, as part of the Planning exercise, the Team conducting the project have spoken to some of you in an attempt to understand and document those requirements.

"[The] Strategic Plan will provide the Registries with a clear direction . . . "

Negotiations are ongoing between senior staff in the Registry and Lawlink representatives in relation to the provision of Direct Access to the Registrie's databases by practitioners from their own P.C.'s, which the Minister for Justice has approved in principle. This is in response to a proposal submitted by solicitors to enable searches and enquiries to be made via telecommunication links to solicitor's offices etc. The Registries are aware of the need in this modern world for up to the minute information particularly in the conveyancing business and we will be striving to meet that need whenever possible.

To this end, on the 28th September last, a programme which involved the computerisation of the Abstract Record against which all searches are carried out, was initiated in the Registry of Deeds. The project commenced with the data capture of the 1990 Abstract Records which is nearing completion and the next step of capturing the previous 10 years back to 1st January 1980, should be completed in early 1991. The longer plan is to capture the manual Abstract Records for a total of 40 years if the demand justifies same.

The benefits from this use of technology will be, I think, obvious to all. The daily retrieval of heavy abstract books, possibly demanded by a number of people at the same time (the multiplicity of demand problem again as with the folio) will be swept away. Finger tip retrieval of information from a number of screens allowing multiple access will be the norm.

The Registry of Deeds system has been designed with flexibility in mind to allow it blend with future requirements and technologies. It is intended, in time, to extend the present Grantor Index to include a Property Index. There are also plans to provide automated access to the Memorial.

Integration of all aspects of the Registries including maps will be important in the future and this is one of the key issues being addressed by the Strategic Planning Project. The result will be a greater focus on service and efficiency, resulting in an improved service TO YOU, our customers, with faster turnaround times for all of the services which the Registries provide by the optimum use of technology where appropriate.

We in the Registries are aware that information is one of our main commodities whether it be from our folio, indices, mapping, or abstract databases and realise that this information must be made available to our customers in the most efficient manner.

As you may be aware, the Minister for Justice, Mr. Ray Burke T.D., announced on the 28th of September 1990 that he had received Government approval in principle to the proposal that the Land Registry and Registry of Deeds should be re-constituted as a Semi-State Body. The Minister stated that so long as the Registries continued to be subject to the constraints in the areas of staffing and funding which apply within the conventional Civil Service structures, it is well-nigh impossible for the Registries to provide the public, their customers, with the standard of service to which they are entitled.

The Strategic Planning exercise has assumed a greater importance since the Minister's announcement and will be completed by mid December. The fact that the Minister's announcement was made during the currency of the Strategic Planning exercise now means that the Plan will be orientated specifically towards operating in a Semi-State environment.

All of the services and improvements planned and being put into operation can only be achieved with your help and co-operation. In developing new systems all aspects of present procedures will be analysed including form formats and structures with a view to making entry of information into our systems as streamlined and as efficient as possible. This should result in faster responses to your needs. Your help and co-operation will make the Land Registry and Registry of Deeds the progressive organisation which will provide accurate information how you want it, when you want it and where you want it.

**The Consultancy exercise was completed and a Report sent to the Minister in January, 1991.*

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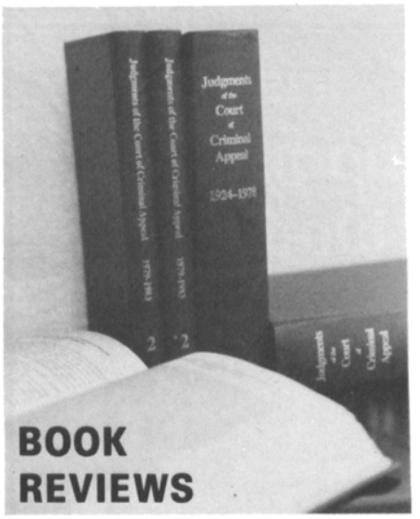

LAND REGISTRY PRACTICE
By Brendan Fitzgerald, [The Round Hall Press,]. £55.00.

An "instant" review would not have done this book justice. It is not a text book; rather it is a compendium of Land Registry practice which is of very considerable assistance to the practitioner.

The writer has had on occasion to refer to this book regularly over the period since its publication and has found it of enormous benefit.

It is not always appreciated that conveyancing practitioners in Dublin have as much and, indeed in some cases, wider experience of Land Registry practice than their country brethren. Apart from the fact that almost all housing developments in the outer suburbs of Dublin in the last 15 to 20 years have been carried out on registered land and most industrial estates have also been developed on registered land and most significantly considerable amounts of complex centre city properties have been compulsorily registered under the provisions of Section 23 of the 1964 Act.

To take an example of the type of problem which has unfortunately arisen much too frequently in recent years – the procedural difficulties which arise when an occupational lease, perhaps on an industrial estate, has been terminated, sometimes informally, on the tenants ceasing to trade are considerable. The passages at pages 71 – 74 of this book will be of considerable assistance to all practitioners. In addition they show the Land Registry as adopting a most positive attitude to the interpretation of the legislation to enable a practical solution to be reached.

It is perhaps timely that this most useful work appeared shortly before the decision to convert the Land Registry into a "Semi-State" body. Timely because it highlights a number of areas where consideration needs to be given not to altering Land Registry practice but to amending the framework within which the practice operates, namely, the *Registration of Title Act, 1964*. That Act was drafted in a context where agricultural land was the prime subject of the Registry's operations. That is significantly less true as we approach the end of 20th century and if compulsory registration is to be extended it will be even less true since the great majority of land remaining to be registered is urban property. There are aspects of the present registration system which do not accommodate complex urban property satisfactorily and it is hoped that an opportunity will be taken when reviewing the change of status of the Registry to look at its fundamental legislation also.

This book will be of enormous practical assistance and is most welcome.

John F. Buckley

FAMILY FINANCE, 1991/92 Edition By Colm Rapple. [Squirrel Press, 1991, 252 pp, IR£4.50, paperback]

Many lawyers are drowning in a sea of paper. A commentator has stated recently that the archaic ritual by which parliament decides how tax law is made is about as appropriate to a modern industrial democracy as tally sticks to the international money market. He added that radical reform of the machinery for enacting tax legislation was needed. Only then would tax legislation become intelligent and intelligible. The commentator stated that as long as we continue to worship in accordance with established rites at the altar of the annual Finance Bill, so long will tax laws be confused and confusing.

Family Finance has been on the best seller list in Ireland for more than a decade providing an annual update on changes on financial matters. Business journalist, Colm Rapple, has specialised in personal finance matters and has written extensively on a wide range of topics in the *Evening Press.*

Family Finance covers many of the financial problems which an average family may encounter. This edition has been completely updated to include developments during the past year including the provisions of the 1991 budget.

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Colm Rapple presents details about the "archaic ritual" – the annual financial legislation – in a lively and straighforward manner.

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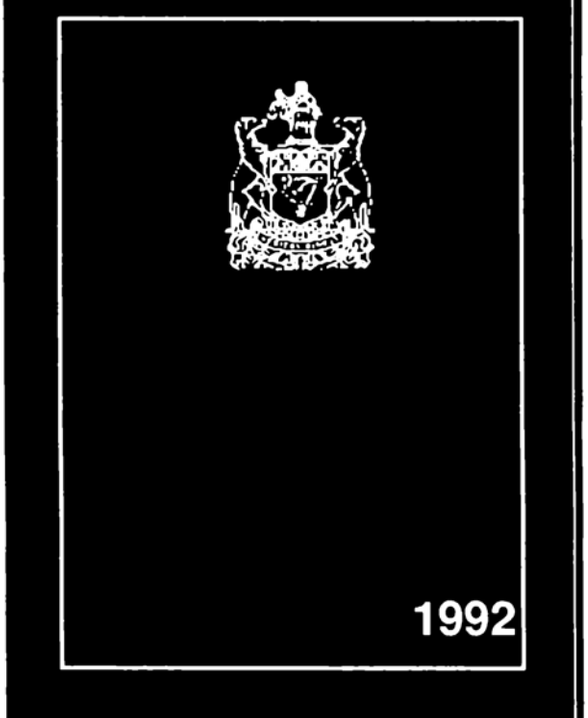

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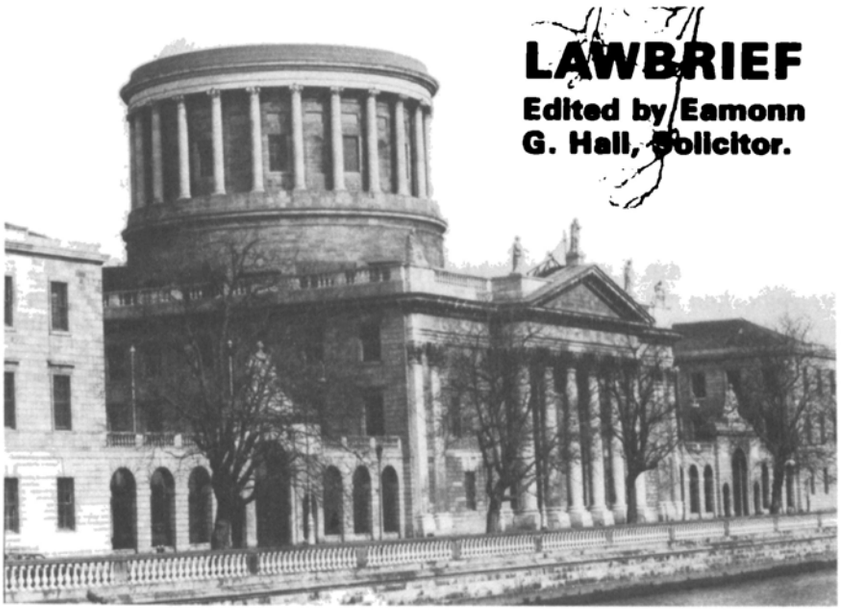

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GOVERNMENT BILLS BEFORE THE OIREACHTAS 1991 as at April 1991

No. 20 of 1988 *Child Care Bill, 1988* (plus Explanatory Memo).

This Bill up-dates the law in relation to the care of children, particularly children who have been assaulted, ill treated, seriously neglected or sexually abused or who are at risk.

Presented in the Dáil by the Minister for Health 20/5/88.

Passed by Dáil Eireann 13/12/90; Second Stage in the Seanad passed 7/3/91.

Present position: Committee Stage in the Seanad.

No. 11 of 1989 *Irish Land Commission Bill, 1989* (plus Explanatory Memo).

This Bill provides for the dissolution of the Irish Land Commission, for the winding up of the system of land purchase, for the transfer of certain functions exercisable under the Land Purchase Acts, and for other connected matters.

Presented in the Dáil by the Minister for Agriculture and Food, 2/3/89.

Present position: Second Stage in the Dáil 4/5/89.

No. 34 of 1989 *Marine Institute Bill, 1989* (plus Explanatory and Financial Memo).

This Bill provides for the establishment of Foras na Mara – the Marine Institute – for the carrying out of marine research and development and related services and for the co-ordination of the resources of the State used for marine research.

Presented in the Seanad by Senator M. Lanigan 17/11/89.

Passed by both Houses of the Oireachtas 7/3/91.

Present position: Enacted.

No. 10 of 1990 *Radiological Protection Bill, 1990* (plus Explanatory Memo).

This Bill provides for the establishment of the Radiological Protection Institute of Ireland, the dissolution of the Nuclear Energy Board; enables a range of radiation protection measures to be taken by various Ministers in the event of a radiological emergency, gives effect to provisions of the Convention on Assistance in the case of a Nuclear Accident or Radiological Emergency (the Assistance Convention), the Convention on Early Notification of a Nuclear Accident (the Notification Convention), and the Convention on the Physical Protection of Nuclear Material (the Protection Convention).

Presented in the Dáil by the Minister for Energy 28/3/90.

Passed by Dáil Eireann, 22/3/91.

Present Position: Seanad, Second Stage.

No. 17 of 1990 *Statute of Limitations (Amendment) Bill,* 1990 (plus Explanatory and Financial Memo).

This Bill amends the law on limitation of actions in so far as it applies to latent personal injuries; provides that the three-year limitation period in personal

injuries cases will run from the date of accrual of the cause of action (as at present) or, if later, from the date of knowledge, i.e. the date on which the person injured (or other person by or on whose behalf an action is taken) discovered, or should have discovered, that there was a cause of action. This follows in substance the recommendations of the *Law Reform Commission (Report on the Statute of Limitations; Claims in respect of Latent Personal Injuries* LRC 21-1987) and amends and extends the *Statute of Limitations 1957* and amends related provisions in other statutes.

Presented in the Seanad by Senator M. Lanigan 30/4/90.

Passed by Seanad Eireann 15/11/90; Second Stage in the Dáil passed 29/11/90.

Present Position: Committee Stage in Dáil.

No. 22 of 1990 *Sea Pollution Bill, 1990* (plus Explanatory and Financial Memo).

This Bill makes provision for the prevention of pollution of the sea by oil and other substances; gives effect to the *International Convention* for *the Prevention of Pollution by Ships 1973* as modified by its 1978 Protocol (MARPOL 73/78) and gives effect to the Protocol relating to Intervention on the High Seas in cases of Marine Pollution by Substances other than Oil 1973; provides for the repeal of the Oil Pollution of the Sea Acts, 1956 to 1977, and provides for other related matters.

Presented in the Dáil by the Minister for the Marine 7/6/90.

Present Position: at Committee Stage in the Dáil 4/12/90, to be resumed.

No. 30 of 1990 *Criminal Damage Bill, 1990.*

This Bill amends the law relating to offences of damage to property and provides for connected matters, replaces the multiplicity of offences of damage to specific kinds of property in the *Malicious Damage Act* 1861 with three offences of damage to property in general. The Bill is based, in the main, on the recommendations of the *Law Reform Commission in its Report on Malicious Damage (LRC 26-1988).*

Presented by the Minister for Justice 18/9/90.

Second Stage in the Dáil passed 29/11/90.

Present Position: Committee Stage in Dáil.

No. 32 of 1990 *Contractual Obligations (Applicable Law) Bill, 1990* (plus Explanatory and Financial Memo).

This Bill gives the force of law to the *Convention on the law applicable to Contractual Obligations* signed at Rome on behalf of the State on 19th June, 1980, and the Convention on the Accession of the Hellenic Republic to the aforesaid Convention signed at Luxembourg on 10th April, 1984, and provides for connected matters.

Presented by Senator Sean Fallon 15/10/90.

Passed by Seanad Eireann 29/11/90.

Present Position: At Second Stage in Dáil.

No. 33 of 1990 *Child Abduction and Enforcement of Custody Orders Bill, 1990* (plus Explanatory Memo).

The Bill gives the force of law in the State to: (a) the *Convention on the Civil Aspects of International Child Abduction, signed at the Hague on 25th October, 1980* (The Hague Convention) and (b) the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, signed at Luxembourg on 20th May, 1980 (the Luxembourg Convention).

Presented by the Minister for Justice 18/10/90.

Passed by both Houses of the Oireachtas 21/3/91.

Present Position: Enacted.

No. 34 of 1990 *Destructive Insects and Pests (Amendment) Bill, 1990* (plus Explanatory Memo).

This Bill amends the *Destructive Insects and Pests (Consolidation) Act, 1958,* to provide effective deterrents under that Act against the introduction or spreading of destructive insects and pests which could have devastating economic effects through crop losses and/or the need for expensive eradication measures.

Presented by the Minister for Agriculture and Food 19/10/90.

Passed by both Houses of the Oireachtas 13/3/91.

Present Position: Enacted.

No. 35 of 1990 *Courts (Supplemental Provisions) (Amendment) (No. 2) Bill, 1990* (plus Explanatory Memo).

This Bill extends to members of the judiciary and specific court officers certain pension benefits which are already available to most other groups in the public service; amends the *Courts (Supplemental*

Provisions) Act, 1961 and the *Court of Justice and Court Officers (Superannuation) Act, 1961,* and provides for other related matters.

Presented by Senator Sean Fallon 25/10/90.

Passed by Seanad Eireann 14/3/91.

Present Position: Committee Stage in the Dáil.

No. 41 of 1990 *Fisheries (Amendment) Bill, 1990* (plus Explanatory Memo).

This Bill provides for the establishment of fisheries co-operative societies to raise and disburse for the public benefit funds for the development of trout or coarse fisheries in fisheries regions; abolishes the licences for angling for trout or coarse fish; provides for the issue of further classes of salmon rod licences and provides for other related matters.

Presented by the Minister for the Marine 28/11/90.

Present Position: at Committee Stage in the Dáil, 5/3/91.

No. 42 of 1990 *European Bank for Reconstruction and Development Bill, 1990* (plus Explanatory Memo).

The Bill provides for the ratification, on behalf of Ireland, of the *Agreement establishing the European Bank for Reconstruction and Development (EBRD)* done at Paris on 29th May, 1990, and provides for connected matters.

Presented by the Minister for Finance 28/11/90.

Present Position: Enacted.

No. 45 of 1990 *Sugar Bill, 1990* (plus Explanatory Memo).

This Bill provides for the restructuring of Siuicre Eireann, c.p.t. through the establishment of a new holding company which will be a public limited company incorporated in Ireland and repeals the *Sugar Manufacture Acts 1933 to 1982.*

Presented by the Minister for Agriculture and Food 6/12/90.

Passed by both Houses of the Oireachtas 15/3/91.

Present Position: Enacted.

No. 46 of 1990 *Environmental Protection Agency Bill,* 1990 (Plus Explanatory Memo).

This Bill provides for the establishment of an Environmental Protection Agency which will have the following main functions: the control and regulation of scheduled activities likely to pose a major risk to environmental quality; the general monitoring of environmental quality; the provision of support, back-up and advisory services to public authorities and the promotion and co-ordination of environmental research. The Bill also provides for a number of miscellaneous matters relating to the protection of the environment and for the increase of certain penalties.

Presented by Senator Sean Fallon 10/12/90.

Second Stage in the Seanad passed 21/2/91.

No. 47 of 1990 *Recognition of Foreign Adoptions Bill, 1990* (plus Explanatory Memo).

This Bill provides for the recognition of foreign adoption orders in circumstances as recommended by the *Law Reform Commission (LRC Report No. 29, May 1989, on the Recognition of Foreign Adoption Decrees)* and also for the extension of recognition in specified additional circumstances which would include adoption orders made in favour of Irish couples in Romania.

Introduced by Deputy A. Shatter; ordered by Dáil Eireann to be printed 13/12/90.

Present Position: Reports Stage in the Dáil.

No. 48 of 1990 *Presidential Establishment (Amendment) Bill, 1990.*

This Bill amends the Presidential Establishment Acts 1938 to 1973.

Presented by the Minister for Finance 17/12/90.

Present Position: Passed by Dáil.

No. 49 of 1990 *Worker Protection (Regular Part-time Employees) Bill, 1990 (plus Explanatory Memo).*

This Bill extends to regular part-time employees the benefits of Acts relating to employment.

Presented by the Minister for Labour 18/12/90.

Passed by both Houses of the Oireachtas 20/3/91.

Present Position: Enacted.

No. 5 of 1991 *Educational Exchange (Ireland and the United States of America) Bill, 1991* (plus Explanatory Memo).

This Bill gives effect to the Agreement signed on 27/10/88 on behalf of the Government with the Government of the U.S.A. for a Programme of Educational Exchange.

Presented by the Minister for Foreign Affairs 28/2/91.

Present Position: Second Stage in the Dáil.

No. 6 of 1991 *Social Welfare Bill, 1991 (plus Explanatory Memo).*

This Bill provides for the increases from July in the rates of social welfare payments announced in the Budget and for other connected matters, amends and extends the *Social Welfare Acts, 1981 to 1990,* the *Pensions Act, 1990,* S.69 of the *Health Act,* 1970 and S. 285 (2) of the *Companies Act, 1963.*

Presented by the Minister for Social Welfare 14/3/91.

Passed by both Houses of the Oireachtas 26/3/91.

Present Position: Enacted.

No. 8 of 1991 *Competition Bill, 1991, (with explanatory memo).*

The primary purpose of this Bill is to prohibit anti-competitive practices and agreements and the abuse of dominant positions in the market. These provisions are based on Articles 85 and 86 of the Treaty of Rome and will apply to all undertakings in the State engaged in trade in goods and services.

Presented by the Minister for Industry and Commerce, 12 April 1991.

No. 11 of 1991 *Liability for Defective Products Bill, 1991 (with explanatory memo).*

The purpose of this Bill is to give effect to the provisions of Directive No. 85/374/EEC of 25th July, 1985 of the Council of the European Communities on the approximation of the laws, regulations and administrative provisions of the Member States of the European Communities concerning liability for defective products. A copy of the Directive is included as an Annex to the Bill.

Presented by the Minister for Industry and Commerce, April 24, 1991.

The special assistance of Margaret Byrne, Librarian, Law Society, is acknowledged in the compilation of the foregoing details.

Presentation of Parchments, April 1951.

Amongst those included in the above photograph were Michael J. Leech, Edmund Doyle, Ritchie Ryan, James Woods, G.J. Lyons, W.E. Bradshaw, Brendan Wallace, Patrick Markey, Kevin Callanan, Donal Lambe, Comhall U. McGuill

Professional Information

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Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

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

LOST LAND CERTIFICATES

William O'Driscoll, Folio No: 1241F; Lands: Rathbane North; Area: 0(a) 0(r) 24(p); County: **LIMERICK.**

John McGovern, Folio No: 445 (R); Lands: (i) Altshallan. (ii) Altshallan; Area: (i) 4(a) 2(r) 10(p), (ii) 64(a) 2(r) 32(p); County: **CAVAN.**

Patrick Joseph Queally, 77 Riverfield Estate, Midleton, Co. Cork. Folio: 1829F; Lands: Townland – Drumcliffe; Area: 8(a) 2(r) 8(p); County: **CLARE.**

James Corcoran, Folio: 6383F; Lands: Ballintubbrid West; Area: 0.631 acres; County: **CORK.**

Oliver Heeney and **Mary Heeney,** Folio: 36779L; Lands: Townland: Balbriggan, Barony: Balrothery East; Area: (Hectares) 0.030; County: **DUBLIN.**

Mary Concepta Conaty, 67 Idrone Drive, Knocklyon Woods, Templeogue, Co. Dublin. Folio: 42166L; Lands: Knocklyon (Barony – Uppercross); Area: Hectares – 0.030; County: **DUBLIN.**

Paul Taylor and **Josephine Taylor;** Folio: 13786F; Lands: Mornington; County: **MEATH.**

Frances McInerney, Kiladerry, Broadford, Co. Clare. Folio: 11600F; Lands: Townland – Killaderry; Area: 0.275 Hectares; County: **CLARE.**

Eileen Wright, Folio: 4807; Lands: Haggardstown; Area: 0(a) 0(r) 22(p); County: **LOUTH.**

Joseph McCormack, Folio: 481R; Lands: Drumlish; Area: 0(a) 0(r) 22(p); County: **LONGFORD.**

Thomas Keane and **Marian Keane,** Folio: 809F; Lands: Poulnagunoge; Area: 0(a) 1(r) 33(p); County: **WATERFORD.**

Clement Ward, Folio: 7490F; Lands: Clondoogan; Area: 0.688 acres; County: **MEATH.**

Michael Carey, Folio: 6425; Lands: Laghile; Area: 37(a) 2(r) 18(p); County: **TIPPERARY.**

Patrick and **Anne Bennett,** Folio: 13913; Lands: Togherstown; Area: 1a.0r.30p. County: **WESTMEATH.**

Sek Kiu Hung, Folio: 3020F; Lands: Rearour, Ballinhassig, Co. Cork. County: **CORK.**

Patrick and **Lena Niland,** Shessy South, Ardrahan, Co. Galway. Folio: 1919; County: **GALWAY.**

Michael Broderick, Folio: 22680; Lands: Doon; Area: 24.171 acres; County: **TIPPERARY.**

Denis Callagy, Folio: 17240; Lands: Part of the lands of Riverstown with the cottage thereon situate in the Barony of Farbill. County: **WESTMEATH.**

The Dairy Disposal Company Limited, Folio: 945; Lands: Ballydwyer East; Area: 0(a) 2(r) 0(p); County: **KERRY.**

Patrick Smith, Folio: 16365 & 814 (R); Lands: (i) Cornagall (ii) Cornagall; Area: (i) 28(a) 2(r) 14(p), (ii) 10(a) 0(r) 1(p); County: **CAVAN.**

Catherine O'Brien, of Richards Cottage, Tillystown, Shankill, Co. Dublin. Folio No: 31075F; Lands: Townland of Shanganagh, Barony of Rathdown. The plot of ground with the dwellinghouse thereon known as Richards Cottage, Tillystown, County: **DUBLIN.**

Thomas A. McMurray, Folio No: 2141; Lands: Townland of Townparks, Barony of Balrothery East. Area: 1.507 hectares. County: **DUBLIN.**

Lost Wills

DONOHUE, James J., deceased late of St. Columbanus Road, Milltown, Dublin 14, date of death 3rd January, 1991. Will any person having knowledge of the whereabouts of a Will of the above named deceased, please contact Joseph Maguire & Co., Solicitors of 98 Main Street, Bray, Co. Wicklow. Telephone Number: 01-2862399.

KILLEEN, William, deceased, late of 2 College Park, Dunshaughlin, Co. Meath, (Previously of 27 Craigford Drive, Artane, Dublin and 10 Fonthill Abbey, Ballyboden Road, Rathfarnham, Dublin). Will anybody having knowledge of any Will made by the above named deceased, who died on 18th March, 1991, please contact M.A. Regan McEntee & Co., High Street, Trim, Co. Meath. Phone No: 046-31202 Ref: AW.

PARSON, Richard; Rathravane, Ballydehob, Co. Cork. Insurance Broker, died 4.4.1991. Anyone knowing the whereabouts of a Will made by the deceased please contact Frank O'Mahony, Solicitor, Bantry, Co. Cork. Phone: 027-50132, Fax: 027-506003 Ref: 7430F.

RYAN, Margaret (Otherwise Madge) Deceased late of Gortussa, Dundrum, in the County of Tipperary. Would any person knowing the whereabouts of the Will of the above named Deceased please contact Philip A. English & Co., Solicitors, 8 St. Michael's Street, Tipperary (ref. BL/MB/1972) Telephone: (062) 52577.

DUFFY, Patrick Joseph, deceased, late of Belisker, Brickens, Claremorris, Co. Mayo. Would any person having knowledge of the whereabouts of the Will of the above named deceased who died on the 27th March, 1969, please contact Mark Ronayne & Co., Solicitors, 130 Terenure Road North, Dublin 6W. Telephone: 909894.

QUINN, Bernard J., deceased late of Boyne Valley Nursing Home, Dowth, Co. Meath and formerly of Tullyallen, Drogheda, Co. Louth, date of death 18th of December 1990. Will any person having knowledge of the whereabouts of a Will for the above named deceased please contact Messrs. Smyth & Son, Solicitors, 30 Magdalene Street, Drogheda, Co. Louth. Telephone: 041-38616.

HEALY, Thomas, deceased, late of Bridge Street, Oughterard in the County of Galway. Will anybody having knowledge of the whereabouts of the original Will dated 23 September, 1988, of the above named deceased who died on 30 January, 1989, please contact Higgins Chambers, Solicitors, Headford, Co. Galway. Tel: (093) 35722.

O'FARRELL, Kathleen, late of 10 Seapark, Mount Prospect Avenue, Clontarf, Dublin 3, and formerly of Woodford, Co. Galway. Spinster. Would anyone having knowledge of the whereabouts of a Will of the above-named deceased, who died on 24 March, 1991, please contact Canning Landy & Co., Solicitors, 98/99 Talbot St., Dublin 1. Tel: 746077 or 746398.

Miscellaneous

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 85 No. 5 June 1991

Law Society Annual Conference 1991 – Professor Anthony Clare, Guest Speaker, with Donal G. Binchy, President of the Society.

- Admission and Refusal Law in Hotels
- Changes in the basis of income tax assessment under the Finance Act, 1990

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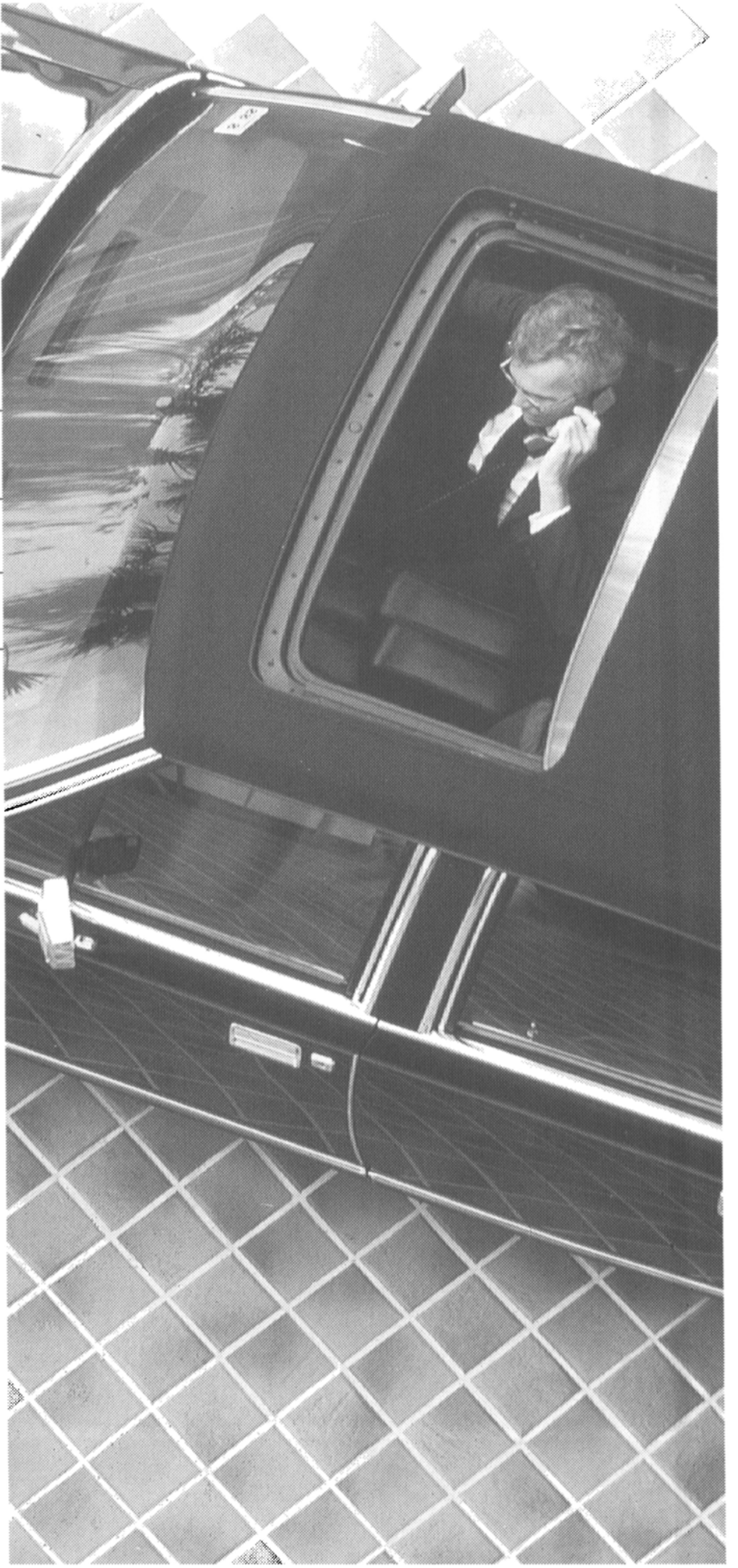

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Viewpoint

Public disquiet is clearly growing with the realization that there is no comprehensive protection for monies placed with investment agencies. There can of course be no guarantee against unwise investments but there seems to be increasing evidence of non-investment or at least non-investment in the promised securities. The Law Society has long provided a Compensation Fund to protect clients against defalcations by solicitors. The two major associations of auctioneers have in recent years also established compensation funds in addition to the Statutory Bonding Scheme. (In passing it is surprising to note that not even in the wake of the Russell Murphy debacle have the accountants bodies established such funds.)

Stock Brokers too protect their clients by means of the Stock Exchange Fund. Insurance Brokers are subject to the recently introduced controls and have bonding schemes in operation. Bodies which take deposits from the public have long been subject to the Central Bank. The travel industry too is subject to bonding requirements.

Perhaps it is the very diversity of these schemes or statutory controls which provides the key to the problem. The absence of any satisfactory controls appears to stem from a familiar situation in our governmental arrangements. The jurisdictional functions of departments are tightly drawn. Matters that cross these boundaries, such as the law relating to children, or worse still fall outside of them may not be subject to satisfactory supervision.

Given that travel agents and tour operators where the amounts involved, if not the dreams they sell, are relatively modest are so strictly controlled, it seems strange that any persons can set themselves up as investment brokers, as long as they do not sell insurance, or property, without any restrictions, qualifications or supervision. Perhaps there is a lurking view that some of the customers of dubious investment agencies have been investing "hot money" and are not deserving of great protection. Even if this were true it seems that many people have also entrusted their legitimately earned savings to such agencies. They are entitled to expect that the State will ensure that strict standards of fiscal control and probity are imposed on those who are permitted to advertise their investment services. If there are those that fall outside the existing protection schemes or controls the sooner the net is widened to include them the better, without waiting for the proposed EC Draft Directive on Capital Adequacy to weave its tortuous way into legislation.

A statutory licensing system with adequate bonding should be imposed on all those not already covered by adequate schemes who solicit or receive funds for investment from the public. □

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Admission and Refusal Law in Hotels – The Appearance of Customers

Introduction

A hotel has an obvious interest in not refusing to admit and serve a person because it is denying itself an opportunity to make money and because it might obtain a bad name in the locality as a result of the refusal. Nonetheless, it is a relatively common occurrence for hotels to refuse to admit and serve various types of persons and it seems that the higher the grade of hotel the greater the incidence of refusals. The wide variety of possible reasons for hotel refusals will be considered later.

There are, in fact, significant legal restrictions on a hotel's freedom to refuse to admit and serve customers, but quite often the hotel is not aware of what these legal restrictions are, or, if it is aware, then it often acts as though it is not. In making such refusals as it wishes, the hotel can usually rely on the customer's ignorance of the hotel's legal obligations and, correspondingly, of his own legal rights. Just how confidently the hotel can rely on the customer's ignorance of his rights is borne out by the fact that nowadays legal actions against hotels for wrongful refusal to admit and serve are almost unknown.

It is extraordinary that this state of affairs should exist because customer, or consumer, rights of service in hotels are one of the oldest forms of consumer protection known to the law. In an era where there has never beena greater emphasis on the rights of consumers, it is doubly remarkable that the existence of such of a consumer right should be quite unknown. The Director of Consumer Affairs and Fair Trade – who is the state official charged with responsibility for consumer matters – has not made any efforts to date to remedy this situation although it is clear that in S 6 (g) of the Consumer Information Act 1978 he possesses the power to do so. He could, for instance, under this statutory provision, launch a public information and education programme to inform the public of its rights under s.3 (1) of the Hotel Proprietors Act 1963. Nor is the Director the only statutory person who is economical with his statutory powers. There is another statutory body – Bord Failte – which also posses the power to inform hotel users of their rights. Section 8 of the Tourist Traffic Act 1983 empowers Bord Failte to require a hotel to display in the interior of the hotel such information as the Bord requires, and under another provision – s.44 of the Tourist Traffic Act 1939 – the Bord is empowered to supply external signs to hotels containing such information as it prescribes. Each of these powers could be used by Board Failte to oblige hotels to inform customers about theirs and the hotel's respective rights of admission and refusal.

by
Mark McDonald,
Lecturer in Law,
Dublin College
of Catering

". . . nowadays legal actions against hotels for wrongful refusal to admit and serve are almost unknown."

Since both the Director of Consumer Affairs and Fair Trade and Bord Failte are statutory bodies concerned with the protection of consumer's interests, albeit in different ways, it is striking that between them neither appears interested in informing the hotel customer of his rights.

While there is not the awareness of the law that there should be, that law still exists and applies, and there is a considerable amount which may be said about it. In the remainder of this short article, it is proposed to concentrate on one aspect of the issue – the refusal by a hotel to admit a person because of his appearance. The other two broad categories of hotel refusal, relating to the facilities of the hotel or the behaviour of the guest will not be examined.

The Legality of Refusals on the Grounds of Appearance

Section 3(1) of the Hotel Proprietors Act 1963 sets out the legal obligations of hotels as regards admission and refusals. It states:

"The proprietor of a hotel is under a duty to receive at the hotel as guests all persons who, whether or not under special contract, present themselves and require sleeping accommodation, food or drink and to provide them therewith, unless he has reasonable grounds of refusal".

If a refusal made under this section is unreasonable the proprietor leaves himself open to both civil and criminal actions in the District Court.

Mark McDonald

It is obvious from reading the section that the crucial feature is whether the refusal is reasonable or not and the section very deliberately avoids defining what reasonableness means. From the Dail Debates on the Hotel Proprietors Bill, it is clear that the legislature wished to provide as wide ranging a test of legality as possible and to leave it to the courts to interpret the phrase "reasonable grounds of refusal" according to the different circumstances of each case.[1] But though the phrase is a very general one, one can still be fairly sure about its application over a wide range of situations.

Before going on to examine the reasonableness of hotel refusals relating to a person's appearance, it is important to emphasise that the obligation in s.3(1) to admit and serve a person only arises if he is seeking either a bedroom or food or drink in the hotel. If the guest does not seek these, if he wants to go to a dance, function, night club, or go for a swim, wait for a friend, use the toilet, await a phone call, etc., then s.3(1) does not arise and the hotel is relatively free to make refusals. The only remaining legal constraints on the hotel arise with people who have pre-booked the use of the hotel's facilities, or with possible objections to the renewal of the hotel's liquor and public dance licences.

A further reason which might prevent s.3(1) from arising as regards bars and restaurants in hotels is that if it can be shown that the bar or restaurant where the refusal was made was run independently as part of the hotel business and not as an integral part of the hotel proper, and was more devoted to a non-resident than a resident trade, then a court might hold that, for s.3(1) purposes, the duty to serve the customer did not arise. There would, however, be obvious difficulties in justifying such a conclusion since there are in general many factors which suggest that any hotel bar or restaurant is part of the hotel proper.

" . . . the obligation . . . to admit and serve a person only arises if he is seeking either a bedroom or food or drink in the hotel."

The Appearance of a Guest

Types of Refusal

A person who presents himself at a hotel in order to avail of sleeping accommodation, food or drink may find himself being refused because of his race – as an Arab or black or coloured person – or because of his social group – as an itinerant – or as a person from a deprived or low income neighbourhood. He may also be refused admittance because of his clothes in that he is wearing, say, denim or other jeans or studded jackets or sneakers or white socks, or even because he is not wearing a jacket or a tie. It used also happen that people were refused admittance because of the length of their hair, though nowadays a refusal seems more likely because of the style or colouring of a person's hair. The hotelier's refusal to receive the person may rest on either or both of two basic motives – the fear of the effect which the presence of the person will have on other guests, or potential guests, of the hotel, or the standards which the hotel seeks to maintain; and secondly, the hotelier's personal objection to the person's appearance.

The existence of these refusal motives raises a significant general question as to how a court should interpret the reasonableness of a refusal. Is a hotelier entitled to expect that the honesty or sincerity of his view, regarding the effect which the admission of customers will have on his business, should be the conclusive determinant of whether or not be acted reasonably? The answer to the question appears to be in the negative. For while the hotelier's fears are obviously relevant to the issue, it is quite clear from the decisions in the cases that in this, as in other areas of refusal law, the honesty or validity of the hotelier's motivation for making or sanctioning the refusal, does not on its own make the refusal permissible. Reasonableness is a broader concept and is judged by a consideration of all the circumstances of the case. And, as will be seen, a factor which perhaps looms larger in this area of refusals than in others is the influence of wider, more general, legal and even constitutional prohibitions against racial and related discrimination and against unfair treatment of people under Article 40 of the Constitution.

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Racial and Related Discrimination

To refuse to admit a person because they come from North Africa, or because they are Arab, or black, or coloured is a reprehensible practice, and although there is no evidence to suggest that it is widespread, it is clear that some racial discrimination in admission to hotels does occur.

Surprisingly, the Constitution does not explicitly prohibit racial or ethnic origin discrimination in any sphere, let alone hotels and catering establishments, although a litigant with time and resources to devote to a constitutional action would probably find that the Constitution implicitly prohibits this kind of discrimination. Nor is there any specific race or ethnic origin legislation in Ireland. In the US, the absence of adequate legislation in this area has been a catalyst for a number of developments. Up to the federal Civil Rights Act 1964, hotel and restaurant refusal to admit and serve blacks was one of the pillars of the *de facto* apartheid system which operated in certain parts of the US. The 1964 Act introduced a general federal prohibition on racial and related discrimination in access

" . . . the Constitution does not explicitly prohibit racial or ethnic origin discrimination in any sphere . . . ".

to public services and facilities, specifically including hotels and many catering establishments.[2]

Although there is no specific ban in Ireland on racial and related discrimination in entry to hotels[3] – and a case for general legislation inthis area does exist – the common law does contain a clear English decision which held that a refusal to permit a black person to stay in a hotel was illegal.[4] Interestingly, there was an early American decision[5] where a refusal to admit a black person was held to be reasonable where the likelihood of damage to the business could be established. It seems very unlikely that such a viewwould be accepted here now. This is an area where the wider public and constitutional policy ideals of racial harmony and equal opportunity would over-rule what may have been an honest, though self interested, motive for refusal. Furthermore, it was very clearly the intent of the Oireachtas when enacting s.3(1) that it would prohibit refusals on account of race.[6]

Itinerants

Many hotels refuse to admit itinerants on the basis that they are disruptive and may cause violence or damage to property. Itinerants can also be refused because of local opposition to itinerants being served and because of feared effect on the hotel's business. It is, however, difficult to see how any general anti-itinerant policy pursued by a hotel can be reasonable.[7] Such an attitude assumes, what is not the case, that all itinerants are necessarily troublesome and disorderly. This can, effectively, amount to a form of racism.

But, though s.3(1) may make any general policy of refusal to serve itinerants illegal, a hotel can still refuse to serve particular itinerants for the good reason – based on the experience of the hotel itself, and more problematically other hotels as well – that they have unjustifiably caused difficulty for the hotel in the past. Furthermore, where an itinerant wishes to attend a dance or a wedding function, s.3(1) does not apply, and consequently the hotel does not have to act reasonably in refusing entry to the person, subject only to the terms of any prior contract and, possibly, constitutional provisions.

"... S 3(1) may make any general policy of refusal to serve itinerants illegal ...".

Accent and Demeanour

It rarely happens that refusal of admittance to a hotel is explicitly stated to be because the person is judged by his accent, mannerism and general demeanour to be undesirable, or because it is thought he would lower the standards of the hotel. Yet, since many hotels, and especially higher grade ones, seek to give the impression of serving a select clientele and of "maintaining standards", there is, in fact, reason to suspect that hotels do sometimes disguise the real reason for refusal by insisting that the hotel is full, or that the person's clothes do not conform to the hotel's dress code, or that the person is a trouble maker, drunk or cheeky. Certainly, if the reason given for the refusal is not the real one, then regardless of whether the real reason was, on its merits, acceptable or not, the lie told will probably render the refusal unreasonable.[8] This point has a special relevance where a hotel does not wish to let it be known that the refusal was made for what might be called "snobbish" reasons. Obviously, though, it is not easy for a prospective guest to show in court that the reason given was not the real one.

Whether it is reasonable to refuse to admit a person because of his common appearance, or because of his background, depends on the weight to be attached to the deliberate policy of a hotel, based, perhaps, on good economic grounds, that business will be lost if it is obliged to admit such people. It could be suggested, for instance, that since there may be alternative local establishments where such a customer could be served, that greater scope should be allowed to modern hotels to set standards and prices appropriate to the socio-economic group which the hotel wishes to serve.[9] Undoubtedly, there is merit in this view. It is suported by the logic of s.3(2) of the 1963 Act, which requires a hotel to only charge whatever prices are current at the time in the hotel.[10]

Yet, acceptance of this reasoning could denude the basic obligation in s.3(1) of much of its force because the duty to admit and serve in s.3(1) would then only

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operate as regards whatever group the hotel itself chose to cater for. It seems unlikely that hotels in Ireland enjoy the freedom to pick and choose their guests because of the definition of a hotel contained in s.1(1) of the 1963 Act.

Section 1(1) defines a hotel as an establishment which provides or holds itself out as providing the usual facilities for "all-comers", and goes on to state that this "includes every establishment registered" with Bord Failte. The central feature of this definition is the idea of "all-comers", and not just "some-comers", and indicates that hotels are not free to choose whatever group they wish to cater for.

It is, of course, true that on one reading of s.1(1) it could be suggested that the use of the word "includes" in the definition means that all Board Failte registered hotels automatically come within the definition, regardless of whether or not they are willing to receive all-comers. Since Bord Failte's registration rules say nothing about rights of admission, this could mean that registered hotels do not have to receive all-comers. They would still, of course, be hotels within s.1(1), and therefore subject to the duty to admit and serve in s.3(1). Yet, to interpret s.1(1) in this way would mean that the pre-eminent reference in the definition of a hotel to "all-comers" would apply to the tiny number of unregistered hotels in Ireland, and would not apply to the vast majority of hotels which are registered with Bord Failte. It seems unlikely that this interpretation would correctly reflect the intent of the Oireachtas in enacting s.1(1). A reading of the Dail Debates preceding the 1963 Act makes it clear that all sides envisaged an Act and an admission obligation of general and wide ranging application.

It seems likely, therefore, that the more correct view of s.1(1), and its, use of the word "includes", is that all Bord Failte registered hotels are to be automatically taken as being establishements willing to receive all-comers. Such a view avoids any nonsense effects and agrees with the pre-1963 position. Any change in the at position on such a fundamental matter would have required the clearest statutory language to be used, and that has not been the case. The position seems to be that hotels cannot select an income group or market segment and then decide whether to act reasonably or not in relation to that group or segment alone.

"The position seems to be that hotels cannot select an income group or market segment and then decide whether to act reasonably or not in relation to that group or segment alone."

Dress Codes

Many hotels in Ireland, and especially higher grade and Dublin hotels, tend to enforce dress codes on their customers, with the result that they quite frequently refuse to admit customers who do not conform with their code.[11] In the higher grade and Dublin hotels, the dress code tends to apply throughout the entire hotel, and is therefore enforced at the point of entry into the hotel, whereas in rural hotels that have dress codes the code is often applied to just one area inside the hotel – the restaurant. The ostensible reason for the dress code is that the hotel does not want customers on the premises whose outward dress and appearance does not conform to the maintenance or improvement of the ambiance of the hotel, as set by a combination of the standard of dress and appearance of the existing clientele's socio-economic grouping and the hotel's own efforts to create an ambiance appropriate to the type of customer it wishes to attract.

As indicated earlier, the dress codes usually consist of prohibitions of customers wearing certain or all types of jeans, sports shoes, jackets, socks; or actual requirements, such as wearing a suitable jacket, tie, or shirt with a collar. The legality of hotel dress codes varies depending on whether the code operates throughout the entire hotel or in just the restaurant. Entire hotel dress codes will be considered first.

Entire Hotel Dress Codes

There are two ways in which the legality of entire hotel dress codes can be judged – one is by considering the reasonableness of the code as it stands, and the other, and more interesting way, is by examining whether the code is merely a cover, a facade to enable the hotel to refuse admittance to "undesirables". In other words, and to borrow a concept from sex discrimination law – whether the operation of the code amounts to indirect social discrimination against a particular segment of the population by setting standards of dress which are not absolutely essential to the successful running of the hotel and which a significantly greater proportion of one social group can comply with than another. If the dress code causes indirect social discrimination, then it is almost certainly in breach of s.3(1) of the Hotel Proprietors Act 1963, because its use to achieve an unstated and masked indirect effect is, by definition, unreasonable.

Social Discrimination

The determination of whether a hotel's dress code causes indirect social discrimination involves the consideration of a number of matters:

(1) The individual items of clothing, or style of clothing, or footwear of prospective customers.

(2) The degree to which a hotel is allowed to pick its own ambiance given the definition of a hotel in s.1(1) that it provide for "all-comers".

(3) The finding of a rational relationship, or linkage, between the item of clothing and the operation or ambiance of the hotel.

(4) The degree to which different social groupings tend to wear such items, or styles, of clothing.

(5) Whether the hotel code is operated in an even-handed and consistent manner and whether facilities are made available by the hotel to enable non-complying customers to comply with the dress code.

While a detailed consideration of all of these factors is beyond the scope of this essay, some remarks may be made about point (3) above, since it also relates to judging the reasonableness of a dress code on its face value, without reference to any hidden effects. Two points may be made.

A hotel code which requires all its customers in the intersts of decency, to wear the basic items of clothing – trousers, footwear, shirt/tee shirt and jacket or jersey – which are in a clean and good state of repair, seems hard to fault and would most likely be deemed reasonable. But a dress code that goes beyond this – and many do – and distinguishes between different types of essential clothes such as trousers and permits, say, flannel trousers but not denim or other types of jeans, might not be regarded as being reasonable. This would be because the hotel's entitlement to make such distinctions has to operate in the context of the definition of a hotel contained in s.1 of the 1963 Act, and its use of the phrase "all-comers". The effect of that definition would seem to be that any clothes related ground of refusal must focus on a standard of appearance or dress below what reasonably could be expected of the average "all-comer" for that hotel. This could well prevent a court from accepting that a hotel can link a "cultivated" atmosphere with formal or expensive clothes. It may be, therefore, be that the hotel must receive all-comers who are wearing trousers, and not just all-comers who are not wearing jeans.

The legality of entire hotel dress codes that go still further and require the wearing of non-essential items of clothing, such as ties or certain kinds of jackets, is even more problematic. The fact that these are, generally speaking, not basic items of clothing could make it much more difficult to establish the reasonableness of a dress code based on these items.

Testing the Genuineness of Entire Hotel Dress Codes

The validity of the assertion by a hotel that its dress code is genuinely linked to a disinterested maintainence of the hotel's ambiance can also be tested by asking whether the code is operated at all times and in a consistent manner throughout the entire hotel, and whether facilities are provided by the hotel to enable the non-complying customer to comply with the code. If a resident appears downstairs in the restaurant for breakfast wearing say, denim jeans, and he is not asked to wear more formal clothing, then this selective application of the code seems to suggest that the code is not really linked to maintaining the hotel's ambiance. Equally, it would seem to be the sign of a genuine linkage between a dress code and the hotel's standards if the hotel provides facilities for the non-complying customer to comply with the code, say, by hiring a jacket or tie to the customer. The current near-universal absence of such facilities tends to suggest that hotels are content when customers do not comply with their codes and also that they do not particularly wish to enable them to comply. This, again, would imply that hotel codes serve other purposes besides their declared ones.

"Restricted area dress codes are much more likely to be reasonable, and therefore legal, than entire area codes."

It should also be appreciated that, even if a hotel's code does satisfy these tests, this would not automatically ensure that the code

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is reasonable and, therefore, within s.3(1). It would merely suggest that the code was not being used for indirect social discrimination, but the code will still fall to be judged according to whether it was an intrinsically reasonable one.

Restricted Area Dress Codes

As regards hotel dress codes that do not operate from point of entry throughout the entire hotel, and only operate in a specific part of the hotel, usually the restaurant, the hotel has a much greater freedom to fix whatever dress code it wishes. Restricted area dress codes are much more likely to be reasonable, and therefore legal, than entire area codes. This is because once the customer is admitted into the hotel and served as he wishes, his right under s.3(1) is exhausted. The right does not extend to entry into any particular lounge or restaurant so long as there is still some acceptable place where he can be served.[12] It would seem, then, that the hotel could set whatever type of dress code it wished for access to its lounge or restaurant, and the code could be as standards – related as the hotel wished.

(1) See Dail Debates Vol. 198 Col. 842, Vol. 199 Col. 433 435.

(2) The constitutionality of Title II of the 1964 Act – dealing with public accommodation discrimination – has been upheld in a hotel case – *Heart of Atlanta Motel v U.S.* (1964) 379 U.S. 241.

(3) The provisions of s.2(1) of Prohibition of Incitement to Racial, Religious or National Hatred Act 1988 could, however, be relevant in the right circumstances. Section 2(1) criminalises words and behaviour which are heard or seen in a public place which are insulting and which, in all the circumstances, are likely to stir up hatred against a group on account of their race, colour, nationality, religion, ethnic or national origins or membership of the travelling community. While this provision might not have an obvious application to hotel refusals, it seems quite conceivable that if a hotel refusal is carried out in front of other people while inside or outside the hotel, and the hotel employee is indiscreet enough to let it be known that he objects to the racial or itinerant origins of the customer, and this is likely to stir up hatred against the group to which the prospective customer belongs, then an offence under the 1988 Act may be committed.

(4) *Constantine -v- Imperial Hotels* [1894] 1KB 693.

(5) *State -v- Steele* (1890) 106 NC 766, 782. See Hartmann, Racial and Religious Discrimination by Innkeepers in USA (1949) 12 MLR 449.

(6) In the Dail Debates – Vol. 198 Col. 842 – on the Hotel Proprietors Bill in 1962, the then Minister for Justice (C. Haughey) stated "it seems absolutely clear to me that no Irish court would hold that colour would be a reasonable ground for refusing admission to any prospective guest".

(7) See *Consolidated Hotels -v- Kelsey* [1982] 2 NZLR 492, 469, where a New Zealand court held a general policy of refusal to serve members of gangs illegal under a law similar to our 1963 Act.

(8) *Kenny -v- O'Loughlin* (1944) 78 ILTR 116.

(9) See *Hoban -v- Royal Hibernian Hotel* (1945) 80 ILTR 61, 64.

(10) S.3(2) of the 1963 Act is intended to prevent a hotel refusing a customer by upping its prices on the spot. Yet, by only requiring the prices charged to be whatever is current in the hotel, it does not prevent a hotel from using its prices policy as a cover for refusing customers. Before 1963, the hotel was obliged to charge reasonable prices, and was therefore restricted in using its prices policy as a cover for refusing undesirables. The change effected in the 1963 Act was attributed in the Dail Debates to representations from the hotel industry – Dail Debates Vol. 198 Col. 399, Vol. 199 Col. 1106.

(11) An example of a hotel restaurant dress code is that customers must not wear overcoats while sitting at the table. *See Lynam -v- Central Hotel* [1959] Ir. Jur. Rep. 56.

(12) *R -v- Sprague* (1899) 12 JP 233.

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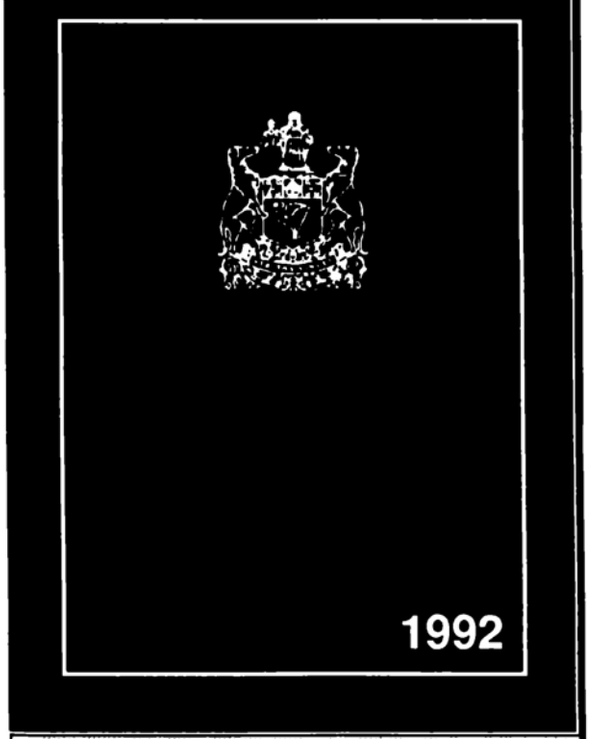

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Practice Notes

Gifts and Inheritances between spouses, Transfers between spouses, Evidence of status

Inheritances between Spouses have not been liable for Inheritance Tax since the 30th January 1985. (Section 59 Finance Act 1985) and Gifts between Spouses have not been liable to Gift Tax since the 31st January 1990 (Section 127 Finance Act 1990). The relevant provisions of both Finance Acts provide that not only are the Gifts and Inheritances exempt from C.A.T., but also that they will not be taken into account in computing liability for Tax on other Dispositions.

The Revenue Commissioners have taken the view that as the Gifts and Inheritances are exempt from Tax there is no necessity to obtain a Certificate of Discharge from Capital Acquisition Tax. The Conveyancing Committee have been asked for their Opinion on this practice and are in agreement with it subject to the Vendor producing evidence that the Parties to the Gift or Inheritance were in fact Spouses at the date of the disposition. It is considered that this evidence should consist of a Statutory Declaration, confirming that the parties were spouses at the date of the gift or date of the death. Such declaration should exhibit the Marriage Certificate of the Parties which Declaration in the case of a Gift should be made by both Parties to the Gift and in the case of an Inheritance by the surviving Spouse. This Declaration should be retained as part of the Title Documents.

Section 114 of the Finance Act 1990 provides that where the property is transferred between Spouses no Stamp Duty should be payable on the Instrument. The Adjudication Office of the Revenue Commissioners have adopted a practice of returning un-adjudicated Deeds of Conveyance and Transfer between Spouses on the basis that adjudication is not required. Having regard to the fact that the exemption from Duty only applies where the Parties are Spouses the Committee consider that such Conveyances and Transfers should be accompanied by a Statutory Declaration of the Parties exhibiting their Marriage Certificate and confirming that they were Spouses as at the date of the Disposition.

Conveyancing Committee

CONDITIONS OF SALE (1991 EDITION)

The Conveyancing Committee has revised the standard Conditions of Sale. The new (1991) edition went on sale in April 1991.

Special Conditions should be utilised in instances where it is required to adopt recommendations or advices of the Law Society or of any Committee associated with it, where such recommendations or advices are at variance with the provisions expressed in the General Conditions.

Other than some minor changes in spacing of printing the following are the only changes to the standard Law Society Conditions of Sale.

GENERAL CONDITIONS

1. The expression "Competent Authority" has been extended slightly so as to allow for the application of the Multi-Storey legislation.

27. This condition relating to apportionment has been expanded so as to allow for clarification but does not in essence alter the original concept of apportionment to the date of completion. Practitioners should take special note of the liability for rates in particular cases and insert appropriate provisions in the Special Conditions.
28. The obligation placed on a Purchaser to arrange for Section 45 consent has been extended so as to provide that the Contract is not conditional upon such consent being obtained. A Purchaser should arrange to have an appropriate provision inserted in the Special Conditions, if necessary.
29. While the obligation remains with the Purchaser to register the title where necessary, the emphasis within this condition has been altered slightly and a requirement has been placed on the Vendor to furnish the necessary map.
35. This condition has been reworded in the interest of clarity but there has been no change from the original meaning.
36. In part (a) of this Condition, it is provided that a Vendor is not required to warrant the position as to Bye-Laws prior to 1st October, 1964.

    In part (c) the reference to the date "1st January, 1970" has been omitted and a Vendor should provide for any particular situation in the Special Conditions.
45. Paragraph (b) has been included to avoid any doubt that a Purchaser has a right to rescission in the event of the destruction of the property.
51. The appointment of an Arbitrator has been extended to allow for a situation where the President is unable or unwilling to make the appointment.

Conveyancing Committee

APPEALS TO THE SUPREME COURT

EXHIBITS

The Chief Justice has requested that solicitors be reminded of the need to ensure that in all Appeals brought before the Supreme Court copies of all exhibits entered by either party, particularly maps, photographs and medical reports, are included with every Book of Appeal when lodged. Photographs must be originals, not photocopies thereof.

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From the President . . .

NORTHERN IRELAND LAW SOCIETY CONFERENCE – LAKE DISTRICT, 25th APRIL, 1991

Discussion on Multi-Disciplinary Practices

There was a most interesting platform and discussion at the Northern Ireland Law Society Conference, which this year was held in the Lake District of England, on Multi-Disciplinary Practices. No papers were actually issued and this is necessarily a selected and personal commentary on some aspects.

The platform comprised Tom Burgess of the Northern Ireland Law Society who is also strongly involved in the CCBE, John Curtin, President of the American Bar Association and Piet Wackie Eysten, President of the CCBE.

Although last to speak, it was Piet who attempted a definition of a multi-disciplinary practice. In jest, he suggested that the initials meant "most discussed problem". His actual definition, however, I think reads as follows – an association of a lawyer or lawyers with non lawyers on a permanent basis. Having regard to the differences throughout the community and the different work undertaken by Barristers, Solicitors, Avocats, Notaires and/or Estate Agents, it might be necessary to consider the definition of a lawyer more fully for each jurisdiction. A temporary association for a single project or situation whereby lawyers employed members of other disciplines was not really a multi-disciplinary practice. Neither did a loose association whereby members of different disciplines without loss of independence referred work to each other constitute a multi-disciplinary practice proper.

The essential point urged for consideration by Tom Burgess was the need of the legal profession to provide a proper service to clients and it appeared to be an increasing requirement of larger corporate clients or international clients that they should be able to get all services under one roof. The matter had to be considered from the standpoint of what served the client and the public interest rather than from what served the interest of the profession. It was clear, however, that any such partnership did raise problems in relation to the independence of the lawyer, possible conflict of interest, clients privilege or confidentiality and discipline or ruling authorities.

According to John Curtin, there was, in fact, no American point of view on the question of M.D.P.'s. Under the ABA's current model rule, partnerships between lawyers and non lawyers were prohibited and there was broad agreement that non lawyers should not have any stake or interest in a legal firm.

There was an American Committee sitting and reporting on this area at the moment. In America, they referred to the M.D.P. as 'ancillary business' rather than an M.D.P., and there was a view that ancillary business could only be provided to clients of the lawyer firm.

John Curtin also gave his definition of a profession as 'a learned art practised as a common calling in the public interest'. He also referred to the existence in the States of litigation support services (possibly from accountants or others) in mega cases.

Piet also affirmed that there was no CCBE standpoint on the question of M.D.P.'s, and the CCBE have no power to lay down any rules. He stressed the need for an open mind on the problem, having regard to the different practices and requirements in different jurisdictions. M.D.P.'s were already in existence in some countries – although the nature of these might not be regarded as objectionable in other countries. For example, in Germany and the Netherlands, there were M.D.P.'s between advocat, notaire, tax advisers but there was a question mark about accountants. The Dutch solution to the problem was that an M.D. Association was allowed provided:–

1. A satisfactory academic training was required.
2. Members of other professions had satisfactory disciplinary rules.
3. The Association did not interfere with the free independent exercise of professional duties and advice. Associations with accountants were normally ruled out because of their duty to certify and report to authorities which could frequently be inconsistent with the lawyers duty to the client.

Piet also referred to the position of the notary who in many cases acts for both parties but is in a sense, above both. He suggested that it was not impossible to have rules to deal with conflict. Finally, he suggested that the strength of the legal profession was unity, diversity and continuity in change.

My personal views in regard to M.D.P.'s were, if anything, confirmed by the discussion. Essentially, it seemed to me more appropriate to proceed by way of a loose association or arrangement for referral (which did not in any way undermine the independence of any of the disciplines involved) is the more appropriate way forward. This would mean that all services can be conveniently and instantly available where required by a client and provided no conflict of interest arises – each profession however, providing the service independently. Obviously, we should not totally close our minds to any further development – or to the possibility that some further development might be imposed upon us by outside authorities – but it seems to me that before we acquiesce in the establishment of M.D.P.'s, we must first see what solutions if any can be provided to cover the following points:–

1. Privilege – and the possible loss of the privilege which belongs to the client. If privilege is not extended to all members of an M.D.P., then there is a serious risk that it would be lost whether on discovery or otherwise. It must be emphasised that this is not for the benefit of lawyers or the legal profession and is not to be confused with the simple obligations of confidence that other professions may regard as binding on them.
2. Professional Indemnity – will the lawyers professional indemnity extend to acts by the non lawyers in the partnership or will it be necessary to structure a special indemnity policy to cover all acts by any of the partners in any of their respective disciplines? and will the partnership then be faced with premiums by reference to the discipline that carries the highest risk?
3. Compensation Fund – is this to be extended to dishonesty by non-lawyer partners? and if so, will they be required to contribute appropriately to the Compensation Fund? If the answer to these two questions is in the negative, then how is the liability of the Compensation Fund to be determined in the case of acts of dishonesty by a non-lawyer partner?
4. Discipline – It would seem that prima facie each partner would be governed by the disciplinary requirements of his own body. How does this affect the lawyer, however, in relation to conduct of non-lawyer partners and in his capacity as an officer of the Court or other matters? A most important point here is that the entire structure of property transactions in this country at the moment functions very largely on solicitors undertakings in relation to a variety of matters: these undertakings in turn are underpinned by the disciplinary conduct and the sanctions that can be imposed on a solicitor for any unprofessional conduct involving breaches of undertakings.

Perhaps, there are some solutions to the foregoing problems but they are not very obvious and as of now, the difficulties strike me as being almost insurmountable.

Donal G. Binchy

SOLICITORS FINANCIAL SERVICES SFS

There are now 274 member firms in SFS, representing an increase of 10% on last year's membership. The success of the scheme is reflected in the number of new firms joining each month. Indeed, we would hope to reach our target of 300 by the end of the year.

A comprehensive corporate plan has been developed and approved by the board of SFS. Some of the main objectives are:—

- Increase the number of member firms.
- Increase practice income of member firms.
- Establish a favourable public profile of SFS.

To improve the marketing aspect of SFS, we have compiled a slide presentation which will help the member firms identify the financial needs of their clients. Coupled with that for each solicitor within the member firms we have designed a short questionnaire or checklist which will be of assistance in identifying clients requirements in this area. These checklists will be distributed over the coming weeks.

It has been decided to allocate a sum of £6,000 towards promotional activities designed to increase the public profile of the scheme, and ultimately, the volume of business. Suggestions from member firms are of course welcome.

For any further information, contact the Law Society or the Solicitors Division, Sedgwick Dineen.

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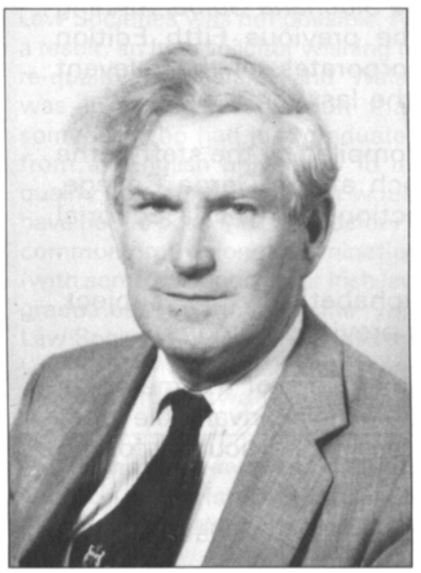
International Award for John F. Buckley



John F. Buckley

Each year the American Law Institute-American Bar Association Committee on Continuing Professional Education invites nominations for the FRANCIS RAWLE AWARD for outstanding contributions in the field of post-admission legal education. The award, named in honour of a former ABA President, is a highly prestigious one. It includes a purse of $2,500 and an inscribed medallion plaque and is publicly and formally announced at the Annual ALI-ABA Luncheon for its authors and lecturers, this year to be held on the 11th August 1991 during the ABA's annual meeting in Atlanta.

The *Gazette* is proud to announce that this year John F. Buckley, long-term Chairman of the Society's Continuing Legal Education Sub-Committee and, *inter alia,* a member of the Gazette Editorial Board, is to be the recipient of the award. Enhancing the honour done to John Buckley is the fact that this is the first time the award has been made to someone from outside the United States.

In the joint written nomination of Professor L.G. Sweeney, Director of Training in the Society's Law School, and of Mr. Frank Harris, Director of Minnesota State Bar Continuing Legal Education, (the latter having worked with him in a number of the areas addressed in the nomination), John's work was considered in the four phases of post-admission legal endeavour which fell to be addressed: publishing, lecturing, programme creation and administration. John's record allowed wide scope for elaboration of the major contribution he has made in all four spheres, not only nationally but with a substantial international dimension.

Included in the nomination are references to the following:-

1. In publishing, John Buckley's work on the Publications Committee of the Law Society in addressing the problem of the absence of Irish texts on Irish Law and his work as Section Publications Officer and Chairman of General Practice Section of the International Bar Association;
2. In lecturing, his period of office as Lecturer in Conveyancing and Land Law to the Society in the decade up to 1972, his contributions to C.L.E. programmes in the areas of Commercial Property Law and Arbitration and Defamation, in particular, his major address to the Joint Conference held in Washington in July 1985 between the Association for Continuing Legal Education Administrators and the IBA. That conference was designed to merge the interest and resources of continuing legal education and the schools of applied law in the common-law countries of the world in addressing the most difficult and challenging of all the aspects of continuing legal education-skills training. The Washington conference is believed to have had a major effect in increasing the emphasis on

skills training in C.L.E. programmes;

3. In programme creation, the major emphasis was on his chairmanship of the Society's Continuing Legal Education Sub-Committee since its creation in 1980 and again on references to the Washington Conference and the joint programme in Dublin with Minnesota C.L.E. on "Doing Business in Ireland", which followed from work done at that Conference;
4. In administration, there was the rich array of posts held by him during membership of the Council of the Law Society from 1973 to 1989 as well as his Presidency of the Dublin Solicitors' Bar Association and his International Bar Association posts.

The whole Irish legal community will unite in congratulating John Buckley on this well-merited award, which also has the added benefit of publicising the Irish legal community in a most positive way on the international scene. In a shrinking world, the beneficial effects on our image abroad stemming from the services of our colleagues serving on or with international bodies are perhaps under-recognised. The timing of the presentation also fortuitously dovetails with the initiative of the Society in commissioning a stand at the ABA Conference in Atlanta in August to promote, internationally, the availability in Ireland and, via Ireland in the EEC, of the services of the Irish solicitors' profession. □

THE GARDA SÍOCHÁNA GUIDE

Sixth Edition

This new edition of the *Garda Síochána Guide,* running to 1627 pages, updates the previous Fifth Edition published in 1981, and incorporates all the relevant legislation and caselaw of the last ten years.

The Sixth Edition has been compiled by the staff of the Training and Research Branch at the Garda College, Templemore, under the direction of a Garda Editorial Board.

The *Guide* is arranged alphabetically by subject, following the format of the previous editions.

While essential to the everyday work of the members of An Garda Síochána, the *Guide* is an invaluable work of reference for the legal profession, particularly for the District Court practitioner.

Price: IR£70.00 per copy plus IR£3.25 packing and postage.

Published by the Incorporated Law Society of Ireland
April 1991

Available from Blackhall Place, Dublin 7. Tel: 710711.

CALL FOR PHOTOGRAPHS

Call to Photographers

"A photograph is not only an image (as a painting is an image), an interpretation of the real, it is also a trace, something directly stencilled off the real, like a footprint or a death mask".

Susan Sontag

Readers are requested to send (old or new) photographs of lawyers and photographs (old and new) of scenes associated with lawyers which will be considered for publication in the *Gazette*. From time to time, a photograph is also required for the front cover.

Readers will appreciate that not all photographs, negatives, etc are capable of being reproduced satisfactorily on the *Gazette* paper. Accordingly, it may not be possible to reproduce all photographs submitted. Photographs must be clear, of an appropriate quality, and should be accompanied by a description of the persons or the scene (Courthouse, etc.) the subject matter of the photograph. All photographs, negatives, etc will be returned to the owners.

News from the Irish Solicitors Bar Association (London)

To my great delight I am able to report that the long-awaited re-qualification of Irish solicitors in England and Wales has now at last happened.

As anyone who has been following the subject will know, certain statutory provisions in the Irish Solicitors Acts meant that reciprocity between the respective Law Societies was not possible. As a result, an Irish solicitor wishing to re-qualify in England and Wales was in no better position than someone who had just graduated from an English university. To re-qualify here an Irish solicitor would have had to pass the Law Society's common professional examination (with some exemptions for Irish law graduates), attend the one year Law Society finals course, pass the Law Society finals examination and then undergo a two year period of articles. Obviously, this was not a practical course of action for any Irish solicitor to take and indeed it was to lobby to change this situation that the Irish Solicitors in London Bar Association was formed in May 1988.

'' . . . the long-awaited requalification of Irish solicitors in England and Wales has now . . . happened.''

The EC Directive on the Mutual Recognition of Higher Education Diplomas, which was due to come into force on 4 January of this year, provided us with the necessary hope. We were delighted when the Law Society of England and Wales (referred to in this article as ''The Law Society'') announced last year that, because the training of Irish solicitors is so similar to that of solicitors in England and Wales, Irish solicitors seeking to re-qualify here under the terms of the Directive would not have to sit any examinations. Lawyers from other EC Member States will have to sit an aptitude test but the Law Society decided that the aptitude test for Irish solicitors would be a nil one, which is fitting, as Ireland is the only other EC Member State with a common law system.

By
Cliona M O'Tuama
(President)

Following negotiations which I had with the Law Society, as a special concession to our Association they very kindly agreed to process any applications from Irish solicitors received before 13 October 1990 in advance of the implementation of the Directive on 4 January 1991. This enabled the Irish solicitors in question to be admitted on the first admission date after 4 January, which was 15 January, and to obtain practising certificates immediately thereafter. (Unlike the Irish Law Society, the Law Society has formal admission dates twice a month). 68 Irish solicitors were enrolled as solicitors in England and Wales on 15 January of this year amid much celebrating.

Normally, solicitors admitted in this jurisdiction have to wait six to eight months before attending a presentation of certificates cere-

Cliona M. O'Tuama, Solicitor, receiving her parchment at the recent admission ceremony in London, from The President of The Law Society of England & Wales Tony Holland.

Front Row: (left to right) Victor Timon, Cliona O'Tuama, Anne Counihan, John Randall (Director, Professional Standards and Development Directorate, The Law Society of England and Wales).
Back Row: (left to right) Philip Lee, Professor Richard Woulfe, Director of Education, The Law Society, Dublin, Tony Holland, President of The Law Society of England and Wales, Roderick Bourke.

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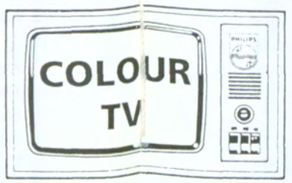

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CCBE (Council of the Bars and Law Societies of The European Community), 74th Plenary Session, Dublin, 9 - 12 May, 1991.
Visit by CCBE delegates to The President of Ireland, Mrs. Mary Robinson, at Áras an Uachtaráin. (Left to right) CCBE Vice Presidents, John Toulmin, Q.C., and José Manuel Coelho Ribeiro, The President, Mrs. Robinson, and Piet A. Wackie Eysten, President, CCBE.

Law Society Annual Conference Guest Speaker
Ward Bower, of Altman & Weil, addressing the conference on ''Marketing Your Practice''.

Attending the recent reception at the National Concert Hall in honour of The President of South Africa were (left to right) District Justice Hubert C. Wine, President de Klerk, and Donal G. Binchy, President of The Law Society.

At the opening of the Plenary Session, Westbury Hotel , were (left to right) Donal G. Binchy, President of The Law Society, the Hon. Mr. Justice Thomas A. Finlay, Chief Justice, Piet A. Wackie Eysten, President, CCBE, and Nial Fennelly, Chairman of The Bar Council.

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mony but the Law Society arranged a special ceremony for Irish solicitors, which was held at the Law Society on 19 March. As well as the original 68 solicitors admitted on 15 January, other Irish solicitors who had been admitted between then and 19 March also attended the ceremony. In total 82 Irish solicitors were presented with their admission certificates by Tony Holland, the President of the Law Society, on 19 March. This ceremony took place in the very lovely Common Room at the Law Society's Hall in Chancery Lane, London.

The President took the opportunity to make a speech about the Law Society's attitude and policy to Europe and pointed out that the Law Society was the first such institution in Europe to be in a position to admit lawyers from another Member State under the terms of the Directive. Indeed the Directive also applies to professionals other than lawyers and no other "competent authority" in any Member State has been in a position to allow the relevant professional people from another Member State to re-qualify in its own Member State. The Law Society can be justifiably proud of this achievement and certainly Irish solicitors in London were all impressed with the courtesy and efficiency which we experienced from the Law Society here. Let's hope that the Irish Law Society follows their good example!

" . . . the [English] Law Society was the first such institution in Europe to be in a position to admit lawyers from another Member State under the terms of the Directive."

I anticipate that there will be several more Irish solicitors admitted here in the course of time. There are approximately 150 Irish solicitors practising in London and, while they might not all have rushed to ensure that they were admitted on the earliest possible date, they will no doubt apply to be admitted in due course.

To celebrate the achievement of the principal aim of this Association, we hosted a reception at the Law Society on the evening of 19 March, to which we had invited, as well as our members and their guests, representatives from both Law Societies, partners from major London City firms and from major Irish firms, representatives of the larger Irish companies and institutions with a presence in London and other legal dignitaries. The reception was a tremendous success and was enjoyed by all those present.

The success of the reception is due in no small way to the generosity of William Fry, which, as all Gazette readers know, is one of the leading Irish firms, who had very kindly offered to sponsor the reception. Without William Fry's help, we would not have been able to host any form of celebratory event. We were particularly grateful to Owen O'Connell and Dan Morrissey, who had travelled from Dublin specially for the reception and to Gerry Halpenny, the resident partner in William Fry's London office.

On my own behalf and on behalf of the Association I would like to extend our special thanks to Tony Holland for the way in which he conducted the admission ceremony. All those present were impressed by the fact that he took the time and trouble to say a few words to everyone as he presented them with their certificates. We were very honoured that he and his wife Kay came to our reception. Thanks are also due to John Hayes, the Secretary General of the Law Society, and John Randall, the Director of the Professional Standards and Development Directorate.

Unfortunately, the President of the Irish Law Society, Don Binchy, was unable to attend the admission ceremony and reception but we were very pleased that Professor Richard Woulfe travelled from Dublin for the events. He was invited by the Law Society to join the "platform party" supporting the President at the admission ceremony. The President was also supported by Peter Johnson, the Chairman of the Law Society's Training Committee, and Alastair Nicholson, the Chairman of the Society's Transfer Casework Committee, both of whom had been involved in the re-admission process.

I would like to thank Professor Woulfe for his help throughout in connection with the re-qualification issue. Also, I would like to thank Don Binchy for his assistance, especially when he was Chairman of the Education Committee. We are also grateful to Tom Shaw, Maurice Curran and Ernest Margetson for the support which they gave to this Association during their respective Presidencies.

On a personal level, I am very grateful to our Honourary Secretary James Healy for all his help in connection with the organisation of our celebratory reception. His secretary Anne Taylor deserves a special word of thanks, as does my own secretary Sarah Wing for all her help.

The Association was delighted to hear of the appointment of our Vice President Anne Counihan as legal adviser to the newly-established National Treasury Management Agency in Dublin. Unfortunately for us, this means that Anne has had to leave London but we are delighted to know that she will be flying the flag of the Association in Dublin.

"Although we have achieved our principal aim, this does not mean that the Association will now disappear."

Although we have achieved our principal aim, this does not mean that the Association will now disappear! We intend to continue to represent the interests of Irish solicitors in London and to raise the profile of Irish solicitors here. We shall of course continue to host our annual Charity Balls at the National History Museum, which have been so successful in raising just under £24,000 to date to help deprived young Irish people in London. It is all too easy to forget in our success that we have been lucky and have received the benefit of a good education in Ireland and that, although we have worked hard to achieve our present positions, we owe a lot to the privileged positions from which we started. There are many other Irish people in London who have not been so lucky. (This year's Charity Ball took place on Saturday 11 May 1991)

Finally, the Association has been re-named "The Irish Solicitors Bar Association (London)."

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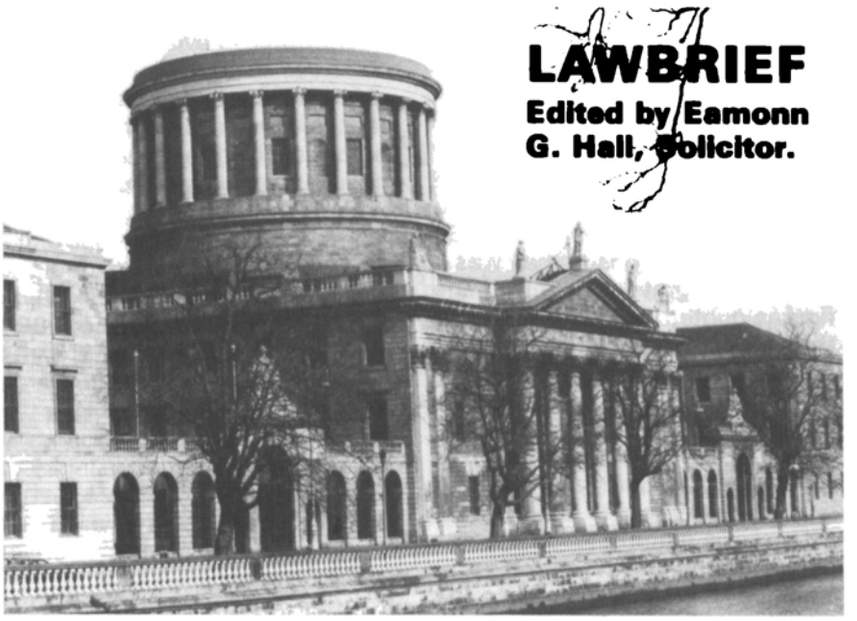


LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

FRAUD OFFENCES

The Law Reform Commission is currently finalising a review of the law relating to dishonesty generally. The Commission is addressing possible measures to tackle the problem of so-called white collar crime and computer-based fraud. The Minister for Justice, Mr. Ray Burke, stated in the Dail in answer to parliamentary questions on May 2, 1991 that it was the Government's intention to make whatever changes in the criminal law are necessary to modernise the law in this regard as soon as the Commission's recommendations have been received.

The Minister stated that he had no proposals to introduce the system of examining magistrates. The alternative suggestion made by the Director of Public Prosecutions to increase the powers of the Garda with regard to search and seizure would be considered.

The Minister also expected to be in the position soon to introduce legislation to deal with the admissibility as evidence in criminal matters of business and computerised records in a proposed Criminal Evidence Bill. This was a matter touched on also by the Director of Public Prosecutions in his recent address. See ***Gazette***, (Lawbrief) April, 1991.

The Garda Síochána Fraud Squad comprises a detective superintendent, two detective inspectors, six detective sergeants and 35 detective gardaí. The strength of the squad was kept under review in the light of changing needs and circumstances. The Minister for Justice stated that as of the 2nd May 1991 a total of 39 companies were being investigated by the Fraud Squad. While specialist lawyers, accountants and auditors were not attached to the Fraud Squad, the Garda authorities were fully aware that any specialist assistance they may need in those areas would be readily made available. The Minister was assured by the Garda authorities that investigations by the squad are not and never have been inhibited by any lack of resources, specialist or otherwise. The Minister stated the legal services of the Chief State Solicitor's office and the office of the Director of Public Prosecutions are made available as required to the squad to assist in their investigations.

The Garda Commissioner has subsequently established an internal unit composed of a chief superintendent and two superintendents to review the operations of the Fraud Squad and make a report.

TELEPHONE TAPPING PROCEDURES

The Minister for Justice, Mr. Ray Burke, stated in the Dail on May 2, 1991 in answer to a parliamentary question that he was having legislation prepared on the regulation of telephone tapping and that it would be introduced in the autumn session. The implications of the ruling of the European Court of Human Rights on 24 April 1990 on ***Kruslin -v- France*** were being examined and, when they were clear, the Bill would be published and debated. The Minister stated that the ***Kruslin -v- France*** judgment of 24 April 1990 (European Court of Human Rights) raised questions as to whether the procedures for telephone tapping which were provided for in the ***Interception of Postal Packets and Telecommunications Messages Regulation Bill 1985*** would be adequate in terms of Ireland's obligations under the European Convention on Human Rights. The Minister stated that it was important to get the legislation right.

UNDER-AGE DRINKING

The Intoxicating Liquor Act, 1988 introduced a wide range of controls which provided a solid framework within which the problem of under-age drinking was being tackled. The Minister for Justice so stated in reply to parliamentary questions on May 2, 1991 in the Dail. The Act provides the following curbs on under-age drinking:

(1) It is now an offence for any person under 18 years of age to purchase alcohol, whether in or at an off-licence or to consume it in any place other than a private residence.

(2) It is now an offence for any person to purchase alcohol for consumption by a person under 18 years of age in any place other than a private residence.

(3) The Garda have been given powers to seize intoxicating liquor in possession of persons under 18 years of age in any place other than a private residence.

(4) Persons under 15 years of age are only allowed into licensed premises if accompanied by a parent or guardian.

(5) No person under 18 years of age is allowed in the part of licensed premises where an extension under a special exemption order is in force.

(6) Persons under the age of 18 are not allowed on off-licensed premises unless accompanied by a parent or guardian.

(7) The law has been changed to make it easier to prove that alcohol has been supplied to persons under 18 years of age.

The Minister stated that the Gardaí have found that most of the complaints relating to under-age drinking relate to parties held on private property. The Minister was assured by the Garda that alcohol was not readily supplied by licensees to persons under 18 years of age. However, no amount of legislative steps would totally overcome the problem of young people acquiring intoxicating liquor from other sources. The Minister stated that the problem of under-age drinking could not be solved by legislation alone. The social, cultural and economic factors involved in the problem of under-age drinking needed to be considered in a broad approach to the problem.

The Garda were involved in organising and assisting local initiatives to deal with alcohol and other substance abuse. Mr. Burke informed the Dail that he was reluctant to introduce a scheme whereby young persons would carry an identity card. He believed local initiatives by concerned parents, teachers, the Garda Siochana and others interested in this matter were likely to be more successful than a scheme operated on a national level without local involvement and support.

With regard to supermarkets, the Minister had under consideration the question of whether he should make an order concerning the sale of alcohol in supermarkets but he had to bear in mind that such an order would have severe repercussions, financial and otherwise, for supermarkets, large and small. He wanted to be sure that the other measures he had put in place to curb under-age drinking were working as effectively as possible before he made the order.

LAWS ON BAIL

Since the law relating to bail was strengthened in the ***Criminal Justice Act, 1984,*** by providing that a sentence of imprisonment for an offence committed by a person on bail must be consecutive on any sentence passed or about to be passed on a person for a previous crime, the number of offences committed by persons on bail had shown a very significant decrease.

The Minister for Justice stated in reply to a parliamentary question on May 2, 1991 in the Dáil that in 1983 before the 1984 Act was passed, 8,295 offences were committed by persons on bail. Last year the comparable figure was 2,494 offences. The Minister accepted that the commission of 2,494 offences by persons on bail was a matter of grave concern. The figures quoted did show however, that contrary to recent public statements, the situation was improving. In relation to an amendment to the Constitution, the Minister did not rule out a constitutional referendum in relation to bail. However, he was not prepared to make a commitment in that regard at present.

The Minister was examining the question of how to speed up trials and take other measures so as not to have our jails overcrowded with people on remand.

DRUNK DRIVING

Arising from consultations between the Garda Authorities, the Director of Public Prosecutions and the officials in the Department of Justice, revised investigation and prosecution procedures have been put in place in the case of motorists involved in fatal accidents where drunk driving was suspected to be a factor.

The Minister for Justice informed the Dail in reply to parliamentary question on May 2, 1991 that it would be inappropriate for him to disclose all the details of the revised procedures but he could confirm that they included the following: all decisions on prosecutions arising from traffic accidents in which fatalities occur – except, of course, where there were no survivors – were now taken by the Director of Public Prosecutions; Garda instructions have been revised with a view to ensuring that, where warranted, successful prosecutions are mounted in such cases by the force; the Garda, again where warranted, now accompany the motorists in question to hospital with a view to ensuring that they are not seeking medical attention solely for the purpose of avoiding a prosecution for drunken driving; and in cases where it is not possible to make an arrest or to obtain a blood or urine sample, the Garda have been instructed to make every effort to secure other relevant evidence in relation to alcohol consumption.

Mr. Burke stated that circumstances arose in the past where a person involved in an accident – conscious of being over the limit in relation to the consumption of alcohol – could lie at the side of his or her car and feign injury until the ambulance arrived and took them to hospital. Until November 1990 that could be done without a Garda presence but now if a Garda suspects an individual was over the limit, the Garda would accompany the person so feigning the injury to the hospital and from there secure a sample which could be used in a case at a later stage.

COURT CONDITIONS

The Minister for Justice told the Dail on May 2, 1991 in reply to parliamentary question that those courthouses in Dublin City which were provided and maintained by the Office of Public Works were generally in good condition.

A few courthouses in Dublin and all courthouses outside Dublin were the responsibility of local authorities. The Minister accepted that many of these courthouses were in a deplorable condition due mainly to the reluctance of local authorities over the years to spend money on them. It was partly for this reason that the Minister secured Government approval last year for a change in the method of financing these courthouses. In future, while local authorities would continue to be responsible for courthouses, the Department of Justice would recoup to them the full capital cost of approved major renovation schemes. The Department would also recoup some of the maintenance costs. The Minister was satisfied that the new arrangement would, in the course of time, lead to significant improvements.

DUBLIN BROTHELS

There have been two convictions in relation to brothel keeping in the past seven years. The Minister for Justice informed the Dáil on May 2, 1991 that all complaints made to the Garda, or any information which comes to their attention relating to alleged brothel keeping were thoroughly investigated and

where sufficient evidence was available the matter was referred to the Director of Public Prosecutions for direction as to whether a prosecution should take place.

RAPE AND OTHER SEXUAL OFFENCES

The law with respect to rape and other sexual offences has recently been amended by the ***Criminal Law (Rape) (Amendment) Act, 1990***. That Act entered into force on January 18, 1991. The Minister for Justice informed the Dáil in relation to a parliamentary question on May 2, 1991 that the 1990 Act represented a significant updating of the law on sexual assaults and provided for increased protection for women who were victims of rape.

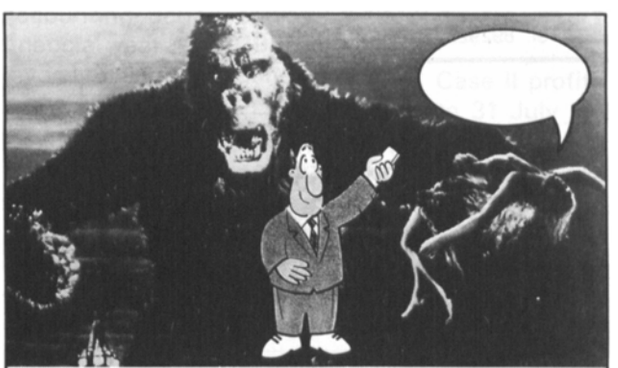
The penalties provided for in the 1990 Act are severe. Crimes which were heretofore classed as indecent assault – carrying a maximum sentence of ten years imprisonment – can now result in a charge of sexual assault, aggravated sexual assault or rape under section 34 of the 1990 Act. The offence of sexual assault covers the less severe offences and carries a maximum penalty of five years. However, the more serious charges of aggravated sexual assault and rape under section 4 attract a maximum penalty of life imprisonment. The maximum penalty for rape itself is life imprisonment and was unaffected by the 1990 Act.

The Minister informed the Dáil that the 1990 Act brought about a major improvement in the protection afforded by the criminal law to married women who have been subjected to sexual abuse. The 1990 Act abolished the rule that a husband could not normally be found guilty of raping his wife so that marital rape is now fully recognised as a crime.

Before the 1990 Act was introduced concern was expressed that rape trials were extremely distressing for the victims and that this had discouraged women from reporting such crimes. A number of measures had been taken to reduce the trauma suffered by complainants in sexual assault cases. Restrictions on adducing evidence relating to the complainant's past sexual history have been extended and provision had been made for the anonymity of complainants in all sexual assaults cases.

Prosecutions for rape, rape under section 4 and aggravated sexual assault are now, by virtue of the 1990 Act, tried in the Central Criminal Court rather than the Circuit Court and the general public are not admitted. Furthermore the civil legal aid scheme has been extended, subject to normal conditions, to allow a complainant in such cases to consult a legal aid solicitor who may accompany the complainant into court. Arrangements were being made by the Director of Public Prosecutions to provide pre-trial consultations with all witnesses including the complainant and to enable complainants to be familiarised with the procedure and layout of the court.

The Garda authorities were very much aware of the problems of rape and sexual assault and gardaí have, in recent years undergone specialised training to equip them to deal sympathetically and effectively with the victims of such crimes. The Garda authorities also make every effort to ensure that



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female gardaí are made available to deal with victims of rape and sexual assault.

CRIMINAL LAW REFORM

The Minister for Justice informed the Dáil on May 2, 1991 that his approach to the need for updating the criminal law was to deal with the matter on a systematic basis affording priority to those areas most in need for review. In this he was assisted by the work of the Law Reform Commission which had published recommendations on many aspects of the criminal law and were currently reviewing other criminal law matters.

Since assuming office as Minister in July 1989, the Minister considered he could justifiably claim a large measure of success in bringing forward and securing the enactment of legislation in the criminal area. He had promoted a number of important Bills which have been enacted – the ***Prohibition of Incitement to Hatred Act, 1989,*** the ***Larceny Act, 1990;*** the ***Criminal Justice Act, 1990*** – abolishing the death penalty; the ***Firearms and Offensive Weapons Act, 1990;*** the ***Criminal Law (Rape) (Amendment) Act, 1990*** and the ***Criminal Justice (Forensic Evidence) Act, 1990. The Criminal Damage Bill, 1990,*** introduced by the Minister was before the House. The Minister hoped shortly to be in a position to publish a Criminal Evidence Bill and a Bill to provide for the seizure and confiscation of the proceeds of drug trafficking and the prevention of money laundering. He would also be bringing forward proposals to amend the law relating to certain sexual offences (including homosexual offences), and to amend the law in relation to criminal insanity. □

Important Business Publications

THE NEW COMPANIES LEGISLATION

Gerard McCormack

Provides a comprehensive and up-to-date guide to the 1990 Companies legislation which effects massive reforms to almost the entire fabric of Irish company law. The work looks at the legislation against the background of existing law. Every effort is made to tease out potential difficulties in the workings of the new machinery. Examples are taken from the law and practice in other jurisdictions to provide pointers towards the position in Ireland. *Available May.* £37.50.

BANKRUPTCY LAW AND PRACTICE IN IRELAND

Bill Holohan and Mark Sanfey

The Bankruptcy Act 1988 has simplified and modernised the law on bankruptcy and aligned it with liquidation under the Companies Acts. The authors, who have considerable experience in bankruptcy and insolvency matters, guide the reader through the bankruptcy process, beginning with a consideration of what constitutes an act of bankruptcy, who may be a bankrupt, who may petition for bankruptcy, the grounds on which a petition may be based etc. *Available May.* £37.50

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Changes in the basis of income tax assessment under the Finance Act 1990

In this article I wish to outline the changes in the basis of assessment for income tax brought about by the Finance Act, 1990 as set out in Chapter 2 of that Act (Sections 14 to 27).

Obviously the changes in the method of assessment of income under Cases 1 and 2 of Schedule D of the Income Tax Act, 1967 (Trading and Professional Income) are of immediate and personal importance to all self-employed people, including Solicitors.

by
Paul McNally,
Solicitor

Section 14 sets out the changes in the assessment of income arising from Cases 1 and 2 of Schedule D sources. Case 1 relates to trading income, Case 2 relates to professional income. However both sources are treated in exactly the same way.

Heretofore income tax for self-employed people was, generally speaking, assessed on a preceding year basis i.e. for the financial year 6th April 1989 to 5th April, 1990 taxable income was assessed on the accounts of the business for an accounting period ending in the financial year 1988/1989. If I had my yearly accounts done up to the 31st of July of each year, then my income tax assessment for 1989/1990 would be based on my accounts for the period 1st August 87 to 31st July 1988.

"As a consequence of Section 14, from 5th April 1990 income tax assessment under Case 1 and Case 2 will no longer be based on a preceding year but on a current year set of accounts . . . "

Case II profits for year to 31 July 1988	£30,000
Case II Income Tax assessment for financial year 1989/1990	£30,000

As a consequence of Section 14, from the 5th of April 1990 income tax assessment under Case 1 and Case 2 will no longer be based on a preceding year but on a current year set of accounts e.g. for the financial year 1990/1991 where annual accounts are made up to the 31st of July my income tax assessment will be based on my accounts for the period 1st of August, 1989 to 31st July 1990 rather than the period 1st of August, 1988 to the 31st of August 1989 as was the case heretofore.

Case II profits for year to 31 July 1989	£35,000
Case II profits for year to 31 July 1990	£40,000
Case II Income Tax assessment for financial year 1990/1991	£40,000

Under the old rules in commencement and cessation situations the income of the actual year of assessment could be used as the basis for the income tax assessment for that year. For example, if I started a Solicitor's practice on the 1st of May, 1987 and I had annual accounts done up to the 30th of April of each year, the basis of my income tax assessment for my first three years would have been as follows:

1987/1988 – The actual income from the 1st of May 1987 (the date of commencement) to the 5th of April 1988.

1988/1989 – The first twelve months of practice (i.e. the 1st of May 1989 to the 30th of April 1988).

1989/1990 – The income arising in the accounting period ending in the preceding year i.e. the accounting period ending on the 30th of April 1988.

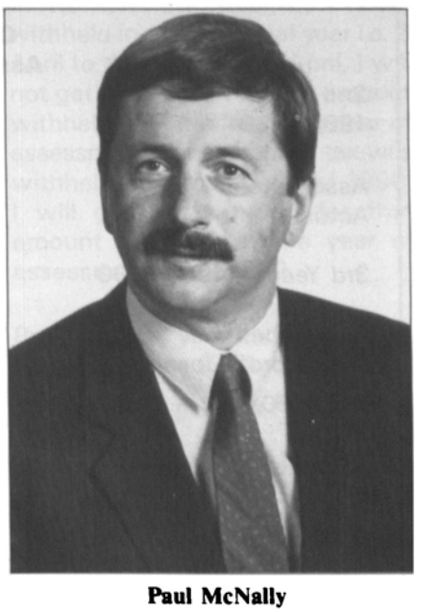
Case II profits for 12 months to 30 April 1988	£15,000
Case II profits for 12 months to 30 April 1989	£20,000
Case II profits for 12 months to 30 April 1990	£25,000

Assessments

1st year – 1987/1988
Period 1/5/87 to 5/4/88

$$£15{,}000 \times \frac{11}{12} = £13{,}750$$

2nd year – 1988/1989
12 months to 30 April 1988 £15,000



Paul McNally

3rd year – 1989/1990
12 months ending in preceding tax year i.e. 12 months to 30 April 1988 £15,000

In respect of the second year the taxpayer could elect to have the assessment based on the actual income for that financial year if it is to his advantage. In the above example the actual income for the second year 1988/1989 is as follows:

$$\frac{1}{12} \times £15,000 = £1,250$$

$$\frac{11}{12} \times £20,000 = £18,333$$

£19,583

It is clearly not in the taxpayers interest in this situation to elect for tax assessment on an actual year basis.

In respect of the third year the taxpayer can again elect for an alternative form of assessment. If the total assessable income for the second and third years – when the third year is calculated on a preceding year basis – exceeds the total income for the second and third years where both of these years are calculated on an actual basis then the tax-payer can elect to have the difference subtracted from the taxable income of the third year calculated on a preceding year basis.

In respect of the above example the position would be as follows:

TABLE 1

	Original Assessment	Actual Assessment
2nd Year – 1988/1989		
Assessment	15,000	
Actual profit for year		19,583
3rd Year – 1989/1990		
Assessment	15,000	
Actual profit for year:		
$\frac{1}{12} \times 20,000$		1,667
$\frac{11}{12} \times 25,000$		22,917
	30,000	44,167

The taxpayer in these circumstances will not make an election for the alternative method of assessment.

As a result of the changes brought about by the Finance Act, 1990, the method of calculating the first year's income will remain the same. The option allowed to the tax-payer in his second financial year has been revoked. The second financial year will now be based on the income for the first twelve months of business. The third year's assessment will be calculated on a current rather than a preceding year basis. In our example the taxable income for the third year will be calculated on the accounts for the year ending 30th of April 1989 rather than the year ending 30th of April 1988. However a deduction is allowed for the taxable income for the third year in the amount by which the income for the first twelve months of business exceeds the income for the actual second year.

Business commences on 1 May 1990:–

Profits for 12 months to 30 April 1988		15,000
Profits for 12 months to 30 April 1989		20,000
Profits for 12 months to 30 April 1990		25,000
Assessments		
1st year – 1987/1988	Profits to 5/4/1988	$\frac{11}{12} \times 15,000 = 13,750$
2nd year – 1988/1989	Profits to 30/4/1988	= 15,000
3rd year – 1989/1990	Profits to 30/4/1989	= 20,000

In cessation situations under the old rules, an actual year rather than a preceding year could also be used as the basis of assessment but this time at the option of the Revenue rather than the taxpayer. For the final year of business the taxable income was based on the income from the previous 6th of April to the date of cessation. For example, if a business ceased operating on the 31st of October, 1988, the taxable income for 1988/1989 would be the income of the business for the period 6th April 1988 to 31 October 1988.

As regards the penultimate and pre-penultimate years of trading, the Revenue had the option to assess the taxable income for those years on the actual income for those years rather than the income arising in the preceding years. As a consequence of the new legislation where a cessation occurs after the 6th of April, 1991 the Revenue will only have the option of reviewing the penultimate year.

"[In cessation situations] as regards the penultimate and pre-penultimate years of trading . . . where a cessation occurs after 6th of April 1991 the Revenue will only have the option of reviewing the penultimate year."

Section 16 sets out transitional provisions for this year i.e. 1990/1991. For this financial year, people chargeable to income tax under Cases 1 and 2 of Schedule D can add together the taxable income for this year based on the old rules and the taxable income for this year based on the new rules and take the average of these two amounts as their taxable income for this

year. However, the taxable income arrived at cannot be less than $\frac{125}{100}$ times the taxable income calculated by the old method.

For example, if my accounting year ends on the 31st of July of each year and taxable earnings for:

Year ending the 31st of July, 1989	–	£20,000
Year ending the 31st of July, 1990	–	£32,000

Under the transitional arrangements my taxable income under Case 2 of Schedule D, 1990/1991 is:

£20,000 + £32,000 x ½ = £26,000

Under the old rules my taxable income would have been £20,000. Under the new rules if the transitional provisions did not apply my taxable income would have been £32,000.

If my accounting year ends on the 31st of July of each year and taxable earnings for:

Year ending the 31st of July, 1989	–	£20,000
Year ending the 31st of July, 1990	–	£26,000

Under the transitional arrangements my taxable income under Case 2 of Schedule D, 1990/1991 is:

£20,000 + £26,000 x ½ = £23,000

However the taxable income for the transitional period 1990/91 cannot be less than:

$\frac{125}{100}$ x £20,000 = £25,000

This transitional arrangement only applies for business set up prior to the 6th of April 1989.

Section 17 deals with the new provisions for Case 3 income i.e. interest paid without deduction for D.I.R.T. and foreign income. Previously this income was taxed on a preceding year basis i.e. the taxable income for the year 1989/1990 would have been the actual income for the year 1988/1989. Under the new provisions the taxable income for 1990/1991 will be the actual income for 1990/ 1991.

Section 18 deals similarly with Case 5 income, i.e. rental income.

Under Section 23 the date for filing the annual tax returns has been extended from the 31st of December to the 31st of January. However, the return required to be made by the 31st of January 1991 is for the actual income of the year 1989/1990 and as regards trading income the income based on accounts ending in the year 1989/1990. In making your income tax return for the 31st of January you do not have to concern yourself with your actual incomee for 1990/1991. If, for example, your accounts for your business are made up to the 31st of July of each year the trading income you will be concerned with in making your return by the 31st of January 1991 will be the income as set out in your accounts for the year ending the 31st of July 1989 and not the year ending the 31st of July 1990.

Under Section 24 preliminary tax is now payable by the 1st of November in each year and there is no period of grace thereafter. If the amount of preliminary tax does not at least equal 90% of the tax which is ultimately deemed to be payable, the tax-payer will be liable to interest on the balance from the time the preliminary tax became due. However the tax-payer can pay as preliminary tax, the amount of tax for which he or she was liable in the previous tax year without incurring the risk of interest even if that amount of preliminary tax ultimately works out at less than 90% of the tax for which he is ultimately liable. The moral appears to be, pay preliminary tax in an amount equal to your tax liability for your previous year and avoid the risk of paying too little. The balance of the tax due for this year 1990/1991 will not have to be paid until at least the date for filing your returns for 1990/1991 which will be the 31st of January, 1992.

"The moral appears to be, pay preliminary tax in an amount equal to your tax liability for your previous year and avoid the risk of paying too little."

Section 26 deals with withholding tax for professional services. Previously where tax was withheld a tax credit could be obtained in the year of assessment the basis period for which was the year in which the tax was withheld. For example, if my accounts were done up to the 31st of July and the tax was withheld from me in April 1988 i.e. in my accounts year ending 31 July 1988 I would get a tax credit for the amount withheld in the year of assessment 1989/1990, my accounts year ending the 31st of July 1988 being the basis period for the year of assessment 1989/1990.

Profits for 12 months to 31 July 1988	20,000
Tax withheld April 1988	5,000
Assessment for financial year 1989/1990	20,000
Tax on assessment (say)	6,000
Less: tax credit	5,000
Tax payable	1,000

With the new changes, if tax is withheld in one financial year i.e. 6 April to the following 5 April, I will not get a tax credit for the amount withheld until the following year of assessment. For example if tax was withheld from me in August 1990, I will get a tax credit for that amount withheld in the year of assessment 1991/1992.

Profit for the year ending 30 September 1990	20,000
Tax withheld August 1990	5,000
Assessment for financial year 1990/1991	20,000
Tax on assessment (say)	6,000
No tax credit	

Assessment for financial year 1991/1992	25,000
Tax on assessment (say)	8,500
Less: Tax credit	5,000
Net tax payable	3,500

The only exception to this is the year of assessment 1990/1991. The old rule applies to this year of assessment i.e. tax credits for that year refer to tax withheld during the basis period for that year of assessment under the old rules, e.g. if my account year ends on the 31st of July and tax is withheld in May 1989 I would get a tax credit for the amount withheld in the year of assessment 1990/1991. However, if for example, tax is withheld in September 1989, when will I get a credit for this tax withheld? The Act provides that if there is a gap between two credit periods then the tax withheld within that period is deemed to have occurred in the second credit period so that in this instance the tax credit will not be available until the year of assessment 1991/1992. □

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THE SOCIETY OF ARCHIVISTS

The above is an International Society with an Irish region based at University College, Cork.

The society is aware that solicitors often come across old records that may appear redundant. In many cases these records have a valuable archival significance. Valuable material has, in the past, been lost through important records being disposed of in tips and dumps. Clearly this is unsatisfactory.

Solicitors wishing to dispose of archival material are urged to contact:-

Virginia Teehan,
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Society of Archivists,
University College, Cork,

who will be happy to advise on the most appropriate method of disposal of such material.

Minutes of the Half Yearly Meeting held in the Great Southern Hotel, Killarney

Saturday, 4th May 1991

1. **Address and welcome by the President of the Kerry Law Society, Mr. Donal Browne.**
Mr. Donal Browne, President of the Kerry Law Society, said that he was very pleased to welcome members of the profession and guests to Kerry. This was the third year in succession that the Half Yearly Meeting had taken place in Killarney and he was very delighted to have been asked to perform the opening of the Meeting. He paid a special tribute to the President, Donal Binchy, who he said came from a renowned legal family and he urged the Conference every success in its work.

2. **Notice convening the meeting**
The Director General, Noel C. Ryan, read the Notice convening the meeting which had been circulated to the profession prior to the meeting.

3. **Minutes of the Annual General Meeting held in Blackhall Place, Dublin 7, on 14th November, 1990.**
The minutes of the Annual General Meeting, which had been published in the December 1990 issue of the Gazette were approved by the meeting and signed by the President, Donal G. Binchy.

4. **Appointment of scrutineers for ballot for council election 1990/91**
The meeting approved of the appointment of the following to act as Scrutineers for the Council Elections 1990/91:
Walter Beatty
Laurence F. Branigan
Terence Dixon
Andrew Donnelly
Eamonn Hall
Clare Leonard
John Maher
Donal O'Hagan
Hugh O'Neill
Peter Prentice
John C. Reidy
William Young
Noel C. Ryan, Director General

5. **Address by the President, Donal G. Binchy**
The main points of the President's address to the Conference are published separately in this issue of the Gazette in an article by a special correspondent.

6. **Report of the Retirement Fund**
Mr. Ernest J. Margetson said that 1990 had not been a very good year for the Fund. However, the Society's investment advisers in the Investment Bank of Ireland said that indications were that the worst effects of the difficult period in the equities market were over and the Fund had recently made a good recovery and was now performing well. Membership had increased during the last year. Mr. Margetson said that he would encourage members to join the Retirement Fund which was the profession's own Fund.

7. **Solicitors' Benevolent Association**
Addressing the meeting, the newly elected Chairman of the Solicitors Benevolent Association, Mr. Andrew F. Smyth, said that he would ask members to support the work of the Benevolent Association. There was an increasing number of members and their families needing the assistance of the Benevolent Association. Mr. Smyth said that he would like to thank the profession, Eva Tobin, Justin McKenna, and Sandra Fisher of the Younger Members Committee, for their continuous support. A Golf Outing in aid of the Association would be held in Nenagh shortly and Mr. Smyth asked for the support of the profession for this and other events which the Association organised.

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

Roscommon Bar Association

Roscommon Bar Association had a most enjoyable Annual Golf Outing at Castlerea Golf Club on Tuesday 28th of May. A bumper turnout of thirty five enjoyed themselves in glorious sunshine. The Association President, Rebecca Finnerty and the Castlerea Mens Captain, Joe Caulfield thanked all for attending and handed prizes to the following:—

Novelty prize: Mary Faherty B.L.; Beginners Prize: Gerry Clarke B.L.
Ladies (guest):— Helen Sweeney, Roscommon.
Bar Association Ladies:— Marie Connellan, Strokestown.
Solicitors:— 1st, Chris Callan, Boyle, Second, Terry O'Keefe, Roscommon, Third, Harry Wynne, Boyle.
Guests:— First, Ray Groarke B.L., Second, Antho McCormack, Castlerea Golf Club.
Gross:— Rupert Staunton, Castlerea Golf Club. □

Address by President of the Law Society, Donal G. Binchy to Society's Annual Conference, Killarney, 4th May 1991.

By a special correspondent

In a wide ranging and, at times, hard-hitting address to the Law Society's Annual Conference on Saturday 4th May 1991 at the Great Southern Hotel, Killarney, the President of the Law Society, Mr. Donal G. Binchy, hit back at the critics of the profession and asserted that the profession provided the public with an efficient and cost effective service. Reviewing the performance and achievements of the profession over his practising lifetime, Mr. Binchy covered all the current issues of interest to the profession.

ADMISSION POLICY

The President refuted the suggestion that the profession maintained a closed shop. "It never was and still is not necessary for a person to have a University Degree in Law or any other discipline or even a Leaving Certificate to become a Solicitor" he declared. Since 1989, anyone with a University Degree in Law, which included the necessary core subjects, was exempt from the Society's entrance examination and at present a profession of some 3,800 practitioners were sustaining an apprentice population of over 900, almost one in four. The profession had doubled its membership in the ten years to 1987 and would double its numbers again in the next ten years or so.

COMPENSATION FUND

The President defended what he called the proud record of refunding in full losses sustained by clients as a result of misappropriation or embezzlement by solicitors. He spoke of the dangers for the future and the need for legislative change to bring the fund back to its original concept. There was no reason, he said, why financial institutions, who can look after themselves very well, should have access to the fund. This view was being pressed very strongly at Government level and he appealed again to the Minister to look favourably at the Society's submissions.

TECHNOLOGY

The President asserted that, contrary to the historic Dickensian image, solicitors have been to the forefront in availing of modern technology and were well ahead in this important area of development.

EDUCATION

The Society's Law School was, according to the President, amongst the most modern in the world and its graduates were infinitely better qualified than their predecessors. Graduates of the Law School could stand comparison with the best graduates of education and training of any other jurisdictions.

CONTINUING LEGAL EDUCATION

Continuing Legal Education (C.L.E.) had been gradually gaining in importance over the past twenty years. The President paid a special tribute to the Society's Law School, to the Society of Young Solicitors for their important contribution and especially to the members of the profession who give of their time so freely in this area.

JOINT PROFESSIONAL LEGAL EDUCATION

The President referred to the recent Fair Trade Commission Report which urged that there should be a common professional law school. He took issue with the report asserting that its authors did not fully understand the requirements of legal education. There was, he said, already a common law school at the academic level. He said that there were at least five Universities providing legal education at that level and that rationalisation in this area was a matter for the Government. The Society and the Bar Council had no objection to common vocational training to the extent that this was appropriate with the proviso that it did not dilute the standards of training and education given by the Society's Law School. But Mr. Binchy went on to say that, in his view, the requirements for solicitors and barristers differed significantly. Although he had an open mind on the question of establishing a Joint Professional Law School, these important considerations had to be borne in mind.

TRANSITION ARRANGEMENTS BETWEEN SOLICITORS AND BARRISTERS

In an important reference to this subject, Mr. Binchy emphasised that the Bar and the Law Society appeared to be at one on the need for maximum ease of transition from one branch of the Profession to the other in common with the trend towards freedom of movement throughout Europe.

EUROPEAN COMMUNITY

The profession was fully up-to-date in relation to the implementation of the Community Directive on recognition of Diplomas, said Mr. Binchy. He also said that, independently of the Community Directive, recognition had been obtained, through the Society's efforts, for Irish solicitors to practice in England. This was, he said, a striking achievement, of very considerable benefit to some hundreds of Irish solicitors now earning their living in England.

CONVEYANCING AND PROPERTY TRANSACTIONS

The President said that the Society had been to the forefront in urging

the reform and modernisation of the Land Registry and Registry of Deeds. The profession was glad that the Government had responded affirmatively to the Society's suggestion that the Land Registry be converted into a State-sponsored body. The only people, he said, who had the expertise and experience to engage in conveyancing were solicitors and it was in the public interest and the interest of the client that this work should be left in the hands of solicitors.

PROFESSIONAL INDEMNITY

The President said that about 80% of the Profession now carried Professional Indemnity Insurance obtained through the Society's own Fund (Solicitors Mutual Defence Fund) or their own insurers. The Society was seeking power in the forthcoming Solicitors Bill to make professional indemnity compulsory.

OTHER ISSUES

The President also made the following points:-

- The Civil Legal Aid Scheme urgently needed to be improved.
- The Society was not opposed to the appointment of a Legal Ombudsman to oversee the handling of complaints by the Society.
- The Society welcomed the proposed increase in the jurisdiction of the District and Circuit Courts but it was essential that the necessary backup services be put in place.
- On costs, the President asserted the right of the profession to fair remuneration for the work and services given. All solicitors' fees and charges were regulated by the Solicitors Remuneration Acts and there was a separate independent system for examining and assessing the reasonableness of solicitors' costs. If freedom of competition were to come, a necessary corollary was that price control would have to go.
- Contingency fees could not be considered until the Government changed the law.
- The President strongly defended the Society's right to issue guidelines on professional fees.
- The adminisration of justice in the Courts was an area crying out for attention; delays needed to be addressed.
- There was an urgent need for establishment of a Commission to consider our laws in relation to civil litigation and Court procedures; the President personnally favoured the granting of Interim Decrees, Income Decrees and the review of Court Orders in relation to claims. Court procedures must be reviewed and the method of listing cases re-examined.

CONCLUSION

Mr. Binchy concluded his address with the following message:-

"I am proud to belong to a profession that, by and large, has provided an efficient, expert and cost-effective service to the community; a profession that in my experience is open to and prepared to collaborate with desirable change - a profession that is a vibrant part of the 20th century and ready for the 21st century - a profession whose motto is appropriate to this age and to all times - Veritas Vincet - Truth shall Prevail."

THE INCORPORATED LAW SOCIETY

CONTINUING LEGAL EDUCATION

July/August 1991 Programme

Thursday 25th July, Dublin
7.00 – 9.00p.m.

JUDICIAL REVIEW: LAW AND PROCEDURE

Consultant:
Eamonn G. Hall, Solicitor

Wednesday 7th August, Dublin
10.00a.m. – 5.00p.m.

C.G.T. and SELF-ASSESSMENT

Consultants:
Caroline Devlin, AITI, Solicitor,
Patrick Hunt, ACA, AITI, BL.

See CLE Brochure for further details

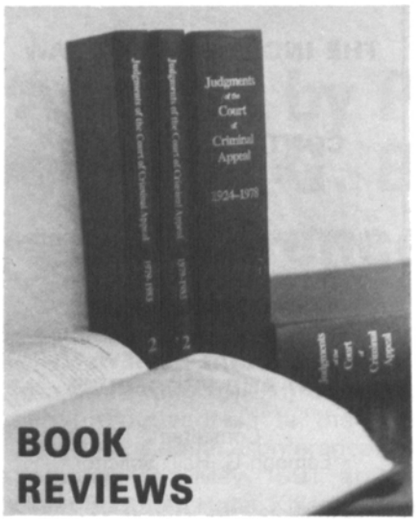
SOLICITORS GOLFING SOCIETY CAPTAINS PRIZE (COLM PRICE) AT HOWTH, GOLF CLUB.

The Captains Prize was held at Howth Golf Club on the 24th of May 1991. One Hundred members competed, the results were as follows:

CAPTAINS PRIZE:	Barry Doyle – 16 – 41 Points.
RUNNER UP OVER-ALL:	Martin Kennedy – 18 – 39 Points.
ST. PATRICKS PLATE:	(12 AND UNDER) John Bourke – 11 – 41 Points.
RUNNER UP:	Brian O'Brien – 9 – 37 Points.
DIRECTOR GENERALS CUP:	Harry Fehilly – 36 Points.
13 AND OVER:	Eamonn Kelly – 14 – 38 Points.
RUNNER UP:	Andy Curneen – 16 – 37 Points.
30 MILES & OVER:	Don Binchy – 8 – 37 Points.
FIRST NINE:	Andrew Smith – 12 – 21 Points
SECOND NINE:	Colm Berkery – 18 – 21 Points.
OVER 65s:	Paul Kearns – 15 – 34 Points.

The Presidents Prize (Don Binchy) will be held at Clonmel Golf Club on Friday the 19th of July 1991 next. Notices will be forwarded in due course.

RICHARD BENNETT
Hon. Secretary



THE LAW OF OCCUPATIONAL PENSION SCHEMES

[By Nigel Inglis-Jones Q C. Publishers: Sweet & Maxwell October 1989 Update October 1990 Lose leaf: £90.00 stg.]

I was asked to review this book shortly before the publication of the Pensions Bill 1990. The Pensions Bill was signed into law on 24th July 1990 but it was not until 1st January 1991 that many of the provisions giving legal effect to the Pensions Act were brought into being. The Pensions Act 1990 was the first statutory enactment dealing with pensions although Part VII of the Act also deals with disability schemes. In the United Kingdom statutory requirements for occupational pension schemes are dealt with in Finance Acts, Social Security Acts, Regulations etc. Irish pensions law is an amalgam of common law principles and statutory enactments i.e. the Trustee Act 1893, Finance Act 1972 and the Pensions Act 1990. I make the foregoing comments as background to reviewing Mr. Nigel Inglis-Jones Q.C.'s book.

There are no Irish text books to date on occupational pension schemes. The author's book is basically an English text book. However, much of Irish general trust law governing the duties of trustees in Ireland derives from English trust law. When reading through the book I found it had all the hallmarks of being written by a lawyer who actually practises in the field of pensions.

The book itself is in a loose leaf format which is a practical way of publishing books on areas of law which are expanding all the time. The last two years have seen a tremendous growth in pension litigation in the United Kingdom and the publishing of the Update October 1990 reflects this. The Update October 1990 is a much fuller volume than its predecessor. The Update October 1990 now includes references in the text to many important decisions as such as *Icarus Limited -v- Driscoll* and the European Court's decision in *Barber -v- Guardian Royal Exchange.*

The book is divided into five parts sub-divided into sections. Part I deals with the creation of a pension scheme, Revenue approval and the consequences of loss of such approval. Naturally, as this is a UK publication, this Part will not be of particular relevance to Irish pension lawyers but I found the section dealing with the consequences of loss of Revenue approval of interest as it is something that one is often asked by clients. I found the section on interim trust deeds somewhat sketchy. The October 1989 edition dealt with announcement letters and booklets in a very basic manner. However, the Update October 1990 has now an extended section with a good paragraph on Estoppel on the basis of the Booklet.

Part II deals with trustees and is divided into eight sections covering every aspect of trusteeship from appointment and removal of trustees, their duties, disclosure of information, to protection of trustees. All lawyers, be they pension lawyers, barristers and solicitors with a chancery practice or general practioners, will find this part most useful and extremely valuable as it brings together all of the important areas which lawyers have to deal with and advise on with regard to pension schemes and trusteeship. In spite of the statutory requirements with regard to trustees, as detailed in the Pensions Act 1990, the common law principles with regard to trusteeship still apply. Naturally again this part has to be read bearing in mind the relevant Irish legislation. I found Section 4 (Duties of Trustees) to be most helpful as it was comprehensive in the areas covered. I particularly liked the way the author stitched in to the text relevant extracts from judgments to which he referred. Section 5 will be read with interest by all pension lawyers as it deals with disclosure of information. There is also a section dealing with the powers of investment but this section should be read taking into account the fact that we do not have a Financial Services Act 1986.

Part III of the book deals with sections on actuaries, surpluses and deficiencies, winding up of pension schemes and sex discrimination in pension schemes. The Update October 1990 takes into account many UK cases dealing with sex discrimination. This is one of the few text books written by a lawyer which outlines what an actuary does and deals with certain actuarial matters which are of interest to lawyers and relevant to pension schemes. This can be easily read by lawyers who are not familiar with pensions matters. The section on sex discrimination now deals with all the significant EC Directives and cases both UK and European which led up to *Barber -v- Guardian Royal Exchange.* The Update October 1990 reflects all the litigation activity in pensions in the intervening year since the book was published.

There is a new Part IV in the Update October 1990 containing a set of precedents including draft Trust Deeds and Rules. This is a welcome addition. While the Rules relate to UK occupational pension Schemes the Definitive Trust Deed and Interim Trust Deed checklist will be of much assistance to Irish Pension Lawyers.

Part V details transcripts from significant UK pension cases and relevant EC Directives. There is also a full index and tables of cases and statutes.

This work, particularly with Update October 1990, is of interest to both general practitioners and pension lawyers. Undoubtedly Part II dealing with Trustees is the corner-stone of the book and this is an area which a pension lawyer will dip into when dealing with various pension matters. The book as a whole is an extremely useful source book for general practitioners who are coming to pensions law with little background know-

(Contd. on p. 208)

Younger Members News

A conference, organised by the Union Des Jeunes Avocats de Paris (The Young Lawyers Association of the Paris Bar) was held in the Palais de Justice, Paris from 12th to 14th April, 1991. It was attended by Patricial Boyd and Gabrielle Dalton on behalf of the Younger Members Committee of the Law Society.

The theme for the "European Weekend" was the representation of the legal profession.

The conference was attended by the Young Lawyers from France, Italy, Belgium, Holland, England, Switzerland and Romania as well as Ireland. On first day of the programme, papers were delivered in French by a member of each delegation outlining how professional training is organised in each country, apprentices' salaries, disciplinary procedures, job opportunities, organisation of firms, ethics and other topics. The French Bar was unique in that there is no national organisation such as the Law Society; each regional Bar regulates discipline, ethics, etc. One of their present concerns was the recent fusing of the professions of "Avocat" and "Conseil Juridique".

The Romanian Lawyers highlighted the problems facing their profession which is directly under the control of the Ministry of Justice. They are actively seeking the liberalisation of the legal profession and are endeavouring to prepare for development in the areas of commercial and environmental law.

Patricia Boyd delivered a paper in French congratulating the English for being the first Member State to recognise the E.C. Directive on Mutual Recognition of Diplomas. The similarities between the legal systems in our respective jurisdictions were acknowledged but the differences in representation of the profession were noted. There are two organisations representing the interest of young apprentices/ solicitors namely the Trainee Solicitors' Group and the Younger Members Group of the English Law Society, while in Ireland, there is no specific group representing apprentices.

The second day of the programme consisted of a tour of the Paris Law School; a lecture on psychoanalysis was in progress during our visit! The facilities were extremely modern and included large lecture halls, language laboratories and a very good restaurant.

The conference ended with a sociable brunch on Sunday and an exchange of names and addresses. It is hoped to write to each delegate asking them to keep us informed of further European events and letting them know about what is being organised here. Already we have facilitated Irish solicitors who were interested in making contact with Romanian lawyers in relation to adoption procedures both here and in Romania.

It is clear from our attendance at the conference how important it is for Irish lawyers to make and maintain social and professional contact with lawyers from non-common law jurisdictions especially those in the E.C. if we are to participate fully in an open Europe. It also struck us forcibly that we must achieve competence in at least one Community language to keep pace with our European colleagues.

PATRICIA BOYD
YMC

Have you ever wondered how to cram a whole week into just two days (and I'm not talking about catching up with work)?

Practical lessons are now available - on a strictly first come, first served basis - from the Northern Ireland Young Solicitors Group (NIYSG), as a party of twenty-four from both the Society of Young Solicitors and the Younger Members Committee recently discovered when we were invited to their Sixth Annual Conference held in Templepatrick, outside Belfast, on Friday and Saturday 10th and 11th May.

Sadly, pressure of work caused all of us to miss the opening lunch and afternoon workshops which this year had a European theme as the Conference was jointly hosted with the Northern Ireland Solicitors European Group. We made up for this late start however by participating (very) actively in all of the events so ably organised by Hilary Wells and her colleagues.

The weekend proper began with the Conference Ball on Friday evening held in the Templeton Hotel (which for those David Lynch fans among us bore a striking resemblance to the hotel in "Twin Peaks" - and here I'm talking about the decor and nothing else!). Everyone enjoyed both the Ball and the apres-Ball which included the first singsong of the weekend featuring the Conference's massed choirs.

Saturday began bright and early at 11.30 a.m. (well, its all relative and, believe me, with the amount of sleep everyone got it felt very early and was far too bright).

This was to be the Longest Day, at least that's what everyone thought who read the page long Programme - and there was even a Bridge Too Far. But before that a coach load of us headed off to the Antrim Coast and Giants causeway where James Wells, who must be the most charismatic member of the National Trust, treated us to a most enjoyable tour of this wonder of the world.

After that, we stopped for lunch in Bushmills Village - although the spirit was willing, the Distillery was closed (which probably wasn't the best decision they ever made!). A very good lunch was enjoyed by all at the Bushmills Inn and it was easy to see why this old coaching inn had been recommended by Egon Ronay. After lunch we travelled to Carrick a Rede Bridge which was quite a challenge but as lawyers, well used to walking without safety nets, we boldly went where only the rope bridge led and happily everyone enjoyed the walk on the

wild side and no one (or at the very most only one or two) took the plunge to the roaring sea far below.

There was just enough time left to return to base and "freshen up" before re-grouping for dinner at Restaurant 44, one of Belfast's chicest venues which was booked out by the conference. This was the location not only for a very fine meal but for the second of the conferences choral evenings, which with many encores, continued well into the wee small hours and provided a fitting finale to the weekend's activities.

So did we enjoy ourselves? Well, lets just say that the NIYSG is hosting a conference in Newcastle, Co. Down next May for all the home countries and details are already being diaried. (In addition to which, those Euro Tour '91 veterans among us had the bonus of a very welcome re-union - but all of that is a story for another day...)

John Campbell
Y.M.C.

"SADSI Flys the Flag"

A SADSI team has recently returned from Washington D.C., where it took part in the Philip C. Jessup International Law Moot Court Competition, reaching the World Finals. This is the largest moot competition in the world, this year attracting forty six teams from countries as diverse as Botswana and Belgium.

The SADSI team were the Irish national champions, having beaten a Kings Inns team in the Irish final. The team was composed as follows: Yvonne McNamara (of Matheson Ormsby Prentice), Tom Hallinan, T.P. Kennedy, Judith Lawless and Donagh McGowan (all of McCann FitzGerald).

The format of the competition was that teams were asked to consider a hypothetical case in which products of one country were dumped in another in contravention of the provisions of the General Agreement on Tariffs and Trade. The second country responds by applying its competition legislation to agreements reached in the first country. Each team was required to submit detailed writted pleadings for both the applicant and respondent states.

The national teams then had to present their oral arguments in Washington, arguing twice on behalf of the applicant and twice on behalf of the respondent, before a "Court" of three judges. The judges were lawyers drawn from the Federal Trade Commission, the GATT Legal Directorate and firms practising international trade law as well as international legal academics. Marks were awarded for both the oral and written arguments and the eight highest ranked teams advanced to the final. The final is run on a knockout basis (not unlike the World Cup - but much more exciting!).

Our performance in the semi-finals broke all records for Irish teams. We won decisive victories against Bulgaria (University of Sofia) and Mexico (Universidad Nacional Autonoma de Mexico). The margin of victory against the American team (Boston College) was a little narrower but we won decisively. We were unlucky to lose narrowly to the other U.S. team (University of Georgia), the holders of the title.

At the end of the semi-final round we finished with the third highest points total of the forty six teams. We therefore advanced to the finals (the first Irish team ever to do so). Unfortunately we were beaten in a very close round by Canada (University of Saskatchewan), the team which won the competition.

We were delighted with our success and to be returning with a trophy for reaching the finals. The Irish reputation for eloquence was triumphantly upheld when Yvonne McNamara received a trophy for being ranked second out of approximately 200 speakers. The Irish team was the only team to have two speakers in the top ten oralists, with T.P. Kennedy being ranked ninth.

In conclusion we would like to thank the many people who enabled us to achieve this level of success. Our very special thanks go to Liz Heffernan who did an outstanding job as our academic coach. Her patience and extensive knowledge of international law steered us through the deeps and shallows. A good deal of the credit for our performance is due to her guidance, enthusiasm and unfailing encouragment.

We would also like to thank the following for their assistance in the run-up to the competition: Eoin O'Dell; Eanna Mulloy, B.L.; Monika Leech; John Bourke; Karen Kenny, B.L.; Joe Kelly; Rosemary O'Farrell; Alex Schuster, B.L.; Paul Kearney; Eileen Roberts; Damian Collins; David Clarke; William Earley; Prof. Richard Woulfe; David Smith; Catherine Moylan and the word processing staff of McCann FitzGerald and the staff of the European Commission library in Brussels.

We would also like to thank our respective employers, who were all most generous in their personal encouragement as well as their practical assistance.

Finally we would like to express our gratitude to our sponsors without whose contributions our participation would not have been possible: The Incorporated Law Society of Ireland; The Bar Council; McCann FitzGerald, Solicitors; Matheson Ormsby Prentice, Solicitors; Telecom Eireann; Round Hall Press and the students of the 22nd Advanced Course.

T.P. Kennedy

Book Review

(Continued from p. 206)

ledge but need to familiarise themselves with it in order to advise clients.

There are of course more specialised pension books published covering specific areas, such as Pension Fund Litigation and the law of Pension Fund Investment, but I would regard this as a basic text book for anyone wishing to educate themselves in pensions law or requiring a more indepth knowledge of a particular aspect of it. I also found it clearly written and easy to read.

One drawback in the book is that the author does not deal with Personal Pensions and Contracting-out arrangements in the UK so that a lawyer dealing with UK schemes might find this a disadvantage. However, the Update Service which is to be published biannually should rectify this situation in time.

Raymonde Kelly

Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

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

LOST LAND CERTIFICATE

Timothy Barton, (deceased) Folio No. 4735; Area: 102a.1r.16p; Land: Leampreaghane, County: **KERRY.**

William Murphy, (deceased), Folio No. 9490; Area: 3a.1r.35p; Land: Templeorum, County: **KILKENNY.**

John Murphy, (deceased), Folio No. 2378; Area: 5a.3r.6p; Land: Whittyshill, County: **WEXFORD.**

Thomas Cantwell, Folio No. 8000F; Land: Ballymoney, County: **WEXFORD.**

Patrick Cahill, Cloonlaheen, Kilmaley, Co. Clare. Folio No. 20695; Land: Townland Cloonlaheen; Area: 0a.1r.10p. County: **CLARE.**

Thomas Kelly, Folio No. 13595; Land: (a) Ballyeighter, (b) Feeghs; Area: (a) 1a.2r.36p, (b) 3a.1r.8p. County: **OFFALY.**

Brian Dempsey, Folio No. 22511; Land: Raheendarrig, County: **WEXFORD.**

Sir George Errington, Folio No. 789A; Land: (i) Lisnagrish, (ii) Gneeve; Area: (i) 277a.1r.26p., (ii) 163(a) 2(r) 4(p), County: **LONGFORD.**

John Kelly, Folio No. 7076; Land: Monascallaghan; Area: 19a.2r.6p., County: **LONGFORD.**

Ellen Clarke, Folio No. 10855; Land: Lisnageeragh, County: **LONGFORD.**

Patrick Caraher, Folio No. 3504F; Land: Knockamaddy; Area: 0.500 acres, County: **MONAGHAN.**

Padraic Faherty, (Tenant in Common), Forramoyle East, Barna, Co. Galway and **Nora Carroll,** (Tenant in Common), 21 St. Mary's Road, Galway. Folio No. 21940F; Land: Forrramoyle East; Area: 1.950 (Acres), County: **GALWAY.**

Thomas Fennell, Folio No. 6276; Land: Creagh Demesne; Area: 7a.1r.24p, County: **WEXFORD.**

Michael Clarke, Folio No. 16123; Land: (i) Gubadorris, (ii) Cloonlaughil (iii) Gubadorris; Area: (i) 6a.1r.38p., (ii) 0a.1r.0p.; (iii) 5a.1r.32p. County: **LEITRIM.**

James Mulcahy, Folio No. 17003; Land: Knockakeo; Area: 10a.2r.20p. County: **CORK.**

Martha Copley, Folio No. 10420; Land: Pottlerath; Area: 64a.1r.11p. County: **KILKENNY.**

A.C.O. Limited: Folio No. 8L; Land: Downs; Area: 4a.2r.18p. County: **WICKLOW.**

John James Fahy, Carrowkeel, Newtowndaly, Loughrea, Co. Galway. Folio: 2514F. County: **GALWAY.**

Michael Mooney, Shankoagh, Ballintubber, Castlerea, Co. Roscommon. Folio No. 3567; Area: Townland 17a.3r.20p.; Lands: Part of the Lands of Shankoagh. County: **ROSCOMMON.**

Daniel Boyle, Folio No. 6182; Lands: Yardland; Area: 1a.1r.37p. County: **WICKLOW.**

John Ryan, Folio No:8706F; Lands: Ballynerrin, Barony of Newcastle, County: **WICKLOW.**

Lost Wills

NOLAN, Stephen, deceased late of Straffan Villa, Straffan Road, Kill in the County of Kildare. Would anybody having knowledge of the whereabouts of a Will of the above-named deceased who died on the 24th December, 1990, please contact Messrs Hanahoe and Hanahoe, Solicitors, 14 North Main Street, Naas, Co. Kildare. Ref: Mr. Hanahoe/1451. Tel: 045-97784/045-76272; Fax: 045-76272.

MULLEN, Mary Josephine, late of 8 Broadford Close, Ballinteer, Dublin 16, Spinster. Will any one having knowledge of the whereabouts of the Will of the above named deceased who died on the 22nd March 1991 please contact Margaret Roche, Solicitor, The Bridge, Enniskerry, Co. Wicklow.

DOHERTY (ORSE DOCHERTY), Joseph, deceased late of 113 West End Lane, West Hampstead, London and Loughrea, Co. Galway. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 1st June, 1990, please contact A. Gerard Moylan & Co., Solicitors, Loughrea, County Galway. Tel: (091) 41356.

CHARLETON, Aengus Joseph, deceased late of "Otis Lodge", Athgoe South, Newcastle, Co. Dublin. Will anyone having knowledge of the existence or whereabouts of the last Will and Testament of the above-named deceased who died on the 18th May, 1991, please contact Messrs. Gerrard Scallan & O'Brien, Solicitors, of 69/71 St. Stephen's Green, Dublin 2, Reference HOD/MOD. Tel: 780699.

WOOTON, Alice (Mrs.), deceased, late of 95 Philipsburgh Avenue, Fairview, Dublin 3. Would anyone having knowledge of the whereabouts of a Will of the above mentioned deceased who died on 20 June, 1991, please contact Thomas O'Reilly, Solicitor, Castleview House, 22 Sandymount Green, Dublin 4. Tel: 687855.

IN THE MATTER OF THE ESTATE OF JAMES COTTER (DECEASED) OF BALLYSPILLANE, MIDLETON, CO. CORK. Would anyone who knows of the present whereabouts of James McCarthy, formerly of Assolus, Skibbereen, Co. Cork and Nephew of the above named deceased, please contact the undersigned as soon as possible.

PATRICK J. O'SHEA & CO.
Solicitors,
77 Main Street,
Midleton,
Co. Cork.
Ref: TKM/c/10823.

Miscellaneous

We act for a lady who had a mastectomy in 1985, when she was aged fifty years. Following her operation she was prescribed the drug **Tamoxifen.** After approximately six months she experienced a reduction in vision in both eyes.

We would be interested to hear from any other members of the profession who have any knowledge of the said drug Tamoxifen or who are aware of any litigation involving same.

Please contact: Oliver Shanley & Co., Solicitors, 11 Bridge Street, Navan, Co. Meath.

IN THE MATTER OF A LANDLORD AND TENANTS (GROUND RENTS) ACTS, 1967 AND 1987.

JOSEPHINE BOURKE – APPLICANT PROPERTY – LADYSWELL STREET, CASHEL, COUNTY TIPPERARY.

WHEREAS the Applicant has applied to me for an Order declaring that she is entitled to acquire the Fee Simple Interest in ALL THAT AND THOSE the Dwellinghouse and property situated at Ladyswell Street, Cashel in the Parish of St. John The Baptist, Barony of Middlethird and County of Tipperary now and for upwards of seventy (70) years last in the occupation of the Applicant and her predecesors in title and for such further or other Order as may be necessary in the matter I HEREBY GIVE NOTICE that I will sit at the Courthouse, Clonmel on the 18th day of July, 1991 at 11.30a.m. to hear said adjourned Application any submissions by any interested parties in relation thereto.

SIGNED: _____
Patrick J. McCormack
(County Registrar)
Circuit Court Office,
O'Connell Street,
CLONMEL.

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LONDON SOLICITOR, relocating to Ireland seeks Assistant Solicitor position to handle non-contentious matters, including probate, trusts and conveyancing – Contact Box No. 52.

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RECENTLY QUALIFIED SPANISH LAWYER (aged 23 years) seeks position in Dublin to commence in October 1991 with particular interest in EEC Law. Reply to Box No. 53.

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AMBROSE STEEN, Solicitor, Commissioner for Oaths has commenced practice at Tara House, Trimgate St., Navan, Co. Meath. under the style of Ambrose Steen & Son. Tel: (046) 27505/6; Fax: (046) 27506.

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"Conquer Cancer Campaign" is a Registered Business Name and is used by the Society for some fund raising purposes. The "Cancer Research Advancement Board" allocates all Research Grants on behalf of the Society.

IRISH CANCER SOCIETY
5 Northumberland Road, Dublin 4, Ireland. Tel: 681855

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

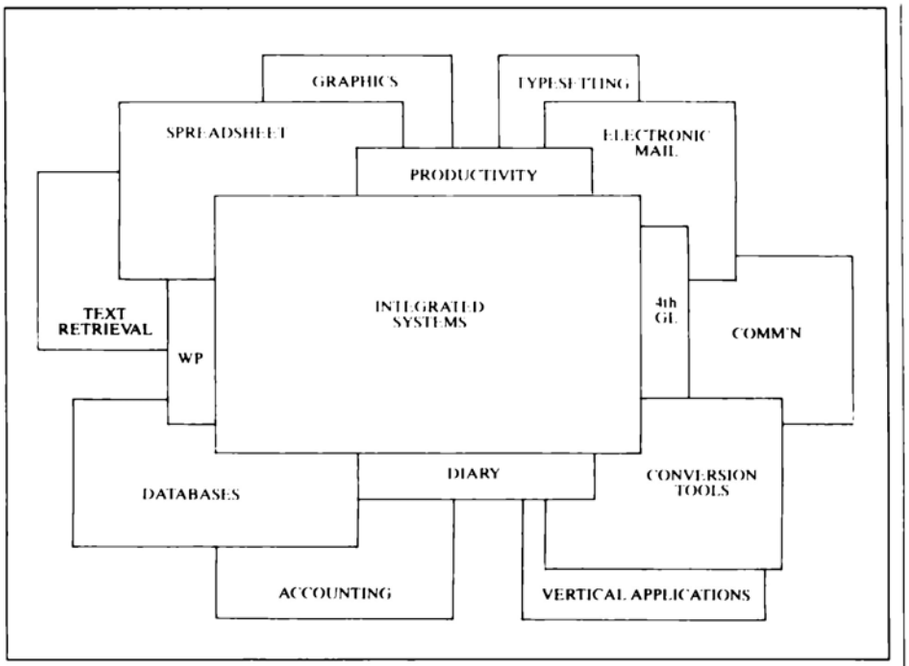
Vol. 85 No. 6 July/August 1991

Mrs. Joan Binchy and Brian O'Connell, President of the Royal Institute of the Architects of Ireland, at the recent unveiling of a bust of Thomas Ivory, who was appointed Architect to the Blue Coat School in 1773.

- Multi-discipline practices
- Vital Issues of Trade Union Law

Q OFFICE

OFFICE AUTOMATION SYSTEMS FROM STAR



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Viewpoint

Now that the problem of crime and lawlessness has ceased to be a political football in the local elections, the issue deserves some serious consideration. Media reports of suburban estates around Dublin and an estate in Limerick being at the mercy of lawless gangs, coupled with the alleged revival of drug dealing in urban areas and the continual presence of mugging and thefts from motorists has only highlighted a growing problem.

It is probably true that the break-up of inner city communities and their transposition to suburban estates inhabited largely by young married couples with children, has created unbalanced communities. High levels of unemployment in these communities cannot but make the situation worse. Lack of parental control is alleged to be widespread.

None of these problems is capable of swift or simple solution although, as has recently been proposed the imposition of liability on parents may be a starting point. How successful it can be in an era where family discipline is regarded as an outmoded concept is another question.

Our capital city after dark presents an unhappy sight. Metal grilles protect almost all our shop fronts presenting an image as unattractive as many North American cities which we would consider hot beds of violence. Security guards man the doors of many city centre business premises whose proprietors complain of high levels of shop lifting.

Calls for the provision of more prison spaces are surely directed at the wrong end of the problem. While there appears indeed to be a scarcity of places in secure accommodation for young offenders, the provision of additional prison accommodation for adult offenders is no more a solution to the problem of crime than the provision of additional graveyards would be a solution to a problem of disease.

Those seeking restrictions on bail seem to happily ignore the fact that our prisons cannot even hold convicted persons for the full length of their sentences.

Problems of petty theft of goods will never be solved until not only can professional receivers be identified and successfully prosecuted with ease but until "ordinary law abiding citizens" stop buying videos, televisions and other stolen goods in pubs or from illicit sources. There must be a greater emphasis on crime prevention too. Are we sure that our police patrolling methods, confined as they seem to be to either foot patrols or squad cars, are really an efficient method of policing our cities? If the thieves are on motorcycles why are Gardaí motorcyclists confined to traffic duties.

It is time we took our cities back and ensured that thieves are not free to roam our city streets cocking a snook at the forces of law and order and the ordinary citizens.

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Multi-discipline practices

The Council of the Law Society has recently examined the question of Multi-Disciplinary Practices ("MDP's"). The Council has unanimously adopted the position set out in the enclosed paper put before it at its February meeting.

Members viewpoints are most welcome and may be sent to the Director-General.

by
Michael Irvine,*
Solicitor

Introduction

This position paper on Multi-Discipline Practices (MDPs) has been prepared at the request of the Council of the Incorporated Law Society of Ireland ("The Law Society"). It has involved the examination of the position in other jurisdictions as well as Ireland, and it seeks to present the arguments concerning MDPs and to draw a conclusion and make recommendations. The paper was prepared as of February 1991.

An MDP is a profession practice in which members of different professions acting in some form of association with each other, but as a single business enterprise, provide professional services to the public (e.g. lawyers with accountants and/or auctioneers and/or engineers etc.)

It is important to realise that the solicitor might not be the dominant profession in any such practice.

The response of the Council of the Law Society of Scotland to the Scottish Home and Health Department Discussion Paper in regard to this topic stated, *inter alia,* as follows:-

> "Members of the Law Society of Scotland clearly view this issue of MDPs as one of the most crucial to face the profession and as one which could create a climate leading to the ultimate destruction of an independent Scottish legal profession . . . . "

There must be serious reservations that MDPs in Ireland could create a similar climate which could lead to the ultimate destruction of an independent Irish legal profession and erode the position of the Law Society and of solicitors generally.

The paper examines the topic under the following headings:-

1. European Comparisons
2. United Kingdom Comparisons
3. CCBE (Association of European Bar Associations).
4. Principal Arguments in favour of MDPs.
5. Principal arguments in favour of the Single Profession Practice and against the MDP.
6. The Law Society 1989.
7. Conclusion.

Note: This paper does not examine any aspect of Multi-National Partnerships ("MNPs") (i.e. partnerships between lawyers practising in different jurisdictions).

1. **European Comparisons**

MDPs are currently only allowed in Germany ("D") and in the Netherlands ("NL").

Comparable partners are notaries (D, NL), patent lawyers (D, NL), accountants (only D), auditors (only in D) and in the Netherlands "practitioners of other independent professions that require an academic or equivalent training and who are members of a Netherlands order or association, of which the members are subject to disciplinary rules comparable to those applicable pursuant to the Advocates Act, provided that as a result thereof, no obligation is imposed that could jeopardise the free and independent exercise of the profession" (Regulation No. 8, Art 2.1).

The joint practice can be exercised in the form of shared office facilities (D, NL and Denmark), partnerships (D, NL) and in the Netherlands also in the form of a corporation.

The MDPs in Germany and the Netherlands are governed by rules or regulations set up by the Law Society or a similar body (Bundesrechtsanwaltskammer in Germany and Nederlandse Orde van Advocaten in the Netherlands).

"In Germany and in the Netherlands each participant of an MDP is governed by his own . . . code of ethics and has his own professional indemnity insurance."

In Germany and in the Netherlands each participant of an MDP is governed by his own deontology code (i.e. code of ethics) and has his own professional indemnity insurance. In Germany, the applicable provision in the Deontology

**Mr. Irvine is a member of the Council of the Law Society and is a former Chairman of the Company Law Committee.*

Michael G. Irvine

Code stipulates that the partners of an MDP have to respect the functions reserved to certain professions (the giving of legal advice except in tax matters and the appearance in certain courts are reserved to lawyers by statute, auditing is a function reserved to auditors by statute – these restrictions also apply in MDPs).

Statistics on MDPs do not exist either for Germany or the Netherlands, but it is estimated that less than 10 per cent of partnerships in Germany are MDPs.

MDPs have existed in both Germany and the Netherlands since the early seventies and in both countries for a longer time with the related profession of notaries.

In both countries there are no plans to abolish them.

Both countries report that so far they have had no problems with MDPs.

MDPs are prohibited:

(a) by statute in Ireland (for solicitors), France, Greece, Luxembourg, Portugal and Sweden (in Sweden with the possibility of exemption by decision of the Board of the Swedish Bar Association).

(b) by rules or regulations set up by the Law Society or a similar body in Ireland (for barristers), France, Denmark, Luxembourg, Belgium, Norway and Finland.

(c) Luxembourg also refers to unwritten rules and tradition and Belgium to bar decisions on the independence of lawyers.

In Ireland, Greece, Luxembourg, Portugal, Belgium and Sweden there is no discussion about the introduction of MDPs.

There is a discussion in France, but MDPs have been rejected.

There is little discussion in Denmark. The argument in favour of the admission of MDPs is the advantage of one-stop-shopping for the client. The opponents argue that MDPs might jeopardise the independence of lawyers.

The discussion of MDPs in Norway is similar to the one that took place in the United Kingdom.

MDPs have been discussed in Finland. An argument made there in favour of MDPs is that they would facilitate the competition against financial institutions. The argument made there against MDPs is that the different code of ethics, the fee-regulations and the preservation of the personal client-lawyer relationship might lead to difficulties.

In all articles on MDPs, the Netherlands and Germany are mentioned as the countries in Europe which allow MDPs, but it is important to understand the background against which these MDPs exist.

In Germany, there are principles of reserved functions for the various professions. An MDP must honour this principle. Therefore the partner from each discipline only does work which is reserved by statute to that discipline. There is, therefore, very little overlapping of function. No such clear demarcation exists in Ireland where accountants, for example, practice in many quasi-legal areas.

"In Germany, there are principles of reserved functions for the various professions."

An MDP (with some parties), such as exists in Germany, would not necessarily operate in such a distinct manner in Ireland, where the lack of demarcation of services would undoubtedly cause certain difficulties.

In the Netherlands, MDPs are not permitted between auditors or accountants and lawyers. The MDPs which are allowed in the Netherlands are restricted to notaries, patent lawyers and other independent professions who have disciplinary rules comparable to the rules pertaining to lawyers. It would therefore be dangerous to believe that the experience of the Netherlands would be relevant to a general system of MDPs which would encompass such diverse professions as lawyers and accountants.

2. **United Kingdom Comparisons**

In the United Kingdom, MDPs are allowed under statute but both the Bar Council and the Law Society of England and Wales have the power to decide with whom solicitors may practise.

In practice, therefore, the English/Wales Law Society can control the entire position in regard to MDPs. In addition, the Courts and Legal Services Act has permitted litigation and advocacy to come under separate distinct rules. In Scotland, the professional rules have been much more difficult to challenge.

At the moment, MDPs do not appear to be on the agenda for discussion by the Scottish Legal Profession.

In Northern Ireland, the situation of MDPs has not been progressed. At the moment a consultation paper has been prepared but there has not been great impetus toward change.

3. **CCBE**

No decision has been taken, either for or against MDPs by the CCBE (Association of European Bar Associations). However, much work has been done to prepare the groundwork for the debate. Examination is being undertaken by the CCBE as to the problems incurred. Additionally, a set of draft rules is being drawn up which will allow a more concrete discussion to take place.

4. **Principal Arguments in favour of MDPs**

The principal arguments for

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MDPs can be summarised as follows:-

(i) The "one-stop-shop" is better equipped to meet client demands especially large commerical clients. An MDP will facilitate speed and allow greater cost reduction for clients.

(ii) Solicitors and other professionals are able to share overheads and thereby cut costs.

(iii) A greater area of expertise is available to the solicitor and to other professionals practising in an MDP.

(iv) The process of encroachment on traditional areas of solicitors' practice is greatly reduced.

5. Principal Arguments in favour of the Single Professional Practice and against the MDP

(i) *General*

While it is accepted that a strong profession is one which thrives in a competitive marketplace it is equally clear that the primary objective of a profession is the provision of independent, trustworthy and competent services to its clients. The pre-requisites of independence and trustworthiness and the furtherance of the clients' best interests are hallmarks which distinguish a profession from a trade or from commerce and industry. There is a conflict in practice between the provision of high quality professional services and fierce client-driven, government encouraged, price competition.

This is particularly so for solicitors who owe legal and moral obligations not only to their clients but also to the courts and the law as officers of the court in the administration of justice.

Solicitors also owe obligations to their fellow solicitors, because what, in the public interest, aids the settlement of many transactions is not just the mutual confidence and trust which a lawyer must establish with his client, but also the mutual confidence and trust between fellow legal professionals who know that their colleagues will abide by and honour accepted professional rules and practices.

There is a point beyond which the provision of high quality trustworthy independent professional services and cut-throat market competition designed to reduce the costs to the consumer are irreconcilable. Solicitors cannot be expected to compete in the marketplace with others at the same price level, if they are required, on the one hand, to provide such services coupled with the total spectrum of consumer protection, while, on the other hand, their competitors are not required to observe such standards of practice, ethics or consumer protections.

(ii) *Independence of the Legal Profession*

In connection with the principle of the lawyer's independence it is appropriate to refer to the current draft Code of Conduct for all lawyers in the EEC:-

"2.1.1 The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore be careful not to compromise his professional standards in order to please his client, the court or third parties.

2.1.2 This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to his clients has no value if it is given only to ingratiate himself, to serve his personal interests or in response to outside pressure."

Despite the probable restriction of admission to an MDP to members of recognised professions, nonetheless, the potential loss of independence is

"[In an MDP] . . . the potential loss of independence is the principal threat to the protection and safeguard of the client."

the principal threat to the protection and safeguards of the client. Independence is perhaps an ephemeral concept easily understood but more difficult to express succinctly. Adherence to independence in the provision of professional legal advice requires a solicitor to pursue without fear or favour his duties to his client, subject only to his duties as an officer of the court and as a member of the legal profession. In particular, the solicitor's duty to give best advice to the client must be pursued free from alien pressure. In the context of MDPs an alien pressure would undoubtedly be that if a consumer consults a solicitor within a MDP, and thereafter needs advice and service from another professional e.g. an accountant or surveyor, the solicitor will be under commercial pressure to direct that consumer to the accountant or the surveyor within the MDP. The solicitor's independence of advice may be compromised and the consumer's freedom of choice will be restricted.

Furthermore, in the event of the consumer seeking legal advice in connection with the possible negligence of a partner in the MDP in a different profession, the solicitor would be prohibited from acting on account of the conflict of interests involved and his

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inability to be independent. The consumer would accordingly require to consult new professional advisers.

MDPs will, in many instances, jeopardise the professional relationship with the client, the judiciary and professional colleagues. MDPs will jeopardise the independence of the legal profession and of the advice given.

"MDPs will jeopardise the independence of the legal profession and of the advice given."

(iii) *Conflicts of Interest*

The following is an extract from the CCBE Information Gazette of Ireland which highlights the important area of conflicts of interest. The author, Mr. H. Collot d'Escury, a lawyer from the Netherlands, highlights the matter by reciting personal experience.

"Conflicting professional rules:

In the case of notaries in the Netherlands, it is professionally acceptable for the notary, should two parties wish to enter into an agreement, to advise and draw up a draft agreement for both parties concerned.

Now let us assume that one party is a client of one of the notaries of your firm and the other of one of the lawyers. The first client (that of the notary) regards it as normal and insists that his notary makes the draft for both sides and does not accept that the lawyer-partner advises the other client, which client has a much longer standing with the firm. What do you do?

Conflicting interest:

The difference in the type of practice may create difficulties. The notary may have clients who use his services always for conveyancing matters in real estate. Such a notary client – certainly where the mixed partnership is fairly young – may not necessarily use the same MDP firm for lawyer services.

Now it may happen that such a notary client is engaged in a conflict leading up to legal action against a client of one of the lawyer partners. As the notary client himself has instructed another law firm to handle this matter there seems to be no problem. The lawyer partner is acting for the adversary of the notary client.

So far so good. What may happen, however, as we found out, was that suddenly out of the blue the notary client objected to the lawyer partner acting in this matter on the ground that the notary partner has privileged knowledge of certain real estate transactions he intended to complete involving considerable amounts of money. He felt that this was dangerous for him.

It has been argued of course that there was no reason for the notary client to be afraid, because the lawyer partner will never try to have and cannot have access to this privileged knowledge.

Furthermore, we pointed out that he himself had chosen another law firm to assist him in the legal proceedings. All to no avail! We decided in the end to withdraw from the lawsuit, but were not happy.

It created much commotion, also within the law firm and brought us to the conclusion that a "mixed committee' to handle these highly complicated conflicts of interest problems – which in this case we in fact had not foreseen – was absolutely necessary!

This example brings me to another problem. How do you realise as partners of the one discipline that there may be a conflicting interest with a client of one of the partners of the other discipline?

In our case we can ask the administration whether the name of the counterpart of one of our clients appears in the client administration of either the law practice or the notary practice and who is the responsible partner. The client administration is split in two parts but the administration, at least the head of the administration, can be this check.

The question was put to me whether one should not avoid the possibility that the partners of one profession can get to know the names of the clients in the section of the other profession. In our case we do not want to avoid this unless the partner in question in a very special case decides that for reasons such as protection of the client, it should not be known.

One can, however, keep this totally separate and avoid this possibility if there were reasons – for example, again, the protection of the client. This could arise in the case of a mixed partnership with a tax lawyer or accountant who do not – like the lawyers – enjoy the privilege of professional secrecy in criminal investigations.

One would then have to keep the administration of the law practice totally separated from that of the tax practice or accountant's practice and include only the result in the administration of the mixed partnership.

In our case there remains the question of professional secrecy. We see no reason to avoid the situation where a practitioner on the one side can find out whether a certain person or company is a client of one of the partners of the other side. The knowledge he thus obtains is privileged and thus protected. In case of a mixed partnership with tax lawyers or chartered accountants one would have to arrange a system whereby the tax lawyer and/or accountant would have no access to the names of the clients of the law practice, combined with a warning system for the lawyers".

(iv) *Foreign Dependence*

If partners of the multinational accountancy firms were to become partners of Irish solicitors, it would not be long before the financial muscle of English, European or American influence could

prejudicially affect the rights, duties, obligations and service of Irish solicitors and the independence and integrity of Irish law itself. It is significant that while the commerical services of the "Big 5" accountants have undoubtedly met the needs of some sectors of commerce and industry they are increasingly failing to satisfy the needs of individuals for cost efficient services delivered with continuity of professional personnel.

"If partners of the multinational accountancy firms were to become partners of Irish solicitors, it would not be long before the financial muscle of English, European or American influence could prejudicially affect . . . Irish solicitors."

(v) *The Rights and Obligations of Confidentiality*

To a greater or lesser degree all professions have a duty to maintain the privacy of their client's communications to them but the obligation upon solicitors as with barristers is absolute and confers an absolute right upon the client. Without the client's permission, it would be a breach of the duty of confidentiality to disclose or discuss the client's affairs with other professionals within the MDP. More importantly, subject to certain well defined exceptions, a solicitor cannot be made to disclose confidential information to the courts.

The obligations upon a solicitor to keep his client's communications confidential is a fundamental principle and part of the ethos of the Irish solicitor.

Cordery on Solicitors, 8th Edition, Page 11 states:-

"A lawyer is under a duty to his client not to disclose to third parties any information confidentially revealed to him in his capacity as a lawyer and that duty continues after the relationship of lawyer and client has ceased".

Lord Chancellor Brougham in *Greenhough -v- Gaskell (1833) explains that the fundamental importance of this privilege*

"is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all

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professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case".

It is also clear that subject to certain well-defined exceptions, confidentiality of communication is imported into the European Community Law as considered in *A.M. & S. -v- EC Commission* (Case 155/1979). See also the draft European Code para 2(3) which states:

"It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. The obligation of confidentiality is therefore recognised as the primary and fundamental right and duty of the lawyer".

The solicitor's duty of confidentiality is therefore more rigorous than that upon members of other professions, as is recognised by the absence in their case of the right and duty to remain silent.

It is doubted whether clients would have any confidence in "chinese walls" as a means of erecting adequate safeguards for safeguarding confidentiality within an MDP or preventing the exchange of information on, for example, the MDPs computer databank.

"It is doubted whether clients would have any confidence in "chinese walls" . . . within an MDP . . ."

(vi) *Freedom of Choice*

The choice of the client might be severely restricted, particularly where there was one MDP in a relatively small area. In may be that it would be very difficult to secure good independent advice in regard to a potential claim against a client of an MDP. It is a widely held misconception that MDPs would allow for greater freedom of choice.

By their very existence MDPs will tend to restrict choice. The basic purpose of an MDP is to enable a client to take all he requires from one source. In fact, the client will be expected to take all of his services from the same source. The client would almost certainly be under constant pressure to take the entire package even if he wished to retain a degree of independent choice.

(vii) *Professional Standards/ Discipline*

In matters of conduct and discipline it would require to be a fundamental principle for MDPs that the rules which apply to members of a single professional firm should be no more rigorous than the rules and obligations incumbent upon an MDP, or, alternatively and correspondingly, that the obligations and rules which apply to MDPs should be at least as rigorous as those placed upon a firm of solicitors. Such a legitimate principle would immediately pose difficulties for the other professions.

The Law Society could not be confident that the differences between the codes and standards of conduct and discipline which at present exist within individual professions are readily capable of a simple solution. Nor could the Law Society be confident that the professions by negotiation and discussion could arrive at a common code of professional conduct. The result of negotiation between the professions would inevitably result in the acceptance of the lowest common standards.

Standards of conduct and discipline for MDPs would require to be established either directly by legislation or by a body established by legislation such as a Council for Mixed Discipline Practices". Such a council would require to promulgate its own code of conduct and disciplinary procedures before any authority was given to practise in MDP form, otherwise the area of discipline and complaints in the context of MDPs would be one fraught with difficulties over inter-professional jurisdiction, investigation and the application of differing standards of practice and penalties.

The establishment of such a body would almost certainly mean loss of status and authority for the Law Society.

(viii) *Compensation Fund*

Solicitors operate through the Law Society a compenstaion fund – such is not the case with accountants. This imbalance might make it difficult to achieve a satisfactory position for the client who might not be able to claim against the fund in the event of monies being mishandled by an MDP.

Alternatively it could place enormous strain on the Compension Fund which solicitors could not be expected to bear.

(ix) *Elimination of Cross-Subsidisation*

The opportunities for cross-subsidisation which arise in smaller communities will not exist to the same degree for MDPs. It can be questioned whether or not such cross-subsidisation is desirable but that it exists to the benefit of the poorer client is undeniable.

The larger the professional practice the more cross-subsidisation will be eroded. It is undeniable that larger professional units, such as large accounting firms, charge higher fees. This can, however, only be sustained in a larger commercial environment. This is not suitable for a smaller and more rural society such as Ireland. In a smaller more under-developed society cross-subsidisation is acceptable. It operates in such areas as electricity and postal services and has been recognised as proper. Why

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should the same not be so for law?

(x) *Taxation of Accounts*
It is believed that no other such independent assessment or taxation of fees exists for other professions who can sue for their fees based upon contract. The consumer safeguard of taxation of fees should be provided to the clients of an MDP. The alternative is that solicitors' accounts should no longer be subject to taxation and that special fee charging arrangements between solicitors and clients should not only be permitted but also enforceable.

(xi) *Practical Considerations*
If MDPs were permitted, it is idle to suggest they might not occur. If legislation legitimised the concept, there would be amalgamations of the small independent legal and accountancy firms in the rural areas with the problems already outlined regarding freedom of choice. In the major cities and financial centres both the "Big 5" accountancy firms and the financial institutions such as merchant banks would, with financial inducements, buy out the most able partners or departments of firms undertaking commercial and corporate work.

This important work would then be concentrated in the hands of the "Big 5" and such financial institutions, the majority of which would be controlled from outside Ireland. Quite apart from the lack of consumer choice for the commercial clients, the effect upon the small independent professional firms left only with the reserved areas and less remunerative legal aid type work, stripped of the benefit of the high value commercial work, would be the closure of many such firms.

6. The Law Society 1989 Questionnaire

In June, 1989 a questionnaire was issued by the Incorporated Law Society to some of the profession. Only 169 questionnaires were returned and whilst it was stated that 441 solicitors were employed by the practitioners returning the forms it would be presumptuous to insinuate that all 441 practitioners were involved.

The number of 169 practitioners is a tiny proportion (some 4.5%) of the total number of solicitors practising in the State.

Such a survey could not be stated to equate in any way to a full and complete debate throughout the profession in Ireland which should be undertaken as a matter of urgency.

7. Conclusion

There has been no clear demand for the introduction of MDPs. Neither has any Government survey indicated that there is a necessity for the introduction of MDPs. It would be prudent first for any demand to be identified – none has.

It is not of course to say that change is not desirable or necessary. Solicitors and the Law Society should attempt to treat not their own interests as paramount, but those of the consumer.

It is however, quite legitimate that the topic of MDPs which is important to the profession should be addressed both within the profession itself and between the profession and other interested parties. The worst scenario would be for a conclusion to be reached without any worthwhile debate having been undertaken. The profession must be made aware of the dangers and opportunities that arise in regard to MDPs. Debate must be seriously undertaken by way of literature, discussion and meetings throughout the profession.

The Law Society on behalf of the profession must adopt a position which is put to Government and debated with Government prior to MDPs being introduced by legislation. It is not evident as to how the anticipated new Solicitors Bill will deal with MDPs – if for example, an extraneous statutory council deals with MDPs, then the Law Society's own influence would diminish dramatically. If, on the other hand, the Law Society is to monitor MDPs then if a position and strategy is not carefully implemented the Law Society's position could erode seriously

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Initially, I believe that MDPs should be opposed. In a small country such as Ireland, with a small commercial and business base introduction of anything other than a strictly controlled form of MDP would be injudicious.

It is not appropriate to compare large and economically stronger societies such as Germany, the Netherlands and the UK, to Ireland.

If MDPs are however introduced I believe the Law Society should:

1. Ensure that solicitors are dominant i.e. forbid MDPs with any non-independent profession (stock brokers/ merchant banks/ estate agents).
2. Ensure that professions with whom MDPs are allowed have similar standards/codes of conduct to solicitors (i.e. the Dutch model).
3. Permit only MDPs with other advisers/thus excluding accountants who audit company accounts, since they may be deemed officers of companies.
4. Ensure that the Law Society has the power to control any involvement by a solicitor in an MDP.
5. Ensure that (at least) the Bar Council and the Law Society adopt a common approach to this matter.

ROSCOMMON BAR DRESS DANCE

May 1991

(left to right): Mrs. Anthony McCormack; Mr. Anthony McCormack, County Registrar; Mrs. Rebecca Finnerty, President, Roscommon Bar Association; Raymond and Eileen Monahan, Sligo; Noel C. Ryan, Director General of the Law Society and Mrs. Una Ryan.

The DCR personal injury judgements series*

One of the encouraging features of practising law in Ireland at present is the amount of new legal material that is becoming available, whether in the form of books, reports, articles or data bases.

For the litigation lawyer, what must be particularly welcomed is the commencement of a new series (referred to herein as "the DCR series") of judgements in High Court personal injury actions (including cases involving liability and assessment, assessment only, and where the plaintiff's claim has been dismissed) published by Doyle Court Reporters, Dublin. So far published are a 2-volume set of no less than 60 such judgments delivered (both in Dublin and on circuit) during the Michaelmas Term 1990 and a further set of 55 such judgments (in one volume) for the Hilary & Easter Terms 1991. About to be published shortly will be a similar volume for the Trinity Term 1991.

Each of these High Court judgments is presented in the form as recorded by the DCR stenographer concerned. Most of the judgments would have been delivered 'ex tempore', or nearly 'ex tempore', at the conclusion of each hearing, as opposed to being reserved judgments. This had the advantage of speed of publication, but, in certain instances, the disadvantage of lack of the clarity in the presentation of the facts and of the judicial determination that one expects and usually gets in a reserved judgment.

In the opinion of this writer, the real value of the new DCR series will be to reflect, term by term, the developing judicial approach to High Court personal injury claims, now that (since 1988) these are in the hands of a judge sitting alone without a jury. At the time of the change to judge-alone sittings, the conventional wisdom was that this would in time make more predictable the levels of damages for different types of injury. Whether this had been, or will become the case, still remains to be seen. Three years on, this writer tends to the belief that the level of damages in any particular case, be it perceived to be high or low, to a considerable extent depends on who is the presiding judge. However, more empirically, the regular practitioner in this area might agree that:

(a) more High Court personal injuries actions are being dismissed than were withdrawn from juries in the pre-1988 period;
(b) the levels of damages awarded for the less serious categories of injuries have gone down;
(c) the levels of damages awarded for the more serious categories of injuries have remained at what insurers would still regard as a high level.

In relation to (c), this writer does not regard either the perceived current levels of damages in serious cases as being too high. After thirty years in the litigation arena, this writer remains firmly of the view that those who suffer serious injuries, particularly with ongoing sequelae, physical and psychological, do require, and should receive, substantial damages; combined, may it be added, with subsequent sound investment advice which their solicitors should ensure they get. A 'ten-year-on' review of seriously injured plaintiffs, who received what at the time might have been perceived to be very high damages, would likely show that most were now very badly off. If, as is to be hoped, the DCR series becomes a permanent institution, the review of damages levels, decade by decade, as well as term by term, will assist such reviews and give practical evidence of the ravages of inflation.

Apart from the practising litigation lawyer, the DCR series will be of considerable value to the High Court judges themselves in their own personal search for fairness and consistency in the difficult task of assessing damages.

Finally, one must not forget the value of the DCR series to the academic lawyer who has (arguably) more time to take an overall view of what happens in the practical application of the law and to present useful conclusions to the practitioner and judiciary. What better source of insight, not only into ongoing levels of damages in personal injury cases, but also into the minds of our learned judges, who are in such cases called upon to sum up and analyse evidence and law and to present a coherent judgment immediately following a hearing. Hopefully, the presence of the DCR stenographer in court will not discourage the delivery of the immediate 'ex tempore' judgment in the less complicated case; but will, at the same time, ensure, where necessary, a constant judicial awareness of the need for, and the usefulness of, clarity of analysis and thought.

*The DCR series of High Court Personal Injury Judgments will be available (in ring-binder form) three times a year for Michaelmas, Hilary & Easter (combined) and Trinity Terms, at £60.00 per term, from Doyle Court Reporters, 2 Arran Quay, Dublin 7. Telephone 722833/862097. The 2-part volume for Michaelmas 1990 and the single volume for Hilary & Easter 1991 are already available.

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IRISH CANCER SOCIETY
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Practice Notes

RE: HOTEL LICENCES

The purpose of this note is to draw the attention of the profession to the need to exercise extreme care in establishing exactly what type of Licence attaches to a Hotel.

If a Hotel was licensed prior to 1902 it has what is commonly knwon as a full Publicans Licence. If a Licence was granted for a Hotel after 1902 pursuant to paragraph (2) of Section 2 of the Licensing (Ireland) Act, 1902 it is not a full Seven Day Publicans Licence as such but is a restricted Publicans Licence. The Licence authorises the sale and supply of intoxicating liquors in a premises, which said premises must comply with the following definition contained in paragraph (2) of Section 2 of the Act 1902 as follows:-

1. The premises must contain at least ten, or, if situate in a County Borough or the Dublin Metropolitan District, twenty apartments set aside and used exclusively for the sleeping accommodation of travellers.

2. There must be no Public Bar on the premises for the sale of intoxicating Liquor.

Section 19 of the Intoxicating Liquor Act, 1960 did away with the prohibition against having a Public Bar on a Hotel premises by providing that where a Hotelier obtained the consent to the extinguishment of an ''unrestricted'' Publicans Licence anywhere in the State, he would be entitled to make an application to the Court for an Order permitting him to have a Public Bar on his Hotel premises.

The making of an Order pursuant to Section 19 of the Intoxicating Liquor Act, 1960 does not convert the restricted Publicans Licence (Hotel) Licence into an unrestricted full Seven Day Publicans On-Licence. A Hotelier who has successfully invoked Section 19 of the Act of 1960 must still ensure that his Hotel premises come within the definition of Paragraph (2) of Section 2 of the Act of 1902 as amended in that it must contain a requisite amount of bedrooms there required and specified.

Furthermore for those Hotels which were first licensed pursuant to the Tourist Traffic Act, 1952 (these are quite limited in number) and for those Hotels which first obtained a Hotel Licence after the enactment of the Intoxicating Liquor Act, 1960 it is necessary in order to obtain a renewal of the Licence to show that the Hotel is registered wtih Bord Failte. This requirement was introduced by Section 20 of the Intoxicating Liquor Act, 1960.

The effect of this is that if a Hotel ceases to maintain the required number of bedrooms, or ceases to be registered with Bord Failte, then the premises ceases to answer the definition of Hotel contained in paragraph (2) of Section 2 of the Act, of 1902 as amended and consequently is no longer entitled to operate as a Hotel and thereby has no licence whatever to operate a Bar on the premises or serve intoxicating liquor to anyone. Once a Hotel premises ceases to operate as a Hotel, the Hotel Licence ceases to be a protection to the Holder.

The actual Licence paper relating to the full Seven Day Publicans On-Licence and to the restricted (Hotel) Licence is one and the same; however, some years ago for the purposes of alerting people to the differences in these licences, the following note was inserted at the bottom of the Licence as follows:-

> ''This form of Licence is used for both (1) Public houses and (2) certain Hotels licensed under Section 2 (2) of the Licensing (Ireland) Act, 1902. These Hotel Licences are subject to certain restrictions which do not apply to Public houses.

Unfortunately, it is not possible, from an examination of the statement, to establish whether this Licence relates to a Public House or a Hotel. The only way in which this can be done is to personally investigate the District Court Licensing Register relating to the actual premises as far back as records go and ascertain the jurisdictional section pursuant to which the Licence was first granted. If the Licence was first granted prior to 1902, then it will clearly not be a Hotel Licence as the Hotel Licence was only created in 1902.

There is a popular misconception that an Application in respect of Hotel premises pursuant to Section 19 of the Act, 1960 converts a ''Hotel Licence'' into a Publicans Licence. This is incorrect and it cannot be sufficiently stressed that a Section 19 Order merely does away with the prohibition against having a Public Bar on a Hotel premises.

Because of this popular misconception however, restricted Hotel Licences have in fact been renewed as Publicans Licences. Again this does not entitle the holder of a Hotel Licence, which he thought was a seven day publicans on-licence to hold a full publicans licence.

In order to protect himself or herself therefore, every solicitor when purchasing a licensed premises for a client, should personally and in detail inspect the District Court Licensing Register in respect of the premises in order to conclusively ascertain the type of Licence attaching to the said premises. □

PROBATE AND ADMINISTRATION

As soon as a Grant of Probate or Administration issues, the personal representatives are absolutely entitled to receive the proceeds of any funds in any bank, building society or post office.

A solicitor acting for such personal representatives should however, be extremely cautious in giving any undertaking concerning such funds.

Any undertaking should only be given after the solicitor ensures with the bank that the funds can only be paid through his office. This should be done by getting the usual irrevocable authority to act for each of the personal representatives and relevant beneficiaries and forwarding this to the bank with the

appropriate undertaking. (See page 188 of *Solicitors' Handbook*).

SOLICITORS UNDERTAKINGS

Certain Investment Companies have approached members of the profession seeking undertakings to support considerable borrowings from Lending Institutions where the Solicitors Undertaking, indicates adequate collateral and security (which is stated to be unencumbered) to back such undertakings and borrowings, which it is indicated are under the control and supervision of the solicitor concerned.

Inducements for giving such Undertakings are very often considerably large and very tempting to the unwary.

Solicitors should not give such Undertakings unless they are absolutely certain that such collateral is evidently available, clearly unencumbered and is and will remain under the personal control and supervision of the solicitor concerned.

The letter of Undertaking drafted by such companies requires the solicitor to certify membership of the Solicitors Mutual Defence Fund. Practitioners will be aware that the SMDF indemnity is limited to £250,000 in respect of each claim by a member. □

ANNUAL LICENSING COURT

The Annual Licensing Court for the Dublin Metropolitan District will be held at Court No. 33 on the second floor of the Chancery Place wing directly over the porter's office as follows:-

Thursday 26th September, 1991
10.30 a.m. CLUB RENEWALS.
2.00 p.m. OBJECTIONS TO PUBLICANS' LICENCES.

Friday 27th September, 1991
10.30 a.m. CONFIRMATION OF TRANSFER.

Monday 30th September, 1991
10.30 a.m. DANCE LICENCES.
2.00 p.m. MUSIC AND SINGING LICENCES.

Tuesday 1st October, 1991 10.30 a.m. RESTAURANT CERTIFICATES.
2.00 p.m. GENERAL EXEMPTIONS.

The Newspaper notice need not be a full copy of the notice filed in Court, and the following is a suggested shortened notice:-

THE DISTRICT COURT DUBLIN ANNUAL LICENSING COURT

TAKE NOTICE that Patrick Murphy will apply at Court 33, Four Courts, Dublin 7 on 27th September, 1991 at 10.30 a.m. for confirmation of transfer of an ordinary publican's licence attached to 274 Chancery Street.

Box and Cox
Solicitors.

The advertisement need not include the names and addresses of notice parties.

This form can be adapted for other applications which require a newspaper advertisement.

The object of the suggested notice is to reduce the cost of the application, but of course practitioners are free to use the longer form if they wish.

Incorporated Law Society of Ireland

CONSULTATION ROOMS
Four Courts

With effect from
1 September, 1991
the cost of hiring a Consultation Room will be £20 per hour or part of an hour.

USE OF EXTERNAL FAX MACHINES

Solicitors who do not themselves possess fax machines occasionally may be asked to receive or send fax messages using the facilities of a fax machine in other premises. In such circumstances it is imperative that, in order to maintain the confidentiality of the information passing, a member of the solicitor's firm attends at the fax machine to monitor the transmission of the message.

Such arrangements should be made on an individual basis. Under no circumstances should the number of any fax machine which is not in the solicitor's office and under the direct control of the solicitor be displayed on the firm's notepaper.

The Society will regard any such display or the unsupervised use of external fax machines as unprofessional conduct, involving as it does a serious risk of breach of client's confidentiality. □

STAMP DUTY – AMNESTY

The attention of the Taxation Committee has been drawn to an article appearing in the *Irish Tax Review* for July 1991 by Aoife Goodman of Craig Gardner & Co. in which she suggests that **an amnesty situation may exist** for stamp duty in respect of instruments executed before 1 November 1991. **If such a situation exists, these instruments would not be liable to penalty and interest charges.**

The interpretation of the provisions of Section 100 Finance Act 1991 which may bring about this situation is not one with which the Revenue Commissioners agree.

However, it is the Taxation Committee's opinion that there are uncertainties in the legislation and it is the Court which must be the final arbiter of any dispute arising from conflicting interpretations.

The Revenue Commissioners will issue a Statement of Practive in August which will set out their interpretation of the Interest and Penalties Section and how various instruments will be treated within that section. A copy of this Statement of Practice will be made available to the profession as soon as it comes to hand.

Taxation Committee

Submission by Law Society Representatives to working committee established by the Minister to advise on the proposed plan to turn the Land Registry and Registry of Deeds into a single Semi-State Body

(1) The Law Society welcomes the decision of the Minister to turn the Land Registry and Registry of Deeds into a single Semi-State Body.

(2) The Law Society has committed itself to supporting the Minister and the Registrar of Deeds and Titles in the implementation of the decision.

(3) The Law Society representatives have met Price Waterhouse who are charged by the Minister with preparing a report as to how this best may be achieved.

(4) The Law Society representatives have not seen the Price Waterhouse Report and as such have no knowledge of its contents or how much of their submissions have been taken on board by the Consultants in the Report.

(5) The Law Society believes that the problem is an urgent one to tackle. Equally, we agree that all aspects of the problem have to be investigated as any question of future legislation after the appropriate Bill is brought in to give effect to the decision will be impossible to achieve and it is therefore most important that all the problems are addressed, at this stage, to achieve the best possible result.

(6) The present position in the Land Registry, as we understand it, is as follows:-

(1) The number of applications in 1990 increased over the number in 1989 namely 225,032.

(2) The authorised staffing at the 1st January 1990 was 448 with the actual staff serving at that date 412. We have no information as to whether the staff has been increased during the past year, but we understand that this has happened,

(3) The number of outstanding dealings to be completed is marginally less than before but it is still in excess of 50,000.

(4) The average over-all delay in the registration of transfers of land has not improved since the 1989 figure of eighteen months to completion.

(5) The Land Registry continues to make a substantial surplus in income and expenditure figures.

(7) We have already committed ourselves to helping and assisting the Registrar in whatever way we can to achieve improvements in the service and are happy to record our appreciation of her work during the past year which has shown significant results in the following areas:-

(a) A continued improvement in the communication levels between the Society and the Land Registry.

(b) Very considerable progress in dealing with the arrears in Dublin which is much appreciated, particularly by the Dublin Solicitors.

(c) Substantial improvements in Dublin for the issuing of Folio and file plans.

(d) The creation of a very pleasant working atmosphere between the staff, the solicitors and the public in the Land Registry.

(8) It is common case that the improvement of the services in the Registry demands (a) resources (b) staff.

(9) The Law Society does not agree with and continues its total opposition to the Policy of the Department of Finance of extracting surpluses from the Land Registry which in the period 1984 to 1990 totalled three million eight hundred and sixty four thousand two hundred and eighty nine pounds. The expenditure of these moneys in the development of the services of the Registry would have already improved the position very considerably from what it is at the moment; the Society believes that the principle enshrined by the late Minister, Gerard Sweetman and as enunciated in the Dáil debates at the time, that the Land Registry should be self-sufficient, is the correct policy and should be adopted by the new Semi-State Body.

(10) We say this working in the dark because we do not know what figures will be required for capital expenditure in the Registry or how they will be financed. We recommend to the Working Committee that in considering the finance required for the Land Registry they would take into account the large take from stamp duty which the Government gets and which in the view of the Society is an integral part of the registration system.

(11) Again, it is common case that the future of the Registry lies in computerisation. The precedent established in Dublin and to be extended to Galway will show the way for the future in registration. The Law Society representatives pledge themselves to support the Registrar in any steps that we may agree to (a) reduce the arrears (b) speed up the registration process.

(12) Such ideals may be implemented by consideration of various methods of improving the existing situation and some of the headings under which this can be done are as follows:-

(a) Ensuring that the Profession, when ordering documents put in the correct Folio, County and name of registered owner.
(b) Consideration of a float system to be operated in the Land Registry so that dealings do not have to be rejected because of small mis-calculations of fees.
(c) Standardisation of fees to make them less complicated.
(d) Consideration of the extension of the facilities for Certification by solicitors to avoid investigation by Land Registry staff.
(e) Priority registration of dealings for commercial building development and house building development which will greatly facilitate the first registration of these developments in the long term and which also would help to increase the number of dealings which are the mainstay of the Registry's income.
(f) Arrangements for a blitz to be conducted in nominated Counties to dispose of arrears.
(g) Up-dating and simplifying the old Equity Discharge procedure particularly where there is registration for a long period without a recent transfer for valuable consideration.

REGISTRY OF DEEDS

A. Replacing the existing Memorial System with:
(a) a form comparable to a P.D. Form which would give full particulars of the transaction.
(b) Provision of sufficient staff to dispose of all the current arrears and the availability of searches up to the minute, thereby doing away with the 48 hour rule.
(c) Amending the legislation to cover the problem which has come to our attention, i.e. that where a Solicitor requisitions Searches in the Registry of Deeds on the morning of the completion of a transaction and a judgement mortgage is registered between the time the search is carried out and the actual closing takes place, it appears that as the law now stands the Judgement Mortgage takes priority; to protect a purchaser adequately, all transactions should actually be completed in the Registry of Deeds.

(13) This is not in any sense an exhaustive list but serves as examples of the way in which the Profession and the Registrar can co-operate to achieve mutual results.
(14) The Society has not expressed any view on the suitability of the premises save in so far that it is the view of our Committee that a suitable premises must be made available which will house the Land Registry under one roof, particularly bearing in mind any extension into other areas in the future.
(15) The Committee is also of a view that in the long term future the Land Registry should be developed with a view to minimising waste by at least sharing resources with the Ordnance Survey Office and the Valuation Office since they all maintain and work from similar maps of all of Ireland. Ideally they should be amalgamated, but we hesitate to suggest something as controversial.
(16) The Society believes that if it is going to have a significant input into the solving of the many problems arising that it may be of assistance to the Working Committee and the Minister that as soon as decisions have been made as to what course of action is to be adopted that the Society will put forward representatives to discuss the matters arising with the Department officials on a constructive and confidential basis independent of the Council of the Society in much the same fashion as has been achieved in the Solicitors Bill Committee.

(17) Finally, the Society congratulates the Registrar on the progress which she has made in the year since her appointment, expresses total confidence in her ability and expertise to solve the problems remaining and pledges its total support for her in achieving her objects. Equally, the Society stresses that these objects can not be attained without the provision by the Department of the necessary resources and adequate personnel to staff this most important service for our citizens. □

ANNUAL CHALLENGE SOCCER MATCH

Dublin Doctors

-v-

Dublin Solicitors

Friday, 30 August, 1991
Blackhall Place, 4.00 pm

All members of the profession and friends are welcome to attend the match and reception.

ANNUAL GENERAL MEETING 13th MARCH, 1991, ROSCOMMON BAR ASSOCIATION – ROSCOMMON

Front row – left to right: Harry Wynne, Noel Ryan, Director General, Marie Connellan, Miriam Walsh, Law Society, Rebecca Finnerty, President Bar Association, Donal Binchy, President Law Society, Tom Callan, John R. Sweeney.
Second row – left to right: Gerard Gannon, Roddy McCrann, Michael O'Dowd, Ian Munnelly, John Kelly, Dermot MacDermott, Kieran Madigan.
Back row – left to right: Peter Jones, John Carlos, Joseph Caulfield, Brian Neilan, Vice-President Bar Association, Vincent Harrington, Christopher Callan and Padraig Kelly, Secretary Bar Association.

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Bicentennial Ball of The Law Club of Ireland 1791 – 1991
Held at Royal Dublin Society, 21 June, 1991, in aid of the Research Centre at Our Lady's Hospital for Sick Children. (Left to right): Andrew F. Smyth, Junior Vice President of The Law Society, with Mr. and Mrs. Peter Sutherland.

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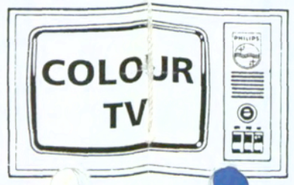

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Inaugural Dinner of the Galway Association of Apprentice Solicitors
(Left to right): Seamus Beirne, A.I.B., Carmel O'Grady (Apprentice), Emmet Fitzgerald (Apprentice), Karen O'Malley (Apprentice), David O'Malley, A.I.B., and Shane Dooley (Apprentice). The launching of The Association took place last March in Park House Restaurant, Galway, where the guests of honour were District Justice John Garavan and Mr. Leonard Silke, President of the Galway Solicitors Bar Association.

The President of The Law Society, Donal G. Binchy, with (far right) Mrs. Binchy and the Attorney General, John L. Murray and Mrs. Murray.

Presentation of the P.A. Curran Memorial Trophy by Michael T. Horan, Solicitor, Horan, Monahan & Co., O'Connell Street, Sligo, to Justice James P. Gilvarry at Enniscrone Golf Club on the occasion of the recent Sligo and Mayo Golfers' Outing.

Younger Members in Scotland (see report of page 236)
(Left to right): Dennis Macharaga, John Campbell (YMC), James H. Campbell, President of The Law Society of Scotland, and Robert Hennessy, YMC.

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Younger Members News

Scotland the brave

What do Liam Brady and the Younger Members Committee (YMC) have in common? Not a lot, you might think.

Well they have both recently been making their presence felt in Glasgow; Liam as the new Manager of Celtic and the YMC in the persons of Robert Hennessy and your correspondent, as delegates at the Scottish Young Lawyers Association (SYLA) International Guests Weekend (IGW) held in the city from 27th to 30th June.

The IGW coincided with, and to some extent overlapped with the SYLA's Arbitration Conference held on Saturday 29th June at the Stakis Grosvenor Hotel where the International Guests were based.

Those attending the IGW included representatives from Young Lawyers Groups in Denmark, Holland, Belgium and England. Ireland was well represented – apart altogether from the YMC duo – with a delegation of six from the Northern Ireland Young Solicitors Group (NIYSG), the Chairman of the Society of Young Solicitors (SYS) and his wife, together with Edel Gormley, who delivered the Irish Groups paper at the Conference.

Indeed, a little piece of history was made when the writer represented the "Shamrock Group" (NIYSG, SYS and YMC) at the Conference's opening session.

In addition to papers from the various National Groups, the Conference schedule included contributions from leading Scottish practitioners and academics. The first paper, on The New York Convention, was delivered by Mr. Walter Semple of Messrs Bird Semple Fyfe Ireland.

The next speaker was Mr. James Arnott of Messrs MacRoberts who dealt with Scots Law and F.I.D.I.C. The subject considered by Professor John Murray QC of Edinburgh University was the Uncitral Model Law. The final address, on Pre-arbitral Referee Procedure, was by Mr. Konstantinos D Magliveras from Aberdeen University.

Although the "weekend" began with dinner on Thursday, Friday was the first day with a full itinerary, beginning with a coach trip to Edinburgh where the first stop was Parliament House, home to Scotland's supreme Civil and Criminal Courts. The group was treated to a specially arranged, guided tour of the Advocates (Barristers) Hall and Library, with the contingent from Ireland in particular enjoying the experience as none of the party had been inside the Belfast or Dublin Bar Libraries! After lunch, the obligatory visit to Edinburgh Castle was followed by a reception very generously hosted by the President of the Law Society of Scotland, Mr. James Campbell.

An evening tour along the shores of Lough Lomond was rounded off with dinner in the Drovers Inn, which managed to re-create the authentic atmosphere of the 17th Century.

Sight seeing of a very different kind was the order of the day on Saturday when flights were organised from Cumbernauld Airport providing birds eye views over Sterling, Edinburgh and Glasgow. A very enjoyable afternoon finished with an impromptu acrobatic display which left the onlookers, though thankfully not the pilot breathless and dizzy.

The highlight of the weekend was the SYLA's Midsummer Ball at the Royal Concert Hall, a magnificent venue, in aid of the British Heart Foundation and Chest, Heart and Stroke Scotland which were appropriate charities to benefit given the sheer pace of the Highland Dancing in which everyone very actively participated. Although it was not admitted to our colleagues from the NIYSG, the Ball was at the very least on a par with the recent Bicentenary Ball at the RDS.

The weekend was to have concluded with Sunday Brunch but two fire alarms in the hotel provided the Conference with its own fashion parade of night attire. These unscheduled additions to the programme did not however lessen in any way the success of the weekend and the truly heroic work of Stuart Murray and his colleagues in the SYLA. Everyone felt really at home and experienced at first hand the genuine sentiment of the traditional Scots saying "Haste ye back".

John Campbell
Y.M.C.

CALL FOR PHOTOGRAPHS

Call to Photographers

"A photograph is not only an image (as a painting is an image), an interpretation of the real, it is also a trace, something directly stencilled off the real, like a footprint or a death mask".

Susan Sontag

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YOUNGER MEMBERS COMMITTEE – LOOKING FORWARD

The Younger Members Committee is a Committee of the Council of the Society the members of which are appointed annually by the President and Council of the Society. The Committee includes elected Council Members together with representatives from the Professional and Advanced Courses and solicitors from around the country.

As the time is drawing near for consideration for appointment of Committees for November 1991 to October 1992 the YMC is keen that solicitors from around the country should be represented on the Committee. In the past both the YMC and the President have written to Bar Associations seeking nominations to the Committee.

Looking at the statistics below it can be seen that the profession has a growing number of younger members and a substantial increase in the number of women becoming solicitors. At the moment there are over 3,500 solicitors holding Practisng Certificates (there are 4,611 solicitors on the Roll of Solicitors).

Conscious of the changing structure of the profession in Ireland and of the other forces of change which will make the professions within Europe a much closer community the YMC would urge that younger solicitors on the ground become involved either in the **YMC Committee or become a Network Contact Member for the Committee.** It is essential that the YMC represent the views of *all* the profession and bring these views to the Council of the Society. It is only with the active participation of solicitors that the YMC can achieve this objective.

If you would like to become involved in the YMC either at a local or Committee level please write to me at the Law Society, Blackhall Place, Dublin 7 or telephone me at 710711.

Sandra Fisher
Media Officer

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Year	Male	Female	Total	Total on file
1970	51	19	70	1017
1971	68	19	87	1104
1972	84	13	97	1201
1973	77	23	100	1301
1974	89	29	118	1419
1975	77	36	113	1532
1976	104	37	141	1673
1977	108	61	169	1842
1978	154	73	227	2069
1979	165	82	247	2316
1980	196	87	283	2599
1981	119	66	185	2784
1982	192	93	285	3069
1983	124	94	218	3287
1984	148	79	227	3514
1985	94	79	173	3687
1986	100	65	165	3852
1987	85	80	165	4017
1988	98	74	172	4189
1989	79	61	140	4329
1990	72	90	162	4491
1991	67	53	120	4611

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Vital Issues of Trade Union Law

NUJ, IPU & others, Applicants, and Noel Martin Sisk *(Registrar of Friendly Societies)* and others, Respondents, Judicial Review, High Court, 31 July, 1990, Keane, J., Supreme Court, 20 June, 1991.

Trade Union Law, especially regarding registration and mergers, is often overshadowed within the wider area of Labour Law which generally focuses on employment and dismissal aspects. The importance and complexity of Trade Union registration law, however, are apparent from a recent decision of Mr. Justice Keane in the High Court,[1a] which was reversed by the Supreme Court.[1b]

Summary of Case

The Irish Print Union (IPU) wished to transfer its engagements (in general terms, a type of merger) to the National Union of Journalists (NUJ). The Registrar of Friendly Societies is the Registrar of trade unions for the purposes of the Principal Act, the Trade Union Act, 1871, and also the Trade Union Act, 1975 dealing with mergers. The Registrar's approval of relevant documents is required before a transfer of engagements can be completed.[2]

The first respondent, Mr. Noel Martin Sisk, solicitor and current Registrar, declined to register the transfer of engagements. The reason for the Registrar's decision was that he was satisfied that the jurisdiction of the Trade Union Act, 1975, and therefore of the Registrar, is limited to trade unions registered in the State. (There is an exception, under Section 9 of the 1975 Act, to cover the other side of the coin: Where a majority of members of a British-based trade union in the State and Northern Ireland wish to merge with a trade union registered in the State). The NUJ was was not registered in the State, and could not be regarded as a trade union for the purposes of the Trade Union Act, 1975.

The NUJ, a British-based union operating in Ireland on a branch basis, is not registered with the Registrar of Friendly Societies, Dublin. (The NUJ does, however, have a negotiation licence granted by the Minister for Industry and Commerce, now Labour under the Trade Union Act, 1941). A judicial review of the Registrar's refusal to register the transfer of engagements was sought, together with an order of certiorari quashing the Registrar's decision.

Mr. Justice Keane, in the High Court, was satisfied that the Registrar was entirely correct in the decision he arrived at. The Court upheld the Registrar's decision because there was no legislative basis providing that a trade union registered in the State could amalgamate with or transfer its engagements to one not so registered. The learned Judge rejected an extra-territorial construction of the legislation and also

by
Anthony P. Quinn,
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MA, B. Comm, FIIS,
Dip. Public Adm; A.C.I. Arb.*

arguments by Mrs. Mary Robinson, S.C., counsel for applicants, based on freedom of association, Article 40.6.1 (iii) of the Irish Constitution.

Comment and Legislative Background

The Registrar's decision, as upheld by the High Court, raises vital points regarding trade union registration law and the position of British-based unions operating in the State. The outcome of the Registrar's decision and the High Court review, however, seems logical and correct having regard to existing law on trade unions in the Irish jurisdiction: The Trade Union Act, 1871, a landmark Statute and still the principal Act in the Irish jurisdiction; some smaller amending Acts, including 1876 and 1913 and the fairly technical Trade Union Act, 1975 on mergers by amalgamation (formation of new union) and transfer of engagements (transferor union ceases to exist but transferee union retains its existence). Transferor unions sometimes retain their indentity informally as a branch or section of the transferee union.

Trade Union Act, 1975 (No. 4 of 1975)

The main relevant provisions are as follows:

Sect. 1: "Trade Union", save where the context otherwise requires, has the same meaning as in the Trade Union Acts, 1871-1971.

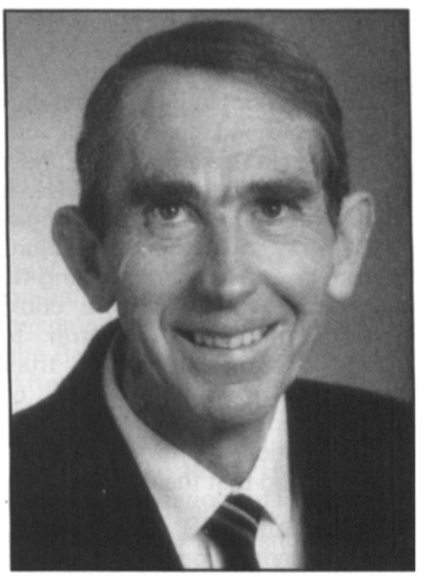
Sect. 2 (3): Subject to the Act, a trade union may transfer its engagements to another trade union.

Sect. 3: There are strict conditions for amalgamations or transfers of engagement, e.g. members' voting by secret ballot, and notification of members re holding the ballot.

Sect. 6: The legal instrument of amalgamation or transfer shall not take effect before it is registered by Registrar.

Sect. 10: The Registrar has important powers including adjudicating on complaints by union members regarding resolutions on amalgamations or transfers of engagements.

The Registrar's power under Sect. 10 (9), purporting to exclude investigation of the validity of a resolution approving an instrument of transfer or amalgamation, in any legal proceedings except those



Anthony P. Quinn

initiated by the Registrar, may be constitutionally suspect.[3]

Trade Union Amalgamations Regulations, 1976 – (S.I. No. 53 of 1976), made by the Minister for Industry and Commerce, with the consent of the Minsiter for Labour, under Sect. 13 of 1975 Act contain detailed procedures on: The manner for obtaining the Registrar's approval to proposed instruments of amalgamation or transfer, content and registration of such instruments, changes of name, and also notices for members' information.

Mr. Justice Keane in his judgment stated that while some of the pre-1921 legislation has been amended or repealed, the bulk of it remains on the statute book. For reasons stated later in this article, it is my view that this corpus of basic legislation on trade unions, inherited from a United Kingdom based on Ireland, England/Wales and Scotland, served its purposes but is now outdated and should be replaced.

Further Points from IPU/NUJ case and Decision of Keane J.

Constitutional and Territorial Aspects

Mrs. Mary Robinson, SC, for the Applicants, submitted that the relevant legislation should be construed in the light of the guarantees of freedom of association contained in Article 40.6.1. (iii), and that accordingly, "the Court should lean in favour of an interpretation (of the Trade Union legislation) which facilitated the merger (if that is how it can be best described) desired by both bodies".

Mr. Ercus Stewart, SC, for the Registrar, contended that the legislation should be construed as being confined to trade unions registered in this jurisdiction under relevant legislation. Otherwise, it would mean imputing to the legislature an intention that trade unions in foreign jurisdictions, having no connection with this State, could require the Irish Registrar to process applications for their amalgamation or transfer of engagements to each other.

Mr. Justice Keane, in his judgment, stated that the constitutional guarantee of the right to form associations and unions did not require him to read the legislation so as to extend the benefits of the Act (of 1975) to unions in other countries, except so far as the legislation itself actually provided. The learned Judge declined to confer an extra-territorial construction on the legislation. Therefore, a body which is a trade union under the law of a foreign country and is not registered in this State as a trade union cannot be regarded as a trade union within the meaning of the Trade Union Acts 1871-1982, and specifically within the meaning of s 2 (3) of the Act of 1975 although s. 2, 1913 Act was less restrictive.

Wider Issues

The Registrar of Friendly Societies and the High Court interpreted the existing law conscientiously in the NUJ/IPU and Registrar case. The effect of the decision, however, raises interesting wider issues. These require clarification and possibly legislative amendments, preferably in a consolidated Trade Union Act rather than in a piecemeal legislative approach.

Vital wider issues relate to:

(1) Rationalisation of trade unions, through mergers, and

(2) The legal position of unions with headquarters in another country, i.e. in practical terms up to now that meant British-based unions, operating in the Irish jurisdiction through branches. In the Single Market, '92, there may be a wider European dimension of mega-unions across frontiers.

Rationalisation of Trade Unions

Successive Irish Governments, political parties and the trade union movement itself agree that the proliferation of trade unions is inefficient and that rationalisation through mergers is necessary. The Department of Labour provides grants towards expenses to encourage the merger of unions, under Sect. 15, 1975 Act as amended by Sect. 22, Industrial Relations Act, 1990.

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The Federated Workers Union of Ireland (FWUI) absorbed many smaller unions such as the Federation of Rural Workers and the National Association of Transport Employees (NATE). SIPTU was formed recently from the FWUI and ITGWU both originating from the traditions of Jim Larkin.[4] Public service unions are also merging to form mega-unions. Despite the official and trade union consensus on the desirability of trade union mergers and public policy aspects, the effect of the Registrar's decision in the NUJ & IPU case, is to block a rationalisation step by the refusal to register a transfer of engagements: In the specific case, the proposed transfer from the Irish-registered IPU to the NUJ, a union with headquarters in Britain, was complicated by the existing legislation re unions with headquarters outside the State.

The Registrar, although appointed by the Minister for Industry and Commerce, is independent in the performance of his statutory duties. Government policy, as administered by the Department of Labour, strongly supports rationalisation, but the Registrar's decisions in accordance with law may be contrary to such policy. Apart from effectively blocking mergers which do not meet statutory requirements, the Registrar may also register new unions which fulfil relevant requirements but add to the multiplicity of trade unions.

British-based Trade Unions

The roots of the dilemma highlighted by the NUJ-IPU case are to be found in the peculiar position of British-based trade unions operating in Ireland. This has been a very emotive and divisive issue in the past, due to historical reasons and strong nationalist traditions.[5] Some rivalries and differences of policy still exist but generally Irish and British-based unions work in reasonably harmony.

The NUJ, the Amalgamated Transport & General Workers Union (ATGWU) and other British-based unions now Irish operate branches in mainstream Irish trade unionism. Nevertheless, there are policy differences, e.g. British-based unions are often critical of centralised pay bargaining.[6]

On a practical level, if a lawyer or member of the public, wishes to search public record files for information about the Irish branches of British-based unions, no enlightenment will be found in the Registry of Friendly Societies, Hume Street, Dublin 2. Unlike Irish unions, trade unions such as the NUJ or ATGWU cannot register with the Irish Registrar for reasons explained below.

Trade Union Act, 1941 (No. 22 of 1941)

That controversial Act was challenged in the courts and Part 3 was declared to be unconstitutional because it unduly restricted freedom of association enshrined in Article 40.6.1 (iii) of the Irish Constitution.[7] In its decision, the Supreme Court may not have given adequate weight to the public interest on the desirability of rationalisation. In the case, the National Union of Railwaymen (NUR), a British-based union, challenged the proposed exclusive rights for the ITGWU in certain employments. (The descendants of both the old rivals, the NUR and ITGWU are now united in SIPTU). The constitutional challenge did not affect the main areas of the 1941 Act dealing with negotiation licences.

The 1941 Act also introduced the concept of authorised trade union. Under Sect. 6, of the 1941 Act, Irish unions, (with specified exceptions mainly public service unions and bodies exempted by Ministerial Order, generally professional bodies such as the Law Society), cannot negotiate on wages or conditions of employment unless granted an negotiation licence. Deposits of specified sums with the High Court, are also required under the 1941 Act, amended by 1971 Act which imposed stricter conditions.

Sect. 7 of the 1941 Act confines the grant of negotiation licences to authorised unions registered in the State or, if not so registered, to trade unions under the law of another country with headquarters control in that country, in practice British-based unions. The general trend is for most Irish unions including public service unions to become registered.

Registration was originally a voluntary process under the Trade Union Act, 1871 which conferred certain advantages e.g. re property and obligations such as filing returns to the Registrar. Registration has now become a virtual necessity for Irish-based unions involved in industrial relations.

British-based Unions Distinguished (Meredith Decision) (1936) IR 471.

The position of British-based unions is different and complex, with deep roots in Irish labour history illustrated by a High Court case of 1935-36, between the ITGWU and the ATGWU, known as the Meredith J. decision.[8]

It is a vital case in understanding the position of British-based unions and why they are not registered in this jurisdiction with the Irish Registrar. Keane J. in the recent NUJ/IPU case referred to decision of Meredith, J.

The plaintiffs, ITGWU, sought (1) to restrain the defendants, the ATGWU from carrying on business in Ireland under the Transport & General name or any similiar name likely to deceive the public; (2) a declaration that the recording of the ATGWU or TGWU (its British title), or of its rules, or amendment thereof, in the Register of Trade Unions in the Irish Free State was illegal and invalid.

The High Court held: A. An action for tortious acts could not be maintained because of indemnity under Sect. 4, Trade Disputes Act, 1906; B. *The recording in the Irish Registry of the rules of the British-based ATGWU was inoperative and of no legal effect.* A vital plank of the decision was the interpretation of Sect. 6 Trade Union Act, 1876, prescribing procedures for registering unions in more than one country of the UK – England, Scotland or Ireland, then a legislative union.

The 1876 Act allowed unions, registered in one UK country, to operate in the other countries by sending the rules for registration to the Registrar in the other country. After the passing of the Irish Free State Constitution, "Ireland" had a different meaning than that envisaged in 1876. By virtue of Sect. 3, Adaptations of Enactments Act, 1922, "Ireland" meant Saorstát Éireann – the Irish Free State. Sect. 6 of the 1876 Act was

no longer applicable. Therefore, the ATGWU and other British-based unions could not register with the Irish Regisrar.[9] The 1941 Act, however, took the Meredith decision into account by allowing British-based unions to be granted negotiation licences without being registered in the State. "Authorised trade union" was a concept introduced by the 1941 Act.

Public Information on British-based Unions

Although not formally registered in the State, these unions must meet certain requirements. Sect. 13 of the 1941 Act provides, inter alia, for union rules on entry and cessor of membership of persons resident in the State; notice to the Minister for Labour of registered Office.

Names of persons to receive service of documents and also of changes in committees and rules must also be notified. Sect. 17 of the 1975 Act, operative by Ministerial Order, SI 177 of 1983, provides for a committee of management of members resident in the State or Northern Ireland. The latter provision acknowledged the position of British-based unions operating in an all-Ireland context. The Irish Congress of Trade Unions (ICTU) is an all-Ireland body.

On the other side of the coin, unions registered in Dublin but operating across the border, e.g. ITGWU (now part of SIPTU), and also INTO and IBOA, representing national teachers and bank officials respectively, have traditionally been required to furnish information to the Registrar in Belfast. The functions of the English Registrar on trade unions are now performed in a modified way by the Certification Officer, London. British trade union law has diverged considerably from that in the Irish jurisdiction and the 1871 statutory base.

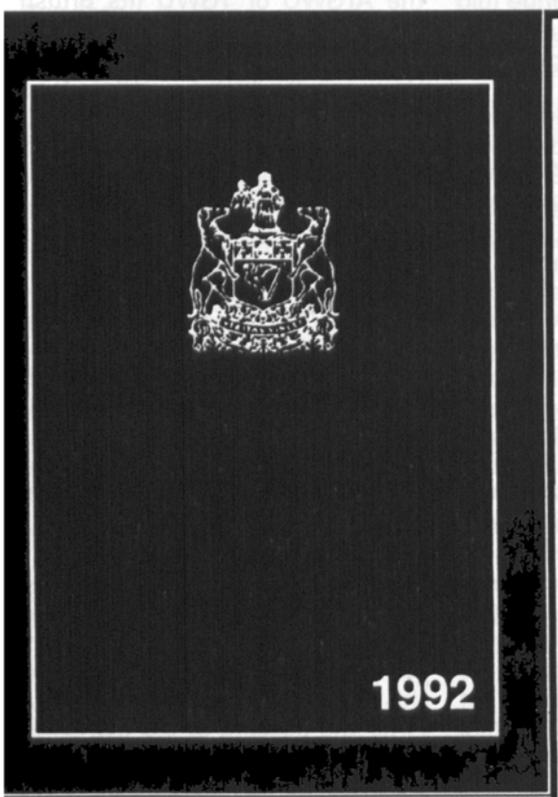
Conclusion

It is appropriate that there should be a statutory office in the Irish jurisdiction, such as the Registrar of Friendly Societies, independent of the Department of Labour, to register trade unions' rules and mergers. Sometimes the Registrar's decision e.g. on transfer of engagements as in the NUJ & IPU case, or in registering a new union, although in accordance with law, may be contrary general official policy on trade union rationalisation. Such independence of the Registrar, however, protects the interests of trade unions and their members, e.g. by providing an objective check and also an inexpensive means of processing complaints.

Law Reform Required

The Registrar of Friendly Societies is limited in his functions to the statutory provisions of the Trade Union Acts, the basic one dating from 1871. The High Court decision in the NUJ/IPU case, however, has highlighted the need for law reform of procedures on trade union registration and mergers, and the position of external unions (British-based) operating in the Irish jurisdiction.

Many of the detailed procedures on registration and submission of information to the Registrar are outdated e.g. there is no clear statutory requirement for audited accounts; the 1871 Act uses outdated terms such as workmen



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and masters. In summary, subsequent to the points highlighted in the NUJ/IPU case, in my view, reform is required as follows:

Amalgamations and transfer of engagements between Irish-based and external trade unions immediately affect British-based unions, but there may be long-term Single Market implications for unions based in other EC Member States which establish a presence in Ireland.

Unions which have their head offices outside the Irish jurisdiction, but which operate branches in the State, should be required to register with the Irish Registrar of Friendly Societies on an external registrar system following the precedent for external companies under Part X1 Companies Act, 1963. Registration and information procedures would be rationalised for both Irish and external-based unions. Information about trade unions would be more transparent. The trade union movement's policy aimed at greater disclosure of company information should be reciprocated by unions disclosing more data about their operations. Employers and unions would welcome a consolidated modern Act on trade union registration and mergers.

The Supreme Court in reversing the High Court decision referred, *inter alia*, to (i) trade unions such as NUJ, which although not registered here have a presence and members in the State. (ii) Freedom of association under the Constitution – McCarthy, J. while agreeing with the Chief Justice referred also to the Registrar of Friendly Societies having acted in good faith and with great propriety.

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NUJ & IPU and Registrar of Friendly Societies Case, July 1990:-

Counsel
For Applicants: Mrs. Mary Robinson, SC, & Mr. Gerard Durcan. B.L. For Respondents: Mr. Ercus Stewart, SC and Mr. Roderick Horan, B.L.

Solicitors
For Applicants: Ann Neary & Co.
For Respondents: Liam Lysaght & Co.
In the Supreme Court, John Rogers, S.C. and G. Durcan, B.L. appeared for the applicants and Patrick J. Morrissey & Co. were solicitors for the respondents.

***Anthony P. Quinn, Barrister of King's Inns & Lincoln's Inn, and a former Assistant Principal, Office of Registrar of Friendly Societies, is a member of the *Irish Society for Labour Law* & the *Irish Labour History Society,* but this article was written in his personal capacity.**

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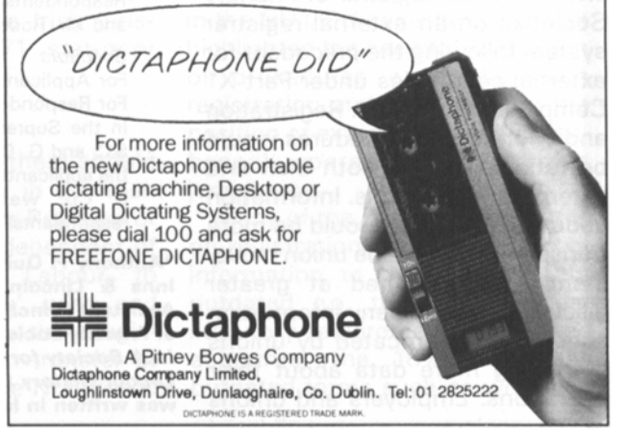

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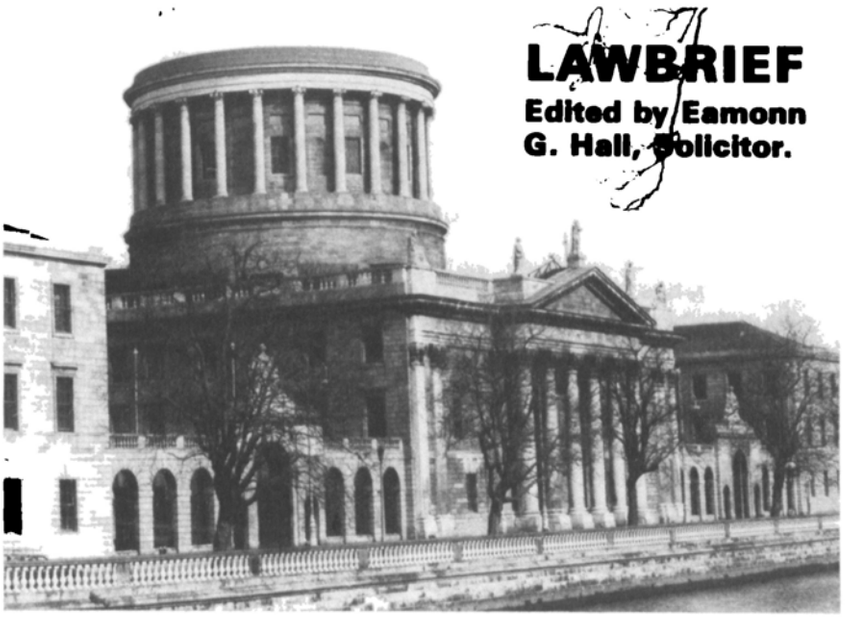

LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

JUDGES OF THE DISTRICT COURT

The Courts (No. 2) Bill 1991 was passed by the Dáil on July 3 1991 and on July 9, 1991 by the Seanad. This legislation, *inter alia*, extends the jurisdiction of the Circuit Court from £15,000 to £30,000 and the jurisdiction of the District Court from £2,500 to £5,000.

The legislation also provides, *inter alia*, for a change in the mode or style of address of judges of the District Court. The mode or style of address will change from "Justice" to "Judge." The Minister for Justice, Mr. Burke, stated in the Dáil on July 3, 1991 that although under the Constitution, District justices were judges, they had been styled as justices since the foundation of the state. The existing statutory provisions (contained in section 5 (2) of the *Courts Establishment and Constitutional Act, 1961)* provided that each judge of the District Court shall be styled "Justice of the District Court." The Minister stated that there had been recommendations previously to change the style of address of a judge of the District Court including one by the Committee on Court Practice and Procedure and the opportunity was taken in the Bill to make the change.

The Minister stated that the change in the style of address in judges in the District Court will come into effect three months after the date of passing of the Bill. This will allow for the passing of other Bills before the Oireachtas which contained references to justices of the District Court, without having to amend them. As and from the commencement date, all reference to justices contained in any statutory or statutory instrument in operation on that date would be construed as a reference to a judge of the District Court by virtue of section 21 of the legislation.

The Minister for Justice, Mr. Burke, thanked deputies in the Dáil for the welcome they had given to the amendment which proposed that in future justices of the District Court would be known as judges of the District Court. The Minister stated that the change was more than symbolic as 90% of the people who contact with the courts of the land did so at District Court level. It was important that the men and women who sit on the bench of the District Court should be addressed as "judge" which is what they were and what the public perceive them to be. The Minister was glad to have the opportunity to remove the title "justice" – a relic of olden days – from the statute book.

BARRISTERS MAKE CHANGES

About 500 of the country's barristers at the largest ever meeting of the Bar of Ireland held in the Law Library in the Four Courts, Dublin, on June 22, 1991 voted for competition in the provision of the services of the Bar when they decided to remove from their rules any rules fixing the number of counsel to be briefed in a case and as to the relationship of their fees. As a result, these will all be matters for agreement between the barrister and the client, through the solicitor. These changes will become effective with the passing into law of the *Courts (No. 2) Bill, 1991*, which will increase the jurisdiction of the Circuit Court to £30,000.

The Chairman of the Bar Council, Nial Fennelly SC, made the following comments.

> "[The] meeting resulted from a very extensive review of the structure of the Bar and professional practice. It included consideration of the Report of the Fair Trade Commission published last year. Detailed discussions have taken place with the Minister for Justice concerning changes which he requested in the interests of the public. Following the changes which have been agreed, the Bar is confident that it cannot be accused of maintaining restrictive practices regarding the provision of its services. Its role is to provide, by means of the independent practitioner, legal representation and legal advice efficiently and at a reasonable cost to the public through the solicitors' profession throughout the country. It will be a vigorous independent self-regulating profession and can face the future with confidence.

The barristers also adopted a new disciplinary code for the Bar. The Federation of Irish Employers and the Irish Congress of Trade Unions have agreed to nominate the lay representatives to the new Barrister's Professional Conduct Tribunal.

TRADE DISPUTE LAW

The Minister for Labour, Mr. Bertie Ahern, reviewed aspects of trade

union law at a seminar on the *Industrial Relations Act, 1990* organised by the Irish Society for Labour Law on July 13, 1991. *Lawbrief* deals here with aspects of trade dispute law which were considered by the Minister.

Until the passing of the 1990 Act, the statute law in relation to striking and picketing was primarily contained in the five sections of the *Trade Disputes Act, 1906,* with a number of further provisions in the *Trade Union Act, 1941* and the *Trade Disputes (Amendment) Act, 1982.*

The Minister stated correctly that the law in this area was not as simple as a reading of those Acts might suggest. Since 1906 a considerable volume of case law had arisen from the interpretation by the Courts of the provisions of the *Trade Disputes Acts.* As a result, the law has become extraordinarily complex and its precise limits were vague and confusing. The usefulness of the statute law in providing a guide to conduct had diminished and it was increasingly necessary to look to case law.

The approach adopted in the area of trade dispute law was to repeal the *Trade Disputes Acts* of 1906 and 1982 and to re-introduce the main provisions of these Acts with amendments. An important by-product of this approach was to give the legislation a clear presumption of constitutionality. Legal actions to challenge the constitutionality of the 1906 Act had been threatened from time to time but were not proceeded with.

The Minister outlined the main features of the provisions relating to trade disputes:

- The definition of trade dispute has been amended to exclude worker versus worker disputes.
- The immunities no longer apply to disputes involving one worker where procedures have not been followed.
- Picketing has been confined to an employer's place of business.
- Secondary picketing is permissible only in situations where workers have a reasonable belief that the second employer has acted in a way likely to frustrate a strike or other industrial action by directly assisting their employer.
- An anomaly whereby organising a strike was protected by the immunities but threatening to organise or take part in a strike appeared not to be protected has been cleared up.
- The immunity enjoyed by trade unions in respect of tortious acts now applies only in the case of acts committed in contemplation or furtherance of a trade dispute.
- Unions are required to have a rule in their rule books within two years (i.e. by 18th July, 1992) providing for the holding of secret ballots before engaging in or supporting a strike or other industrial action.
- In trade dispute situations where a secret ballot has been held and notice given, the granting of injunctions, particularly ex-parte injunctions, is restricted.

Picketing

The picketing provisions in the 1990 Act, sought, according to the Minister for Labour to strike a balance between the rights and interests of both sides. In the case of primary picketing the previous extremely broad definition, which permitted picketing *"at or near* a house or place where a person resides or works or carries on business or happens to be'', has been amended to read ''at, or where this is not practical, at the approaches to'' a place where their employer carries on business.

The intention was to ensure that picketing takes place at the employer's place of business. However, because of the position in relation to private property rights and the need to avoid trespass on private property, there may be circumstances where it will not be possible to picket directly at the employer's premises. The Minister gave the example of where a dispute arises affecting one employer in a shopping centre or industrial complex, it should be possible to secure agreement that the picket be placed at the individual employer's business rather than at the entry to the complex. It was necessary, however, to provide a saver for situations where this turns out not to be practical or possible.

Secondary Picketing

As far as secondary picketing is

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concerned, the Minister stated the Act regulated such picketing more closely and it defined secondary picketing in clearly understood industrial relations terms. Secondary picketing – that is, picketing at the place of business of an employer other than an employer involved in a trade dispute – is now lawful only where the workers in dispute have a reasonable belief that the second employer has directly assisted the employer who is party to the dispute for the purpose of frustrating the strike or other industrial action. There were strong demands from the employers' side for the total outlawing of secondary picketing but it was the Minister's belief that to do this would tilt the balance in favour of employers by providing a means of breaking strikes by setting up business elsewhere.

Ballots and Injunctions

The Minister outlined the provision relating to ballots and injunctions. The secret ballot provisions require every union to have a pre-strike secret ballot rule in its rule-book within two years of the passing of the Act (i.e. by 18th July, 1992). The provisions on injunctions are closely linked to those on secret ballots. Where a secret ballot has been held and at least one week's notice of industrial action has been given, the employer will not be entitled to seek an injunction without giving notice to the union and the workers concerned. This is to remedy the abuse of injunctions by some employers in trade disputes.

The granting of ex-parte injunctions, often in a judge's home outside court hours, has been a matter of considerable concern to trade unions for a long time. The Act also provides that interlocutory injunctions will not be granted where, in addition to having a secret ballot and giving notice, the union establishes a fair case that it was acting in contemplation or furtherance of a trade dispute. However, these restrictions on the granting of injunctions will not apply in the case of trespass, damage to property, or action likely to cause death or personal injury.

One Worker Disputes

The 1990 Act provides that immunities will apply in the case of disputes involving one worker only if procedures (where these exist in the employment concerned) for resolution of grievances have been resorted to and exhausted.

The reasoning behind this provision is to remove protection from individuals taking wildcat action (and from those supporting them) in situations where there are procedures available for the resolution of grievances.

During the Dáil debate a lot of emphasis was laid on the position of vulnerable categories of workers and the claim was made that the provision as it then stood could act to the detriment of such workers. To take account of such fears, the Minister amended the relevant section to make it clear that the procedures referred to were *agreed* procedures, either ones availed of by custom or in practice or ones provided for in a collective agreement.

RTE TV QUIZ

Challenging Times

SADSI has been invited to participate in this inter-college TV Quiz.

Teams of 4 should contact Joe Kelly c/o A & L Goodbody before the 1st September.

SADSI will organise a competition between interested teams and prize money will be awarded to the winner.

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DEBATING

SADSI is selecting teams to take part in the following competitions:

- Jessup Moot International Law
- Coyle Hamilton Law Students Debating Competition
- Irish Times
- Observer Mace

Anyone interested please contact either Joe Kelly c/o A & L Goodbody or Donal Taaffe c/o Fergus P. Taaffe.

A meeting will be held upstairs at O'Dwyer's of Leeson St. on Tuesday, 27th August at 7.00p.m.

Association of Pension Lawyers Republic of Ireland Regional Group – Activities Update

The 17th of May 1990 was a significant date for Pension Lawyers. The European Court of Justice passed down an important decision on equality and pension schemes. The Barber Case has absorbed the attention of many of our colleagues in the United Kingdom for the past year. In Ireland we have been absorbed by the Pensions Act 1990!

The Association had an extremely busy year. Our first meeting on 25th September last was addressed by the Chairman of the Society of Actuaries in Ireland, Mr Paul Kelly FIA and the Chairman of the Irish Association of Pension Funds, Mr Paddy Gallagher BL. The theme of the meeting was "The Pensions Act 1990 – An Update". This meeting was followed up by a meeting on a specific aspect of the Pensions Act. Chetwode Hamilton of Arthur Cox & Co. delivered a detailed apper on "Trusteeship and the Pensions Act 1990". We were delighted that this Presentation formed the basis of an Article which was published in this March's Law Society *Gazette*. By January 1991 the Pensions Board itself had been appointed and the Disclosure of Information Regulations were published shortly afterwards. At that juncture our Legislative and Parliamentary Committee, which is chaired by Michael Lane of New Ireland Assurance Co. Ltd, with Ultan Stephenson, Roddie Buckley, Brian Bohan and Anne Maher, got to work on the Disclosure Regulations. Their recommendations and comments were passed on to the Association's representative on the Pensions Board, Mr Brian McCracken SC who is chairman of the Legislative and Parliamentary Committee of the Pensions Board.

In early February one of our members Fiona Thornton of A & L Goodbody delivered a paper on "Some practical implications of the principle of equal treatment in its application to pension schemes" to members of the Association and also members of the Irish Society for Labour Law. We were delighted that the chairperson of the Equality Agency joined us for that meeting. We were also delighted to be invited by Irish Pensions Trust Ltd to refreshments afterwards where there was a great deal of exchange of views on Equal Treatment and the Barber Case!

It has been the policy of the Association to encourage members who find themselves in London on nights when the Association of Pension Lawyers hold their Seminars to attend so that we can keep up to date with developments in Pensions Law in the United Kingdom. Throughout the year members of the Association have attended meetings of the Association of Pension Lawyers. Chetwode Hamilton was at a joint meeting between the APL and the Association of Consulting Actuaries. That particular meeting discussed the conflicts of interest in dealing with pension schemes generally i.e. where a Lawyer might be acting for both the Trustee and the Principal Employer. Brian Buggy of Matheson, Ormsby & Prentice attended another meeting on the Imperial Tobacco cases.

To coincide with the tremendous work which the Legislative and Parliamentary Committee were doing, Amme Maher of Irish Life Assurance plc delivered a paper on "Pensions Act 1990 – The Disclosure Regulations". This was a technical presentation on a specific area of the Pensions Act and of great interest to all our members. Once again the social exchange after the meeting proper was most enjoyable and this time it was hosted by Pension Investment Consultants Ltd.

May was a busy month as we celebrated our first anniversary and held a Dinner in the Kildare Street and University Club which was a resounding success. We were delighted that the Regional Director of the Association of Pension Lawyers, Andrew Fleming, travelled from Glasgow to join us for dinner. Andrew was most complimentary about our success throughout the year and encouraged us to greater heights for the future.

Our final meeting for the 1990/91 session was held in late May. Mr Brian McCracken SC our respresentative on the Pensions Board gave us a presentation on "the Overview of the Pensions Board's Activities to date".

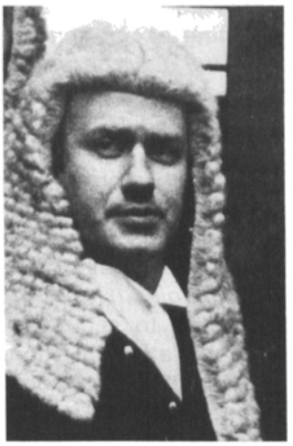
The Association of Pension Lawyers are holding their Annual Conference in Dublin in October. This is as a tribute to the great success of our Association and the enthusiasm we have shown in establishing our Regional Group. It is a great honour to us that the Association are coming to Dublin and it will heighten barristers' and solicitors' awareness of the whole area of Pensions Law.

On the eve of the Conference our Regional Group will also be celebrating its establishment as a separate Association from the Association of Pension Lawyers in the United Kingdom. To mark our establishment we will be hosting a reception for our members and for all the delegates to the Conference. We are delighted to have the opportunity to thank all of those people in the legal profession and in the insurance industry who have supported us so enthusiastically throughout the year and who have encouraged us to go forward to our own separate establishment. In future we will be known as the Association of Pension Lawyers in Ireland.

Finally I am delighted to be able to state that our membership has risen from 12 on 16 May 1990 to over 80 by end June 1991. The increase in numbers in our Association is a great tribute to the membership who have supported us so loyally throughout the year.

RAYMONDE KELLY

New President of the Circuit Court



The Hon. Mr. Justice Frank Spain has been appointed President of the Circuit Court. Judge Spain holds a Batchelor of Civil Law Degree (U.C.D., 1967) and was called to the Bar, Kings Inns, in 1968. He was called to the Inner Bar in 1980. He has practised in Dublin and on the Eastern Circuit in the areas of criminal law and personal injury actions. He was appointed a judge in July, 1987.

Judgments of the Court of Criminal Appeal 1984-1989

Edited by: **Eithne Casey, Barrister-at-Law**

This volume, the third in the series commenced by the late G.L. Frewen, brings up to the year 1989 the publication of judgments of the Court of Criminal Appeal. It is divided into three parts as follows:

Part I Previously unreported judgments 1984-1989

Part II *ex tempore* judgments 1984-1989

Part III headnotes of cases reported in the *Irish Reports* and *Irish Law Reports Monthly*, 1984-1989

What is new about the third volume is the inclusion of a section in Part II devoted to *ex tempore* judgments of the court. Busy practitioners should find this of tremendous benefit. It will also be useful to academics and students seeking a more complete picture of the jurisprudence of the court. Sentencing is one of the most important areas of criminal law and one in which there are very few reported cases. This volume includes such cases.

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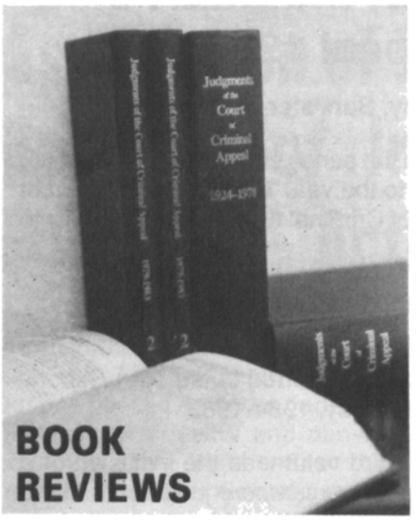

BANKRUPTCY LAW AND PRACTICE IN IRELAND [by Mark Sanfey and Bill Holohan, The Round Hall Press, Price £37.50]

It was said in the 19th Century that practitioners in the Bankruptcy Court has "lost the words and played everything by ear"!
This book will be of enormous help for those looking for the Words!

Not so long ago, the law and practice relating to bankruptcy and personal insolvency was avoided studiously by most practitioners. Happily, that attitude has changed in recent years and the speed of change will increase dramatically with the availability of this book.

Since the enactment of the *Bankruptcy Act, 1988*, this whole area of law seems so much more relevant and immediate.

The book contains an excellent blend of an analysis of the substantive law as well as paying close attention to the requirements of practitioners.

Each chapter has a brief introduction giving some historical background. From this, it is quite apparent that, although the 1988 Act is very suitable to the late 20th Century, most of the principles of bankruptcy evolved in the 19th Century (and before) and remain in place.

The book is the result of a joint venture between a practising Barrister and a Solicitor (a formidable combination!) and as a result, it is very practical and includes helpful precedents including a sample Statement of Affairs, already completed.

There is an entire chapter devoted to the effect of bankruptcy on the family home. This will prove invaluable for practitioners advising clients in relation to an extremely emotive problem.

Similarly, there is a chapter on "Bankruptcy and Conveyancing" which will provide the answers to many questions which crop up from time to time in researching titles.

It is interesting to see that in the chapter headed "alternatives to bankruptcy", there is a description of "the protection process". This allows an insolvent individual to request the High Court to protect his assets from any action by creditors. This concept is a carry-over from the 1857 Act. Now, as we all know, this concept is available in corporate insolvency as a result of the *Companies (Amendment) Act, 1990.* In fact, advisers on corporate insolvency will also benefit from this book because it deals with the historical development of bankruptcy principles which have been adopted by corporate insolvency law.

Overall, this is a very welcome book and practitioners are indebted to the authors for their industry in producing it.

BARRY O'NEILL

THE NEW COMPANIES LEGISLATION [By Gerard McCormack. The Round Hall Press. Dublin xxiv + 252pp, hardback, £37.50].

In his book, *Company Law in the Republic of Ireland,* Mr. Justice Ronan Keane wrote of the stupefying burden of Irish company law which weighs down Irish business. He commented that the people who actually conduct commercial life are enmeshed in webs of unnecessarily complex legislation for which, in some instances, only lawyers and accountants ultimately benefit. Mr. Justice Keane called for a radical review of Irish company law. Such a general review does not appear to be on the legislative horizon. Many lawyers and accountants in their professional capacities equally regard company law in Ireland as a stupefying burden. That burden is relieved, to a certain extent, by the writing of our scholars.

The Companies Act, 1990, which includes 262 sections, was introduced in 1987 and enacted in December 1990. This Act fundamentally reforms several areas of basic company law in Ireland. *The Companies (Amendment) Act, 1990,* originally Part IX of the *Companies (No. 2) Bill 1987,* was enacted to secure the rescue or rehabilitation of ailing companies.

Gerard McCormack, a graduate of the National University of Ireland (University College Dublin), a barrister of Kings Inns, Dublin, now a lecturer in law at Southampton University, sets out in his book to provide a comprehensive guide to the new companies legislation. The legislation is examined against the background of existing law. Copious references are made to the parliamentary debates which help to explain the background to relevant sections and often their meaning. Periodical literature is helpfully set out, where appropriate, in the footnotes. The reader is also referred to the law and practice in other jurisdictions, where appropriate.

Gerard McCormack focuses on thirteen major themes in his book. Some readers of the *Gazette* may find it useful to know the titles of the chapters. The chapters have the following titles: Introduction; Investigation of Companies; Purchase by a Company of its own Shares and Related matters; Investment Companies; Controlling Self-Dealing by Directors; Disclosure of Interest in Shares; Insider Dealing; Director Disqualification and Restriction; Accounts and Audits; New Rules on Receivers; Rescue of Ailing Companies; Swelling the assets of a Company in a Winding Up and Miscellaneous Provisions in a Winding Up.

Gerard McCormack has given the new companies legislation the detailed and thoughtful attention it deserves. His book is well researched and informative, and deserves to be welcomed.

EAMONN G. HALL

BEYOND ANY REASONABLE DOUBT?

[by Kenneth E. L. Deale, Gill & McMillan, 1990. £6.99].

This book of Irish murder trials was first published in 1960 by the late Mr. Justice Kenneth Deale, a Circuit Court judge on the Eastern Circuit for many years before being elevated to the High Court towards the end of his long judicial career. This was Judge Deale's second book of that genre, the first being MEMORABLE IRISH TRIALS.

To older legal practitioners, Judge Deale is better known as the author of the seminal work on the Irish Landlord & Tenant Act 1931. His son, Julian, has followed in his father's footsteps with his recent book on Irish Landlord & Tenant Law. Julian has also written the foreword to the 1990 re-publication of BEYOND ANY REASONABLE DOUBT?

Among the ten murder trials described and analysed in detail (of varying gruesomeness), is the trial of David O'Shea in 1931, for the murder of Helen Sullivan at Rathmore on the Cork/Kerry border. This trial is memorable for one particular incident where, after a number of gardaí had visited the suspect's house, all but one left, the one hiding himself under a bed from where he allegedly heard an incriminating conversation between the suspect and his sister.

Another of the trials described is entitled the Malahide Mystery (A.G. -v- Henry McCabe), when, in March 1926, 'La Mancha', the Malahide residence of the McDonnell family, was set alight after the murder in it of no less than six people. Parts of the ruin of 'La Mancha' remain visible to this day.

All in all, a very easy, if necessarily morbid, read. Because they are all Irish cases, the Irish reader will probably feel a sense of identification with the 'locus-in-quo' of each crime, whether that 'locus' be in rural Cork, Kerry, Louth or Roscommon or in urban Booterstown, Drumcondra or Rathmines. Also, those familiar with today's criminal process will be conscious of the much shorter time that elapsed in those times gone by between the arrest and charging of the accused and the trial by judge and jury; and, following conviction, the hearing of the subsequent appeal by the Court of Criminal Appeal; and (where it occurred) the execution of the convicted murderer. Nowadays, the wheels of justice grind much more slowly, if more humanely in terms of the untimate outcome. Obliquely, Mr. Justice Deale, by highlighting areas of doubt in some of the cases, was an advocate of the abolition of that most final of legal conclusions, the death penalty.

□

Michael V. O'Mahony

NORDIC STUDIES IN INFORMATION TECHNOLOGY AND LAW

Edited by P. Blume. [Kluwer, 1991, xii + 223 pp. Dfl 90, –/US$54 (excl. VAT)]

The Nordic countries comprise small jurisdictions, Sweden, Finland, Denmark, Iceland and Norway. Their legal traditions emphasise statutory law, but they are not civil law countries. Court-made law is important but these countries cannot be classified as case-law jurisdictions. The Danish, Swedish and Norwegian languages are sufficiently similar for communication to be carried out without interpretation.

Legal informatics plays an important part in the legal studies of the Nordic lawyer.

(a) the production, storage, retrieval and use of legal information in all its forms,

(b) the implementation of computer technology and the implications of its use for the duties and working procedures of lawyers, the courts and public corporations;

(c) the implementation of computer technology and the implications of its use for a reform of the general doctrines and recommended interpretations of different fields within law, and

(d) changes in legislation necessitated by the implementation and use of computers.

The book opens with an article on "The Right to Know" by Peter Seipel, Professor of legal informatics at the University of Stockholm. He argues for an "adequate openness structure" making a new level of participatory democracy possible. Ahti Saarenpaa writes on "Computers and Legal Life". Peter Blume, the editor, writes on legal information systems. Jon Bing, Professor of legal informatics at the University of Oslo, writes on rules and representation. The fifth article is entitled "Problems of description in Computer Tort Law". Data protection, the methods of teaching legal informatics at the different Nordic universities and a description of the legal information service in the Nordic countries are also described.

This book forms part of Kluwer's Computer/Law series. Dr. Robert Clark, Statutory Lecturer in Law, University College, Dublin is on the distinguished international board of editors.

Telecommunication technology will soon function as the backbone and nervous system of national and international commerce. Yesterday's legal arrangements (still applicable in Ireland) have lost and will continue to lose relevance in the face of modern modes of telecommunication.

Eamonn G. Hall

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ITS NOT THE *GAZETTE!*

A new magazine for apprentice solicitors was launched at O'Dwyers of Leeson Street, on the 16th May. It is hoped that "Zeitgeist" (for the non-Germanic amongst us this means – "genius of the times"), will become the sounding board for opinion amongst all apprentices throughout the country.

A reception prior to the launch of the magazine was hosted by SADSI. The historic moment was captured in celluloid and thereafter, the attendance was swelled by racing punters who came along to enjoy a race night (indoors) which was scheduled to kick off the magazine to a flying start.

The evening was a sell out and everyone who participated certainly got a good shout in even if they did not get a winner. Punter of the evening was David O'Donnell who succeeded in backing the winner in almost every race.

As to the magazine itself, it is hoped that Zeitgeist will provide a forum for apprentice solicitors to exchange views and to receive information on topics of relevance. in this time of increasing change in the legal profession, Zeitgeist can play a critical role in developing opinion amongst the profession at the most junior level. The magazine will be circulated with the *Gazette* and while the first edition was funded by SADSI, the independent group running the magazine, and headed up by TP Kennedy and Ursula Condon, hope to attract funding from The Law Society on a regular basis. Your support for the magazine will be most welcome, particularly in the form of articles, letters, or any comments in relation to its contents.

The publication of the first edition of Zeitgeist would not have been possible without the assistance of generous sponsorship from the following firms to whom we would like to record our deep appreciation. They include A & L Goodbody; William Fry; Cawley Sheerin Wynne; Maguire McErlean; Lennon Heather; Fergus P. Taaffe; McCann FitzGerald; and Margetson and Greene. Our thanks also to O'Dwyers Pub in Leeson Street for providing the facilities and some liquid sponsorship. □

Dara McCluskey (Young & Co.), Joe Kelly (A. & L. Goodbody), presenting cheque, Stephanie Coggans (Binchy & Partners), T. P. Kennedy (McCann FitzGerald) receiving cheque to sponsor new magazine "Zeitgeist", and Ursula Condon (Kevans, Solicitors).

Correspondence

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Incorporated Law Society,
Blackhall Place,
Dublin 7.

June 6th, 1991

Dear Sir,

We frequently receive requests from people who wish to consult a solicitor in connection with a matter related to schizophrenia, for example, family law issues where one family member suffers from schizophrenia; making longterm financial provision for a person suffering from the illness etc.

Experience in the past has shown however that where a solicitor has no knowledge or understanding of severe mental illness this can lead to problems in communication between client and solicitor and ultimately in dealing with the particular issue.

We are currently drawing up a list of solicitors who have had experience in this area which we will make available to our members and callers. We would appreciate if solicitors with such experience would contact the undersigned.

Pamela McHugh,
Administrator,
Schizophrenia Association
of Ireland,
4 Fitzwilliam Place,
Dublin 2.

Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.
1st day of August, 1990.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

LOST LAND CERTIFICATES

Patrick Shannon, Caran, Castleplunkett, Castlerea, Co. Roscommon. Folio: 17847; Lands: Caran (Part), Caran (Part); Area: 26(a) 2(r) 21(p), 4(a) 1(r) 5(p). County: **ROSCOMMON.**

David O'Dea, Folio: 9347F; Lands: (1) Clonbarton, (2) Cloghreagh; Area: (1) 0.706; (2) 48.038. County: **MEATH.**

John Kiernan, Folio: 1587; Lands: Pooladdoey; Area: 18a.2r.15p. County: **LONGFORD.**

Garrett Leech, Folio: 1351; Lands: Deerinturn; Area: 2a.2r.0p. County: **KILDARE.**

Denis Dunne, Folio: 18269; Lands: Acragar; Area: 0.190 Hectares. County: **QUEENS.**

James P. Keegan, 70 Castleview Road, Clondalkin, Co. Dublin. Folio: 10659; Lands: Townland: Clondalkin, Barony: Uppercross, Situate to the North side of the road leading from Rathcoole to Dublin in the Town of Clondalkin. County: **DUBLIN.**

Michael Hayes, Folio: 11360 now closed to 26571; Area: (a) 9a.2r.2p (b) 9a.1.r.32p (c) 17a.3r.8p. County: **LIMERICK.**

Lynn Yelverton & Terence Yelverton, Folio: 20919F; Lands: Garravagh; Area: 0.313 acres. County: **CORK.**

Thomas Cassidy, Folio: 8039; Land: (a) Fardrumman (b) Tawnagh; Area: (a) 20a.2r.10p, (b) 2a.1r.17p. County: **LONGFORD.**

Thomas R. Claxton and Eileen Claxton, Folio: (a) 4853 (b) 1168; Land: (a) Millerstown (b) Kilminnin; Area: (a) 66a.3r.25p, (b) 160a.1r.7p. County: **WATERFORD.**

Patricia Powderley and **Morgan Powderley,** 41 Marsham Court, Kilmacud West, Dublin. Folio: 49556L; Land: Townland: Kilmacud West, Barony: Rathdown. County: **DUBLIN.**

Mary Egan, Folio: 34664; Land: Huggarts Land; Area: 0a.0r.17p. County: **CORK.**

Michael Costello (Junior), Gortneenaveela, Aughrim and **Michael Costello,** Gortneenaveela, Kiltormer, Ballinasloe, Co. Galway. Folio: 15673F; Land: 1. Gorteenaveela, 2. Gorteenaveela, 3. Gorteenaveela, 4. Gorteenaveela, 5. Ardranny Beg, 6. Gorteenaveela. Area: 1. 25.650 Hectares, 2. .900 Hectares, 3. 6.231 Hectares, 4. 0.038 Hectares, 5. 8.338 Hectares, 6. .406 Hectares.

Sir George Errington, Folio: 789A; Land: (i) Lisnagrish, (ii) Gneeve; Area: (i) 277(a) 1(r) 26(p); (ii) 163(a) 2(r) 4(p). County: **LONGFORD.**

Patrick Grahan, Folio: 21981; Land: Wilkinstown, Area: 0a.1r.36p. County: **MEATH.**

Michael Nolan, Folio: 3214F; Land: Castlekevin; Area: (a) 0.300 acres, (b) 11.938 acres, (c) 10.181 acres, (d) 6.125 acres, (e) 16.800 acres. County: **WICKLOW.**

Allen McLeod Martin and **Frances Mary Martin,** Folio: 25444. County; **MEATH.**

William Dee, Folio: 20622; Area: 1a.1r.0p. Land: Moybella North. County: **KERRY.**

Timothy Lennon, Folio: 4515; Area: 3a.2r.30p. Lands: Kilbeg. County: **WICKLOW.**

James McGrath, Folio: 7395F; Area: 0.231 acres; Land: Knockane. County: **TIPPERARY.**

Maureen Kervick, Tomnalossett, Fern, Co. Wexford. Folio: (1) 10507, (2) 14231; Area: (1) 10.363 acres, (2) 21a.1r.22p. Land: (1) Tomnalossett, (2) Tomnalossett. County: **WEXFORD.**

Sean Crossan, Ballymakenny Road, Drogheda, Co. Louth. Folio: 40774F; Land: The property situated in the townland of Grange and Barony of Balrothery West: **DUBLIN.**

Joseph Anthony and Ann Moroney, Folio: 56903; Land: Ballytrasna; Area: 0a.1r.0p; County: **CORK.**

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MATURE GRADUATE, (27) seeks apprenticeship. Remuneration not essential. Tel: (065) 40933.

Lost Wills

WILLIAM FLANAGAN, Deceased, late of Castlebrown, Clane, Co. Kildare. Would anyone having knowledge of the whereabouts of the Will of the above named deceased who died on the 11th day of June, 1991, please contact Messrs. James A. Boyle & Co., Solicitors, Clane, Co. Kildare at (045) 68045.

MURPHY, LIAM, late of Knockavoheen, Kiskeam, Mallow in the County of Cork. Would anyone having knowlege of the existence of a Will of the above named deceased who died on the 25 April, 1991, please contact Messrs. David J. O'Meara & Sons, Solicitors, Bank Place, Mallow, Co. Cork. Ref: NC/PO'D – Tel No: (022) 21539.

KILBANE, JOHN, deceased O.B. 19 March 1991, late of (1) 103 Golden Grove, St. Mary's Southampton, SO1 1TA. (2) 4 Brittanic House, Kent St., Northam, Southampton. (3) 9 Broad Green, Kingsland, Southampton. (4) 40 Oxford Avenue, Southampton. (5) Hillside, Dooega West, Achill, Co. Mayo. Will any person holding a Will on behalf of the above named deceased, please contact the undersigned solicitor:- Denis M. Molloy, Bridge Street, Ballina, Co. Mayo.

HIGGINS (PETER WILLIAM), deceased, late of Flat 63, Oak House, Mespil House Flats, Sussex Road, Dublin 4. Retired Civil Engineer. Would any person having knowledge of the whereabouts of a Will of the above named deceased who died on the 3rd May, 1991 please contact Messrs. Brooks and Company, Solicitors, Baldwin Street, Mitchelstown, County Cork. Reference MP/CB. Telephone (025) 24833.

GLEESON, SHEILA, deceased, late of 10 Wallace's Avenue, Ballinlough, Cork. Date of Death: early March. Will any person having knowledge of the whereabouts of a Will of the above named deceased please contact Babington Clarke & Mooney, Solicitors, 48 South Mall, Cork.

KELLY, HANNAH, Will anybody holding a Will for Hannah Kelly late of 76, Clashduv Road, Togher, Cork and 30, Coolroe Heights, Ballincollig, Cork who died on 14 June, 1991, please contact Murphy & Long, Solicitors, Lower Kilbrogan, Bandon, Co. Cork. Phone No. 023/44420 and Fax No. 023/44635.

CROWLEY, JOHN, late of the Doon, Dunderrow, Kinsale, Co. Cork. Bachelor. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 3 day of February, 1990, please contact Barry C. Galvin & Son, Solicitors, of 91, South Mall, Cork. Tel: 021-271962.

BYRNE, KEVIN, deceased, late of 57 Shanganagh Grove, Shankill, Co. Dublin. Would anybody having knowledge of the whereabouts of a will of the above-named deceased, who died on 1 April, 1991, please contact Neville Murphy & Co., Solicitors, Dargle House, 1 Lr. Main St., Bray, Co. Wicklow. Tel. 2860639. Fax: 2860572.

Miscellaneous

SIX DAY EARLY CLOSING Publican's Licence – North Tipperary area. No endorsements. Enquiries to F.P. Gleeson & Co., Solicitors, Thurles (Ref: WFG) 0504-22577.

STATUTORY NOTICE TO CREDITORS in the Estate of James Francis Duff, late of 13 Mountainview Park, Greystones, in the County of Wicklow.

NOTICE

Notice is hereby given pursuant to Section 49 of the Succession Act 1965 that particulars in writing of all claims against the estate of the above named deceased who died on the 9 day of June 1991 should be furnished to the undersigned solicitors for the Administratrix on or before the 9 day of August 1991 after which date the assets will be distributed having regard only to the claims furnished.

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 85 No. 7 September 1991

John Hussey, Solicitor, Surrey, England; Donal Binchy, President, Incorporated Law Society of Ireland, and Mark Sheldon, Vice-President, Law Society of England and Wales, at the parchment ceremony on Friday 26th July, at which for the first time solicitors from Northern Ireland, England and Wales were admitted to the Irish Roll of Solicitors.

- Latest hazard to Guarantees – S 31 Companies Act, 1990
- Contractural Obligations Act, 1991
- Competition Act – An Unguided Missile?
- Changes in the Social Welfare Code Affecting Personal Representatives

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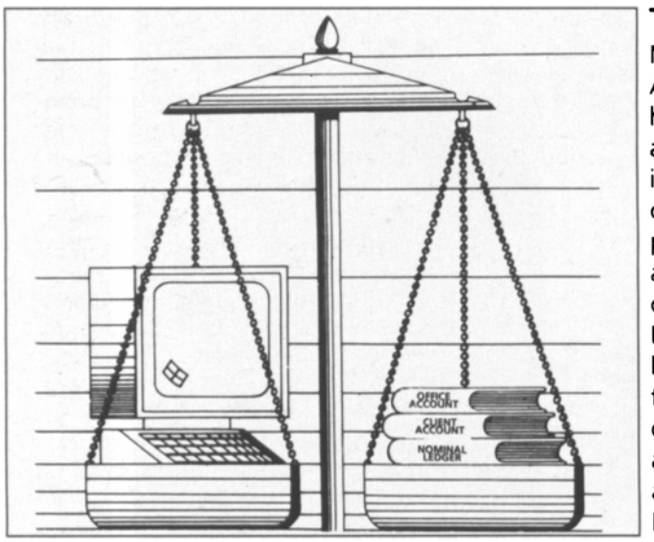

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GAZETTE
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Viewpoint

Competition Act – An Unguided Missile?

The Competition Bill, 1991 has now been enacted into law. Readers will be aware that one of the primary objectives of the Act is to outlaw agreements, decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade or the supply of services. The Act will establish a Competition Authority with powers to enforce the new competition rules. In this respect, Ireland is moving in the direction already taken by most other Member States of the EC (with the exception of the United Kingdom) in implementing directly into its law provisions analogous with Articles 85 and 86 of the Treaty of Rome.

The Minister for Industry and Commerce, Mr. O'Malley, made it clear, when introducing the Bill, that it would apply to the professions, including the legal profession, and an examination of the Act makes it clear that it could have far-reaching implications.

There seems little doubt that legislation of this kind, which seeks to improve the competitiveness of the economy, will be welcomed in many quarters and will be seen as desirable to ensure that consumers of goods and services get the best possible deal in the market place. The distortions of trade, to the ultimate detriment of the consumer, that have been evident in the past through the operation of cartels can now be tackled seriously. Even in relation to the professions, it is at least arguable that such restrictions as may result from the concerted practices of professional organisations should be subjected to the scrutiny of a body such as the Competition Authority to ensure that any distorting or harmful effects they might have on competition would be eliminated.

The problem, however, is that the Government, bowing, perhaps, to pressure exerted by Mr. O'Malley, seem to have chosen this legislation as a vehicle through which to attempt to alter in a fundamental way the manner in which the legal profession is organised in this country and legal services are delivered to the public. We would submit that a Competition Act, designed principally to tackle abuses of an essentially economic kind, is not a proper instrument to effect change in the structure of the legal profession. On its face, the Act has nothing whatever to say about the legal system or about how lawyers organise themselves and deliver services to their clients. Moreover, in the course of its passage through the Oireachtas, very few members of either House adverted to the implications of the legislation for the professions in general or for the legal profession in particular. One wonders, in this regard, whether, in giving Mr. O'Malley the green light to bring forward this legislation, the Government were at all conscious of its potentially serious implications.

We are not suggesting, of course, that there is anything improper about the Government deciding to bring forward legislation which seeks to effect change in the legal profession. We do say, however, that, in such a vitally important area, it is essential that such changes as are proposed are carefully considered and evaluated, brought forward in legislation which makes it clear *on its face* what is being proposed and, ultimately, subjected to the scrutiny which all legislation gets in the course of debate and passage through the Dail and Seanad. Moreover, it hardly needs to be said that the Minister with responsibility for the administration of justice and the legal system as a whole, who is the Minister for Justice, is the

(Cont'd on p.266)

THE LAW SOCIETY
BLACKHALL PLACE DUBLIN 7

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The Latest Hazard to Guarantees: The Effects of S.31, Companies Act, 1990 on Inter-Company Guarantees

Part III of the Companies Act, 1990 is entitled, "Transactions Involving Directors", and extends from S.25 to S.52 inclusive of the Act.[1] Its title is somewhat of a misnomer in that it would appear to be confined to transactions/arrangements involving a company and its directors. In fact, this Part of the Act, and in particular S.31, has created a veritable minefield for lending institutions and their legal advisers, where they seek a guarantee from a company in consideration of that lending institution granting facilities to another company.

by
Thomas B. Courtney
B.A., LL.B
of Hanby Wallace,
Solicitors

1. Inter-Company Guarantees

Ostensibly, S.31 of the Companies Act, 1990 only concerns the situation where a company enters an arrangement with one of its directors. However, while it may come as a surprise it is also the case that inter-company guarantees are affected.

"S[ection] 31 has created a veritable minefield for lending institutions."

A typical situation may be set out in the following fashion. Borrowings Ltd, approaches Big Bank plc seeking to get a loan for £1,000,000 IR. Big Bank plc considers the request, and in due course sends a facility letter to Borrowings Ltd, setting out, *inter alia,* the security which Big Bank plc will require before drawdown. Of course, Big Bank plc will require that Borrowings Ltd will give a charge, whether fixed or floating, over its assets. However, Big Bank plc will typically require a **guarantee** supported by a fixed and/or floating charge over the assets of a company which is "associated", but not in the sense of a group, with Borrowings Ltd, which we shall term Guarantor Ltd. By virtue of S.31 Companies Act, 1990, such an inter-company guarantee can be rendered **voidable** in certain circumstances.

2. S.31: The Hidden Scenario

S.31 (1), which is entitled "Prohibition of loans, etc. to directors and connected persons", provides as follows:

> "Except as provided by *sections* 32 to 37, a company shall not—
>
> (a) make a loan or a quasi-loan to a director of the company or of its holding company or to a person connected with such a director;
>
> (b) enter into a credit transaction as creditor for such a director or a person so connected;
>
> (c) enter into a guarantee or provide any security in connection with a loan, quasi-loan or credit transaction made by any other person for such a director or a person so connected.[2]

For our present purposes, it is S.31 (1) (c) which is of concern. Again, ostensibly, this section would appear to merely prohibit a company from giving a guarantee etc. in favour of a human person, namely, one of its directors or a director of its holding company.

However, the inclusion of **"a person so connected"** has the effect of prohibiting a company from, *inter alia* giving a guarantee in favour of **another company** in that S.26 (2) provides:

> "A body corporate shall also be deemed to be connected with a director of a company if it is controlled by that director".

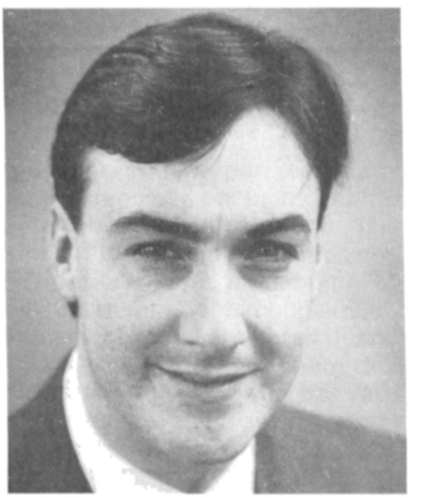
Hence, it is the case that where the other requirements of S.31 are met, a company may not give a guarantee in favour of another company where that other company is "connected with" and "controlled by" any of the following persons:

- a director of Guarantor Ltd;
- a director of the company which is the holding company of Guarantor Ltd;
- a "shadow director" of Guarantor Ltd;
- a "shadow director" of the company which is the holding company of Guarantor Ltd.

"the . . . [Act] . . has the effect of prohibiting a company from . . . giving a guarantee in favour of another company [in certain circumstances]."

Where it does, such a guarantee[3] is prima facie voidable.[4]

S.27(1) of the Companies Act, 1990 defines a **"shadow director"** as:



Thomas B. Courtney

". . . a person in accordance with whose directions or instructions the directors of a company are accustomed to act . . . shall be treated for the purposes of this Part as a director of the company unless the directors are accustomed so to act by reason only that they do so on advice given by him in a professional capacity."

Accordingly, it seems clear that solicitors and accountants who advise a company will not *ipso facto* be deemed to be "shadow directors" solely by virtue of advice given qua solicitor/accountant. However, where their advice goes beyond that of "professional advice", and more particularly where the solicitor/accountant has a legal or beneficial interest in the company (Borrowings Ltd) it would be open to a court to find that he was in fact and in law a "shadow director".

3. The concept of "Control".

Fortunately, at least from the point of view of interpretation, the Act does not leave the concept of "control" hanging in the air. S.26 (3) provides that

". . . a director of a company shall be deemed to control a body corporate if, but only if, he is, alone or together with any of the persons referred to in *paragraph (a), (b)* or *(c) of subsection (1),* interested in more than one-half of the equity share capital of that body or entitled to exercise or control the exercise of more than one-half of the voting power at any general meeting of that body."

As with so many sections of the Act, one cannot make sense of any given provision without cross-reference to another. As such it is necessary to examine two concepts which are referred to in S.26 (3).

In the first place, there is the question of **"aggregation"** of the interests of the director with certain other persons (listed in S.26 (1)) to determine whether or not that director will be deemed to "control" Borrowings Ltd.

These are:

(a) that director's spouse, parent, brother, sister or child;

(b) a person acting in his capacity as the trustee of any trust, the principal beneficiaries of which are the director, his spouse or any of his children or any body corporate which he controls; or

(c) a partner of that director.

Secondly, one should note that **"control"**, is determined by reference to "equity share capital" and "voting power". By virtue of S.26 (4) (a) of the Companies Act, 1990, "equity share capital" is given the same meaning as in S.155 Companies Act, 1963, and hence, in any given situation, one should refer to this section.

The alternative test is that regarding the control of "the exercise of more than one-half of the voting power at any general meeting of that body". S.26 (4) (b) of the Companies Act, 1990 provides that:

"references to voting power exercised by a director shall include references to voting power exercised by another body corporate which that director controls."

From the foregoing it is evident that the S.31 prohibition has been drafted very widely by the legislative draftsmen.

4. Anti-Avoidance Provisions

It should also be noted that S.31, subsections (2) and (3) contain anti-avoidance measures. S.31 (2) has the effect of preventing Guarantor Ltd from arranging for an assignment or assuming rights, liabilities or obligations under a transaction which, if entered by Guarantor Ltd itself, would have contravened S.31 (1). S.31 (3) prevents Guarantor Ltd from taking part in an arrangement in which another person enters a transaction which if entered by Guarantor Ltd itself, would have contravened S.31 (1) where that other person obtains any benefit from Guarantor Ltd or related companies.

Furthermore, while Part III of the Act is not retrospective in the true sense, S.25 (7) provides that:

". . . for the purposes of determining whether an arrangement is one to which *section 31 (2)* or *31 (3)* applies the transaction to which the arrangement relates shall, if it was entered into before the said commencement, be deemed to have been entered into thereafter."

And, if it were thought that the S.31 prohibition were capable of being avoided by the parties executing documentation abroad, S.25 (8) provides that Part III has effect in relation to arrangements/transactions whether governed by

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the law of Ireland or another country.

5. The Exceptions of S.31

To the general prohibition contained in S.31 against companies giving guarantees or providing any security in connection with loans etc. in the prescribed circumstances, there are but two exceptions.[5]

(i) Inter-Group Guarantees

S.34 (b) provides that where a company is a member of a group of companies, "consisting of a holding company and its subsidiaries", S.31 shall not prohibit that company from:

> ". . . (b) entering into a guarantee or providing any security in connection with a loan or quasi-loan made by any person to another member of the group;
> by reason only that a director of one member of the group is connected with another."

Thus S.34 (b) applies to situations involving the members of a group of companies, and so there is no prohibition on one member giving a guarantee in favour of another member.

A group relationship must however be first determined, and so regard must be had to the provisions contained in S.155 of the Companies Act, 1963 which provides the tests for determining whether or not a company is in law, a "subsidiary" or a "holding" company.

". . . there is no prohibition on one member [of a group of companies] giving a guarantee in favour of another member."

(ii) Transactions with Holding Company

S.35 provides another exception, namely that S.31 shall not prohibit a company from, *inter alia*,

> "(a). . . entering into a guarantee or providing any security in connection with a loan or quasi-loan made by any person to its holding company;
> (b). . . entering into a guarantee or providing any security in connection with any credit transaction made by any other person for its holding company."

Essentially, S.35 (a) and (b) envisages Guarantor Ltd giving a guarantee in respect of a loan, quasi-loan or credit transaction made by Big Bank plc for Borrowings Ltd, where Borrowings Ltd is the holding company of Guarantor Ltd.

6. The "Non-Applicable" Exceptions

Suffice it to say that the exceptions contained in S.32 and S.37 do **not** apply to guarantees because by their very terms, they are only applicable to loans, quasi-loans and credit transactions. Thus, S.32 provides that S.31 shall not apply to certain "arrangements" pursuant to S.32 (2) (a) "if it makes a loan or quasi-loan to, or enters a credit transaction as creditor for, that person. . . ". Clearly, guarantees are not included and so S.32 has no application. Similarly, S.37 merely provides that S.31 shall not prohibit a company from making "any loan or quasi-loan or entering any credit transaction as creditor. . . .". Again, there is no application of this section to guarantees entered by the company.

7. The Civil Consequences of Contravention

For a lending institution, the consequences of a guarantee falling foul of the S.31 prohibition, may give rise to an appalling vista. S.38 (1) provides that:

> "Where a company enters into a transaction or arrangement in contravention of section 31 the transaction or arrangement shall be **voidable at the instance of the company. . . ".**

unless, any of the following situations can be said to apply:

(a) restitution of any money or any other asset which is the subject matter of the arrangement or transaction is no longer possible: S.38 (1) (a), **or**

(b) the company has been indemnified in pursuance of subsection (2) (b) for the loss or damage suffered by it: S.38 (1) (a), **or,**

(c) any rights acquired *bona fide* for value and without actual notice of the contravention by any person other than the person for whom the transaction or arrangement was made would be affected by its avoidance: S.38 (1) (b).

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As with Part III of the Companies Act, 1990, the foregoing exceptions to the voidability of guarantees in contravention of S.31 are not without difficulty. The following analysis must be read in the light of the fact that to a large extent their scope and interpretation will in all probability be the subject of judicial review and so is now, to a large degree, speculative.

(a) Restitution Impossible

Thus the section provides that the guarantee is voidable at the instance of the company, **unless** restitution of the money or other asset given by Guarantor Ltd is no longer possible. It should be appreciated that this is primarily designed to protect the assets of Guarantor Ltd, and that furthermore, to make sense of this exception, it must be appreciated that it seems to be framed with loans to directors in mind.

". . . the guarantee [in contravention of Section 31] is voidable at the instance of the company unless [certain exceptions apply]."

Hence, in the case of a guarantee, what Guarantor Ltd gives is a consent to a contingent liability (secured by its assets) to pay a debt or part of a debt of Borrowings Ltd to Big Bank plc if Borrowings Ltd defaults in the repayment of that debt. Thus, it does not in fact part with any tangible property, but binds itself to a possible future liability. The concept of restitution can be seen to rest on the possibility of reinstatement and reimbursement. Applying the concept of restitution to these facts, it would seem that a guarantee will **only** be valid where the guarantee given, **cannot** be restituted to Guarantor Ltd. Where the guarantee given has not been "called-in", by Big Bank plc, restitution is legally possible and so

it seems that the guarantee is voidable. Similarly, where the guarantee has been called in, it would also seem that restitution is possible in that it is likely that Big Bank plc can pay the money back making the guarantee voidable. However, it must be said that in so saying that restitution is possible in these circumstances, we are taking for granted that we are talking about "restitution" being possible in the sense of it being possible on foot of a court order.

It should be noted that an alternative analysis of the "restitution exception" could view the money or other asset which is the subject matter of the arrangement or transaction as the loan given by Big Bank plc to Borrowings Ltd. However, it is thought that it is the **guarantee** itself which is the "money or other asset" which is in fact the subject matter of the arrangement or transaction, and not the loan.

(b) The Indemnity

The **indemnity** exception would seem to be a **pre-emptive** form of relief for Big Bank plc canvassed, if at all, prior to drawdown of the loan.

Essentially, the indemnity which is required to be given is to be in accordance with S.38 (2) (b), which provides that the persons referred to below should:

> "(jointly and severally with any other person liable under this subsection) to indemnify the company for any loss or damage resulting from the arrangement or transaction."

The persons referred to are those in S.38 (2) itself are are:

- the director or shadow director of Guarantor Ltd,
- Borrowings Ltd (the person so connected),
- any other director of Guarantor Ltd who authorised the transaction or arrangement.

However, the usefulness of this exception is dubious.

In the first place, one must ask what exactly does "has been indemnified" actually mean? The word "indemnify" has been defined[6] as to

> ". . . . secure (person from or against loss); exempt from penalty (for actions); compensate. . . "

As such it can be seen that "indemnified" can mean **either** to certify or guarantee that Guarantor Ltd will not have to suffer any loss **or** that Guarantor Ltd has actually been compensated or reimbursed for any loss or damage suffered. If the latter is the case, it seems to mean that before the second limb of S.38 (1) (a) can have the effect of meaning that Guarantor Ltd cannot avoid the guarantee, Guarantor Ltd, must have actually been compensated for the loss or damage i.e. the amount of the guarantee.

In the second place, there must exist serious public policy considerations for a bank to require such an indemnity, and indeed furthermore, a pre-emptive reliance on the indemnity exception could possibly obviate the availability of the actual notice defence discussed next.

(c) Bona Fide for Value Without Actual Notice.

The third situation where Guarantor Ltd cannot avoid the guarantee is where to do so would affect any rights acquired *bona fide* for value and without actual notice of the contravention of S.31, other than the person for whom the guarantee was made. Again this requires analysis.

In the first place, not everyone can claim to have rights acquired bona fide for value and be without actual notice i.e. the person for whom the transaction or arrangement was made.

S.25 (6) (c) provides that such is "made for a person" where:

> "in the case of a guarantee of security, it is entered into or provided in connection with a loan or quasi- loan made to him or a credit transaction made for him."

So it seems that Borrowings Ltd cannot rely on this exception, even if it fulfils the other requirements of the subsection. However, on this analysis, Big Bank plc would seem not to be ipso facto prevented from relying on S.38 (1) (b).

In the second place, while prima facie, it might seem that Big Bank plc (and their solicitors) could adopt a blinkered approach to investigating whether or not there was a contravention of S.31 so as to be without actual notice, the reality is that it seems almost inevitable that the facts which will indicate whether the guarantee will be in breach of S.31 will come to their notice through standard routine enquiries which every solicitor acting for a bank will make in any event. Thus, a solicitor acting for Big Bank plc will have to try to ascertain whether or not there is a commercial benefit to Guarantor Ltd in giving a guarantee for Borrowings Ltd there being a reluctance to rely upon Regulation 6 of S.I. 163/1973.[7] Such an inquiry will give him actual notice of the shareholdings of both companies, and the Memorandum and Articles of Association will give him actual notice of the directors of the company. Indeed, prior to any lending institution agreeing to give a loan to a company, it would be most unusual were it not, itself, to seek information about those who **control** that company. Information required by a lending institution to determine the suitability of the company applying for the loan, would, it seems, put it on notice of the possibility of a contravention of S.31. While all of these factors, *per se*, will not necessarily disclose the likelihood of a contravention of S.31, the solicitor for Big Bank plc is walking a very fine line, and of course, if he is deemed to have actual notice, such will be imputed to Big Bank plc. As with Part III in general, any analysis of this subsection is fraught with difficulty, and must remain in the realm of the speculative until the subject of judicial interpretation.

. . . a solicitor acting for Big Bank plc will have to try to ascertain whether or not there is a commercial benefit to Guarantor Ltd in giving a guarantee . . . ."

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8. The Criminal Consequences of Contravention

Where a guarantee contravenes S.31 of the Companies Act, 1990, the officers of Guarantor Ltd may by virtue of S.40 (1) of the Act, be guilty of an offence, where they know, or have reasonable cause to believe, that the company was contravening S.31. Less clear is the offence created by S.40 (2), which provides that:

> "A person who procures a company to enter into a transaction or arrangement knowing or having reasonable cause to believe that the company was thereby contravening section 31 shall be guilty of an offence."

One question must be, can a solicitor who acts either for the lender or the borrower be guilty of an offence where it can be proved that he procured Guarantor Ltd to enter the transaction or arrangement?

". . . can a solicitor who acts either for the lender or the borrower be guilty of an offence where it can be proved that he procured Guarantor Ltd to enter the transaction or arrangement?"

The penalties prescribed for commiting either of the foregoing offences are set out in S.240 of the Companies Act, 1990. Thus, on summary conviction, one is liable to a fine not exceeding £1,000 or at the discretion of the court, to imprisonment for a term not exceeding 12 months, or both. On conviction on indictment, one is liable to a fine not exceeding £10,000, or at the discretion of the court, to imprisonment for a term not exceeding 3 years, or both.

It must also be noted that a contravention of S.31 **remains** a criminal offence even if the guarantee is **not** voidable, by virtue of the "savers" of S.38 (1) (a) and (b) applying. Their cumulative effect is merely to prevent a transaction or arrangement from being avoided – the fact remains that there has been a contravention of S.31, and so it follows that the sanctions in S.40 continue to apply.

9. When Does a Guarantee Contravene S.31?

The question of whether any given guarantee contravenes S.31 is a matter to be decided by each solicitor and his client looking at the facts of each individual situation. It is not attempted to detail here what should be sought by a solicitor acting for a lending institution, but it would seem that the following may be included in any new requisitions:

- Are Borrowings Ltd and Guarantor Ltd companies which are part of a group of companies?
- Who are the shareholders, what are their holdings, and who are entitled to exercise voting rights in Borrowings Ltd?
- What are their relationships (lineal and marital) with the directors (including shadow directors) of Guarantor Ltd and of the

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holding company (if any) of Guarantor Ltd with the shareholders of Borrowings Ltd?

- Who are the directors (including shadow directors) of Guarantor Ltd and of the holding company (if any) of Guarantor Ltd?

Clearly, the foregoing are certainly not definitive, and until there is a Law Society recommendation on this point providing standard requisitions, it will probably be the case that a variety of diverse sets of requisitions will be put to the solicitor acting for Borrowings Ltd and Guarantor Ltd.

10. Achieving Valid Security

Acquiring an enforceable security for a lending institution without contravening the provisions of S.31 of the Companies Act, 1990 will be a difficult and hazardous task for any solicitor. The basic problem is to try to secure a facility with the assets of not only the company which is to receive the loan, but also with the assets of another company. One obvious means is to try to bring Guarantor Ltd and Borrowings Ltd within the S.34 and S.35 exemptions, by attempting to restructure the shareholdings in both companies. However, in view of the possible tax implications for both companies and their shareholders, extreme caution must be exercised, and the implications of any restructuring fully considered. One of the other solutions which may be employed is for Big Bank plc to seek additional security in the form of a quasi-mortgage over the shares of Guarantor Ltd. Neither of these possibilities is without complication, and it is certainly the case that the ingenuity of the legal profession will be tested in devising a means to acquire an enforceable security in such circumstances.

11. Conclusion

From the foregoing, it is clear that Part III of the Companies Act, 1990 has created a minefield for those involved on either side of an inter-company guarantee transaction. It seems to the writer that this part of the Act has been drafted without reference to the realities of commercial life. In particular, the exclusion of guarantees from the exceptions contained in S.32 and S.37 seems incomprehensible. The intention of S.31 of the Companies Act, 1990 seems clearly to be aimed at delinquent directors who abuse their position by milking the company to which they owe a duty of its assets, in favour of another company in which they have an interest. However, because of the applicaton of the provisions of Part III to inter-company guarantees involving companies "related" but not legally related within a "group of companies", the result is causing great problems to solicitors having to apply the black letter of the Act to what are in most cases, bona fide commercial transactions. The inclusion of the exemptions in S.34 and S.35 seems to have been motivated by a desire to save guarantees, but in fact it is quite normal for transactions to be entered into *bona fide* by companies which do not come within the definition of "group of companies", and so are outside these sections. Although the relevant Part of the Act has only been in force since 1 February, 1991, it is hoped that the legislature might look afresh at the implications of S.31 on everyday, bona fide commercial transactions and if necessary, amend this Part, to accord with such commercial realities.

". . . the exclusion of guarantees from the exceptions contained in Section 32 and Section 37 seems incomprehensible".

NOTES

1. Part III of the Companies Act, 1990 has in the main been brought into force by S.I. 10 of 1991, commencing on 1 February, 1991. S.28 (Contracts of Employment of Directors), S.50 (Inspection of Directors Service Contracts) and S.51 (Register of Directors and Secretaries) have also been brought into force by S.I. 117 of 1991, save in respect of subsection (8) of S.195 of the Companies Act, 1963, as inserted by S.51 of the Companies Act, 1990, and commenced on the 1 July, 1991.
2. Emphasis on "guarantee", added.
3. Which by virtue of S.25 (1) includes an "indemnity".
4. See S.38 Companies Act, 1990 considered post.
5. Note, Keane, *"Company Law in the Republic of Ireland"* (1991) at 29.17 and McCormack *"The New Companies Legislation"* (1991) at p.78, where the matter is considered, and the point made only by implication. In fact, these are the only exceptions in the case of guarantees.
6. The Pocket Oxford Dictionary.
7. See Lingard, *"Bank Security Documents"*, (1988) Butterworths at 4.1. □

Viewpoint – Cont'd from p. 259

proper person to formulate and promote such legislation.

In our view, the Competition Act is very much in the nature of an unguided missile. Nobody, at this stage, seems to know precisely what its effect will be. If there is to be change, it may take a considerable period for the effect of the new law to work its way through the system. This may even involve expensive litigation in the Courts. We feel that it is appropriate to ask whether this is the right way to go about the business of legal change and reform of the legal system. Some very serious issues, vitally important to barristers and solicitors, may be at issue. For example, the Act may have implications for the present general rule maintained by the General Council of the Bar which restricts the public from having direct access to barristers. If that is the case, and if that rule is ultimately to fall as a consequence of the introduction of this legislation, what will be the effect? It might mean, for example, that barristers will be able to deal directly with clients and handle clients' money without a range of protective measures of the kind maintained by the Law Society in relation to solicitors. Those measures include strict rules about the handling of clients' funds and a statutory Compensation Fund to make good any losses suffered as a result of dishonesty. We doubt very much that such a development would be in the public interest. Accordingly, we believe that there is need for an urgent public debate on the implications of this Act and for a clear commitment from the Government that they will take steps to ensure that the public are adequately informed about what is likely to happen and that, in the new order of things, the public are also protected at least as well as under the existing system. □

Practice Notes

CERTIFICATE OF DISCHARGE FROM CAT

Capital Acquisitions Tax is a charge on the property comprised in the taxable gift or inheritance. The charge has priority over all other charges and interests created by the donee/successor.

The charge lapses in favour of a bona fide purchaser or mortgagee for full value on the expiration of 12 years from the date of the gift/inheritance.

When the tax has been paid the Revenue Commissioners are obliged to give a certificate of discharge from Capital Acquisitions Tax which may be limited in the following ways:-

1. Where there is a gift and the disponer dies within 2 years from the date of the gift, the gift is deemed to be an inheritance and additional tax becomes payable. The certificate of discharge will be restricted to cover this contingent liability.
2. If at the time of the issue of the certificate of discharge there has been no sale of the property but a sale takes place within 3 years of the date of gift or inheritance, the certificate will be restricted to cover this contingent liability.
3. Where agricultural relief is claimed in respect of a gift or inheritance and there is a sale within 6 years of the gift or inheritance the agricultural relief may be withdrawn and the certificate will be restricted to cover this contingent liability.

Difficulties may arise if the donee/successor wishes to borrow money on the security of the property the subject matter of the gift/inheritance. A lending institution will usually, **and if it is a building society, must,** insist on having a first legal charge over the property.

Unless therefore an unrestricted certificate of discharge has issued a solicitor cannot undertake to put a first legal charge in place over the property in favour of the lending institution or certify to a building society, that it can take a first legal charge in place over the property.

If the certificate is restricted then any undertaking to the lending institution should be qualified to take account of the fact that the certificate is so restricted.

Taxation Committee

MEDICO/LEGAL FEES LAW SOCIETY'S POSITION

1. Agreement has been reached between the Irish Hospital Consultants Association and the Irish Insurance Federation in relation to a scale of fees to be paid to consultants for medico-legal reports and attendances at court. The agreed scale was published in the January/February 1991 issue of the *Gazette.*
2. Some difficulties have arisen as to who precisely are represented by the Irish Hospital Consultants Association and the Irish Medical Organisation (IMO) It is clear, however, the the IMO represents some consultants and also, apparently, that some consultants are members of both bodies. The Irish Insurance Federation has indicated that the same level of fees are applicable to all consultants irrespective of which of those bodies they belong to.
3. No agreement has been reached with the IMO in relation to fees applicable to *general practitioners.*
4. The Law Society takes the view that it should not enter into discussions with the IMO alone in relation to a scale of fees for medico-legal work for general practitioners unless any such scale has first been agreed to by the Irish Insurance Federation.
5. For the foregoing reasons, the Law Society is unable to indicate to members what scale of fee is appropriate for general practitioners. Where the costs are being taxed, it would appear that the appropriate scale is the scale as fixed by the County Registrar and/or Taxing Master. There is, however, some indication that at least some insurance companies are, as a matter of practice, willing to pay general practitioners the same scale as that applicable to consultants.

Litigation Committee

ESTATE DUTY

Members with queries on Estate Duty should contact:—

Mr. Pat Dowling,
Capital Taxes Branch,
Revenue Commissioners,
Dublin Castle.
6792777.

Taxation Committee

CAPITAL ACQUISITIONS TAX FORM CA24A, SHORT FORM OF INLAND REVENUE AFFIDAVIT

An abbreviated form CA24 – Inland Revenue Affidavit – has been introduced by this Branch, form CA24A. It is designed to speed up the processing of Inland Revenue Affidavits in certain cases where the beneficiaries are not liable to tax. This innovation should further improve the service to solicitors in this area.

Supplies of the new form CA24A may be obtained from this Branch, Tel. 6792777 Ext. 2236.

Assistance regarding the use of the short form Affidavit may be obtained from the taxpayer advisory service. Tel: 6792777 Ext. 2226, 2227, 2228, 2018.

Capital Taxes Branch,
Dublin Castle.

(Cont'd on p. 295)

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Moot Court Competition

The valuable role which "mooting" can play in the education of a lawyer is undisputed. A tradition of holding moot court competitions and, indeed, of making participation in such competitions a compulsory part of a course of legal study, is common in other jurisdictions, particularly in civil law countries and in the United States. Ireland has been slow to follow suit, although individual universities have organised such events internally over a number of years.

It is now hoped that such a tradition may be developed here over the next few years and, to this end, the Irish Moot Court Committee has been established. The Committee, with Mr. Justice Niall McCarthy of the Supreme Court as its President, is planning to hold two major events in the coming year. The first will be the preliminary rounds and national final of the Philip C. Jessup International Law Moot Court Competition. This event is one which is well known to Irish law students as they have been participating therein for a number of years and have had some considerable success. This event is concerned with public international law and invariably the problem to be addressed is topical and stimulating. This competition will be held in early February and the winners will travel to Washington in April, 1992 to participate in the international competition.

The Committee will also be organising a new event in the form of the National Moot Court Competition. This competition will involve domestic law. The substantive area of law addressed will change from year to year. Participants will be recruited from the university law faculties and from the professional schools. The following institutions will be requested to send teams: the Solicitors' Apprentices Debating Society of Ireland; the King's Inns Debating Society; the Institute for Professional Legal Studies, Belfast; Trinity College, Dublin; University College Dublin; University College Cork; University College Galway; Queen's University Belfast; Dublin City University; University of Limerick and the University of Ulster.

So what happens in a moot court competition and how will those who participate benefit? In competitions of this nature, a factual legal problem is formulated which encapsulates certain novel points of law. Participants form themselves into groups of four and each team must then set about preparing a written and an oral response to the problem. Written submissions in the form of memorials are submitted in advance of the oral hearing and students' performance is judged on the contents of their written submission as well as on the oral presentation made to the judges who may question the participants on the arguments advocated by them. Mooting affords the participants an opportunity to put the law which they have learned into a practical context and also develops skills in advocacy. Students must have a thorough knowledge of their subject as they do not know what questions will be posed by the judges. They must be able to think on their feet, due to the time limits which are imposed. Lengthy periods spent considering questions posed will result in points being lost.

Mooting is also an enjoyable spectator sport! The audience is given an outline of the problem and can follow the submissions made. The novel styles of presentation used by some mooters can be very entertaining.

The Committee is presently seeking sponsorship for both competitions. Solicitors' firms may well see these events as performing a useful role in recruitment and, therefore, may wish to have an involvement with these events. Further information may be obtained by contacting Eoin O'Dell or Liz Heffernan at the Law School, Trinity College Dublin 2 or by contacting Nuala Jackson at the Law Library. □

IBA CONDEMNS COUP

Law Society President, Donal Binchy, was co-signatory to a recent statement by the International Bar Association following the attempted coup in the USSR.

The statement, issued after a meeting of International Bar Leaders at the Canadian Bar Association in Calgary, Alberta, expressed the concern of the international legal community at the violation of the rule of law and constitutional due process perpetrated by the instigators of the coup. The statement was issued on August 22 within days of the dramatic events taking place.

The full text of the statement read as follows:—

"The President and representatives of the following national bar associations and law societies express the concern of the international legal community at the violations of the rule of law and constitutional due process perpetrated in the past days in the Soviet Union, reaffirm the supremacy of the rule of law in the world and manifest their solidarity and full support for the Soviet lawyers and the Soviet people in their struggle to reinstate constitutional due process and the rule of law in the Soviet Union."

In addition to Donal Binchy, the signatories to the statement were:—

Mr. Guiseppe Bisconti, President IBA; J.J. Camp, President of the Canadian Bar Association; Tony Holland of The Law Society of England and Wales; Judith Potter, President, The Law Society of New Zealand; J.A. Cameron, Q.C., Vice Dean of the Faculty of Advocates, Scotland; Henrin Grondin, President, Union Internationale des Avocats, Anthony Scrivener, Chairman, Bar of England and Wales; James H. Campbell, President of The Law Society of Scotland.

The statement was prepared following contacts with Soviet Lawyers based in New York. According to Giuseppe Bisconti, President of the International Bar Association, upon learning of the statement of support the Soviet representatives said, "we are very grateful and we shall never forget." □

LAW SOCIETY APPOINTS EDITOR/ PR EXECUTIVE

The Law Society has appointed Barbara Cahalane as Editor Gazette and Public Relations Executive. Her principal functions will be to edit and develop the Gazette, and to co-ordinate the Society's press and public relations activities.

Barbara joins the Law Society from the Federation of Irish Employers where, since 1984, she was employed as Press Officer and latterly as Press Executive and Editor, Publications. Prior to that she spent three years with the Association of Garda Sergeants and Inspectors as Assistant PRO and Deputy Editor of Garda News.

She is a graduate of UCD and was called to the Bar in July, 1990.

Barbara takes over the editorship of the Gazette from Mary Gaynor, who was Executive Editor since 1980. Mary now resumes her duties as Assistant Librarian.

The Editorial Board wishes to express its appreciation of Mary's hard work and commitment to the *Gazette* over the past 11 years.

□

PLANNING AND ENVIRONMENTAL LAW

An intensive course entitled "Property Development : Planning and Environmental Law Issues for the 90s" will be run over nine evening sessions commencing the Tuesday 15th October – ending 10th December, 1991. The course is specifically designed for property developers, project managers and their advisors.

For further information contact:

The Project Manager,
University Industry Programme,
UCD,
Dublin 4.

Tel: 2830644.
Fax: 2830669.

□

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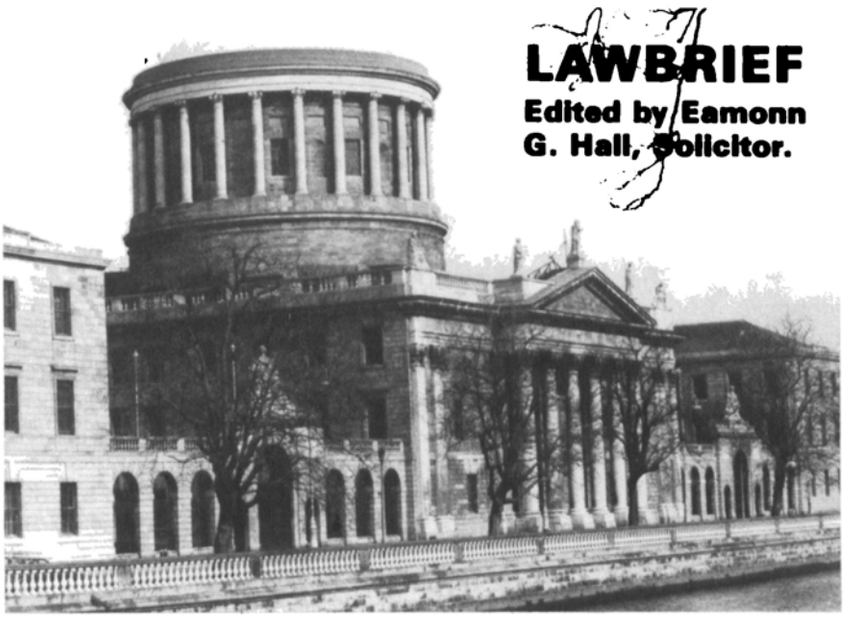

LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

EIGHT SENSIBLE WAYS TO REDUCE YOUR EXPOSURE TO A NEGLIGENCE ACTION

1. Always ask the "why" question. You have to know why a client has chosen you. If it's because of your particular expertise or reputation – great. But, if it's because several other firms have withdrawn or because it's known that you're just a little too hungry – watch out!

2. Trust your instincts. If you're being asked to do something that doesn't seem just right, turn down the business.

3. Be careful who you hire. You are responsible for the acts of your partners, associates, and employees. Period!

4. Don't keep a client you can't handle. If your client has outgrown your capabilities, be smart enough to recommend another firm. And, if you can no longer trust a client – withdraw!

5. Avoid misunderstandings. Use engagement and disengagement letters. Agree on what has to be done and what it will cost. Once fees have been established bill regularly.

6. Know your client's problems. You are trained to ascertain the facts and analyse them. Use this skill before accepting representation.

7. Go back to school. Continuing education courses can be very important to you.

8. Don't be a nice guy. It is not a required standard in your profession to be nice. Be professional. Even when it involves giving the client unhappy news.

The above advice was given by Professional Liability Insurance Agents, Herbert L. Jamison & Co., in an advertisement in the *New York State Bar Journal,* May/June 1991.

LAWYERS' DUTY TO CORRECT JUDGE

Mr Justice Buckley for the Court of Appeal (England and Wales) in *Regina -v- Nunes*, 'The Times', July 31, 1991, stated the court would like to observe, yet again, that it really was the duty of both prosecuting and defence lawyers to bring to the attention of the sentencing judge any matter about which he was wrong. It was the duty of lawyers attending court to know what the maximum sentences were and what options were open to the judge. If the judge made a mistake, it saved a great deal of public expense if it could be corrected at the time.

The court hoped that lawyers generally would heed those remarks.

BAR COMMITTEES TO CONSIDER DISTINCTION BETWEEN JUNIOR AND SENIOR COUNSEL

The adjourned general meeting of the Bar took place in the Law Library on Saturday 20 July, 1991. The meeting adopted a new constitution for the Bar. On the issue of the distinction between senior and junior counsel, the meeting agreed that a committee be appointed comprising Bruce Antoniotti BL, Paul Walsh BL, Yvonne Murphy BL, Tony Aston BL, together with four nominees of the Bar Council and a chairman to be chosen by the members.

The committee is to solicit the views of the members of the Bar, taking into account the recent changes as monitored by the committee appointed by the Bar Council, to formulate proposals and report to the Bar in general meeting before May 31, 1992 concerning any changes that might be desirable in relation to: the relationship between counsel; calls to the Inner Bar; the difference in function between senior and junior counsel; the composition of the Bar Council, and any other related matters.

Court Dress

A majority of speakers at the adjourned general meeting of the Bar spoke in favour of the retention of wigs. However, it was decided to appoint a special committee to conduct a review of suitable court dress for barristers and to report to a future general meeting of the Bar.

SELECTED GOVERNMENT LEGISLATION STATUS

At Adjournment July, 1991.

Child Care Act, 1991 (No 17 of 1991).
Provisions: provides by means of various statutory duties and procedures for the updating of the law in relation to the care of children, particularly children who have been assaulted, ill treated, seriously neglected or sexually abused or who are at risk.

Presented in the Dail by the Minister for Health 20/5/88.

Present position: passed by both Houses of the Oireachtas 2/7/91 and *enacted.*

Irish Land Commission Bill, 1989.
Provisions: provides for the dissolution of the Irish Land Commission, for the winding up of the system of land purchase, for the transfer of certain functions exercisable under the Land Purchase Acts, and for other connected matters.

Presented in the Dail by the Minister for Agriculture and Food 2/3/89.

Present position: at second stage in the Dail 4/5/89.

Statute of Limitations (Amendment) Act, 1991. (No 18 of 1991).
Provisions: amends the law on limitation of actions in so far as it applies to latent personal injuries; provides that the three-year limitation period in personal injuries cases will run from the date of accrual of the cause of action (as at present) or, if later, from the date of knowledge, i.e. the date on which the person injured (or other person by or on whose behalf an action is taken) discovered, or should have discovered, that there was a cause of action. This follows in substance the recommendations of the *Law Reform Commission (Report on the Statute of Limitations; Claims in respect of Latent Personal Injuries LRC 21-1987).* Amends and extends the *Statute of Limitations, 1957* and amends related provisions in other statutes.

Presented in the Seanad by Senator M. Lanigan 30/4/90.

Present position: passed by both Houses of the Oireachtas 4/7/91 and *enacted.*

Criminal Damage Bill, 1990
Provisions: amends the law relating to offences of damage to property and provides for connected matters. Replaces the multiplicity of offences of damage to specific kinds of property in the *Malicious Damage Act, 1861* with three offences of damage to property in general. The Bill is based, in the main, on the recommendations of the *Law Reform Commission in its Report on Malicious Damage* (LRC 26-1988).

Presented by the Minister for Justice 18/9/90.

Present position: at Committee stage in the Dail 19/6/91.

Contractual Obligations (Applicable Law) Act, 1991 (No. 8 of 1991)
Provisions: to give the force of law to the Convention on the law applicable to Contractual Obligations signed at Rome on behalf of the State on 19th June, 1980, and the Convention on the Accession of the Hellenic Republic to the aforesaid Convention signed at Luxembourg on 10th April, 1984, and provides for connected matters.

Presented by Senator Sean Fallon 15/10/90.

Present position: passed by both Houses of Oireachtas 2/5/91 and *enacted.*

Child Abduction and Enforcement of Custody Orders Act, 1991 (No. 6 of 1991).
Provisions: gives the force of the law in the State to: (a) the Convention on the Civil Aspects of International Child Abduction, signed at the Hague on 25th October, 1980 (The Hague Convention) and (b) the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, signed at Luxembourg on 20th May, 1980 (the Luxembourg Convention).

Presented by the Minister for Justice 18/10/90.

Present position: passed by both Houses of the Oireachtas 21/3/91 and *enacted.*

Destructive Insects and Pests (Amendment) Act, 1991 (No. 4 of 1991).
Provisions: amends the *Destructive Insects and Pests (Consolidation) Act, 1958,* to provide effective deterrents under that Act against the introduction or spreading of destructive insects and pests which could have devastating economic effects through crop losses and/or the need for expensive eradication measures.

Presented by the Minister for Agriculture and Food 19/10/90.

Present position: passed by both Houses of the Oireachtas 13/3/91 and *enacted.*

Courts (Supplemental Provisions) (Amendment) (No. 2) Act, 1991 (No. 23 of 1991).
Provisions: extends to members of the judiciary and specific court officers certain pension benefits which are already available to most other groups in the public service; amends the *Courts (Supplemental Provisions) Act, 1961,* and the *Courts of Justice and Court Officers (Superannuation) Act, 1961,* and provides for other related matters.

Presented by Senator Sean Fallon 25/10/90.

Present position: passed by both Houses of the Oireachtas 10/7/91 and *enacted.*

Environmental Protection Agency Bill, 1990 (plus Explanatory Memo).
Provisions: provides for the establishment of an Environmental Protection Agency which will have the following main functions: the control and regulation of scheduled activities likely to pose a major risk to environmental quality; the general monitoring of environmental quality; the provision of support, back-up and advisory services to public authorities and the promotion and co-ordination of environmental research. The Bill also provides for a number of miscellaneous matters relating to the protection of the environment and for the increase of certain penalties.

Presented by Senator Sean Fallon 10/12/90.

Present position: passed by Seanad Eireann 4/7/91.

Adoption Act, 1991 (No. 14 of 1991) changed from Recognition of Foreign Adoptions Bill, 1990.
Provisions: provides for the recognition of foreign adoption orders in circumstances as recommended by the Law Reform Commission *(LRC Report No. 29, May, 1989, on the Recognition of Foreign Adoption Decrees)* and also for the extension of recognition in specified additional circumstances which would include adoption orders made in Romania in favour of Irish couples.

Introduced by Deputy A. Shatter: ordered by Dail Eireann to be printed 13/12/90.

Present position: passed by both Houses of the Oireachtas 21/5/91 and *enacted.*

Worker Protection (Regular Part-Time Employees) Act, 1991 (No. 5 of 1991).
Provisions: extends to regular part-time employees the benefits of Acts relating to employment.

Presented by the Minister for Labour 18/12/90.

Present position: passed by both Houses of the Oireachtas 20/3/91 and *enacted.*

Social Welfare Act, 1991 (No. 7 of 1991).
Provisions: provides for the increases from July in the rates of social welfare payments announced in the Budget and for other connected matters. Amends and extends the *Social Welfare Acts, 1981 to 1990,* the *Pensions Act, 1990,* S.69 of the *Health Act, 1970* and S.285 (2) of the *Companies Act, 1963.*

Presented by the Minister for Social Welfare 14/3/91.

Present position: passed by both Houses of the Oireachtas 26/3/91 and *enacted.*

Finance Act, 1991 (No. 13 of 1991).
Provisions: provides for the charging and imposition of certain duties of customs and inland revenue (including excise); amends the law relating thereto and makes further provision in connection with finance.

Introduced by the Minister for Finance; ordered by Dail Eireann to be printed 21/3/91.

Present Position: passed by both Houses of the Oireachtas 28/5/91 and *enacted.*

Competition Act, 1991 (No. 24 of 1991).
Provisions: primary purpose of the Act is to prohibit anti-competitive practices and agreements and the abuse of dominant positions in the market; provisions are based on Articles 85 and 86 of the Treaty of Rome and will apply to all undertakings in the State engaged in trade in goods and services. Establishes a competition authority; amends the Mergers, Take-Overs and Monopolies (Control) Act, 1978, repeals the Restrictive Practices Acts, 1972 and the sections of the Restrictive Practices (Amendment) Act, 1987, which relate to restrictive practices and fair trade.

Presented by the Minister for Industry and Commerce 12/4/91.

Present Position: passed by both Houses of the Oireachtas 17/7/91 and *enacted.*

Liability for Defective Products Bill, 1991 (plus Explanatory Memo).
Provisions: enables effect to be given to the provisions of Council Directive No. 85/374/EEC of 25 July, 1985, on the approximation of the laws, regulations and administrative provisions of the Member States of the EC concerning liability for defective products.

Presented by the Minister for Industry and Commerce 24/4/91.

Present Position: second stage in the Dail passed 6/6/91.

Roads Bill, 1991 (plus Explanatory and Financial Memo).
Provisions: provides for the construction and maintenance of public roads, establishes a national roads authority, provides for motorways, busways and protected roads, and other connected matters.

Presented by the Minsiter for the Environment 25/4/91.

Present Position: no progress.

Local Government Act, 1991 (No. 11 of 1991).
Presented by the Minister for the Environment 2/5/91.

Provisions: amends and extends the law relating to local government; covers a wide range of matters including local government structures and boundaries, powers, functions and procedures of local authorities, provisions relating to elected members and managers of local authorities, and other related matters.

Present position: passed by both Houses of the Oireachtas 17/5/91 and *enacted.*

Health (Amendment) Act, 1991 (No. 15 of 1991).
Provisions: amends and extends the Health Act, 1970, and the Health Contributions Act, 1979, relating to the eligibility for health services.

Presented by the Minister for Health 15/5/91.

Present position: passed by both Houses of the Oireachtas 30/5/91 and *enacted.*

CALL FOR PHOTOGRAPHS

Call to Photographers

"A photograph is not only an image (as a painting is an image), an interpretation of the real, it is also a trace, something directly stencilled off the real, like a footprint or a death mask".

Susan Sontag

Readers are requested to send (old and new) photographs of lawyers and photographs (old and new) of scenes associated with lawyers which will be considered for publication in the *Gazette.* From time to time a photograph is also required for the front cover.

Readers will appreciate that not all photographs, negatives, etc are capable of being reproduced satisfactorily on the *Gazette* paper. Accordingly, it may not be possible to reproduce all photographs submitted. Photographs must be clear, of an appropriate quality, and should be accompanied by a description of the persons or the scene (Courthouse, etc.) the subject matter of the photograph. All photographs, negatives, etc will be returned to the owners.

Payment of Wages Act, 1991 (No. 25 of 1991)

Provisions: provides for the repeal of the Truck Acts 1831 to 1896 which govern, among other things, the payment of wages to manual workers in cash, and provides protection for all employees in relation to modes of wage payment and deductions from wages.

Presented by Senator S. Fallon 17/5/91.

Present position: passed by both Houses of the Oireachtas 17/7/91 and *enacted.*

Courts (No. 2) Act, 1991.

(No. 19 of 1991)

This Act extends the time provided for in the *Petty Sessions (Ireland) Act, 1851* for the issue of District Court warrants of committal to prison for non-payment of fines (or for the non-performance of any condition) ordered by the District Court.

Presented by the Minister for Justice 10/6/91.

Present position: passed by both Houses of the Oireachtas 10/7/91 and *enacted.*

Courts Act, 1991 (No. 20 of 1991).

Provisions: increases the monetary limits of the civil jurisdiction of the Circuit and District Courts and makes provisions for procedures relating to the transfer of actions from the High Court to the lower Courts and from the Circuit Court to the District Court; provides for an increase in the number of High Court Judges, permanent Judges of the Circuit Court and permanent Judges of the District Court and provides for other related matters. Amends and extends the *Courts of Justice Acts, 1924 to 1961* and the *Courts (Supplemental Provisions) Act, 1961 to 1988.*

Presented by the Minister for Justice 10/6/91.

Present position: passed by both Houses of the Oireachtas 9/7/91 and *enacted.* □

The assistance of Margaret Byrne, Librarian, Law Society in the foregoing compilation is acknowledged.

SOLICITORS' GOLFING SOCIETY

Ph: 626 9020.
626 9029.

Fax: 626 0903.

288 Ballyfermot Road,
Ballyfermot,

Dublin 10.

PRESIDENT'S PRIZE (Don Binchy)

The President's Prize of the Solicitors' Golfing Society was held at Clonmel Golf Club on Friday, 19 July, 1991.

The results were as follows:-

Winner:		
Pat Barriscale	10	40 points
Second:		
Tom Flood	18	38 points
Twelve & Under:		
First:		
Tony Ensor	7	35 points
Second:		
David Alexander	10	34 points
Gross Prize:		
Rory Dean	6	78 strokes
Ryan Cup (13 – 18)		
First:		
Gerry Cronin	15	34 points
Second:		
John Dwyer	17	33 points
Veterans' Cup		
First:		
J. Binchy	11	35 points
Second:		
Don Binchy	9	33 points
First Nine:		
Donald Binchy	12	19 points
Second Nine:		
Cairbre Finan	13	19 points
Over 30 miles from Clonmel		
Frank Heffernan	20	33 points

The Annual General Meeting of the Society was held on the evening of the 19th.

Richard Bennett and William Jolley were re-elected as Secretary and Treasurer respectively.

John Lynch was elected Captain of the Society for 1992.

RICHARD BENNETT
Bennett & Co.

Younger Members News

"Europe under one hat"?

"Europe under one hat"?.... theme of the Conference held in The Hague, Netherlands, from the 13th to the 16th of June last.

The Conference was attended by Eva Tobin and Rosemarie Loftus on behalf of the Younger Members Committee of the Law Society.

The Conference was attended by young lawyers from Holland, Rome, Germany, Italy, Belgium, U.S.A., England and Budapest. Everything centred around the annual closing ceremony of the legal year which took place in De, Groteclerk, Groenmarkt. This Ceremony was attended by 70 invited delegates together with other invited Dutch lawyers. The President of the Young Bar, M.B. Craemer, welcomed everybody and gave an introductory speech and this was followed by the official announcement of the winner of the 1991 PLEA contest. This contest is held annually and attracts much attention in Holland. There was also a lecture given on the "Intellectual Property Law through the Ages" which was a very interesting overview of the evolution of the law in this area. After the ceremony an informal lunch was held where the delegates were introduced to each other and discussed the differences between respective legal professions. It was noted with interest the fact that in Holland an advocat and procureur performs all legal duties. A procureur signs documents in Civil cases, makes Court applications and deals with formal matters, while an advocat is similar to our "Solicitor". An advocat may only work in the District in which he is admitted and therefore if an advocat from Amsterdam wishes to prepare a case for Rotterdam, he can do so, but he cannot run the case in Rotterdam himself and therefore must get a local procureur to do this. In The Hague there are very few Solicitors admitted to the legal profession every year and the figures range between 30 to 40 Solicitors. Like our system all advocats must obtain experience under an apprenticeship of approximately 3 years.

Much of the conversation throughout the conference centred on the open market and 1992. All nationalities have agreed that the links between mainland Europe and Ireland and Britain will increase and therefore they were pleased to have made contact with our Law Society. It seems that all the nationalities present erroneously thought that we had a joint legal system with Britain. In this regard, the Europeans always contacted their British contemporaries for advice and actual handling of work even if, the subject matter was within the Irish jurisdiction. Therefore our presence in Holland assured direct contact with our Law Society in the future.

The final evening saw the holding of a Gala Ball. The theme of the Conference was again very apparent in that all persons had to wear a hat for the evening. This proved to be a very enjoyable evening and the Dutch hospitality was superb.

The Conference ended with a casual but sociable lunch on Sunday and many invitations were received by us to Conferences all over Europe. It is hoped that many of the delegates present will come to one of our Conferences here in Ireland. We have a list of all delegates' names in attendance in The Hague and we will be writing to them individually keeping them informed of future events in Ireland and giving them a contact number in the Law Society for any business matters which may arise.

All in all, we must stress that attendance at such a Conference by Irish delegates is essential to promote the Irish Legal Profession, with the hope of creating new business in the future, and in particular coming up to the Single Market in 1992, which as we all know is "hot on our heels".

Rosemarie Loftus.

THE SOCIETY OF YOUNG SOLICITORS 1991 AGM

The Society of Young Solicitors held its Annual General Meeting on the 6 July, 1991. The Minutes of the previous meeting were duly read and approved after which the following Officers were appointed for 1991/1992:

CHAIRMAN: James McCourt
VICE-CHAIRMAN: Owen O'Sullivan
TREASURER: Paul White
SECRETARY: Maureen Walsh
PUBLIC RELATIONS OFFICER: Jennifer Blunden

James McCourt

The outgoing Chairman, Colin Sainsbury, then addressed the meeting. He paid tribute to Katherine Delahunt, a former Chairman who was retiring from the Committee after five years. A feature of her period as Chairman was the commencement of breakfast meetings for the sub-committees. The new Chairman, who had been a former Treasurer and Vice-Chairman, was wished every success during his period of office as the Society commenced its 26th year. The outgoing Chairman further proposed that joint conferences with the Bar and

(Cont'd. on p.279)

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PEOPLE AND PLACES

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Pictured at the Law Society's stand at the American Bar Association's Conference in Atlanta, Georgia, were, left to right: Frank O'Donnell, Council Member, Sir Gordon Slynn, member of the European Court of Justice, Peter Murphy, Council Member.

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British Midland Airways sponsored spot prizes at the recent SADSI Ball. The photograph shows Ewen McDougall, Regional Sales Manager, British Midland Airways, presenting tickets to Maire Ann Ni Ghallchoir, Treasurer, SADSI.

Also at the American Bar Association's Conference in Atlanta were, left to right: Frank Murphy, Gleeson McGrath Baldwin, Geraldine Clarke, Council Member, John Curtin, President, American Bar Association, Chris Mahon, Director of Professional Services, Law Society, and Brian Mahon, Chairman, Public Relations Committee.

Left to Right: Michael Davey, President, Law Society of Northern Ireland, Donal Binchy, President, Incorporated Law Society of Ireland, and Jeremy Thorp, Counsellor and Head of Chancery, British Embassy, at the parchment ceremony on 26th July at which, for the first time, solicitors from Northern Ireland, England and Wales were admitted to the Irish Roll of Solicitors.

At the presentation of the MacEntee Cup following the Annual Solicitors/Barristers soccer match were, left to right: Pat O'Gorman, Captain, Barristers' team, Patrick MacEntee, S.C., and Martin Moran, Captain, Solictors' team. *(See report at p.292.)*

Legal & General
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Irish Red Cross Society *British Red Cross Society*

Conference on International Humanitarian Law

Venue: University College, Dublin
Saturday, 19th October, 1991
Cost £10.00

PRELIMINARY PROGRAMME

0.930 hrs	REGISTRATION	[UCD building and room]
10.00 hrs	WELCOME	Irish Red Cross official
10.05 hrs	**THE INTERNATIONAL RED CROSS AND RED CRESCENT: HISTORY, STRUCTURE AND PRINCIPLES**	DR HANS-PETER GASSER Legal Adviser to the Directorate, International Committee of the Red Cross (ICRC)
10.25 hrs	DISCUSSION	
10.35 hrs	**INTERNATIONAL HUMANITARIAN LAW (IHL): HISTORY, PRINCIPLES AND IMPLEMENTATION**	Moderator: MR GEORGE REID Co-Director, International Promotion Bureau, Geneva *Speakers:* MISS FRANCOISE HAMPSON Senior Lecturer in Law, University of Essex DR FRITS KALSHOVEN Emeritus Professor of IHL, University of Leiden
11.05 hrs	DISCUSSION	
11.20 hrs	**CASE STUDY** (to be done in groups)	
11.55 hrs	**REPORTING BACK AND DISCUSSION**	PANEL AS ABOVE
12.30 hrs	Lunch	
13.45 hrs	**IHL AND NON-INTERNATIONAL ARMED CONFLICTS**	DR HANS-PETER GASSER
14.05 hrs	DISCUSSION	
14.15 hrs	**IHL AND TERRORISM**	Academic Lawyer
14.30 hrs	DISCUSSION	
14.40 hrs	**RED CROSS VIDEO**	
15.00 hrs	Tea	
15.25 hrs	**IHL AND HUMAN RIGHTS**	DR COLM CAMPBELL Lecturer in Law, The Queen's University of Belfast
15.45 hrs	DISCUSSION	
15.55 hrs	CONCLUDING REMARKS	N. Ireland Red Cross official

Michael A Meyer
British Red Cross
16th May 1991

(Cont'd. from p.275)

with our Northern Irish colleagues become a regular feature of the Society and that relations with our European counterparts and with the Younger Members Committee be improved. It was noted that a joint conference would be held in Northern Ireland in May, 1992.

The new Chairman, James McCourt, proposed a vote of thanks to the outgoing Chairman who had been most active during his period of office in representing the Society at Conferences in Northern Ireland, the UK and Europe. The success of the Autumn, 1990 Conference in Cork and the Spring, 1991 Conference in Westport during Mr. Sainsbury's period as Chairman were noted. The new Chairman also expressed the hope that Katherine Delahunt who was retiring from the Committee would continue her involvement with the Society in a consultative role and attend conferences wherever possible. The new Chairman would wish to encourage more of those Solicitors who are young at heart though not necessarily in age to attend the twice yearly conferences. James McCourt also endorsed the sentiments of the outgoing Chairman with regard to establishing closer links with the Bar and building on existing links with groups from Northern Ireland, England, Scotland, Wales and the Continent. He went on to compliment the hardworking Committee.

Special thanks are due to Investment Bank of Ireland, the main sponsors of the Society, for their generous sponsorship throughout this and previous years.

Apart from the above mentioned Officers, the current Committee Members are Colin Sainsbury, Mary Hayes, Gavin Buckley, Brian O'Connor and Paul Marren.

The Autumn Conference will be held in the Newpark Hotel, Kilkenny from the 15th to the 17th November 1991. Topics will range from Insolvency and in particular its implications for property practitioners to the Competition Act and the EC Contractual Obligations Convention. □

The Medico-Legal Society of Ireland

Annual General Meeting

The following officers and council were elected for 1991-92 session.

Patron: Prof. P.D.J. Holland

President: Dr. Anne Clancy, M.B.; D.C.H., D.Obs., M.P.H.

Immediate Past President:

Mary MacMurrough Murphy, B.L.

Vice President: Prof. P.N. Meenan

Hon. Secretary: Brendan Garvan, Solicitor

Hon. Treasurer: Dr. Donal MacSorley

Hon. Auditor: Dr. Sheila Willis, Ph.D.

Legal

Judge D. Cassidy

Judge G. Hussey

Judge T. King

Nora Gallagher, Solicitor

Raymond Downey, Solicitor

Eamonn G. Hall, Solicitor

Carmel Killeen, Solicitor

Emer O'Donoghue, Solicitor

Tom Kennedy, Solicitor

Medical

Dr. Declan Gilsenan

Dr. Robert Towers

Dr. Seamus Ryan

Dr. Liam Daly

Dr. Desmond MacGrath

Prof. John Harbison

Dr. Sarah Rogers

Dr. Bartley Sheahan

Dr. Charles Smith

Prof. Max Ryan

Anne Clancy

Profile of New President

Dr. Anne Clancy, M.B.; D.C.H.; D.Obst.; M.P.H.

Anne Clancy was born in Dublin and was educated at Scoil Chaitriona, Dublin. She graduated from U.C.D. in 1976.

Dr. Clancy worked initially as a Registrar in Psychiatry in Newcastle Hospital, Wicklow and at Stewart's Hospital, Palmerstown.

She has been employed by the North Eastern Health Board as an Area Medical Officer in Public Health Medicine since 1982. She is, at present, an Area Medical Officer in the County Meath Community Care Area with special interest in mental handicap and child sexual abuse.

The new President is the daughter of the late Mr. Jack Clancy, a former Official Assignee in Bankruptcy. □

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During 1990 the Irish Kidney Association's Donor Awareness Programme helped 200 people suffering Kidney, Heart and Liver failure to receive a second chance for life.

The Irish Kidney Association could not carry this life-saving work without the help of informed caring members of the community - such as the legal profession.

Finance received through bequests/donations has enabled not only educational and research programmes but also the purchase of life-saving equipment for hospitals nationwide.

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IRISH KIDNEY ASSOCIATION
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Fax: 01-683820
Registered in Ireland, No: 66109
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Telephone: 01-685001.

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When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

"I give, devise and bequeath the sum of Pounds to the Irish Cancer Society Limited to be applied by it for any of its charitable objects, as it, at its absolute discretion, may decide."

All monies received by the Society are expended within the Republic of Ireland.

"Conquer Cancer Campaign" is a Registered Business Name and is used by the Society for some fund raising purposes.
The "Cancer Research Advancement Board" allocates all Research Grants on behalf of the Society.

IRISH CANCER SOCIETY
5 Northumberland Road, Dublin 4, Ireland. Tel: 681855

THE LOST CHILDREN OF AUTISM

A mothers love or summer flowers,
The fairytales of castle towers,
The happiness a birthday brings,
My child can't understand these things,
For he's autistic, cold, alone,
The reason for his plight, unknown,
Please help us to provide a way,
To turn his endless night to day.

THE LOST CHILDREN OF AUTISM
PLEASE HELP US TO REACH THEM.

When you are making a will
Please remember us

Irish Society for Autistic Children

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DUBLIN 1.
Telephone: (01) 744684

Contractual Obligations (Applicable Law) Act, 1991

by John King, Solicitor

The Contractual Obligations (Applicable Law) Act 1991 was signed by the President on 8th May, 1991. It is expected that it will be brought into effect by way of commencement order towards the latter part of this year. Its purpose is to enable Ireland to ratify the 1980 Rome Convention on the law applicable to contractual obligations.

Harmonisation

The aim of the Convention is to harmonise rules relating to conflicts of laws within the EC. It will come into force in Ireland when the Act becomes law.

Scope

The Convention applies to contractual obligations in situations involving a choice between the laws of different countries, except in the case of certain matters which are specifically excluded from its scope. These are:—

(i) questions involving the status of legal capacity of natural persons;
(ii) contractual obligations relating to wills and succession;
(iii) rights in property arising out of marriage;
(iv) rights and duties arising out of a family relationship;
(v) certain obligations arising under negotiable instruments;
(vi) arbitration and choice of jurisdiction agreements;
(vii) questions arising under company law and the law of agency;
(viii) questions arising from trusts;
(ix) matters relating to rules of evidence and procedure;
(x) contracts of insurance covering risks situated in the EC.

Choice of Law

Where contracts within the scope of the Convention are concerned an important principle is that a contract will be governed by the law chosen by the parties. That choice may be made expressly, or may be inferred from the surrounding circumstances. Commercial lawyers will undoubtedly choose to express the parties' choice of law in a clearly drafted contractual provision.

Close Connection

The Convention also deals with what happens if the parties do not expressly or by inference choose what law is to apply to the contract. In such circumstances the contract will be governed by the law of the country to which it is most closely connected.

As with many of the concepts in the Convention, the concept of "close connection" will not be new to Irish lawyers. However, the Convention attempts to clarify the concept by setting up certain presumptions. For instance, where land is the subject matter of a contract, the presumption is that the contract is most closely connected with the country in which the land is situated.

". . . if the parties do not . . . choose what law is to apply . . . the contract will be governed by the law of the country to which it is most closely connected."

Mandatory Rules

Having set out the general principles the Convention goes on to deal with specific issues. Of particular interest to practitioners will be the provisions in aid of consumers and employees. These provisions are designed to prevent consumers and employees from having their statutory rights eroded through the application of rules concerning the proper law of contracts.

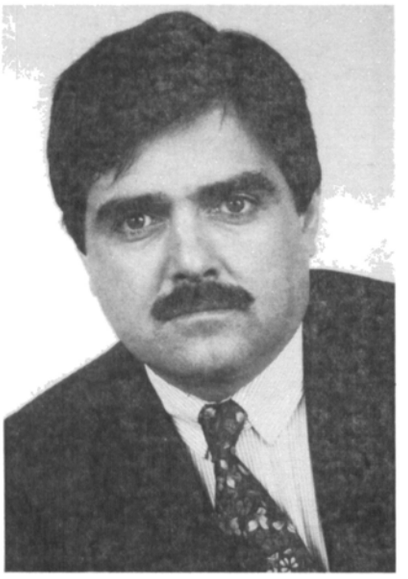
The domestic laws of many member states include what in the Convention are described as mandatory rules. These are rules, originating in statute, which parties to agreements may not exclude. Such a rule in Ireland is the provision in the Sale of Goods and Supply of Services Act, 1980 which provides that one may not exclude implied terms as to title in a hire purchase agreement.

The Convention provides that such mandatory rules of law, in the case of consumers or employees in one country, may not normally be excluded as a result of the application of the law of another country.

Formal Validity

A group of articles deals with matters associated with the formal validity of contracts. It is provided that a contract concluded between parties who are in the same country is formally valid if it satisfies the requirements of the law which governs it under the Convention, or the law of the country in which it is concluded. Similarly a contract concluded between parties in different countries is formally valid if it satisfies the formal requirements of the law of one of those countries. The policy here is clearly against the striking down of contracts for formal invalidity.

"The policy is . . . against the striking down of contracts for formal invalidity."



John King

Incapacity
In the absence of counter measures, the complexities which arise when a choice has to be made between the laws of different countries can give opportunities for the unscrupulous and the opportunistic. The Convention tries to close off certain possibilities of this kind. For instance two parties might enter into a contract in one country, choosing the law of a second country as the proper law. One of the parties, having the capacity to contract under the law of the first country, might invoke his incapacity to contract under the second country's law to avoid his contractual obligations. The Convention provides that a defence of this kind is not normally possible.

Common Rules
The Convention deals with these and other issues in language which is clear and concise. Whereas its ratification will not of itself remove the uncertainty which can exist where legal problems have an international dimension, the fact that a clear set of rules will in the future be applied throughout the EC clearly represents a step forward. □

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Civil Liability for the Supply and Sale of Intoxicating Alcohol Massachusetts Experience

by
Gregory Glynn*
Solicitor

My first Christmas in Ireland, after five years in Massachusetts was illuminating, the main reason being the diligent Garda enforcement of the criminal law against drunken driving.

In the United States over the last several years there has been a public demand for a complete crackdown on drunken driving.

Considerable success has resulted in stricter civil laws being passed in a number of the individual states to curtail drunken driving. A lot of this success is due to voluntary organisations, most particularly the lobby organisation known as Mothers Against Drunk Driving (MADD).

The laws of these states are sometimes referred to as "Dram Shop" statutes or civil liability statutes. They impose liability on the seller of intoxicating alcohol when a third party is injured as a result of the intoxication of the buyer where the sale has caused or contributed to such intoxication. Several states' laws apply to gifts as well as sales of alcohol. Also, in some instances, a remedy is given to the dependant family of a seriously injured third party for loss of support of the "breadwinner', just as it would apply if the third party died.

In Massachusetts, there are no 'Dram Shop' statutes which impose civil liability against one who furnishes alcoholic beverages to a person who becomes intoxicated and thereafter negligently injures or kills a third person. In Massachusetts, any civil liability in such cases is still grounded in the common law of negligence – *thus offering a more useful comparison for Irish lawyers.*

The following is a Massachusetts' case study!

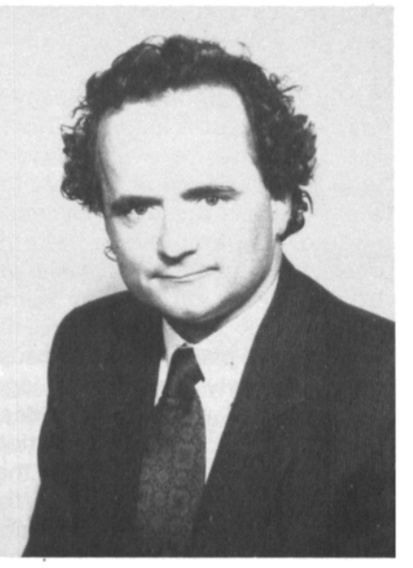
Company X has for years permitted its employees to hold an informal 'happy hour' each Friday evening. Although Company X does not supply or subsidise the purchase of alcoholic beverages, it does make space available for the occasion and presumably also supplies cups, ice, and the like. No effort is made by Company X to prohibit the drinking of alcohol by persons under 21 years of age, the minimum legal drinking age in Massachusetts being 21. Company X does not receive any form of compensation as a result of these gatherings.

At least two sets of legal issues are raised by this example. First, under Massachusetts law, it is a criminal offence to sell or deliver alcoholic beverages to any person under 21 years of age. Specifically, M.G.L. c.138, Section 34 provides that "whoever makes a sale or delivery of any alcoholic beverage or alcohol to a person under 21 years of age . . . shall be punished by a fine of not more than $2,000 or by imprisonment for not more than six months, or both." It is not at all clear whether Company X, by simply. providing space for these weekly get-togethers, is "selling" or "delivering" alcoholic beverages to underage individuals. However, in a recent case, the Massachusetts Supreme Judicial Court suggested that a social host who provided alcoholic beverages to a minor may be found to have violated this provision. (See *Langemann -v- Davis,* 398 Mass. 166, 168 n.2 (1986). Although Company X as a corporation does not itself furnish alcoholic beverages, the concern is that it might be held vicariously responsible for its employees who actually purchase the alcohol and deliver it to the premises. In any case, Company X's criminal law exposure under this statutory provision is, at the least, problematic.

". . . . [a company] might be held vicariously responsible for its employees who . . . purchase alcohol and deliver it to the premises."

Second, regardless of the potential for criminal penalties

** (Gregory Glynn is the resident Irish solicitor and US Associate in the US office of the Dublin firm of Arthur Cox).*



Gregory Glynn

under the above provision, significant issues arise concerning Company X's possible civil liability for damages caused by employees who become intoxicated on its premises. Although Massachusetts has no so-called 'Dram Shop' statute, recent case law has suggested that a social host may be found to be liable under a theory of common law negligence for injuries to persons caused by guests who become intoxicated on the social host's premises. In *McGuiggan -v- New England Telephone and Telegraph Company, et al,* 398 Mass. 152, 162 (1986), the Massachusetts Supreme Judicial Court stated as follows:

> "We would recognise a social host's liability to a person injured by an intoxicated guest's negligent operation of a motor vehicle where a social host who knew or should have known that his guest was drunk, nevertheless, gave him or permitted him to take an alcoholic drink and, thereafter, because of his intoxication, the guest negligently operated a motor vehicle, causing the third person's injury. In deciding whether the social host exercised statutory prudence in such circumstances, a relevant consideration will be whether this social host knew or reasonably should have known that the intoxicated guest might presently operate a motor vehicle".

Although the facts of that case exculpated the defendants under this standard, it is not difficult to see the potential risk Company X runs by having these weekly gatherings. Although Company X may argue that it is not a "host" in the same manner as an individual who provides food and alcohol at a party at his personal residence, should an employee become intoxicated and then cause injury to a third person on his way home, Company X would likely be the target of the plaintiff both because of this newly articulated legal standard as well as its 'deep pocket' status. In this connection, it cannot be seriously disputed that Company X knows most of the participating "guests" will soon operate motor vehicles to return home.

This concern appears well grounded given the discussion in *Langemann -v- Davis* where the Court held the defendant to be not liable. In that case, the Court emphasised that the defendant was not at home at the time of the party in question; had never kept alcoholic beverages; had left no alcoholic beverages in the home before leaving the party; and did not observe anyone consuming alcohol at the home. Contrasted with the situation presented here, Company X clearly has knowledge of and permits its employees to consume alcohol on its premises and corporately observes such consumption. Under the *McGuiggan* standard quoted above, the danger exists that Company X could, under certain circumstances, be characterised as a "host" which "permitted" the consumption of additional alcohol by an already intoxicated employee who thereafter causes injury to a third person.

". . . . recent case law has suggested that a social host may be found to be liable under . . . common law negligence for injuries to persons caused by guests who become intoxicated on the social host's premises."

Finally, this situation would be even further exacerbated should the employee in question be under the age of 21. In the *Langemann* case, the Court at least suggested that a more lenient standard of liability might be imposed upon a host who provides alcohol to a minor. In particular, the Court observed that other jurisdictions have considered unimportant the question of minors' intoxication at the time a social host provided an alcoholic beverage and pointed to cases which held that the furnishing of alcohol to a minor who later becomes intoxicated and drives negligently causing injury is sufficient to cause liability. In addition, should Company X be found to have delivered an alcoholic beverage to a minor in violation of the criminal law statutory provision, this too could be considered evidence of its negligence. Although Company X could still argue that it did not actually furnish the alcohol and therefore should not be held accountable, it remains unclear whether such a defence would prevail.

In summary, serious issues are raised regarding this 'happy hour' practice. Certainly, its origin and continuation is founded on the notion that such gatherings promote a level of conviviality and goodwill among employees and provide an opportunity for individuals at varying echelons within a company to intermingle socially. However, given the potential risks, it may well behove Company X to consider whether the presence of alcohol is a prerequisite for such social interaction. The outlined category of potential civil liability for a "host" may soon be applied here by extension of our common law negligence principles, particularly as such 'alcohol' centred entertainment is very much part of the Irish ethos.

These legal developments in the US relating to the purchase or supply of alcohol have had quite an effect. Bar Staff are very conscious of the alcohol condition of patrons; your personal friend (i.e. the social host) who throws a party at his home is very conscious of your alcohol condition when you leave.

Food (or drink) for thought!

Editor's Note: see *Jordan House -v- Menow.*

□

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M.J. O'Connor & Co. – Museum

To celebrate the centenary of its foundation in 1898, the firm of M.J. O'Connor & Co., of Wexford has established a museum containing over 100 exhibits. The museum is located in what must have been one of the earliest purpose built solicitors' offices in Ireland when they were erected in Georges Street, Wexford in 1894.

The offices stand on the site of a townhouse formerly owned by the 1798 patriot Bagenal Harvey and appropriately the museum contains a flintlock pistol reputed to have been owned by Bagenal Harvey.

The founder of the firm, Michael J. O'Connor, was the author of a series of articles on Land Reform published in the *Freemans Journal* and this series of articles is exhibited in the museum.

Michael O'Connor's brother, James, was successively a Solicitor, a Barrister, a Kings Counsel, Solicitor General and then Attorney General of Ireland, Judge of the Chancery Division and a Lord Justice of Appeal in Ireland and finally a Solicitor again. He was the author of *The Irish Justice of the Peace* and *The Licensing Laws of Ireland* both of which are displayed in the Museum.

A feature of the museum is the collection of splendidly mounted and framed old deeds including a Grant of 1668 of lands to Richard Belew and a Deed of 1754 under the Seal of the Chancery Division of the High Court authorising Charles W. Walker to hold Courts in the County of Wexford. In addition, the museum contains a considerable collection of ancient Bank Notes including the earliest drawn on the Wexford Bank on the 12th October, 1805 and a Bank of Ireland Bank Note for 30 shillings dated 17th March, 1812.

Michael J. O'Connor's son, Fintan, practised in the firm for 56 years up to 1979 and has been succeeded by the present principal, James O'Connor Junior, who has been responsible for the establishment of the museum.

□

James T. O'Connor, standing in the waiting room of the offices of M.J. O'Connor & Co., holding the first letter book of the office.

This photograph, taken on the 9 November, 1919, on the occasion of the visit of The Royal Price Faisal IBN Saud of Arabia and his suite to Michael T. O'Connor's shooting lodge at the North Slob, Wexford. In the back row standing first left is Mr. H. St. John, T.B. Philby of the British Colonial Office, who was the father of "Third Man", Mr. Kim Philby. Beside him is the cousin of the Prince The Abadulla of Qusaibi. Michael T. O'Connor is sitting in the centre of the photograph, and his wife, Catherine, is behind him.

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Recent changes in the liabilities of personal representatives under the Social Welfare Code

Legal practitioners may be interested to note recent changes, effected by the Social Welfare Act, 1991, to the statutory obligations placed on personal representatives administering an estate where the deceased had been in receipt of a non-contributory (i.e. means-tested) old age pension.[1] Such pensions would often be paid to self-employed persons who, because they did not pay PRSI, would not qualify for the contributory old age pension and thus the contents of this article should be of particular, though not exclusive, interest to practitioners with a rural clientele.

by
Gerry F. Whyte
F.T.C.D.

General provision for the non-contributory old age pension is to be found in Sections 157 to 174 of the Social Welfare (Consolidation) Act, 1981 (hereinafter referred to as "the 1981 Act") as amended. Sections 169, 172 and 174 are especially relevant to personal representatives.

Obligation to provide information to the Department of Social Welfare – s.174

Perhaps the most significant provision in the 1981 Act referring to personal representatives is s.174, as amended by s.33 of the Social Welfare Act, 1991. Sub-section (1) provides:

> "The personal representative of a person who at any time was in receipt of [non-contributory] old age pension, shall, at the request of a social welfare officer made for the purposes of an inquiry and report in relation to the pension, and within such period (not being less than 30 days) as may be specified in the request –
>
> a) furnish to the officer such information, books and documents relating to the affairs of the person which are in the power, possession or procurement of the personal representative as he may reasonably require and permit the officer to take extracts from the books and documents and furnish to him such information as he may reasonably require in relation to such extracts and
>
> b) authorise the officer to inspect any entries relating to the affairs of the person in the books of any bank (including any savings bank) and to take copies of such entries and furnish to the officer such information which is within the power, possession or procurement of the personal representative as he may reasonably require in relation to such entries."

Failure to comply with this provision is an offence punishable, on summary conviction, to a fine not exceeding £500 or imprisonment for a term not exceeding 1 year, or to both such fine and imprisonment, or on conviction on indictment to a fine not exceeding £2,000 or imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.

Sub-section 3 imposes certain conditions which must be satisfied before the assets of the deceased can be distributed. This provision, as amended by s.33 of the 1991 Act, now provides:

> "The personal representative of a person who was at any time in receipt of a pension shall before distributing the assets of the person –
>
> a) (i) inform the Minister, by notice, in writing delivered to the Minister, of his intention to distribute the assets, and
>
> (ii) provide the Minister with a schedule of the assets of the estate,
>
> not less than three months before the distribution commences and
>
> (b) if requested in writing by the Minister, within eight weeks of the furnishing of the notice and schedule of assets referred to in paragraph (a), ensure that sufficient assets are retained, to the extent (if any) appropriate, to repay any sum which is determined to be due to the Minister or the State (as the case may be) in respect of –
>
> (i) payment of pension to the person at a time when the person was not entitled to receive the pension, or
>
> (ii)payment of pension to the person of an amount in excess of the amount which the person was entitled to receive."

So where one is dealing with the estate of a non-contributory old age pensioner, the personal representative must always prepare a written notice of his intention to distribute the assets and submit such notice, together with a schedule of assets of the estate, to the Minister at least three months before distribution begins. The purpose of this provision is to afford the Department the opportunity to see whether any overpayment of pension took place. Then, in those cases in which a written communication is received from the Minister within the succeeding eight weeks, sufficient assets must be retained in order to meet any possible claim from the Minister arising out of overpaid pension. In this context it should be noted that s.174(3A), inserted by s.33 of the 1991 Act, provides for a presumption, which can be rebutted by the personal representative, that all of the

deceased's assets at the time of his death belonged to him for the entire period during which the pension was paid. Furthermore, s.174 (3B), also inserted by s.33 of the 1991 Act, confers on the Minister a discretion to mitigate amounts determined to be due to him in accordance with sub-s.3A where it appears equitable to him to do so.

A most important point to note in this context is that contravention of s.174 (3) leaves the personal representative *personally* liable, and not just liable in his capacity as personal representative, to repay to the Minister an amount equal to the amount, if any, which was due to the Minister from the estate in respect of overpaid old age pension. Given that in the majority of cases the personal representative will have relied on the advice of a solicitor, if such a contravention does occur, one would expect him to be able to seek, in effect, an indemnity against his legal adviser by bringing a claim for professional negligence.

Obligation to repay overpaid pension – Sections 169 and 172

In some cases the personal representative will be faced with a demand for repayment of overpaid (non-contributory) old age pension. This can arise under two provisions.

By virtue of s.169 (3) of the 1981 Act, a personal representative is liable to repay to the Minister any sums paid to the claimant in respect of non-contributory old age pension while the statutory conditions were not fulfilled or while he was disqualified for receiving the pension.[2] This liability would appear to be absolute in the sense that it does not appear to be necessary for the authorities to establish fraud on the part of the claimant in order to be able to claim back such overpayments. Section 169 (7), as amended by s.24 of the Social Welfare Act, 1984, provides, *inter alia,* that such sums may be deducted from any monies to which the personal representative becomes entitled, *as personal representative,* on account of non-contributory old age pension. This presumably refers to any such pension outstanding at the date of the claimant's death, together with any such pension payable, where appropriate, for the period of six weeks after that date.[3] This means of recovery is without prejudice to the general power of the Minister under s.169 (3) to recover the overpaid pension. The decision as to whether the statutory conditions for eligibility were fulfilled or whether the claimant had been disqualified for receipt of the pension has to be made by a deciding officer of the Department of Social Welfare[4] and such a decision is subject to the appellate procedures set out in Part VIII of the 1981 Act as amended by Part V of the Social Welfare Act, 1990. This is in contrast to decisions made pursuant to s.172 of the 1981 Act, to which I now turn.

Section 172 deals with recovery of overpaid pension in a very specific situation, *viz.* where the pensioner failed to notify the Department of an increase in means. Sub-section (1), as amended by s.53 of the Social Welfare Act, 1991, obliges an old age pensioner, or any person who has applied for a non-contributory old age pension, to notify the Minister of any increase in the means of the person within three months after the end of the month in which such increase occurred. Sub-section 2 provides in relevant part:

> A person who contravenes subsection 1 or, in case he is dead, his personal representative shall, unless it is shown to the satisfaction of the Minister that the person was not aware of the increase to which the contravention related...be liable to repay the Minister on demand

any sums received by way of non-contributory old age pension to which he was not entitled. Section 172(3) provides that any such sum payable shall be a debt due by the person to the Minister.

There are two statutory defences available to the claimant in this situation. First, sub-section 2 itself provides that if the claimant can establish to the satisfaction of the Minister that he, the claimant, was unaware of the increase in means, no liability to repay will arise. This defence is presumably also available to the personal representative if the latter can establish that the

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Edited by: **Shane Murphy, Barrister-at-Law**
With a foreword by:
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deceased had been unaware of any increase in means. If this defence is made out, then it would appear that the claimant, or his estate, can retain any overpaid pension, notwithstanding that there might be adequate monies available to satisfy any demand for repayment. Second, s.172(4) provides that

> [w]here a person has contravened subsection (1) and the Minister is satisfied that there was, in relation to the contravention, no fraudulent intent on the part of the person and that there are no significant resources available to the person, subsections (2) and (3) shall not apply in relation to the increase referred to in subsection (1).

This presumably covers a situation in which the person was aware of the increase in means but was not aware of the obligation to report such increases to the Minister. Given that, the likely purpose of s.172(4) is to avoid pushing a pensioner with inadequate resources further into poverty, it may be that this defence would not be relevant after his demise and that, therefore, it may not be available to his personal representative. The position here is unclear.

By way of contrast with s.169(3), s.172 clearly envisages that all decisions under that section are to be made by the Minister (in reality the executive officers acting on his behalf) rather than by the deciding officers of the Department. It follows that there is no right of appeal from any decision made under this section.

A further difference between these two provisions is that if the claimant can show that he had not acted with fraudulent intent, he had gone a considerable way towards establishing a statutory defence to a claim under s.172.[5] However no comparable defence is available to a claim under s.169 (3), where liability to repay overpaid pension would appear to be strict. This strict liability may be compared with the general obligation to repay overpaid social welfare payments. By virtue of s.113 (2) of the 1981 Act, regulations may provide, *inter alia,* for the repayment of social welfare in cases referred to in s.300 (5) (a) of the Act.[6] Section 300 (5) (a), which deals with the revision of decisions by deciding officers or appeals officers, provides in relevant part:

> "A revised decision . . . shall take effect as follows – (a) where any benefit . . . (or) assistance . . . will, by virtue of the revised decision, be disallowed or reduced . . . and the revised decision is given owing to the original decision having been given . . . by reason of any statement or representation (whether written or verbal) which was to the knowledge of the person making it false or misleading in a material respect or by reason of the wilful concealment of any material fact, [the revised decision] shall take effect as from the date on which the original decision took effect . . . ."

The significant point to note here is that the revised decision reducing or disallowing a social welfare entitlement can only have retrospective effect where the original decision resulted from a fraudulent misrepresentation on the part of the claimant.[7] In *The State (Hoolahan) -v- Minister for Social Welfare*[8] Barron J. held that before s.300 (5) (a) could be invoked, the claimant must be given an opportunity to present his side of the case in relation to the allegation of fraud. This contrasts with s.169 (3) and to the extent that there is any inconsistency between these two provisions in relation to the non-contributory old age pension, it is submitted that it should be resolved in favour of the application of s.169 (3) by virtue of the presumption of statutory interpretation, *generalia specialibus non derogant*, i.e. general provisions do not amend or alter specific ones.[9]

Time limits for the making of claims under ss.169 and 172

A new provision inserted by s.34 of the Social Welfare Act, 1991 – s.169 (11) – provides for the time limit within which proceedings may be brought against the estate of a deceased person of the recovery of overpaid non-contributory old age pension under either s.169 (3) or s.172 (2). Such proceedings must be brought within the period of two years commencing on the date on which the notice and schedule of assets referred to in s.174 (3) is received by the Minister or within any other period fixed in any other enactment, whichever is the longer. The breadth of the second limb of this provision is quite extraordinary and raises the possibility that this time limit may be amended by legislation which has little obvious connection with the Social Welfare Acts. It should be noted that s.169 (11) deals only with proceedings taken against the estate of a deceased pensioner and therefore one presumes that claims taken directly against a pensioner are subject to the normal limitation period of six years from the date on which the cause of action accrued.[10]

". . . proceedings [under s.169 (3) or s.172 (2)] must be brought within the period of two years [from submission of the notice and schedule of assets] or within any other period fixed in any other enactment, whichever is the longer".

Miscellaneous

Other aspects of the welfare code may be of interest to practitioners in this context. By virtue of s.120 of the 1981 Act, unpaid social insurance contributions form part of the preferential debts which rank after funeral, testamentary and administration expenses in the

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administration of the estate. If a health board incurred expense in relation to the burial of the deceased, it may obtain repayment of such expenses from the estate of the deceased or, indeed, from any person liable to maintain the deceased immediately before his death – s.216 of the 1981 Act.

A number of welfare payments fall due on the death of a person. Widows' pensions are perhaps the most obvious but in addition it may be possible to claim a death grant (ss.107-109); a survivor's benefit, for a widower who is incapable of self-support by reason of some physical or mental infirmity and whose wife had been in receipt of retirement pension or contributory old age pension (s.87); death benefit, if the deceased died as a result of an occupational accident or disease (ss.49-53); and lone parent's allowance where the surviving spouse is the parent of one or more qualified children (Part III of the Social Welfare Act, 1990). Furthermore if the deceased had been in receipt of any one of a number of specified social welfare payments and had an adult dependant, his welfare payment continues to be paid for a period of six weeks after this death (s.125, as amended by s.9 of the Social Welfare Act, 1991). Finally, s.112(4) empowers the Minister to make regulations providing that probate or other proof of title of the personal representative of any deceased person may be dispensed with in the case of payment of social welfare payments and also providing for the manner of distribution of such payments. The relevant regulations are the Social Welfare (Claims and Payments) Regulations, 1952, in particular art.17 thereof.

FOOTNOTES

1. The statutory provisions considered in this note also apply to the blind pension, which originated as a variant of the non-contributory old age pension.

2. The statutory conditions for receipt of the non-contributory old age pension are that the claimant has attained 66 years of age and that he satisfies the appropriate means test. A claimant is disqualified if he is absent from the State; is imprisoned for any offence; is in receipt of a contributory old age pension or is convicted of an offence under s.169 (1) of the 1981 Act, in which case he is automatically disqualified for the six month period following the date of conviction.

3. See s.125 of the 1981 Act, as amended by s.9 of the Social Welfare Act, 1991.

4. See s.296 of the 1981 Act.

5. See s.172 (4), cited above.

6. The relevant regulations are the Social Welfare (General Benefit) Regulations 1953 (S.I. No. 16 of 1953), as amended by S.I. No. 126 of 1963.

7. By virtue of s.35 of the 1991 Act, a new paragraph, s.300 (5) (aa) is inserted into this sub-section which gives a deciding officer the discretion to determine when a revised decision shall take effect where such decision is based on new evidence or new facts. However the authority to seek a repayment of overpaid welfare is still conferred by s.113 (2) (b) and this authority has not been extended to take account of the new s.300 65) (aa).

8. Unreported, High Court, 23 July, 1986.

9. For an illustration of the application of this presumption, see *D.P.P. -v- Scott Grey* [1986] I.R. 317.

10. Statute of Limitations, 1957, s.11 (1) (a).

□

CRIMINAL LAW IN THE 1990s A EUROPEAN PERSPECTIVE

The Society's Criminal Lawyers Committee is organising a Seminar on the theme of Criminal Law in the 1990s – A European Perspective, in the President's Hall, Law Society, Blackhall Place on Saturday, 16th November, 1991.

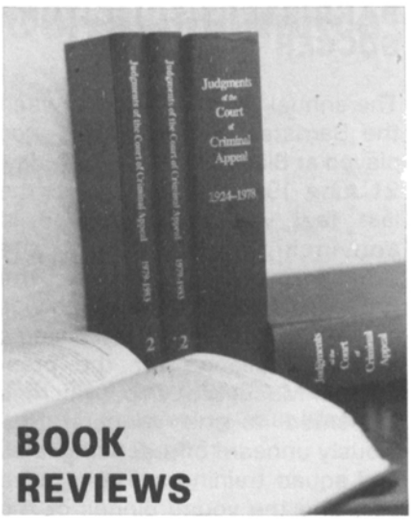
The one-day Conference (from 9.15 a.m. – 3.45 p.m.) will examine the following topics:—

- The Proection of Rights
  Speaker: Michael Mansfield, Q.C.
- The Practice of Criminal Law in a Civil Law Jurisdiction
  Speaker: Antoine Comte, Avocat à la Cour, Paris
- Computer Fraud in the 1990s
  Speaker: Eamonn Barnes, Director of Public Prosecutions
- Reform of the Criminal Law in the 1990s
  Speaker: The Hon. Mr. Justice Ronan Keane, President, Law Reform Commission

A limited number of places are available on a first-come, first-served basis to members of the Society who would like to attend the Conference.

If you would like to attend, please write to, or phone, Ms Linda Kirwan, Secretary, Criminal Lawyers Committee, at: The Law Society, Blackhall Place, Dublin 7, before Tuesday, 11th October, 1991. Tel: (01) 710711.

□



Blackstone's "Criminal Practice" [Ed. Peter Murphy, (Blackstone Press, Ltd., London 1991 ISBN 185431 001 1)]

The Preface to this weighty tome announces that the last time a new work was published in the field of criminal law, dealing comprehensively with all aspects of substantive law and procedure required by practitioners, was 1822. That date marked publication of the first edition of Archbold whose stated aim was "to compress the whole into the smallest possible compass consistent with perspicuity" (Preface (V)). With time, that volume has correspondingly grown, and the particular publication here under review, attempts to fill the resultant gap for a comprehensive single work aimed at the criminal law practitioner.

This volume does not aim to be all-inclusive and sacrifices such overtly for the sake of portability. The bias in favour of material which is truly essential to modern day criminal work is made initially and without reservation, thus dictating the structure and contents of the book.

Part A contains the general principles of criminal law; Part B the substantive law itself; Part C the more important road traffic offences; D criminal procedure; E sentencing and F the rules of evidence.

Significantly, despite its practical slant, the work does not sacrifice academic analysis. This is a welcome development, as too often recent works and publications of a legal nature draw what some might consider an artificial distinction between the needs of practice and those of the academic. While the two may not be synonymous, too often is it assumed that they are entirely distinct. Such distinction impoverishes a work, particularly in the criminal field where appellate tribunals, in particular, demand a depth of analysis and familiarity with the nuances of academic debate, which both informs and in turn is informed by, the stuff of practice.

Hence the inclusion of Part A, in particular, with its discussion of general principles of criminal liability is to be welcomed by practitioners and academics alike. On a basic level, it is self-evident, that if any work is to survive – despite constant updating on a yearly basis as here anticipated – the plethora of emerging novel offences, then those general principles of criminal liability which apply whatever the relevant criminal code, merit sufficient review.

To highlight some aspects of Part A of the volume: the section on *Actus Reus* contains a succinct summary of basic elements from causation and voluntariness to the 'egg-shell' rule sufficiently clearly to be accessible to any first year student of criminal law, without being overly simplistic. *'Mens rea'* receives similar treatment. Of course, the summary may at times for the sake of brevity appear cursory; and the tension and conceptual difficulty in considering these principles in isolation from given offences (experienced alike by the criminal law teacher), is evident, yet the authors do manage to strike if not a happy balance, an acceptable one. One could criticise for example the treatment of intention – particularly in the context of murder – as being unduly dismissive or brief, yet if the authors were to indulge academic arguments, this single volume would indeed have become several. Issue could be taken, however, with the authors' practice of commencing each section with a brief (if not bald) statement of the law in the area, which if not followed through by the reader might prove misleading. For instance, in the context of the concept of 'intention' it is stated (p.19) that

> "A person clearly intends a consequence if he wants that consequence to follow from his action. This is so whether the consequence is very likely or very unlikely to result. Thus an accused who shoots at another wanting to kill him; intends to kill whether the intended victim is 2 metres away or an easy target or whether he is 200 metres away and it would have taken an exceptionally good shot to hit him. In either case, even if the accused misses, he will be liable for a crime requiring intention to kill, such as attempted murder."

Given the recent debate regarding the complexity and confusion of 'intention' particularly in relation to murder, such a statement although obviously accessible to any reader may, in its equation of intention with desire, appear somewhat misleading, if not glib.

However, it is a tribute to the text that these lapses are rare, and perhaps inevitable, in what is after all but one section of a large volume, not wholly devoted to such issues.

This leads us to the strength of the text: its attempt to address the practitioner's need for an overall perspective on all rules relating to criminal practice: not adhering to the artificial distinction made between areas of study, which in any case overlap in the courtroom; but rather pursuing a sequential analysis of each area of law relevant to a criminal case. Obviously for the Irish practitioner some sections will prove more useful than others – those dealing with the list of offences/procedure being somewhat irrelevant, except to the extent of correspondence between the jurisdictions, due to our somewhat slavish adherence to British legislative precedents. Moreover, given the absence of such works devoted exclusively to Irish law, and the continuing popularity of Archbold with the Irish Criminal Bar, it is probable that most Irish criminal law practitioners will find this tome a useful addition to their shelf.

This publication may also prove helpful – if handled carefully and with due adherence to more than the introductory paragraphs – to those practitioners who have occasional recourse to the criminal tribunals, and require a single volume to guide their passage.

Perhaps, in summary, this is the appeal of the text: a volume which whets the appetite of practitioner, academic and student, giving each a glance at the other's territory. While not sufficient perhaps to satiate the juices thus evoked, it proves a useful guide to where and how one might look for more, should the need arise. In an area as complex and constantly changing as criminal law, the role of a volume such as this with a broad and yet serious appeal must be great.

Caroline Fennell

COMBINED COMPANIES ACTS 1963-1990

By Declan Hogan, Barry O'Neill and John Bowen-Walsh [Bastow Charleton Publications, 1991. Loose-leaf format, IR £40 for solicitors, otherwise £47.50]

In 1921 Sir Cecil Carr wrote that as a collection, the statute book "might be summed up as beyond the average citizen's pocket to purchase, beyond his book-shelves to accommodate, beyond his leisure to study and beyond his intellect to comprehend" *Delegated Legislation.* Some judges have been more forthright. Earlier, in 1854 Vice Chancellor Kindersley, when examining an Act of Parliament said, that he had carefully gone through the statute "and to say that it might have been made more clear and precise than it is, or even to say that there is at least one passage in it which is absolute nonsense, is only to say of this Act which I am afraid may be predicated of perhaps nine out of ten Acts of Parliament which come before Courts of Justice for their consideration." *(Trevillian -v- Mayor etc of Exeter* (1854) 5 De GM & G828 at 831). It has always been fashionable for lawyers to criticise the Parliamentary Draftsmen. Drafting statutes in Ireland on slender resources is an arduous task. However, the writer of this notice does admit to frequent intellectual difficulties when trying to understand some of the provisions of Irish company law statutes.

The compilers of *The Companies Acts 1963-1990*, Declan Hogan, FCA, Bastow Charleton, Barry O'Neill, Solicitor, Eugene F Collins & Son, and John Bowen-Walsh FCA, the Institute of Chartered Accountants in Ireland, state in their preface that the purpose of the compilation is to assist accountants, solicitors and other regular users of the Companies Acts by presenting the legislation in one volume. The Acts have been compiled by amending and deleting sections in each of the individual Acts to take account of subsequent legislation. The compilers note that their efforts are not an attempt at a full consolidation that would group together the sections relating to a particular topic. The compilers hope, nevertheless, that the legislation presented in their format will be of benefit to practitioners and students pending the completion by the Department of Industry and Commerce of its consolidating legislation.

A useful index has been added to the compilation and details of the commencement dates of the *Companies Acts, 1990* are also set out. The compilation will be of considerable benefit to practitioners. The publication may be obtained from Bastow Charleton Publications, Marine House, Clanwilliam Court, Lr. Mount Street, Dublin 2.

In addition to the price quoted, £2.50 should be added for postage and packing.

Eamonn G Hall □

BARRISTERS/SOLICITORS SOCCER

The annual Soccer game between the Barristers and Solicitors was played at Blackhall Place on Friday, 21 June, 1991. The games over the last few years had resulted in convincing victories for the Solicitors but this year the Barristers decided that enough was enough and set about organising a serious challenge for the prestigious MacEntee Cup which is presented to the winners. Previously unheard of practice games and squad training sessions were held and the young bloods of the Bar were recruited and organised by Pat O'Gorman. In an effort to lead to a competitive game the Solicitors played with 9 men and having underestimated the opposition found themselves under constant pressure from the eager Bar team with Eamon Maree leading the challenge. However the older but more experienced Solicitors' team lead from the back by Captain Martin Moran and veteran Bill Jolley coped with everything the the Bar could throw at them and Solicitors' goalkeeper Dan Murphy capped a confident performance with a 2nd half penalty save. With a little bit more composure in front of goal John Kilroy might have scored a late winner for the Solicitors on his senior debut but the result of the closely fought game was a deserved 1-1 draw.

Paddy MacEntee SC, as usual, kindly attended to present the cup to the Captains to be held for 6 months each and generously lodged a sum of money behind the bar which was gratefully accepted by all present. The event was a great success and all concerned are looking forward to next year's game. □

SADSI CAREER SEMINAR

7 p.m. Thursday 24 October, 1991

at the Law Society, Blackhall Place, Dublin 7

Employment prospects in Ireland, UK, USA, Europe and Australia will be discussed by experienced practitioners, followed by a wine reception and informal question and answer session.

Correspondence

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

15th July, 1991

RE: The introduction of telephone answering machines in the Land Registry

Dear Sir,
In view of the apparently successful introduction and operation of telephone answering machines in other offices offering a public service, I have decided to introduce them on a pilot basis in the Ground Rents Section and in the Dealings Sections for Counties Clare, Galway, Mayo, Roscommon, and Sligo.

The Staff in these Dealing Sections have a heavy work-load as a result of the introduction of computerisation of their folios. As you will appreciate the necessity of dealing with a large number of unexpected telephone calls can be the ruination of a planned daily work schedule.

By arranging the times at which we will deal with our incoming telephone calls the work load of the office will be more efficiently managed and the service provided over the telephone will be improved upon as we will have the subject matter of an enquiry to hand and researched when we return the call. The messages left on the machines will be monitored and dealt with towards the end of each morning and evening.

It will still be possible where circumstances warrant it for anyone to ask at the switchboard for direct access to the staff to have a problem dealt with immediately. Hopefully such calls will be kept to a minimum.

As an improvement in the efficiency of the Registry is to all our benefit I would ask for the co-operation of our clients with the pilot scheme. Its operation as it affects both our clients and the Registry will be monitored and reviewed at the end of a trial period.

Yours faithfully,

Catherine Treacy,
Registrar,
Land Registry,
Chancery Street,
Dublin 7.

---

18 July 1991

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

Dear Editor,
In line with the new Government policy of 40% minimum representation of women on State boards, the National Women's Talent Bank is updating its register of women who are available to participate on these boards.

We are actively recruiting new talent for our register.

Any woman who is interested in putting her name forward for our register should contact the National Women's Talent Bank at, 64 Lower Mount Street, Dublin 2.

We thank you for your cooperation.

Yours sincerely,

Denise Conn
Chairwoman
National Women's Talent Bank
c/o Council for Status of Women
64 Lower Mount Street
Dublin 2

The Taxation Committee,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

RE: CAT Amnesty and Enforcement

Dear Sir,

With reference to the article in the April Gazette, it is stated "it is the duty of every solicitor to bring this Tax Amnesty to the attention of his clients....".

The impression given is that whether or not a solicitor is aware that a client might have received a gift, it is his duty to notify every one of his clients of the position.

This is placing a very onerous burden on the professional to, in effect, circularise every single one of his clients in order to protect himself against a claim for negligence.

A solicitor would only be on notice of such matters as pass through his hands, and information which would be available from his files.

It could happen that one solicitor in a firm could be dealing with a client who received a gift which would have been under the threshold for which no return was made, and that same client could be a client of another firm when he received another gift which might have put him above the threshold. Neither firm of solicitors could be aware of the other's activities in relation to that client unless the client disclosed same to them. The question arises as to what would be the duties of each of those solicitors to that client.

A client may have been the recipient of gifts of chattels which would not be to the knowledge of his solicitor, and yet it would appear that there is an onus on the solicitor to advise the client in such a case.

Surely the duty must be limited to such clients where the solicitor is aware, in his professional capacity, of gifts having been made to a client, and that the duty would only rest with such cases.

Perhaps you would clarify the position in the next issue of the Gazette.

Yours faithfully,

Quentin Crivon,
Solicitor,
94 Lr. Baggot St.,
Dublin 2.

The article did not represent itself to be a dissertation on negligence but rather an appropriate time to inform solicitors of the new situation presented by the Amnesty and of the opportunities that it affords, and that the question of negligence is only something to be answered by the Courts.

Taxation Committee

(Cont'd on p. 295)

Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

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

LOST LAND CERTIFICATE

Bridget Kildea, Gatestown, Taghmaconnell, Ballinasloe, Co. Galway. Folio: 3507F; Lands: Corraree and Ballygalta, Corraree and Ballygalta (six undivided fortieth parts), Cloonoghil, Cloonoghil, Cloonoghil; Area: 12.819 acres, 16.313 acres, 16.263 acres, 16.575 acres, 0.200 acres respectively. County: **GALWAY.**

Patrick Moynagh, Folio: 26284; Land: Shannon Upper; Area: 0a.1r.27p. County: **CAVAN.**

Clondalkin Concrete Ltd. Folio: 19151; Land: Townland: Auburn, Barony: Coolock; Townland: Drinan, Barony: Coolock; Area: (1) 0.324 Hectares, (2) 3.642 Hectares, County: **DUBLIN.**

Kate Donnelly, Athleague, Co. Roscommon, Folio: 25272; Land: Townland: Kilmore; Area: 6.956 Hectares, County: **ROSCOMMON.**

Representative Church Body of the Church of Ireland, Folio: 11200; Land: Glebe; Area: 2a.2r.36p. County: **DONEGAL.**

Patrick Davis, 26 Kildare Road, Crumlin, Folio: 28182L; Land: 26 Kildare Road situate in the Parish of Crumlin and District of Terenure. County: **DUBLIN.**

Kevin Fahey, Tullina, Ardrahan, Co. Galway. Folio: 33124; Land: (1) Reaskgarriff, (2) Carrownamona, (3) Reaskgarriff; Area: (1) 16a.3r.31p, (2) 7a.1r.28p, (3) 41a.0r.0p. County: **GALWAY.**

Michael Hassett, Carhue, Dysart, Co. Clare. Folio: 14613; Land: Cregmoher; Area: 165a 0r 38p; County: **CLARE.**

James Deady, Kathleen Deady, Folio: 110R closed to 3164F; Land: (1) Lissanearla West, (2) Lismore; Area: (1) 38a.2r.29p, (2) 14a.2r.10p. County: **KERRY.**

Gerard and **Nuala Rush,** Folio: 10882F; Land: Tramore; County: **WATERFORD.**

Sean Crossan, Ballymakeeny Road, Drogheda, Co. Louth. Folio: 40774F; Land: The property situated in the Townland of Grange and Barony of Balrothery West. County: **DUBLIN.**

Eric Wray MacDonald, Folio: 23445; Land: Rockhill; Area: 0a.2r.27p. County: **DONEGAL.**

Bartholomew Guiney, Folio: 237R now 2263F; Land: Knocknasnaa; Area: 21a.1r.27p. County: **LIMERICK.**

Patrick Joseph Doherty, Folio: 9035F; Land: Magherabeg; Area: 0.538 acres; County: **DONEGAL.**

Mary McLoughlin, Folio: 26537; Land: Carroutlieve; Area: 0a.2r.16p. County: **DONEGAL.**

Julia O'Connell, Folio: 1136; Land: Glencollins; Area: 6a.0r.5p. County: **CORK.**

Kitty O'Sullivan, Folio: 16 S.D.; Land: Liscahane; Area: 0a.0r 3 1/2p. County: **CORK.**

Veronica Rose Flanagan, Folio: 28579; Land: Ballylongane. County: **CORK.**

Thomas Carmody, Tullassa, Kilnamona, Co. Clare. Folio: 6284. County: **CLARE.**

Michael O'Reilly, Folio: 6060; Area: 0a.3r.39p; Land: Donaguile. County: **KILKENNY.**

Thomas Lucey and **Mary Bridget Lucey,** Rock Filling Station, Cusack Road, Ennis, Co. Clare. Folio: 27963; Land: Townland – Claureen; Area: 1a 1r 0p. County: **CLARE.**

Daniel McGowan, 9 Orwell Gardens, Rathgar, Dublin 6. Folio: 2901L; Land: Property situate on the South side of the said Gardens in the Parish and District of Rathfarnham. County: **DUBLIN.**

Lost Title Deeds

Gerard Mahon, formerly of 16 Prussia St., Dublin 7 and **Mary Mahon,** deceased, late of 16 Prussia St., Dublin 7. Will any person having knowledge of the whereabouts of any title deeds to the above property, please contact Thomas W. Enright, Solicitor, John's Place, Birr, Co. Offaly. Tel: (0509) 20293.

Lost Wills

KING, ANNIE, deceased, late of 147 Rahylin Glebe, Ballybane, Galway. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 26th day of April, 1990, please contact Messrs, MacDermot and Allen, Solicitors, 10 St. Francis Street, Galway. Telephone: 091-67071.

O'DOCHARTAIGH, TOMAS, (otherwise Thomas Doherty) late of 22, Collins Park, Whitehall, Dublin 9 who died on the 11th day of December 1988. Any person having knowledge of the whereabouts of a Will for the above named deceased please contact MacGinley, Solicitors, 3 Inns Quay, Chancery Place, Dublin 7. Telephone No: 773682.

O'BYRNE, PATRICK, Deceased late of 25 St. Cynoc's Terrace, Ferbane, Co. Offaly. Date of death 22nd September, 1989. Would any person having knowledge of the whereabouts of a Will of the above named deceased please contact Hugh P.J. Byrne, Solicitor, 59 Merrion Square, Dublin 2. Telephone No: 768697/8.

IN THE MATTER OF THE ESTATE OF PATRICK LOGAN, DECEASED, LATE OF MOYCASHEL, KILBEGGAN, CO. WESTMEATH.

Would anyone who knows of the present whereabouts of Barry, Gerry and Rita Devaney formerly Maiden Street, Newcastle West, Co. Limerick,

please contact the undersigned as soon as possible.

O'Donovan & Cowen,
Solicitors,
William Street,
Tullamore,
Co. Offaly.
Ref: 288/84/NB.

BARRY, ROBERT, deceased late of St. Joseph's Hospital, Limerick and St. Cammillus' Hospital, Limerick – Would anybody having knowledge of the execution of a Will by Robert Barry who died on the 6th July, 1988, or knowing the identity of any of his next-of-kin, please contact Leahy & O'Sullivan, Solicitors, Mount Kennett House, Henry Street, Limerick. Phone: (061) 315100 (REF: POB).

GEARY, FRANCIS EDWARD, late of 4 The Park, Smith's Street, Charleville, Co. Cork. Will anybody having knowledge of the whereabouts of a Will of the above named deceased, who died on the 13 November, 1989, please contact Nagle & McCarthy, Solicitors, Buttevant, Co. Cork. Tel: (022) 23208.

Employment

SOLICITOR retired, lengthy experience in Conveyancing, Court Work, Litigation, Probate and Administration, seeks part-time position preferably in Dublin area. Tel: (045) 97422.

SOLICITOR, 3 years' post qualification experience in Civil Litigation with city firm seeks position in Dublin. Box No. 71.

Miscellaneous

FOR SALE: Full seven-day Rural Pub Licence. Inquiries to:- Downing Courtney & Larkin, Solicitors, 84 New Street, Killarney, Co. Kerry. (Ref. LC) (064) 31061.

FOR SALE: Ordinary Seven Day Publican's Licence. Midlands area. Reply Box No. 70.

RORY P. BENVILLE, Solicitor, has commenced practice under the style of Rory P. Benville & Co., at 93 Main Street, Bray, Co. Wicklow. Tel: (01) 2864994.

SOLICITORS in Cork City with excellent practice have accommodation for a firm or sole practitioner, preferably with a commercial and conveyancing practice, to share with a view to amalgamation. Excellent address with secure tenure. Box No. 72.

Correspondence

(Cont'd from p. 293)

Re: Solicitors' Voluntary Subscription for the Free Legal Advice Centres

Dear Sir,

Through the courtesy of your letters page I would like to express my sincere thanks, on behalf of the Free Legal Advice Centres, to the many solicitors who contributed most generously to the voluntary subscription for the support of FLAC.

FLAC has always depended on the goodwill and support of the legal profession in order to continue our work of providing legal advice to people who would otherwise be unable to obtain such assistance. FLAC receives no funding from the Department of Justice and we are dependent on the charitable support of the legal profession and the general public for our survival. This voluntary subscription is a tangible expression of the profession's commitment to FLAC's work.

Unfortunately, the need for our services remains just as great as ever and the number of people who contact us, often in difficult family situations, continues to grow. Thank you again for your support and we hope to be able to rely on your continued support in the future.

Yours sincerely,

Iseult O Malley,
Chairperson,
FLAC. □

LAW SOCIETY TO EXHIBIT AT PLOUGHING CHAMPIONSHIPS

The Law Society is taking an Exhibition Stand at the National Ploughing Championships that take place in Crecora, Co. Limerick from 8-10 October, 1991.

The PR Committee is organising a panel of volunteers to 'man' the stand over the three days. The assistance of members of the profession in the region would be gratefully accepted.

If you would be prepared to offer an hour or two of your time, please contact Barbara Cahalane, Public Relations Executive, at the Law Society (01) 710711. □

Practice Notes

(Cont'd from p. 267)

CAPITAL TAX AMNESTY

The CAT/Estate Duty Amnesty ends on 30th September after which time a more rigorous enforcement procedure will be utilised e.g. use of Revenue Sheriffs, Powers of Attachment etc.

If there are any cases falling within the Amnesty provisions which still have not been dealt with they should be brought to the Revenue Commissioners attention as quickly as possible, before 30th September.

Taxation Committee

INHERITANCE TAKEN BY PARENTS FROM THEIR CHILDREN

The Finance Act, 1991 (Section 116) introduced an important relief whereby the class threshold of £150,000 (index linked since 1990) is to be applied to inheritances taken by parents from their children. The relief does not apply to limited interests or gifts. The relief is retrospective to 2 June, 1982. Where tax is refunded it will be paid without interest.

The tax will not be repaid automatically. It must be claimed by writing a letter to the Capital Taxes Branch of the Revenue Commissioners requesting a refund.

Taxation Committee

□

Opportunity comes to Pass not to Pause

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Park House, Forster Street, Galway. (091) 63167/8/9.
125 O'Connell Street, Limerick. (061) 42477.

GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 85 No. 8 October 1991

Mrs. Mary Loftus, The Hon. Mr. Justice Liam Hamilton, President of the High Court, Ms. Rosemarie Loftus, who was admitted to the Roll of Solicitors, and Mr. Leo Loftus, Solicitor, at the Parchment Ceremony on Friday, 11th October, 1991.

- Why not Solicitor Judges?
- The Limitation of Personal Injury and Death Actions
- Multi-National Practices – the Need for Safeguards
- My Love Affair with Joyce

THE OFFICE MANAGER

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Viewpoint

Why Not Solicitor Judges?

The Society has been pressing for many years for a change in the law so as to permit the appointment of solicitors as judges in the Circuit and High Court.

In his speech at a recent presentation of parchments to newly-admitted solicitors, the President of the High Court advanced an argument, which has been offered previously on behalf of the Bar, to the effect that until such time as solicitors exercise their rights of audience in the higher courts and practised regularly as advocates they should not be appointed as judges in the higher courts.

The presentation of this argument on behalf of the Bar and by the President may itself be a fine example of the skill of the advocate. A proposition is advanced to which there appears to be no ready answer yet which on more critical examination may be seen to be not as sustainable as it appears.

The qualities expected of a judge are not necessarily those expected of an advocate. Patience, courtesy, a reasonable knowledge of the law (which in our system will be supplemented by assistance from the skilled advocates appearing before him/her), an ability to marshal facts and assess arguments critically and to judge the likely veracity of witnesses and the value of their evidence, are the qualities that would be expected of a good judge. While a judge will be required in his judgment to set out in a logical manner his assessment of the case put before him and to apply the law to that case, it is not required of him that he be spectacularly persuasive in his judgement whether oral or written. It is his judgement that counts not his style.

Familiarity with the rules of evidence of the Superior Courts and their application in those courts is a further qualification which judges require. This knowledge is not vested only in those who practise as advocates in the higher courts. In truth of course, solicitors who practise in higher courts must be at least familiar with these matters.

The suggestion that solicitors are not capable of acting as judges in the higher courts, completely overlooks the fact that solicitors are already acting as ''quasi judges'' in arbitrations both national and international in which very significant issues of law and fact are dealt with. In many cases the amounts involved are six or even seven figure sums of money.

We have commented before that our system of judicial appointment is flawed in that at all levels persons are appointed to be judges without any initial training or any attempt to assess their qualities as judges. Developments in the US and the UK in judicial training seem to have gone unnoticed in our jurisdiction. The English system whereby practitioners, both barristers and solicitors, are appointed as recorders on a part-time basis so that their suitability for permanent appointment to the Bench may be assessed, has not been followed here. Criticism has been expressed from time to time of the process of

(Cont'd on p. 324)

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Multi-National Practices – the Need for Safeguards

The establishment of Multi-National Practices (MNPs) raises important issues of principle regarding safeguards for clients and disciplinary and regulatory arrangements. In a recent address to the *ESSEBA* Group (English speaking secretaries of law societies and bar associations), Law Society Director General, ***Noel Ryan,*** outlined the key considerations that arise.

What is a MNP?

Several distinguishing features of MNPs were worth stressing, he said:

- "first, we are talking about practices that exclusively comprise lawyers;
- secondly, the concept relates to lawyers from different jurisdictions joining together in a single practice;
- thirdly, such a practice provides services of an international kind on an international basis, and;
- fourthly, the practice can be organised in a variety of forms."

While it seemed clear, he said, that issues raised by the establishment of MNPs did not give rise to the same difficulties as were raised by multi-disciplinary partnerships (MDPs), nonetheless, law societies would have to examine a number of important questions.

Recognition arrangements

"It is clear that the essence of the relationship in a multi-disciplinary practice is that there is a fee-sharing arrangement between lawyers who are fully qualified to practise within the jurisdiction in which the practice is established and *foreign* lawyers, that is to say, lawyers who are qualified in another jurisdiction but who chose to operate, under home title, in the jurisdiction of the practice. This means that rules, whether statutorily-based or otherwise, which prohibit lawyers from sharing fees with foreign lawyers would have to be changed to enable MNPs to be developed. Law societies will have to decide, therefore, on how they are to approach the question of *recognition* of foreign lawyers for this purpose. The approach adopted by the Law Society of England and Wales involves the establishment of a *register of foreign lawyers* which will be maintained by that Society."

Safeguards and regulations

Noel Ryan said that the setting up of such partnerships had implications in regard to safeguards for clients and regulation of the profession, among them:

- "How is the question of regulation and control by law societies of foreign lawyers practising within the jurisdiction, who will not be members of the home law society, to be exercised and what arrangements are needed to ensure that they will be answerable in a disciplinary sense;
- how can law societies ensure that there is adequate protection of the public, especially in relation to handling by foreign lawyers of clients' money and, in this connection, what is to be the liability of locally maintained compensation or guarantee funds for acts of dishonesty by foreign lawyers;
- is there to be participation by foreign lawyers in indemnity funds or professional indemnity insurance arrangements;
- how is the issue of professional conduct to be regulated, and in particular, what codes of conduct and other disciplinary codes are to apply?

MNPs are on the way

"As yet these issues have not surfaced in a concrete way in Ireland", said Noel Ryan, "that is to say the Law Society has not had to draw up rules relating to any

Noel C. Ryan

Irish based multi-national practice. We have, however, considered the issues involved at the *legal* level and the forthcoming Solicitors Bill is expected to contain provisions that will facilitate the development of MNPs in Ireland. The message issuing from Government would seem to be that whatever legal obstacles exist to the creation of MNPs should be removed.

"The international trend would also seem to be clear. MNPs are already happening. It is certainly true that larger firms in the UK and Ireland are already in a business relationship of one kind or another with foreign-based firms as a matter of necessity. We hope that in Europe the development of MNPs will proceed in an orderly manner. Meanwhile in Ireland, the Law Society will in due course develop a policy stance in relation to the desirability or otherwise of permitting such practices." □

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A one time "ageing, computer illiterate, country solicitor" tells of how his life was transformed by . . . .

My Love Affair With Joyce

by
Henry C.P. Barry
Solicitor

Imagine if you will an ageing, computer illiterate, country solicitor in 1985, with rapidly rising overheads, an equally rapidly receding hairline, who had progressed through the sixties when memorials had to be hand written with a fountain pen on parchment, when photocopiers were only, and could only be, used by the FBI, when a commissioner for oath's fee was 5/=d, when the best agricultural land in the country was selling for two hundred and forty pounds per acre, and you will have some idea of why I was wide open to a love affair with *Joyce.* I should explain that *Joyce* is the affectionate name given to the Amstrad PCW 8256.

Having attended various seminars, talks, lectures, and exhibitions on computers, in the early 1980s, I was convinced that the marriage of wordprocessing and a solicitor's office was absolutely inevitable. The first problem – as always – was finance, or to be more precise, the lack of it. The second problem was that there was no affordable friendly computer around with whom I might form a liaison.

The message that came across was that wordprocessors were very expensive, needed a dust free environment, a new wiring system, and a maintenance contract which would cost 10% of the original cost of the hardware and software. Enter *Alan Michael Sugar* and the (A)lan (M)ichael (S)ugar (Trad)ing Company Limited – AMSTRAD.

In the summer of 1985 there appeared the AMSTRAD PCW 8256 selling for the noble sum of three hundred and ninety nine pounds Stg. It comprised an 8 bit computer which used the outdated CP/M processing system, an integrated screen and printer and came bundled with a wordprocessing program specially written for it called locoscript. Some disparagingly called it the Model T. Ford of computers or the poor man's computer.

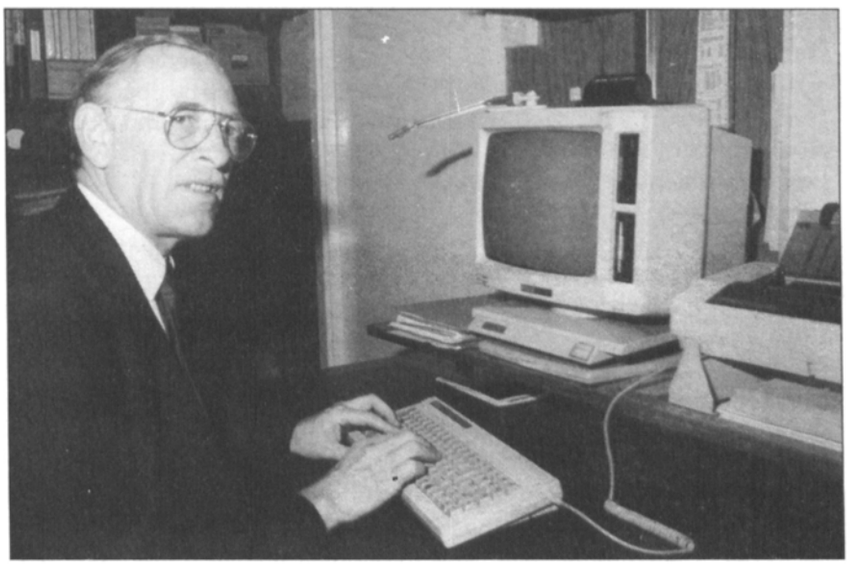
Contrary to all the advice of the pundits and experts, I bought it, and returned one winter's evening to the office with a large box from which I tremblingly assembled the bits and pieces. I plugged it in and was confronted with a green screen. Carefully following the instructions, I managed to load the disc and after about an hour had managed to produce a short letter. A love affair had begun.

Since then my extra marital affair with *Joyce* has blossomed and grown. Not only that but I now willingly share my experiences with a large number of previously impoverished and equally lovelorn colleagues both in this country and elsewhere. Am I jealous? Never.

Joyce is a fabulous lover, with many erogenous zones, who delights in sharing her favours with all and sundry. She is friendly and lovable with the most endearing quirks and hidden delights which always come as a pleasant surprise.

She may be slow but who cares. She is adaptable. She is a linguist being able to print love letters in many languages, including Gaelic, Cyrillic, Greek, French, Spanish, and many more. Not only that but her dot-matrix printer can print in various fonts without changing print wheels. She can also do spreadsheets, accounts, graphs, play games, print sideways (with the right software), and all these in draft mode or near letter quality mode. There are literally hundreds of very affordable and very useful programs available and they are still being produced.

As I have grown older she has grown younger. Locoscript which once could only run under CP/M, has recently been written to run under MS.DOS, and by means of what is known as Locolink I have now transferred all the precedent wills, land registry forms, declarations, conveyances, court docu-



Henry C. P. Barry seated before his beloved

ments, and datafiles, created over the past five years onto my Wang PC.

Have I discarded my love, you may ask? No, she is still going strong, having been fitted with a second disc drive making her a PCW 8512 and she has now been joined by a younger sister, the PCW 9512, both of which are in daily use. Newcomers on the staff find little or no difficulty in getting to know and love *Joyce* the way I once did.

If I were asked if there is one single aspect of *Joyce* that I find most admirable it is her ability to make friends with anybody. On a number of occasions over the past five years we have had changes in staff for various reasons and I have found that newcomers with no formal wordprocessing training have been able, within a few days, to use *Joyce* without any great difficulty. None would go back to a typewriter again.

Another advantage with having the 8512 and 9512 is that discs are interchangeable between the 9512 drive and the B drive of the 8512 so that if, for example, the daisywheel printer on the 9512 breaks down, one can move the disc being used on the 9512 into the B Drive on the 8512 and print one's file out using the dot matrix printer. Recently I have scrapped the daisywheel printer which the 9512 comes bundled with and linked a brother laser printer and a star printer to the Wang PC and the 9512.

Those of you who use wordprocessors are well aware of why they have become so indispensable. However, for those who are still using typewriters, electric or otherwise, I shall outline some of the uses to which our office has put them.

District Court

Most of our work in the District Court is defence or road traffic prosecutions both for our own clients and also on an agency basis for other solicitors all over the country. We have set up a court list template with the following headings:-

Instructions

As we receive instructions either from our own clients or from colleagues, the data is inserted in the court list for the relevant court and saved on disc. Each case is given a number and the papers, summonses etc. relating to that case are pinned together and given the same number. From experience we have found that we receive instructions from colleagues and defendants themselves, right up to within 15 minutes of the court sitting, both by phone and now by fax.

A printout is then done of the court list on the morning of the court and given to the author together with the papers, literally minutes before s/he goes to court. Naturally s/he will have seen the incoming instructions as they arrive. Standard letters are then produced after court, in which the result of the case is given in the first schedule to the letter, and our fee is given in the second schedule. Notices of appeal, recognisances, warrants etc. are also set up and can be edited speedily after the court, if required.

We pride ourselves on being able to notify all those who have instructed us, layman or lawyer alike, of the result of the case by post within 48 hours of the end of the court. My only wish is that we always got paid as promptly!

In an effort to expedite this service, we are currently setting up a datafile using a program called Locofile so that we will have the names and addresses of all our colleagues around the country from whom we regularly receive instructions available to import into these reporting letters automatically using the mail merge facility of Locomail. Both Locomail and Locofile are fully integrated with Locoscript which is the wordprocessiong package which comes bundled with the Amstrad. Locofont is another program that can be purchased.

As well as this, we have set up a precedent set of forms for debt collection, licensing applications, local authority summonses (eg. litter, for possession, planning) warrants, civil processes, with endorsements of claim set up as separate files, which can be pasted in.

Circuit Court and High Court

Precedents of all forms which we normally use are set up on individual discs with separate files for standard initiating letters, letters to doctors for medical reports, letters to witnesses, engineers, etc. Endorsement of claim, notice for particulars, garda reports and various other standard letters.

We pride ourselves on being able to notify . . . the result of a case by post within 48 hours of the end of Court

Wills, probate and administration

We have set up precedents of various types of wills over the past 5/6 years including single testator/testatrix, mutual wills of married persons, and discretionary trusts. Various types of clauses are set up as individual files, as are different types of attestation clauses for use when the testator/rix is suffering from some disability eg. blindness.

Being close to nursing homes, and hospitals, we find that it is of great assistance to be able to take instructions at a person's bedside, and get a printout of that person's will within minutes, ready for execution. Speed can be vital on occasions like this. These wills we call "intensive care wills".

In this age of universal travel we have found that it is again invaluable to be able to take instructions from a client in the office an hour or two before s/he is travelling abroad, and produce the will there

and then for him/her. We call these "jumbo wills'. This impresses the client enormously.

Needless to say standard letters to banks, building societies, etc. enquiring about accounts held by the deceased are on disc and can be sent out on the day we receive instructions from the personal representative(s).

When it comes to extracting a grant, we have all the necessary forms on disc including oath for executor/administrator, affidavits of plight and condition, due execution, delay, notice of application etc.

Different titles for intestate administration are saved as individual files on disc and these can be imported and pasted into the relevant part of the oath for administator/rix or administration with will annexed, which is being edited.

We find that another invaluable use of *Joyce* and her sister is the maintenance of executors and administrators accounts. All receipts and payments can be recorded and saved, and when it comes to finalising the administration of an estate, we can prepare the executors/administrators current, capital, and distribution accounts readily, and moreover show the client the position at any given time. We use a program called money manager for this purpose.

Conveyancing

Practically all the land registry standard forms are on disc. Right from the introduction into the office of *Joyce* it seemed to the author that if there was any single use that a wordprocessor could be put to, it was in land registry work. Experience has shown this to be the case.

The classic example is where a father is voluntarily transferring his farm to his son reserving rights of residence, annuity, and so on in favour of himself and his wife, and charging the lands with payments to other children. Using our precedent bank of forms and clauses and utilising the cut and paste facilities of Locoscript we can produce the transfer, S.72 declaration, declaration of solvency, Family Home Protection Act/etc. declaration, certificate of market value, form 17, discharge of existing registered charge(s), undertaking to bank or other lending institution, standard letters etc. within one working day or less.

In addition to land registry work, we also have standard conveyances, leases for business and private lettings, memorials for registration in the registry of deeds, reconveyances, mortgages, assignments of leases and various other documents e.g. powers of attorney readily available at the press of a few keys stored on disc.

Accounts

Quotations, statements of account, and invoices are all set up in templates for production when required. We have a full solicitors accounts program running on our Wang PC which can give reports on practically every aspect of our financial position both for internal administration purposes and for production to clients when required.

The future

Perhaps a rejuvenated *Joyce* will play her part in the revolutionary period ahead? How about a steroid injection or should I say silicon implant for my old girlfriend, Mr. Sugar? There are reputedly over two million users of *Joyce* in Britain alone who, but for her, would never have had either the courage to overcome their fear of the computer or the pleasure of using one. □

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General Conditions of Sale

It has come to the notice of the Society that many solicitors are photocopying the General Conditions of Sale and attaching them to their contracts.

As a general concession to members, the Society allows members to put the first four pages of its contract on Word Processors. However, no consent has been given to the reproduction of the General Conditions of Sale.

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Noel C. Ryan,
Director General

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The Limitation of Personal Injury and Death Actions

The Statute of Limitations (Amendment) Act, 1991, has introduced major reforms of the law of limitations in the case of personal injury and death actions. In an action for damages for personal injuries the ordinary period of limitation is now the period of three years from the date of accrual of the cause of action which is the subject of the proceedings or the "date of knowledge", within the meaning of section 2 of the Statute of Limitations (Amendment) Act, 1991, of the person injured, if later.

In this article, *Dr. John White* of UCC reviews the law governing the limitation of personal injury and death actions in the context of the recent statutory amendments and examines the assertion by the Supreme Court of a jurisdiction, not only to dismiss a claim for want of prosecution, but also to dismiss a claim commenced within the period of limitation allowed by statute and prosecuted with due diligence, where the Court determines that the interest of justice requires it.

by
Dr. John P.M. White
Lecturer in Law,
University College, Cork

Personal injury: the ordinary period

Section 3 (1) of the Statute of Limitations (Amendment) Act, 1991, provides for an ordinary limitation period of three years from the date of accrual of the cause of action or the "date of knowledge", within the meaning of section 2 of the Act of 1991, if later, in the case of actions for personal injuries.[1] The subsection provides that:

> "An action . . . claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

Under the Statute of Limitations, 1957, the limitation period commenced from "the date on which the cause of action accrued".[2] In *Hegarty -v- O'Loughran*[3] the Supreme Court declined to interpret this provision as meaning the date when the plaintiff knew, or as a reasonable person ought to have known, that she had sustained the damage in issue as a result of the defendant's conduct, whichever first occured. On the contrary, the Court held that for the purposes of the Act of 1957 a cause of action for personal injuries accrued when the plaintiff had sustained "a provable personal injury capable of attracting compensation," regardless of whether the plaintiff actually knew or ought to have known that she had sustained injury caused by the defendant's conduct.[4] This meant that the period of limitation might well expire on an injured person in circumstances where that person had no opportunity of commencing proceedings in respect of that injury because the plaintiff was not aware and could not reasonably have been expected to be aware of her injury and its causal connection with the defendant's conduct. The manifest injustice of this result has now been remedied by the 1991 Act which postpones the date of operation of the limitation period until the "date of knowledge" as defined in section 2 of that Act - a criterion which must be considered in detail below; but it should be observed first that section 7 of the Act of 1991 provides that *the provisions of the Act of 1991 "apply to all causes of action whether accruing before or after its passing and to proceedings pending at its passing."* Therefore, the benefits of the Act are afforded not only to persons injured after its commencement but to any person, whether or not he has already instituted proceedings, who comes within its terms.

The "date of knowledge"

Section 2 of the Act of 1991, which defines the "date of knowledge" for the purposes of the Act, deserves to be quoted in full. Section 2 provides that:

> "(1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:
>
> (a) that the person alleged to have been injured had been injured,
>
> (b) that the injury in question was significant;
>
> (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,

(d) the identity of the defendant, and

(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant; and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

"(2) For the purpose of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire –

(a) from facts observable or ascertainable by him, or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.

"(3) Notwithstanding subsection (2) of this section –

(a) a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and

(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury."

It is submitted that the effect of this provision in the case of a personal injury action is as follows: *The "date of knowledge" is the date when the plaintiff first knew that he had sustained a significant injury caused in whole or in part by the defendant's conduct.*[5] *However, the plaintiff will be fixed with knowledge of those facts which he could reasonably have been expected to ascertain with his own faculties and by investigation (unless impairment of these faculties due to the injury in issue has prevented him from acquiring such knowledge) and also with knowledge of such facts as would have been reasonably ascertainable with the help of medical or other expert advice which expert advice he could reasonably have been expected to seek, obtain and act upon.*[6] *But the plaintiff's knowledge of the legal quality of the defendant's conduct is irrelevant so that if he knows that he has sustained a significant injury caused by the defendant's conduct it is irrelevant that he does not know that the conduct amounted to a tort.*[7] *Finally, subsection 1(e) extends the benefit of the subsection to cases, such as that of master and servant, where the conduct of the servant supports the bringing of an action against the master: the limitation period does not begin to run against the plaintiff in his action against the defendant master until the identity of the servant is known and until the existence of the facts giving rise to the relationship of master and servant acting in the course of the master's employment is also known.*

Severance of damage

It should also be remembered that the courts are prepared, where damage has continued to be sustained over a period as a result of an insidious disease, to sever that part of the damage which was sustained outside the limitation period from that part of the damage which was sustained within that period and to allow recovery in respect of the latter. This has been done in cases where the damage caused by the disease in its initial stages was, because of what was then known of the disease, not negligently inflicted and therefore not recoverable, although the later damage was negligently occasioned;[8] but the same principle must apply where part of the damage sustained over a period is not recoverable by reason of the operation of a limitation period rather than by reason of the absence of a breach of duty in respect of that part of that damage. This principle was obviously of greater importance before the Act of 1991 provided for the postponement of the operation of the limitation period to the "date of knowledge" of the plaintiff within the meaning of section 2 of that Act. However, occasions for its use will doubtless arise in the future where a plaintiff – whether because of initial unwillingness to sue or want of appreciation that the facts afford him/her a cause of action – delays commencement of his/her action beyond the limitation period provided in the Act of 1991.

Survival actions

Section 4 of the Act of 1991 provides for a new period of limitation in *survival actions,* i.e, where a cause of action for personal injuries has not been prosecuted to judgment by the victim of the wrong before his/her death and is, by virtue of section 7 of the Civil Liability Act, 1961, transmitted to his estate on his death for prosecution by the personal representative.[9] In the case of a personal injury action (not barred before the death of the victim) so transmitted on his death to his/her estate, the limitation period is three years from the date of death of the victim or the date of the personal representative's "knowledge" within the meaning of section 2 of the 1991 Act, *whichever is the later.*[10] Moreover, if the personal representative has acquired knowledge of the injury before his/her appointment as personal representative of the estate of the deceased, the "date of knowledge" of that person shall be taken to be the date of his appointment as personal representative so that the estate is not fixed with knowledge acquired by the personal representative before his appointment.[11] However, "personal representative" is defined to include any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate),[12] and where there are two or more personal

representatives of the victims's estate and their "dates of knowledge" are different, the earliest date is the one which is relevant for the purpose of determining the commencement of the period of limitation.[13]

Wrongful death: the ordinary period

Section 48 (6) of the Civil Liability Act, 1961, is repealed[14] and the period of limitation of three years from the date of the death specified by that provision in the case of wrongful death actions under Part IV of that Act is extended by section 6 of the Act of 1991. The new period of limitation is the period of three years from the date of the death or the "date of knowledge" of the person for whose benefit the action is brought, *whichever is the later.*[15] In other words, want of "knowledge" on the part of a dependant concerning the injury which occasioned the death of the deceased postpones the operation of the limitation period. Where there are a number of dependants for whose benefit the wrongful death action is brought, this limitation period applies in respect of the claim of each so that the claim of one may be barred while the claim of another or others who acquired "knowledge" concerning the injury which occasioned the death only later are allowed to succeed.[16] However, a dependant's claim will not be barred, notwithstanding the expiry of this limitation period in respect of his/her claim, if that dependant could, were s/he the sole dependant, rely upon some further ground for defeating the operation of such period of limitation whether by reason of an extension of time afforded to persons under a disability under section 5 of the Act of 1991 or an agreement between the parties not to raise the defence or otherwise.[17]

". . . want of 'knowledge' on the part of a dependant concerning the injury which occasioned the death of the deceased postpones the operation of the limitation period."

Special period for disability

An extension of the ordinary limitation period in personal injury and wrongful death actions is allowed to persons "under a disability." Section 48 of the Statute of Limitations, 1957, provides that a person shall be deemed to be "under a disability" while he is an infant or person of unsound mind or a convict subject to the operation of the Forfeiture Act, 1870, in whose case no administrator or curator has been appointed under the latter Act. A person is conclusively deemed to be of "unsound mind" while he is detained in pursuance of any enactment authorising the detention of persons of unsound mind or criminal lunatics;[18] but the definition of "person of unsound mind" in this context is not limited to persons so detained[19] and in *Kirby -v- Leather*[20] the Court of Appeal held a person to be of "unsound mind" when incapable, by reason of mental illness, of managing his affairs in relation to the accident as a reasonable person would do. Section 5(1) of the Act of 1991 provides that where, in the case of personal injury claims and claims for wrongful death under Part IV of the Civil Liability Act, 1961, "the person having the right to bring the action was under a disability either at the time when that right accrued to him or at the date of his knowledge, the action may be brought at any time before the expiration of three years from the date when he ceased to be under a disability or died, whichever event first occurred, "notwithstanding, in the case of personal injury actions, that the period specified in section 3 of the Act of 1991, i.e., the 'ordinary period of limitation,' has expired. In other words, in the case of such persons, a special period of limitation of three years from the date of termination of the disability or the date of death of the person under the disability, whichever first occurs, applies.[21] This special period of limitation does not apply, however, in the case of a cause of action which is vested in a person not under a disability and is then transmitted to a person under a disability.[22] Moreover, where a cause of action accrues to a person under a disability and that person dies while still under a disability with the result that his/her cause of action is transmitted to another person under a disability, no further extension of time is allowed by reason of the disability of the second person.[23]

". . . in the case of such persons, a special period of limitation of three years from the date of termination of the disability on the date of death of the person under the disability, whichever first occurs, applies."

Dismissal for want of prosecution or for fairness

Order 27, r. 1, R.S.C., 1986, provides that:

> "If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the court to dismiss the action, with costs, for want of prosecution; and on the hearing of such application the Court may order the action to be dismissed accordingly, or may make such other order on such terms as the Court shall think just."

In *Rainsford -v- Corporation of Limerick*[24] Finlay, P., in the High Court, considered whether an order of the Master of the High Court extending the time within which the plaintiff might deliver a statement of claim ought to be set aside and the action dismissed for want of prosecution in circumstances where the plaintiff's accident had

occurred on 14 May, 1971, the writ had been issued on 20 August, 1973, and the plaintiff's solicitors had sought a consent to the late filing of a statement of claim in July, 1978, which consent had been refused. The Master granted the extension of time on 2 March, 1979. After reviewing the authorities, the learned President stated what he considered to be the "legal principle applicable in this country at present to the problem of the dismissal of an action for want of prosecution or to its continuance by an extension of the time for pleading" and enunciated four principles:

> "1. Inquiry should be made as to whether the delay on the part of the person seeking to proceed has been firstly inordinate and, even if inordinate, whether it has been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable would appear to lie upon the party seeking a dismiss and opposing a continuance of the proceedings.
>
> "2. Where a delay has not been both inordinate and inexcusable, it would appear that there are no real grounds for dismissing the proceedings.
>
> "3. Even where the delay has been both inordinate and inexcusable the court must further proceed to exercise a judgment on whether in its discretion on the facts the balance of justice is in favour of, or against, the proceeding of the case. Delay on the part of a defendant seeking a dismiss of the action and to some extent a failure on his part to exercise his right to apply at any given time for the dismiss of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion.
>
> "4. Whilst the party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material to the exercise of the court's discretion."[25]

Although the President found that there had been inordinate and inexcusable delay he, nevertheless, came to the conclusion that the balance of justice lay in favour of permitting the plaintiff's action to proceed and, accordingly, he affirmed the order of the Master of the High Court. These principles are eminently just and necessary to prevent abuse of the process of the Court by delay in the prosecution of an action which delay has become oppressive to the defendant.

> *" [The Rainsford] principles are eminently just and necessary to prevent abuse of the process of the Court. . . . "*

In *O'Domhnaill -v- Merrick* (26) Henchy, J., with whom Griffin, J., concurred, enunciated a broader jurisdiction to dismiss an action for want of prosecution, relying not only on delay in the prosecution of the litigation once commenced but upon antecedent matters notwithstanding that these did not affect the plaintiff's right to maintain the action under the Statute of Limitations, 1957. The plaintiff was born on 29 November, 1957, and sustained very serious injuries with permanent sequelae in a road traffic accident on 5 March, 1961. In 1965, approximately one year after the expiration of the three-year period of limitation then provided for in the Statute of Limitations, 1957 a writ was issued on her behalf. As the law then stood, her action was statute-barred. No further step was taken in those proceedings and, on the application of the defendant owner of the car who had been sued in those proceedings, the action was dismissed for want of prosecution by order of 23 April, 1968. In *O'Brien -v- Keogh*[27] the Supreme Court found unconstitutional that provision of the Statute of Limitations, 1957, which restricted the period of limitation in the case of an infant plaintiff in the custody of a parent to three years.[28] Thereafter, the period of limitation was 3 years from the date of the plaintiff's majority, i.e. 21 years + 3 years. In March, 1977, the plaintiff's mother, as next friend, consulted another solicitor who issued a writ against the present defendant, the driver of the car, on 9 September, 1977, which was served on 2 December, 1977. An appearance was eventually, entered on 9 May, 1978 following a series of extensions of time for so doing granted on consent by the plaintiff's solicitor. For over two years, until the end of 1979, the plaintiff's solicitor was in correspondence with insurers

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in connection with the claim and then a firm of solicitors, not on record, wrote on behalf of the defendant indicating that they intended to apply to have the action dismissed on the ground that to proceed with the action so long after the occurrence of the accident would be contrary to natural justice. When these solicitors eventually came on record on 25 October, 1979, the plaintiff shortly thereafter served notice of intention to proceed in the action and on four different occasions sought letters consenting to late filing and service of the statement of claim. This was consistently refused. Ultimately, in January, 1982, the plaintiff applied for and obtained an order extending the time for delivery of defence on 5 February, 1982, but this was reversed by the High Court in December, 1982, and the action was dismissed for want of prosecution. The plaintiff's appeal to the Supreme Court was delayed by her solicitor's failure to lodge the books of appeal and was ultimately heard in May, 1984. The appeal was dismissed. Henchy, J., with whom Griffin, J. concurred, held that there was "inordinate and inexcusable delay on the part of the plaintiff" and enunciated the most extraordinary doctrine that, given the plaintiff's age during the later part of the delay, she could not, although still an infant and under a disability within the meaning of the Act of 1957, "separate herself from the delay as she might possibly have done if she had been a younger person. There was at least an onus on her to show that she took such steps to prosecute her claim as could reasonably be expected from a person of her age or, failing such steps, to give an explanation of her inactivity" which had not been forthcoming.[29] (These propositions were vigorously disputed by McCarthy, J., who dissented and who also made the telling point that there was no evidence that the witnesses to the accident were unavailable or that they had no meaningful recollection of the circumstances of the accident.) Henchy, J., concluded that the plaintiff's action, should stand dismissed:

> "After due regard to all relevant factors, I am driven to the conclusion that not only was the delay in this case inordinate and inexcusable but there are no countervailing circumstances which would justify a disregard of that delay. I consider that it would be contrary to natural justice and an abuse of the process of the Courts if the defendant had to face a trial in which she would have to try to defeat an allegation of negligence on her part in an accident that would have taken place 24 years before the trial, and a claim for damages of which she first learned 16 years after the accident. Apart from the personal unfairness that such a trial would thrust on the defendant, I consider that a trial after such a remove in time from the cause of action would be essentially unfair for being incompatible with the contingencies which insurers of motor vehicles could reasonably be expected to provide against...
>
> "As to a plaintiff's right to proceed with an action brought before the period of limitation has run out, the Courts in the past have been reluctant to exercise their equitable jurisdiction to terminate stale claims at a time when the statutory period of limitation has yet to expire. However, the Statute of Limitations, 1957, was enacted in a legal milieu which makes such reluctance to intervene inappropriate...
>
> "Although the plaintiff's claim is not statute barred, I would hold that the lapse of 24 years between the cause of action and the hearing of the complaint - a delay which is virtually entirely the fault of the plaintiff or her advisers - is so patently and grossly unfair to the defendant that her claim to have the case against her dismissed is unanswerable. I might say that I reach that conclusion in the knowledge that it has not been submitted on behalf of the plaintiff that it would not be possible for her to take an alternative course to this action for the purpose of recovering damages or compensation."[30]

Constitutional jurisdiction to dismiss

In *Toal -v- Duignan (Nos. 1 & 2)*[31] the Supreme Court went further and asserted a jurisdiction to dismiss an action brought within the limitation period not as part of the inherent jurisdiction of the courts to dismiss an action which amounts to an abuse of process because of want of prosecution but rather as a jurisdiction derived from the Constitution and even where there is no culpable delay on the part of the plaintiff. The plaintiff was born in the Coombe Hospital on 28 June, 1961, with an undescended right testicle. This condition was not in fact detected by the staff in that hospital either on the occasion of his birth or on a return visit some three months later with a complaint of vomiting and consequently no treatment was given to the plaintiff in respect of this condition nor was any warning given to the plaintiff's parents to watch carefully to see if the right testicle would descend during the following two or three years and if not to seek further medical advice. The first time the plaintiff's genital area was again examined by a medical doctor was in June, 1971, when the plaintiff was almost ten years of age and developed mumps. He was referred at once to Harcourt Street Children's Hospital and was there detained from some days, during which time he was examined.

. . . . the Supreme Court . . . asserted a jurisdiction to dismiss an action brought within the limitation period . . . as a jurisdiction derived from the Constitution.

At this time he was also allegedly examined by two general practitioners. The plaintiff learned of his condition in 1983 and a writ was issued on his behalf on 1 October, 1984, claiming damages for negligence and breach of contract against eight defendants. These defendants were the Master of the Coombe Hospital in 1984, the Hospital itself, the Master of that Hospital in 1961 who was the gynaecologist attending at his birth, the estate of a paediatrician (since deceased) who had examined him at that time, the two general practitioners whom it was alleged had examined him in 1971 and Harcourt Street Children's Hospital. The former Master of the Coombe Hospital subsequently died and the proceedings were not reconstituted against his estate. In *Toal (No. 1)* the Master of the Coombe Hospital at the date of the writ, the Hospital itself, the estate of the paediatrician and one of the general practitioners successfully applied to the High Court for dismissal of the proceedings against them. The Master of the Hospital succeeded on the ground that no cause of action was disclosed against him. The other applicants succeeded on the ground that they could not properly be expected to defend the proceedings because of the delay between the date of the alleged wrong and the date of the institution of proceedings. The plaintiff's appeal to the Supreme Court was dismissed, notwithstanding that the Court accepted that there was no culpable delay on his part in the commencement and prosecution of the proceedings. Finlay, C.J., delivering the judgment of the Court, said:

> "With regard to the hospital and fourth-named defendant who is the widow of the consultant paediatrician employed in the hospital in 1961, the position appears to me to be as follows. What is alleged is failure either to diagnose on examination an undescended testicle, or in the alternative, a failure, having diagnosed it, to give the appropriate advice to the plaintiff's parents with regard to what should be done if it did not rectify itself naturally by the time he was between three and five years of age. It would be impossible for either the hospital authorities or the consultants engaged, in the absence of the most detailed clinical notes and records [which were incomplete due to a change in the location of the hospital in the interim] to defend themselves 26 years on from attendance at a birth in 1961. It is wholly impossible, the death having occurred of both the gynaecologist and paediatrician concerned, either for the hospital or for the widow sued as a personal representative of the paediatrician to defend themselves in any way against the allegations which are being made against them.
>
> "Even though, therefore, the plaintiff may be blameless in regard to the date at which these proceedings have been instituted and with regard to the period of 25 to 26 years since the events out of which they arose, as far as these defendants are concerned there would be an absolute and obvious injustice in permitting the case to continue against them. One cannot but be moved with sympathy for the plaintiff who obviously feels deeply the medical condition which he is advised he presently suffers from, but that sympathy could not be permitted to justify what would be unjust proceedings against these defendants. In the High Court it was held by Keane, J., that the case was governed by the decision of this Court in *O'Domhnaill -v- Merrick.*[32] I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this Court in that case, but they may be summarised in their application to the present appeal as being that *where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action."*[33]

In *Toal -v- Duignan (No. 2)*[34] certain other defendants to the plaintiff's action appealed against the refusal of Lynch, J., to likewise dismiss the plaintiff's action against them. These defendants were the Harcourt Street Children's Hospital and the other general practitioner whom it was alleged had seen the plaintiff in 1971 when he had mumps. The latter defendant was held, not having records, to be in the same position as defendants who had earlier been dismissed from the action and her appeal was allowed. The Hospital's appeal was dismissed, however, on the ground that in their case

> "the doctor [Dr. Rees] involved is alive; has apparently personal records as well as some personal recollection; he has not made any affidavit indicating any particular difficulty or disadvantage in giving evidence, although the affidavit filed on behalf of the hospital itself indicates the general disadvantage of a long lapse of time. There is no real evidence of a concrete kind with regard to the nature of the records which are available, nor to any attempt by this hospital to ascertain the whereabouts or availability of other persons who were involved at the treatment of the plaintiff at the relevant time. A rather comprehensive note of his treatment written by Dr. Rees to the eight and fifth-named defendants after his treatment in hospital is an immediate source capable of being used by him (Dr. Rees) to revive his memory. In all these circumstances I am satisfied that these defendants have not

made out a case for probable injustice which would entitle them to be dismissed out of the action . . . ''[35]

Finlay, C.J., reiterated and, indeed reinforced, the view of the law which he had expressed in *Toal (No.1)* and asserted that the Court's jurisdiction to bar a blameless plaintiff's claim was an inherent jurisdiction under the Constitution. The learned Chief Justice said

> ''I adhere to the view expressed by me in the previous appeal in this case that the court has got such an inherent jurisdiction. It seems to me that to conclude otherwise is to give to the Oireachtas a supremacy over the courts which is inconsistent with the Constitution.
>
> ''If the courts were to be deprived of the right to secure to a party in litigation before them justice by dismissing against him or her a claim which by reason of the delay in bringing it, whether culpable or not, would probably lead to an unjust trial and an unjust result merely by reason of the fact that the Oireachtas has provided a time limit which in the particular case has not been breached would be to accept a legislative intervention in what is one of the most fundamental rights and obligations of a court to do ultimate justice between the parties before it.
>
> ''This view does not, however, of course mean that this is a jurisdiction which could be frequently or lightly assumed and there can be no doubt that the issue before the court always remains that which was identified by Henchy, J., in *O'Domhnaill -v- Merrick* where, in the course of his judgment, he stated:
>
> 'In all cases the problem of the court would seem to be to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend.'[36]
>
> ''I also accept, as I indicated in my judgment on the previous appeal in this case, that the existence of culpable negligence on the part of a plaintiff whose claim has been delayed is of considerable relevance but that it is not an essential ingredient for the exercise by the court of its jurisdiction.''[37]

support. The powerful dissenting judgments of McCarthy, J., in *O'Domhnaill's* case and *Toal (No. 2)* express, more eloquently than the present writer could hope to do, the objections to the new doctrine; and Professor McMahon's and Mr. Binchy's commentary is one with which one can wholly concur.[39] The present writer would say only this: that his grave mistrust of the doctrine of judicial review and ''constitutional law-making'' under the Constitution, as practised in the Irish courts, has been confirmed.

. . . the utmost caution is required . . . in accepting instructions in a claim which may be regarded by the Courts as "stale" but . . . is nevertheless sanctioned by the authority of the Oireachtas.

Conclusion: utmost caution required

The practical conclusion to be drawn from these decisions of the Supreme Court is that the utmost caution is required by solicitors in accepting instructions in a claim which may be regarded by the Courts as ''stale'' but is one the bringing of which is nevertheless sanctioned by the authority of the Oireachtas. Most certainly, solicitors acting in such cases should proceed with all due diligence and not allow themselves to enter into negotiations with insurance companies who may, thereafter, rely on the period involved for the purpose of alleging delay on the part of the plaintiff's solicitor. For, if even the wholly innocent may lose their rights at law in the manner sanctioned by the Supreme Court in these cases, the mildly culpable, guilty of only ''small delay'', are in double jeopardy. In *O'Domhnaill -v- Merrick* McCarthy, J., dissenting, rightly observed: ''I have already referred to the charge of delay as being one made against the plaintiff's present solicitor; *in truth, the charge is one of foolhardiness in taking on the case at all* . . . .''[38] As to the merits of these decisions, it is of no avail to discuss these when the Supreme Court has twice asserted this novel doctrine and invoked the Constitution in its support. It is something which is profoundly undemocratic and a cause for the most serious concern, even outside its immediate effects on plaintiffs in the instant cases who are deprived by it of the rights afforded them by the Oireachtas. That ''the Supreme Court knows best'' is not a philosophy with which the present writer can concur. Where the Court relies upon its traditional common law function of law-making – even on the grand scale of *McNamara -v- Electricity Supply Board*[40] where it began the process, which it has since continued, of re-writing the common law of occupiers' liability – it relies on the cogency of its arguments and the commonly perceived justice of the result to commend its conclusion to the Legislature; but, if it cannot so persuade the Legislature, it has lost the argument, and the democratic arm of the Government may amend the law. The common lawyers rely upon the cogency of their arguments to justify their conclusion; but the Supreme Court, in invoking the Constitution, relies on its view of a vague document, not intended to be used in the fashion now popular, and against which it is of no avail to argue on any ground. That the Oireachtas, the democratic organ of Government, should be bound in such manner is undoubtedly the gravest result of these decisions.

NOTES

1. By section 3(3) of the Act of 1991 a limitation period of two years from the date on which the cause of action accrued or two years from the "date of knowledge" of the person injured, if later, is provided for *actions under section 13(7) of the Sale of Goods and Supply of Services Act, 1980, which consist of or include damages for personal injuries* in lieu of the limitation period specified in section 11(2) (d) of the Statute of Limitations, 1957 (as inserted by section 13 (8) of the Act of 1980). By section 3 (4) of the Act of 1991 the reference in *section 21 (4) (b) of the Control of Dogs Act, 1986,* to section 11 (2) (b) of the Act of 1957 is to be construed as a reference to section 3 (1) of the Act of 1991.
2. Section 11 (2) (b) of the Act of 1957, now repealed by section 3 (2) of the Act of 1991.
3. [1990] 1 I.R. 148 (S.C.).
4. Ibid., p.157, per Finlay, C.J.
5. Subs. (1) (a), (b), (c) & (d).
6. Subss. (2) & (3).
7. Subs. (1), the final sub-clause thereof.
8. See *Thompson -v- Smiths Ship repairers (North Shields) Ltd.* [1984] *1 All E.R. 881.*
9. *For survival actions, see White, Irish Law of Damages for Personal Injuries and Death,* para. 14.1.01 et seq.
10. Section 4 (1) of the Act of 1991.
11. Section 4 (2) (b) of the Act of 1991.
12. Section 4 (2) (a) of the Act of 1991.
13. Section 4 (3) of the Act of 1991.
14. Section 6 (5) of the Act of 1991.
15. Section 6 (1) of the Act of 1991.
16. Section 6 (2) & (3) of the Act of 1991.
17. Section 6 (4) of the Act of 1991.
18. Section 48 (2) of the Act of 1957.
19. Ibid.
20. [1965] 2 All E.R. 441 (C.A.).
21. It may also be noted that section 5 (3) of the Act of 1991 affords a new limitation period in the case of persons under a disability in actions for personal injuries under section 13 (7) of the Sale of Goods and Supply of Services Act, 1980, amending section 49 (5) of the Act of 1957 as inserted by section 13 (8) of the Act of 1980.
22. Section 5 (2) of the Act of 1991.
23. Section 49 (1) (c) of the Act of 1957 as applied by section 5 (1) of the Act of 1991.
24. [1984] I.R. 152n (H.C.)
25. Ibid., p.153.
26. [1984] I.R. 151 (S.C.)
27. [1972] I.R. 144 (S.C.)
28. Section 49 (2) (a) (ii) of the Act of 1957. Section 49 (2) is now repealed by section 5 of the Act of 1991.
29. [1984] I.R. 151, 157.
30. Ibid., pp.157-159.
31. [1991] I.L.R.M. 135 (S.C.) (No. 1); [1991] I.L.R.M. 140 (S.C.) (No.2).
32. [1984] I.R. 151 (S.C.)
33. [1991] I.L.R.M. 135, 138-139 (emphasis added).
34. [1991] I.L.R.M. 140 (S.C.)
35. Ibid., p.145.
36. [1984] I.R. 151, 157.
37. [1991] I.L.R.M. 140, 142-143.
38. [1984] I.R. 151, 168 (emphasis added).
39. McMahon & Binchy, *Irish Law of Torts,* 2nd ed., pp.831-832.
40. [1975] I.R. 1 (S.C.) □

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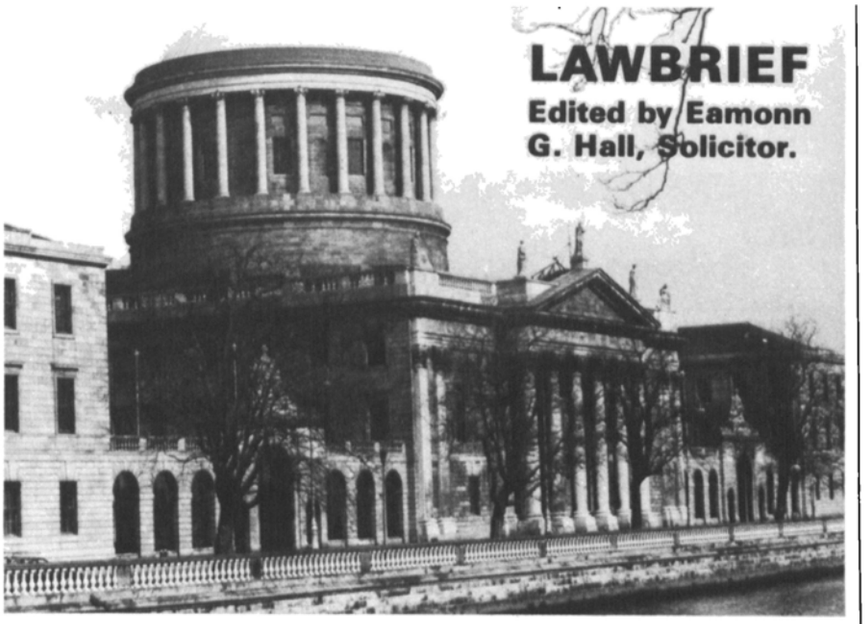

European Register of Wills?

There have been discussions in the media recently about the establishment of a private system for registering wills. This issue has been considered in the European Parliament. Mr. Gerardo Fernandez Albor (PPE) on 15 October, 1990 in a written question to the European Commission, asked whether it would be appropriate to set up a single Community information office on wills drawn up by Community citizens owning property in Community countries other than their own, with a view to co-ordinating measures from respective bodies dealing with last wills and testaments, and thus to contribute to greater security in real estate transactions and in other transactions of a general nature, by improving information access.

The Hon. Member stated that the mobility of Community citizens, their resettling in other Community countries and their participation in real estate transactions in their adopted countries meant that they owned property which was logically among the dispositions in their respective wills.

Gerardo Fernandez stated that since, in most cases, these wills were made in the relevant country of origin, although they covered the property purchased in their adopted country, those involved in the testator's business transactions in their adopted country were naturally confused as to whether the deceased made a will in his/her country of origin, in the presence of which notary; which body was responsible for co-ordinating this information in the deceased's country of origin; and what guarantees of notarial information they might receive etc.

Replying, Mr. Bangemann, on behalf of the Commission, (*Official Journal of the European Communities* No. C 63/59, 11.3 1991), stated that the matter referred to by the Hon. Member fell within the jurisdiction of the Member States. Mr. Bangemann stated, however, that there was already an instrument of international law in this field, namely the Basle Convention of 16 May, 1972 on the establishment of a scheme of registration of wills. This was a Council of Europe Convention, which has so far been ratified by France, Belgium, the Netherlands, Italy, Portugal, Luxembourg and Spain among the Community Countries, and by a number of other European countries. Ireland is not yet a party to this Convention.

ECJ Revises Rules of Procedure

The Court of Justice of the European Communities, in the interests of clarity and simplicity, and with the intention of establishing a coherent authentic text of its *Rules of Procedure,* has now revised its rules. The new *Rules of Procedure* have been set out in the *Official Journal of the European Communities (No. L 176/9 of July 4, 1991).*

Readers may be interested in some of the rules. Before taking up his duties as Judge, a Judge of the Court of Justice takes the following oath:

> "I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the court."

It is also of interest that immediately after taking the oath, a Judge must sign a declaration by which he solemnly undertakes that, both during and after his term of office, he will respect the obligations arising therefrom, and in particular the duty to behave with integrity and discretion as regards the acceptance, after he had ceased to hold office, of certain appointments and benefits.

Article 6 of the Rules provides that Judges and Advocates-General shall rank equally in precedence according to their seniority in office.

Readers will be interested that the language before the Court of Justice of a case may be in Irish. The language of a case is chosen by the applicant – subject to certain conditions.

Articles 32 and 36 of the Rules deal with the rights and obligations of agents, advisers and lawyers appearing before the Court. Agents, advisers and lawyers enjoy certain privileges and facilities. Papers and documents relating to the proceedings are exempt from both search and seizure. In the

(Cont'd on p. 318)

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At the Parchment Ceremony on Friday, 11th October, were Eimear Lane, Lucy Lane, P.J. Connolly, Registrar of Solicitors, Maria McGovern and Mary Rose McGovern.

A delegation of German Notaries Public recently visited the Law Society – (left to right) Chris Mahon, Director, Professional Services, Law Society; Albrecht Ruhr, Notary; Franz Luffnat-Pictseriu, Notary, presenting a bottle of wine to Brendan Walsh, Registrar, Faculty of Notaries Public, Dublin; Verena Countess Roedern, First Secretary, German Embassy, Dublin, and Frank O'Donnell, Council Member, Law Society.

The President of the Law Society, Donal G. Binchy, recently presented a cheque for £10,000 to Our Lady's Hospital for Sick Children, Crumlin. The money was raised from the proceeds of the bi-centennial ball of the Law Club.
At the Presentation were (left to right) Des Ryan, Deputy Chairman, Our Lady's Hospital for Sick Children; Eva Tobin, Vice Chairman, Organising Committee, bi-centennial ball; Donal Binchy, President, Law Society; Orla Coyne, Organising Committee, and Adrian Bourke, Chairman of the Organising Committee.

The Victorious SADSI GAA Team (see report on p.326)
Back Row (left to right): David O'Donnell, Seamus Roe, Brendan O'Reilly, John O'Sullivan, Kevin Murphy, Sean McDonagh, Tom Hallinan, Michael Keane, Joe Varley, Daragh Bowen.
Front Row (left to right): Niall Clancy, Joe Kelly, Liam Brazil, Tim O'Leary, Michael Woods, Seamus O'Connor, Gerard O'Reilly.
Photographer: James Staines.

Legal & General
Office Supplies

(Cont'd from p. 315)

event of a dispute in relation to this issue the customs officials or police may seal relevant papers and documents and then forward the papers immediately to the Court for inspection in the presence of the Registrar and of the person concerned. Agents, advisers and lawyers appearing before the Court are to be entitled to such allocation of foreign currency as may be necessary for the performance of their duties. Finally, agents, advisers and lawyers are to be entitled to travel in the course of the duty without hindrance.

Article 76 provides that a party who is wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid. The application must be accompanied by evidence of the applicant's need of assistance, and in particular by a document from the competent authority certifying his lack of means. Where legal aid is granted, the cashier of the Court advances the funds necessary to meet the expenses.

The *Rules of Procedure* of the Court of Justice contain specific rules on pleadings, preparatory inquiries, the summoning and examination of witnesses and experts, oral procedure, judgments, costs, service of documents, time limits and other rules which regulate the conduct of the business of the Court.

The Society for Computers and Law

The Society for Computers and Law will hold its dinner on Friday 29 November 1991 – 7.00 for 7.30p.m. at the Naval and Military Club, 94 Piccadilly, London W1V OPB.

The President, the Rt. Hon. Lord Justice Neill, will present the Society's 1991 Award for the most outstanding application of information technology to the law in the United Kingdom and the Republic of Ireland.

Further details are available from Ms. Ruth Baker, Administrative Secretary, Society for Computers and Law, 10 Hurle Crescent, Clifton, Bristol BS8 2TA. Telephone 0272 237393. Fax: 0272 239305.

British and Irish Legal Education Technology Assocation

The British and Irish Legal Education Technology Association will hold its 7th annual conference on Technology and Law in April 1992. The conference will be held at the prestigious new Scarman House on the University of Warwick campus. The conference will consider aspects of technology and law including computer law; computer-assisted learning; information retrieval; hypertext and multi-media; expert systems; the socio-legal implications of technology applications; networks and telecommunications.

This annual conference attracts academic delegates from around the world together with practitioners.

Contact person

The contact person is *Moyra Butterworth,* Information Officer, CTI Law Technology Centre, Social Studies Building, University of Warwick, Coventry CV4 7A1, United Kingdom.

Eamonn Hall

□

Disputes Resolution Company Formed

A new company, Commercial Dispute Resolution Limited (CDRL), has recently launched its services. The company intends to offer Alternative Dispute Resolution (ADR) to parties between whom disputes have arisen primarily due to non-performance of a contract, or the perception of non-performance.

The approach of ADR is to endeavour to reach a solution that is mutually acceptable to the parties in dispute. An independent "neutral" assists the disputants to find a formula for settlement. One of the key requirements is that the "neutral" should endeavour to keep the parties in dialogue until a settlement is reached. In some cases, the independent "neutral" will formulate recommendations for consideration by the parties, in others s/he might act as chairperson in any negotiations that may take place. The company says that its service is intended to provide a speedy and cost effective alternative to formal legal proceedings, and that it envisages that the main source of its referrals will be from solicitors.

The Chairman of the company is ***James J. Ivers,*** former Director General of the Law Society.

□

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Irish Wheelchair Association
Áras Chuchulain, Blackheath Drive,
Clontarf. Dublin 3. Tel: 338241
IRISH WHEELCHAIR ASSOCIATION

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4 Fairbrook Terrace, Rathfarnham
Dublin 14
Bookkeeping-Accountant with 8 years' experience in Solicitors' accounts will provide complete management package, client and office accounts, taxation submission.
Contact *Anne Breslin*
Telephone: 933069

LRC proposals on defamation, contempt and libel

In January, 1989 the Attorney General requested the Law Reform Commission to examine the law of defamation and contempt. In three recent consultation papers the Commission has set out proposals for a thorough modernisation of the law on civil defamation, contempt of court, and criminal libel.

Free Expression or Fair Name?

Consultation Paper on the Civil Law of Defamation
Law Reform Commission, March, 1991. 467pp £20.00

Introducing their proposals for reform the Commissioners say that it is generally agreed that the law of defamation should protect and vindicate so far as possible the individual's right to his/her good name and the right of free expression. "Both of these rights are expressly guaranteed by the Constitution, but our law of defamation which has remained unaltered for nearly 30 years does not provide in modern conditions a satisfactory framework for ensuring that they are adequately protected."

Following a thorough examination of the existing law in this and other common law jurisdictions, the Commissioners have departed slightly from their usual format by setting out an examination of the law in the United States, observing that: "American jurisprudence on defamation has undergone a radical transformation in the past 25 years and has rejected much of the common law framework in this area. Secondly, the changes effected were achieved under a Constitutional guarantee of free speech. The parallel with Ireland is obvious". Then follows an analysis by the Commission of the merits (and drawbacks) of United States defamation law. Clearly, many of the proposals have been influenced by this exercise such as the conclusion that the retention of defamation as a 'strict liability' wrong is no longer justified, the proposal for the introduction of a new remedy of declaratory judgment that would provide a plaintiff with a speedy method of correcting a false statement, and the proposal to abolish the common law rule that 'malice' defeats the defence of 'fair comment'.

The comprehensive suggestions for reform include the abolition of the distinction between libel and slander which, the Commissioners observe, is no longer tenable in our technological age. A new definition of defamation is set out which, interestingly, contains within it the proviso that: "matter shall not be considered injurious to the plaintiff's reputation if it states that s/he upheld, assisted or complied with the law in any way."

Among the remaining proposals are provisions that: while juries should indicate at what level damages should be assessed, the actual amount should be determined by the judge; a new cause of action in respect of defamation by the dead; and immunity from defamation actions for printers and distributors.

Finally, an appendix to the paper deals with the development of a right to privacy in Irish law. The Commissioners conclude that a line has emerged in the Supreme Court recognising privacy as an unspecified personal right under the Constitution - albeit almost exclusively within the context of family relationships - but with potential for further development in future cases.

Since its publication the Commission held an all day public symposium on the topic at the end of April attended by, particularly, representatives of the print and electronic media. Following this, submissions on its reform proposals were received by the Commission from interested parties. It is likely that the Commission's final proposals for changes in the law of defamation will be presented to Government and published before the end of this year.

Free Speech or Fair Trials?

Consultation Paper on Contempt of Court. Law Reform Commission, July, 1991. 447pp £20.00

In a society hungry for information and where transmission of news is instantaneous, how best can be a balance be achieved between the competing claims of the public's right to know and a defendant's right to a fair trial? In the second phase of its examination of the law on defamation and contempt, the Law Reform Commission's consultation paper on Contempt of Court grapples with this key issue.

Commenting that the current law may be considered 'archaic' and 'out of touch', the Commission has, again, set out a thorough examination of the current law in this country coupled with extensive examination of case law and research findings in other jurisdictions. The first 10 chapters provide a valuable guide for practitioners, dealing with: contempt in the face of the court, scandalising, *sub judice* rule, acts that interfere with the course of justice, civil contempt, jurisdiction, the roles of judge and jury, and contempt in relation to tribunals.

WHERE THERE'S A WILL THIS IS THE WAY...

When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

"I give, devise and bequeath the sum of Pounds to the Irish Cancer Society Limited to be applied by it for any of its charitable objects, as it, at its absolute discretion, may decide."

All monies received by the Society are expended within the Republic of Ireland.

"Conquer Cancer Campaign" is a Registered Business Name and is used by the Society for some fund raising purposes.
The "Cancer Research Advancement Board" allocates all Research Grants on behalf of the Society.

IRISH CANCER SOCIETY
5 Northumberland Road, Dublin 4, Ireland. Tel: 681855

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Friends for Life

During 1990 the Irish Kidney Association's Donor Awareness Programme helped 200 people suffering Kidney, Heart and Liver failure to receive a second chance for life.

The Irish Kidney Association could not carry this life-saving work without the help of informed caring members of the community - such as the legal profession.

Finance received through bequests/donations has enabled not only educational and research programmes but also the purchase of life-saving equipment for hospitals nationwide.

The Irish Kidney Association is proud of its record of treating people from all walks of life and from all parts of the country as equal beneficiaries of its services.

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"It shows the Spirit of Christ taking place, the story of Sister Consilio speaks for itself"
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Cuan Mhuire Rehabilitation Centre,
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Bequests, Donations etc. most greatfully received by the **Sister Consilio Fund, Cuan Mhuire, Athy, Co. Kildare.**

A restatement of the *sub judice* rule - favoured shield of politicians and bane of journalists - is among the many proposals for reform set out by the Commissioners in the second half of the paper. The rule, they suggest, should apply to any publication which creates a risk, other than a remote one, that the course of justice in the proceedings in question will be seriously impeded or prejudiced. It would not be a defence to *sub judice* contempt that the offending material was published incidentally to a discussion of public affairs. A defence of necessity to publish, presumably for the greater common good, would be available. Scant comfort for news editors who will hardly be dispensing with the services of their professional advisors on foot of these proposals!

The Commission has included contempt in relation to tribunals in its remit. The consultation paper considers whether there should be a greater equivalence between contempt of court and similar conduct in regard to a tribunal and concludes that it is in society's interest to ensure that the proceedings of tribunals are not interfered with. Therefore, a tentative recommendation is made that legislation should provide that certain conduct would be an offence such as improperly attempting to – or influencing – a tribunal in the determination of any issue. Attempts to – or actual – bribing, intimidating or taking reprisals against a tribunal witness would also become offences.

The proposals, which are wide-ranging, include suggestions that the law of contempt in the face of the court should be retained, the retention of imprisonment as a sanction in civil proceedings, abolition of the rule that scandalous abuse of the judiciary constitutes contempt by scandalising, and the retention of journalists' obligation to give evidence and answer questions.

Criminal Libel Re-defined

Consultation paper on the Crime of Libel. Law Reform Commission, September, 1991. 194pp £10.00

The crime of libel is an interesting one "because it is at once of high and trivial importance" according to the Law Reform Commission. Of high importance because Ireland has a Constitutional guarantee of free speech and the common law rules represent stringent restrictions upon the individual's right of expression. Trivial, because in modern society it has assumed a very minor role and the offence in any form is rarely prosecuted. Bearing the latter fact in mind, the Commissioners declare that they have attempted to maintain a common sense approach. Their suggestions, nonetheless, amount to a proposed radical overhaul of the law on criminal libel.

The paper deals with the historical development of the crime of libel and then goes on to consider the present law governing each of the branches of the crime of libel i.e. seditious libel, blasphemous libel, obscene libel and defamatory libel.

The Commissioners provisionally recommend the abolition, without replacement, of the common law offence of seditious libel taking the view that it is incompatible with the Constitutional guarantees of free speech. Likewise, in view of the unsatisfactory state of the common law and in view of the specific legislative provisions which punish publication of obscene matter, the abolition of the common law offence of obscene libel is also recommended.

Turning to blasphemous libel the Commission says "It is absurd that an offence exists in Irish law . . . which is totally uncertain as to both its *actus reus* and *mens rea*. It may well be unconstitutional to punish a person in respect of a crime which the State has failed to define, not only in matters of detail, but in borad outline." The Commission suggests a new offence of "publication of blasphemous matter" defined as "matter the effect of which is likely to cause outrage to a substantial number of the adherents to a religion by reason of its insulting content concerning matters held sacred by that religion." Religion for the purposes of the definition would include Christian and non-Christian religions.

The retention of the offence of defamatory libel in its present form is strongly opposed by the Commission, but the Commission draws a tentative conclusion in favour of retaining the offence in a more restricted form, being of the view that the *Fleming* case demonstrated that its abolition would deprive the criminal law of a valuable weapon. In narrowing the offence the provisional recommendations are that prosecutions in respect of defamatory libel should be instituted only with the consent of the DPP, on whose option the offence would be triable either summarily or on indictment. The Commission proposes a more stringent burden of proof on the prosecution to show that the matter was actually false as well as defamatory and to show the requisite mens rea.

Copies of the consultation papers on Contempt of Court, Civil Law of Defamation, and the Crime of Libel may be obtained from the Law Reform Commission, Ardilaun Centre, 11 St. Stephen's Green, Dublin 2.

Barbara Cahalane

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The Law Society provides a prompt and efficient company formation service based on a standard form of Memorandum & Articles of Association.

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Practice Notes

Communication with clients of another solicitor

The attention of the Litigation Committee has been drawn to a number of instances of solicitors communicating directly with clients of colleagues in contentious litigation particularly in personal injury cases. Practitioners are referred to Chapter 7 (7) of the Guide to Professional Conduct of Solicitors in Ireland (1988) and Rule 7 of the International Bar Association International Code of Ethics (1986) both of which are published hereunder:-

A Guide to Professional Conduct of Solicitors in Ireland

7. (7) A solicitor should neither interview nor otherwise communicate with the client of another solicitor except with that solicitor's consent. In exceptional circumstances, this general rule does not apply. Where a solicitor on the other side of a transaction or a case does not reply to correspondence, a solicitor may be justified in writing directly to the client of the other solicitor. A solicitor who intends to write to a client of another solicitor should first warn that solicitor of his intention to do so.

International Bar Association International Code of Ethics

7. It shall be considered improper for lawyers to communicate about a particular case directly with any person whom they know to be represented in that case by another lawyer without the latter's consent.

Litigation Committee

Restoration of Companies Struck-off

Practitioners are reminded that the Companies Act, 1990 has amended Section 12 of the Companies (Amendment) Act, 1982, so that companies that do not for two consecutive years make annual returns required by Sections 125 and 126 of the Companies Act, 1963, expose themselves to being struck-off the Register of Companies.

Section 246 of the 1990 Act has inserted a new Section 311A in the 1963 Act to the effect that application may be made for 12 months from the strike off to the Registrar of Companies rather than to the High Court. Whilst this is likely to be of some assistance to practitioners, note that the fee for examining an application for the restoration of a company to the Register is IR£500 payable to the Companies Office. This is before any other costs or outlay are incurred.

Company Law Committee

Irish Association of Investment Managers

Guidelines

The Company and Commercial Law Committee would like to bring to the attention of the profession publications on the following subjects by the Irish Association of Investment Managers:

1. Code of Best Practice concerning the new insider dealing law under the Companies Act, 1990.
2. Amended Guidelines on share option and profit sharing schemes.
3. Guidelines on company purchase of own shares.

Copies of these codes and guidelines are available from the IAIM, 7 Lower Fitzwilliam Street, Dublin 2.

Company Law Committee

Local Government (Multi-Story Buildings) Act, 1988

Under Section 2 (2) of the Act, the Local Authority is bound to serve notice on the owner of a multi-storey building which has been constructed before the commencement of the Act requiring the owner to furnish the Local Authority with a certificate in respect of the building in one of the forms appended to the Local Government (Multi-Storey Buildings) (Amendment) Regulations, 1990.

Under Section 4 (1) of the Act there is an obligation to furnish a certificate to the Local Authority in respect of a multi-storey building which has not been completed before the commencement of the Act and such certificate must be furnished before the building or any part of the building is occupied.

For some time after the passing of the Act (because the Local Authority had not had time to serve notices on owners) it was felt sufficient to merely obtain a certificate from a 'competent person' which could then be sent to the Local Authority once the Local Authority had served a notice pursuant to the Act.

However, it has come to the Committee's attention that a number of such certificates have not been accepted by the Local Authority and have not therefore been recorded on the Register which the Local Authority is bound to maintain under the Local Government (Multi-Storey Buildings) Regulations, 1988.

Solicitors acting for purchasers or tenants are therefore advised that in all cases they should not just receive a copy of the certificate furnished or to be furnished to the Local Authority but also some evidence from the Local Authority that it has accepted and recorded the certificate on the Register established under the Act.

Conveyancing Committee

Loss of Deposit Cover

The Conveyancing Committee is very pleased at the introduction by the NHBGS of loss of deposit cover on the insolvency of builders as an extension of the existing structural defects cover. Where a builder has this cover there should be no need to have deposits and stage payments held by the builder solicitors' as stakeholders and subject to the limits of the scheme such money can be paid direct to the registered builder, his auctioneer or sales agent. The only foreseeable risk that can arise in this respect is that some agent might purport to take deposits on behalf of a builder without any authority. If the advice regarding the form HG41 set out in the last paragraph is followed we cannot see how this could happen.

It must, however, be made quite clear that the only circumstances under which the NHGBS will guarantee the refund of this deposit is by reason of the insolvency or fraud of the member and it is not the intention of the NHGBS to get involved in the type of arguments or disagreements which regularly arise between builders and purchasers on any other matters. The purchaser must satisfy the scheme that s/he has been unable (having used reasonble endeavours) to obtain reimbursement of the amount of the deposit by reason of the insolvency or fraud of the member. The NHGBS have assured us that in cases where their members are in liquidation or receivership there would be no question of purhasers having to take any legal proeedings. Even in cases where the position may not be as clear they have assured the Society that regard will be had to the needs of the purchaser to get a refund of the deposit (perhaps to buy an alternative property) and except in very unusual circumstances they do not envisage having to ask the purchaser to obtain a judgment or take any legal proceedings before dealing with the claim.

The time limit on the cover in any case is two years from the date of registration of the building or one year from the date of issue of the HG41 (whichever is the later) unless the purchaser requests an extension of time. Any such extension of time will be given for the asking and will extend the date of the cover for a period of 6 months from the original date of expiry. The NHBGS have a new document called HG41 which verifies the deposit cover in any particular case. There is a limitation of £20,000 or 15% of the purchase price which ever is the lesser in any case. This deposit cover will cover stage payments provided they are within the limits and rules.

Solicitors should make sure that their clients are aware of the rules and that it is up to the client to monitor the time limit and to seek assistance if the construction of the house does not seem to be proceeding and time seems to be running out.

Even if the deposit is covered by the NHGBS scheme, instruction should be obtained from the client to pay over the deposit to the builder. Solicitors should draw clients' attention to the rules in relation to the deposit by sending them details of the cover. The limits of £20,000 or 15% of the purchase price are important. It is particularly important, when paying a deposit to a selling agent, to establish the identity of the registered member of the NHBGS on whose behalf the agent is acting. The most important point of all is to make sure that the deposit cover applies in any case. Membership of the NHBGS or the registration of a house for the usual six year structural defects warranty from the NHBGS does not automatically entitle a purchaser from a registered builder/developer to deposit cover. Sight of the original HG41 is advisable if you are paying the deposit to anyone other than the builder/developer or their solicitor. It is not essential for the purchaser to get possession of the original HG41 and a copy from the builder or any reputable source should be sufficient. The important thing is that the registration of the house for deposit cover has taken place.

Conveyancing Committee

Hotel Licences

Further to the practice note which was published in the July/August edition of the *Gazette*, the Conveyancing Committee wish to draw attention to the fact that all relevant searches should be carried out prior to contract and in the event that the District Court register contains insufficient information, a further search should be carried out on the Circuit Court file.

Conveyancing Committee

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Viewpoint

Why not Solicitor Judges?

(Cont'd from p. 299)

selection for the Bench. In a small jurisdiction there will always be a difficulty about achieving an objective assessment of candidates who necessarily will be known personally by any likely selectors. In such a system it seems even more important that the qualities of prospective appointees to the bench, particularly where such appointments are not initially of a temporary nature, should be ascertained before a permanent appointment is made.

With increasing specialisation among practitioners it is important that where persons are to be appointed as judges of general and wide jurisdiction, that they are given an opportunity in training programmes, some of which should be completed prior to their appointment, to familiarise themselves with areas of jurisdiction in which they have not regularly practised.

□

Correspondence

Dear Sirs

We are a medium sized firm of solicitors in Leeds which, as you are aware, is a thriving commerical and industrial centre in the North of England.

Our firm has one office in the centre of Leeds and five branch offices.

We specialise in giving a full legal service to medium sized and smaller companies and are looking to link up with lawyers of a similar size in cities within Europe.

The idea behind this connection is to ensure that clients of our respective firms will be able to receive expert advice on the legal system of the respective countries in which a problem may have arisen.

If any of your members would be interested in becoming a member of such an association then please note that in addition to your city we are also endeavouring to make contact with solicitors in Milan, Malaga, Rotterdam, Lyon, Antwerp, Tel Aviv and Oporto.

We would be obliged if you could provide this information to the lawyers in your city and we await hearing from them in due course.

If we can be of any further assistance in providing any additional information then please do not hesitate to contact our Mr. Carvis.

Yours faithfully,

GODLOVE PEARLMAN.
Godlove Pearlman, Solicitors,
120 Harrogate Road,
Chapel Allerton,
Leeds, LS7 4NY.
Tel: 0532 696186,
Fax: 0532 661585

Mr. Noel C. Ryan,
Director General,
The Law Society.

Dear Sir,

We refer to our newspaper advertisement in early July concerning a bus accident at White's Cross. We sincerely regret this publication which we understand caused offence to some people. This was not intended and we shall take all views expressed into consideration in the future.

Yours faithfully,

Mangan O'Beirne.

Director General,
Incorporated Law Society of Ireland.

Dear Sir,

Re: **Multi-discipline practices (MDPs). Article in July/August 1991 *Gazette*.**

I have read Mr. Irvine's article with interest. I refer to the paragraph entitled "Principal Arguments in favour of the Single Professional Practice as against the MDP." In subparagraph [ii] thereof it is stated rather baldly "MDPs will, in many instances, jeopardise the professional relationship with the client, the judiciary and professional colleagues. MDPs will jeopardise the independence of the legal profession and of the advice given." Why should this be so? If the arguments against MDPs are to be seen as anything more than protection for the interests of lawyers themselves as opposed to the consumer I think some detailed examples would be necessary in this regard. It is stated that a consumer wishing to sue the non lawyer in an MDP would have to consult new legal advisers. Is there anything surprising about this? Surely, if a client wanted to sue partner No. 645 in a large practice, he would not ask partner number 1 to take the case!

At sub-heading [iv] entitled "Foreign Dependence" it is suggested that partnership between Irish solicitors and multinational accountancy firms could prejudice the independence of Irish solicitors and the the independence and integrity of Irish law itself. Again, there is no explanation or example as to why or when this would or should occur. The comment in relation to the failure of the big accountancy firms to satisfy on a cost efficient basis the needs of individuals, is I submit irrelevant in the context of the article. In any event the same comments could presumably be made against the larger law firms.

At number [v] under the heading "Confidentiality", while I think our profession could certainly benefit from an entire article and reminder on the subject of confidentiality, I do not think it is reasonable to suggest that non-lawyer partners in an MDP would find it any way to their benefit to ignore confidentiality insofar as a client of that MDP was concerned. The question of privilege is a different matter but I suggest this would give little difficulty as the MDP concept would seem designed for matters of a 'civil' rather than 'criminal' nature.

At paragraph [iv] on the topic of professional standards/discipline and the difficulties over inter professional jurisdiction, it is suggested that the establishment of a body with such jurisdiction would almost certainly mean loss of status and authority for the Law Society. Would this be such a terrible thing? What in the public mind is the present status and authority of the Law Society? Has

it become a self-perpetuating body of strutting peacocks, each slowly but surely climbing the safety non-slip ladder to Presidency or is it Excellency? These questions are not of course strictly relevant to the topic of MDPs under discussion but as the article is written in our Law Society publication and as it smacks of protectionism, I think some of the fundamentals need examination.

Under the heading "Practical Consideration" at paragraph [xi] the article refers to a reduction in freedom of choice in rural areas should MDPs be established. Why would this be a realistic practical difficulty?

The author must be complimented on the time he has taken to open the issues involved in MDPs. As he states, there seems to be little interest in the matter and it will be of benefit to all to open up these issues but, rather than approach it in a negative or protectionist way for lawyers and rather than seeking to impose lawyers as the leaders in MDPs without good reason, it is surely time to redefine the role of a solicitor in a rural and city context. I suggest the role can be enhanced by greater technical knowledge and expertise being disseminated to those interested in the profession at large rather than being concentrated in the hands of the larger firms. In this regard it would be very welcome to see some of the Continuing Legal Education lectures described as specialised rather than the almost universal 'general' classification given to them. In my limited experience the numbers attending these lectures would seem to more than justify on a cost basis, specific technical expertise rather than a general overview of any particular area under discussion.

To conclude I wish you the very best in your term of office.

Yours faithfully,

John G. Murphy,
JOHN A. SINNOTT & CO. □

Medico-Legal Soccer Cup

On Friday, 30 August, 1991 the inaugural Medico-Legal Soccer Match, sponsored by Astra Pharmaceuticals took place at Blackhall Place. The doctors team and solicitors team were made up of members of the respective professions who practise in Dublin. The game was the first ever Soccer game between the two professions and both teams were anxious to become the first winners of the cup. The game was keenly contested and despite some comments that because of the robust tackling it appeared that both sets of players were anxious to drum up business for their respective professions, the game was played in a sporting manner. The doctors took the lead after 20 minutes with a well worked goal scored by Dr. John McHale and the solicitors levelled scores shortly before half time. After a penalty that was hotly disputed by the doctors both teams upped the tempo in the second half. While the solicitors applied most of the pressure and missed a number of chances to take the lead the doctors scored a late winner when Dr. Dermot Kelly beat the attempted off-side trap and the despairing Dan Murphy in the solicitors' goal with a well struck shot to the corner of the net.

The game was followed by a buffet reception in the members bar. Bill Jolley represented the solicitors profession and presented the cup to the winning captain, Dr. Dermot Kelly, and in an eloquent speech informed those present that the solicitors would be going all out to win the cup next year. In reply for the doctors Mr. Austin Leahy said they looked forward to another keenly fought contest next year.

After the presentation the real business of the night got under way and the cup was last seen being carried down Leeson Street in the early hours of the morning! □

SADSI Vanquish Dentists

On Wednesday, 25 September, 1991 fifteen aggressive litigators lined out against a lean and fit Dublin Dental Hospital team. SADSI secured an early lead with a goal from Tim O'Leary. However, after the first quarter the dentists found their form and took control of midfield. By half-time they had built up a substantial lead.

SADSI spirits were further dampened in the second half by some excellent point scoring from the dentists. However, with ten minutes to go, encouraged by fanatical supporters, SADSI resurrected their pride, battled hard and with the skill of players like Tom O'Regan and Dave O'Donnell - the backs, Joe Varley at midfield and Niall Clancy at full forward, coupled with a timely charge by the forwards, SADSI rattled the dentists net four times to win the match 6:3 to 2:13.

Finally, a word of thanks to the referee who played the extra time which resulted in the SADSI victory - another example of the importance of knowing your judge!

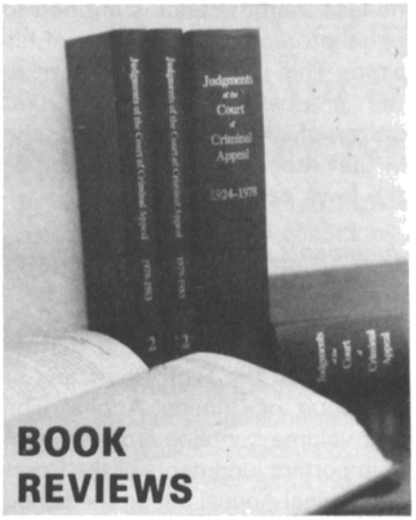
Kevin Murphy

SADSI Auditorship 1992

Nominations for the post of Auditor are invited to reach *Joe Kelly,* c/o The Law Society before 5.00p.m. Friday, 8 November, 1991.

- Each nominee must be proposed and seconded by apprentices under indentures on the 1 November, 1991.
- Each nominee must be under indentures until 31 December, 1992.
- Results of Election to be announced at AGM in December.

□



Irish Company Law Index. Donal McGahon, Gill & MacMillan 256pp. £19.99

Given the usual Irish reluctance to produce consolidating legislation, the practitioner in mid-1991 was faced with 7 Companies Acts and 2 related Acts (Mergers, Take-Over and Monopolies) Control Act, 1978 and Stock Transfer Act, 1963 when obliged to consider the application of company law to any problem. The publication of this work will come as a great boon particularly to those practitioners who would not claim to be specialists in the field. The index is well set out, clear, legible, well cross-referenced and will undoubtedly be a useful tool for practitioners.

Invariably it seems that one's first attempt to identify a topic in most law book indexes comes to naught. As one struggling to come to terms with the implications of Sections 25 to 40 of the Companies Act, 1990, I was somewhat disappointed not to find any entry for "control" a concept which is now of major importance. Neither curiously enough was there an entry under the heading *Business* for carrying on "in a reckless manner" although there was one for "in a fraudulent manner". No doubt this and other minor blemishes which may be discovered will be dealt with in the later editions of this book which may well become an indispensable tool for the practitioner.

John Buckley

91/92 Money PAYE & Tax Guide
Taxation Advice Bureau
£5.50

"The 91/92 Money PAYE & Tax Guide" is an excellent guide on tax and money matters for all taxpayers and a useful reference work for those involved in advising on such subjects. The guide deals concisely with the major areas of personal taxation explaining their effect and giving easy to follow advice on reducing tax payments. The guide has few statutory references and no footnotes - omissions which keep the text readable but, as always, the professional advisor will need to consult the legislation. The annual issue of a new updated guide is praiseworthy - in tax matters obsolete information is dangerous.

The guide is divided into four parts. The first deals with money and tax planning containing advice on the most tax effective way of saving. It compares the cost and benefits of endowment mortgages with the traditional type of mortgage and provides a table of the mortgage charges levied by building societies and banks. An admirable feature of the entire guide is the comprehensive and fully worked examples given throughout. Part two deals with social welfare and contributory pensions and indicates the tax savings to be achieved through pension contributions.

The main personal taxes are covered in part three which serves as an excellent checklist for the practitioner when giving advice. Practical advice on how to reduce your tax bill is given. Completion of an individual's annual tax return is dealt with in the final part. Not only are extensive details given but copies of Revenue Form 11 (self employed) and Form 12 (PAYE) are included along with references to the text dealing with each aspect of the forms. This is of great help to an individual completing his or her own return and certainly the average PAYE earner should be well able to undertake this task, having studied the guide.

Many readers who believe their tax bill is unchangeable should find useful ideas in the guide. The guide explains the tax system in readable form. It shows how tax saving can be achieved. It should be much in demand.

David Glynn

Garda Siochana Guide - 6th Edition

Advertising, broadcasting, data protection, fishery, gaming and lotteries, merchandise marks and consumer information, national monuments, occupational health and safety, official secrets, poisons and pharmacy, railways, trade unions and trade disputes, video recording, wild life - a wide range of legal topics indeed.

All of them and, of course, many more examples of criminal law subjects are covered in the index to the Garda Siochana Guide. Its 1570 pages contain a mine of valuable information on every piece of legislation under which the Gardaí have jurisdiction. It is a potted encyclopaedia of the vast range of offences for which clients may be prosecuted. It does not claim to be the last word on any of these topics but for the wise practitioner it should often be the first to be consulted.

In the 10 years since the last edition many more statutes imposing criminal liability have been passed.

The range of topics listed above should be sufficient to persuade those who might have assumed that because they do not do "criminal" work they had no need of this book.

The book is available from the Law Society, price £70.00 plus £3.25 for packing and postage.

John Buckley

Irish Planning Law and Practice.
O'Sullivan and Shepherd.
Butterworths (Ireland)
£95.00 Looseleaf

Current Irish planning law, given birth to by the 1963 Act, grew slowly in its initial stages. With the passing years it developed with increasing momentum until, fuelled by the seemingly endless legislation and judicial interpretation of recent years, it now represents something akin to a raging torrent to which no brakes can be applied. While this complex web, which continues to grow, creates enormous compliance difficulties it must nevertheless be welcome as it does no more than reflect the wishes and aspirations of a developing, forward-thinking society which is conscious of its environment and the need to protect it.

One wonders how the late, fondly remembered and sadly missed, Mr. Justice Eamonn Walsh, author of the first text book on Irish Planning Law in 1979*, and probably the first person to explore the 1963 Act in depth, would react to the current state of affairs.

Welcome as this increasing body of law may be, it must, if it is to be effective, be presented in a lucid and comprehensive manner which is accessible to all. The authors of Irish Planning Law & Practice have not alone achieved this but have provided, in the loose leaf format of the text, a facility for keeping it constantly up to date. Indeed, the text had to be updated with the addition of the recent controversial Radio Tara Supreme Court decision in the interval between being sent to the printers and publication. With the benefit of past experience this facility will be availed of on a regular basis.

Divided into ten constituent sections Irish Planning Law & Practice not only brings the authors' previous publications up to date but extends them to include for the first time comprehensive sections dealing with the growing areas of Environmental and European Community law. The law relating to pollution, toxic waste and environmental impact assessments amongst others, products of a growing awareness, is fully set out. The addition of a Practice Guide and the Advice and Guidelines of the Department of the Environment to Planning Authorities are a most useful aid to all those who embark or adjudicate upon planning applications. It is regrettable however that the latest statistics provided are for 1981.

The relevant case law is conveniently added at the end of each section and makes for easy assimilation. The time involved in searching for authorities is consequently cut to a minimum. The advantage of all case law pertinent to a problem being available in one place cannot be over-stressed. One of the great benefits of the lay-out of this text is the ease with which one can find the appropriate reference for the question in issue.

For the lawyer, the planner and for all others whether they have a detailed requirement or merely a passing interest, Irish Planning Law & Practice provides the entire framework within which Irish Planning Law currently operates. The authors are to be congratulated on the formidable task they have undertaken and so successfully completed. Would that similar text in all other areas of Irish law were available.

**Planning & Development Law*

Stephen Miley

Judgments of the Court of Criminal Appeal 1984-1989.
Edited by Eithne Casey, The Round Hall Press, 1991, 322pp. Hardback, IR£65.

Democratic societies put their trust in a system of criminal laws to punish lawless conduct. In an effort to avoid personal feuds and violent vendettas, society is structured so that citizens are encouraged to expect that wrongs against them will be vindicated in the courts of the land. Justice Hugo L. Black in *Bell -v- Maryland* 378 US 226, 328 (1964) stated that the worst citizen no less than the best is entitled to equal protection of the laws of his State. This book is a testament to the proposition that the worst citizen of the State is entitled, and in fact receives, the protection of the laws of Ireland.

Judgments of the Court of Criminal Appeal 1984 - 1989 is the third volume in the series inaugurated by the late G.L. Frewen, a former Registrar of the High Court and of the Court of Criminal Appeal. The first volume contains a compilation of important judgments of the Court of Criminal Appeal during the period 1924 - 1978. In 1984 Mr. Frewen updated the earlier volume up to 1983. Both of these volumes, cited as 1 Frewen and 2 Frewen were published by, and are available from, the Incorporated Council of Law Reporting for Ireland, Four Courts, Dublin.

This present volume, 3 Frewen, edited by Eithne Casey, barrister-at-law, brings up to 1989 the publication of significant judgments of the Court of Criminal Appeal. The book is divided into three parts. Part I contains previously unreported judgments in the period 1984-1989. Part II contains ex tempore judgments for the same period and Part III contains headnotes of cases reported in the *Irish Reports* and the *Irish Law Reports Monthly* during the period 1984 to 1989.

It has been said that the natural leaning of many judges is in favour of prisoners. Lord Kenyon, CJ in *King -v- Suddis* (1800) 1 East, 314 noted that there had been complaints that judges had given way too easily to mere formal objections on behalf of those charged with criminal offences. Lord Hale considered this extreme facility "as a great blemish, owing to which more offenders escaped than by the manifestation of their innocence." (2 Hale 193).

This third volume in the Frewen series is an essential reference work for anyone involved in Criminal Law.

Eamonn G. Hall

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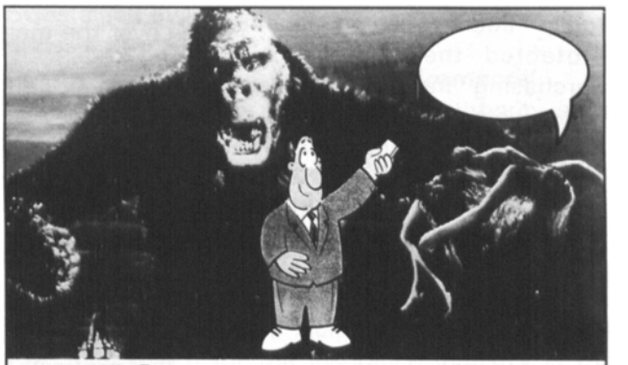

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The growth of captive insurance and the attraction of the IFSC

The establishment of the International Financial Services Centre (IFSC), has resulted in Ireland becoming the most attractive *domicile* for captive insurance companies in Europe. There will be a rapid increase in the number of such companies incorporated here in the immediate future.

A captive insurance company is usually a *wholly owned subsidiary* of a company which provides a range of insurance policies for its parent. It is called a captive because it only provides policies for its parent, not for any outside parties. Instead of paying premiums to an outside insurance company, the funds are paid to the captive subsidiary.

by
Muiris O'Ceidigh
B.A., LL.B*

Captive insurance

In today's world managing the risks and exposures of a company is a difficult and important task. One has only to think about disasters such as the oil spill in Alaska, chemical escapes in India and the collapse of a crane on a construction site in the middle of San Francisco, to realise the potential disasters facing all businesses today. Traditionally, management protected the corporation by purchasing insurance coverage from insurance companies. For companies operating in hazardous industries, this option is becoming cost-prohibitive and in some cases impossible to obtain. To solve this dilemma many companies are self-insuring through captive insurance companies.

A company can set up and manage its own captive or the company can hire a management company to undertake the legal arrangements, establish and manage the captive. Captives can be of any size and can be established anywhere but are often set up off-shore for tax reasons.

The functions of a captive insurance company are the same as any insurance company. Management invests the funds generated from the premiums received and assesses the risks involved. It is seldom possible for a captive insurance subsidiary to have the resources to cover all of the potential losses of the parent. For this reason it is usually the case that captives look to reinsurance to cover the major part of the risk.

Captives and reinsurance

Reinsurance is the term used for when a company takes over *an insurance risk* from another insurer. It involves a financial contract that indicates the type of risk, the amount of cover required and the premium charged. The standardisation of reinsurance risk cover means that contracts for risk can be bought and sold as investment items by any reinsurance company. The competitive nature of this market has meant that market forces have established minimum costs for the cover of each risk segment. The reinsurance market provides an efficient low cost way for captive insurance companies to spread the cover of the risk they underwrite.

There are two types of insurance captives. There is the "reinsurance captive" which uses "fronting companies" and does not directly insure its parent. In this instance the parent company's insurance will be spread between a group of fronting insurance companies. These fronting companies then, rather than go to the reinsurance market, will hold on to about 5% of the total business and pass the 95% on to the reinsurance captive. The reinsurance captive then collects the premiums from the fronting companies, and places its business on the reinsurance market. Therefore a "reinsurance captive" is essentially based on a four tier structure of parent company, fronting companies, reinsurance captive and the reinsurance market. The fronting companies continue to carry out inspections and on-site work at which they are expert, and the reinsurance captive makes money out of the reduced premium cost on the reinsurance market and the improved cash flow.

The "direct-writing captive" on the other hand insures the parent directly, taking 100% of the business and removes the fronting companies from the structure, resulting in a three tier structure of the parent company, the captive and the reinsurance market. While this type of operation involves the undertaking in the on-site inspection and advisory work, it has the advantage of full control of cash flow and enables negotiation of timing of payments directly with both the parent and the reinsurance market with a consequent positive effect on interest.

Muiris O'Ceidigh

The advantages of a captive

There are four major reasons for establishing a captive. Firstly, to insure risks not covered by traditional insurance. Captives are becoming particularly popular in Europe as a means of insuring risks that the market is fighting shy of. Insurers are unenthusiastic about covering pollution liabilities, especially in the context of a move towards a European-wide strict liability regime for pollution risks, and product liabilities, especially where companies have substantial US exposures.

Secondly, a captive can provide a flexible well managed risk portfolio. The apportionment of risk can be fully determined by the captive. In this way, lucrative business can remain with the captive, whilst less profitable risk can be handled on the reinsurance market.

Thirdly, there is the cost advantage of eliminating the middleman (i.e. the traditional insurance company), the captive gaining the benefit of direct access to the reinsurance market and its low costs.

Finally, the premiums are held by the captive for payment to cover losses as necessary, but more importantly provide a large source of funds for investment as required by the parent.

The attraction of the IFSC for captives

The major attraction for the establishment of a captive in Ireland is the International Financial Services Centre currently under construction in Dublin docklands. Dublin is the only EC domicile with favourable taxation arrangements where "direct writing" is possible, (in the other possible domicile Luxembourg, captive incentives are all limited to reinsurance). This is Ireland's big advantage over Guernsey and Isle of Man. When the single market is a fact, a Dublin captive will be able to write one insurance policy for all EC risks.

The IFSC has also advantages for reinsurance captives. Luxembourg allows reinsurance captives to reduce taxable income by creating catastrophe reserves. But then to pay a dividend to the parent, those reserves must be taken back into revenue and the Luxembourg tax paid on it is 37%. A rate of 10% is guaranteed in the IFSC up until December 31, 2000 and it may be extended beyond that date.

There is no premium tax in Ireland on international insurance and no capital gains tax on trading income arising from the IFSC activities. There is no valued-added tax on services supplied by firms located in the Centre.

Ireland has double taxation treaties with 21 countries. In general they benefit captives in that dividends paid from the Dublin captive to treaty-country owners may receive up to 100% exemption when repatriated. Most of the countries with which Ireland has double taxation treaties have tax "Sparing Clauses", so that the dividends can be repatriated almost tax free.

Setting up in the IFSC is aided by a package which includes a 200% deduction of rent expenses to lessees in the IFSC for 10 years and a 100% write-off in the first year of new building costs for lessors. In addition there is the 100% write-off in the first year of spending on new equipment. All these factors combine to make Ireland the most attractive domicile in which to incorporate a captive insurance company.

Increasing European interest

The concept of captive insurance is well established in the United States but is relatively new to Europe. Many European companies are now becoming bigger, partially as a result of the drive towards the single market, and as a result are becoming more sophisticated in their insurance buying. Three hundred of the top five hundred American companies already have captive insurance subsidaries, while only thirty of the top five hundred European companies have captive subsidaries. The advantages of the IFSC will result in many captives being established there. The IDA has stated that it expects five hundred captives to be established in Dublin by the year two thousand.

The establishment of a captive

In order to gain admittance to the IFSC, a company must first make an application to the IDA, which will in turn forward it to the Certification Advisory Committee of the Department of Finance. The committee will then assess the principals and will consider their objectives. A detailed business plan must be submitted which is required to deal with such issues as underwriting, financing and the capital structure. Projections of premiums and loss levels and discriptions of reinsurance arrangements are required. When Committee approval has been achieved, a draft tax certificate is prepared by the Department of Finance. After approval, the tax certificate is issued by the Minister for Finance, specifying the activities that qualify for the 10% rate.

Regulatory requirements

The main regulatory authority is the Minister for Industry and Commerce. An Irish direct writing captive is subject to all the rules governing Irish insurance companies.

The principal regulatory measure for the insurance industry is the Insurance Act, 1936, which has been amended on many occasions most notably in 1989. Directive no. 73/239, O.J.L. 228/3 was implemented by the European Communities (Non-Life Insurance) Regulations, 1976.

Direct writing captives must have a minimum paid up capital of £500,000 which is not withdrawable or repayable to the company members. All applicants for an insurance authorisation are required to 'limit (their) business activities' to insurance and directly related activities, to the exclusion of all other commercial business. A

direct writing captive is given one licence for all lines of business for which it has applied. If it wants to add other lines at a future date, a new application and authorisation are necessary. Currently the captives in the IFSC are writing property, liability, marine, aviation, motor, business interruption, transport, storage, fidelity and extended warranty.

The solvency requirement is set according to EC regulation which requires approximately a 4:1 premium to capital and surplus ratio.

The level of guarantee funds, the part of the solvency margin that must remain in liquid form is also set by EC Regulation and amounts to 1/3 of the solvency margin (subject to minimums of ECU 400,000 liability, credit and suretyship, ECU 300,000 property and financial loss and ECU 200,000 miscellaneous property and legal expenses).

The reporting requirements include annual audited accounts and unaudited interim reports during start-up. An annual board meeting in Ireland is required.

There is very little regulation of reinsurance captives. The only rules that apply now are that such companies must notify the Minister for Industry and Commerce in advance of their intention to carry on business, and to submit annual audited accounts in summary format. There is no maximum premium to capital ratio (solvency ratio) and no risk to capital ratio. However, reinsurance companies have been included in the EC's draft directive on non-life insurance companies, under which all procedures and forms will be standardised and will include information on how assets are held, which is not now part of their submission.

Conclusion

The establishment of the IFSC will lead to a major expansion of the incorporation of captive insurance companies in Ireland. The attraction has its foundation in the special position accorded to Ireland by the EC. The industry is bound by many EC rules and standards. If EC regulation is not strictly applied Dublin may be viewed as having foregone its right to special treatment let alone an extension of it. It is therefore of importance that exact compliance is insisted upon. The captive Insurance industry represents one of the major opportunities which has been presented to the legal profession by the IFSC, indicating the growth in importance of the commercial sector.

** Muiris O'Ceidigh was awarded the J.P. O'Reilly Memorial Scholarship in Commercial Law by the Law Society in October, 1990.* □

1990 A Busy Year for the Law Reform Commission

1990 was another busy year for the Law Reform Commission which has just published its Twelfth Report outlining its achievements during that year and legislative action taken on foot of its recommendations.

By 31 December, 1990, the Commission had, since its inception in 1977, formulated and submitted to the Taoiseach and Attorney General 34 Reports, 11 Working Papers and 2 Consultation Papers.

The main features of the Commission's work during 1990 were a report on Child Sexual Abuse (LRC 33-1990), a Report on Sexual Offences against the Mentally Handicapped (LRC 33-1990), and a report on Oath and Affirmations (LRC 34-1990).

During 1990, a working group on Conveyancing and Land Law continued its work on the identification of anomalies in the law and proposals for improvement, and a report is due for publication later this year (1991).

During the year the Commission also examined and made recommendations on the law of defamation, criminal libel, and contempt of court and this has resulted in the recent publication of consultation papers on these topics *(see also page 319).*

Work also continued on an examination of the feasibility of seizure of proceeds of crime (a report was published in January, 1991 (LRC 35-91); on the preparation of a discussion paper on the law relating to larceny, fraud and other offences contained in the Larceny Act, 1916, and the preparation of a discussion paper on the rule against hearsay in criminal cases.

Family law has been the subject of much examination by the Commission (some 6 reports in all). In 1990 the Commission established an ad-hoc advisory committee to consider the question of the best type of judicial or courts structure appropriate to deal with the different matters which fall under the general heading of family law, and the work of this committee is proceeding.

1990 saw many of the Commission's recommendations being incorporated in legislation, most notably the Criminal Law (Rape) Amendment Act, 1990 which implemented most of the Commission's recommendations in its report on Rape and Allied Offences (LRC 24-1988).

The Commission notes, however, that the Larceny Act, 1990 differs in many respects from the Commission's recommendations in regard to handling unlawfully obtained property (LRC 23-87).

Copies of the Twelfth Report are available from the Law Reform Commission, Ardilaun House, St. Stephen's Green, Dublin 2. Price £1.50. □

Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

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

Lost Land Certificates

Owen Ward, Folio: 11034 closed to 2377F; Land: Baronstown Demesne; Area: 24.625 & 24.563 acres. County: **WESTMEATH.**

Marie Mitchell and **Michael Mitchell,** Folio: 2656F; Land: Ballydonarea. County: **WICKLOW.**

Thomas Devlin & Mary Devlin, Folio: 3517F; Land: Emy; Area: 0.431 acres. County: **MONAGHAN.**

Clonkeen Mushroom Developments Ltd, Folio: 6462; Land: Garran Olra; Area: 21a 0r 36p. County: **MONAGHAN.**

Patrick Breen, Folio: 3801F; Lands: Donore. County: **MEATH.**

Emmet Lenihan, Folio: 3393; Land: Gaigue; Area: 61a 2r 26 p. County: **LONGFORD.**

Anthony Geraghty, Folio: 45626; Land: 1. Ballymacsherron, 2. Ballymachsherron (one undivided 11th part), 3. Ballymacsherron, 4. Ballymacsherron (an undivided moiety); Area: (1.) 6a 2 r 8 p; (2.) 15a 1 r 2p; (3.) 9a 2 r 10p; (4.) 5a 0r 10p. County: **MAYO.**

James Mary Walsh and **Alexandra Walsh,** 57 Edgewood Lawn, Blanchardstown, Co. Dublin. Folio: 46032L; Lands: Towland: Corduff Barony: Castleknock; Area: 0.023 (Hectares). County: **DUBLIN.**

Elizabeth Rosemary Frost and **James W. Frost,** Folio: 57281; Lands: Garraneragh; Area: 1a 0r 5p. County: **CORK.**

Mel Dowd, Folio: 3898; Land: Cordivin; Area: 19a 0r 20p. County: **LONGFORD.**

Patrick Delee, Folio: 48392; Land: Knockbarry. County: **CORK.**

Bridgette Dempsey, Folio: 34706F; Land: Mallow. County: **CORK.**

Bernard McCabe and **Teresa McCabe,** 46 Greendale Avenue, Blackbanks, Sutton; Folio: 34589L; Land: Townland: Kilbarrack Upper, Barony: Coolock. Property to the north of Greendale Avenue, in the Parish and District of Kilbarrack. County: **DUBLIN.**

John McNamara, 13 St. Fintan's Park, Deansgrange, Co. Dublin. Folio: 11960; Lands: Division 61 Book No. 4. Townland: Kill of the Grange, Barony: Rathdown situate to the East side of the road from Dublin to Bray in the Village of Deansgrange showing plan on registry map No. 13. County: **DUBLIN.**

David Cowen, Folio: 16108; Land: Clonkeen; Area: 31a 2 r 10p. County: **CAVAN.**

Albert Moran and **Eileen Moran,** Folio: 19511; Land: Lisnabrack; Area: 0a 1r 24p. County: **LEITRIM.**

Finbar Galvin (Tractors) Limited, Folio: 26896F; Land: 1 & 2 Knocknagarrane; Area: (1) 0.422 acres (2) 0.373 acres. County: **CORK.**

Patrick Flanagan, Brickens, Claremorris, Co. Mayo. Folio: 40852 & 40853; Land: Townland; Area; Folio 40852: Brickeens, 23a 3r 15p, Brickeens, 5a 0r 37p, Treanrevagh, 3a 3r 0p, Brickeens, 2a 0r 37p. Folio 40853: Brickeens 28a 0r 16p, Brickeens, 5a 2r 28p. County: **MAYO.**

Kay McBride, Folio: 5111F; Land: Dowdallshill; Area: 0.113 acres. County: **LOUTH.**

Elizabeth Hillar Barbour, Ardkeeran, Riverstown, Co. Sligo. Folio: 9127; Land: Ardkeeran (parts); Area: 41a 1 r 22p. County: **SLIGO.**

James Beirne, Folio: 7615R closed to 9565; Land: (1) Cartrons, (2) Cartrons; Area: (1) 24 a 2 r 1 p, (2) 14a 1 r 11p. County: **LONGFORD.**

Landenstown Estates Limited, Folio: 4956 & 4961; Land: Landenstown and Longtown South; Area: 81a 1r 37p (Landenstown Folio 4961), 61a 3r 26p (Longtown South Folio 4961), 242a 0r 38p (Landenstown Folio 4956). County: **KILDARE.**

Maye Concrete Limited, of Strandhill Road, Sligo. Folio: 21742; Land: Aghamore Far; Area: 1a 2r 37p. County: **SLIGO.**

Bridget Quinn, Castle Street, Dunmore, Co. Galway. Folio: 30704; Land: Dunmore; Area: 0a 0r 4p, 8 sq. yards. County: **GALWAY.**

Kathleen Bolger and Josephine Bolger, Folio: 6651; Land: (1) Townparks, (2) Island; Area: (1) 12a 1r 16p, (2) 1a 2r 30p. County: **KINGS.**

(a) **James Garavan,** Devlin, Louisburgh, Co. Mayo. (b) **James Garavan,** Devlin South, Killadoon, Louisburgh, Co. Mayo. Folio: (a) 18545, (b) 48712; Lands: (a) (1) Kinnakillew, (2) Cloonaghmanagh, (3) Claggan (commonage); (b) (1) Devlin South, (2) Devlin South (1 und 8th part); Area: (a) (1) 56a 3r 7p, (2) 2a 0r 1p, (3) 2a 0r 2p; (b) (1) 18a 1r 10p, (2) 91a 3r 18p. County: **MAYO.**

James P. Coyne, Derrylahan, Moyard, Co. Galway. Folio: 21361; Land: (1) Derrylahan, (2) Tievemore; Area: (1) 33.431 acres, (2) 7.351 acres. County: **GALWAY.**

James Finn, Folio: 15443; Land: Newtown; Area: 19a 1r 2p. County: **WEXFORD.**

(1) **Anne (orse nan) McKenna** and **Bridget McKenna,** both of Gainstown, Navan, Co. Meath are full owners as tenants in common of one undivided third share. (2) **Anne (orse nan) McKenna** of Gainstown, Navan, Co. Meath is full owner as tenant in common of one undivided third share. (3) **Bridget McKenna** of Gainstown, Navan, Co. Meath is full owner as tenant in common of one undivided third share. Folio: 2099; Land: Gainstown; Area: 26a 1r 35p. County: **MEATH.**

Lost Wills

McQUAID, FINBARR BERNARD, Deceased, late of Main Street, Ballybofey, County Donegal, Retired Teacher. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on the 6th August, 1991, please contact Messrs. P. O'Connor & Son, Solicitors, Swinford, Co. Mayo. Tel: (094) 51333.

O'NEILL LOCKHART, JOHN G, late of 171 Alderside, Armagh Road, Newry, Co. Down who died on 28th September, 1990. Will any persons knowing of a will for the above named deceased, please contact MacGuill and Co. Solicitors, Roden Place, Dundalk. Tel: (042) 34026, Fax: (042) 34897.

MATTHEWS, PATRICK, late of 8, Rutland Cottages, Dublin 1, who died 1st July, 1991. Would anyone having knowledge of the existence of a will of the above named deceased, please contact RUTHERFORDS, Solicitors, 41, Fitzwilliam Square, Dublin 2. Telephone No. 616466.

RYAN, VIOLET, deceased, late of 59 Tyrconnell Road, Inchicore, Dublin 8. Date of death 17th October, 1990. Would any person having knowledge of the whereabouts of the original will dated the 22nd February, 1983 of the above named deceased, please contact Weston Dunne, Solicitors, 53a Rathgar Avenue, Dublin 6.

MURRAY, JEREMIAH CHRISTOPHER, deceased, late of Barrachauring, Donoughmore, Co. Cork. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 25th July, 1991, please contact Burke, O'Riordan & Co., Solicitors, Washington House, 33 Washington Street, Cork. Tel: (021) 272242.

FOX, JOHN, deceased, late of 54 Beneavin Road, Dublin 11. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 24th day of August, 1991, please contact Messrs. F.N. Murtagh & Co., Solicitors of Kingscourt in the County of Cavan. Tel: 042-67503.

DOYLE, JOHN FELIX, deceased, late of Ballybeg Big, Graignamanagh, Co. Kilkenny. Would anyone having knowledge of the whereabouts of the will of the above named deceased who died on 15th July, 1991, please contact Messrs. O'Shea Russell, Solicitors, Main Street, Graignamanagh, Co. Kilkenny at (0503) 24106/24642.

HEGARTY, ROSE FRANCES, deceased, late of Flat 3, Rinn Ronan, Rushbrook, Co. Cork. Would any person having knowledge of a will of the above named deceased who died on the 31st day of January, 1974 at Kilmacud House, Stillorgan, County Dublin, please contact John O'Connor, Solicitor, of 168 Pembroke Road, Ballsbridge, Dublin 4. Telephone: (01) 684366, Fax: (01) 684203.

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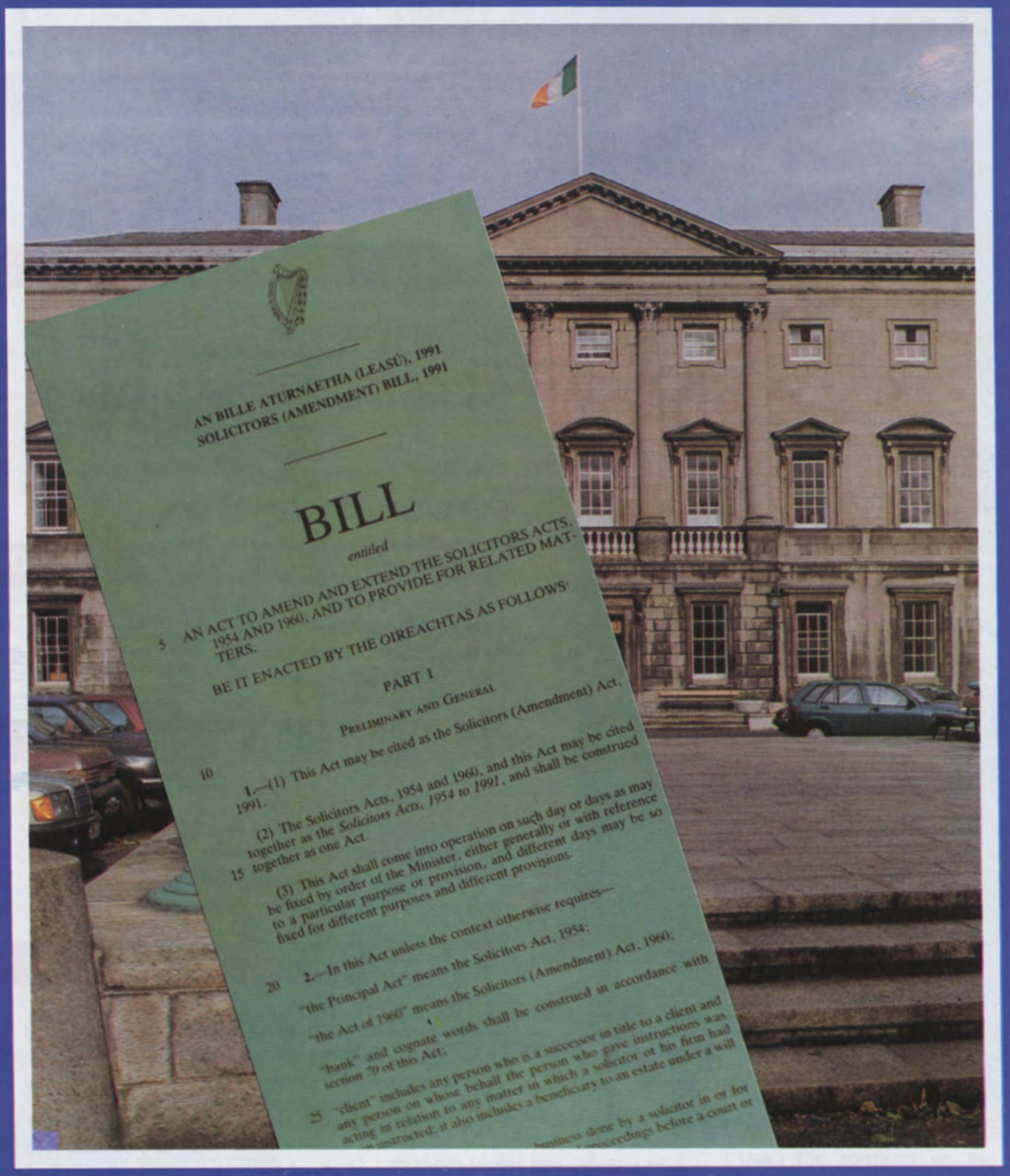

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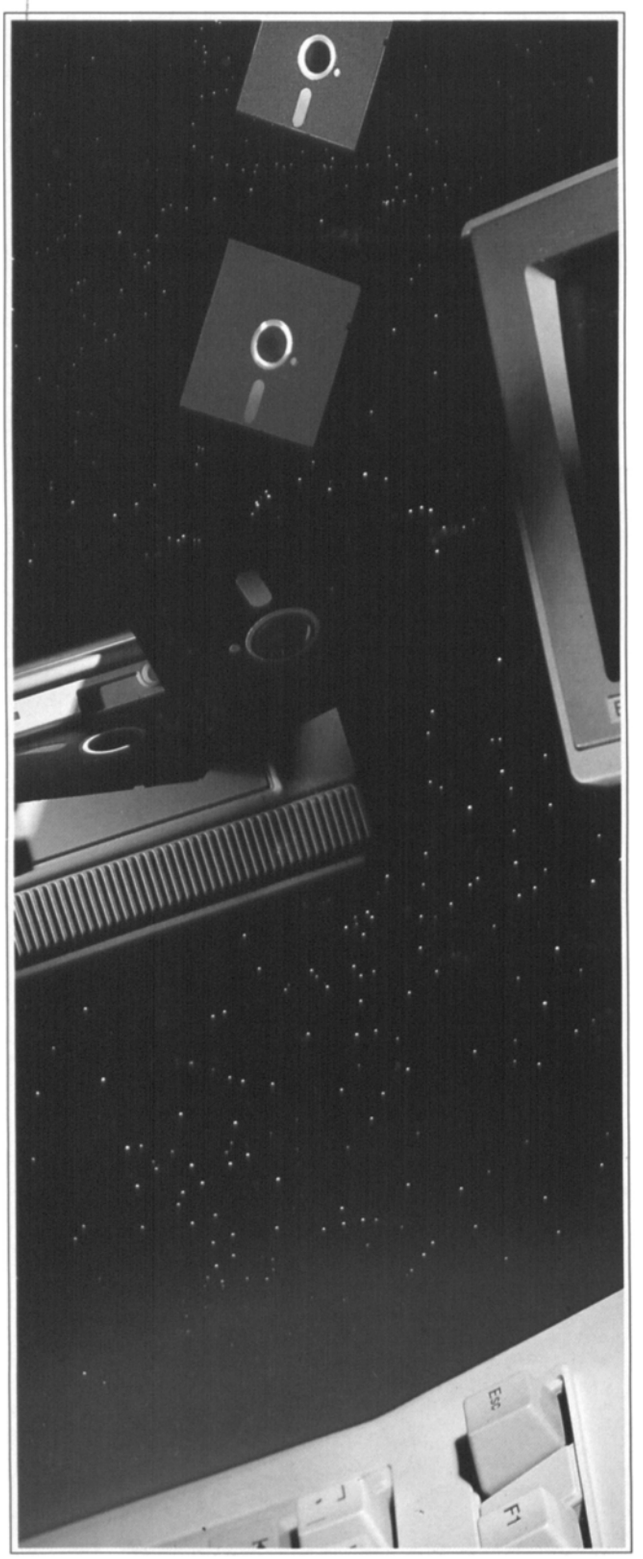

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

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Viewpoint

The Courts Dispute - A Failure to Protect the Public's Rights

As we go to press, we are in the middle of the most serious disruption of the services of the courts in this country for very many years - perhaps the most serious ever.

The dispute raises a number of issues that are of fundamental importance in this country, none of which appears to us to have been addressed, in any serious way, to-date. And, while it is right that the Law Society, in its public responses, has been careful to avoid making any judgement on the merits of the issues that have given rise to the dispute, we think it is proper to raise some of these important questions.

The first of these concerns a person's right to have access to the courts, a right which has been seriously eroded and, in some cases, denied as a result of this dispute. In the order of things, this right is at least as important as the right of a person to have access to public transport or even to have his letters delivered through the post. Yet the threat to its existence, as a result of the action of a relatively small number of civil servants in the courts service, has scarcely been noticed by the media while the disputes affecting public transport and An Post have been given daily headline coverage. The courts dispute is causing serious inconvenience and even, in some cases, hardship but, more importantly, ordinary citizens are being denied a right guaranteed to them under the Constitution.

In drawing attention to this state of affairs, we are not suggesting that civil servants who work in the courts area should not have the right, enjoyed by other citizens, to withdraw their labour in pursuance of what they perceive to be their just demands. We think, however, that serious consideration needs to be given to ensuring that, in relation to this vital public service, there is a mechanism in place which will enable the grievances of staff to be pursued through a process of conciliation and arbitration, thereby ensuring that disruptions of this kind do not occur. In our view, the courts service is as vital to the maintenance of the stability of our society as the services of the police and the army. There are, of course, two sides to every dispute but the primary responsibility, we would suggest, of ensuring that industrial relations within the courts service is maintained at a satisfactory level rests with the Minister for Justice. We understand that the nature of the claim in this case puts it outside the scope of the scheme of conciliation and arbitration that exists within the civil service. We find this difficult to understand. If a demand for the upgrading of staff who are claiming that the value and importance of their work has changed for various reasons, including the impact of legislation increasing the jurisdictions of the courts, is outside the scope of the conciliation and arbitration service, this surely needs to be looked at again.

The dispute has, once again, focused the spotlight on the courts service where, unfortunately, all has not been well for some time. We

(Continued overleaf)

Viewpoint

Courts Dispute – A Failure to Protect the Public's Rights

have said before that there is an urgent need for a comprehensive examination of many features of our courts service. The Law Society has frequently adverted to the inordinate delays in the Circuit Court in some areas of the country and in the High Court in general. Our court procedures, and especially those relating to the way in which cases are initiated and presented in court, are in some important respects outmoded and are now contributing to delays and adding to cost. The listing system in the High Court, to give but one example, is in need of overhaul. Our courthouse accommodation in some areas is very poor. In a number of areas, it is nothing short of a disgrace. Once again, the budget allocated for the courts service has been cut as a result of public expenditure cut-backs with the result that many important refurbishment projects will not now go ahead this year nor, as far as we can see, next year either. The fact is that the service itself has been a 'cinderella' for many years and, because the staff lack the muscle of the police and prison officers, the problem is not getting the attention it deserves. Moreover, it seems to us that, whatever the merits of the claim by the Civil and Public Service Union, there must be a serious question about a system of administration in which there can be as many as four or five different grades performing work that in most non-civil service organisations would be done by a single clerical grade.

A more important question, however, is the way in which the courts service itself is structured and managed. It is not an exaggeration to say that there is **not** a courts service, as such. It is a disjointed amalgam of different civil service offices covering the four levels of our courts with a multiplicity of grades and with no clear overall, unified management structure. It is totally lacking in cohesiveness. It is time that this matter was addressed. The Law Society has, in the past, called for the establishment of a new courts service to be headed by a chief executive and with a co-ordinated management structure which will be given the resources, both in terms of finance and manpower, to develop the administration of the courts. We believe that the case for this has been made and that it is now time for a response from the Minister. □

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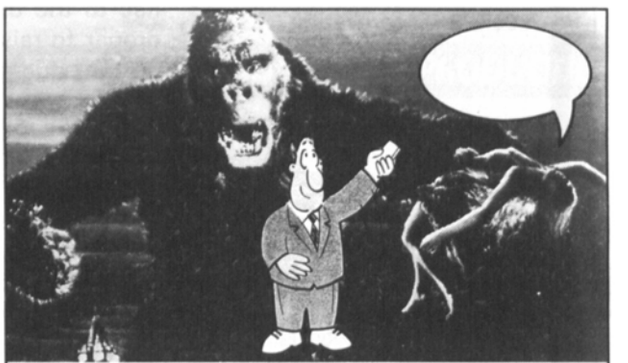
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Solicitors Bill Welcomed, but Some Provisions "not in the Public Interest"

The Solicitors (Amendment) Bill, 1991 was published by the Minister for Justice, *Raphael Burke,* TD, on Friday, 25th October, 1991. The Minister heralded the Bill as a major reforming measure which was being introduced to protect the interest of clients of solicitors, to promote high standards in the profession and to enable solicitors to adapt and respond to commercial and economic changes. The Law Society reacted promptly to the publication of the Bill and in a press statement said that while it supported the majority of the Bill's provisions, the Society was however, concerned that some provisions – especially those relating to fee advertising, allowing banks and trust corporations to do probate work and allowing banks to do conveyancing – were not in the public interest.

Positive features

At a press conference staged on the afternoon of Friday, 25th October, 1991, the Society outlined the many positive features in the Bill, pointing out that many of them had been included at the request of the Society following a lengthy period of discussion and consultation with the Government. Examples of the positive changes were:

- an important change in the law relating to the Compensation Fund which will limit claims under the Fund to the clients of solicitors;
- the appointment of an independent adjudicator (Legal Ombudsman) who will have power to oversee the handling of complaints of solicitors;
- lay membership of the Disciplinary Committee;
- a power to make professional indemnity insurance compulsory;
- a restriction for the first three years on newly qualified solicitors practising on their own.

In addition, the Law Society welcomed the stronger powers given to the Society in the Bill to deal with complaints from the public against solicitors. The strengthened powers of the Disciplinary Committee of the High Court to deal with cases of misconduct or dishonesty were also welcomed.

Negative provisions

However, the Chairman of the Solicitors Bill Committee, *Maurice Curran,* stressed that not everything in the Bill was acceptable to the Society.

Ombudsman

Mr. Curran said that it was totally inappropriate that any non-Governmental organisation such as the Society would have to pay the expenses of a Legal Ombudsman who would be a public official carrying out a public watchdog function. Such a requirement was inconsistent with the principle of the independence of the office.

Fee advertising

Mr. Curran said that the Society was strongly opposed to allowing solicitors to advertise fees and believed that it would be likely to cause confusion, lead to the public being exposed to the risk of shoddy or careless work and unsatisfactory legal service and would be very likely to generate additional complaints from clients. Fee advertising was neither in the public interest nor the profession's interest. In a later TV interview, the out-going President of the Law Society, *Donal G. Binchy,* pointed out that legal services were not amenable to market forces in the same way as commercial goods. "We are not dealing in canned peas", he said.

Probate by banks and trust corporations

The Society said that allowing banks and trust corporations to do probate work would be an extremely ill-advised step. There were four arguments against it:-

(i) probate and administrations involved complex legal work that had to be done by legally qualified persons;

(ii) there would be no protection for clients funds (such as the solicitors Compensation Fund) and, unless such work was done by solicitors, there might be no professional indemnity insurance to cover negligence.

(iii) there was a serious risk of conflict of interest if banks acted for their own customers; their clients would not have independent legal advice;

(iv) overheads of banks were such that they could not provide a cheaper service than solicitors and their fees were not subject to any control.

Conveyancing by banks

At the press conference, the Society pointed out that conveyancing was an area of work that should be reserved for properly trained persons who were supported by professional indemnity insurance, a compensation fund and a disciplinary code which would deal adequately with complaints from the public. Solicitors were the only persons with the required expertise, insurance cover and regulatory control. Maurice Curran said that he was at a loss to understand why the Minister was on the side of the big banks viz-a-viz solicitors who were trying to earn a living.

Further consultation with members

At the press conference, the then President of the Law Society, *Donal Binchy,* stressed that these were the Society's preliminary views on publication of the Bill. A full process of consultation would take place with members of the profession and following this consultation the Society would formulate a more detailed response to the Bill and would seek to have those provisions in the Bill that were unacceptable to the profession modified or amended. □

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Solicitors Bill Assessed

In this article, the Director General of the Law Society, Noel Ryan, gives a personal assessment of how the Solicitors (Amendment) Bill, 1991 helps the profession in relation to the many issues currently facing it.

By now each member of the profession will have had an opportunity of studying the Solicitors Bill in some detail and many will have made an assessment of its impact on the profession. The purpose of this article is to give a personal view as to how I see the Bill in terms of the problems facing the profession at present and the demands that are emerging, or are likely to emerge, in the foreseeable future.

Issues facing the profession

Amongst the major issues facing the profession at the present time are:

- the Compensation Fund and how the financial burden of it can be lessened
- enhancing professionalism in day-to-day practice, improving the profession's image as client-orientated and providing a quality service
- improving the disciplinary machinery of the Society so that it can deal more effectively with disciplinary matters
- achieving a balance between ensuring reasonable access to the profession, on the one hand, and ensuring that standards are not lessened and livelihoods threatened through over-supply of new entrants
- the question of whether we should have joint professional legal education and other related issues
- competition from non-lawyers in the provision of legal services
- the structure of the profession itself and what changes, if any, might be on the way.

I propose to look at the Bill and see what it has to offer on each of these in turn.

Compensation Fund

The burning issue over the past 12 months has been the Compensation Fund and the open-ended liability of the profession in respect of claims arising from dishonesty on the part of some practising solicitors. The seriousness of this was brought home to the Society in late 1990, when a claim of £9.2m was notified in one particular case. In the circumstances, it is reassuring that the very considerable pressure exerted by the Society on the Government to have the law relating to the Compensation Fund amended has been successful, in at least one important respect. Section 28 of the Bill amends the 1960 Act to provide that claims on the Fund may in future be made only by persons who are *clients* of solicitors. In this context, it also provides that a solicitor cannot himself be a client of his own practice. This provision will reverse the effect of the Supreme Court decision in the *Trustee Savings Bank* case in 1989 and should go a very substantial way towards easing the concerns of the profession, particularly in relation to the possibility of claims arising from undertakings given to third parties (especially financial institutions) which has been a feature of recent high-profile claims.

Improving professionalism

Not every member of the Society will automatically relate the new powers which the Bill will give to the Society to the concept of improving the professionalism and, thereby, the image of the Society. In my view, there is a clear link.

The Bill provides the Society with new powers which will help it deal more effectively with those in the profession who, sadly, do not adhere to the high standards of their colleagues, thereby damaging the good name of the profession as a whole. Some of these powers are long overdue and badly needed and they will help the Society both in relation to the area of dishonesty and the area of complaints about inadequate professional standards and overcharging. The new powers (in sections 8 and 9) which will allow the Society to impose sanctions on solicitors for inadequate services and overcharging are important. The Society lacks any real teeth in these areas at present.

These powers should also help towards improving the image of the

At the Law Society's Press Conference on the Solicitors (Amendment) Bill which took place on Friday, 25th October, 1991 were L-R: R. Maurice R. Curran, Chairman of the Solicitors Bill Committee; Donal G. Binchy, then President of the Law Society; and Adrian P. Bourke, President-elect, Law Society.

Society in relation to the handling of complaints and, at the same time, enhance the image of the profession as one which maintains the highest standards of professional behaviour and provides a quality service at reasonable cost. Taken in conjunction with the establishment of the office of **Legal Ombudsman** – an official who will have a role in overseeing the handling of complaints by the Society – this should provide valuable reassurance to the public.

The Society will also have a new power to apply to the High Court to suspend the practising certificate of a solicitor who breaches in a serious way any of the regulations made under the Solicitors Acts. There is also a new power under which the Society can intervene in a practice where a solicitor has abandoned his practice, a provision which will give the High Court important new powers to direct banks or other financial institutions to furnish to the Society information relating to the financial affairs of a practice, a power to make professional indemnity insurance compulsory and a provision which restricts newly admitted solicitors from practising as sole practitioners in the first three years after qualification. Moreover, in cases where the Society, having intervened in a practice, applies to the High Court, the Court will have a new general power to make **any order** in relation to a practice to protect or secure the rights of a client or make an order which the Court feels is in the public interest or in the interest of the profession itself or to assist the Society generally in discharging its functions under the Act. This is an important new general power which will give great flexibility to the Society, acting through the Court, in the future. When one adds to the foregoing, new provisions which substantially increase the penalties for offences under the Act, you have, I think, a comprehensive package which should lead to a more effective policing of the profession and a more speedy 'neutralising' of transgressors.

Disciplinary

As the profession is aware, it is considered in many quarters to be a serious drawback that, under existing law, only the High Court itself can impose a sanction on a solicitor who transgresses. This system is clearly unsatisfactory. The provisions of the Constitution relating to the administration of justice inhibit the granting to the Society itself of a power to strike a solicitor off the Roll or suspend his right to practise. The Bill, however, goes as far as is constitutionally permissible to give the Disciplinary Committee of the High Court the power to impose sanctions. In addition, the Council itself (acting as it, presumably, will through the Registrar's Committee) is given a power to require solicitors to pay up to £1,000 into the Compensation Fund in certain circumstances.

The Bill will also enable the President of the High Court to appoint up to five **lay persons** to be members of the Disciplinary Committee. This is a reform which the Society itself has sought and will help to introduce greater public accountability in relation to the Society's important role in maintaining discipline. The profession itself has no reason to fear this development. The international experience suggests that, frequently, lay members are less severe than the solicitor members of disciplinary tribunals. However, it is important that justice is not only done adequately in practice but is also, of course, seen to be done.

Education

The Bill does nothing to disturb the control of the Society over admissions policy and, therefore, the Society will remain firmly in charge. The task for the future will be to achieve a balance between, on the one hand, the need to maintain an open policy on admissions to all who are qualified and, on the other hand, ensuring that standards are not lessened and livelihoods threatened through over-supply of new entrants.

There are, however, some important changes in the Bill in relation to education which will provide a framework for the development of the profession in the future. The changes are in the nature of enabling provisions which will require policy decisions to be taken by the Society. These include:

- a power to enable joint professional legal education with barristers to be introduced
- provisions which will enable the Society to ease the transition arrangements for barristers wishing to become solicitors
- a power which will enable the Society to introduce compulsory continuing legal education in the future
- a provision which reduces the period of apprenticeship to a maximum of three years in all cases.

Mention should also be made, in this context, of the provision which will enable the Society to require evidence that a person is a fit and proper person to be admitted as a solicitor. The Society has in the past been inhibited by the absence of such a power to prevent certain persons from being admitted.

Competition and the future of the profession

There are two other areas of current concern to the profession where the Bill contains a number of important provisions. The first relates to the area of competition. Members of the profession will be aware that this Bill comes fairly closely on the heels of a major report by the Fair Trade Commission on restrictive practices in the legal profession. That report examined the question of ending the legal monopoly held by solicitors on certain areas of legal work and made a number of recommendations. Some of these are now reflected in the Bill. The most important – and contentious – are the provisions which will allow banks and trust corporations to do probate work and banks to do conveyancing. There is also a pro-

vision which will effectively prevent the Society in the future from banning fee advertising.

The Society has already given its reaction publicly to these provisions – to which it is opposed – and I will not repeat here what the Society has already said. I will, however, say that, bad and all as the profession may think these proposals are, they could have been worse. We are, at least, being spared the introduction here of the 'licenced conveyancer' such as they already have in England. In our neighbouring jurisdiction up North, where recently published legislation proposes to follow the British example, the Law Society is already discussing the possibility of solicitors withdrawing their services in protest. It is important, therefore, that, in considering and debating the proposals in the Bill, we maintain a sense of balance about them. We should also remember the strengths we have as a unified solicitors profession. Quite apart from the fact that we can and will successfully compete with any opposition in these areas, we should not be slow to remind the banks, in particular, of the importance to them of solicitors as customers. I would personally be suprised if banks had any serious intention of getting involved in these areas.

The second matter that I want to mention, in this context, is the provisions in the Bill which will, to some extent, enable decisions to be taken which could alter the way in which the profession is structured in the future. I allude principally to the provision which would, if the Society thought fit, enable practices to become incorporated and the provision which would allow multi-disciplinary and multi-national practices to be established. Again, the Society is very much in control in relation to these matters as the provisions in the Bill are enabling ones only and leave it to the Society itself to decide whether these developments should be brought in. Once again, however, it is important to bear in mind, in considering the Bill as a whole, that there is nothing in it which threatens the future of the solicitors profession or nothing which should cause any fears in relation to the possibility of coerced fusion.

Conclusion

On the whole, this is a Bill which assists the profession and the Society and, while members will strongly oppose some of its provisions, overall it should contribute substantially to enhancing the image of the profession as we move through the 90s and face the inevitable competition that the future will bring in Ireland. It has something to offer in relation to most of the major areas of concern to the Society and, if implemented effectively, it will, in my view, strengthen the profession and enhance its status and reputation as a profession which, in an age of increasing consumer awareness, provides high quality legal services, is client-orientated and gives good value for money. □

Pre-Apprenticeship Register

The attention of practitioners is drawn to a Pre-Apprenticeship Register which is maintained by the Society's Law School. This is a comprehensive index of the names and personal particulars of students seeking the help of the Law Society in securing apprenticeship and who are otherwise eligible to attend the Law School's Professional Course.

Students on the Register are catalogued by name and their area of origin and, accordingly, practitioners, and particularly those from outside of Dublin, are encouraged to make use of the Register if they are interested at all in taking on an apprentice.

The merits of a rural practioner taking on an apprentice at a time where there is some evidence of disinclination on the part of qualified solicitors to move to employment outside Dublin or the larger commercial centres cannot be over-emphasised. Contrary to the Society's original expectations, it is now possible to assign an apprentice to a Professional Course starting only a few months after the commencement of apprenticeship, as soon as the apprentice has found an office. Indeed, not infrequently, students on the Pre-Apprenticeship Register who are recruited by practitioners find that they can ease the worry of offices by securing admission to the next available Professional Course, provided they have three months spent in the office before the course starts.

This service is without charge and is absolutely confidential. It is entirely a matter for any solicitor contacting the Law School whether he or she wishes to recruit or even to interview a prospective apprentice whose details have been furnished. The Society strongly encourages practitioners to consider taking on an apprentice, and, furthermore, to consider the use of the Society's Pre-Apprenticeship Register.

For further particulars please contact:

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

□

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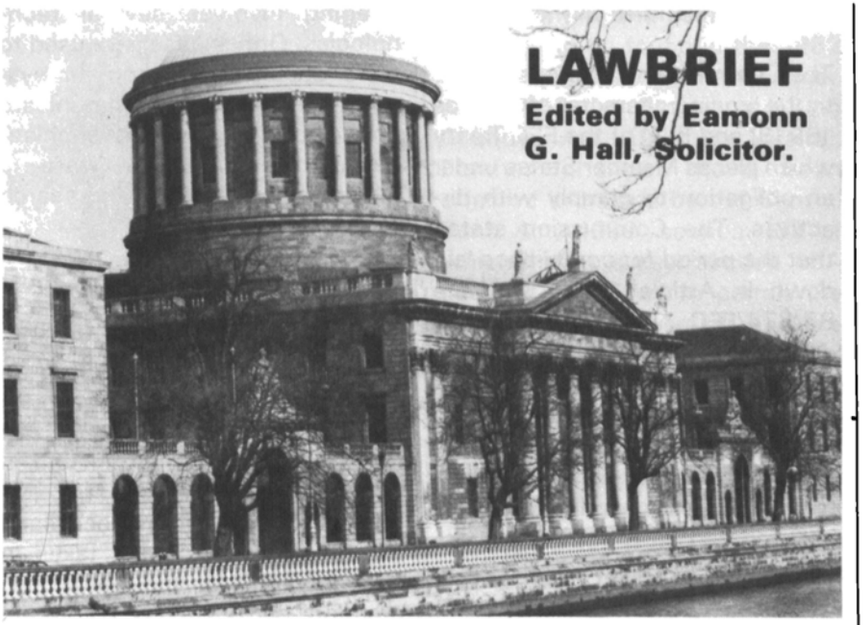

Law Reporting Council celebrates One Hundred Years

The Law Reporting Council of Ireland has celebrated the first one hundred years of its existence. It was in February, 1891 that the Law Reporting Council was registered under the Companies Acts then in force. However, the history of the Council goes back much further. Records show that it existed in one form or another since about 1868 and the Irish Reports, the principal work of the Council, have been produced and published since 1838.

The Law Reporting Council may be described as a "joint venture" which includes senior members of the Judiciary, the Attorney General, Senior Counsel, Junior Counsel, the Director General of the Law Society and members of the Law Society. The members of the Society on the Council are Michael O'Mahony, Michael Staines and Eamonn Hall.

The Chief Justice, Mr. Justice *T. Finlay* launched the *Quinquennial Digest 1984/1988* in the King's Inns on Thursday, October 17, 1991. The Chief Justice stated that it was a fortuitous coincidence that the Council of Law Reporting for Ireland hosted a reception for the launch of the Quinquennial Digest in 1991 – the centenary of the year in which the present council was incorporated.

The Chief Justice stated the principal work of the Council was the publication of the *Irish Reports* which contain the official records of the important judgments of the Supreme Court, the High Court and the Court of Criminal Appeal. The importance of these official reports in a political system firmly rooted in the rule of law can never be underrated. The Chief Justice stated that our legal system, like most other common law countries, depended heavily on precedent and in particular on the law as it was to be found in the judgments of earlier cases. Therefore, it was easy to see how essential it was to have a reliable system of reporting such judgments.

The Chief Justice stated that in keeping with such expectations of reliability, the *Irish Reports* have been produced over the years to a consistently high quality. There had been complaints in the past at the slowness with which the reports were published, but the authors of such criticism should remember that because the work was an official record for posterity, quality couldn't be easily sacrificed solely in the interest of punctuality.

The aim of the Council, stated the Chief Justice, was to marry a high standard of quality with an efficient and reasonably up-to-date service for its subscribers. To a large extent this had been achieved by the improvement of the last eight years. This was borne out by comparison to previous years. The 1983 reports had about 390 pages and were produced some years in arrears. The 1991 *Irish Reports* will comprise one thousand two hundred pages in two volumes, the first of which will be produced before this Christmas i.e. in 1991, the same year as its title.

The improvement in publishing the *Irish Reports* was due, according to the Chief Justice, in large part, to the members of the Council in these past eight years. A particular mention was made of the Chairmen in this period, *Noel Macdonald* and *David Butler,* both now sadly deceased, and the present Chairman, *Eoghan Fitzsimons,* SC. Credit was also due to the present Vice-Chairman *Michael McDowell,* SC, Secretary, *Carroll Moran,* Editor, *Sunniva McDonagh,* BL, Business Manager, *Michael McCloskey* and Compositor, *Kathy Kelly.*

Apart from the reports, the Council's other periodic publication is the Digest. The Digest contains a precis of all the cases reported between certain years and is, thus, an invaluable reference book for lawyers. Up to now the Council has published seven Digests containing cases going, in unbroken sequence, from 1894 to 1983. *The Quinquennial Digest 1984/1988* was the eighth digest and covered the years between 1984 and 1988. It contained, in over 1,200 columns, synopses of all cases reported in those five years in the *Irish Reports* and in the *Irish Law Reports Monthly.* The Chief Justice stated that the large size of this book, for such a relatively short period of five years, was indicative of the increased volume of reporting in recent times, compared with years gone by.

The Digest was started by Professor *Ted Ryan*, who combined the role of being a Professor of Law at University College Cork with that

of a practising barrister. Unfortunately, he died without completing the work. The task was then taken up by *Julitta Clancy.* The Chief Justice stated that it was difficult at any time to take up a project started by someone else, but Mrs. Clancy cheerfully agreed to take up the work and finished the work with remarkable effect. The Chief Justice expressed the Council's gratitude to the proof reader, *Mary Gaynor* of the Law Society's Library in Blackhall Place, to *Gerard Hogan,* the Consultant Editor, to the printers and to *Margaret Byrne* of the Law Society for helping Mrs. Clancy in her research.

Finally, the Chief Justice mentioned that in addition to its other enterprises the Council is about to embark on the publication of Cumulative Index to the contents of all reported law, thus facilitating for lawyers a method of searching through the various Digests.

The *Irish Digest 1984-1988* is available from the Law Reporting Council, First Floor, Four Courts, Dublin 7 at the price of £55 plus £2.50 post and packaging.

Liability for Defective Products

An action against Ireland was brought before the Court of Justice of the European Communities on 26 July, 1991 by the Commission of the European Communities [Case C-192/92]. The Commission claims that the Court of Justice should:

1. declare that by failing to bring into force the laws, regulations and administrative provisions necessary to comply with Council Directive 85/374/EEC of 25 July, 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products and/or by failing to inform the Commission forthwith thereof, Ireland has failed to fulfil its obligations pursuant to that Directive and in particular its Article 19 and pursuant to the Treaty establishing the European Economic Community;
2. order Ireland to pay the costs.

The Commission in the case refers to the binding character of Articles 189 (3) and 5 (1) of the EEC Treaty which places Member States under an obligation to comply with directives. The Commission stated that the period for compliance laid down in Article 19 of Directive 85/374/EEC had expired on 30 July, 1988 but that the Irish Government had not put the appropriate legislation into force or, in any event, the Commission had not received any communication from Ireland which indicated that it has done so.

Imaging – A Revolutionary Technology

Imaging has been described as one of the most revolutionary technologies to come along in decades. The technology, called imaging, is changing the way information is used, the way we work, and the way business operates. Although still in its infancy, imaging is already making an impact on organisations around the world.

Imaging is the automation of paper processing – storing, accessing, and distributing the electronic images of paper documents – allowing more people, in a shorter period of time, to use information to do their jobs more effectively.

The first attempt to solve the paper problem was the technology of micro-graphics. Images were captured by camera, recorded on a role of film or fiche and stored in cabinets. Yet micro-film has its limitations. Images are the electronic copies of paper documents. Image systems automate and streamline the flow of paper through an organisation. Imaging is the automated technology of document storage, management retrieval and communication. It is called 'imaging' because the system does not store the actual physical document but rather an electronic image of the document – an exact electronic duplicate.

Imaging involves several technologies. Optical discs are used to store documents; computer systems are needed to communicate and display them; and sophisticated data base software is necessary to organise and search for specific images.

Every information system must capture the information before it can be used. In a computer system, this is done at a keyboard. In an imaging system, it is done by a ''scanning device''. The image or document is fed into the system as it is, without alterations. No rekeying of the data is necessary. In effect the scanner takes a ''photograph'' of the document, creating an unaltered electronic copy of the original. After the document is in the image system, it must be indexed for later retrieval.

In *Computers and Law,* September 1991, the journal of the Society for Computers and Law, *John Matthews* outlines recent developments on document imaging in the legal profession. John Matthews states that interest in document-image processing is high among law firms but there is a reluctance to take action especially as those firms that have taken ''the plunge'' have met with mixed success.

John Matthews states that litigation is where document imaging will impact first. Solicitors hope that document imaging can cut the time and cost involved in litigation so that both the solicitor and the clients stand to benefit. He says that, in the long term, document imaging along with advances in electronic publishing and document management promises to transform the management of documents in law firms. □

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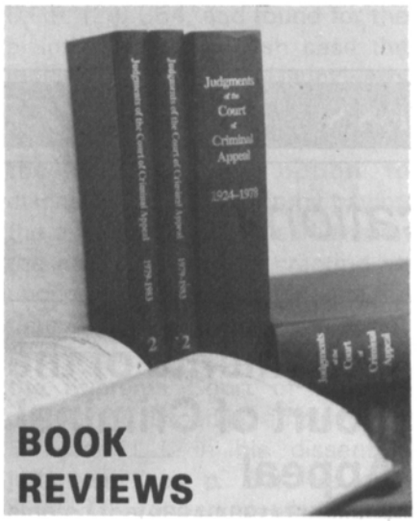

Chalmers & Guest on Bills of Exchange.

Edited by A.G. Guest [Sweet & Maxwell] £110

The last edition (the 13th) of *Chalmers* was published in 1964. A reflection of the extent of the changes that have taken place in the law and practice of banking since then is that the work has expanded from 420 to 836 pages. Although the pattern of previous editions is followed, in that the text is presented in the form of a section-by-section commentary on the Bills of Exchange Act, 1882 and the Cheques Act, 1957, Professor Guest has rewritten the text completely, "leaving very little of the old Chalmers". The helpful practice, rare nowadays, of providing illustrations is also continued but based this time on decided cases.

Bills of exchange were first brought into use by the Florentines in the 12th century as an instrument by which a trade debt, due in one place, was transferred in another, thus avoiding the necessity of transmitting cash from place to place. As they developed in England, however, bills of exchange became flexible paper currency. Chalmers summed up the difference well when he said that in France and the other civil law systems a bill of exchange represented a trade transaction whereas in England it was merely an instrument of credit.

In both Britain and Ireland the law is largely to be found in the 1882 Act as modified by the Cheques Act, 1957 (in Britain) and the Cheques Act, 1959 (in Ireland). Further changes have been effected in Ireland by the Central Bank Act, 1989, section 132 of which inserts a new section 45A into the 1882 Act to permit the "truncation" of cheques. This is a process which replaces physical presentation with an electronic message and enables banks to make greater use of electronic means of data transfer. The 1989 Act makes a number of other amendments which should be noted, namely the substitution of a new paragraph (1) in section 14 of the 1882 Act and the insertion of a new section after section 3 of the Cheques Act, 1959. Furthermore the Building Societies Act, 1989 amends the definition of "bank" in section 2 of the 1882 Act to include a building society.

Professor Guest identifies a number of other changes which are necessary to bring the 1882 Act up to date. He doubts, for instance, whether the Act permits the use of instruments denominated in units of account such as the ECU. In the United Kingdom the government has announced (Cm. 1026) that it will amend the 1882 Act so that the expression "a sum certain in money" in section 3 (1) is defined to include a monetary unit of account established by an intergovernmental institution or by agreement between two or more States. The UK government also proposes to amend the 1882 Act to recognise a guarantee given by way of an "aval". As Guest points out (p. 459), an aval is a common practice in most EC Member States and is essentially "a guarantee of payment of a bill". Quite simply a third person guarantees the payment of a bill by signing it. The liability of the giver of an aval is not, however, the exact equivalent of that of a guarantor in English or Irish law since, as Guest explains, his undertaking is valid even when the liability which he has guaranteed is inoperative for any reason other than defect in form.

On a more practical level another area where amending legislation would appear to be required is cheque crossing. The expression "not negotiable" written on a cheque is not generally understood. It does not mean that the cheque cannot be transferred, it means only that if it is transferred the holder does not get better rights of ownership than the person from whom he received it. There is undoubtedly a need for a clear method of making cheques non-transferable and perhaps this should be done by giving legal status to the words "Account Payee only". As Guest points out (p. 642) such words are not "words prohibiting transfer, or indicating that the cheque should not be transferable". Nevertheless, in practice, they may render the cheque transferable only with difficulty or not at all "for a banker may refuse to collect a third party cheque so crossed in the absence of explanation as to why it is being collected for his customer who is not the payee".

Irish cases on negotiable instruments are not particularly common, the most important recent case probably being *Creative Press Ltd. -v- Harmon* [1973] I.R. 313. Section 83 (1) of the 1882 Act provides that a promissory not is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or "at a fixed or determinable future time" a sum certain in money to a specified person. Each of the defendants signed a document which stated that they, jointly and severally, promised to pay the plaintiff "on or before the 1st day of November, 1970" the sum of £2000. The point at issue was whether an instrument payable "on or before" a specified date was invalid as a promissory note since it was not payable at a fixed future time. Pringle J. refused to apply the English Court of Appeal decision in *Williamson -v- Rider* [1963] 1 Q.B. 89, preferring to follow instead the decision of the Supreme Court of Canada in *John Burrows Ltd. -v- Subsurface Surveys Ltd.* (1968) 68

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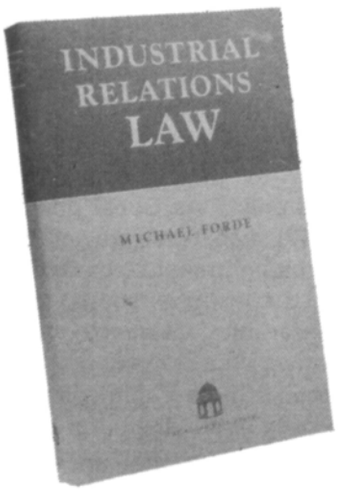

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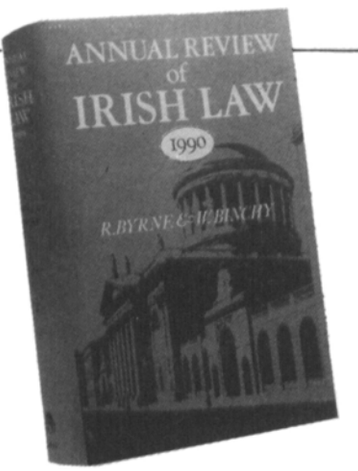

Annual Review of Irish Law 1990

RAYMOND BYRNE & WILLIAM BINCHY

The fourth volume in the series which provides an analytical account of work by the courts, the Oireachtas, scholars and practitioners during the year.

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D.L.R. (2d) 354, and found for the plaintiff. In the English case the majority (Willmer and Danckwerts L.JJ.) held that the use of the words "on or before" gave the maker of the document an option to discharge his obligation by paying the amount at a date earlier than the date named thus creating an uncertainty and contingency in the time of payment. Professor Guest, like Pringle J. and the five judges of the Supreme Court of Canada, prefers the reasoning employed by Ormerod L.J. in his dissenting judgment (see p. 67). He considered that the terms of the document created no uncertainty as the maker would not be under any obligation to pay the note until the specified date arrived. *Williamson -v- Rider,* however, was followed in *Clayton -v- Bradley* [1987] 1 W.L.R. 521.

Another difference between British and Irish law noted by Professor Guest concerns the process used for the clearing of cheques through a clearing house. In previous editions of *Chalmers* the view had been put forward that presentment to the paying bank takes place when the cheque was delivered to the employee or agent of the paying bank at the clearing house and this view was adopted by the Supreme Court, reversing Murnaghan J., in *Royal Bank of Ireland -v- O'Rourke* [1962] I.R. 159. In *Barclays Bank plc -v- Bank of England* [1985] 1 A11 E.R. 385, however, Bingham J. (as he then was) said that he preferred the approach of Murnaghan J. and held that presentment only took place when the cheque was presented for payment at the branch of the paying bank on which it was drawn.

Nine other Irish cases appear in the work although *Reade -v- Royal Bank of Ireland* [1922] 2 I.R. 22, which is referred to at p. 617, is omitted from the Table of Cases. In addition a relatively large number of Commonwealth authorities are also cited (156 Canadian, 78 Australian and 19 New Zealand) as well as assorted decisions from Malaya, Sri Lanka, South Africa and the United States of America. Professor Guest also provides, where relevant, comparative references to the Geneva Convention providing a Uniform Law for Cheques and the American Uniform Commercial Code. The full text of the United Nations Convention on International Bills of Exchange and International Promissory Notes is included as an appendix. Another appendix contains a helpful set of precedents of pleadings.

For most lawyers bills of exchange and promissory notes are, as Professor Guest remarks in the Preface, "a rather technical and arcane area of the law". Nevertheless he has succeeded in his aim of writing "a systematic, even readable, treatise" on bills of exchange, cheques on a bank and promissory notes. He provides a full, coherent and up-to-date (the Preface being dated January 1, 1991) account of the law and the work can be unequivocably commended.

Tony Kerr
Statutory Lecturer
in Law, University
College Dublin

The Background of the Common Law.

Second Edition, By Derek Roebuck, Oxford University Press/OUP, Hong Kong, 1990, £6.99 sterling.

Professor F.H. Newark writing in (1947) 7 NILQ 121 noted that Ireland may one day have its Reeves or Holdsworth. Professor Newark added that it would not be an easy task to write the legal history of Ireland. Fortunately, over the past six decades, there has been a "quickening interest" in research in Irish Legal History. Scholars such as Dr. R.B. McDowell, Dr. A.G. Donaldson and Dr. V.T.H. Delaney have made their contributions to the study of legal history. In recent times, scholars such as Professor W.N. Osborough, Professor of Laws at Trinity College, Dublin, Dr. Paul Brand, Dr. Geoffrey Hand, Mr. Justice Ronan Keane, Mr. Daire Hogan, Solicitor and Dr. Colum Kenny have contributed (or are about to make further significant contributions) to our fuller understanding of Irish legal history. The Irish Legal History Society, a society which owes its existence to the vision of Professor Osborough, has already advanced the knowledge of the history of Irish law.

The author notes that the story of the common law is a good tale but it is not a romance. Many lawyers have tried to convince themselves and others that it has divine attributes. The modern after-dinner speaker who raises his glass to 'Our Lady of the Common Law' has many predecessors. The author refers to reports from at least the fifteenth century of statements such as: 'The common law is nothing but common reason', 'Our law is founded on the law of God', and even 'The common law has been for all time since the world began'. The author correctly notes that the common law can only be understood if it is seen for what it is: not a romantic ideal or a divine gift or the acme of the judicial genius or even the legal aspect of the most politically wise and refined race, but an interesting human construct, the creature of times and places, of economic forces and class interest, of battles for power between political factions and trials of wits between lawyers of great skill and inventiveness.

We are fortunate that the common law system has recorded the names of the judicial innovators and of judges who withstood the innovators. The system of reporting cases in common law countries allows the names of judges to stand out in a way they cannot in the anonymous reports of the countries of that other great system, the civil law of continental Europe.

The author is under no illusions about some of the judges who have

(Continued on Page 355)

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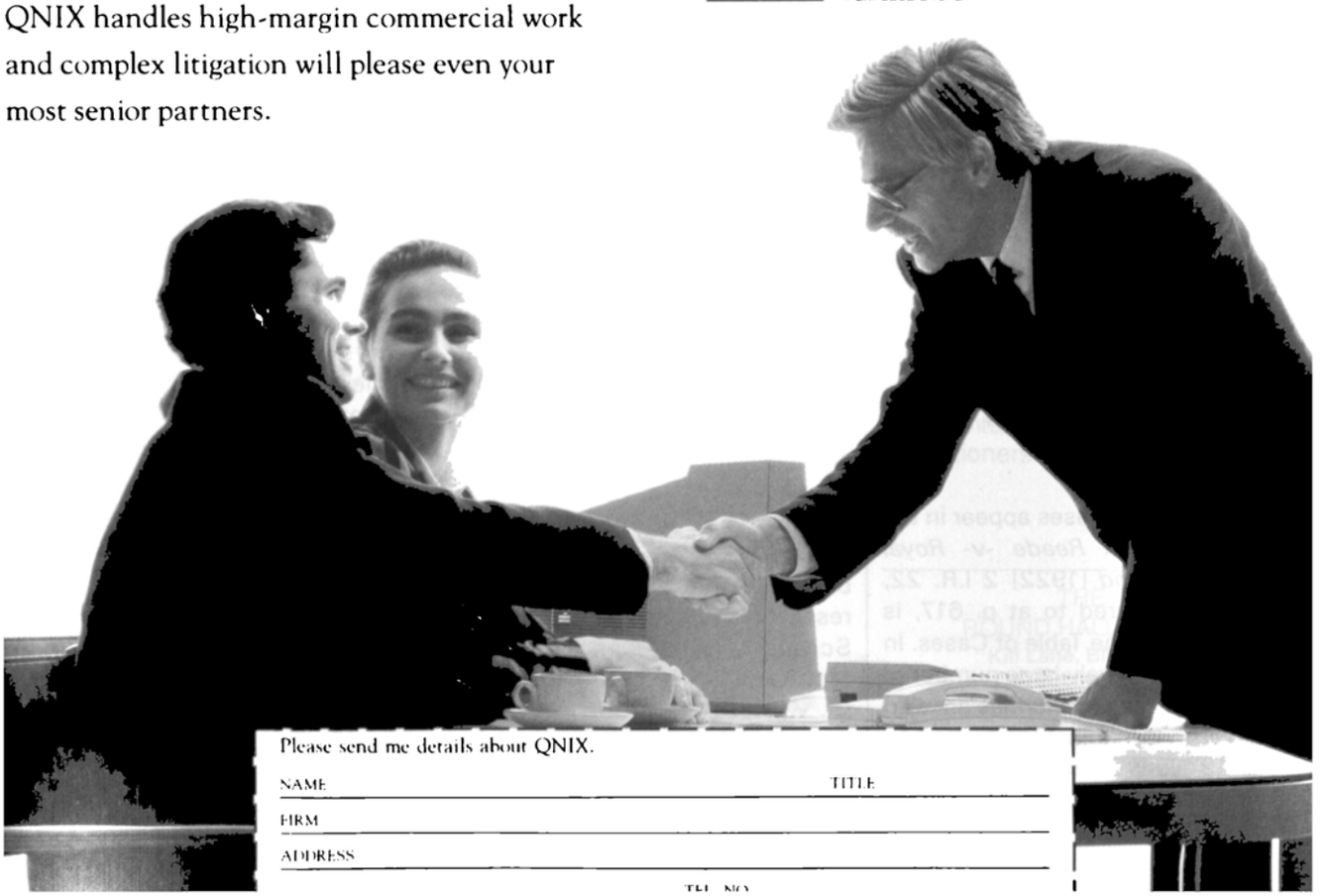

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The "voice" is not that of a film director but belongs to *Bill James* one of the tutors on the advocacy module of the Advanced Course in the Society's Law School.

Every student attending the Law Society's Advanced Course now gets three days' practical training on advocacy in the District Court.

The emphasis is on learning by doing. The students are divided up into teams, plaintiff and defendant or prosecution and defence. After a day of making bail applications and pleas in mitigation the students conduct a series of cases, criminal and civil before a judge and their performance is videoed. Each student has a minimun of two sessions before the camera, conducting an examination in chief, cross-examination or re-examination. After each session they receive a short, constructive commentary (the critique) on their performance – an exercise from which the whole group benefits – before leaving the "courtroom" to watch their performance being played back. The playback gives the opportunity for a more extensive critique by a course tutor.

While *Suzanne* is on her feet, students *Joseph O'Sullivan* and *Michael O'Connor* are in the playback room watching their performances with tutor *Jim Dennison. Jim* hits the pause button every now and then to make a point about their presentation or demeanour.

A student being videoed on the Advocacy Training Course

"The great advantage is that the students are learning by doing" says *Jim Dennison.* "Video is also an advantage for the tutors. So much is going on when the tutor is watching the live performance, that it can be impossible to jot down all the points you want to pick up on." *Jim Dennison* says the improvement in the students' performance over the two days is very noticeable.

What do the students think? *Suzanne Hill* says: "It's very beneficial because it helps you to see your mistakes. It's nerve wracking being in front of the cameras, but I think it will definitely stand to me to have been in this situation".

Joseph O'Sullivan feels it is the most practical aspect of the advanced course: "Put it this way, no one is going to give you these tips when you are out there practising and doing it for real".

After the students have had their turn they are treated to a live role play from the tutors who act out the same case, and students get an opportunity to turn the tables by critically evaluating their mentors' performance!

Practical advocacy training started in the Spring of 1981 and was an early feature of the Advanced Course. It is administered by Professor *Laurence Sweeney,* Director of Training. The approach, he says, is influenced by the NITA (National Institute/Training Advocacy) system. "It's a building block approach. The emphasis is on preparing, doing, critiquing and repeating the process".

The course consultants receive comprehensive guidelines based on the NITA system. They are asked to emphasise what the students have done well, as well as picking out one – or at most two – points about what was wrong with the student's performance explaining why and demonstrating – very briefly – how to do it better. The demonstration is the key element of the critique and the feature from which the students perhaps learn most.

Formal lecturing is kept to a minimum. The focus throughout is

on what the student did. Body language is not emphasised since the playbacks demonstrate it to the students. In any case such problems tend to disappear as the skill and confidence of the student develop over the three days. At the end of the process students are given pointers on one or two aspects of their presentation that they need to work on.

Laurence Sweeney says it would not be possible to run the course without the co-operation of a panel of 40 consultants comprising two District Judges, former judges including High Court Judge *Herbert McWilliam* and President of the District Court Judge *Oliver Macklin,* barristers, state solicitors and defence solicitors. Why do they become involved and give so generously of their time? *Laurence Sweeney* says "I think it is because they want to contribute – 'to give something back' – they learn from it and from each other, and also simply, because they enjoy it."

Advocacy training is clearly here to stay. One student, *Joe Kelly,* Auditor of SADSI, and member of the Society's Younger Members Committee has no doubts about its benefits. "It's confidence building" he says "and I can see the spin-off of it reflected among our debaters."

Barbara Cahalane

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Job Prospects at Home and Abroad

SADSI recently organised a seminar on job prospects at home and abroad for newly qualified solicitors. Speakers from UK, US, Australia and Europe outlined the practical aspects, advantages and disadvantages of working abroad.

UK experience

There was strong representation from the big London law firms; *David Rance* and *Guy Whalley* from Freshfields, *Niall Morgan* from Slaughter & May, *Nicholas Jordan* from Clifford Chance and *Alexandra Marks* from Findlaters & Paines. These speakers discussed the functions of the big City firms in providing backup services to London as a financial and business centre. They outlined the facilities afforded in terms of career development, continuous training, the backup of libraries, investment in information technology and opportunities for specialisation. Additionally, many operate offices in other continental and worldwide locations and give opportunities for short or long term placement in these locations. Most recruit approximately one third of their staff from outside the firm, and look for people with a good commercial background with two to three years' post qualification experience. They look for people who add value to the services they provide.

UK slump limits opportunities

An increase in the number of people qualifying in England and Wales, together with an overall slump in business due to the recession have severely limited opportunities in London at present. However, some firms are still recruiting in particular areas and it was stressed that things can change quite rapidly. The firms tend to take a long term view that people with the type of experience they require should contact them if interested in pursuing a career in the City.

Ann Counihan, who is now Head of Legal and Corporate Affairs at the National Treasury Management Agency, outlined her experiences of working in a big city law firm and in Manufacturers Hanover Bank as an in-house lawyer. She also documented the activities of the London Irish solicitor's Bar Association and their success in having Irish solicitors admitted in England and Wales.

US - recovery will bring opportunities

John Chrisman represented Sullivan & Cromwell of New York and he is based in their London office. He discussed legal developments from an American perspective and plotted the response of American law firms in terms of changing economic activity, firstly to new areas in the US and now to Europe and further afield. His view was that law is a vital component in furthering global economic progress. From a US perspective, he felt that Irish lawyers who travelled should sell themselves as being European lawyers as he felt this would have significant prestige in the US in particular. He said that legal services had been hit hard in the US recession following a period of unprecedented expansion, but felt that long term, there would be a recovery with new opportunities.

Conor McAuliffe worked in different areas of the US and did an LLM in the University of Michigan. He mentioned that different states in the US have different requirements in terms of qualifying for their bar exams. Normally, it takes three years to re-qualify; however, it is possible in various States to negotiate up to two years off this period depending on qualifications. He felt that if people are going to the US, they should consider going to areas such as New Mexico and Arizona which offer far more opportunities than some of the crowded traditional

centres. He felt it was a positive advantage to be Irish in the US but that you would need to re-qualify.

Siobhan Lohan worked for a number of years in New York and did the New York Bar Exam. She mentioned that the Irish Lawyers Association in New York is very active and of great assistance in helping people to acclimatize.

Brussels

Ann Kelly outlined the opportunities of working in Brussels in EC related areas. Normally, people who take this option will have gone through the stagaire process with a placement with the Commission or Parliament. The emphasis on the firms operating in Brussels is on competition policy, intellectual property and there are also possibilities of working either for the Commission directly or on contract. There is a European Law Students Association.

Australia - a year to re-qualify

Fionnuala McGinley worked in Australia for a number of years. Initially, she worked as an assistant in a firm doing mainly litigation and subsequently re-qualified in New South Wales. She estimates that it would take approximately ten months to a year in terms of study and lectures to re-qualify. The bulk of the professional training done here is accepted in Australia and re-qualification is necessary only in limited areas. She mentioned that in the Sydney area recruitment is mainly organised through seven or eight legal agencies, who if they take a shine to you, will push hard to place you in a suitable firm. In the last year or so, things have become quite difficult in Australia in terms of seeking work so if people are going, they should be prepared to wait to get a job or should consider doing casual work in the interim.

Dublin - demand is quiet

John Ellis, who runs Law People in Dublin and is linked to a London Recruitment Agency outlined the recruitment process. He said that in Dublin at present the scene is quiet. There is demand in urban centres around the country. He noticed that an increasing use is being made of a locum service in Dublin and of temporary placements. He felt that the recession was starting to lift and that there would be increased demand from both professional firms and from businesses for in-house lawyers in the near future.

The Irish lawyers who had worked abroad felt that if people do travel they should aim for the top and be careful to ensure that they don't end up being stuck doing repetitive work in whatever firm they are working in. They generally found the experiences very stimulating exposing them to new areas of law and ways of doing things which they wouldn't have been able to do at home at the period. However, when they subsequently came back to work in Ireland, it sometimes proved difficult to convince a prospective employer of the benefits of having worked in a different jurisdiction. There was also a feeling that the standard of professional training here was very high and equipped people well for working in different jurisdictions.

There is now general mutual recognition of professional qualifications throughout EC countries. However, if people do work in say, England, there would still tend to be a bias towards locally trained staff who are familiar with the local law. If people wish to travel further afield, it seems that if they intend staying for any lengthy period, it would be advantageous financially and careerwise to re-qualify in that jurisdiction; however, selection of a particular state or area can ensure a far shorter period for re- qualification.

Patrick Crowley
SADSI

Book Reviews

Cont'd from page 351

been honoured as the giants of law and equity. He adds that the law was not created by angels. This should not surprise any student, and may,increase the likelihood of the subject retaining his or her interest.

The Background of The Common Law is intended for those who are starting their study of the legal system in one of those jurisdictions which have inherited the common law. Assuming no knowledge of history, law or legal vocabulary, the author provides the reader with the understanding of the history of the common law. The second edition contains two new chapters on the language and literature of the common law.

The Background of the Common Law is an introductory volume and will be useful for students and others who require general understanding of the subject.

Eamonn G. Hall

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Obituary – George G. Overend

While he would no doubt have been an excellent accountant, for he possessed remarkable mathematical skills, *George Overend* probably never contemplated any career other than the law. His grandfather was a judge, as was his uncle Kingsbury, and his father was a distinguished solicitor and former president of the Law Society – but the real determinant in his choice of profession was his certainty that he would enjoy the practice of law. He savoured it because it afforded him the opportunity of bringing all his talents into play and gave him the infinite variety of challenge which he so loved. Highly articulate, he had an astonishing memory which was steeped in knowledge of the law. All this, allied to a natural pragmatism, made him a very desirable man to have on one's side in any encounter.

His ability to quickly tease out what was important in, say, a Finance Act, and where it differed from preceding Finance Acts, was outstanding. It all seemed so effortless it was all the more impressive. Where a consultation was held to solve some difficult problem he could light up the whole meeting by supplying the solution which had evaded everybody else. After one such occasion the client spoke of him as "a lad with a good head" – a truly Irish accolade, indicating not just intelligence, but also wisdom, perception and what is popularly known as "cop", a highly desirable quality in a lawyer.

He was the quintessential businessman's lawyer with his profound knowledge of company law, his ability to read and accurately interpret a balance-sheet, his innate common sense and the courage to take a stand on any matter of importance. These qualities made him a very valuable board member on a number of well known public companies and he was also a past president of the Law Society and a former governor of the Irish Times Trust. As an innovator in a solicitors' practice he introduced anything which he thought might lead to greater efficiency and he always closely concerned himself with young solicitors and had no peer in their instruction and training.

Part of the essence of a man is lost if there is no mention of imperfection: he becomes too good to be true. It is correct that from time to time GGO, as he was popularly known, appeared to be abrupt, impatient and even a trifle irascible. This is understandable when one remembers how often he worked into the small hours of the morning on complex matters. On a cold appraisal, however, there was no defect of any significance to be found in his character or bearing. This superbly talented man was free from rhetoric, from bombast and from false pride.

For all of us who respected and admired him his monument is the standard of excellence, of integrity and of dedication which he set. Our deepest sympathy goes out in particular to those most closely affected by his death, his loving and devoted wife *Muriel* and his daughters *Janet, Lorna and Cherrie.*

'A Lawyer'

(Reprinted by kind permission of 'The Irish Times')

Competition Act, 1991

The Competition Act 1991 (Commencement) Order, 1991, (S.I. No. 249 of 1991) brings the main provisions of the *Competition Act, 1991* into effect from October 1, 1991. The order establishes the Competition Authority from that date and also retains the Restrictive Practices (Groceries) Order, 1987. *The Competition (Notification Fee) Regulations 1991,* (S.I. No. 250 of 1991) prescribe the appropriate fee to be sent with any agreement, decision or concerted practice which is notified under the *Competition Act, 1991.* That fee is £100.00.

Practice Notes

VHI – Form of Undertaking

Members are advised that following discussions with the VHI, the Society has agreed to recommend to its members a form of undertaking to be furnished to the VHI where the VHI has agreed to discharge hospital and medical expenses for the client to the extent of his cover limits. The recommended fee payable to the solicitor in respect of such undertaking is £60 plus VAT. The form of authority to be completed by the member and the form of undertaking to be completed by the solicitor are set out hereunder.

Authority

In consideration of the VHI discharging my hospital and medical expenses to the extent of my cover limits, I undertake to the VHI to include these expenses as part of my claim against a third party(ies). I hereby irrevocably authorise the solicitor(s) representing me in making a claim to furnish to the VHI an undertaking in the following form:-

In consideration of the VHI discharging the hospital and medical expenses of my/our client (name), I/we hereby undertake to include as part of my/our client's (name) claim the monies so paid by the VHI (details of which are now supplied to us by the VHI) and subject to any order to the contrary, to repay to the VHI out of the proceeds that come into our hands the net amount recovered in respect of such payments made by the VHI.

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At a recent Continuing Legal Education Seminar on Effective Legal Negotiation were, L-R: Kevin O'Higgins, Kevin O'Higgins & Co.; Laetitia Baker, MacCarthy Baker & Co.; Gary Byrne, Byrne Collins & Moran, and Gabriel Toolan, Walter P. Toolan & Sons.

At the recent SADSI Careers Seminar were L-R: Pat Crowley, Education Officer, SADSI; Fionnula McGinley, A & L Goodbody; Joe Kelly, Auditor, SADSI; and Tony Ensor, Chairman, Education Committee, Law Society.

The President of the Law Society, Donal G. Binchy, with Peter H. Prost, Managing Director, Sedgwick Dineen Personal Financial Management Limited and Peter Murphy, Council Member. Mr. Murphy received the award for being the member of the Solicitors Financial Services who generated the highest level of business in the year to 30th September, 1991.

At a recent lunch for the spouses of Law Society Presidents were L-R: Ruth Bourke, Joan Binchy, and Anne Smyth.

At the presentation of the J.P. O'Reilly Memorial Scholarship for 1991 were L-R: Donal Binchy, President of the Law Society, Dr. A.J.F. O'Reilly, and Richard Devereux, winner of the Scholarship.

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An MBA - A Competitive Advantage

***Muiris O'Ceidigh* was the winner of the J.P. O'Reilly memorial Fund Scholarship in 1990. In this article he highlights the benefits of an MBA to lawyers.**

An MBA or a Masters Degree in Business Administration is generally regarded as a premium qualification in business undertaken by people with 5 or more years business experience and who have a primary degree. The competition for places in MBA programmes is intense with many people competing for very few places.

What an MBA involves:
Following the award of the J.P. O'Reilly Memorial prize in commercial law, Muiris O'Ceidigh was accepted for an MBA at Trinity College Dublin. MBAs are also offered at UCD, UCG, University of Limerick and DCU. However, the Trinity MBA is unique in that it offers hands on experience at an executive level in a major corporation, in this case, Avonmore Foods plc. Two such experience-related activities are undertaken during the course of the programme. The other one which he undertook was with a captive insurance management company operating in the International Financial Services Centre. Both these projects and in particular the company project enable one to use the analytical skills instilled during the initial part of the programme.

There are many modules offered during the course of the programme; these include modules of financial analysis, corporate finance, corporate strategy and general management. The Trinity MBA places a high emphasis on an understanding of corporate strategy. During the course of the programme one analyses several major international corporations from a financial and strategic point of view and spends many hours considering the financial and strategic alternatives open to the company for the future. During the course of the programme one gains several useful skills such as the ability to give a presentation using computer graphics, how to compile a corporate analysis for a Chief Executive, training in team work and group dynamics.

An MBA programme has many benefits for a commercial lawyer. It enables him to have full financial competency and additionally an appreciation of where an enterprise is endeavouring to get strategically. However, an MBA programme should not be undertaken lightly as it requires up to 70 hours work per week and at times can be exceedingly stressful, but the disadvantages are far outweighed by the benefits in terms of personal development.

Muiris works for A & L Goodbody, Solicitors. He has lectured in commercial law at Galway Regional Technical College, and at the Sorbonne University in Paris. He has several publications in the commercial law area.

□

The J.P. O'Reilly Memorial Fund

Founded by Dr. A.J.F. O'Reilly to honour the memory of his late father, the Fund provides a

Scholarship of £10,000

to contribute towards the cost of attendance at a full-time or part-time MBA course.

The Fund seeks to promote knowledge of commercial law and corporate finance among young Irish solicitors.

The award – which may be apportioned among candidates – is by competition, open to all apprentices and solicitors qualified within the last ten years who satisfy entry requirements (see below) for an approved MBA course, whether at home or abroad.

The competition will have two tiers:
(1) An essay of between 3,000 and 5,000 words in a commercial law subject chosen by the candidate;
(2) a panel interview which will assess the background interests, motivation and potential of selected essayists.

Applications to participate to be made not later than 6 January, 1992; and essays should be submitted by the 28 January, 1992. The successful candidate is expected to commence the study programme in Autumn, 1992.

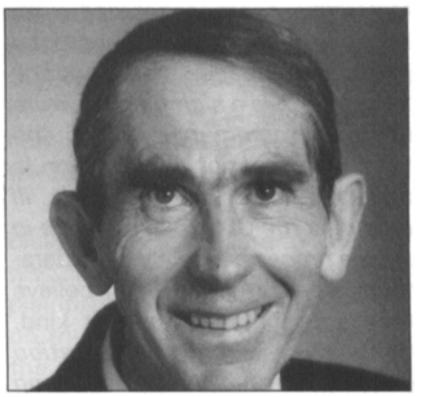
Telephone or write to Professor L. G. Sweeney, Director of Training, Law Society, Blackhall Place, Dublin 7. Tel: 710711.

MBA Requirements

These are threefold:
- normally a primary degree, commonly with first or second class honours or an approved professional qualification,
- work experience at an acceptable level of responsibility over a period of three, four or five years depending on the institute and the candidate's other qualifications,
- a passing grade in the Graduate Management Admission Test (GMAT). The GMAT is internationally recognised and can be taken in centres in all countries. Information is available from: Graduate Management Admission Test, Educational Testing Service, CN6103 Princeton NJ 08541 - 6103, USA.

Arbitration – The Superior Courts' Attitude

"The courts have no desire unnecessarily or impetuously to intervene in arbitration . . . The enforcement of the result of an arbitration requires the enforcement agencies of the State which the courts, and only the courts, can in such matters invoke . . . Arbitrators, whether learned in law or not, are entitled to avail by the mechanism of case stated to the finality and certainty of court decisions on questions of law.[1]"



Anthony P. Quinn

by
Anthony P. Quinn*
Barrister; FCI.Arb; Dip. Arb.Law;
Dip. Intrntl. Arb. Law; MA;
B.Comm; Dip. Publ.Adm; FIIS

Chief Justice T. Finlay expressed those views at an Arbitration Workshop at Blackhall Place, organised in November, 1990 by the International Chamber of Commerce – Ireland, in co-operation with the Bar Council, The Law Society and the Chartered Institute of Arbitrators (CIArb) – Irish Branch. Other members of the Irish judiciary, including Mr. Justice Hamilton, President of the High Court, and Mr. Justice Robert Barr have also spoken publicly of the Irish courts' positive attitude to, and support for, arbitration as an appropriate alternative dispute resolution (ADR) system especially in technical cases. Such support makes certain basic assumptions including the observance by arbitrators of relevant law, fair procedures and natural justice. This article illustrates the courts' attitude to the arbitral process by reference to case law within the framework of legislation and the common law.

Legislative background

An outline of relevant legislation is necessary to understanding case law. There was an arbitral element in the Brehon Laws but the first Irish Arbitration Act was passed in King Billy's reign, 1698.[2] The Arbitration Acts, 1950 and 1980 built on the common law tradition.[3] The court, defined in s.2, 1954 Act as the High Court, has various powers such as making orders for costs, discovery, etc., under s.22. arbitrators may, and shall if directed by the court, state a case for the court's decision on any point of law arising in the reference (to arbitration) and any award (decision of arbitrator) may be referred to the court as a special case – s.35. Other court powers include: remission of award to arbitrator – s.36; removal of arbitrator for misconduct – s.37; setting award aside for misconduct – s.38; granting relief where arbitrator is not impartial or the dispute involves fraud – s.39. The court also has power to extend time limits. Awards may be enforced in the same manner as judgments – s.41 and Order 56, *Rules of Superior Courts*.

The 1980 Act, which implements the New York Convention providing for worldwide enforcement of arbitral awards through the courts, is mainly of interest to international arbitrations. S.5, 1980 Act, however, applies also to Irish domestic arbitrations: courts at all levels *must,* on request, make an order staying court proceedings where a valid arbitration agreement covers a dispute, where no step in the proceedings has been taken and there is no question of fraud. The s.5 provision underpins the courts' practical support for arbitration.[4]

Deviations from the norm of commercial arbitration

Court support for the arbitral process must be understood in the context of equality of bargaining power in commercial contracts which include properly drafted arbitration clauses and submission procedures. Consumer contracts, e.g. in travel and tourism, would require more detailed examination as courts protect consumers under the Sale of Goods & Supply of Services Act, 1980 *(McCarthy & Ors -v- Joe Walsh Tours Ltd.).*[5]

Difficulties about arbitration of disputes between customers and travel agents may be resolved by a new scheme available through the Chartered Institute of Arbitrators – Irish Branch (CIArb – Irish Branch) in conjunction with the Irish Travel Agents Association.[6]

Employment and industrial relations law is another area which deviates from the norm of commercial arbitration. Employment contracts may contain arbitration clauses and there are special schemes for the public service. S.5 of the 1954 Act excludes employment and industrial relations from the Arbitration Acts. Although agreements to refer to arbitration would be binding, the courts' supervisory role and support would not be available. Neither the mandatory staying of court proceedings under s.5, 1980 Act, nor Order 56 *Rules of the Superior Courts* apply in employment contracts. Statutory provisions of employment protection legislation, however, may affect the validity of clauses in employment agreements. The Arbitration Acts of England & Wales, although comparable in many ways to the Irish Acts, do not specifically exclude employment contracts.

Supreme court's strong support for arbitral process

In *Keenan -v- Shield Insurance*[7], the unanimous judgment of five judges of the Supreme Court in

1988 upholding the High Court decision of Blayney J. and the arbitrator's award was delivered by McCarthy J. He concluded with lines which are often quoted by judges, practitioners and students: *"Arbitration is a significant feature of modern commercial life; . . .* the field of international arbitration is an ever expanding one. *It ill becomes the Courts to interfere in such a process;* if policy considerations are appropriate, as I believe they are in matters of this kind, then *every such consideration points to the desirability of making an award final in every sense of the term."*

In *Keenan -v- Shield,* the insurance company repudiated liability on the basis of alleged misrepresentation of fact and non-disclosure of information. The arbitrator's award found against the insurer on those allegations but decided that the insured was not entitled to recover under the policy. Challenges to the award failed in the High Court and on appeal to the Supreme Court.

McCarthy J. in his judgment also made the following points:

(1) It was too late for the arbitrator to state a case under s.35 of the 1954 Act after he had made his award and became *functus officio.* (The case-stated procedure has in general not been abused in the Irish jurisdiction. In England & Wales, which have Arbitration Acts different from Scotland and Northern Ireland, a restricted appeal system has replaced the case-stated procedure).

(2) At common law, the Court can either remit or set aside an award if there is an error on its face. Policy considerations point to the desirability of making an arbitration award final in every sense of the term. Therefore, McCarthy J. did not approve of courts fine-combing an award unless it showed on its face an error of law so fundamental that the courts could not stand aside and allow it to remain unchallenged. *Keenan -v- Shield* was not such a case. The learned judge was critical of fine-combing by Costello J. in a previous case *Church & General Insurance -v- Connolly & anor.*[8]

Comment

The jurisdiction to set an award aside because of an error of law on its face is often criticised as anomalous.[9] It was abolished in the English Arbitration Act, 1979 which also introduced (a) a new appeal procedure with specific restrictions, (b) statutory recognition of parties' rights to reasoned awards. There is a strong case for similar reforms in Irish law so that arbitrators in line with international trends may give reasons for awards without perceived fears of undue court interference.

In *McStay -v- Assicurazione Generali & Maguire,*[10] known as the *McStay case,* the Supreme Court in November, 1990 upheld the arbitrator's award and dismissed the plaintiff's appeal against a High Court challenge to the award. This was also an insurance case. The plaintiff/appellant, John McStay as receiver of Hotel Holyrood Ltd. pleaded *inter alia* in the High Court for an order remitting to the second defendant, Peter Maguire SC, for reconsideration part of his award in which the arbitrator had decided that he had no jurisdiction to award interest for the period *prior* to the award.

Chief Justice Finlay's judgment in *McStay* endorsed the arbitral process and made the following points:

(1) A fundamental ingredient of arbitration as contained in the common law is the finality of the arbitrator's decision subject to certain qualifications and precautions. Parties acknowledge when agreeing to refer a particular question in dispute to an arbitrator's decision, that they have abandoned their right to litigate that precise question.

(2) Exceptions to the finality as outlined at (1) above arise at common law and in statutory provisions:

(a) The arbitrator has power to state any question of law arising in course of a reference or award, as a special case for the High Court's decision. The Court may, on application, direct an arbitrator to state such a case – s.35, 1954 Act.

(b) The Court may remove an arbitrator for misconduct – s.37, 1965 Act.

(c) The Court may set aside an award where an arbitrator has misconducted himself or an award has been improperly obtained – s.38, 1954 Act.

(d) The Court may revoke an arbitrator's power because he may be partial.

(e) At common law, where an arbitrator decides a question of law *where that precise question has not been referred to him for decision,* the Court may intervene in its discretion and in particular cases where the decision is clearly wrong on its face by remitting the matter to the arbitrator in the interests of justice.

The Chief Justice emphasised in McStay *that a decision made by an arbitrator on a specific point of law referred to him for decision, was not covered by any of the exceptions listed above even if the award appears on its face to be erroneous.* Finlay C.J. referred to an English case *Absolom -v- Great Western London Garden Village Society.*[11] Lord Russell of Killowen succinctly set out the law:

"It is essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes mater ial, distinct from the case where a specific question of law has been referred to him for decision . . . The authorities make a clear distinction between the two cases . . . in the former case the Court can interfere if and when any error of law appears on the face of the award, but in the latter case no such interference is possible . . ."

In *McStay,* the arbitrator had power to decide a specific question of law which was referred to him for decision i.e. the plaintiff's claim for interest in respect of the period prior to the arbitrator's award. He decided that he did not have power to award such interest and he was entitled in law to make such a decision. The plaintiff did not seek a case stated and was bound by the arbitrator's decision whether that decision was erroneous or not.

O'Flaherty J., dissenting from the Supreme Court's decision in *McStay,* considered that a case stated would have been appropriate before the arbitrator made his decision and became *functus officio.* The case ought to have been remitted to the arbitrator for reconsideration in the interests of justice.

Comment

The Supreme Court decision in *McStay* clearly endorses the arbitral process and the principle of finality: *interest republicae ut sit finis litium.* On the other hand there is the high principle of justice: *fiat justitia, ruat coelum.* It seems unjust to deprive a claimant of interest on an award for a period between the date of an event giving rise to a claim, e.g. a breach of contract, and the date of the award. There should be a statutory provision, as in England, for allowing such interest for the earlier period. The interest from the date of award is allowable on the same basis as a judgment debt and causes no particular complications – s.34, 1954 Act.

Courts' endorsement of arbitrators' powers

In *Grangeford -v- S.H. Ltd.,*[12] a building contract case, the Supreme Court decided in 1989 that an arbitrator has inherent power to issue directions requiring the parties to submit details of their claims, to fix a date for hearing a reference to arbitration and to proceed thereon despite the absence of a party where that party had been refused a further hearing. There had been inordinate delay, mostly the defendant's fault, between the arbitrator's appointment and the date fixed for hearing. In the High Court, Costello J. found that there had been no misconduct. The arbitrator acted reasonably and was entitled to proceed in the defendant's absence.

Bremer Vulcan, an important House of Lords case of 1981, was cited.[13] The Supreme Court in *Grangeford* considered that the English case did not offer any support to the defendant. What Lord Diplock for the majority and Lord Scarman dissenting, said the arbitrator had power to do in *Bremer Vulcan* was what he had done in *Grangeford.* He made an award on the evidence before him, excluding the defendant's counterclaim as it was not before him. An award must be confined to matters properly before the arbitrator on evidence heard and determined.

McCarthy J. stated in *Grangeford* that s.19(1) of the 1954 Act, imports into every agreement a provision that relevant witnesses will be available with necessary documents. There is no power of sanction given or implied. (Avory J. in *Unione Stearinerie,*[14]) It is not a punishment either to proceed in the absence of a party who refuses to take part or to make an award in such circumstances. The arbitrator must, however, act judicially.

Natural justice

The courts in supporting the arbitral process assume that basic principles of natural justice and the due process of law have been observed. Absence of bias is vital.

Bord na Móna -v- Sisk, High Court, 1990[15]

The judgment of Blayney J. is useful as a good practical guide for arbitrators with references to case law on the tests for bias. This case arose from an application by the plaintiff/claimant for an extension of time under Order 56, Rule 4(e), Rules of the Superior Courts to set aside an award on allegations that the arbitrator misconducted himself. Bias was alleged on the basis that he had failed to disclose his involvement as an architect with a company associated with the defendant/respondents.

Blayney J., with regard to the non-disclosure, considered whether the plaintiff had a good arguable case on the merits. On bias he applied the test of a real likelihood of an operative prejudice, whether conscious or unconscious. There must be evidence that there was a real likelihood of bias by the arbitrator. Relevant wider case law quoted in the *Bord na Móna -v- Sisk* judgment included:

> *Dublin & County Broadcasting -v- Indep. Radio & TV Comm.*[16]
> *Corrigan -v- Irish Land Commission.*[17]
> *Rex -v- Rand.*[18]
> *Rex (Taverner) -v- Justices of Co. Tyrone*[19]
> *Haigh -v- London & North Western Railway Co.*[20]

The final case quoted involved an arbitration and was the nearest in facts to *Bord na Móna -v- Sisk.* In the Sisk case, Blayney J. found that there was little risk of bias by the arbitrator and the plaintiff's motion to extend time to overturn the award was refused. The moral for arbitrators, however, is to disclose relevant interests if any doubt arises about possible bias. The general rules on natural justice – *audi alterem partem* and *nemo iudex in sua causa* apply.

Caveat re court's Role

Case law has been cited extensively in this article to illustrate the courts' support for arbitration which is properly conducted within the due process of law. Most arbitrations never reach the courts but support of the courts is available when required. Unlike statutory arbitrations, private commercial arbitrations cannot avail of judicial

review in the strict sense of that term and in the specific meaning within Order 84, Rules of the Superior Courts.[21]

International arbitration and legislative reform

In general, the Superior Courts' role has been positive in supporting the arbitral process as an alternative to litigation. That is important in promoting a projected International Arbitration Centre in Ireland and specifically in Dublin.[22] Internationally, however, there is a negative perception of procedures such as "case stated" and "error on the face of the award", as outlined in this article. At least in respect of international arbitrations which may be conducted in Ireland, legislative reform is required (in line with the Arbitration Act 1979, England & Wales) to abolish outdated procedures in favour of a clear-cut but limited right of appeal of arbitral decisions to the High Court. Arbitrators should be facilitated in providing reasoned awards in line with international trends without fear of undue court interference because of technical errors on the face of awards. Other reforms are also desirable, e.g. as contained in the UNCITRAL model law, an optional code promoted by the United Nations and recently adopted in many jurisdictions including Scotland and Hong Kong.[23]

Conclusion

On the topic of the courts being increasingly supportive of arbitration, a commentator wondered whether it was simply a matter of keeping pressure off the courts or whether there was informed awareness of the various alternatives to litigation in court.[24]

In the "vivid but rather untactful phrase" of Denning J. *"arbitrators are just as likely to be as right as judges, and probably more so."*[25]

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*Anthony P. Quinn recently completed post-graduate study of Arbitration and International Arbitration Law at the Dublin Institute of Technology and has been admitted as a Fellow, Chartered Institute of Arbitrators. □

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Concluding Message From Out-going President Donal Binchy

Lawyers Face Same Problems Worldwide

It was my privilege to represent the profession at the American, Canadian and Australian Conferences. In doing this I left Ireland on the 9 August and arrived back 40 days later. Half the time of Phileas Fogg!

All three conferences were very impressive and the business and social programmes quite intensive.

Some of the highlights included:

1. The Presentation of the Francis Rawle Award in Atlanta to *John Buckley* in recognition of his contribution to continuing education of the legal profession. This was the first time that this award was given to a lawyer outside the States. The Irish contingent was very proud to be present at this award, to hear the glowing tributes paid to John and his own eloquent response.

2. The establishment of an exhibitor's stand by the Law Society at Atlanta. The interest shown in the stand and the numbers attracted was beyond our best expectations. The purpose of the stand was to establish Ireland as the legal gateway to Europe and to make it known in America that our profession can provide services that are as good and sophisticated as anywhere else in Europe. I believe that a significant number of enquiries have already been received with good business prospects. It is, of course, open to all Irish solicitors to participate by purchasing a time slot on the stand and promoting their own firm.

3. It was during the Canadian Conference that the coup against Mikhail Gorbachev took place. I had the opportunity of joining with the International Bar Association in signing a statement deploring the coup and expressing our support and solidarity with our fellow lawyers in the USSR. At the Canadian Conference I also had the honour of being made an Honorary member of the Canadian Bar Association.

4. On the social side in Calgary there was a mini rodeo with all the trappings of the Wild West including Bronco busting and bull riding.

5. At the Australian Conference in Adelaide two young Irish solicitors introduced themselves to me: these were solicitors with full qualifications in Ireland but now practising in Adelaide. We had a long chat and they appeared to be very happy there.

There were many other highlights at each conference including the Pro Bono Awards at Atlanta, impressive papers at business sessions, eloquent speeches and magnificent banquets ending with a Venetian Musical Ball in Adelaide.

What are the lasting impressions or lessons to be gained from attendance at these conferences? So much has happened so quickly there has been little time to reflect in any depth. What follows therefore are more in the nature of first impressions rather than definitive conclusions.

International contacts are vital

There is no doubt that, with the speed of travel and communication the modern world is becoming a much smaller place. The movement and interaction of peoples, businesses and nations is now virtually global and not merely European. All of this requires a much wider range of legal service and a profession that is able to meet such international requirements. If Ireland – and in the context of the legal profession Ireland's lawyers – do not keep in

Donal Binchy (Out-going President, Law Society)

constant contact with the remainder of the world we will lose touch and will inevitably be bypassed. It is essential, therefore, for our own growth and well-being that we maintain an adequate level of international contacts.

Another strong impression is the particularly warm welcome that is given to Irish delegates. Perhaps this is due in part to our small nation status, but clearly the Irish dimension in the States, Canada and Australia has a large part to play as well. And this goodwill is an obvious asset to us in developing business and legal contacts. It puts us in an ideal position to take advantage of the fact that Ireland is the first port of call from the West to Europe.

Lawyers face same challenges worldwide

Yet another strong impression left from my travels is that the problems facing lawyers throughout the world are very similar. This is both consoling but also more than a little worrying. There are very considerable pressures on the profession from all governments – stimulated I think by the consumer orientated society in which we live – to change some of the long standing practices of lawyers, to remove restrictions on advertising and price quotations, to allow other professions to engage in areas of work that have traditionally been

the field of lawyers and generally to try to secure a cheaper and less costly service from the maximum amount of competition. There is pressure to permit multi-disciplinary partnerships or, as they call them in the United States, ancillary services. There are complaints about the level and amount of litigation and the cost both of claims and litigation. There are ongoing attacks on the historic lawyer/client privilege and legislative attempts to remove this in different areas (frequently this being mistaken for a lawyer's rather than a client's privilege). There is the argument about fusion of barristers' and solicitors' profession in South Australia, there are the social and legal problems arising from the increasingly pluralist nature of the societies in which we live. There are the usual complaints about the standard of services from lawyers and the fees of lawyers; and the absence of lay persons upon lawyers' complaints committees. The scale, dimension or emphasis of the problems may differ but the general nature is extraordinarily similar to those at home. My great fear is that, in the pursuit of supermarket bargain prices for legal services, the independence and integrity of the profession may be undermined and the rights of the individual eroded. In speaking to lawyers it is not necessary for me to stress the importance to any nation or society of a competent, independent, and honest legal profession.

Importance of Communication

Perhaps one of the most important points made in different ways at the conferences is the need for communication at all levels. The need for the profession to communicate and respond to the media (although the response should be considered, it should not be delayed too much because the opportunity may then disappear); the need for the lawyer to communicate with and inform the client as to what is involved in the handling of the client's legal business including the basis of charge; the need for communication between members of the profession with each other and with their Law Societies or Bars; the need to communicate with other professions and organisations; and finally, (as suggested by Lord Chancellor Mckay) the need to communicate with one's self because at the end of the day in terms of spiritual and moral responsibility, this may be what will count the most. Communication is clearly one of the most important requirements of our profession – it can help to educate the public as to the role of the lawyer and the importance of the rule of law; it can help to inform ourselves, our clients and others with whom we deal in the course of our legal affairs and to avoid unnecessary misunderstandings.

Finally, there is a very heartening impression that the legal profession in all these jurisdictions is alive and well, and is fully aware of the challenges and problems that are being faced. There is an extraordinary high level of commitment by so many of our professions not merely in the service of their own profession and clients but also in the greater service to the public good. Indeed it is impossible not to feel a strong sense of admiration for the contribution and commitment of so many colleagues, who are clearly not motivated either by self interest or sectional interest, and at the same time a great sense of pride in belonging to the same profession.

In conclusion I wish to express my thanks to all the members of the profession for their encouragement during the past year and to say that it has been a great honour to serve as your President. My sincerest thanks also to the Vice-Presidents, to the Council and Committees, to the Director General and entire administration for their unfailing help and support at all times throughout the year. I also wish to extend my best wishes to my designated successor, *Adrian Bourke,* who, as this goes to press, is due to take up office on the 15th November. I am very grateful for his support as Senior Vice-President during the past year and know that the Society will be in capable hands under his leadership.

□

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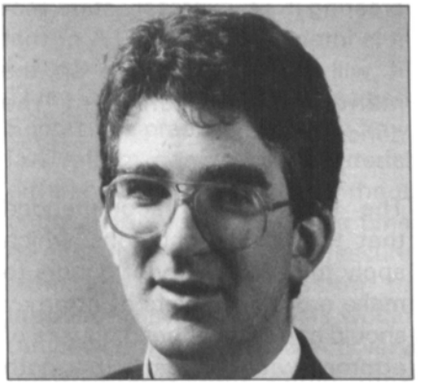
Old Age and Enduring Powers of Attorney

At 75, Mary, single, diabetic and living alone, was becoming increasingly forgetful and frail. Last Autumn, she suffered several falls and had spells in hospital and frequently failed to recognise familiar people or understand what was going on. By Christmas it was obvious that she could not manage alone and social workers arranged for her to enter a nursing home. Earlier in the year, you had, as the family solicitor, drafted a will which was executed by Mary. At the time Mary's nephew had asked you about the possibility of Mary becoming increasingly senile and he wondered whether a power of attorney or some such document could be prepared so that he could handle her affairs if she became mentally incapable. You pointed out that in Irish law a power of attorney is revoked automatically by insanity. You have just now been consulted by the nephew and have been explaining to him the difficulties and expense involved in wardship.

If the Oireachtas enacts the Law Reform Commission Report on Enduring Powers of Attorney (LRC 31-1989) the above scenario could be completely altered. Ireland is one of the few common law jurisdictions not to have reformed its law to allow for these enduring powers.



Ciaran O'Mara

By
Ciaran A. O'Mara.
BCL Dip EI

Power of attorney

A power of attorney is a document which appoints a person, called the donee or attorney, and invests him with power to act either generally or in a manner specified on behalf of the person who gives the power, called the donor. The law in this area is of common law origin and is regarded as a branch of the general law of agency. Solicitors will be familiar with the situation where a donor is going to be absent from Ireland and gives a power for the purpose of sale of property or the management of an investment. Power of attorney can of course be granted when the donor is not leaving the country but simply wishes to appoint somebody else to look after a particular transaction on his or her behalf.

At common law it is necessary for a donor to create a power of attorney by executing a deed. An Instrument creating a power and which provides that the donor cannot revoke the power within twelve months from the date of coming in to effect may be deposited in the Central Office of the High Court and memorials of such instruments may be registered in the Registry of Deeds under the Conveyancing Act, 1881. That Act also authorises an attorney to execute documents in his or her own name as well as in that of the donor. At common law a power of attorney is revoked automatically by certain events i.e. the donor's death, insanity, marriage or bankruptcy. It is also revoked on the expiration of the time for which the instrument was created or on completion of the specific transaction for which it was created.

Wardship procedure

At the present time a person who would like to deal with the possibility of his or her becoming incapable of managing his or her affairs may only hope that arrangements will be made in due course to have him or her made a ward of court. The wardship procedure is contained in the very old Lunacy Regulation (Ireland) Act, 1871. A person called a committee is appointed to look after the person of the ward while the President of the High Court takes charge of the property of the ward. In practice, a manager may be appointed over any trading or business concern to which the ward is entitled but there is no active management of any investments of the ward. A Committee may not deal in equities and has no power to actively manage an investment portfolio. Wardship involves a petition to the President of the High Court and requires medical evidence of total incapacity from two doctors and a medical visitor and service of such evidence on the prospective ward.

As the proportion of the population in the older age group increases, more people are likely to survive and become senile or develop Alzheimer's disease. The wardship procedure does not seem to be appropriate for modern conditions for many people of ordinary or modest means and there is a pressing need to reform the law on the lines of the Law Reform Commission Report.

Features of Enduring Powers of Attorney (EPAs)

The Law Reform Commission was concerned to strike a balance

between simplicity and protection. Following other Law Reform Commissions, the Irish Report recommends a requirement that an intention to create an EPA be evidenced in the instrument creating it, i.e. expressly state that it is intended to be an EPA or that it will come into effect on the mental incompetence of the donor.

The Commission recommended that the same conditions which apply to the capacity of donors to make ordinary powers of attorney should apply to enduring powers of attorney with the result that both minors and undischarged bankrupts would be able to create enduring powers of attorney. There would be no restriction on the number or attorneys who might be appointed. The attorney would be of full age and of sound mind and would not be a bankrupt. The Commission recommended that it should be up to the donor to specify in the instrument whether the attorneys were appointed jointly or, jointly and severally. Where the power was silent there would be a presumption that they were appointed jointly.

Witnessing

Under common law, powers of attorney are not required to be witnessed. There are, however, advantages in requiring an EPA to be witnessed:- it confirms the donor's identity, it helps to prevent forgery and ensures the absence of physical duress. It also impresses on the donor the gravity of the action and helps to prove the authenticity of the document for a third party. The Commission therefore recommended that there should be a requirement that the instrument creating an EPA be witnessed. While the Commission was against unnecessary formalities, it recommended that the donor's solicitor should be capable of acting as a witness but neither the attorney nor his solicitor should be capable of so acting. It was also recommended that there should be a statutory requirement that the donor should be advised of the wisdom of taking independent legal advice on the effect of an EPA before executing it and this should be evidenced in the instrument creating it.

While the Commission recommended that a standard form of EPA should be prescribed, it was not in favour of making the use of the prescribed form mandatory. As with a will, compliance with the requirements of the law would be sufficient. Failure to use the prescribed form would not disqualify the power of attorney from being effective. It was recommended however that there should be a standard form available which would contain explanatory notes in plain English. The donor would be able to limit the duration of the power but in the event of the donor becoming incompetent before the expiration of the specified time the EPA would not be allowed to lapse as this would defeat the purpose of the EPA. The donor would not be able to waive the special statutory provisions concerning the creation and use of an EPA which were aimed at his protection.

Registration

The Commission was against registration of the EPA at the time of execution. In England, the attorney is under a statutory duty to apply to the Court of Protection for registration of the EPA once he has reason to believe that a donor is becoming, or has become, mentally incapable. The English scheme provides for the compulsory notification of at least three of the donor's relatives by the attorney of his intention to apply for registration. He would also inform them of their rights to object if they wish. A list of relatives is set out in the English Enduring Powers of Attorney Act, 1985 and the attorney must choose in order of priority, class by class, as set out in the Act. The attorney must also notify the donor of his intention to apply for registration. In England, pending registration, and in the absence of any stipulation to the contrary, the EPA is in effect an ordinary power. This means that pending the determination of the application, the power is actually revoked but the attorney is given limited authority to act under the power that is, to maintain the donor and prevent loss to his estate. Pending registration, the attorney cannot disclaim the power until he has given valid notice of his intention to disclaim to the court. The position after registration in England is that (1) the donor may not revoke the power unless and until the court confirms their revocation, (2) no disclaimer of the power is valid unless and until the attorney gives notice of it to the court, (3) the donor may not extend or restrict the scope of the authority conferred by the instrument. The Irish Law Reform Commission strongly recommended that the English system be established in Ireland.

Authority and duties of the attorney

The Report recommends that where a general power is conferred, the law should provide that the attorney may act so as to benefit himself or any other person to the extent that the donor might be expected to provide for his or that person's needs. The Commission was also of the opinion that the duty of prudent management and that of a trustee were too onerous and that a duty of good faith would be a sufficiently reasonable and practicable one to impose on an attorney. The duty of the attorney to the donor would come into effect as soon as the attorney became aware of the power. At common law the attorney is under a duty to keep accounts and produce them to the donor. This is obviously of little protection against abuse if the donor is incompetent. The Commission recommended that the court would be empowered to look for accounts where it appeared reasonable to do so.

Substitution of attorneys and delegation of powers.

The donor may of course substitute attorneys before he becomes mentally incompetent. The Commission believes that the donor should be entitled to appoint a substitute in the power itself and the court would be empowered to substitute an attorney in the event of there not being a full and competent attorney. Similarly to ordinary powers, the EPA attorney would have implied power to delegate any of his functions which were not such that the donor would have expected the attorney to attend to personally. Any warrant or power to delegate would have to be provided for expressly in the instrument.

Termination and revocation of EPAs

All the other jurisdictions provide for mechanisms whereby the court may terminate an EPA. The donor would be entitled to revoke the power at any time until his imcompetency. The Commission recommended that the court should have power to terminate an EPA only where there was evidence that the power was not being operated properly. The Commission concluded that overall the English system was a suitable one to implement in the Irish jurisdiction and they so recommended.

What has been the English experience? Interested organisations for the aged see enormous advantages in EPAs. There are cheap to administer and enable donors to plan in advance for possible senility. Solicitors are being encouraged to suggest to clients approaching old age that they execute EPAs as a matter of routine, often at the same time as making a will. Around thirty thousand EPAs were traced in 1989. Approximately two thousand were registered in that year. A typical donor was a woman aged between 80 and 90. More than sixty per cent of the recipient attorneys were related to donors. The English Court of Protection has been criticised for being complex, slow and remote and the English Law Society has proposed that the Court be made more accessible possibly by means of local tribunals. Another weakness in the EPA procedure is that no one knows whether registrations are taking place when appropriate. Unregistered EPAs may be perpetuated long after the donor had lost capacity. Recently the *London Independent* stated that "there was also a clear tension between operating a system that is simple, cheap and convenient, and the need to prevent abuse by self-interested attorneys or disruption by officious third parties. No technical or medical test is applied to mental capacity on registration. The donor's attorneys apply when they themselves consider the donor to have become incapacitated". The answer is of course that additional resources will be needed and an overall examination of the law dealing with the mentally disabled is required. This does not however take away from the immediate impact and relief that a system of EPAs would bring to many elderly people in Ireland.

Conclusion

This Law Reform Commission Report is a practical example how law reform can make a material difference to the public without imposing any great cost at a time of economic stringency. Pressure from the legal profession to introduce a system of EPAs would be viewed by the public in a very positive way and could only improve our public relations. Finally, enduring powers of attorney have been perceived by many of our English counterparts as a useful new source of fee income. Visions of "Make a Will and an Enduring Power of Attorney week" should move the more cynical of our colleagues. □

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MICHAEL FORDE

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The Development of Judicial Interpretation of Articles 41 and 42

In this article *Angela O'Reilly* traces the development of judicial interpretations of Articles 41 and 42 of the Constitution that deal with family rights. The article is based on a lecture delivered last February in memory of the late *Antonia O'Callaghan* BL.

By
Angela O'Reilly, BL

Before we examine Articles 41 and 42, it is appropriate that we should look at the legal status of the family based upon marriage before the enactment of the 1937 Constitution and indeed before the enactment of the 1922 Constitution. The common law espoused the paramountcy of paternal rights, or indeed more correctly the paramountcy of paternal rights. The father had a duty to protect any minor child of his and this right was absolute, even against the mother. In certain cases where the father's conduct would seriously endanger the child's health or morals the mother would be awarded custody of the child. At common law, therefore, the father was entitled to custody until the child was 21. After his death, the mother was entitled.[1]

A growing jurisprudence developed in the Chancery Courts whereby it was held that the welfare of the child was the first and primary consideration in any dispute concerning a child and a father could lose his rights if it would be contrary to the child's interests to allow the father exercise those rights. By the end of the 19th century the Courts of Chancery were quite willing to exercise their jurisdiction to award custody of a child to its mother if there was any threat of physical or moral harm to the child from the father. Also, if a father abandoned or abdicated his rights once, for example if he deserted his family, he would not be allowed arbitrarily to reassert his rights if by so doing he would endanger the child's welfare. In *Re Eliot*[2] and in *Re O'Hara*[3] the Irish Courts decided that the Court may supersede the rights of the parents over the child if the circumstances of the case dictated that the moral, mental and physical welfare of the child warranted superseding the parental rights. Thus the judicial perspective before the enactment of the 1922 Constitution concerning the resolution of parental/child conflicts in areas of family life affecting the child, was one dominated by equitable principles.

The enactment of the 1922 Constitution did not effect any change in this judicial attitude which continued in the same vein as it had done in the late 19th and early 20th century. The reason, perhaps, for this lack of change lay in the fact that there were no provisions concerning the rights of the family in the 1922 Constitution. However, in 1937, Articles 41 and 42 of the Constitution heralded a profound change in judicial attitude.

The 1937 Constitution

In providing exclusively for protection of the family unit, the 1937 Constitution differed greatly from the Constitution of the Free State.[4] Personal rights, such as habeas corpus, freedom to practise one's own choice of religion, freedom of association, the right to free elementary education and the inviolability of the dwelling, were protected by the 1922 Constitution. However, there was no reference in the provisions of the Constitution to "equality", "due process", or to the "family".

When Mr. de Valera came to draft the "Fundamental Rights" provision of Bunreacht na hEireann, he chose that the State should expressly vindicate the individual's right to equal treatment before the law and the "personal rights" of the citizen. The "family" is recognised as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law. One "inalienable" right is enumerated. This is the right of parents to educate their children. This detailed recital of fundamental rights derived from both the natural rights philosophies and, more particularly, from the natural law doctrine expounded by St. Thomas Aquinas.

St. Thomas Aquinas lived in the 13th century. He espoused the classical natural law doctrine which became a foundation stone of the Catholic Church. He argued in support of the existence of a hierarchy of law derived from God in which human law had a rightful but inferior place. Early Christian thinkers had argued that social and political institutions were the result of sin and its divine remedy. St. Thomas refuted this argument by submitting that sin does not affect the existence of natural values which existed independently of it. He argued that natural law doctrine found a practical mode of expression in politics. The State has a duty to facilitate the fulfilment of the individual's duty to follow natural law precepts. The whole tenor of the 1937 Constitution reflects the employment of a social contract to protect the individual's natural rights. The people enacted the Constitution which Constitution created modes of government and the Government is bound, through the Constitution, to vindicate the fundamental rights of the citizen. Before we look at the Aquinian thought present in the substance of Article 41.1 and Article 42, it is interesting to look at the background to the format and layout of the Articles.

The Provisional Government established a committee to draft a Constitution in 1922. Draft A, Draft B and Draft C were submitted by the Committee in 1922. Draft B eventually became the 1922 Constitution. Draft C was composed by Professor Alfred O'Rahilly. However, it appears to have had an influence on the drafting of Bunreacht na hEireann. Articles 52 and 54 of Draft C read:

"Family, Education and Religion:

Article 53 (1)
Marriage, as the basis of family life and national wellbeing, is under the special protection of the State; and all attacks on the purity, health and sacredness shall be forbidden.

(2) The Irish State shall recognise, as heretofore the inviolable sanctity of the marital bond.

(3) The civil validity of religiously solemnised marriages shall be recognised, provided that the details of registration prescribed by legislation are duly complied with.

Article 54 (1)
Parents have the right and duty of rearing and educating their children so as to make them good citizens. The State has the right of supervision. Parents must provide their children with education at least up to the completed 14th year of age. This obligation shall be determined in detail by law.

(2) Children deprived of parental care have the right to the help and protection of the State in the limits fixed by law. A judicial decree is necessary to deprive parents of their rights over the child".

It would be possible to contend that the basic textual content in the above i.e. the importance of protecting the family, the right and duty of parents to educate their children, is present in Articles 41 and 42. However, Aquinian philosophy would hold that the family was a nucleus deserving not only of protection from the State, but of a legal position which protected its rights and duties from encroachments by the positive law. Thus we have the terminology "inalienable", which was defined in *Ryan -v- Attorney General*[6] by Kenny J. as that which cannot be transferred or given away, and "imprescriptible" also defined by the learned Judge as that which cannot be lost by the passage of time or abandoned by non-exercise.[7] It is now pertinent to examine the case law which developed judicial interpretation of the Articles. In effect, the judiciary had the task of integrating this natural law terminology into positive law.

Equitable principles -v- Articles 41 and 42

In *Re O'Connor,*[8] decided in 1946, Gavan Duffy J. considered the effect of Articles 41 and 42 on previously employed equitable principles, as follows:-

> ". . . under our own Constitution, wherein very definitely the family is recognised as a fundamental unit of society and as a moral institution with imprescriptible rights [this judge-made theory] will have to reconsidered under that new light, because no inconsistent doctrine of the old Courts of Equity can prevail against the principles of the Constitution. . . where our children are concerned, we will have to re-examine . . . certain . . . of our problems with great care under the guidance of the Constitution of Ireland."[9]

The judiciary, however, continued to employ equitable principles in child custody cases despite these dicta.

In *Re Frost*[10] decided in 1947, the main issue was the question of the religion in which a child would be raised. However, interesting dicta emanated from the case concerning Articles 41 and 42. The Chief Justice found that he could not accept the proposition that:

> "the rights of the parents, or of the surviving parent, are absolute rights, the exercise of which cannot in any circumstances be controlled by the Court . . . I am satisfied that the Court has jurisdiction to control the exercise of parental rights but in exercising that jurisdiction it must not act upon any principle which is repugnant to the Constitution."[11]

It is clear from these dicta that the equitable principle of the paramountcy of the child had come into conflict with Articles 41 and 42.

Three years later, *Re Tilson*[12] was decided, and Gavan Duffy J's dicta in this judgment proved to be a forceful initiation of Articles 41 and 42 into Irish Law. Further, his Lordship stated of the Articles:

> "The Irish Code marks a new departure from time honoured precedents which are not ours . . . Articles 41 and 42, redolent as they are of the great Papal encyclical *in pari materia,* formulate first principles with conspicuous power and clarity . . . The strong language of these Articles arrests attention . . . for religion, for marriage, for the family and for the children, we have laid our own foundations . . . [T]he confined philosophy of law bequeathed to us by the 19th century is suspended by Articles which exalt the family by proclaiming and adopting in . . . the Constitution . . . the Christian conception of the place of the family in society and in the State."[13]

The Supreme Court did not endorse the dicta of the High Court Judge. However, the Court did recognise that both parents had the right to determine the child's religion.[14] Previously the common law had dictated that it lay within the father's authority only to determine his child's religion.[15]

Articles 41 and 42 were further cemented into Irish jurisprudence in *Re O'Brien* decided three years after the Tilson case. The facts of the case were that a father sought custody of his child. The child had been in the custody of its grandmother for two years. His mother had died and the father had become a patient in a sanatorium. When he left the sanatorium he remarried and sought custody. Counsel for the respondent argued that the welfare of the child demanded that she be left with her grandmother. O'Byrne J. in the Supreme Court, replied as follows:-

> "These considerations are quite independent of the constitutional provisions which seem to me to be of paramount importance in this case"[16]

Referring to Article 42.1 he continued:

> "This seems to contemplate and require that the children should be members of the family and attached to the parental home. The sanctity of the family and enduring existence of parental authority seem to me to be guaranteed by these provisions. Articles 41 and 42 of the Constitution constitute the fundamental law of this State and must be taken as over-riding any pre-existing law inconsistent therewith".[17]

The child was returned to the father. The case, however, clearly shows the conflict between the potential conflict between parental rights and the child's where the parents had *not* been culpably unmindful of their duties and the child's welfare lay outside parental custody.

In *Re J.*[18] decided in 1966 an illegitimate child was placed for adoption. An adoption order was made but was quashed. The parents married and the child was thus legitimated. She was no longer eligible for adoption and the parents sought custody. The adopters argued that under section 3 of the Guardianship of Infants Act, 1964, the child's welfare was better served with them. Section 3 of the 1964 Act states that where in any proceedings before any court, the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held in trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration. A divisional High Court held that the child should be returned to the parents. Teevan J. and Henchy J. observed that if section 3 purported to diminish parental control over children, then the question of its constitutionality would arise. The Court did not think that the child's welfare would not be served in the parents' custody. However, the case makes abundantly clear the difficulty in reconciling the equitable paramountcy of the child principle expressed in section 3 of the 1964 Act and the parents' rights over their child enunciated in Articles 41 and 42.

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Balancing rights of parent to child

It is this writer's submission that the tide of judicial thought began to turn towards balancing the rights of parent to child in 1979.[19] In *G. -v- An Bord Uchtála*[20] the constitutional right of an unwed mother to the custody of her child was analysed.

The Supreme Court held that the mother relinquished this right at placement of the child for adoption and not at the later stage of the signing by the mother of the consent to the making of the adoption order.[21] Finlay P. (as he then was), however, in the High Court, held that the right was relinquished only at the signing of the consent to adoption. His lordship reasoned that the mother's constitutional right to custody of her child demanded that her placed child be returned to her unless the "overwhelming interests" of her child demanded that the child remain with the adopters, or unless the mother's refusal to consent to the adoption was capricious or irresponsible. The judgment is important from the point of Articles 41 and 42 because Finlay P. was prepared to balance the mother's constitutional rights, albeit under Article 40.3, against the child's. The mother's right would not be satisifed if the "overwhelming interests" of the child demanded differently. This reasoning, encompassing a "balancing" approach towards constitutional rights, would be employed eventually in the context of Articles 41 and 42.

In 1980. *P.W. -v- A.W. & Ors.*[22] was decided. The case involved an attempt to reconcile the conflict between parental rights and the child's welfare. In *P.W. -v- A.W.* a husband and wife had four children. Upon the birth of the fourth child, the mother permitted her husband's sister to look after the child as she had bouts of mental illness, for which hospitalisation was necessary. The arrangement began as a temporary one but became permanent, due to the mother's incapacity to fend for her child. Two years after the placement, the parents separated and the mother obtained custody of the three elder children. The aunt had custody of the youngest and the mother sought custody of this child.

Ellis J. refused the mother custody. The child had been integrated into her aunt's home, and evidence was heard as to the detrimental effect any change in custody would have on the child. The learned judge noted that:

> "[T]here is nothing in the Constitution to indicate that in cases of apparent alleged conflict, the rights of a parent always have to be given primacy . . ."[23]

Later in the judgment, he stated that:

> "If however, there is a conflict between the constitutional rights of a legitimate child and the prima facie constitutional right of its mother to its custody, I am of the opinion that the infant's rights, which are to be determined by regard to what is required for its welfare, should prevail, even if its welfare is to be found in the custody of a stranger . . ."[24]

It may be noted that there is nothing in the Constitution to indicate that children's rights should be given primacy over parental rights. However, the judgment is clearly indicative of the changing trend in judicial attitude. The learned judge was seeking to circumvent the absolutist support for parental rights present in Articles 41 and 42.

This trend was further endorsed in *Tormey -v- The Attorney General*[25] and *Murray -v- the Attorney General*,[26] two judgments handed down in 1985. The Tormey case did not concern any question of the rights of the family, but Henchy J. handed down interesting dicta on the wisdom of a literal mode of constitutional interpretation in the case. The learned judge referred to the need to adopt a construction of the Constitution which would "lead to the smooth and harmonious operation of the Constitution",[27] and to avoid a strict construction which would "allow the imperfection or inadequacy of words used to defeat or prevent any of the fundamental purposes of the Courts."[28] In *Murray -v- the A.G.* the plaintiffs were imprisoned married persons who asserted that their right to procreate was protected by Article 41 of the Constitution.[29]

"The learned judge referred to the need to adopt a construction . . . which would 'lead to the smooth and harmonious operation of the Constitution' "

Counsel for the plaintiffs relied on the terminology of "inalienable" and "imprescriptible" employed in Article 41 to endorse his clients' submissions. Costello J. replied:

> "[P]articular reliance is placed upon Article 41, for it is said that there is a hierarchy of constitutionally protected rights and this right shows how high in the scale of values the rights claimed in this case should be placed."[30]

His Lordship stated that the success of the plaintiffs' argument did not depend upon "establishing that the right to beget children is protected by Article 41 rather than Article 40."[31]

In what is a revealing dictum as to judicial perspective of the purpose of the fundamental rights Articles, his Lordship said that "inalienable" and "imprescriptible" are words used to describe the family's rights and neither of those adjectives was used to describe other personal rights in the Constitution. The Constitution, his Lordship added, does not confer on citizens human rights, but in effect recognised these rights as "antecedent to all positive law." His Lordship pointed out that although no reference is made in Article 41 to any restrictive power over the inalienable and imprescriptible rights of the family to integrity as a unit group, it is obvious that the State *can* validly restrict these rights for example, when its laws allow a man to be barred from the family home. His Lordship continued:

> "[I]n construing the Constitution, the Courts should bear in mind that the document is a political one as well as a legal one and whilst not ignoring the express text of the Constitution, a purposive approach to interpretation which would look at the whole text of the Constitution and identify its purpose and objectives in protecting human rights is frequently a desirable one."[32]

Costello J. recognised the spirit of Articles 41 and 42 in his judgment. The learned judge furthered the judicial quest to reconcile the absolutism of the Articles to real life situations. The enactment of the Articles had brought about a pro parental tendency on the part of the judiciary. In the seventies the judiciary had begun to reject this approach. By 1985, the nemesis of literal interpretation had arrived. The climax of this evolving judicial approach occurred in *K.C. and A.C. -v- An Bord Uchtála*.[33]

In this case, a natural mother placed her child in foster care a week after the birth. The child was placed for adoption subsequently. The natural parents married and applied pursuant to the Legitimacy Act, 1931 to have the infant's birth re-registered. The mother refused to consent to the adoption order being made and the adoptive parents sought to dispense with her consent as is their legal entitlement.[34] The natural parents sought custody of the child. Lynch J. put a stay on the re-registration would make the child non-eligible for adoption. The adoptive couple sought to dispense with the mother's consent to the adoption under section 3 of the Adoption Act, 1974. The learned High Court judge did not dispense with the mother's consent because in the case of a legitimated child, both the father's and mother's consent to the initial placement with the adoptive couple is necessary and the father had not consented. The issue then became a custody issue on the basis of section 3 of the Guardianship of Infants Act, 1964. As noted above, this section states

that the child's welfare is to be the paramount consideration in any dispute concerning the child. There was evidence that the child was "clearly bonded"[35] to the adoptive parents having been in their custody for two years. Lynch J. gave custody to the adoptive couple subject to access by the natural parents. On appeal, the only question to be decided was whether the parents or the adoptive couple should have custody of the child. The Chief Justice delivered the judgment of the Court. His lordship said:

> "The child, being the child of married parents, and now legitimated, had rights under the Constitution as a member of a family. These were:
>
> 1. (a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41.1)
>
> (b) to protection by the State of the family to which it belonged (Article 41.2).
>
> (c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42.1).
>
> 2. The State could have implemented the role of the parents in providing for the child's educational rights under Article 42 only in exceptional circumstances (Article 42.5).
>
> 3. The 1964 Act must, if possible, be interpreted consistently with the Constitution."

So where, as here, there was a custody conflict between the Article 41/Article 42 family and a third party, section 3 must be construed as "involving a constitutional presumption that the welfare of the child which is defined in section 2 of the Act . . . is to be found within the family unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence established an exceptional case where the parents have failed to provide education for their child for moral or physical reasons."[36] Thus the "compelling reasons" test was created. In addition to the exceptional case, where, if the parents failed to educate their child, they would lose custody of the child, the parents would also lose custody of the child if "compelling reasons" were presented to the Court as to why the child's welfare did not lie in the parents' custody.

The Supreme Court did not enunciate an example of a "compelling reason".[37]

The analogy between the reasoning of Finlay P. in *G. -v- An Bord Uchtála*[38] and the Supreme Court in the above case is clear. Finlay P found that the constitutional right of a child to have his welfare accommodated would be satisfied in the mother's custody unless the "overwhelming interests" of the child demanded otherwise. In the *K.C.* case, the Supreme Court (Finlay C.J. giving the judgment of the Court), decided that the constitutional right of a child to have his welfare accommodated would be satisfied in his parents' custody unless "compelling reasons" were established as to why this was not the case, or unless an "exceptional" case under Article 42.5 existed. Thus, the parents' rights over their child under Articles 41 and 42 were balanced against the child's rights to protection of his welfare.

. . . the Supreme Court decided that the Constitutional right of a child to have his welfare accommodated would be satisfied in his parents custody unless "compelling reasons" were established . . .

Parental duty to cater for personal rights of child

In 1988, the Supreme Court decided the case in *Re Article 26 of the Constitution and the Adoption Bill (No. 2)* 1987.[39] The Bill provided for involuntary adoption in restricted circumstances. The Bill pertained to the adoption of legitimate children, legitimated children and those children born out of wedlock. The reason as to why the Bill was referred to the Supreme Court lay in the uncertain validity of providing for the adoption of legitimate children. The Dail expressed the fears of its 1951 predecessors who had debated the 1952 Adoption Act. The protection afforded by Articles 41 and 42 to married parents threatened the validity of any legislation providing for the adoption of legitimate children where the parents of these children were still alive.[40]

Stringent conditions are laid down in the Act as to when the legitimate child becomes eligible for adoption. In effect, the Court, before authorising the Adoption Board to make an order concerning a legitimate child, must be satisfied that:

1. The parents have failed in their duty for physical or moral reasons for a continuous period of not less than twelve months immediately preceding the time of the making of the application.

2. Such a failure will continue without interruption until the child attains 18 years of age.

3. Such failure is an abandonment on the part of the parents of all parental rights towards their child, and by reason of the failure, the State "as guardian

of the common good''[41] should supply the place of the parents.

How did the Court reconcile the forfeiture of parental rights with the content of Articles 41 and 42?

Counsel arguing against the constitutionality of the Bill submitted that the provisions of the Bill relating to adoption:

(a) represented an attack upon the constitution and authority of the family to which the child belonged:

(b) represented a fundamental attack upon the authority of that family unit, eliminating as it must, the authority of the family and its members over the child;

(c) effectively extinguished the child's right to belong to his particular family unit, which right, it was submitted, was inalienable and imprescriptible;

(d) extinguished other rights the child possesses as a member of his family, namely the right to the society of the other members of the family unit and the right to be educated by the family group to which he belongs. These rights, it was submitted, were inalienable and imprescriptible;

(e) extinguished the parents' inalienable right to educate and have custody of their children.

Counsel for the Attorney General, arguing for the constitutionality of the Bill, submitted that:

(a) Article 42.5 which allowed the State, in exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, to endeavour to supply the place of the parents by appropriate means, was reflected in the Bill.

(b) The State has the duty and right to protect and to vindicate the rights of a child who by reason of its parents' failure has lost, and is likely permanently to lose, not only its rights as identified in Articles 41 and 42 of the Constitution, but also other personal rights which derive from the Constitution. Adoption, it was submitted, was the method necessary to afford that protection and vindication.

The Court held that Article 42.5 of the Constitution is not confined in its application to the duty of parents to provide education for their children. The Article extends to the parental duty to cater for the other personal rights of the child. The Court also held that under Article 40.3, the State is obliged to vindicate the personal rights of the child in so far as same is practicable. On the question of the ''inalienable'' and ''imprescriptible'' rights possessed by the family under Article 42, Finlay C.J. ruled as follows:

> ''The Court rejects the submission that the nature of the family as a unit group possessing inalienable and imprescriptible rights, makes it constitutionally impermissible for a statute to restore to any member of an individual family constitutional rights of which he had been deprived by a method which disturbs or alters the constitution of that family if that method is necessary to achieve that purpose. The guarantees afforded to the institution of the family by the Constitution with the consequent benefit to the children of a family should not be construed so that upon the failure of that benefit it cannot be replaced where the circumstances demand it, by incorporation of the child into an alternative family.''[42]

The Court held that the only limitation upon supplying the place of the parents lay in the obligation upon the State to have due regard for ''the natural and imprescriptible rights of the child.''[43] Thus, the Court upheld the constitutionality of the Bill. It is clear upon reading the judgment that the words 'inalienable' and 'imprescriptible' no longer proved to be as unassailable as they once were.

In effect, one cannot reconcile the dicta of the Supreme Court in *Re Doyle*[44] (which was cited to the Court during the case but which was not alluded to in the judgment) with that of the 1988 Court deciding the constitutionality of the Adoption Bill. In *Re Doyle,* the following dicta emerged:

> ''It seems . . . to this court that the makers of the Constitution by the provisions of Article 42 and particularly by ss 1 and ss 2 of this Article deliberately preserved the common law principle and have put it beyond the reach of ordinary legislation.''[45]

''The upholding of the Adoption Bill 1987 as constitutional is further evidence that judicial interpretation now balances the parental rights against the child's rights in the context of Articles 41 and 42.''

The common law principle being referred to was that a parent could not deprive himself of his rights to custody of his child unless by gross misconduct. In effect, the judiciary began with a literal interpretation of the natural law terminology present in the Articles. Thus a judicial tendency towards the supremacy of parental rights developed. As time passed, attempts were made to reconcile parental and child's rights resulting sometimes in a pro-parental decision (*Re.; J*)[46] and sometimes in a pro-child decision (P.W. -v- A.W.).[47] Eventually, the ''overwhelming interests'' test came about (*G. -v- An Bord*

Uchtála).[48] The upholding of the Adoption Bill 1987 as constitutional is further evidence that judicial interpretation now balances the parental right against the child's rights in the context of Articles 41 and 42. Could one now say that the difficulties of interpreting natural law terminology in a positivist context have been reconciled by the judiciary in the context of the family based upon marriage?

NOTES

1. See *Bromley, Family Law,* 5th Ed. Chp. 10, Parental Powers and Duties, 298 et seq. Also Delany, "The Custody and Education of Children: a Changing legal concept in Eire" (1952) Ir. Jur. 17.
2. (1893) 32 L.R. I.R. 504.
3. [1900] 2 I.R. 232.
4. See Brian Farrell "The Drafting of the Irish Free State Constitution: III" Vol 6. Ir. Jur. (1971) 111.
5. See Note 4. I am indebted to the author for information regarding Drafts A, B, and C of the 1922 Constitution gleaned from his Article.
6. [1965] I.R. 294.
7. At page 308.
8. (Unrep) H.C. 31 July, 1946.
9. See LL. M. thesis of G.M. Golding, presented to U.C.D. in 1979. This excerpt is reproduced at 445.
10. [1947] I.R. 3.
11. At page 28.
12. [1951] I.R. 1.
13. At page 14.
14. See Murnaghan J. at page 32 where his Lordship says "Article 42 recognises a joint right and duty in them to provide for the religious education of their children."
15. See Note 14.
16. At page 9.
17. At page 10.
18. [1966] I.R. 295.
19. See *G. -v- An Bord Uchtála* at note 20.
20. [1980] I.R. 32.
21. When the mother of a child born outside wedlock proceeds to have her child adopted, there are two consents necessary to the adoption. The first is her consent to the placing of the child with adoptive parents, the second consists of her consenting to the adoption order being made which order finalises adoption of the child.
22. April 1980, H. Ct. Unrep. Ellis J.
23. At page 70.
24. At page 71.
25. [1985] I.R. 289.
26. [1985] I.R. 532.
27. Supra. at p. 379.
28. Supra at 379.
29. The plaintiffs also asserted that their right to procreate was protected by Article 40 of the Constitution.
30. At page 545.
31. At page 547.
32. At pages 547 and 548.
33. There were four decisions in this case. Two were delivered by Lynch J. in the High Court in August and October of 1984 followed by a Supreme Court decision in March of 1985. Lynch J. delivered the final judgment in May, 1985. The first three judgments are to be found in [1985] I.L.R.M. 302, and the last in [1986] I.L.R.M. 65.
34. S. 3 Adoption Act, 1974.
35. See the second Judgment of Lynch J. in *K.C. & A.C. -v- An Bord Uchtála*, supra. at 138.
36. At page 317.
37. The Court did not enumerate a compelling reason or compelling reasons. Lynch J. could not find any such reasons not to return the child into the parents' custody when the case was returned to his Lordship.
38. See Note 20.
39. [1989] 1 I.R. 656.
40. See Dáil Debates, Vol 372, 5 May 1987, Deputy Shatter 1022 at 1030. Also D.D. Col 372, 12 May 1987, Deputy McCartan, 1647 at 1648.
41. Interestingly, an Aquinian tendency appears in these words.
42. At page 12 of the judgment of the Court (Unreported, 26th July 1988).
43. Page 13 of the judgment.
44. Unrep. Dec. 1955, Sup. Ct.
45. Supra at note 44.
46. See Note 18.
47. See Note 22.
48. See Note 20.
49. See Note 33.

Law Society – Solicitor

A vacancy has arisen for a solicitor in the Directorate of Professional Services in the Law Society. The appointee will be responsible for handling all matters in relation to the winding down of solicitors' practices that have ceased to trade. The ideal candidate will have experience in the administration of solicitors' practices, experience of general practice, good interpersonal skills, and the ability to work under pressure.

The post is based in Dublin but will involve some travel. Persons under 35 years of age are unlikely to have sufficient experience for the post. The position is full-time and a contract of one year is envisaged initially.

Applications should be sent to:-
The Director General,
C/o The Law Society,
Blackhall Place,
Dublin 7,

by Friday, 6 December, 1991.

Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.
1st day of August, 1990.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

Land Certificates

Denis and Anne Neary, Bangor Erris, Ballina, Co. Mayo. Folio: 40024; Land: (1) Srahanarry, (2) Srahanarry (An undivided moiety); Area: (1) 9.245 acres, (2) 154-3-30. County: **MAYO.**

Michael McGarry, Folio: 82 closed to 14645; Land: (1) Drumgeaglom, (2) Drumhierny; Area: (1) 17a2r34p, (2) 9a2r12p. County: **LEITRIM.**

Francis Robert Tyer, Folio: 9776; Land: (1) Annacrivey and (2) Annacrivey; Area: (1) 35.025 acres and (2) 5a1r35p. County: **WICKLOW.**

William O'Neill, Castleroberts, Adare, Co. Limerick. Folios: 15450, 15449 and 20461; Land: 15450 – Fanningstown, 15449, 20461 – Castleroberts; Area: 15450 – 37a3r0p, 15449 – 1a2r0p, 20461 – 1a2r0p. County: **LIMERICK.**

John Francis Colreavy, Drumshanbo, Co. Leitrim. Folio: 12017 closed to folio 18901; Lands: Annaghmore, Co. Leitrim; Area: (1) 30a2r0p, (2) 1a0r34p. County: **LEITRIM.**

Eileen McDonagh, Castleblakeney, Ballinasloe, Co. Galway. Folio: 1822; Land: Knockarasser; Area: 50a3r10p. County: **GALWAY.**

Bridget Lafferty, 101 Home Farm Road, Drumcondra, Dublin. Folio: 563L; Lands: 101 Home Farm Road situate on the north side of the said road in the Parish of Clonturk and District of Drumcondra. County: **DUBLIN.**

Dermot Anthony Canavan and **Mary Catherine Canavan,** 9 Carrick Court, Portmarnock, Co. Dublin. Folio: 3621F; Land: Property situate in the Townland of Carrickhill and Barony of Coolock. County: **DUBLIN.**

Patrick Rooney (deceased), Folio: 52834; Land: (1) Creggaun, (2) Rathroeen, (3) Farrandeelion; Area: (1) 21a2r20p, (2) 7a2r20p, (3) 0a2r0p. County: **MAYO.**

Mary Bligh, Derrylahan, Cloonfad, Ballyhaunis, Co. Mayo. Folio: 31691. County: **ROSCOMMON.**

William Edward George Bradshaw, Folio: 2636R; Land: Townland: Blanchardstown, Barony: Castleknock, Plots of ground with buildings thereon in the village of Blanchardstown on the West side and the North East side of the Road leading to the village of Mulhuddart. County: **DUBLIN.**

Marie Ledwith, Flat 5, Eaton Brae, Orwell Road, Rathgar, Dublin 6. Folio: DN076456L; Land: Plan: 385. Being Flat 5 on the ground floor of Newtown Court Apartments situate on the Southside of Orwell Road, in the District and Parish of Rathfarnham. County: **DUBLIN.**

Michael McGarry, (deceased), Folio: 12378; Land: Rathbawn (Part); Area: 5a2r31p. County: **MAYO.**

Rohan Industrial Estates Ltd. Folio: 37697F; Land: Ballyfermot Upper, Barony of Uppercross. County: **DUBLIN.**

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SOLICITOR qualified 1978, wide experience including litigation. Not wishing to commence as a sole practitioner seeks interesting career appointment or partnership. Reply to Box 85.

Lost Wills

CURTIN, DAVID, (otherwise David Patrick) deceased, late of Boola Bweeing, Mallow, Co. Cork. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on 31 August, 1991, please contact Burke, O'Riordan & Co., Solicitors, Washington House, 33 Washington Street, Cork.

FLYNN, JAMES, (deceased), late of Bridgefield House, Kilworth, Co. Cork. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 23rd day of September, 1991 at Blackrock Clinic, Co. Dublin, please contact Messrs. John Molan & Sons, Solicitors, 57 Lower Cork Street, Mitchelstown, Co. Cork. Telephone: (025) 24543/24118.

LYNCH, MARTIN, deceased, late of Cappacannaun, Cloonusker, Scariff, Co. Clare. Would anybody have any knowledge of the whereabouts of a will of the above named deceased who died on 19 March, 1991, please contact Messrs. O'Sullivan & Hutchinson, Solicitors, Portarlington, Co. Laois. Telephone: (0502) 23182.

NOCTOR, MARY, late of 12 Forth Road, East Wall, Dublin 3, widow, will anyone having knowledge of the whereabouts of the will of the above deceased who died on the 23 February, 1991, please contact Brian Devaney, Solicitor, Devaney & Ryan, 53 North Strand Road, Dublin 3.

MEEHAN, FATHER DENIS, deceased, late of Benmore, Ballincurra, Limerick and formerly of Holy Rosary Presbytery, Aintree Lane, Old Rowan, Aintree in the County of Lancaster and Liverpool. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 30th day of January, 1991, please contact Messrs. Murray Sweeney, Solicitors, 87 O'Connell Street, Limerick. Reference LC. Telephone 061-317533.

PHELAN, JOHN, late of 99 Clanranald Road, Donnycarney, Dublin 5, groundsman, deceased. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on 16 July, 1989, please contact Liam Lysaght & Co., Solicitors, 1a Lower George's Stree, Dun Laoghaire, Co. Dublin. Telephone: 2806655.

McANALLY, ROISIN, deceased late of 11 Elm Park, Blackrock, Dundalk. Will anybody having knowledge of the whereabouts of a will of the above named deceased who died on October 1, 1991, please contact Messrs. Daniel J. Reilly & Co., Solicitors, Trim, Co. Meath. Tel: (046) 31206.

KEIGHERY, JOSEPH, deceased late of 15 New Avenue, Rahoon Road, Galway. Do you have the last will of the above mentioned who died on the 13 day of October, 1991? If so, please contact Tony Taaffe & Co., 1 Main Street, Finglas, Dublin 11. Phone 344959.

STAFFORD-O'BRIEN, ROBERT GUY, (deceased). Would the solicitors, trustees, or assigns, of the above formerly of Blatherwycke Park, Northants, who died in 1990 in Ireland please contact The Manorial Society of Great Britain, 104 Kennington Road, London SE11 6RE (phone 071-735-6633; Fax: 071-582-7022) regarding Manorial Rights in England that may still vest in the family. Reasonable disbursements in answering this inquiry will be met.

Miscellaneous

FOR SALE – Dictaphone Dual Display Word Processing System including Twin Disk Central Processing Unit, Communications, Configuration, two A4 size Screens, two Gas Plasma Keyboards, Heavy Duty Diablo Printer, sound proofing fan-controlled printer hood, box of discs, box of printer ribbons, all plugs and cables, full service record. (Power Supply Unit in CPU needs repair) £750.00 the lot. Frank Lanigan Malcomson & Law, Court Place, Carlow.

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FOR SALE Complete set of *Weekly Law Reports* 1953-1990 (unbound), thin paper edition *English Law Reports* 1953-1970 (unbound). Offers to Box 94.

INSOLVENCY
I act for a client who submitted a complaint to the Ombudsman, against the Department of Labour for allegedly not advising him, within 18 months of an award, that payment could only be made from the Insolvency Fund if a liquidator was appointed within 18 months of the award. My client understands that a number of similar cases were submitted to the Ombudsman and that my client's case was to be decided before a decision was made on the other cases. My client is anxious to meet with others who submitted complaints with a view to discussing future action/sharing of legal costs etc. Replies to Box No. 92.

ENGLISH AGENTS: Agency work undertaken for Irish solicitors in both litigation and non-contentious matters – including legal aid. Fearon & Co., Solicitors, 12 The Broadway, Woking, Surrey SU21 5AU. Tel: 03-0483-726272. Fax: 03-0483-725807.

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 85 No. 10 Dec. 1991

The President of the Law Society for 1991/92, Adrian P. Bourke, and his wife, Ruth, with their family; back row – Elizabeth, James, Catherine, Robert; front row – Rebecca, Jane and Richard.

- Law Society Council and Committees 1991/92
- Equal Treatment, Married Women and Social Welfare Rights
- Valuation for CAT and Stamp Duty Purposes
- Law Society Recommends Comprehensive Scheme of Civil Legal Aid

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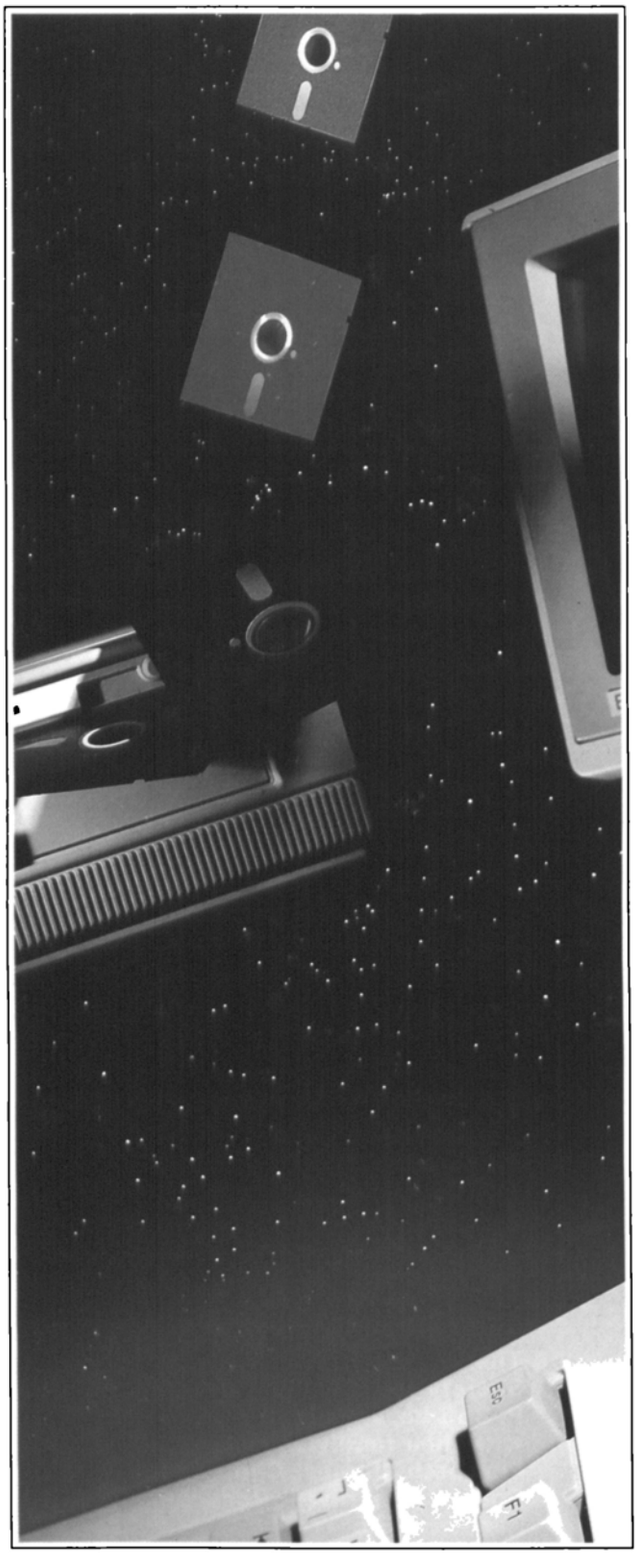

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 85 No. 10 December 1991

Viewpoint

Legal Controls on Solicitors Remuneration are Anti-Competitive

Through the medium of the Competition Act, 1991, the Minister for Industry and Commerce, Mr. O'Malley, has sought to introduce new competition rules one of the objectives of which is to outlaw concerted practices or anything in the nature of price fixing arrangments. These new rules apply across the board and will impinge on the professions, including the legal profession. While it remains to be seen precisely what the impact of the Competition Act will be on the legal profession, one interpretation of it is that it will prevent Bar Associations from recommending minimum fees to their members. It might also have implications for the Law Society itself in so far as the Society promulgates guideline rates for particular legal services.

Whatever its effect on legal services, the Competition Act was intended to herald a new era of competition, importing into domestic law some of the principles of the Treaty of Rome, and ensuring that there was real and genuine competition in the marketplace in the supply of goods and services. For that reason, the solicitors' profession in Ireland might well have expected that the new competition rules would have meant an end to legal controls on solicitors' remuneration. On examination of the Competition Act, however, it transpires that the competition rules do not affect any statutory provisions and, consequently, notwithstanding the new spirit of competition that has been ushered in by the Act, the full panoply of legal controls on solicitors remuneration are untouched.

The preparation of a new Solicitors Bill afforded another opportunity to the Government to show that their commitment to the ideal of competition was all that it purported to be. Close examination of the Bill reveals a number of provisions that, once again, are consistent with the concept of a free market situation. There is, for example, a provision in the Bill which prohibits the Society from preventing solicitors charging less than the current scale fee for any particular service; there are provisions which will introduce competition from banks and trust corporations in the area of probate work and which will also provide competition from banks in relation to conveyancing. Moreover, there is a provision controlling the manner in which solicitor and client fees may be charged and, to cap it all, the Law Society will be given a statutory role in relation to dealing with complaints about solicitors who overcharge their clients. When one takes into account, in conjunction with the foregoing, the existing system whereby a client can have a Taxing Master in the High Court or a County Registrar in the Circuit Court adjudicate on the fairness of solicitor's bill of costs one would have thought that there was an adequate infrastructure to ensure that the forces of competition could operate and ade-

(Cont'd overleaf)

(Viewpoint Cont'd)

quate safeguards to protect clients against any possibility of exploitation. Against that background, one would, naturally, have expected the Solicitors (Amendment) Bill to have contained a provision removing all statutory controls on solicitors remuneration. Alas, such is not the case. The legal controls remain.

We would simply say to the Government that they cannot have it both ways. It is, in our view, completely inconsistent with any reasonable notion of competition to maintain a framework of legal control on the charges that solicitors make for certain legal services in a context in which there is to be free and open competition in the provision of legal services; all the more so in a situation where there is an infrastructure, including a Legal Ombudsman, to deal with complaints about overcharging. We would ask the Government to think again. □

Gazette – Articles

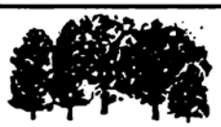
The Editorial Board of the Gazette invites members of the profession to submit articles for publication in the Gazette. The following guidelines apply:-

- the length of articles should not exceed 3,000 words
- manuscripts should be typed in double line spacing in upper and lower case;
- notes (if used) should be numbered in sequence throughout the text and listed at the end of the article,
- an introductory paragraph should set out the general thesis of the article and the subject matter covered,
- the use of sub headings throughout the article is encouraged.

Authors are requested, if possible, to supply a good quality black and white head and shoulders photograph of themselves to accompany publication.

A fee of £75.00 is paid for articles that are published.

Articles should be submitted to *Barbara Cahalane,* Editor, Law Society Gazette, Blackhall Place, Dublin 7.



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New President Will Oppose Threats to Solicitors' Incomes

Opening message from Adrian P. Bourke, President, 1991-1992.

It is an honour to serve as President of the Law Society and I am looking forward to an exciting and challenging year ahead. In this article I would like to set out what I see as the priorities for my presidency.

The list of the Council of the Society and the members of each committee are listed on pages 386 to 390 of this Gazette, and I would encourage every member of the Society to use the Committee network to raise any issue you consider important and to feed through your ideas and views.

The Law Society has an important role to fulfil not only in representing the interests of solicitors but also in ensuring that the profession itself maintains the highest professional standards and responds effectively to an increasingly consumer-orientated public. It is vital, in this context, that the Society is accountable - and is seen to be so - for the manner in which it deals with legitimate complaints against members of the profession. For that reason, I welcome the new powers in the Solicitors (Amendment) Bill, 1991 to deal with complaints and the appointment of a Legal Ombudsman.

I look forward to the challenge of leading the solicitors profession at a time of change for the profession in Ireland. The Solicitors Bill 1991, following in the wake of the report by the Fair Trade Commission on the legal profession, sets the agenda for the profession for the foreseeable future. While there is much to be welcomed in the Solicitors Bill, I am determined to lead the profession in opposition to some of the Bill's provisions which threaten the profession and which are not, in my view, in the public interest.

Real and Serious Pressures on Solicitors' Incomes

The Society has a dual role, being both the regulator of the profession and its representative body. I see it as a task of my presidency to achieve a balance between these sometimes conflicting roles at a time of increasing competition within the profession resulting from the substantial growth in numbers over the past 10 years. There are now real and serious pressures on the incomes of solicitors and the proposals contained in the Solicitors Bill to allow non-legally qualified bodies to do work of a legal nature would further exacerbate those pressures. The Government should be aware of the dangers inherent in a situation where the force of competition places the livelihoods of members of the profession at risk and threatens the high standards of professionalism that have traditionally been maintained by the profession. The way forward, I believe, is to achieve a balance between, on the one hand, having adequate competition to ensure that the public get good value for money but not, in so doing, to create a situation where solicitors are driven out of the profession and put out of business or put in situations which compromise their integrity and high standards.

Fees Advertising "a step in the wrong direction".

I am also concerned about the general implications of the continuing high demand for access to the profession and the numbers currently qualifying annually. It is questionable whether the profession can sustain an additional 300 or more new entrants **annually** without creating serious risks **for the public.** I am not aware of any other profession in Ireland, or elsewhere, where there is an open-ended policy of admissions. Resources available in the profession for education and regulation of such growing numbers are not unlimited and are already coming under serious strain. I believe that, if matters continue as they are, there is a serious risk that, at the prevailing level of growth in the economy, there will be unemployment in the profession in the near future. Is it realistic to be qualifying so many new solicitors annually when there is insufficient work available for them? The community is already adequately catered for in terms of availability of legal practitioners and it is questionable if it is right to go on qualifying more lawyers for a stagnant or dwindling market place. If there are too many solicitors competing for work, expecially in a period of recession, standards could be compromised and integrity threatened to the detriment of the public. The introduction of fee advertising in the Solicitors Bill is, in this context, a step in the wrong direction because it will encourage cost-cutting and, inevitably, threaten standards. A legal service is essentially about quality - price cannot be allowed to be the sole determining factor.

". . . I am determined to lead the profession in opposition to some of the [Solicitors] Bill's provisions which threaten the profession and which are not. . . in the public interest."

Independence of Profession.
The public interest requires a vibrant and independent legal profession in Ireland. At the present time, with the public spotlight focused very much on allegations of impropriety in the business life of our community, there is a need for a strong and independent legal profession. Solicitors, as legal advisers, have a very onerous task, particularly in the commercial field, of ensuring that the advice they give their clients is impartial and in the best interests of the public. They have done this in the past with great distinction. It is gratifying that solicitors have been appointed as inspectors in a number of recent high profile investigations. I am confident that the profession will always discharge duties of this kind with scrupulous fairness and to the highest standards of professional competence.

Solicitors as Judges
I will continue to press for the appointment of members of the solicitors profession to the bench in the Superior Courts of Ireland. There is no reason why solicitors who at present have the right to advocate in all the courts should not be considered eligible for the highest judicial office.

Berlin - 1992
The Law Society's Annual Conference on the theme "Lawyers in Business in Europe" will take place in Berlin from Thursday 23 April to Sunday 26 April, 1992. This is the first time the Society has staged its Conference outside the jurisdiction.

The purpose of going to Berlin is to acknowledge our presence in Europe and to show that Irish lawyers have a serious intent towards the EC, the creation of a single market and monetary and political union.

Germany like Ireland, has a written Constitution, and a deep commitment to European union. We want to project Irish lawyers as the ideal choice for German law firms when they want to do business in a Common Law jurisdiction. Keynote speakers at the Conference will be *Peter Sutherland* SC and Dr. *Tony O'Reilly.*

Of course, I also hope that the occasion will be an enjoyable one in one of the most exciting cities in Europe. I would particularly encourage younger members of the Society to participate. The cost at approximately £500 for four days and three nights is good value and has been kept to a minimum. An advance notice is enclosed in this *Gazette* and a brochure will appear in the January/February Issue.

Finally, the members of the Council and the Director General and staff of the Law Society, join me in wishing you and your families a peaceful and joyful Christmas.

Adrian P. Bourke
President

Results of Council Elections 1991-1992

The following list shows the successful candidates in the elections for the Council of the Law Society 1991-1992.

The total number of valid voting papers was 2,230.

Donal G. Binchy	1252
Anthony H. Ensor	1218
Moya Quinlan	1212
James MacGuill	1184
Eva Tobin	1135
John Shaw	1111
P. Frank O'Donnell	1057
Patrick O'Connor	1055
Geraldine M. Clarke	1037
Michael V. O'Mahony	1022
Michael G. Irvine	988
Brian J. Mahon	986
Niall G. Casey	983
Laurence K. Shields	983
Elma Lynch	954
Raymond T. Monahan	951
Anthony E. Collins	947
Owen M. Binchy	933
Francis D. Daly	913
Patrick A. Glynn	907
Philip M. Joyce	896
Barry St. J. Galvin	895
Maeve Hayes	883
Andrew F. Smyth	876
Brian Sheridan	842
Gerard F. Griffin	823
Ernest J. Cantillon	766
Ken Murphy	723
Justin McKenna	720
John G. Fish	719

Provincial Delegates
Edward M. McEllin – Connaught
John B. Harte – Leinster
Mary O'Halloran – Munster
Peter F. R. Murphy – Ulster

Dublin Solicitors Bar Association
Richard Bennett
Gerard Doherty
Anthony S. Sheil

Southern Law Association
Justin Condon
William Irwin
Cormac O'Hanlon
Tim Lucey
James V. Long

Law Society of Northern Ireland
Brian Walker
Patrick Duffy
John Comerton
James Doran,
Junior Vice-President elect

Past Presidents entitled to sit on Council pursuant to the Society's bye laws:
W. Brendan Allen
Walter Beatty
Bruce St. J. Blake
John Carrigan
Laurence Cullen
Maurice R. Curran
Joseph L. Dundon
Gerald Hickey
Michael Houlihan
John Maher
Ernest J. Margetson
W. Osborne
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Peter Prentice
Thomas D. Shaw □

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P. Frank O'Donnell, *Vice-Chairman*
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Ernest J. Cantillon
Anthony E. Collins
Barry St. J. Galvin
John Harte
Maeve Hayes
Michael G. Irvine
James V. Long
James MacGuill
Brian J. Mahon
Ken Murphy
Cormac O'Hanlon
John Shaw
Anthony S. Sheil

Education

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Patrick O'Connor, *Vice-Chairman*
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Francis D. Daly
Anthony H. Ensor
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Patrick A. Glynn
Raymond T. Monahan
Michael V. O'Mahony
Andrew F. Smyth

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Anthony E. Collins
Francis D. Daly
Anthony H. Ensor
Gerard F. Griffin
Elma Lynch
Edward McEllin
Justin McKenna
Raymond T. Monahan
Patrick O'Connor
Moya Quinlan
Laurence K. Shields
Eva Tobin

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Raymond T. Monahan, *Senior Vice-President*
Francis D. Daly, *Junior Vice-President*
Donal G. Binchy
Geraldine M. Clarke
Anthony E. Collins
Gerard F. Griffin
Edward McEllin
Justin McKenna
P. Frank O'Donnell
Moya Quinlan
Eva Tobin

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John G. Fish
Maeve Hayes
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Ken Murphy
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John Shaw

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John F. Buckley
Timothy Bouchier-Hayes
Michael Carrigan
Bernard V. Gogarty
Gerald Hickey
Ernest J. Margetson
P. Frank O'Donnell
David R. Pigot
Brendan Walsh

Annual Conference 1992

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Adrian P. Bourke
Geraldine M. Clarke
Noel C. Ryan

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Bernard Rogan, *Vice-Chairman*
David Beattie
Neil Breheny
Gerard Coll
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Gerald Fitzgerald
Conor Foley
Paddy Geraghty
Robert Hennessy
Michael G. Irvine
William Johnston
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Laura McDermott
Patricia McGovern
Anne Neary
Brian O'Connor
John O'Connor
Cormac O'Hanlon
Mark Ryan

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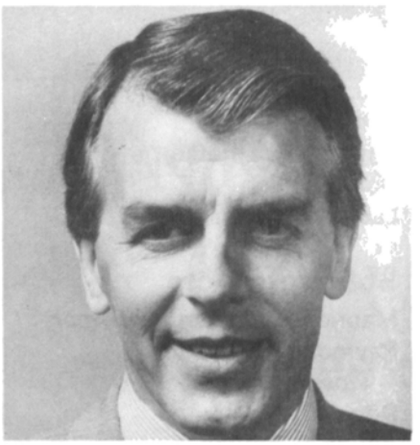
Ray Monahan, Senior Vice President 1991 - 1992



Ray Monahan qualified as a solicitor in 1971. He was elected to the Council of the Law Society in 1975 and has served as a member of a wide range of committees including Finance, PR, Compensation Fund, Registrars, Education and Premises. He is a former Chairman of the EC and International Affairs Committee and of the Education Committee. He was the Society's representative on the CCBE (Council of the Bars and Law Societies of the European Community) for ten years, 1979 - 1989.

Ray Monahan was Chairman of the North West Airport Company Limited in 1989 and 1990. He was President of the Sligo Chamber of Commerce in 1990. He is married to Eileen (nee Doyle), a solicitor, and the couple have seven children. In his spare time he takes an interest in sport of all kinds.

Ray says that his main task as senior Vice President this year, will be to prepare himself for next year!

Frank Daly, Junior Vice President 1991 - 1992

Frank Daly qualified as a solicitor in Hilary term, 1966. On qualification he joined the firm of Cornelius J. Daly, the forerunner of the firm Ronan Daly Jermyn and Co., where he currently practises. Frank was first elected to the Council of the Law Society in 1975 and he has served on a wide range of committees. He was Chairman of Education Committee for three years, Chairman of the Compensation Fund Committee for three years and latterly Chairman of Finance (1988-1991).

He is a member of the Executive Committee of the Chamber of Commerce in Cork and is Chairman of the Metropole Hotel. Frank is married to Pat (nee O'Connor) and the couple have four children; two boys and two girls. His interests are golf, shooting and the town of Schull in West Cork. He says he is looking forward to a challenging year ahead as Junior Vice President.

□

Family Lawyers Association Workshop

An informal workshop will take place in Buswells Hotel at 7.15p.m. Wednesday 15 January, 1992.

The purpose of the workshop is to examine the conveyancing aspects of the property adjustment orders of the Judicial Separation and Family Law Reform Act, 1989 and problems which often arise in transferring property from one spouse to another pursuant to the terms of a deed of separation. In particular, the question of general consents to future disposals of a family home will be looked at.

It is intended that this workshop will pool the experience of all the members and explore whether a common practice can be agreed. The Association would welcome participation from general conveyancing solicitors.

For further information contact:

Chairperson:
Eugene Davy
Telephone No. 754766

Seminar Organiser:
Muriel Walls
Telephone No. 8290000

Further Seminar:
Tuesday 3rd March, 1992 at 7.15p.m. Hague & Luxembourg Convention on Child Abduction and Enforcement of Child Custody Orders. □

Equal Treatment, Married Women and Social Welfare Rights

Directive 79/7/EEC on the progressive implementation of equal treatment for men and women in matters of social security came into force on 23 December, 1984. The Directive applies to the working population and to retired or invalided workers and self-employed persons.[1] It covers statutory schemes which provide protection against sickness, invalidity, old age, accidents at work and occupational diseases and unemployment; and also applies to social assistance payments insofar as they are intended to supplement or replace such schemes.[2]

Mel Cousins

by
Mel Cousins BL,
Administrator, FLAC.

Article 4 of the Directive provides that

> "The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:
>
> - the scope of the schemes and the conditions of access thereto,
> - the obligation to contribute and the calculation of contributions,
> - the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and the retention of entitlement to benefits."

Discrimination under the Irish social welfare code:

Historically, married women living with or being maintained by their husbands had been treated less favourably under the Irish social welfare code than had married men and single persons. At the time when the Directive came into force in 1984 several discriminatory provisions remained in the social welfare system. These included the following:

1. Married women in receipt of unemployment benefit, disability benefit, invalidity pension, injury benefit, disablement benefit and unemployability supplement received £5 less per week than did married men and single persons.
2. Married women received unemployment benefit for only twelve months as opposed to fifteen months in the case of most claimants.
3. A married man automatically received increases for adult and child dependants even where his wife was not actually dependent on him. However, a married woman could only claim these payments where the husband was incapable of supporting himself by reason of mental or physical infirmity.
4. A married woman was only entitled to the means tested unemployment assistance where her husband was incapable of self-support.

The Irish Government did not implement the Directive by the 23 December, 1984. In fact it was only in the Social Welfare (No. 2) Act, 1985 that provision was made to amend the discriminatory provisions referred to above. Even then these provisions did not come into effect until May, 1986 as concerned the lower rates of payment and the shorter duration of unemployment benefit[3] and November, 1986 as concerned the dependant increases.[4] The relevant provisions increased the rate of payment for married women to that received by other claimants and increased the duration of unemployment benefit for married women to 15 months. The legislation also provided that payment of an increase in respect of adult and child dependants was to be limited to a situation where actual dependency could be shown irrespective of the sex of the claimant.[5] This provision meant that many married men in receipt of social welfare payments were no longer entitled to dependency increases in respect of their wives and that their child dependant increases were reduced. Accordingly the Minister for Social Welfare introduced "transitional payments" to these claimants to partially compensate for the loss of the dependency increases.[6] These transitional payments were only paid to married men.

McDermott & Cotter I:[7]

In early 1985 two married women, Ann Cotter and Norah McDermott, who were affected by the discriminatory provisions which remained in force in Ireland in relation to social welfare payments, brought a case to the High Court claiming that they were entitled to be treated in the same way as married men in the same position in accordance with the EC Directive regardless of the fact that Ireland had not implemented the Directive at that time. The High Court referred this case to the European Court of Justice for a preliminary ruling as to whether the Directive had direct

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effect in Irish law. The Irish Government argued before the Court that the Directive had left considerable discretion to each Member State in determining how it should be implemented and that it did not therefore impose sufficiently clear and precise obligations to have direct effect. However, the Court of Justice held that Article 4(1) of the Directive was sufficiently precise to be relied upon in legal proceedings and applied by a court.[8] The Court also referred to the fact that the Article in no way permitted Member States to restrict or place conditions on the application of the principle of equal treatment in its area of application.

The [European] Court also referred to the fact that the Article in no way permitted Member States to restrict or place conditions on the application of the principle of equal treatment in its area of application.

Accordingly the Court held that where Directive 79/7/EEC had not been implemented, Article 4(1) of the Directive could be relied on as and from the 23 December, 1984 in order to preclude the application of any national provision inconsistent with it. The Court also held that where no measures had been taken to implement Article 4(1) of the Directive women were entitled to have the same rules applied to them as were applied to men in the same situation since where the Directive had not been implemented those rules remained the only valid point of reference.

The Irish High Court, when the case came before it again, held in favour of the women in relation to their claim concerning the duration of payment and also the claim for the higher rate of payment.[9] The Irish authorities subsequently appealed against this decision but this appeal was withdrawn and they conceded that payments in respect of these claims were due to the two women.

McDermott & Cotter II:[10]

When the matter came back before the Irish High Court additional claims were also made in relation to the dependant allowances and in relation to entitlement to transitional payments. However, the High Court rejected the women's claim for these payments[11] and the matter was appealed by the two women to the Supreme Court. When the matter came before that Court the respondents argued that to allow the womens' claims would offend against the principle of unjust enrichment which they argued constituted a ground for restricting or refusing relief in certain circumstances under Irish law. The Supreme Court decided to make a further reference to the Court of Justice for a preliminary ruling and asked the Court two questions.

The First Question – In its first question the Supreme Court asked if Article 4 of the Directive meant that if married men automatically received increases in social security benefits in respect of spouses and children deemed to be dependent without having to prove actual dependency, married women in the same situation were entitled to the same increases even if in some circumstances that would lead to double payment of such increase.

The Court of Justice referred to its judgement in *McDermott and Cotter I* and pointed out that in the present case the only valid point of reference was the scheme which applied to married men concerning dependency increases. The Court held that if married men received dependency increases without having to prove actual dependency, married women in the same circumstances were also entitled to these increases and that "no additional conditions applicable only to married women could be imposed".[12] The Court, referring to the argument of the Irish authorities that such increases might infringe a national rule which prohibited unjust enrichment, held that

> To permit reliance on that prohibition would enable the national authorities to use their own unlawful conduct as a ground for depriving Article 4(1) of the Directive of its full effect.[13]

The Second Question – The second question sought to determine if Article 4 meant that where a Member State had introduced a transitional payment to compensate married men for the loss of dependency increases, married women in the same circumstances were entitled to such payments even if this infringed a prohibition on unjust enrichment laid down by national law. The Court held that the Directive did not provide for any derogation from the principle of equal treatment laid down in Article 4 to authorise the extension of the discriminatory provisions of national law and that a Member State could not maintain after 23 December, 1984[14]

> "any inequalities of treatment attributable to the fact that the conditions for entitlement to compensatory payments are those which applied before that date. This is so nothwithstanding the fact that those inequalities are the result of transitional provisions (see Case 80/87 *Dik* [1988] E.C.R. 1601).
>
> Moreover, it must be made clear that such belatedly-adopted implementing measures must fully respect the rights which Article 4(1) has conferred on individuals in a Member State as from the expiry of the period allowed to the Member States for complying with it (see Case 80/87, above)."

The Court had already held in relation to the first question that Member States could not be allowed to use their own unlawful conduct to deprive the Directive of its full effect by relying on a principle of national law relating to unjust enrichment. Therefore the Court held that where married men received transitional payments, married women in the same family

Therefore the Court held that where married men received transitional payments, married women in the same family circumstances were also entitled to these payments even if this infringed a prohibition on unjust enrichment in national law.

circumstances were also entitled to these payments even if this infringed a prohibition on unjust enrichment in national law.

When the matter came before the Supreme Court, the Court was told that the proceedings had been settled. The terms of the settlement were not announced but it was stated that the settlement involved payment of an undisclosed sum to the claimants.[15]

Emmott -v- The Minister for Social Welfare:[16]

Mrs. Emmott had been in receipt of disability benefit from 1983. She also had been discriminated against under the Irish social welfare code. Unlike Mrs. Cotter and Mrs. McDermott who took proceedings shortly after the Directive came into force, Mrs. Emmott did not take any action until after the decision of the Court of Justice in the *McDermott and Cotter I* case in March, 1987. In common with many thousands of other married women, she apparently did not realise until that time that she might be entitled to any payments under the Directive. Some days after the judgement in that case she wrote to the Minister for Social Welfare seeking entitlement to equal treatment in accordance with the Directive. The Department of Social Welfare replied that as the matter was still before the Irish courts no decision could be taken in her case and that her application would be considered as soon as the High Court proceedings were concluded. It was not until January, 1988 that Mrs. Emmott instructed solicitors to take proceedings on her behalf and in July of 1988 she obtained leave to bring judicial review proceedings before the High Court subject to the respondents' right to plead failure to observe the procedural time limits. The respondents did indeed argue that the time limits for taking a claim had expired and accordingly the High Court referred a further question for a preliminary ruling to the Court of Justice. The question referred sought to know if it was contrary to the general principles of Community law for the relevant authorities of a Member State to rely upon national procedural rules, in particular rules relating to time limits, in bringing claims in defence of a claim to equal treatment under the Directive.

Mrs. Emmott argued that the Irish authorities should not be allowed to rely on such time limits since this would be to allow them to obtain a possible benefit from their own default. She further argued that to allow the respondents to rely upon these time limits would be to fail to apply the principle of equal treatment between men and women. It would mean that married women would only have been able to obtain equal treatment with married men if they, in addition to complying with the normal procedures for making a claim which applied to married men, had also initiated proceedings before the courts. This would impose an additional onerous pre-condition on married women, namely the need to commence legal proceedings without delay, if they were to obtain equal treatment. It would allow the respondents to treat such married women in a discriminatory way.

However, the Irish authorities, the Government of the United Kingdom and of the Netherlands and the Commission all argued that the Court's established caselaw relating to the recovery of payments should apply. The Courts had consistently held that in the absence of Community rules on the subject, it was for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions were not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights by Community law.[17]

The Advocate General accepted these arguments and proposed that the question referred to the Court should be answered as follows:

> "In an action such as that described in the question, the competent authorities of a Member State do not infringe Community law by relying on national procedural rules, in particular those relating to time limits, if the same time limits apply to actions of a similar scope brought under national law. Such time limits should also be of reasonable length and should begin to run only from the time when the person concerned should reasonably have been aware of his rights and his exercise of those rights must not have been made impossible in practice by the attitude of the competent authorities.[18]"

The Court of Justice also referred to its previous caselaw concerning the recovery of overpayments. However the Court said that while the laying down of reasonable time-limits in principle satisfies the two conditions mentioned above, "account must nevertheless be taken of the particular nature of Directives".[19] The Court recalled that according to Article 189 (3) of the EC Treaty, a Directive is binding on each Member State as to the result to be achieved while leaving to the Member States the choice of how to implement it. The Court stated that the freedom to choose the manner of implementation[20]

> "does not affect the obligation, imposed on all Member States. . . to adopt, within the framework of their national legal

systems, all measures necessary to ensure that the Directive is fully effective, in accordance with the objective which it pursues (see Case 14/83 *Van Colson and Kamann* [1984] E.C.R. 1891).

. . . Member States are required to ensure the full application in a sufficiently clear and precise manner so that, where Directives are intended to create rights for individuals, they can ascertain the full extent of those rights and, where necessary, rely on them before the national courts (see, in particular, Case 363/85 *Commission -v- Italy* [1987] E.C.R. 1733)."

The Court went on to hold that[21]

"so long as a Directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsists even after the Court has delivered a judgement finding that the Member State in question has not fulfilled its obligations under the Directive and even if the Court has held that a particular provision or provisions of the Directive are sufficiently precise and unconditional to be relied upon before a national court.

Only the proper transposition of the Directive will bring that state of uncertainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are to be required to assert their rights is created."

Therefore the Court held that until such time as a Directive had been properly transposed into national law, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it to protect rights conferred on him/her by a Directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run until the Directive had been properly transposed.

". . . until such time as a Directive had been properly transposed into national law, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it to protect rights conferred on him/her by a Directive."

Implications of the Judgment:

The *Emmott* case has now to go back to the High Court to have the ruling of the Court of Justice applied in relation to the particular facts of the case. However, it would appear from the decision of the Court of Justice that the Irish authorities will not be able to rely upon time limits in order to deny claimants their entitlements under Directive 79/7. Therefore any married woman in any of the following situations would have a claim for arrears of payment and would be able to bring proceedings before the courts to secure her entitlements:

i) A married woman who received a lower rate of unemployment benefit, disability benefit, invalidity pension, injury benefit, disablement benefit and unemployability supplement between 23 December, 1984, and May, 1986.

ii) A married woman who received unemployment benefit for only 12 months between 23 December, 1984 and May, 1986 or whose unemployment benefit expired within the three months preceding 23 December, 1984.

iii) A married woman who did not receive adult or child dependant allowances between 23 December, 1984 and November, 1986 in circumstances where a man in the same family circumstances would have received such payments.

iv) A married woman who did not receive transitional payments after November, 1986 where a man in the same family circumstances would have received such payments.

v) A woman who was denied access to unemployment assistance between 23 December, 1984 and November, 1986 on the grounds that she was married.

Approximately 3,000 other married women have also instituted proceedings before the Irish courts in relation to this matter. In addition, following a complaint from the Free Legal Advice Centres, the Commission of the European Communities had initiated infringement proceedings under Article 169 of the Treaty of Rome against Ireland in relation to its failure to correctly implement the Directive. The Commission has already written to Ireland setting out the reasons why it feels that Ireland is in breach of its obligations under the Treaty and is currently awaiting a response from the Irish authorities. The Commission could then issue a reasoned opinion on the matter after which Ireland has two months to take action to correctly implement the Directive. If this is not done, the Commission could then institute proceedings before the Court of Justice. Such proceedings would relate to the obligation on the Irish authorities to implement the principle of equal treatment in relation to all married women and not simply those who have taken proceedings before the courts.

The decision in the *Emmott* case also has broader implications concerning the implementation of Directives by Member States generally. Although Directives leave to Member States a wide discretion as to how Directives should be implemented, the Court has consistently held that wherever the provisions of a Directive appear to be unconditional and sufficiently precise, individuals may rely on those provisions in the absence of implementing measures adopted within the prescribed period as against any national provisions which are incompatible with the Directive or insofar as the provisions define rights which individuals are able to assert against the State.[22] The

Court has also held that

> "In applying national law and particularly those provisions of national law especially introduced to give effect to a Directive, the national court is bound to intrepret its national law in the light of the text and of the aim of the Directive to reach the result envisaged by Article 189 (3) of the Treaty.[23]"

The decision of the Court in the *Emmott* case to refuse to allow Member States to rely on time limits where the Member State had not correctly implemented the Directive will make it more difficult for defaulting Member States to renege on their obligations under EC Directives and will increase the effectiveness of this form of Community legislation.[24]

□

NOTES

1. Article 2 of the Directive.
2. Article 3 of the Directive. In accordance with Article 3(2) the Directive does not apply to survivors or family benefits.
3. Social Welfare Act, 1986 and the Social Welfare (No. 2) Act, 1985 (Section 6) (Commencement) Order, 1986 – S.I. No. 173 of 1986.
4. Social Welfare (No. 2) Act, 1985 (Commencement) Order – S.I. No. 365 of 1986. This legislative change also allowed married women to claim unemployment assistance.
5. Sections 3 and 4 of the Social Welfare (No. 2) Act, 1985; Social Welfare (Normal Residence) Regulations, 1986 – S.I. No. 367 of 1986; Social Welfare (Adult Dependant) Regulations, 1986 – S.I. No. 369 of 1986. Briefly, these provisions provided that a spouse was to be treated as an adult dependant only if s/he was neither in receipt of a social welfare payment in his or her own right nor had an earned income of more than £50 (now £55) per week. Where the spouse of a married claimant was not dependent on him or her, the claimant received only half the relevant child dependant allowance.
6. Social Welfare (Preservation of Rights) (No. 2) Regulations – S.I. No. 422 of 1986 – subsequently amended and extended on several occasions.
7. Case 286/85 *McDermott & Cotter -v- Minister for Social Welfare and the Attorney General* [1987] E.C.R. 1453.
8. Following its judgment in Case 71/85 *Netherlands -v FNV* [1986] E.C.R. 3855.
9. *Mc.Dermott -v- Minister for Social Welfare and anor; Cotter -v- Minister for Social Welfare and anor* [1990] 2 CMLR 94, 141. See Whyte ed. Sex Equality, Community Rights and Irish Social Welfare Law, ICEL No. 2
10. Case C-377/89 *Cotter and McDermott -v- Minister for Social Welfare and the Attorney General,* Judgment of 13 March 1991 not yet reported. See Whyte and O'Dell, *Welfare, Women and Unjust Enrichment – Cotter McDermott No. 2* I.L.J. forthcoming.
11. Fn. 9 *supra.*
12. Point 19 of the judgement.
13. Point 21.
14. Points 24 and 25.
15. Irish Times 10 June, 1991.
16. Case C-208/90 *Emmott -v- Minister for Social Welfare and the Attorney General,* Judgement of 25 July, 1991 not yet reported.
17. Case 33/76 *Rewe-Zentralfinanz AG and Rewe-Zentral AG -v- Landwirtschaftskammer für das Saarland* [1976] E.C.R. 1989 and Case 199/82 *Amministrazione delle Finanze dello Stato -v- San Giogio SpA* [1983] E.C.R. 3595.
18. Opinion of Advocate General Mischo 23 April, 1991.
19. Point 17 of the judgement.
20. Points 18 and 19.
21. Points 21 and 22.
22. Case 8/81 *Becker* [1982] E.C.R. 53.
23. Case 80/86 *Kilpinghuis Nijmegen* [1987] E.C.R. 3969.
24. See also the judgment of the Court in Case C-31/90 *Johnson,* Judgement of 11 July, 1991, not yet reported, in which the Court held that national legislation which made entitlement to a benefit subject to the submission of a claim in respect of a previous discriminatory benefit which had since been abolished and which, in practice, many female claimants would not have been entitled to, was in breach of the Directive. □

Denis C. Guerin
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The Late District Justice Sean O'Hanrahan

This photograph of the late District Justice Sean O'Hanrahan (23 January, 1889 – 13th November, 1955) was supplied by his widow, Maire O'Hanrahan, with the following caption:-

"District Justices appointed by the Provisional Government in 1922 were made permanent in 1924 and then wore the cap and gown shown in the photograph. The cap was discarded after a few years".

Solicitors Walk for M.S.

Last May, four solicitors were among 67 people from all over Ireland who set out on a 200 mile walk for 14 days in Northern Spain in order to raise money for the Multiple Sclerosis Society of Ireland. The four solicitors, John Lindsay and James Conlon from Dublin, Dermot Morrissey-Murphy from Limerick and Ray Hennessy from Cork, each raised over £2,000 in much needed sponsorship for the Society.

The walk took the group over one of the most spectacular and historical regions of Spain across the Cantabrian Mountains and through the ancient cities of Pamplona and Leon.

The Multiple Sclerosis Society is organising another Spanish walk next year. Any solicitor who would like to join the group may obtain further information from *Lorna Mitchell* of the Multiple Sclerosis Society, 2 Sandymount Green, Dublin 4. Tel: 01 - 2694599.

□

From the Director General

Some Reflections on Atlanta and Brussels 1991

It is probably fair to say that there is a perception amongst the ordinary members of most organisations that attendance at international conferences by those who are privileged enough to hold positions such as mine are, in the main, of the 'junket' variety and are part and parcel of the perks of office. This is an understandable perception. Which of us, for example, has not been sceptical of reports of droves of local government councillors and officials from rural parts of Ireland heading off to conferences on urban planning issues in exotic parts of the world. Of course, perception can sometimes be wide of the mark. To my mind, attendance at some international conferences is a *sine qua non* of keeping abreast of international developments. Selectivity is, of course, important. It is also important that, when one is present at a conference, one attends at least some of the more important business sessions.

This year I did not go to Atlanta where the American Bar Association had its Annual Conference though the Law Society of Ireland was represented there. I did, however, attend the English Law Society Conference in Brussels in October.

Atlanta

You might think it odd that I am writing about a conference that I did not attend. The reason for this is that this year's ABA Conference created something of a stir. The Law Society of Ireland's principal interest was in promoting, with American lawyers, the use of Irish law firms as a bridge to Europe and, in this respect, they were competing with their English Law Society colleagues (reports indicate that the Irish Law Society efforts were a huge success). But the main stir was caused by a very trenchant attack on the American legal profession made by U.S. Vice President, *Dan Quayle.*

Noel Ryan

Quayle set the cat among the pigeons and ruffled a few feathers (!) by accusing the profession of being partly responsible for what he described as the excessive litigation in America which was, he said, blunting the competitive edge of the American economy. There were 18 million civil actions in 1989 with US individuals and businesses spending more than $80 billion on direct litigation costs and higher insurance premiums.

In his address, he outlined proposals for major reforms of the US civil justice system, including the introduction of a rule under which costs would follow the event, as in this jurisdiction and the UK.

Vice President Quayle's proposals emanated from a report put forward by a special working group of the US Government's 'Council on Competitiveness'. In addition to the introduction of the loser pay rule he said that "the Government were considering strict limits on punitive damages, pre trial discovery and use of expert evidence". On the loser pay rule, Vice President Quayle said that "the rule was grounded in fairness and was applied in virtually every other western country besides the USA. There is no doubt it weeds out a lot of frivolous claims and specious defences". On the issue of punitive damages, he referred to a report of a 1987 study of 24,000 jury trials in Illinois which showed that the average punitive damages award shot up from $43,000 in 1969 to $729,000 in 1984 – a jump of 1,500%. On this topic, Mr. Quayle said that "what began as a sanction only for the most reprehensible conduct has now become almost routine". Clearly, from reports that I have read, the ABA's President *Jack Curtin,* was not amused, particularly at Quayle's rhetorical question about whether America really needed 70% of the world's lawyers. Curtin responded by saying that anyone who believed a better day would dawn when lawyers were eliminated bore the burden of explaining who would take their place. "Who will protect the poor, the injured, the victims of negligence, the victims of racial discrimination and the victims of racial violence", he asked.

The lessons that I would draw from the current situation that obtains in relation to litigation in the United States, as outlined by Vice President Quayle, is that the Americans are in the mess they are in primarily because of two factors. The first is the charging by American lawyers of contingency fees which gives them a stake in the action and, undoubtedly, contributes towards the proliferation of litigation. The second, in my personal view, is that, over the years, in most of the US States there has been uncontrolled access to the legal profession resulting in the situation, highlighted by Vice President Quayle, where America now has 70% of the world's population of lawyers.

Brussels

President's Keynote Address

The English Law Society's Conference took place in Brussels from 16-20 October. The new President,

Philip Ely, in his keynote address on the theme of widening horizons (again, reflecting the increasing internationalisation of legal practice) provided some interesting reflections from a solicitor with more than 33 years of service to his profession behind him. He chose essentially domestic themes in a wide-ranging address. He spoke of the problems facing the profession in a period of recession in the UK highlighting the growing cost of solicitors' overheads. It now costs the average firm about £27,000 per year simply to stay in practice and the cost to the sole practitioner is about £6,000 (these are the aggregation of the cost of practising certificates, investment business certificates, indemnity insurance and Compensation Fund). The recession was also causing unemployment and younger members were now finding it very difficult to get jobs on qualifying. But though the recession is biting, Ely believes that the profession in England is well placed to meet the challenges. The quality of those now qualifying, their academic ability, their training and their further continuing education was of a much higher order than when he himself commenced practice, he said. Technology was also a major development and he spoke of the growing awareness and application of management skills in the profession. This was also linked to a growing recognition of the need for client awareness, efficiency and communication.

He stressed also how essential it was to have a strong independent profession in the UK. "Never before has there been a greater need for independent advice and for independent defence against the powerful, against the departments of state, against the monopolistic institutions which now control the property market", he said. He reminded his listeners of the role of the independent solicitors in the long and distressing catalogue of mishandled cases, including Birmingham and Guildford as well as many other cases where solicitors carried great responsibility, very often on their own, for many years. He also spoke about the inefficient and dishonest in the profession in the UK and questioned whether the efficient solicitors could forever be expected to protect and pay for the inefficient. He also doubted whether the Law Society itself could sustain its role or its credibility if it in turn forever protected the inefficient and dishonest at the cost of the efficient and the honest. These no doubt are themes which will strike cords of sympathy in many quarters of the profession here. I have no doubt that we shall be hearing more on these subjects.

Judicial review

I attended an interesting session on the subject of judicial review which, apparently, has undergone something of an explosion in recent years in the UK. First, there was an assessment of the development of judicial review by a local authority solicitor who presented a comprehensive outline of how it operated and the basis upon which judicial review can be obtained. He also gave a good deal of statistical information on its growth of recent years. Then there was a session which amounted in essence to an attack on the judiciary for having made a mess of judicial review by *James Goudie,* QC. The response on the part of the judiciary was given by Lord Justice *Woolf* who said that, while the judges had not made a mess of it, they might have done somewhat better.

To my mind, what was interesting, from an Irish viewpoint, was the open and frank way in which these matters were being discussed with the judges. One comes across this time and again at UK conferences. There appears to be a much greater willingness to subject all aspects of the legal system to searching and critical examination and, apparently, a willingness on the part of the judiciary to take part in the process.

Human Rights

Another interesting session was that devoted to the subject of human rights in which a number of eminent lawyers, including *Helena Kennedy,* QC, who has been prominently associated with the Charter 88 Group. She argued the case for a fundamental revision of the English constitution to enable human rights to be better protected in law. The essential theme of the speakers was that Britain needed a written constitution which would explicitly protect basic human rights and that the European Convention on Human Rights should be directly incorporated into British law. Some important points were made about the protection of the rights of accused persons and Helena Kennedy, in particular, drew heavily on the lessons to be learned from Birmingham and Guildford. Charter 88, of which she is a council member, are, of course, pressing for more than just a Bill of Rights. They are also seeking electoral reform and important changes in relation to the appointment of judges.

One could hardly fail to be impressed by the strength of the case they made in relation, in particular, to the protection of the rights of those accused of criminal offences and I thought it of considerable interest that they laid great emphasis on the importance of access by a solicitor to an accused person in custody. Their view was that this should be an absolute right, with no provision for derogation from it. □

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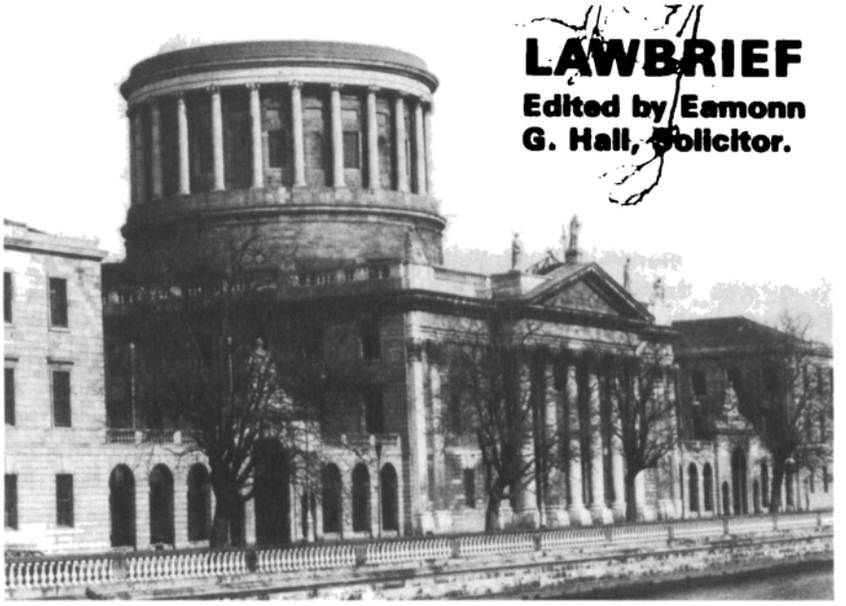


LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

Conference on Scottish Small Claims Procedure

Judge *Mary Kotsonouris,* formely of the District Court, contributes the following report on a recent conference on Scottish small claims procedure.

Judge Mary Kotsonouris

The Scottish Consumer Council held a one-day conference in Glasgow, on 5 November, 1991 to consider the result of the research which had recently been completed on the operation of small claims courts. Such courts were provided for under section 18 of *Law Reform (Miscellaneous Provisions) (Scotland) Act 1985* and they began in 1987. They had been preceded by a great deal of research and consultation, and there had also been a voluntary, experimental court in Dundee from 1979 to 1981 as a work study project. The present research had been carried out by the Scottish Office working jointly with an academic team.

The opening speech was given by Lord Fraser, the Lord Advocate, and he seemed to be the only speaker to have anything positive to say about the past four years. Alan Patterson, who is a solicitor and professor at Strathclyde University, was head of the academic group who compiled the report. He said there was widespread dissatisfaction amongst those interviewed, particularly with the preliminary hearings, which were carried out in such a perfunctory manner as to serve no useful purpose. People who went to court were put off by the formality, the way solicitors seemed to monopolise the attention of the court, and the fact that the users were unprepared for the reality. They had not thought the procedure was going to be so structured. Most only heard about the small claims system through being told by a solicitor; there had been very little public information given. Other speakers echoed these complaints.

In the afternoon, there was one workshop where the operation of the courts was discussed. There were several Sheriffs present; these are the judges who deal with small claims. They were obviously not pleased about all the criticism that had been made about them. Some of them said that courts had to have a degree of formality and that it was not possible to run courts with individual cases scheduled for certain hours, since a lot of time would be wasted, when cases did not go on, for one reason or another. Other participants expressed the view that the main failure was due to the marked absence of an inquisitorial approach by the court, rather than an adversarial one. Later an English judge said they had small claims legislation in operation for twenty-one years, and they had still not got it right! He thought an 'interventionist' approach by the judge was essential, and that they are introducing new rules shortly in England to try to bring this about.

Already, it would appear that the matter of re-scheduling types of cases in some Scottish court districts is being looked at, as well as evening and Saturday sittings. However, in spite of the misgivings expressed, there are no plans at present to remove the jurisdiction from the Sheriffs and give it to the lower courts, or to set up a system of tribunals.

Elixir for the Christmas Vacation

A wise judge noted that he was not aware that men resorted to the opinions of the courts as a spiritual elixir in hours of depression. However, as Christmas is upon us, *Lawbrief* takes the opportunity of referring to a book which may truly serve as an elixir during the Christmas vacation.

The writer refers to Rex Mackey's *Windward of the Law* (2nd edition) which was launched in the Berkley Court Hotel on 13 November, 1991. The guests at the launch were addressed by Paddy MacEntee SC, QC. Referring to Rex Mackey's period on the Donegal Circuit, Patrick MacEntee (who arrived much later on the same circuit) observed that "he [Rex Mackey] left behind him the reputation of a most extraordinary person - a mythological figure who had done everything possible, good and bad, for about 300 years."

Referring to the book, Mr MacEntee continued: "It is a brilliant book about the law as practised in Ireland. The stories are extremely funny and perennial. A theme runs through the book which is that Rex Mackey believes every barrister has an anarchistic streak. The stories are not merely legal anecdotes, it is a book with profound humanity and above all it is extremely humorous."

Rex Mackey is a senior member of the Irish Bar. Educated at Castleknock College, UCD, King's Inns and the Inner Temple, he took time off to become a distinguished actor in both Dublin and the West End. At a time when the Abbey was at its greatest, he starred in Drama at Innis; he acted in the Gate with Hilton Edwards, Michael Macliamoir and Orson Wells in a variety of roles. He has written the dialogue for films in the UK. He also wrote plays for radio and a series for television. All through this period Rex Mackey kept up his practice at the Bar and became a member of the English Bar.

The Gazette will shortly review *Windward of the Law.* The book (in hardback) is available from the Round Hall Press, Kill Lane, Blackrock, Co. Dublin at £19.50

Solicitor's Duty over Character Reference on Client

The Queen's Bench Division (UK) held in the case of *Edwards and Others -v- Lee (The Times* Law Report, November 5, 1991) that a solicitor who was asked to give a character reference on a client and who was constrained by legal professional privilege from disclosing that the client was facing criminal charges, could not give the client any sort of favourable reference.

The Court held that the solicitor could not fulfil his duty of care to the reference-seeker unless he first sought his client's permission to reveal all that he judged it necessary to tell. If the client then refused permission, the solicitor should consider whether he could properly tell the reference-seeker anything.

Damages for negligence to the third plaintiff, Cabana Soft Drinks (Surrey) Ltd, were awarded against the defendant, Julian Lee, a solicitor.

Brooke J. said the defendant was a solicitor whose client Mr. Robert Hawkes was at the relevant time awaiting trial on 13 charges of criminal deception and other offences of dishonesty. The plaintiffs, David and Susan Edwards and their company, Cabana Soft Drinks (Surrey) Ltd, claimed they had suffered financial loss because of false, misleading and negligent assurances about Mr. Hawkes's integrity given by the defendant after Mr. Hawkes had referred them to him for a reference.

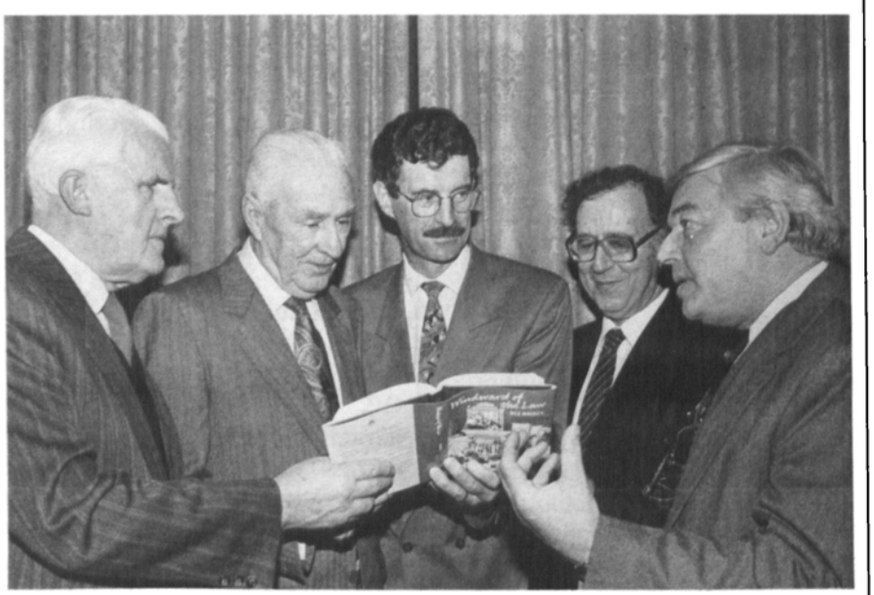
Mr. Hawkes had approached Mr. Edwards offering to arrange an exchange of his Mercedes car, then worth £28,500, for a Turbo Bentley which could be sold at a profit. Mr. Edwards had handed over the car, but began to worry about the arrangement when he was approached by a Mr. Folley who had been offered the car by Mr. Hawkes for £25,500 and was suspicious about it.

Mr. Edwards had confronted Mr. Hawkes, who at first denied having approached Mr. Folley, then denied the price of £25,500 and finally said he would not sell to Mr. Folley. When Mr. Edwards threatened to terminate their arrangement, Mr. Hawkes had told him to approach Mr. Lee, his solicitor, for a character reference.

Mr. Lee had persuaded himself that because of legal professional privilege he could not lawfully tell Mr. Edwards that Mr. Hawkes was at that moment awaiting trial on charges where the facts were more or less identical to those currently worrying Mr. Edwards. He had told Mr. Edwards that he knew of no reason why Mr. Edwards would not recover his money. In the event, Mr. Edwards did not recover his money.

In his Lordship's judgment, Mr. Lee could not fulfil his duty to Mr. Edwards to take such reasonable care as the circumstances required unless he first sought his client's permission to say all that he knew of him, warts and all, which he judged it necessary to tell Mr. Edwards in order to fulfil his duty to him.

If Mr. Hawkes had withheld permission in whole or in part, Mr.



L-R: The Hon. Mr. Justice Brian Walsh, Rex Mackey SC, Dick Spring T.D., the Hon. Mr. Justice Henry Barron and Patric MacEntee SC PC at the launch of 'Windward of the Law' by Rex Mackey, published by the Roundhall Press.

Lee should then have considered whether he could properly tell Mr. Edwards anything at all. His Lordship had no evidence that those matters crossed Mr. Lee's mind.

Solicitor contributory negligence was established at 50 per cent. The court held that the defendant solicitor was liable to the third plaintiff for £12,250.

No Privilege for Company Officer

Vinelott J of the (UK) Chancery Division in Re *Jeffrey S. Levitt Ltd* (*The Times Law Report,* November 6, 1991) held that an officer of an insolvent company, if summoned to appear before the court to be examined under section 236 of the (UK) *Insolvency Act, 1986* could not refuse to answer questions on the ground that they might incriminate him, because he was under an overriding statutory duty to assist the receivers in their functions.

Vinelott J so held in ordering such an examination of Mr Jeffrey S. Levitt, formerly the controlling director of Jeffrey S. Levitt Ltd, to be resumed before a judge of the Chancery Division.

The Court stated that the *Insolvency Acts of 1985 and 1986* were the outcome of a radical overhaul of both individual and corporate insolvency law following the *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558), with special reference to the need to discourage insolvent trading and to disqualify delinquent directors.

The court considered that if section 236 of the (UK) *Insolvency Act, 1986* was read in the context of sections 234 and 235, it was clear that those sections established a class of persons on whom was laid a duty to furnish all relevant information to such as the present receivers; so Mr. Levitt had not been entitled to invoke the privilege.

Injury Too Remote From Employer

The Court of Appeal (England and Wales) (Mustill, Mann and Farquharson LJJ) (*The Times* Law Report of October 23 1991) held that an employer in England who sent an employee to work as a computer consultant in Saudi Arabia was not to be held liable for an injury to the employee resulting from a fall on defective flooring at his workplace there.

The Court held that although circumstances might well require home-based employers to satisfy themselves as to the safety of foreign sites, it would not be reasonable to hold reliable employers in breach of their duty of care because of a hazard created by others some 8,000 miles away.

Farquharson LJ for the court said that both the trial judge and counsel for the employee cast far too high a responsibility on the employers. The site occupiers and the general contractors were reliable companies and aware of their responsibility for the safety of workers on site. The suggestion that the home-based employers had any responsibility for the daily events of a site in Saudi Arabia had an air of unreality. It might be that in some cases where a number of employees were going to work on a foreign site or where one or two employees were called on to work there for a considerable period of time, an employer might be required to inspect the site and satisfy himself that the occupiers were conscious of their obligations concerning the safety of people working there. But one could not prescribe any rules in that context. It would depend on the facts of individual cases.

The evidence in the case before the court did not show that the accident was caused by any breach of duty on the employers' part.

Eamonn Hall

The Medico-Legal Society of Ireland

Programme for Winter/Spring 1992

1. Thursday 23rd January, 1992:
   Dr. Anne Clancy
   – "The Presidential Address"

2. Thursday 27th February, 1992:
   Professor *Michael Gibney,* Department of Clinical Nutrition, Trinity College, Dublin
   – "The Right to Eat Wrongly"

3. Thursday 26th March, 1992:
   Professor John Harbison, State Pathologist
   – "The Sevilla Project"

Lectures take place at 8.30p.m. at the United Service Club, St. Stephen's Green, Dublin 2, by kind permission.

Members and their guests are invited to join the Council and guest speakers for dinner at the Club at 6p.m. for 6.30p.m. on the evening of each lecture. Members intending to dine must communicate, not later than the previous day, with Miss *Mary MacMurrough Murphy,* B.L. at 2 Whitebeam Road, Clonskeagh, Dublin 14 (Telephone 2694280) or at the Law Library, Four Courts, Dublin 7 (Telephone 720622).

Membership of the Society is open to members of the medical and legal professions and to others especially interested in medico-legal matters. The current annual subscription is £10.00. Membership proposal forms and full details may be obtained from *Mary MacMurrough Murphy* at the above address.

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Published by the Incorporated Law Society of Ireland
April 1991

Available from Blackhall Place, Dublin 7. Tel: 710711.

Need for Comprehensive Scheme of Civil Legal Aid

Report of Law Society Committee on Civil Legal Aid

The current scheme of Civil Legal Aid falls very short of what is needed according to the report of the Law Society Committee on Civil Legal Aid. The Committee was appointed by the Council of the Society to examine the existing scheme of legal aid and to make recommendations as to how the scheme might be improved. The Committee says that the provision of a comprehensive legal aid scheme is an indispensable feature of a modern democratic society which has proper regard for equal opportunity and the importance of access to justice.

Shortcomings

The Committee's report identifies a number of shortcomings in the current scheme. The existing scheme of civil legal aid was established in 1980 on foot of a report by the Pringle Committee. However, the scheme introduced by the Government fell far short of the comprehensive scheme recommended by that Committee. For example, a range of proceedings are excluded from the scope of the scheme including defamation, disputes concerning rights and interests over land, civil bills for sums below £150, arbitration under the Landlord and Tenant Acts and conveyancing matters. The scheme does not cover class actions or test cases. The scheme applies only to proceedings before a court; proceedings before tribunals including inquests and arbitrations are excluded from the scheme.

Another serious limitation is that the scheme provides its services solely through lawyers employed directly by the Legal Aid Board in centres run by the Board throughout the country. Lawyers in private practice are excluded. The Pringle Committee had recommended that legal aid and advice should be provided both by lawyers in private practice and lawyers in community legal advice centres.

At present, there are only twelve legal advice centres in the country and there are wide areas of the country which do not have the services of a centre. As a consequence, the catchment areas of many of the centres are very large, in many cases covering more than one county. The existing centres are inundated with work and quite unable to cope with the current level of demand. Persons seeking legal aid often have to travel substantial distances to obtain a service. There are long waiting periods for people seeking advice.

Recommendations for a comprehensive scheme of civil legal aid and advice

The Committee's report makes a number of recommendations:

1. The scheme of civil legal aid and advice, suitably improved, should be put on a statutory basis without delay. The Legal Aid board should be established in law and given statutory powers and responsibilities. It should be independent in the exercise of its functions. The Board should have an adequate budget sufficient to enable it to discharge its functions effectively including research and dissemination of information about legal rights. The necessary legislation should be introduced without further delay.

2. The number of legal aid centres should be increased. There should be at least one centre in every principal county town in the country. The number of centres in Dublin and other larger cities needs to be increased.

3. While the network of law centres around the country needs to be extended, clearly it would not be economic to establish a centre in every town or village. Therefore, the Law Society believes there is a role for the private practitioner in the scheme to cover areas where it would not be practicable to have a full-time law centre.

4. A second reason for involving private practitioners in the scheme would be to enable the Legal Aid Board to deal adequately with *conflict* cases in the family law area. At present, when marital difficulties arise between spouses and the parties are eligible for legal aid, only one of the spouses can be represented by the local legal aid centre. This means that if the other spouse also requires legal services, he has to obtain a service from another centre. The result is that at least one of the solicitors has to travel a long distance to take instructions and to represent his client in court. This is an uneconomic way of providing the service.

5. Private practitioners should also be involved in the scheme to deal with adjournments and to provide replacements for Legal Aid Board solicitors who are absent.

6. The scope of the scheme should be extended to cover representation of persons before tribunals, in particular, the Employment Appeal Tribunal.

7. The present criteria for eligibility for legal aid gives rise to confusion and requires clarification. All medical card holders should be entitled to obtain services under the scheme and the Legal Aid Board should be given a residual discretion in relation to borderline cases.

(Cont'd on page 423)

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PEOPLE AND PLACES

L-R: Andrew Smyth, Chairman, Solicitors Benevolent Fund; the President of the Law Society, Adrian P. Bourke, and Eva Tobin, former Chairman of the Younger Members Committee, presenting a cheque for £2,000 to the Solicitors Benevolent Fund. The money was raised from the proceeds of quiz nights staged by the Younger Members Committee in 1991.

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At a reception in the Law Society to mark the launch by the Dublin Solicitors Bar Association of CORT (see report on page 427) were: L-R – Maeve Hayes, then Chairman of the Conveyancing Committee, Colm Price, current Vice-Chairman of the Conveyancing Committee, and David Walley, President of the Dublin Solicitors Bar Association.

The Attorney General, Harold Whelehan, SC, with Michael Mansfield, QC, at the Seminar 'Criminal Law in the 1990s – A European Perspective' staged by the Criminal Law Committee of the Law Society on Saturday, 16 November, 1991.

On 15 November, 1991, Ms. Naomi Overend presented the Law Society with the Gold Medal won by her father, Trevor T.L. Overend, for superior answering at the Final Examination in the Michaelmas Term of the year 1875.
Trevor T.L. Overend was admitted as a solicitor in the Hilary term in 1876. He was a member of the Council of the Society from 1884-1902 and was President of the Society in 1894-1895. He died in April 1919.
The photograph shows: L-R – Brendan Doyle, T.T.L. Overend, McCarron & Gibbons; Ms. Naomi Overend and the then President of the Law Society, Donal G. Binchy.

Mr. Sean O'hOisin of Oisin Publications presenting a copy of the 1992 Lawyers Desk Diary to the President of the Law Society, Adrian P. Bourke.

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Valuation for Capital Acquisitions Tax and Stamp Duty Purposes

The introduction of the surcharge for Stamp Duty undervaluation in section 103 Finance Act, 1991 has highlighted again the very dangerous area of "valuation" for tax purposes. A similar provision was introduced in Section 79 Finance Act, 1989 in relation to capital acquisitions tax although the penalties are not so draconian as in the later legislation. In addition therefore, to the difficulties it causes on future disposals for capital gains tax purposes, undervaluation of property for both taxes is a serious risk in respect of current transactions.

by
Brian Bohan BL,
Solicitor,
(Chairman Law Society
Taxation Committee
1990-1991)

Pre-surcharge situation

An artificially low base cost has its own penalty when the property is disposed of. The undervaluation on acquisition will be exaggerated by indexation:

For example, property acquired on 1 May, 1986 under a voluntary disposition, from father to son, the real value being £65,000 but the value submitted was, inadvertently, £50,000 for stamp duty and gift tax purposes. No great discussion took place and the Revenue "accepted" the valuation as submitted.

This property was disposed of on 1 September, 1991 for £100,000. Ignoring legal costs, and the stamp duty on acquisition the result is as shown in Table 1 below.

The introduction of the surcharges makes such errors much more expensive for the taxpayer, and will cause the Revenue to investigate the valuation of property more thoroughly.

Stamp Duty

Section 103 Finance Act, 1991 covers the provisions relating to under-value for stamp duty purposes.

Once the instrument operates or is deemed to operate as a voluntary disposition under Section 74 Finance (1909/10) Act, 1910 or Section 24 Finance Act, 1949, and the statement of value of such property or minimum amount of value referred to in Section 24 ("the submitted value") is less than the value as ultimately agreed with the Revenue Commissioners (the "ascertained value") by certain percentages, the surcharge becomes payable. Those percentages are:

	Surcharge as % of duty
Where the submitted value is less than the ascertained value by an amount which is greater than 10% but not greater than 30% of the ascertained value – (subject to the minimum difference in value of £5,000).	**50%**
Where the submitted value is less than the ascertained value by an amount which is greater than 30% but not greater than 50% of the ascertained value.	**100%**
Where the submitted value is less than the ascertained value by an amount which is greater than 50%.	**200%**

This surcharge is mandatory under the legislation except that in subsection (1) it is stated to be a penalty and under section 100(3), Finance Act, 1991 the Commissioners may, if they think fit, remit *any* penalty payable on stamping. It is to be hoped that this will be availed of to a great extent in view of the draconian provisions of the stamp duty legislation.

Disposal	£100,000	
Acquisition £50,000		
Indexation 1.218		
Indexed acquisition cost	£60,900	
Gain	£39,100	
Annual allowance	£4,000	
Taxable Gain	£35,100	
Tax at 35%		£12,285

The position should have been:

Disposal	£100,000	
Acquisition £65,000		
Indexation 1.218		
Indexed acquisition cost	£79,170	
Gain	£20,830	
Annual allowance	£4,000	
Taxable Gain	£16,830	
Tax at 35%		£5,890

The difference, £6,395.

Capital Acquisitions Tax

On the other hand, section 79 Finance Act, 1989 imposes a surcharge. Where the estimate of the market value (the "estimated market value") of any asset comprised in a gift or inheritance and included in a self-assessment return, when expressed as a percentage of the value ultimately ascertained ("the ascertained value") is within any of the following percentages, the surcharge indicated is payable:

	Surcharge as % of Tax
(a) The estimated market value is equal to or greater than 0% but less than 40% of the ascertained value	**30%**
(b) The estimated market value is equal to or greater than 40% but less than 50% of the ascertained value	**20%**
(c) The estimated market value is equal to or greater than 50% but less than 67% of the ascertained value	**10%**
(d) The estimated market value is equal to or greater than 67% of the ascertained value	**Nil%**

Chronologically, section 79 Finance Act, 1989 introduced the idea of a surcharge for undervaluations of property. It is a necessary ingredient in the concept of self-assessment and although its impact and philosophy in capital acquisition tax is similar to that applying in stamp duty, the net effect is not as harsh.

In both cases, the surcharge appears to be mandatory although there are powers of remission in both codes, which may apply to surcharges. This means that unless a case to remit is presented to the Revenue the surcharges will automatically apply.

Stamp duty appears to differ from the capital acquisitions tax provision in the following ways:

(a) There is no minimum difference applicable to CAT. Unless the difference exceeds £5,000 for stamp duty, no surcharge arises at the lowest penalty rate.

(b) The differences are looked at from different perspectives in both taxes but they both provide the same answer:

For example

Submitted value on £150,000;
Ascertained value £200,000
For stamp duty purposes, the difference is 25% of the ascertained value.
For CAT purposes, the submitted value as a % of the ascertained value is 75%.
Consequently there would be a penalty for stamp duty but none for CAT.

For this reason it must not be assumed that because a surcharge is avoided for CAT purposes, that it is automatically avoided for stamp duty purposes. Similarly, because of the £5,000 "floor" for stamp duty purposes, it cannot be assumed that the avoidance of a stamp duty charge on that ground, avoids a surcharge for CAT.

Stamp Duty and Negligence Provisions

Section 103 is complicated by the provisions of Section 97 of the Finance Act, 1991 which provides that where all the circumstances affecting a transaction cannot be set out in the instrument, they must be set out in a statement to accompany the instrument. Any person interested in or concerned in or about the making of that instrument (or statement) and who is guilty of any fraud or negligence (negligence is a new provision) will be liable to a penalty of £1,000 together with the difference (or in the case of fraud, twice the difference) between the stamp duty that should be payable and the stamp duty that would have been payable on the submitted facts.

For example, if through some negligence a solicitor is in default under this section the following could result:

(a) The client could be liable under the surcharge provisions of section 103 for anything between 50% and 200% of the duty together with the penalty provisions of section 97.

(b) The solicitor, under Section 97 could be liable for £1,000 and 100% of the difference in the duty. This latter penalty could also apply to any other person concerned in or about the preparation of the instrument (valuers, brokers, bankers) including the taxpayer and these penalties would be cumulative:
Ascertained value £200,000;
Submitted value £150,000
Surcharge: 50% Rate of stamp duty 3%

Client:	Stamp duty	£6,000
	Surcharge	£3,000
	Penalty	£1,000
	Difference	£1,500
Solicitor:	Penalty	£1,000
	Difference	£1,500
		£14,000

CAT and Secondary Liability

On the other hand, the capital acquisitions tax provisions of section 79 are confined solely to the accountable person. However, an "accountable person" is defined in the Principal Act as a person who is primarily accountable and a person who is secondarily accountable (which would include a solicitor in certain circumstances). That of itself does not make the solicitor, qua solicitor, liable for the CAT surcharge although it may make him liable as solicitor qua accountable person.

However, under section 94 Finance Act, 1983 (Revenue Offences) any person who knowingly aids, abets, assists, incites or induces another person to make or deliver, knowingly or wilfully, an incorrect return, statement or account, in connection with any tax (which includes CAT and stamp duty) will be liable to a penalty under that section.

The exposure under the stamp duty provisions is far greater for the professional than under the CAT provisions. A professional under the stamp duty provisions will be liable qua professional, and, possibly, under the provisions of section 94, whereas under the CAT provisions he can only be liable qua accountable person unless he falls within the provisions of section 94.

It may be convenient at this stage to list some of the areas where professionals must consider the provisions of both sets of legislation and the effect that legislation may have if they fail to identify or notify dutiable or taxable situations.

Situations

Associated companies

Transfers of property between associated companies carry a liability for stamp duty at 2% (provided they fulfil the conditions) and in addition there *may* be some element of gift (or inheritance) passing by reason of the transfer between associated companies. Historically many associated companies would transfer properties at historical value or at book value. This can still take place *provided* the real or market value is notified to the Revenue Commissioners in a statement to accompany the instrument. In this event, there is no material difference for stamp duty purposes in submitting the market value in the instrument or in the statement. It may have for other purposes and that has to be borne in mind, for example, balancing charges etc.

The same consideration applies to CAT.

Grant/Exercise of option

Normally, for stamp duty purposes stamp duty will be payable on the consideration for the grant. If that grant conceals a voluntary disposition, the surcharge provisions of both stamp duty and CAT must be borne in mind and an appropriate statement must accompany the instrument of grant.

An option whether over land or not, is an item of property separate from the underlying property *(George Wimpey -v- IRC* (1975) 2 All ER 45) – it is not a contract for sale of any equitable estate or interest in property under S. 59 Stamp Act, 1891. A voluntary disposition can arise where, for example, a parent transfers the right to exercise a favourable option to a child or where an enforceable option is granted to a child, for a nominal consideration, to purchase property, at present worth (say) £500,000, at a future date for £200,000.

Similarly, on the exercise of the option, a written notice exercising the option may constitute an agreement for sale of an equitable interest in property stampable under Section 59, Stamp Act, 1891. If so, it or the instrument giving effect to the transfer, is stampable. Again, if a gift or voluntary disposition is hidden in the exercise of the option, it must be brought to the notice of the Revenue Commissioners in an appropriate statement. This may arise where, on the exercise of the option, the transferor agrees to take consideration less than the option price. For stamp duty purposes, the statement is required. For CAT purposes, the market value is required and a return (if necessary) must be submitted.

The signed copy letter of acceptance of a proposed mortgage may be, now, a stampable document even if the mortgage is never taken up.

Probate

For probate purposes, valuations have often been depressed. Probate should not, in itself, give rise to stamp duty problems, although an appropriation under Section 55 Succession Act, 1965 could bear stamp duty unless the will gives the authority for the appropriation. It is, however, a serious problem for CAT purposes. In addition, a low probate value will have serious capital gains tax problems on any future disposal. Even if the value is uplifted, for CAT purposes, at the valuation date, the low date of death value has the problems for capital gains tax (Section 15 CGTA, 1975) already referred to.

If the probate value is low, giving rise to a subsequent capital gains tax liability, that liability is not a credit against the CAT liability arising on the death. They are referable to different "events".

Connected persons

Very often, as with associated companies, transactions take place between connected persons at book value or written down value or at reduced value. This must now be brought to the attention of the Revenue Commissioners in a statement for stamp duty purposes and, if necessary, a return made with true market value included for CAT purposes. The same considerations as apply to associated companies are involved here.

Voluntary dispositions

All voluntary dispositions give rise to stamp duty and CAT considerations and, as for associated companies, if the "value" in the instrument is below the market value, this must be brought to the attention of the Revenue Commissioners for both taxes. A CAT return is required and a statement for stamp duty purposes. Failure to do this may leave the parties liable to the surcharges and other penalties. The donor is also liable to stamp duty and the solicitor advising him must ensure his protection in the event of under valuation.

The solicitor must also be able to obtain some form of comfort in relation to the stamp duty from the donee or ultimately from the Revenue Commissioners. The question must now arise as to some form of certificate of payment of stamp duties, particularly, for trustees, personal representatives, etc. The adjudication stamp is only a comfort for a purchaser. The accountable parties,

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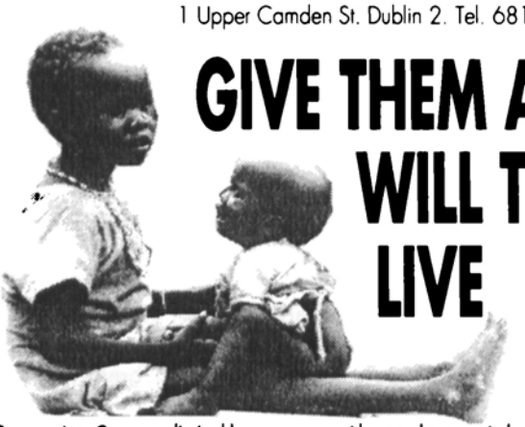

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which include the donor and the solicitor or other adviser employed or concerned in or about the preparation of the instrument or accompanying statement, may remain liable to any variation in stamp duty without time limit.

Private company shares
This type of transaction is fraught with difficulty and very often the divergence in values between the official value per share and the submitted value can be astronomical. No longer can the parties to an instrument rely on the Revenue Commissioners to settle a reasonable value because of the surcharges. The submitted value must be a reasonable estimate of the market value and if it falls short of the ascertained value to an extent greater than the requirements for the surcharges, the Revenue may impose those surcharges. It is no longer sufficient to submit the estimated value or the price at the last sale. Each transaction will require an independent valuation.

Partnerships
Some partnership agreements still contain clauses relating to future sale of goodwill viz., the surviving partners agreeing to purchase the interest of a deceased partner from his personal representatives or on retirement or expulsion of a partner, forbidding his acting in an area for a reasonable period. All these reflect an element of goodwill which is incapable of valuation at partnership deed stage. Accordingly, the Revenue Commissioners may insist on section 104 Finance Act, 1991 (procedure to apply where consideration cannot be ascertained) being applied and, if appropriate, may stamp the deed and impose the surcharge if necessary.

These are areas which, up to now, never gave rise to problems for stamp duties but now, because of the compulsory nature and other factors, must be considered in all cases.

Miscellaneous
The foregoing are only some examples where problems arise. Now it is necessary to examine each document, even of the most innocuous nature, to ascertain if there are any transfers or other stampable transactions relating to any "property" whatsoever. Intangibles such as goodwill, benefit of contracts and intellectual property, will be subject to stamp duty at contract stage. Employment agreements, management agreements, for example, where they include an element of purchase by the new employer, of the benefit of a previous contract with the old employer, foreign loans secured on Irish property and all such, which could be termed "innocent" documents from a stamp duty point of view, must be investigated by the professionals to ascertain the stamp duty position.

This leaves trustees, personal representatives and persons secondarily liable for CAT in a very invidious situation vis a vis both taxes. At least for capital acquisitions tax, there is the availability of the Green Certificate under section 48 (As amended) CATA, 1976 but this applies only after the period of two years from the date of the gift or inheritance, although the Revenue Commissioners are willing to consider it within the two years and will certainly do so if there is no argument as to values, e.g. quoted stocks and shares etc. However, the certificate now becomes more urgent, particularly with stamp duty in view. It will be necessary to obtain this "green certificate" in all areas where the trustees etc. have an exposure. At least this will copper-fasten the values in the absence of fraud or failure to disclose material facts. If the trustee or personal representative has been acting bona fide, it is anticipated that the Revenue will raise no problems with them once the certificate has issued.

The Future

The Revenue must now consider some form of discharge from stamp duty and, it is submitted, that the Revenue Commissioners should consider combining the stamp duty and capital acquisitions tax discharges in the Green Certificate or similar certificate.

Some form of practical protection for the professional and innocent donor must be obtained. If a professional is acting bona fide, he should not be penalised for any inadvertence or negligence on the part of the taxpayer.

As in the income tax code, there must be an appeal to the Appeal Commissioners, for stamp duty. If

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a professional falls foul of the surcharge provisions or the negligence provisions, his only appeal is to the High Court. This surely is against all considerations of justice, particularly as there is available, in other taxes, a much more convenient and easily acceptable form of appeal, to the Appeal Commissioners. This must be afforded to the sufferers in stamp duty as well.

Because of the uncertainty relating to the words "interested or concerned in or about" an instrument for stamp duty purposes, this type of protection and discharge must be given to the professional.

The professional, for his own protection, must inform the taxpayer at the earliest stage of a transaction, of the duty to disclose and the problems of undervaluation. This must be forcibly brought to his attention in the initial letter, placing the obligation firmly on the shoulders of the client and of his valuer in the case of the surcharges.

The following are suggested as approriate paragraphs or clauses to be incorporated in that letter:

Duty to Disclose

1. Your attention is drawn to the provisions of Finance Act, 1991 relating to the duty to disclose for all purposes of stamp duty. This duty is incumbent on you and in so far as the Revenue may require information relating to the transaction you are obliged to supply all the information in your possession. Failure to make full disclosure, particularly when requested, could result in your being liable for the following:
   (a) A penalty of £1,000, together with
   (b) the difference in stamp duty occasioned by the failure to disclose (in the case of fraud, this penalty is doubled).

Undervaluation

2. Your attention is, (also) drawn to the provisions of [Finance Act, 1989 and Finance Act, 1991 (as appropriate)] in relation to the valuation of property for [gift tax, inheritance tax and stamp duty purposes]. The consequences of undervaluation, and it does not require a great deal of undervaluation to bring this about, can have a serious effect on the tax. The surcharge penalty, for stamp duty purposes, can amount to double the stamp duty, and for gift tax and inheritance tax, can amount to 100% of that liability. In addition, it may be possible to seek further penalties under the failure to disclose provisions referred to above.

□

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A Seasonal Tale

(Younger Members News)

"Once upon a time, in a Place called Blackhall, there was a large old house. One of its many rooms was used as a creche for youngsters who passed the time eating ice-cream and drinking soda pop. The youngsters appeared content with their lot and the counsellors who owned the house were happy that the youngsters seemed to be enjoying themselves.

Things continued in this fashion until eventually the youngsters tired of their lotus eating and became curious, as all young people do, about the world around them. The youngsters started wandering the corridors beyond the confines of Room 4 and discovered a whole new universe full of interest and (relative) excitement. Most exciting of all was the Council chamber which seemed to be just like their own creche only bigger and better and brighter. No sooner had they reached this Aladdin's Cave than they began to wonder how they had managed to stay away for so long..."

1991 ended on a high note for the Younger Members Committee with the re-election to the Council of *James McGuill* and *Eva Tobin,* its outgoing Chairman (which is not to say that there any shrinking violets among its number). Between the two of them they amassed 2319 votes and finished in fourth and fifth place respectively in the poll.

New Chairman, *Michael Lanigan* has his work cut out to emulate the success of E.T. but with the support and co-operation of his colleagues a very full year is already being planned.

Among the new faces on the YMC is incoming Vice-Chairman *John Shaw,* elected to Council at his first attempt (and without ever being to the creche!).

One of the highlights of the 1992 Programme is the Conference at Newcastle, Co. Down on 8/10 May 1992 being organised by the Northern Ireland Young Solicitors Group in association with the Society for Young Solicitors and the YMC. (Watch this space for further details).

In fact, all going well, there probably won't be any time left for ice-cream and soda pop! Ah well, success has its price...

John Campbell
YMC

The Law Society Retirement Annuity Pension Plan

Now is the Time to Get in

by *Harry Cassidy,* Associate Director,
Investment Department, The Investment Bank of Ireland Limited.

We are again approaching that time in the financial year when those who are self employed are looking for some tax breaks to alleviate the tax liability before the end of the income tax year. With all of the recent government talk of increasing the tax net and withdrawing or reducing allowances and reliefs, still one of the most attractive tax breaks available is the area of pension contributions. All contributions are fully deductible against income tax at your top rate subject to an overall limit of 15% of net relevant earnings. While this article does not allow the space to go into the detailed tax complications of pension contributions, I would like to bring to your attention one of the most attractive and beneficial plans available at present, namely the Law Society Retirement Annuity Plan. This plan offers all the tax benefits mentioned above and much more.

Retirement Annuity Plan

The Incorporated Law Society established a Retirement Annuity Plan in 1975 to provide its members who are self employed or in non pensionable employment with the opportunity to provide for their retirement during their working life.

There is still a very small percentage of qualified solicitors who are actually members of this scheme but the number are increasing annually.

The significant advantages of this scheme over all other available schemes have to be highlighted.

Main Advantages

The main advantages of the scheme will be felt in the early years as a direct result of the very low entry costs. The entry and ongoing cost of the Retirement Annuity Plan are lower than those of any other life assurance scheme available at present. The initial entry charge is only 2.5% of each sum invested and the ongoing management fee is only 0.5% per annum.

Normally, most insurance schemes carry an entry charge of at least 5% with annual management fees ranging from 0.75 to 1%. This has a negative effect on the investment level and performance.

The Law Society Retirement Plan has the following benefits:

- Low entry costs.
- Low management fee.
- No initial units.
- No charge for switching between funds.
- No penalty charges for ceasing contributions.

In making contributions to the plan, you are not tied to making payment every year. Indeed, the minimum contribution that can be made in any year is only £500.

Choice of Funds

The Plan is invested in two funds. A solicitor can choose to invest in the managed fund which is a broad spread of equities, gilts and cash or the cash fund which is suitable for those years immediately prior to retirement thus allowing an individual to protect accumulated gains.

Performance

Although I cannot guarantee the rate of return of the plan, our objective as fund manager is to achieve a real rate of return substantially in excess of inflation. The returns for the past six years and the year to date are set out in the Table.

As you will see from these figures, the Law Society Plan has performed very favourably alongside the main insurance companies and remember all gains made within the fund are completely tax free.

Time to Invest

This is normally the time when you will be considering making payments or increasing contributions to an existing plan. Contributions for tax purposes can be made up to the 31st January, 1992 and if you are considering making payments, why not consider the Law Society Plan for your next contribution.

If you require any further details on the plan and wish to investigate the many benefits in great detail, please contact either myself or *Terence Deacon* at The Investment Bank of Ireland Limited, 26 Fitzwilliam Place, Dublin 2. Telephone 616433.

□

	Year to 1/10/91	90	89	88	87	86	85
Irish Law Society Pension Fund	17.98	(9.4)	19.2	26.9	7.4	20.8	28.1
Irish Life Managed Fund	14.22	(11.2)	19.8	26.1	10.9	22.1	24.9
Standard Life Manged Fund	17.42	(14.8)	16.4	29.0	14.1	20.8	31.2

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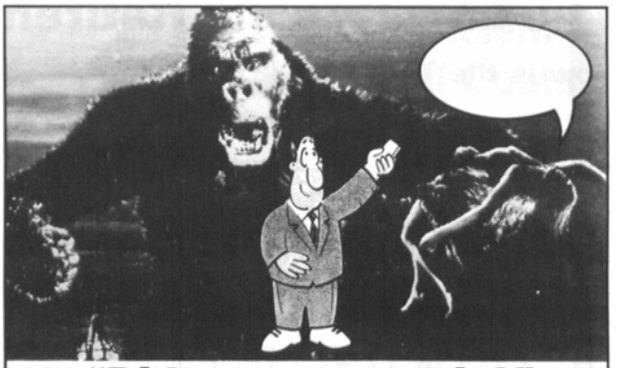

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MICHAEL FORDE

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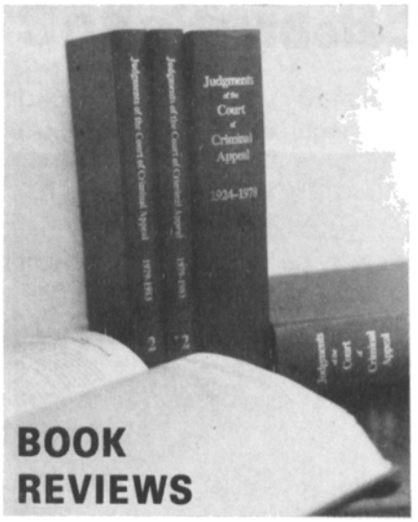

Administrative Law in Ireland

Second Edition. By Gerard Hogan and David Morgan. [London, Sweet & Maxwell, 1991, £39.20 paperback]

What is Administrative law? Professor S.A. de Smith wrote in 1968 in relation to the term "adminstrative law" that in place of integrated coherence, our nearest neighbours had "an asymmetrical hotchpotch, developed pragmatically by legislation and judicial decisions in particular contexts, blending fitfully with private law and magisterial law, alternatively blurred and jagged in its outlines, still partly secreted in the interstices of medieval form of action."

The authors refer to the conventional definition of administrative law as the law regulating the organisation, composition, function and procedures of public authorities (in the wider sense); their impact on the citizen; and the restraints to which they are subject. However, there is still the element of hotchpotch in administrative law; the outlines of the subject may be partly blurred and jagged, but adminstrative law has assumed an important role in legal affairs in Ireland.

Justice Robert Jackson once observed of the US Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." Gerard Hogan and David Morgan consider over 200 Irish cases decided since their first edition in 1986. But the authors do not accept automatically either the finality or the infallibility of these or earlier decisions. In their examination of relevant cases, the authors express concern for the general lack of respect for precedent. They note that the respect for precedent is the vital vehicle to ensure certainty and consistency and lack of judicial subjectivity which are the essential features of any legal system. The authors go so far as to speak of a breakdown in the system of precedent.

In the context of any breakdown in respect for precedent, your reviewer in conscious of the words of Cardozo, one of the great American legal philosophers and judges. He wrote in 1924 in *The Growth of the Law* of the fecundity of case law. He continued: "The output of a multitude of minds must be expected to contain its proportion of vagaries... An avalanche of decisions by tribunals great and small is producing a situation where a citation of precedent is tending to count for less, and appeal to an informing principle is tending to count for more. Crowded dockets make it impossible for judges, however able, to probe every case to its foundation." Your reviewer agrees with Cardozo that certainty can be bought at too high a price, "that there is danger in perpetual quiescence as well as perpetual motion, and that a compromise must be found in a principle of growth." One is reminded of the words expressed in *Glanzer -v- Shepard* 233 N.Y. 236, 241; "Life (a legal case) has relations not capable of divisions into inflexible compartments. The moulds expand and shrink."

The law relating to instruments of government, such as ministers, departments and the civil service, state-sponsored bodies and local government, is set out in *Administrative Law in Ireland.* The instruments of control, namely tribunals and inquiries, the Ombudsman (Chapters 6 and 7), judicial review (in Chapters 8 to 11) and the modification in ordinary litigation where public authorities are involved (in Chapters 12 - 14) are described in some detail.

Gerard Hogan and David Morgan have produced a treasury of learning. In so far as is possible, the authors have endeavoured to bring certainty and order out of the frequent wilderness of precedent. "He who has not a copy of Azo's books," stated the proverb of the Middle Ages, "need not go to the Courts of Justice." (Vinogradoff, *Common Sense in Law* p.202). The authors have provided an inestimably important service for judges, practitioners, public servants, and students. He or she who has not consulted Hogan and Morgan's *Administrative Law in Ireland* should be wary of going to court on any issue touching upon administrative law.

Eamonn G. Hall

Daniel O'Connell; Political Pioneer,

Edited by Maurice R. O'Connell, Institute of Public Administration on behalf of DOCAL - Daniel O'Connell Association Limited, vii + 147pp, paperback, IR£9.95.

As a barrister, Daniel O'Connell was described by a contemporary, Charles Phillips, a Commissioner of the Court for the Relief of Insolvent Debtors, as an admirable Nisi Prius advocate, a shrewd, subtle, successful cross-examiner, an excellent detailer of facts, a skillful dissector of evidence. His speech in the case of *The King -v- Magee* is a noble specimen of his talents and intrepidity. This he published afterwards as a pamphlet. Charles Phillips often acted as Daniel O'Connell's junior and stated that in the management of a case, Daniel O'Connell was both discreet and dexterous. Toward the bench

respectful, independent, and at times even stern, he was ever towards his colleagues sociable and kind. In the midst of his multiplicity of affairs, Daniel O'Connell read every novel of the day and was a great reciter of poetry.

Daniel O'Connell is famous for his achievements in the struggle for emancipation. Phillips states that Daniel O'Connell, determined, undaunted, indefatigable, through toil and danger, and difficulties of every kind, led the people to the promised land. However, contemporary reports demonstrate that Daniel O'Connell, like other great men, was no saint.

Daniel O'Connell: Political Pioneer presents the proceedings of the first annual Daniel O'Connell Workshop held in Derrynane, County Kerry - close to O'Connell's ancestral home - in October, 1990. The contributors, drawn from Ireland and abroad, discuss the diversity of the O'Connell legacy. They highlight his relevance to the evolution of modern Ireland and they also examine his significant contribution to European political development.

The editor, Maurice R. O'Connell, a descendant of Daniel O'Connell, taught history in American universities until his retirement to Ireland in 1988. His publications include *Irish Politics and Social Conflict in the Age of the American Revolution (1965),* the eight-volume edition of *The Correspondence of Daniel O'Connell (1972-80)* and *Daniel O'Connell: The Man and his Politics (1990).*

Readers interested in the lives of great men and their times will find *Daniel O'Connell: Political Pioneer* an enjoyable read.

Eamonn G. Hall

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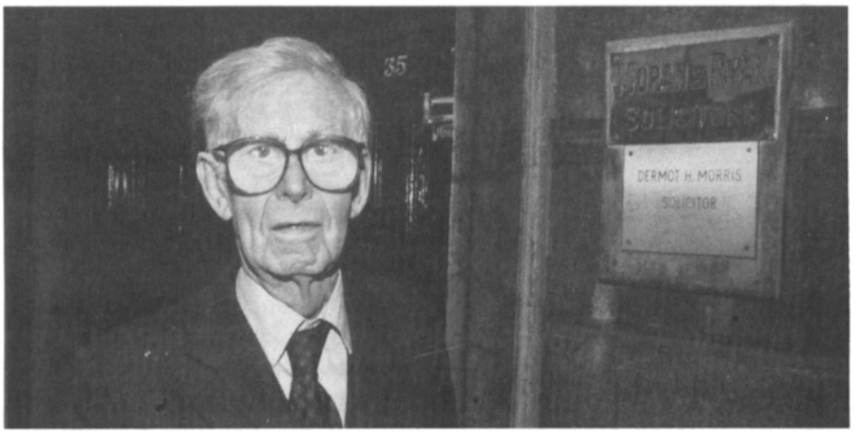
Dublin Solicitor Celebrates 60 Years in Practice.



Desmond Moran

Dublin Solicitor, Desmond Moran, celebrates 60 years in the profession, this month.

Desmond was born in 1908 and educated at Belvedere College. He was apprenticed to his father, a well known Dublin solicitor - John Moran, and studied law at Trinity College and the Incorporated Law Society. He was admitted a solicitor in Michaelmas 1931 and continues in practice as a consultant to this day.

During his career he held many offices. In 1950 he was elected President of the Dublin Solicitors' Bar Association. The following year he was appointed Sheriff for the County of Dublin, a position he held until 1978 when he retired.

He was elected to the Council of the Incorporated Law Society of Ireland in 1962 and served until 1971. He remained a member of the Publications Committee for many years which was responsible for the 5th edition of the Garda Guide, published in 1981.

Desmond has been an active member of the International Bar Association, and was a member of the Organising Committee for their meeting in Dublin in 1968. He attended overseas meetings of the Association including one in Vancouver in 1970. He also visitied the Soviet Union in 1971 where he had an interview with the Deputy Chief Justice of the Supreme Court.

He is best known, however, for his practice and was involved in many noted cases including *Modern Homes Ireland Ltd. -v- Dublin Corporation* which compelled the Dublin Corporation to make a Town Plan and the defence of Singer in connection with the stamps case.

Desmond and his wife Madeleine have three children: *Carroll,* now a barrister, *Ronan* a medical doctor, and *Michael,* a solicitor. □

TURKS AND CAICOS ISLANDS AND THE ISLE OF MAN
Samuel McCleery
Attorney - at - Law and Solicitor of PO Box 127 in Grand Turk,Turks and Caicos Islands, British West Indies and at 1 Castle Street, Castletown, Isle of Man will be pleased to accept instructions generally from Irish Solicitors in the formation and administration of Exempt Turks and Caicos Island Companies and Non - Resident Isle of Man Companies as well as Trust Administration
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Solicitors Bill Dominates A.G.M.

Debate on the Solicitors (Amendment) Bill, 1991 dominated the proceedings of the Society's Annual General Meeting that took place in Blackhall Place on Thursday, 14 November, 1991.

Business/Accounts
Minutes of the previous General Meeting were adopted without amendment.

Frank Daly, outgoing Chairman of the Finance Committee, reported that there had been a surplus in the annual accounts to December, 1990 of £67,837. The Society had the dubious privilege of paying £36,000 in tax. He said that he expected a surplus next year.

Mr. *T.C. Gerard O'Mahony* referred to the accounts. He said the cost of maintaining the Law Society per solicitor had risen from £29 in 1971 to £357 per solicitor in 1990. The outgoing President, *Donal Binchy,* said that costs were very carefully monitored by the Director General and were kept to a minimum. Mr. O'Mahony queried what the liability of individual members of the Society would be for its debt. Frank Daly replied the liability would be nil since the Society was incorporated. Mr. O'Mahony also enquired about the report on the Law Society by a team of management consultants. The Director General, *Noel Ryan,* said a firm of management consultants had been commissioned to examine the operation and staffing of the Law Society. The consultants had subjected the Society to a rigorous examination including the level of staffing, salaries, and divisons of responsibility. It had been considered to be an opportune time to engage in such a process to co-incide with the appointment of a new Director General. The President said the objective was to have a trim operation that was not overstaffed, but, rather, adequately staffed to meet the obligations and duties placed on the Law Society. The draft report of the management consultants was now being considered by a steering committee as to how best it might be implemented.

A cross section of the attendance at the Law Society Annual General Meeting.

Mr. O'Mahony also expressed concern about the cost of expenditure and maintenance on the Society's premises. He said the current report showed that expenditure for the four years prior to 31 December, 1990 was in excess of £1m and it was extimated that more than £300,000 had been spent prior to that. Furthermore, he noted the Premises Committee was gravely concerned about imminent substantial expenses to be incurred. Replying, *Stephen Maher,* outgoing Chairman of the Premises Committee, said that the Law Society's premises were the envy of every other profession in the country. The building provided excellent facilities for the secretariat and for meetings and seminars. The expenditure on the premises had to be considered in the context of what it would cost to rent office space. Mr. Maher said he estimated that the cost of renting office space would be £300,000 to £400,000 per annum. Whatever money had been spent on the premises had been well and carefully spent. He said he could not give an exact figure for the current value of the premises but they were insured for £17m.

The reports of the various committees as published in the Annual Report 1990-1991 were adopted.

Solicitors (Amendment) Bill 1991
Under any other business there was a wide ranging discussion of the Solicitors (Amendment) Bill, 1991. There was a large number of speakers; what follows is a cross section of contributions. The President, *Donal Binchy,* said that, back in 1984, the Department of Justice had offered the Law Society the opportunity to become involved in discussions on the Bill. The Society had accepted the offer fully aware that it would have to maintain the utmost confidentiality about the discussions. The Society had reposed its confidence in the Solicitors Bill Committee. The Committee, he said, had operated very successfully. A number of positive provisions in the Bill had been sought by the Society. Furthermore, the Committee had been successful in neutralising a number of potentially negative provisions. It also had to be remembered that a number of very unpalatable provisions had ended up on the cutting room floor thanks to the intervention of the Committee. However, it would have been unrealistic to have expected that the Bill would not contain provisions that the profession would oppose. The President emphasised that the Law Society's public response to the Bill when it was published on Friday, 25 October, 1991 had been a preliminary one. The entire profession had been informed immediately of the contents of the Bill. A very

full discussion had taked place with the Presidents and Secretaries of Bar Associations earlier that day.

Maurice Curran, Chairman of the Solicitors Bill Committee, then outlined what the Society's response had been to both the negative and positive provisions in the Bill.

Barry St. J. Galvin took issue with the way the Law Society had dealt with the Bill. He said the Solicitors Bill Committee had been a secret committee. It had not been able to report back to the Council. The Council had not been able to make its views known while the discussions were taking place. He said he was disappointed with the attitude of the Law Society to the changes in the Bill. The Society appeared to be welcoming interference in its own system of regulation. The profession had not failed to regulate itself. The Disciplinary Committee of the Society had no power of sanction and could only report to the President of the High Court. Why should the Society be penalised for failing to exercise powers that it did not have, he said.

Andrew Curneen said he was concerned about the definition of "client" in the the Bill as it was very widely drafted and included anyone who was a successor-in-title to a client. He said that this could include a purchaser or a mortagee's lending institution. He thought that the Society should have stood up and fought against the Bill. The other branch of the profession had been successful in showing its teeth and had escaped regulation.

David Walley, President of the Dublin Solicitors Bar Association, complimented the Society on the superb summary of the Bill that had been produced and on reacting speedily to the Bill. He said that the provision in the Bill in Section 62(1) providing that fees must be advised in writing to clients could be ridiculous in certain cases say, for example, when a will was being drafted. David Walley said he was opposed to the provision prohibiting percentage fees. This was not harmful to clients and clients could readily understand the percentage basis. He said it was necessary to examine the whole manner in which lawyers charge fees and the whole issue of costs. Section 63 permitting advertising of fees could lead to supermarket-style 'price wars'. Meanwhile, the Competition Act had abolished the Bar Associations' recommended fees. This was a schizophrenic approach on the part of the Government. He said he thought compulsory professional indemnity insurance was a good idea but queried whether the Mutual Defence Fund would become a last resort for solicitors with poor claims records who could not get insured elsewhere.

James MacGuill said that the Bill was anti-solicitor and anti-client and the Law Society should not have welcomed any part of it. In the absence of a statutory civil legal aid scheme, solicitors engaged in cross subsidisation of cases, and often took actions for impecunious clients but under the Bill it would be impossible to do so. The profession would now be the most policed profession in Europe. He noted there was no provision in the Bill to penalise a complainant who made a false complaint. The solicitors profession provided an excellent service to the public and the Law Society should not appear defeatist.

Michael Nugent dealt with the provisions of the Bill relating to newly-qualified solicitors. He said over the years there had been a continuous erosion of what a Practising Certificate entitled a practitioner to do. The proposed restriction on newly qualified solicitors practising on their own for three years after qualification was introducing two tiers into the profession. It would, in effect, informally extend the apprenticeship period by a further three years. It this was to happen, the Society should introduce stringent and fair provisions for minimum wages to be paid to solicitors in the first three years of practice. He felt this provision would be an erosion of the freedom of newly qualified solicitors to dispose of their labour; they would be constrained to be employees.

Garrett Sheehan said that currently there was no provision guaranteeing that someone who had passed the preliminary examinations for entry to the Law School would get an apprenticeship. He felt that no one should be precluded from practising as a solicitor because he could not get an apprenticeship.

Tim O'Sullivan said he supported the provisions in the Bill that would allow incorporation and said he would like to see limited partnerships. *Brian McMahon* said there would be casualties in the profession if normal market forces were allowed into play. It would be a question of the survival of the fittest and the cheapest. *Andrew Crowley* said the Bill was a slur on the profession. He said there should be a sanction in the Bill for anyone who charged an uneconomic fee. He said there came a point in economics where competition went beyond benefiting the consumer.

Frank Lanigan said that Section 63 dealing with fees advertising looked very much the same as the 1988 advertising regulations. He said the criteria in both were essentially subjective and a tightening up of the criteria should be considered to prevent tasteless, badly, or improperly worded advertisements.

Donnchadh Lehane said that in opposing the Bill the Society should hone in on those provisions that were unconstitutional and seek to impugn the legislation when the Bill became law.

Replying to these comments, *Maurice Curran,* Chairman of the Solicitors Bill Committee, pointed out that not all of the provisions in the Bill were at the Society's behest. Some of the provisions in the Bill had been included even though the Committee had trenchantly opposed them. The Committee had been successful in ensuring that even more unpalatable provisions

(Cont'd on page 420)

Practice Notes

Directors Dealing with Company

Section 29 Companies Act, 1990

Section 29 of the Companies Act, 1990 came into operation on 1st, February, 1991. As a result a company may not enter into an arrangement with:-

(a) a director of the company; or
(b) a director of its holding company, or
(c) a person connected with such director

without the arrangement having been first approved by resolution of the company in general meeting.

An arrangement for the purpose of the section is one whereby one or more non-cash assets are acquired by:-

(a) the company from a director;
(b) the company from a person connected with its director or a director of its holding company,
(c) a director or a person connected with him from the company or its holding company.

Connected persons are defined in Section 26 of the Act as:-

(a) the director's spouse, parent brother, sister or child;
(b) a person acting in his capacity as the trustee of a trust the principal beneficiaries of which are the director, his spouse or any of his children or any body corporate which he controls, or
(c) a partner of that director.

A body corporate is connected with a director if it is controlled by the director. Section 26(3) contains detailed provisions defining control. It should also be noted that the definition of a director includes a shadow director as defined in section 27.

Transactions falling below the thresholds specified in section 29(2) are not affected. The transaction must not exceed IR£1,000 in value. If it does, it will only be exempt from the provisions of the section where it is less than IR£50,000 in value and that value does not exceed 10% of the relevant assets of the company as defined in the subsection.

The Conveyancing Committee has considered the implication of Section 29 for conveyancing practice and has taken the opinion of Professor Wylie on the matter. As a result it has decided to issue the following practice note.

In transactions between natural persons and bodies corporate and in transactions between bodies corporate a certificate should be included to show either that the parties are not connected with one another for the purposes of Section 29 or that they are connected with one another and the requisite resolution has been passed by one or more companies involved.

The Committee considers that the detail of the matter should not be one of title and that the certificates should do no more than certify the position. Accordingly, it is not sought to produce either the formal resolution on the company or other detail in the certificates which would put an investigator on notice of additional facts.

These certificates are not required in a transaction between two natural persons.

In these certificates the expression "A" should be replaced by a reference to either the vendor or the purchaser as appropriate. The expression "B" should be replaced by the name of the holding company of either the vendor or the purchaser as appropriate.

The first certificate deals with a transaction where the parties are connected.

The second certificate deals with a transaction where the vendor or the purchaser is a natural person dealing with a body corporate with which he/she is not connected.

The third certificate deals with a transaction where both the vendor and the purchaser are unconnected corporate bodies.

These certificates do not exhaust the situations which may arise and should be varied as appropriate.

The following points arising under the Companies Acts should be borne in mind:-

1. Where the Articles of Association of the company permit, the company may pass a resolution under section 141 (8) of the Companies Act, 1963. Such a resolution in writing signed by all the members for the time being entitled to attend and vote on such resolution at a general meeting is as valid and effective for all purposes as if the resolution had been passed at a general meeting of the company duly convened and held.

2. "Holding company" is defined in Section 155 (4) of the Companies Act, 1963 as:- "a company shall be deemed to be another company's holding company if, but only if, that other is its subsidiary". The full definition of subsidiary is set out in Section 155 (1) of the Companies Act, 1963.

3. "Director" under provisions of Section 27 of the Companies Act, 1990 includes a shadow director. A shadow director is a person in accordance with whose direction or instructions the directors of a company are accustomed to act. The only exclusion is a person whose directions or instructions are given as advice in a professional capacity.

Certificates

1. [IT IS HEREBY CERTIFIED for the purposes of Section 29 of the Companies Act, 1990 that the transaction hereby effected has been approved by a resolution passed (at an Extraordinary General Meeting of the members of [A/B being the holding company of A]) or (as a written resolution of the members of [A/B being the holding company of A])

OR

2. [IT IS HEREBY CERTIFIED for the purposes of Section 29 of the Companies Act, 1990 that the [vendor/purchaser] is not a director or a person connected with a director of A or its holding company]

OR

3. [IT IS HEREBY CERTIFIED for the purposes of section 29 of the Companies Act, 1990 that the vendor and the purchaser are not bodies corporate connected with one another in a manner which would require this transaction to be ratified by resolution of either]

Conveyancing Committee

Company Guarantees Section 31 Certificates

In making financial facilities available to customers certain financial institutions have adopted a practice of requesting the customer's solicitor to provide an unqualified certificate that Section 31 of the Companies Act, 1990 has been complied with. The Company and Commercial Law Committee of the Law Society recommend that such certificates be given by solicitors only where they are absolutely certain as to the nature of the inter-company shareholding and that the effect of such shareholding does not result in a breach of Section 31. For example, amongst other things, the solicitor should be absolutely certain that neither company is a shadow director of the other.

Financial institutions and their advisers are at liberty to seek whatever certificates they deem appropriate for their protection. However, such certificates should not be given by solicitors unless they have a clear understanding of the application of Sections 31 – 40 of the Companies Act, 1990 and have direct access to the share registers of the appropriate companies. Accordingly, extreme caution should be exercised in giving such certificates.

Solicitors should be aware that should they give such an unqualified certificate and it transpires that there was a connection resulting in a breach of Section 31, thereby rendering the transaction voidable, the solicitor giving the certificate could be personally liable to make good to the financial institution the total sum involved.

Company Law Committee

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Solicitors Bill Dominates AGM

(Cont'd from page 418)

had not seen the light of day. Maurice Curran also pointed out that many of the provisions of the Bill were merely enabling provisions. It had been thirty years since the last piece of legislation dealing with the profession had been enacted; the Society had sought a number of flexible provisions that would give the Society freedom to deal with developments in the future as required.

At the meeting there was general support for the idea of holding a special annual general meeting to deal in more detail with the views of members of the profession on the Bill. The Council of the Law Society at its meeting the following day, decided to stage a special AGM on Tuesday, 3 December, 1991, which was due to take place as this issue of the *Gazette* went to press.

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Mayo Bar Association Dinner

At a dinner of the Mayo Bar Association to honour Joseph M. King, Michael J. Egan and Moya O'Connor, all of whom qualified over 50 years ago were: seated left to right— Judge John Garavan, Michael J. Egan, solicitor, Moya O'Connor, solicitor, Donal Binchy, then President of the Law Society, Joseph M. King, solicitor, Judge John Cassidy. Standing left to right— Judge Patrick Brennan, Patrick U. Murphy, County Registrar, Bernard Daly, Retired County Registrar, Patrick Moran, President of the Mayo Solicitor's Bar Association, Noel Ryan, Director General of the Law Society, Judge Jarlath Ruane.

Annual Report of The Disciplinary Committee

New Applications:		**44**
Law Society		
Prima facie cases found	25	
Prima facie case not found	2	
Prima facie decision adjourned	1	
Private		
Prima facie case found	3	
Prima facie case not found	7	
Prima facie decision adjourned	1	
Awaiting prima facie decision	5	
At Hearing		
Law Society		**28**
Misconduct	10	
No misconduct	2	
Adjourned	10	
Awaiting inquiry	3	
Private		
Adjourned	2	
Leave to withdraw after inquiry directed	1	

Applications from Previous Year		**21**
Law Society		
Misconduct	4	
No misconduct	5	
Further inquiry held when case was remitted by the President of the High Court	2	
Adjourned	4	
Leave to withdraw after inquiry directed	2	
Private		
Prima facie decision adjourned	2	
Inquiry adjourned	2	

Between the 1st September, 1990 and the 31st August, 1991 the Disciplinary Committee met on 29 occasions.

Subject Matter of Complaints

Civil Claims
Conveyancing
Probate
Solicitors' Accounts Regulations

Main Grounds on Which the Committee found Misconduct

Misappropriation of clients' funds.

Created and maintained a deficit on the clients account.

Improperly and without authority advanced the funds of one client to the benefit of another client.

Created debit balances in the clients accounts in breach of Regulation No. 2 of 1984.

Failure to keep proper books of account and was thereby in breach of the Solicitors' Accounts Regulations (No. 2) of 1984.

Falsifying the books of account of the practice by engaging in the improper practice of teeming and lading.

Placing false letters and attendance notes in clients files to support teeming and lading.

Engaging in the practice of kiting cheques which had the effect of overstating the amount of monies in the client account at relevant times.

Books of account were misleading and inaccurate.

Tendering cheques drawn on office account which were dishonoured by the bank as there were insufficient funds or overdraft sanctions to fund these payments.

Transferring from client's bank account or directly lodging to office bank account amounts in excess of fees and outlay.

Clients funds were improperly used to fund VAT payments.

Knowingly gave misleading information to the Law Society.

Failure to account properly to a client in respect of monies obtained from two accident claims.

Misleading a client in relation to the settlement of an accident claim.

Notwithstanding that a client had paid the full purchase price, stamp duty and Land Registry fees, a deed of transfer was not lodged in the Land Registry.

Drawing up false contracts for sale in respect of an alleged offer.

Giving dishonest undertakings.

Giving two undertakings in respect of the same property.

Failure to disclose a prior existing undertaking when giving undertakings in respect of a home loan.

Failure to reply to the Society's correspondence.

Failure to attend a meeting of the Registrar's Committee or Compensation Fund Committee when requested to do so.

Failure to reply to correspondence from clients or the client's new solicitors.

Commentary

The Disciplinary Committee, which is a statutory body wholly independent of The Incorporated Law Society of Ireland, is at present constituted under the Solicitors' Acts 1954 and 1960. It is a Committee of ten practising solicitors and its powers are restricted to receiving and hearing complaints of alleged misconduct in accordance with the Rules made under Section 16 of the 1954 Act. During the year it has come to the attention of the Committee that members of the profession still fail to appreciate the significance of the Disciplinary Committee and the role it plays in regulating the conduct of solicitors. They fail to understand that it is a committee of the High Court and is unconnected to the Law Society's procedures in relation to the conduct of solicitors.

The majority of applications which come before the Committee issue from the Law Society, but any party may make a direct application. This year approximately 38% of applications received were from members of the public. However, it must be stressed that the Committee had no power to carry out its own investigations and any informal complaint is usually referred to the Law Society, with the consent of the complainant, for enquiry.

This year saw a decline in the number of applications which came before the Disciplinary Committee for consideration and this is a very welcome sign. Notwithstanding this, the Committee still found it necessary to sit regularly throughout the year. The seriousness of the matters considered by the Committee is illustrated by the fact that five solicitors had their names struck off the Roll of Solicitors, one was suspended and another had his practising certificate restricted.

Under Section 3 of the Solicitors Act 1960 misconduct includes

(a) the commission of treason or a felony or a misdemeanour,
(b) the commission outside the State of a crime or an offence which would be a felony or a misdemeanour if committed in the State,
(c) the contravention of a provision of the Solicitors' Acts 1954/1960 or any Order of Regulation made thereunder,
(d) conduct tending to bring the profession into disrepute.

Forms leading to the institution of an inquiry into the conduct of a solicitor may be obtained from the Clerk to the Committee, Blackhall Place, Dublin 7.

An analysis of the findings of the Committee would indicate that there have been very serious breaches of the Solicitors Accounts Regulations during the period under review. A very critical view was taken of solicitors who had misappropriated clients funds, engaged in the practice of teeming and lading, created and maintained deficits on clients account, or who improperly and without authority advanced the funds of one client to the benefit of another. The Committee in such cases had no hesitation in finding misconduct and reporting the matter to the President of the High Court, with a recommendation that the solicitors either be struck off the Roll of

The High Court

Cases presented to the High Court between the 1st September, 1990 and the 31st August, 1991	**22**
Name of solicitor struck off the Roll	5
*Suspended from practising as a solicitor for three years	1
Practising Certificate to be withheld until the High Court shall make an Order to the contrary	1
Practising Certificate limited so that for the next three years the solicitor practises under the supervision of a solicitor of not less than 10 years standing who is acceptable to the Society.	1
Cautioned in respect of delays. Costs awarded.	1
Censured, fined and costs	4
Censured and costs	5
Adjourned	1
Awaiting presentation to the High Court	1

Cases adjourned by the President of the High Court last year	**4**
Remitted to the Disciplinary Committee Stay on Order of Suspension – Adjourned	1
Remitted to the Disciplinary Committee Adjourned	1
Censured and costs	1
*Suspended from practising as a solicitor for three years	

** These Orders were made in respect of the same solicitor. Fines of £1,000 were imposed in the appropriate cases.*

Solicitors or suspended from practice. I would like to take this opportunity to advise all partners of firms that they should take an active interest in ensuring that the Solicitors Accounts Regulations are rigidly adhered to, because unless they do so they will be equally responsible for any breaches of the Regulations should they arise.

In some instances false and misleading information was given to clients and the Society. It is incumbent on each solicitor to reply fully and accurately to any enquiry which may be received from the Law Society. Obviously situations where a solicitor misleads his client in relation to the settlement of an accident claim, and then proceeds to settle her action and endorse her settlement cheque without her consent must be viewed with gravity because they are particularly damaging to the reputation of the profession.

A feature of most complaints which come before the Committee is the failure of solicitors to reply to correspondence from clients or the Society. This is a constant omission by members of the profession who appear before the Committee and is a source of exasperation especially when it transpires that a complaint would not have been pursued had the solicitor responded to a client or the Law Society. I have already indicated in a previous report that the Committee views and will continue to view such failures as very serious, and as sufficient grounds for misconduct and in the absence of an adequate explanation will report such findings to the President of the High Court.

During the year Mrs. *Moya Quinlan* and Ms. *Elma Lynch* were reappointed to the Committee by the President of the High Court for another period of five years.

I would like to record my thanks to the members of the Committee for their hard work and support during the past year and to *Mary Lynch,* Clerk to the Committee, who looks after the work and administration most expertly.

Walter Beatty
Chairman
3 December, 1991

(A list of the members of the Disciplinary Committee appears on page 390 of this Gazette).

Correspondence

Dear Sir,

I came to live here in Italy approximately six weeks ago, it being my intention when I mastered the language sufficiently to return to the profession. In the meantime, I was advised very strongly by the Department of Social Welfare in Ireland to register myself immediately with the Department of Labour and Finance here in order to obtain a Revenue Number and also to get myself registered as unemployed and thus keep up my pension rights until I am in a position to pay tax or social insurance.

After four weeks of no less than 14 visits to numerous government offices, I have finally succeeded. Amongst the many details I was required to give was my mother's maiden name. One office insisted on seeing my original Parchment. Having made arrangements to have this forwarded, I was informed by a different office that it was quite useless as my qualifications did not apply here. In another office, I discovered them checking up on Social Welfare requirements in Ireland!

I write to alert any members of the profession considering coming to work here to be prepared for endless delays, the fact that we are all EC members will not make one bit of difference.

Yours faithfully,
Lavinia Anderson,
Via Aia S, francesco 19,
03013 Ferention FR,
Italy.

YOUR WILL
can help
Adreen Cheshire Home
Shillelagh
For donations and further particulars contact:
Jarlath Tunney
or ***Margaret Warren***
Ardeen, Shillelagh, Co. Wicklow.
Tel : (055) 29143 Fax : (055) 29170

Civil Legal Aid Report

(Cont'd from page 403)

8. The Legal Aid Board should be entitled to recover costs against unsuccessful parties.

9. In 1977 the Pringle Committee estimated that the cost of introducing a comprehensive scheme of legal aid would be £2m. That figure translated into 1991 prices would now be just over £6m. Currently, the Government is spending only £2.5m a year. The cost of a properly funded comprehensive legal aid scheme is not high and the Committee believes that even in times of financial stringency it is a vital service. If these recommendations were implemented, the existing scheme could be substantially improved and the cost involved would not be inordinate and certainly not disproportionate to the importance of the issue involved.

The report of the Committee has been approved by the Council of the Law Society and a copy has been submitted to the Minister for Justice.

The members of the Committee were: *Moya Quinlan,* (Chairman), *Frank O'Donnell, Ernest Margetson, Michael Reilly,* Judge of the District Court, *Eugene Davy, Mel Cousins, Noel C. Ryan,* and *Linda Kirwan* (Secretary).

□

Breslin & Associates
4 Fairbrook Terrace, Rathfarnham
Dublin 14
Bookkeeping-Accountant with 8 years' experience in Solicitors' accounts will provide complete management package, client and office accounts, taxation submission.
Contact *Anne Breslin*
Telephone: 933069

Technology News

Requisitions on Title

The limited number of Irish sourced support packages has been added to in the past few weeks with the launch by the Dublin Solicitors Bar Association of an automated requisitions on title package known as CORT (Computerised Objections and Requisitions on Title).

The system which incorporates the standard form of requisition on title is designed to save time and to simplify the procedure in respect of requisitions. The system is intended for use by solicitors acting for a vendor who can compile a standard form of requisition with the appropriate replies suited to the sale or transfer in hand.

In using the system, the vendors solicitor will raise the standard Requisitions on Title (excluding obvious requisitions which are inapplicable to the particular transaction e.g. flats or licensing where the sale is of a second hand dwelling house). The content of the requisitions cannot be varied from the current editions issued by the Incorporated Law Society.

It is envisaged that the vendors solicitor will send the completed Requisitions with the appropriate replies to the purchaser's solicitor at the time he returns the executed contract to the purchaser. CORT operates on IBM compatible PCs and is available in network versions. Minimum PC requirements are 512k memory and 2Mb disk. The system will print to any standard printer. Further details on the system are available from Noltag Computer Services at Dublin (01) 724911. (See also report on page 427)

Moving Documents

When a Word Processed document is complete the quickest way to transfer it to counsel or to another firm who may be making further revisions of it is by giving them a copy of the disc with the document on it. Until now if different systems were used, the document required a substantial conversion process before it could be used, then when it was transferred back to the original user the conversion had to take place all over again.

Now there is news from the United Kingdom of a system which enables documents to be sent between systems by a combination of fax and computer and which can provide the means to convert and check the document at the other end. Legal Information Exchange (LIX) has launched a communications application which allows for rapid transfer of word processed documents between its users. The documents are converted to the correct word processing version at either end and the system checks the received material for formatting etc. The system also provides for revision and marking of word processed drafts in a readable style. Clearly, the system is only as good as the number of users and the company is reported to be actively recruiting new users throughout the UK. LIX is a non profit making distribution company which has received sponsorship from the English Law Society and the Bar Council.

Opening Windows!

Many practitioners may feel confused lately by the introduction into any computer related discussion of the term "windows". The term can be used to describe the product developed by Macintosh as Windows 3.0 following on the Apple/Macintosh range of applications. In its generic sense, windows is better described as a Graphical User Interface.

Graphical User Interface replaces the cumbersome operating methods of keys and commands with a series of graphical images on the screen that are manipulated through a hand held device known as a mouse. This blend of screen images called icons and the mouse pointer makes operation of a computer system manageable for the least computer literate amongst us. Many existing computer applications are in the process of introducing the interfaces for use with their product. Wang have introduced Upword for use with Wang WP; Word Perfect are launching windows for Word Perfect in late 1991 or early 1992 and Wordstar are working on Wordstar Legacy for an early release.

This column is contributed by members of the Technology Advisory Group, an informal grouping of solicitors who, with the approval of the Technology Committee of the Law Society, seek to promote awareness and use of technology within the profession. Further details from the Honorary Secretary, John Furlong, c/o William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2. □

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Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.
1st day of August, 1990.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

Lost Land Certificates

Ann Marie Dowling Folio: 4581; Land: Damerstown West; Area: 81a 1r 0p. County: **KILKENNY.**

James Duggan Folio: 1200; Land: Curraghanoe; Area: 11a 3r 25p. County: **CAVAN.**

Edward Ferdinand Clancy, Michael Columba Normoyle, Edward Baptist Doyle and Joseph Adrian Mulholland Folio: 11686; Land: North side of Clinton's Lane, Drogheda; Area: 3 roods 10 perches. County: **LOUTH.**

Anthony Ahern, Folio: 5577F; Land: Roxborough; Area: 0a 2r 35p. County: **LIMERICK.**

Mary Bligh, Derrylahan, Cloonfad, Ballyhaunis, Co. Mayo. Folio: 31691; Land: Derrylahan; Area: 17a 1r 13p. County: **ROSCOMMON.**

Sheila Harrington, Kingsland, Boyle, Co. Roscommon. Folio: 32130; Land: Tonroe or Creen; Area: 1 rood 2 perches. County: **ROSCOMMON.**

Julia Toomey, Folio: 34457; Land: Springfield. County: **TIPPERARY.**

Otto Puls, Folio: 1776F; Land: (1) Ardgroom Inward, (2) Ardgroom Inward; Area: (1) 5a 2r 4p, (2) 11a2r0p. County: **CORK.**

Michael Dunleavy, Mullaghowney, Attymass, Ballina, Co. Mayo. Folio: 346; Land: Larganmore; Area: 9a 2r 3p. County: **MAYO.**

Michael and Bridget Morrissey, Moneen, Kilkee, Co. Clare. Folio: 18285; Lands: (1) Moneen West, (2) Tullaher; Area: (1) 17a 0r 0p, (2) 1a 0r 32p. County: **CLARE.**

John Conroy, Folio: 245L; Land: Beladd. County: **QUEENS.**

St. Nathy's Diocesan Trust, St. Nathy's, Ballaghaderreen, Co. Roscommon. Limited Liability Company. Folio: 9108; Land: Cordarragh; Area: 3a 0r ½p. County: **MAYO.**

John Griffin, Folio: 1514; land: Cloghaunmore (West); Area: 10a 1r 27p. County: **CLARE.**

Geraldine Murphy and William Fleming, Folio: 1746L; Land: Carrick. County: **TIPPERARY.**

Humphrey Mulcahy (Junior), Folio: 5637; Land: Corran; Area: 18a 1r 20p. County: **CORK.**

The County Council of the County of Clare, c/o T.A. Lynch, Solicitor, 5 Bindon Street, Ennis, Co. Clare. Folio: 1707; Land: Ballyminogue; Area: 9a 3r 12p. County: **CLARE.**

Vincent Bourke, Folio: 2900; Land: Cadamstown; Area: 261a 2r 18p. County: **KILDARE.**

Margaret and Joseph McNally, 13 Cronan Lawn, Shannon, Co. Clare. Folio: 15702F; Land: Tullyvarraga. County: **CLARE.**

Laurence Duffy, Rahins, Mountbellew, Co. Galway. Folio: 34986; Land: (1) Rahins, (2) Rahins,, (3) Rahins (4) Corgorry Eighter, (5) Corgorry Eighter (one undivided 16th part); Area: (1) 5a 2r 18p, (2) 5a 1r 30p, (3) 2a 0r 17p, (4) 15a 1r 21p, (5) 96a 1r 5p. County: **GALWAY.**

Leonard Noone, Balliniar, Sligo. Folio: 1862; Land: Balliniar; Area: 11a 2r 15p. County: **SLIGO.**

Anthony P. Holland, 2 Whitehall Close, (formerly H.5 Whitehall Cross Estate, Dublin). Folio: 49413F County Dublin; Land: Townland, Whitehall Barony Uppercross. County: **DUBLIN.**

James O'Neill, Folio: 8193F; Land: Broadleas Commons; Area: 4.888 acres. County: **KILDARE.**

John Sexton, Cappaduff, Mountshannon, Co. Clare. Folio: 1337F; Land: Cappaduff; Area: 0a 1r 4p. County: **CLARE.**

Margaret Ryan Folio: 9886; Land: Owning; Area: 29a 2r 28 p. County: **KILKENNY.**

Eugene Clarke, Folio: 25914; Land: Carrick; Area: 0a 0r 10p. County: **CAVAN.**

William Farrell, Silverhill, Ballinfull, Co. Sligo. Folio: 22296; Land: Aghagad; Area: 0a 0r 13p. County: **SLIGO.**

Roger Mullarkey, Marian Road, Boyle, Co. Roscommon. And also of 56, Lucan Heights, Lucan, Co. Dublin. Folio: 35071; Land: Warren or Drum; Area: 2a 3r 23p. County: **ROSCOMMON.**

Anthony Carney, Ballynamona, Kiltimagh, Co. Mayo. Folio: 18646; Land: Ballynamona (Parts); Area: 9a 1r 9p. County: **MAYO.**

Lost Wills

Simpson, Eileen, deceased, late of 22 Verchoyle Court, Lower Mount Street, Dublin 2. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on 18 August, 1991, please contact Messrs William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2. Tel: 681711, Ref: BH.

Donnelly, Kathleen, deceased, late of 332 Mullaghcreevie Park, Killylea Road, Armagh, Co. Armagh (formerly of 7, Morehampton Road, Donnybrook, Dublin 4) Spinster. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on the 31 August, 1991, please contact Messrs. Paul N. Beausang & Co., Solicitors, 8 Clanwilliam Terrace, Dublin 2. Telephone: 612808; Fax: 612532.

Fitzgerald, Donal, deceased, late of Clash Road, Little Island, Co. Cork. Caddy Master. Will any person with knowledge of the whereabouts of the last will of the above named, who died on or about 11th day of September, 1991, please contact Messrs O'Keeffe Buttimer and Co., Solicitors, 19 Washington Street, Cork. Telephone: 021-277330 or Fax: 021-272496.

Stafford-O'Brien, Robert Guy (deceased). Would the solicitors, trustees, or assigns, of the above formerly of Blatherwycke Park, Northants, who died in 1990 in Ireland please contact The Manorial Society of Great Britain, 104 Kennington Road, London SE11 6RE (phone: 071-7356633; fax: 071-582-7022) regarding manorial rights in England that may still vest in the family. Reasonable disbursements in answering this inquiry will be met.

Oliver, Hugh, deceased, late of Distillery Road, Wexford, Co. Wexford, and formerly 58 Ogle Street, Armagh, Northern Ireland, auctioneer and numismatist. Will any person having knowledge of the whereabouts of the will of the above named deceased who died on the 22nd day of September, 1991, please contact Messrs M.J. O'Connor & Co., Solicitors, George's Street, Wexford. Telephone: 053-22555, Fax: 053-24365. Ref: EW/PK.

Doherty, Daniel, deceased, late of Patrick Street (otherwise Coote Street), Mountrath, Co. Laois, retired farmer. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on the 29 Setpember, 1991 please contact Tom O'Grady, BCL, Solicitor, Ballyfin Road, Mountrath, Co. Laois. Tel: 0502-32214.

Scully, Matthew Anthony, deceased, late of 12, Greenmount Buildings, Cork. Retired aviation control officer. Will any person having knowledge of the whereabouts of a will of the above named deceased, who died on the 8 October, 1991, please contact Murphy and Condon, Solicitors, Bank Buildings, 2 Shandon Street, Cork. Telephone: (021) 397655.

Barry, Christopher (Christy), deceased, late of 63 North Circular Road, Dublin 7, formerly of 40, Charlemont Road, Clontarf, Dublin 3, and Monanimy, Killavullon, Co. Cork, also resided at Castlereagh, Co. Roscommon. Would anyone having knowledge of the whereabouts of a will of the above-named deceased who died on the 6 November, 1991, please contact Messrs. MacGrath & Co., Solicitors, 51 Kenyon Street, Nenagh, Co. Tipperary. Tel: 067-33455.

Walsh, Maureen J., (Nee McLoughlin), deceased, late of 114 Kildare Road, Crumlin, Dublin 12. Would anyone having knowledge of the existence and/or whereabouts of the will of the above named deceased who died on 29 September, 1991, please contact Giles J. Kennedy & Co., Solicitors, 81 Eccles Street, Dublin 7. Ref: GJK/OB. Tel: 725288.

Devenney, Daniel, late of Drumennan, Glenswilly, Letterkenny, Co. Donegal, retired farmer, deceased. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 4 October, 1991, please contact Sheridan and Co., Solicitors, Lower Main Street, Letterkenny, Co. Donegal.

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LOCUM SOLICITOR, required for General Practice in County Wexford for four months commencing 1st of February, 1992. Contact Foley, O'Cuinneagain & Co., Solicitors, 4 Court Street, Enniscorthy, Co. Wexford. Telephone: (054) 35611, Fax: (054) 35234 ref: JPF.

SOLICITOR, available from 6th January, 1992 for part-time of locum work. Box No: 101.

(Cont'd on page 427)

NOTICE TO ADVERTISERS

Members wishing to advertise in the Professional Information Section of the Gazette are advised that, owing to increasing printing and administrative costs, the fee for advertisements is being increased with effect from January, 1992. A notice for a lost land certificate will cost £15.00 and for a lost will £18.00. Miscellaneous insertions will be £3.00 per printed line. Advertisements, clearly typed, should be submitted to *Catherine Kearney,* Law Society Gazette, Blackhall Place, Dublin 7. Tel: 710711 Fax: 710704. Advertisers will be invoiced on publication.

Please note that the deadline for insertions in the Professional Information Section of the January/February Gazette will be Monday, 6th January, 1992.

DSBA Launches CORT

Computerised Objections and Requisitions on Title

The Dublin Solicitors Bar Association in association with Noltag Computers Limited has developed a simple computer software package which enables a reply to be made to Requisitions on Title using a PC computer without the need for the use of typewriters and forms. At a reception to mark the launch of CORT, held in the Law Society, the President of the DSBA, *David Walley,* explained how CORT had come about. "The idea arose almost two years ago when the Law Society's Conveyancing Committee asked for Bar associations' suggestions in this area. The Dublin Solicitors Bar Association Conveyancing Committee in conjunction with Noltag Computer Services Limited played around with various suggestions and eventually came up with this software package.

"The system operates on a very simple presumption. The vendor presumes that the purchaser will raise the standard requisitions on title and rather than waiting for him to raise them, he raises them himself and replies to them himself at the time that the contracts are exchanged. The purchaser, of course, will then raise whatever other requisitions he has by way of letter and that letter will then, of course be replied to by letter".

David Walley said that the advantages of the system were:-

- simple to use;
- can be used on any PC
- can be used with any wordprocessing system;
- developed by solicitors for solicitors;
- cheap;
- quick and easy to amend the software to take account of a modification by the Law Society of the Requisitions on Title.

David Walley continued "each firm using the system will have a copyright licence from the Law Society and the cost of this licence will be included in the CORT software licence fee. This fee is an annual licence fee and is pitched at a level which we consider is affordable. The single user system costs £95. A two user system £145 and for each additional user a further £40." David Walley said that he would particularly like to thank *Maeve Hayes*, Chairperson of the Law Society Conveyancing Committee, and the members of the Committee for their support in the development of the programme. David Walley also thanked all the solicitors who were involved in the pilot study, namely *Daire Murphy, Rory O'Donnell, Dominic Dowling, John Buckley, Justin McKenna, Richard Bennett, Gerry Griffin* and *Gerry Doherty.*

How CORT operates

The standard form of Requisitions on Title is incorporated into the computer software. The operator of the software can only type into the document the usual particulars on the front page e.g. vendor, purchaser, property details etc. The content of the Requisitions cannot be varied from the current edition of the Law Society Requisitions.

The vendor's solicitor will assume that the purchaser's solicitor will raise the standard Requisitions on Title (excluding the obvious requisitions which are inapplicable e.g. flats, licensing etc where a second hand house is involved). The vendor solicitor will send these requisitions with replies to the purchaser's solicitor at the time he returns the executed contract to the purchaser.

The purchaser's solicitor will then raise whatever other Requisitions on Title that he may wish to raise together with his rejoinders and prepare a list of documents he wants handed over on closing. This will be sent to the purchaser's solicitor, in letter form and replied to by the vendor's solicitors in letter form.

It is thought that the time saved in waiting for the purchaser to raise the standard Requisitions on Title will be as much as seven days.

The software enables the user to use standard phrases e.g. agreed, yes, no, not applicable, enquiries being made, etc at the touch of a button without having to type in the specific reply.

If a category of requisition does not apply to the transaction, the requisition category is not raised at all. A statement is made to the effect that it does not apply on the Requisitions on Title side of the document. If however a part of a category of requisition does not apply, the entire category will be raised as a Requisition on Title obliging the vendor to reply to each section and sub-section of a category individually. This will save on paper and postage costs. □

Professional Information

(Cont'd from page 426)

Miscellaneous

Solicitors Practice required: Leinster area. Confidentiality assured. Box No: 91.

Cooper Estate
"Would any person having knowledge of the Cooper Estate which held property in Knocklong, Co. Limerick, please contact M/S William A. Lee & Son, Solicitors, Kilfinane, Co. Limerick. Reference PE, Phone No: 063-91116."

ENGLISH AGENTS: Agency work undertaken for Irish solicitors in both litigation and non-contentious matters – including legal aid. Fearon & Co., Solicitors, 12 the Broadway, Woking, Surrey GU21 5AU. Tel: 03-0483-726272. Fax: 03-0483-725807.

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125 O'Connell Street, Limerick. (061) 42477.

Recent Irish Cases

Compiled by
Raymond Byrne, B.C.L., LL.M., B.L.,
Lecturer in Law, Dublin City University

The following case summaries have been reprinted from the *Irish Law Times and Solicitors Journal*, with the kind permission of the publishers.

BREEN -v- MINISTER FOR DEFENCE SUPREME COURT 20 JULY 1990.

DEFENCE FORCES — PENSION — TERMINATION ON FOOT OF AWARD IN PERSONAL INJURIES ACTION — WHETHER INJURIES SUFFERED CONSTITUTED WOUND — WHETHER MINISTER EXERCISED DISCRETION TO TERMINATE PENSION ULTRA VIRES — WHETHER UNREASONABLE — Army Pensions Act 1923, s.13(2) — Army Pensions Act 1927, s.3(1).

The applicant had been a member of the Defence Forces. By virtue of a road traffic accident in an Army vehicle, the applicant suffered severe personal injuries, and in a subsequent claim recovered £60,000 damages, though a large portion of this award went to meet debts of the applicant and to meet solicitor and client costs. In the meantime, the applicant had been awarded a disability wound pension under the 1923 and 1927 Acts. The Minister, after lengthy correspondence with the applicant's solicitors, purported to terminate the applicant's wound pension, pursuant to his powers under s.13(2) of the 1923 Act, as amended by s.3(1) of the 1927 Act. In the High Court, O'Hanlon J declined to grant judicial review of the Minister's decision: [1988] IR 242. On appeal by the applicant **HELD** by the Supreme Court (Finlay CJ, Hederman and O'Flaherty JJ) allowing the appeal: (1) a wound pension could be abated under the 1923 and 1927 Acts even where such wound was not sustained on active service; (2) while the courts would not interfere with an administrative discretion merely because the courts might have reached a different conclusion, nonetheless the Minister in the instant case would not appear to have responded to the representations made on the applicant's behalf as to why the pension in the instant case should not have been abated; and although a decision of this kind did not in all cases require a reasoned judgment, the Minister's decision was ultra vires for unreasonableness, on the basis that it appeared not to have taken into account the individual circumstances of the applicant, and accordingly the Minister's abatement of the pension would be quashed. *The State (Thornhill) -v- Minister for Defence* [1986] IR 1 discussed. Dicta in *The State (Keegan) -v- Stardust Victims Compensation Tribunal* [1987] ILRM 202; [1986] IR 642 applied. *Semble:* the Minister would have been clearly right if he had taken into account half of what had been awarded in the applicant's damages claim.

BULA LTD AND ORS -v- CROWLEY AND ORS SUPREME COURT 29 JUNE 1990

PRACTICE — DISCOVERY — PRIVILEGE — LEGAL PROFESSIONAL — WHETHER AFFIDAVIT MUST LIST INDIVIDUAL DOCUMENTS FOR WHICH PRIVILEGE CLAIMED — DISCOVERY OF COMMUNICATIONS MADE AFTER COMMENCEMENT OF PROCEEDINGS — PURPORTED EXCLUSION OF DOCUMENTS AS IRRELEVANT — Rules of the Superior Courts 1986, O.31, rr.12, 13.

The plaintiffs instituted proceedings against the defendants which involved, *inter alia*, claims of negligence and breach of duty in connection with lending transactions made between the defendants and the plaintiffs. The proceedings were instituted in 1986 and they related to transactions made between the defendants and the plaintiffs. The proceedings were instituted in 1986 and they related to transactions dating back to the early 1970s and continuing thereafter. In the course of the proceedings, an affidavit of discovery filed on behalf of one of the defendants claimed legal professional privilege in respect of certain documents without identifying the precise documents in question. Another defendant also resisted discovery in respect of communications generated after the institution of the proceedings. Finally, discovery was also resisted in respect of certain documents relating to loan transactions made prior to 1974. Another defendant had acknowledged, in a previous affidavit of discovery, the relevance of pre-1974 documents to the proceedings. **HELD** by the Supreme Court (Finlay CJ, Griffin and O'Flaherty JJ): (1) whatever the practice may have been in the past, privilege could not be claimed in a blanket manner in an affidavit of discovery, and the appropriate form under the 1986 Rules was to identify each document in question and the particular basis on which privilege was claimed. *Bula Ltd. -v- Tara Mines Ltd* (Supreme Court, 5 February 1990) and *Smurfit Paribas Bank Ltd. -v- AAB Export Finance Ltd.* [1990] ILRM 588 applied; (2) while a court should be satisfied as a matter of probability of the relevance of documents to the proceedings and in particular should not allow a party to indulge in an exploratory or fishing expedition in seeking further discovery, there was sufficient indication from the statement of claim that documents generated after the institution of the proceedings could be relevant; (3) since the relevance of documents concerning loans given by the defendants to the plaintiffs prior to 1974 had been acknowledged already by another defendant, and having regard to the wide-ranging nature of the claim in the proceedings, such documents were discoverable.

W.J. PRENDERGAST & SON LTD. -v- CARLOW COUNTY COUNCIL SUPREME COURT 30 MAY 1990

PRACTICE — SUPREME COURT — APPEAL — WHETHER APPEAL LIES — MALICIOUS INJURIES — CIRCUIT COURT HEARING — APPEAL TO HIGH COURT ALLOWED — WHETHER APPEAL BY WAY OF CASE STATED LIES TO SUPREME COURT — WHETHER APPEAL ON POINT OF LAW LIES TO SUPREME COURT — Courts of Justice Act 1936, ss.38, 39 — Malicious Injuries Act 1981, ss.17, 18.

The applicant brought proceedings in the Circuit Court under the 1981 Act seeking compensation from the respondent Council. The appliçant was successful on the issue of liability in the Circuit Court, but on appeal to the High Court, O'Hanlon J held that compensation was not payable under the 1981 Act (High Court, 3 June 1988). The applicant then purported to lodge an appeal to the Supreme Court against the decision of the High Court. The applicant also applied to O'Hanlon J for a case stated to the Supreme Court. O'Hanlon J held that no case stated could lie having regard to the terms of the 1936 Act. **HELD** by the Supreme Court (Finaly CJ, Griffin, Hederman, McCarthy and O'Flaherty JJ): neither an appeal on a point of law nor appeal by way of case stated could lie from the High Court in the circumstances of the instant case, since the statutory scheme of the 1981 Act indicated that it was subject to the provisions of ss.38 and 39 of the 1936 Act, and this affirmed the finality of a High Court decision in a Circuit appeal; but that under the terms of the 1981 Act it was possible, by way of consultative case stated, for a malicious injuries claim to be referred to the Supreme Court either from the District Court or from the Circuit Court.

F.(U.) (FORMERLY U.C.) -v- C.(J.) SUPREME COURT 11 JULY 1990

FAMILY LAW — NULLITY — PARTY TO MARRIAGE HAVING HOMOSEXUAL ORIENTATION — OTHER PARTY UNAWARE OF SUCH ORIENTATION AT TIME OF MARRIAGE — WHETHER MARRIAGE A NULLITY — WHETHER LAW RECOGNISES INABILITY TO FORM NORMAL MARITAL RELATIONSHIP AS GROUND FOR ANNULMENT — ORIGINS OF NULLITY JURISDICTION OF COURTS — Marriage Law (Ireland) Amendment Act 1870, s.13.

The petitioner entered into a ceremony of marriage with the respondent in 1981. The parties had had a sexual relationship prior to their marriage, and their sexual relationship continued for some time thereafter. By 1984, however, the respondent had begun to use excuses to sleep in a separate bedroom. The petitioner confided her problems to a woman friend who told her that the respondent had been a homosexual for many years. The petitioner sought a decree of nullity on the ground that the respondent was, by virtue of his homosexual nature, unable to form a normal marital relationship. In the course of evidence a psychiatrist stated that the respondent was almost exclusively homosexual, with occasional heterosexual experiences. In the High Court (24 May 1989) (1990) 8 ILT Digest 106, Keane J dismissed the petitioner's claim for a nullity decree. On appeal by the petitioner **HELD** by the Supreme Court (Finlay CJ, Griffin, Hederman, McCarthy and O'Flaherty JJ) allowing the appeal: (1) the incapacity of one of the parties to a marriage to form or maintain a normal marital relationship with the other party, by virtue of a homosexual nature, is a valid ground for nullity; and it was appropriate in this context for the courts to use as an analogy the case law on

incapacity of one person by reason of impotence, and that in developing the law of nullity under the general provisions of s.13 of the 1870 Act, the courts were not confined to advances in psychiatric medicine but were also entitled to take account of advances in knowledge and understanding of human affairs in general. Dicta in *S. -v- S.* [1976-7] ILRM 156 and *N.(K) -v- K.* [1986] ILRM 75; [1985] IR 733 discussed and followed. *R.S.J. -v- J.S.J.* [1982] ILRM 263 and *D. -v- C.* [1984] ILRM 173 approved; (2) on the evidence adduced the only inference which the trial judge could arrive at was that the respondent in the instant case was, by virtue of his homosexual nature, incapable of maintaining a normal marital relationship and that therefore the marriage was a nullity. *Per curiam:* since the issue whether the onus of proof required in nullity cases did not arise in the instant case, the Court would express no view as to whether it could in any particular case be connected with the grounds on which a decree of nullity should be granted.

McGRATH -v- GARDA COMMISSIONER SUPREME COURT 17 JULY 1990

GARDA SIOCHANA – DISCIPLINE – CONDUCT PREJUDICIAL TO DISCIPLINE AND LIKELY TO BRING DISCREDIT TO FORCE – GARDA CHARGED AND ACQUITTED OF CERTAIN CRIMINAL CHARGES – WHETHER APPEARANCE AND ACQUITTAL IN CRIMINAL COURT SUFFICIENT TO JUSTIFY DISCIPLINARY CHARGE – CORRUPT OR IMPROPER PRACTICE – WHETHER GARDA COMMISSIONER ENTITLED TO REOPEN MATTERS DETERMINED IN CRIMINAL COURT – FAIR PROCEDURES – Garda Siochana (Discipline) Regulations 1971, Reg. 9.

The applicant member of the Force had been charged with offences under the Larceny Act 1916 in connection with payments made to him in discharge of court orders imposing fines. The applicant admitted that he had not issued official receipts for any of the payments, thus leaving the persons who had paid their fines to him liable to imprisonment. The applicant was returned for trial before the Circuit Criminal Court, but he was acquitted on all counts. Subsequent to his acquittal, he was served with notices under Reg. 9 of the 1971 Regulations stating that he might have been in breach of discipline as a result of being charged with criminal offences and of appearing before the District Court and the Circuit Criminal Court. He was then served with detailed forms setting out the alleged breaches of discipline. The first three breaches were of conduct prejudicial to the Force, the particulars being the appearances in the District Court and Circuit Criminal Court. The other three breaches alleged were of corrupt or improper practice, the particulars alleging failure to account for the sums of money received by him in the course of his duty which had been the subject matter of the criminal charges. The applicant applied for judicial review seeking to prohibit the holding of an inquiry into the alleged breaches of discipline. In the High Court, Lynch J acceded to the application in part: [1990] ILRM 5; [1989] IR 241. On appeal by the Commissioner **HELD** by the Supreme Court (Finlay CJ, Griffin, Hederman, McCarthy and O'Flaherty JJ) dismissing the appeal: in the circumstances of the case it would amount to an unfair procedure for the Commissioner to proceed with a disciplinary hearing alleging corrupt or improper practices after essentially the same issues which would arise at such hearing had been fully heard and determined by a court of competent jurisdiction. *Semble:* a charge of improper practice could proceed under the 1971 Regulations. *Per curiam:* no view would be expressed as to whether the doctrine of res judicata applied in the instant case. *Kelly -v- Ireland* [1986] ILRM 318 referred to.

KEATING -v- GOVERNOR OF MOUNTJOY PRISON SUPREME COURT 10 JULY 1990

CRIMINAL LAW – PROCEDURE – DISTRICT COURT – REMAND IN CUSTODY – DEFENCE SOLICITOR RAISING LEGALITY OF ACCUSED'S DETENTION IN GARDA CUSTODY – DISTRICT JUSTICE DECLINING TO ENTER INTO QUESTION – WHETHER REMAND VALID – Criminal Procedure Act 1967 – Criminal Justice Act 1984, s.4 – Constitution, Article 40.4.

The applicant was arrested in connection with larceny charges and was then detained in custody under s.4 of the 1984 Act, during which time he was alleged to have made certain statements to the Gardaí relating to the offences. At the remand hearing in the District Court, held under the 1967 Act, his solicitor raised the legality of the applicant's detention in Garda custody under s.4 of the 1984 Act as a ground for refusing to remand the applicant in custody. The District Justice declined to enter into the question of the validity of the applicant's detention under the 1984 Act, and proceeded to remand him in custody. The applicant sought an inquiry under Article 40.4 of the Constitution into the legality of his detention on foot of the remand order of the District Court. In the High Court, Barrington J dismissed the application for release on the ground that it was irrelevant to the validity of the remand order whether the applicant was lawfully or unlawfully before the District Court: [1989] IR 286. On appeal by the applicant **HELD** by the Supreme Court (Finlay CJ, McCarthy and O'Flaherty JJ) dismissing the appeal it would be wholly inconsistent with the role of the High Court under Article 40.4 of the Constitution for the District Court to enter into an inquiry into the validity of the detention of a person appearing before the Court under the 1967 Act; and the District Justice in the instant case had taken the correct course of remanding the applicant in custody and thus facilitating any application under Article 40.4 which he might be advised to take. *Per* O'Flaherty J (concurring): issues of the kind raised in the instant case are more properly raised in the context of the admissibility of evidence.

McNALLY -v- O MAOLDOMHNAIGH SUPREME COURT 29 JUNE 1990

REVENUE – INCOME TAX – INVESTMENT ALLOWANCES – DESIGNATED AREA – PLANT AND EQUIPMENT – WHETHER EXCLUSIVE USE IN DESIGNATED AREA REQUIRED – PLANT HIRE – WHETHER CAPABLE OF ATTRACTING ANY ALLOWANCE – Industrial Development Act 1969, s.33 – Finance Act 1971, s.22.

The taxpayer carried on business as a plant hire contractor in County Monaghan, a designated area for the purposes of claiming investment allowances for machinery and plant pursuant to s.22 of the 1971 Act. The 1971 Act referred expressly to the scheme of designated areas contained in the 1969 Act, which was intended to encourage industrial activity in certain areas by the provision, *inter alia*, of grants for investment in those areas designated by the Minister for Industry and Commerce. The taxpayer had purchased a crane, with a value of over £100,000, which he then let out on hire, and it was agreed that for 94% of the time it was used in a designated area. The inspector of taxes took the view, however, that exclusive use in a designated area was required to qualify for relief under s.22, and this was upheld by the Circuit Court and High Court: [1989] ILRM 688. On further appeal **HELD** by the Supreme Court (Finlay CJ, Hederman and O'Flaherty JJ) allowing the appeal: (1) in providing that the investment allowance was to be for plant and equipment 'provided for use' in a designated area, s.22 of the 1971 Act did not unambiguously indicate that it applied only where plant was used exclusively in a designated area, as had been argued by the Revenue; and in such circumstances the Court was required to examine the overall purpose of the section; (2) by the use of a direct reference to the designated areas provisions in the 1969 Act, the 1971 Act had clearly and unequivocally identified its objective as intended to further and support the objectives of s.33 of the 1969 Act; and having regard to the evidence that the plant was used in a designated area for 94% of the time and that the taxpayer exclusively employed persons from designated areas in connection with the use of the plant, the taxpayer was entitled to the allowance in question. Quaere: whether the High Court judge had been correct in expressing the view that plant hired out by the taxpayer could fall within s.22, even if used exclusively in a designated area.

THE PEOPLE (D.P.P.) -v- O'TOOLE AND HICKEY COURT OF CRIMINAL APPEAL 20 JULY 1990.

CRIMINAL LAW – EVIDENCE – ARREST – DETENTION IN GARDA CUSTODY – WHETHER NECESSARY FOR THE PROPER INVESTIGATION OF OFFENCE – MEMBER IN CHARGE – WHETHER HAVING SUFFICIENT MATERIAL TO REACH CONCLUSION AS TO NECESSITY OF DETENTION – DETAINED PERSON MAKING STATEMENT ADMITTING INVOLVEMENT IN CRIME – WHETHER PERSON SHOULD BE BROUGHT IMMEDIATELY BEFORE COURT – WHETHER EXTENSION ORDER FOR FURTHER DETENTION MAY BE MADE – WHETHER DETENTION FOR PURPOSE OF HOLDING IDENTIFICATION PARADE PERMISSIBLE – WHETHER DIRECTOR OF PUBLIC PROSECUTIONS MAY BE CONSULTED AS TO WHETHER TO PREFER CHARGES – MURDER – COMMON DESIGN – WHETHER ESTABLISHED – Criminal Justice Act 1984, s.4.

The applicants were convicted of murder in the Central Criminal Court. They had been arrested at common law on suspicion of murder and brought to a Garda station. On arrival, they were detained pursuant to the provisions of s.4 of the 1984 Act. The member in charge of the station had been informed earlier that morning by the arresting Gardaí that they intended to proceed with search warrants to the houses

which they knew to be occupied by the applicants. Before the expiration of the initial six hour period of detention under s.4 of the 1984 Act, the applicants made statements indicating their participation in the robbery of the deceased person. The Gardaí consulted the Director of Public Prosecutions who indicated that they should not be charged with murder at that stage. A further six hour period of detention of the applicants was ordered under s.4 of the 1984 Act. The investigating Gardaí then arranged for an identification parade at which the applicants were identified. A further statement was made by one of the applicants during the second period of detention. Evidence was also given at the trial of statements from the applicants as to whether there had been a common design between them to murder the deceased or to rob him only. **HELD** by the Court of Criminal Appeal (Hederman, Egan and Johnson JJ) dismissing applications for leave to appeal: (1) in order to justify a detention under s.4 of the 1984 Act, the member in charge of a Garda station must have an independent bona fide belief that the person who had arrived in custody is a person who should be detained by the member in charge for a period not exceeding six hours from the time of the arrest as a necessary part of the proper investigation of the offence for which the person was brought to the station; such independent opinion can be formed as a result of information given to the member in charge, either prior to the arrest or even when the arrested person is brought to the station; and the evidence in the instant case indicated that the member in charge had reasonable grounds for believing that the applicants' detention was necessary for the proper investigation of the offence of murder and was thus entitled to exercise the powers conferred on him by s.4 of the 1984 Act; (2) the Gardaí had acted properly in contacting the Director of Public Prosecutions to seek advice as to whether they should charge the applicants with murder after they had made their statements admitting involvement in the robbery of the deceased; (3) the Gardaí had acted correctly in deciding to hold an identification parade rather than charging the applicants immediately after they had made their statements, since the obtaining of statements was only part of an investigation of an offence, and the Gardaí had been entitled to extend the period of detention of the applicants under s.4 of the 1984 Act for a further period of six hours for the purposes of facilitating the identification parade; and while the courts must ensure strict compliance with the terms of s.4, there was full compliance with its terms in the instant case; (4) the trial judge was entitled to exercise his discretion to admit a second statement by one of the applicants on the evidence before him; (5) the trial judge had correctly directed the jury on the mental and physical elements required to establish a common design by both applicants to murder the deceased.

STROKER -v- DOHERTY AND ORS SUPREME COURT 26 JULY 1990

GARDA SIOCHANA – DISCIPLINE – CONDUCT PREJUDICIAL TO DISCIPLINE – MEMBER IN PUBLIC HOUSE – LEWD COMMENTS – FAILURE TO ASSIST WIFE TO LEAVE PUBLIC HOUSE AT CLOSING TIME – RURAL COMMUNITY – WHETHER RELEVANT TO WHETHER DISCIPLINARY OFFENCE COMMITTED – WHETHER RELEVANT TO PENALTY IMPOSED – DISMISSAL FROM FORCE – Garda Siochana (Discipline) Regulations 1971, Reg. 6.

The applicant had been a member of the Garda Siochana for 14 years when he was involved in an incident in a public house in the rural locality in which he was stationed. It was alleged, *inter alia*, that he made lewd remarks to an acquaintance in relation to his (the applicant's) wife; and that when the licensee of the premises called for the applicant's wife to leave the premises at closing time the applicant failed to assist his wife to leave the premises. The applicant was charged with a number of disciplinary offences under Reg. 6 of the 1971 Regulations, being alleged to be conduct prejudicial to the Force, but after a disciplinary inquiry under the regulations and an appeal to an Appeal Board, he was ultimately only convicted in relation to the lewd comments and the failure to assist his wife to leave the licensed premises. The Appeal Board recommended dismissal from the Force and this was implemented by the Garda Commissioner. On judicial review, seeking to have the convictions and dismissal set aside, *inter alia* for unreasonableness Barron J granted the relief sought: [1989] ILRM 428; [1989] IR 440. On appeal by the respondent Commissioner **HELD** by the Supreme Court (Finlay CJ, Griffin and McCarthy JJ) allowing the appeal: (1) the decision of the Appeal Board could not be said to have been unreasonable in the sense of being contrary to reason or common sense and in that light it should not be quashed; (2) like considerations applied to the penalty chosen by the Appeal Board under the 1971 Regulations, and the courts should be reluctant to interfere with a matter peculiarly appropriate for determination by the Gardaí themselves under the Regulations; and in those circumstances the penalty imposed should not be quashed. Dicta in *The State (Keegan) -v- Stardust Victims Compensation Tribunal* [1987] ILRM 202; [1986] IR 642 applied.

TAYLOR -v- SMYTH, KAPE INVESTMENTS LTD AND ORS SUPREME COURT 5 JULY 1990

CONTRACT – REPUDIATION – DELAY IN COMPLETION OF COMPROMISE OF ACTION – WHETHER UNREASONABLE DELAY – WHETHER JUSTIFYING REPUDIATION – WHETHER REPUDIATION CONSTITUTED BREACH OF CONTRACT – COMPANY – CONSPIRACY – WHETHER INDIVIDUAL HAVING CONTROL OVER COMPANY MAY ENTER INTO CONSPIRACY WITH COMPANY.

The plaintiff entered into a compromise of an action, in which he agreed to sell his freehold interest in certain premises to the first defendant, or his nominee. The second defendant, which was controlled by the first defendant, had previously acquired the mortgage interest in the premises from a bank. Under the compromise entered into, the plaintiff agreed to complete the sale by July 1980, and that interest of 22% per annum would be payable if the first defendant by his default delayed the sale beyond that date. The plaintiff also agreed to consent to the assignment to the second defendant of his leasehold interest in the premises (which was held by another company). The defendants also agreed to release all securities or guarantees held by them over the premises. The plaintiff subsequently consented to the assignment of his leasehold interest in the premises and the first defendant also paid a deposit on the free-hold of the premises. By December 1980, however, the sale had not been completed and the first defendant purported to rescind the agreement for sale. This was held by the Supreme Court to be an ineffective rescission. The plaintiff then instituted proceedings seeking damages for breach of contract and actionable conspiracy. The issues revolved, ultimately, around the actions of the first and second defendants. In the High Court, Lardner J held that, although the delay in completion had been unreasonable, this had not caused any damage or loss to the defendants; that the repudiation of the contract by them constituted a breach of contract; that the combination of the first and second defendants to procure a breach of contract was an actionable conspiracy; and that damages together with the 22% interest as agreed should be awarded, with a reduction in proportion to the delay in proceeding attributable to the plaintiff: [1990] ILRM 377. On appeal by the first and second defendants **HELD** by the Supreme Court (Finlay CJ, Hederman and McCarthy JJ): dismissing the appeal: (1) having regard to the manner in which the first defendant had pleaded in his defence that no conspiracy had been entered into with the other defendants, it was not now open to the first defendant to deny that he was not capable of entering into a conspiracy with a company of which he was the effective controller; (2) such an argument was, in any event, unsound in principle and not supported by the authorities which had discussed the nature of the limited company as being a distinct legal entity from its members. *Salomon -v- Salomon & Co* [1897] AC 22, *R -v- McDonnell* [1966] I QB 233 and *Belmont Finance Corp Ltd -v- Williams Furniture Ltd* [1979] 1 All ER 118 discussed; (3) the defendants would be liable in the tort of conspiracy if either the object was lawful or, even if its object was lawful, unlawful means are contemplated or used to attain the object, whether or not such means amount to an infringement of a constitutional right; and so it was no defence for the defendants to claim that they had engaged in the actions in the instant case to protect their own legitimate interests in the intoxicating liquor licence attaching to the premises in question. *McGowan -v- Murphy* (Supreme Court, 10 April 1967) and *Meskell -v- CIE* [1973] IR 121 approved. *Lonhro Ltd -v- Shell Petroleum Co Ltd* (No. 2) [1982] AC 173 not followed; (4) the trial judge had correctly assessed the damages appropriate in the case.

Recent Irish Cases

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MAHON -V- BURKE AND ANOR HIGH COURT 15 MAY 1990

Practice — Action — Survival of action — Deceased compromising action — Whether dependants entitled to maintain action notwithstanding compromise — Statute — Interpretation — Civil Liability Act 1961, ss.7, 48, 49.

The plaintiff's deceased husband had been under the care of the defendants in hospital. The deceased had instituted proceedings against the defendants in negligence arising from the treatment he received, and these proceedings were compromised prior to the deceased's death. After her husband's death, the plaintiff instituted the instant proceedings claiming damages pursuant to s.48 of the 1961 Act as a dependent of the deceased as well as claiming funeral expenses. She also claimed on behalf of a number of other persons who were related to the deceased. The defendants argued that the proceedings were not maintainable. In the Circuit Court, it was held by Judge Gleeson that the plaintiff was entitled to funeral expenses only under s.49. On appeal **HELD** by Lavan J dismissing the plaintiff's entire claim: (1) since the plaintiff's husband had compromised his action prior to his death there was no longer vested in him before his death a cause of action within the meaning of s.7 of the 1961 Act, and so the plaintiff could not maintain the proceedings under s.48 of the 1961 Act. *Dicta* in *Gammell -v- Wilson* [1982] AC 27 approved; (2) s.49 was to be interpreted according to its ordinary meaning, and in allowing for funeral expenses it was confined to claims by a person entitled to sue pursuant to s.48, and since the plaintiff was not entitled to maintain a claim under s.48 she was not entitled to funeral expenses under s.49.

D. COAKLEY & CO LTD -V- COMMISSIONER OF VALUATION HIGH COURT 29 MAY 1990

Local government — Rating — Manufactory — Silos used for grain handling — Whether use of silos produces different product — Practice — Case Stated — No reason given for finding in lower court — Judge having retired — Annual Revision of Rateable Property (Ireland) Amendment Act 1860, s.7.

The applicant company operated a grain silo. The silo consisted of a number of grain bins, each of which was fed by a number of conveyers and elevators and other machinery. The respondent Commissioner accepted that the machinery was not rateable as it constituted manufacturing plant for the purposes of the 1860 Act. In the Circuit Court, Judge Fawsitt found that the silo also constituted a manufactory for the purposes of the 1860 Act. The Commissioner requested a case stated. Judge Fawsitt had retired at the time when the High Court heard the case stated. **HELD** by Barron J: (1) on the authorities, the silos constituted machinery within s.7 of the 1860 Act; (2) the silos did not constitute a manufactory within s.7 since the essential purpose of a silo was to handle grain; and while various functions were performed on the grain to make it suitable for sale to the company's customers these did not purport to produce a different product. *Dicta* in *Cronin -v- Strand Dairy Ltd* (High Court, 18 December 1985) applied; (3) there was no evidence in the case stated to justify the findings of the Circuit Court that the silos constituted a manufactory within s.7 of the 1860 Act, and since Judge Fawsitt had retired the correct approach was to order that the silos were not exempt from rating. *North Western Health Board -v- Martyn* [1988] ILRM 519; [1987] IR 565 distinguished; (4) although the Commissioner's concession that the machinery in the silos was not rateable must have been based, in part, on a view that the entire plant was a manufactory, he was not estopped from raising an issue of fact in the instant case; nor was it relevant that Judge Fawsitt had found that similar plant in the premises next door to the applicant was exempt from rating and that this decision had not been appealed.

D.P.P. (CROWLEY) -V- CONNORS HIGH COURT 10 MAY 1990

Criminal Law — Road Traffic — Driving with excess of alcohol — Certificate of Medical Bureau of Road Safety — Evidence of non-delivery of certificate to accused — Whether charge should be dismissed — Presumption of compliance with statutory duties — Practice — Case Stated — Lack of clarity — Road Traffic (Amendment) Act 1978, ss.22, 23.

The defendant had been charged with driving a mechanically propelled vehicle when the level of alcohol in his system was in excess of the permitted levels, contrary to s.49 of the Road Traffic Act 1961, as amended by the 1978 Act. At his trial in the District Court, he gave evidence that he resided at a campsite on which a number of persons with his first and last name also resided. He also stated that he did not receive a copy of the certificate of the Medical Bureau of Road Safety as to the results of the blood test carried out by the Bureau under the terms of the 1978 Act. Evidence given by a postman was that he had delivered the certificate to one of the houses on the site, but that he was aware that there were a number of persons living there with the defendant's name. The District Justice dismissed the charge against the defendant on the ground that it had not been shown that the Bureau had complied with its statutory duty to forward the test results to the defendant as required by s.22 of the 1978 Act. On case stated **HELD** by Lavan J remitting the matter to the District Court: having regard to the presumption of compliance with statutory duties in s.23 of the 1978 Act it was not sufficient to establish that the Bureau was in breach of its duties for the defendant to indicate that the Bureau's certificate had not been delivered to him; and the case should be re-entered in the District Court to enable the Justice to hear any submissions which might be made by the defendant as to whether the Bureau was in breach of such duties, the onus of establishing non-compliance being on the defendant. *Director of Public Prosecutions -v- Walsh* [1985] ILRM 243 applied. *Per* Lavan J: there was a difficulty identifying the precise question of law posed in a case stated where the legal submissions made in the lower court are not identified in the case stated itself and where a general question is posed.

CORCORAN AND ORS -V- ELECTRICITY SUPPLY BOARD HIGH COURT 10 MAY 1990

Employment — Dismissal — Allegations of serious misconduct during strike — Strike settlement including non-victimisation clause — Whether precluding dismissal in absence of criminal convictions — Whether procedures adopted fair.

In the course of a lengthy unofficial dispute by the defendant Board's employees, allegations were made that some of the strikers engaged in physical violence towards and intimidation of the Board's management and, in some instances, intimidation of their wives and children and also interference with and damage to property of staff members and of the Board. As part of the strike settlement, a non-victimisation clause was agreed. In clarifying the clause, the Board's Industrial Council stated that 'proven serious cases of endangering life or limb, misappropriation or damage to property or other matters with legal connotations could not of course be covered by a no victimisation clause'. The Board decided that those employees who had engaged in the activities mentioned should be dismissed. The plaintiffs were informed that the Board's dismissal procedure would be invoked in relation to them. The plaintiffs did not participate in the procedures at local level, but were represented at the later regional stages by their trade union officials. The plaintiffs were dismissed. The plaintiffs challenged the validity of the dismissals on the grounds that the procedures adopted were not in accordance with fair procedures and that the no victimization clause precluded the Board from dismissing them in the absence of criminal convictions concerning the actions alleged to have taken place during the strike. **HELD** by Barron J dismissing the claim: (1) the plaintiffs could not complain of the alleged deficiencies in the procedures adopted at local level since they were not participating in the process at the time; nor could they complain in relation to the procedures at regional level since their union representatives had insisted that such procedures be adopted; (2) as a matter of construction and having regard to the clarification from the Board's Industrial Council, the non-victimisation clause could not be interpreted as precluding the Board from adopting the dismissal procedures only where criminal charges had been brought against the plaintiffs.

WHELAN -V- CORK CORPORATION HIGH COURT 13 FEBRUARY 1990

Land law — Restrictive covenant — Assignment of land — Rule in *Tulk -v- Moxhay* — Whether assignee having notice — Whether covenant enforceable by tenant against assignee of landlord — Interpretation of covenant — Whether covenant extinguished by assignee's purchase of fee simple — Constitution — Whether extinguishment of covenant in breach of property rights — Landlord and Tenant (Ireland) Act [Deasy's Act] 1860, s.13 — Conveyancing Act 1882, s.1 — Landlord and Tenant (Ground Rents) (No. 2) Act 1978, s.28 — Constitution, Article 40.3.

The plaintiffs were the leasehold owners of property in respect of which a restrictive covenant existed in their favour which prohibited the construction on a certain portion of the land of any structure in excess of 12 feet in height. In 1984, the defendant Corporation purchased an interest in possession in the land in respect of which the restrictive covenant existed. In 1985, the defendant was informed by letter that the plaintiffs were entitled to the benefit of the restrictive covenant over the land. In 1989 the defendant Corporation purchased the leasehold interest in the property and later that year it also acquired the fee simple estate in the property. The plaintiffs sought injunctions to restrain the defendant from completing certain works on the ground that they were in breach of the restrictive covenant. It was agreed by the parties that the works would involve structures in excess of 12 feet in height. The defendant Corporation argued, however, that it was not bound by the covenant on the grounds that: (i) it was a purchaser for value without notice within s.1 of the 1882 Act; (ii) the covenant was not sufficiently wide to capture the defendant; (iii) the covenant was not a contract concerning the lands and thus could not be enforced by a tenant against an assignee of his landlord under s.13 of the 1860 Act (Deasy's Act); and (iv) the covenant ceased to exist pursuant to s.28 of the 1978 Act once the defendant purchased the fee simple estate. **HELD** by Murphy J refusing the injunctions sought: (1) the plaintiffs were entitled to enforce the covenant in equity as persons entitled in equity to the benefit of the bargain by which it was created against any person bound in equity by notice of it, either express or to be imputed at the time of acquisition of title. *Tulk -v- Moxhay* (1848) 2 Ph 774 and *Williams & Co Ltd -v- LSD Ltd* (High Court, 19 June 1970) applied; (2) the defendant had notice of the covenant after it received the letter in 1985 indicating the plaintiffs' entitlement to rely on the covenant; but even prior to 1985 the defendant would have had notice imputed to them because the nature of the covenant should have resulted in inquiries being put in train to ascertain whether there were third parties such as the plaintiffs who might have been entitled to enforce the covenant; (3) the interpretation contended for the defendant that the word 'assign' in the covenant did not capture the circumstances by which it obtained the property was too narrow, and while it might have been more helpful to express impersonally the obligations imposed by the restrictive covenant than to identify it with the actions or inactions of particular persons, the court should take a practical and purposeful interpretation of the language used. *Dicta* in *Ricketts -v- Enfield Church Wardens* [1909] 1 Ch 544 approved; (4) s.13 of the 1860 Act (Deasy's Act) had no application to the instant case since liabilty in equity under the rule in *Tulk -v- Moxhay* was quite distinct from the position of parties suing in the position of landlord and tenant; (5) the defendant was entitled to rely on the wide terms of s.28 of the 1978 Act, which referred to the extinguishing of 'all covenants' on the purchase of the fee simple, in arguing that the covenant had been extinguished in.the instant case; and while this might have resulted in the extinguishment of property rights, this did not necessarily render unconstitutional s.28 of 1978 Act, and in the absence of arguments from the Attorney General the court would not adjudicate on the constitutional issue. *East Donegal Co-Op Ltd -v- Attorney General* [1970] IR 317 discussed.

D. -V- D. HIGH COURT 19 DECEMBER 1989

Family law — Maintenance agreement — Provision for variation upwards — Application to vary downwards — Whether court may make such order — Family Law (Maintenance of Spouses and Children) Act 1976, s..5, 8.

The parties had entered into a separation agreement, which included a clause providing for increases in the maintenance payable by the husband in accordance with inflation. The agreement was made a rule of Court under s.8 of the 1976 Act. The husband applied to Court for an order that the maintenance payments be adjusted downwards on the ground that his financial circumstances had worsened considerably since the agreement was entered into. **HELD** by Barron J: the husband was entitled to a variation downwards in the sum payable to the wife, and althought there appeared to be a lacuna in the 1976 Act in this respect, the ability of the husband to apply for such variation was consistent with the right to apply for a maintenance agreement under s.5 of the 1976 Act and there was therefore mutuality of rights between the parties. *Dicta* in *H.D. -v- P.D.* (Supreme Court, 8 May 1978) applied.

DUNLEA -V- NISSAN (IRL) LTD HIGH COURT 24 MAY 1990

Injunction — Interlocutory — Stateable case — Balance of convenience — Franchise agreement — Termination — European Communities regulation — Directive on Exclusive Dealing 85/123/EEC — Treaty of Rome (1957), Article 86.

The plaintiff, a motor car dealer, had been since 1980 the Nissan dealer for south County Kildare, pursuant to agreement with the defendant. In 1989, the plaintiff began selling used cars imported from Japan, iincluding Nissan vehicles. In October 1989 the plaintiff became aware that the defendant objected to the second hand car sales, and despite some discussion on the matter the defendant terminated the plaintiff's Nissan franchise by letter in December 1989, to take effect in February 1990. Subsequent to the termination the plaintiff excluded second hand Nissan vehicles from the range of imported vehicles which he sold and also carried on the second hand business at a separate premises from those relating to the Nissan dealership. The plaintiff applied for an interlocutory injunction pending the trial of his action claiming that the defendant had wrongly terminated the franchise. **HELD** by Barr J granting the injunction: (1) without making a final determination on the issue, the plaintiff had established an arguable case that the termination of the agreement was in breach of the 1985 EEC Directive on Exclusive Dealing or in breach of Article 86 of the Treaty of Rome; (2) having regard to the respective positions of the parties, damages would not be an adequate remedy for the plaintiff if an interlocutory injunction was refused; (3) the balance of convenience lay in favour of granting the interlocutory injunction, since if the plaintiff was ultimately successful his loss if the injunction was not granted would be unquantifiable and signficant, whereas if the defendant was ultimately successful the undertaking as to damages by the plaintiff would be sufficient to compensate for any loss suffered through continuation of the franchise.

O'CONNOR -V- FIRST NATIONAL BUILDING SOCIETY AND HENDERSON AND ORS (MARGETSON & GREENE) HIGH COURT 3 JULY 1990

Negligence — Solicitor — Purchase of land — Independent inspection — Whether solicitor under invariable duty to recommend independent inspection of property — Whether *Prima Facie* duty arises — Building society — Whether dissuading purchaser from seeking independent inspection

The plaintiffs, husband and wife, purchased a house, in connection with which the first defendant advanced a loan and the second defendant (a firm of solicitors) acted on behalf of the plaintiffs. The house was in a bad state of decorative repair. When the plaintiffs were arranging the loan from the first defendant, they were told that an independent inspection could cost anything between £100 and £700 but that the Society would arrange a survey for a fee of £29. The plaintiffs paid this latter sum for the survey and signed a loan application form which provided that the Society accepted no responsibility for the condition of the property. When the plaintiffs saw their solicitor in the second defendant's firm, they inquired about an independent inspection of the property. The solicitor, who appeared to be under the impression that the plaintiff husband was in the building trade, recommended that they carry out a test themselves on the floorboards and walls. The Society's survey failed to reveal that there was seriouos damage to the chimney flues in the house as well as some ground floor rot. The plaintiffs sued both defendants in negligence. **HELD** by Lynch J finding against the second defendants only: (1) the nature of the reference by the building society to an independent inspection did not amount to a representation dissuading the plaintiffs from obtaining such independent inspection, nor were they misled as to the form of the survey which the society arranged; and they must also be fixed with notice of the clause in the loan application form by which the society accepted no responsibility for the condition of the property. *Dicta* in *Ward -v- McMaster* [1989] ILRM 400; [1988] IR 337 applied; (2) while there was no absolute rule that a solicitor must always advise a purchaser to have an independent inspection by a suitably qualified person, a *prima facie* duty to so advise does arise which can only be negatived by the particular circumstances of a case; and in the instant case it was clear that the plaintiffs would have invested the necessary amount to provide for such an independent inspection, which would have

revealed the defects complained of; and the plaintiffs were entitled to damages in respect of these defects, as well as damages for discomfort which would arise principally when the work on the defects would be carried out.

HANAFIN -V- GAYNOR HIGH COURT 29 MAY 1990

Negligence — Solicitor — Purchase of land — Requisitions on title — Planning permission — Defects resulting in property being of diminished value — Whether planning permission properly investigated by solicitor — Test of liability

The defendant, a solicitor, acted on behalf of the plaintiff in connection with the purchase of property in 1981 for £540,000. Certain documents were furnished to the defendant at contract stage, including a 1970 planning permission for a proposed industrial building on the property. The defendant processed requisitions on title in connection with the property, which revealed the existence of a 1973 planning permission but which was stated not to affect the property in question. After the transaction was completed, the plaintiff became aware of a 1972 planning permission which severely affected the value of the property, and the property was eventually sold for £150,000 in 1985. The plaintiff claimed damages in negligence and/or breach of contract, primarily on the basis that the defendant should have discovered by means of proper requisitions on title the existence of the 1972 permission. The plaintiff also claimed that he had entered into the contract on the basis of a representation by the defendant that the property was worth £1.2 million. **HELD** by Egan J dismissing the claim: (1) there was no evidence that the defendant had to any time made any representation to the plaintiff as to the value of the property; (2) the defendant could only be held liable in negligence if guilty of such a failure as no other solicitor of equal status and skill would be guilty of if acting with ordinary care, unless the practice which the solicitor was following had inherent defects which ought to have been obvious to any person giving the matter due consideration. *Roche -v- Peilow* [1986] ILRM 189; [1985] IR 232 and *Dunne -v- National Maternity Hospital* [1989] ILRM 735; [1989] IR 91 followed; (3) the defendant had prepared proper requisitions on title in connection with the purchase, and the answers received when the 1973 planning permission was revealed gave no grounds for the defendant to query its accuracy or to believe that there was a 1972 permission in existence; and having regard to the fact that a search conducted by professional law searchers shortly after the contract had been completed also failed to reveal the existence of the 1972 permission, it could not be said that the defendant was guilty of such failure as no other solicitor of equal status and skill would be guilty of if acting with ordinary care.

DIRECTOR OF PUBLIC PROSECUTIONS -V- KENNY HIGH COURT 8 MARCH 1990

Criminal law — Road traffic — Driving with level of intoxicant as to be incapable of controlling vehicle — Opinion of medical practitioner as to fitness of accused to drive — Presence of medical practitioner in police station — Whether in breach of accused's right to privacy — Road Traffic (Amendment) Act 1978, s.13 — Constitution, Article 40.3.

The defendant had been charged with driving a mechnically propelled vehicle when he was under the influence of an intoxicant to such an extent as to be incapable of having proper control of his vehicle, contrary to s.49 of the Road Traffic Act 1961, as amended. The defendant had been arrested under s.49 and brought to a Garda station where he consented to having a registered medical practitioner take a blood sample. No analysis was made of this sample. At his trial in the District Court, the defendant objected to evidence being given by the medical practitioner as to his opinion of the defendant's level of intoxication. The objection was on the ground that such evidence was obtained in breach of the defendant's right to privacy. On a case stated **HELD** by Barron J: (1) the defendant had a right to privacy while in police custody, but since the defendant had not argued that there was an abuse of s.13 of the 1978 Act, under which the medical practitioner was in the Garda station, the full nature of that right did not arise in the present case; (2) where the defendant had consented to the sample being taken by the medical practitioner, it was perfectly permissible for the doctor to give evidence of his observation of the defendant. *Kennedy -v- Ireland* [1988] ILRM 472; [1987] IR 587 referred to ; *dicta* in *Sullivan -v- Robinson* [1954] IR 161 distinguished.

GLAVIN -V- GOVERNOR OF TRAINING UNIT MOUNTJOY PRISON HIGH COURT, 11 MAY 1990; SUPREME COURT, 21 DECEMBER 1990

Constitution — Administration of justice — Trial of offences — Failure to issue warrant continuing district justice in office due to mistake as to his age — Subsequent legislation validating justice's orders — Preliminary examination conducted prior to passing of legislation — Whether null and void — Whether trial conducted in due course of law — Lapse of time — Whether matter to be remitted to District Court — Criminal Procedure Act 1967, Part II - Courts (No. 2) Act 1988 - Constitution, Article 38.1

The applicant had been charged in 1986 with offences under the Larceny Act 1916, as amended. He appeared before District Justice Mahon, who conducted a preliminary examination under Part II of the 1967 Act and sent him forward for trial in the Circuit Court. There, the applicant pleaded guilty and was sentenced to 10 years imprisonment. In 1987, the Court of Criminal Appeal reduced this to 6 years. At the time that District Justice Mahon conducted the preliminary examination in the applicant's case, he had in fact reached retirement age, but due to a misunderstanding as to his correct age no warrant continuing him in office had been issued under the Courts of Justice (District Court) Act 1949. The Courts (No. 2) Act 1988 purported to validate retrospectively orders made by District Justice Mahon, but without prejudice to any constitutional rights which might have been affected by his orders. The applicant sought an inquiry and release under Article 40.4.2 of the Constitution. **HELD** by Hamilton P ordering his release: (1) the preliminary examination conducted by District Justice Mahon was null and void and the Circuit Criminal Court thus had no jurisdiction to try him. The *People -v- Boggan* [1958] IR 67 applied; (2) while the applicant did not have a constitutional right to a preliminary examination, the applicant's trial was not conducted in due course of law within Article 38.1 of the Constitution, and so the 1988 Act had not validated the applicant's trial since it was enacted on the express basis that the Oireachtas did not intend to infringe any person's constitutional rights. *Shelly -v- Mahon* [1990] IR 36 applied; (3) having regard to the fact that the applicant had served over 3 years in prison, it would be unjust and inequitable to return the matter to the District Court and the applicant would be released immediately. On appeal by the respondents **HELD** by the Supreme Court (Griffin, Hederman, McCarthy, O'Flaherty and Keane JJ) dismissing the appeal : (1) a trial in due course of law within Article 38.1 of the Constitution required compliance with steps provided for in legislation, including those which are required as preliminary to a trial on indictment, and the applicant thus had a constitutional right to have a preliminary examination conducted by a District Justice duly appointed in accordance with the Constitution. *O'Shea -v- Director of Public Prosecutions* [1989] ILRM 309; [1988] IR 655 discussed. *Quaere per* O'Flaherty J (Hederman J concurring): whether it would be constitutionally permissible for legislation to be enacted which would remove the right to have a preliminary examination prior to trial on indictment; (2) since the 1988 Act by its terms did not purport to validate any orders made in conflict with constitutional rights, it did not alter the invalidity of the preliminary examination conducted in the applicant's case, and since the return for trial was null and void the applicant was entitled to the relief sought. *Shelly -v- Mahon* [1990] IR 36 applied; (3) once the applicant's conviction had been found invalid, the High Court must immediately order his release and it was not within its competence to consider whether the case should be returned to the District Court, this being a matter for the Director of Public Prosecutions.

ROHAN -V- BORD NA MONA HIGH COURT 10 MAY 1990

Limitation of actions — Extension of time — Person of unsound mind — Whether established in evidence — Whether extension applicable where incident giving rise to proceedings results in unsoundness of mind — Statute of Limitations 1957, s.49.

In February 1985, the plaintiff sustained serious head and facial injuries as a result of an explosion which occurred in the course of his employment with the defendant. Proceedings claiming damages against the defendant were not issued until September 1988. The plaintiff claimed to be entitled to an extension of the normal three year time limit under s.49 of the 1957 Statute on the ground that, by reason of the injuries which

he sustained in the explosion, he was a person of unsound mind within the meaning of s.49. A large amount of medical evidence was given as to the plaintiff's mental condition since the explosion. In addition to challenging the assertion that the plaintiff was of unsound mind, the defendant argued that s.49 only applied to a person who was of unsound mind prior to the incident giving rise to the proceedings. **HELD** by Barron J determining that the claim was not statute barred: (1) where there was a conflict of evidence between the medical witnesses, the evidence for the plaintiff was more convincing and on this basis it had been established that the plaintiff was of unsound mind, in that he was now a person in the mildly mentally handicapped class; (2) having regard to the normal meaning of the words used in s.49 of the 1957 Statute, its terms applied to a person who was of unsound mind at any time on the date when any right of action accrued, and it was not confined to persons who were of unsound mind before the date on which the cause of action accrued. *Kirby -v- Leather* [1965] 2 QB 367 discussed.

O'GRADY (INSPECTOR OF TAXES) -V- LARAGAN QUARRIES LTD HIGH COURT 27 JUNE 1990

Revenue — Income Tax — Construction operations — Deduction at source — Haulage of quarry materials — Hauliers entering into agreements by which they became owners of quarry materials — Whether haulage for hire — Finance Act 1970. s.17 — Finance Act 1976, s.21.

A number of road hauliers entered into agreements with the respondent company by which they agreed to sell quarry materials to the respondent and also agreed to transport the material to the destinations specified by the respondent. The rate per ton of material was to be paid by the respondent together with the supply of all necessary fuel. All materials were to be purchased from another company, Hanley Bros Ltd, with which the respondent was associated. The hauliers entered into a simultaneous agreement with Hanley Bros Ltd by which all sums owed to Hanley Bros Ltd for the purchase of quarry materials be deducted from the amount owed to the hauliers by the respondent for the supply of quarry materials. The hauliers who regularly collected quarry material from Hanley Bros Ltd, were debited with the cost and then delivered the material to customers of the respondent. At the end of each month, the respondent prepared an account in which the cost price of the material due to Hanleys was debited against the sale price payable by the respondent and a cheque for the balance was paid to the hauliers. The respondent conceded that this cheque represented the total of the transport charges involved. The inspector argued that the payments were made in respect of 'haulage for hire of materials for use in construction operations' and that, pursuant to s.17 of the 1970 Act (as inserted by s.21 of the 1976 Act), a deduction of 35% should have been made at source and forwarded to the Revenue. In the Circuit Court, it was held that the payments did not come within s.17. On a case stated **HELD** by Murphy J: (1) while the Court should attempt to ascertain the substance of a contract, it should not ignore the actual bargain between the parties by substituting an agreement more in harmony with the commercial realities of the situation; and while the parties own labels will not determine the outcome, the transaction itself must be examined. *Gatien Motor Co Ltd -v- Continental Oil Ltd* [1979] IR 406 applied. *Dicta* in *Irish Shell & BP Ltd -v- J Costello Ltd* [1981] ILRM 66 explained; (2) having regard to the clear terms of the agreements entered into between the hauliers and the respondent, there was no reason why it should not take effect as such; and in this light the parties had deliverately arranged that the relationship between them should not in law constitute a hiring, so that s.17 of the 1970 Act (as inserted by s.21 of the 1976 Act) did not apply.

PARAMOUNT PICTURES CORP AND ORS -V- CABLELINK LTD HIGH COURT 8 MARCH 1990

Injunction — Interlocutory — Stateable case — Balance of convenience — Whether damages adequate remedy — Breach of copyright — Transmission of films through cable TV and microwave distribution (MMDS) systems — Whether injunction required — Deposit of sums pending trial of action — Practice — Defence — Whether sustainable — European Communities — Abuse of dominant position — Treaty of Rome (1957), Articles 85, 86.

The plaintiffs were companies holding the copyright in numerous films; the defendant was a company which operated a cable TV system principally in Dublin. The plaintiffs claimed injunctions and damages from the defendant on the basis that the defendant breached the copyright in the films by transmitting them on the cable TV system without paying the plaintiffs the appropriate royalties. On the plaintiffs' original application for interlocutory injunctions, the principal defence was that the plaintiffs were acting in breach of Articles 85 and 86 of the Treaty of Rome. At the hearing of that application, an interlocutory injunction was refused but the order of the Court required the defendant to lodge a certain percentage of its income from the cable system in the bank account to meet any claim which the plaintiffs might establish. This condition was complied with. The plaintiffs renewed their application for an interlocutory injunction. The plaintiffs raised the fact that the defendant was now planning to transmit material through a multi-point microwave distribution system (MMDS) in addition to the cable system. They also argued that the defendant could not rely on any new defences (which now included, *inter alia,* constitutional challenges to copyright legislation) and were confined to the defence based on Articles 85 and 86 of the Treaty of Rome, which the plaintiffs argued did not disclose an arguable defence. **HELD** by Murphy J declining to alter the previous order made: (1) the fact that the defendant was now relying on new grounds of defence could not be used to cast doubt on the strength of its case, and they should be considered on their merits; and since the plaintiffs did not suggest that these new grounds were themselves unsustainable, the defendant would be permitted to rely on them; (2) the defence based on Articles 85 and 86 of the Treaty of Rome should, like all other defences, be considered on its merits, without expressing a view on whether it would ultimately be successful; and in the instant case it would not be struck out since it disclosed an arguable case that the plaintiffs were abusing their position by treating the defendant less favourably than companies in other EC countries. *Dicta* in *British Leyland Motor Corp Ltd -v- Armstrong Patents Co. Ltd.* [1981] 2 CMLR 75 applied; (3) the question as to whether the proposed use of the MMDS system raised new issues in the instant application should be judged against the background of the general principles applicable in interlocutory applications; and having regard in particular to the question of the adequacy of damages if the plaintiffs were ultimately successful, the deposit of a specified amount of the defendant's income was sufficient to meet the full justice of the case. *Campus Oil Ltd -v- Minister for Industry and Energy (No 2)* [1983] IR 88 applied; (4) the amount required to be placed on deposit by the defendant was not excessive, but having regard to the fact that it now amounted to a very substantial sum in total, the parties might arrange to have it invested in Government securities or some other procedure to protect their interests.

Recent Irish Cases

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DUNNE -V- HONEYWELL CONTROL SYSTEMS LTD AND VIRGINIA MILK PRODUCTS LTD HIGH COURT 20 JULY 1990

TORT — EMPLOYER'S LIABILITY — EMPLOYEE WORKING AWAY FROM EMPLOYER'S PREMISES — ACCESS TO AND EGRESS FROM PLACE OF WORK NOT REASONABLY SAFE — WHETHER OCCUPIER OWES COMMON LAW DUTY TO PERSON WORKING IN OCCUPIER'S PREMISES FOR BENEFIT OF OCCUPIER — DEGREES OF FAULT ATTRIBUTABLE TO PARTIES — BREACH OF STATUTORY DUTY ACCESS TO AND EGRESS FROM PLACE OF WORK — WHETHER DUTY OWED TO EMPLOYEES OR TO ALL PERSONS GAINING ACCESS TO PLACE OF WORK — CONTRIBUTORY NEGLIGENCE ARISING FROM BREACH OF STATUTORY DUTY — Factories Act 1955, s.37(1) — Safety in Industry Act 1980, s.12.(1).

The first defendant had installed control equipment in a factory and also had a service contract for the maintenance of the control equipment. The factory was owned and operated by the second defendant. The plaintiff was an electrial technician employed by the first defendant. In the course of his employment he sustained injuries at the second defendant's premises while carrying out maintenance work on the control equipment. To gain access to the place of work, he climbed a vertical ladder fixed to the wall of the building. As he was descending from the job holding the case containing his tools, he lost balance and sustained severe injuries to his left heel. Evidence was given that the first defendant had previously given its electricians a satchel for their tools which they would have carried over their shoulder, but that cases had been issued to them on the basis that these gave their work a better image. Evidence was also given that the ladder had been built after the factory premises was completed and that the space available at the roof and the narrowness and depth of the steps were not in accordance with the recommendations in a 1985 British Standard for ladders. **HELD** by Barron J: (1) even though the plaintiff was working away from the first defendant's premises, the first defendant as employer was in breach of its duty of care to the plaintiff by failing to warn him not to carry his whole case of tools onto the control room roof; but the second defendant as occupier of the factory also had control over the situation and since the plaintiff was doing work for the benefit of the second defendant a duty of care between them also arose; nor could the plaintiff be exonerated completely since he should have realised the danger; and liability at common law would be assessed as being 70% on the second defendant; 20% on the first defendant and 10% on the plaintiff. *Mulcare -v- South Eastern Health Board* [1988] ILRM 689 and *Garrard -v- Southey & Co Ltd* [1952] 2 QB 174 applied; (2) the second defendant was also in breach of statutory duty towards the plaintiff under s.37(1) of the 1955 Act, as amended by s.12(1) of the 1980 Act, which required that there shall so far as is reasonably practicable be provided and maintained safe means of access to and egress from every place of work; and in the circumstances the plaintiff could not be shown to have been contributorily negligent under this heading of claim, since that concept in the context of breach of statutory duty required more than mere carelessness or inattention; and thus the plaintiff was entitled to recover in full against the second defendant for breach of statutory duty. *Roche -v- Kelly & Co Ltd* [1969] IR 100 and *Kennedy -v- East Cork Foods Ltd* [1973] IR 244 applied; (3) having regard to the serious injuries sustained by the plaintiff and the evidence as to the future damage to the plaintiff's foot which would require further surgery to fuse the joints, damages for past pain and suffering would be assessed at £50,000 and for the future at £75,000, and there were agreed special damages of £3,669.87.

MCINTYRE -V- LEWIS AND ORS SUPREME COURT 17 DECEMBER 1990

TORT — FALSE IMPRISONMENT — MALICIOUS PROSECUTION — ALLEGATION THAT GARDAÍ ASSAULTED AND MALICIOUSLY PROSECUTED PLAINTIFF — WHETHER NECESSARY TO PROVE ABSENCE OF REASONABLE AND PROBABLE CAUSE FOR PROSECUTION — WHETHER JUDGE REQUIRED TO TELL JURY THAT THEY MAY DISAGREE ON VERDICT IF NINE OF THEM UNABLE TO AGREE ON VERDICT — WHETHER EXEMPLARY OR PUNITIVE DAMAGES APPROPRIATE — WHETHER EXCESSIVE — WHETHER PROPORTION SHOULD EXIST BETWEEN AWARDS FOR FALSE IMPRISONMENT AND MALICIOUS PROSECUTION

The plaintiff alleged that he had been assaulted by two members of the Garda Siochana, the first two defendants. The plaintiff was arrested and brought to a Garda station. The Gardaí brought charges against the plaintiff claiming that he had assaulted them in the execution of their duty. The plaintiff was acquitted in the Circuit Criminal Court on these charges. He then instituted proceedings claiming damages or assault, false imprisonment and malicious prosecution. In the High Court, the jury found that the plaintiff had been assaulted and awarded damages of £5,000. For malicious prosecution, the jury awarded £60,000. On appeal by the defendants **HELD** by the Supreme Court (Hederman, McCarthy and O'Flaherty JJ): (1) once the jury had made a finding of assault, they inevitably also had to conclude that there had been a malicious prosecution; so that in the instant case there was no need for the trial judge to make a specific decision as to whether the Gardaí had reasonable and probable cause for bringing the prosecution against the plaintiff; (2) the trial judge was not obliged to tell the jury that they could disagree on a verdict if less than nine of them were unable to agree on an issue, nor was any authority cited for this proposition; (3) while a claim for exemplary or punitive damages need not be specifically pleaded, it was desirable that such a claim be indicated so that the defendants would have an opportunity to meet such a claim; but in the instant case counsel for the plaintiff indicated that a claim over and above general damages was being sought; and having regard to the findings made by the jury, they were entitled to award exemplary damages, and to award it for both the assault and malicious prosecution or for one of them; and in this case they had not awarded any exemplary damages for the assault; (4) (Hederman and O'Flaherty JJ: McCarthy J dissenting) the award for the malicious prosecution bore no relation to the award for assault and the Court would substitute a figure of £20,000 for the malicious prosecution; (5) the issue of vicarious liability of the State had not been contested at the trial and should not be entertained by the Court.

MURPHY -V- GREEN SUPREME COURT 18 DECEMBER 1990

MENTAL TREATMENT — LEAVE TO COMMENCE PROCEEDINGS CHALLENGING COMMITTAL — SUBSTANTIAL GROUNDS FOR CONTENDING BAD FAITH OR LACK OF REASONABLE CAUSE GROUNDING COMMITTAL — ONUS ON PLAINTIFF — WHETHER HIGHER THAN CIVIL STANDARD OF PROOF — CONSTITUTION — RIGHT OF ACCESS TO THE COURTS — WHETHER REASONABLE RESTRICTION — DOCTOR CERTIFYING PLAINTIFF FOR DETENTION — WHETHER MIS-DIAGNOSIS SUFFICIENT TO GROUND LEAVE TO COMMENCE — Mental Treatment Act 1945, s.260 — Constitution, Article 40.3

The plaintiff had been brought to a Garda station after his wife had made complaints to the Gardaí that the plaintiff had beaten his daughter. The wife had previously obtained a protection order against the plaintiff in the District Court. The wife then contacted the defendant doctor who was on call for another doctor. The defendant had never attended the plaintiff. The wife explained the circumstances in which the plaintiff had been taken to the Garda station and she requested the defendant to certify that the plaintiff be committed to a psychiatric hospital under the 1945 Act. The defendant attended the plaintiff in the Garda station, concluded that the plaintiff was intoxicated and certified that he should be committed as an addict under the 1945 Act and that he required 6 months treatment. The plaintiff was escorted by the Gardaí in an ambulance to a psychiatric hospital. He was released from the hospital approximately 12 hours later. The plaintiff sought leave under s.260 of the 1945 Act to bring proceedings against the defendant.

The plaintiff averred that he was not an alcoholic, that the defendant did not conduct a proper examination of him in the Garda station and that a second opinion should have been obtained by him. In the High Court, MacKenzie J granted leave under s.260. **HELD** by the Supreme Court (Finlay CJ, Griffin, Hederman, McCarthy and O'Flaherty JJ) allowing the defendant's appeal: (1) the requirement in s.260 of the 1945 Act that the Court must be satisfied that there are substantial grounds for contending that there was bad faith or want of reasonable care is a restriction on the constitutional right of access to the courts under Article 40.3, and such restriction must be stricly construed in the sense that the restriction must not be availed of except where it is essential to do so. *In re. R. Ltd.* [1989] ILRM 757; [1989] IR 126 applied; (2) the restriction on the right of access to the courts in s.260 was reasonable, and it was not necessary for the plaintiff to establish the grounds for proceeding on any standard greater than that in ordinary civil proceedings, but nor was it sufficient that the plaintiff merely bring forward a prima facie case since this would not be consistent with the requirement to serve notice under s.260 on any intended defendant; Dicta in *O'Dowd -v- North Western Health Board* [1983] ILRM 186 discussed; (3) the plaintiff had failed to bring forward evidence which satisfied the Court of substantial grounds of want of reasonable care, since a mis-diagnosis did not necessarily signify want of reasonable care, nor was a second opinion required, and in the circumstances leave under s.260 of the 1945 Act would not be granted. *Per curiam:* the plaintiff's brief affidavit, in which he averred that the facts in his notice of motion were correct, was not in the appropriate form.

QUINN AND ORS -V- WATERFORD CORPORATION SUPREME COURT 27 NOVEMBER 1990

ELECTIONS — REGISTRATION — STUDENTS IN THIRD LEVEL COLLEGE — WHETHER ORDINARILY RESIDENT IN THE CONSTITUENCY IN WHICH COLLEGE SITUATED — STUDENTS REGISTERED IN HOME CONSTITUENCY — WHETHER REGISTRAR ENTITLED TO REFUSE REGISTRATION FOR FEAR OF DOUBLE EXERCISE OF VOTE — Registration of Electoral and Juries Acts (Specification of Dates) Regulations 1963, Art. 12 — Electoral Act 1963, s.5 — Constitution, Article 16.1.4.

The appellants were students at the Waterford Regional Technical College. None of the students' homes was in Waterford, but for the academic year they resided within the County Borough of Waterford. They were all on the Register of Electors for their 'home' constituency. They applied for registration on the Register of Electors for Waterford County Borough for 1988/1989. The County Registrar refused their application. This decision was upheld on appeal to the Circuit Court on the grounds that the students were not 'ordinarily resident' in the Borough within the meaning of s.5 of the 1963 Act, and that the Registrar was entitled to take account of the risk of double voting having regard to the fact that the appellants were also registered to vote in their home constituency. On case stated **HELD** by the Supreme Court (Finlay CJ, Hederman and McCarthy JJ): (1) the appellants were 'ordinarily resident' in the Waterford County Borough for at least the period of the academic year, within the meaning of s.5 of the 1963 Act. *Fox -v- Stirk and Bristol Electoral Registration Officer* [1970] 2 QB 463 discussed. Per curiam: the appellants might also be ordinarily resident in Waterford for the full calendar year, since s.5(4) of the 1963 Act appeared to envisage ordinary residence in more than one constituency; (2) while the Registrar was entitled under Art. 12 of the 1963 Regulations to require information in carrying out his duties, he was restricted to matters that lie within his constituency, and it was irrelevant that registration might result in double registration within a larger European Parliament constituency since Article 16.1.4 of the Constitution prohibited double voting and not double registration.

SMITH -V- CORAS IOMPAIR EIREANN SUPREME COURT 29 NOVEMBER 1990

TORT — OCCUPIER'S LIABILITY — FORESEEABILITY OF INJURY — TRESPASSER — ACCESS TO LAND — WHETHER ESTABLISHED THAT OCCUPIER KNEW OF PATTERN OF ACCESS — TRESPASSER CHASING OTHER PERSONS ON RAILWAY LINE — WHETHER FORESEEABLE — CONSIDERATION OF ENTIRE CIRCUMSTANCES

The plaintiff, then aged 20, lost both legs when in collision with a train on a railway line owned by the defendant company. The plaintiff had been two youths riding his horse in a field near the railway line, and when they ran onto the railway line he followed them. The youths and the plaintiff gained access to the line by means of a low wall (part of which had been broken down) and a rough path which led down to an embankment beside the line. The plaintiff stated that he ran 'flat out' after the youths along the side of the railway line, and that he fell and got up a couple of times to continue the chase. He also stated that he saw the train with which he collided coming through a tunnel, but did not actually remember the collision itself. The plaintiff claimed damages arising from the collision on the ground of negligence. Evidence was given at the trial of the action that local people used the embankment down which the plaintiff had run as a short-cut to a local public house and other shops on the far side of the line. The defendant denied that a duty of care arose in the case on the ground that the events were not foreseeable. The defendant did not rest any argument on the plaintiff being a trespasser. In the High Court, Egan J dismissed the plaintiff's claim at the conclusion of the evidence for the plaintiff. On appeal **HELD** by the Supreme Court (Finlay CJ, Griffin, Hederman, McCarthy and O'Flaherty JJ) dismissing the appeal: (1) the test of an occupier's liability even in the case of an intruder was whether what occurred was reasonably foreseeable and in relation to a person who was proximate to the occupier; and the court must take account of the entire circumstances surrounding the incident under discussion, including the nature of the danger involved, the age and knowledge of the person likely to be injured, the time and place of the incident and the conduct of the person who came onto the premises. *Purtill -v- Athlone UDC* [1968] IR 205 and *McNamara -v- ESB* [1975] IR 1 followed; (2) in the instant case there was no evidence that the defendant knew that persons used the railway as a short-cut; but even if the defendant had been shown to tolerate such crossings it was not reasonably foreseeable that an adult would run along the line in the circumstances of the instant case, taking account in particular that the plaintiff had fallen a couple of times and had seen the train approaching but had not stepped aside to avoid it; and accordingly the claim had been properly dismissed. *Per curiam:* since the defendant had not relied on the plaintiff's position as trespasser, it was not necessary for the Court to consider whether an occupier owes different duties of care to different categories of entrants and the question should be reserved for another case.

McDAID -V- SHEEHY SUPREME COURT 5 DECEMBER 1990

REVENUE — IMPOSITION OF DUTIES — POWER TO IMPOSE DUTIES BY STATUTORY ORDER — WHETHER SUBSEQUENT CONFIRMATION BY ACT VALIDATES ORDER — CONSTITUTION — CASE CAPABLE OF DECISION WITHOUT NEED TO ADDRESS CONSTITUTIONAL ISSUE — CONSTITUTIONAL ISSUE NOT ADDRESSED BY SUPREME COURT ALTHOUGH DEALT WITH IN HIGH COURT — Imposition of Duties Act 1957, s.1 — Imposition of Duties (No. 221) (Excise Duties) Order 1975 — Finance Act 1976, s.46.

The applicant was convicted in the District Court of the offence of keeping in his vehicle certain hydrocarbon oil chargeable with an excise duty on which a rebate of duty had been allowed under the 1975 Order, contrary to s.21 of the Finance Act 1935, as amended, inter alia, by the 1975 Order. The conviction had been upheld by the respondent Circuit Court judge. The 1975 Order was made pursuant to s.1 of the 1957 Act, by which the government are empowered to impose customs duties, by statutory order, with or without limitations 'of such amount as they think proper on any particular description of goods imported into the State'. S.2 of the 1957 Act provides that any such excise Order shall have effect only until the end of the calendar year in which it is made, unless it is confirmed by the Act of the Oireachtas. The 1975 Order had been confirmed by s.46 of the 1976 Act and the applicant had been convicted in respect of an offence alleged to have been committed in 1984. The applicant sought judicial review of his conviction. In the High Court ([1989] ILRM 342) Blayney J held that the 1975 Order was invalid as an impermissible delegation of the law-making power of the Oireachtas under Article 15.2.1 of the Constitution, but he declined to quash the applicant's conviction on the basis that the confirmation of the Order by the 1976 Act could be interpreted as an intention to validate the order without intending to breach Article 15.2.1. On appeal **HELD** by the Supreme Court (Finlay CJ, Griffin, Hederman, McCarthy and O'Flaherty JJ) dismissing the appeal: (1) the High Court judge was correct in concluding that s.46 of the 1976 Act was a valid confirmation of the 1975 Order and that the applicant's conviction should therefore stand; (2) (Finlay CJ, Griffin, Hederman and O'Flaherty JJ: McCarthy J dissenting) the High Court judge should not have dealt with the constitutional

issue, having regard to the almost unbroken line of decisions on the Supreme Court by which is avoided dealing with a constitutional issue where a case could be determined on some other ground; and there were many factors which supported abstaining from making a moot decision, among them being that in a full constitutional action the Court would be required to take into consideration a variety of factors pertaining to the precise effect of a statutory provision on the interests of the citizen impugning it; and accordingly the portion of the High Court judge's decision dealing with the constitutional issue should be deemed to be obiter dictum, and the portion of his Order declaring s.1 of the 1957 Act to be constitutionally invalid would be set aside; but the remainder of the High Court Order would be upheld. *Cooke -v- Walsh* [1984] ILRM 208; [1984] IR710 and *Murphy -v- Roche* [1987] IR 106 approved. McDonald -v- Bord na gCon [1964] IR 350 not followed. *Per* McCarthy J (dissenting): in view of the overriding importance to the executive branch of a definitive determination of the constitutional issue in question, the Court should determine that issue.

PHILLIPS -V- DURGAN SUPREME COURT 14 DECEMBER 1990

TORT — OCCUPIER'S LIABILITY — WARNING OF DANGER — INVITEES — CLEANING OF EXCEEDINGLY GREASY KITCHEN — FIRE STARTED AND SPREADING RAPIDLY — RESCUE FROM FIRE — WHETHER OCCUPIER OWING DUTY OF CARE TO INVITEES — CONTRIBUTORY NEGLIGENCE — PRACTICE — SUPREME COURT — ASSESSMENT OF LIABILITY — NO DISPUTE ON FACTS

The plaintiffs, husband and wife, agreed to clean the kitchen in the defendant's house prior to its sale. The plaintiff wife was the defendant's sister. The plaintiffs were given no specific instructions or warning by the defendant prior to beginning the cleaning work. The gas cooker in the kitchen was full of grease from frying and three of the four gas jets were blocked as a result of grease. The plaintiff wife began boiling a kettle (to get some hot water for the cleaning) on the one jet which worked, and that jet was described as 'stutterring'. There was a large number of greasy fish and chip bags around the cooker also and some other paper on the floor. While the water was boiling the plaintiff bent down and began to scrape some grease from the side of the cooker. As she did so, she slipped and a cloth in her left hand caught fire in the flame under the kettle. The cloth dropped on the floor and fire spread rapidly around the room. She was dragged out of the kitchen by her husband, but she sustained severe burns. The plaintiff husband suffered less severe burns in the course of rescuing her. In the High Court, Egan J found for the plaintiffs on the basis of a 'rescue' principle, but without a specific finding of negligence by the defendant. He found no contributory negligence. On appeal **HELD** by the Supreme Court (Finlay CJ, Griffin and Hederman JJ): (1) the rescue principle is primarily a matter of foreseeability of injury arising from the creation of a danger, and the trial judge had incorrectly applied the principle; and insofar as he held that the defendant had not been negligent in creating the danger which led to the fire, he had also erred in law. *Ogwo -v- Taylor* [1987] 2 All ER 961 referred to; (2) although the Court would normally order a re-trial in such circumstances, the Court in the instant case was in as good a position as a court of trial to assess the issues in the case and would do so having regard also to the fact that the injuries had been sustained over ten years ago; (3) the defendant was negligent in failing to either warn the plaintiffs of the dangers associated with the cleaning work or by providing them with a safe system of work which avoided the use of the cooker as a source of hot water. *O'Donoghue -v- Green* [1967] IR 40 discussed; (4) the plaintiff husband could not be found guilty of any contributory negligence in the context of the injuries he sustained; but the plaintiff wife could have taken some special precautions having seen the stuttering nature of the cooker flame and the amount of grease in the kitchen; but having regard to the defendant's main culpability the degree of contributory negligence would be assessed at 15%; (5) the level of damages awarded to the plaintiffs was not outside a reasonable assessment and would not be interfered with.

CAHILL (INSPECTOR OF TAXES) -V- HARDING AND ORS HIGH COURT 8 MAY 1990

REVENUE — INCOME TAX — SEVERANCE PAYMENTS — WHETHER ARISING FROM DISABILITY OR REDUNDANCY — EMPLOYER GOING INTO LIQUIDATION — WHETHER PAYMENTS RECEIVED PRIOR TO TERMINATION OF EMPLOYMENT — Income Tax Act 1967, s.115.

The respondents had been employed by Henry Ford & Son Ltd. and each had a degree of disability to one extent or another. In 1984, the company announced the closure of its production plant in Cork. Prior to 1984, the company developed a scheme by which it encouraged disabled employees to take disability retirement thus avoiding compulsory disability retirement. In July 1984, protective dismissal notices were issues to the entire workforce, and in August the company forwarded a list of employees (including the respondents) whose employment was being terminated for disability. The Inspector replied that tax should be deducted from all lump sum payments to employees, and the company did so. On receipt of the payment, each employee signed a statement stating that the payment was in full and final settlement of any rights, claims and demands arising from the closure. Subsequently, the company received 60% of the statutory element of the sums paid to each employee whose employment was terminated. The respondents claimed that no deduction should have been made as the payments were made on account of disability and were thus exempt under s.115 of the 1967 Act. Two of the respondents were production workers whose jobs were to go in the closedown, while the other three respondents' jobs were to continue. In the Circuit Court the judge held that each of the payments was exempt under s.115. On appeal **HELD** by Carroll J: (1) the respondents were not estopped from making their present claim by reason of the documentation used in accepting the payment or by the fact that the company recouped 60% of the statutory element of the sums paid to the employees; (2) the three respondents whose jobs were to continue were entitled to the exemption from tax under s.115 of the 1967 Act since the payments were made on account of their disabilities; (3) the two production workers were not entitled to the exemption since, although the payment was made to someone suffering from a disability, it had not been made on account of the disability because their jobs were not continuing after protective notice had been served; and since this was a mixed question of fact and law, the Court was entitled to overturn the decision of the Circuit Court judge. *Mara -v- Hummingbird Ltd* [1982] ILRM 421 applied.

IN RE CASEY, A BANKRUPT SUPREME COURT 21 DECEMBER, 1990

BANKRUPTCY — CREDITOR — CONTRACT WITH BANKRUPT — WHETHER ADJUDICATION HAVING EFFECT OF TERMINATING CONTRACT — WHETHER CONTRACT NOVATED BY LAW — WHETHER OFFICIAL ASSIGNEE DISCLAIMING THE CONTRACT — WHETHER CREDITOR HAVING LIABILITY IN BANKRUPT'S ESTATE — Bankruptcy (Ireland) (Amendment) Act 1872, s.97.

The bankrupt was a beet farmer who supplied the beet to Comhlucht Siuicre Eireann Teo (the company). The terms of the contracts entered into from time to time between the bankrupt and the company allowed the bankrupt to obtain various goods on credit, and these were set off against the beet to be supplied. In April 1981, a contract was entered into which provided that previous credits would be payable out of sums due from the company, and were a charge against his account with the company. The adjudication in bankruptcy took place in July 1981. The company was informed of the adjudication by letter from the Official Assignee of 12 November 1981. The letter indicated that sums due to the bankrupt should be forwarded to the Official Assignee. The company applied to claim in bankruptcy for the sums owed by the bankrupt. In the High Court, Hamilton P held that the letter from the Official Assignee had terminated the contract between the company and the bankrupt and that the company was not entitled to what would amount to a preference in the bankruptcy: (High Court, 21 July 1986) (1987) 5 ILT Digest 43. On appeal **HELD** by the Supreme Court (Finlay CJ, Griffin and O'Flaherty JJ) allowing the appeal: (1) the adjudication in bankruptcy could not have the effect of terminating the contract between the company and the bankrupt, but instead it amounted to a novation of the contract so that the Official Assignee became entitled to the bankrupt's rights and obligations under it, unless these were disclaimed; (2) the Official Assignee's letter did not amount to a disclaimer of the contract under s.97 of the 1872 Act, and was precisely to the contrary effect; and therefore, by virtue of the terms of the contract, the company had no liability in the bankruptcy and was entitled to prove in the bankruptcy as a creditor against the estate for the balance between the value of the beet supplied by the bankrupt and the goods supplied on credit.

D.B. (D. O'R) -V- N. O'R. SUPREME COURT 13 DECEMBER 1990

FAMILY LAW — NULLITY — CONSENT — WHETHER REAL OR APPARENT — PETITIONER HAVING SPENT MOST OF HER LIFE IN ORPHANAGE — WHETHER AWARE OF CONSEQUENCES OF MARRIAGE — DURESS AND UNDUE INFLUENCE — WHETHER ESTABLISHED — PREGNANCY OF PETITIONER — DELAY — WHETHER NULLITY DECREE SHOULD ISSUE

The petitioner was 16 years of age when she married the respondent in 1966. At the time, she had spent most of her life in a convent orphanage, in which she had been placed by her parents. The petitioner regarded the nun in charge as her mother. The petitioner had met the respondent after she had begun her first job. They had intercourse, and she became pregnant. Her parents became angry and sent her back to the orphanage. When the pregnancy was confirmed, the nun in charge contacted the respondent who was living in England and he agreed to marry the petitioner. The marriage arrangements were not discussed with the petitioner until shortly before the ceremony. After the marriage, they lived together for almost 20 years and had five children in all. The marriage appeared to break down in 1983 and the petitioner started to go out with friends. She had a liaison with a married man, there were violent disagreements with the respondent and the petitioner ultimately obtained a barring order against him. She moved out of the family home in 1988 and began living with another man. In the High Court, she applied for a decree of nullity primarily on the ground of duress or undue influence from the nun in charge of the orphanage. Carroll J dismissed the petition (High Court, 29 July, 1988) (1989) 7 ILT Digest 82. On appeal, the petitioner abandoned the argument based on duress and undue influence but argued that the petitioner's consent was not full and free. **HELD** by the Supreme Court (Finlay CJ, Hederman and O'Flaherty JJ) allowing the appeal: (1) the finding by the trial judge that the nun in charge would have helped the petitioner if she had indicated that she did not wish to go through with the marriage did not dispose of the consent issue; (2) since the petitioner had never been given any instruction on the nature of marriage, had been abandoned by her parents and was not offered any alternative to marriage, she was not in a position to give her consnet, and her consent was not real but apparent. *Dicta* in *N.(K) -v- K.* [1986] ILRM 75; [1985] IR 733 applied; (3) the Court should be reluctant to grant a decree of nullity where there was a long delay, as in the instant case, but having regard to the evidence (including the forthright evidence of the respondent) as to the petitioner's lack of real consent to the marriage, the Court would grant a decree of nullity.

DUGGAN -V- DUBLIN CORPORATION SUPREME COURT 4 DECEMBER 1990

MALICIOUS INJURIES — STOLEN PROPERTY — THEFT OF JEWELLERY FROM SHOP BY THREE PERSON GANG — WHETHER PROPERTY STOLEN BY PERSONS WHO ARE 'TUMULTUOUSLY AND RIOTOUSLY ASSEMBLED' — STATUTORY INTERPRETATION — WHETHER 'AND' SHOULD BE TAKEN TO MEAN 'OR' — WHETHER STATUTORY PROVISION MEANINGLESS IF 'AND' INTERPRETED CONJUNCTIVELY — Malicious Injuries Act 1981, ss.5,6.

The applicant was the owner of a jewellery shop. The shop was entered by a three man gang, who committed extensive property damage inside the shop, struck the applicant on the arm with a baseball bat (breaking the arm in three places) and stole a number of trays of rings and other items of jewellery. The gang escaped in a car driven by a fourth member. The jewellery stolen was valued at £10,650, while the damage done to the display cases in the shop was in the sum of £750. The applicant claimed damages against the Corporation under s.6 of the 1981 Act, which provides that a malicious injuries claim for stolen property can be made arising from a situation in which 'three or more persons . . . are tumultuously and riotously assembled together . . .'' The applicant's claim was dismissed in the Circuit Court. On case stated **HELD** by the Supreme Court (Finlay CJ, McCarthy and O'Flaherty JJ) affirming the Circuit Court: (1) to construe the word 'and' in s.6 in a disjunctive sense would be to amend the section, and such an interpretation was impermissible having regard in particular to s.5 of the Act (which dealt with claims for damage to property as opposed to stolen property), which had used the phrase 'unlawfully, riotously or tumultuously'; (2) while the reference to 'three or more persons' in s.6 of the 1981 Act might not be readily consistent with the concept of a 'tumultuous' as well as a 'riotous' assembly, this did not render s.6 inoperable; and the proper meaning of the section was that a successful claim would be confined to cases where looting had taken place as part of a riot; and so construed, the necessity to prove a tumultuous assembly separately and in addition to a riotous assembly became plain and meaningful. Dicta in *Dwyer Ltd -v- Metropolitan Police District Receiver* [1967] 2 QB 970 and *Fosters of Castlereagh Ltd. -v- Secretary of State* [1976] NI 25 approved.

FALCON TRAVEL LTD -V- OWNERS ABROAD GROUP PLC (TRADING AS FALCON LEISURE GROUP) HIGH COURT 28 JUNE 1990

TORT — PASSING OFF — WHETHER PECUNIARY LOSS AN ESSENTIAL INGREDIENT — WHETHER APPROPRIATION OF REPUTATION MOST SIGNIFICANT FACTOR — TOUR OPERATOR USING SAME NAME AS ESTABLISHED TRAVEL AGENT — NO INDICATION OF FINANCIAL LOSS — REMEDY — INJUNCTION — WHETHER DAMAGES MORE APPROPRIATE REMEDY

The plaintiff company for a number of years carried on the business of travel agent primarily in the Wicklow and Dublin areas. The defendant company was a substantial tour operator and it published holiday brochures which circulated originally in the UK area. In 1988, the defendant decided to extend its operations to this State and indicated that it intended to trade as a tour operator under the name 'Falcon'. The plaintiff objected that this would lead to confusion in the mind of the public. The defendant responded that since it would only carry on business as a 'wholesale' operator, this would not affect the plaintiff's business as a 'retail' travel agent. The plaintiff instituted proceedings for passing off claiming injunctive relief. It was accepted by the plaintiff that the confusion complained of did not cause any loss of customers to the plaintiff but it was argued that the tort had been established in that the plaintiff's reputation had become submerged in the defendant's. **HELD** by Murphy J: (1) it was correct to say that damage of some kind must be shown in order to establish the tort of passing off, but such damage arose primarily from the wrongful appropriation of the reputation attaching to the business which brings the complaint; and it was not always a question of establishing pecuniary loss. Dicta in *C & A Modes -v- C & A (Waterford) Ltd* [1976] IR 198 approved. Dicta in *Erven Warnink BV -v- J Townsend & Sons Ltd.* [1979] AC 731 discussed; (2) in the circumstances the Court would exercise its discretion against granting an injunction, and award damages to the plaintiff which would be of such a level as would enable the plaintiff to mount an advertising campaign to explain to the public and those in the business the real difference between the parties.

J.P.D. -V- M.G. SUPREME COURT 17 DECEMBER 1990

FAMILY LAW — PATERNITY — BLOOD TESTS — DNA FINGERPRINTING — HUSBAND BRINGING GUARDIANSHIP PROCEEDINGS — WIFE DENYING PATERNITY — JUDGE ORDERING BLOOD TESTS — WHETHER WELFARE OF CHILDREN CONSIDERED — PRACTICE — COSTS — Guardianship of Infants Act 1964, s.11 — Status of Children Act 1987, s.38.

The plaintiff husband issued proceedings under s.11 of the 1964 Act seeking, as guardian, a declaration concerning the welfare of two of his wife's (the defendant's) children. The wife sought an order under s.38 of the 1987 Act requiring the plaintiff and the two children to submit to blood tests; she claimed that the plaintiff was not the father of the children, though at the time they were conceived she was lawfully married to the plaintiff and was having sexual relations with him. Having reserved judgment, the High Court (Lavan J) granted the order under s.38. He awarded the plaintiff the costs of the motion on the ground that there was an agreement between the parties that he would not be required to pay costs of separation. On appeal **HELD** by the Supeme Court (Griffin, Hederman and McCarthy JJ): (1) while s.38 of the 1987 Act was silent as to how the Court might exercise its discretion as to whether to order a blood test, it was clear that the discretion must be exercised judicially by taking account of relevant matters and disregarding irrelevant ones; but there was no indication that the trial judge had failed to take into account the welfare of the children or the relationship between the husband and the children; and the order under s.38 of the 1987 Act would be upheld; (2) there was no evidence to support the High Court judge's reference to an agreement between the parties concerning costs in a case such as the present, and the costs of the s.38 motion would be reserved to the full action under s.11 of the 1964 Act.

Recent Irish Cases

COMPILED BY RAYMOND BYRNE, B.C.L,. LL.M.,B.L., LECTURER IN LAW, DUBLIN CITY UNIVERSITY

International Fishing Vessels Ltd v Minister for the Marine (No.2) Supreme Court 22 February 1991

ADMINISTRATIVE LAW — NATURAL JUSTICE — REFUSAL OF SEA-FISHING LICENCE - REASONS GIVEN FOR DECISION — OTHER REASONS NOT COMMUNICATED TO APPLICANT FOR LICENCE — WHETHER DECISION SHOULD BE QUASHED — WHETHER REASONS ACTUALLY GIVEN SUFFICIENT TO JUSTIFY REFUSAL

The applicant company had been refused sea-fishery licences by the respondent Minister in respect of two fishing vessels. No reasons were given by the Minister in refusing the licence. The company sought judicial review challenging the validity of the refusal. In a preliminary application in the proceedings, the High Court ordered the Minister to furnish the applicant with the reasons for the refusal of the licences: International Fishing Vessels Ltd v Minister for the Marine [1989] IR 149. In giving reasons pursuant to this order, the Minister referred to certain matters which had been communicated to the applicant prior to the refusal of the licence, but certain matters were also mentioned which had not been so communicated. In the High Court, Gannon J held that the Minister's refusal of a licence was not invalidated by the failure to communicate some of the reasons to the applicant. On appeal by the applicant **HELD** by the Supreme Court (Hederman, McCarthy and O'Flaherty JJ) dismissing the appeal: in the instant case the reasons actually communicated to the applicant by the Minister prior to his decision to refuse the licence were valid grounds on which to base a refusal; and while the other grounds referred to in the reasons given after the preliminary application also constituted grounds for refusal of a licence, the fact that they were not communicated to the applicant prior to the refusal did not invalidate that refusal. *Per* Hederman and McCarthy JJ: the applicant was deserving of little sympathy from the Court in view of its failure to honour previous undertakings given to the Minister in respect of landings of fish and the employment of Irish citizens as crew. Per O'Flaherty J (concurring): to grant the applicant relief would involve a moot since the applicant no longer sought a licence in respect of the vessels concerned in the original application.

Murray and Anor v Ireland Supreme Court 14 February 1991

CONSTITUTION — FAMILY — HUSBAND AND WIFE — IMPRISONMENT ON FOOT OF CONVICTIONS — RIGHT TO PROCREATE — ABSENCE OF FACILITIES WITHIN PRISON TO PROCREATE - EFFECT OF IMPRISONMENT ON NORMAL CONSTITUTIONAL RIGHTS — WHETHER RESTRICTIONS ON RIGHT TO PROCREATE JUSTIFIED AS CONSEQUENCE OF CONVICTIONS — Constitution, Articles 40.3, 41

The plaintiffs, wife and husband, were prisoners serving sentences of life imprisonment for murder. They had no children, but wished to be provided with facilities to procreate within prison. Such facilities were refused by the prison authorities, and the plaintiffs instituted proceedings claiming that the absence of such facilities amounted to a denial of their rights as a married couple to beget children. The plaintiffs were allowed to visit each other regularly but the prison authorities required that, for security reasons, these visits took place in the sight and hearing of prison officers. In evidence in the High Court, it was stated that by the time of their possible date for release the first plaintiff (at that time 36 years of age) would be unlikely, by reason of her age, to be able to conceive a child. Costello J dismissed the plaintiffs' claim: [1985] ILRM 542 [1985] IR 532. On appeal by the plaintiffs **HELD** by the Supreme Court (Finlay CJ, Hamilton P, McCarthy, O'Flaherty and Keane JJ) dismissing the appeal: (1) since no application to adduce additional evidence had been made between the time of the High Court judgment in 1985 and the hearing of the appeal in January 1991, it would not be consistent with fair procedures for the Court to admit further evidence, whether relating to the ability of the first plaintiff to bear children or as to the relevance of the fact that the plaintiffs had been granted temporary release in December 1990 for two and a half days; and accordingly the appeal would be based on the evidence adduced in the High Court; (2) the arguments of the plaintiffs applied equally where one spouse only was imprisoned; nor could a distinction be drawn between a couple with children who wished to beget more, on the one hand, and a couple who have no children, on the other; (3) an inevitable practical and legal consequence of imprisonment as a convicted person was that a great many constitutional rights arising from the married status are, for the period of imprisonment, suspended or placed in abeyance; and the trial judge had been correct to conclude that the right to beget children was a right which was, in general, put in abeyance for the period of imprisonment; (4) the general regulation of prison conditions was a matter for the executive, subject to supervision by the courts for constitutional validity and to ensure that the executive did not operate its power in a capricious, arbitrary or unjust way; but the courts would not intervene merely because they would have reached a different conclusion on the appropriateness of particular restrictions; nor would the courts intervene in the context of the question whether the executive ought to exercise its power to grant temporary release to prisoners in the position of the plaintiffs in the instant case; (5) having regard to the evidence as to the difficulties associated with giving the plaintiffs, and others in a like situation, the facilities for procreation claimed, the trial judge had applied the correct approach in dismissing the plaintiffs' claim.

The People (D.P.P.) v Gallagher Supreme Court 12 February 1991

CONSTITUTION — SEPARATION OF POWERS — CRIMINAL TRIAL — FINDING OF GUILTY BUT INSANE — ORDER FOR DETENTION OF FORMER ACCUSED IN PSYCHIATRIC HOSPITAL - CORRECT FORM OF ORDER — WHETHER CONSTITUTING PART OF ADMINISTRATION OF JUSTICE — RELEASE OF FORMER ACCUSED — WHETHER MATTER FOR JUDICIAL OR EXECUTIVE ARM OF GOVERNMENT — FAIR PROCEDURES — Constitution: Article 34.1, 38.1 — Trial of Lunatics Act 1883, s.2

The applicant had been tried for murder in 1984 in the Central Criminal Court, and the jury returned a verdict of guilty but insane in accordance with s.2 of the 1883 Act. The trial judge ordered, also in accordance with s.2 of the 1883 Act, that the applicant be detained in the Central Mental Hospital until further order. In 1990, the applicant applied to the trial judge for his release. This application was refused on the ground that such release was a matter for the executive, and the trial judge amended the original order for the applicant's detention to provide that the applicant be detained in the Central Mental Hospital until the pleasure of the Government of Ireland is known. On appeal by the applicant **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Barr JJ) dismissing the appeal: (1) the verdict arrived at in accordance with s.2 of the 1883 Act is one of acquittal, and the function of the court of trial in such cases was to order the former accused's detention, at least for some minimum time, until the executive decides on the further disposition of the person; (2) such function of the court does not form part of the administration of justice, since it amounts to the carrying out of the executive's role in caring for society and the protection of the common good, in particular by inquiring into the then mental state of the former accused, in a manner which was akin to the role of the executive under s.165 of the Mental Treatment Act 1945. *In re Clarke* [1950] IR 235 approved. *People v Neilan* [1991] ILRM 184, sub nom. *Application of Neilan* [1990] 2 IR 267 overruled; (3) where a former accused detained pursuant to s.2 of the 1883 Act seeks release from detention, he may apply to the executive; and the executive must inquire into whether the former accused is no longer suffering from any mental disorder and must adopt fair and constitutional procedures, and such inquiry may be subject to judicial review.

Sinnott v O'Connor Supreme Court 12 February 1991

CONTRACT — INDUCEMENT BY FRAUD — WHETHER ESTABLISHED — WHETHER REPRESENTATION AS TO ACCURACY OF DRAFT COMPANY ACCOUNTS MADE — SUPREME COURT — WHETHER FINDINGS OF HIGH COURT JUSTIFIED ON THE EVIDENCE

The plaintiff and defendant entered into an agreement in which it was acknowledged that the defendant was entitled to a 50% share in a company, in respect of which both parties had been prime movers. A meeting had taken place between the parties prior to them entering into the agreement. At the meeting, draft accounts for the company had been presented which indicated a profit of £91,000 for the year in question. The defendant was also told that, while he could not be made director of the company, he would be given all the rights and entitlements of a director. The defendant signed the agreement in question after this meeting. Audited accounts for the company were later prepared, and these indicated that, in fact, the company made a profit £7,000 for the year in question rather than the £91,000 indicated in the draft accounts presented at the meeting between the parties. The defendant had assumed, on the basis of the draft accounts, that the agreement entered into would entitle him to a substantial sum of money; but on the basis of the actual figures presented he was in deficit to the company to the extent of about £22,000. The audited accounts hade been approved at a meeting of the board of directors of the company. Due to an oversight, the defendant did not receive a copy of the audited accounts until after the board meeting and thus had no opportunity to seek to have the accounts reiected. The plaintiff instituted proceedings in which the defendant counterclaimed that the agreement entered into had been induced by a fraudulent representation by the plaintiff as to the accuracy of the draft set of accounts. The plaintiff denied that he had made any representation as to the accuracy of the draft accounts and that he had, on the contrary, indicated to the defendant that they were not accurate and would require some adjustment downwards. In the High Court, Murphy J dismissed the defendant's counterclaim, holding that since, on the evidence, no representation had been made by the plaintiff as to the accuracy of the accounts the question of fraud did not arise. He also held that, while it was unfortunate that the defendant had not been informed in time of the date of the meeting at which the audited accounts were approved by the board of the company, this was not relevant to the defendant's counterclaim. On appeal by the defendant **HELD** by the Supreme Court (Finlay CJ, Hederman and O'Flaherty JJ) dismissing the appeal: (1) the Supreme Court was only entitled, on appeal from the High Court, to ask whether the trial judge was correct, on the facts as properly found by him, to come to the conclusion that he did; (2) in the instant case, not only was the trial judge entitled to come to the findings he did, but he could not reasonably have come to any other findings; and on the evidence he was constrained to acquit the plaintiff of any fraud or, indeed, of any form of malpractice which would call for reproach; (2) while it was unfortunate that the defendant was not in fact given the rights and privileges akin to a director in the context of receiving the audited accounts in good time, it was accepted that this was due to a genuine mistake and not to any deliberate action on the part of the plaintiff; and since there was no suggestion that the accounts had not been properly prepared, the trial judge had been correct in concluding that no representations that the defendant might have made could have been of any relevance.

The People(D.P.P.) v Reid Court of Criminal Appeal 20 February 1991

CRIMINAL LAW — EVIDENCE — CORROBORATION — SEXUAL OFFENCE — EVIDENCE OF COMPLAINANT — WARNING TO JURY — WHETHER ADEQUATE — WHETHER TRIAL JUDGE FAILED TO IDENTIFY CORROBORATIVE EVIDENCE — WHETHER PREJUDICIAL EVIDENCE AS TO MENTAL STATE OF COMPLAINANT ACTUALLY ADMITTED — APPLICATION FOR CERTIFICATE THAT POINT OF LAW OF EXCEPTIONAL PUBLIC IMPORTANCE INVOLVED — REFUSAL — Courts of Justice Act 1924, s.29 — Criminal Law (Rape) (Amendment) Act 1990

The applicant had been convicted of rape in the Circuit Criminal Court. In evidence he accepted that sexual intercourse had taken place with the complainant but alleged that it had been consensual. His application for leave to appeal to the Court of Criminal Appeal related primarily to the trial judge's warning to the jury as to the dangers of convicting on the uncorroborated evidence of the complainant. The trial judge indicated that the jury was entitled to convict without corroborative evidence but that it was dangerous to do so. The trial judge later referred to medical evidence which indicated that there was no bruising on the complainant's body, but that the indications from her vagina were that sexual intercourse had recently taken place and that certain force was used. The trial judge also referred to the evidence of the distressed condition of the complainant at the time. The trial judge did not deal specifically with the question as to what constituted corroborative evidence, having indicated to counsel that he would give the usual warning in relation to corroboration and would allow the jury to decide whether there was in fact corroboration. **HELD** by the Court of Criminal Appeal (O'Flaherty, Keane and Lavan JJ) dismissing the application for leave to appeal: (1) there was no requirement in law that the warning to be given in cases such as the present should be in any particular form; and having regard to the course which the trial judge had indicated to counsel he was going to take in his charge, it was understandable that he did not deal in any detail with the matters which the jury might have treated as being corroborative of the complainant's account. The *People v Williams* [1940] IR 195 and *The People v Egan (L.)* [1990] ILRM 780 discussed. *Per curiam:* while the Criminal Law (Rape) (Amendment) Act 1990 came into force after the trial in the instant case, trial judges may feel that a warning may still be required; and in general, it may be of assistance for the trial judge to draw the jury's attention to those aspects of the evidence which are capable of corroborating the complainant's version; (2) there was ample evidence in the instant case to corroborate the complainant's version, but if the jury mistakenly believed that there was no such corroboration then, in the light of the trial judge's warning, they could only have applied a standard which was unnecessarily favourable to the applicant; (3) no evidence prejudicial to the applicant had emerged indicating that the complainant had a mild form of mental disability since counsel for the applicant had objected before a question on this point had been posed by counsel for the prosecution; (4) the question as to whether the charge to the jury in the instant case was adequate — despite the lack of an objection in the court of trial to the failure of the trial judge to identify those items of evidence which were capable of amounting to corroboration — did not appear to raise a point of law, and certainly did not raise a point of law of exceptional public importance which would merit a certificate of appeal to the Supreme Court pursuant to s.29 of the 1924 Act.

G. and McD. v Governor of Mountjoy Prison High Court 7 March 1991

CRIMINAL LAW — YOUNG PERSONS — CONVICTION — CERTIFICATE THAT YOUNG PERSONS DEPRAVED AND THAT THEY BE DETAINED IN PRISON — WHETHER POWER TO IMPRISON YOUNG PERSON INCONSISTENT WITH CONSTITUTION — CONSTITUTION — PERSONAL RIGHTS - WHETHER EVIDENCE INDICATING DEPRAVED CHARACTER — WHETHER 'DEPRAVED' VAGUE - PRISON RULES — WHETHER BREACH OF RULES ENTITLES APPLICANT TO RELIEF - Constitution, Article 40.3 — Children Act 1908, ss.102, 131 — Rules for the Government of Prisons 1947, rr. 223, 224.

The applicants were both 15 years of age, and were 'young persons' within s.131 of the 1908 Act. They were both convicted of assault and other offences, and had been sentenced in the District Court (Children's Court) to terms of imprisonment ranging from three to 12 months imprisonment. The Judge of the District Court before whom they appeared certified that the applicants, both of whom had a number of previous convictions, should serve their sentences in a prison since they were, within the meaning of s.102 of the 1908 Act, 'of so depraved a character' that they were not fit to be detained in an institution for young offenders. The applicants sought an enquiry pursuant to Article 40.4 of the Constitution, seeking various forms of relief, including a declaration that s.102 of the 1908 Act was inconsistent with the Constitution, that the word 'depraved' lacked clarity and that there was no evidence on which the applicants should be detained in a prison, and that their conditions of confinement were in breach of the 1947 Prison Rules. The applicants did not seek release from custody but that some form of secure accommodation be provided. HELD by Blayney J dismissing the application: (1) the power to order detention of a 'young person' in prison under s.102 of the 1908 Act was not inconsistent with the applicants' personal rights under Article 40.3 of the Constitution since, on the contrary, it defends their rights by prohibiting the detention in prison of the young person except in certain specified circumstances; and the requirement that the young person be 'depraved' was perfectly fair as the other young persons in a place of detention must be protected against anyone who is so depraved as not to be fit to be detained there; (2) the absence of any definition of 'depraved' in the 1908 Act, or of any judicial decision on its interpretation did not mean that the

Court should refuse to construe it; and having regard to dictionary definitions, which defined depraved as 'immoral, vicious, unprincipled, wicked' there was ample evidence on which the Judge of the District Court could conclude that the applicants were of so immoral and vicious a character that they were not fit to be detained in a place of detention provided under the 1908 Act; (3) the evidence indicated that the applicants were not being detained in accordance with rr. 223 and 224 of the 1947 Prison Rules, but the question arose as to whether such non-compliance entitled the applicants to the form of relief sought, since they did not seek release from custody, and further argument was required. *The State (Comerford) v Governor of Mountjoy Prison* [1981] ILRM 86 referred to.

Conway v Irish National Teachers Organisation and Ors Supreme Court 14 February 1991

DAMAGES — EXEMPLARY DAMAGES — BREACH OF CONSTITUTIONAL RIGHT — CONSPIRACY TO DEPRIVE CHILD OF PRIMARY EDUCATION — WHETHER EXEMPLARY DAMAGES SHOULD BE AWARDED — WHETHER DISTINCTION EXISTS BETWEEN PUNITIVE AND EXEMPLARY DAMAGES - GENERAL DAMAGES — WHETHER EXCESSIVE — Civil Liability Act 1961, ss.7, 14

The plaintiff had been attending primary school in 1976 when a teachers' strike, organised by the I.N.T.O., began and which lasted until February 1977. In proceedings arising out of the dispute it was indicated that the I.N.T.O. had acted in breach of the pupils' constitutional right to primary education under Article 42.4: *Crowley v Ireland* [1980] IR 102. Subsequently, approximately 70 pupils instituted proceedings claiming damages for breach of their rights. The plaintiff in the instant case was measured as having an IQ of 126, being in the top 5% of the population. In the High Court, Barron J assessed general damages at £10,000 and he also awarded exemplary damages of 1,500: (High Court, 2 November 1988) (1989) 7 ILT Digest 123. On appeal by the I.N.T.O. **HELD** by the Supreme Court (Finlay CJ, Griffin and McCarthy JJ) dismissing the appeal: (1) notwithstanding the apparent distinction made in ss.7 and 14 of the 1961 Act between punitive and exemplary damages, there was no distinction in law between them and they must be taken to mean the same thing. *Dicta* in *Kennedy v Ireland* [1988] ILRM 472; [1987] IR 587 not followed; (2) the courts were not limited to awarding exemplary damages to instances where the defendants constituted servants or agents of the executive, since if that were so the courts would be setting at nought the rights contained in the Constitution. *Dicta* in *The State (Quinn) v Ryan* [1965] IR 70 applied; *dicta* in *Rookes v Barnard* [1964] AC 1129 not followed; (3) exemplary damages would not, however, be appropriate in every instance of a breach of constitutional rights, and the court must look at the surrounding circumstances of each case to determine whether exemplary damages should be awarded; (4) while a claim for exemplary damages should normally be included in pleadings, the plaintiff should not be deprived of her claim for exemplary damages since the defendants at no time sought to challenge the failure to include such claim in the course of the trial in the High Court; (5) in the instant case, exemplary damages were appropriate in view of the concerted activities of the I.N.T.O., representing all primary teachers in the State, and also having regard to the fact that the constitutional right in question was vested in the plaintiff as an individual and that the breach of the right was an intended, as opposed to an inadvertent, consequence of the I.N.T.O. strike; (6) while in certain cases, where exemplary damages might otherwise be appropriate, the level of compensatory damages might be sufficient to constitute public disapproval of the wrongdoing, in the instant case the trial judge had not erred in awarding exemplary damages, nor had he erred in the actual amount awarded; (7) having regard to the evidence adduced in the High Court, the trial judge had not erred in the award of general damages.

In re D.G., an Infant; O.G. v An Bord Uchtala and Ors High Court, 9 November 1990; Supreme Court, 26 February 1991

FAMILY LAW — ADOPTION — CONSENT — WHETHER FULLY INFORMED — WHETHER ADOPTION SOCIETY COMPLIED WITH STATUTORY OBLIGATION TO INFORM MOTHER OF CONSEQUENCES OF CONSENT — MOTHER ADVISED BY SOCIAL WORKER EMPLOYED BY CHARITABLE ORGANISATION _ SUPREME COURT — WHETHER INFERENCES DRAWN BY HIGH COURT JUDGE CONSISTENT WITH EVIDENCE — Adoption Act 1952, s.39 — Guardianship of Infants Act 1964, s.11 - Adoption Act 1974, s.3

The child, D.G., was born in January 1987. His mother was 15 years old when she became pregnant. Prior to the birth, the mother had discussed adoption with a social worker and had indicated that she intended to have her child adopted. The social worker was an employee of Barnardo's, a charitable organisation, and the mother continued to be counselled by Barnardo's up to June 1989. The child was put into short term fostering for a time, but the mother resumed caring for the child and she resided in various residences for unmarried mothers. She returned with the child to her parent's house in May 1988, but in October 1988 she informed the Barnardo's social worker that she intended to place the child for adoption. The social worker made inquiries through an Adoption Society about prospective adoptive parents, and in December 1988, the mother signed a consent to adoption, having had it explained to her by the Barnardo's social worker. Later that month the child was placed with the adoptive parents and remained in their custody thereafter. In March 1989, the child's father applied to be appointed guardian pursuant to the Status of Children Act 1987; during these proceedings the mother re-stated her wish that the child be adopted. In June 1989, however, the mother wrote to the respondent Bord and to the Adoption Society withdrawing her consent to adoption. She instituted proceedings seeking the return of the child; the adoptive parents also instituted proceedings seeking to dispense with the mother's consent under s.3 of the 1974 Act and seeking custody of the child. **HELD** by Lavan J: (1) the Adoption Society had failed to comply with s.39 of the 1952 Act since it had not actually furnished to the mother the statutorily prescribed form of consent and the explanation of that consent; it was not sufficient for the Adoption Society to claim that the Barnardo's social worker had discussed the issue of consent with the mother; and in the circumstances the Court could not hold that the mother's consent should be dispensed with since there had been no valid consent; (2) the mother's consent was also flawed arising from the conflict of interest in which the Barnardo's social workers were in as between the mother and any prospective adoptive parents, and having regard to the inadequate and unsound advice given by the social workers, the question of dispensing with the mother's consent under s.3 of the 1974 Act did not arise; (3) the welfare of the child did not require that he remain in the custody of the adoptive parents and, while he had been with them for almost two years, he should be returned to the custody of the mother. On appeal **HELD** by the Supreme Court (Finlay CJ, McCarthy and O'Flaherty JJ) allowing the appeal and remitting the case to the High Court: (1) the requirements of s.39 of the 1952 Act had been complied with in the instant case since the mother had signed the prescribed consent form, and there was nothing in s.39 to indicate that the Adoption Society was required to furnish the consent form through its servants or agents; and in the circumstances the trial judge's finding that the adoption was invalid for non-compliance with s.39 should be set aside; (2) a fully informed consent to placement for adoption requires that the mother is aware, at the time of her agreement to placement, that a court may dispense with her consent under s.3 of the 1974 Act. *Dicta* in *G. v An Bord Uchtala* [1980] IR 32 approved: (3) the conclusions reached by the trial judge as to the quality of the mother's consent in the instant case had been largely influenced by his opinion as to the conduct of the social workers who had counselled the mother, but there was no foundation in the evidence before him for the conclusions which he had drawn; and in the circumstances the case would be remitted to the High Court for a determination as to whether a valid consent had been given, and if so, whether the consent should be dispensed with.

Fitzgerald and Ors v Corcoran Supreme Court 20 February 1991

LAND LAW — LANDLORD AND TENANT — SPORTING LEASE — TENNIS CLUB — PARTLY-BUILT LEASE — APPLICATION TO ENLARGE LEASE INTO FEE SIMPLE — APPLICATION FOR ENTIRE OF LAND CONTAINED IN LEASE — WHETHER FEE SIMPLE SHOULD BE GRANTED FOR CLUB HOUSE AND SURROUNDING AREA — Landlord and Tenant (Ground Rents) Act 1967, s.4 Landlord and Tenant (Amendment) Act 1971 — Landlord and Tenant (Ground Rents) (No.2) Act 1978, s.14

The applicants were the trustees of Castleknock Tennis Club. They held a 35 year lease in respect of the club premises from the respondent landlord. The lease was a sporting lease within the meaning of the 1971 Act. The trustees applied, under s.4 of the 1967 Act, for an enlargement of their interest in the premises into a fee simple. The application was allowed by the County Registrar, but on appeal by the respondent was rejected in the Circuit Court. The trustees appealed to the High Court. Lardner J

held that the trustees could not be entitled to a fee simple in respect of the entire premises leased by the club since the tennis courts and car park did not constitute 'permanent buildings' under s.14 of the 1978 Act. On case stated **HELD** by the Supreme Court (Finlay CJ, Griffin and O'Flaherty JJ): (1) it had been correctly conceded by counsel for the respondent that the trustees could not be defeated in their claim for a fee simple merely because their claim under s.4 of the 1967 Act referred to an area greater than that to which they had any potential claim. *Corr v Ivers* [1949] IR 245 applied; (2) the provisions in s.14 of the 1978 Act, concerning applications for enlargements of a lease into a fee simple in respect of partly-built leases, were only logical or sensible if construed as referring to portions of land held under a lease some area of which is subsidiary and ancillary, and some area of which is not; and construed in that light the trustees were entitled to claim a fee simple in respect of the club house and such ground as is subsidiary and ancillary thereto, the balance of the ground being deemed to be a vacant lease within the meaning of s.14 of the 1978 Act.

Mullen v Quinnsworth Ltd (No.2) Supreme Court 25 February 1991

OCCUPIER'S LIABILITY — INVITEE — SUPERMARKET — CUSTOMER SLIPPING ON COOKING OIL ON FLOOR — WHETHER SUPERMARKET EXERCISING REASONABLE CARE — SYSTEM OF CLEARING SPILLAGES — RES IPSA LOQUITOR — ONUS ON DEFENDANT TO DISPROVE LIABILITY — SUPREME COURT — INFERENCES FROM UNDISPUTED FACTS FOUND AT COURT OF TRIAL

The plaintiff, then aged 74, was a customer in the defendant company's supermarket. Walking towards the cake shelf, she slipped in a pool of cooking oil which was spread over a reasonably wide area of the floor and she sustained injuries as a result. The oil had come from a plastic bottle of cooking oil which was part of a large display of cooking oil. The cooking oil was the same colour as that of the floor. The plaintiff instituted proceedings arising from the fall, claiming damages for negligence. At the first trial of the plaintiff's action, Barrington J withdrew the case from the jury. On appeal by the plaintiff the Supreme Court, holding that the doctrine of res ipsa loquitor applied, directed a retrial of the action: [1990] 1 IR 59. On remittal to the High Court, the defendants argued that their system by which an individual member of staff was designated for mopping up and sweeping the floor amounted to a reasonable system and that accordingly they had discharged their duty of care to the plaintiff as invitee. Evidence was also given that in the region of three breakages of the plastic bottles in question occurred during any given week. An engineer for the plaintiff gave his opinion that the bottles in question were unsuitable, being prone to breakage and that the system of display was also unsuitable. Lynch J dismissed the plaintiff's claim, being satisfied that the defendants had not been negligent in all the circumstances. On appeal by the plaintiff **HELD** by the Supreme Court (Griffin, Hederman and McCarthy JJ) allowing the appeal: (1) where no question arises as to the truthfulness of the witnesses in a case, as here, the Supreme Court is in as good a position as the trial judge to draw its own conclusions or inferences from facts proved or admitted and to decide the case accordingly. *Northern Bank Finance Corp Ltd v Charlton* [1979] IR 149 applied; (2) the essential question was whether, in all the circumstances, the defendant took reasonable care to see that the premises were reasonably safe for the plaintiff, the onus being on the defendants; (3) having regard to the largely uncontroverted evidence for the plaintiff that the plastic bottles were unsuitable and that the stacking system was also unsuitable, and also having regard to the fact that the defendants did not vary the system for cleaning spillages to take account of particular areas of risk such as the area involved in the instant case, the defendants had failed to satisfy the onus on them that they took reasonable precautions for the plaintiff; and accordingly a retrial on damages would be ordered. Per curiam: having regard to the plaintiff's age, the interests of justice would seem to require that damages be agreed or that an application for a very early trial be made to the President of the High Court. Per McCarthy J (concurring): since the parties were requested by the Court to argue the case on the basis of whether reasonable care had been taken, the issue of strict liability in such cases remained for future consideration.

Donnelly v Timber Factors Ltd Supreme Court 25 January 1991

PRACTICE — INTERVENTIONS BY TRIAL JUDGE IN COURSE OF DAMAGES CLAIM — WHETHER EXCESSIVE — COMMENTS BY TRIAL JUDGE ON CONDUCT OF WITNESS — WHETHER AWARD OF DAMAGES SHOULD BE SET ASIDE

The plaintiff was involved in a collision with a vehicle driven by an employee of the defendant company. Liability was accepted and the trial of the action was confined to assessment of damages. The plaintiff had had a history of back injury prior to the collision, but her consultant gave evidence that this had cleared up at the time of the collision. He also described the plaintiff as a person who did not exaggerate her condition. The plaintiff stated that she was unable to continue with sporting activities after the collision. The defendant argued that the plaintiff's injuries were not substantial. The defendant's consultant had examined the plaintiff on two occasions. It was accepted that the first examination was not satisfactory. The plaintiff described the defendant consultant's attitude as 'hostile' and that he had attempted to minimise her injury. The consultant also had in his possession the plaintiff's medical records. The trial judge criticised the consultant for his approach to the examination and for his possession of the plaintiff's records. It emerged, however, that the defendant's consultant had been given the medical records by the plaintiff's consultant. The trial judge also intervened on a number of occasions during the examination of the defendant's consultant. The trial judge awarded £35,000 in general damages. The defendant appealed the award. **HELD** by the Supreme Court (Hederman, McCarthy and O'Flaherty JJ) dismissing the appeal: (1) the trial judge's criticism of the defendant's consultant was severe, for which there was no support in the transcript; and while a judge may be required on occasion to intervene to maintain an even balance between the parties, in the instant case the trial judge had, in his criticisms of the defendant's consultant, failed to conduct the trial in a manner which conformed to the division of functions between a trial judge and that of counsel; (2) (Hederman and O'Flaherty JJ; McCarthy J dissenting) while the trial judge had been in error in his criticism, there had not otherwise been an excessive degree of intervention by him in the course of the trial; and given the nature of the defence in the instant case where the defendant was attempting to minimise the plaintiff's injuries, it was to be expected that the trial judge would react in a particular way if, as occurred, he accepted that the plaintiff was a very genuine witness; and taking a commonsense view of the gist of the evidence, rather than necessarily the view most favourable to the defendant, it would be disproportionate to the error made by the trial judge to order a retrial on the assessment of damages. *Jones v National Coal Board* [1957] 2 QB 55 doubted.

Browne v Bank of Ireland Finance Ltd Supreme Court 8 February 1991

REVENUE — CASE STATED — WHETHER FINDINGS OF CIRCUIT COURT MAY BE SET ASIDE - WHETHER FINDINGS REASONABLE — BANKING BUSINESS ASSOCIATED WITH CREDIT FINANCE DIVIDENDS FROM GOVERNMENT STOCK — WHETHER INCOME IN COURSE OF TRADE — Income Tax Act 1967, s.428(6), Schedule D, Class 1 — Central Bank Act 1971, s.9

The respondent company was engaged in banking activities, including the provision of credit finance and leasing, but not the operation of current accounts. As part of the conditions of their banking licence under the 1971 Act, the company was required to hold a specified number of government stocks. The Revenue did not accept that the company's business constituted banking business, and applied to have the dividend from the government stock treated as income from trade under Schedule D, Class 1 of the 1967 Act. In the Circuit Court (Judge Martin) it was held that the dividend did not arise from the company's trade since it did not deal in investments in the ordinary course of business and the gain did not therefore result from its trade. On case stated the High Court (Blayney J) declined to interfere with the Circuit Court decision: [1987] IR 346. On further appeal by the Revenue **HELD** by the Supreme Court (Griffin, Hederman and McCarthy JJ) allowing the appeal: (1) the Court would only set aside primary findings of fact where there was no evidence whatever to support them, and inferences drawn from primary facts would only be set aside where no reasonable court or Appeal Commissioner would have drawn such conclusions. *Mara v Hummingbird Ltd* [1982] ILRM 421 applied; (2) the inferences drawn by the Circuit Court judge were not such as could reasonably have been made, and he had erred in concluding that the gains from the government stocks did not form part of the company's trading profits; (3) since the government stocks had been bought by the company to comply with the conditions attached to its banking licence under the 1971 Act, it was necessarily done in the course of its normal trading activities and the realised gains made on redemption of such stocks were profits in the nature of trade and were chargeable to tax under Schedule D, Class 1 of the 1967 Act.